

Case Note

MISREPRESENTATION AND CONTRACTUAL ESTOPPEL

The *Raiffeisen* clarifications

Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc
[2010] EWHC 1392 (Comm)

Misrepresentation continues to be one of the most commonly pleaded vitiating factors. When such a plea is made, the representor's reply has often been that there is a contractual clause which affects the matter at hand, and the legal inquiry turns to whether the clause excludes liability for misrepresentation and, if so, whether it is reasonable. In recent times, a somewhat surprising argument has surfaced – that the clause estops any allegation of misrepresentation. Such estoppel takes two forms. The first – estoppel by representation – is a reasonably well-established doctrine. The second – contractual estoppel – is a recent and controversial concept, and has been gaining judicial support. But the application of the doctrine of contractual estoppel raises serious questions and doubts. This case note considers how and the extent to which Mr Justice Clarke's judgment in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) provides the clarification much needed in this area.

LOW Kee Yang*

LLB (National University of Singapore), LLM,

PhD (King's College, London);

Associate Professor of Law, Singapore Management University.

I. Introduction

1 The last decade has witnessed interesting developments in the judicial response to the increased use of contractual clauses that address the issue of misrepresentation. These clauses cover an array of matters, the more recent of which are acknowledgments of non-reliance on

* In writing this case note, the author benefitted from discussions with Professor George Wei and Professor Michael Furmston; any deficiencies are the author's alone.

representations (“non-reliance clauses”) and recitations of the basis of the contract (“basis clauses”). In the past, the legal effect of such clauses turned primarily on the question of whether the clause is an exclusion of misrepresentation liability¹ and, if it is, whether it satisfies the requirement of reasonableness.

2 In recent times, the argumentation has taken a rather unexpected twist, with the assertion that the contractual clause operates as an estoppel and precludes an allegation that the contract was induced by misrepresentation. Two forms of estoppel have been relied upon: estoppel by representation (also referred to as evidential estoppel)² and contractual estoppel.

3 The leading authority on the use of estoppel by representation in the context of misrepresentation is the English Court of Appeal decision in *Lowe v Lombank*³ (“*Lowe*”), where Diplock J (as he then was) stated the principle⁴ in the following way:⁵

In order to found an estoppel ... the defendants must show:

- (i) that [the statement] is clear and unambiguous;
- (ii) that the plaintiff meant it to be acted on by the defendants or, at any rate, so conducted herself that a reasonable man in the position of the defendants would take the representation to be true and believe that it was meant that he should act on it ...; [and]
- (iii) that the defendants in fact believed it to be true and were induced by such belief to act on it.

4 In essence, the three requirements are a clear statement by the plaintiff, the plaintiff’s intention that the defendant would rely, and belief and reliance on the part of the defendant. That truth plays a critical role in this doctrine is clearly brought out by the learned judge’s comment “[t]o call it 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 ...”.⁶ The *Lowe* principle has been cited and applied in several cases including, in the

1 Misrepresentation Act 1967 (c 7) (UK) s 3; Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore) s 3.

2 See, eg, *Grimstead & Son Ltd v McGarrigan* [1999] EWCA Civ 3029; 1999 WL 85282 at p 16; *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317 at [39], [40]; and *Peart Stevenson Associates Ltd v Holland* [2008] EWHC 1868 (QB) HQ07X03235 (transcript) at [40]; and *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm) 2008 (transcript) at [34], [35].

3 [1960] 1 WLR 196.

4 Although Diplock J did not specifically use the term “estoppel by representation”, it is clear from the elements he identifies that that species is being referred to.

5 *Lowe v Lombank* [1960] 1 WLR 196 at 205.

6 *Lowe v Lombank* [1960] 1 WLR 196 at 204.

English Court of Appeal, *Cremdean Properties Ltd v Nash*,⁷ *EA Grimstead & Son Ltd v McGarrigan*,⁸ *Watford Electronics Ltd v Sanderson CFL Ltd*⁹ and *Peekay Intermark Ltd v ANZ Banking Group Ltd*,¹⁰ and, in the English High Court, in *Quest 4 Finance Ltd v Maxfield*,¹¹ *JP Morgan Chase Bank v Springwell Navigation Corp*¹² and *Peart Stevenson Associates Ltd v Holland*.¹³

5 More recently, however, a new strand of estoppel – contractual estoppel – is being developed and applied. Delivering the leading judgment of the English Court of Appeal in *Peekay Intermark Ltd v ANZ Banking Group Ltd*¹⁴ (“*Peekay*”), Moore-Bick LJ declared that:

There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, *whether it be the case or not* ... 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 ... The contract itself gives rise to an estoppel. [emphasis added]

6 The contractual estoppel principle enunciated in *Peekay*¹⁵ has been cited with approval and applied in a string of recent English High Court decisions in *JP Morgan Chase Bank v Springwell, Navigation Corp*,¹⁶ *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd*¹⁷ (“*Trident*”), *Titan Steel Wheels Ltd v Royal Bank of Scotland plc*¹⁸ (“*Titan Steel*”) and *Food Co UK LLP v Henry Boot Developments Ltd*¹⁹ (“*Henry Boot*”).

II. Singapore cases

7 In Singapore, there has been limited judicial discussion of the application of either form of estoppel to contractual clauses which affect a plea of misrepresentation. In *Orient Centre Investments Ltd v Societe*

7 (1977) 244 EG 547 (CA).

8 [1999] EWCA Civ 3029.

9 [2001] EWCA Civ 317.

10 [2006] EWCA Civ 386.

11 [2007] EWHC 2313 (QB) HQ0603191.

12 [2008] EWHC 1186 (Comm) 2001-404.

13 [2008] EWHC 1868 (QB) HQ07X03235.

14 [2006] EWCA Civ 386 at [56].

15 *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386.

16 *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) 2001-404.

17 [2008] EWHC 1686 (Comm) 2008.

18 [2010] EWHC 211 (Comm) 1231.

19 [2010] EWHC 358 (Ch).

*Generale*²⁰ (“*Orient*”), estoppel by representation²¹ and the *Lowe*²² requirements were cited and applied by the Singapore Court of Appeal; *Peekay*²³ was also cited,²⁴ though without any mention of contractual estoppel.²⁵

8 In *Jurong Shipyard Pte Ltd v BNP Paribas*,²⁶ in dealing with contractual estoppel, Lee Seiu Kin J surveyed the authorities, including *Colchester Borough Council v Smith*,²⁷ *Peekay*²⁸ and *Orient*²⁹ but held that the doctrine applied only “in the absence of the normal vitiating factors such as duress, undue influence and misrepresentation”.

9 *JP Morgan Chase Bank v Springwell Navigation Corp*³⁰ was cited with approval by the Singapore High Court in both *Crédit Industriel et Commercial v Teo Wai Cheong*³¹ and *Go Dante Yap v Bank Austria Creditanstalt AG*,³² where the issue was not misrepresentation but rather the duty of a bank in tort (and in contract).

III. Controversy and uncertainty

10 Juxtaposing the two species of estoppel, it is clear that estoppel by representation is the more robust or rigorous of the two. Detrimental reliance, a traditional characteristic of estoppel,³³ is evidenced in estoppel by representation by requiring, in addition to a clear statement, that the maker of the statement intended the recipient to rely, and that the recipient believed in the statement and relied. In contrast, contractual estoppel only requires a clear statement.

20 *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566 at [44]–[50].

21 The term referred to was “evidential estoppel”.

22 *Lowe v Lombank* [1960] 1 WLR 196.

23 *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386

24 *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566 at [51]–[53].

25 Contractual estoppel was also applied by District Judge Tan May Tee in *Gunvor Singapore Pte Ltd v Kesavan Esuvanathan* [2009] SGDC 357.

26 [2008] 4 SLR(R) 33 at [100]. Such a position runs counter to the current tide of English cases.

27 [1992] Ch 241.

28 *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386.

29 *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566.

30 [2008] EWHC 1186 (Comm) 2001-404.

31 [2010] 3 SLR 1149.

32 [2010] 4 SLR 916.

33 See *Spencer Bower, The Law Relating to Estoppel by Representation* (Feltham, Hochberg & Leech eds) (LexisNexis, 4th Ed, 2004) at para I.2.5; K R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2006) at para 1-009; and *Wilken & Villiers' The Law of Waiver, Variation & Estoppel* (OUP, 2nd Ed, 2002) at paras 7.10–7.11.

11 The emergence of the doctrine of contractual estoppel is a controversial one and raises a host of related questions, the foremost of which are:

- (a) Has the repeated application of the doctrine confirmed its correctness and legitimacy?
- (b) Does not the application of contractual estoppel undermine the importance and rigour of estoppel by representation?
- (c) If a clause can found a contractual estoppel in a situation where a representation had in fact been made, does that not directly contradict Diplock J's statement in *Lowe*³⁴ that a contract clause "cannot convert a statement as to past facts known by both parties to be untrue into a contractual obligation"?
- (d) Whilst it may be appropriate to apply contractual estoppel to situations involving commercial parties of equal bargaining power, can the doctrine be fairly applied where the circumstances are very different?
- (e) Where contractual estoppel is applied, is there a further need to consider whether the clause is in effect an exclusion of misrepresentation liability and therefore subject to s 3 of the Misrepresentation Act³⁵ and the reasonableness requirement?

12 The recent decision of Mr Justice Christopher Clarke in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc*³⁶ ("*Raiffeisen*") provides valuable insights as one seeks to answer the above questions. After examining *Raiffeisen*, we consider the extent to which Clarke J's analysis has been endorsed by the English Court of Appeal in *Springwell Navigation Corp v JP Morgan Chase Bank*.³⁷

IV. The facts and the decision

13 The case involved a complex structured finance arrangement whereby the Royal Bank of Scotland ("RBS") lent £138.5m to an Enron company. The structure was designed to achieve an accounting treatment (permissible at the time) that enabled Enron Corp to not account for its borrowing, yet be able to recognise a profit at the conclusion of the transaction. It involved RBS incorporating a special

34 *Lowe v Lombank* [1960] 1 WLR 196 at 204.

35 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

36 [2010] EWHC 1392 (Comm), 2006 Folio 1202.

37 [2010] EWCA Civ 1221.

purpose entity (“SPE”) capitalised by debt of £138.5m through a Syndicated Credit Facility (“SCF”) and equity of £4.9m (3.55%) (US accounting principles required at least 3% of an SPE’s equity to be at risk). Whilst there was a clear legal obligation on the part of the Enron entities to be responsible for the debt, there was no such obligation as to the equity. During negotiations, RBS received informal assurances from Enron that it would ensure that RBS recovered its equity investment at the end of the transaction.

14 Raiffeisen Zentralbank Osterreich (“RZB”) participated in the syndication and lent £10m which, following Enron’s collapse in December 2001, became unrecoverable. The gist of RZB’s case was that RBS had impliedly represented that its equity in the SPE was at risk (whereas in reality it was not) and that the lending to Enron complied with accounting principles, and that these representations induced RZB to participate in the syndication.

15 In issue was the effect of provisions in the documentation. Clause 5 of the Confidentiality Agreement provided that:

The Recipient [*ie*, RZB] acknowledges and agrees that

(a) RBS and its Affiliates, officers ... do not make any representation or warranty, express or implied as to, or assume any responsibility for, the accuracy, adequacy, reliability or completeness of any of the Confidential Information; ...

(b) The Confidential Information is not intended to provide the sole basis of any credit evaluation and should not be considered to be a recommendation that the Recipient participate in the Transaction.

16 In similar vein, the Information Memorandum stated under an opening heading “Important Notice” that:

The contents of this Memorandum have not been independently verified. No representation, warranty or undertaking (express or implied) is made, and no responsibility is accepted as to the adequacy, accuracy, completeness or reasonableness of this Memorandum ... This Memorandum is being provided for information purposes only and is not intended to provide the basis of any credit decision ... and should not be considered as a recommendation that any recipient ... should participate in the Facility. Each potential participant should determine its interest in participating in the Facility based upon such investigations and analysis as it deems necessary for such purpose.

17 Clauses 22.4(a) and 24.15(d) of the Facility Agreement were clauses to similar effect.

18 RBS argued that there was no operative misrepresentation by RBS and that the contractual clauses estopped RZB from alleging misrepresentation. Mr Justice Christopher Clarke decided in favour of

RBS. He found that RBS had not made any implied representations, and that even if there had been such implied representations, they did not induce RZB as they were not a “real and substantial cause”³⁸ of RZB’s participating in the syndication. His judgment includes a detailed discussion of the captious topic of inducement and causation in the law of misrepresentation, which interested readers may find enlightening.³⁹ This note focuses on the estoppel aspects of the case.

19 The honourable judge was also of the view that the relevant clauses to the effect that no representations were being made as to, or responsibility taken for, the accuracy or completeness of the information provided contractually estopped assertions of misrepresentation. He then proceeded to consider the application of s 3 of the Misrepresentation Act⁴⁰ and concluded that the clauses were not an attempt to exclude liability for misrepresentation. In any case, he found that, in the circumstances, the clauses satisfied the requirement of reasonableness.

20 Clarke J’s judgment merits careful reading (and re-reading) as it provides thoughtful analysis of the profound challenges of utilising such a concept as contractual estoppel to do justice in a scenario where an allegation of misrepresentation meets contraindications in the contractual clauses.

V. Affirmation of doctrine of contractual estoppel

21 In *Raiffeisen*, the latest in a succession of English High Court cases to affirm the existence of the doctrine of contractual estoppel, Clarke J laid down the proposition as follows:⁴¹

Parties to a contract may agree that a particular state of affairs is to be the basis upon which they are contracting, regardless of *whether or not that state of affairs is true*. ... such an agreement may give rise to a contractual estoppel, precluding the assertion of facts inconsistent with those that have been agreed to form the basis of the contract. [emphasis added]

22 On this principle, a contractual clause, such as a non-reliance clause or a basis clause, can estop a plaintiff from alleging that the defendant was guilty of misrepresentation.

38 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [214].

39 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [153]–[199].

40 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

41 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [230].

23 Noting that in several of the cases forming the chain of authority, some of the relevant earlier authorities were not cited, Clarke J proceeded to survey the authorities. He then acknowledged that the doctrine of contractual estoppel “is not easy to reconcile ... with the apparently absolute statement in *Lowe* that a statement as to past facts known to be untrue cannot be converted into a contractual obligation and is not a contractual promise”. However, he was of the view that if *Lowe*⁴² was adverse authority for the doctrine of contractual estoppel, it was wrong and *per incuriam*, having regard to the English Court of Appeal decisions in *Colchester Borough Council v Smith*,⁴³ *Burroughs Adding Machine Ltd v Aspinall*⁴⁴ and *Peekay*,⁴⁵ the last of which, he noted, had been followed in several English High Court decisions.

VI. Application of the Misrepresentation Act

24 It is particularly significant that whilst Clarke J appeared fully convinced of the correctness and applicability of the doctrine of contractual estoppel, he was also equally certain that the next step was to consider if the clause(s) amounted to an exclusion of misrepresentation liability and, if so, whether the clause was reasonable, for no sooner had he stated the proposition stated above did he add:⁴⁶

If that is done [*ie*, the precluding of an assertion of misrepresentation] the question arises as to whether or not the agreement constitutes an attempted exclusion of liability for misrepresentation to which section 3 of the Misrepresentation Act 1967 applies.

25 In this regard, he cited approvingly (it would appear) the oft-quoted words of Bridge LJ, in the context where a representation had in fact been made, that:⁴⁷

I should have thought that [the clause] was only a form of words the intended and actual effect of which was to exclude or restrict liability, and I should not have thought that the courts would have been ready to allow such *ingenuity in the forms of language* to defeat the *plain purpose* at which section 3 is aimed. [emphasis added]

42 *Lowe v Lombank* [1960] 1 WLR 196.

43 [1991] Ch 448, *affd* [1992] Ch 421.

44 [1925] 41 TLR 276.

45 *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386.

46 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [230].

47 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [276].

26 In similar vein, he cited⁴⁸ the following words of Judge Raymond Jack QC in *Government of Zanzibar v British Aerospace (Lancaster House) Ltd*:⁴⁹

A term which negates a reliance which in fact existed is a term which excludes a liability which the representor would otherwise be subject to by reason of the misrepresentation. If that were wrong, it would mean that section 3 would always be defeated by including an appropriate non-reliance clause in the contract, however unreasonable that might be.

27 The reason s 3 of the Misrepresentation Act⁵⁰ must apply, Clarke J explained, is that since “contractual estoppel clauses” are used not just in complex transactions between sophisticated parties but also in everyday contracts involving consumers:⁵¹

Any interpretation of section 3 must accommodate the car dealer as well as the bond dealer ... If section 3 has no application in respect of a contractual estoppel there is *no further control mechanism* on its operation, which does not require detrimental reliance.

The seller ... may ... make non-fraudulent⁵² misrepresentations of that type with impunity.

[emphasis and footnote added]

28 The above paragraph is of paramount importance, for while David Steel J in *Titan Steel*,⁵³ Aikens J (as he then was) in *Trident*⁵⁴ and Lewison J in *Henry Boot*⁵⁵ all took the position⁵⁶ that even where contractual estoppel applied the clause was subject to s 3 of the Misrepresentation Act,⁵⁷ none of them gave any reason for holding such

48 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [282].

49 [1977] 2 EGLR 80; 244 EG 547.

50 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

51 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [305], [307].

52 In general, liability for fraudulent, as opposed to non-fraudulent, misrepresentation, cannot be excluded: *HIH Casualty & General Insurance v Chase Manhattan* [2003] UKHL 6; [2003] 2 Lloyd's Rep 61.

53 *Titan Steel Wheels Ltd v Royal Bank of Scotland plc* [2010] EWHC 211 (Comm) 1231, at [98]ff.

54 *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm) 2008, at [45] *et seq.*

55 *Food Co UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [172].

56 In contrast, in *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) 2001-404, Mrs Justice Gloster was much more tentative on this issue: see [597]–[605].

57 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

a view. In *Raiffeisen*,⁵⁸ Clarke J supplied the explanation – contractual estoppel does not require detrimental reliance and therefore does not possess any control mechanism in its operation (other than requiring a clear and unequivocal statement); hence, to do justice, it is necessary to supplement its application with some control mechanism and s 3 of the Misrepresentation Act provides it.

29 Taking Toulson J's example in *IFE v Goldman Sachs* of a car dealer who says "I have serviced the car since it was new, it has had only one owner and the clock reading is accurate", and yet seeks to use a non-reliance clause to invoke contractual estoppel, Clarke J opined:⁵⁹

In such a situation section 3 is ... applicable because, on those facts, there has been what the person to whom the statement was made would reasonably understand to be a representation, which was intended to be and was relied upon. The clause seeks to avoid liability for what, absent the clause, would be a clear liability in misrepresentation.

30 His Honour was mindful that while the application of contractual estoppel alone may be appropriate in transactions involving parties of equal bargaining power such as the parties in *Raiffeisen*,⁶⁰ its application to transactions involving consumers may cause serious injustice.

31 The learned judge's next sentence is equally important in understanding his perception of the full legal position:⁶¹

The situation might be different in the unlikely scenario that before he contracts the buyer *sees the clause and, eyes wide open, agrees* that he is not relying on what he may have been told. [emphasis added]

32 This single sentence of Clarke J's contains much wisdom and provides illumination in a confused area of law. While he had earlier alluded to the bond dealer and the car dealer (*ie*, situations involving sophisticated parties and situations where one party is a consumer respectively), the learned judge was well aware that the classification or distinction is not always or not necessarily decisive. It is possible, though rare, in the second situation, that the consumer was fully aware of the clause and yet freely agreed to the content of that clause. (We shall

58 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202.

59 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [308].

60 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202.

61 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [308].

return to these aspects of awareness and free assent later.) In such a scenario, the clause would not be an exclusion clause within the meaning of s 3 of the Misrepresentation Act.⁶²

VII. The touchstone of reality

33 Since contractual estoppel lacks control mechanisms, Clarke J brings the legal inquiry to its next stage: is the clause an exclusion of misrepresentation liability and, if it is, is the clause reasonable? Here, as his Honour explains, “the essential question is whether the clause in question goes to whether the alleged representation was made ... or whether it excludes or restricts liability in respect of representations made ...”.⁶³

34 However, Clarke J is well aware of the challenge of applying the yardstick to actual scenarios, noting that while:⁶⁴

It is obviously advantageous that commercial parties of equal bargaining power should be able to agree what responsibility they are taking (or not taking) towards each other without having to satisfy some reasonableness test ... there is a danger that the ‘ingenuity of the draftsman’ will insert into a myriad of contracts a clause ... as a means of evading liability which is intended to be impregnable.

35 To meet the challenge of discerning if the clause is one which “makes clear that no representation is being made and one which purports to exclude a representation that has been made”,⁶⁵ Clarke J suggests that the test is “whether the clause attempts to rewrite history or parts company with reality”.⁶⁶ In short, the learned judge proposed the touchstone of reality. If, on the facts, the clause recites that there has been no representation or no reliance when actually there has been representation or reliance (as the case may be), then the clause “rewrites history” or, put another way, “parts company with reality”, and is an exclusion of misrepresentation liability clause (and is therefore subject to the reasonableness requirement).

62 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

63 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [310].

64 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [313].

65 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [287].

66 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [314].

36 In contrast, Clarke J reasoned:⁶⁷

If sophisticated commercial parties *agree*, in terms which *both are aware*, to regulate their future relationship by prescribing the basis on which they will be dealing with each other and what representations they 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 made or are being made or are intended to be relied upon. [emphasis added]

37 In such a case, the clause does not rewrite history or part company with reality; on the contrary, it reflects the reality of the basis upon which the parties intended to deal with each other. In contrast, “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”.⁶⁸

38 Clarke J’s brilliant introduction of the touchstone of reality provides a neat solution to the challenge of achieving fairness in divergent scenarios and greatly assists in distinguishing veiled attempts at excluding misrepresentation liability from genuine “basis of contract” situations.

VIII. The focus on awareness and free assent

39 The judicial sentiment that contractual clauses such as non-reliance clauses should be upheld as between parties of equal bargaining power (or, at least, not vastly unequal bargaining power) is often repeated. To be more precise, the expression used by Chadwick LJ in *EA Grimstead & Son Ltd v McGarrigan* was “commercial contract between *experienced parties of equal bargaining power*”⁶⁹ [emphasis added] and the reasons he gave for the courts’ inclination to uphold such a contract are that the parties desire commercial certainty and the contract price reflects the commercial risk which each party is willing to accept.

67 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [314]; Clarke J adds: “Such parties are capable of distinguishing between statements which are to be treated as representations on which the recipient is entitled to rely, and statements which do not have that character, and should be allowed to agree among themselves into which category any given statement may fall.”

68 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [315].

69 [1999] EWCA Civ 3029; 1999 WL 85282 at p 17.

40 Clarke J endorsed such a judicial stance but raised the legal analysis to a higher level of refinement. The basis for upholding or striking down a contract clause is not so much whether the parties are commercial or non-commercial, sophisticated or unsophisticated, of equal or unequal bargaining power, important though these aspects may be, but rather that the clause was one which both parties were aware of and freely agreed to. The words of Clarke J bear repeating: “[i]f commercial parties agree, in terms of which both are aware”. This is reinforced later in his judgment:⁷⁰

The Courts have on several occasions expressed the undesirability, generally speaking, of striking down terms freely agreed between large commercial parties who are usually regarded as the best judges of their own interests.

IX. The Raiffeisen schematic

41 To recapitulate, where a contractual clause is expressed in clear and unambiguous terms, the clause operates as a contractual estoppel and prevents the plaintiff from alleging to the contrary. Thus, for example, in the face of a contractual clause clearly expressing that there is no representation, or no reliance, or that the terms in the contract represent the basis of the parties’ dealing, the plaintiff cannot allege that he had been induced by a representation made by the defendant.

42 However, such a clause must next meet the hurdle of s 3 of the Misrepresentation Act.⁷¹ The issue then is whether the clause makes clear that no representation is being made and prevents liability from arising, or whether it seeks to exclude liability for misrepresentation (and thus needs to satisfy the reasonableness test).

43 To this end, the inquiry focuses on reality (or truth). If a representation had indeed been made and relied upon, *ipso facto*, the clause really seeks to rewrite history and is an exclusion clause.

44 In order for the clause to reflect reality, both parties must be aware of the clause and must freely agree to it. This is likely to be the case where the contract is a commercial contract between sophisticated parties of equal bargaining power. In contrast, in a contract where one party is a non-commercial party and where a representation had earlier been made, it is unlikely, though possible, for the clause to reflect reality,

70 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202, at [321].

71 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

as where the clause was one which the non-commercial party was aware of and freely assented to.

45 The principle laid down by Clarke J bears repeating – a contractual clause which both parties were fully aware of and freely agreed to is one which reflects reality and is, therefore, not an exclusion clause.

X. The *Springwell* appeal

46 Five months after *Raiffeisen*,⁷² the judgment of the English Court of Appeal in *Springwell Navigation Corp v JP Morgan Chase Bank*⁷³ was given. In the lower court, Springwell's massive US\$700m claim against JP Morgan Chase (and other parties) for mis-sold financial products was rejected by Mrs Justice Gloster, DBE, in the English High Court on the ground, *inter alia*, of contractual estoppel.⁷⁴ The Court of Appeal upheld her decision.

47 Lord Justice Aikens, with whom Lord Justices Rimer and Rix agreed, delivered the judgment of the court. Lord Justice Aikens' judgment dealt with (*inter alia*)⁷⁵ several aspects of contractual estoppel.

48 First, he addressed what he termed the "*Lowe v Lombank* issue" – the proposition (set forth by Diplock J, as he then was, in *Lowe*)⁷⁶ that a contractual clause cannot be used to "convert a statement as to past facts known by both parties to be untrue into a contractual obligation". Examining the subject from principle, Aikens LJ opined:⁷⁷

If A and B enter into a contract then, unless there is some principle of law or statute to the contrary, they are entitled to agree what they like. Unless *Lowe v Lombank* is authority to the contrary, there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is concluded or has been in the past *even if that is not the case*, so that the contract is made

72 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202.

73 [2010] EWCA Civ 1221.

74 Mrs Justice Gloster was of the view that the elements of estoppel by representation were also satisfied: see *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) 2001-404, at [568].

75 The judgment included a consideration of whether the statements made by the bank's representative were statements of opinion rather than of fact (*Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221 at [116]–[122]) and the possibility of the representative, who was merely a salesman sitting on the trading floor, owing a "low level" duty of care ([123]).

76 *Lowe v Lombank* [1960] 1 WLR 196 at 204.

77 *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221 at [143].

upon the basis that the present or past facts are as stated and agreed by the parties. [emphasis added]

49 He then expressed the view⁷⁸ that the Court of Appeal in *Lowe* decided on the basis of s 8(3) of the 1938 Hire-Purchase Act and that the above remark by Diplock J was therefore *obiter* and not good authority.

50 After surveying the principal supporting authorities, in particular *Burrough's Adding Machines Ltd v Aspinall*,⁷⁹ *Colchester Borough Council v Smith*⁸⁰ and *Peekay*,⁸¹ as Clarke J had done in *Raiffeisen*,⁸² Aikens LJ affirmed the correctness of the doctrine of estoppel⁸³ and its existence as a distinct and separate doctrine.⁸⁴ He further held, rejecting the argument of Springwell's counsel, that where contractual estoppel applies, there is no requirement that the party invoking estoppel must demonstrate that it would be unconscionable for the other party to resile from the agreed state of affairs.

51 Next, Aikens LJ proceeded to consider if the contractual clauses fell within the scope of s 3 of the Misrepresentation Act⁸⁵ and, if they did, whether they satisfied the reasonableness requirement. This part of Aikens LJ's judgment is rather brief. After quoting with approval⁸⁶ the following words of Clarke J:

... 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,

78 *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221 at [151]–[153]. Aikens LJ disagreed with Clarke J's view in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202 that the Court of Appeal in *Lowe v Lombank* [1960] 1 WLR 196 did not decide on the basis of the statutory provision.

79 [1925] 41 TLR 276.

80 [1991] Ch 448, affd [1992] Ch 421.

81 *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386.

82 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202.

83 *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221 at [156]–[169].

84 *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221 at [177].

85 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

86 *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221 at [181].

52 Aikens LJ concluded that the relevant clause fell within s 3 of the Misrepresentation Act.⁸⁷ He then agreed with the finding of Mrs Justice Gloster that the clause was reasonable, since the risks of the investments had been explained and Springwell was a sophisticated investor.

53 In a nutshell, the Court of Appeal in *Springwell Navigation Corp v JP Morgan Chase Bank*⁸⁸ established the following principles:

- (a) contractual estoppel is a separate and distinct principle and does not require unconscionability (or detrimental reliance);
- (b) parties to a contract are free to agree a state of facts as a basis of their contract even if the state is untrue;
- (c) even where contractual estoppel applies, there is a need to consider if the relevant contract clause is a clause which seeks to exclude liability for misrepresentation within the meaning of s 3 of the Misrepresentation Act⁸⁹ and, if it is, whether it is reasonable; and
- (d) a clause that attempts retrospectively to alter the character and effect of what has gone on before is in substance an attempt to exclude or restrict misrepresentation liability.

54 The Court of Appeal's decision in *Springwell Navigation Corp v JP Morgan Chase Bank*⁹⁰ accords with and confirms much of what was said by Clarke J in *Raiffeisen*.⁹¹ Several qualifications are in order, however. First, whilst *Springwell Navigation Corp v JP Morgan Chase Bank* was silent on the motivation for considering s 3 of the Misrepresentation Act⁹² even when contractual estoppel applies, Clarke J provided the illuminating explanation that a "further control mechanism" is required, since contractual estoppel does not require detrimental reliance. Secondly, Aikens LJ made reference to just a small part of Clarke J's analysis of whether a clause fell within the statutory provision; Clarke J's analysis was much more comprehensive and instructive. Finally, Aiken LJ was silent on perhaps the most important aspect of Clarke J's schematic – that at the core of the touchstone of reality are the elements of awareness and free assent.

87 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

88 [2010] EWCA Civ 1221.

89 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

90 [2010] EWCA Civ 1221.

91 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202.

92 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

XI. Conceptual conundrum

55 Yet valuable as the schematic suggested by Clarke J is, it is not without difficulty. It seems perfectly logical for an observer to question: if indeed a contractual clause operates as an estoppel, from the conceptual standpoint, why does the clause have to meet the Misrepresentation Act⁹³ hurdle? If the clause estops the misrepresentation argument, does not the legal inquiry end? Any discussion of exclusion of misrepresentation presupposes that misrepresentation has been (or is being) established. If despite the supposed estoppel the court still proceeds to consider exclusion of misrepresentation liability, then in effect the clause has not operated as an estoppel at all.

56 The reason Clarke J gave for subjecting the clause to the Misrepresentation Act⁹⁴ hurdle – the need for a control mechanism – is a pragmatic one. The conceptual justification for such an approach, however, is not easily found.

XII. A rose by any other name

57 If one were to take a few steps back from the maze of interrelated concepts and conflicting authorities in this area, and reflect broadly and deeply upon the matter, one would come to a realisation that the various approaches of the law have a common objective and that the approaches are strikingly similar in substance.

58 Estoppel by representation (*Lowe*)⁹⁵ requires detrimental reliance – the maker of the statement must have intended the recipient to rely, and the recipient must have believed in the statement and relied. In such circumstances, it is equitable and right not to allow the plaintiff (maker of the statement) to allege misrepresentation and controvert the clear wording and intention of the contractual clause.

59 The statutory control of a clause that excludes liability for misrepresentation is that such clause must satisfy the requirement of reasonableness, the more common factors of which are:⁹⁶

93 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

94 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

95 *Lowe v Lombank* [1960] 1 WLR 196.

96 See Second Schedule of Unfair Contract Terms Act 1977 (c 50) (UK) (Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) (Singapore)); and see, eg, *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm) 2001-404, at [605], *Titan Steel Wheels Ltd v Royal Bank of Scotland plc* [2010] EWHC 211 (Comm) 1231, at [105]–[106] and *Food Co UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [177].

- (a) the relative bargaining power of the parties;
- (b) whether such a clause is standard in the industry;
- (c) whether the clause was open to negotiation;
- (d) whether the clause was clear and brought to the notice of the party upon whom the clause was sought to be imposed; and
- (e) whether independent legal advice was sought or could easily have been sought.

60 Although the reasonableness test is not identical in form to the *Lowe*⁹⁷ requirements, in substance, the two sets of controls address similar issues. It is more than likely that if, in the circumstances, a contractual clause satisfies the *Lowe* requirements, it would also satisfy the reasonableness test, and *vice versa*.

61 The touchstone of reality introduced by Clarke J in *Raiffeisen*⁹⁸ to decide if a clause is an exclusion clause points the inquiry in a similar direction. A clause which does not part company with reality but rather reflects the true agreement of the parties should not be regarded as an exclusion of misrepresentation liability. Such reality exists if and only if, at the time of the contract, both parties were fully aware of the clause and freely assented to it.

62 Thus, whether one approaches the contractual clause from the perspective of estoppel by representation or the touchstone of reality (to determine if the clause is an exclusion clause) or the statutory requirement of reasonableness, the fundamental question is: is it fair and reasonable to allow the defendant to rely on the contractual clause? The different tests, “control mechanisms” or “set[s] of buffers”⁹⁹ essentially involve similar considerations and achieve the same result.

63 One then wonders if the development of the doctrine of contractual estoppel was a deviation that was not just inadequate, since on its own it lacks sufficient control mechanisms and needs to be supplemented by s 3 of the Misrepresentation Act,¹⁰⁰ but also unnecessary, as the doctrine of estoppel by representation, with its sensible and

97 *Lowe v Lombank* [1960] 1 WLR 196.

98 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202.

99 To borrow the term used by Judge Richard Seymour QC in *Peart Stevenson Associates Ltd v Holland* [EWHC] 1686 (QB) at [102].

100 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).

rigorous controls, is more than adequate for deciding whether a contractual clause should estop an assertion of misrepresentation.¹⁰¹

XIII. Final words

64 Certainly, Clarke J's judgment in *Raiffeisen*¹⁰² has contributed significantly by providing illumination in this hazy area of law. Whilst embracing the emerging doctrine of contractual estoppel, the learned judge highlighted its weakness and supplemented its application with the statutory control of s 3 of the Misrepresentation Act.¹⁰³ To assist in determining if a clause is an exclusion clause within the meaning of the section, he proposed a touchstone of reality. Finally, and this is probably the learned judge's greatest contribution in this matter, he explained that for the clause to reflect reality, it is critical that the clause is one which both parties were fully aware of and freely agreed to. All in all, Clarke J's legal schematic provides a complete and vigorous structure to assist judges in navigating the treacherous waters.

65 Yet, as useful as this legal schematic is, one has serious doubts whether the doctrine of contractual estoppel should have been developed in the first place. Perhaps the next occasion the doctrine receives the attention of an appellate court may be an opportune time to consider discarding the emperor's new clothes.

101 One could even push the argument further and assert that it is also not necessary to utilise the doctrine of estoppel by representation since the statutory control does a similar and equally proficient job.

102 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), 2006 Folio 1202.

103 Misrepresentation Act 1967 (c 7) (UK); Misrepresentation Act (Cap 390, 1994 Rev Ed) (Singapore).