CONSTRUCTION : BULLETIN

Incorporating Standard Terms & Conditions – Beware the Pitfalls

Successfully incorporating standard terms and conditions into contracts can be a minefield and there is often considerable uncertainty about which party's terms apply. Once the terms of the contract have been established, there is often the further question of whether the terms are reasonable for the purposes of the Unfair Contract Terms Act 1977 ("UCTA"). Both of these common problems were illustrated in the case of *Commercial Management (Investments) Ltd v Mitchell Design and Construct Ltd and Regorco Ltd*.

Background

In 2002, Mitchell Design and Construct Ltd ("Mitchell") was engaged to design and build a warehouse in Kent. Vibro compaction ground treatment works were sub-contracted to Regorco Ltd ("Regorco"), formerly known as Roger Bullivant. Commercial Management (Investments) Ltd ("CML") later acquired an interest in the completed warehouse and pursued a claim against Mitchell and Regorco, via a collateral warranty, for defects associated with settlement in the floor slab. These defects were not detected until November 2011.

Regorco sought to defend CML's claim on the basis that its standard terms and conditions were incorporated into its sub-contract with Mitchell and those terms excluded liability for the defects. A preliminary trial was held to determine whether Regorco's terms and conditions were incorporated and whether the exclusion of liability was reasonable.

The terms of the sub-contract

Regorco's tender for the sub-contract works referred to and enclosed their standard terms and conditions.

In response to the tender, Mitchell wrote a letter confirming its "*intention to place a purchase order*" and effectively authorising Regorco to start work on site, subject to agreement of a start date. Regorco started work in early March 2002 and completed the work by 31 March 2002.

In early April 2002, Mitchell issued an order to Regorco for signature. The order had Mitchell's standard terms printed on the back. Regorco made a handwritten amendment to the order, signed it and returned it to Mitchell. Mitchell signed the amended order and returned a copy to Regorco.

Regorco's amendment to the order was an alteration to clause 14 in Mitchell's standard terms so that the clause read:
"*The terms of this order and its conditions shall be deemed to override any terms and conditions of your tender, **where applicable, otherwise, Roger Bullivant Conditions apply**.*"

The amendments to the clause made by Regorco are shown in bold.

The relevant clauses

Regorco wished to rely on clause 12(d) of their terms and conditions, which stated:
"*All claims under or in connection with this Contract must in order to be considered as valid be notified to us in writing within 28 days of the appearance of any alleged defect or of the occurrence (or non-occurrence as the case may be) of the event complained of, and shall in any event be deemed to be waived and absolutely barred unless so notified*

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within one calendar year of the date of completion of the works".

As the claim had not been notified within either 28 days or one year, Regorco considered this to be a complete defence.

Mitchell wished to rely on clause 15 of their terms and conditions, which stated:
"*The Sub-Contractor shall maintain insurance and indemnify Mitchell Design and Construct Ltd against liability at law for death or injury to persons or loss of or damage to property (including consequential loss flowing therefrom) arising out of the performance of the Sub-Contract…*".

The effect of the amended clause 14

Regorco argued that the amended clause 14 meant that Mitchell's terms prevailed only if they were inconsistent with Regorco's terms, and that clause 12(d) of Regorco's terms was not inconsistent with clause 15 of Mitchell's terms because clause 12(d) simply imposed restrictions on the circumstances in which the indemnity in clause 15 could be enforced.

The court decided that the amended clause 14 did not mean what Regorco thought it meant. The effect of the amended clause 14 was that all the provisions of Mitchell's terms which were applicable to the sub-contract would override Regorco's terms. There was no requirement for there to be a conflict between the two sets of terms; if Mitchell's terms contained a provision relating to a particular issue, any provision in Regorco's terms relating to the same issue would not apply. Clause 15 of Mitchell's terms related to the same subject matter as clause 12(d) of Regorco's terms and therefore overrode clause 12(d), so clause 12(d) was not incorporated into the sub-contract.

Was clause 12(d) unreasonable?

The court went on to consider whether clause 12(d) would have been unreasonable if it was incorporated into the sub-contract.

Section 3 of UCTA prohibits clauses in standard terms and conditions from unreasonably excluding or limiting liability for breach of contract. Section 11 of UCTA provides that an exclusion or limitation of liability clause must be "*fair and reasonable… having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made*".

The factors that will generally be taken into consideration when considering reasonableness include:

- the strength of the parties' bargaining positions;
- whether the party alleging unreasonableness had an opportunity to enter into a contract with someone else without having to accept a similar term;
- whether the party alleging unreasonableness knew or ought reasonably to have known of the existence and extent of the term; and
- where the term excludes or restricts liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable.

Regorco argued that UCTA did not apply because the parties had not entered into a contract under Regorco's standard terms of business in their entirety. The court disagreed, confirming that UCTA applied to Regorco's terms to the extent they were incorporated into the sub-contract.

Although the parties had had equal bargaining power, the court decided that clause 12(d) was unreasonable because:

- The nature of ground compaction works is such that defects may be undiscovered for much longer than 28 days.
- Failure of ground compaction works is usually a gradual process and cracks may appear, but not be noticed, for a considerable period of time. It was not reasonable to expect that compliance with such a short time bar would be practicable.
- The time bar was not drafted in reasonable terms because the 28 day period ran from when the defect appeared, rather than from when the claimant became aware of it.
- Mitchell would not have appreciated the impact of the clause on the ability to bring a defects claim when placing the sub-contract.

Analysis

This case illustrates two key points. First, trying to include a set of standard terms and conditions in a contract is not straightforward. Any amendments to the contract made with a view to incorporating standard terms may not necessarily have the effect you think they do. Here, Regorco thought they had successfully incorporated their standard terms, but this was not the case. It may be better to sit down with the other party to the contract and try to agree a single set of terms than to try to shoehorn two conflicting sets of standard terms into a single contract.

Secondly, this case is a reminder of the importance of not going over the top with limitations and exclusions of liability. Whilst it is understandable that everyone wishes to protect their position as much as possible, it is essential to consider whether a court is likely to view limitation and exclusion of liability clauses as reasonable. It may be better to tone down your exclusion clauses slightly than to find out that you are unable to rely on them at all.

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