1-2021

Form or substance? Excluding liability for misrepresentation

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FORM OR SUBSTANCE?
EXCLUDING LIABILITY FOR MISREPRESENTATION

Exclusion of liability for misrepresentation has long been controversial. There are many ways in which one could go about doing it, namely, through express exclusion of liability clauses, entire agreement clauses, non-reliance clauses, and maybe even basis clauses. The key question is whether such clauses are subject to s 3 of the Misrepresentation Act, which prevents a contracting party from escaping liability when it is unreasonable to do so. Notably, English jurisprudence has taken the view that any term that excludes liability for misrepresentation in effect would be subject to the test of reasonableness. Singapore appears to be moving in the same direction, and this paper explores why Singapore should do so. The bottom line is that a contracting party should not be given full immunity for misrepresentation when the other contracting party is unsavvy and/or unwary.

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I. Introduction

1 The last two decades have seen a number of developments in both Singapore and the United Kingdom ("**UK**") with respect to the increased use of contractual clauses to exclude liability for misrepresentation. The contractual clauses can be largely divided into three classes: express exclusion of liability clauses, entire agreement clauses, and non-reliance clauses. There is also a fourth category of contractual clauses, otherwise known as basis clauses. Such clauses, which recite the basis of the contract, can sometimes constitute a form of non-reliance clause that excludes liability for misrepresentation. The touchstone of the inquiry seems to be whether the clause, in effect, excludes liability for misrepresentation.

[*] The author would like to express his thanks to Mr Vincent Ooi for his guidance in writing this essay. All errors remain the author's alone.

2 Under English law, any clause that seeks to exclude liability for misrepresentation will be subject to s 3 of the English Misrepresentation Act. To that end, the English courts would appear to be focused on the substantive legal effect of the clause as opposed to its form. However, under Singapore law, the position remains that non-reliance clauses, operating under the doctrines of evidential or contractual estoppel, are not subject to s 3 of the Misrepresentation Act ("**MA**"). This paper argues that clauses which substantively serve to exclude liability, such as non-reliance clauses, should be subject to s 3 MA.

3 There are two main sections to this paper. In Part II, we discuss how express exclusion of liability clauses, entire agreement clauses, and non-reliance clauses can operate to exclude liability for misrepresentation in Singapore. Generally, entire agreement clauses can preclude liability if the parties have agreed that no representations were made, provided that the word "representations" does not take its place alongside other words expressive of contractual obligation. Non-reliance clauses may exclude liability for misrepresentation under the doctrine of evidential estoppel. It bears noting that it is difficult for the representor to rely on the doctrine of evidential estoppel as he has to prove that he did not intend for his representations to be relied upon by the representee to enter the contract. It is unclear whether a non-reliance clause may exclude liability for misrepresentation under the doctrine of contractual estoppel, which has not been adopted by our Singapore courts. If the doctrine of contractual estoppel is adopted, it is argued that contractual estoppel is merely a judicial enforcement of contractual obligations, and it operates separately from the doctrine of evidential estoppel which depends on reliance and notions of unconscionability. Also, it would typically apply in commercial transactions where both parties are of equal bargaining power, with the benefit of professional legal advice. Thus, as a matter of an objective construction of the contract, it is more likely that both parties intended for the representor to be exempted from liability for misrepresentation in such a case.

4 In Part III, we discuss whether all clauses that exclude liability for misrepresentation are subject to s 3 MA which requires the person relying on the clause to show that it satisfies the requirement of reasonableness as stated in s 11(1) of the Unfair Contract Terms Act. It is argued that any clause that excludes liability for misrepresentation should be subject to s 3 MA for the following reasons. First, to allow

parties to escape liability for misrepresentation in all situations would stultify the purpose of the Misrepresentation Act, which is to prevent contracting parties from escaping liability for misrepresentation unless it is reasonable for them to do so. Second, recent local decisions indicate that Singapore law is moving towards the position that any clause seeking to exclude liability for misrepresentation will be subject to s 3 MA. The Court of Appeal in *Deutsche Bank AG v Chang Tse Wen*[1] has, after all, mentioned by way of *obiter dictum*, in relation to the Unfair Contract Terms Act ("**UCTA**"), that the legislative eye is firmly set on the "substantive effect" of a term or notice, rather than on its "form or identification".[2] Finally, the Court of Appeal in *Orient Centre Investments Ltd v Societe Generale*[3] previously relied on an English decision to hold that non-reliance clauses may provide an insuperable obstacle to any misrepresentation claim, but that English decision does not in fact support such a proposition. Part IV concludes.

II. Exclusion of Liability for Misrepresentation

A. Modes of Excluding Liability for Misrepresentation

5 As held by the Court of Appeal in *RBC Properties Pte Ltd v Defu Furniture Pte Ltd ("**RBC Properties**")*,[4] there are three ways in which parties can exclude liability for misrepresentation:[5]

(a) the parties agreed that no representations were made;
(b) the parties agreed that there was no reliance on any representation; or
(c) the parties expressly excluded liability for misrepresentation.

6 It appears that entire agreement clauses can preclude liability for misrepresentation if they clearly express that no representations were made. Alternatively, non-reliance clauses may exclude liability if they clearly express that there was no reliance on any representation. The touchstone of the inquiry seems to be whether the clause in question clearly excludes liability for misrepresentation.[6] We turn now to

1 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886.
2 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [68].
3 *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566.
4 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997.
5 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [112].
6 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [110], [113].

examine how entire agreement clauses and non-reliance clauses operate to exclude liability.

B. Entire Agreement Clauses

7 The current position is that entire agreement clauses can preclude liability if the parties agree that no representations were made. This can be seen in the leading case of *RBC Properties*, which involved a lease agreement. There, the Appellant, RBC Properties, had represented to the Respondent, Defu, that the necessary approvals for the premises in question (to be used as a showroom) had been obtained.[7] This was untrue, since the Singapore Land Authority had not approved the premises for such a use pursuant to the appellant's rights under the landlord's state lease.[8] The court held that the Respondent was entitled to rescind the lease for misrepresentation, along with a consequential indemnity for all sums it was obliged to pay over under the lease.[9] The issue was whether liability for misrepresentation was excluded by clause 6.9 of the agreement.[10]

8 The court held that clause 6.9 was an entire agreement clause, in that it stipulated that no "representations or promises" except those expressed in the lease agreement could have contractual effect.[11] Furthermore, citing *AXA Sun Life Services plc v Campbell Martin Ltd*[12] for the proposition that "where the word 'representations' takes its place alongside other words expressive of contractual obligations, talk of the parties' contract superseding such prior agreement will not by itself absolve a party of misrepresentation",[13] the court held that since the word "representation" was employed alongside words expressive of contractual obligations, it was not dealing with whether liability for misrepresentation was excluded.[14] Thus, clause 6.9 did not clearly exclude liability for misrepresentation and the appellant could not avail itself of the clause.[15]

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7 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [55].
8 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [55].
9 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [56].
10 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [109].
11 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [113].
12 *AXA Sun Life Services plc v Campbell Martin Ltd* [2011] 2 Lloyd's Rep 1, [94].
13 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [113].
14 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [113].
15 *RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997, [113].

9 The effect of this is that an entire agreement clause can only preclude liability for misrepresentation where it clearly expresses that no representations were made. Further, the word "representations" cannot be employed alongside other words expressive of contractual obligations.

10 However, an argument may be made against this interpretation of an entire agreement clause in future cases. One might argue that the parties objectively intended for the clause to be given legal effect by entering into the agreement. In particular, it is likely that the parties intended to: (a) exclude liability for misrepresentation, and not a breach of contractual terms, by excluding representations; and (b) to exclude liability for breach of contractual warranties by excluding warranties. Afterall, such entire agreement clauses are usually drafted by trained solicitors who should be aware of the separate legal consequences of pre-contractual representations and warranties. Thus, entire agreement clauses should not be denuded of legal effect in excluding liability for misrepresentation just because the word "representations" is employed alongside words representative of contractual obligations.

C. Non-reliance clauses

11 Aside from entire agreement clauses, contractual parties have sought to exclude liability for misrepresentation by stating that the parties did not rely on any representation. Under common law, there are two methods in which such non-reliance clauses may exclude liability for misrepresentation: (a) the doctrine of evidential estoppel; and (b) the doctrine of contractual estoppel. We will examine both doctrines in turn.

(1) Evidential Estoppel

12 The *novus classicus* for the doctrine of evidential estoppel appears to be the English Court of Appeal decision of *Lowe v Lombank Ltd*.[16] In *Lowe*, Diplock J laid out the elements required for the doctrine of evidential estoppel:[17]

> (a) the clause was clear and unambiguous;
> (b) that the representee meant it to be acted upon by the representor; and

[16] *Lowe v Lombank Ltd* [1960] 1 WLR 196; Low Kee Yang, "Misrepresentation and Contractual Estoppel: The Raiffeisen Clarifications" (2011) 23 SAcLJ 390, [3].

[17] *Lowe v Lombank Ltd* [1960] 1 WLR 196, [205].

(c) that the representor in fact believed it to be true and was induced by such belief to act upon it.

13 The rationale of the doctrine is to prevent the party who has made a representation from asserting in subsequent litigation that the representation given to the same party is not true. In essence, primacy is given to the parties' intention, and the courts are likely to find that there was, as the parties intended, no reliance on any representation if the requirements in *Lowe* are satisfied. The test for evidential estoppel has since been adopted into Singapore law in the High Court decision of *Deutsche Bank AG v Chang Tse Wen* ("***Deutsche Bank* (HC)**"),[18] where it was applied on the facts of the case.[19] It is of note that while the case went on appeal, the doctrine of evidential estoppel was not one of the issues on appeal.

14 In *Deutsche Bank* (HC), Deutsche Bank submitted that it did not owe Dr Chang any duty of care and in any event, there was no breach of any duty of care by reason of evidential or contractual estoppels arising from the service agreement.[20] The service agreement stated that, if Deutsche Bank gives advice or makes recommendations, "such advice or recommendations are given and on the basis [that the representee] will make [his] own assessment and rely on [his] own judgement". The court held that the second requirement in *Lowe* was not satisfied as there was no evidence to suggest that the relevant disclaimers were "brought to Dr Chang's attention".[21] The court went further in observing that the outcome would have been different if Dr Chang had been informed before signing the account application form that he could not rely on Deutsche Bank to exercise reasonable care in advising him on managing his new wealth, and that he should retain his own independent professional or legal advisors for that purpose.[22]

15 The difficulty lies with establishing that the representor believed the non-reliance clause to be true and that he was induced by such belief to enter into the contract. In the English Court of Appeal decision of *Watford Electronics Ltd v Sanderson CFL Ltd*,[23] Chadwick

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18 *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310.
19 *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [137].
20 *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [118].
21 *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [137].
22 *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [137].
23 *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696.

LJ observed that the three requirements in *Lowe* are not easily satisfied in a case of misrepresentation, "not least because it may be impossible for a party who has made representations which he intended should be relied upon to satisfy the court that he entered into the contract in the belief that a statement by the other party that he had not relied upon those representations was true".[24] In other words, in a case involving misrepresentation, it is difficult for the representor to prove he entered into the contract believing that the representee did not rely on any representation. This is because it is usually the case that the representor intended for his representations to be relied upon by the representee to enter the contract.

16 Thus, in the context of excluding liability for misrepresentation, the first requirement in *Lowe* would be satisfied if the clause clearly and unambiguously states that the parties agreed that there was no reliance on any representation. Following *Deutsche Bank* (HC), it seems that the second requirement in *Lowe* would be satisfied if the non-reliance clause is brought to the representee's attention, and the representee proceeds to enter into the agreement. The third requirement would arguably be the largest hurdle to overcome, since the representor has to prove that he did not intend for his representations to be relied upon by the representee to enter the contract. Hence, a representor seeking to exclude liability for misrepresentation by relying on the doctrine of evidential estoppel may be faced with "insuperable difficulties".[25]

17 It is of note that the doctrine of evidential estoppel can only be invoked by the party seeking to rely on it if said party has specifically pleaded for the legal effect of the clause in question – that is, it excludes liability for misrepresentation.[26]

(2) Contractual Estoppel

18 The doctrine of contractual estoppel was introduced by way of *obiter dictum* in the English Court of Appeal case of *Peekay Intermark Ltd v Australia and New Zealand Banking Group Limited* ("***Peekay***").[27] In *Peekay*, the plaintiff was a company that traded in a variety of

[24] *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696, 711.
[25] *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696, 711.
[26] *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566, [45].
[27] *Peekay Intermark Ltd v Australia and New Zealand Banking Group Limited* [2006] EWCA Civ 386.

investments. It sued the defendant bank for damages for misrepresentation in relation to the nature of certain bonds. The bank sought to exclude liability for misrepresentation by relying on certain non-reliance clauses. Moore-Bick LJ held that 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.[28] Specifically, if "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.[29]

19 The doctrine of contractual estoppel appears to have "watered down"[30] the second and third requirements of the doctrine of evidential estoppel, since the representor only has to prove the first requirement in *Lowe*, in that there was an agreement between the parties to deny the existence of the facts and matters upon which they have agreed. In the context of misrepresentation, the representor only has to prove that the parties agreed that there was no reliance on any representation. The doctrine was applied in two English cases involving actions by bank customers against banks in their capacity as derivative counterparties.[31]

20 It is unclear whether the doctrine of contractual estoppel will be adopted into Singapore law for cases involving misrepresentation if this "defence" were to be pleaded in future cases. In *Orient Centre Investments Ltd v Societe Generale*, the Court of Appeal cited *Peekay* and commented, by way of *obiter dictum*, that "the combined effect of the express general and specific terms and conditions applicable to the structured products provides an insuperable obstacle to any claim by the [appellants] against [the respondent] based on the alleged breach of representations or duties, fiduciary or contractual or on negligence".[32] This seems to indicate that the Court of Appeal would be receptive towards the doctrine of contractual estoppel if such a case appears before

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28 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Limited* [2006] EWCA Civ 386, [56] – [57].

29 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Limited* [2006] EWCA Civ 386, [56] – [57].

30 *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [132].

31 *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ 1221; *Titan Steel Wheels Ltd v The Royal Bank of Scotland plc* [2010] EWHC 211 (Comm).

32 *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566, [50].

the court. However, in the subsequent Court of Appeal decision of *Als Memasa v UBS AG*,[33] the Court of Appeal considered whether financial institutions should be accorded full immunity for their misconduct by relying on non-reliance clauses. This was "in light of the many allegations made against many financial institutions for 'mis-selling' complex financial products to linguistically and financially illiterate and unwary customers.[34] Additionally, the High Court in *Deutsche Bank* was "extremely hesitant to apply the doctrine of contractual estoppel developed in the line of cases following *Peekay*".[35] Most recently, the Court of Appeal in *Deutsche Bank* expressed doubts as to the High Court's "exposition of this area of the law",[36] which suggests that the doctrine of contractual estoppel may be applied after all.

21 If the doctrine of contractual estoppel is adopted into Singapore law, there needs to be clarification on its conceptualisation and application. The main contention in this area of the law is whether the doctrine of contractual estoppel is a true estoppel in the sense of being a substantive legal doctrine independent of the contract, or whether it is a mere judicial enforcement of a contractual term. The key arguments against a purely contractual analysis for non-reliance clauses (or the doctrine of contractual estoppel as merely a judicial enforcement of a contractual term) are best expressed by Diplock J in *Lowe*:

(a) First, a contractual obligation "is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future".[37] The representee's acknowledgement that he had not relied on any pre-contractual representations is merely a representation of past facts rather than an enforceable contractual obligation. This may give rise to an estoppel by representation, or evidential estoppel, but it cannot give rise to a positive contractual obligation by the representee.

(b) Second, it is hard to conceive how a representation of non-reliance can amount to a contractual term when it was known to be untrue at the time it was made. This can be

[33] *Als Memasa v UBS AG* [2012] 4 SLR 992, [29].
[34] *Als Memasa v UBS AG* [2012] 4 SLR 992, [29].
[35] *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [138].
[36] *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [79].
[37] *Lowe v Lombank Ltd* [1960] 1 WLR 196, 204.

> inferred from Diplock J's requirement that the representation must be believed to be true by the representee.

22 We now review each of Diplock J's arguments in turn. With respect to the first argument, it is doubtful if there are grounds to restrict contractual undertakings to promises as to future conduct, which excludes statements of past or present fact.[38] In practice, statements of past and present fact can be enforced as contractual promises. Under s 14 of the Sale of Goods Act,[39] there are statutorily implied terms about the quality or fitness of the contractual subject matter, such as freedom from minor defects, safety, and durability. Indeed, as stated by *Loi*, "it is quite common in practice for statements of fact to be enforced as contractual promises".[40]

23 Alternatively, drawing an analogy with agency law, the statement of fact "may mean that one assumes liability for the statement's being incorrect and undertakes to put the other party in the position as if the statement were correct".[41] This means that it is the representee's subsequent refusal to pay compensation, rather than the initial incorrectness of the statement of fact, which constitutes a breach of contract generating a secondary obligation to pay damages.

24 Both interpretations support the argument that a statement of past or present fact may connote a contractual promise, supported by examples from agency law and sale of goods contracts. Thus, Diplock J's first argument that contractual obligations are restricted to future facts is unsupported, and the true problem is one of construction – whether the clause in question means that a party assumes an obligation in respect of non-reliance on any pre-contractual representations.

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38 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 351; Coote, B., (R Bigwood, ed.), *Contract as Assumption: Essays on a Theme* (Hart, Oxford, 2010) ("*Coote*"), pp 13 and 131.

39 Sale of Goods Act (Cap 393, 1999 Rev Ed).

40 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 352.

41 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 353; AS Burrows, "Contract, Tort and Restitution – A Satisfactory Division or Not?" (1983) 99 LQR 217, 251; PS Atiyah, *Essays on Contract* (Oxford: OUP, 1986), pp 281 – 282, 325 – 236.

25 With respect to Diplock J's second argument, that argument alone does not warrant legal prohibition of contractual estoppel, but instead, qualifies the efficacy of a non-reliance clause in a situation where the parties knew that the statement of present or past fact was false when it was made. In such a case, as a matter of construction of the contract, it is very unlikely that the parties intended for the representor to be able to exclude liability for misrepresentation when the representee knew that the representation in question was false when it was made. Thus, as suggested by *Loi*, the doctrine of contractual estoppel is merely a judicial enforcement of contractual obligations, and it operates separately from the doctrine of evidential estoppel which depends on reliance and notions of unconscionability; it is not a true estoppel.[42]

26 Singapore's current position on the doctrine of contractual estoppel is possibly best expressed by Lee Seiu Kin J in the local High Court decision of *Jurong Shipyard Pte Ltd v BNP Paribas*.[43] After surveying various local and foreign authorities, Lee Seiu Kin J held that the doctrine of contractual estoppel would apply "in the absence of the normal vitiating factors such as duress, undue influence and misrepresentation".[44] This indicates that the local courts are in favour of the purely contractual analysis; the non-reliance clause, which is regarded as a contractual obligation, may be enforced. Alternatively, the contract may be vitiated altogether if the normal vitiating factors such as duress, undue influence, and misrepresentation are present in the innocent party's entry into the contract (with the non-reliance clause).

27 In sum, while local courts seem receptive towards the doctrine of contractual estoppel, it has not been officially adopted into Singapore law. If it is to be adopted into Singapore law, it would be best conceptualised as a judicial enforcement of contractual obligations. However, in view of judicial reticence of providing financial institutions with full immunity against liability in all situations, there would be an issue of whether the application of the doctrine would be subject to s 3 MA. This issue is addressed below.[45]

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42 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 349.
43 *Jurong Shipyard Pte Ltd v BNP Paribas* [2008] 4 SLR(R) 33.
44 *Jurong Shipyard Pte Ltd v BNP Paribas* [2008] 4 SLR(R) 33, [104].
45 See [33] of the main text.

(3) How the Doctrines of Evidential and Contractual Estoppel should be applied

28 Following our discussion on the applicability of the doctrines of evidential and contractual estoppel, a further question arises as to how they should be invoked. If, indeed, the doctrine of contractual estoppel operates as a judicial enforcement of a contractual obligation as opposed to a true estoppel, it would operate separately in the alternative to the doctrine of evidential estoppel.

29 As stated by Loi, contractual estoppel derives its binding effect purely on the basis of contract, unlike evidential estoppel, which depends on notions of unconscionability or reliance to be effected.[46] This means that the doctrine of contractual estoppel has no content whatsoever apart from being the remedial consequence of a threatened breach of contract, and it is neither a true estoppel with any substance nor an independent existence apart from contract.[47] The court merely enforces the representee's contractual obligation not to assert reliance.[48] This is supported by the decision in *Peekay*, where the English Court of Appeal expressed the view that a "properly worded non-reliance clause could, apart from giving rise to the more traditional estoppel by representation if the [*Lowe*] requirements were satisfied, also raise an alternative contractual estoppel simply on the strength of the contract in which the clause was found".[49]

30 As to the cases in which the two estoppels will apply, while the doctrine of evidential estoppel is applicable so long as the requirements in *Lowe* are satisfied, the doctrine of contractual estoppel would typically apply in commercial transactions where both parties are of equal bargaining power, with the benefit of professional legal advice – as a matter of objective construction of the contract, it is more likely that both parties intended for the representor to be exempted from liability for misrepresentation in such a context. This seems to be in line with the approach taken by the High Court in *Deutsche Bank*. That case was distinguished from the Court of Appeal's decision in *Orient Investments*,

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46 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 350; McMeel [2011] LMCLQ 185, 197; S Wilken and K Ghaly, *The Law of Waiver, Variation, and Estoppel*, 3rd edn (OUP, Oxford, 2012) [9.14], [13.21], and [13.22].

47 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 357.

48 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 357.

49 Loi, K., "Contractual Estoppel and Non-Reliance Clauses" [2015] LMCLQ 346, 349.

in that the representee was known by the representors to be financially inexperienced, and that the representors themselves have the expertise and undertook pre-contractually to advise the representee in managing his new wealth.[50] The doctrine of contractual estoppel was not applied. Thus, it is possible that while the doctrine of evidential estoppel typically applies, the doctrine of contractual estoppel may be applied in the alternative, in commercial transactions where both parties are of equal bargaining power, with the benefit of professional legal advice.

(4) Summary of Effect of Non-Reliance Clauses

31 A representor may rely on the operation of a non-reliance clause as evidential or contractual estoppels to exclude the representor's liability in misrepresentation, as well as the representor's "duty of care and fiduciary obligation"[51] owed to the representee. The doctrine of evidential estoppel would typically apply, as opposed to the doctrine of contractual estoppel which "watered down" the doctrine of evidential estoppel to the first requirement in *Lowe* – that the clause was clear and unambiguous that there was no reliance on any representation. In the context of misrepresentation, however, it may be impossible for the representor to invoke the doctrine of evidential estoppel as it is difficult for the representor to prove that he entered into the contract with the belief that there was no reliance by the representee on any representation.

32 In the alternative, the representor may seek to rely on the doctrine of contractual estoppel. The apex court has not made a pronouncement on the applicability of the doctrine of contractual estoppel in local courts. It is likely that the doctrine of contractual estoppel will be adopted into Singapore law should the appropriate case come before the courts. This is to promote commercial certainty and to allow for commercial allocation of risk between the parties, so that the financial services industry in Singapore will be able to maintain the "remarkable growth in recent years".[52] Afterall, the apex court is of the view that "cleaning up the paperwork and communicating in clear terms with customers after the initial discussions to identify with precision just what is and is not being provided might well be a worthwhile exercise

[50] *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [136].
[51] *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310, [48].
[52] *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [92].

for banks to undertake".[53] We will now address the issue of whether a non-reliance clause, operating either under the doctrines of evidential or contractual estoppel, is subject to s 3 MA.

III. Whether such clauses fall within s 3 Misrepresentation Act

33 Entire agreement clauses, non-reliance clauses, and express exclusion of liability clauses all serve to exclude the representor's liability for misrepresentation. Hence, the question arises as to whether they are, or should, fall within the purview of s 3 MA.[54] Under s 3 MA, if a contract contains a term that would exclude or restrict liability for misrepresentation, the term has no effect except in so far it satisfies the requirement of reasonableness stated in s 11(1) UCTA.[55] It is for the representor, who is seeking to rely on the exclusion of liability clause, to prove that the term satisfies the requirement of reasonableness. However, the English and Singapore positions diverge.

A. The English Position

34 To begin with, it is important to recognise the difference between clauses that exclude liability and clauses that delimit the primary obligations of one of the contracting parties. Where, as a matter of interpretation, the term allegedly seeking to exclude liability does no more than to describe one party's primary obligations there can be no question of applying the test of reasonableness. This position is well expressed in the English High Court decision of *JP Morgan Bank v Springwell Navigation Corp*,[56] where Gloster J held that if the clause only "prevent[s] an obligation from arising in the first place", it simply defines the basis upon which performance of the contract will be rendered and should not be subject to s 3 of the Misrepresentation Act 1967.[57] Otherwise, "every contract which contains contractual terms defining the extent of each party's obligations would have to satisfy the requirement of reasonableness".[58] Thus, "basis clauses" are not subject

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53 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [92].
54 (Cap 390, 1994 Rev Ed).
55 (Cap 396, 1994 Rev Ed).
56 *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), [602], [603].
57 *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), [602], [603].
58 *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), [602], [603].

to the requirement of reasonableness, in so far as they define the parties' primary obligations.[59] If, however, these "basis clauses" operate as a form of estoppel rather than a delimitation of the parties' primary obligations, then they may be subject to the reasonableness test.

35 Entire agreement clauses that exclude liability for misrepresentation fall under the purview of s 3 MA.[60] The position on whether non-reliance clauses are subject to s 3 has also been clarified in the recent English Court of Appeal case of *First Tower Trustees*.[61] In essence, English courts now look at the substance and not the form of the clause. If the clause, in effect, excludes liability for misrepresentation, it will be subject to the UK equivalent of s 3 MA and the requirement of reasonableness under the UK equivalent of s 11(1) UCTA.

36 The English Court of Appeal in *First Tower Trustees Ltd* explained that while the position in common law is that parties can bind themselves by contract to accept that there was no reliance or representations made, there remains consideration whether there is a "statute to the contrary".[62] The court then interpreted s 3 of the English Misrepresentation Act 1967 to give effect to its evident policy – prevent contracting parties from escaping from liability for misrepresentation unless it is reasonable for them to do so.[63] The court held that "how they seek to avoid that liability is subsidiary".[64] To hold otherwise would, in the words of Bridge LJ in *Creamdean Properties v Nash*,[65] allow "ingenuity in forms of language" to undermine the statutory purpose of s 3 of the Misrepresentation Act 1967. The court also relied on various English authorities to support its proposition that any term that excludes liability for misrepresentation in effect would fall under the purview of s 3 of the Misrepresentation Act 1967.[66]

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59 *First Tower Trustees Ltd v CDS (Superstores Intl.) Ltd* [2018] EWCA Civ 1396, [44].
60 *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, 597.
61 *First Tower Trustees Ltd v CDS (Superstores Intl.) Ltd* [2018] EWCA Civ 1396.
62 *First Tower Trustees Ltd v CDS (Superstores Intl.) Ltd* [2018] EWCA Civ 1396, [47].
63 *First Tower Trustees Ltd v CDS (Superstores Intl.) Ltd* [2018] EWCA Civ 1396, [51].
64 *First Tower Trustees Ltd v CDS (Superstores Intl.) Ltd* [2018] EWCA Civ 1396, [51].
65 *Creamdean Properties Ltd v Nash* [1977] 2 EGLR 80.
66 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm); *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333.

37 In summary, when a clause states that no representations have been made or, for that matter, have been relied on, there are two possible situations. First, the clause seeks to define the parties' primary obligations, in that there were no representations made that would amount to certain terms of the contract, and it will therefore not be subject to s 3 MA. Second, it seeks to exclude or restrict liability in respect of representations that were, in actual fact, made, intended to be acted on, and in fact acted on. In that case, it will be subject to s 3 MA and the requirement of reasonableness.

B. Singapore's Position

38 The contention lies in whether non-reliance clauses operating under the doctrines of contractual or evidential estoppel are subjected to s 3 MA. In the leading Court of Appeal decision of *Orient Centre Investments*,[67] the Court of Appeal expressed the view that "the combined effect of the express general and specific terms and conditions applicable to the structured products provides an insuperable obstacle to any claim by the appellants based on the alleged breach of representations". This seems to suggest that the local position is that one may exclude liability for misrepresentation by relying on a non-reliance clause, even if it is not reasonable under s 11(1) UCTA.

39 There are, however, strong arguments to the contrary. It is possible that the local Court of Appeal may take the English position in *First Tower Trustees* in future cases. In the more recent Court of Appeal decision of *Deutsche Bank*, the court mentioned in *obiter* that allowing basis clauses to exclude liability for breach of an existing duty even if it is unreasonable to do so "seems to place undue emphasis on the form of the language used rather than on its substantive effect".[68] The court expressed the view that "the only question which arises for a court is whether a term or notice has the effect of excluding or restricting the imposition of a duty of care in law. If so, it will have to satisfy the requirement of reasonableness".[69] It is submitted that there are three reasons why non-reliance clauses should be subjected to s 3 MA.

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67 *Orient Centre Investments Ltd v Societe Generale* [2007] 3 SLR(R) 566, [50].
68 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [63].
69 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [68].

40 First, to allow contracting parties to escape liability for misrepresentation in all situations would stultify the purpose of the Misrepresentation Act, which is to prevent contracting parties from escaping from liability for misrepresentation unless it is reasonable for them to do so. In *Orient Centre Investments*,[70] the Court of Appeal may have relied on a passage from Chadwick LJ in *Watford Electronics* where it was mentioned that:[71]

(a) it is reasonable to assume that the parties desire commercial certainty. They want to order their affairs based on the written document which they have signed and avoid the uncertainty of litigation based on allegations of pre-contractual oral agreements;
(b) it is reasonable to assume that the price to be paid reflects the commercial risk which each party is willing to accept, a practice that is legitimate and commercially desirable. The risk is determined, in part at least, by the warranties which the vendor is prepared to give based on what the purchaser is prepared to pay.

41 The author is of the view that while the above reasoning makes a strong case for adopting the doctrine of contractual estoppel into Singapore law, it does not justify why non-reliance clauses operating under the doctrines of contractual or evidential estoppel should not be subject to s 3 MA. Chadwick LJ only acknowledged that effect should be given to non-reliance clauses in the limited situation "where those parties have the benefit of professional advice".[72] Contracting parties should not be allowed to undermine the purpose of the Misrepresentation Act with ingenuity in forms of language; by wording what is, in effect, an exclusion of a liability clause as a non-reliance clause capable of invoking the doctrines of evidential or contractual estoppel. Requiring the clause to satisfy s 3 MA would allow the courts to recognise situations where it is unreasonable for contracting parties to escape liability for misrepresentation.

42 Second, recent local decisions indicate that Singapore law is moving towards the position taken by the English Court of Appeal in

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70 *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [44].
71 *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696, 710.
72 *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All ER (Comm) 696, 710.

First Tower Trustees Ltd, in that any clause seeking to exclude liability for misrepresentation will be subjected to s 3 MA. In the Court of Appeal decision of *Als Memasa*, it was held that "it may be desirable for the courts to reconsider whether financial institutions should be accorded full immunity for [their 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". [73] The wording suggests that the Court of Appeal is receptive to the idea that a party should not be able to escape liability by relying on a non-reliance clause, even when it is not reasonable for the party to do so.

43 The most recent case of *Deutsche Bank* further demonstrates our local courts' receptiveness towards subjecting non-reliance clauses to the test of reasonableness. While the High Court in *Deutsche Bank* recognised the Court of Appeal's concerns in *Als Memasa* that financial institutions should not be accorded with full immunity from misconduct or negligence as against unsophisticated customers, it was bound by the Court of Appeal's decision in *Orient Centre Investments*. It distinguished *Orient Centre Investments* on the basis that the representee was known to the representors to be financially experienced and the representors themselves undertook pre-contractually to advise him in managing his new wealth. This indicates judicial sentiment that financial institutions may not always exclude liability for misrepresentation simply with the use of a non-reliance clause. On appeal, the Court of Appeal mentioned in *obiter* that "the legislative eye is firmly set on the substantive effect of a term or notice, rather than on its form or identification".[74] In other words, so long as the term or notice has the effect of excluding or restricting the imposition of a duty of care in law, it will have to satisfy the requirement of reasonableness under the Unfair Contract Terms Act.[75]

44 It appears from the decisions of *Als Memasa* and *Deutsche Bank* that non-reliance clauses may be subject to s 3 MA in future cases. Similar to s 13(1) UCTA, which was noted by the Court of Appeal in *Deutsche Bank*, s 3 MA prevents a party from excluding or restricting liability for misrepresentation by reference to a contractual term. This appears to preclude "any material distinction being drawn between

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[73] *Als Memasa v UBS AG* [2012] 4 SLR 992, [29] .
[74] *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [68].
[75] *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [68].

clauses which exclude liability and those which restrict the scope of the duty or the obligation".[76] The test of reasonableness is unlikely to fail in commercial transactions where parties are usually of equal bargaining power and they enjoy benefit of professional advice; parties would be able to rely on their non-reliance clauses, and the test of unreasonableness would not undermine commercial certainty and the allocation of commercial risk between the parties. Thus, the impact of subjecting non-reliance clauses to the Misrepresentation Act on financial institutions should not be overstated; contracting parties should not be allowed to undermine the purpose of the Misrepresentation Act by wording what is, in effect, an exclusion of a liability clause as a non-reliance clause capable of invoking the doctrines of evidential or contractual estoppel.

45 Third, *Watford Electronics*, which was relied upon by the Court of Appeal in *Orient Centre Investments*, does not stand for the proposition that non-reliance clauses which exclude liability for misrepresentation are not subject to s 3 MA. The contract in that case contained clause 7.3 which limited liability for indirect losses and clause 14 which is an entire agreement clause stating: "… no statement or representations made by either party have been relied upon by the other in agreeing to enter into the Contract". Chadwick LJ held that "where both parties to the contract have acknowledged, in the document itself, that they have not relied upon any pre-contract representation, it would be bizarre (unless compelled to do so by the words which they have used) to attribute to them an intention to exclude a liability which they must have thought could never arise".[77]

46 It is important to note that Chadwick LJ was referring to clause 7.3 which limited liability for indirect loss arising out of negligence or otherwise, as opposed to clause 14 which is a non-reliance clause. The issue was whether clause 7.3 was intended to capture liability for pre-contractual representation. It was in that context that Chadwick LJ held that it was bizarre to attribute to parties in clause 7.3 an intention to exclude liability which they must have thought could never arise. Thus, Chadwick LJ was not considering whether s 3 of the Misrepresentation Act applied to clause 14. His proposition, that an intention to exclude a

[76] *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [63].
[77] *Deutsche Bank AG v Chang Tse Wen* [2013] 4 SLR 886, [41].

liability should not be attributed to the parties when they have acknowledged that they have not relied upon any pre-contractual representation, does not apply where a party seeks to exclude liability for misrepresentation. Instead, it applies where a party seeks to limit liability for indirect loss arising out of negligence or otherwise. Thus, *Watford Electronics* does not stand for the proposition that non-reliance clauses are not subject to s 3 of the Misrepresentation Act.

47 To summarise, following *Orient Centre Investments*, the current position in Singapore is that unlike entire agreement clauses and express exclusion of liability clauses, non-reliance clauses are not subject to the test of reasonableness. However, in light of the High Court and Court of Appeal's reticence of granting financial institutions with full immunity for their misrepresentations in all situations, it is possible that any clause seeking to exclude liability for misrepresentation may be subject to the test of reasonableness in future cases. This seems to be the position taken by the Court of Appeal in the recent case of *Deutsche Bank*, and such an approach would also be concordant with the purpose of the Misrepresentation Act, namely, to prevent contracting parties from escaping from liability for misrepresentation unless it is reasonable for them to do so.

48 It is also important to note that in cases involving fraudulent misrepresentation, any exclusion of liability clause is very unlikely to be given legal effect. In *Thomas Witter*,[78] the relevant clause under the contract (clause 17.2) had an exclusionary effect, but it referred to "any liability" and "any misrepresentation". Clause 17.2 was subject to s 3 MA and it had to pass the test of reasonableness under s 11(1) UCTA. The court held that the term was not severable: it was either reasonable as a whole or not.[79] The court was of the view that since the clause did not distinguish between fraudulent, negligent, or innocent misrepresentation, it purported to exclude liability for all types of misrepresentation. Hence, the clause was deemed to be unreasonable as it sought to exclude liability for fraudulent misrepresentation. This demonstrates that fraud cannot be excluded from contracts as a policy reason and courts will, as a matter of construction, always interpret contracts as not excluding fraud.

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78 *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, 598.
79 *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, 598.

IV. Conclusion

49 Contractual covenants may effectively exclude liability for misrepresentation even when they are phrased as entire agreement clauses or non-reliance clauses. In the case of non-reliance clauses, this can be done through the doctrines of evidential or contractual estoppel. While Singapore courts appear receptive towards the doctrine of contractual estoppel, its application remains an open question. It is suggested that if the doctrine is to be applied, it should be a mere enforcement of contractual obligations.

50 A further question is whether said contractual covenants are subject to s 3 of the Misrepresentation Act. The English Courts have set their eyes on the substantive legal effect of the clause, as opposed to the form it takes. Similarly, it would seem that Singapore courts are moving towards the position that s 3 MA applies so long as the clause, in effect, excludes liability for misrepresentation. After all, this will prevent a contracting party from escaping liability even when it is not reasonable to allow him to do so, which is the purpose of the Misrepresentation Act. Furthermore, the Court of Appeal clearly expressed in *Deutsche* Bank that the focus should be on the substantive effect of the clause as opposed to the form of the language used. Thus, any clause seeking to exclude liability for misrepresentation in effect may be subject to s 3 MA.

51 The impact that this will have on financial institutions should not be overstated since financial institutions will be allowed to exclude liability for pre-contractual representations where it is reasonable for them to do so. This is likely to be the case in commercial transactions involving parties with independent legal advice and equal bargaining power. What will be required of such financial institutions, in the final analysis, is this: they must exercise prudence in making pre-contractual representations when dealing with linguistically and financially illiterate and unwary customers.