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Basis clauses – an update

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Basis clauses have faced the Court's scrutiny on a number of occasions this year. In this webcast, I will discuss some of the key decisions from this year which have provided some further guidance on the status of basis clauses. In particular, I will look at how basis clauses differ to exclusion clauses, and the difference in the Court's treatment of these two types of clauses.

What is a basis clause?

Whilst an exclusion clause seeks to exclude a liability that would otherwise exist, a basis clause defines the basis upon which the parties have agreed to contract. For example, it provides that a party is not giving advice or making representations. Such clauses establish a contractual estoppel against the Claimant.

Basis clauses in financial mis-selling claims – a recap

In recent years, the Courts have considered the status of basis clauses, most notably in the context of financial mis-selling claims. In most of these cases, basis clauses have been upheld by the English Courts:

In *Crestsign v Natwest and RBS,* the Court held that a claimant can be precluded from establishing that an advisory relationship existed if there is a basis clause in the relevant contract which defines the basis or the scope of the relationship between the parties as one in which advice was not being given.
[Crestsign Ltd v NatWest Bank and RBS [2014] EWHC 3043 (Ch)]

This is the case even if in reality advice or recommendations were given by the bank.
[Thornbridge Ltd v Barclays Bank Plc [2015] EWHC 3430 (QB)]

In *Property Alliance Group v RBS,* the court affirmed the "non-reliance" clauses in the contract between the parties that precluded Property Alliance Group from asserting that it had relied on any advice or recommendations by the bank.
[Property Alliance Group v RBS [2016] EWHC 3342 (Ch)]

Case law this year

Unlike exclusion clauses, basis clauses are not subject to the reasonableness test under the Unfair Contract Terms Act 1977 ("UCTA") and the Misrepresentation Act 1967. However, recent decisions this year have shown that basis clauses are not immune to scrutiny and the line between the two types of clauses can often be blurred.

1. Carney & Others v N M Rothschild & Sons Limited [2018] EWCH 958 (Comm)

In the case of *Carney & Others v Rothschild*, the Court was asked (for the first time) to consider the reasonableness of certain basis clauses in the context of a claim by borrowers against a lender under s.140(A) and (B) of the Consumer Credit Act 1974 ("CCA"). The borrowers alleged that there was an unfair relationship between the parties arising out of (inter alia) the terms of a loan agreement, which included certain basis clauses.

The Court considered whether the basis clauses in question could be regarded as exclusion clauses, in which case the reasonableness requirement under UCTA would apply.

It was held that the clauses were plainly not exclusion clauses but were basis clauses, establishing a contractual estoppel against the Claimant. The judge's reasoning was as follows:

- The natural language of the clauses did not suggest exclusion of liability, but of the absence of any advice that could give rise to any liability;
- There were other clear indications that the Defendant's relationship with the Claimant was not an advisory one;
- The clauses were not artificial nor did they re-write history; and
- The clauses were not found within a myriad of standard terms.

The judge commented that even if they were exclusion clauses, they were manifestly reasonable under UCTA.

Whilst the clauses were not subject to the reasonableness test under UCTA, they were still reviewed for fairness under s140(1) CCA. The clauses were held to be fair/reasonable and therefore did not give rise to an unfair relationship.

This decision is the first where the Court has upheld the fairness of basis clauses in the context of an unfair relationship claim, which is good news for lenders.

2. First Tower Trustees Ltd and Intertrust Trustees Ltd v CDS (Superstores International) Ltd [2018] EWCA Civ 1396

In the case of *First Tower Trustees and Intertrust v CDS*, a purported basis clause, which provided that the tenant had not entered into the lease on reliance on any representation made by the landlord, came under scrutiny in the context of a misrepresentation claim by the tenant against the landlord.

Section 3 of the Misrepresentation Act provides that a clause which excludes liability for misrepresentation is ineffective unless it satisfies the reasonableness test under UCTA.

In the case of *Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA 1221*, it was confirmed that a basis clause falls outside the scope of section 3 of the Misrepresentation Act.

So was this a basis clause or an exclusion clause? The Court of Appeal held that the clause was not in fact a basis clause but an attempt to exclude liability for misrepresentation. The reasonableness of the clause therefore fell under scrutiny under UCTA.

It was held that the clause did not satisfy the reasonableness test under UCTA. The Court's reasoning was that the important function of pre-contract enquiries would become worthless if this clause governed the landlord's liability.

3. Parmar v Barclays Bank PLC [2018] EKWCH 1027 (Ch)

In this case, the Claimants entered into two interest rate hedging products ("IRHPs") with Barclays. Before entering into the IRHPs, the Claimants had been provided with various presentations regarding a range of different IRHPs. The presentations and contractual documentation contained various disclaimers and basis clauses regarding the non-advisory nature of the relationship.

The Claimants alleged that Barclays had breached the FCA's Conduct of Business Sourcebook Rules ("COBS") in relation to the sale of the IRHPs.

The Court had to decide whether Barclays had advised the Claimants or had merely given information. One of the defences being run by the bank was that it could rely upon its basis clauses which set out that the bank was not advising the Claimants.

For various reasons, the Court was convinced that this was not an advised sale by Barclays. The judge went on to say that if it had found that Barclays had given advice to the Claimants, then Barclays would not have been able to rely on its basis clauses because that would be in breach of COBS Rule 2.1.2, which goes further than the provisions in UCTA. COBS Rule 2.1.2 prevents a party from seeking to exclude or restrict any duty.

Conclusion

Some key points to note from the recent cases on basis clauses are as follows:

- Basis clauses are not immune to scrutiny, in particular in the context of claims under the CCA, the Misrepresentation Act and COBS.
- On the face of it, a clause may appear to be a basis clause. However, the Court will scrutinise the clause and consider whether the effect of the clause is actually to exclude liability. As Toulson J said in *IFE v Goldman Sachs [2007] 1 Lloyds Rep 264, "a party cannot by a carefully chosen form of wording circumvent the statutory controls on exclusion of liability for a representation which has on proper analysis been made."*
- In considering whether a clause is a basis clause or an exclusion clause, the Court will look at several factors including, the language of the clause, its context, the relationship between the parties and the effect of the clause.
- If a clause is deemed to be an exclusion clause, the reasonableness of that clause may be challenged under UCTA.
- In the context of a claim for breach of the COBS Rules, a basis clause is likely to be held to be void.