

ELSA UK COMMERCIAL LAW MOOT COURT COMPETITION

SAMPLE WRITTEN SUBMISSION

Team Members

FOR THE RESPONDENTS

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LIST OF AUTHORITIES

1. Legislation

1. Unfair Contract Terms Act 1977 ('**UCTA**')
2. Misrepresentation Act 1967 ('**MA**')

2. Cases

1. Peekay Intermark v Australia and New Zealand Banking Group [2006] EWCA Civ 386
2. Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221
3. Raiffeisen Zentralbank Osterreich v RBS [2010] EWHC 1392 (Comm)
4. Camerata v Credit Suisse Securities (Europe) Ltd [2012] EWHC 7 (Comm)
5. Arnold v Britton & ors [2015] UKSC 36
6. Wood v Capita Insurance Services Ltd [2017] UKSC 24
7. Hedley Bryne & Co Ltd v Heller & Partners Ltd [1964] AC 465
8. IFE Fund SA v Goldman Sachs International [2006] EWHC 2887 (QB) (Comm)
9. Derry v Peek [1889] 14 App Cas 337
10. Dadourian v Simms [2009] EWCA Civ 169
11. Bradford Third Equitable Benefit Building Society v Borders [1941] 2 All ER 211
12. Golden Belt 1 Sukuk Co BSC(c) v BNP Paribas [2018] Bus. L.R. 816 #
13. BskyB Ltd v HP Enterprise Services UK Ltd [2010] EWHC 86 (TCC)
14. Rainy Sky SA v Kookmin Bank [2011] UKSC 50
15. Trident Turboprop v First Flight Couries Ltd [2008] EWHC 1686
16. Marcaulay v Schroeder [1974] 1 WLR 1308
17. Carney & Anor v N M Rothschild & Sons Ltd [2018] EWHC 958 (Comm)

3. Secondary Sources

1. The Law of Contract (Treitel), E Peel, 14th Ed. 2015
2. A Best Practice Oversight Approach for Securities Lending, JP Morgan

LIST OF ABBREVIATIONS

Abbreviation	Meaning
<u>LB</u>	Lamen Broders Ltd UK
<u>LR</u>	Low Risk Investments GmbH
<u>B</u>	Mr. Billme Whatyoulike
<u>LM</u>	Ms. Lola Moneymaker
<u>S</u>	Ms. Safe Tyfirst
<u>LW</u>	Mr. Lang Weilich

SUMMARY OF SUBMISSIONS

Senior Counsel

1. No tort of negligence arises because there was no assumption of responsibility on the part of LB, such that LB did not owe a duty of care to LR.
2. The alleged pre-contractual representations were either accurate, when understood in their context, or mere puffs that do not constitute actionable representations. Even if representations were indeed made, they were neither made negligently nor fraudulently.
3. In any event, the alleged misrepresentations merely encouraged the decision to enter into the contract and does not satisfy the threshold for finding inducement. Therefore, no prima facie misrepresentation can be established.

Junior Counsel

1. As a fall-back argument, the limitation clause creates a contractual estoppel which estops the claimant from claiming, *inter alia*, the following:
 - 1.1 That representations were made with regards to the performance of the syndicate loan;
 - 1.2 That LR does not have knowledge about the associated risk of the investment project or that they relied on LB's advice in making investment decisions; and
 - 1.3 That there was inducement resulting from the alleged misrepresentations.
2. Where the Claimant is estopped from claiming the essential requirements of misrepresentation, its action is bound to fail.
3. The limitation clause is clearly a basis clause and, therefore, s. 3 of the MA does not apply. However, even if this is not true, the limitation clause is clearly reasonable under s. 11 of the UCTA as there is no manifest inequality in terms of bargaining power and the terms of the disclaimer is applied across the syndicate loan market.

SKELETON ARGUMENT FOR SENIOR COUNSEL

A. Negligent misstatement

1. In a claim for negligent misstatement, the claimant must prove, on a balance of probabilities, that LB owed LR a duty of care that was breached by LB and which caused LR to suffer loss.

A1. Evidential burden

2. For a claim of negligent misstatement, the evidential burden is on the Claimant to establish that a duty of care existed. This burden has not been met.

A2. Duty of care

3. It is submitted that LB did not owe a duty to LR to take reasonable care to inform LR that the facts as stated by either B or LM, as agents of LB, were incorrect in any material way.

(i) Requirements for duty of care

4. The applicable test for whether there was the existence of a duty of care is the assumption of duty test as laid down in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*¹.

4.1 To invoke the *Hedley Byrne* duty of care, the Claimant must satisfy this Court that there was first an assumption of responsibility on the part of LB, and that there was reasonable reliance on that assumption of responsibility on the part of LR.

4.2 Although LR's agents may have relied on statements from LB's agents in entering the agreement, there was in fact no assumption of responsibility to ground that reliance.

(ii) No assumption of responsibility

5. In general, a party involved in negotiations towards a commercial venture owes no positive duty of disclosure towards another prospective party². Courts have consistently

¹ [1964] AC 465

² *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (QB) (Comm), §64.

held that there is nothing in the relationship of a banker and customer to give rise to a *Hedley Byrne* relationship³.

5.1 This is particularly so when the defendant has not assumed any direct obligation to advise the investor about appropriate investments⁴.

B. Misrepresentation

6. It is submitted that there was neither fraudulent misrepresentation, nor negligent misrepresentation.

B1. No representations made

7. In order to establish misrepresentation, there must first be a representation made. It is submitted that there were no representations made. The contested statements are either statements of opinion or mere puff.

8. The statements in dispute may be categorized as follows: those relating to (i) the security of the investment; (ii) the liquidity of the investment; (iii) the prospects of investing in energy infrastructure.

(i) Statements relating to the security of the investment

9. The statement that the investment was secure was only made with reference to the fact that LB, indirectly, had proprietary rights in the windfarm. Understood in context, the investment was indeed secure in terms of the availability of security⁵.

(ii) Statements relating to the liquidity of the investment

10. It was never stated in absolute terms that the syndicated loan was as liquid investment.

10.1 LM stated that the growing secondary market for syndicated loans in the UK made the investment “practically liquid”⁶, while B remarked that the loan is “quite liquid”⁷.

11. Moreover, B’s statement in the email made it clear that his statement was only his opinion, and was not a statement in fact to be relied on as a representation⁸.

³ See also *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ 1221.

⁴ cf Exhibit 3, Disclaimer: “You should carefully consider these factors in light of your particular investment needs, objectives and financial circumstances...and seek advice from a suitably qualified professional advisor”.

⁵ cf *Springwell Navigation Corporation*, *ibid*.

⁶ [7] of the Agreed Facts.

⁷ Exhibit 5

(iii) Statements relating to the prospects of investing in energy infrastructure

12. LM's statements as to the energy infrastructure market are mere puffs, which are not actionable. They constitute vague⁹ and exaggerated laudatory statements about the investment, and do not amount to a representation.

B2. Alleged representations are not actionable

13. Moreover, the alleged representations are not actionable.

14. They must be read in light of their context, which is of LB's agents offering their views and opinions as salesmen – mere sales talk. As such, these statements are rightly characterised as expressions of opinion without any representation as to the maker having objectively reasonable grounds for their view, following the decision of this Court in *Springwell Navigation Corporation v JP Morgan Chase Bank*¹⁰.

B3. No fraudulent misrepresentation

15. There can only be fraudulent misrepresentation where a false representation has been made knowingly without belief in its truth, or recklessly, without caring whether it be true or false¹¹.

15.1 Even if the statement was made carelessly and without reasonable ground for believing it to be true, it does not necessarily amount to fraud, as long as it was made in the honest belief that it is true¹².

B4. No negligent misrepresentation

16. Even if the Court finds that there were representations made by LB's agents in the course of their communication with LR, LB is nonetheless not liable because there is no *negligent* misrepresentation.

(i) Test for inducement has not been met

17. The key requirement for negligent misrepresentation is inducement: LB's representations must have induced LR to enter into the contract.

⁸ Exhibit 5: "but between you and me"

⁹ The Law of Contract (Treitel), E Peel, 14th Ed at [9-011]

¹⁰ [2010] EWCA Civ 1221

¹¹ *Derry v Peek* [1889] 14 App Cas 337.

¹² *Ibid.*

18. The test for inducement was laid down in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc*: “but for” the representation, the person would not have entered into the contract. It is not sufficient to show that Ms. Safe Tyfirst (“S”) was merely ‘supported’ or ‘encouraged’ in reaching her decision by the representations in question¹³.

18.1 In the present case, it is likely that S would have invested in the syndicated loan even without the alleged representations, as it was a key part to her new investment strategy that she was determined to implement¹⁴.

¹³ *Dadourian v Simms* [2009] EWCA Civ 169

¹⁴ Cf [1] of the Agreed Facts.

SKELETON ARGUMENT FOR JUNIOR COUNSEL

C. Effect of the Limitation Clause

19. As a fall-back argument, it is submitted that even if false representations were made, LR is contractually estopped from relying on those due to the limitation clause, which is not unreasonable.

C1. Content of Limitation Clause

20. The Respondent relies on the paragraph under ‘Disclaimer’ as set out in the Information Memorandum (the ‘**Disclaimer**’) which is duly incorporated into the Loan Agreement.

21. LR acknowledged that LB and its related entities including its directors or officers did not give any representations pertaining to the performance of the syndicate loan (**‘Clause 1’**).

22. The Disclaimer further provides and LR acknowledged the risks associated with the investment; and that the investment project’s compatibility with the investment needs and objectives of LR has not been considered.

22.1 The Disclaimer further provides that LR should seek advice from suitably qualified professional adviser before deciding whether to invest

22.2 This is to be read together with Clause 16.5 of the Loan Agreement which states that LB does not act as a fiduciary (read together as **‘Clause 2’**).

C2. Contractual Estoppel arises

23. It is submitted that a contractual estoppel arises by virtue of Clause 1 and Clause 2 of the Information Memorandum.

(i) Requirements for a contractual estoppel

24. In order to establish a contractual estoppel, there is no requirement of reliance by the representor¹⁵ nor is there any need to show that it would be unconscionable for the

¹⁵ *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221 at [144]

representee to resile from the representation that there was no representation made to him¹⁶. The essence of a contractual estoppel lies in the agreement itself.

25. Where parties express an agreement that a certain state of affairs should form the basis for the transaction, neither can subsequently deny the existence of the facts upon which they have agreed¹⁷. This applies even if the parties know that the presumed state of affairs is not true.

(ii) Estopped from claiming representations made

26. A contractual estoppel will arise so long as the clause(s) in question have been appropriately drafted. The clause(s) must amount to an agreement that representations have been withdrawn, overridden or of no legal effect¹⁸. Clause 1 is appropriately drafted and sought to remove the legal effects of any pre-contractual representations.
27. In particular, the wordings of Clause 1 are materially identical to the limitation clause in *Trident Turboprop v First Flight Couries Ltd*¹⁹ where it was held that the parties have agreed that no representations were made at all and, therefore, the misrepresentation claim was defeated.
28. It is trite law that courts when interpreting contracts are entitled to prefer the construction which better accords with business common sense, so long as the interpretation is consistent with the wording adopted²⁰.
29. In the present case, the clause goes towards the performance of the syndicate. The performance of investment lending necessarily focuses on not only the investment return but also the associated risk taken²¹. This would include the risk of bad debt in the event of default, absent security, or poor performance of the investment project.

¹⁶ *Ibid* at [177]

¹⁷ *Peekay Intermark v ANZ Banking Group* [2006] EWCA Civ 386

¹⁸ *BskyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC) at [382]

¹⁹ [2008] EWHC 1686 at [32] and [36]

²⁰ See e.g. *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 at [21]

²¹ A Best Practice Oversight Approach for Securities Lending, JP Morgan

30. The necessary conclusion here must be that LR is estopped from claiming any pre-contractual misrepresentation with respect to the growth potential in the windfarm and the securitization of the loan.

(iii) Estopped from claiming inducement

31. It is submitted that, further or alternatively, Clause 2 estops LR from claiming that they did not understand the true nature of (including the lack of security) and the risk associated with the investment project.
32. The wordings in Clause 2 is materially identical to the clause in question in *Peekay Intermark v ANZ Banking Group*²² with, *inter alia*, the following notable features: (1) the bank denies any fiduciary duty and capacity as a financial advisor; (2) the clause points towards the need to consult an independent advisor/engage in independent enquiry towards the suitability of the investment project.
33. Although Clause 2 does not expressly provide for an acknowledgement of the risk associated with the investment, it is clear that the reasoning by Moore-Bick LJ in *Peekay*²³ still applies.
34. Where the purpose of the clause was to draw the attention of the investor to ‘the need for caution when investing in emerging markets’ and that the LB was only willing to enter into a contract with LR on the assumption that it ‘had satisfied [itself] that the transaction was suitable for [it]’, LR shall be estopped from claiming that they were induced to enter into the contract due to a misrepresentation of the nature of the investment²⁴.

(iv) Alternative reading of Peekay

35. On an alternative reading of *Peekay*, it may be understood as an authority for the proposition that where it is ‘reasonable to expect the representee to make use of the opportunity to discover the truth’, a claim for misrepresentation will be defeated²⁵.

²² [2006] EWCA Civ 386 at [13] – [15]

²³ *Ibid* at [60]

²⁴ *Ibid* at [60]

²⁵ The Law of Contract (Treitel), Edwin Peel, 14th Ed. 2015 at [9-028]

36. In the present case, LR has had multiple opportunities to ‘discover’ the truth with regards to the nature of the investment, the lack of security and the transferability issue (assuming all claims of misrepresentation were satisfied, all of which are denied). Therefore, the claim for misrepresentation cannot succeed.

C3. Section 3 of MA

(i) Basis clause not exclusionary clause

37. Where a clause is a basis clause, it will not be subject to s. 3 of the MA²⁶.
38. In the context of representations, whether a basis clause remains one depends on **the extent** and **clarity** of the representations made and the extent the clause seeks to rewrite reality. Furthermore, it depends on whether if there are other oral or written evidence which clearly indicates that there was **an advisory relationship**²⁷.
39. In the present case, it is submitted that the representations were neither extensive nor clear. Counsel respectfully reminds the court of the analysis set out in section B to C of this skeleton argument. Furthermore, B has never gave oral or written indications that there was an advisory relationship. Clause 1 and 2 are clearly basis clauses.

(ii) Fall-back: Clause still reasonable

40. Even if the limitation clause is indeed exclusionary and is subject to the test under s. 11 of the Unfair Contract Terms Act 1977 (‘UCTA’), it is submitted that it is still reasonable.
41. The assessment of reasonableness must be viewed with regards to the following facts²⁸:
- 41.1 That the two companies were of equal bargaining power with considerable size and financial standing;

²⁶ Springwell Navigation Corp v JP Morgan Chase Bank [2010] EWCA Civ 1221 at [181] – [183]

²⁷ Carney & Anor v N M Rothschild & Sons Ltd [2018] EWHC 958 (Comm) at [93]

²⁸ See factors as set out in Sch. 2 of the UCTA

- 41.2 That even though Ms. Safe Tyfirst was inexperienced she was still astute and intelligent and LR entered into the contract with advice from a legal professional, Mr. Lang Weilich²⁹; and
- 41.3 That the Loan Agreement was based materially on the terms recommended by the Loan Market Association – a multi-national association which provides guidelines for syndicated loans across Europe.
42. Furthermore, the Disclaimer contained in the Information Memorandum is materially identical to many limitation clauses which were all held to be reasonable³⁰.
43. It is submitted that even though there were no negotiations specifically with regards to the Disclaimer, the very fact that similar terms are widely used in many Syndicate loans and/or investment projects suggests that they are adopted because experience has shown that they facilitate the conduct of trade.
- 43.1 They should be distinguished from standard terms that were simply from ‘take it or leave it’ negotiations³¹.
- 43.2 These clauses are settled over years of negotiation by representatives of the commercial interests involved and there is a strong presumption that these terms are fair and reasonable per Lord Diplock³².
44. The limitation clause is clearly reasonable.

On the basis of these submissions, counsel respectfully submits that the action be dismissed and pray that this Honourable court quash the Claimant’s claims.

Counsels for the Respondent

²⁹ See e.g. the factors discussed in *Carney & Anor v N M Rothschild & Sons Ltd* [2018] EWHC 958 (Comm) at [356]

³⁰ See e.g. *Trident* [2008] EWHC 1686 at [32] and *Peekay* [2006] EWCA Civ 386 at [13] – [15]

³¹ *Marcaulay v Schroeder* [1974] 1 WLR 1308 at 1316 F-G

³² *ibid* at 1316 C-D