The doctrine of contractual estoppel in the financial services arena

The Court of Appeal recently handed down its decision in the *JP Morgan v. Springwell* case.

The *Springwell* case has confirmed the importance of the principle of ‘contractual estoppel’ as it applies to an agreement between parties as to the factual background for their contract, even if they agree on a factual background which is not in fact true. As the Court of Appeal held in *Springwell*, “parties [can] agree that X is the case even if both know that it is not so”.

Thus, in an agreement governing dealings between a bank or broker and its client:

“A and B can agree that A has made no pre-contract representations to B about the quality or nature of a financial instrument that A is selling to B … [even if] A did, in fact, make representations, so that the statement that A had not is contrary to what each side knows is the case…”.

The only exception to the above rule allowed by the Court of Appeal is if the contractual agreement as to the state of affairs “contradicts some other specific or more general rule of English public policy”.

One consequence of drafting which successfully gives rise to a contractual estoppel concerning an allegation of misrepresentation is that section 3 of the Misrepresentation Act 1967, which prevents an agreement from excluding or restricting liability for misrepresentation unless the term is “reasonable”, may not be engaged at all – precisely because the parties have agreed that no representation has been made.

There is clearly potential for the doctrine of contractual estoppel to be used (or misused) by those drafting agreements for use with retail clients in a financial services context and equally for other categories of consumers (car dealers and their customers being the popular example). Apart from the remarks highlighted above concerning public policy, the Court of Appeal in *Springwell* did not comment on this aspect, with its evident potential for consumer detriment.

In the period between the High Court and Court of Appeal hearings in *Springwell*, however, there was a similar case heard by the High Court: *Raiffeisen Zentral Bank Osterreich AG v. The Royal Bank of Scotland* (June 2010). In *Raiffeisen*, the judge spent some time wrestling with the implication of allowing the application of contractual estoppel to retail agreements, in this case in a financial services context. Clarke J said:

“… the essential question is whether the clause in question goes to whether the alleged representation was made (or, I would add, was intended to be understood and acted on as a representation) or whether it excludes or restricts liability...”.

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1. [2010] EWCA Civ 1221
2. [2010] EWHC 1392
in respect of representations made, intended to be acted on and in fact acted on; and that question is one of substance not form."

And further,

"In this respect the key question, as it seems to me, is whether the clause attempts to rewrite history or part company with reality. If 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 they are or are not making . . . 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.

Per contra, 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."

However, the Court of Appeal judgment in Springwell does, it seems, allow parties to "rewrite history". The distinction, perhaps laudable, which the judge in Raiffeisen was trying to draw therefore may not be tenable in the light of Springwell, or at least can probably only be applied by enlisting some rule of public policy, as suggested by the Court of Appeal in Springwell.

Following this line of thought, it may be that terms purporting to provide for the non-existence of certain representations (for example in the small print of a car dealer’s standard contract) "part company with reality" to such an extent that it would offend public policy to give effect to them. The distinction is clearly not an easy one (for example, flowing from the nature of the client, professional or retail).

One can envisage a situation where it might be reasonable to uphold such a term, even in an agreement with a retail client, where the term had been specifically drawn to the attention of the customer and dealings between the firm and the customer had proceeded on that basis over a period of time. This might perhaps in some circumstances include a "no advice" agreement as was in contention in the Springwell case.

Nevertheless, it should be remembered that the financial services arena is different because other bodies of rules and laws are at play; in particular, contractual estoppel gets no purchase in a case where regulatory obligations arise independently of contract. Thus in a FSMA/MiFID context, for example, a customer cannot agree that no advice has been given if advice has in fact been given. The regulatory duties which follow in circumstances where a retail client has in fact received advice do not depend for their existence on contract.

CONCLUDING THOUGHTS

The combined effect of Raiffeisen and the Court of Appeal’s judgment in Springwell is the absence of certainty as to what extent a firm in the financial services sector can rely, as a matter of contract, on terms which purport to record a retail client’s agreement that no representations have been made by the firm and/or that the client is not entering into the relationship, or a particular transaction, on the basis of any representations, in circumstances where those terms are not (or not wholly) reflective of the facts.
Those firms who deal regularly with retail clients may wish to review their standard terms of business in light of these decisions.

Business practice ought not to be materially affected, however, on the basis that contract law appears now only to have become more aligned with the UK regulatory regime, where firms are held to account for what is actually said to a client, and where the principle of fair treatment is paramount.