

Is there no stopping contractual estoppel?

*Daniel Toledano QC
One Essex Court*

Introduction

- ◉ Two Court of Appeal cases
- ◉ Peekay Intermark v Australia & New Zealand Banking Group in 2006
- ◉ Springwell Navigation v JP Morgan Chase Bank in 2010

Controversy

- ◎ Some commentators have described the concept as unsound
- ◎ Philosophy of “documentary fundamentalism”
- ◎ “A myth”

Operation of the doctrine

- ◉ Investor and bank enter into financial transaction
- ◉ Bank inserts provisions that minimise its potential liability
- ◉ Investor is precluded by estoppel from denying the provisions

Common clauses

- ◉ Three common clauses
- ◉ No responsibility clauses eg no advisory duty
- ◉ No representation and no reliance clauses
- ◉ Entire agreement clauses

Underlying principles

- ◉ Freedom of contract
- ◉ Certainty and finality
- ◉ Not taking advantage of wrong

Credit Suisse v Vestia

- ◉ Lack of capacity to enter into transactions
- ◉ But clause in framework agreement gave rise to contractual estoppel

The Limits

- ◉ Wording of the clauses limits their operation as to
 - > Scope,
 - > Time, and
 - > Purpose

Camerata v Credit Suisse

- ◉ Decision of Andrew Smith J
- ◉ Wording limited to date of acquisition whereas allegation of negligence later
- ◉ Wording limited to specific purpose

UBS v Leipzig

- ◉ Entire Agreement clause did not impact on claims for misrepresentation
- ◉ No reliance clause only related to investment advice, not other representations

External limits

- ◉ Public policy and statute
- ◉ Will not bar a fraud claim
- ◉ Impact of UCTA 1977 and Misrepresentation Act 1967

Operation of statutory controls

- ◎ Two difficulties with UCTA
- ◎ If clause defines basis of relationship then outside UCTA
- ◎ If clause reasonable then satisfies UCTA

Basis clauses

- ◉ Fine line between basis clauses and exclusion clauses
- ◉ Does clause rewrite history or part company with reality?
- ◉ Raiffesen v RBS
- ◉ Thornbridge v Barclays Bank

Where next?

- ◉ Implications for other contractual contexts and wide range of clauses

Dinsdale Moorland v Evans

- ◉ Restrictive covenant in employment contract
- ◉ Arguable that public policy restricted parties' freedom of contract
- ◉ Therefore no summary judgment

Wood v Capital Bridging Finance

- ◉ Declaration that money borrowed for business of borrower such that loan potentially unregulated
- ◉ Estoppel argument based on declaration failed because could not contract out of protections of the Consumer Credit Act

Conclusion

- ◉ Doctrine here to stay
- ◉ Limits yet to be fully defined
- ◉ More cases likely as limits tested