EXCLUSION CLAUSES AND THE REQUIREMENT OF REASONABLENESS

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Exclusion Clauses are commonly used in amended construction contracts and Contractors and Sub-Contractors alike, will often find clauses of this nature relating to two common themes; (i) where a Party may seek to exclude representations made in pre-contract negotiations/inquiries, and (ii) where Parties to a construction contract seek to exclude liability as part of a condition precedent clause, such as the failure to notify delay and/or a variation within a certain period, would exclude one Party from all liability arising from the same.

Last month saw two cases come out of the Court of Appeal only one day apart. Each case was focussed upon exclusion clauses within a contract. The Court of Appeal were tasked with applying the requirement of reasonableness as set out in the Unfair Contract Terms Act 1997 ("UCTA"). Both Goodlife Foods Ltd v Hall Fire Protection Ltd[i] ("Goodlife") and (1) First Tower Trustees Ltd (2) Intertrust Trustees Ltd v CDS (Superstores International) Ltd[ii] ("Trustees v CDS"), demonstrated that each exclusion clause contained within a contract, that comes before the Court, will be considered in both its contractual and factual context and on a case by case basis. One of these cases satisfied the requirement of reasonableness imposed by the UCTA, whereas the other fell foul of the same.

A REASONABLE CLAUSE UNDER THE UCTA – GOODLIFE GOODS LTD V HALL FIRE PROTECTION LTD - 18TH JUNE 2018

FACTS

This case followed a fire in Goodlife's factory where Hall Fire had installed the fire suppression system ten years prior, under a Contract worth £7,490. A claim in Contract was statute barred for Goodlife, whereas, although a claim in negligence has a 6-year limitation period, this limitation period did not commence till the date of the fire. Therefore, a claim in negligence was permissible and the Parties were agreed that the terms of the Contract were directly relevant to the nature and scope of Hall Fire's duty of care[iii].

Hall Fire sought to rely upon clause 11 of their standard terms and conditions, which was sent to Goodlife as part of a quotation in January 2001. Goodlife accepted the quotation a year

i Goodlife Foods Ltd v Hall Fire Protection Ltd [2018] EWCA Civ 1371

ii (1) First Tower Trustees Ltd (2) Intertrust Trustees Ltd v CDS (Superstores International) Ltd [2018] EWCA Civ 1396

iii Ibid n1 [2]

later in April 2002 by way of a purchase order, which the TCC Judge held did not amount to a counter offer. The Judge found that Hall Fire's terms and conditions became express terms of the Contract.[iv]

If Hall Fire were successfully able to rely upon clause 11 of its conditions, it would be excluded from any liability for Goodlife's claim for damages following the fire (to the tune of £6.6m).

On appeal from the lower Court, the Court of Appeal had two distinct issues to decide; (i) was clause 11 particularly unusual and/or onerous and if so, was it fairly and reasonably brought to the attention of Goodlife, and (ii) if clause 11 was incorporated into the Contract, was it unreasonable (and therefore ineffective) as a result of the requirement imposed by section 11 of the UCTA?

The opening paragraph of Hall Fire's terms and conditions read as follows:

> *T&C's - "We draw your particular attention to the following specific conditions and assumptions on which the tender is based, unless qualified in our covering letter. Any contract would be based on our tender and these supplementary conditions sections 4 - 12 which do not provide for the imposition of any form of damages whatsoever and are based on English Law…"*

Clause 11, to which Hall Fire sought to rely upon, read as follows:

> *Cl 11 - "We exclude all liability, loss, damages or expense consequential or otherwise caused to your property, goods, persons or the like, directly or indirectly resulting from our negligence or delay or failure or malfunction of the systems or components provided by HFS for whatever reason. In the case of faulty components, we include only for the replacement, free of charge, of those defected parts. As an alternative to our basic tender, we can provide insurance to cover the above risks. Please ask for the extra cost of the provision of this cover if required."*

The TCC Judge found in favour of Hall Fire and Goodlife subsequently appealed, where Lord Justice Coulson, in his new role in the Court of Appeal, provided the leading judgement in this case.

iv Ibid n1 [10] – [17]

COURT OF APPEAL DECISION

Coulson LJ outlined his reasoning, firstly dealing with incorporation (issue (i)). He stated that the clause must be considered within the Contract as whole, in that, this case is a supply and installation contract for a modest sum. He stated that in his opinion, and in agreement with the trial Judge, this clause was neither unusual nor onerous and, despite being at the high end of the spectrum for excluding liability, it was in line with clauses of a similar ilk, in similar contracts, providing similar service[v].

He went on further to state that clause 11 was not buried away in the middle of a raft of small print and, that the warning at the very start of the conditions was cast in almost apocalyptic terms and is a point against Goodlife rather than in its favour, Coulson LJ said in his judgement:

"If this [the T&C's] did not alert [Goodlife] to the effect of Clause 11 then nothing would have done"."[vi]

Coulson LJ expanded on this point stating that:

"It would be commercially unrealistic to say that clause 11 was not brought to the attention of Goodlife"[vii]

Furthermore, Coulson LJ gave reasoning that satisfied both the matter of incorporation and the requirement of reasonableness imposed by the UCTA. His reasons were to the point and included the fact that Goodlife had over a year to consider the quotation, the terms included within the quotation and that Goodlife freely agreed to enter into the contract. He went on further to point out that, Hall Fire (in the third part of clause 11) even gave Goodlife an option to discharge some of the burden, by increasing the contract price for Hall Fire to include a wider liability by way of insurance to cover such an event, and that opportunity was not pursed[viii].

Coulson LJ concluded that clause 11 was an allocation of risk that was expressly advertised for a Contract worth £7,490, which meant that both Parties knew Hall Fire did not have an open-ended liability for events that happened a decade after the Contract Works[ix]. The first judgement was upheld in favour of Hall Fire, in that clause 11 was incorporated into the contract and satisfied

v Ibid n1 [46], [48]
vi Ibid n1 [53] (Coulson LJ)
vii Ibid n1 [55] (Coulson LJ)
viii Ibid n1 [47], [54], [79], [88]
ix Ibid n1 [88]

the requirement of reasonableness imposed by the UCTA.

NOT REASONABLE UNDER THE UCTA - (1) FIRST TOWER TRUSTEES LTD (2) INTERTRUST TRUSTEES LTD V CDS (SUPERSTORES INTERNATIONAL) LTD -19TH JUNE 2018

FACTS

The two Trustee Companies (the "Landlords") appealed a decision that it was liable for misrepresentation following the lease of a warehouse, where it was known to the Landlords that the property was contaminated with asbestos and that it was dangerous to enter[x].

CDS, in its pre-contract enquiries, requested details (as far as the Landlords were aware) as to the existence of any hazardous substances in the property, including asbestos and/or asbestos containing materials and, whether there were any potential environmental problems relating to the property. The Landlords replied to CDS stating that it has not been notified of any such breaches or environmental problems relating to the property[xi].

The Landlord's replies to CDS's pre-contract enquiries were accompanied by an interpretation section/document which included an important provision which was in CDS's favour, as follows:

Enq. Doc. - "The Seller confirms that pending exchange of contracts or, where there is no prior contract, pending completion of the Transaction, it will notify the Buyer on becoming aware of anything which may cause any reply that it has given to these or any supplemental enquiries to be incorrect."[xii]

Subsequently, the Landlords received notification that the property contained asbestos and that the property might be unsafe to enter for this very reason. The Landlords, despite the aforementioned provision, failed to notify CDS of its findings relating to the presence of asbestos.

In the absence of any notification of the aforementioned, CDS entered into the lease agreement with the Landlords and subsequently discovered the presence of asbestos in the property. CDS undertook remedial works to remove the asbestos and were forced to lease alternative premises while the works were undertaken, incurring costs of circa. £1.4m.

CDS brought a claim for misrepresentation against the Landlords, who sought to rely upon clause 12.1 of the agreement for lease and, clause 5.8 of the lease to avoid any liability.

Cl 12.1 - The Tenant acknowledge and agree [sic] that it has not entered into this Agreement in reliance on any statement or representation made by or on behalf of the Landlord other than those made in writing by the Landlord's solicitors in response to the Tenant's solicitors' written enquiries.

x Ibid n2 [1]

xi Ibid n2 [7]

xii Ibid n2 [6] (Lewison LJ)

Cl 5.8 - The tenant acknowledges that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord.

The trial Judge found that clause 12.1 satisfied the requirement of reasonableness and clause 5.8 fell foul of the same, therefore, he held that CDS had entered into the lease agreement on the premise of the Landlord's misrepresentation. The Landlords subsequently appealed, which brought before the Court of Appeal the issues of (i) whether clause 5.8 was in fact an exclusion clause for misrepresentation pursuant to Section 3(1) of the Misrepresentation Act 1967 and, (ii) the requirement of reasonableness under the UCTA.

THE COURT OF APPEAL DECISION

Save for the discussion regarding contractual estoppel, the CoA dealt swiftly with issue (i), by assessing the situation as if Clause 5.8 was never there, where Lord Justice Lewison said that:

"Absent clause 5.8, I consider that the position is clear. The landlords would have been liable for misrepresentation. The only reason why they may not be is the existence of clause 5.8. On the face of it, therefore, clause 5.8 is a contract term which would exclude liability for misrepresentation."[xiii]

After concluding that clause 5.8 was a clause that attempts to exclude liability for misrepresentation, the Court was left to deal with the requirement of reasonableness.

When considering reasonableness, the Court of Appeal, in this case, did little to interfere with the trial Judge's decision, George Mitchell Ltd[xiv] applied. Instead Lewison LJ, analysed the trial Judge's reasoning and application of the law. Lewison LJ agreed with the trial Judge in applying Lewison LJ's previous approach in FoodCo LLP v Henry Boot Developments Ltd[xv] , in that, clause 12.1 was a fair and reasonable clause to include within a contract, in so far as the parties were on an equal footing when represented by conveyancing solicitors.

Lewison LJ then considered the trial Judge's reasoning for his decision on clause 5.8. The trial Judge considered that a clause of this nature, which denies reliance on pre-contractual replies, casts doubt on its reasonableness and that the approach in FoodCo is not applicable to this clause. The trial judge went on to say that in the conveyancing world, pre-contractual inquiries have a particular importance and

xiii Ibid n2 at para 41

xiv George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803

xv FoodCo LLP v Henry Boot Developments Ltd [2010] EWHC 358 (Ch)

the existence of clause 5.8 renders them worthless[xvi].

Lewison LJ further supported the trial judge's statement and upheld that clause 5.8 failed to satisfy the requirement of reasonableness under the UCTA:

"That was not a reasonable clause [clause 5.8] to put into a lease, because its effect would render the whole exercise of making enquiries and relying on answers thereto all but nugatory. I suspect that conveyancing practitioners would be appalled if such clauses […] were upheld by the courts."[xvii]

WHAT CAN WE TAKE FROM THESE CASES?

Unfortunately, these two cases demonstrate that there is no conclusive way forward when it comes to exclusion clauses, and this is due to the fact that each clause will be tested upon its factual and contractual context and is approached on a case by case basis. Coulson LJ stated in Goodlife that; every case will turn on its own facts[xviii] and that some exclusion clauses will fall one side of the line and some the other, therefore, it is impossible for the Courts to lay down perspective rules.[xix]

Coulson LJ, in Goodlife, was specifically referring to exclusion clauses that fall within the meaning of s2(2) of the UCTA. One may not find these points particularly helpful if in a pre-contract relationship when negotiating contract terms and, whether a particular clause would be subject to the requirement of reasonableness. Lewison LJ addressed this issue in his judgement when he noted a statement made in JP Morgan Bank[xx]. Where, when considering a clause that may or may not be subject to the requirement of reasonableness, one can draw a clear distinction between clauses that exclude liability and clauses which define the terms upon which the Parties are conducting their business[xxi]. Lewison LJ referred to the latter as "basis clauses". It is these "basis clauses" that do not fall subject to the requirement of reasonableness imposed by UCTA.

One rather interesting point that Coulson LJ did make, is that the trend of the UCTA cases decided in recent years has been towards upholding terms freely agreed, particularly if the other party could have contracted elsewhere [xxii]. This trend was confirmed in Goodlife.

With this in mind, Contractors and Sub-Contractors, must check contracts, quotations and inquiry documents alike, for clauses that may exclude any liability to your detriment and/or clauses you may wish to include. Furthermore, if you do find yourself either, negotiating a term excluding

xvi First Tower Trustees Ltd v CDS (Superstores International) Ltd [2017] EWHC 891 (Ch) at para 38
xvii Ibid n16 [40] (Brindle QC)
xviii Ibid n1 [91]
xix Ibid n1 [93]
xx JP Morgan Bank v Springwell Navigation Corp [2008] EWHC 1186 (Comm)
xxi Ibid n2 [43]
xxii Ibid n1 [93]

liability, relying upon an exclusion clause or alternatively seeking to contend one, you must first consider the well-defined and tested guidelines in Schedule 2 of the UCTA. These are:

- Strength of the bargaining position of the Parties; are the Parties on an equal footing?
- Did the customer receive an inducement to agree the term, or could the customer have entered into a similar contract with other persons without having to accept a similar term?
- Was the customer aware, or ought to have reasonably been aware, of the existence of the term?
- In the case of condition precedent clauses, would it be reasonable at the time of contracting to expect compliance with a certain condition?

MORE INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

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