Limitation of Liability in Construction Contracts: the Relevance of Intentional or Repudiatory Breaches

By David Young and Aidan Steensma

A recent TCC decision has considered the interpretation of general exclusions and limitations of liability and seeks to resolve conflicting case law as to whether any interpretative presumption exists against the exclusion or limitation of liability for deliberate breaches of contract. The case also highlights the benefits of using a cap on liability rather than a total exclusion where very broad clauses are concerned.

An interpretive presumption against intentional and deliberate breaches?

The leading authorities on exclusion and limitation clauses are the *Suisse Atlantique* and *Photo Production* cases, in which the House of Lords rejected the so-called doctrine of fundamental breach which disabled a party from relying on an exclusion clause where a contract had been brought to an end as a result of a fundamental breach of contract, such as by repudiation. Instead it was held that whether an exclusion clause was to be applied to any given breach of contract was a matter purely of contractual interpretation.

In a well-known passage from *Suisse Atlantique*, Lord Wilberforce noted that the usual rules of contractual interpretation meant *"the more radical the breach the clearer must the language be if it is to be covered"*. Lord Wilberforce also noted that very broad clauses would be read down if they would otherwise deprive one party's obligations of all contractual force, as *"to do so would be to reduce the contract to a mere declaration of intent"*.

Whether the requirement for clear language in relation to radical breaches gives rise to an interpretative presumption has been considered in subsequent cases including in relation to deliberate and intentional breaches. In *Internet Broadcasting Corporation Ltd & others v MAR LLC ("Marhedge")*, a Deputy Judge held that there was a strong presumption that an exclusion clause would not be found to cover a deliberate repudiatory breach of contract and that the presumption could only be rebutted by strong and explicit language. This differs from the decision in *AstraZeneca UK Ltd v Albemarle International Corp* where the High Court held that the correct approach was "*simply one of construing the clause, albeit strictly, but without any presumption*." Mr Justice Flaux went on to state in that case that he considered the decision in *Marhedge* to be wrong on the basis it sought to revive the doctrine of fundamental breach which the House of Lords had concluded was no longer good law.

Similar issues were considered by the Court of Appeal in *Kudos Catering (UK) v Manchester Central Convention Complex*. A five-year exclusive supply agreement for catering services at two large convention centres contained a broad exclusion of any liability for loss of business, revenue or profits in favour of the operator of the centres. The operator was alleged to have repudiated the agreement and at first instance the exclusion clause was held to defeat a claim for loss of profits for the remaining period of the agreement. The Court of Appeal overturned this finding, deciding that the clause should be read as applying only to claims arising in the performance of the agreement, not its repudiation. If an exclusion of all liability for financial loss in the event of a repudiation by the owner had been intended, the Court *"would have expected them to spell that out clearly, probably in a free-standing clause"*. The Court rejected the suggestion that its approach was a resort to the doctrine of fundamental breach overruled in *Photo Production*. Rather, it was: *"a legitimate exercise in construing a contract consistently with business common sense and not in a manner which defeats its commercial object. It is an attempt to give effect to the presumption that parties do not lightly abandon a remedy for breach of contract afforded them by the general law."* A similar conclusion was reached by the Court of Appeal in *Transocean Drilling v Providence Resources* where a broad exclusion clause covering loss of revenue and loss

of profit was said not to contemplate a deliberate repudiation of the contract.

Mott MacDonald Ltd v Trant Engineering Ltd

Trant, an engineering contractor, engaged Mott MacDonald ("MM") for design consultancy services in connection with the construction of a new power station at a military base in the Falkland Islands. Following an initial dispute, the parties entered a Settlement and Services Agreement ("SSA") to resolve the existing dispute and govern the parties' obligations on the project going forward. The SSA contained a total cap on liability of £500,000, exclusions on liability and a net contribution clause.

Following Trant's failure to make certain payments, MM commenced proceedings. Trant counterclaimed for £5 million alleging that MM had "*fundamentally, deliberately and wilfully*" breached the SSA by a refusal to perform. MM denied the breach, but contended that even if Trant could prove breach, and those breaches were deliberate and fundamental, the exclusion and limitation clauses in the SSA would still apply.

No presumption

The TCC granted summary judgment for MM on this issue. Judge Eyre QC recognised the stark contrast between the approaches in *Marhedge* and *AstraZeneca* and concluded that the Deputy Judge in *Marhedge* had erred in his analysis of the true effect of the House of Lords authorities. The judge endorsed the position set out in *Photo Production* and as summarised in the *AstraZeneca* case, notably that exclusion clauses including those purporting to exclude or limit liability for deliberate and repudiatory breaches are to be construed by reference to normal principles of contractual construction without the imposition of a presumption and without requiring any particular wording to achieve the effect of excluding liability. This finding was subject to the proviso that an exclusion or limitation of liability will not be read as operating to reduce a party's obligations to the level of a mere declaration of intent.

Following this approach, the judge found that the clauses in the SSA were in clear terms and capable of applying to the alleged breaches, noting that the SSA was a bespoke agreement intended to be a comprehensive regulation of the parties' future dealings.

The judge considered whether a deliberate breach would leave the exclusion and limitation clauses commercially nonsensical or such as to reduce MM's obligations to a mere declaration of intent. On the facts, the judge was satisfied that the presence of the £500,000 liability cap made the latter impossible on the basis that in the event of a repudiatory breach accepted by Trant as terminating the SSA, MM would remain liable up the level of the cap.

Conclusions and implications

This decision is significant for its analysis of conflicting previous decisions as to the interpretation of exclusion and limitation clauses in relation to deliberate and intentional breaches of contract. The court's refusal to apply a presumption against the application of these clauses to such breaches appears to accord with a more general trend in recent times towards allowing such clauses to speak for themselves without presumptive fetters.

The court's judgment does not refer to either of the Court of Appeal's decisions in *Kudos* or *Transocean*. It remains to be seen, therefore, how the court's decision is to be reconciled with the conclusion in those cases, expressed in presumptive language, that repudiatory breaches would fall outside an otherwise generally worded exclusion clause. Parties should also be aware that courts will generally construe exclusions more strictly than limitations and care should be taken where agreeing exclusion clauses that deprive one party's obligations of all contractual force. One key reason for the court upholding the limitation clause in the present case was that MM retained liability to a certain extent up to the £500,000 cap, making arguments as to commercial absurdity and "mere declarations of intent" much more difficult.

References

Suisse Atlantique Societe d'Armement Maritime SA v N V Rotterdamsche Kolen Centrale [1967] 1 AC 63

Photo Production Ltd v Securicor Transport Ltd [1980] AC 827

Internet Broadcasting Corporation Ltd & others v MAR LLC [2009] EWHC 844 (Ch)

AstraZeneca UK Ltd v Albemarle International Corporation & another [2011] EWHC 1574 (Comm)

Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd [2013] EWCA Civ 38

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