



Zachary Bredemear

Property Law Briefing

Entire Agreement Clauses

An entire agreement clause is used by the draftsman to try to ensure that what he drafts is the full extent of the obligations between the parties. The purpose of such a clause is to achieve certainty and forestall disputes about whether things were or were not said prior to exchange of contracts. This is a reasonable object and the courts are generally willing to give effect to such clauses (see e.g. *Lloyd v Browning* [2014] 1 P & CR 11).

In its common form the clause often not only provides that the written contract forms the entire agreement but also provides that the parties accept no warranty or representation in the negotiations has been relied on by either party in entering into the agreement. It has been said that such a clause is effective because it gives rise to an evidential estoppel between the parties that no other term exists or representation has been relied on (*Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317 per Chadwick L.J. at 39).

However, the “entire agreement” is not all powerful. The decision of *Djurberg v Small* (Ch D (Murray Rosen QC) 1/09/2017) demonstrates two ways in which the effect of an “entire agreement” can be avoided.

In *Djurberg* a couple had entered into a Bill of Sale and construction contract for a new houseboat for £850,000. The negotiations had been accompanied by a promise by the seller that the couple would be entitled to a 125 year

licence to moor the houseboat at a mooring he owned and that it would be lawful for them to reside at the mooring. In fact there was no planning permission to use of the mooring as a permanent residence and, after the boat was built, the seller sought monthly payments from the buyers for the mooring.

The construction contract contained an “entire agreement” on which the vendor relied at trial. The judge decided that this did not avail him for two reasons.

The first reason was that whilst the construction contract covered the subject-matter of the construction of the houseboat it did not cover the subject-matter of the mooring. The clause might be effective to exclude any additional term about the building of the houseboat but did not exclude the agreement about a different subject-matter.

The second reason was that the term fell foul of section 3 of the Misrepresentation Act 1967, the Unfair Contract Terms Act 1977 (“UCTA”) and the Unfair Terms in Consumer Contracts Regulations 1999 (“UTCCR”). By section 3 of the 1967 Act, a contractual term which purports to exclude or restrict any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made is of no effect except in so far as it satisfies the requirement of reasonableness in section 11 of UCTA. Under regulation 5 of UTCCR a contractual term which has not been individually negotiated shall be regarded as unfair and so unenforceable if,

contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The judge held that the entire agreement clause was unfair and unreasonable having regard to the following factors:

1. the bargaining position of the buyers had been exploited as they had devoted considerable time and effort to their "new life" in a houseboat and had sold their house;

2. the buyers had already "lost" a deposit of £70,000 from a previous attempt to buy a different houseboat from the seller and only saved their money because it was agreed to be applied to the purchase of the second boat;

3. The purchase was presented on a "take it or leave it" basis by the seller;

4. Although the buyers had solicitors, there was no negotiation about the terms of the agreement.

Whilst the factors that allowed the judge to hold the entire agreement clause unfair and unreasonable were specific to the case the judge's willingness to limit the effect entire agreement clause to the subject-matter of the contract is interesting. Would an agreement to carry out works to a property be treated as a different subject-matter to a contract to dispose of the property (see e.g. *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900 and the problems this questions give rise to under s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989)? Future litigants can be expected to test the limits of this approach to entire agreements clause.