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John Eldridge

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'ENTIRE AGREEMENT' CLAUSES: HOW EFFECTIVE?

John Eldridge*

I INTRODUCTION

For any commercial practitioner, the ubiquitous 'entire agreement' clause is a familiar drafting tool. Insofar as such clauses purport to promote certainty and clarity in the content and meaning of contracts, their popularity is hardly surprising. Indeed, 'entire agreement' clauses, in their various guises, have today proliferated beyond the bounds of commercial contracting, and are just as likely to appear in negotiated and standard form consumer contracts.

In spite of the readiness with which 'entire agreement' clauses are employed, the effect of such clauses in Australian law remains a subject of some difficulty. Whereas English law has largely embraced the notion that such clauses are to be enforced according to their terms, the position in Australia is less clear.[1] Although the effect of 'entire agreement' clauses in Australian law has been the subject of much able commentary, their prevalence and importance nonetheless warrants a further examination of the status of such clauses on the current state of the law.[2] The object of this short paper is to explore the degree to which 'entire agreement' clauses are effective in Australian law, and to highlight the ways in which an apparently effective provision might be vulnerable to circumvention.

In order to embark upon this task, something must be said at the outset as to what an 'entire agreement' clause might commonly be expected to achieve. Although the object of such a clause might be thought to be obvious, there is good reason to take care in defining what it is for such a clause to be 'effective'. This is because such clauses might have a number of distinct effects. Matthew Barber, for instance, has characterised an 'entire agreement' clause thus:

> The essence of an entire agreement clause is the statement that the document of which the clause is a part constitutes the entire agreement between the parties. Any of a number of other statements may be added to this: some clauses specify other documents that are also part of the agreement; some explicitly limit the scope of the clauses' effects to the subject-matter of the document, and so allow that there may be other agreements between the parties unrelated to the contract in question; most entire agreement clauses contain a statement that the contractual document supersedes all prior representations, agreements, negotiations, discussions and/or understandings between the parties. Entire agreement clauses are often coupled with an acknowledgement that one or both parties have not relied upon any statements or representations made by the other party in entering into the agreement. The

* BA LLB(Hons) PhD (Adelaide) LLM(Cambridge); Lecturer, University of Sydney Law School.
[1] For the English position, see, eg: *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep. 611; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] 2 Lloyd's Rep 1.
[2] For discussion of the Australian position, see, eg: Elisabeth Peden and J W Carter, 'Entire Agreement—and Similar—Clauses' (2006) 22 *Journal of Contract Law* 1; I M Jackman, 'Some Judicial Fallacies Concerning Entire Agreement Clauses' (2015) 89 *Australian Law Journal* 791.

> operation of these non-reliance clauses raises significant issues, particularly as to whether and how they function in the face of evidence that one party did in fact rely on representations made by the other.[3]

Barber here acknowledges several different functions which an 'entire agreement' clause might serve. Although each of these functions might be said to be directed to the same underlying purpose, it is nonetheless necessary to recognise that a single 'entire agreement' clause may affect the parties' rights and obligations in a range of ways, each of which may necessitate separate analysis. Indeed, the multifaceted quality of an 'entire agreement' clause is often apparent upon its face. A clear example is provided by the clause which was at issue in *Hope v RCA Photophone of Australia Pty Ltd*.[4] That provision – which is typical of the form and content of an 'entire agreement' clause – provided:

> [T]his agreement and lease as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof and there is no other understanding agreement warranty or representation express or implied in any way binding extending defining or otherwise relating to the equipment or the provisions hereof on any of the matters to which these presents relate.[5]

This clause might, at first glance, be thought to operate not only to preclude a party from leading evidence to establish the existence of express terms not recorded in the written agreement, but also to exclude any implied terms which might otherwise form part of the parties' bargain. It might also be thought effective to defeat a claim founded upon misrepresentation, misleading or deceptive conduct, or estoppel. It would thus be necessary, when querying whether this clause were 'effective', to consider each of these questions in turn.

This paper will accordingly proceed in three parts. It will first examine the question of whether an 'entire agreement' clause might be effective to prevent a court from having recourse to extrinsic evidence as an aid to the construction of a contract's express terms. It will then proceed to examine the question of whether, and when, such a clause might be effective to exclude implied terms which might, in the absence of such a clause, form part of the parties' bargain. Finally, it will consider the effectiveness of an 'entire agreement' clause in robbing a pre-contractual representation of its legal effect. As will be seen, this final section will include a discussion of a number of separate ways in which such a representation may affect the parties' legal rights and obligations. In addition to the possibility of such a representation amounting to a promise which is enforceable in contract (whether as a term of the parties' main contract or pursuant to a collateral contract), consideration will also be given to the possibility of such a representation giving rise to rights founded upon a basis other than contract.

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[3] Matthew Barber, 'The Limits of Entire Agreement Clauses' [2012] *Journal of Business Law* 486, 486.
[4] (1937) 59 CLR 348.
[5] Ibid. For a further typical example, see: *Johnson Matthey Ltd v AC Rochester Overseas Corp* (1990) 23 NSWLR 190, 194.

II ENTIRE AGREEMENT CLAUSES AND CONTRACTUAL INTERPRETATION

One might be forgiven for wondering at why contracting parties would wish to prevent a court from having recourse to extrinsic evidence as an aid to the interpretation of the express terms of their bargain.[6] Indeed, it can scarcely be denied that in many cases, the exclusion of relevant contextual material in the course of the constructional exercise will result in outcomes which are both uncommercial and undesirable.[7] Even so, it is not difficult to conceive of situations in which contracting parties might rationally wish to limit the degree to which a court might have recourse to extrinsic materials in the course of interpreting their contract. Where, for instance, the terms of a contract are likely to be relied upon by third parties – and especially where those parties are limited in their capacity to look beyond the terms of the written contract – it may be desirable to take steps to ensure that the contract will be interpreted in a way which gives primacy to the contractual text.[8]

In exploring whether an 'entire agreement' clause might be effective to prevent a court from having recourse to extrinsic evidence as an aid to the construction of a contract's express terms, it is first necessary to determine the circumstances in which a court may have recourse to such evidence in the *absence* of such a clause. Though it would be somewhat misleading to suggest that the English position in this regard is wholly settled,[9] it remains the case that contractual interpretation in English law is governed by reference to the following key principles set out by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in

[6] It should be noted that the term 'extrinsic evidence' is employed in this paper simply to refer to matters or materials which are extraneous to the contractual text and yet which may rationally bear on its proper interpretation.
[7] Indeed, the rise of 'commercial construction' has been due in no small measure to recognition of this point. Though this is not the place for a detailed discussion of what 'commercial construction' entails, an overview can be found in: J W Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013) pp 15-20.
[8] Such an approach might be described as 'contracting out of contextualism'. See: Catherine Mitchell, 'Entire Agreement Clauses: Contracting Out of Contextualism' (2006) 22 *Journal of Contract Law* 222.
[9] See the discussion in: Jonathan Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' (2017) 17 *Oxford University Commonwealth Law Journal* 301.

> ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd*. [1997] 2 WLR 945.
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> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.[10]

Most significant for present purposes is the fact that, when construing a contract in line with these principles, a court may have recourse to evidence of relevant 'background' as a matter of course. Accordingly, the use of an 'entire agreement' clause to prevent a court from having recourse to extrinsic evidence as an aid to the construction of a contract's express terms would, so far as English law is concerned, amount to an inversion of the 'default rule' in this setting.

In Australian law, considerable doubt continues to attend the principles governing the use of extrinsic evidence in contractual interpretation. Indeed, the law in this sphere is marked by an ongoing controversy as to whether it is necessary to point to textual 'ambiguity' as a precondition for the use of such evidence as an aid to construction.[11] The difficulties in this setting are traceable to the decision in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*,[12] in which Mason J, as his Honour then was, stated:

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning.[13]

On one view, this statement can be taken to mean that it is necessary to point to textual

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[10] [1998] 1 WLR 896, 912-913.
[11] For a detailed overview of this controversy, see: John Eldridge, ''Surrounding Circumstances'' in Contractual Interpretation: Where are we Now?' (2018) 32(3) *Commercial Law Quarterly* 3.
[12] (1982) 149 CLR 337.
[13] Ibid 352.

'ambiguity' before a court may have regard to extrinsic evidence as an aid to interpretation.[14] Although this interpretation of Mason J's 'true rule' has found support in some quarters,[15] and has been explicitly endorsed by a panel of three judges of the High Court of Australia in the course of disposing of an application for special leave to appeal,[16] it is nonetheless very difficult to reconcile with more recent High Court authority in this sphere.[17] The confusion in the High Court authorities has led to a divergence between different intermediate appellate courts within Australia. In New South Wales, there is now a well-entrenched line of authority which holds that it is not necessary to point to textual 'ambiguity' before having recourse to extrinsic evidence as an aid to interpretation.[18] This conclusion has also been endorsed by the Full Court of the Federal Court of Australia.[19] Different approaches, however, can be seen elsewhere.[20]

The unsettled state of the law in this area poses some difficulty when seeking to explore the effectiveness of an 'entire agreement' in preventing a court from having recourse to otherwise-admissible extrinsic evidence as an aid to the construction of a contract's express terms. This is because, unlike in English law, there is considerable doubt as to what is the 'default' position in respect of the use which a court may make of extrinsic evidence when construing a contract. This difficulty is compounded by the fact that there is relatively little authority which directly addresses the question of whether an 'entire agreement' clause might be effective to achieve this end. Those authorities, moreover, do not speak with one voice – indeed, while there is authority which suggests that 'entire agreement' clauses are ineffectual for this purpose,[21] there also exists support for the opposite view.[22]

In the absence of a clear answer as a matter of authority, it is submitted that the proper approach is to look to basal principle for guidance. Several commentators have argued

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[14] For an example of this interpretation of *Codelfa* being endorsed in an intermediate appellate court, see: *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 163 (Heydon JA).
[15] See, in particular: Thomas Prince, 'Defending Orthodoxy: Codelfa and Ambiguity' (2015) 89 *Australian Law Journal* 491; Thomas Prince, 'Still Defending Orthodoxy: The New Front in the War on *Codelfa*' (2018) 46 *Australian Bar Review* 156; J D Heydon, *Heydon on Contract* (Thomson Reuters, 2019) pp 368-390.
[16] *Western Export Services Inc v Jireh International Pty Ltd* (2011) 282 ALR 604.
[17] See, eg: *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 188; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 461 – 462; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656. For a brief overview of the relevant authorities, see: John Eldridge, ''Surrounding Circumstances'' in Contractual Interpretation: Where are we Now?' (2018) 32(3) *Commercial Law Quarterly* 3. For a detailed (albeit now somewhat dated) survey of the caselaw, see, eg: David McLauchlan, 'Plain Meaning and Commercial Construction: Has Australia Adopted the *ICS* Principles?' (2009) 25 *Journal of Contract Law* 7.
[18] See, eg: *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633, 653; *Righi v Kissane Family Pty Ltd* [2015] NSWCA 238, [44]; *Calvo v Ellimark Pty Ltd* [2016] NSWCA 136, [55]; *Zhang v ROC Services (NSW) Pty Ltd; National Transport Insurance by its manager NTI Ltd v Zhang* [2016] NSWCA 370, [79]; *Cherry v Steele-Park* [2017] NSWCA 295.
[19] *Stratton Finance Pty Ltd v Webb* [2014] FCAFC 110, [36] – [40] (Allsop CJ, Siopis and Flick JJ).
[20] See, eg, the approach taken in Western Australia: *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* [2014] WASCA 164.
[21] See, eg: *John v Price Waterhouse* [2002] EWCA Civ 899, [67]; *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218, 224.
[22] See: *MacDonald v Shinko Australia Pty Ltd* [1999] 2 Qd R 152.

convincingly that a properly drafted 'entire agreement' clause ought to be effective to preclude a court from having recourse to extrinsic evidence when construing a contract, and that such an approach is defensible as a matter of principle insofar as it promotes and protects the parties' autonomy.[23] Such a conclusion would also arguably promote coherence in the law – indeed, if contracting parties are able, by their conduct, to render admissible as an aid to construction evidence which would ordinarily be excluded for this purpose, there can be no reason for denying contracting parties the freedom to *limit* by explicit agreement the materials which might be used for this same task.[24]

III Entire Agreement Clauses and the Implication of Terms

Although the law respecting implied terms is by no means straightforward – and has been attended by considerable debate in recent years – there is little need for present purposes to dwell upon the subtleties of this area. Indeed, the question of whether an 'entire agreement' clause might be effective to exclude an implied term which might, in the absence of such a clause, form part of the parties' bargain, can be answered with two points.

First, and most importantly, the effect of an 'entire agreement' clause will always turn upon the construction of the clause in question. Though this point is undoubtedly obvious, its importance means that it nonetheless merits emphasis. Though there is ample authority for the proposition that an 'entire agreement' clause *may* as a matter of principle be effective to exclude a term implied in fact,[25] a term implied by law,[26] or a term implied through custom or usage,[27] such authority offers only limited guidance in answering the question of whether a *particular* clause *does* in fact achieve one of these ends. The answer to that latter question will emerge only upon a close consideration of the text of the provision in question, construed in light of the contract as a whole.

Second, when considering the potential for an 'entire agreement' clause to exclude a term which would otherwise be implied as a matter of law, it is essential to consider whether the source of the relevant implication is a statutory provision, and, if so, whether the statutory regime in question permits the parties to 'contract out' of the operation of the relevant provisions. In this regard, the Australian Consumer Law furnishes an example which is at once instructive and misleading. Contracting parties are not able to derogate from the 'consumer guarantees' set out in the Australian Consumer Law.[28] It is thus a clear example of a setting in

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[23] See, eg: Catherine Mitchell, 'Entire Agreement Clauses: Contracting Out of Contextualism' (2006) 22 *Journal of Contract Law* 222; I M Jackman, 'Some Judicial Fallacies Concerning Entire Agreement Clauses' (2015) 89 *Australian Law Journal* 791, 801; J D Heydon, *Heydon on Contract* (Thomson Reuters, 2019) p 376.
[24] See, eg: *Partenreederei MS Karen Oltmann v Scarsdale Shipping Co Ltd (The Karen Oltmann)* [1976] 2 Lloyd's Rep 708. This decision, and the proposition for which it is cited here, are controversial. See the discussion in: David McLauchlan, 'Contract Interpretation: What Is It About?' (2009) 31 *Sydney Law Review* 5.
[25] See, eg: *Etna v Arif* [1999] 2 VR 353, 371.
[26] See, eg: *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.
[27] See, eg: *Exxonmobil Sales and Supply Corp v Texaco Ltd (The Helene Knutsen)* [2003] 2 Lloyd's Rep 686, [24].
[28] Australian Consumer Law s 64.

which an 'entire agreement' clause will not be effective in preventing the enforcement of rights derived from statute. Yet at the same time, it must be remembered that the 'consumer guarantees' are, in truth, not implied terms at all.[29]

IV Entire Agreement Clauses and the Legal Effect of Pre-Contractual Statements

It is necessary to turn finally to a consideration of the effectiveness of an 'entire agreement' clause in robbing a pre-contractual representation of its legal effect. This is, perhaps, the purpose to which such clauses are most commonly directed. Indeed, as Lightman J stated in *Inntrepreneur Pub Company v East Crown Ltd*:

> The purpose of an entire agreement clause is to preclude a party to a written agreement from thrashing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim [as] to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause … is to denude what would otherwise constitute a collateral warranty of legal effect.[30]

There are, of course, a range of different ways in which a pre-contractual representation may have legal effect. In addition to the possibility of such a representation amounting to a promise which is enforceable in contract, there is also the possibility of such a representation giving rise to rights which are founded upon a basis other than contract.

An 'entire agreement' clause is, in principle, capable of operating so as to deny legal effect to a representation that would, but for the operation of the clause, be enforceable as a contractual promise (whether as a term of the parties' main contract or pursuant to a collateral contract). Such a clause is thus capable of going further than the parol evidence rule in preventing the parties from proving the existence of contractual promises which are not recorded in the parties' written agreement. As Heydon has explained:

> It is true that sometimes the parol evidence rule will achieve the same result for a contract without an entire agreement clause as would have been achieved if there had been an entire agreement clause. But often their scope and effects

[29] For discussion in respect of this point, see: Jeannie Marie Paterson, 'The New Consumer Guarantee Law and the Reasons for Replacing the Regime of Statutory Implied Terms in Consumer Transactions' (2011) 35 *Melbourne University Law Review* 252.
[30] [2000] 2 Lloyd's Rep. 611, [7].

> are different. Thus the parol evidence rule cannot apply if the written contractual materials are incomplete. But an entire agreement clause can prevent recourse to any materials save particular written ones. The parol evidence rule cannot apply until an affirmative answer is given to the question: "Is the written contract the entire contract?" An entire agreement clause renders that question unnecessary. Further, an entire agreement clause is capable of much wider operation than the parol evidence rule, with its numerous exceptions.[31]

Insofar as collateral contracts are concerned, there has been doubt expressed in some quarters as to the extent to which clear language which will be required before such a contract is excluded by operation of an 'entire agreement' clause.[32] Though it would be wrong to claim that the law is wholly settled in this respect, the better view seems to be that stated by Jackson J in *Coast Corp Pacific Pty Ltd v Stockland Development Pty Ltd*, where it was concluded that 'there is no special rule of construction that applies to the operation of an entire agreement clause, to the effect that something amounting to express words of exclusion of a collateral contract is required before an entire agreement clause can apply to a collateral contract'.[33]

The operation of an 'entire agreement' clause in respect of rights which are founded on bases other than contract is somewhat more complex. There are, of course, a great many ways in which a pre-contractual representation may operate to attract legal liability, and this is not the occasion for an exhaustive examination of the various doctrines which may be enlivened in cases of this type.[34] It is important to note, however, that in a great many of the situations in which a party claims that a pre-contractual representation gives rise to a right founded on a basis other than contract, an 'entire agreement' clause will be wholly ineffective in *directly* defeating the claim. It may, however, have some considerable *indirect* effect, insofar as it precludes a party from successfully establishing reliance upon the representation in question.

A clear example of this point can be seen in actions which are founded upon a contravention of section 18 of the Australian Consumer Law – the statutory proscription of misleading or deceptive conduct in trade or commerce. Although it is well settled law that parties cannot 'contract out' of section 18, it is equally well settled that an appropriately-drafted clause – whether expressed to be an 'entire agreement' clause, a 'disclaimer' or otherwise – can in principle operate to defeat a claim founded upon section 18. Such a result may follow either because the impugned conduct, when taken together with the relevant clause, is adjudged not to be misleading or deceptive, or, alternatively, because the clause precludes a party from

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[31] J D Heydon, *Heydon on Contract* (Thomson Reuters, 2019) p 333.
[32] See, eg: *McMahon v National Foods Milk Ltd* (2009) 25 VR 251, 273.
[33] [2018] QSC 305, [138].
[34] For further discussion of the effect of clauses by which a party disclaims reliance upon representations made by another party prior to contract, see, eg: A Trukhtanov, 'Misrepresentation: Acknowledgment of Non-reliance as Defence' (2009) 125 *Law Quarterly Review* 648; A Trukhtanov, 'Exclusion of Liability for Pre-contractual Misrepresentation: A Setback' (2011) 127 *Law Quarterly Review* 345.

successfully demonstrating that the impugned conduct caused the loss of which they complain.[35]

A similar point can be made in respect of the effect of an 'entire agreement' clause upon a claim founded upon equitable estoppel. As Campbell JA explained in *Franklins Pty Ltd v Metcash Trading Ltd*:

> I would accept that an entire agreement clause, even one that … specifically denies efficacy to all previous negotiations and representations, could not overcome an equitable estoppel, once established. An "entire agreement clause" might create a factual difficulty in the way of proof of the elements of equitable estoppel, most obviously, proof of inducement or reliance, and I would not want to rule out the possibility that it might be relevant to any precise remedy granted (though I cannot at present think of an example of when that might occur). However, it does not create an insuperable obstacle of principle. Consistently with the equitable principle that it will not allow a contract to be an instrument of fraud, equity would not permit an entire agreement clause to stultify the operation of its doctrines.[36]

It can thus be seen that an 'entire agreement' clause may well have utility even where its effect is oblique rather than direct. Even so, it must be borne in mind that careful drafting is especially important if such a clause is to be effective in respect of claims founded upon a basis other than contract.

V CONCLUSION

This paper has examined three key questions in respect of the effectiveness of 'entire agreement' clauses. First, it considered whether an 'entire agreement' clause might be effective to prevent a court from having recourse to extrinsic evidence as an aid to the construction of a contract's express terms. It then proceeded to examine the question of whether, and when, such a clause might be effective to exclude implied terms which might, in the absence of such a clause, form part of the parties' bargain. Finally, it considered the effectiveness of an 'entire agreement' clause in robbing a pre-contractual representation of its legal effect.

The most significant point to emerge from the discussion of each of these points is the crucial importance of attending closely to the language of the particular clause which is at issue in any given case. Indeed, virtually all of the points made above are necessarily statements merely of general principle and are thus inherently incapable of providing a definitive resolution to the question of what effect a particular clause will have in the context of a particular case. It is, for instance, correct to say that an 'entire agreement' clause is capable of excluding a term implied

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[35] Perhaps the seminal authority on the effect of a 'disclaimer' in this setting is *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592.
[36] (2009) 76 NSWLR 603, [554]. See further: *Saleh v Romanous* [2010] NSWCA 274.

in fact – but the question of whether a particular term is indeed effective to exclude an implied term for which another party contends is a question which necessitates close attention to text and context.