

No stone unturned—a detailed guide to misrepresentation claims (Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd)

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Dispute Resolution analysis: In this recent judgment Mr Justice Moulder analyses a failed set of complex transactions, which has brought about a cornucopia of creative claims attempting to resolve the resulting fallout. Considering misrepresentation, rescission and its debarment, as well as loss of chance, this judgment provides a whistle-stop tour of litigious approaches to derailed deals. Written by Natalie Todd, partner, and Anastasia Troshka, trainee solicitor, at PCB Litigation LLP.

Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd and another [\[2020\] EWHC 2602 \(Comm\)](#) (2 October 2020)

What are the practical implications of this case?

This judgment will prove useful to both beginners and experienced practitioners as a comprehensive guide to a large number of claims and the criteria required, as well as the current trends in judicial evaluation of witness evidence and contractual interpretation. Misrepresentations of different kinds, both express and implied, were alleged and considered in helpful detail, along with submissions as to whether parties may rely upon them. The availability of rescission, an equitable remedy available for misrepresentation, was valiantly, but unsuccessfully disputed on the grounds of delay and unavailability of restitution. Finally, Moulder J also dealt with indemnity and loss of chance claims, completing this admirably thorough and didactic analysis.

What was the background?

The proceedings concern the sale by Raiffeisen Bank International AG (RBI) of a portfolio of defaulted loans and security for those loans, including some shares held by RBI (the shares). A series of agreements and documents were executed in 2015 including: a sale and purchase agreement for the sale of the loans and associated guarantees and security (the Loans) between RBI and the first defendant (ACE) (the SPA); a framework agreement between, among others, ACE, RBI and an acquisition vehicle (RACL), in relation to the sale of the shares; and a confirmation addressed by Ashurst to RBI (confirmation). Both elements of the SPA were intended to occur simultaneously, but after a change of plans RBI agreed to release its security before an independent valuation of the shares could be obtained. RBI transferred the shares to ACE and received \$US 50m, but the SPA was not completed. ACE did not pay the purchase price and the Loans were not transferred by RBI.

RBI sought specific performance of the SPA by ACE or damages for breach. ACE disputed this relief was available due to misrepresentations in disclosure and sought rescission, subject to arguments on laches and restitutio in integrum.

The alleged misrepresentations were comprised of statements in a summary document erroneously placed in a dataroom for ACE's review (the summary) and concerned incomplete details about the Loans, including valuations. RBI pleaded that the summary was an internal document not intended for circulation.

What did the court decide?

Misrepresentation

In order to construe alleged representations the court must consider the context in which the words were used and have regard to the purpose of and reason for the statements, at para [82]. The court decided that it was not an internal document, but rather a marketing document providing a summary of the Loans. Indeed, it was the only summary available in the dataroom, at para [89].

RBI argued that the position in the document should have only been taken as true on the date stated, but Moulder J decided that the likely effect of the summary being the only overview in the dataroom

was that a reasonable person would have inferred that the position remained true at the time of the document being placed in the data room, at para [98].

The representations, express or implied, had to be false. For example, the summary was set out in a way where a reasonable person would infer circumstances of the Loans that were untrue, at paras [96]–[97]. The state of knowledge of the representor is irrelevant to whether the statement was objectively misleading, at para [117].

A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true (*Cassa di Risparmio della Repubblica di San Marino SpA* [2011] EWHC 484 (Comm), at para [215]). As the summary was not an internal document, ACE was entitled to rely upon it and did in fact rely upon it, at paras [167], [217]; with the judge summarising the law at paras [169]–[171] that a misrepresentation only has legal effect if it operates on the mind of the representee, albeit it need not be the sole factor which caused the representee to enter into the contract. Thus the summary had induced ACE, among other factors, to act based on it, at para [178].

Obstacles to rescission

Rescission would however not be available if ACE affirmed the SPA or was debarred from rescission by laches or by an inability to give *restitutio in integrum*, at para [218].

Following discovery of the misrepresentations, if ACE had expressed an unequivocal intention to continue with the contract or acted inconsistently with an intention of rescinding it, it would have been prevented from pursuing rescission. It did not do so on the facts, at paras [237]–[240].

Rescission could be denied due to delay or unavailability of restitution in relation to the shares. In the circumstances, despite three years of delay, where ACE's agreement to purchase loans was a separate transaction, it would not be inequitable to allow rescission of the SPA, at paras [242]–[246]. As a result, RBI's claim for specific performance of the SPA failed, at para [248].

Indemnity claim

ACE's claim for an indemnity from RBI in respect of those SPA obligations it had already performed where the SPA was now rescinded was that money spent ought to be reimbursed. This was refused as the costs were incurred pursuant to the Loans purchase, not the SPA; and damages were unavailable as they are mutually exclusive to rescission, at paras [257]–[259].

Loss of chance

Moulder J also rejected the argument that there was a realistic prospect of an alternative arrangement being reached pursuant to the same commercial purpose (purchase of the Loans), had the escrow agent refused to release the funds, at para [307].

Case details

- Court: Commercial Court, Queen's Bench Division, High Court of Justice
- Judge: Mrs Justice Moulder
- Date of judgment: 2 October 2020

Natalie Todd is a partner and Anastasia Tropsha is a trainee solicitor at PCB Litigation LLP. Natalie is also a member of LexisPSL's Case Analysis Expert Panels. If you have any questions about membership of these panels, please contact caseanalysis@lexisnexis.co.uk.

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