

KEY POINTS

- Entire agreement clauses are intended to defeat claims outside of a contract.
- They include a statement that there has been no reliance on pre-contractual representations.
- This is intended to defeat misrepresentation claims, but success is not inevitable.
- A party seeking to rely on a non-reliance clause must show that it believed the declaration of non-reliance to be true and acted upon it.

Feature

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Threshing through the undergrowth for claims: an update

THE PURPOSE OF ENTIRE AGREEMENT CLAUSES

In the November issue of this journal ((2007) 10 JIBFL 592) we considered the role of entire agreement clauses in excluding or restricting the ability to bring claims outside of a contract.

One element of an entire agreement clause is a statement that the parties have not relied on any representations other than those set out in the contract. This is intended to be fatal to a misrepresentation claim, as reliance is a necessary element.

Since the November 2007 article, the High Court has considered statements of non-reliance: *Quest 4 Finance Ltd v Maxfield & Ors* [2007] EWHC 2313 (QB). The case has not altered what must be established to rely on a statement of non-reliance, but is an interesting illustration of the application of the law.

A defendant seeking to rely on a non-reliance clause to defeat a claim for misrepresentation must show that:

- the clause is clear and unequivocal;
- the claimant intended the defendant should act upon it; and
- the defendant believed the representation in the clause to be true and had acted upon it.

Facts of the case

Quest offered short-term finance to Hilmax Engineering Limited. In the loan agreement Hilmax gave a warranty that it would not go into administration. Its directors also signed a contract, described as a 'warranty', in which they agreed to indemnify Quest against any breach of the promise by Hilmax.

Hilmax subsequently went into administration, the loan became irrecoverable and Quest sought to recover it from the directors for breach of their warranty. Quest's difficulty was that it had categorically stated, in a brochure provided to the managing director and reviewed by him at a meeting

Directors warranted to a lender that a company would not go into administration. It subsequently did. The lender sought to recover the loan from directors. The claim failed because the lender had clearly and unequivocally represented to the directors prior to the loan agreement that no personal guarantee was required. The lender could not rely on an entire agreement clause because it had not shown that it believed to be true, and had relied upon, a statement of non-reliance on pre-contractual representations.

regarding the finance, that no personal guarantees would be required as a condition of finance, and that the warranty provided by the directors applied only in the case of fraud by them.

The directors argued that these statements were misrepresentations with the consequence that the 'warranty' contract should be set aside. Quest asserted that the directors could not rely on any misrepresentations as the

contract contained a non-reliance clause.

It was for Quest to demonstrate that it believed the statement of non-reliance to be true, and that it had relied upon it. The judge said that there was no presumption that it had done so where it had made clear and unequivocal representations, calculated to be attractive to company directors. Quest had provided no explanation as to how it could reconcile this with a belief that the directors had not relied upon pre-contractual representations.

Biog box

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CONCLUSION

Non-reliance clauses remain a necessary tool to minimise the risk of a misrepresentation claim. As the judge recognised, in the ordinary case the court would expect that 'a contracting party who has required the other contracting party to make a declaration of non-reliance [on representations other than those in a contract] to believe the declaration to be true and to rely upon it'.

"Non-reliance clauses remain a necessary tool to minimise the risk of a misrepresentation claim."

However, this case reiterates that a non-reliance clause will not inevitably be effective. Here, a misrepresentation claim succeeded despite a non-reliance clause because the misrepresentations were clear and unequivocal, and because the company that made them was unable to demonstrate a belief that the declaration of non-reliance was true and that it had acted upon it. The case demonstrates that the likelihood of defeating a non-reliance clause increases with the clarity and importance of the misrepresentation. ■