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A PROPHET ON PROFITS? WHEN WILL ATTEMPTS TO EVADE THE OPERATION OF EXCLUSION CLAUSES COVERING LOSS OF PROFITS BE SUCCESSFUL?

By Jack Spence

In *EE Limited* v *Virgin Mobile Telecoms Limited* [2023] EWHC 1989 (TCC), the Technology and Construction Court considered the recoverability of lost revenues in the face of an exclusion clause. The case provides a useful reminder of the principles that apply to the construction of such clauses.

Mobile data transfer in the United Kingdom

In the United Kingdom, there are only four mobile network operators (i.e. mobile network companies who actually own and manage their own physical data cables and radio antennae – EE, Vodafone, Three and O2) but around 25 'virtual mobile network operators' or "VMNOs" (such as GiffGaff, Tesco Mobile and Smarty), which essentially purchase wholesale phone services from a mobile network company, and then sell these services on to their own customers.

Virgin Mobile is one such VMNO, who on 28 August 2013 entered into a Telecommunications Supply Agreement (the "**TSA**") with EE (a mobile network operator, with its own physical infrastructure) to allow Virgin Mobile customers to access data and other phone services using EE's equipment, in exchange for Virgin Mobile paying EE for the services that its customers used. Among the terms in the TSA was an exclusivity clause, under which Virgin Mobile agreed to only use EE's equipment for the provision of services to its customers, thereby ensuring a steady stream of revenue for EE.

However, following the execution of the agreement in 2013, new technology enabled the implementation of 5G services, which allow for the far faster transfer of data but which were not envisaged or catered for within the original TSA. Virgin Mobile and EE therefore entered into an amendment to the TSA, to provide for a mechanism for the provision of 5G services to Virgin Mobile's customers.

This amendment provided that, if Virgin Mobile and EE could not agree how 5G services would be provided then Virgin Mobile was entitled to source such services from a different mobile network operator. Clause 5B.2 provided that where "*a customer of VM is provided with such 5G services sourced from an alternative supplier then VM shall also be entitled to provide such customer of VM with 2G, 3G services and 4G/LTE services sourced from such alternative supplier*". Essentially, if Virgin Mobile ended up securing 5G services from another mobile network then, those of its customers who were using 5G services could also receive other phone services from that alternative mobile network (likely a technical necessity, given the challenges in using different suppliers for different generation of data services).

This would not, however, allow Virgin Mobile to provide services from other operators to those of its customers who were *not* using 5G services, who would still be covered by the original exclusivity provision. However this is what EE claimed that Virgin Mobile had done, moving large numbers of non-5G customers to using services from the Vodafone network rather than those of EE (presumably because Virgin Mobile had secured more commercially advantageous terms with Vodafone).

EE's claim

EE therefore brought a claim against Virgin Mobile for breach of contract, seeking to recover the revenue that EE would have received from Virgin Mobile under the TSA for the provision of services to those customers. Virgin Mobile, in turn, denied that it was in breach of the exclusivity provision within the TSA but that, in any event, the proper measure of damages to be claimed by EE was not lost *revenue* but rather lost *profit* (being the lost revenue, subtracting the costs of providing the services) which was, it argued, excluded by Clause 34.5(a) of the TSA.

It was the construction of this clause of the TSA which was the subject of the application for summary determination, which fell to be determined by Mrs Justice Smith, sitting in the Technology and Construction Court.

The clause at the heart of the dispute

The sections of clause 34 which were considered relevant to the application read as follows (emphasis added):

> "*34. Limitations of Liability*
>
> *34.2 …*
>
> > *(c) any liability for damage or loss arising from reckless or wilful misconduct or gross negligence of either Party, its employees, agents or permitted sub-contractors (or any other person for which it is responsible for performance or conduct).*
>
> *34.3 For the purposes of Clause 34.2(c); and in the case of acts or omissions of EE, "wilful misconduct" will include any intentional act by EE resulting in any discontinuance, withdrawal or refusal to supply any Service to VM contrary to EE's obligations under this Agreement…*
>
> *…*
>
> *34.5 Except for any damages claims by VM pursuant to Clause 34.2(c), to which Clause 34.3 applies (which EE acknowledges may include claims of damages for loss of profits), and for no other damage claims whatsoever, neither Party shall have liability to the other in respect of:*
>
> > *(a) anticipated profits; or*
> >
> > *(b) anticipated savings…*"

A claim for the expectation loss

The first way in which EE sought to evade the strictures of the exclusion provided for in clause 34 was by attempting to reframe its claim as one not for lost *profits*, but rather simply for the lost *revenue* which it would have otherwise received.

This argument received rather short shrift from the court, which strongly rejected the argument that EE's claim was for anything other than expectation loss.

Firstly, EE attempted to argue that it was entitled to recover the "*lost charges*" under Clause 18.1 of the TSA. It was this clause that required, and provided the mechanics for, Virgin Mobile to pay the charges incurred for services provided to its customers. However this would not be available to EE for the "*lost charges*" as it was found that this clause created a debt in respect of the charges incurred for services actually provided. It would not be engaged for "*lost charges*" which never accrued because services were, by reason of a breach of contract, never provided.

Secondly, the court would not allow for the recovery of pure lost revenue from Virgin Mobile, as this would run against fundamental principles of English law. The basic principle governing the recoverability of damages under English law is familiar to all law students – the compensatory principle articulated in *Robinson* v *Harman*[1], that the innocent party is entitled "*to be placed in the same situation, with respect to damages, as if the contract had been performed*" (i.e. to recover its expectation loss). Permitting EE to recover lost revenue as damages, without giving credit for the costs that it would have incurred in providing services to Virgin Mobile customers, would have run contrary to this principle by putting EE in a *better* position than it would have been in but for Virgin Mobile's breach. As the court put it at paragraph 42 of its judgment "*the compensatory principle does not permit the recovery of the full consideration for the provision of the Services, but only the profit that would have been made once those costs are netted off*".

For these reasons the court held that it could not "*see that this is anything other than a claim for loss of profits. I fail to see how EE's claim ... Can somehow fall within a different category of loss which would enable EE to escape the strictures of* [the compensatory principle]".

Was the expectation loss properly caught by the exclusion in Clause 34?

Even though the court found that the sums claimed by EE were properly characterised as losses of profit, it still fell to be determined whether such profits were properly excluded by Clause 34's preclusion of liability for "*anticipated profits*".

EE sought to argue that its claim was, properly construed, a claim for a reduced price which it had received for its services. In support of this it drew on *The Herdentor*[2] and *The Ease Faith*[3]. In *The Herdentor* the Claimant brought a claim against the defendant tug provider in respect of the lower price it received under a head contract due to the Defendant's abandoning of the salvage, which the Court found was not excluded by a clause

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[1] *Robinson v Harman* (1848) 1 Ex 850

[2] *Alexander G. Tsavliris & Sons Maritime Company v OSA Marine Limited* (T/A O.I.L Marine Ltd) 1992 Folio No.2557

[3] *Ease Faith Ltd v Leonis Marine Management Ltd (The Ease Faith)* [2006] EWHC 232

precluding liability for "*loss of profit*" finding that it was "*as if* [the claimant] … *suffered a diminution of price*". The same logic was also applied by Andrew Smith J in *The Ease Faith* in respect of the reduced sum received by the Claimant for a vessel delivered in China because of the Defendant's breach of contract.

These cases, the Court found, however would not assist EE for the same reason that Clause 18 was not engaged – the services simply had not been provided by EE and so there was no "*price*" which could be capable of diminution. That being the case, the court continued to consider whether the ordinary principles of contractual construction supported the position that EE's expectation loss was covered by Clause 34, ultimately concluding that it clearly was.

Firstly, and most importantly, it was found that the language of the clause was "*on its face clear and unambiguous. With one express exception, liability for anticipated profits in claims for damage is excluded*". The Court's analysis could, most likely, have stopped here – in accordance with the decision of the Supreme Court in *Arnold* v *Britton*[4], which found that the court should only look behind the wording of a clause at commercial considerations where the relevant wording was ambiguous and capable of more than one meaning.

Nevertheless, in any event, the court found that this construction was supported by the wider contractual regime. A specific carve out from the general exclusion was provided for in Clause 34.5 for "*damages claims by VM pursuant to Clause 34.2(c)*"[5], suggesting that the parties had considered whether there should be any exemptions to the general exclusion, and provided for this where they had intended this.

General background considerations also supported this construction, including the fact that the TSA was a "*bespoke, lengthy and detailed contract negotiated by two sophisticated parties …* [on] *a level playing field*" meaning that it could be more likely successfully interpreted "*principally by a textual analysis*"[6], and that it was clear "*detailed consideration* [had] *gone into the risks and rewards for each party* [and that the clause] … *contains … detailed provisions governing the parties' right to remedies as between each other*" which was "*tailor-made, standalone ... apparently intended to have a wide reach … plainly part of the risk allocation exercise between the parties*". As such, the Court would be slow to disturb the allocation of risks and commercial arrangement reflected by the wording of the TSA itself.

While *Gilbert Ash*[7], approved of by the Supreme Court in *Triple Point*[8] stated that "*clear express words*" must be used to rebut the presumption that neither party intends to "*abandon any remedies arising by operation of law*" (such as a claim for damages for breach of contract), the words used by the parties in the TSA were found to be sufficiently clear to rebut this presumption, for the reasons given above.

Finally, the court rejected that the effect of Clause 34 was to exclude the entirety of Virgin Mobile's potential liability, such that the TSA would be rendered a mere declaration of intent. While EE would not be able to

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[4] *Arnold v Britton & Ors* [2015] UKSC 36

[5] Which concerned situations where EE had a long term failure in service which resulted in Virgin Mobile suffering losses, including losses of profit

[6] *Wood v Capita Insurance Services Ltd* [2017] UKSC 24

[7] *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689

[8] *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29

recover any lost profits as a result of Virgin Mobile's breach of contract, it would be entitled to recover "*reliance losses*" (i.e. additional expenses which it had incurred in performing the contract), remained entitled to a minimum revenue commitment under the TSA (regardless of the volume of services actually provided) and would, perhaps most significantly, be entitled to seek equitable relief in the form of an injunction, prohibiting Virgin Mobile from moving customers in breach of contract which could alleviate much of the loss potentially suffered by EE if secured promptly.

Conclusion

The Court's judgment seems intuitively correct - given the meaning that the clause conveys on first glance it would seem challenging to find that lost profits were not excluded by a clause preventing recovery of "*anticipated profits*". Nevertheless, the ruling provides a useful and digestible overview of the legal principles on which claims for breach of contract are determined and the law regarding the construction of exclusion clauses, reflecting the ordinary principles of contractual interpretation and the importance of ensuring fidelity with the ordinary meaning of the words of the contract wherever possible. The biggest, practical, takeaway from this case is to ensure that contracts are properly reviewed before execution, in order to make sure that you are happy with what the words of the contract provide for. As the court has made clear in *EE* v *Virgin Mobile*, it will not come running to your rescue if you have inadvertently entered into a commercial arrangement which ultimately transpires to not be in your best interests.