

A DONE DEAL..... BUT IS IT THE ENTIRE AGREEMENT?

It has become accepted practice for parties entering into a business relationship, or indeed reaching an agreement of any kind, to record the detail in a written contract. A signature from each party then records their acceptance of the written terms. Agreeing what each will or will not do at the outset makes perfect commercial sense. Put simply, everyone knows where they stand. Or do they? A recent Court decision has highlighted circumstances where discussions between parties, which do not make their way into the written agreement, can nevertheless override its terms.

THINC GROUP LTD V MR & MRS ARMSTRONG

This case concerned a couple, Mr and Mrs Armstrong, who joined Thinc Group Ltd ('Thinc') as self-employed financial advisers, having run their own business for many years. Thinc offered the Armstrongs a 'supplemental payment' amounting to £243,052 based on 50% of the Armstrongs' previous year's gross income, since the Armstrongs would be bringing their client base of 10,000 to Thinc's business. In effect Thinc was buying the goodwill of the Armstrongs' business, although this was not how the arrangement was expressed in the contract.

The Negotiations

The Armstrongs sought numerous reassurances, during what turned out to be protracted negotiations, as to whether any conditions were to be attached to this supplemental payment. Their concern was whether there were any circumstances under which it may need to be repaid. Thinc assured them that there were not, the only stipulation being that the Armstrongs had to remain with Thinc for 3 years. The Armstrongs were happy with this since they were keen for any move to be their last before retirement.

The Contract

The problem arose because the written contract did not reflect the assurances which had been given by Thinc to the Armstrongs. Not only did it give Thinc the right to terminate at any time by giving notice, without needing any specific grounds for doing so, but it also provided that in the event it was terminated within 3 years, the supplemental payment was repayable by the Armstrongs. The contract did not include a clause stating that the contract represented the entire agreement between the parties (an 'entire agreement' clause).

The Legal Proceedings

Fifteen months after the contract was signed Thinc served notice on the Armstrongs and claimed repayment of the supplemental payment. The Armstrongs refused to pay the money back and were sued by Thinc. The Court of Appeal upheld the lower Court's decision that the Armstrongs were entitled to keep the payment, the promise by the Thinc directors having been found itself to be a collateral warranty binding Thinc. The absence of an entire agreement clause enabled the collateral warranty to prevail over the express terms of the contract. Interestingly the evidence of Mrs Armstrong was considerably strengthened by the fact that she had kept clear written notes of the assurances which were given by Thinc during the negotiations.

ENTIRE AGREEMENT CLAUSES

Clearly a party should not make promises to another unless it is prepared to honour them. Where any such promise is made, it should be incorporated into the terms of the written contract to avoid a dispute, such as that faced by the Armstrongs, at a later stage. An appropriately worded entire agreement clause also should be included, to make clear that this is the final version of what has been agreed. Careful drafting is essential for such a clause to be effective, as a number of such clauses have been considered by the Courts in recent years with varying results.

An example was in *Axa Sun Life Services Plc (AXA) v Campbell Martin Limited & Others* [2011] where the defendant companies (various appointed representatives) alleged that AXA had made negligent misrepresentations which induced them to enter into several standard form agreements to provide financial services. AXA argued that liability for misrepresentations was excluded by virtue of the entire agreement clause in the agreements, which excluded any prior “representations”. The Court of Appeal stated that clear words were needed to exclude liability for negligent misrepresentation and that since the clause concerned did not include any such wording it was no bar to the appointed representatives pursuing their claims.

From a broking perspective these clauses can have a real value where the parties want to ensure there is a clear understanding as to the basis upon which services are to be provided. This can be particularly so where both parties concerned are agreeing to perform services, for example in a co-broking arrangement. These clauses should not be treated as standard or ‘boilerplate’ clauses though and should be carefully considered in the context of the agreement being entered into. Where a broker is issuing standard terms of business to clients without individual negotiation a basic clause such as the following is likely to be appropriate:

“This Agreement constitutes the entire agreement and understanding of the Parties and supersedes any previous agreement between the Parties relating to the subject matter of this Agreement.”

This basic clause is unlikely to be sufficient where the agreement being entered into is the product of protracted negotiations. A more detailed clause may well be needed to protect the positions which the parties have negotiated, and legal advice (which should probably be obtained on the agreement in any event) on what is an appropriate clause in the circumstances is likely to be necessary. However, even a bespoke provision will not be a substitute for an agreement which accurately records both parties’ intentions in their entirety.

RISK MANAGEMENT MESSAGE

1. Keep a clear written record of negotiations with the other party as they progress.
2. Carefully check that the written agreement accurately reflects the outcome of those negotiations.
3. Consider whether it is appropriate to include an entire agreement clause in the signed agreement, particularly where service agreements such as Terms of Business Agreements are concerned.

4. Do not treat this as a 'boilerplate' or standard provision but as part of the agreement upon which legal advice may need to be sought, depending on the nature and extent of any preceding negotiations.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

All rights reserved. No part of this publication may be reproduced in any material form, whether by photocopying, scanning, downloading to computer or otherwise without the written permission of Griffin Managers except in accordance with the provisions of the Copyright, Designs and Patents Act 1988.

First Issued: September 2013
© Tindall Riley Ltd

Managers: Griffin Managers
Regis House
45 King William Street
London EC4R 9AN
Telephone 020 7407 3588
Email griffin@triley.co.uk
www.griffin-insurance.co.uk