

E-briefing | 7 July 2021

E-briefing: Harry Elias Partnership LLP wins Court of Appeal case concerning “as is basis” clause and misrepresentation

Why this is important

1. CA/CA 26/2020 was an appeal from the High Court decision in ***Smoothlink Worldwide Services Pte Ltd v Regional Marine & Engineering Services Pte Ltd and another suit*** [2020] SGHC 94. This case involves claims of misrepresentation and breach of contract in the context of the sale of drilling rigs on an “as is” basis, and the application of well-established contractual principles such as the *contra proferentem* rule, rectification, proof of loss and implied condition under the Sale of Goods Act. Notably, the Court of Appeal affirmed that an “as is basis” clause in contracts of sale and purchase refers to taking the goods in their then existing condition, including their weights, despite the Defendant-Appellant’s contention that the “as is basis” clause is not all-encompassing and did not include the weight of the rigs.
2. Our Ms Yasmeen J. Marican and Mr Lloyd Tan, supported by Mr Kushal Atul Shah, successfully acted for the Plaintiff in both the High Court and Court of Appeal proceedings.

Background facts

3. On 23 February 2018, the Plaintiff, Smoothlink Worldwide Services Pte Ltd, entered into separate agreements with the Defendant, Regional Marine & Engineering Services Pte Ltd, to sell the two drilling rigs to the Defendant at the price of \$1,100,000 each (collectively referred to as the “**Agreements**”).
4. The Plaintiff commenced two suits in the State Courts against the Defendant for \$100,000 each, being the balance purchase price under contracts for the sale of the rigs by the Plaintiff to the Defendant.
5. The Defendant counterclaimed as follows:
 - a. The Defendant alleged that the Plaintiff made misrepresentations as to the weight of the rigs to the Defendant.
 - b. The Defendant pleaded breach of contract by the Plaintiff and counterclaimed for damages of \$3,739,260 and \$2,941,260 respectively.
 - c. The Defendant also sought the return of \$280,000 which the Defendant claimed to have paid to a third party on behalf of the Plaintiff.
6. The two suits were subsequently transferred to the High Court and consolidated as the Defendant’s counterclaims exceeded the jurisdiction of the State Courts.

The High Court decision

7. At the outset, the trial judge held that there was no dispute that the Defendant’s liability to pay the Plaintiff the sum of \$100,000 had fallen due.
8. Turning to the Defendant’s counterclaims, the trial judge found, amongst others, that:
 - a. The Defendant made false representations as to the weight of the rigs, but the key issue was whether the Defendant was induced to enter into the Agreements by the Plaintiff’s representations.
 - b. The Defendant was not induced by the Plaintiff’s representations given that:
 - i. The Agreements provided that the Defendant bought the rigs on an “as is” basis. While the Agreements referred to an “as in” basis, the trial judge agreed with our submission that this was clearly a typographical

error. In any event, the Agreements were drafted and the “as is” clause was inserted by the Defendant’s lawyers. Any doubt in this regard would have been resolved against the Defendant, in line with the *contra proferentem* rule.

- ii. The trial judge agreed with our submission that the “as is” clause meant that the Defendant had agreed to take the rigs in their then existing condition, including their weights. In this regard, the Defendant understood that the “as is” clause meant that the Defendant could not complain about the weight of the rigs.
 - iii. The Agreements were silent as to the weight of the rigs. It was most unlikely that the Defendant would have simply forgotten to include the weight of the rigs in the Agreements when, according to the Defendant, the weight was important. This was all the more so when the Defendant had given express instructions to its lawyers to include the “as is” clause in the Agreements.
- c. In any event, the trial judge accepted our submission that the Defendant had not proved its loss. There was insufficient evidence as to what the actual weight of each rig was and the Defendant had provided discrepant weights of the rigs.
9. Accordingly, the High Court judge found for the Plaintiff and dismissed the Defendant’s counterclaims. The Defendant then appealed against the High Court decision.
10. The full text of the High Court decision may be accessed [here](#).

Key findings by the Court of Appeal

11. The Court of Appeal unanimously dismissed the Defendant-Appellant’s appeal and did not require the Plaintiff-Respondent to respond to the submissions made. The Court of Appeal’s decision was based on the following reasons:
- a. The Court of Appeal noted that it was not the Defendant-Appellant’s case that the phrase “as in basis” has some meaning in the present context and that because it has meaning, it could not have been an error on the face of the record.
 - b. The Court of Appeal held that the phrase “as in basis” is an obvious typographical error to anyone familiar with contracts of sale and purchase and that in the circumstances, the trial judge interpreted the clause sensibly. There was no question of rectification of contractual terms.
 - c. There was no need to resort to the *contra proferentem* rule of construction even though the Agreements were drafted by the Defendant-Appellant’s lawyers. The *contra proferentem* rule only applies when there is ambiguity in the words used in an agreement and the phrase in issue had no ambiguity or double meaning. It was simply a typographical error. The trial judge was therefore entirely correct in holding that the sale and purchase was on an “as is where is” basis.
 - d. The Court of Appeal also agreed with the trial judge that the Plaintiff-Respondent’s representations as to the weight of the rigs were false, but the Defendant-Appellant had not been induced to enter into the Agreements for the reasons as set out by the trial judge.
 - e. The Court of Appeal further affirmed the trial judge’s decision on all other issues relating to the Appellant’s counterclaims.

Conclusion

12. Parties negotiating contracts should be alive to the implications of including the term “as is” basis without more, given the broad and all-encompassing scope of such a term. This case serves as a timely reminder for careful and precise contract drafting.

For further information, contact:

Yasmeen J. Marican

Partner, Restructuring and Insolvency
YasmeenJMarican@harryelias.com
+65 6361 9813



Lloyd Tan

Legal Associate
LloydTan@harryelias.com
+65 6361 9809



Supporting team member

Kushal Atul Shah

Trainee
KushalShah@harryelias.com

Data protection and privacy statement

Your information will be held by Harry Elias Partnership LLP. You can unsubscribe from our e-bulletins, newsletters and other marketing publications and materials at any time. To unsubscribe please email contactus@harryelias.com and include the word 'unsubscribe' in the subject field.

Harry Elias Partnership LLP is a limited liability partnership registered in Singapore under the Limited Liability Partnerships Act (Cap 163A), UEN T10LL0175E and with our registered place of business at 4 Shenton Way #17-01 SGX Centre 2 Singapore 068807 Singapore. We are regulated by the Law Society of Singapore and the Legal Services Regulatory Authority.