

# Liability Caps:

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How do you control – and overcome – difficulties with contractual liability and how do you secure the best outcome for clients?

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# All Construction is risky...

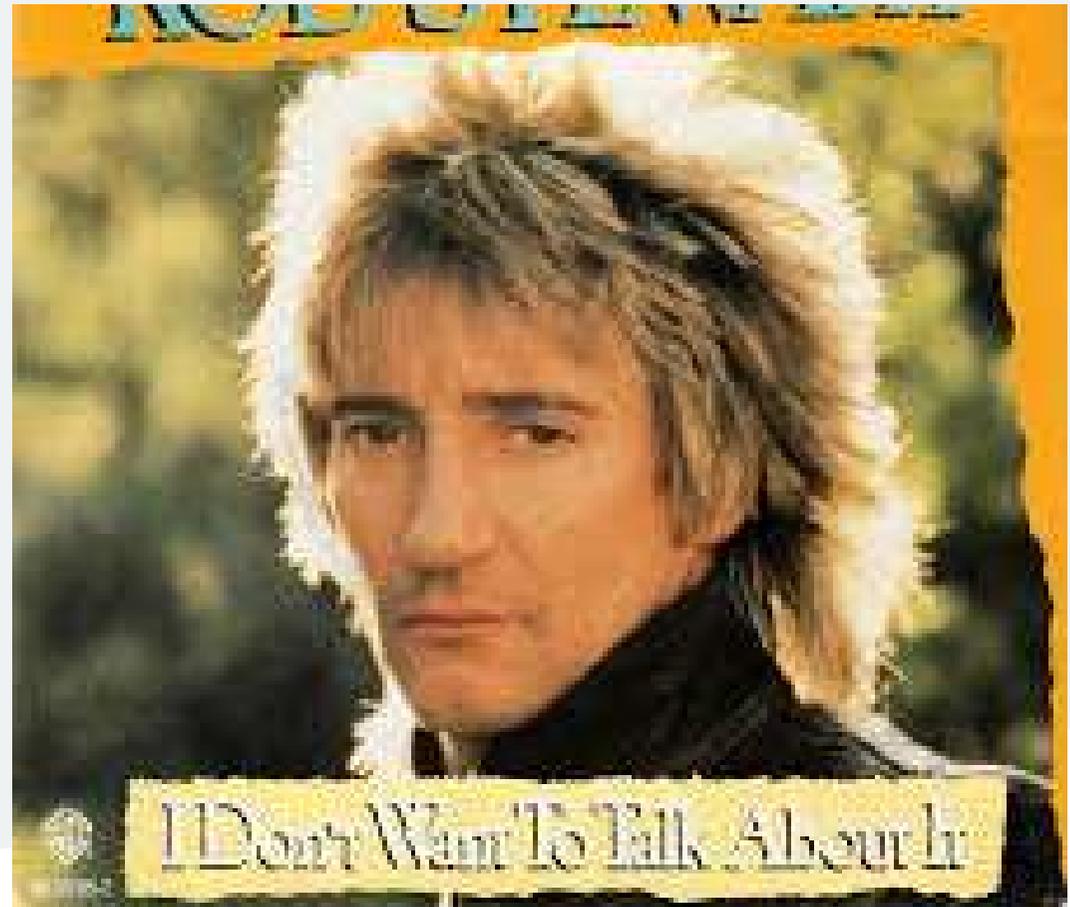
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It's only natural that our clients want to limit their exposure.



# Time is short...

- Is it in the Agreement at all? *Arcadis v AMEC* [2018] EWCA Civ 2222
- Contra Proferentem: *Persimmon Homes v Ove Arup* [2017] EWCA Civ 373
- Excluding Negligence: *Persimmon*
- Does it include interest and costs? *Irwell v Arcadis* [2024] EWHC 1857
- Single or multiple caps? *Tata v Disclosure* [2024] EWHC 1185
- UCTA: *Goodlife Foods v Hall Fire Protection* [2018] EWCA Civ 1371



# Consequential/Indirect Losses

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- Consequential:
  - *“Following as a result, esp an indirect result”*
  - *“Following, esp as a natural effect or deduction...that which follows; the natural effect of a cause”*
- Indirect:
  - *“Not direct or straight...not related in the natural way”*



# The Traditional Approach

- Exclusion of indirect/consequential loss intends to exclude only *Hadley v Baxendale* Limb 2 special knowledge loss
- *Saint Line v Richardsons* [1940] – does not exclude natural result of breaches
- *British Sugar Plc v Projects Ltd* [1997]
  - “...once a phrase has been authoritatively construed by a court in a very similar context to that which exists in the case in point, it seems to me that a reasonable businessman must more naturally be taken to be having the intention that the phrase should bear the same meaning as construed in the case in point”

# Cracks begin to appear?

- *Caledonian North Sea v BT* [2002]
- *Transocean Drilling v Providence Resources Plc* [2016] EWCA Civ 372
  - *“It is questionable whether some of those cases would be decided in the same way today...”*
- *Star Polaris v HHIC-PHIL Inc* [2016] EWHC 2941
  - Depends on the particular wording of the contract

## 2 *Entertain Video v Sony* DADC [2020] EWHC 972

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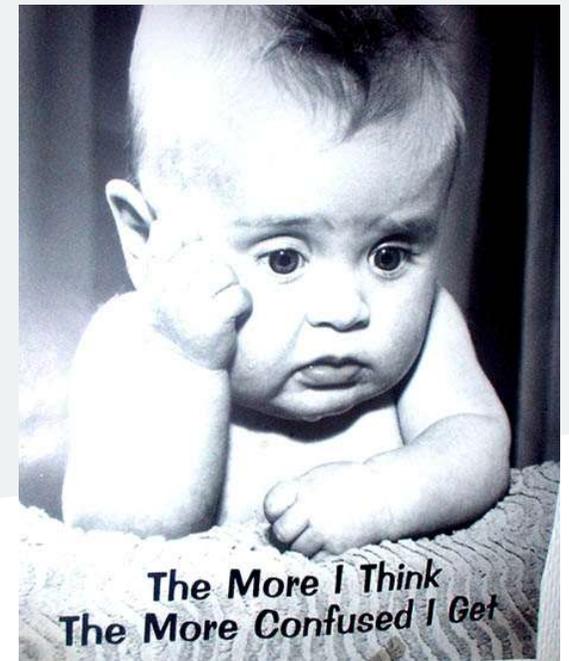
*“The direct and natural result of the fire was the destruction of goods and the warehouse, causing loss of profits and business interruption losses to the claimants. Therefore, the claims in this case do not appear to fall within the scope of the exclusion” (para 222)*



# So, where does that leave us?

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- *“I accept Mr Quiney’s submission that any general understanding of the meaning of “indirect or consequential loss” must not override the true construction of that clause when read in context...”* (para 238)
- *Pinewood Technologies Asia v Pinewood Technologies PLC* [2023] EWHC 2506
- *AF Kopp v HSBC* [2024] EWHC 1004



# “Loss of Profits” is clear though, right? right?

- *Soteria v IBM* [2022] EWCA Civ 440
  - *Difference between loss of profits and wasted expenditure*
- *Tata Consultancy v Disclosure & Barring* [2024] EWHC 1185
- *EE v Virgin Media* [2025] EWCA Civ 70
  - *Difference between loss of profits and anticipated profits*



# *Topalsson v Rolls-Royce* [2024] EWCA Civ 1330



# Topalsson v RR

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- *“Total liability of either party to the other shall be limited in aggregate for all claims no matter how arising to the sum of €5m”*
- RR terminated after delays and T claimed damages – RR defended and counterclaimed for losses from termination
- Judge held termination valid and RR due €8m damages – T due €800,000 at termination
  - T said you apply cap to both elements – so RR due €4.2m
  - RR said you set-off sums first and then apply cap – so RR due €5m

# Topallson v RR

- O'Farrell J's "typically crisp and neat" analysis focussed on 'total liability' and distinguished 'laundry' analysis:
  - Concluded you total liability first, then apply cap
- COA reached opposite conclusion:
  - The words "*suggest a totting up, not a netting off*".



- Terminology can be troublesome
- Often hard to predict
- Precedents unreliable?
- Give examples?



# Thank you!

Any questions?

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