

CONTRACTUAL ESTOPPEL

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Overview

- A. The legal history behind contractual estoppel**
- B. How a contractual estoppel works**
- C. The boundaries of the concept**
- D. Statistical analysis of the contractual estoppel defence in recent English cases**
- E. Conclusion**

EQUITABLE REMEDIES IN COMMERCIAL LITIGATION

A. The Legal History of Contractual Estoppel

(1) Lowe v Lombank

- The traditional view: Diplock J in Lowe v Lombank [1960] 1 WLR 1960 applying a standard estoppel analysis to a contractual representation, requiring for an estoppel to arise:
 - A clear and unambiguous statement;
 - Intended by the claimant to be acted upon by the defendant, or that such an intention could be inferred; and
 - The defendant believed it to be true and was induced by such belief.
- On such an analysis, a simple representation in a contract, if known to be false, cannot create a contractual estoppel.

EQUITABLE REMEDIES IN COMMERCIAL LITIGATION

A. The Legal History of Contractual Estoppel

(2) The CA in Colchester & Peekay

- Colchester Borough Council [1992] Ch 421, in the context of a compromise agreement, Dillon LJ refers at 435 to a somewhat inchoate concept of estoppel by agreement: “*Mr Tillson ... is estopped by the terms of the agreement he made from going behind it ... whether it be labelled estoppel by agreement or estoppel by convention is a matter of indifference.*”
- Peekay v ANZ [2006] 2 Lloyds Rep 511 in which Moore-Bick LJ said at [56]: “*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...*”

B. How a Contractual Estoppel Works (1) The general principle

- If **Party A** and **Party B** enter into a Purchase Agreement which, for example, includes a clause to the effect that **Party A** warrants that it sought and received suitable advice before contracting, then **Party A** will be subsequently “estopped” from arguing otherwise.
- Put simply, where parties represent a fact in a contract, they will be barred from subsequently denying the truth of that fact even if both parties knew at the time of contracting that the fact was false.

B. How a Contractual Estoppel Works (2) A creature of equity or convention?

- Andrew Smith J in Credit Suisse International [2014] EWHC 3103 (COMM) at [309]: “*the term ‘contractual estoppel’ has been adopted as a convenient label, it is no more than that: a defining characteristic of estoppels is detriment in some form or other, and, as I have said, contractual estoppel does not require detriment*”.
- The use of the term “estoppel” is a misnomer of sorts – perhaps a better word is “contractual bar” as Lord Hodge described it under Scots law (in Grant Estates v RBS).

C. The boundaries of the principle (1) Restrictive Interpretation

- The Courts will construe contractual representations restrictively:
 - An entire agreement clause will not necessarily contractually estop misrepresentation claims (Ramsey J in, BskyB Limited [2010] EWHC 86).
 - Cassa di Risparmio [2011] EWHC 484 (Comm): Hamblen J explained that a non-reliance on advice clause creates a contractual estoppel as to alleged “advice”, but not other alleged misrepresentations.
 - HSH Nordbank [2014] EWHC 142: Burton J concluded that a non-reliance clause will not contractually estop a claim for mistake.

C. The Boundaries of the Principle (2) Reasonableness test?

- The Unfair Contracts Terms Act (UCTA) and the Misrepresentation Act will strike down “exclusion clauses” which are unreasonable.
 - In Raffeisen [2010] EWHC 1392 (Comm), Christopher Clarke J explained (obiter) that Section 3 might apply where on the facts *“[t]he clause seeks to avoid liability for what, absent the clause, would be a clear liability in misrepresentation”* (see at [306–315]).
 - This was approved by Aikens LJ in Springwell ([2010] EWCA Civ 1221) at §181, where he concluded that a “no representation” clause was an exclusion clause, albeit that on the facts it was reasonable.
- Consider Crestsign [2014] EWHC 3043 (Ch) where Tim Kerr QC indicated, obiter, that had the basis clause been construed as an exclusion clause (it was not), it would be unreasonable (at §120).

C. The Boundaries of the Principle (3) Interaction with Statutory Obligations

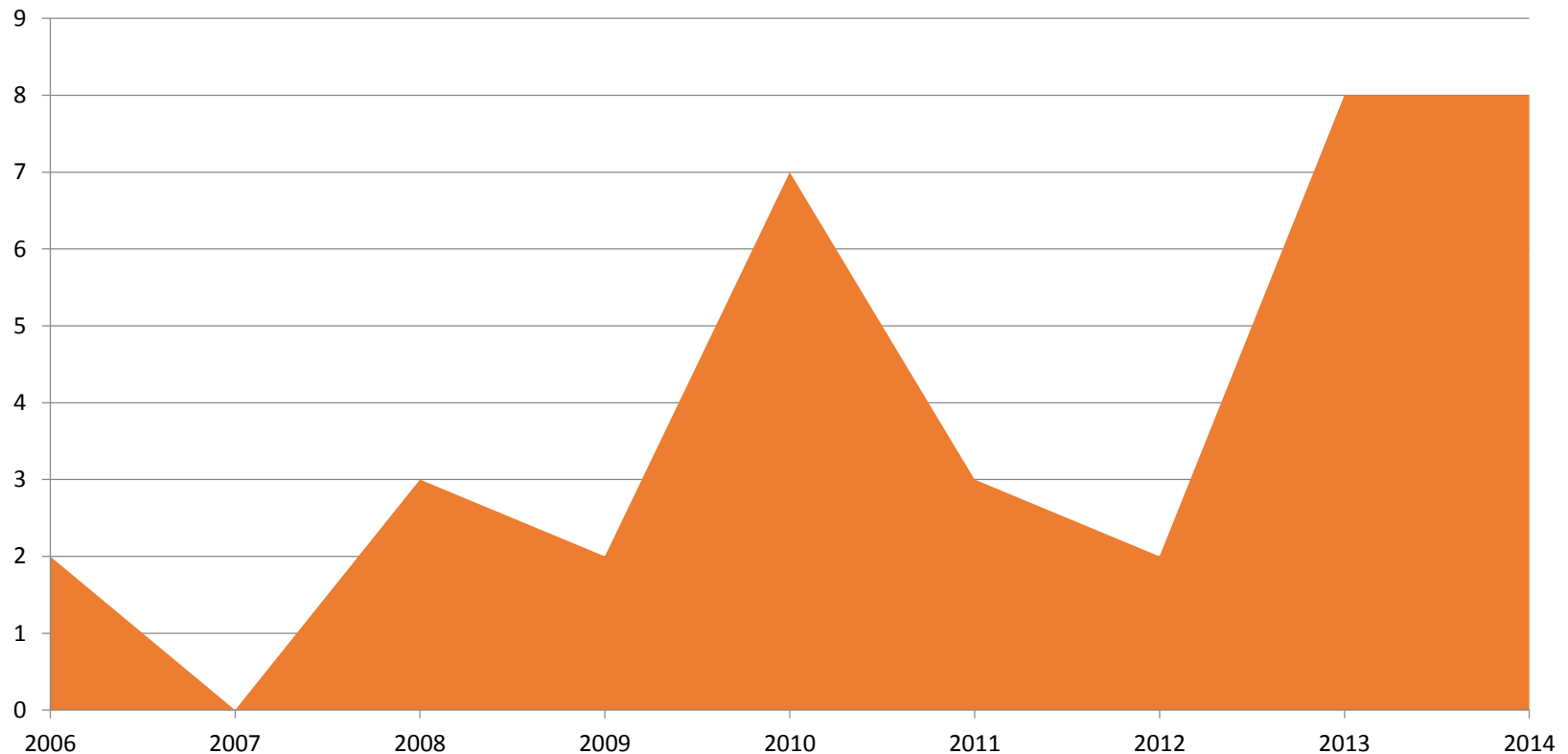
- Unclear interaction with statutory obligations.

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- First Subsea [2014] EWHC 866 (Ch) where Norris J explained that an employer cannot simply include a representation in an employment contract that a clause is “fair, reasonable and necessary” estop an employee from arguing otherwise, in the light of an employer’s statutory obligations.
- **WITH** the large number of cases where a banking counterparty has been held to be contractually estopped from alleging that it was given advice in breach of statutory duty because of a “no advice” clause, and in circumstances where on the facts advice was given

EQUITABLE REMEDIES IN COMMERCIAL LITIGATION

D. Statistical Analysis of Recent Cases (1) Recent Growth in the Number of Cases



D. Statistical Analysis of Recent Cases (2) Significant Appellate Treatment

- **Court of Appeal**
 - Springwell Navigation [2010] EWCA Civ 1221 (Rix LJ, Rimer LJ, Aikens LJ)
 - Olympic Airlines [2013] EWCA Civ 369 (Tomlinson LJ, Rix LJ, Kitchin LJ)
 - Richards v Wood & Wood [2014] EWCA Civ 327 (Aikens LJ, MacFarlane LJ, Lewison LJ)
- **Privy Council**
 - Prime Sight Limited [2013] UKPC 22 (Lord Neuberger, Lord Wilson, Lord Reed, Lord Carnwath, Lord Toulson)

D. Statistical Analysis of Recent Cases (3) Fairly Restricted Subject-Matters

- Principally banking and finance cases
- Principally relating to boilerplate clauses:
 - Non-reliance
 - Entire Agreement
 - No Advice Given Clauses
 - No Representation Clauses

E. Conclusion

- Although the concept is well enshrined in English law, there remain a number of challenges to contractual estoppel:
 - **Unilateral mistake:** Where one party knows that the other is acting under a mistake regarding the basis clause.
 - **Reasonableness:** In the light of the decisions in Raffeisen and Springwell, a clause which parts with “reality” may be construed as an exclusion clause.
 - **Public policy / statutory obligation:** There may be circumstances where a party will not be able to rely on a contractual estoppel to avoid a statutory liability.

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