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Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Dispatch

Exclusion clauses and the UCTA

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

This appeal concerned an exclusion clause in the standard terms of a specialist fire suppression contractor. The question for the CA was whether the clause was incorporated into the contract between the parties and, if so, whether the clause was reasonable within the meaning of the Unfair Contract Terms Act 1977 ("UCTA"). The case followed a fire at factory premises in Warrington. Goodlife brought a claim against Hall Fire who had supplied and installed the fire suppression system some ten years before. The claim for breach of contract was statute-barred; however, the claim in negligence, where the six year limitation period did not begin to run until the date of the fire, was not statute-barred. Hall Fire relied upon clause 11 in their standard terms and conditions:

"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."

If Hall were entitled to rely on clause 11, then this would exclude liability for any part of Goodlife's claim. LJ Coulson, in one of his first decisions in the CA, explained that:

"It is a well-established principle of common law that, even if A knows that there are standard conditions provided as part of B's tender, a condition which is 'particularly onerous or unusual' will not be incorporated into the contract, unless it has been fairly and reasonably brought to A's attention."

The Judge noted that the mere fact that the clause in question is a limitation or exclusion clause did not mean of itself that it was onerous or unusual. Clauses which have limited a specialist supplier or subcontractor's liability to the amount of the contract price, or which have excluded liability for indirect loss or loss of profit, have not been regarded by the courts as particularly onerous or unusual. The clause here was not a blanket exclusion clause. The question had to be considered in the context of the contract as a whole. This was a one-off supply contract carried out, for a modest sum, in 2002. Hall Fire had no maintenance obligations or any other connection with the premises at Warrington after they had installed the system. It was therefore neither particularly unusual nor onerous for Hall Fire fully to protect themselves against the possibility of unlimited liability arising from future events. In addition, Hall Fire had indicated that, as an alternative, they might have been prepared to accept a wider liability, but that this would have involved different insurance arrangements and an increase in the contract price, so that was not pursued.

When it came to the issue of notice, clause 11 was not "buried away" in the middle of a raft of small print. It was one of the standard conditions which were expressly referred to on the front of the quotation and which were printed in clear type. Further, its potentially wide-reaching effect was expressly identified at the very start of those same conditions. Also, Goodlife had had over a year between the sending of the quotation, with the relevant standard terms and conditions, and the entering into of the contract. That was plenty of time to take advice.

This left the question of whether or not clause 11 was unreasonable in accordance with the UCTA. If it was, then the clause would be ineffective. Essentially, under section 2 of the UCTA you cannot exclude or restrict liability for negligence: "except in so far as the term or notice satisfies the requirement of reasonableness. By section 11, the relevant test is whether the contract term was a *"fair and reasonable one ... having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made"*. Those circumstances include: (a) the resources available for the purpose of meeting the liability should it arise; and (b) the availability of insurance cover. Schedule 2 of the UCTA lists some guidelines including:

" (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term; ...
(e) whether the goods were manufactured, processed or adapted to the special order of the customer."

LJ Coulson considered that both of these were relevant here and both pointed towards the reasonableness of clause 11. For example, the parties were broadly equal in terms of their bargaining positions. Goodlife could have gone elsewhere and found a supplier who was prepared to contract on a less stringent basis and Goodlife ought reasonably to have known of the existence of the terms. The insurance issue was another "important consideration" in favour of Hall Fire and the reasonableness of clause 11. Goodlife, given its knowledge of the precise effect on its business if there were a fire which stopped the factory working, was in the best position to place its own insurance to cover those risks. Hall Fire's insurers would never have had the same detailed knowledge. Further, although clause 11 excluded liability for future events, it suggested an alternative to Hall Fire's basic tender: insurance. There was more than a year between Goodlife receiving the term proposed by Hall Fire, and agreeing to the contract. That was plenty of time to consider and explore the alternative options.

Finally, it could not be said that as Hall Fire were seeking to avoid their core obligation of providing a proper fire suppression system, clause 11 should be regarded as unreasonable. Looking at the contract as a whole, although Hall Fire had agreed to provide the fire suppression system, they had agreed to do so on the basis that they had severely limited their liability for any future claims. The supply of the system and clause 11 itself could not be looked at in isolation from the terms on which Hall Fire were prepared to supply and install it. The clause was reasonable and Hall Fire were entitled to rely upon it.

Responsibilities of the lead consultant

Midlothian Council v Bracewell Stirling Architects & Others

[2018] CSIH 21

This was a Scottish appeal case arising out of a claim for £12million in damages in respect of the loss at a social housing development in Midlothian. The homes were rendered uninhabitable as a result of the ingress of carbon dioxide from disused mine workings. Midlothian said that Bracewell, who had been appointed as lead Consultant in terms of a Framework Agreement in 2005, had assumed responsibility for the work, including the ground investigations, carried out by the second defender, and the peer review of those investigations carried out by the third defender. The question for the court was whether Bracewell were liable for work carried out by the other defenders.

Clause 3.8 noted that: Bracewell was the "*lead consultant and lead design consultant*" who would have "*overall responsibility for co-ordinating the Other Consultants (if any) and co-ordinating and integrating the input (including the detailed design prepared by or on behalf of) of all designers, the Council and the Contractor*". They were therefore made responsible for the overall progress of the particular "Build", in this case the Gorebridge site.

By clause 3.15A, Bracewell were "*fully responsible for the whole design*" and for the obtaining of all consents needed for such design. Lord Carloway said that this obligation was intended to embody the architect's usual responsibilities for overall coordination of the design works. It did not constitute an acceptance of liability for anything that might ultimately go wrong with the design, no matter what its cause. It was apparent from clause 3.16 that the parties were contemplating a standard which required the consultant to use only "reasonable endeavours" to achieve an objective.

Clause 5.1 referred to work to be carried out in the future in respect of a particular project. It was prospective in outlook, rendering the consultant "*wholly responsible*" for the site investigation works including surveys. Here that was a reference to the "normal site investigations" to be carried out, and for which the consultant was to obtain collateral warranties from the relevant contractor. It was not obviously referable to investigations, such as the ground investigations, carried out by the second defender on the instructions of Midlothian. It referred to work subcontracted by Bracewell and so over which they would have had some measure of control and contractual rights against the subcontractor.

Clause 5.5 was indicative of Bracewell assuming responsibility for the work of subconsultants, being those appointed (prospectively) by them in relation to the particular project, but that responsibility related to their general skills and was limited to "reasonable endeavours" in that regard and in ensuring that the subconsultants complied with legislation, guidance and procedures. Even in relation to the circulation of any report of investigations, clause 5.6 again limited this to making "reasonable endeavours" to ensure that, in relation to a particular project, all relevant persons were aware of the contents of the report.

Clause 7.1 dealt with the standard of skill and care to be used by Bracewell. This was "all reasonable skill and care" in carrying out the Services and the Build Services. This was again forward looking. Although clause 15.1 provided that Bracewell were to be responsible for the performance of obligations or Build Services by certain parties, this was specifically restricted to those to whom they have delegated (subconsultant or subcontracts) work. It was not referable to "Other Consultants" not appointed by them.

In relation to those appointed by Midlothian, clause 22.2 noted that: *"the Consultant shall not be held responsible…for the services provided by any other party appointed by the Council but without prejudice to the Consultant's duty to warn the Council of any concerns as to the performance by any Other Consultants"*. Bracewell therefore had no responsibility other than a residual duty to warn Midlothian of any concerns about their performance.

Bracewell assumed no responsibility for site investigations carried out by anyone other than themselves or their own subconsultants. The language of the contract, did not impose any responsibility on Bracewell for a breach of contract, including negligence, by the other defenders. This was also consistent with business common sense. It would not be usual practice for a contractor to assume liability for work carried out by parties with whom they were not in a contractual relationship, or for work which had been carried out before they were involved in the particular project. Lord Carloway stated:

"Although it may be open to a commercial enterprise to assume responsibility for the actings of another, with whom they have had no contractual relationship, whose specialist expertise would be outwith their own skill base and whose appointment preceded their own, it would be an unusual step and one carrying very considerable risks."

Further, those risks may not have been insurable. It would, in addition, be anomalous if the standard of skill and care owed by Bracewell for their own actions was "reasonable" but they were liable for those of the other defenders without qualification. Accordingly, the lead consultant Bracewell's appointment only imposed contractual responsibility for the services provided by its own subconsultants and not third parties, i.e. the defenders here, appointed by the Midlothian, the employer.

Case update: costs

Kupeli & Others v Kibris Turk Hava Yollari and Anr

[2018] EWCA Civ 1264

We reported on this case in Issue 193. Mrs Justice Whipple had had to decide liability for costs. Taking as a starting point the approach of looking at who had to write the cheque at the end of the case, the Judge ultimately decided to award the claimants a percentage (33%) of their costs. That decision has now, somewhat unusually, has been set aside. The CA, looking at the nature of the case in its entirety, decided that as it was a group action, it could not be characterised as a simple claim for money between two parties. It was therefore more appropriate to take an issue-based costs approach. Doing that, it was clear that neither party had anything close to complete success. Instead "honours were fairly even". Where the court considered success and determined that no party was successful – in the sense that "honours were even" – it might be appropriate to make no order as to costs. That is the course the CA decided to take.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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