



Sloan Plumb Wood

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Legal Update

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Introduction

Welcome to the latest edition of the Sloan Plumb Wood LLP legal update.

In this issue we cover:

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If you would like any advice or further information on any of the topics in this issue, or would like to suggest any subjects that you would like to see covered in future issues please get in touch with one of the following:

Martin Wood

martin.wood@spw-law.co.uk

Philip Sloan

philip.sloan@spw-law.co.uk

Philip Vickers

philip.vickers@spw-law.co.uk

Sloan Plumb Wood LLP

Apollo House

Isis Way

Minerva Business Park

Lynch Wood

Peterborough

PE2 6QR

Telephone:

01733 302410

Email:

enquiries@spw-law.co.uk

www.spw-law.co.uk

Case Law Updates

Limitation of Liability

Markerstudy Insurance Company Limited and Ors v Endsleigh Insurance Services Limited [2010] EWCH 281 (Comm)

There have been a number of recent cases discussing limitation of liability clauses in commercial contracts. In SPW legal update 112 we reviewed the decision in GB Gas Holdings Ltd v Accenture (UK) Ltd & Others [2009] EWHC 2734 in which the court considered the distinction between direct and indirect losses. As highlighted in that case this distinction can have a huge effect on the operation of a provision in a contract seeking to limit a party's liability. In Markerstudy Insurance Company Limited and Ors v Endsleigh Insurance Services Limited [2010] EWCH 281 (Comm) the court was faced with a similar problem to that in the GB Gas Holdings case above. The court considered, inter alia, two clauses of the contract between the parties:

"13.1 Neither party shall be liable to the other for any indirect or consequential loss (including but not limited to loss of goodwill, loss of business, loss of anticipated profits or savings and all other pure economic loss) arising out of or in connection with this Agreement.

13.2 Endsleigh's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Agreement shall be limited to the aggregate amount of fees received..."

As to clause 13.1, Markerstudy's case was that this clause only exempted Endsleigh from liability for indirect or consequential loss. Endsleigh contended that it was exempted not only for indirect and consequential loss but also for direct loss in the categories of loss contained in brackets. In coming to its decision the court considered whether the specific heads of loss such as loss of goodwill were freestanding in the sense that they encompass all losses within that category whether direct or indirect, or whether they were examples of the type of losses making up indirect loss?

The court preferred Markerstudy's case, finding (1) that the use of the phrase "including but not limited to" is a strong indicator that the specified heads of loss are but examples of the excluded indirect loss (2) the elevation of all "pure economic loss" as a freestanding category for which liability is excluded potentially cuts across recovery of even direct loss: yet it is Clause 13.2 which furnishes the "limit" to direct loss recovery and (3) the purported exclusion of the specified categories of loss in both direct and indirect form is not expressed clearly.

Next the court considered the question whether the limit to liability provided in Clause 13.2 includes or excludes interest. Endsleigh argued that the limitation applied to Endsleigh's "total liability in contract ..." and that clearly covered any contractual claim for interest. The court agreed that Endsleigh was correct on its stance on contractual interest but considered that statutory interest is of a different character. It is not a "liability in contract" but a discrete statutory liability arising from the exercise of the Court's discretion. Accordingly, in the court's judgment, it is excluded from the cap.

This decision would appear to be another indication of the court's desire to encourage parties to place limitations on liability in contracts in a more focused and less general approach possibly by adopting a bespoke inclusion (or exclusion) clause which specifies as far as practically possible the actual losses that they hope to recover (or exclude) in the event of a breach of contract and/or reasonable financial caps on liability.

Case Law Updates Continued

Entire Agreement Clause

Axa Sun Life Services plc v Campbell Martin Limited and others [2011] EWCA 133

This case concerns the use of “entire agreement” clauses in commercial contracts. Such clauses are frequently used to ensure that nothing that is not specifically referred to within the terms of the agreement between the parties can be relied on by any of the parties to the agreement or give rise to claims for misrepresentations.

The clause will usually provide that the agreement is the full and complete record of the agreement between the parties and that neither party has relied on any matter outside of the agreement.

In this case, one issue for the Court of Appeal to consider was whether an agreement incorporating an entire agreement clause could exclude liability for misrepresentations. The parties entered into an agreement which provided, inter alia, as follows:

"This Agreement and the Schedules and documents referred to herein constitute the entire agreement and understanding between you and us in relation to the subject matter thereof. Without prejudice to any variation as provided in clause 1.1, this Agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement but this will not affect any obligations in any such prior agreement which are expressed to continue after termination."

Campbell Martin alleged that the agreement incorporated certain implied terms imposing obligations on AXA, and that they were induced to enter into the agreement by misrepresentations given by AXA. Campbell Martin submitted that the clause in question was insufficiently clear and unequivocal to exclude misrepresentations or liability for them. AXA argued that by virtue of the above mentioned clause, Campbell Martin was precluded from alleging misrepresentation (absent fraudulent misrepresentation which cannot be excluded).

The Court of Appeal pored over the clause subjecting it to severe scrutiny and highlighting the issues that can arise out of the slightest ambiguity in drafting. Lord Justice Rix considered that the clause contained four parts:

"(i) This Agreement and the Schedules and documents referred to herein constitute the entire agreement and understanding between you and us in relation to the subject matter thereof. (ii) Without prejudice to any variation as provided in clause 1.1, (iii) this Agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement (iv) but this will not affect any obligations in any such prior agreement which are expressed to continue after termination."

The Court of Appeal found that the clause was ineffective to exclude misrepresentations. Rix LJ in reaching a decision that AXA may not rely on the entire agreement clause to exclude misrepresentations stated as follows:

"Given that the clause as a whole is concerned with agreements rather than misrepresentations, and that the word "misrepresentations" does not appear in it, this is not to my mind fertile ground for AXA's submission. Nevertheless, the word "representations" does appear, albeit it will be seen that it is completely sandwiched between words of contractual import, namely prior "promises, agreements...undertakings or implications". It will also be observed that part (iii) does not in terms state either that no representations have been made, or that no reliance has been placed on any representations, or that liability for (mis)representations is excluded: each of which is a traditional way in which potential liability for misrepresentations has been sought to be avoided."

This case together with the Merkerstudy case above highlights the need for careful and considered drafting to ensure that clauses are drafted in such a way as to reflect the intentions of the parties and are drafted in such a way as to reduce the risk of ambiguity and/or leave the intentions of the parties open to possibly unfavourable interpretations.

Local Democracy, Economic Development and Construction Act 2009

In preparation for the Local Democracy, Economic Development and Construction Act 2009 (“LDED Act”) coming into force Sloan Plumb Wood LLP will be giving in-house seminars on the Act. If you would be interested in holding such a seminar please contact Philip Vickers (philip.vickers@spw-law.co.uk).

Adjudication – Contract in Writing

Irvin v Robertson [2010] EWHC 3723 (TCC)

Section 107 of the Housing Grants, Construction and Regeneration Act 1996 requires a party wishing to refer a dispute to adjudication to have a written construction contract or an agreement to adjudicate from the other party or parties to the proposed adjudication before any adjudication may be commenced.

The question therefore as to whether the parties entered into a contract in writing can be a difficult one. Often parties will seek to rely on their own terms and conditions of business or will require a party to sign and return a purchase order or equivalent on placing or accepting an order. If there is any ambiguity as to the terms on which the parties contracted an adjudicator may not have jurisdiction to deal with the parties' dispute.

In *Irvin v Robertson* [2010] EWHC 3723 (TCC), Irvin sought a declaration from the court that the parties had agreed a contract in writing and could therefore adjudicate the dispute between them. The court was not asked to consider the substance of the dispute between the parties and Irvin used the procedure in Part 8 of the Civil Procedure Rules 1998 which allows the court to deal with the matter quickly (as it is unlikely to involve a substantial dispute of fact) as a means of seeking a quick judgment allowing it (if successful) to commence adjudication.

Irvin relied on a schedule of 23 letters and e-mails between 28 July 2004 and 25 April 2006 as evidencing a concluded subcontract compliant with the requirements of section 107 of the Housing Grants and Reconstruction Act 1996. Robertson appeared to have proceeded on the basis that it would be appropriate to approach the engagement of an Mechanical and Engineering subcontractor, firstly, on a supply and install basis and then to separately and subsequently, after due diligence, follow the option of converting to a full design and build contract with novation of the existing M & E design, all by bolting on a total design agreement. Robertson considered that Irvin commenced works on site without the benefit of a concluded contract.

The court concluded that the parties were not in agreement as to essential issues at the time of the alleged contract. Matters such as design responsibility, price or whether there was to be a guaranteed maximum price for the contract were not agreed. Against this background there could be no contract in writing as Irvin alleged and therefore no right to adjudicate.

The future changes to the adjudication process brought about by the LDEDC Act 2009 will mean that a contract in writing will no longer be required in order to refer a dispute to adjudication. However the existence of a contract at all is likely to be an area of concern once the new LDEDC Act comes into force.

Adjudication – “Tolent” Clauses

Profile Projects Limited v Elmwood (Glasgow) Limited [2011] CSOH 64

In our Winter 2010 Legal Update we reported on *Yuanda (UK) Limited v WW Gear Construction Ltd* [2010] EWHC 720 (TCC), an English case concerning an area of law that had arisen out of an earlier case, *Bridgeway Construction Limited v Tolent Construction Limited* (2000) CILL 1662. That case gave support to so called “Tolent” clauses, contractual clauses that seek to make a party to a construction contract liable for all of the costs of any adjudication commenced by that party in respect of any dispute under the contract.

In *Yuanda* the English court considered that the practical effect of such a clause was to deny the successful referring party to adjudication the benefit of any award (in certain cases) as the responding party could take any argument, however frivolous, and run up excessive costs in responding to the adjudication. This was considered to be contrary to the spirit of the Housing Grants, Construction and Regeneration Act 1996.

In *Profile Projects Limited v Elmwood (Glasgow) Limited* [2011] CSOH 64 the Scottish court was given an opportunity to consider its position on Tolent clauses in view of the recent *Yuanda* decision. The Scottish court considered it persuasive that one of the issues addressed in the forthcoming LDEDC Act 2009 is the “mischief” of the Tolent clause, by section 108A of the Act. As parliament considers legislation is necessary to curb the use of Tolent clauses, they must be compatible with the current Housing Grants, Construction and Regeneration Act 1996 and therefore capable of being agreed by parties to a construction contract.

The court was asked to consider whether the inclusion of a clause in the parties' contract that was not compatible with the 1996 ACT meant that the contract failed entirely and should be replaced by the terms of the Scheme for Construction Contracts. The court considered that only clauses that are incompatible with the 1996 Act are struck out, not the contract in its entirety.

In this case, the Tolent clause survived as did the clause specifying the nominating body for any adjudicator appointed under the contract. The Claimant had referred the adjudication to the wrong nominating body. The adjudicator appointed had no jurisdiction to hear the dispute and the court declined to enforce the award.

On Demand Bonds

Simon Carves Ltd v Ensus UK Ltd [2011] EWHC 657 (TCC)

There is often an argument between the parties as to whether the bond given by party A was a conditional obligation capable of being called by party B “on demand” at any time and for any reason or whether the bond should be conditional.

Party A may have a perfectly valid argument under the terms of the contract underlying the bond that would defeat any call on the bond, however, the courts had generally maintained the view that an “on demand” bond should be just that, payable without argument on the beneficiary’s demand, and that the court should not consider the terms of the underlying contract in considering whether a demand was valid. This view began to change and more recently the court has been willing to look at the underlying contract to see whether a call is valid (see *Sirius International Insurance v FAI General Insurance* [2004] UKHL 54 and *Permasteelisa Japan KK v Bouyguesstroi (and another)* [2007] EWHC 3508 (TCC)).

In *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC) Akenhead J was asked to decide whether to continue an injunction preventing a call on an on demand bond in circumstances where it appeared the bond had become contractually null and void. The contract between the parties was for a bioethanol plant to be built by the Contractor, Simon Carves, for the Employer, Ensus.

The parties used the Institution of Chemical Engineers' (IChemE) General Conditions of Contract for Lump Sum Contract (2001 edition) (commonly known as the "Red Book") with amendments that included a requirement for the Contractor to provide a bond to the Employer. The contract appeared to provide that, after the Employer issued an “Acceptance Certificate” to the Contractor, the bond given by the Contractor would become null and void.

Notwithstanding that the Employer was aware of serious defects affecting the Contractor’s works, it issued an “Acceptance Certificate”, albeit with a list of defects attached to it. The Employer later attempted to call the bond. The Contractor argued that the bond was null and void following the “Acceptance Certificate”. The court granted an injunction preventing the Employer from calling the bond. Akenhead J (without making any decision as to the potential defects claim) held that there was a good case for the Contractor to argue that the bond was null and void and therefore the Employer’s call should be prevented.

The previous position that the courts adopted was in part to preserve confidence in the international finance market and the “on demand” nature of such bonds. The Courts now appear to be increasingly willing to assess the underlying contract between the parties in order to decide whether a call on the bond may be made.



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The articles within this newsletter are for general information purposes only and intended to raise your awareness of the issues covered. They are not a comprehensive report on all aspects of the law applicable to the topics referred to nor are they a substitute for specific legal advice.

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Sloan Plumb Wood LLP
Apollo House
Isis Way
Minerva Business Park
Lynch Wood
Peterborough
PE2 6QR

Telephone:
01733 302410

Email:
enquiries@spw-law.co.uk

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