

A Prophet on Profits? When Will Attempts to Evade the Operation of Exclusion Clauses Covering Loss of Profits be Successful?

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PRACTICES Litigation, International Arbitration

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).

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