

## Construction Law Update

### Excluding Liability for Deliberate Breach – Is Special Wording Required?

In the recent case of *Mott Macdonald Ltd v Trant Engineering Ltd* [2021] EWHC 754 the TCC considered whether an exclusion clause required exceptional wording in order to exclude liability for fundamental, deliberate and wilful breaches.

#### Background

Trant Engineering Limited (“TE”) was engaged by an operating arm of the Ministry of Defence to construct a new power station at RAF Mount Pleasant in the Falkland Islands (the “**Main Contract Works**”). Mott Macdonald Ltd (“MML”) was engaged by TE to provide design consultancy services in relation to the Main Contract Works (the “**Services**”).

A dispute developed between the parties as to the existence and effect of a contract between them. TE commenced proceedings in 2017 which ultimately resulted in the parties entering into a Settlement and Services Agreement (“SSA”) to dispose of the proceedings in full, settle all prior claims and govern the future relationship between the parties. Amongst other things, the SSA dealt with how payment would be made to MML and included exclusion clauses which governed MML’s liabilities to TE in the event of a breach.

#### Application for Summary Judgment

A further dispute has since arisen, in which MML contends that payment of c.£1.8m is outstanding to it under the SSA, and TE contends that it has a substantial counterclaim (over £5m) arising out of alleged intentional breaches of the SSA by MML.

MML denies breaching the SSA but contends that, in any event, the claim set out in TE’s counterclaim is subject to the exclusion clauses contained in the SSA (including an aggregate liability cap of £500,000). TE maintains that MML has committed those alleged breaches “*fundamentally, deliberately, and wilfully*” and that, as a result, the exclusion clauses in the SSA do not apply.

In this case, MML sought summary judgment as to whether the breaches alleged by TE fell within the scope of the SSA’s exclusion clauses.

#### The Construction of Exemption Clauses

Whilst MML and TE agreed that the construction of contracts *generally* followed the well-established principles set out in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, it was TE’s position that in addition to the general principles of contractual interpretation, there was a strong but rebuttable presumption that exclusion clauses did not apply to fundamental breaches and that for a contractual term to be effective to exclude liability for a deliberate breach (at least for one of the gravity alleged) then the use of clear, express language to that effect was necessary.

The court considered the relevant authorities relating to the construction of exclusion clauses, including in relation to the now rejected ‘*doctrine of fundamental breach*,’ and concluded that exclusion clauses - including those purporting to limit liability for deliberate and repudiatory breaches - are to be construed by reference to the normal principles of contractual construction, without the imposition of a presumption and without requiring any particular form of words or level of language to achieve the effect of excluding liability. This principle is, however, subject to the important proviso that an exclusion or limitation of liability will not be read as operating to reduce a party’s obligations to the level of a mere declaration of intent.

#### Construction of the Provisions of the SSA

The exclusion clauses in the SSA were clearly drafted to cover, cap and exclude particular categories of loss but not so as to exclude *all* liability of MML, or all of MML’s obligations to TE. As such, the court concluded that fundamental, deliberate and wilful breaches of the SSA did fall within the scope of the exclusion clauses and summary judgment was granted in MML’s favour. Crucial considerations were that the clauses were set

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out in clear language, contained in a bespoke agreement which had been negotiated between the parties to regulate their future relationship and, on the ordinary interpretation of the clauses, were capable of covering breaches such as those alleged by TE.

### Analysis

This case is a useful reminder that exclusion clauses must be drafted carefully, as no special considerations will apply when construing the same. Should a party wish to ensure deliberate breaches fall outside the scope of an exclusion clause, then that must be made clear in the wording. If it is not, a wilful breach will be treated the same as any other breach.

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