Call It What You Like: Anticipated Profits and Exclusion Clauses

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In *EE Limited v Virgin Mobile Telecoms Limited*[1], the Court of Appeal has recently upheld a High Court judgment where an exclusion clause was interpreted to exclude a substantial claim for loss of profits. It serves as a reminder that contracting parties should ensure such clauses are drafted with absolute clarity to avoid inadvertently giving up important rights to recover losses caused by breach of contract.

Background

By a Telecommunications Supply Agreement (TSA), Virgin Mobile Telecoms Limited (Virgin) agreed that during a fixed period it would use EE's network exclusively for its customers, for charges listed in the TSA. This did not include 5G services, but a later amendment provided for potential agreement for these services to be supplied by EE. When no agreement was made, Virgin entered into an agreement with Vodafone for the supply of 5G services and began migrating customers from EE's network to Vodafone's network.

EE alleged the migration breached the exclusivity agreement, resulting in losses of over £24 million and issued proceedings against Virgin to recover this sum. Virgin denied the claim in full and contended that, in any event, the claim was precluded by the TSA's exclusion clause where neither party could recover *"anticipated profits."* On that basis, EE's claim should be struck out.

The Strike Out Application

Summary judgment was granted to Virgin by Mrs. Justice Joanna Smith. Despite EE characterising its claim as *"charges unlawfully avoided",* the judge found it was fanciful to suggest that it was anything other than a claim for loss of profit, and where there was no difference between *"anticipated profits"* and *"lost profits"* in the exclusion clause, the damages sought by EE were barred.

EE's Appeal

EE appealed to the Court of Appeal on two grounds, claiming that the judge was wrong (1) to characterise EE's claim as *"lost profits"* and (2) to construe the exclusion clause as barring the damages pleaded by EE.

<u>Ground 1: The Characterisation of EE's Claim</u>

The leading judgment (in a tight majority) from the Court of Appeal was given by Lord Justice Zacaroli, who found the debate of whether EE's claim was for *"loss of profits"* or *"diminution in price"* to be an arid one, when the only question was whether EE's claim was one *"in respect of anticipated profits"* within the meaning of the TSA's exclusion clause.

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Ground 2: The True Construction of the Exclusion Clause

Zacaroli LJ observed that the core issue was whether a claim for *“anticipated profits”* means, on a true construction of the exclusion clause, a claim for loss of profit other than the loss that consists in the value to EE of the contractual performance which would have been provided by Virgin, but for the breach of contract (EE’s *“expectation loss”*).

EE argued that on the judge’s construction, the exclusion of liability for loss of profits was capable of obliterating virtually every claim by the victim of a breach of contract to recover their expectation loss. Given that the commercial consequence of the judge’s construction means that EE was left without a meaningful remedy for Virgin’s breach of the exclusivity agreement, EE said, that should lead the court to give a narrower construction to the clause. Additionally, EE claimed that the wording of the exclusion clause itself favours the narrower construction that *“anticipated profits”* means profits that were anticipated to be earned outside of the contract.

Zacaroli LJ dismissed all arguments finding that EE’s claim was excluded, and the clause had been correctly interpreted by the judge. In summary he held that there is no overarching principle of law that limits an exclusion of liability for loss of anticipated profits to losses other than expectation losses or diminution in price and the wording of the exclusion clause was clear and unequivocal. When construing the TSA itself, weight was given to the placing of the exclusion clause immediately after the clause excluding liability for indirect or consequential loss – when read cumulatively, it was likely that *“anticipated profits”* was intended to indicate something additional to indirect or consequential loss. If the parties had intended *“anticipated profits”* to cover only direct loss of profit claims that did not fall within the ambit of expectation loss, they would have expressly said so. Finally, it was held that EE were not deprived of a remedy in circumstances where the TSA provided for injunctive relief and claims for wasted expenditure were not excluded.

Conclusion

The judgment gave weight to the fact that the exclusion clause was part of a lengthy contract drafted with the assistance of legal advice on both sides, involving a careful allocation of risk between the parties. Yet despite this pre-contract advice, EE’s £24 million claim was excluded, highlighting the risk of liability inadvertently being limited beyond that which is contemplated (by one party) at the time of contract. The court here considered that *“anticipated profits”*, and *“loss of profits”* were used interchangeably in the exclusion clause. Neither phrase had defined meanings, and therefore it was left to the court to consider those within the context that they were used. Where contracting parties include phrases that can have several interpretations, they should ensure that the contract contains clear definitions. As always, parties should make certain that the contract clearly reflects their agreed intentions.

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[1] [2025] EWCA Civ 70

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