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Exclusion of Liability Clauses and Reasonableness

It is typical for businesses to include clauses in their standard terms and conditions which limit and/or exclude their liability as far as possible. However, the Unfair Contract Terms Act 1977 ("UCTA") imposes restrictions on what can and cannot be excluded, which can make drafting such clauses tricky. In the recent case of *Goodlife Foods Limited v Hall Fire Protection Limited* (2017), the court considered an exclusion clause which a purchaser argued was unreasonable.

Background

In 2002, Goodlife Foods Limited ("Goodlife"), a producer of frozen foods, engaged Hall Fire Protection Limited ("Hall") to install a fire suppression system at its factory for a cost of £7,490.

In 2012, a fire occurred at the factory which led to property damage and business interruption losses in excess of £6 million. Goodlife claimed that the fire suppression system had failed to put the fire out. As the six year limitation period for bringing a breach of contract claim had expired, Goodlife sued Hall for negligence. Hall defended the claim on the basis that clause 11 of its standard terms and conditions excluded liability for negligence. Clause 11 read:

"We exclude all liability, loss, damage 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 HFS for whatever reason. In the case of faulty components, we include only for the replacement, free of charge, of those defective parts. As an alternative to our basic tender, we can provide insurance to cover the above risks. Please ask for the extra cost of provision of this cover if required."

Goodlife challenged the enforceability of clause 11 on the basis that:

- Hall's standard terms and conditions were not incorporated into the contract;
- clause 11 was not incorporated because it had not been adequately drawn to Goodlife's attention;
- clause 11 was unenforceable because it sought to exclude liability for personal injury and death; and
- clause 11 was not reasonable.

Were Hall's terms and conditions incorporated?

The first hurdle for any party seeking to rely on its standard terms and conditions is to prove that they were incorporated into the contract.

Matters were complicated in this case by the fact that the parties had almost no written records. The only document still in existence was Hall's quotation, which stated "*Standard HFS terms and conditions apply*". Goodlife was not able to prove it had not received the terms and conditions. The court concluded from witness evidence that the terms and conditions must have been sent to Goodlife by fax. In the absence of a copy of Goodlife's purchase order, there was no evidence Goodlife had ever put forward any alternative terms and conditions, so the court concluded that Hall's standard terms and conditions had been incorporated.

Was the clause drawn to Goodlife's attention?

Goodlife argued that clause 11 was an unusual and onerous term which was not brought to its attention enough to incorporate it into the contract. The court rejected this argument for the following reasons:

1. The opening wording of the terms and conditions stated "*We draw your particular attention to the following specific conditions... which do not provide for the imposition of any form of damages whatsoever…*". This was sufficient to draw to the attention of even a non-legally qualified reader that the standard terms and conditions contained important exclusions.
2. Whilst it was arguably more common in the fire protection industry for suppliers to limit their liability to the contract price rather than exclude it completely, since the contract price was so low,

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there was little practical difference between an exclusion and a limitation in this case.

3. Goodlife had ample opportunity to read and consider the terms before placing their order.

Did the clause exclude liability for personal injury and death, and if so, did this invalidate the clause?

Section 2(1) of UCTA prohibits clauses which exclude or limit liability for death or personal injury resulting from negligence. Goodlife argued that clause 11 was in breach of section 2(1) and therefore invalid.

The court found that clause 11 was in breach of clause 2(1) because by referring to "*damage… to persons*" it purported to exclude liability for personal injury. However, this did not render the whole clause invalid and instead the clause was to be interpreted as if it did not refer to "*persons*".

Was the clause unreasonable?

Section 2(2) of UCTA prohibits clauses in standard terms which exclude or limit liability for negligence unless they satisfy the requirement of reasonableness. This requirement is that it must have been fair and reasonable to include the clause having regard to the circumstances which were known, or ought reasonably to have been known, to the parties when the contract was made. If serious loss or damage is subsequently caused, this does not affect considerations of whether the clause was reasonable at the time the contract was made.

The court found that clause 11 was reasonable because:

1. The parties were in a roughly equal bargaining position.
2. Goodlife could have procured a fire suppression system from an alternative supplier if it wished.
3. Any company in Goodlife's position could have easily located clause 11 and realised Hall was seeking to exclude its liability and that it needed to be insured against losses resulting from fire.
4. Given that it was better for insurance against losses resulting from fire to be maintained by Goodlife than by Hall on Goodlife's behalf, the clause was a "*perfectly sensible allocation of the risk of loss and damage*" in the court's opinion.
5. The clause did include a warranty for replacement of defective parts which was to Goodlife's benefit.

Consequently, Goodlife's claim against Hall failed.

Analysis

Given the very wide ambit of clause 11, and the fact it was partially in breach of UCTA, Hall may be considered to have been lucky that it was upheld. This case demonstrates the importance of clear and careful drafting where exclusion and limitation clauses are concerned.

Hall was perhaps also lucky that the court decided its terms and conditions had been issued to Goodlife notwithstanding the almost total lack of evidence. The court stressed that if it had decided otherwise (i.e. if it had decided that the terms and conditions were not sent), simply referring to them in the quotation would not have been sufficient to incorporate them. This is a useful reminder of the importance of sending the other party a copy of your standard terms, or at least making it very clear that copies are available upon request or can be viewed on a website.

Finally, it is worth noting that both parties were hampered in this case by the fact that they had no written records. Whilst the parties perhaps cannot be criticised for this due to the passage of time since the contract was formed, it is critical for businesses to adopt robust document retention policies in relation to important contracts.

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