

To what extent is the court taking a fluid approach to “consequential loss”; and so giving effect to the intention of the parties and the commercial freedom to negotiate risk?”

Rachael O’Hagan
39 Essex Chambers
6 December 2017

1. Introduction

- Consequential loss in context
- Claiming the kitchen sink
- Excluding liability for consequential loss
- Latest developments in the law on exclusion clauses and consequential loss

2. Consequential Loss in Context

- Claims for breach of contract.
- Heads of loss are limited to those which are not too remote and which are not specifically excluded under the contract.

3. Claiming the kitchen sink

A. Is the loss too remote?

Hadley v Baxendale (1854) 156 ER 145

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be [1: The First Limb] such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or [2: The Second Limb] such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”

The Achilleas [2008] UKHL 48

B. Breach of contract and claims in construction contracts

- What types of claims do we see for breach of contract in construction claims?

C. Claiming the “unclaimable”

- Obtain guidance from the legal team.
- Documents are King.
- Categories of “consequential loss” which are often recoverable.

4. Excluding Liability for Consequential Loss

A. Front-end issues: having your cake and eating it ...

B. Example Clause

Clause 17.6 of the FIDIC Red Book:

“Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract.”

C. Some common pitfalls

Is the loss actually direct loss?

- British Sugar v NEI Power Projects Ltd (1998) 87 BLR 42
- Deepak v ICI [1991] 1 Lloyd's Rep 387
- Pegler Ltd v Wang (UK) Ltd [2000] BLR 218

- Exclusion clause only refers to “consequential loss”
- Oops – accidentally limiting the clause
Ferryways NV v Associated British Ports [2008] EWHC 225

D. Case Study

- Claimshandling Corp provided administration and claims handling services to Insurance Co.
- Insurance Co claimed that Claimshandling Corp was in breach of contract and claimed £100m in damages.
- There were two relevant exclusion clauses:

“1. Neither party shall be liable to the other for any indirect or consequential loss (including but not limited to loss of goodwill, loss of business, loss of anticipated profits or savings and all other pure economic loss) arising out of or in connection with this Agreement”

“2. Claimshandling Corp will not be liable to [Insurance Co] for any indirect or consequential loss or loss of profit or loss of business arising out of data input errors put into Policy Schedules, Certificates of Insurance or Endorsements.”

- Claimshandling Corp argued that it was not liable for both direct and indirect losses for the specific heads of loss referred to in each clause.

- What do you think the Court found here?

Makerstudy Insurance Company v Endsleigh
Insurance Services Ltd [2010] EWHC 281
(Comm).

5. Latest developments in law on exclusion clauses and consequential loss

A. Transocean Drilling v Providence [2016] EWCA Civ 372

The relevant Clause provided:

“Consequential loss

For the purpose of this Clause 20 the expression ‘Consequential Loss’ shall mean:

(i) any indirect or consequential loss or damages under English law, and/or

(ii) to the extent not covered by (i) above, loss or deferment or production, loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties)”

“I can see no reason in principle why commercial parties should not be free to embark on a venture of this kind on the basis of an agreement that losses arising in the course of the work will be borne in a certain way and that neither should be liable to the other for consequential losses, however they choose to define them.”

B. Star Polaris v HHIC-PHIL [2016] EWHC 2941 (Comm)

Clause was:

“Except as expressly provided in this Paragraph, in no circumstances and on no ground whatsoever shall the Builder have any responsibility or liability whatsoever or howsoever arising in respect of or in connection with the Vessel or this Contract after the delivery of the Vessel. Further, but without in any way limiting the generality of the foregoing, the Builder shall have no liability or responsibility whatsoever or howsoever arising for or in connection with any consequential or special losses, damages or expenses unless otherwise stated herein.”

C. Royal Devon and Exeter NHS Trust v ATOS IT Services
UK Limited [2017] EWHC 2197 (TCC)

“87. Where, as in this case, the words used could give rise to competing interpretations, one of which makes commercial sense and the other does not, it is open to the court to prefer the interpretation that makes commercial common sense...”

5. Conclusions

To what extent is the court taking a fluid approach to “consequential loss”; and so giving effect to the intention of the parties and the commercial freedom to negotiate risk?”

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number OC360005) with its registered office at 81 Chancery Lane, London WC2A 1DD. 39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.