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DEFINING THE LIMITS TO LIMITS OF LIABILITY

McGee Group Limited v Galliford Try Building Limited [2017] EWHC 87 (TCC):

- Confirms there are no public policy reasons for limitation/exclusion clauses to be applied narrowly;
- Requires such clauses to be given their natural meaning in the broader contractual landscape;
- Reminds us of the need for clear and unambiguous drafting

What's it about?

Galliford Try Building ('**GT**') as main contractor had employed McGee Group Limited ('**McGee**') as its sub-contractor on a heavily amended version of the JCT D&B 2011 Sub-Contract Conditions for the substructure and superstructure of a development in Birmingham.

Amended clauses 2.1 – 2.21A dealt with McGee's obligation to carry out their works according to GT's programme, to achieve an 'access condition' for certain units by certain dates, and to complete their works in Sections by the required dates. There were liquidated damages if McGee failed to meet any of the access dates and McGee were to be liable for any direct loss and expense incurred by GT, should McGee miss the required completion dates.

Then there was clause 2.21B which read:

- "*Provided always that the sub-contractor's liability for direct loss and/or expense and/or damages shall not exceed 10% (ten percent) of the value of this subcontract order.*"

The agreed amount of that 10% liability cap was approximately £1.5m.

Further on in the Conditions there were clauses 4.19 - 4.22 which, although heavily amended, were not substantially different from the normal JCT clauses dealing with the liability of either party to the other for causing delay and/or disruption to the progress of the works or sub-contract works, under which McGee were to be liable for any loss, damage or expense so caused to GT by the sub-contractor's default.

The sub-contract works were delayed. From time to time GT served loss and expense claims on McGee for delay and disruption, initially all capped within the clause 2.21B limit but later only capped in part, the uncapped part of the claim finally reaching around £2.3m. Litigation ensued and the court was asked to decide firstly whether McGee's entire liability for loss and expense came within the cap.

Why does it matter?

GT's case was that the cap was part of and related only to clause 2, which was concerned only with McGee's obligation to meet the required access and completion dates. There was no cross-reference between clauses 2 and 4, and clause 4 related to the quite separate matter of GT's losses, should GT's progress be delayed and disrupted by McGee's default. Accordingly, GT said that McGee's liability under clause 4 was unlimited.

Furthermore, GT said, if the liability cap for damages had general application, it would limit McGee's potential liability for any defects in the sub-contract works, which was so improbably the parties' mutual intention that the clause must be understood to apply only to the consequences under clause 2 of late completion of the sub-contract works.

Coulson J rejected the reasoning in both of those submissions.

Citing a wealth of previous decided cases, he said that whereas the courts had previously interpreted exclusion and limitation of liability clauses narrowly, that approach had been abandoned in favour of giving clear words in a contract their natural meaning in the context in which they are used. That change in judicial policy had come about, initially only with respect to limitation clauses, but latterly more generally with respect to all clauses of those types. He said that GT's case made little commercial sense and relied on a "*distinction without a difference*" in that "*one man's delay is another man's disruption*".

He also dismissed GT's attempt to build a case out of any supposed distinction between "direct loss and/or expense" and "damages", as used in clause 2.21B, which in the context of the JCT Contracts he considered to be almost synonymous

Now what?

This decision does not break new ground, however its common-sense recognition of commercial realities is refreshing. It is also a valuable lesson in the modern approach to contract interpretation which, in commercial cases, is to respect the right of the parties to make their own bargain and allow them to stand or fall accordingly. The court will have little patience with over-technical arguments which seek to impose on contract terms a meaning they do not naturally bear, and will not allow minor infelicities of language or in the arrangement of clauses to defeat the most probable intentions of the parties.

Casting an interesting sidelight on his experience of sitting in the TCC, Coulson J did include the remark that "*this case is all too common: a potential mismatch between the JCT standard terms and the bespoke amendments*". Alas, although we lawyers try very hard, we do not always succeed.

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