

HOW FAR CAN YOU PUSH THE COURT OVER
INDIRECT AND CONSEQUENTIAL LOSS CLAUSES,
FOLLOWING THE SPATE OF RECENT CASES?

WHAT COUNTS AND MAKES ALL THE DIFFERENCE?

Richard Wilmot-Smith Q.C.

October 2021

Wood v Capita Insurance Services Ltd [2017] AC 1173

- Paragraph 13 per Lord Hodge

Textualism and contextualism are not conflicting paradigms..... Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement.....

Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type.

Spartan Steel and Alloys Ltd. v Martin & Co (Contractors) Ltd. [1973] QB 27

- Lord Denning MR

These considerations lead me to the conclusion that the plaintiff should recover for the physical damage to the one melt (£368), and the loss of profit on that melt consequent thereon (£400): but not for the loss of profit on the four melts (£1,767), because that was economic loss independent of the physical damage. I would, therefore, allow the appeal and reduce the damages to £768.

- Lawton LJ

In my judgment the answer to this question is that such financial damage cannot be recovered save when it is the immediate consequence of a breach of duty to safeguard the plaintiff from that kind of loss.

Hadley v Baxendale [1854] 9 Ex 341 per Alderson B at 354

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it

Saint Line Ltd v Richardsons, Westgarth and Co Ltd [1940] 2 KB 99

In my judgment, the words ‘indirect or consequential’ do not exclude liability for damages which are the direct and natural result of the breaches complained of ... What the clause does do is to protect the respondents from claims for special damages which would be recoverable only on proof of special circumstances and for damages contributed to by some supervening cause. I am satisfied that it does not protect them from the claims which are made in this case

British Sugar plc v NEI Power Projects Limited [1997] EWCA (Civ) 2438; 87 BLR 42.

(iv) The Seller will be liable for any loss, damage, cost or expense incurred by the Purchaser arising from the supply by the Seller of any such faulty goods or materials or any goods or materials not being suitable for the purposes for which they are required save that the Seller's liability for consequential loss is limited to the value of the contracts .

Star Polaris LLC v HHIC-Phil Inc [2016] EWHC 2941 (Comm),

- (i) What is the correct construction of the phrase "consequential or special losses, damages or expenses" in Article IX.4(a) of the shipbuilding contract in issue herein. In particular, does that phrase mean such losses, damages or expenses as fall within the second limb of Hadley v Baxendale (1854) 9 Ex 341 ? Alternatively, does the phrase have a "cause and effect" meaning, as held by the Tribunal?
- (ii) If the Tribunal is right as to the meaning of "consequential or special losses, damages or expenses", on a proper construction of Article IX(4)(a), does diminution in value constitute a "consequential or special loss"?

Except as expressly provided in this Paragraph, in no circumstances and on no ground whatsoever shall the BUILDER have any responsibility or liability whatsoever or howsoever arising in respect of or in connection with the VESSEL or this CONTRACT after the delivery of the VESSEL. Further, but without in any way limiting the generality of the foregoing, the BUILDER shall have no liability or responsibility whatsoever or howsoever arising for or in connection with any consequential or special losses, damages or expenses unless otherwise stated herein.

Transocean Drilling UK Ltd v Providence Resources Plc [2016] EWCA Civ 372; [2016] 2 Lloyd's Rep 51

CONSEQUENTIAL LOSS

For the purposes of this Clause 20 the expression "Consequential Loss" shall mean:

(i) any indirect or consequential loss or damages under English law, and/or

(ii) to the extent not covered by (i) above, loss or deferment of production, loss of product, loss of use (including, without limitation, loss of use or the cost of use of property, equipment, materials and services including without limitation, those provided by contractors or subcontractors of every tier or by third parties), loss of business and business interruption, loss of revenue (which for the avoidance of doubt shall not include payments due to CONTRACTOR by way of remuneration under this CONTRACT), loss of profit or anticipated profit, loss and/or deferral of drilling rights and/or loss, restriction or forfeiture of licence, concession or field interests

whether or not such losses were foreseeable at the time of entering into the CONTRACT and, in respect of paragraph (ii) only, whether the same are direct or indirect. The expression "Consequential Loss" shall not include CONTRACTOR'S losses arising in connection with (1) failure by COMPANY to provide the letter of credit as required by Clause 3.13 of Section III or resulting termination of this CONTRACT or (2) any termination of this CONTRACT by reason of COMPANY'S repudiatory breach.

Subject to and without affecting the provisions of this CONTRACT regarding (a) the payment rights and obligations of the parties or (b) the risk of loss, or (c) release and indemnity rights and obligations of the parties but notwithstanding any other provision of the CONTRACT to the contrary the COMPANY shall save, indemnify, defend and hold harmless the CONTRACTOR GROUP from the COMPANY GROUP'S own consequential loss and the CONTRACTOR shall save, indemnify, defend and hold harmless the COMPANY GROUP from the CONTRACTOR GROUP'S own consequential loss.

2 Entertain Video Ltd v Sony DADC Europe Ltd [2020] EWHC 972

Clause 10.1:

[Sony's] liability for any loss of or damage to Client's Materials or Client's Goods shall not exceed their manufacturing replacement cost.

Clause 10.3:

Neither party shall be liable under this Agreement in connection with the supply of or failure to supply the Logistics Services for any indirect or consequential loss or damage including (to the extent only that such are indirect or consequential loss or damage only) but not limited to loss of profits, loss of sales, loss of revenue, damage to reputation, loss or waste of management or staff time or interruption of business.