Hawkswell | Kilvington

CONSTRUCTION & ENGINEERING SOLICITORS

Construction Law Update

Exclusion Clauses: Incorporation and Reasonableness

In our article in May 2017 we considered the case of Goodlife Foods Limited ("Goodlife") v Hall Fire Protection Limited ("Hall") which concerned a widely drafted exclusion clause. In a unanimous decision, the Court of Appeal has now upheld that decision.

Background

In 2002, Goodlife engaged Hall to install a fire suppression system at its premises for a fee of £7,490. In 2012 a fire occurred at the premises which Goodlife claimed caused property damage and business interruption losses of approximately £6.6 million. At first instance the judge held that Hall's standard terms and conditions had been incorporated into the contract and they were entitled to rely on clause 11 to defeat Goodlife's claim in its entirety.

Clause 11 provided:

"*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 [Hall] 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.*"

On appeal, it was not disputed that Hall's standard terms and conditions had been incorporated in general. Rather the appeal concerned whether clause 11, specifically, had been incorporated into the contract and, if it had, whether it was unreasonable and therefore ineffective under the Unfair Contract Terms Act 1977 ("UCTA").

Was clause 11 incorporated into the contract?

"*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 Court of Appeal held that, given that this was a one-off supply contract carried out for a modest sum and that Hall had no maintenance obligations or other connection with the premises after installing the system, the clause was not particularly onerous or unusual. Further, although this was a wide exclusion clause (when compared to other examples in the industry), it was still within the spectrum of clauses which could not be regarded as particularly reasonable or onerous.

Even if the clause was particularly onerous or unusual, the Court of Appeal held that it had been brought to Goodlife's attention. It had not been hidden in small print, but was in clear type on the front of the quotation and its effect was expressly identified at the start of the terms and conditions.

Was clause 11 unreasonable under UCTA?

Section 2(2) of UCTA prohibits clauses excluding or restricting liability unless they satisfy the requirement of reasonableness, namely that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known or in the contemplation of the parties when the contract was made.

In holding that the term was reasonable, the Court of Appeal placed particular emphasis on the importance of insurance. There was no doubt that Goodlife was best placed to affect the necessary insurance given its knowledge of the premises, operations and likely effect

on its business. Further, clause 11 provided an alternative to Hall's basic tender in the form of optional insurance, and it would have been unrealistic to ignore the fact that the claim had actually been brought by Goodlife's insurers. Even though the clause was so widely drafted, the fact that Goodlife could (and did) insure against the excluded risks weighed heavily in favour of it being found reasonable.

Analysis

The Court of Appeal noted the distinction between incorporation at common law and reasonableness under UCTA. Whilst there may be some overlap between the matters to be considered under each principle, the questions to be decided in respect of each are clearly separate. As to the former, the Court of Appeal reaffirmed previous authorities that the more outlandish the clause the greater the notice which must be given to the other party for the term to be validly incorporated. However, the mere fact that a clause excludes or restricts liability will not mean that it is onerous or unreasonable.

As to reasonableness, the decision demonstrates the willingness of the Courts to uphold clauses which have been freely agreed between commercial entities of equal bargaining power. Parties should therefore exercise particular care to review the terms before entering into contract as it will be difficult to subsequently persuade a court that a term is unreasonable.

However, the Court of Appeal stressed that this decision does not mean that UCTA was defunct, stating that each clause has to be considered in its factual and contractual context and that UCTA remains in force to protect against unconscionable behaviour.