

Ticket2Final OU v Wigan Athletic AFC Ltd

When will pre-contractual representations amount to fraud? James Ferrow, associate at Couchmans LLP, discusses the construction of the contract in a recent ruling – with useful tips for practitioners.

What was the structure of the Ticket2Final OU (“T2F”) model?

T2F’s business model was to offer fans the opportunity to purchase an option to buy tickets for certain future sporting events. In relation to football clubs, the basic approach was for T2F to enter into agreements with clubs whereby, in return for a fee paid by T2F to the club, the club would grant to T2F the right to sell options to fans to purchase match tickets for future games (if the fan buying an option were to exercise that option, they would still have to buy the match ticket itself from the club – the option essentially gave fans the right to get to the front of the queue to buy tickets from the club in question).

What was the substance of the dispute over the construction of the contract?

The main factual issue at hand is that Wigan was unable to fulfil its obligation to T2F in respect of the FA Cup Semi-Final and the Final (which Wigan appeared in in 2013) as ticketing for those matches was controlled by the FA. Therefore, when Wigan reached the 2012/13 FA Cup Semi-Final and Final, it did not have the right to sell tickets to fans who had bought options from T2F (i.e. options to buy those tickets from the club).

T2F argued that Wigan had breached the obligation in the contract pursuant to which Wigan had agreed that “the execution of and delivery of the Agreement and the performance and observance of its obligations is and will be within its power and that it is duly authorized to perform and observe each of the terms of the Agreement”. The court deemed this obligation to be a representation which had been made by Wigan, and agreed that the obligation had been breached by the club.

T2F claimed damages for (pre-contractual) misrepresentation (in tort) and for breach of contract. T2F also claimed that the clause in the contract limiting Wigan’s liability for all breaches in connection with the contract to the payments it had received from T2F in the year of the breach should not apply as the contract also contained an overriding clause which excluded the operation of such limitation of liability in the event of fraud.

Therefore, the key elements for T2F to prove were:

- that there had been a representation that induced T2F to enter into the Agreement, and
- this representation was made fraudulently.

By way of reminder, fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless as to whether it be true or false. To prevent a false statement being fraudulent, there must always be an honest belief in its truth.

What approach did the court take when assessing the construction of the contract?

The Deputy Judge ruled that T2F’s skeleton argument was ‘mistaken’ to present as *fait accompli* that the substance of clause 3.5.1 was actionable as a pre-contractual representation. The Deputy Judge referred to certain case law on the issue of the characterisation of warranties and representations in commercial contracts (*Sycamore Bidco Ltd v Sean Breslin* and *Investec Ltd v De Mol Holdings*).

The Deputy Judge held: “Wigan were representing that what is set out in clause 3.5.1 was true and, accordingly, was actionable as a representation if it was false, which I have held it was.”

The Deputy Judge’s explanation as to why the representation was false was that “Wigan had neglected to request and did not get the permission from the FA for the sale of options by T2F, and since such permission was essential, at least for the matches at Wembley, Wigan could not and did not satisfy its grant

in respect thereof and the due performance of its obligations under the Agreement were not within its power”.

It is not particularly clear from the judgment itself, but it appears that the Deputy Judge decided that the substance of clause 3.5.1 was actionable as a contractual representation.

Further discussion around the issue of whether Wigan’s representation was a pre-contractual representation or a contractual term would have been interesting. In particular, the Deputy Judge might have considered another aspect of the Sycamore judgment which noted the “conceptual problem in characterising provisions in the contract as being representations relied on in entering the contract” because the timing does not work i.e. the normal case in misrepresentation involves the making of a representation and as a result the entering into of the contract. That does not work where the only representation is said to be in the contract itself. The Deputy Judge did not examine this point in any detail in this particular case. The point was moot in any case because the limitation of liability applied equally to a claim for pre-contractual representation and breach of a term of the contract, and this limitation would only have been overridden in the event of fraud (which the Deputy Judge determined was not the case).

Does this case add anything to our understanding of representations and contractual clauses?

Probably not, no. As the issue was determined on a very specific set of facts and the specific wording of the contract which was, according to the Deputy Judge, “not the most natural”, it is difficult to draw definitive conclusions which inform our understanding of representations and contractual clauses.

The case is perhaps more useful as an example of how the courts will determine what amounts to fraud. The Deputy Judge determined that the conduct of one of the Defendant’s key witnesses, Mr Ryan, “was just not very competent and well below the standard reasonably expected of him” rather than reckless in the *Derry v Peak* sense.

This case also highlights the importance of ensuring proper compliance with contractually agreed notice provisions and expressly providing for notices by email in a contract, if desired. Wigan had purported to terminate the contract for late payments by T2F. The contract entitled Wigan to terminate if T2F failed to pay any sums due and the sums remained outstanding for seven days following notice. The contract contained a formal notice clause requiring notices to be given in a prescribed manner. Wigan failed to comply with the requirements of the formal notice clause when it demanded payment before termination. Wigan argued that the formal notice clause did not apply to a notice demanding payment before termination and also that there was an implied term arising from the parties’ conduct that formal notices could be given by email. The Deputy Judge disagreed and held that the formal notice clause did apply to the notice demanding payment before termination. He said that the purpose of having a formal notice clause is to ensure that significant notices, such as those which if not complied with might lead to termination, are served in the prescribed manner so that “the recipient can be in no doubt about their importance.”

What should lawyers take from this decision?

This is an example of a very standard provision (i.e. authority and power to enter into the contract and comply with its obligations) being included in a contract without much thought (if any) being given as to whether it was in fact true in respect of all of the contracting party’s obligations.

Lawyers should always consult with their clients regarding the various warranties, representations and undertakings included in any contract to ensure that, in practice, their clients have turned their minds to whether they are in fact able to comply with such provisions, however ‘standard-form’ they might appear.

Lawyers should draft notice provisions in contracts carefully and in consultation with their clients to ensure they are practical and consistent with their client’s approach to business communications.

It may be worth considering whether to include further carve-outs from limitations of liability for behaviour which does not necessarily amount to fraud e.g. negligence, wilful misconduct, wilful deceit etc.