

When does an Entire Agreement clause not afford the protection intended?

"Through tattered clothes great vices do appear; robes and furred gowns hide all.

Plate sin with gold and the strong lance of justice hurtless breaks.

Arm it in rags, a pygmy's straw does pierce it"

(William Shakespeare, "King Lear")

Preamble:

Many parties to a commercial bargain seek to **exclude** or **neuter** each other's rights to make claims afterwards for recompense arising from any matters, documents or words said which preceded the making of the Agreement itself and which have occasioned loss and damage.

How successful are such clauses in practice?

This may be important if, for instance, **words are spoken or documents produced** prior to Agreement which are **important** and **persuade** one party or the other to go ahead and enter into the agreement, yet the agreement is silent thereon.

Recent developments in English case law have brought welcome clarity to this sometimes vexed topic.

The recently reported case of *NF Football Investments Limited* is germane.

There follows a brief synopsis of the main facts and the current law on this question.

No.	Item	Note
1.	The brief facts	<p>The Claimants NF Football Investments Limited (NF) and Nottingham Forest Football Club (the Club) claimed compensation from the Defendants NFFC Group Holdings Limited (NFF) and one Mr Fawaz Al-Hasawi (Mr Al-Hasawi) arising from a Share Purchase Agreement (the Agreement) dated 12.04.17</p> <p>Under the Agreement NF had purchased all of the shares in the Club from NFF.</p> <p>NF and the Club alleged that they were owed substantial sums from NFF and Mr Al-Hasawi under the Agreement.</p>

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		<p>NFF and Mr Al-Hasawai counterclaimed for damages on the grounds that documents relating to the financial liabilities of the Club, produced prior to the Agreement, had woefully understated the Club's indebtedness. They alleged that the financial documents constituted statutory misrepresentations.</p>
2.	<p>The Misrepresentation Act 1967: section 2 (1)</p> <p>("The 1967 Act")</p>	<p>Section 2(1) provides a statutory remedy for false or misleading statements made by one party ("the representor") to the other ("the representee") in negotiations and on which the representee relies in deciding to make the Agreement but which representations are found to have resulted in loss and damage.</p> <p>Section 2(1) states thus:</p> <p><i>"Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had:</i></p> <p>a) reasonable ground to believe and</p> <p>b) did believe</p> <p><i>up to the time the contract was made the facts represented were true".</i></p> <p>Essential Elements:</p> <ol style="list-style-type: none"> 1) a misrepresentation i.e. a statement or document whose contents are untrue 2) reliance thereon by the representee 3) loss resulting from that reliance. <p>Defences to a claim for Statutory Misrepresentation:</p> <ol style="list-style-type: none"> a) reasonable grounds of belief in the truth of the statements or the documents and b) actual belief therein.

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3.	<p>Counterclaim by NFF and Mr Al-Hasawi for statutory misrepresentation under section 2(1) aforesaid.</p>	<p>The Court allowed the Defendants NFF and Mr Al-Hasawi to put in a Counterclaim for statutory misrepresentation; that is, a claim for damages for misrepresentation under section 2(1) of The 1967 Act.</p> <p>The Counterclaim alleged that a spreadsheet produced by the Claimants prior to the Agreement and purporting to quantify the liabilities of the Club had been seriously understated.</p> <p>In the spreadsheet it was said that the Club's liabilities totalled <i>circa</i> £6,566,000.</p> <p>However after the Agreement had been made - and upon further enquiry - the Defendants discovered that the Club's true liabilities were more in the region of £10,363,000.</p> <p>The Defendants sought to be awarded the difference arising from that misrepresentation i.e. approximately £3,797,000.</p> <p>The Claimants as a matter of fact, did not appear to dispute the true arithmetic of the debt.</p> <p>However, the Claimants contended that the Agreement contained an "Entire Agreement clause" which effectively precluded the Counterclaim for damages for misrepresentation.</p>
4.	<p>The Entire Agreement clause</p>	<p>It read thus:</p> <p>"12. Entire Agreement.</p> <p><i>This Agreement (together with the documents referred to in it) constitutes the Entire Agreement between the parties and supersedes and extinguishes all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations and understandings between them [the parties] whether written or oral, relating to its subject matter"</i></p>

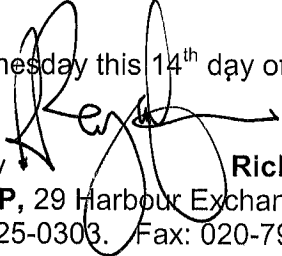
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5.	The question for Court	<p>The Court had to decide as a preliminary point whether the Entire Agreement clause operated effectively to extinguish or annul any rights to claim damages for Statutory Misrepresentation.</p> <p>If it did, then NFFC and Mr Al-Hasawi would be prohibited from claiming compensation and their Counterclaim would be dismissed.</p>
6.	At first instance (ie the lower Court)	<p>The case came before Master Bowles (a junior Judge of the Chancery Division) who delivered his judgment on the 6th June 2018.</p> <p>In summary Master Bowles held that the “<i>deliberately wide language</i>” used in clause 12 –</p> <p>in the context of considerable steps which had been taken by the parties to enable disputes of any kind arising under the Agreement to be dealt with within the four walls of the Agreement –</p> <p>demonstrated that the parties’ core contractual intention was that any dispute arising under the Agreement should be resolved in keeping with its contractual framework.</p> <p>As a consequence it was intended therefore that the parties should be precluded or excluded to a significant extent from making any claims outside of the contractual structures.</p> <p>Accordingly the Court decided that the Defendants were excluded from making any claims for damages for statutory misrepresentation.</p>
7.	The Chancery Court of Appeal: His Honour Judge David Cooke (judgment delivered 01.11.18)	<p>The Defendants appealed Master Bowles’ judgment.</p> <p>The Appeal came before HHJ David Cooke.</p> <p>The Judge delivered his judgment on the 1st November 2018.</p> <p>In summary the Judge decided as follows:</p> <p>(1) the Court duly noted that the measure of damages for statutory misrepresentation was different from the calculation of damages for</p>

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		<p>breach of contract</p> <p>(2) the Court also said that there is a distinction between</p> <ul style="list-style-type: none"> (a) an Entire Agreement clause - which seeks to exclude liability for contractual statements made pre-agreement and (b) claims of a non-contractual nature - such as claims for damages for statutory misrepresentation.
8.	<p>A supportive case: <i>Inntrepreneur</i></p>	<p>Judge Cooke examined earlier reported cases which lent support to the Court's approach.</p> <p>The earlier decided case of <i>Inntrepreneur Pub Co.v East Crown Limited</i> [2000] Lloyd's Rep 611 was cited by his Honour Judge Cooke with approval.</p> <p><i>Inntrepreneur</i> stated thus:</p> <p><i>"the purpose of an Entire Agreement clause is to preclude a party to a written Agreement threshing the undergrowth and finding in the course of negotiations some chance remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty..such a clause constitutes a binding Agreement between the parties that the full contractual terms are to be found in the document containing the Entire Agreement clause and not elsewhere...</i></p> <p>Lord Justice Rix in <i>Inntrepreneur</i> stated thus:</p> <p><i>"an Entire Agreement clause does not preclude a claim in misrepresentation, for the denial of contractual force to a statement cannot affect the status of a statement as misrepresentation"</i></p>

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9.	A further supportive case: BSkyB	<p>Judge Cooke also examined the separate reported case of <i>BskyB</i>.</p> <p>Rix LJ also examined the earlier reported case of <i>BSkyB Limited v HP Enterprise Services UK Limited</i> [2010] EWHC86.</p> <p><i>BSkyB</i> also concerned an Entire Agreement clause.</p> <p>In this case Judge Ramsay examined an Entire Agreement clause and stated that:</p> <p><i>"those words do not in my judgment amount to an Agreement that representations are withdrawn overridden or of no legal effect so far as any liability for misrepresentation may be concerned...if it (the Entire Agreement clause) had intended to withdraw representations for all purposes then the language would, in my judgment have had to go further"</i></p>
10.	The kernel of the Judgment in <i>NF Football Investments Limited</i>	<p>At paragraph 22 of his judgment HHJ Cooke stated thus:</p> <p><i>"Unfortunately I do not agree that contractual language providing for one type of claim carries an implication that all other types of claim are intended to be excluded"</i></p> <p>And at 23:</p> <p><i>"one may well think that a purchaser would have been given information about assets, such as the properties which are schedule to the SPA, but if the Seller is correct no remedy exists if that information was not accurate"</i></p> <p>And at 27:</p> <p><i>"for these reasons I respectfully disagree with the Master as to the construction of clause 12 and I allow the Appeal"</i></p>
11.	Preliminary conclusions	<p>(1) Allowing for the fact specific nature of any Entire Agreement clause or the misrepresentations relied upon, <i>NF Football Investments Limited</i> is authority for the contention that an Entire Agreement</p>

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		<p>clause (unless extremely tightly drafted) does not as a matter of law operate to exclude the rights to claim legal redress and compensation for non-contractual claims such as statutory misrepresentation.</p> <p>(2) The ability to exclude a claim for damages for statutory misrepresentation (or even under the common law tort of misrepresentation) might, for instance, include terms which record that:</p> <ul style="list-style-type: none"> (a) no material representations have been made in relation to any matters or documents preceding the Agreement (b) no reliance has been placed thereon in any event and (c) liability for loss resulted from misrepresentations is expressly excluded. <p>(3) The author respectively submits that no matter how widely or concisely cast, a claim founded upon damages for fraudulent misrepresentation (that is, a statement of importance by a representor to a representee, deliberately and knowingly intended to deceive) cannot be overridden by an Entire Agreement clause.</p> <p>(4) In passing it is to be noted that one classic definition of fraud is:</p> <p><i>"I would not have done what I did, had I known then what I know now".</i></p>

Dated Wednesday this 14th day of January 2019

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