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BANKS, AGENCY AND MISREPRESENTATION

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A plaintiff-investor has been induced by pre-contractual misrepresentations to enter into an investment contract with a defendant-bank. This article discusses some of the issues which must be addressed in such cases. Although triggered by recent litigation between investors and banks, the discussion draws on basic commercial law principles which are of general application. Apart from the novel doctrine of 'contractual estoppel', there are alternative orthodox tools of the trade readily deployable by a commercial lawyer. These alternative means of reasoning include basic and well-established contract law principles of misrepresentation and traditional agency principles of authority, which have been overlooked because they have been overshadowed by contractual estoppel in current discourse. The point of this article is simply to take us back to basics by bringing these alternate analyses back into focus.

I. INTRODUCTION

It is a fairly common phenomenon for a plaintiff to allege that he entered into a contract with the defendants after some pre-contractual misrepresentation had been made to him. It is hornbook law that the misled contracting party might in some cases be able to rescind the contract; indeed, under some circumstances, he might be able to recover damages.[1] What is not very commonly asserted is that the way the contract was entered into—including the sequence of events and the status of the

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[1] See generally John Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 3rd ed. (London: Sweet & Maxwell, 2012); Pearlie Koh, "Misrepresentation and Non-Disclosure" in Andrew Phang Boon Leong, ed., *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) 661 at 661; Gary Chan Kok Yew, *The Law of Torts in Singapore* (Singapore: Academy Publishing, 2011) at 124 *et seq.*, 531 *et seq.*; Mindy Chen-Wishart, *Contract Law*, 4th ed. (Oxford: Oxford University Press, 2012) at 201 *et seq.*; Edwin Peel, *Treitel: The Law of Contract*, 13th ed. (London: Sweet & Maxwell, 2011) at 360 *et seq.*; and the *Misrepresentation Act* (Cap. 390, 1994 Rev. Ed. Sing.), s. 2.

Previously, contracts for financial products and services were largely exempted from its scope of application (s. 2(1) read with para. 2 of the First Schedule) when the *Consumer Protection* (*Fair Trading*) *Act 2003* (No. 27 of 2003) was first enacted; however, that exemption has since been removed (*Consumer Protection* (*Fair Trading*) (*Amendment*) *Act 2008* (No. 15 of 2008)). Consequently, the interested reader should also take note of the additional remedies available to consumers under the *Consumer Protection* (*Fair Trading*) *Act* (Cap. 52A, 2009 Rev. Ed. Sing.) and the *Consumer Protection* (*Fair Trading*) (*Regulated Financial Products and Services*) *Regulations 2009* (S. 64/2009 Sing.).

actors in the contracting process—could possibly determine the outcome of a case and whether a right to damages or rescission exists.

This area of law is evolving and becoming increasingly complex. Current discourse on misrepresentation is dominated by an exciting debate over the doctrinal legitimacy and policy desirability of a novel species of estoppel. Recent judicial, and hence academic, activity on misrepresentation has focused on high-profile lawsuits involving plaintiff-investors (misrepresentees) who, having relied on some pre-contractual misrepresentations, entered into investment contracts with defendant-banks and lost large sums of money. The English appellate decisions, *Peekay Intermark Limited v. Australia and New Zealand Banking Group Limited*[2] and *Springwell Navigation Corporation v. JP Morgan Chase Bank*,[3] involving such claims have titillated legal imagination with non-reliance clauses and a new doctrine called "contractual estoppel".[4] The significance of contractual estoppel and non-reliance clauses is likely to grow,[5] having regard to the series of English first instance decisions in which they were invoked.[6] It is inevitable that the birthing of a new doctrine in the course of high-networth litigation would grab the imagination of lawyers. Despite earlier judicial reception of *Peekay* in the Singapore decision of *Orient Centre*,[7] the widespread use of non-reliance clauses by banks and the prominent role they have played in recent investment disputes have clearly caused concern. This has prompted the Singapore Court of Appeal to indicate, in *Als Memasa v. UBS*

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2 [2006] EWCA Civ 386 at paras. 56, 57, Moore-Bick L.J. [*Peekay*].

3 [2010] EWCA Civ 1221 at paras. 143, 144, 169, Aikens L.J. [*Springwell*].

4 See also *Orient Centre Investments Ltd v. Société Générale* [2007] 3 S.L.R.(R.) 566 at para. 51 (C.A.), Chan C.J. [*Orient Centre*]; *Axa Sun Life Services plc v. Campbell Martin Ltd* [2011] EWCA Civ 133 at para. 34, Stanley Burnton L.J., para. 93, Rix L.J. [*Axa Sun Life Services*].

5 The substantial case law has been documented elsewhere. Samples include Sean Wilken Q.C. & Karim Ghaly, *The Law of Waiver, Variation, and Estoppel*, 3rd ed. (Oxford: Oxford University Press, 2012) at 313; Sir Kim Lewison, *The Interpretation of Contracts*, 5th ed. (London: Sweet & Maxwell, 2011) at 630; Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification*, 2nd ed. (Oxford: Oxford University Press, 2011) at 702 [McMeel, *The Construction of Contracts*]; Rupert Lewis, "The Development of Contractual Estoppel" (2011) Journal of International Banking Law and Regulation 49; Gerard McMeel, "Documentary Fundamentalism in the Senior Courts: The Myth of Contractual Estoppel" [2011] L.M.C.L.Q. 185 at 187 [McMeel, "Documentary Fundamentalism"]; Low Kee Yang, "Misrepresentation and Contractual Estoppel: The *Raiffeisen* Clarifications" (2011) 23 Sing. Ac. L.J. 390 at 392; Alexander Trukhtanov, "Misrepresentation: Acknowledgement of Non-Reliance as a Defence" (2009) 125 Law Q. Rev. 648; Lee C. Mason, "Non-Reliance Clauses: Past, Present (and Futile?)" (2009) 20 Eur. Bus. L. Rev. 623.

6 See, for instance, *Bottin International Investments Limited v. Venson Group plc* [2006] EWHC 3112 (Ch) at para. 154, Blackburne J.; *Donegal International Limited v. Zambia* [2007] EWHC 197 (Comm) at paras. 13, 465, Andrew Smith J.; *Trident Turboprop (Dublin) Limited v. First Flight Couriers Limited* [2008] EWHC 1686 (Comm) at paras. 30-36, Aikens J., aff'd [2009] EWCA Civ 290; *BSkyB Limited v. HP Enterprise Services UK Limited* [2010] EWHC 86 (TCC) at paras. 380-385, Ramsey J.; *Titan Steel Wheels Limited v. The Royal Bank of Scotland plc* [2010] EWHC 211 (Comm) at paras. 87-89, David Steel J.; *FoodCo UK LLP v. Henry Boot Developments Limited* [2010] EWHC 358 (Ch) at paras. 169-171, Lewison J.; *Raiffeisen Zentralbank Osterreich AG v. The Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm) at paras. 250, 255, Christopher Clarke J. [*Raiffeisen*]; *Camerata Property Inc. v. Credit Suisse Securities (Europe) Ltd.* [2011] EWHC 479 (Comm) at para. 184, Andrew Smith J.; *Cassa di Risparmio della Repubblica di San Marino SpA v. Barclays Bank Ltd.* [2011] EWHC 484 (Comm) at para. 505, Hamblen J.; *Bank Leumi (UK) plc v. Wachner* [2011] EWHC 656 (Comm) at para. 184, Flaux J.; *Standard Chartered Bank v. Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) at paras. 527-529, Hamblen J.; *Brown v. InnovatorOne Plc* [2012] EWHC 1321 (Comm) at paras. 890-892, Hamblen J.

7 *Supra* note 4 at para. 51, Chan C.J., following *Peekay*, *supra* note 2.

AG,[8] that it now wishes to reconsider imposing limits on the scope and effectiveness of non-reliance clauses.

As such, it would be timely to turn our gaze back towards the more traditional principles upon which commercial law is built. This article brings these fundamental principles back into focus. Many contracts are entered into with the interposing of some agent acting for at least one contracting party, thus implicating the law of agency. The law of misrepresentation as applied to contracts is a well-developed framework of rules established long before the new doctrine of contractual estoppel. Our traditional tools of analysis—those basic commercial law principles concerning agency and pre-contractual misrepresentations—can well be deployed to arrive at a decision in a principled, and less controversial, manner.

II. Contractual Estoppel and Non-Reliance Clauses

We could start our discussion with those traditional principles; however, a brief diversion into the recently discovered territory of contractual estoppel would be a welcome distraction. Its exciting but unchartered terrain must surely be the best reminder that we could do worse than to return to the traditional comfort and familiar security of established principles.

In this brief diversion, let us assume that a plaintiff-investor entered into an investment contract with a defendant-bank after the defendant-bank had made certain pre-contractual misrepresentations. Nonetheless, do bear in mind that attributing the misrepresentation to the defendant-bank is just a convenient assumption temporarily adopted to simplify this stage of our analysis.[9]

According to *Peekay* and *Springwell*, the novel doctrine of contractual estoppel arises this way.[10] Unless prohibited by some policy, principle or statute, contracting parties are free to stipulate a certain state of affairs as the basis on which they deal with each other, even if the stipulation is untrue and even if either or both of the parties know it to be untrue. Thus, contracting parties are free to contract on the basis that the plaintiff-investor had not relied on any pre-contractual misrepresentations in entering into the investment contract. That is something which a well-drafted non-reliance clause would stipulate in the defendant-bank's formal investment contract. The effect of such a non-reliance clause, and the resultant contractual estoppel, would be to prevent (or estop) the plaintiff-investor from asserting that he had been induced by the defendant-bank's pre-contractual misrepresentation to enter into that contract.

Contractual estoppel is a new creature of the courts; it stands apart from estoppel by representation and estoppel by convention. Contractual estoppel derives its legal effect from the written contract itself; it typically arises from non-reliance clauses commonly found in formal contracts. Herein lies the significance of the novel contractual estoppel propounded in *Peekay* and *Springwell*. Contractual estoppel, having

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[8] [2012] SGCA 43 at paras. 25-29, Chan C.J. [*Als Memasa*]; see also *Deutsche Bank AG v. Chang Tse Wen* [2012] SGHC 248 at para. 138, Pillai J.

[9] See note 34 and accompanying text.

[10] *Peekay*, *supra* note 2; *Springwell*, *supra* note 3 at paras. 143, 144, 177, Aikens L.J. See also *Orient Centre*, *supra* note 4 at para. 51, Chan C.J.

dispensed with all technical pre-requisites of the older, established estoppel by representation and estoppel by convention, is far easier for defendant-banks to raise. All it requires is for a properly drafted non-reliance clause to be inserted into a contract.

Unlike *estoppel by convention*,[11] contractual estoppel can be raised by the defendant-bank without separately demonstrating that it would be unconscionable for the plaintiff-investor to depart from the non-reliance clause.[12] Furthermore, unlike *estoppel by representation*,[13] it does not require the defendant-bank to show that the defendant-bank relied to its detriment on the non-reliance clause and in fact believed that the plaintiff-investor had placed no reliance on pre-contractual misrepresentations.[14] In fact, *Springwell* makes it clear that contractual estoppel allows a defendant-bank to enforce a non-reliance clause and prevents a plaintiff-investor from alleging that he had relied on the defendant-bank's pre-contractual misrepresentations, even if it knew that the plaintiff-investor had in fact relied on those misrepresentations.[15] In contrast, very few banks would be able to raise the cumbersome estoppel by representation. After all, "it may be impossible" for the defendant-bank, which had itself made pre-contractual misrepresentations which it "intended should be relied upon" by the plaintiff-investor, to "satisfy the court that [the defendant-bank] entered into the contract in the belief that a statement [*i.e.* the non-reliance clause] by the [plaintiff-investor] that [plaintiff-investor] had not relied upon those [misrepresentations] was true…"[16]

Without purporting to answer these questions here, since the legitimacy of contractual estoppel is not the focus of this article, one might still legitimately ask whether:

- A defendant-bank should be allowed to rely on a tainted contract and a non-reliance clause contained therein, if the defendant-bank *knew* all along that the plaintiff-investor had relied on pre-contractual misrepresentations in entering into that contract;
- The non-reliance clause should be binding and raise a contractual estoppel if the contract itself was voidable because it was induced by misrepresentation;
- It should be unnecessary for a non-reliance clause to raise a contractual estoppel when the clause is itself part of a contract supported by consideration;
- A non-reliance clause purporting to state a historical fact (*i.e.* that the plaintiff-investor *had not relied* on pre-contractual misrepresentations) could be converted into a contractual, *in futuro*, promise;
- Such a non-reliance clause should be treated as a representation of fact *simpliciter*, if it is not a contractual promise;

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[11] *Ryan v. Moore* [2005] 2 S.C.R. 53 at para. 59, Bastarache J.; Wilken & Ghaly, *supra* note 5 at 199, 200.

[12] *Springwell*, *supra* note 3 at paras. 143, 144, 177, Aikens L.J.

[13] *Lowe v. Lombank* [1960] 1 W.L.R. 196 at 204, 205 (C.A.), Diplock J.; Low Kee Yang, "Effective Use of Non-reliance Clauses: Satisfying *Lowe v Lombank*" The Law Gazette [of Singapore], online: Law Society of Singapore <www.lawgazette.com.sg/2009-12/feature1.htm>.

[14] See Wilken & Ghaly, *supra* note 5 at 94, 95, 315; McMeel, "Documentary Fundamentalism", *supra* note 5 at 189, 199.

[15] *Springwell*, *supra* note 3 at para. 155, Aikens L.J.

[16] *Watford Electronics Limited v. Sanderson CFL Limited* [2001] EWCA Civ 317 at para. 40, Chadwick L.J. See also *Quest 4 Finance Limited v. Maxfield* [2007] EWHC 2313 (QB) at para. 39, Teare J. [*Quest 4 Finance*].

- Such a clause, if it is a mere representation of fact, should not be given effect unless all the cumbersome requirements of estoppel by representation are satisfied; and
- The courts ought to "enforce" an estoppel at all, unless it is to remedy some reliance (whether detrimental or otherwise) or prevent some unconscionability (however vague the notion might be).

It could ultimately turn out that not all its apparent difficulties are insurmountable and perhaps the new doctrine might continue flourishing after all is said and done. Hence, for instance, it might ultimately turn out that a statement of past or present fact (non-reliance clause) implies an *in futuro* promise not to deny that fact (by asserting actual reliance), so that enforcing representations of fact contained in agreements supported by consideration is nothing more than the orthodox recognition of personal obligations created by contract (without resorting to superfluous notions of estoppel).[17] In other words, it might be said that there is nothing fundamentally wrong with "contractual estoppel" except that it is a misnomer: it is all about the enforcement of a contractual promise and has nothing to do with estoppels.[18] Or it might turn out that, because there is no overarching theory uniting all estoppels, there cannot be a general, immutable insistence upon reliance or unconscionability as a prerequisite for novel species of estoppel[19] (and it is most unlikely that the courts are now beyond the age of birthing new doctrinal offspring). For now, however, it is an understatement to say that this doctrine of contractual estoppel will remain contentious for some time yet. As indicated earlier, its legitimacy (as a new species of estoppel) and desirability (as a matter of policy) has been questioned in current literature and the Singapore Court of Appeal is now contemplating the imposition of

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[17] *Cf.* Wilken & Ghaly, *supra* note 5 at 316; Trukhtanov, *supra* note 5 at 654; Alexander Trukhtanov, "Limits of Contractual Estoppel" [2012] L.M.C.L.Q. 358 at 363.

[18] *Cf.* Brian Coote, *Contract as Assumption*, by Rick Bigwood (Oxford: Hart, 2010) at 13 (reprinted from Brian Coote, "The Essence of Contract (Part I)" (1988) 1 Journal of Contract Law 91 and "The Essence of Contract (Part II)" (1988) 1 Journal of Contract Law 183):

> Some philosophers and others have assumed that promises must involve the doing (or refraining from doing) of some act in the future. If promises were so limited, there could, prima facie, be no place in contract for a warranty, the essence of which is a statement of past or present fact rather than the promise of something to be done in the future [footnote numbers omitted].

Common statements of fact enforced as contractual promises include conditions and warranties implied statutorily under the *Sale of Goods Act* (Cap. 393, 1999 Rev. Ed. Sing.), ss. 12-15, relating to a seller's right to sell, prior disclosure of known encumbrances, quality, fitness for particular purposes and correspondence with description of the goods, *etc*. On this view, *Jorden v. Money* (1854) 5 H.L.C. 185, 10 E.R. 868 (H.L.) secured the primacy of the common law doctrine of consideration by requiring that promises could be enforced in contract only if supported by consideration and that equity and common law gave effect to representations of fact via estoppel, but the decision did not prohibit statements of fact being enforced as contractual promises if supported by consideration. *Cf.* J D Davies, "Promises in Equity" [2000] Sing. J.L.S. 162 at 163, 164; Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford: Oxford University Press, 2000) at 22, 23.

[19] *India v. India Shipping Co. Ltd. (No. 2)* [1998] A.C. 878 at 914 (H.L.), Lord Steyn: "to restate the law in terms of an overarching principle might tend to blur the necessarily separate requirements, and distinct terrain of application, of the two kinds of estoppel."; *Crabb v. Arun District Council* [1976] 1 Ch. 179 at 187 (C.A.), Lord Denning M.R.: "there are estoppels and estoppels" but *cf.* at 193, Scarman L.J.: "I do not think that… putting the law into categories is of the slightest assistance."; *First National Bank Plc. v. Thompson* [1996] Ch. 231 at 236, Millett L.J.: "[the] attempt to demonstrate that all estoppels… are now subsumed in the single and all-embracing estoppel by representation and that they are all governed by the same requirements has never won general acceptance".

some limits on the efficacy of non-reliance clauses,[20] resorting perhaps to statutory controls under the *UCTA*.[21] (This should not be surprising since Chong J. in *Jiang Ou v. EFG Bank AG* [22] had already made a similar move in subjecting banks' conclusive evidence clauses to the *UCTA* regime.) However, there is no need to rehearse all those arguments here. Suffice it to say that they give cause for a lawyer to pause a little, before founding his client's case entirely on such a novel but controversial doctrine.

Hence, we shift our gaze back to the more traditional, and undoubtedly better-established, commercial law principles. We start with an exposition of the basic principles of agency and misrepresentation before moving on to apply them.

III. Established Principles: Limiting an Agent's Authority to Bind his Principal

Although theoretically possible, banks rarely ever enter into contracts directly through its two organs (the company in general meeting and the board of directors). Rather, the bank's memorandum and articles of association or its organs would normally authorise its appointed agents to negotiate and enter into contracts on its behalf.

It is hornbook law that a principal is bound by a contract entered into by its agent if the agent had acted with the principal's authority.[23] Likewise, an agent's representations can be attributed to, and hence affect or "bind", the principal if the agent's representations had been authorised by the principal.[24] The agent's authority, in this context, could be actual or ostensible (or apparent). An agent has actual authority if he in fact acts with his principal's authority within the scope of his principal's instructions. A principal can still be bound, despite his agent exceeding actual authority, if the principal held his agent out to the third party as if he had been authorised, and the third party relied on such holding out and altered his position

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[20] *Als Memasa*, *supra* note 8 at paras. 25-29, Chan C.J.; the *Unfair Contract Terms Act* (Cap. 396, 1994 Rev. Ed. Sing.) [*UCTA*]. See also *Deutsche Bank AG v. Chang Tse Wen, supra* note 8 at para. 138; Wilken & Ghaly, *supra* note 5 at 313; McMeel, *The Construction of Contracts*, *supra* note 5 at 702; McMeel, "Documentary Fundamentalism", *supra* note 5 at 187.

[21] See note 67 and accompanying text. The *Misrepresentation Act*, *supra* note 1, s. 3, deals with exemptions of "remedy" and "liability"; *cf. Axa Sun Life Services*, *supra* note 4 at para. 51, Stanley Burnton L.J.; *Springwell*, *supra* note 3 at paras. 181, 182, Aikens L.J. Unlike the more primitive *Misrepresentation Act*, the more advanced *UCTA*, *supra* note 20, has anti-evasion provisions (ss. 3(2)(b), 13(1)) which also protect "performance [that was] reasonably expected" and strike at attempts to limit "obligation or duty". However, the key operational provisions of the *UCTA* (ss. 2(2) (negligence liability), 3(2)(a) (breach of contract)) are statutorily restricted and do not apply to, *inter alia*, insurance contracts and contracts relating to the creation or transfer of interests in securities (First Schedule, paras. 1(a), (e)).

[22] [2011] 4 S.L.R. 246 at para. 108 *et seq.* (H.C.); Alexander F.H. Loke, "Framing Contractual Freedom within the Precept of 'Honesty, Reliability and Integrity'" [2012] Sing. J.L.S. 174.

[23] See generally Tan Cheng Han, *The Law of Agency* (Singapore: Academy Publishing, 2011); Peter Watts & F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 19th ed. (London: Sweet and Maxwell, 2010).

[24] *Barclays Bank Plc. v. O'Brien* [1994] 1 A.C. 180 (H.L.) [*O'Brien*]; *Royal Bank of Scotland plc. v. Etridge (No. 2)* [2002] 2 A.C. 773 (H.L.) [*Etridge*]; J. Beatson, A. Burrows & J. Cartwright, *Anson's Law of Contract*, 29th ed. (Oxford: Oxford University Press, 2010) at 370 [*Anson's Law of Contract*]; Malcolm Clarke, "Vitiating Factors" in Andrew Grubb & Michael Furmston, ed., *The Law of Contract*, 4th ed. (London: Butterworths, 2010) at 908.

(typically by contracting with the principal through the agent).[25] This flows from the agent's apparent or ostensible authority, which is based on a form of estoppel, resulting from the holding out.[26]

By holding out the agent to third parties as if he was authorised, when in fact the principal had prohibited the agent from acting as he did, the principal has misrepresented to third parties on the scope or existence of the agent's authority. The third parties' reliance and consequent acting on that false appearance of authority raises an estoppel against the principal. Under apparent authority reasoning, the principal is made liable for the agent's actions not because the agent was authorised, but because the principal is estopped from denying that the agent was authorised. However, the third party is not always entitled to rely on the agent's appearance of authority. After all, the agent cannot confer authority on himself and a third party cannot rely exclusively on the agent's *ipse dixit*.

The agent's appearance of authority must ultimately flow from the principal holding the agent out as if he had been authorised,[27] though of course the agent could be held out by an intermediary who was properly authorised by the principal.[28] The agent cannot pull himself up by his own bootstraps. As Chan C.J. put it in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd*, "an agent who has no authority, whether actual or ostensible, to perform a certain act cannot confer upon himself authority to do that act by representing that he has such authority."[29] Consequently, a third party who knew or ought to have known that the agent is acting without actual authority will normally be unable to say that the agent acted with apparent authority.[30]

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[25] *Arctic Shipping Co Ltd v. Mobilia AB ("The Tatra")* [1990] 2 Lloyd's Rep. 51 at 59 (H.C.), Gatehouse J.

[26] *Rama Corporation Ld. v. Proved Tin and General Investments Ld.* [1952] 2 Q.B. 147 (H.C.), Slade J.; *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* [1964] 2 Q.B. 480 at 500 *et seq*. (C.A.), Diplock L.J.; *Hely-Hutchinson v. Brayhead Ltd.* [1968] 1 Q.B. 549 (C.A.), Lord Denning M.R.

[27] *Kelly v. Fraser* [2012] UKPC 25 at para. 15, Lord Sumption [*Kelly*]; *Armagas Limited v. Mundogas S.A.* ("*The Ocean Frost*") [1986] A.C. 717 (H.L.), Lord Keith; *United Bank of Kuwait Ltd. v. Hammoud* [1988] 1 W.L.R. 1051 at 1066 (C.A.), Lord Donaldson M.R.; F.M.B. Reynolds, "The Ultimate Apparent Authority" (1994) 110 Law Q. Rev. 21 at 22; Cheng-Han Tan, "Unauthorised Agency in English Law" in Danny Busch & Laura J. Macgregor, eds., *The Unauthorised Agent: Perspectives from European and Comparative Law* (Cambridge: Cambridge University Press, 2009) 185 at 189.

[28] *Egyptian International Foreign Trade Co. v. Soplex Wholesale Supplies Ltd.* ("*The Raffaella*") [1985] 2 Lloyd's Rep. 36 (C.A.), Browne-Wilkinson L.J.

[29] [2011] 3 S.L.R. 540 at para. 38 (C.A.), Chan C.J.; noted in Tracey Evans Chan & Hans Tjio, "Unusual Apparent Authority and Vicarious Liability" (2012) 128 Law Q. Rev. 27. See also *Thanakharn Kasikorn Thai Chamkat (Mahachon) v. Akai Holdings Limited (in liquidation) (No. 2)* (2010) 13 Hong Kong Court of Final Appeal Reports 479 [*Thanakharn*] at paras. 64, 68, 70, Lord Neuberger N.P.J.; noted in Ji Lian Yap, "Knowing Receipt and Apparent Authority" (2011) 127 Law Q. Rev. 350.

[30] *Jurong Shipyard Pte. Ltd. v. BNP Paribas* [2008] 4 S.L.R.(R.) 33 at paras. 111, 112 (H.C.), Lee J. [*Jurong Shipyard*], citing *Criterion Properties plc v. Stratford UK Properties LLC* [2004] 1 W.L.R. 1846 (H.L.); *Heinl v. Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Law Reports Banking 511 at 521 (C.A.), Nourse L.J. [*Heinl*]; *Overbrooke Estates Ltd. v. Glencombe Properties Ltd.* [1974] 1 W.L.R 1335 (H.C.), Brightman J. [*Overbrooke*]; *Kelly*, *supra* note 27 at para. 12, Lord Sumption. *Cf. Thanakharn*, *supra* note 29 at para. 62, Lord Neuberger N.P.J.: "it is open to [a third party] to rely on [an agent's] apparent authority… unless the [third party's] belief [in his appearance of authority] was dishonest or irrational (which includes turning a blind eye and being reckless)."

If the false appearance was corrected before the third party acted on it, then the third party's knowledge of the truth destroys the agent's false appearance of authority.[31] Conversely, it would be *too late* to try to correct the false appearance *after* the third party has acted on it.

It follows from these basic principles of agency law that the very first issue a lawyer must consider, when a defendant-bank is sued by a plaintiff-investor, is whether the pre-contractual misrepresentations had been made by an agent acting with the defendant-bank's authority, actual or apparent. This is because, where the misrepresentations had been made by someone who had no authority to make them, they simply cannot be attributed to the defendant-bank. Unless the agent's misrepresentations are attributed to the defendant-bank, the plaintiff-investor will normally have no recourse (for damages or rescission) against the defendant-bank for those misrepresentations.

Two caveats must be lodged here. First, if the agent happens to be its employee, the defendant-bank might potentially be saddled with responsibility for the agent's misrepresentations on grounds of vicarious liability instead of authority. The attribution rules of vicarious liability might potentially be wider (and hence more disadvantageous to employer-principals) than the notion of authority in agency. It remains to be seen whether the rules of vicarious liability or the authority rules of agency will prevail in circumstances where they conflict. It is as yet unclear whether the courts will attribute misrepresentations made by employee-agents to an employer-principal using the wider notion of vicarious liability, in situations where the authority rules of agency negate attribution.[32] Secondly, the defendant-bank's ability to enforce the investment contract might still be affected if it had "notice" of the agent's unauthorised misrepresentations inducing the plaintiff-investor to enter into the contract.[33] Nonetheless, it remains generally unsafe to assume that, just because some agent had made pre-contractual misrepresentations to the plaintiff-investor, those misrepresentations *must* be attributed to the defendant-bank.[34]

IV. Established Principles: Pre-Contractual Misrepresentation

The law of contract recognises a number of established "vitiating factors", including misrepresentation (fraudulent, negligent or innocent), duress and undue influence. If one party (P1) induces (by any of these vitiating factors) another party (P2) to enter

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[31] *Heinl*, *supra* note 30 at 521, Nourse L.J.:

> Where an agent is known by the other party to a purported contract to have no authority to bind his principal, no contract comes into existence. The agent does not purport to contract on his own behalf and the knowledge of the other party unclothes him of ostensible authority to contract on behalf of the principal… If no contract comes into existence, there is nothing to avoid or rescind, nor can any property pass under it.

[32] Peter Watts, "Principals' Tortious Liability for Agents' Negligent Statements—Is 'Authority' Necessary?" (2012) 128 Law Q. Rev. 260 at 274 *et seq.*; Watts & Reynolds, *supra* note 23 at 489-493; Chan & Tjio, *supra* note 29 at 31; Tan Cheng Han, "Authority, Vicarious Liability and Misrepresentation" [2012] Sing. J.L.S. 92 at 109-111.

[33] L.S. Sealy & R.J.A. Hooley, *Commercial Law: Text, Cases, and Materials*, 4th ed. (Oxford: Oxford University Press, 2009) at 659, 660, 677; E.P. Ellinger, E. Lomnicka & C.V.M. Hare, *Ellinger's Modern Banking Law*, 5th ed. (Oxford: Oxford University Press, 2011) at 139 *et seq.*, especially 143-150.

[34] See note 9 and accompanying text.

into a transaction with him (P1), then the resulting tainted transaction is voidable if the victim (P2) elects to rescind it. P2 is said to have an "equity" to rescind the transaction so long as the bars to rescission have not set in. Rescission applies not only to contracts, but also other transactions such as gratuitous transfers of property, but our concern here is with contracts.[35]

Indeed, the law goes further. P2's equity of rescission will bind those who have notice of it (although, since *Etridge*,[36] the language of "notice" seems to have been superseded by that of being "put on inquiry"). The victim (P2) is entitled to rescind the tainted contract against the other contracting party (P1), even if P1 himself had not made any misrepresentation, exercised any duress or asserted any undue influence on P2. P2 is entitled to rescind the contract with P1, so long as P1 had notice, when entering into the contract with P2, that P2 entered into that contract because he was induced by *someone else's* misrepresentation, duress or undue influence. The authorities for these propositions are of course *O'Brien* and *Etridge*[37] (and there is certainly much to learn from Lee J.'s judgment in *Jurong Shipyard*[38] about the nuanced interplay between agency and notice of vitiating factors). Although *O'Brien* and *Etridge* were decisions on misrepresentation and undue influence respectively, there is no reason why the doctrine of notice should not apply to duress, given the affinity between duress and (actual) undue influence.

As we are here focusing on misrepresentation, one might ask why we need to be distracted by undue influence and duress. The aim here is to emphasise a commonly overlooked, but significant, point. The appeal to the House of Lords in *O'Brien* was in fact based on misrepresentation,[39] although the case is inevitably cited in chapters dealing with undue influence in many mainstream contract textbooks. In other words, the doctrine of notice is not restricted to undue influence (and, by extrapolation, duress); it applies just as much to misrepresentation.[40]

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[35] *Allcard v. Skinner* (1887) L.R. 36 Ch.D. 145 (C.A.) concerned recovery (on grounds of presumed undue influence) of gifts.

[36] *Supra* note 24.

[37] *O'Brien*, *supra* note 24 at 191, 195, 198, Lord Browne-Wilkinson; *Etridge*, *supra* note 24 at paras. 38-42, Lord Nicholls, at paras. 143-147, Lord Scott; see also Hans Tjio, "Banking: New Cases Applying O'Brien" [1996] J. Bus. L. 266 at 266.

[38] See also *Jurong Shipyard*, *supra* note 30 at para. 104, Lee J.:

> I do not doubt the logic of Lord Justice Moore-Bick's reasoning, but have my doubts about whether he contemplated the extreme scenarios propounded… in the present originating summons: see [42] above. In *Peekay*, there was no question about P's authority to enter into the contract with the bank on the claimant's behalf. Certainly, there was no suggestion that the bank had colluded with P in any acts beyond the scope of his authority, or had actual or constructive notice of such acts. Thus, in the absence of the normal vitiating factors such as duress, undue influence and misrepresentation, P's signature on the Risk Disclosure Statement estopped the plaintiff from advancing arguments in contradiction of the representations therein. The question remains open whether the bank would have been able to rely on those representations to raise an estoppel if, for instance, the bank had been colluding with P in acting beyond the scope of his authority when entering into the contract, or had actual or constructive notice that P was doing so.

[39] Ewan McKendrick, *Contract Law: Text, Cases and Materials*, 5th ed. (Oxford: Oxford University Press, 2012) at 661; Cartwright, *supra* note 1 at 180-184.

[40] Chen-Wishart, *supra* note 1 at 346; Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, 1st ed. (London: Sweet and Maxwell, 2006) at 333, 349; *Anson's Law of Contract*, *supra* note 24 at 372; Peel, *supra* note 1 at 366, 461; *cf.* Clarke, *supra* note 24 at 908.

There are two simple lessons from this very brief exposition. First, even if an agent's pre-contractual misrepresentations cannot be attributed to the defendant-bank through authority or vicarious liability reasoning, the plaintiff-investor can still have a right to rescind the investment contract with the defendant-bank if the defendant-bank had notice of the misrepresentations. Secondly, it goes without saying that since the right to rescind arises only if the contract had been *induced by* misrepresentation, the misrepresentation must have occurred before the tainted, voidable contract came about. It follows that the contract, from inception, was voidable *ab initio*; indeed, upon rescission, the tainted contract is set aside as if never entered into. Conversely, any prior misrepresentation cannot be said to have induced one to enter into a contract if the misrepresentation had been corrected *before* contracting.

However, the equity to rescind or the right to set aside a voidable contract for pre-contractual misrepresentation has its limitations. Rescission is not available if one of the usual bars to rescission has set in (say, affirmation, intervention of innocent third parties, impossibility of mutual restitution, *etc*.),[41] or if the court exercises its statutory discretion under the *Misrepresentation Act* to award damages in lieu of rescission where the misrepresentation was not fraudulent.[42] Likewise, a contracting party might not necessarily wish to elect to rescind, but might wish simply to set up the misrepresentation as a 'defence' (but the term is used here in a very loose sense).[43]

Whilst English law (unlike Australian law) does not allow 'partial rescission' (so a party must either keep the entire contract alive or set it aside *in toto*)[44] a contracting party is in fact allowed under some circumstances to set up the misrepresentation as a 'defence' without necessarily rescinding the contract. This is in fact well-established. First, the misrepresentation may serve a defensive function where it amounts to a cause of action for damages under statute or in tort,[45] results in a collateral contract, or raises an estoppel.[46] These could entitle the plaintiff-investor to take the offensive and assert a right to damages or an injunction, or take the defensive and prevent the defendant-bank from asserting a counterclaim without making good the earlier misrepresentation. Secondly, but less significantly, because specific performance decrees are in any event uncommon, under some circumstances, a pre-contractual misrepresentation may be used to resist a claim for specific performance even if it does not justify rescission.[47] Thirdly, the misrepresentation may directly provide a

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[41] Koh, *supra* note 1 at 717 *et seq*.; Chen-Wishart, *supra* note 1 at 231 *et seq*.

[42] *Misrepresentation Act*, *supra* note 1, s. 2(2).

[43] Obviously, the term "defence" is here used very loosely because the misrepresentation need not always function defensively and could sometimes be used to mount a separate cause of action (say, in tort or pursuant to a collateral contract), but this "defence" terminology is adopted here merely for ease of exposition and because it is sometimes used by leading commentators for convenience. See generally *Anson's Law of Contract*, *supra* note 24 at 308; Peel, *supra* note 1 at 439.

[44] *T.S.B. Bank Plc. v. Camfield* [1995] 1 W.L.R. 430 at 437 (C.A.), Nourse L.J., at 439, Roch L.J.; *cf. Vadasz v. Pioneer Concrete (SA) Pty Limited* (1995) 184 C.L.R. 102 at 115 (H.C.A.), Deane, Dawson, Toohey, Gaudron and McHugh JJ.; Sealy & Hooley, *supra* note 33 at 677.

[45] For the tort of negligent misrepresentation, the tort of deceit or under the *Misrepresentation Act*, *supra* note 1, s. 2(2).

[46] Peel, *supra* note 1 at 386 (statement amounting to oral contract collateral to written contract), 439, 440 (estoppel as a defence and estoppel to remove a defence).

[47] Cartwright, *supra* note 1 at 533; *Cadman v. Horner* (1810), 18 Ves. Jun. 10, 34 E.R. 221, Grant M.R.; *Re Banister* (1879) 12 Ch.D. 131 at 142 (C.A.), Jessel M.R.

defence, according to the well-known cases of *L'Estrange v. F. Graucob, Limited.*[48] and *Curtis v. Chemical Cleaning and Dyeing Co.*,[49] by preventing a clause (which is inconsistent with the earlier misrepresentation) from becoming part of the contract or by cutting down its scope.

Although operative pre-contractual misrepresentations will usually relate to the terms (*i.e.* contents or effect) of the contract, there is generally no strict rule requiring them to relate to terms in order to attract any remedy (whether by way of rescission, damages, or to be raised as a defence).[50] However, quite exceptionally, this third defence—the *Curtis* defence—seems to operate only where the misrepresentation relates to terms.[51]

Applying the *Curtis* defence, the pre-contractual misrepresentation, if it relates to the terms of the contract, might operate as an exception to the 'incorporation by signature' rule (in *L'Estrange*)[52]. In the words of Somervell L.J. in *Curtis*, one way by which this defence operates is that "owing to [the] misrepresentation, [the exemption clause] never became part of the contract".[53] As Professor Cartwright puts it:[54]

> Where a claimant seeks to rely on a written term in accordance with its objective meaning, the defendant may show that the claimant made a statement at or before the time of the contract that the term would not have the effect which the claimant now asserts. Where, therefore, a party makes a misrepresentation to the effect that the defendant will not be bound by an exemption clause which is included in

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[48] [1934] 2 K.B. 394 at 403 (C.A.), Scrutton L.J. [*L'Estrange*].

[49] [1951] 1 K.B. 805 at 810 (C.A.), Denning L.J. [*Curtis*]: "[i]n my opinion when the signature to a condition, purporting to exempt a person from his common-law liabilities, is obtained by an innocent misrepresentation, the party who has made that misrepresentation is disentitled to rely on the exemption."

[50] See notes 51 and 57, and accompanying text; *cf.* McMeel, "Documentary Fundamentalism", *supra* note 5 at 202:

> Secondly, in confining the misrepresentation exception to statements as to the meaning and effect of the contractual terms, both Moore-Bick LJ in *Peekay* and Gloster J in *Springwell* may have confined the exception more narrowly than Scrutton LJ had expressed it in *L'Estrange*. It is also difficult in practice to draw the line between misrepresentations in general and misrepresentations as to terms.

Hence, for example, *Redgrave v. Hurd* (1881) 20 Ch.D. 1 (C.A.) concerned the rescission of a contract to purchase a house induced by misrepresentations concerning the vendor's business (not the terms of the contract for purchasing the house), and *Pankhania v. London Borough of Hackney* [2002] EWHC 2441 (Ch) recognised that misrepresentations of law (not as to terms of contract) inducing one to enter into a contract could ground an action for damages. (By way of illustration, let us assume that T misrepresents to P1 that T is getting married and that T would like a car as a wedding gift; P1 contracts with P2 to purchase a car as a gift, and P2 has notice of the falsity of T's misrepresentation. There would be no principle preventing P1 from rescinding his contract with P2; yet, clearly, T's misrepresentation does not relate to any of the terms of the sale of goods contract between P1 and P2. If P1 chooses not to rescind, it is difficult to see how P1 can raise a *Curtis* defence: There was no misrepresentation as to terms, and so no particular term could be excluded from being incorporated into the contract).

[51] *Cf.* McMeel, "Documentary Fundamentalism", *supra* note 5 at 202. See notes 50 and 57, and accompanying text.

[52] *L'Estrange*, *supra* note 48 at 403, Scrutton L.J.: "[w]hen a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not." This was in fact a case where the written contract was signed, and it contained an entire agreement clause: see McMeel, "Documentary Fundamentalism", *supra* note 5 at n. 38.

[53] *Curtis*, *supra* note 49 at 808, Somervell L.J.; *Axa Sun Life Services*, *supra* note 4 at para. 105, Rix L.J.; Pearlie Koh & Andrew Phang Boon Leong, "Regulation of Terms" in Phang, *supra* note 1, 331 at 342.

[54] Cartwright, *supra* note 1 at 541, citing *Curtis*, *supra* note 4 [footnote number omitted].

> a contractual document, or that the clause is only to have a more limited scope by way of exemption of the claimant's liability than its literal, objective interpretation would provide, then the claimant cannot enforce the clause against the defendant (either at all, or beyond its represented scope, as the case may be).

In other words, a pre-contractual misrepresentation as to the terms of a written (even signed) contract prevents a clause from becoming part of the contract if it would be inconsistent with the misrepresentation or if the misrepresentation cuts down the operational scope of the term so as to avoid inconsistency. Professor McMeel also reminds us that *Curtis* stands for the view that the "misrepresentation disentitle[s] the representor from enforcing the contract in accordance with the terms so misdescribed"[55] without requiring the misrepresentee to rescind:[56]

> [I]t is clear from Woolf LJ's analysis [in *Lloyds Bank Plc v. Waterhouse*] that there is no need to rescind or avoid the contract to take advantage of the exception: "Misrepresentation can always amount to a defence to a claim on a contract if that misrepresentation was made by the party seeking to enforce the contract…. If he does not correct… the misrepresentation which he has made, the court will not allow him to benefit from his misrepresentation…".

Obviously, since the *Curtis* defence operates by excluding or cutting down the scope of clauses inconsistent with the misrepresentation, the defence can only work if the misrepresentation related to terms (*i.e.* contents or effect) of the contract. If the misrepresentation did not relate to the terms of the contract, it could not have contradicted any of its terms (say, an exemption clause). This *Curtis* defence must therefore be confined to misrepresentations relating to the terms of the contract; but this is just a *practical consequence* of how the *Curtis* defence operates at ground level, not a hard rule of law mandated by principle. With respect, Professor McMeel's proposition,[57] that there is no principle requiring pre-contractual misrepresentation to relate to terms before the plaintiff-investor is entitled to a remedy or defence, remains obviously sound. In any event, since most operative misrepresentations would in practice relate to terms, it should be rare for the question (whether a misrepresentation relates to terms) to be decisive and we could safely proceed on the assumption that, generally, we are here dealing with misrepresentations relating to terms.[58]

The last point of principle to make at this juncture is this: regardless of whether the misrepresentee who had entered into the tainted contract wishes to rescind, claim damages or assert the misrepresentation as a defence, the misrepresentee must say that he had relied on the misrepresentation and that he was entitled to rely on it.[59]

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[55] McMeel, "Documentary Fundamentalism", *supra* note 5 at 201.

[56] *Ibid*. at 202, quoting from *Lloyds Bank Plc v. Waterhouse* [1993] 2 Fam. L.R. 97 at 120 (C.A.), Woolf L.J., and also citing *Quest 4 Finance Ltd*, *supra* note 16. Note that the ellipses were used by Prof. McMeel.

[57] See notes 50 and 51, and accompanying text; McMeel, "Documentary Fundamentalism", *supra* note 5 at 202: "in confining the misrepresentation exception to statements as to the meaning and effect of the contractual terms, both Moore-Bick LJ in *Peekay* and Gloster J in *Springwell* may have confined the exception more narrowly than Scrutton LJ had expressed it in *L'Estrange*".

[58] See text accompanying notes 63 and 65.

[59] Cartwright, *supra* note 1 at 43.

This, he cannot say, if it was clear beforehand that he or his agent knew of the truth,[60] *i.e.* if the misrepresentation had been corrected before he acted on it.[61]

V. Application of Principles

How then do we apply these principles of misrepresentation and agency?

Inserting a clause in the tainted contract to say retroactively that the earlier pre-contractual misrepresentations were not relied upon, or to retroactively negative the agent's prior apparent (or actual) authority when making pre-contractual misrepresentations, cannot be effective if, apart from that clause, the tainted contract would have been liable to be rescinded.

Logically, the clause came too late. The clause, like the rest of the contract, is tainted and voidable precisely because it was induced by prior misrepresentation. The contract cannot pull itself up by its own bootstraps.[62] The same objection would seem to apply to a contractual clause in the tainted contract which purports to retroactively certify non-reliance on, or exclude liability for, pre-contractual misrepresentation. In principle, such late clauses are completely ineffective, regardless of reasonableness; there is no need to invoke statutory controls of exemption clauses because they are voidable and liable to be rescinded together with the rest of the tainted contract.

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[60] *Eurocopy plc v. Teesdale* [1992] Butterworths Company Law Cases 1067 (C.A.); *Bawden v. The London, Edinburgh and Glasgow Assurance Co* [1892] 2 Q.B. 534 (C.A.); *Strover v. Harrington* [1988] Ch. 390 (H.C.).

[61] Koh, *supra* note 1 at 685; Cartwright, *supra* note 1 at 42; McKendrick, *supra* note 39 at 581:

> A misrepresentation does not induce a party to enter into a contract in the case… where the defendant corrected his misrepresentation and actually drew the claimant's attention to the correction prior to any reliance upon it (*Peekay Intermark Ltd* v. *Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511). On the other hand, the fact that the claimant could have discovered the true position by acting in a more diligent fashion does not, of itself, prevent him from asserting that he was induced to enter into the contract in reliance upon the defendant's misrepresentation (see *Redgrave* v. *Hurd* (1881) 20 Ch D 1, p. 595, Section 4(a)). The proposition that the claimant must have discovered the truth, and that it does not suffice that he could have discovered the truth, has been affirmed by the Court of Appeal (*Peekay Intermark Ltd* v. *Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511).

Cf. note 62 below.

[62] See note 61 above. *Cf.* Cartwright, *supra* note 1 at 42, 43:

> Where, however, the true position appears clearly from the very terms of the contract which the representee claims to have been induced to enter into by the misrepresentation, the misrepresentation will have been "corrected" as long as the claimant is bound by those terms [citing *Peekay*, *supra* note 2, footnote number omitted].

However, it must be noted, crucially, that the contract in *Peekay* was not in fact induced by misrepresentation, was binding and was not rescinded. Furthermore, Prof. Cartwright's statement was made on the basis that the contractual terms which "corrected" the misrepresentation must be binding in the first place. Hence, neither Prof. Cartwright nor *Peekay* support the dubious proposition that a voidable clause in a voidable contract which is itself being rescinded could "correct" a prior misrepresentation. Ultimately, even in the very unlikely event that *Peekay* were to be re-interpreted as authority allowing a tainted term of a voidable contract to correct pre-contractual misrepresentations, the question remains whether the local courts should follow it, and thereby allow a tainted contract to pull itself up by its own bootstraps. The local courts could be persuaded to do so, but that would entail judicial reform of, or departure from, established principles on policy grounds. It remains to be seen whether any particularly meritorious defendant-bank can proffer sufficiently cogent evidence of strong policy reasons to persuade the local courts to deviate from principle, and divert the course of local jurisprudence down the defendant-bank's preferred path.

The point is particularly poignant where the voidable contract itself is being rescinded. However, apart from rescission, the pre-contractual misrepresentations can be raised by the plaintiff-investor as a 'defence' (again using this term very loosely) against the defendant-bank, preventing the defendant-bank from asserting contractual clauses which contradict the earlier representations.

Should it make any difference that rescission is no longer possible or that the plaintiff-investor has affirmed or is otherwise not seeking to rescind? Nothing in principle prevents the plaintiff-investor from asserting the pre-contractual misrepresentation as a 'defence', regardless of whether the plaintiff-investor is suing the defendant-bank for damages for pre-contractual misrepresentation, resisting the defendant-bank's enforcement of a contract induced by misrepresentation, or preventing the defendant-bank from enforcing terms which contradict those misrepresentations. Here, we assume that the misrepresentation relates to terms.[63] If the contract contains a clause stating that the agent had no authority to make representations about terms[64] despite being held out with the appearance of authority or that the plaintiff-investor had not relied on the agent's pre-contractual misrepresentations in entering into this contract, the real question is whether the plaintiff-investor would have entered into the contract if he had known that he could not rely on those misrepresentations or had known of the agent's lack of authority. If he would not have done so, then the contract had in fact been induced by misrepresentation, and the plaintiff-investor had acted on the misrepresentation. Indeed, if the plaintiff-investor had suffered damage as a result of the misrepresentation, the cause of action for recovering damages is complete. It is too late for the defendant-bank to try to *retroactively* correct the misrepresentation. Therefore, in cases where the *pre-contractual misrepresentation is related to terms*, such late clauses are completely ineffective even without rescission because, under the *Curtis* defence, they were not incorporated into the contract or have been cut down in scope to avoid inconsistency with the prior misrepresentation.

Even if we proceed by assuming that the earlier misrepresentation does *not* relate to terms and the tainted contract has been affirmed by the plaintiff-investor,[65] the plaintiff-investor could still invoke the pre-contractual misrepresentation to claim damages in tort, under s. 2(1) of the *Misrepresentation Act* or, in appropriate cases, breach of collateral contract. The cause of action in such cases accrued when he acted on the misrepresentation and contracted with the defendant-bank. Any late clauses in the contract which purport *retroactively* to negative the agent's authority to make pre-contractual representations or to negative the plaintiff-investor's prior reliance on misrepresentations would have come too late. However, they are not completely ineffective: these clauses are neither avoided by rescission, completely cut out nor cut down in scope pursuant to the *Curtis* defence. Nonetheless, these late clauses cannot even pretend to be prior preclusions of obligations or duties rather than exemptions of remedies or liabilities: They are *clearly* exemption clauses which

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[63] See text accompanying notes 58 and 65: we assume here that the agent's misrepresentation relates to terms of the contract. Whilst the defendant-bank might merely have misrepresented (by holding out) the agent's authority, the agent might have misrepresented the contract terms.

[64] *Overbrooke*, *supra* note 30; *Ng Kong Teck v. Sia Kiok Kok* [1996] 2 S.L.R.(R.) 720 at paras. 31-33 (H.C.), Lim J.C.

[65] See text accompanying notes 58 and 63.

purport to *retroactively* exclude remedies or liabilities which have already arisen.[66] Therefore, there can be no doubt that such late clauses can be effective only if they survive relevant statutory controls of exemption clauses.

It is true that there has always been a policy-driven controversy in the case law as to whether contractual provisions defining obligations or duties should also be subject to the statutory controls of exemption clauses (under the *Misrepresentation Act* and the *UCTA*) together with contractual provisions which restrict liabilities or remedies; and if so, how to effectively distinguish between the two types of provisions.[67] There is however no need to enter into that difficult debate here, because contractual provisions purporting to retroactively exclude reliance or negative authority after liabilities or remedies have arisen do not even come close to pretending to be prior preclusions of duties or obligations.

VI. Conclusion

Recent English appellate authorities recognise that a non-reliance clause could raise a "contractual estoppel". Its nature, ambit and legitimacy remain unsettled; indeed it has been questioned whether it is an estoppel at all. Nonetheless, regardless of whether it is a creature of equity or common law and whether its effects are evidential, substantive, defensive or offensive, this newly-minted estoppel appears to allow one contracting party (defendant-bank) to prevent the other (plaintiff-investor, misrepresentee) from alleging that he (plaintiff-investor, misrepresentee) had been induced by the other party's (defendant-bank's) misrepresentation in entering into the contract. This article posits a more traditional analytical framework using well-established contract principles of misrepresentation and agency principles of authority to deal with such cases.

As stated at the beginning, the objective of this article is to take us back to basics, bringing back into focus those fundamental commercial law principles of agency and misrepresentation which have been overlooked because they have been overshadowed by the novel doctrine of contractual estoppel. First, we started with a demonstration of how controversial the novel doctrine is. Secondly, a brief exposition of the basic principles of agency and misrepresentation was set out before those principles were applied to a scenario where a plaintiff-investor entered into an

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[66] *Springwell*, *supra* note 3 at paras. 181, 182, Aikens L.J.:

> However, as Christopher Clarke J trenchantly put the point in [*Raiffeisen* at para. 315], "… 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 be an attempt to exclude or restrict liability". I would therefore be inclined to regard that part of [the clause in question] as falling within section 3 [of the *Misrepresentation Act*] and therefore subject to the UCTA regime.
>
> … If, contrary to my conclusion, Chase had made representations to Springwell, then this clause is an attempt retrospectively to alter the character and effect of what has gone on before and so is in substance an attempt to exclude or restrict liability.

[67] See note 21 and accompanying text. See generally Chen-Wishart, *supra* note 1 at 239, 240; *Anson's Law of Contract*, *supra* note 24 at 193-196, 328-331; Edwin Peel, "Reasonable Exemption Clauses" (2001) 117 Law Q. Rev. 545; John Cartwright, "Excluding Liability for Misrepresentation" in Andrew Burrows & Edwin Peel, eds., *Contract Terms* (Oxford: Oxford University Press, 2007) 213; Koh, *supra* note 1 at 770; Koh & Phang, *supra* note 53 at 371 *et seq.*

investment contract with a defendant-bank after some misrepresentation had been made. These fundamental principles seem basic, but their nuanced application to the factual scenario leads to an alternate analysis which emphasises the sequencing of events and the status of the actors in the contracting process.

In short, it would normally be too late to insert clauses into the final signed investment contract purporting to limit the agent's authority to make (mis)representations. Such limitations have to be made known to the plaintiff-investor beforehand. So, apart from the identity and status of the actors involved, the sequencing of the contracting process is also vital. This is a consequence of the traditional contract principles relating to pre-contractual misrepresentation as well as the principles of apparent authority, the latter being an instance of misrepresentation of the scope or existence of an agent's authority. Both protect a misrepresentee who has *acted in reliance* on the misrepresentation, so the logical consequence is that the correction of any misrepresentation must be carried out *before* the misrepresentee (the plaintiff-investor) has acted on it.

This is why the defendant-bank needs to ensure that the plaintiff-investor knows, *before* he is induced to enter into an investment contract, that the agent had no authority to make pre-contractual (mis)representations. In any event, regardless of whether the agent's misrepresentations were made with actual or apparent authority, the defendant-bank will not be able to enforce misrepresented terms of the contract or prevent rescission if it had *notice* of the agent's misrepresentation. The parameters of the relationship between the parties (*i.e.* the plaintiff-investor, the agent and the defendant-bank) must be defined early on, and certainly before the misrepresentation induces the plaintiff-investor to enter into the tainted contract. The plaintiff-investor's cause of action against the defendant-bank is already complete when he enters into the investment contract, and it will normally be too late to retroactively alter their relationship by clauses in the tainted contract.

This is so, particularly where the plaintiff-investor seeks to rescind the investment contract or where there was a misrepresentation as to the terms of the investment contract.

Even where the plaintiff-investor does not seek rescission of the investment contract and the misrepresentation does not relate to terms, clauses in the tainted contract purporting to retroactively negative pre-contractual misrepresentations or the agent's prior apparent authority cannot be effective unless they are reasonable enough to survive the statutory control of exemption clauses.