Limiting Liability in the case of Deliberate Breach: Recent Developments

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Clauses that seek to exclude or limit the liabilities of parties to a contract are important in the oil and gas industry due to the potential financial implications in the event of an incident or breach of contract. The significance of such clauses has meant that cases involving their interpretation often come before the courts. The recent case of *Mott MacDonald Ltd v Trant Engineering Ltd* [2021] EWHC 754 (TCC) is such an example from the construction sector that considered whether exclusion and restriction clauses applied to limit liability for breaches that were committed fundamentally, wilfully or deliberately.

Background

The case arose out of a long running dispute between an engineering consultancy ("the Claimant") and an engineering contractor ("the Defendant") concerning the provision of initial design consultancy services during the tender period of constructing power generation facilities at a military base in the Falkland Islands. This judgment concerned the Settlement and Services Agreement ("the Agreement") entered into between the parties to resolve a dispute and govern their ongoing relationship. Importantly, the Agreement contained a liability cap at clause 1.4.1 (ii) (a) of £500,000, an exclusions clause at 1.4.1 (ii) (b) for all liability and a net contribution clause at 1.4.1 (iii).

The Claimant claimed payment of £1,793,246.66 remained outstanding under the Agreement. The Defendant counterclaimed that the Claimant had breached the Agreement by refusing to complete the required design deliverables, to provide the native data files and detailed calculations that the Claimant had created and to carry out independent reviews of its design. The Defendant claimed that the Claimant had either refused to perform in order to deliberately harm the Defendant, or to exert commercial pressure in relation to its demands for payment and that these breaches had been committed "*fundamentally, deliberately, and wilfully*".

The Claimant denied it had breached the Agreement, especially that it had done so in a fundamental, deliberate and wilful manner, and further contended that, in any event, the alleged breaches raised in the counterclaim were subject to the exclusions and restriction clauses in the Agreement, in particular the liability cap. However, the Defendant alleged the liability cap did not apply to the breaches it alleged the Claimant had committed.

The Technology and Construction Court ("the TCC") were asked to consider an application to grant summary judgment to the Claimant on the basis that the alleged breaches fell within the scope of the clauses limiting and restricting liability.

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Current state of the law

Both parties had agreed on the approach to be taken towards interpretation of clauses generally and followed the principles set out in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24. These require a court to construe the relevant wording in "*their documentary, factual and commercial context*" looking at the natural ordinary meaning of the provisions, with consideration to wider concerns such as commercial common sense and the overall purpose of the provision itself, while disregarding any subjective evidence provided by the parties. There was however, a disagreement between the parties when it came to the construction of terms that excluded or restricted liability.

The starting point for His Honour Judge Eyre QC in this judgment was the House of Lords decision in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 which found that the correct approach to the interpretation of exclusion clauses was by reference to the generally applicable rules of contractual interpretation. He quoted extensively from the judgment including Lord Wilberforce, who said "*that the question is one of construction, not merely of course of the exclusion clause alone, but of the whole contract*". He also noted that the House of Lords had rejected the former fundamental breach doctrine and that an exclusion clause did not need to be drafted in strong terms to be effective.

However, there have been several conflicting authorities since the decision in *Photo Production*, which illustrated that there may instead be a need for clear language to exclude a deliberate breach. One such case considered by the judge was the judgment of Teare J in *A Turtle Offshore SA v Superior Trading Inc* [2008] EWHC 3034 (Admly) where the exclusion clause was found to apply only when the parties were performing their obligations, as otherwise, it would exclude all liability to the point of reducing a party's obligations to mere statements of intent. The TCC did not consider that this case was seeking to articulate any special rule, as it was clear that Teare J had used the general terms of contractual interpretation to reach that conclusion.

The TCC also considered that *Internet Broadcasting Corporation Ltd (t/a NETTV) & others v MAR LLC (t/a MARHedge)* [2009] EWHC 844 (Ch) did not apply the general rules of contractual interpretation, when it held that "strong language" was required in an exemption clause to cover the defendant's breach, rather than the literal interpretation of the contract.

This case was subsequently dismissed in *Astrazeneca UK Ltd v Albemarle International Corporation & another* [2011] EWHC 1574 (Comm) as "*heterodox and regressive and does not properly represent the current state of English law*". Instead, Flaux J stated that the correct approach was "*simply one of construing the clause, albeit strictly, but without any presumption*."

While the TCC was compelled to follow *Astrazeneca* due to court convention, it was satisfied that Flaux J's analysis of the law was the correct one and it was right to avoid reintroducing the doctrine of "fundamental breach" by the back door. Instead, the TCC stated that the court was "*to construe the contract so as to give effect to the parties' intention as disclosed by the language read in context*". The court went further to state that there is no presumption or requirement for particular words to be used within an exclusion of liability, even when the breach that is alleged to have occurred is deliberate or repudiatory. Importantly, he did add the caveat that these clauses cannot be read to reduce a party's obligations to ones of mere declarations of intent and where it is possible for a clause to have more than one meaning then the process of construction laid down in *Wood v Capita* should be used.

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The Defendant also raised the argument that the Agreement was poorly drafted and key sections were not present or negotiated due to a lack of time, clause 5A of the Agreement explicitly acknowledging this, suggesting that the intentions of the parties were not articulated adequately in the present clauses. The court dismissed this argument on the basis that "*it will be a rare contract where no criticism can be made of the quality of the drafting*" and the imperfections within the Agreement did not sufficiently prove that the text was not logical or coherent or lacked clarity.

The TCC judgement

In the instant case, the TCC held that, by the Defendant's own admission, the clauses were capable of being read to apply to the alleged breaches by the Claimant. The TCC focused heavily on the liability cap clause in their judgment, finding that it was not for the court to save one party from a bad bargain, referring to the cap being £500,000, and that the payment meant a breach was not painless to the Claimant. The court went further and stated that where there was a repudiatory breach of the contract, it does not cause the Agreement to be of no effect, with the Claimant still liable up to the liability cap, therefore, not reducing the Claimant's obligations to statements of mere intent.

Furthermore, the court held that while the exclusion clause was drafted widely, it did not preclude all liability, only that of particular categories of loss, nor reduce the Claimant's obligations to mere declarations of intent, even where there had been a deliberate or wilful breach. The TCC followed this logic for the net contribution clause also, finding it clear and arguments that it was nonsensical or removing the contractual effect of the Claimant's obligations as incorrect. Following these conclusions, the judge gave summary judgment in favour of the Claimant.

Conclusion

While this case did not proceed to a full trial, the judgment included a detailed review of the law on the issue and provides clarity as to the current approach of the courts to clauses limiting and excluding liability. It serves as a reminder for those in industries such as the oil and gas industry, that care should be exercised when drafting exclusion and limitation clauses to ensure that liability is only limited in accordance with the parties' intentions. Further, the judgment highlights again that there is no doctrine of fundamental breach under English law for parties which seek to allege a breach has been committed fundamentally, wilfully or deliberately.

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