Commercial Litigation

Entire Agreement Clauses are Not Foolproof

The Ontario Court of Appeal has issued fair warning to commercial parties that they need to be mindful when making representations to contractual counterparties after entering into an agreement, even where the contract at issue contains an express entire agreement clause.

Commercial parties often include clauses in their contracts to the effect that there are no other representations and warranties that form part of the agreement other than what is specified therein. These clauses, referred to as entire agreement clauses, are intended to ensure that the terms of the agreement are defined within the four corners of the contract. However, a recent Ontario Court of Appeal decision has cast doubt upon the enforceability of entire agreement clauses in certain situations.

In Soboczynski v. Beauchamp, released April 23, 2015, the Ontario Court of Appeal ruled that parties cannot necessarily rely on an entire agreement clause to shield them from liability flowing from representations made after a contract has been signed.

The entire agreement clause in Soboczynski was contained in a residential agreement of purchase and sale. The specific wording of the entire agreement clause at issue was as follows:

![The APS], including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition which affects [the APS] other than as expressed herein.

After entering into the agreement of purchase and sale, the appellants provided the respondents with a document called a “Seller Property Information Statement”. The subject of the litigation was misrepresentations allegedly made by the appellants in the Seller Property Information Statement.

The Court ruled that the appellants could not rely on the entire agreement clause to shield them from liability for the alleged misrepresentations. The Court explained that the entire agreement clause was retrospective, rather than prospective, and as such did not preclude liability for representations made after the agreement of purchase and sale had been entered. Writing for the Court, Epstein, J.A. stated:

In my view, the answer to the question is that, in the circumstances of this case, any consequences flowing from representations made in the SPIS were outside the reach of the entire agreement clause. The entire agreement clause in the APS operates retrospectively, not prospectively. In other words, the application of the clause is restricted to limit representations, warranties, collateral agreements, and conditions made prior to or during the negotiations leading up to the signing of the APS. When the appellants made representations in the SPIS, a document completed after the APS had been signed by all parties, the entire agreement clause was spent. [emphasis in original]

Lessons to be Learned

In light of the decision in Soboczynski, commercial parties should be cautious when making representations to contractual counterparties after the contract has been executed. Even where there is an entire agreement clause, liability may flow from representations where the entire agreement clause is interpreted as being retrospective in nature.

To help avoid this risk, contractual parties may wish to consider negotiating entire agreement clauses that are both retrospective and prospective in nature. The Court referenced the Ontario Court of Appeal decision in Shelan Inc. v. Print Three Franchising Corp. (2003), 64 O.R. (3d) 533 in raising the potential for such a clause:

Shelan clarified certain points about entire agreement clauses.

First, an entire agreement clause does not prevent the parties from amending the terms of their agreement. In other words, post-contract events can affect both the enforceability of the obligation in the agreement and new obligations to those imposed by its terms.
Second, and relatedly, entire agreement clauses do not apply prospectively unless the wording expressly so provides.

Both the general purpose of entire agreement clauses set out above and the approach to their application evident in this court’s decision in Shelan support the conclusion that, subject to express wording to the contrary, these clauses do not apply to agreements or representations that post-date the contract in which the clause is found.

Note, however, that (a) sophisticated counterparties may not consent to a retrospective and prospective entire agreement clause, and (b) it remains to be seen whether a court would uphold such a clause in the face of representations made after the agreement had been executed. As noted in Soboczynski, there is little jurisprudence on the effect of an entire agreement clause on representations made after the contract containing the clause has been entered into.

As a practical matter, it is likely prudent for parties to appoint a single point person to discuss matters related to contractual obligations with their counterparties after a contract has been executed to help ensure that no representations are made after the contract has been executed that may impact the parties’ respective contractual obligations and rights. This would appear to be the lesson that sophisticated commercial parties should take from the Court’s decision in Soboczynski.

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