CONSTRUCTION : BULLETIN

Limiting Liability for Delay under JCT Contracts

It is common practice in construction and engineering contracts for contracting parties to seek to limit their contractual liability. The recent case of *McGee Group Limited v Galliford Try Building Limited* concerned a main contractor's attempt to challenge the scope of a clause purporting to limit a sub-contractor's liability for delay.

Background

Galliford Try Building Limited ('GT') engaged McGee Group Limited ('McGee') as a sub-contractor to carry out earthworks and construction of concrete superstructures at a site in Birmingham known as Resorts World. The sub-contract consisted of the JCT Design and Build Sub-Contract 2011 with bespoke amendments. One of the amendments was a new clause 2.21B, which stated:

"*Provided always that the Subcontractor'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 parties agreed that 10% of the Sub-Contract value equated to £1,489,733.

Completion of the project was delayed and in June 2014 GT sent McGee letters setting out claims for delay and disruption. Subsequently, each time GT notified McGee of deductions from interim payments, they referred back to the letters of June 2014 and deducted £1,489,733 (i.e. 10% of the Sub-Contract value) for "*reimbursement costs loss and expense and costs associated with McGee's failing to regularly and diligently progress their works*".

However, when GT sent McGee the Statement of the Calculation of the Final Sub-Contract Sum in October 2016, it included a document entitled "*Galliford Try Summary Statement of Entitlement to Loss and Expense and Interest*". This document set out separate claims for:

- "*delayed and disruptive delivery of the sub-contract works*" falling under clause 2.21B – for which GT claimed £1,489,733; and
- "*the financial consequences of delay and disruption*" falling under clause 4.21 – for which GT claimed a further £2,291,495.53 which they alleged fell outside the 10% liability cap.

GT had therefore changed their position and were seeking to recover some of their delay and disruption claim as loss and expense under clause 4.21 of the Sub-Contract so that the liability cap under clause 2.21B did not apply. Clause 4.21 (as amended) allowed GT to deduct from interim payments due to McGee sums representing the loss, damage, expense or cost suffered by GT due to the regular progress of the main contract works being affected by McGee's acts, omissions or defaults.

McGee applied to court for a declaration of the extent to which clause 2.21B limited McGee's liability under the Sub-Contract. McGee argued that its entirely liability to GT for claims relating to delay and disruption was covered by the 10% liability cap in clause 2.21B.

Interpretation of clause 2.21B

The court confirmed that limitation of liability clauses, as distinct from exclusion of liability clauses, have no special rules of interpretation and are

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simply to be treated as an element of the parties' wider allocation of benefit, risk and responsibility. However, as with any contractual provision, a clause limiting liability must be clear and unambiguous.

Looking at the wording of clause 2.21B, the court found that:

- It was a straightforward cap on liability for a particular type of claim, namely "direct loss and/or expense and/or damages".
- It was not specific to claims made under any particular clauses of the Sub-Contract.
- There could be no doubt that the clause covered the financial loss which flowed directly from delay and disruption caused to GT.
- The clause did not cap McGee's liability for anything other than "direct loss and/or expense and/or damages".
- The fact that the clause referred to "damages" as well as "loss and/or expense" was "entirely unremarkable" and did not mean that the liability cap covered other types of loss (for example, the cost of rectifying defective work).

GT's arguments

GT argued that the location of clause 2.21B in the Sub-Contract near clause 2.21 (Failure of Sub-Contractor to complete on time) and bespoke clause 2.21A (Non-achievement of Access Condition by the Access Target Date caused by Sub-Contractor) meant that it only covered McGee's liabilities under those two clauses.

The court firmly rejected this argument, noting that clause 2.21B did not cap claims arising under specific clauses in the Sub-Contract. The clause covered McGee's liability for the entire type of claim, regardless of how and where the liability might arise under the Sub-Contract. In addition, the words used in clause 2.21B were wider than those used in clauses 2.21 and 2.21A. Clause 2.21B expressly extended the liability cap beyond loss and expense to include damages, which would normally only arise under clause 4.21 of the Sub-Contract. This demonstrated that clause 2.21B was not necessarily linked to clauses 2.21 and 2.21A.

GT also sought to make a distinction between claims arising under clauses 2.21 and 2.21A and claims arising under clause 4.21. GT argued that loss and expense caused to them by McGee's failure to complete on time and loss and expense caused to them by McGee's failure to allow them to meet the access dates fell under clauses 2.21 and 2.21A and was caught by clause 2.21B, but loss and expense caused to them by McGee's failures affecting the regular progress of the main contract works fell under clause 4.21 and was not covered by the liability cap.

The court strongly rejected this argument as an "*artificial and uncommercial interpretation of the terms*" which had "*no basis in practical reality*". The court stated that no sensible distinction can be drawn between delay and disruption and it would be impossible to separate them into distinct categories. The court condemned GT's argument as "*a reading of the sub-contract designed solely to try and get round the effect of the cap*" which "*should not be condoned by the court*". The court also noted that even GT's "*Summary Statement of Entitlement to Loss and Expense and Interest*" document made no clear distinction between claims for delay and claims for disruption.

Conclusion

The court held that GT's claims were all traditional claims for direct loss and/or expense and/or damages and were therefore caught by the liability cap in clause 2.21B, regardless of which clause in the Sub-Contract the claims arose under.

The court also stated that even if its interpretation of clause 2.21B was wrong and the liability cap only applied to claims under clauses 2.21 and 2.21A, McGee would still be protected by the liability cap as long as an individual claim under clause 4.21 could also have been brought under clause 2.21 and/or 2.21A.

Analysis

This case provides useful confirmation that liability caps, provided they are clear and unambiguous, will be upheld by the courts. The case is also a useful reminder to attempt to avoid disputes in the first place by using clear drafting. Whilst the court took the view that this clause was sufficiently clear, a dispute might never have arisen in the first place if clause 2.21B had been located elsewhere in the Sub-Contract or had explicitly stated that it applied to liabilities arising under all provisions of the Sub-Contract.

This case is also a good example of the courts not allowing a contracting party to escape from a bad bargain. The court was obviously unimpressed by GT's attempts to overcome a liability cap it had previously agreed by employing artificial arguments. With this in mind, contracting parties must give careful consideration to the negotiation of important provisions such as liability caps.

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