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When is a loss considered to be a "loss of profit"?

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Commercial contracts often include exclusion clauses which seek to exclude a party's liability for the other party's loss of profit in the case of a claim for breach of contract. Such clauses are an important means of allocating risk for such losses between the parties, especially as such losses can be very substantial and adequate insurance is normally not available to cover such losses.

The recent case of *EE Limited v Virgin Mobile Telecoms Limited [2023] EWHC 1989 (TCC)* considered questions of whether the losses sought to be recovered by one party, EE Limited ("EE") against the other party, Virgin Mobile Telecoms Limited ("VM") for a breach of an exclusivity obligation should be properly classified as a "loss of profit", which was excluded under the agreement between them.

Background

The case concerned the provision by EE of 2G, 3G and 4G mobile network services to VM under a Telecommunications Supply Agreement ("TSA"). EE claimed that VM had breached its exclusivity obligation under the TSA to use EE's network in providing services to VM's customers. EE claimed substantial damages for losses representing amounts that it says VM would have been obliged to pay EE under the TSA if it had not breached the exclusivity clause.

VM denied that it was in breach. It argued in any event, that EE would need to take into account its costs of providing the services to customers which it no longer provided. VM also claimed that EE's claim was excluded by clause 34.5 (a) of the TSA which excluded the parties' liability to each other for "*anticipated profits*" or "*anticipated savings*". The exclusion applied in all circumstances except in the case of wilful or reckless misconduct or gross negligence.

EE's case that its claim was not for loss of profits

EE referred to several cases, including *The Herdentor*[1] and *The Ease Faith*[2], to argue that its claim was not a claim for loss of profit. These were both shipping cases concerned with whether a claim was excluded by a clause excluding liability for "*loss of profit, loss of use, loss of production or any other indirect or consequential damage for any reason whatsoever."*

In *The Herdentor*, the claimant sued the defendant pursuant to a contract for the hire of a tug for damage suffered by it due to the defendant's tug abandoning the salvage job without completing it. The claimant alleged that because of such breach, it had received less money under its salvage contract with a third party as payment for its services than it would have done. The court found that the claimant suffered a diminution in the price payable to it for the salvage services.

In *The Ease Faith*, the owner of a vessel claimed damages under a tug hire contract for the late delivery of the vessel to a buyer in China. Such damages were for the reduced sale price of the vessel due to the late delivery.

[1] *Alexander Tsavliris & Sons Maritime Company v OSA Marine Limited (The Herdentor) (1996)* Folio 2557 unreported.

[2] *Ease Faith Ltd v Leonis Marine Management Ltd (The Ease Faith) [2006] EWHC 232 (Comm).*

The court also considered in that case that such loss "*is more akin to a diminution of price than a loss of profit."* It also noted that the exclusion clause in that contract only excluded liability for indirect loss of profit due to the words *"or any*[3] *other indirect or consequential damage"* in the exclusion clause.

EE's case regarding the Exclusion Clause

In support of its position that its claim was not excluded by clause 34.5 (a) of the TSA, EE referred to *University of Wales v London College of Business Limited [2015] EWHC 1280 (QB)* to claim that "anticipated profits" meant only business losses outside the TSA. This case related to a purported termination and repudiatory breach of a validation agreement pursuant to which the University of Wales validated courses provided to students by the London College. Damages sought were for loss of revenue and profits but the key question was whether the claim was excluded by the words *"loss of any anticipated or future business, revenue, goodwill or profit.*"

The court construed those words as excluding only "*business losses outside"* the validation agreement. This was primarily by reference to the entire clause which was concerned with losses which were not reasonably foreseeable at the date of the agreement and the fact that a wider interpretation would have had the effect in the event of a breach of negating the primary commercial benefit of the contract for each party.

EE also claimed that on VM's interpretation of clause 34.5 (a), EE *"would have no remedy at all"* for VM's breach of the exclusivity clause, depriving it of all contractual force and turning it into a mere statement of intent. EE claimed that the TSA should be construed so as to avoid this result.

EE relied also upon *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd [2013] EWCA Civ*, a case which concerned a claim for lost profits arising by reason of the repudiatory breach of a contract for the provision of catering services. The Court of Appeal construed a clause referring to lost profits in its particular context, so as to have a narrow meaning, namely lost profits arising by reason of the defective performance of the agreement and not lost profits arising by reason of the defendant's complete refusal to perform the contract. Lord Justice Tomlinson (as he then was) observed that it was inherently unlikely that the parties could have intended the clause to have a wider effect in circumstances where that would render the agreement as *"effectively devoid of contractual content since there is no sanction for non-performance."*

The Court's decision

In analysing the issues before the court, the Judge, Mrs Justice Joanna Smith, considered various authorities on the interpretation of contracts and exclusion clauses including those discussed above,[4] as well as the specific authorities relied upon by EE. The Court found that EE's claim for damages against VM was a claim for loss of

[3] Please refer to Haynes Boone's paper "Knocking at an open door: The English law approach to mutual indemnities in the offshore oil and gas sector" by Glenn Kangisser (Partner), Teena Grewal (Counsel) and Mette Duffy (Associate) which also includes, amongst other things, a discussion of some cases relating to exclusions and indemnities for "direct" loss of profits and to "indirect" loss of profits.

[4] Please refer to Haynes Boone's article "Update on contractual indemnities under English law" by Glenn Kangisser (Partner) and Teena Grewal (Counsel) at https://www.haynesboone.com/news/publications/update-on-contractual-indemnities-under-english-law which also considers the principles of contract interpretation derived from some of these cases, including *Rainy Sky SA & others v Kookmin Bank [2011] UKSC 50 and Wood v Capita Insurance Services Ltd [2017] UKSC 24.*

profits which was excluded by the terms of clause 34.5 (a) of the TSA and granted summary judgment in VM's favour. The reasons for the Court's findings are summarised below.

Loss of Profit

Mrs Justice Smith considered that the facts of the instant case were different to *The Herdentor* as EE had not provided services which had cost it more but rather had not provided any services at all.

The Court considered that the facts of the instant case were different to *The Ease Faith* and there was no "difference in price" analysis available to EE.

The Court also considered that case law concerning a claim for wasted expenditure was also not relevant and found that EE's claim was in fact a claim for loss of profits.

The Judge considered that in giving the phrase "anticipated profits" its natural meaning in the context of clause 34.5 (a), the contract was seeking to exclude damages claims for loss of profits of any kind which it was foreseeable would be made by either party. The Judge did not consider that there was any distinction between "anticipated profits" and "lost profits" for these purposes.

The Court noted that the TSA was a bespoke, lengthy and detailed contract negotiated by two sophisticated parties operating in the field of telecommunications. As a result, it is more likely that the TSA could be successfully interpreted "*principally by textual analysis."*

The application of the Exclusion Clause

The Court considered whether the wider context of the TSA and the importance of the exclusivity clause was sufficient to cast doubt on the clear and natural meaning of the words used in clause 34.5 and concluded that it was not. The authorities clearly provide that the court should not apply a strained meaning to an exclusion clause, or effectively rewrite its language, where the words of the clause are clear unless the effect of the clause is to relieve a party of all liability for breach of any of its obligations under the contract.

The Judge noted that the exclusion clause in the *University of Wales* case was contained in a very different contract, its context and its words were different from this case and that there is no reference to "future" profits in clause 34.5 (a) of the TSA.

The Judge distinguished this case from *Kudos* for three reasons:

1. the wording of clause 34.5 of the TSA was clear;

2. VM's interpretation of clause 34.5 did not denude the TSA of all commercial effect. It only excluded liability for specific types of loss. It would not preclude a claim for wasted expenditure and nor would it preclude a claim for injunctive relief against VM for breach of the exclusivity clause. The Judge considered that EE would likely have a strong claim for injunctive relief in appropriate circumstances.

3. EE remained contractually entitled to the payment of Minimum Revenue Commitments under the TSA and was entitled to bring a debt claim for payment of any sums that were due and unpaid.

The Judge therefore considered that it was wrong to suggest that VM's interpretation of clause 34.5 left EE without the fundamental consideration that it required for entering into the contract, i.e, the charges that EE was seeking to recover in this case.

Comment

As the Judge noted, the true nature of a party's claim and whether it will fall within the terms of a potentially relevant exclusion clause is a case sensitive issue. It depends on understanding how the claim is advanced, its true nature and whether it is genuinely concerned with a loss of profit (rather than for example wasted expenditure or diminution in price).

The case shows that it is important to review such exclusion clauses with the potential claims in mind with the assistance of legal counsel. The decision also shows that in the absence of clear wording the court will assume that the parties do not intend to derogate from normal rights and obligations. However, clear wording in a business contract will be respected, especially where the words in an exclusion clause are fairly susceptible to one meaning only, unless doing so would relieve a party from all liability under the contract and turn it into a mere statement of intent.

It is also very important that the language of the exclusion clause is clear as to whether it applies to loss of profit, whether direct or indirect, or whether it only applies to indirect loss of profit.

Postscript

The High Court's decision is currently subject to appeal after permission to appeal was granted on 5 December 2023. A hearing before the Court of Appeal is scheduled to take place before 20 January 2025.