



CONSTRUCTION

# CAPS AND LIMITATIONS ON LIABILITY

CONSTRUCTION LAW FOR PROJECT MANAGERS

6 DECEMBER 2017

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How enforceable is a **financial cap** or **limitation of responsibilities to reasonable skill and care**, with reference to the X18 and X15 **NEC3** provisions and **JCT**

- Standard Form Contracts:
    - NEC4 (June 2017)
    - JCT Design and Build Contract 2016
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- Why cap liability?
  - A party who is in breach of contract/ negligent will otherwise have **unlimited liability** for:
    - Direct losses (arise naturally); and
    - Indirect losses (in reasonable contemplation of Parties at time Contract made)
  - A cap on liability **limits** Contractor's liability to the Client
  - Restrictions on liability caps?
    - **death or personal injury** resulting from negligence (s 2(1) UCTA)
    - **negligence** must pass the “reasonableness” test (s 2(2) UCTA)
    - If dealing on standard terms, cannot limit liability for breach unless reasonable (s 3 UCTA)
    - **fraud** or fraudulent misrepresentation (public policy)
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- Examples of Contractor Caps:
    - Overall Financial Cap on Liability (e.g. % of Contract Price), and Sub-Cap for LADs?
    - Exclude liability for Indirect and Consequential Losses (usually also Loss of Profit)
    - Exclude liability for particular matters (e.g. pollution/ asbestos)
  - Carve-Outs/ Exclusions:
    - Abandonment
    - Indemnities
    - Breach of Insurance Obligations
  - Employer Liability Cap?
  - Temporal Limitation (no liability after a particular date)
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## FINANCIAL LIABILITY CAPS: NEC4 (SECONDARY OPTION X18)

X18.2 The *Contractor's* liability to the *Client* for the *Client's* **indirect or consequential loss** is limited to the amount in the Contract Data

X18.5 The *Contractor's* **total liability** to the *Client* for all matters arising under or in connection with the contract, **other than the excluded matters**, is limited to the amount stated in the Contract Data and applies in contract, tort or delict and otherwise to the extent allowed under the *law of the contract*

*...Excluded matters* are amounts payable by the *Contractor* as stated in the contract for:

- Loss of or damage to the *Client's* property
  - Delay damages...
  - Low performance damages...
  - Contractor's share [if Option C or D]
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- JCT DB 2016
  - **no** contractual cap on liability
  - Liability for indirect and consequential losses can be capped for design by Clause 2.17.3

*“...the Contractor’s liability for **loss of use, loss of profit or other consequential loss** arising in respect of the liability of the Contractor **referred to in Clause 2.17.1 [design]** shall be **limited to the amount**, if any, stated in the Contract Particulars; but such a limitation shall not apply to or be affected by any liability for liquidated damages under clause 2.29”*

- Common to agree overall Financial Cap on Liability as a bespoke Clause
  - Also common to agree express exclusion of all liability for indirect and consequential loss
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- *McGee Group Ltd v Galliford Try Building Ltd* [Feb 2017]
    - Clause 2.21B “**...subcontractor’s liability for direct loss and/ or expense and/ or damages shall not exceed 10% (ten per cent) of this Subcontract order**”
    - GTB: did not capture delay and disruption under Clause 4.21
    - McGee: Clause 2.21B was a total cap
    - Court held:
      - It was a straightforward cap on liability for a particular type of claim
      - It was not specific to claims under any particular clauses of the Subcontract
      - There could be no doubt it covered the financial loss which flowed from delay and disruption caused to GTB
      - The clause did not cap McGee’s liability for anything other than “direct loss and/ or expense and/ or damages”
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- Practical Tips for drafting an enforceable financial liability cap:
    - Ensure it is incorporated into the agreement:
      - e.g. avoid battle of forms
    - Use clear language
    - Ensure it does not capture losses that cannot be limited/ excluded as a matter of law
    - Check the scope of other exclusions/ carve-outs:
      - e.g. indemnities for breach of contract...
    - If excluding liability for consequential losses, ensure clear definition of what this captures:
      - e.g. loss of profit?
    - Expressly restrict the time period in which a claim can be made
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## LIMITING PERFORMANCE STANDARDS

- Why should a Contractor limit its liability to reasonable skill and care?
    - Fit for purpose (s 14 Sale of Goods Act)
    - PI Insurance will not respond to Fit For Purpose
  - What is the difference?
    - The roof must be designed to be **fit for purpose**; the "purpose" is that it should not allow any water ingress
    - The roof must be designed using **reasonable skill and care**
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## LIMITING PERFORMANCE STANDARDS

- The risk of ambiguity
  - *Hojgaard v E.ON* [2017] UKSC 59
  - key issue was whether the design standard was:
    - reasonable skill and care (which Hojgaard achieved); or
    - or an absolute performance warranty, i.e. fitness for purpose/ 20 year service life warranty
  - TCC: fit for purpose [Contractor pays]
  - COA: reasonable skill & care [Owner pays]
  - Supreme Court: fit for purpose [Contractor pays]
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## LIMITING PERFORMANCE STANDARDS

- What performance standard applies under Standard Form Contracts?
    - NEC4:
      - Contractor to provide the Works in accordance with the Scope [Works Information]
      - Secondary Option X15 reduces Contractor's liability to reasonable skill and care
      - If X15 not selected, a D&B Contractor is subject to fit for purpose
      - *Hochtief v SSE* [Dec 2016]
    - JCT DB 2016:
      - Clause 2.17 limits Contractor's liability for its design of the Works to the standard required of an architect, imposing a reasonable skill and care obligation
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## LIMITING PERFORMANCE STANDARDS

- Practical Tips for Limiting Liability:
    - Silence – attracts fit for purpose standard
    - Even an express fit for purpose standard can be “limited”:
      - define what the “purpose” is; and/ or
      - exclude liability for issues outside Contractor’s control
    - Express statement that Contractor’s obligations are limited to reasonable skill and care ousts implied fitness for purpose obligation
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*HFW*

**QUESTIONS**





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