CHANCERY BAR

HOT TOPICS FOR FINANCE LAWYERS

Jersey Chancery Bar Conference

Thursday 16th October 2014

Catherine Gibaud QC

HOT TOPICS FOR FINANCE LAWYERS
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- "Rewriting History" – when can non-reliance clauses be relied upon?
- When is opinion not opinion….but actionable representation?
- When is default wilful?
- When is negligence gross?

"Rewriting History" – when can non-reliance clauses be relied upon?

When does an adviser assume responsibility for financial advice given to clients?

- There is a distinction recognised in the English cases between giving advice and assuming responsibility for that advice.
- A salesperson of a financial product may give investment advice or express opinions without becoming an investment adviser and undertaking duties of care as such.
- What does the contract state about the relationship between the parties, and whether it is advisory or non-advisory in nature?
- If the parties have contractually, clearly and fairly defined the way in which they will conduct their business in advance then that will often determine the scope of responsibility assumed, even if the services actually provided in fact go beyond those services.

"Rewriting History" – when can non-reliance clauses be relied upon?

- If there is no contract, a careful assessment of the background to the parties' relationship is needed; the absence of any contract is also significant: see **J P Morgan v Springwell** [2008] EWHC 1186 (Comm) (Gloster J) affirmed [2010] EWCA Civ 1221
- In the light of that context and background, how are the exchanges between the parties correctly characterised as a matter of law?
- The analysis is heavily fact dependent in each case.
- Whether the giving of advice gives rise to legal obligations in tort to exercise reasonable care or to advise on certain matters depends on the terms of the legal and factual relationship between the parties and not just on what advice or information is given.
- See Hamblen J in **Standard Chartered Bank v Ceylon Petroleum Corporation** [2011] EWHC 1785 (Comm) at paras 505 ff and 544

"Rewriting History" – when can non-reliance clauses be relied upon?

Non-advice and non-reliance clauses: contractual estoppel

- ***"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, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel"***

per Moore-Bick in **Peekay Intermark Limited v Australia and New Zealand Banking Group Limited** [2006] EWCA Civ 386 at para 56

"Rewriting History" – when can non-reliance clauses be relied upon?

Non-advice and non-reliance clauses: contractual estoppel

- ***"The authorities accordingly establish that…it is possible for the parties to agree that one party has not made any pre-contract representations to the other about a particular matter, or that any such representations have not been relied on by the other party, even if they both know that such representations have in fact been made or relied on, and that such an agreement may give rise to a contractual estoppel."***

: Casa di Risparmio della Repubblica di sn Marino SpA v Barclays Bank Ltd [2011] EWHC 484 (Comm), Hamblen J [#505] applying the principle of contractual estoppel to non-reliance clauses and pre-contract representations

"Rewriting History" – when can non-reliance clauses be relied upon?

- Principle of contractual estoppel upheld:
  - **Springwell Navigation Corp v JP Morgan Chase Bank and others** [2008] EWHC 1186; upheld [2010] EWCA Civ 1221;
  - **Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland** [2010] EWHC 1392 (Comm)
  - **Titan Steel Wheels Limited v Royal Bank of Scotland** [2010] EWHC 211 (Comm)
  - **Standard Chartered Bank v Ceylon Petroleum Corporation** [2011] EWHC 1785 (Comm)
  - **Bank Leumi (UK) plc v Wachner** [2011] EWHC 656 (Comm)
  - **Casa di Risparmio della Repubblica di sn Marino SpA v Barclays Bank Ltd** [2011] EWHC 484 (Comm)
  - **Wilson v MF Global UK Limited** [2011] EWHC 138 (QB)
  - **Grant Estates Limited and others v The Royal Bank of Scotland plc and others** [2012] CSOH 133
  - **Barclays Bank plc v Svizera Holdings BV and another** [2014] EWHC 1020 (Comm) [2014] EWHC 1020 (Comm)
  - **Bailey and another v Barclays Bank plc** [2014] EWHC 2882 (QB), (27 August 2014)

"Rewriting History" – when can non-reliance clauses be relied upon?

Responses to contractual estoppel :

(1) The non-advice or non-reliance clause "rewrites history" or "parts company with reality"

(2) The clause relied upon for the contractual estoppel or non-reliance does not cover the factual situation at hand

(3) Reverse estoppel

"Rewriting History" – when can non-reliance clauses be relied upon?

(1) **The non-advice or non-reliance clause "rewrites history" or "parts company with reality" :** see Christopher Clarke J in ***Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland plc*** [2010] EWHC 1392 (Comm), [2010] 1 Lloyd's Rep 123 at [314]

- Distinction drawn between "basis clauses" and "exclusion clauses"
- If a non-reliance clause is found to "Rewrite history", it means that the clause is an exclusion clause, and so subject to Section 3 Misrepresentation Act 1967 and/or UCTA, importing the requirement of reasonableness.
- See Newey J in **Avrora Fine Arts Investment Limited v Christie, Manson and Woods Limited** [2012] EWHC 2198 (Ch) at [#142-146]

"Rewriting History" – when can non-reliance clauses be relied upon?

(2) The clause relied upon for the contractual estoppel or non-reliance does not cover the factual situation at hand

- Aikens LJ in **Springwell** (CA) subjected the Relevant Provisions to close scrutiny;
- Burnton LJ in **Axa Sun Life Services plc v Campbell Martin Ltd** [2011] EWCA Civ 133 at #78 ff where on a proper construction of the relevant entire agreement clause, it did not exclude the alleged prior representation; and Rix LJ at #94ff ;
- Davis LJ in **Roberts v Egan** [2014] EWHC 1849 (Ch) (obiter) at #57 ff: exclusion of liability for misrepresentation must be clearly stated. Statements that the parties' contract supersedes any prior agreement will not absolve a party of misrepresentation.

"Rewriting History" – when can non-reliance clauses be relied upon?

(3) Reverse Estoppel

- The argument is that the bank and the client shared a common assumption that advice would be given and that the client would be relying on that advice, such that this common assumption negates the contractual non-reliance or non-advice clauses.

- This argument failed on the facts in ***Standard Chartered Bank v Ceylon Petroleum Corporation*** [2011] EWHC 1785 (Comm) but is still regularly pleaded by claimants against the banks.

When is opinion not opinion….but actionable representation?

Bissett v Wilkinson [1927] AC 177

- A statement honestly made by the vendor prior to the sale of a farm, the capacity of which had never been practically ascertained, that it would carry two thousand sheep, which statement proved to be mistaken, was not to be regarded as being anything more than an expression of the vendor's opinion, and did not entitle the purchaser to claim rescission of the contract.

When is opinion not opinion….but actionable representation?

Esso Petroleum v Mardon [1976] QB 801 (CA)

- During the negotiations in relation to the grant of a tenancy over a petrol station, L, an Esso representative who had had 40 years' experience in the petrol trade, told the defendant in good faith that Esso had estimated that the throughput of petrol would reach 200,000 gallons a year in the third year of operation of the station.
- On the basis of L's representation as to the potential throughput the defendant was induced to enter into a tenancy agreement. Despite his hard work, at the end of the first 15 months only 78,000 gallons of petrol had been consumed at the station and the defendant had incurred a loss in running it.

When is opinion not opinion….but actionable representation?

Held:

- The forecast was not merely an expression of opinion in the circumstances

- Since the forecast made by Esso of the throughput of petrol was based on their wide experience of the petrol trade and had (as intended) induced the defendant to enter into the tenancy agreement, the forecast was to be construed as constituting an implied representation that the forecast had been made with reasonable care and skill and was reliable, and this was therefore an actionable representation.

- Accordingly, Esso was liable to the defendant for breach of the implied representation that they had taken reasonable care in relation to the forecast.

When is opinion not opinion….but actionable representation?

- In the more modern cases, the effect of the contractual terms is often to preclude any representation, whether of fact or opinion, being made at all because the parties contract on the express basis that the claimant/client was taking its own decisions to enter the transactions and that the Bank was not assuming any responsibility for statements of fact or opinion made.
  - **IFE Fund SA v Goldman Sachs International** [2007] EWCA Civ 811
  - **Springwell Navigation Corp v JP Morgan Chase Bank and others** [2008] EWHC 1186; upheld [2010] EWCA Civ 1221
  - **Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland** [2010] EWHC 1392 (Comm)
  - **Wilson v MF Global UK Ltd** [2011] EWHC 138 (QB)

When is opinion not opinion….but actionable representation?

Forsta AP Fonden v BNYM [2013] EWHC 3127 (Comm)

- BNYM submitted that the views expressed by the bank in the telephone calls of 16 and 19 May 2008 regarding the prospects for the Sigma MTNs were non-actionable statements of opinion that, in any case, were reasonable and reflected the bank's considered view of Sigma at the time.
- Blair J held:
  - BNYM's statements were not just opinion but actionable statements.
  - BNYM did not take reasonable care in making the representations it did about the Sigma MTNs; what was said was misleading in that relevant facts were omitted which were necessary to give a proper picture. The representations made constituted negligent misrepresentations and/or misleading partial representations.
- Blair J also held that BNYM were in breach of their duty to the claimant in contract and tort by making the statements, as they did not give a fair presentation of the risks.

When is default wilful?

- What is the judicial meaning ascribed to “wilful misconduct” and “wilful default” in commercial agreements in English case law?

- How does it differ from negligence/gross negligence at one end of the culpability spectrum and from dishonesty/fraud at the other?

- Does the term have a different meaning in Jersey statute/case law?

When is default wilful?

- **What is the judicial meaning ascribed to "wilful misconduct" and "wilful default" in English case law?**
  - *Lewis v Great Western Railway Co* (1877) 3 Q. B. D. 195
  - *Forder v Great Western Railway Co* [1905] 2 KB 532 (at 535-536)
  - *Re City Equitable Fire Insurance Co* [1925] 1 Ch 407
  - *National Semiconductors (UK) Ltd v UPS Ltd* [1996] 2 Lloyds Rep 212
  - *Armitage v Nurse* [1998] Ch 241, per Millett LJ (at 252F):
  - *TNT Global SpA & Anor v Denflect International Ltd & Anor* [2007] 1 CLC 710

When is default wilful?

- *Forder v Great Western Railway Co* [1905] 2 KB 532 (at 535-536):

  *"I am quite prepared to adopt, with one slight addition, the definition of wilful misconduct given by Johnson J. in Graham v. Belfast and Northern Counties Ry. Co., where he says: "**Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission regardless of consequences."** The addition which I would suggest is, "or acts with reckless carelessness, not caring what the results of his carelessness may be."* per Lord Alverstone CJ at 535-536

When is default wilful?

- **Armitage v Nurse [1998] Ch 241**, per Millett LJ, in construing a trustee exemption clause:

  …wilful default means "a deliberate breach of trust." (at 252F):"Nothing less than conscious and wilful misconduct is sufficient. A trustee must be "conscious that, in doing the act which is complained of or in omitting to do the act which it said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not" see In re Vickery [1931] 1 Ch. 572, 582, per Maugham J."

When is default wilful?

- The consistent meaning of “wilful misconduct” as gleaned from the cases appears to be as follows:
  - The person knows and appreciates that he is acting in breach of duty; or
  - That person is reckless or recklessly indifferent as to whether or not his conduct is in breach of duty.

- Wilful misconduct (even that involving recklessness and reckless indifference) is to be contrasted with conduct which is negligent, very negligent, or grossly negligent.

When is negligence gross?

- Gross negligence has memorably been described as ordinary negligence *"with the addition of a vituperative epithet"*: *Wilson v Brett* (1843) 152 ER 737.
- English courts have in the past commented upon the difficulty of distinguishing mere negligence and gross negligence; and have concluded that there was no distinction relevant to the cases before them:
- In **Tradigrain SA v Intertek Testing Services (ITS) Canada Ltd** [2007] EWCA Civ 154 at [23], Moore-Bick LJ observed that:

> "The term "gross negligence", although often found in commercial documents, has never been accepted by English civil law as a concept distinct from civil negligence…"

When is negligence gross?

- However, recent case law has perhaps moved away from the notion that English civil law does not recognise any distinction between “mere negligence” and “gross negligence”, at least in the context of the construction of commercial contracts where both epithets appear.
- See, for example:
  - **Camerata Property Inc v Credit Suisse Securities (Europe) Ltd** [2011] 2 BCLC 54; [2011] EWHC 479 (Comm) Andrew Smith J
  - **Red Sea Tankers Ltd v Papachristidis, The Hellespont Ardent** [1997] 2 Lloyd's Rep 547 at 586 per Mance J
- It is clear, however, that the difference between negligence and gross negligence is one of degree, and that both are different in kind to “wilful default”.

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