Liability: A conclusion for exclusion?

Nick Lees explains key cases on exclusion clauses and offers some practical advice

Walker Morris LLP

The ability to pre-emptively exclude or limit future liability for breach is often a key term in a commercial contract. However there are statutory and common law restraints on the ability of parties to limit or restrict their liability and the interpretation of exclusion clauses in commercial contracts continues to prompt disputes and debate.

Statutory control

The Unfair Contract Terms Act 1977 (UCTA) applies to determine the enforceability of clauses which seek to restrict or exclude business liability in the majority of supply contracts. UCTA provides, in short, that any attempt to exclude or restrict liability for death or personal injury is void and that any attempt to exclude or restrict liability for other loss is subject to the 'reasonableness test'. See s11(1) and Sch 2, UCTA.

Goodlife Foods v Hall Fire Protection [2018]

In *Goodlife*, when Goodlife alleged that Hall Fire Protection was liable for a fire at its factory and claimed over £6m in property and business interruption damages, Hall Fire Protection sought to rely on the widely drafted contractual provision which excluded all liability for loss caused to:

> *… property, goods, persons or the like, directly or indirectly resulting from our negligence or delay or failure or malfunction of the systems or components provided…*

Goodlife argued that the reference to 'persons' was an attempt to exclude liability for death/personal injury which rendered the exclusion clause void.

High Court decision

The High Court agreed with Goodlife that the clause included an attempt to exclude or limit liability for death or personal injury but, perhaps somewhat surprisingly, decided that the whole clause was not rendered invalid.

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Instead, the High Court found that the part of the clause seeking to exclude liability for death/personal injury could be severed, and the remainder could be upheld as enforceable if it passed the UCTA reasonableness test. The court went on to find that the remainder of the clause *was* reasonable and therefore enforceable, placing particular emphasis on the facts that the parties were of roughly equal bargaining position and that the real risk behind this contractual arrangement was the risk of fire damage, which could be insured against.

Court of Appeal confirmation

In a recent unanimous decision, the Court of Appeal has upheld the High Court's decision that the wide exclusion clause was reasonable and valid.

This case may appear surprising, firstly because it seems to contradict received wisdom that an exclusion of liability for death/personal injury renders an entire clause void. Secondly, it also goes against what has been a relatively common reluctance on the part of the courts to leave a party without any remedy at all. However, the case of *Transocean Drilling UK Ltd v Providence Resources plc* [2016] also provides clear authority that, where sophisticated parties enter into contractual terms which very clearly define the exclusions and limitations of risks to which they have agreed, the courts will most likely uphold such exclusions even if this will deprive an innocent party of sums due following a breach of contract.

In *Goodlife* the Court of Appeal confirmed that the fact that the parties were of equal bargaining position was significant. Also critical to the finding that the exclusion was reasonable was the insurance position: Goodlife was best placed to obtain appropriate insurance as it had the requisite knowledge of its business, the premises and the effects that a fire would have; plus related, relevant provisions within the contract made clear that Hall Fire would not assume liability if Goodlife did not have the necessary insurance in place.

So, while the decision might remain unexpected, it is perhaps not unreasonable. As for the message to take away from this case: when it comes to the interpretation of a wide exclusion/limitation clause, context will be key.

***Motortrak v FCA Australia Pty Ltd* [2018]**

In this case, when the FCA Australia (FCAA) stopped paying invoices, Motortrak terminated the contract and claimed damages for loss of the profit that it would have

received had the contract continued for the remainder of its term, had it not been for FCAA's repudiatory breach (a repudiatory breach is a breach that is so fundamental to the performance of the contract that it entitles the aggrieved party to terminate and sue for damages).

FCAA defended the claim in reliance on the clearly worded, mutual exclusion clause:

> *Neither party shall be liable to the other for: (a) any indirect or consequential loss or damage at all; or (b) any loss of business, capital, profit, anticipated saving, reputation or goodwill, arising out of or in connection with the [contract] or its subject matter.*

Motortrak countered that the exclusion clause should only apply where loss has been suffered in connection with a party's defective performance of the contract and not where a party has refused to perform at all. (That argument was in line with the Court of Appeal decision in *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013].)

Clear clause upheld

Considering the factual context and finding that *Kudos* could be distinguished, the High Court upheld the exclusion clause, allowing FCAA to escape liability and leaving Motortrak without a remedy.

At first glance this might appear to be another surprising decision, but the court placed emphasis on the fact that the parties were of equal bargaining power (again) and also that the clause was reciprocal – it had been drafted for the mutual benefit of both parties. In addition, the language of the exclusion clause was very clear. In line with recent authorities on contractual interpretation, the court adopted a strict, literal approach and could find no reason to depart from the wording.

The takeaway from this case is that, as the wording of a contractual exclusion clause will be paramount, it is absolutely essential for the parties to very carefully consider exactly the circumstances in which loss might be suffered (as well as the types of loss which

might be incurred), and to cater clearly for those eventualities. Here, Motortrak had negotiated a clear and enforceable mutually beneficial exclusion, but it had not ensured that the exclusion would not apply in the event of FCAA's wholesale default.

Interactive E-solutions JLT v O3b Africa Ltd [2018]

The *Interactive E-solutions* case also involves the upholding of a widely drafted exclusion clause. When Interactive failed to pay a fee in a contract to provide satellite services on the one part and satellite-based infrastructure on the other, O3b Africa (O3b) purported to terminate the contract. Interactive then claimed, alternatively:

- specific performance of the contract; or
- damages of $55m on the basis that O3b's termination was a repudiatory breach.

The contract contained a very widely drafted exclusion clause, which excluded liability for anything except claims 'arising from fraud'. O3b sought to rely on the exclusion clause and Interactive argued that statements made by O3b and one of its subcontractors during the application process for necessary regulatory approval were untrue, and that the exclusion did not, therefore, apply.

The Court of Appeal noted that it is common practice for businesses to include a fraud carve-out to reflect the fact that a party may be prepared to assume the risk of negligence by its counterparty, but not the risk of fraud. It went on to conclude that, in that context, liability arising from fraud must mean liability in relation to which fraud is a necessary ingredient of the legal claim for loss.

In this case, Interactive's claim was based on breach of contract. Allegations of dishonesty in connection with the regulatory approval application were not relevant to that cause of action. Acknowledging that, in commercial contracts made between entities

of equal bargaining power, exclusion/limitation clauses are an integral part of risk allocation between the parties, the Court of Appeal upheld the clause.

Comment and practical advice

On the one hand, exclusion clauses restrict a party's contractual rights or remedies and the law provides that parties should not lightly be taken to have limited their rights or remedies without clear wording to that effect. On the other, however, freedom of contract is a crucial concept within English commercial contract law which allows parties – in particular commercial parties of equal bargaining strength entering into sophisticated contractual arrangements – to apportion responsibility and risk howsoever they see fit. Case law seems to increasingly demonstrate that, certainly in the commercial context, there is no special rule that exclusion clauses should necessarily be interpreted narrowly.

There is a tension between these apparently competing legal principles. Combine that with the circumstantial pressure that arises when a costly dispute is on foot and the parties have turned to their contract to ascertain where liability falls, and it is easy to see why exclusion clauses can be highly controversial. So what can parties do?

- Rarely can a limitation/exclusion of liability clause be absolutely watertight. In many cases, therefore, rather than seeking to exclude all liability in all or any circumstances (and potentially thereby rendering your clause unenforceable altogether), it may be better to accept limited liability in some circumstances to ensure that your clause will stand.
- Key to that process will be for the parties to 'get behind' the contract to try to identify the likely possible risks from the outset, and to really think about how best those risks can be allocated between them or otherwise mitigated (for example, through insurance). Legal advisers should review and draft or redraft contract terms in light of particular business needs, so as to get the balance right.

- Having properly ascertained exactly what the limitation/exclusion clause should cover, parties must remember that the wording is paramount, and ensure that the drafting is clear and absolutely accurate.
- In addition, limitation/exclusion clauses should, where possible, be drafted in a series of separate, self-contained provisions so that if any part of the clause is found to be void or unreasonable, there is at least a chance that this part can be severed, thereby leaving the remainder of the clause enforceable.

Cases Referenced

Cases in **bold** have further reading - click to view related articles.

- *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371
- *Interactive E-solutions JLT & anor v O3b Africa Ltd* [2018] EWCA Civ 62
- *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38
- *Motortrak Ltd v FCA Australia Pty Ltd* [2018] EWHC 990 (Comm)
- ***Transocean Drilling UK Ltd v Providence Resources plc* [2016] EWCA Civ 372**