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# Contractual estoppel and the Misrepresentation Act 1967

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**ABSTRACT.** Contractual estoppel has been developed in the context of the exclusion of liability for misrepresentation. It provides a legal explanation for the validity of ‘no representation’ and ‘no reliance’ clauses, which may contradict the true state of affairs and prevent a claim for misrepresentation arising. The importance of contractual estoppel does not end there for it may be applied more generally to prevent parties denying the existence of a state of affairs which was the basis of their contract. This paper seeks to answer two central questions that continue to trouble the courts, most commonly when a claim is based upon the alleged mis-selling of a financial product. The questions are: (1) What is the true nature of contractual estoppel? (2) Are ‘no representation’ and ‘no reliance’ clauses subject to the test of reasonableness set out in the Unfair Contract Terms Act 1977, as extended to contractual terms which ‘exclude or restrict’ liability for misrepresentation by s 3 of the Misrepresentation Act 1967?

**KEYWORDS:** contractual estoppel, misrepresentation, reliance, exclusion clauses, basis clauses and the Misrepresentation Act 1967.

## Introduction

1. The alleged mis-selling of financial products has generated a considerable amount of litigation in recent years. The buyer often alleges that he purchased the financial product from a bank as a result of express or implied misrepresentations about the product made by a salesman which induced him to enter into the contract. Further or alternatively, the claim might be based on a failure to advise, or at least to advise properly, as to the nature or suitability of the product. Usually this is coupled with an assertion that the bank owed the buyer a general duty to advise. The Financial Services and Markets Act 2000, and the conduct of business rules made pursuant to that Act, may come to the aid of an individual who purchases the product, and who usually meets the statutory

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requirement of ‘private person’,<sup>1</sup> but, thanks to a decision of David Steel J in *Titan Steel Wheels Ltd v Royal Bank of Scotland plc*,<sup>2</sup> a corporate buyer purchasing a product ‘in the course of carrying on a business of any kind’ falls outside the definition of ‘private person’ and has no direct right of action under the statute.<sup>3</sup> The corporate buyer is left to advance its claim at common law. This restriction applies just as much to a small, family run company, where, for example, a husband and wife are the sole directors and shareholders, as it does to a large corporation.

2. When the corporate buyer brings its mis-selling claim at common law it usually loses, or at least it does where the bank that has sold the financial product can point to terms of its (usually) standard banking contract whereby the parties agree or acknowledge that no representations have been made (a ‘no representation’ clause), or that they have not relied on any representations that have been made (a ‘no reliance’ clause), or which otherwise seek to establish the basis of the relationship between the buyer and the seller, for example, by providing that the buyer was a ‘sophisticated’ investor who understood the nature of the investment and was aware of (and accepted) the risks involved, and/or that the transaction was ‘execution only’ and that no advisory duty arose or had arisen in the past. ‘No representation’ and ‘no reliance’ clauses are included in the contract to protect the bank from potential liability for misrepresentation and supplement the protection offered by a ‘pure’ entire agreement clause, again a usual feature of a standard banking contract, which merely denies contractual effect to any promise made by

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<sup>1</sup> See the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 3.

<sup>2</sup> [2010] EWHC 211 (Comm), [2010] 2 Lloyd’s Rep 92 at [68]-[70].

<sup>3</sup> Under the Financial Services and Markets Act 2000, s 138D (prior to April 1, 2013, this was found in s 150 of the Act). Cf *Flex-E-Vouchers Ltd v Royal Bank of Scotland plc* [2016] EWHC 2604 (Ch) at [19], HH Judge Waksman QC, sitting in the High Court: ‘[i]n certain limited circumstances, a complaint can be made to the financial ombudsman, but, more importantly, a complaint can be made to the FCA, which has the power to impose disciplinary sanctions...it would be quite wrong to suggest that a complainant is left without any realistic recourse, even if not able to bring a claim for breach of statutory duty.’

the bank outside the written agreement.<sup>4</sup> A ‘pure’ entire agreement does not protect against liability for misrepresentation.<sup>5</sup>

3. This rough and ready summary provides the context for what is to be discussed in this paper, which can be broken down into two broad questions:

- (1) What is the legal mechanism by which the buyer’s claim for misrepresentation is defeated by ‘no representation’ and ‘no reliance’ clauses?
- (2) Whether such clauses are subject to the reasonableness test found in the Unfair Contract Terms Act 1977, as extended to contract terms which ‘exclude or restrict’ liability for misrepresentation through s 3 of the Misrepresentation Act 1967?

### **Estoppel by representation**

4. ‘No representation’ and ‘no reliance’ clauses may bar the buyer’s misrepresentation claim because they remove one or more of the essential pillars upon which that claim must be based. The most obvious (and uncontroversial) explanation for this is through the operation of an estoppel by representation (of which evidential estoppel is an example) which prevents the buyer from denying that no representation was made or that he did not rely on any representation that might have been made. However, the seller will usually have a problem relying on estoppel by representation because he is required to show that he relied on the buyer’s counter-representation contained in the ‘no representation’ or ‘no reliance’ clauses, and he may not be able to do that if it is clear that he did make the representation and it was intended that the buyer should rely on it.<sup>6</sup> Nevertheless, it is worth remembering that, in the right (perhaps

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<sup>4</sup> There will be no further discussion of entire agreement clauses in this paper because, unlike a ‘no representation’ or ‘no reliance’ clause, they do not preclude the admission of facts but merely deny substantive effect to a promise made outside the written agreement.

<sup>5</sup> The precise wording of the clause will need to be construed in order to determine its scope: see, eg, *AXA Sun Life Service plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd’s Rep 1.

<sup>6</sup> *Lowe v Lombank Ltd* [1960] 1 WLR 196, 205, Diplock J (in the Court of Appeal). See also Chadwick LJ in *EA Grimstead & Son Ltd v McGarrigan* [1998-99] Info TLR 384, 412, and in *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696 at [40]. See also A Trukhtanov, ‘Misrepresentation: Acknowledgment of Non-Reliance as a Defence’ (2009) 125 LQR 648, 651-653.

rare) circumstances, estoppel by representation may be decisive of the issue quite independently of any alternative explanation as to why such a clause can contradict the truth (known to the seller) that a representation has been made and the buyer has relied on it.<sup>7</sup> How is this ‘magic’, some might say ‘black magic’, worked?

### **Contractual estoppel**

5. The explanation is said to turn on what has been called the doctrine of ‘contractual estoppel’. Contractual estoppel facilitates the enforcement of an agreement on the state of facts by precluding proof of facts that contradict that agreement. The key decision is *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*,<sup>8</sup> where the Court of Appeal considered the effect of a term, in a contract for the sale and purchase of a financial product, which stated that the ‘sophisticated’ investor had read the risk disclosure statement provided by the bank and fully understood the nature of the transaction and the risk. Moore-Bick LJ said that:<sup>9</sup>

‘There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis of the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least as far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gave rise to an estoppel: see *Colchester Borough Council v Smith* [1991] Ch 448, affirmed on appeal [1992] Ch 421.’

6. It has been argued that Moore-Bick LJ’s statement was merely *obiter* or, alternatively, *per incuriam*, but those arguments have been rejected by

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<sup>7</sup> *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd’s Rep 511 at [57], Moore-Bick LJ: ‘A clause of that kind may (depending on its terms) also be capable of giving rise to an estoppel by representation if the necessary elements can be established.’ See also *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2008] 2 Lloyd’s Rep 581 at [35], Aikens J.

<sup>8</sup> [2006] EWCA Civ 386, [2006] 2 Lloyd’s Rep 511.

<sup>9</sup> At [56].

the courts.<sup>10</sup> If there was any doubt as to the status of Moore-Bick LJ's statement, it was removed by Aikens LJ in *Springwell Navigation Corp v JP Morgan Chase*, who said it was 'consistent with principle and authority'.<sup>11</sup> Aikens LJ also confirmed that contractual estoppel operated as a 'separate doctrine':<sup>12</sup> (1) there is no requirement of reliance or detrimental reliance with contractual estoppel, which makes it different from estoppel by representation;<sup>13</sup> (2) the party relying on the estoppel does not have to show that it would be unconscionable for the other party to resile from the agreed state of affairs, which makes it different from estoppel by (non-contractual) convention;<sup>14</sup> and (3) the representation of fact is enforceable only because it forms part of the contract between the parties.

### Commercial justification

7. 'No representation' and 'no reliance' clauses can be justified on commercial grounds. First, they bring greater commercial certainty for 'there is commercial utility in such clauses being enforceable, so that the parties know precisely the basis on which they are entering into their contractual relationship'.<sup>15</sup> They bring greater certainty by maintaining the integrity of the written agreement. In *Inntrepreneur Pub Co (GL) v East Crown Ltd*,<sup>16</sup> Lightman J famously said that an entire agreement clause (which, in its extended form, can include 'no representation' and 'no reliance' elements) is designed to stop a party 'thr[a]shing through 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' based on breach of warranty (or, we may add, for misrepresentation, where the clause is in its extended form). In most

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<sup>10</sup> For dismissal of the *obiter* argument, see *Springwell Navigation Corp v JP Morgan Chase* [2008] EWHC 1186 (Comm) at [556]-[561], Gloster J; *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 at [241], Christopher Clarke J. For dismissal of the *per incuriam* argument, see *Springwell* [2008] EWHC 1186 (Comm) at [562], Gloster J, and on appeal [2010] EWCA Civ 1221, [2010] 2 CLC 705 at [169], Aikens LJ.

<sup>11</sup> [2010] EWCA Civ 1221 at [169].

<sup>12</sup> At [177] (where he was distinguishing the doctrine from estoppel by convention).

<sup>13</sup> *Springwell* [2008] EWHC 1186 (Comm) at [556]-[563], Gloster J; *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) at [309], Andrew Smith J. Trukhtanov (2009) 125 LQR 648, 656-657, says that the 'reliance doctrine' is the foundation for estoppel both by convention and representation.

<sup>14</sup> *Springwell* [2010] EWCA Civ 1221 at [177], Aikens LJ.

<sup>15</sup> *Springwell* at [144], Aikens LJ. See also the example given by Moore-Bick LJ in *Peekay* at [56] (and quoted in para 5 above).

<sup>16</sup> [2000] 2 Lloyd's Rep 611, 614.

cases, this reduces the risk of litigation.<sup>17</sup> Secondly, such clauses allow for the efficient allocation of risk between the contracting parties, as ‘it is reasonable to assume that the price to be paid reflects the commercial risk which each party – or, more usually, the purchaser – is willing to accept’.<sup>18</sup>

### **True nature of the doctrine**

8. Contractual estoppel has been described as an ‘anomalous doctrine’.<sup>19</sup> It does not share the requirements of estoppel by representation (reliance or detrimental reliance) or estoppel by non-contractual convention (unconscionability) because they are types of equitable estoppel and contractual estoppel is a common law doctrine. The relationship between contractual estoppel and estoppel by deed (also a common law doctrine<sup>20</sup>) is less certain. Estoppel by deed means that a person who executed a deed is held bound by its recitals even though they contradict the actual state of affairs.<sup>21</sup> Originally, the rule was based on the solemnity of a deed,<sup>22</sup> but Lord Toulson recently stated, when delivering the advice of the Privy Council in *Prime Sight Ltd v Lavarello*, that estoppel by deed, like ‘any other express or implied contractual convention ... accords with the principle of party autonomy which underlies the common law of contract’.<sup>23</sup> Alexander Trukhtanov goes so far as to argue that, although Lord Toulson does not mention ‘*Springwell*-based contractual estoppel’ by name in *Lavarello*, ‘the same concept is clearly in play’.<sup>24</sup>

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<sup>17</sup> *Foodco UK LLP v Henry Boot Development Ltd* [2010] EWHC 358 (Ch) at [177(i)], Lewison J. The number of cases referred to in this paper shows that the laudable aim of reducing the risk of litigation is not always achieved.

<sup>18</sup> *EA Grimstead & Son Ltd v McGarrigan* [1998-99] Info TLR 384, 413, Chadwick LJ, and cited by his Lordship in *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696 at [39]. See also *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd’s Rep 123 at [327], Christopher Clarke J.

<sup>19</sup> S Wilken and K Ghaly, *The Law of Waiver, Variation, and Estoppel* (3<sup>rd</sup> ed, 2012), [13.16].

<sup>20</sup> KR Handley, *Estoppel by Conduct and Election* (2<sup>nd</sup> ed, 2016), [7-001].

<sup>21</sup> The editors of *Spencer Bower on Estoppel by Representation* (4<sup>th</sup> ed, 2004), at VIII.13.3, note that the position has changed over time, and submit that ‘the operative words of a deed may, if they necessarily imply a convention as to a matter of fact or law, found an estoppel’.

<sup>22</sup> *Goodtitle ex d Edwards v Bailey* (1777) 2 Cowp 597, 601, Lord Mansfield.

<sup>23</sup> [2013] UKPC 22, [2014] AC 436 at [46]. The Privy Council held that a receipt clause in a deed raised an estoppel against the payee despite an admission that no payment had been made.

<sup>24</sup> A Trukhtanov, ‘Receipt Clauses: From Estoppel by Deed to Contractual Estoppel’ (2014) 130 LQR 3, 5; and see also (2009) 125 LQR 648, 665. The editors of *Spencer*

9. Professor Gerrard McMeel has argued, in forceful terms, that because contractual estoppel appears, by stealth, to subsume the more narrowly formulated estoppel by deed, it is ‘an illegitimate species of estoppel’, and the cases that have established the doctrine are *per incuriam* because they ignore established authority (especially *Greer v Kettle*<sup>25</sup>) supporting estoppel by deed.<sup>26</sup> However, in *Lavarello*, Lord Toulson rejected the idea that estoppel by deed should be abandoned, and proposed to retain it because of the ‘particular characteristic’ of a deed that it requires no consideration.<sup>27</sup> But, as Lord Toulson added: ‘where there is a contractual convention, it makes no difference in principle whether or not the contract is embodied in a deed.’ A case of ‘pure’ estoppel by deed, where there is no consideration, is likely to be rare; nevertheless, as Trukhtanov observes, the continued recognition of estoppel by deed ‘enables it to raise an estoppel where a non-contractual convention could not without subverting the doctrine of consideration’.<sup>28</sup> Consequently, although estoppel by deed and contractual estoppel may share a common foundation based on freedom of contract/party autonomy,<sup>29</sup> it is submitted that McMeel is wrong to say that the former has been subsumed by the latter, and the fact that the cases on estoppel by deed were not analysed by the Court of Appeal *Peekay* and *Springwell* does not make those decisions *per incuriam*.

10. The ‘doctrine’ of contractual estoppel has been misdescribed. The use of the term ‘estoppel’ is ‘confusing’.<sup>30</sup> It is not an established form of estoppel at all. The term ‘contractual estoppel’ should either be properly explained or, better still, abandoned and replaced by a more appropriate term, such as ‘contractual preclusion’ or ‘preclusion by agreement’.<sup>31</sup>

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*Bower on Estoppel by Representation* (4<sup>th</sup> ed, 2004), at VIII.7.1 (and at VIII.13.1) also submit that ‘an estoppel by deed, properly analysed, is simply a contractual provision by which the parties and their successors are bound’.

<sup>25</sup> [1938] AC 156, 171, Lord Maugham.

<sup>26</sup> G McMeel, ‘Documentary Fundamentalism in the Senior Courts’ [2011] LMCLQ 185, 206-207; G McMeel, ‘Banks, the Judiciary and “Documentary Fundamentalism”’, *Counsel*, April 2015, 10-12. Contrast, Trukhtanov (2009) 125 LQR 648 at 665-666, Trukhtanov, ‘Limits of Contractual Estoppel’ [2012] LMCLQ 358, 361-363, Trukhtanov (2014) 130 LQR 3, 5.

<sup>27</sup> [2013] UKPC 22 at [30].

<sup>28</sup> Trukhtanov (2014) 130 LQR 3, 6.

<sup>29</sup> *Prime Sight Ltd v Lavarello* [2013] UKPC 22 at [46]-[47], Lord Toulson.

<sup>30</sup> P Feltham, D Hochberg and T Leech, *Spencer Bower on Estoppel by Representation* (4<sup>th</sup> ed, 2004), at VIII.7.1.

<sup>31</sup> Note that the trial judge in *Colchester BC v Smith* [1991] Ch 448, 493, cited a passage from the third edition (1977) of *Spencer Bower on Estoppel by*



Laymen and Scottish lawyers would no doubt feel more at home with that description! But the real advantage is that it would distinguish between the key requirements of the common law doctrine (agreement of the parties) and those that lie at the heart of equitable estoppel (detrimental reliance and unconscionability). Despite making this suggestion, it will probably cause less confusion if, for the purposes of this paper, we continue to refer to ‘contractual estoppel’.

11. How is contractual estoppel to be explained if not as an established type of estoppel? The starting point is that ‘no representation’, ‘no reliance’ and similar clauses that set out the basis of the relationship between the contracting parties, are contractual terms which bind the parties like other contract terms. This has led some to argue that, to the extent that a party to the contract seeks to assert contrary facts, there is a breach of contract. However, because a court will not allow a party to benefit from its own wrong, including its own breach of contract, that party will be prevented from asserting contrary facts. This is the view of Sean Wilken QC and Karim Ghaly,<sup>32</sup> whose analysis was adopted by Andrew Smith J in *Credit Suisse International v Stichting Vestia Groep*, when he held that contractual estoppel can arise where the parties have made an agreement about a state of affairs in the future.<sup>33</sup> Wilken and Ghaly explain the true nature of the doctrine as follows:<sup>34</sup>

‘*Peekay*, if it cannot be justified by recourse to an estoppel, has to be justified by some other means. The most obvious means is contractual. Since the parties have agreed X to be the case, then the party which denies that X is in fact the case is in breach of contract. The Courts will not permit a party to benefit from its own wrong – including its own breach of contract. The *Peekay* contractual estoppel would be a reflection of that principle.’

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*Representation*, para 158, where there is a reference to being ‘precluded, as a matter of contract, by operative words’. By analogy, see the reference to ‘precluded’ in s 21(1) of the Sale of Goods Act 1979 (‘...the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell.’). It is submitted that ‘precluded by signature’ is too narrow as there may be an oral agreement, or an agreement by conduct, on standard terms. The term ‘contractual convention’ is more acceptable, but runs the risk that it will be confused with a ‘non-contractual convention’ which requires a finding of unconscionability.

<sup>32</sup> S Wilken and K Ghaly, *The Law of Waiver, Variation and Estoppel* (3<sup>rd</sup> ed, 2012), at [13.24].

<sup>33</sup> [2014] EWHC 3103 (Comm) at [309].

<sup>34</sup> N 32 above.

12. Professor Andrew Burrows says that if we are seeking to defend the language of estoppel, we might say that its importance, going beyond the normal consequences of breach of a term, is that it explains there being a rule of evidence (which cannot be explained by the ordinary rules as to breach) that the party cannot deny that the state of affairs is different than warranted.<sup>35</sup> However, the response is provided by Burrows himself when he says that ‘a contrary, and probably preferable, view is that the language of estoppel here reflects nothing more than the idea that a party may be prevented by a court from being in breach of contract and that the concept of a contractual estoppel is unnecessary and unhelpful’.<sup>36</sup>

13. How will a court prevent the party from being in breach of contract? There is no suggestion in the contractual estoppel cases that a court was willing to grant injunctive relief or make an order for specific performance. But there are plenty of examples of the courts being willing to prevent a party from taking advantage of his own breach of contract, when the court employs a restrictive construction of a contract term,<sup>37</sup> or implies a term into the contract,<sup>38</sup> to prevent that happening. There is also an analogous rule that one party will not do anything ‘of his own motion’ to put an end to any state of circumstances on which the performance of the contract depends.<sup>39</sup> There may even be a more general principle that ‘[a] man cannot be permitted to take advantage of his own wrong’.<sup>40</sup>

14. Is this a satisfactory explanation? It is submitted that it is not. First, it is an (overly) elaborate explanation which takes the idea that a party may not rely on his own breach into an area where it has not been used before. Secondly, it assumes that there will be a breach of contract whenever one party claims that the facts were not as stated in the ‘no representation’ or ‘no reliance’ clause. In *Photo Production Ltd v Securicor Ltd*,<sup>41</sup> Lord Diplock famously stated that [e]very failure to perform a primary obligation is a breach of contract’, but with a ‘no representation’ or ‘no reliance’ clause there is real difficulty in identifying a primary (in the

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<sup>35</sup> A Burrows, *A Restatement of the English Law of Contract* (2016), p 79; J Beatson, A Burrows and J Cartwright, *Anson’s Law of Contract* (30<sup>th</sup> ed, 2016), p 136.

<sup>36</sup> *Anson*, p 136. Burrows seems to be hardening his earlier view expressed in the commentary to his *Restatement* at p 79, where ‘probably preferable’ is omitted.

<sup>37</sup> See *Alghussein Establishment v Eton College* [1988] 1 WLR 587.

<sup>38</sup> See *BDW Trading Ltd v JM Rowe Investments Ltd* [2011] EWCA Civ 548 at [34].

<sup>39</sup> *Stirling v Maitland* (1864) 5 B & S 840; *CEL Group Ltd v Nedlloyd Lines UK Ltd* [2003] Civ 1716, [2004] 1 Lloyd’s Rep 381 at [11].

<sup>40</sup> H Beale et al (eds), *Chitty on Contracts* (32 ed, 2015), Vol 1, [13-085] and cases cited therein.

<sup>41</sup> [1980] AC 827, 849.

sense of promissory) obligation that has been breached.<sup>42</sup> Thirdly, it is telling that, in *Peekay*, Chadwick LJ held that the relevant provisions operated as a contractual estoppel to prevent Peekay (the investor) from ‘asserting in litigation’ that it had not in fact read and understood the risk disclosure statement.<sup>43</sup> Trukhtanov makes the point that contractual estoppel is ‘merely a piece of procedural machinery to the use of which a party is entitled simply by virtue of a binding agreement’.<sup>44</sup> On this basis, there is no need to employ an explanation based on the prevention of a party from taking advantage of his own wrongdoing. It is submitted that where a ‘no representation’ or ‘no reliance’ clause is construed as giving rise to a binding contractual term, a party is precluded by that contractual term alone from asserting contrary facts. The court’s duty, which is derived from the principle of freedom of contract/party autonomy, is to enforce contractual terms and, based on Lord Toulson’s judgment in *Lavarello*, a declaratory statement of fact intended to be contractually binding is just such a term and must be enforced.<sup>45</sup>

### ***Lowe v Lombank***

15. Critics of the doctrine of contractual estoppel say that it allows the contracting parties to create ‘a parallel factual universe, that may be wholly at odds with reality and truth but nevertheless binding’, which can lead to unfairness where one is not dealing with sophisticated commercial parties of equal bargaining power.<sup>46</sup>

16. *Lowe v Lombank Ltd*<sup>47</sup> does not fit easily, if at all, into the ‘virtual’ world created by contractual estoppel. A 65 year old widow bought a motor car on hire purchase. The salesman described it as ‘perfect’ or ‘near perfect’. In fact it was unroadworthy and dangerous. Clause 9(ii) of the HP agreement, which she did not read and he did not explain, provided that the hirer acknowledged and agreed that she had examined

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<sup>42</sup> It might be said that a contractual obligation could arise through an implied term. But the test for implication of a term based on the intention of the parties is severe and not easily met, especially in the case of a detailed contract between commercial parties: see *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742.

<sup>43</sup> [2006] EWCA Civ 386 at [70]. See also J Braithwaite, ‘The Origins and Implications of Contractual Estoppel’ (2016) 132 LQR 120, 146.

<sup>44</sup> Trukhtanov (2009) 125 LQR 648, 657.

<sup>45</sup> *Prime Sight Ltd v Lavarello* [2013] UKPC 2 at [46]-[47], Lord Toulson; and adopting the analysis provided by Trukhtanov (2014) 130 LQR 3, 4.

<sup>46</sup> P Marshall, ‘Humpty Dumpty is broken: “unsuitable” and “inappropriate” swap transactions’ [2014] JIBFL 679, 680, 683.

<sup>47</sup> [1960] 1 WLR 196.

the goods prior to the signing of the agreement; and they were of merchantable quality and that she had not ‘made known to the owners expressly or by implication the particular purpose for which the goods are required and that the goods are reasonably fit for the purpose for which they are in fact required’. She also signed a delivery receipt which contained a statement that she acknowledged that she had read the whole agreement and that she had examined the goods and that they were in good order and condition. Later the widow claimed damages for breach of the implied condition of fitness for purpose under s 8(2) of the Hire Purchase Act 1938. The hire purchase company argued unsuccessfully that she was estopped from relying on any such implied condition.

17. Diplock J, sitting in the Court of Appeal, said:<sup>48</sup>

‘To call [Clause 9(ii)] an agreement as well as an acknowledgment by the plaintiff cannot convert a statement as to past facts, known by both parties to be untrue, into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future. To say that the hirer “agrees” that he has not done something in the past means no more than that the hirer, at the request of the owner, represents that he has not done that thing in the past. If intended by the hirer to be acted upon by the person to whom the representation is made, believed to be true by such person and acted upon by such person to his detriment, it can give rise to an estoppel: it cannot give rise to any positive contractual rights.’

18. Judges have had to ‘explain away’ Diplock J’s statement as *obiter* when endorsing the concept of contractual estoppel. In *Springwell*,<sup>49</sup> Gloster J said that his Lordship was considering whether or not the agreement between the plaintiff and the hire-purchase company was a ‘sham’ of the kind he subsequently discussed in *Snook v London & West Riding Investments Ltd*.<sup>50</sup> On appeal in the same case, Aiken LJ disagreed,<sup>51</sup> and said that Diplock J’s statement was not binding because it was not necessary for the decision in that case, which was based on an

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<sup>48</sup> At 204.

<sup>49</sup> [2008] EWHC 1186 (Comm) at [550].

<sup>50</sup> [1967] 2 QB 786, CA. Trukhtanov (2009) 125 LQR 648, 658, n 49, submits that there was no sham in *Lowe* as there was no ‘common intention’.

<sup>51</sup> [2010] EWCA Civ 1221 at [151]-[153], [155]-[156] and [169]. Aikens LJ (at [151]) also disagreed with Christopher Clarke J’s analysis of *Lowe v Lombank* in *Raiffeisen* [2010] EWHC 1392 (Comm) at [252].

application of the anti-avoidance provisions in s 8(3) of the Hire Purchase Act 1938, and that it was inconsistent with *Burrough's Adding Machines Ltd v Aspinall*.<sup>52</sup>

19. This paper does not consider in any detail whether or not *Lowe v Lombank*, which was not cited to the Court of Appeal in *Peekay*, deals a fatal blow to the doctrine of contractual estoppel. The issue has been exhaustively debated in the academic journals.<sup>53</sup> It will now take a decision of the Supreme Court to reverse the Court of Appeal's endorsement of the doctrine of contractual estoppel. Nevertheless, the way Diplock J's statement in *Lowe v Lombank* was distinguished in the contractual estoppel cases does raise some fundamental questions. First, *Peekay* and *Springwell* appear to blur the line previously drawn between a warranty, which is a contractual promise, and a representation, which is a statement of fact or law.<sup>54</sup> The courts have recently been keen to draw that line when rejecting claims made by a buyer of a business that warranties given by the seller, in the sale and purchase agreement (SPA), contained implied representations of fact that gave the buyer a cause of action for misrepresentation (the claim for breach of contract being time-barred under the SPA).<sup>55</sup> Andrew Smith J drew the same line in *Vestia*<sup>56</sup> when he said that '[m]ere representations do not ... engage the principle of contractual estoppel.' There must be a contractual obligation for the estoppel to bite on, and if it cannot be found there can be no contractual estoppel.<sup>57</sup> This takes us back to the problem raised by Diplock J: is a statement as to past facts, known by both parties to be untrue, a mere representation or does it give rise to a contractual obligation? Secondly, if we are to treat a contractually agreed state of affairs as precluding one or both parties from alleging that the actual facts are inconsistent with the

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<sup>52</sup> (1925) 41 TLR 276.

<sup>53</sup> See, in particular, McMeel [2011] LMCLQ 185, 191; Trukhtanov (2009) 125 LQR 648, 649; Braithwaite (2016) 132 LQR 120, 127.

<sup>54</sup> *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909 (Comm) at [14], A Baker QC, sitting as a Deputy High Court judge. See also D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2<sup>nd</sup> ed, 2014), [4.17].

<sup>55</sup> *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909 (Comm) at [13]-[21]; *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) at [200]-[211]; cf *Invertec Ltd v De Mol Holding BV* [2009] EWHC 2471 (Ch) at [362]-[363]. Of course, the seller may expressly 'represent and warrant', but this is less common in SPAs than it is, eg, in standard form syndicated loan agreements.

<sup>56</sup> *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) at [303].

<sup>57</sup> See, eg, *Police and Crime Commission for Greater Manchester v Butterworth*, unreported, 10<sup>th</sup> November 2016, at [29], J Crow QC, sitting as a Deputy High Court judge.

state of affairs so specified in the contract, does this mean that the estoppel that comes into existence has the potential itself to give rise to a cause of action, in other words can it be used as a ‘sword’ and not just as a ‘shield’? Of course, at one level, the question is pointless, because contractual estoppel is not a form of estoppel at all.<sup>58</sup> Proper construction of the statement contained in the contract becomes essential. For example, where the statement contains a promise that a state of affairs does or will exist then it is likely to be construed as a warranty. A statement as to past facts may also constitute a warranty, but that does not automatically follow and, despite *Peekay* and *Springwell*, it remains open for argument in the Supreme Court whether such a statement should operate as a contractual obligation when both parties know it to be untrue.<sup>59</sup>

### **Has there been agreement?**

20. If we accept that there is a doctrine of ‘contractual estoppel’, the central question is whether the ‘no representation’ and ‘no reliance’ clauses have been agreed by the parties. There is no (black or white) magic in that question. The objective principle of contract formation is clear. If you sign a contract then you are bound by it, whether or not you have read the terms of the contract: this is the ‘signature rule’ enshrined in *L’Estrange v Graucob*.<sup>60</sup> That is what a reasonable person would expect from the representation that you have made by signing something that was, or appeared to be, a contractual document. Of course, there are exceptions to the signature rule when the contract is rendered voidable for, for example, misrepresentation, duress or undue influence, or void for mistake (including the doctrine of *non est factum*). There have been attempts over the years to water down the signature rule. It was famously argued by Professor John Spencer that the rule should not apply where one party knows (or ought to know) that the other has not read the terms and that he would not have agreed to them.<sup>61</sup> But this approach has not

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<sup>58</sup> Burton J stated in *NRAM plc v McAdam* [2014] EWHC 4174 (Comm), [2015] 1 All ER (Comm) 1239 at [14(iii)(a)], revsd on appeal [2015] EWCA Civ 451, that a contractual estoppel, like an estoppel by convention, could only be used as a ‘shield not a sword’. Cf *Chitty on Contracts* (32<sup>nd</sup> ed, 2015), Vol 1, [4-116, n 693].

<sup>59</sup> Cf *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) at [250]-[255], Christopher Clarke J.

<sup>60</sup> [1934] 2 KB 394, 403, Scrutton LJ.

<sup>61</sup> JR Spencer, ‘Signature, Consent, and the Rule in *L’Estrange v Graucob*’ [1973] CLJ 104. For a similar argument, see also D McLauchlan, ‘The Entire Agreement Clause: Conclusive or a Question of Weight?’ (2012) 128 LQR 521. Recently, Leggatt J tentatively questioned whether there is a limited exception to the objective approach to contract formation when one party knows, or ought reasonably to know,

generally found favour on these shores.<sup>62</sup> In *Peekay*, Moore-Bick LJ endorsed a robust approach to the signature rule when he said that:<sup>63</sup>

‘It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have repercussions far beyond the business community.’

21. The temptation is to be sympathetic to the needs of the buyer in a mis-selling case, especially where the ‘buyer’ is, in effect (if not in law), the husband and wife team who are sole directors and shareholders of a small company, and it becomes clear on the facts that misrepresentations were made and relied upon. But the signature rule should continue to be applied rigorously. There are many points of contract law that would come as a complete surprise to the reasonable man or woman travelling on a bus in Poplar,<sup>64</sup> perhaps the rule that you can be bound by your *oral* agreement is one of them, but it is highly likely that the reasonable man or woman well knows that by signing something that is, or reasonably appears to be, a contractual document, you risk being bound by its terms.

22. The real problem arises where the buyer is misled into signing something. ‘No representation’ and ‘no reliance’ clauses in the contract arguably prevent the buyer setting aside the contract even though he has actually been misled. In *Peekay*, Moore-Bick LJ left the door open to rescission of the whole agreement when he said:<sup>65</sup>

‘The effectiveness of a clause of that kind [a ‘no reliance’ clause] may be challenged on the ground that the contract as a whole, including the clause in question, can be avoided if in fact one or other of the parties was induced to enter it by misrepresentation.’

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that the other has no subjective intention to be bound: see *Novus Aviation Ltd v Alubaf Arab International Bank BSC(c)* [2016] EWHC 1575 (Comm) at [54]-[59].

<sup>62</sup> By way of exception, see Sir Edward Eveleigh in *Lloyds Bank plc v Waterhouse* [1993] 2 FLR 97, CA. In *Morgan v Pooley* [2010] EWHC 2447 (QB) at [14], Edwards-Stuart J said that if the clause (in that case a ‘no reliance’ clause) was not one of which it might be reasonable to expect the representee to be aware, it cannot be invoked because it is contained in the very contract which is to be avoided for misrepresentation. For examples of foreign courts taking a less strict approach to the signature rule, see *Tilden Rent-A-Car Co v Clendenning* (1978) 83 DLR (3d) 400 (Ont CA); *Als Memasa v UBS AG* [2012] SGCAS 43 (Sing CA), noted by SA Booysen, ‘Rethinking the Signature Rule’ [2013] LMCLQ 21.

<sup>63</sup> [2006] EWCA Civ 386 at [43].

<sup>64</sup> Too many lawyers and investment bankers now live in Clapham for it to continue to be useful for these purposes!

<sup>65</sup> [2006] EWCA Civ 386 at [57].

But he then made reference to the fact that a clause in the contract might alter that state of affairs. He continued:<sup>66</sup>

‘However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognized in *Colchester BC v Smith*.’

23. Later in his judgment, Moore-Bick LJ referred to that fact that there had been no suggestion that the bank had misrepresented ‘the effect’ of the documents which gave rise to the contractual estoppel.<sup>67</sup> In *Springwell*, Aikens LJ said that it was not asserted in *Peekay* that the bank had misrepresented ‘the nature’ of the documents.<sup>68</sup> In *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank plc*,<sup>69</sup> Hamblin J said that these authorities established that ‘[t]he principle [of contractual estoppel] may not apply where there has been a misrepresentation as to the effect of the contractual documents which give rise to the estoppel’.

24. These cases seem to suggest that where the misrepresentation is as to the ‘contents’ or ‘effect’ of the contract documents, as opposed to a misrepresentation about the nature or suitability of the financial product itself, then the buyer should still be able to rescind the contract despite the presence of a ‘no representation’ or ‘no reliance’ clause. The misrepresentation must be as to the contents or effect of one or more of the clauses in the contract. But does it matter which clause the misrepresentation relates to? If it relates to the ‘no representation’ or ‘no reliance’ clauses then we do not have a problem, although such cases will be rare as the parties themselves are unlikely to focus on ‘boilerplate’ clauses in their pre-contractual negotiations – that is what the lawyers are for! In such a case, even if rescission is no longer possible, a court can adopt the approach taken by the Court of Appeal in *Curtis v Chemical Cleaning and Dyeing Co* and deny effect to the clause.<sup>70</sup> The problem

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<sup>66</sup> *Ibid.*

<sup>67</sup> At [60].

<sup>68</sup> [2010] EWCA Civ 1221 at [166].

<sup>69</sup> [2011] EWHC 484 (Comm) at [505].

<sup>70</sup> [1951] 1 KB 805. See KR Handley, *Spencer Bower and Handley on Actionable Misrepresentation* (5<sup>th</sup> ed, 2014), [18.11]: ‘This must depend on the contract being notionally rectified.’ Cf the narrow explanation of *Curtis* provided by Rix LJ (*obiter*)



arises where the misrepresentation relates to some other clause. The ‘no representation’ and ‘no reliance’ clauses remain active and so it can be argued that there is no ‘misrepresentation’ (or reliance) at all. The distinction is sound in principle. It denies effect to a ‘no representation’ or ‘no reliance’ clause when the misrepresentation is about that very clause, but upholds freedom of contract, and allows a contracting party to rely on those clauses, when the ‘misrepresentation’ relates to some other clause.<sup>71</sup> Otherwise, the commercial advantages of ‘no representation’ and ‘no reliance’ clauses, as well as entire agreement clauses generally, will be lost if they are abandoned in the very circumstances that they are most useful.

### **Common law protection**

25. There is something ‘Denningsque’ about the way the courts have tried to redress the balance when faced with contractual estoppel. Just as Lord Denning battled against exclusion clauses in the days before the Unfair Contract Terms Act 1977 by invoking legitimate common law concepts of incorporation and construction (and even the illegitimate one of ‘fundamental breach’), the courts have marshalled the same concepts to control the reach of contractual estoppel.

26. First, incorporation of the relevant ‘disclaimers’ into the contract may be in issue. In *Taberna Europe CDO II plc v Selskabet (In Bankruptcy)*,<sup>72</sup> industry standard ‘no representation’ and ‘no reliance’ disclaimers in investor presentation roadshow slides were held by Eder J not to be part of issuer-investor subordinated notes contract and so contractual estoppel did not arise. Secondly, following construction of the clause in question, the court may hold that the clause is being relied upon for a different

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in *AXA Sun Life Service plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd’s Rep 1 at [100]-[105], based on the judgment of Somervell LJ, which Rix LJ said represented the *ratio* of *Curtis*.

<sup>71</sup> It could not be said that a misrepresentation about another clause allows the representee to rescind the whole contract, including the ‘no representation’ and ‘no reliance’ clauses, because that is the very thing that those clauses are designed to prevent. Cf KR Handley, *Estoppel by Conduct and Election* (2<sup>nd</sup> ed, 2016), [8-004]: ‘an estoppel created by a contractual convention cannot trump the representee’s power, in a proper case, to rescind the contract, including the clause, for misrepresentation.’

<sup>72</sup> [2015] EWHC 871 (Comm) at [120].

purpose than the one specified,<sup>73</sup> or that it is limited in scope so as not to extend to the representations actually made.<sup>74</sup>

### **Freedom of contract and public policy**

27. Freedom of contract lies at the heart of contractual estoppel.<sup>75</sup> The parties should be allowed to order their affairs as they wish, unless it runs contrary to statute or some established principle of public policy.<sup>76</sup> Public policy includes the deterrence of fraud, and nobody has tried to argue that contractual estoppel should afford an answer to a fraudster's claim on a contract.<sup>77</sup>

28. Contractual estoppel has been developed in the context of the exclusion of liability for misrepresentation. We have seen that it provides a legal explanation for the validity of 'no representation' and 'no reliance' clauses, which contradict the true state of affairs and prevent a claim for misrepresentation arising. The importance of contractual estoppel does not end there for it may be applied more generally to prevent parties denying the existence of a state of affairs which was the basis of their contract. Banking and derivatives contracts may include provisions that no advisory duty is to arise or has arisen in the past. Building and engineering contracts may give conclusive effect to certificates of an architect or engineer. Mortgages, loans and guarantees may provide that a certificate of indebtedness signed by the financier will

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<sup>73</sup> *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm) at [184].

<sup>74</sup> *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GMBH* [2014] EWHC 3615 (Comm) at [773-784].

<sup>75</sup> *Prime Sight Ltd v Lavarello* [2013] UKPC 22 at [46]-[47], Lord Toulson, and main text to n 23 above.

<sup>76</sup> *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at [64] and [100], Beatson LJ.

<sup>77</sup> Contractual estoppel will not work where the allegation is of fraudulent misrepresentation or deliberate concealment (the position is more uncertain with regard to the exclusion of liability for the fraud of an agent or employee): see *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 at [325], Christopher Clarke J; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep 61 at [16], Lord Bingham; cf *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 2793 (Comm) at [156] (although dishonest misrepresentation was alleged it made no difference because the issue was whether the clause precluded a duty of care arising), affd [2016] EWCA Civ 119; *Graisley Properties Ltd v Barclays Bank plc* [2013] EWCA Civ 1372 at [29] (the point was 'arguable').

be conclusive evidence of the amount owing. There are plenty of other examples.<sup>78</sup>

29. *Proactive Sports Management Ltd v Rooney*<sup>79</sup> provides a good example of the potentially wide application of contractual estoppel and also of some of the problems that can arise because of it. The issue was whether an image rights representation agreement (IRRA) between a company (Proactive) providing management and agency services to a professional footballer (Wayne Rooney) and the company (Stoneygate) to which his image rights had been assigned was unenforceable by the management company as being in restraint of trade. Proactive argued that Stoneygate was contractually estopped by virtue of clause 24 of the IRRA from contending that any restraints imposed by the agreement were unreasonable. Clause 24 was headed ‘Independent Legal Advice’ and read as follows:

‘The Client and the Player hereby confirm that in reviewing this Agreement prior to execution and deciding to enter into this agreement, they have sought, taken and understood independent legal advice and hereby confirm that the terms and conditions thereof, including without limitation the Term and financial provisions of the Company’s appointment hereunder, are reasonable.’

30. HH Judge Hegarty QC, sitting as a judge of the High Court, rejected Proactive’s argument. The judge said:<sup>80</sup>

‘I would regard it as a highly unsatisfactory consequence of the principle [of contractual estoppel] if it meant that a party who sought to take advantage of a contract by the transparent device of ensuring that some suitable provision akin to clause 24 was included in the contract. The reason why such a device would not, in my judgment, be effective is because restraint of trade is a matter of public policy out of which the parties cannot contract.’

31. Public policy can be used to control freedom of contract. Aikens LJ acknowledged the point in *Springwell* when he said:<sup>81</sup>

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<sup>78</sup> See KR Handley, *Estoppel by Conduct and Election* (2 ed, 2016), [8-004].

<sup>79</sup> [2010] EWHC 1807 (QB), reversed in part [2011] EWCA Civ 1444, [2012] 2 All ER (Comm) 815.

<sup>80</sup> At [670]. See also P Feltham, D Hochberg and T Leech, *Spencer Bower on Estoppel by Representation* (4<sup>th</sup> ed, 2004), at VIII.10.3, and cited in *Rooney* at [670].

<sup>81</sup> [2010] EWCA Civ 705 at [144].

‘Apart from the remarks of Diplock J in *Lowe v Lombank*, Mr Brindle did not show us any case that might support the proposition that parties cannot agree that X is the case even if both know that it is not so. I am unaware of any legal principle to that effect. The only possible exception might be if the particular agreement between A and B on the certain state of affairs concerned contradicts some other specific or more general rule of English public policy.’

32. Public policy issues may explain a case like *Lowe v Lombank* in terms of consumer protection.<sup>82</sup> The courts will not allow the parties to usurp the function of the court in such cases. This explains why the parties’ agreement that a term is ‘reasonable’ does not always decide the issue, although the fact they have so agreed will be something the court must take into account.<sup>83</sup> In *Rooney*,<sup>84</sup> the judge said that he did not ‘consider that the confirmation that the terms and conditions of the Agreement were “reasonable” can prevent the Court from determining whether Proactive has, in fact, discharged the burden of showing that the restraints were reasonable.’ Similarly, in *Dinsdale Moorland Services Ltd v Evans*,<sup>85</sup> Judge Behrens, sitting in the High Court, declined to award summary judgment in favour of an employer seeking to enforce a restrictive covenant against its managing director, despite the fact that the managing director had agreed under the terms of the employment contract that the restrictions contained in the clause ‘are reasonable and necessary for the protection of [the company] and that they do not bear harshly upon him’. The judge held that the public policy restraints relating to such covenants could not be avoided by contractual estoppel, and stated that ‘[i]t seems to me to be by no means fanciful to suggest that the parties cannot themselves agree that such a clause is reasonable in the public interest’.<sup>86</sup> But where public policy is not in issue, there seems nothing to prevent the

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<sup>82</sup> In effect, that was how Aikens LJ explained the case in *Springwell* [2010] EWCA Civ 705 at [151], when he said that clause 9(ii) of the hire purchase agreement in *Lowe v Lombank* was an attempt to evade s 8(2), (3) of the Hire Purchase Act 1938. For similar public policy reasoning, applied with reference to the Consumer Credit Act 1974, see *Wood v Capital Bridging Financing Ltd* [2015] EWCA Civ 451 at [30]-[31], Briggs LJ; *NRAM plc v McAdam* [2015] EWCA Civ 751 at [53]-[56], Gloster LJ.

<sup>83</sup> See also *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm) at [120]-[122], Cooke J: contractual estoppel not allowed to oust court’s jurisdiction to rectify contracts.

<sup>84</sup> At [671].

<sup>85</sup> [2014] EWHC 2 (Ch), [2014] 2 Costs LR 217.

<sup>86</sup> At [41].

parties from clearly and unambiguously agreeing that a contractual (as opposed to a statutory or public policy) requirement of ‘reasonableness’, ‘reasonable endeavours’ or ‘good faith’ has been met.<sup>87</sup> Contractual estoppel would then work to prevent either party from later denying that such a state of affairs existed.<sup>88</sup>

33. It has been argued by Paul Marshall that contractual estoppel should not be used to frustrate the public policy of protection of investors represented by the Financial Conduct Authority’s Conduct of Business Sourcebook.<sup>89</sup> He is particularly critical of the judge in *Crestsign v National Westminster Bank plc*<sup>90</sup> who, after holding that the bank had voluntarily assumed an advisory role in recommending an interest rate swap to Crestsign Ltd, and that the bank was in breach of the obligations it had chosen to assume; nevertheless, held that the expressly agreed basis of the contractual relationship was that the bank was not acting in any advisory capacity. Marshall submits that the judge failed to recognize that ‘the regulatory backdrop is, additionally, relevant to the question as to whether, where a duty has been voluntarily assumed (namely to advise), such a duty and consequent liability for breach, can be excluded, whether fairly or at all’.<sup>91</sup>

34. But public policy arguments must not be given free rein. This is particularly the case where the public policy is derived from provisions in, or made pursuant to, an Act of Parliament, such as the Financial Services and Markets Act 2000. The Act of Parliament defines the extent of the court’s power to intervene and where there is no statutory provision giving protection to a particular group, as is the case for corporate buyers of financial services who have contracted on an agreed state of facts and who fall outside the ‘private person’ statutory right of action under the 2000 Act, the courts should not look to introduce protection by the ‘back door’ through general reliance on ‘the regulatory backdrop’.<sup>92</sup> The fact that s 138D of the FSMA 2000 is not available to

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<sup>87</sup> See *Shaker v Vistajet Group Holding SA* [2012] EWHC 1329 (Comm), [2012] 2 All ER (Comm) 1010, Teare J.

<sup>88</sup> At [25].

<sup>89</sup> Marshall [2014] JIBFL 679, 683-684, especially with reference to COBS 2.1.2 (which applies to any client) and COBS 2.1.3 (which applies to retail clients). The COBS rules are made pursuant to the requirements of the Markets in Financial Instruments Directive 2004/39/EC (MiFID) and the FCA’s operational objectives under the Financial Services and Markets Act 2000.

<sup>90</sup> [2014] EWHC 3043 (Ch).

<sup>91</sup> Marshall [2014] JIBFL 679, 684.

<sup>92</sup> In *Green & Rowley v Royal Bank of Scotland plc* [2013] EWCA Civ 1197, [2013] 2 CLC 632, the Court of Appeal held that the existence of a statutory means of

all, but only to a ‘private person’, is recognition that the statutory protection is intended to be limited. If the problem stems from the fact that the definition of a ‘private person’ has been interpreted too narrowly in *Titan Steel Wheels*<sup>93</sup> then the answer lies in reversal of that decision.

35. Importantly, in *Prime Sight Ltd v Lavarello*,<sup>94</sup> Lord Toulson said that:

‘... contractual estoppels are subject to the same limits as other contractual provisions, but there is nothing inherently contrary to public policy in parties agreeing to contract on the basis that certain facts are to be treated as established for the purposes of their transaction, although they know the acts to be otherwise.’

This supports the argument that there is no public policy doctrine, such as illegality, the rule against penalty clauses or restraint of trade, that directly impeaches a ‘no representation’ or ‘no reliance’ clause. Does the very fact that the clause purports to negate pre-contractual statements amounting to representations inducing the contract, or negates reliance upon those statements, of itself raise issues of public policy? Professor John Carter thinks that it does.<sup>95</sup> His reasoning is as follows: the Misrepresentation Act 1967 embodies rules of public policy; a ‘no reliance’ clause is an attempt to contract out of the Act; there is nothing in the Act which permits that to occur; if the parties choose to do that their clause is simply void and no question of reasonableness arises; the clause is invalid independently of the Act. However, there is no authority to support Carter’s argument.<sup>96</sup> This is not surprising. It is submitted that there must be evidence of a policy under the Act to regulate such clauses,

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enforcement of the then current conduct of business rules under s 150 (now s 138D) of the FSMA 2000, meant that no separate co-extensive common law duty of care arose and there could be no claim for breach of those rules other than under s 150. By contrast, where a bank undertakes an advisory duty, what is to be expected of the reasonably skilled and careful advisor under the common law is in part informed by the regulatory backdrop (*Rowley & Green* at [18], Tomlinson LJ). *Rowley & Green* was distinguished in *Crestsign* [2014] EWHC 3043 (Ch) at [147] where the bank undertook to explain the nature of the transaction to the customer and was held to owe an ‘intermediate’ duty to do so fully and properly (as well as accurately) - but note the doubts later expressed about such an intermediate duty in *Thornbridge Ltd v Barclays Bank plc* [2015] EWHC 3430 (QB) at [118]-[131].

<sup>93</sup> [2010] EWHC 211 (Comm). See also para 1 above.

<sup>94</sup> [2013] UKPC 436 at [47].

<sup>95</sup> JW Carter, *The Construction of Commercial Contracts* (2013), [10-33]; E Peden and JW Carter, ‘Entire Agreement – and Similar – Clauses’ (2006) 22 JCL 1, 12.

<sup>96</sup> As Carter himself acknowledges, see *Construction of Commercial Contracts*, [10-33].

and this takes us to the second question to be discussed in this paper, namely whether s 3 of the Misrepresentation Act 1967 extends to ‘no representation’ and ‘no reliance’ clauses. Parliament has defined the types of term that are to be controlled. This represents the limit of that control. The principle of freedom of contract would be undermined if the courts attempted to go further.<sup>97</sup>

### **Misrepresentation Act 1967, s 3**

36. Section 3(1) of the Misrepresentation Act 1967 provides as follows:

If a contract contains a term which would exclude or restrict –

- (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
- (b) any remedy available to another party to the contract by reason of such a misrepresentation,

that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in s 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.

37. Section 3 of the Misrepresentation Act has recently been amended by the Consumer Rights Act 2015, so while statutory control of a clause exempting liability for misrepresentation in a contract that is not a ‘consumer contract’, as defined in the 2015 Act,<sup>98</sup> is still to be found in s 3 of the Misrepresentation Act, statutory control of such a clause in a ‘consumer contract’ now falls within the general control of unfair terms to be found in Part 2 of the Consumer Rights Act 2015.<sup>99</sup> The focus of this paper is on the corporate buyer and the 1967 Act, because all the claims, whether brought by an individual or a company, that have reached the courts so far, and which have involved consideration of the statutory control of exemption clauses, pre-date the 2015 Act.

38. There has been uncertainty as to whether s 3 of the Misrepresentation Act applies to a clause that is so worded so as to exclude any liability for misrepresentation from arising at all, by stating that one of the essential elements of that liability is missing, for example, through a ‘no representation’ or ‘no reliance’ clause. A similar problem arises, although in a slightly different way, with s 2 of the Unfair Contract Terms 1977, which controls terms in non-consumer contracts that exclude or restrict liability for negligence, and which will be particularly relevant to a claim for negligent misrepresentation where the misrepresenter is not the other

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<sup>97</sup> See *National Westminster Bank plc v Morgan* [1985] AC 686, 708, Lord Scarman.

<sup>98</sup> Consumer Rights Act 2015, s 61(1)-(3).

<sup>99</sup> Misrepresentation Act 1967, s 3(2).

party to the contract.<sup>100</sup> Section 13(1) of the 1977 Act extends the reach of s 2 to any term which ‘excludes or restricts the relevant obligation or duty’. The Misrepresentation Act 1967 does not include a similar provision. But s 13(1) does not answer all questions because it still leaves the court to decide whether a term excludes or restricts a duty or merely defines the scope (or ‘basis’) of the parties’ relationship in the first place.<sup>101</sup>

39. The case law has not been consistent. It has been said that there is a ‘tension’ in the authorities that needs to be resolved.<sup>102</sup> On the one hand, there are cases like *Watford Electronics Ltd v Sanderson CFL Ltd*,<sup>103</sup> where the Court of Appeal held that a ‘no reliance’ clause prevented liability from arising (and did not exclude it) so as to escape statutory control. Chadwick LJ thought that where both parties to the contract had acknowledged, in the document itself, that they had not relied upon any pre-contract representation, ‘it would be bizarre (unless compelled to do so by the words which they have used) to attribute to them an intention to exclude liability which they must have thought could never arise’.<sup>104</sup>

40. By contrast, there are cases like *Cremdean Properties Ltd v Nash*,<sup>105</sup> where Scarman LJ rejected the argument that a clause warning the representee to check the accuracy of a statement was a clause which effectively avoided s 3 by preventing their being a ‘misrepresentation’. He famously said:

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<sup>100</sup> As, eg, in a *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 type scenario.

<sup>101</sup> This reminds us of Professor Brian Coote’s thesis that exclusion clauses define liability by determining the obligations assumed under the contract in the first place: B Coote, *Exception Clauses* (1964), especially Chap 1 (reprinted as B Coote, ‘The Function of Exception Clauses’ in R Bigwood (ed), *Contract as Assumption: Essays on a Theme* (2010)). Cf JA Weir’s review of Coote’s book [1965] CLJ 801; J Adams and R Brownsword, ‘The Unfair Contract Terms Act: A Decade of Discretion’ (1988) 104 LQR 94. The impact of s 13(1) of the 1977 Act on definitional clauses is explored in N Palmer and D Yates, ‘The Future of the Unfair Contract Terms Act 1977’ [1981] CLJ 108.

<sup>102</sup> *Ahmed v Landstone Leisure Ltd* [2009] EWHC 125 (Ch) at [30]-[31], HH Judge Purle QC, sitting as a High Court judge.

<sup>103</sup> [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696. See also *William Sindall plc v Cambridgeshire CC* [1994] 1 WLR 1016, 1034, Hoffmann LJ.

<sup>104</sup> At [41]. Two factors might explain this robust view: (1) both parties were commercial parties, and (2) the estoppel would be evidential, which means there would have to be reliance on the clause (*Peekay* was still five years away)

<sup>105</sup> (1977) 244 EG 547, 551. See also *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333.



‘Humpty Dumpty would have fallen for this argument. If we were to fall for it, the Misrepresentation Act would be dashed to pieces which not all the King’s lawyers could put together again.’

Bridge LJ said that the ‘ingenuity of a draftsman’ should not be allowed to defeat the plain purpose at which s 3 was aimed: otherwise s 3 could always be defeated by including an appropriate ‘no reliance’ clause in the contract, however unreasonable that might be.<sup>106</sup>

41. More recent cases have adopted the same ‘substance over form’ approach favoured in *Cremdean v Nash*. For example, in *AXA Sun Life Services plc v Campbell Martin Ltd*,<sup>107</sup> it was submitted by Leading Counsel for AXA that, since the parties had agreed by clause 24 of their contract that there had been no misrepresentations, s 3 of the 1967 Act could not apply to that clause. Stanley Burton LJ (*obiter*) said:<sup>108</sup>

‘While I see the logic of his submission, to my mind his approach to s 3 is too formalistic. Looked at sensibly and practically ... it excludes AXA’s liability for misrepresentations it made, and would be subject to the statutory requirement of reasonableness in this respect too.’

42. The obvious attraction of this approach is that it enables the courts to apply the statutory test of reasonableness to any clause which ‘in substance’ excludes or restricts liability. Professor Edwin Peel prefers the ‘substance’ approach because it still allows matters of commercial certainty and allocation of risk, which ‘no representation’, ‘no reliance’ and other ‘basis’ clauses are designed to achieve, to be taken into account as part of the test of reasonableness and, where the parties are of roughly equal bargaining power, he believes these factors are likely to lead to a decision that the clause is reasonable.<sup>109</sup> If the courts do not take such an approach, judicial recognition of the doctrine of contractual estoppel makes it much harder for a contracting party to rely on the other party’s pre-contractual misrepresentation as a ground for rescission of the contract. The rescinding party is at much greater risk of being held to have wrongly exercised the right and, in consequence, of finding himself in repudiatory breach of contract.<sup>110</sup>

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<sup>106</sup> At 551.

<sup>107</sup> [2011] EWCA Civ 133, [2011] 1 CLC 312.

<sup>108</sup> At [51].

<sup>109</sup> E Peel, ‘Reasonable Exemption Clauses’ (2001) 117 LQR 545, 549.

<sup>110</sup> PS Davies and C Hare, ‘Limits of rescission for misrepresentation’ [2016] JIBFL 387, 389.

43. But it may be easier to say that the issue turns on ‘substance over form’ than it is to apply that principle in practice. Andrew Smith J made the following astute observation in *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd*:<sup>111</sup>

‘Although the distinction is clear in principle, it seems to me that in application the question whether, as a matter of substance rather than form, a particular provision should be regarded as defining the terms upon which business was conducted or as purporting to allow a party by his standard terms to render a performance substantially different from that which was reasonably to be expected of him can be a fine one, and ultimately, I think, can be a matter of impression rather than analysis.’

How is the ‘substance’ of the provision to be identified?

44. In *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc*,<sup>112</sup> Christopher Clarke J said that the ‘key question’ in deciding whether a ‘no representation’ or ‘no reliance’ clause is an exemption clause, so as to fall within the scope of s 3 of the 1967 Act, is ‘whether the clause attempts to rewrite history or parts company with reality’. He immediately followed this statement with an example, which appears as footnote 45 to his judgment: ‘As in *Lowe v Lombank* when the agreement was as to “past facts, known by both parties to be untrue”’.

45. In *Raiffeisen*, the claimant bank alleged that it had been induced to enter into a syndicated loan facility by several representations made by the defendant bank which had arranged the facility. The syndicate member argued that certain representations had been impliedly made in an information memorandum distributed by the arranger. Christopher Clarke J held that a ‘no representation’ and a ‘no responsibility’ clause contained in the information memorandum formed part of the context to be taken into account when considering whether the alleged representations had been made, and concluded that the parties contracted on the basis that information provided by the arranger was not to be regarded as a representation of fact on which the arranger intended that the syndicate member should rely or upon which it was entitled to rely. It followed that the ‘no representation’ and ‘no responsibility’ clauses were

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<sup>111</sup> [2011] EWHC 479 (Comm) at [186].

<sup>112</sup> [2010] EWHC 1392 (Comm), [2011] 1 Lloyd’s Rep 123 at [314].

not in substance an attempt to exclude or restrict liability so as to fall within the protective legislation.<sup>113</sup>

46. Judges and textbook writers frequently refer to Christopher Clarke J's 'key question', but it is surprising how often they fail to mention footnote 45!<sup>114</sup> Yet, it is an important footnote because, by providing this example, it is submitted that Christopher Clarke J implicitly accepts that there must be a balance between the 'real' world of actual occurrence and the 'virtual' world of contractual agreement, such that a known untruth may only be used by the contracting parties as the agreed basis of their relationship when it is reasonable to do so.<sup>115</sup>

47. Immediately after setting out what he described as 'the key question', Clarke J went on to distinguish cases where:<sup>116</sup>

'[i]f sophisticated commercial parties agree, in terms of which they are both aware, to regulate their future relationship by prescribing the basis on which they will be dealing with each other and what representations that are or are not making, a suitably drafted clause may properly be regarded as establishing that no representations (or none other than honest belief) are being made or are intended to be relied on...'

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<sup>113</sup> See also *IFE Fund SA v Goldman Sachs International* [2007] 1 Lloyd's Rep 264 at [70]-[71], Toulson J, affd [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep 449 at [28], Waller LJ.

<sup>114</sup> Examples of the former include *Avrora Fine Arts Investment Ltd v Christie Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] PNLR 35 at [142]; *Crestsign Ltd v National Westminster Bank plc* [2014] EWHC 3043 (Ch) at [101]. Examples of the latter include A Burrows, *A Restatement of the English Law of Contract* (2016), p 100; E Peel, *Treitel's Law of Contract* (14<sup>th</sup> ed, 2015), [9-126]; R Lawson, *Exclusion Clauses and Unfair Contract Terms* (11<sup>th</sup> ed, 2014), [7-006].

<sup>115</sup> The fact that both parties know that the clause does not reflect what actually happened of itself does not make the agreement a 'sham'. For acts or documents to be a sham, 'all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating': *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802, Diplock LJ. The seller may know that the statement of 'no representation' or 'no reliance' is false, but this does not mean that the buyer does not intend the statement to be acted upon or has acted in such a way as to create the impression of that intention. For example, there was nothing to suggest in *Lowe v Lombark* that the buyer of the car herself had a common intention with the sellers that the acknowledgment she gave would be no more than appearance (Trukhtanov (2009) 125 LQR 648, 658, n 49).

<sup>116</sup> At [314].

from those where:<sup>117</sup>

‘to tell the man in the street that the car you are selling him is perfect and then agree that the basis of your contract is that no representations have been made or relied on, may be nothing more than an attempt retrospectively to alter the character and effect of what has gone before, and in substance an attempt to exclude or restrict liability.’

48. What is striking is that the passage dealing with ‘sophisticated commercial parties’ points to terms which ‘regulate their *future* relationship by prescribing the basis on which they *will* be dealing with each other’ (emphasis added), whereas the passage dealing with the ‘man in the street’ changes the chronological order, so that the agreement that no representations are being made comes after the statement that the car is perfect and is an attempt *retrospectively* to alter the character and effect of what has gone before. Christopher Clarke J must have had Diplock J’s statement in *Lowe v Lombank* in mind.<sup>118</sup> In the ‘man in the street’ scenario, Christopher Clarke J regarded the agreed basis of the contract as being, in substance, no more than an attempt to alter ‘past facts, known by both parties to be untrue’. This was the very thing that had to be made subject to the reasonableness test.

49. But why restrict the example to the ‘man in the street’? An agreement between ‘sophisticated commercial parties’ may similarly seek to alter ‘past facts, known by both parties to be untrue’. Christopher Clarke J was prepared to allow freedom of contract to hold sway where sophisticated commercial parties agreed how they should regulate their future relationship, but he said nothing about being so indulgent when they attempt retrospectively to alter their past relationship. It is submitted that, in a ‘past facts’ scenario like this, we should not take commercial parties out of the protection of s 3 of the 1967 Act on the spurious ground that only consumers require protection.<sup>119</sup> The Consumer Rights Act 2015 has now taken ‘consumer contracts’ out of Unfair Contract Terms Act 1977, and given consumers broader protection under Part 2 of 2015 Act.<sup>120</sup>

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<sup>117</sup> At [315].

<sup>118</sup> See para 17 above. Whilst Diplock J thought that a statement as to ‘past facts, known by both parties to be untrue’, could not be converted into a contractual obligation, he accepted that there could be a promise ‘that facts exist at the time of the promise or will exist in the future’.

<sup>119</sup> Contra, Trukhtanov (2009) 125 LQR 648, 669.

<sup>120</sup> Parts 1 and 2 of the Act were brought into force so as to apply to contracts made on or after October 1, 2015.

However, as neither large, medium nor small companies can be ‘consumers’ for this purpose,<sup>121</sup> they fall outside the 2015 Act, and such statutory protection as they have can only be found in the Unfair Contract Terms Act, as extended to misrepresentations by s 3 of the Misrepresentation Act. As a matter of general policy, it seems clear that Christopher Clarke J was keen to ensure that s 3 applied to contractual estoppel cases, which do not require detrimental reliance, where there are ‘no further control mechanism on its operation.’<sup>122</sup>

50. This uniform treatment of ‘past facts’ cases gains support from the Court of Appeal’s decision in *Springwell*. In that case the purchaser of a complex financial product was an investment company owned and run by a family of wealthy Greek shipowners. These were not ‘men in the street’. Nevertheless, Aikens LJ applied the ‘men in the street’ part of Christopher Clarke J’s analysis and held that a clause which provided that ‘no representation or warranty, express or implied, is or will be made ... in or in relation to such documents or information’ was ‘an attempt retrospectively to alter the character and effect of what has gone before’ and thus it fell within s 3 of the Misrepresentation Act 1967 so as to be exposed to the test of reasonableness.

51. However, not all clauses that deal with past facts in this way will necessarily be held to be exclusion or limitation clauses. It may not be certain what, if any, representation has been made or whether there has been reliance. In cases of uncertainty, a term stating that no representation has been made or relied upon does not alter ‘past facts, *known* by both parties to be untrue’ (emphasis added). Christopher Clarke J was perfectly entitled to take account of the ‘no representation’ clause as one factor to consider when deciding whether a representation was to be implied. In those circumstances, the clause merely set out the basis of the relationship of the parties in such a case of uncertainty.<sup>123</sup> It should be remembered that ‘no representation’, ‘no reliance’ and similar basis clauses have greatest commercial utility when there is uncertainty.<sup>124</sup>

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<sup>121</sup> Consumer Rights Act 2015, s 2(3), defines ‘consumer’ to mean ‘an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.’

<sup>122</sup> At [307].

<sup>123</sup> See also *Crestsign Ltd v National Westminster Bank plc* [2014] EWHC 3042 (Ch) at [115]-[116], where Tim Kerr QC, sitting as a Deputy Judge of the High Court, held that, on the facts before him, reasonable people might disagree whether advice was given, and so the parties could legitimately seek to define their relationship on the basis that no advice was given.

<sup>124</sup> See para 7 above.

52. It would be wrong to think, as some have, that Christopher Clarke J merely applied a ‘but for’ test when distinguishing between definitional (or basis) and exclusion clauses.<sup>125</sup> First, he never said that he was doing that and, secondly, such a test would ensnare his ‘sophisticated commercial parties’ scenario, which he clearly intended to keep out of the protective net. A ‘but for’ test means the court must first ignore the clause and, in its absence, decide whether a cause of action can be made out. Where it can, then a clause preventing that cause of action from arising is to be treated as an exclusion clause and exposed to the reasonableness test. A ‘but for’ test was famously employed by the House of Lords in *Smith v Eric S Bush*<sup>126</sup> when determining whether a disclaimer was caught by s 13(1) of the Unfair Contract Terms Act.<sup>127</sup> However, a ‘but for’ test is a crude instrument to distinguish between definitional and exclusion clauses, and arguably underplays the significance of the contractual relationship between the parties.<sup>128</sup> The test fails to take sufficient account of the parties’ freedom to contract on terms of their choosing. It brings their chosen terms into account too late in the day. The same can also be said of any test based upon whether the clause conflicts with the ‘reasonable expectations’ of the parties.<sup>129</sup> The presence of a ‘no representation’, ‘no reliance’ or similar basis clause should be taken to influence those *reasonable* expectations.<sup>130</sup> Any attempt to

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<sup>125</sup> J White, ‘Defining “Exclusion” Clauses and Excluding “Defining” Clauses: The Need to Clarify the Scope of the Unfair Contract Terms Act 1977’ [2016] JBL 373, 382, who goes on to argue that ‘this approach ought not to be pursued due to its inability to account for freedom of contract for defining clauses’.

<sup>126</sup> [1990] 1 AC 831, 857, Lord Griffith, who took account of the second report of the Law Commission on Exemption Clauses (1975) (Law Com No 69), especially para 127. See also *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, 625, Slade LJ.

<sup>127</sup> See also *Deutsche Bank AG v Chang Tse Wen* [2013] SGCA 49 at [63], Menon CJ examining the wording of s 13(1) of the Singaporean Unfair Contract Terms Act, and concluding (*obiter*) that ‘[t]his seems to preclude any material distinction being drawn between clauses which exclude liability and those which restrict the scope of the duty or the obligation.’ The Act is almost identical to the English UCTA.

<sup>128</sup> In any event, in *Titan Steel Wheels Ltd v Royal Bank of Scotland plc* [2010] EWHC 211 (Comm) at [104], David Steel J said *Smith v Bush* ‘may have been somewhat overtaken by later decisions in regard to assumption of responsibility and the move away from any ‘but for’ test in regard to the existence and extent of any duty.’

<sup>129</sup> Cf E Macdonald, ‘Exception Clauses: Exclusionary or Definitional? It depends!’ (2012) 29 JCL 47, although Macdonald accepts that where the parties are ‘legally sophisticated, and advised, and the transaction is a significant one’ then they may be taken to expect what the written terms provide.

<sup>130</sup> When A contracts on B’s written standard terms of business, UCTA 1977, s 3(2)(b)(i), states that B cannot rely on a term ‘to render a contractual performance

ignore the clause because it is a boilerplate provision and, therefore, likely to be unread, undermines the recognized commercial benefit of certainty that comes with a rigorous application of the signature rule enshrined in *L'Esrange v Graucob*.<sup>131</sup> By signing the contract a party takes a risk as to the content of its terms if he does not read those terms.

53. It is submitted that the legal effect of a contract term, including whether a term is definitional or exclusionary, turns on the common intention of the parties as revealed in the words used by the parties, construed by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', and disregarding subjective evidence of any party's intention.<sup>132</sup> Christopher Clarke J recognized this in *Raiffeisen* when he asks whether the clause 'attempts to rewrite history or parts company with reality'. In using the word 'attempts' it is submitted that he implicitly indicates that the issue turns on the intention of the parties as objectively ascertained. The judge's repeated reference to contextual matters, such as the characteristics of the parties,<sup>133</sup> and their awareness of the relevant terms,<sup>134</sup> also reveals an intention-based approach to the issue.

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substantially different from that which was reasonably expected of him', unless the term satisfies the requirement of reasonableness. One view is that this provision, like s 13(1) of the 1977 Act, is designed to catch 'disguised exemption clauses', and it has been suggested that s 3(2)(b)(i) might be applied to 'conclusive evidence clauses' in commercial loan agreements (S Booyesen, "Pay Now-Argue Later": Conclusive Evidence Clauses in Commercial Loan Contracts' [2014] JBL 31, 42). However, 'the apparently wide words of s 3(2)(b) have not given rise to an expansive interpretation by the courts' (A Burrows, *A Restatement of the English Law of Contract*, 2016, p 99). One difficulty is that s 3(2)(b)(i) will only come into play where one party can show that the clause regulates the other party's 'performance', and that may be difficult to establish (*AXA Sun Life Service plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep 1 at [50], Stanley Burnton LJ). Furthermore, there is no equivalent provision to s 3(2)(b)(i) in the Misrepresentation Act 1967.

<sup>131</sup> Considered in para 20 above.

<sup>132</sup> *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15], Lord Neuberger, quoting Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [14]. See also *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm) at [237], Richard Salter QC, sitting as a Deputy High Court judge.

<sup>133</sup> See, eg, at [313] ('commercial parties of equal bargaining power'), [314] ('sophisticated commercial parties'; 'such parties'), [315] ('the man in the street') and [317] ('[i]f parties such as these').

<sup>134</sup> See, eg, at [308] ('eyes wide open'), [314] ('both are aware').

54. Arguably, such an intention-based approach to the question is supported by the judgment of Tim Kerr QC, sitting as a Deputy High Court judge in *Crestsign Ltd v National Westminster Bank plc*,<sup>135</sup> another case involving the sale of an interest rate swap on the bank's standard terms, which included various disclaimers, but this time the buyer was a small, family run company and not a large commercial party. The judge made no express reference to an intention-based test but, after referring to several authorities, including *Raiffeisen*, he said:<sup>136</sup>

‘the principle is simple enough: you look at the words used to see whether, understood in their proper context from the perspective of an impartial and reasonable observer (ie the court), they prevent a representation from having been made, or whether, by contrast, they exclude liability for making it.’

55. *Crestsign* was followed by *Thornbridge Ltd v Barclays Bank plc*, another case involving the sale of an interest rate swap to a small, family run company, where Her Honour Judge Moulder QC, sitting in the High Court, said that:<sup>137</sup>

‘the test is not whether the clause attempts to rewrite history or parts company with reality. The first step is to determine as a matter of construction whether the terms define the basis upon which the parties were transacting business or whether they were clauses inserted as a means of evading liability.’

56. The judge then reviewed *Barclays Bank plc v Svizera Holdings BV*,<sup>138</sup> where Flaux J examined Moore-Bick LJ's judgment in *Peekay*,<sup>139</sup> and Hamblin J's later judgment in *Cassa di Risparmio della Repubblica di*

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<sup>135</sup> [2014] EWHC 3042 (Ch). See also White [2016] JBL 373, 383: ‘[a]lthough *Crestsign* does not explicitly provide an intention-based test, its analysis clearly engages a similar objective intention test rather than referencing hypothetical duties that exist but for the clause’.

<sup>136</sup> At [112]. The judge held that the ‘no advice’ clause prevented a duty of care arising in tort, rather than excluding liability, so that it fell outside s 2(2) of the Unfair Contract Terms Act 1977 (see also para 33 above).

<sup>137</sup> [2015] EWHC 3430 (QB) at [105], and cited with approval by HH Judge Hodge, sitting in the High Court in *Sears v Minco plc* [2016] EWHC 433 (Ch) at [80]. In *Thornbridge*, HH Judge Moulder QC stated (*obiter*) that the ‘no reliance’ clause was a ‘basis’ clause, and did not exclude liability for negligence, so that it fell outside s 2(2) of the Unfair Contract Terms Act 1977. An appeal in *Thornbridge* is due to be heard on 30<sup>th</sup> November 2016.

<sup>138</sup> [2014] EWHC 1020 (Comm) at [58]-[59].

<sup>139</sup> [2006] EWCA Civ 386 at [57].



*San Marino v Barclays Bank Ltd.*<sup>140</sup> The point that HH Judge Moulder QC drew from these cases was that the parties may agree the basis on which they enter into a relationship so as to give rise to a contractual estoppel, and that ‘[t]his is so even where for example parties agree that one party has not made any pre-contract representations about a particular matter and both parties know such representations have in fact been made’.<sup>141</sup> This led her to ‘reject the submission that the test is whether the clause “rewrite history”’.<sup>142</sup>

57. It is submitted that there is a degree of confusion here. Judge Moulder elides two separate issues into one. The first issue relates to the scope of contractual estoppel. She is right to say that the doctrine can apply to contractual statements about past facts that both parties know to be untrue.<sup>143</sup> The second issue is whether that contractual statement is definitional or exclusionary for the purposes of deciding whether it falls within s 3 of the Misrepresentation Act. The fact that a clause that ‘rewrites history’ precludes denial of what actually happened under the doctrine of contractual estoppel does not mean that the clause is automatically a definitional or basis clause which falls outside the statute. In fact, the opposite is true for, as Christopher Clarke J has told us, if it ‘rewrites history’ then it will fall within s 3 of the 1967 Act. In summary, and contrary to the reasoning of Judge Moulder, a clause may be binding at common law, under the doctrine of contractual estoppel, and yet still be categorized as exclusionary, so as to be unenforceable under the statute if it fails the test of reasonableness.

58. An intention-based approach to the question whether a term is definitional or exclusionary may be simple enough to state, but it may be difficult to apply in practice without further guidance. Christopher Clarke J provides that guidance in *Raiffeisen*. It is submitted that the approach taken by Christopher Clarke J, and that taken by the judges in *Crestsign* and *Thornbridge* (at least after the confusion in Judge Moulder’s reasoning is identified), are not mutually exclusive. Objective construction of the clause in question is essential in order to ascertain the common intention of the parties. In essence, the court must ask whether the parties intend to exclude or restrict liability or merely to define the basis of their relationship. The process is analogous to where the court

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<sup>140</sup> [2011] EWHC 484 (Comm) at [505] and [525].

<sup>141</sup> [2015] EWHC 3430 (QB) at [111].

<sup>142</sup> *Ibid.*

<sup>143</sup> *Springwell* [2010] EWCA Civ 1221 at [155], Aikens LJ; *Cassa di Risparmio della Repubblica di San Marino v Barclays Bank Ltd* [2011] EWHC 484 (Comm) at [505], Hamblin J.

must ascertain whether the parties intend a term to be a condition of the contract. Outside statute, the classification of a term turns on the intention of the parties, which must be objectively construed.<sup>144</sup> The labels used by the parties are not decisive of the issue when classifying terms,<sup>145</sup> and neither should they be decisive when deciding whether the parties' intention is to define or exclude. A contractual provision that the parties 'intend clause X to define the nature and extent of the obligations existing between them and do not intend clause X to exclude liability' would not in itself determine the issue.<sup>146</sup>

## Conclusion

59. There remains something unsettling about a world that parts company with reality and where business is done on the basis of knowingly untruthful statements contained in the contract itself. Here we have a direct conflict between, on the one hand, the principles of freedom of contract and commercial certainty, which are at the heart of contractual estoppel, and, on the other, the need to protect the weak(er) and (more) vulnerable from exploitation. Freedom of contract and commercial certainty currently have the upper hand.<sup>147</sup> There is nothing wrong either with that or with the doctrine of contractual estoppel itself. The commercial utility of the doctrine justifies its application, and that utility will be all the greater when dealing with the sale of complex financial products between sophisticated commercial parties of roughly equal bargaining strength using industry standard terms of business.<sup>148</sup> Nevertheless, it is submitted that an appropriate balance can be achieved between the 'real' world and the 'virtual' world created by the agreement of the parties, not by denying effect to that agreement, unless it impinges upon statute or some broader principle of public policy, but by

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<sup>144</sup> *Bentsen v Taylor Sons & Co* [1893] 2 QB 274, 281; *Bunge Corporation v Tradax Export SA* [1981] 1 WLR 711, 725. See generally, A Burrows, *A Restatement of the English Law of Contract* (2016), p 114, cited with approval by Gross LJ in *Grand China Logistics Holding (Group) Ltd v Spar Shipping SA* [2016] EWCA Civ 982 at [20], and see also Sir Terence Etherton MR at [98].

<sup>145</sup> *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, HL.

<sup>146</sup> Cf *White* [2016] JBL 373, 384.

<sup>147</sup> This seems to be a current trend for contract law in general: there is strong evidence of the influence of freedom of contract in recent decisions of the Supreme Court, especially in the speeches of Lord Neuberger in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 (construction), *Cavendish Square Holdings BV v El Makdessi* [2015] UKSC 67, [2015] 3 WLR 1373 (penalty clauses) and *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 (implied terms).

<sup>148</sup> Braithwaite (2016) 132 LQR 120, 133.

recognizing that Parliament's control of clauses which exclude or restrict liability, through the Unfair Contract Terms Act 1977 and the Misrepresentation Act 1967, also extends to those clauses that seek to deny 'past facts, known by both parties to be untrue'. Movement in one direction (towards contractual estoppel) demands equal movement in another direction (towards pragmatic interpretation of the legislation).

60. However, Lord Toulson has recently reminded us that 'words of exception may be simply a way of delineating the scope of the primary obligation'.<sup>149</sup> Similarly, 'no representation', 'no reliance' and other 'basis clauses' may simply delineate the scope of a primary obligation. Where they do so, they should not be exposed to a test of reasonableness.<sup>150</sup> Whether they do so, is a different question. It is not surprising that, with the rise of contractual estoppel, the courts have focused more on the test to be applied to distinguish between 'basis clauses' and those which exclude or restrict liability. That there has been inconsistency in the case law is not surprising either because the poorly drafted Misrepresentation Act fails to address the issue at all. Just as much as we must construe the words used by the parties, it is also necessary to construe the words used by Parliament in the Act itself and, unfortunately, the Act only gives us 'exclude or restrict' to work on.<sup>151</sup>

61. The 'key question' asked by Christopher Clarke J helps identify the parties' intentions. Where it is answered positively, the clause will be held to 'exclude or restrict' liability. Where it is answered negatively, the clause may (not must) be held to define obligations and provide the basis (or part of the basis) of the relationship between the contracting parties. But construction of a term turns on 'the meaning of the relevant words ... in their documentary, factual and commercial context'.<sup>152</sup> The characteristics of the contracting parties are part of the commercial context. Whether the contracting parties are or are not both sophisticated commercial parties of roughly equal bargaining power is a contextual

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<sup>149</sup> *Impact Funding Solutions Ltd v AIG Europe Ltd* [2016] UKSC 57 at [35].

<sup>150</sup> Cf N Goh, 'Non-Reliance Clauses and Contractual Estoppel: Commercially Sensible or Anomalous?' [2015] JBL 511, 526, who makes the somewhat draconian proposal that all 'no reliance' clauses be brought within the UCTA regime.

<sup>151</sup> J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (3<sup>rd</sup> ed, 2012), [9-21, n 81], notes that, during the passing of the Misrepresentation Bill, the Solicitor-General did not give a direct answer to a question about how 'no reliance' clauses would be caught by s 3 (*Hansard*, HC Vol 741, 20 Feb 1967, cols 1375-1376, 1387-1390).

<sup>152</sup> *Arnold v Britton* [2015] AC 1619 at [15], Lord Neuberger.

factor to be taken into account when construing the contract in order, objectively, to ascertain the intention of the parties.<sup>153</sup>

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<sup>153</sup> White [2016] JBL 373, 385 rejects an intention-based test as ‘counter-productive’ and prefers an interpretation of ‘excluding or restricting’ which allows the court ‘to consider all the circumstances’. It is submitted that a contextual approach to construction brings all the circumstances into account in any event. An alternative two-stage process which combines ‘construction’ with ‘categorization’, employed by Lord Millett in *Agnew v Commr of Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710 at [32], runs into the problem that, unlike where the question is whether the transaction to be categorized is a sale or security, fixed charge or floating charge, or lease or licence, there is no obvious, objective legal criterion which can be used to distinguish a definitional clause from an exemption clause.