



CROWN
OFFICE
CHAMBERS



LIMITATION OF LIABILITY

28 September 2016

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Crown Office Chambers

Issues

- The Need for Limits
- Exclusions vs. Limitations
- Scope of Retainers
- Types of Exclusions
- Financial Limits and Time Limits

The Need for Limits

- The crucial need for certainty and protection.
- Balance the scale of unforeseen losses against the need to protect clients.
- Often there is a clash between freedom of contract with statutory and regulatory provisions.
- The vital role of professional indemnity insurance.

Exclusion v Limitation

- *Ailsa Craig Fishing Co. Ltd. v Malvern Fishing Co. Ltd* [1983] 1 W.L.R. 964 Lord Wilberforce at 966:

“Whether a clause limiting liability is effective or not is a question of construction of that clause in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed, and in such a contract as this, must be construed contra proferentem. I do not think that there is any doubt so far. But I venture to add one further qualification, or at least clarification: one must not strive to create ambiguities by strained construction, as I think that the appellants have striven to do. The relevant words must be given, if possible, their natural, plain meaning. Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure.”

Statutory Limits

- UCTA 1977:

“2 Negligence liability.

(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

(3) Where a contract term or notice purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.”

Statutory Limits

- UCTA 1977:

"3 Liability arising in contract.

(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term—

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled—

(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness."

- Reasonableness: s. 11 and Schedule 2: *"... the term shall have been a fair and reasonable one to be included having regard to the circumstances which were or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made"*.

Reasonableness: Schedule 2



- There is nothing surprising or unreasonable about such standard terms; *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] BLR 135, paras. 66 – 69); Schedule 2:
 - (a) *the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;*
 - (b) *whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;*
 - (c) *whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);*
 - (d) *where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;*
 - (e) *whether the goods were manufactured, processed or adapted to the special order of the customer”.*
- Not limited to Schedule 2: *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 2 Lloyd’s Rep. 273 at para. 10

Regulatory Limits

- Solicitors: Solicitors Act 1974 s. 60(5): void any provision in a contentious business agreement exempting the solicitor from liability for negligence.
- Auditors: Companies Act 2006 ss. 532 – 538: void any provision exempting or indemnifying auditors for liability for any negligence, default, breach of duty or breach of trust. It permits “liability limitation agreements” between a company and its auditors.
- Consumers: special rules see Consumer Rights Act 2015 etc.

Contractual Interpretation



- Lord Neuberger in *Arnold v Britton* [2015] AC 1619 (at 1627-1628):

“15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of:

(i) the natural and ordinary meaning of the clause,
(ii) any other relevant provisions of the lease,
(iii) the overall purpose of the clause and the lease,
(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and
(v) commercial common sense, but
(vi) disregarding subjective evidence of any party's intentions.”

Onerous Clauses

- Exemption clauses must be expressed clearly and without ambiguity or they will be ineffective (*Ailsa Craig*)
- If the clause is unduly onerous mere reference will be insufficient (see *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 and *Poseidon Freight Forwarding Ltd. v. Davies Turner Southern Ltd.* [1996] 2 Lloyds Rep 388).
- *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 466 Lord Denning: some clauses:
“ ... would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.”

Burdens/Rules

- The burden is on the party relying on clause to raise and prove the clause and effect.
- Contra proferentem? Relevant (*Ailsa Craig*); but determinative?
 - No; *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2012] Ch 497 at paragraph 68 per Lord Neuberger MR).
 - Yes; *Nobahar-Cookson & Ors v The Hut Group Ltd* [2016] EWCA Civ 128 para. 18
 - Only if ambiguity: *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] 2 Lloyd's Rep 51 paras. 20-21.
- “the very purpose” test: inherently unlikely that the parties will intend a party to not be liable when negligently performing the service it promised.
 - Stephenson LJ in “The Raphael” [1982] 2 Lloyd's 42 at pages 50 and 51

Third Parties

- Problem: Privity of Contract
 - but Contracts (Rights of Third Parties) Act 1999 and/or agency).
- Solution: is there an assumption of responsibility?
- *McCullagh v. Lane Fox & Partners Ltd* [1996] PNLR 205 Hobhouse LJ:

“...the existence of the disclaimer [is] one of the facts relevant to answering the question whether there has been an assumption of responsibility by the defendants for the relevant statement. This question must be answered objectively by reference to what the reasonable person in the position [of the plaintiff] would have understood at the time he finally relied upon the representation.”

Scope of Retainer

- *Minkin v Lesley Landsberg* [2016] WLR 1489 para. 38:
 - "(1) A solicitor's contractual duty is to carry out tasks which the client has instructed and the solicitor has agreed to undertake;
 - (2) it is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out;
 - (3) in determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client;
 - (4) in relation to [that], it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client;
 - (5) the solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept any such restriction was agreed."
- *BPC Hotels Ltd v Wright Hassall LLP* [2016] EWHC 1286 (TCC)

Examples

- Lawyers: Legal Advice vs. Commercial Advice
 - *Yager v Fishman Co* [1944] 1 All ER 552.
 - *Carradine Properties Ltd v DJ Freeman Co* [1999] Lloyds PN 483.
- Architects:
 - Design services vs. supervisory services.
 - Patent vs. Latent defects.
 - *McGlinn v Waltham Contractors Ltd* [2008] Bus LR 233.

Defining Losses

- Excluding types of losses; yes.
- Limiting level of losses; yes.
 - *Marplace (No.512) Ltd v Chaffe Street (A Firm)* [2006] EWHC 1919 (Ch).
 - *Dennard v PricewaterhouseCoopers LLP* [2010] EWHC 812 (Ch).
- Limited by Insurance: yes (see above).
 - Insurance relevant to “reasonableness”; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) paras. 73-75.

Net Contribution Clauses

- *West v Ian Finlay & Associates* [2014] BLR 324

"We confirm that we maintain professional indemnity insurance cover of £1,000,000.00 in respect of any one event. This will be the maximum limit of our liability to you arising out of this Agreement. Any such liability will expire after six years from conclusion of our appointment or (if earlier) practical completion of the construction of the Project. **Our liability for loss or damage will be limited to the amount that it is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you**" (emphasis added).

- CA found language clear and reasonable under UCTA.

Time Limits

- Usual rules for bringing claims governed by Limitation Act 1980.
- The parties can agree to limit when claims can be brought.
 - E.g. 1 year
 - *Inframatrix Investments Limited v Dean Construction Limited* (2012) 28 Const. L.J. 438.
- Clear words are required to achieve this.
 - E.g. defining the time limit by reference to filing claims inadequate as that is not the correct term.
 - *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* [2013] EWHC 1191 (TCC)