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Banking Documentation and Contractual Estoppel: Commercially Sensible or Anomalous?

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ABSTRACT:

The novel doctrine of contractual estoppel has entrenched itself in English law vide the Court of Appeal decisions of Peekay Intermark Ltd v ANZ Banking Group [2006] EWCA Civ 386 and Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221. Recent dicta by the Singapore Court of Appeal suggest that questions remain as to the applicability of the doctrine. This paper seeks to analyse the development of the doctrine, the utility and criticism of the same. Despite the strong criticisms against the doctrine, it is submitted that the Singapore Courts should adopt the doctrine of contractual estoppel but depart from the English position on the extent to which non-reliance clauses are subject to the Unfair Contract Terms regime.

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I. Introduction

It is not uncommon for commercial contracts to provide, in varying permutations, that:

Party A confirms it has not relied on any representation or warranty by Party B or its agents or of any other person in respect of the subject matter of this Agreement save for any representation or warranty expressly set out in this Agreement.

The above is an example of a typical (though simplistic) non-reliance clause. The clause acts to confirm that the parties did not rely on representations extraneous to the agreement and seeks to limit liability for pre-contractual representations.² Non-reliance clauses have found judicial support. The tenor of the English Courts toward them is that commercial men should be allowed to dictate the terms of their bargain and adhere to them. Essentially, it is open to the parties to agree to a state of affairs as the basis for the contract. The underpinning philosophy is the freedom of contract: “The value of all things contracted for, is measured by the appetite of the contractors; and therefore the just value, is that which they be contented to give”.³

Recent English decisions have held that where parties have inserted a non-reliance clause in their contract, they are later estopped from asserting the contrary. This novel doctrine of estoppel by contract, or, contractual estoppel, was established in the Court of Appeal decisions of *Peekay Intermark Ltd v ANZ Banking Group*⁴ and *Springwell Navigation Corp v JP Morgan Chase Bank*.⁵

The position in Singapore is less clear. The Singapore Courts have not had the chance to discuss the outworking and application of the doctrine. The Court of Appeal decision in *Orient Centre Investments Ltd v Anor v. Societe Generale*⁶ (and to a lesser extent two other High Court decisions)⁷ merely accepts that contractual estoppel is part of Singapore’s jurisprudence. Recent pronouncements by the Court of Appeal in *Als Memasa v UBS AG*⁸ and *Deutsche Bank AG v Chang Wen Tse*⁹ however, have raised doubts as to whether non-reliance clauses are a fully effective protection against claims for misrepresentation.

² Non-reliance clauses are often paired with entire agreement clauses which frequently states that the agreement “sets out the entire agreement and understanding between the Parties”. This acts to restrict the contractual bargain to the contract document. Both types of clauses have found judicial support.

³ Thomas Hobbes, *Leviathan*, ed. E Curley, (Indianapolis/Cambridge: Hackett Publishing Company, Inc, 1994) at Chapter XV, Of Other Laws of Nature, [14].

⁴ [2006] EWCA Civ 386. Hereinafter “*Peekay*”.

⁵ [2010] EWCA Civ 1221. Hereinafter “Springwell (CA)”. The first instance decision by Gloster J in *JP Morgan Case v Springwell Navigation Corp* [2008] EWHC 1186, which is also relevant to analysing non-reliance clauses, shall be referred to hereinafter as Springwell (HC).

⁶ [2007] SLR(R) 566. And to a lesser extent, the decisions of

⁷ *Deutsche Bank AG v Chang Wen Tse* [2013] 1 SLR 1310 and *Jurong Shipyard Pte Ltd v BNP Paribas* [2008] 4 SLR(R) 33

⁸ *Als Memasa v UBS AG* [2012] 4 SLR 992. Hereinafter referred to as “*Als Memasa*”.

⁹ *Deutsche Bank AG v Chang Wen Tse* [2013] 4 SLR 886.

The advent of the doctrine in England has received mixed reviews.¹⁰ Broadly, those who welcome the doctrine celebrate that it has affirmed the centrality of freedom of contract in English law. As Moore-Bick J famously opined in *Peekay*, “[t]here 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.”¹¹ The commercial utility of non-reliance clauses is that they add certainty to the parties’ relationship. Parties know precisely the basis on which they reach an agreement. This is perfectly sensible and prevents one party from “threshing the undergrowth”¹² to find an operative misrepresentation to unravel the contract.

On the opposite end of the spectrum, the doctrine has been attacked on several grounds. First, for its weak precedential basis – the authorities which purportedly support it, when analysed, appear to be authorities for different propositions. Further, even though it is labelled an estoppel it has been criticised for not having the characteristics of the species of estoppel, and therefore, anomalous. The main difficulty with contractual estoppel is that despite these alleged inadequacies, it has strong implications. For one, the English Courts have accepted that in certain situations, where a non-reliance clause is construed as an obligation-defining or basis-defining clause, they are not liability-excluding and therefore do not engage Section 3 of the Misrepresentation Act and the Unfair Contract Terms Act.

This paper seeks to analyse the development of the doctrine, the utility and criticism of the same. It also argues that contractual estoppel can be justified on traditional estoppel grounds, and therefore should be embraced in Singapore’s jurisprudence. However, it is respectfully submitted that the Singapore Courts should not adopt the English position of accepting that where non-reliance clause appear to set out the basis for the parties contract, that such clauses fall outside the Unfair Contract Terms regime.

II. Surveying the English Authorities

A. Sowing the Seeds – *Lowe and Grimstead*

In a less known decision of *Alman and Benson v Associated Newspapers Group Ltd* where the Court dealt with entire agreement clauses, Browne-Wilkinson J (as he then was) found that certain entire agreement clauses were insufficient to provide a defence against misrepresentation claims. What may work, the Judge suggested, would be “a clause acknowledging that the parties had not relied on any representations in entering into the contract.”¹³ Not long after, it was noted that non-reliance clauses became commonplace in commercial contracts.¹⁴ Along with *Alman*, two other decisions set the scene for contractual estoppel.

¹⁰ For a robust critique of the doctrine, see Gerard McMeel, *Documentary Fundamentalism in the Senior Courts: the Myth of Contractual Estoppel*, [2011] LMCLQ 185 (hereinafter “Documentary Fundamentalism”). To support the efficacy of non-reliance clauses and contractual estoppel see A Trukhtanov, *Exclusion of Liability for Pre-Contractual Misrepresentation: A Setback* (2011) 127 LQR 345.

¹¹ [2006] EWCA Civ 386.

¹² *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's LR 611 *per* Lightman J at [7].

¹³ *Alman and Benson v Associated Newspapers Group Ltd*, (Unreported, 20 June 1980), cited in *Deepak v ICI* [1998] 2 Lloyd's Rep 139 QBD at 168 and *Axa Sun Life Services Plc v Campbell Martin Ltd & Ors* [2011] EWCA Civ 133 at [84].

¹⁴ *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573 Ch D *per* Jacob J at 597.

The early beginnings is said to be *Lowe v Lombank*,¹⁵ a decision of the English Court of Appeal.¹⁶ Nancy Lowe, a 65 years' old widow, purchased a car under a hire-purchase arrangement. She later discovered that there were defects in the engine, steering and brakes of the car, and sued the hire-purchase company. The hire-purchase company relied on two defences. First, that the hirer did not make known the purpose of the hire. This would impact whether there was any warranty as to the fitness of the vehicle. Secondly, that by way of acknowledgement clauses which stated that the goods were in a good condition, the hirer was estopped from asserting that the vehicle was defective.

The Court of Appeal was tasked with two issues: first, whether the hire-purchase agreement was subject to the implied condition that the car should be reasonably fit for purpose; and second, whether the plaintiff was estopped from asserting the vehicle was defective. On the first issue, Diplock J found that there was an implied condition under the Hire Purchase Act that the car was to be fit for purpose. This could not be ousted by contractual clauses. Notwithstanding that the appeal had succeeded on the first ground, Diplock J went on to elaborate on the second.

The Judge was dismissive of the estoppel argument, saying: "To call it an agreement as well as an acknowledgement by the [claimant] cannot convert a statement as to past facts, known by both parties to be untrue, into a contractual obligation... If [the representation was] intended by the hirer to be acted upon by the person to whom the representation is made, believed to be true by such person and acted upon by such person to his detriment, it can give rise to an estoppel [but] it cannot give rise to any positive contractual obligation".¹⁷

As to the estoppel argument, Diplock LJ held that for an estoppel to succeed, three elements were required: (1) that the statement is clear and unambiguous; (2) that the plaintiff meant for it to be acted upon by the defendant, or that the plaintiff conduct's led the defendant to take the representation to be true and should act on it; (3) that the defendant believed it to be true and were induced by such belief to act upon it (the "**Lowe Requirements**"). None of these elements were met on the evidence. *Lowe* therefore stood for the proposition that a representation, made in a contract, could give rise to an estoppel if the *Lowe* Requirements were fulfilled. This would be an evidential estoppel which prevented one party from contradicting the representation in the contract. In terms of legal taxonomy, *Lowe* is categorised as an example of estoppel by representation, save that the representation is made by way of a contractual clause.¹⁸

In *Lowe*'s wake came *E A Grimstead & Son Ltd v McGarrigan*.¹⁹ Grimstead concerned the share purchase agreement. On appeal, the Court reversed the first instance decision on whether there was an

¹⁵ [1960] 1 WLR 196. Applied in *RHB-Cathay Securities Pte Ltd v Ibrahim Khan and ors* [1999] 1 SLR(R) 857 at [84] to [104]. The Judge termed this as 'estoppel by acknowledgement'.

¹⁶ See generally, Low KY, *Effective Use of Non-Reliance Clauses: Satisfying Lowe v Lombank*, Law Gazette, December 2009.

¹⁷ *Lowe* at p204.

¹⁸ See Wilken and Ghaly, *The Law of Waiver, Variation and Estoppel*, 3rd ed., (Oxford: Oxford University Press, 2012) (hereinafter "**Wilken & Ghaly**") at [9.15] and the accompanying footnote, [9.32], [9.70],[9.75], [9.82]-[9.85].

¹⁹ [1999] EWCA Civ 3029. Hereinafter "**Grimstead**".

operative misrepresentation. It need not have gone analysed the alternative defence of non-reliance but nonetheless did so.

The defendant McGarrigan, pleaded that by Clauses 2.5 and 8.1, the plaintiff could have no remedy for pre-contractual statements. By Clauses 2.5, the purchaser confirmed that it did not rely on any representation save for those expressly set out in the agreement. Clause 8.1 was a hybrid entire agreement and non-reliance clause confirming that no party entered into the agreement in reliance on any representation not set out in the agreement. Albeit strictly obiter, Chadwick LJ was firmly of the view that non-reliance clauses are capable of operating as an evidential estoppel. He found that such clauses prevent the party giving the representation from subsequently asserting otherwise in litigation. However, for such clauses to be effective as an evidential estoppel, Chadwick LJ found that they had to fulfil the *Lowe* Requirements – clarity, intention to cause reliance, belief leading to reliance. On the facts, Chadwick LJ found that even if there was misrepresentation, Clauses 2.5 and 8.1 would have raised an evidential estoppel.

In his judgement, Chadwick LJ also provided reasons why such a clause was useful:

“There are, as it seems to me, at least two good reasons why the courts should not refuse to give effect to an acknowledgement of non-reliance in a commercial contract between experienced parties of equal bargaining power ... First, it is reasonable to assume that the parties desire commercial certainty. They want to order their affairs on the basis that the bargain between them can be found within the document which they have signed. They want to avoid the uncertainty of litigation based on allegations as to the content of oral discussions at pre-contractual meetings. Second, it is reasonable to assume that the price to be paid reflects the commercial risk which each party – or, more usually, the purchaser – is willing to accept. The risk is determined, in part at least, by the warranties which the vendor is prepared to give. The tighter the warranties, the less the risk and (in principle, at least) the greater the price the vendor will require and which the purchaser will be prepared to pay. It is legitimate, and commercially desirable, that both parties should be able to measure the risk, and agree the price, on the basis of the warranties which have been given and accepted.”

B. Entrenching the Position

Peekay Intermark Ltd v ANZ Banking Group

Lowe and *Grimstead* established that if a non-reliance clause met the *Lowe* Requirements, it could give rise to an evidential estoppel.

The decisions of *Peekay Intermark Ltd v ANZ Banking Group* (“**Peekay**”),²⁰ *JP Morgan Case v Springwell Navigation Corp* (“**Springwell (HC)**”),²¹ *Springwell Navigation Corp v JP Morgan Chase Bank* (“**Springwell (CA)**”),²² were watershed moments in that they developed a doctrine similar to but

²⁰ [2006] EWCA Civ 386.

²¹ [2008] EWHC 1186.

²² [2010] EWCA Civ 1221.

distinct from that in *Lowe*. These decisions found that it was possible to set up an estoppel by contract (or, a contractual estoppel) without the requirement of reliance.

*Peekay*²³ concerned the purchase of a structured product linked to a series of Russian government bonds known as GKO.²⁴ Mr Pawani, through his investment vehicle, Peekay, invested a sum of US\$250,000.00 in such bonds through the defendant ANZ Bank. Mr Pawani was first approached by the bank's officer to ask if he was interested in GKO bonds. He was however, not told that in the event of default, investors would have no control on how the bonds were liquidated. Mr Pawani agreed to purchase the product as described to him. Subsequently, he was sent a series of transaction documents which made clear the nature and risks of the product. Mr Pawani executed these without reading them in detail. In August 1998, the Russian government announced a moratorium on certain of its debt obligations, including those arising under GKOs. As a result, on maturity, the amount recovered by Peekay was a mere US\$5,918.06 and this led to the lawsuit.

At first instance, the Judge found that ANZ bank had given the false impression that investors in the product would have a proprietary right in the underlying assets. As this misrepresentation induced the claimants to enter the contract, the Judge gave judgment in their favour. On appeal, the finding was reversed, primarily on the grounds that Mr. Pawani was not induced by ANZ's description of the product, but by his own assumptions on the product. The terms of the transactional documents made clear that the investment was fundamentally different from what was initially represented.

Although the Court of Appeal need not have gone into the law relating to non-reliance clauses, as this was raised as a defence and fully argued, it did. In what has now become an oft-quoted passage, Moore-Bick LJ explained:²⁵ "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. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. 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.*²⁶" (emphasis added).

Moore-Bick LJ went on to hold that quite apart from a contractual estoppel, a non-reliance clause was capable of giving rise to an estoppel by representation of the kind in *Grimstead*.²⁷ In his concurring

²³ Commentaries which discuss the *Peekay* decision in the context of contractual estoppel include:- E Gooding, *Selling Investment Products to Sophisticated Investors: Reflections on Peekay v ANZ*, [2006] 11 Journal of International Banking Law and Regulation 628; A Trukhtanov, *Misrepresentation: Acknowledgement of Non-Reliance as Defence*, [2009] LQR 648; R Lewis, *The Development of Contractual Estoppel*, [2011] 26(2) Journal of International Banking Law and Regulation 49.

²⁴ Gosudarstvenniye Kratkosrochniye Beskuponniye Obligatsio.

²⁵ [56] of *Peekay*.

²⁶ Moore-Bick LJ relied upon the decision of Colchester Borough Council v Smith [1991] Ch 448, which was affirmed in appeal in [1992] Ch 421. See [56] of *Peekay*.

²⁷ [57] of *Peekay*.

judgment, Chadwick LJ agreed that Mr Pawani's confirmation in the transactional documents "operate[d] as a *contractual estoppel* to prevent Peekay from asserting in litigation, that it had not...read and understood the Risk Disclosure Statement" (emphasis added).

The *Springwell* Litigation

Following *Peekay*, several English High Court decisions adopted and applied the principle of contractual estoppel as set out therein.²⁸ If there was any doubt as to the applicability of the doctrine given Moore-Bick LJ's comments were obiter, these were put to bed by the decision in *Springwell CA*.

The *Springwell* litigation involved *Springwell*, the corporate investment vehicle, of the wealthy shipowning Polemis family. *Springwell* claimed against JP Morgan Chase Bank and its related investment entities for US\$290 million of direct losses from botched investments.²⁹ As one commentator noted, "this was litigation on a grand scale: the trial lasted 68 days, with 390 lever arch files of trial bundle, and 22 lever arch files of authorities".³⁰ In the broadest of terms, *Springwell* sued the bank for misleading it as to the characteristics of the underlying assets, as well as for failing to advise it to diversify its portfolio, which was focused on emerging-market assets.

At first instance, Gloster J in the High Court dismissed the claim.³¹ As regards contractual estoppel, the learned Judge concluded that: (1) *Peekay* was not *obiter* as regards contractual estoppel; (2) *Peekay* and subsequent authorities recognise the difference between contractual estoppel and estoppel by representation. Only the latter requires detrimental reliance. Gloster J also confined the conflicting parts of *Lowe* as not being the ratio in that decision.

Save for a small custody fees claim, *Springwell's* case was dismissed on appeal. As with *Peekay*, the Court of Appeal had decided that on the facts, there was no actionable misrepresentation, but went on to consider the defence of contractual estoppel. Interestingly, prior to reviewing the authorities raised in argument, Aikens LJ proceeded on the basis of principle. The Lord Justice said: "If A and B enter into a contract then, unless there is some principle of law or statute to the contrary, they are entitled to agree what they like. Unless *Lowe & Lombank* is authority to the contrary, there is no legal principle that states that parties cannot agree to assume that a certain state of affairs is the case at the time the contract is

²⁸ For example, *Bottin International Investments Ltd v Vonson* [2006] EWHC 3112; *Donegal International v Republic of Zambia* [2007] 1 Lloyd's Rep 397; *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] 1 All ER (Comm) 16; *Titan Steel Wheels Limited v Royal Bank of Scotland* [2010] EWHC 211 (Comm); *Food Co UK LLP v Henry Boot Developments* [2010] EWHC 358; *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland PLC* [2010] EWHC 1392.

²⁹ Strictly speaking JP Morgan Chase Bank were the claimants, although for purpose of the proceedings, *Springwell* was the "effective claimants", a term used by Gloster J: [2008] EWHC 1186 at paragraph 1.

³⁰ *Documentary Fundamentalism* at footnote 50.

³¹ Gloster J rendered two decisions: [2008] EWHC 1793 (Comm) and [2010] EWHC 1793 (Comm), the latter dealing primarily with *Springwell's* post-default claims. For commentary on her decision, see: M Ryan & A Yong, "*Springwell* - are the English courts the venue of last resort for complex investor claims?" (2009) 24(1) *Journal of International Banking Law and Regulation* 54; Christa Band, "Selling complex financial products to sophisticated clients: *JP Morgan Chase v Springwell*: Part I" (2009) 24(2) *Journal of International Banking Law and Regulation* 71; and Christa Band and Karen Anderson, "Selling complex financial products to sophisticated clients: *JP Morgan Chase v Springwell*: Part II" (2009) 24(5) *Journal of International Banking Law and Regulation* 233.

concluded or has been so in the past, even if that is not the case, so that the contract is made upon the basis that the present or past facts are as stated and agreed by the parties.”

After proceeding on the basis of principle, Aikens LJ proceeded to discuss the authorities.³² The Lord Justice ultimately relied on *Peekay*. Indeed, by the time the *Springwell* decision was rendered, *Peekay* was cited and applied in a string of no less than six High Court decisions.³³ If at all the authorities were unclear that contractual estoppel was a novel and distinct category of estoppel, Aikens LJ was at pains to do so.³⁴ The Lord Justice emphatically rejected the argument that, as with the case of estoppel by convention, equitable considerations of ‘unconscionability’ must apply before contractual estoppel can arise. Aikens LJ took the view that contractual estoppel arose purely by virtue of the parties’ agreement. In contrast, estoppel by convention which was raised by counsel required the elements of reliance and detriment (thus possibly giving rise to unconscionability) due to a want of an express agreement. Aikens LJ also confined *Lowe* as decided on the Hire Purchase Act. As such, Diplock J’s prohibition against untrue statements being turned into contractual obligations was deemed as not binding and purely obiter.³⁵

As to utility of the rule, the Lord Justice stated: “Like Moore-Bick LJ in *Peekay* I see commercial utility in such clauses being enforceable, so that parties know precisely the basis on which they are entering into their contractual relationship.

C. In Full Bloom

The doctrine of contractual estoppel, as established in *Peekay* and *Springwell (CA)*, has been cited in numerous English decisions since,³⁶ as well as some of the local authorities discussed below. Without doubt, unless there is further consideration of the matter by the House of Lords, *Springwell (CA)*

³² Aikens LJ referred to *Burrough’s Adding Machine Limited v Aspinall* (1925) 41 TLR 276, *Colchester Borough Council v Smith* [1991] Ch 448, *Spencer Bower and Turner, Estoppel by Representation*, 3rd ed. (1977) para 158 at page 158.

³³ *Bottin International Investments Ltd v Vonson* [2006] EWHC 3112; *Donegal International v Republic of Zambia* [2007] 1 Lloyd’s Rep 397; *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] 1 All ER (Comm) 16; *Titan Steel Wheels Limited v Royal Bank of Scotland* [2010] EWHC 211 (Comm); *Food Co UK LLP v Henry Boot Developments* [2010] EWHC 358; *Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland PLC* [2010] EWHC 1392.

³⁴ See also *Raiffeisen Zentralbank Osterreich AG v RBS* [2010] EWHC 1392 (Comm) at [234], [244], where Christopher Clarke J makes clear that contractual estoppel is not the same as evidential estoppel or estoppel by representation of the kind raised in *Lowe v Lombank*. See also *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] 2 Lloyd’s Rep 581; [2009] 1 All ER (Comm) 16; [2008] EWHC 1686 (Comm) at paras 33-6.

³⁵ [150]-[153] of *Springwell CA*.

³⁶ For instance:- *Bank Leumi (UK) Plc v Akrill* [2013] EWCA Civ 907 (concerning a guarantee given by a property developer to a bank); *Roberts v Egan* [2014] EWHC 1849 (Ch) (concerning a property investment agreement); *Barclays Bank Plc v Svizzera Holdings BV* [2014] EWHC 1020 (Comm) (a claim in relation to a syndicated loan); *Slocom Trading Limited, Derbent Management Limited v Tatik Inc, Sibir Energy plc, Maritime Villa Holdings SCI* [2012] EWHC 3464 (Ch) (a claim for proceeds in one of the largest private properties in Cote d’Azur between Russian businessmen); *Bank Leumi (UK) Plc v Linda Joy Wachner* [2011] EWHC 656 (Comm) (claim by bank against customer of medium sophistication in relation to foreign exchange facility); *Bikam Ood (a company incorporated under the laws of Bulgaria), Central Investment Group SA (a company incorporated under the laws of Luxembourg) v Adria Cable S.A.R.L.* (a company incorporated under the laws of Luxembourg) [2013] EWHC 1985 (Comm) (involving a share sale agreement in respect of a satellite television company).

represents the position on contractual estoppel in English law. It should be noted, however, that the cases following *Springwell (CA)* mostly involve parties of equal bargaining power and the issues related to the doctrine which may affect unsophisticated parties have yet to surface.

III. The Singapore Authorities

A. Pre-Memasa Authorities

Prior to the *Deutsche bank* decision³⁷s and *Al Memasa*,³⁸ the Singapore decisions where contractual estoppel was raised did not contain an in-depth analysis of the doctrine. In *Orient Centre Investments Ltd v anor v Societe Generale*,³⁹ the claimants sued the bank for *inter alia* misrepresentation, breach of fiduciary duties and negligence over its investments with the bank. The claim was struck out by the High Court and the claimants appealed. The appeal was dismissed.

Applying contractual estoppel, the Court of Appeal found that “the combined effect of the express general and specific terms and conditions applicable to the structured products provide[d] an insuperable obstacle to any claim ... based on the alleged breach of representations or duties, fiduciary or contractual ... In the face of Orient’s own representations and warranties with respect to each of the structured products, it is not possible for the appellants to argue that Orient had relied on any alleged representation on the part of [the bank’s agent]...”.⁴⁰ Citing *Peekay*, the Court of Appeal found that even if the bank’s agent had made the alleged representations, these pre-contractual representations would be superseded by the express non-reliance clauses.⁴¹ The claimants could therefore not assert that they were induced to enter the contract by a misunderstanding of the nature of the product.⁴²

Orient Centre was followed by *Jurong Shipyard Pte Ltd v BNP Paribas*.⁴³ The plaintiff, Jurong Shipyard, applied for an injunction to stop the defendant’s winding up application on grounds that the plaintiff owed more than US\$ 50 million in relation to forex transactions. The focal point was whether the plaintiff’s Chief Financial Officer had been authorised to enter into the loss-making forex transactions. The Judge accepted that in principle, by signing the risk disclosure statement, the plaintiff was estopped from advancing arguments in contradictions of the representations in the form. Nonetheless, because there was a question as to whether the agent went beyond its scope of authority, the Judge declined to hold that the plaintiff was estopped.

³⁷ *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 (High Court), *Deutsche Bank AG v Chang Tse Wen and anor appeal* [2013] 4 SLR 886 (Court of Appeal).

³⁸ *Als Memasa and anor v UBS AG* [2012] 4 SLR 992.

³⁹ [2007] 3 SLR(R) 566 (Court of Appeal). Hereinafter “*Orient Centre*”.

⁴⁰ *Orient Centre* at [50].

⁴¹ *Orient Centre* at [51].

⁴² *Orient Centre* at [53].

⁴³ [2008] 4 SLR(R) 33 (High Court)

The approach in *Orient Centre* and *Jurong Shipyard* toward non-reliance clauses is consistent with the Singapore Court's approach to uphold the express bargain between the parties. In the banking context, this may be seen in cases involving verification or conclusive evidence clauses. Banking contracts typically contain terms stating that the customer undertakes to inform the bank in writing within a limited time frame from the date the statement of account is received of any discrepancies, omissions, incorrect or inaccurate entries. The customer's failure to do so allows the bank to deem the statement as conclusive and binding on the client. Further, the customer shall also be deemed to have waived all claims against the bank in respect of any transactions captured by the statement.

Four decisions highlighting this bear brief mention. In *Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association*,⁴⁴ the plaintiff discovered that \$94,355.32 was debited from its account by way of 15 forged cheques. It sued the bank which claimed that the plaintiff was precluded from raising the issue because of the conclusive evidence clause. The High Court found that the conclusive evidence clause was valid on its face as it passed the rigorous test of having to be "clear and unambiguous".⁴⁵

In *Pertamina Energy Trading Limited v Credit Suisse*,⁴⁶ the Court of Appeal considered the effectiveness of conclusive evidence clauses as a defence for the first time. The plaintiff opened an account with the defendant bank depositing a total of US\$9 million. The plaintiff's vice-president of finance later opened a credit facility and fraudulently drew-down about US\$8 million therefrom. Based on a set-off clause, the bank subsequently deducted the US\$8 million from the deposit account. The plaintiff sued to recover the difference. The plaintiff lost at first instance and on appeal. The Court of Appeal took the view that a conclusive evidence clause could be an effective defence, subject to it being clear and unambiguous, and that it should pass muster under the UCTA and not fall foul of public policy.

Following *Pertamina*, the High Court was presented the opportunity to consider conclusive evidence clauses between a bank and a non-commercial counterparty. In *Jiang Ou v EFG Bank AG*,⁴⁷ the plaintiff opened an account with the bank depositing close to US\$5 million. Without instructions, her relationship manager executed 160 high-volume and high-risk leveraged foreign exchange and securities transactions, incurring a loss of US\$2,338,278.68. The bank's argued that the conclusive evidence clause prevented her from challenging the correctness of the transactions. The conclusive evidence clause would have been an effective defence but for the fact that the trades involved fraudulent act's of the bank's employee, which could not be protected against.

In *Nitine Jantilal v BNP Paribas Wealth Management*,⁴⁸ the customer was held to have understood and agreed to the bank's terms and conditions that statements rendered are deemed conclusive if not challenged within 14 day, and his claim to challenge alleged irregular transactions failed.

⁴⁴ [1992] 2 SLR(R) 195.

⁴⁵ [15]-[20].

⁴⁶ [2006] 4 SLR(R) 273

⁴⁷ [2011] 4 SLR 246.

⁴⁸ [2012] SGHC 28. Despite involving an individual, the High Court held the bank's standard clauses were reasonable under the UCTA.

Cosmat, Pertamina, Jiang Ou and *Nitine* demonstrate the Singapore's Court willingness to uphold the contractual bargain between the parties, and in the case of *Nitine*, even where the contract involves the bank and an individual investor.

B. *Al Memasa* and the *Deutsche* decisions

The tide shifted slightly in *Als Memasa and anor v UBS AG*.⁴⁹ A wealthy 95 year old Indonesian businessman and his 60 year old daughter opened three non-discretionary accounts with the defendant bank UBS AG (“**UBS**”) in 2006. Under these accounts, various transactions were carried out including a purchase of certain Russian bonds for US\$3.8 million. Due to a fall in the price of the Russian bonds, their accounts entered into a margin call situation and they were required to top up US\$2 million into their accounts. As the price of Russian bonds continued to fall, UBS liquidated a large portion of the plaintiffs' accounts. The plaintiffs subsequently sued the bank. As with *Orient Centre*, this decision involved an appeal from a decision to strike out the plaintiffs' claims. One of the grounds for striking out was that the plaintiffs were precluded from relying on any alleged misrepresentation given the non-reliance clauses in the contract.

The Court of Appeal reversed the decision. Its main ground was that there were triable issues as to whether the plaintiffs had authorised the Russian bonds transactions or affirmed it. What is relevant for present purposes is that the Court of Appeal also took issue with the holding that the plaintiffs were barred from bringing the claim in misrepresentation on the basis of the non-reliance clauses. The Court of Appeal held that there were two issues which needed to be tried. First, was whether non-reliance clauses were subject to the Unfair Contract Terms regime, and second, was whether the first plaintiff's illiteracy affected the transaction.

Notably, the former Chief Justice expressed his concern: “...in the light of the many allegations made against many financial institutions for “mis-selling” complex financial products to linguistically and financially illiterate and unwary customers during the financial crisis in 2008, it may be desirable for the Courts to reconsider whether financial institutions should be accorded full immunity for such “misconduct” by relying on non-reliance clauses which unsophisticated customers might have been induced or persuaded to sign without truly understanding their potential legal effect on any form of misconduct or negligence on the part of the relevant officers in relation to the investment recommended by them.”⁵⁰

The above passage had a clear impact in the decision of *Deutsche Bank AG v Chang Tse Wen* (“**Deutsche HC**”).⁵¹ In *Deutsche HC*, the bank sued its customer for a margin shortfall of close to US\$1.8 million. The defendant counterclaim for US\$49 million on grounds that the bank had misrepresented the risks involved in the Discount Share Purchase Program (DSPP) to him thereby causing him loss. The bank

⁴⁹ [2012] 4 SLR 992

⁵⁰ [29] of *Als Memasa*.

⁵¹ [2013] 1 SLR 1310.

raised contractual estoppel as a defence to the counterclaim, which gave the High Court an opportunity to deal with the issue. The High Court appeared to adopt both estoppel by representation *and* contractual estoppel. As regards estoppel by representation, it cited *Lowe*⁵² and *Grimstead*⁵³ that the bank had to fulfil the *Lowe* Requirements to succeed.⁵⁴ The Judge found on the evidence that there was no evidence to show that the customer was even aware of the non-reliance clauses.

More interestingly, the Judge said: “Given the Court of Appeal’s holding in *Als Memasa*, I would be extremely hesitant to apply the doctrine of contractual estoppel developed in the line of cases following *Peekay*.” The Judge noted that *Peekay*, *Springwell* and *Orient Centre* all involved sophisticated investors with equal bargaining power. He distinguished the case before him on grounds that the defendant was “financially inexperienced”. He went further to say that even if contractual estoppel were to be applied it was a precondition to its operation that there had to be a “clear intention” for it to operate.⁵⁵ The High Court judge eventually dismissed *Deutsche Bank’s* claim and allowed *Dr Chang’s* counterclaim in negligence.

Both parties appealed. The bank appealed against the finding that it owed a duty to *Dr Chang* and that it had breached this duty, while *Dr Chang* appealed against the finding that there was no operative misrepresentation. On appeal, the Court of Appeal reversed the trial judge’s decision, on the main ground that no duty of care existed between the bank and *Dr Chang*. It also dismissed *Dr Chang’s* appeal that there was an operative misrepresentation. As the appeal did not focus on the issue of contractual estoppel, the Court of Appeal merely stated that “we doubt the correctness of the Judge’s exposition of this area of the law but as the issues raised are important, they are better addressed on a future occasion when it is necessary to do so”.⁵⁶

IV. Evaluating Contractual Estoppel

A. Weak Precedential Basis

The strongest argument against contractual estoppel is its lack of precedential basis. This is best analysed by *McMeel* in *Documentary Fundamentalism*,⁵⁷ and could be summarised as follows. First, there is a clear tension between *Lowe* on the one hand, and *Peekay* and *Springwell* on the other. Despite their similarities, *Lowe* stands for the proposition that if a statement in a contract was to give rise to an evidential estoppel (as an estoppel by representation), it had to fulfil the *Lowe* Requirements, which includes reliance. Further, as per *Diplock J*, it is not possible for parties to agree to turn an untrue statement of the facts into a contractual obligation. There is no question that *Lowe* accords with estoppel

⁵² [1960] 1 WLR 196.

⁵³ [1999] EWCA Civ 3029

⁵⁴ [130].

⁵⁵ [138] of *Deutsche HC*.

⁵⁶ [79] of *Deutsche CA*.

⁵⁷ *Documentary Fundamentalism* at 198-201.

orthodoxy. Therefore, if *Peekay* and *Springwell* were to depart from *Lowe*, a justification needs to be proffered.

According to *Peekay* and *Springwell*, this justification is based on principle, policy and two purported authorities. As a matter of principle, Moore-Bick LJ, Gloster J and Aikens LJ all agreed that it was possible for commercial men to dictate the terms of the bargain, including the factual basis on which parties entered into the agreement. As a matter of policy, this leads to certainty in commercial contracts and reduces litigation which may arise from one party “threshing the undergrowth” to find an inaccurate statement made pre-contract. While these appear to be sound reasons, it is the lack of precedential basis which makes the doctrine problematic.

In *Peekay*, Moore-Bick LJ relied on *Colchester Borough Council v Smith*⁵⁸ for the proposition that an estoppel could arise by virtue of a contract. However, as explained by McMeel, *Colchester* involved a bona fide compromise agreement. Prior to the compromise agreement, parties disputed whether the defendant had acquired a right to land by way of adverse possession. By the compromise, the defendant acknowledged the local authorities title. The first instance Judge found that he was estopped from asserting any claim to the land. But a passage from Dillon LJ in the appeal provides a more accurate context: “In my judgement this was bona fide compromise of a dispute and [the defendant], who had the advice of his solicitors and signed the agreement through them, is estopped by the terms of the agreement he made from going behind it and litigating the antecedent dispute. ... *whether it be labelled estoppel by agreement or estoppel by convention is a matter of indifference*”.⁵⁹ Thus, while at a high level of abstraction *Colchester* could support the contractual estoppel doctrine, it was specific to compromise agreements where public policy considerations such as finality of disputes apply, and was not expressly decided on estoppel grounds. McMeel argues that what *Peekay* and *Springwell* did was “*an illegitimate extension of the principle [in Colchester]*”.

The Court of Appeal in *Springwell* relied on *Burrough's Adding Machines Ltd v Aspinall*.⁶⁰ In this case, a salesman had sought to challenge the commissions due to him under a statement of account. The statement however, included a conclusive evidence type clause saying any challenge must be made within 30 days. The Court of Appeal simply held that the salesperson was too late. The Court, did not, however, lay down any new proposition as regards estoppel.

Based on the above reading of *Colchester* and *Burrough's Adding Machines*, it is difficult to find precedential justification for the doctrine of contractual estoppel.

⁵⁸ [1991] Ch 448, affirmed in [1992] Ch 421.

⁵⁹ [1992] Ch 421 at 435 per Dillon LJ.

⁶⁰ (1925) 41 TLR 276.

B. A False Estoppel?

A second major criticism of contractual estoppel is that it is not a true estoppel, in that it does not bear the hallmark characteristics the other estoppels do.⁶¹ Given this, it is questionable if it should be categorised as an estoppel. Going beyond nomenclature, it is a further question if contractual estoppel should have the impact it does. Indeed, a leading estoppel text has opined that contractual estoppel is anomalous to the estoppel family and should be analysed purely as a breach of contract.⁶²

Estoppels are powerful weapons. Less controversially, estoppels can be used as a defence to a claim, or to preclude the raising of certain facts and evidence. Estoppels are also extremely flexible. Certain cases have acknowledged that while they cannot give rise to a cause of action, they may form the factual basis for a cause of action. At the other end of the spectrum, estoppel can in limited circumstance give rise to rights. A good example of its potency is in the realm of proprietary estoppel, where a party could acquire an interest in land based on the representation of another, if there has been detrimental reliance which makes it unconscionable for the representor to resile.⁶³ It should be noted that the general maxim that estoppels (with the exception of proprietary estoppel) may be used as a 'shield' and not a 'sword' has been under gradual attack. At the frontlines is *Waltons Stores (Interstate) Limited v Maher*,⁶⁴ the leading commonwealth decision where promissory estoppel was allowed as a cause of action. Both the English⁶⁵ and Singapore Courts⁶⁶ have acknowledged the gradual shift in the shield-sword debate. Even though the point is not settled, the foregoing outlines the subtle potency and flexibility of the estoppel doctrine.

For one to assert that contractual estoppel fails for want of similarity, one first needs to identify a common thread between the various estoppel doctrines. But this is not difficult. As noted by Wilken & Ghaly, it has been recognised that estoppels may be underpinned by 'a principle of honesty',⁶⁷ 'a principle of common sense'⁶⁸ and 'a principle of common fairness'.⁶⁹ The motivation for a unified theory of estoppels is not hard to discern: an untechnical approach to estoppels provides "perhaps the most

⁶¹ *Wilken & Ghaly* categorize them as follows: (1) Estoppel by representation. This includes estoppel by conduct, in which a representation can be made by conduct; (2) Estoppel by Convention; (3) Proprietary Estoppel; (4) Estoppel by Deed. Interestingly, the authors classify contractual estoppel as an anomaly. See *Wilken & Ghaly*, Chapter 13.

⁶² See *Wilken & Ghaly* pp312-316. The authors suggest that if the doctrine cannot be justified on estoppel grounds, any right arising from non-reliance clauses would merely be contractual. At [13.24] they say, "since parties have agreed X to be the case, then the party which denies that X is in fact the case is in breach of contract. The Courts will not permit a party to benefit from its own wrong – including its own breach of contract."

⁶³ *Wilken & Ghaly* identifies the elements as (a) assurance; (b) reliance; (c) detriment. See [11.21]-[11.81].

⁶⁴ (1988) 164 CLR 387. This is the leading Australian decision in which promissory estoppel was allowed to be utilised as a cause of action, i.e., as a 'sword'.

⁶⁵ *Baird Textile Holdings Ltd v Marks & Spencer plc* [2002] 1 All ER (Comm) 737. See in particular the dicta of Morritt VC at 751-752; Although, the Court of Appeal recognised that as matters stood, proprietary estoppel was the only estoppel which could be used as a 'sword'.

⁶⁶ *Tee Soon Kay* [2007] 3 SLR(R) 133.

⁶⁷ *Re Exchange Securities & Commodities Ltd* [1988] Ch 46 at 54 per Harman J.

⁶⁸ *London Joint Stock Bank Ltd v Macmillan* [1918] AC 777 at 818 per Lord Haldane.

⁶⁹ *Lyle-Meller v A Lewis & Co* [1956] 1 WLR 29 (CA) at 44 per Morris LJ.

powerful and flexible instrument to be found in any system of court jurisprudence".⁷⁰ There has in fact been a discussion on whether there exists a unifying theory concerning estoppels.⁷¹ Lord Denning MR identified the underlying thread when he remarked:⁷² "The doctrine of estoppel is one of the most flexible and useful in the armoury of the law ... It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel ... All these can now be seen to merge into one general principle shorn of limitations ... neither party will be allowed to go back on an assumption when it would be *unfair* or *unjust* to allow him to do so" (emphasis added).⁷³ More recently, Neuberger LJ (as he then was) suggested in *Steria Ltd v Ronald Hutchison*⁷⁴ that fundamentally, the common factor to all estoppels was unconscionability.

It is difficult to disagree that the basic commonality in the established categories of estoppels is the form of unconscionability or unfairness, as a result of reliance leading to a detriment.⁷⁵ At this broad level, most of the estoppels align. Take for instance, the well-established categories of promissory estoppel and proprietary estoppel. For the former, there needs to be a sufficiently clear representation, reliance by the representee who then suffers detriment.⁷⁶ There must also be a further overarching requirement that it must have been inequitable in all the circumstances for the promisor to resile.⁷⁷ Estoppel by convention has this requirement as well. It must be unconscionable for one party to resile from a commonly assumed state of affairs which has been relied upon by the other, to his detriment.⁷⁸ In this regard, the English and Singapore authorities speak with one voice.⁷⁹ Thus, in *Lim Suat Hwa v Singapore Health Partners Pte*

⁷⁰ *Wilken & Ghaly* at [7.04] quoting from *Canada and Dominion Sugar Company Limited v Canadian National (West Indies) Steamships Limited* [1974] AC 46 PC Canaga at 56, quoting from Sir Frederick Pollock.

⁷¹ *Wilken & Ghaly* at [7.10]-[7.32] provides a summary of the debate. Lord Denning first suggested the idea of a unified theory in *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84 at 122a-d. This idea was again mentioned in two other Denning decisions: *Lyle-Meller v A Lewis & Co* [1956] 1 WLR 29 (CA) at 35 and *Moorgate Mercantile Co Ltd v Twitchings* [1976] 1 QB 225 (CA) at 241. For a more modern English pronouncement on this issue, see Lord Neuberger, *The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity* [2009] CLJ 537, *Scottish Equitable Plc v Derby* [2001] 3 All ER 818 at para 48 per Robert Walker LJ, and *National Westminster Bank Plc v Somer International Ltd* [2002] 1 All ER 198 at paras 35, 48 per Potter LJ; 59-61 per Clarke LJ. The idea of a unified theory in Australia was first alluded to in *Grundt v Great Boulder Pty Gold Mines* (1938) 59 CLR 641 at 674-5.

⁷² *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 at 122.

⁷³ Endorsed in the Singapore High Court decision of *Pannell Pte Ltd v Indian Bank* [2001] 3 SLR(R) 462.

⁷⁴ [2007] ICR 445; [2006] EWCA Civ 1551 at paras 91-93 and 129.

⁷⁵ It bears pointing out that there is debate as to the scope of the detriment requirement. As to this, see *Orchard Central Pte Ltd v Cupid Jewels Pte Ltd (Forever Jewels Pte Ltd, non-party)* [2013] 2 SLR 667 at [47]-[49] where a discussion on whether detriment is required, and if so, whether a narrow or wide sense of the requirement should be applied.

⁷⁶ *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen. ed.) Academy Publishing, 2012) at para 04.073-04.085.

⁷⁷ *Orchard Central Pte Ltd v Cupid Jewels Pte Ltd* [2013] 2 SLR 667 at [44].

⁷⁸ *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 at [30]-[31];

⁷⁹ For the Singapore position on estoppel by convention, see generally: *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 at [28]; *Chok Boon Hock v Great Eastern Life Assurance Co Ltd* [1998] 2 SLR(R) 878 at [20]; *Pannell Pte Ltd and anor v Indian Bank* [2001] 3 SLR(R) 462 at [61]-[62]; *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR(R) 379 at [43]-[44]

Ltd.,⁸⁰ the High Court endorsed and applied this passage in *Credit Suisse v Borough Council of Allerdale*.⁸¹ "The basis for that unconscionability is that the party said to be estopped would otherwise be allowed to adopt a position which was inconsistent with that which he had previously led the other party to believe was common ground. There would therefore be both inconsistency of conduct and potential prejudice from that inconsistency which is the essence of estoppel by whatever name it is known." On these grounds, it is not difficult to see why contractual estoppel has been labelled an anomaly.

C. Exclusion of Statutory Controls

A third aspect of the contractual estoppel doctrine that has caused alarm is the apparent non-applicability of the Unfair Contract Terms regime to such clauses. For purposes of this analysis, it should be noted that the relevant sections Singapore's Misrepresentation Act (Cap. 390) ("**Misrepresentation Act**") and Unfair Contract Terms Act (Cap. 396) ("**UCTA**") mirror that of the UK Misrepresentation Act 1967 ("**UK Misrepresentation Act**") and Unfair Contract Terms Act 1977 ("**UK UCTA**").

Under Section 3 of the Misrepresentation Act, "[i]f a contract contains a term which would 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 ... that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the [UCTA]". Section 11(1) of the UCTA essentially provides that a term is only "reasonable" if it is fair and reasonable to have been included having regard to the circumstances known or ought reasonably to be known by the parties when the contract was made. In determining this, the Court may have regard to the Second Schedule of the UCTA which sets out guidelines such as the strength of the bargaining positions and whether the customer knew of the term in question.

There has been an extant debate on what types of clauses escape the purview of the Unfair Contract Terms regime. For instance, questions have been raised about whether duty-defining clauses, in relation to possible tortious acts, may exclude liability and yet not fall under the Court's supervision. In one sense, the characterisation of non-reliance clauses as obligation-defining or basis-defining terms (hereinafter "**Basis Clauses**") is not completely new in this area.

In *Springwell (HC)*, counsel for the bank submitted that there was a distinction between clauses which exclude liability and those which define the terms on which parties are conducting their businesses⁸² - as Gloster J put it, the latter being "clauses which prevent an obligation from arising in the first place".⁸³ Gloster J found support in dicta in *Tudor Grange Holdings v Citibank*⁸⁴ where the judge stated that the UK UCTA was "normally regarded as being aimed as exemption clauses in the strict sense ... clauses

⁸⁰ [2012] 2 SLR 805 at [51].

⁸¹ [1995] 1 Lloyd's Rep 315.

⁸² *Springwell* HC at [602].

⁸³ *Ibid.*

⁸⁴ [1992] Ch 53 at paragraphs 65-66.

which aim to cut down *prospective liability* in the performance of the contract” (emphasis added).⁸⁵ Gloster J was also persuaded that if Basis Clauses are subject to the UCTA, “every contract [containing Basis Clauses] would have to satisfy the requirement of reasonableness”. Although she did not articulate the point fully, Gloster J might have had in mind the fear that this would lead to more litigation. An example of the potentially far-reaching attack on commercial bargain was seen in *IFE v Goldman Sachs*⁸⁶ where many terms were characterised by the claimants as liability excluding terms, particular where such terms dealt with the scope of any duty owed by the bank. Citing Chadwick LJ in *Grimstead*, Gloster J explained that the reluctance of the Courts to interfere with commercial contracts “reflects the strong business need for commercial certainty”. On the facts in *Springwell HC*, Gloster J held that some of the impugned clauses engaged the UCTA, but that none of them were unreasonable. The Court of Appeal agreed with her conclusion.⁸⁷

Although both *Springwell (HC)* and *Springwell (CA)* dealt with this issue, it is the decision of Christopher Clarke J in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc*⁸⁸ which analyses the position in greater depth.⁸⁹ In *Raiffeisen*, the defendant RBS agreed to lend a sum of £138 million to Enron Corporation. The plaintiff, Raiffeisen, participated in the syndication of the loan, and lent £10 million. Under the loan, RBS would provide £4.9 million in equity, and £138.5 million in a separate credit facility. To guarantee the credit facility, there was a swap agreement in place. However, this did not apply to the equity portion. Enron subsequently entered into Chapter 11 bankruptcy in the US and the sums provided by Raiffeisen were unrecoverable. Raiffeisen sued RBS for misrepresentation over the risk involved in the transaction but failed.

In his decision, Clarke J went on to analyse whether the clauses relied upon by RBS for its contractual estoppel defence could be struck down under the UK UCTA. As to whether a clause would engage Section 3 of the UCTA, Clarke J reviewed two differing lines of cases, the first being the line of cases cited and adopted by Gloster J in *Springwell HC*, which created a carve-out for Basis Clauses. In the second group were cases the Courts held that whether a defensive clause (for instance, an entire agreement clause or non-reliance clause) engaged the UK UCTA depended on the *substance* of the clause and not the form.⁹⁰ Put another way, the Court would be more concerned with the effect of the clause on liability, than the actual wording. The impetus for this was explained by Bridge LJ in *Creamdean Properties*:⁹¹ “I should not have thought that the courts would have been ready to allow such ingenuity in

⁸⁵ There is some support for this view, viz, that the UCTA was enacted to deal with exclusion of liability in the performance of a contract, in the Second Report of the Law Commission and the Scottish Law Commission on Exemption Clauses (Law Com. No 69, Scot Law Com. No 39) which came before the enactment of the UK UCTA. This was cited in *Watford Electronics Ltd v Sanderson CFL Limited* [2001] EWCA Civ 317 at [16]-[17] Per Chadwick LJ.

⁸⁶ [2006] EWHC 2887 (Comm)

⁸⁷ *Springwell CA* at [179]-[184]

⁸⁸ [2010] EWHC 1392 (Comm) (hereinafter “*Raiffeisen*”).

⁸⁹ For a critique of Clarke J’s decision, see KY Low, *Misrepresentation and Contractual Estoppel, The Raiffeisen clarifications* (2011) 23 SAclJ 390.

⁹⁰ *Cremdean Properties Ltd v Nash* (1977) 241 EG 837 (and its appeal in [1977] 2 EGLR 80 (1977) 244 EG 547); *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333.

⁹¹ *Creamdean Properties Ltd v Nash* [1977] 2 EGLR 80; (1977) 244 EG 547.

the form of language to defeat the plain purpose at which section 3 is aimed.” Sir Raymond Jack QC in *Government of Zanzibar* unpacked this further: “A term which negates a reliance which in fact existed is a term which excludes a liability which the representor would otherwise be subject to by reason of the misrepresentation. If that were wrong, it would mean that section 3 could always be defeated by including an appropriate non-reliance clause in the contract, however reasonable that might be.”

In *Raiffeisen*, Clarke J eventually took a more nuanced approach, although ultimately agreeing with Gloster J that certain clauses could be characterised as Basis Clauses. The Judge held in analysing the point, it would obviously be a question of how the express terms of the contract are construed and the facts of each case.⁹² In acknowledging the importance of both commercial certainty and the role of the Unfair Contract Terms regime, Clarke J took the view that “the key question ... is whether the clause attempts to *rewrite history or parts company with reality*”.⁹³ Clarke J explained this with two examples. He was of the view that sophisticated parties were involved, they should be allowed to agree among themselves into which category any given statement may fall. In contrast, to represent a fact to the man on the street, then state in your contract that no representation was made, was an attempt at excluding or restrict liability. Intuitively, one can appreciate how non-reliance clauses could pass muster as not being liability-excluding but in fact duty-defining. This is because where parties are of equal bargaining power and able to take commercial and legal advice, they will know the contract is likely to include a non-reliance clause. And they will know the impact of the non-reliance clause. Consequently, in the period of negotiation and prior to executing the contract, they are likely to know that all statements made prior to entry of the contract have little legal significance and are unlikely to give rise to a vitiating factor. In in context, it is possible for a non-reliance clauses to be truly duty-defining.

But one could see the fine nuances which may lead to an inconsistent and unpredictable application. The difficulty latent in the question of whether and how a term is a Basis Clause is exemplified too in *Foodco UK LLP v Henry Boot Development Ltd*⁹⁴ where Lewison J held that a clause saying there had been no representation would not give rise to a contractual estoppel but a clause saying what representations were relied on (or not) could suffice.

Commentators have questioned the wisdom of allowing non-reliance clauses to bypass the statutory controls⁹⁵ and this aspect of non-reliance clauses adds to the problems which beset the doctrine.

⁹² See [302] of *Raiffeisen*. Citing Chadwick LJ in *Watford Electronics*.

⁹³ [314] of *Raiffeisen*. Low, *Misrepresentation and Contractual Estoppel* at [38] as described this test of reality as “a neat solution to the challenge of achieving fairness in divergent scenarios and greatly assists in distinguishing veiled attempts at excluding misrepresentation liability from genuine “basis of contract” situations.”

⁹⁴ [2010] EWHC 358 (Ch).

⁹⁵ *Documentary Fundamentalism*, p202-205; A Trukhtanov, *Misrepresentation: Acknowledgement of Non-Reliance as a Defence* (2009) 125 LQR 648 at p666-670.

V. Whither Contractual Estoppel in Singapore?

Despite the above criticisms of the contractual estoppel doctrine, it is submitted that there are good reasons why. This section seeks to reiterate the *raison d'être* reasons in the recent English cases, and thereafter, attempt to respond to the main planks of criticism against contractual estoppel.

A. The Underpinning Motivations

It is useful to bear in mind that the idea that a clause could, in certain circumstances, create an estoppel against collateral attacks, was raised in an estoppel by representation case. In *Grimstead*, there was no question of departing from precedent. Chadwick LJ was of the opinion that non-reliance clauses would breed certainty. Put another way, parties derived the benefit of knowing that the contract would not be subsequently attack, on the basis of pre-contractual statements which are not part of the contract. Commercially, the Lord Justice considered that having a non-reliance clause generally meant that more weight would be put on the warranties in the contract. What was warranted bore on the risk latent in that contract. The price of the contract also turned on the risk involved. Therefore, in the larger scheme of things, non-reliance clauses enable parties to better ascertain the risk and price they wish to pay. Gloster J in *Springwell HC* and Aikens LJ in *Springwell CA* were likewise convinced that contractual certainly was one of the basis for the Court of Appeal's decision in *Peekay*.⁹⁶

The other overarching impetus for the advent of the doctrine is undoubtedly freedom of contract. The idea was judicially noted in *Alman* in response to a deficient entire agreement clause – the suggestion that what could work was a non-reliance clause was certainly taken up in practice. But more importantly, both Chadwick LJ in *Grimstead* and Moore-Bick LJ in *Peekay* both in freedom of contract terms: parties should be allowed to contract as they wish.

It is crucial to note that Aikens LJ in *Springwell (CA)* did caveat the freedom of contract principle, in that, non-reliance clauses would obviously have to be subject to public policy and legislative controls. Therefore, the Courts are not celebrating freedom of contract *in extremis*, but recognising that so long as the relevant controls are in place, it is perfectly reasonable and commercially sensible to reach consensus on a basis for the parties' agreement.

B. A Doctrinal Basis - Analogy to Estoppel by Deed?

To recap, contractual estoppel has been labelled an anomaly in the family of estoppels. The most obvious reason for this is that it does not bear the basic hallmark of detrimental reliance, and the common thread of 'unfairness' or 'unconscionability'. Although contractual estoppel does not mirror the more common categories of estoppels outlined above, there is one estoppel which the doctrine closely mirrors – that is, estoppel by deed.

⁹⁶ [558] of *Springwell HC* and [144] *Springwell CA*.

Under the doctrine of estoppel by deed, parties are bound by the ‘solemn and unambiguous statements’ in a deed they have executed.⁹⁷ The doctrine prevents parties from contradicting a statement made therein. The legal outcome between the parties will then be determined on the basis of the state of facts established by the estoppel.⁹⁸ Where two parties to a valid deed have included a statement of facts in the deed, which forms the basis of the agreement, neither party is allowed to resile from it.⁹⁹ The estoppel by deed doctrine is not altogether antiquated – having been applied in the recent decision of *First National Bank v Thompson*.¹⁰⁰ There are some specific rules for estoppel by deed to operate. First, only a clear and unambiguous statement suffices to trigger the doctrine.¹⁰¹ An inferred representation from ambiguous words will not suffice.¹⁰² The underlying rationale was originally that deeds were taken so seriously that they could not admit contradiction.¹⁰³

What is unique about estoppel by deed is that the usual requirement of detrimental reliance is not required. In *PW & Co v Milton Gate Investments Ltd*, Neuberger J (as he then was) thought it was well-established that the doctrine ‘requires no subsequent conduct or any other act of reliance by the party invoking the estoppel’.¹⁰⁴ The rationale appears to be the mere fact that parties have mutually agreed to the statement as a basis for their transactions. This anomaly in estoppel by deed has been explained in several ways. First, a party may suffer a detriment by the other party attempt to resile for the statement in the deed.¹⁰⁵ Second, there is authority to suggest that the mere entering into the deed, and accepting the legal consequences of the same, may be sufficient detriment.¹⁰⁶ Therefore even though concepts of inequity or unconscionability “seemingly play no part in the law of estoppel by deed”, there still remains the element of detrimental reliance.

A close analysis would show that estoppel by deed is not very different from contractual estoppel. The obvious distinction would be the difference in the type of documents. That aside, the lack of an ‘unconscionability’ and ‘reliance’¹⁰⁷ requirements are highly similar. Further, the underlying rationale is simply that parties should be held to the express agreement they execute. Indeed, Wilken & Ghaly suggest that contractual estoppel is expansive enough to absorb the doctrine of estoppel by Deed¹⁰⁸ – which

⁹⁷ *Wilken & Ghaly* at [12.01] citing *First National Bank Plc v Thompson* [1996] 1 All ER 144 CA at 149]; *Greer v Kettle* [1938] AC 156 at 171.

⁹⁸ Similar to estoppel by representation.

⁹⁹ *Wilken & Ghaly* at [12.14].

¹⁰⁰ [1996] 1 All ER 144 CA.

¹⁰¹ *Low v Boveries* [1891] 3 Ch 82 CA per Kay LJ at 113. See also *Re Distributors and Warehousing Ltd* [1986] BCLC 129 per Walton J at 139e.

¹⁰² *Re Distributors and Warehousing Ltd* [1986] BCLC 129 per Walton J at 139f.

¹⁰³ [12/02] *Wilken*.

¹⁰⁴ [2004] Ch 142; [2004] 2 WLR 443 at paras 149 and 155.

¹⁰⁵ *Wilken & Ghaly* at [12.44].

¹⁰⁶ *Wilken & Ghaly* at [12.44] citing *Keith v R Gancia and Co Ltd* [1904] Ch 774 CA.

¹⁰⁷ *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142; [2004] 2 WLR 443 per Neuberger J at para 149 and 155.

¹⁰⁸ *Wilken & Ghaly* at [12.03].

assumes their similarity. If the only distinction therefore is the formality of a deed (as compared to a contract), there may be grounds for arguing that the distinction is artificial, and the same basis for estoppel by deed can be grounds for contractual estoppel, especially given the diluted importance of consideration.¹⁰⁹ McMeel himself suggests that the closest analogy, which was not properly analysed, is estoppel by deed.¹¹⁰

Some, albeit slender, support for this view may be found in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd*.¹¹¹ *OMG* concerned a suit for trademark infringement. In attempting to establish goodwill, the plaintiff argued that the recitals in the contract, which states that “the Licensor [the Plaintiff] has developed significant goodwill in the Asia market” was sufficient to found an estoppel which gave rise to an enforceable goodwill. The Court ultimately found against the plaintiff on grounds that estoppel could not be used as a sword, but it accepted in principle, that recitals to a contract could give rise to an estoppel. Traditionally, recitals in contracts are not regarded as terms which give rise to legal obligations.¹¹² However, in deeds, recitals were sufficient to give rise to binding obligations. Citing *Spencer Bower*, Ang J wrote: “The necessity of finding that a recital was intended to be an agreement to admit its truth by the party to be estopped reveals the true foundation of the modern doctrine of estoppel by deed *inter partes*. For, an intention to be bound by agreement is a contractual intention, and the requirement of consideration is obviated by execution of the deed: the parties are therefore, estopped by contract”. The learned Judge went one step further to say that recitals, in an agreement executed by deed or not, would give rise to an estoppel. Speaking in the language of contractual estoppel, Ang J stated: “I find that it is more conceptually consistent for a recital in an agreement not by deed to be similarly capable of giving rise to an estoppel by convention, where the proposition in the recital was contemplated by the parties and intended to be an agreement between them.”

It is not difficult to understand the sentiment behind it. Parties to a deed are estopped from contradicting facts stated in a recital. The fundamental motivation is the formality and importance to the agreement enshrined in a deed. Should not the same apply to commercial contracts? Deeds traditional were used for solemn matter such as disposition and transfer of property. But surely the same considerations should apply to investment contracts worth millions of dollars?

That estoppel by contract can be justified on the same grounds which give rise to estoppel by deed, and vice versa, is also alluded to in the recent Privy Council decision of *Prime Sight Ltd v Lavarello* (“*Lavarello*”).¹¹³ In *Lavarello*, one Mr Marrache had assigned an interest in a property to a company

¹⁰⁹ The requirement of consideration appears to be the difference between contracts and deeds. However, the doctrine of consideration has itself been “diluted enough to enable the courts to declare it satisfied in most situations where commercial intentions of contracting parties would otherwise be defeated by a technicality”: A Trukhtanov, *Receipt Clauses: From Estoppel by Deed to Contractual Estoppel* (2014) 130 LQR 3 at 7. See also ZX Koo, *Envisioning the Judicial Abolition of the Doctrine of Consideration in Singapore* (2011) 23 SAclJ 463.

¹¹⁰ *Documentary Fundamentalism* at 206. Although McMeel notes that in equity, no estoppel can be raised on an untrue statement.

¹¹¹ [2012] 4 SLR 201

¹¹² [68] of *OMG*.

¹¹³ [2013] UKPC 22. See also A Trukhtanov, *Receipt Clauses: From Estoppel by Deed to Contractual Estoppel* (2014) 130 LQR 3.

beneficially owned by his wife. The Deed in question read: “in consideration of the sum of £499,950 now paid by the Assignee to the Assignor (receipt and payment of which the Assignor hereby acknowledges)”. It was common ground the sum was not paid. When Mr Marrache became bankrupt his Official Assignee sued the company which then raised an estoppel by way of the receipt clause.

Lord Toulson, giving the decision of the Privy Council, relied on a string of estoppel by deed cases *as well as* authorities involving estoppel by convention and estoppel by representation. His Lordship’s enunciation of the principles is illumination and the relevant parts are set out as follows:¹¹⁴

“45. The law is correctly analysed by Spencer Bower¹¹⁵ at page 197: “... an estoppel by convention need not involve any misleading of a representee by a representor, nor is it essential that the representee shall be shown to have believed in the assumed state of facts or law. The full facts may be known to both parties; but if, even knowing those facts to the full, they are shown to have assumed a different state of facts or law as between themselves for the purposes of a particular transaction, then a convention will be established. The claim of the party raising the estoppel is, not that he believed the assumed version of facts or law was true, but that he believed (and agreed) that it should be treated as true.” This passage refers to estoppel by convention and not expressly to estoppel by deed. *However, there is no logical reason to treat declaratory statements in a deed which are intended to be contractually binding as less effective than any other express or implied contractual convention.* The law as stated by Spencer Bower not only carries the considerable authority of Dixon J, who was a master of the common law, and is supported by earlier authorities to which reference has been made, *but more fundamentally it accords with the principle of party autonomy which underlies the common law of contract.*

47. Parties are ordinarily free to contract on whatever terms they choose and the court’s role is to enforce them. There are exceptions and qualifications, but these too are part of the general law of contract. In *Greer v Kettle* Lord Maugham referred to fraud, illegality, mistake and misrepresentation. Similarly, just as a court may refuse in some circumstances to enforce a contract on grounds of public policy (a topic closely related to illegality), the same will apply to a contractual convention... In short, contractual estoppels are subject to the same limits as other contractual provisions, but there is nothing inherently contrary to public policy in parties agreeing to contract on the basis that certain facts are to be treated as established for the purposes of their transaction, although they know the facts to be otherwise.” (emphasis added)

On the facts, the Privy Council held that an estoppel arose.

The underpinnings in *Lavarello* are eerily similar to *Peekay* and *Springwell*. Save for issues of illegality, public policy or legislative controls, it is the contractual convention which gives rise to the estoppel. As one commentator put it, “*Lavarello* marks a change in the basis of estoppel raised by a receipt clause at law from formality to actual contractual intention, which leaves equity with

¹¹⁴ [45]-[48] of *Lavarello*.

¹¹⁵ *Spencer Bower on Estoppel by Representation*, 4th ed (2004), at 197.

no jurisdiction”, and this in one sense, answers the question as to why an estoppel can be raised without the usual unconscionability requirement.

On the above grounds, even though contractual estoppel may have sprung from the wrong seed, it is not difficult, and in fact possible to justify it by an analogy to estoppel by deed.

C. Adopting the Substance Test

Following from the above, if one can accept that contractual estoppel is justifiable on grounds of policy, principle and doctrine, what remains is the question of how and whether to control its excesses.

In this author’s view, the largest bugbear to the estoppel by contract doctrine is the fear that it overly empowers commercial Goliaths. In the colourful words of Lord Denning MR, it was “a bleak winter of [the] law of contract” when exemption clauses were ubiquitous because “...no matter how unreasonable they were, [the consumer] was bound. All this was done in the name of freedom of contract. But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man ... The big concern said, "Take it or leave it." The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man.”¹¹⁶

In this context, it is crucial to appreciate the provenance of the contractual estoppel doctrine. The major decision trumpeting the novel estoppel doctrine involved sophisticated parties with legal and commercial advice. *Peekay, Springwell* and *Raiffeisen* involved sophisticated counterparties who were able to protect themselves. Even *Grimstead* could be described as an arms-length transaction. It is little wonder then that freedom of contract triumphed in these cases because there was true freedom. In contrast, *Lowe* and *Als Memasa* involve elderly or vulnerable individuals. But it is precisely because the doctrine bluntly fails to distinguish between parties of equal bargaining power and one-sided contracts, that its implications may have a profound and unintended consequence of limited the weak from overcoming a standard clause.

As McMeel put it:¹¹⁷ “...boilerplate [non reliance clauses] ... bear no relation to reality [and] pushes the desire for commercial certainty to unnecessary and potentially unjust extremes. In many commercial and financial transactions where the parties both sign up to bespoke clauses seeking to insulate their documentary contract from easy collateral attack, such provisions may well represent the reality. However, such clauses are endemic in commercial transactions more generally, and, where they constituted the standard terms of one party ... the Courts are requires investigating the substance of claims or pre-contractual representations...”.

Given this, it is submitted that the real mischief may be dealt with by a robust application of statutory controls. There is no need to shunt contractual estoppel because the counter- balance to an excessive

¹¹⁶ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1982] 3 WLR 1036 at 1043 Per Lord Denning MR.

¹¹⁷ *Documentary Fundamentalism* at 207.

application of the doctrine may be found in a rigorous application of the Unfair Contract Terms regime¹¹⁸ – and this is where Singapore should depart from the English position, notwithstanding the nuanced and careful approach in Raiffeisen.

In the first instance, the approach should not be to ask if the clause is drafted to define the duty of the parties. The focus should instead be on the substance or effect of the clause. Support for this can be garnered from the obiter of Menon CJ in *Deutsche Bank CA*,¹¹⁹ where the Chief Justice opined that the argument that non-reliance and non-representation clauses merely define the basis of the relationship of the parties “seems to place undue emphasis on the *form* of the language used rather than on its substantive *effect*”. The Court cited *Philips Products v Hyland*¹²⁰ and *Smith v Eric Bush*¹²¹ for the proposition that in relation to the Unfair Contract Terms regime, the Courts must “look at the effect of the term...at its substance”.¹²² Further, the Court of Appeal pointed out that the UCTA simply addresses itself to clauses which “exclude or restrict” a liability, obligation or duty, and not to “exclusion clauses”. Effectively, “the legislative eye is firmly set on the substantive *effect* of a term or notice rather than on its *form* or identification” (emphasis original).

Whether a contractual provision falls foul of the UCTA must therefore be a question which falls within the province of the Court. As a matter of principle and policy, it would be problematic if a Court’s supervisory powers under the UCTA can be obviated purely by characterisation or clever drafting of a contractual provision.

Departing from the English approach is also fair when one compares the position of the corporation against the man on the street. As regards one-sided contracts, adopting the English approach however runs the risk that a David would never be able to challenge the defence raised by Goliath on the reasonableness of the clause in the circumstances of the case.¹²³ As regards contracts with parties both of substantial concern, having the Courts examine the effect and substance of the clause does not unduly disadvantage them. This is because when they arrive at the second stage of the Unfair Contract Terms analysis, such clauses, even if found to be liability-excluding, are likely to be reasonable.

¹¹⁸ This approach is also consistent with the Singapore Court’s approach in subjecting conclusive evidence clauses to the UCTA framework. For instance, In *Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR(R) 273, the Court of Appeal pointed out at [60]-[61] that in principle, conclusive evidence clauses should be upheld under the UCTA framework because they were a contractually agreed means to allocate risk. In the context where the customer is a commercial entity, it would not be onerous to place the risk of verifying its statements given the resource available. This implies it may be different for a consumer. The Court of Appeal when further to reserve the position concerning saying that its decision was limited to the context of the relationship between a bank and a corporate entity.

¹¹⁹ *Deutsche CA* [60]-[68]. See also K Loi and KF Low, *Non-Reliance Clauses and the Unfair Contract Terms Act: Welcome Clarity from Singapore* [2014] 2 JBL 156.

¹²⁰ [1987] 1 WLR 659.

¹²¹ [1990] 1 AC 831.

¹²² *Philips Products Ltd v Hyland* at [1987] 1 WLR 659 at 666 per Slade LJ.

¹²³ *Lloyd v Browning* [2013] EWCA Civ 1637 where Davis LH held at [33] that “[t]he ultimate question is not whether this clause is in general fair and reasonable clause: the ultimate question is whether ... it was a fair and reasonable clause as contained in this particular contract.”

The overall benefit of adopting the substance test is aptly explained by one leading commentator:¹²⁴ “...the “substance” approach taken by the judge in *Watford Electronics*¹²⁵ is to be preferred. This is not to deny the importance to be attached to non-reliance clauses in commercial contracts [which] allow the parties “to order their affairs on the basis that the bargain between them can be found within the document they have signed” ... [However] by rejecting the “substance” test, they will leave the court with no opportunity to police such clauses when they are used against consumers, or parties of unequal bargaining power.”

V. Conclusion

The doctrine of contractual estoppel was spawned at a time where the Courts needed to denounce unmeritorious attacks on commercial contracts between parties of equal rank. Non-reliance clauses were the opportune medium by which the Court could shut out claims of misrepresentation, especially where parties had agreed that pre-contractual statements were not relied upon to enter into the agreement.

It is true that an analysis of the precedents reveal that the precedential basis for the doctrine is weak. Nonetheless, the modern approach to estoppel by deeds may serve to be a legitimate alternative basis for the doctrine.

Perhaps the true concern with non-reliance clauses is that current case law does not consider its impact on individual consumers or parties with substantially less bargaining power. This is where freedom of contract is perverted because the vulnerable may be trampled upon in its name despite the lack of true freedom. Once one is able to see this, the solution may simply be to depart from the English position of first ascertaining whether a clause is a Basis Clause. All non-reliance clauses should fall under the purview of the UCTA, and there is further, no undue detriment to a bank or corporation because non-reliance clauses are likely to be reasonable if the counterparty is one of equal bargaining power. But there is no real detriment where commercial Goliaths are concerned. There are and can be reasonable exemption clauses.

¹²⁴ E Peel, *Reasonable Exemption Clauses* (2001) 117 LQR 545 at 549.

¹²⁵ *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317.