Exclusion clauses in commercial contracts: the contract is king

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It is quite difficult to explain to a non-lawyer why the decision in *Persimmon Homes Ltd and others v Ove Arup & Partners Ltd* is important. After all, didn't the Court of Appeal simply decide that the exclusion clause in question means what it says? But to lawyers, who read exclusion clauses through a prism of past case law and long-standing rules of interpretation, the decision is interesting. It reinforces the court's recent willingness to champion "business common sense" and to uphold contractual terms agreed between commercial parties of equal bargaining strength. This trend should make the English courts a more business-friendly place to litigate.

The problem

Arup provided advice and professional services to a developer in relation to a site in Barry, Wales, which included advice in relation to asbestos contamination. The contract included a limitation and exclusion clause which stated:

> The Consultant's aggregate liability under this Deed whether in contract, tort (including negligence), for breach of statutory duty or otherwise (other than for death or personal injury caused by the Consultant's negligence) shall be limited to £5,000,000.00 (five million pounds) with the liability for pollution and contamination limited to £5,000,000.00 (five million pounds) in the aggregate. Liability for any claim in relation to asbestos is excluded.

The developer purchased the site in reliance on Arup's advice, but subsequently an unexpected quantity of asbestos contamination was found. The developer sued Arup, claiming breach of contract, breach of statutory duty and negligence.

What was the effect of the exclusion clause?
The Court of Appeal was asked to decide whether the exclusion clause exempted Arup from all liability for asbestos-related losses suffered by the developer.

The developer argued that it did not because:

- The word “for” in the exclusion clauses had a causative meaning, so that the clause was intended to exclude liability “for causing” the spread of asbestos but not liability arising from a failure to advise about a pre-existing state of affairs.

- It did not expressly exclude liability for negligence so Arup remained liable for losses arising from its negligence, in accordance with the rule in *Canada Steamship*, and the doctrine of *contra proferentem* (any ambiguity in an exclusion clause should be construed against the party that put the clause forward and seeks to rely on it).

The court rejected both of these arguments:

- Accepting the developer’s interpretation of the clause would lead to a “bizarre, if not ungrammatical” result.

- An assessment of the natural language of the clause coupled with the “application of business common sense” meant that the exclusion clause did exclude all claims for asbestos-related losses suffered by the developer.

- The *contra proferentem* rule has limited application to commercial contracts that are negotiated by parties of equal bargaining power and where, as here, the meaning of the clause is unambiguous.

- The rule in *Canada Steamship* (a Canadian case that was decided by the Privy Council in 1952) has more relevance to indemnity clauses than exclusion clauses. In addition, it only applies where the loss contemplated could arise out of either negligence or some other cause. Here the loss contemplated could only have arisen out of Arup’s negligence.

**A changing approach to exclusion clauses?**

This case is the latest in a line of cases where the courts prioritise commercial parties’ autonomy to allocate liability and risk as they see fit.

In *Transocean Drilling UK Ltd v Providence Resources Plc* the Court of Appeal highlighted the importance of freedom of contract, saying:
The principle of freedom of contract, which is still fundamental to our commercial law, requires the court to respect and give effect to the parties' agreement.

In enforcing the indemnity clause, the court warned against courts “making for the parties an agreement which they had not themselves chosen to make”.

In Fujitsu Services Ltd v IBM United Kingdom Ltd the court sought to protect the provisions of the “contract freely negotiated between two large commercial parties”. The court considered the language used by the parties in the exclusion clause and whether the clause was “commercially unreasonable or inconsistent with business sense.”

In this case, as in Transocean Drilling and Fujitsu, the Court of Appeal avoided an interpretation that was inconsistent with the parties’ intentions. It commented:

In major construction contracts the parties commonly agree how they will allocate the risks between themselves and who will insure against what. Exemption clauses are part of the contractual apparatus for distributing risk. There is no need to approach such clauses with horror or with a mindset determined to cut them down. Contractors and consultants who accept large risks will charge for doing so and will no doubt take out appropriate insurance. Contractors and consultants who accept lesser degrees of risk will presumably reflect that in the fees which they agree.

So, what can we take from this decision?

- As the Supreme Court did in Rainy Sky (most recently considered and endorsed in Wood v Capita), the Court of Appeal used “business common sense” in part as its justification for preferring one interpretation over another. Jackson LJ was open in his desire to champion autonomous agreements between commercial parties. The courts are willing to assess the legal and commercial context in which agreements are made, allowing weight for commercial considerations. (Although precisely what “business common sense” means is undefined and therefore remains somewhat subjective!)

- Adopting this approach means that the courts seem to find less ambiguity in commercial contracts, reducing the relevance of the traditional rules of interpretation, such as contra proferentem.

- Less reliance on historic cases like Canada Steamship should give commercial parties further confidence that the court will enforce the agreement that the parties have reached.
Together, these subtle changes should help make the law of England and Wales and our Business and Property Courts an attractive choice, particularly when compared with other jurisdictions, such as some civil law jurisdictions, where the courts are perceived to be more interfering.

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