CROWN
OFFICE
CHAMBERS

LIMITATIONS ON LIABILITY

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Crown Office Chambers

Issues

- The Need for Limits
- Exclusions vs. Limitations.
- The problem of negligence.
- Types of Exclusions.
- Financial Limits and Time Limits.
- Standard exclusions.

Freedom of Contract

- "*Parties are free to agree to whatever exclusion or modification of all three types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract; and must not offend against the equitable rule against penalties … Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations.*"

  – Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 850.

Allocation of Risks

- *"In major construction contracts the parties commonly agree how they will allocate the risks between themselves and who will insure against what. Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down. Contractors and consultants who accept large risks will charge for doing so and will no doubt take out appropriate insurance. Contractors and consultants who accept lesser degrees of risk will presumably reflect that in the fees which they agree."*

  – Jackson LJ in *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373 at para. 57.

The Need for Limits

- The crucial need for certainty and protection.
- Balance the scale of unforeseen losses against the need to protect clients.
- Often there is a clash between freedom of contract with statutory and regulatory provisions.
- The Price Paid and Insurance.
  - (see Chadwick LJ in *E A Grimstead & Son Ltd v McGarrigan* (unreported, 27 October 1999))

Scope of Contract

- Central issue: what has been promised?
- E.g. Duties of care vs. warranties of performance
- Oliver J in *Midland Bank Trust Co Ltd v. Hett, Stubbs and Kemp.* [1979] Ch 384 analogous.
- Concurrent duties in Tort and *Henderson* networks of contracts.
- The price paid.

Exclusion v Limitation

- *Ailsa Craig Fishing Co. Ltd. v Malvern Fishing Co. Ltd* [1983] 1 W.L.R. 964 Lord Wilberforce at 966:

  "*Whether a clause limiting liability is effective or not is a question of construction of that clause in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed, and in such a contract as this, must be construed contra proferentem. I do not think that there is any doubt so far. But I venture to add one further qualification, or at least clarification: one must not strive to create ambiguities by strained construction, as I think that the appellants have striven to do. The relevant words must be given, if possible, their natural, plain meaning. Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure.*"

Contractual Interpretation

- Lord Neuberger in *Arnold v Britton* [2015] AC 1619 (at 1627-1628):

"15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of:

(i) the natural and ordinary meaning of the clause,

(ii) any other relevant provisions of the lease,

(iii) the overall purpose of the clause and the lease,

(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and

(v) commercial common sense, but

(vi) disregarding subjective evidence of any party's intentions."

- And see *Wood v Capita Insurance Services Ltd* [2017] 2 WLR 1095

Onerous Clauses

- Exemption clauses must be expressed clearly and without ambiguity or they will be ineffective (*Ailsa Craig*)

- If the clause is unduly onerous mere reference will be insufficient (see *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 and *Poseidon Freight Forwarding Ltd. v. Davies Turner Southern Ltd.* [1996] 2 Lloyds Rep 388).

- *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 466 Lord Denning: some clauses:

  " … would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

- Query: movement away from this? *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373

Burdens/Rules

- The burden is on the party relying on clause to raise and prove the clause and effect.
- Contra proferentem? Relevant (*Ailsa Craig*); but determinative?
  - No; *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2012] Ch 497 at paragraph 68 per Lord Neuberger MR).
  - Yes; *Nobahar-Cookson & Ors v The Hut Group Ltd* [2016] EWCA Civ 128 para. 18
  - Only if ambiguity: *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] 2 Lloyd's Rep 51 paras. 20-21.
- "the very purpose" test: inherently unlikely that the parties will intend a party to not be liable when negligently performing the service it promised.
  - Stephenson LJ in "The Raphael" [1982] 2 Lloyd's 42 at pages 50 and 51

The Problem of Negligence

- Can a party exclude or cap liability for own negligence?
  - Yes, except death or injury.

- How?

  - (1) Does the clause expressly exclude liability for negligence?

  - (2) If not, are the words wide enough to over negligence?

  - (3) If not, then negligence is not excluded.

  - (4) If so, then is the clause wide enough to cover a head of damage other than negligence and if so, then the negligence is not excluded

- *Canadian Steamship Lines v. The King* [1952] AC 192, 208 (PC)

Negligence and Dishonesty

Popplewell *J Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2014] EWHC 2197 (Comm):

(1) A clear intention must appear from the words used before the Court will reach the conclusion that one party has agreed to exempt the other from the consequences of his own negligence or indemnify him against losses so caused. The underlying rationale is that clear words are needed because it is inherently improbable that one party should agree to assume responsibility for the consequences of the other's negligence.

(2) The ***Canada Steamship*** *principles are not to be applied mechanistically and ought to be considered as no more than guidelines; the task is always to ascertain what the parties intended in their particular commercial context in accordance with the established principles of construction They nevertheless form a useful guide to the approach where the commercial context makes it improbable that in the absence of clear words one party would have agreed to assume responsibility for the relevant negligence of the other.*

(3) These principles apply with even greater force to dishonest wrongdoing, because of the inherent improbability of one party assuming responsibility for the consequences of dishonest wrongdoing by the other. The law, on public policy grounds, does not permit a party to exclude liability for the consequences of his own fraud; and if the consequences of fraudulent or dishonest misrepresentation or deceit by his agent are to be excluded, such intention must be expressed in clear and unmistakeable terms on the face of the contract. General words will not serve.

Statutory Limits

- UCTA 1977:

"2 Negligence liability.

(1)A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2)In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3)Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk."

Statutory Limits

- UCTA 1977:

"3 Liability arising in contract.

(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term—

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled—

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness."

- Reasonableness: s. 11 and Schedule 2: *"... the term shall have been a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made".*

Reasonableness: Schedule 2

- There is nothing surprising or unreasonable about such standard terms; *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] BLR 135, paras. 66 – 69); Schedule 2:

  (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

  (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

  (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

  (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would by practicable;

  (e) whether the goods were manufactured, processed or adapted to the special order of the customer".

- Not limited to Schedule 2: *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep. 273 at para. 10

Third Parties

- Problem: Privity of Contract
  - but Contracts (Rights of Third Parties) Act 1999 and/or agency.

- Solution: is there an assumption of responsibility?

- *McCullagh* v. *Lane Fox & Partners Ltd* [1996] PNLR 205 Hobhouse LJ:

  "…the existence of the disclaimer [is] one of the facts relevant to answering the question whether there has been an assumption of responsibility by the defendants for the relevant statement. This question must be answered objectively by reference to what the reasonable person in the position [of the plaintiff] would have understood at the time he finally relied upon the representation."

Defining Losses

- Excluding types of losses; yes.
- Limiting level of losses; yes.
  - *Marplace (No.512) Ltd v Chaffe Street (A Firm)* [2006] EWHC 1919 (Ch).
  - *Dennard v PricewaterhouseCoopers LLP* [2010] EWHC 812 (Ch).
- Limited by Insurance: yes (see above).
  - Insurance relevant to "reasonableness"; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) paras. 73-75.

Net Contribution Clauses

- *West v Ian Finlay & Associates* [2014] BLR 324

"We confirm that we maintain professional indemnity insurance cover of £1,000,000.00 in respect of any one event. This will be the maximum limit of our liability to you arising out of this Agreement. Any such liability will expire after six years from conclusion of our appointment or (if earlier) practical completion of the construction of the Project. **Our liability for loss or damage will be limited to the amount that it is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you**" (emphasis added).

- CA found language clear and reasonable under UCTA.

Time Limits

- Usual rules for bringing claims governed by Limitation Act 1980.

- The parties can agree to limit when claims can be brought.
  - E.g. 1 year
  - *Inframatrix Investments Limited v Dean Construction Limited* (2012) 28 Const. L.J. 438.

- Clear words are required to achieve this.
  - E.g. defining the time limit by reference to filing claims inadequate as that is not the correct term.
  - *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* [2013] EWHC 1191 (TCC)

NEC 3

- “X15.1 The Contractor is not liable for Defects in the works due to his design so far as he proves that he used reasonable skill and care to ensure that his design complied with the Works Information.

- X18.1 The Contractor's liability to the Employer for the Employer's indirect or consequential loss is limited to the amount stated in the Contract Data.

- X18.5 The Contractor is not liable to the Employer for a matter unless it is notified to the Contractor before the end of liability date.”

JCT Design and Build

- “2.17.1 Insofar as his design of the Works is comprised in the Contractor's Proposals and in what the Contractor is to complete in accordance with the Employer's Requirements and these Conditions (including any further design required to be carried out by the Contractor as a result of a Change), the Contractor shall in respect of any inadequacy in such design have the like liability to the Employer, whether under statute or otherwise, as would an architect or, as the case may be, other appropriate professional designer holding himself out as competent to take on work for such design who, acting independently under a separate contract with the Employer, has supplied such design for or in connection with works to be carried out and completed by a building contractor who is not the supplier of the design.”
- And Cl. 2.17.3