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CAN AN EXCLUSION CLAUSE OR LIABILITY CAP APPLY TO A DELIBERATE OR FUNDAMENTAL BREACH? (MOTT MACDONALD V TRANT ENGINEERING)

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SUMMARY

In Mott MacDonald Ltd v Trant Engineering Ltd [2021] EWHC 754 (TCC) , the TCC held that a clause in a professional services agreement containing a cap on liability, exclusions on liability, and a net contribution clause applied even to fundamental, willful or deliberate breaches of contract. In this casenote, first published by LexisPSL, Marcus M Birch takes a closer look at this case.

Mott MacDonald Ltd v Trant Engineering Ltd [2021] EWHC 754 (TCC)

Construction analysis: The Technology and Construction Court gave summary judgment, holding that a clause in a professional services agreement containing a cap on liability, exclusions on liability, and a net contribution clause applied even to fundamental, willful, or deliberate breaches of contract. It did so on the basis that the clause was worded broadly enough to cover such breaches, and there was no need for it expressly to refer to them. The court upheld longstanding authority on the interpretation and application of exclusion clauses. As a result, when the case proceeds to trial, the counterclaim valued at around £5m will need to overcome all the exclusions and will in any event be worth at most £500,000. Written by Marcus M Birch, associate director at Bryan Cave Leighton Paisner LLP, London.

What are the practical implications of this case?

This case restates and reaffirms the court's established approach to interpreting and applying exclusion and limitation clauses. It repeats that there is neither a rule of law whereby clauses do not apply where the party seeking to rely on them was guilty of a deliberate or fundamental breach, nor any presumption that clauses will be interpreted narrowly so as not to apply in such cases.

The case is important for contractors, consultants and professional advisers in maintaining the certainty of the law in this area. Parties can continue to rely on the clear wording of precedent

exclusion clauses, and to limit their exposure by liability caps without concern that the clause will be disregarded in a dispute because of particular facts. The same certainty is of obvious value to professional indemnity insurers.

For legal practitioners concerned with the drafting and interpretation of contracts in this sector, the case confirms the primacy of text over context and comforts the use of generally-worded exclusion and limitation clauses. Provided the wording is broad and general, there is no need for such clauses to list 'for the avoidance of doubt' the various types of breach to which they are intended to extend.

What was the background?

Mott MacDonald Ltd (MML) and Trant entered into a settlement and services agreement (SSA), under which MML was to provide design services for the work being undertaken by Trant in upgrading facilities at the military base at RAF Mount Pleasant in the Falkland Islands. MML performed the services, but during a dispute over the scope of work and payment, MML revoked the passwords that had been provided to Trant in order to access the building information modelling database, meaning that Trant had no access to the design data.

MML claimed payments of over £1.6m under the SSA. Trant defended on the basis that, by not completing the design deliverables and not providing the native data files and detailed calculations, MML had 'fundamentally, deliberately and willfully' breached the SSA. Trant's case was that MML had deliberately refused to perform its obligations in order to place pressure on Trant to pay. Trant counterclaimed for damages of £5m—the cost of having to complete and redo much of the design work.

MML denied that it was in breach, but in any event argued that even if Trant did prove breach, and that the breaches were deliberate and fundamental, the exclusion and limitation clauses in the contract would still apply. It applied for summary judgment on that point.

What did the court decide?

The court granted summary judgment for MML. Judge Eyre QC's very thorough judgment proceeded in three stages.

First, he relied on the standard principles governing the construction of contracts as set out by the Supreme Court in Wood v Capita Insurance Services Ltd [2017] UKSC 24 and summarised in the Court of Appeal in Lamesa Investments Ltd v Cynergy Bank Ltd [2020] EWCA Civ 821.

Next, he reviewed the authorities on the construction of exclusion and limitation clauses, in particular the leading cases of Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale NV [1967] 1 AC 361 and Photo Production Ltd v Securicor Transport Ltd [1980] AC 827. In those cases, the House of Lords rejected the doctrine of fundamental breach, holding that if

an exclusion clause is sufficiently clear, it will apply to deliberate or fundamental breaches even if that appears unfair or unreasonable.

The judge considered the MARHedge case (Internet Broadcasting Corpn Ltd (t/a NETTV) v MAR LLC (t/a MARHedge) [2009] EWHC 844 (Ch)), in which a deputy judge had said there was a strong presumption against an exclusion clause operating to preclude liability for a deliberate repudiatory breach of contract, which could only be rebutted by strong language. But he found that MARHedge was wrongly decided on that point and declined to follow it.

Finally, against that background, the judge applied the standard principles of construction to the clauses in question. He accepted that context was relevant, but only the context known at the time of contracting, and not any later facts concerning the nature or impact of MML's alleged breaches. He accepted there were certain infelicities in the drafting, but found these were of insufficient scale and importance to disregard the clear intent of the wording and the fact that the parties had sought to establish a comprehensive regime regulating MML's liability.

The judge accepted that, in order to exclude liability for deliberate or fundamental breaches, clear words were required. Crucially however, that did not require that the clause specifically refer to such breaches. The clause in the SSA was in very broad terms (for example, the liability cap merely said 'the total liability of the Consultant shall be limited to £500,000') and that was sufficient.

Overall, the case is comforting to those drafting and relying on standard exclusion and limitation clauses. These will be respected by the court. There remains a single, small, window of opportunity for a party seeking to disapply such a clause: the judge recognised that a clause would not apply if in practice it would exclude all liability for all breach or reduce one party's obligations to a mere declaration of intent.

Case details

- Court: Technology and Construction Court, Queen's Bench Division, High Court of Justice
- Judge: Judge Eyre QC
- Date of judgment: 30 March 2021

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MEET THE TEAM

Marcus Birch

London

marcus.birch@bclplaw.com
+44 (0) 20 3400 4605
