

Standard form agreement – unfair clauses?

The recent case of *Axa Sun Life Services plc v Campbell Martin Ltd and others* is another example of the Court's willingness to strike out provisions in standard terms and conditions and the dangers of making these obligations too onerous.

The Facts

AXA Sun Life appointed Campbell Martin Ltd as its authorised representative to sell its products and services. The terms of Campbell Martin's appointment were set out in AXA's standard form agreement. AXA also obtained personal guarantees from the directors of Campbell Martin.

Under the standard form agreement, AXA provided an "Initial Development Allowance" to be used by Campbell Martin to develop their businesses as approved by AXA. AXA also provided a "Business Benefits Allowance" as support for Campbell Martin to enable it to conduct its business. The agreement also set out annual commission targets. If the commission targets were not met, or the agreement was terminated within 5 years, part of the allowances had to be repaid.

Upon the early termination of the agreement, AXA claimed part of the allowances, together with some of the commission claw back, from Campbell Martin and its guarantors. The case was heard with a number of other claims involving former authorised representatives of AXA and their personal guarantors arising from the same standard form agreement. In their defences, the former agents (including Campbell Martin) asserted that they had been misled by AXA in various ways when entering into their respective agreements and that AXA had breached certain implied terms that were necessary to give business efficacy to the agreements, such as AXA processing business submitted to it without unreasonable delay.

The Consequences

AXA sought to rely on a number of exclusion and limitation clauses in its standard form agreement that limited the scope of the defences and counterclaims put forward by the former authorised agents. The Court was asked to rule on whether these clauses did as a matter of interpretation preclude the authorised agents from putting their defences forward and, if so, whether such clauses were valid and lawful.

The standard agreements contained "conclusive evidence" clauses. These provided that the decisions of AXA about its agents' entitlement to commission and obligation to repay allowances if it did not meet commission targets would, *save for manifest error, be final and conclusive and binding* on that other party. The Court held that these clauses took effect in accordance with their terms and prevented the Court from determining the true amount of any sums covered by those clauses, in the absence of manifest error.

However, the clauses were only valid to the extent that they were reasonable. In the particular circumstances of the case, the agents would have a clear record of the sums due either from or to AXA and would therefore be able to show that an incorrect calculation was obviously wrong and subject to a manifest error. The clause was therefore held to be reasonable.

The standard agreements also contained a “no set-off” clause. This provided that each agent had to pay all sums due to AXA without withholding or deducting any sums due to it from AXA. The Court held that the clause took effect in accordance with its terms and prevented the former agents from relying on its counterclaim to withhold payment to AXA. However, again, this clause was only valid to the extent it was reasonable. Even though it was clearly signposted in the documents, there was no explanation of AXA’s requirement for the clause. The Court therefore held that it was not shown that the clause was reasonable.

The standard agreements also contained an entire agreement clause. This provided that the terms of the standard form agreement superseded any *prior promises, agreements, representations, undertakings or implications* relating to the subject matter of the Agreement. The Court held that the clause took effect in accordance with its terms and excluded collateral warranties. The Court held that this was a reasonable provision as it gave both sides certainty as to the terms of their contract.

However, the Court held that the clause did not have any effect on misrepresentations made as to the effect of the agreement. Further, the clause had no effect on implied terms which were necessary to give business efficacy to the Agreement. Such clauses were part of the Agreement and not “prior” to it.

The Lesson

It is common for standard terms to contain clauses which purport to exclude or limit the ability of the other party to bring claims against them, whether in respect of specific claims or generally. This case illustrates the potential difficulty for a party seeking to rely on such clauses.

It is important for a party to be comfortable that the clauses it seeks to rely on in its standard terms will have the effect they are intended to have. There are a number of well known contractual provisions that can be used to exclude or limit liability in respect of particular issues. Using an inappropriate clause however can mean that they will not provide the anticipated level of protection.

Exclusion and limitation clauses in standard terms and conditions are often subject to the legal requirement of reasonableness in order for them to be valid. This can create unwelcome uncertainty for both parties. A party seeking to rely on such a clause in their standard terms must be able to explain their requirement for such a provision. In the event of a dispute arising, if a court decides that this explanation is not satisfactory, the clause will not be reasonable and the party may not be able to rely on it.

Equally, even where a clause within a party’s standard terms is particularly harsh, it is an inherently risky strategy for the other party to rely on its ability to challenge its reasonableness, particularly in agreements made between commercial organisations in a commercial context.

This case illustrates how important it is for businesses using standard form agreements to have an informed view of how enforceable their terms and conditions are.

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