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Drafting Exclusion Clauses: Say what you mean

by Huw Wilkins

Exclusions of Liability generally

When negotiating construction contracts, it is often the case that either or both parties will want to exclude or limit their liability in some way. For example, consultants will frequently try to limit their liability to match their professional indemnity insurance coverage. The parties will then negotiate what liability is excluded and/or what level it is capped at.

Do they cover fundamental, wilful or deliberate breaches of contract?

The recent case of *Mott MacDonald Ltd -v- Trant Engineering Ltd* arose out of a contract to upgrade facilities at RAF Mount Pleasant in the Falkland Islands. Trant Engineering alleged that Mott MacDonald had breached that contract "*fundamentally, deliberately, and wilfully*" and that it was entitled to damages of more than £5 million. Mott MacDonald denied being in breach at all but, in particular, doing so fundamentally, deliberately, and wilfully.

Mott MacDonald also relied on several broadly drafted contract clauses excluding and/or limiting its liability for various elements of the services, as well as the services in their entirety. However, the clauses that Mott MacDonald relied on made no mention of fundamental, deliberate, or wilful breaches of contract (by way of example, one of the provisions provided that *"... the total liability of the Consultant [i.e. Mott MacDonald] in the aggregate for all claims shall be limited to £500,000 (Five hundred thousand Pounds)".)* The Court was therefore asked to decide whether the exclusion and limitations that Mott MacDonald relied on covered fundamental, wilful, or deliberate breaches. If they did, Trant Engineering's claims would be limited to £500,000 – approximately 10% of the loss that it claimed to have suffered.

What rules apply when interpreting contract terms?

The principal case setting out the rules on how to interpret contact terms is the Supreme Court's decision in *Wood-v-Capita Insurance Services Ltd*. It decided that in interpreting a contract clause, a court must consider the contract as a whole, including the nature, formality and quality of its drafting, and reach an objective view on the clause's meaning. Where a clause can be interpreted in more than one way, the court can reach a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the practical implications of competing constructions, the court must consider the quality of the drafting of the clause.

The court's decision demonstrates a reluctance in the courts to interpret poorly drafted

provisions based on "commercial context" when the meaning can be found in the language chosen by the parties. In other words, the court's role is not to relieve a party of a bad bargain. This is especially true for complex and detailed contracts drafted by experienced lawyers.

Do different rules apply when interpreting clauses excluding or restricting liability?

Mott MacDonald was seeking to rely on exclusions and limitations on liability. It argued that those clauses should be construed in accordance with the same principles as any other contractual provision and, that in doing so, the exclusion and limitation clauses covered fundamental,Trant, on the other hand, argued that "clear words" are required to exclude liability for deliberate breaches. The clauses in question had no such clear words and, therefore, did not apply to those breaches.

The Court decided that clauses excluding or limiting liability are to be construed in the same way as any other contract terms and that the clauses in this case were sufficiently broad so as to apply to fundamental, deliberate, or wilful breaches of contract. That being the case, Mott MacDonald could rely on those clauses to limit its liability to £500,000.

The court also set out the following guidance about how to interpret exclusion and limitation clauses:

- The court should construe the contract and give effect to the parties' intention as recorded by the language read in context;
- In doing so, the court is to be conscious that the exclusion of a liability that would otherwise and ordinarily arise is a departure from the norm;
- In the absence of clear words, the Court is unlikely to conclude that a clause should properly be construed as excluding liability;
- A limitation of liability can be regarded as reflecting an agreed allocation of risk and a lesser departure from the norm than a total exclusion of liability – so a court is more likely to conclude that a limitation of liability was intended than it would a total exclusion of liability;
- There is no presumption against an exclusion of liability and no requirement for any particular words to do so; and
- If the language of an exclusion clause is such that it is only capable of one meaning, then effect must be given to that meaning.

Lessons to learn

At its simplest, this case demonstrates that when drafting exclusion or limitation clauses, clarity is key. Parties should make sure exclusion and limitations clauses reflect their intentions.

Exclusion and limitation clauses are often drafted in a broad and general way, so as to cover a whole host of risks and liabilities. This case confirms that, so long as they are clearly drafted, such clauses are valid and so there is no need to list the various types of breach which they are intended to exclude or limit. But, conversely, if a party wishes to carve out specific breaches from a widely drafted exclusion or limitation clause (for example, fundamental, deliberate, or wilful breaches), the clause should expressly set out those risks in clear and unambiguous language. Otherwise, a party may find out that its claims are worth much less than its actual losses.