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Small print - isn't it exciting

The answer is it can be (to lawyers).

Have a look at a Contract or someone's Terms & Conditions. Near or at the end you will probably find a clause called "Entire Agreement" or something similar. Because it is near the end of the document, a lot of people tend not to read it. If you asked a lawyer what it meant, he is likely to say that it means that you should ignore all promises made by salesmen, what is said in advertisements and anything that isn't written into the Contract itself. In general terms, that is a good guide to the intended effect of the clause. However, the issue has been looked at this year by the Court of Appeal which has reminded us that these things are never as simple as they seem.

In the case the Court considered, Axa Sun Life Services plc had an agreement with agents for them to sell its financial products. Under the agreements, Axa could claw back commission paid to its agents if customers cancelled purchases of products. When the agreements were terminated, Axa brought claims against the agents for commission claw-back and various other sums. The agents said, among other things, that they were induced to enter into the agreements as a result of misrepresentations made by Axa. Axa said that, since the misrepresentations were "outside" and before the contract, they were not relevant.

The Court looked at the precise wording of the clause in the contract. It was in fairly common form and said that the agreement "shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing". The Court analyzed the text of the clause in detail and concluded that it did not exclude liability for misrepresentations of any kind because the clause was concerned with matters of the agreement and its terms only. In this context, the inclusion of the word "representations" in the clause referred to representations which might be argued, but for the clause, to have become terms or conditions of the contract itself, and did not relate to misrepresentations which were made or given in the time leading up to the contract but did not form part of the subject matter of the contract itself. So pre-contract representations did become relevant. If they were wrong, the agents had cause for complaint. Axa could not rely on the clause.

My view is that it may be possible to exclude liability for prior misrepresentation but that must now be clearly stated in the clause so that both parties to the contract understand that.

Clients complain that most of the documents that we produce are too long. It is this sort of problem that causes that. Everything has to be spelt out in detail. We seem to have to cover all possibilities and eventualities. We have to try and predict all known potential problems and produce some wording to account for them. The end result tends to be that the small print gets smaller but that is probably necessary.

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