CAN YOU EXCLUDE OR LIMIT LIABILITY FOR A DELIBERATE BREACH OF CONTRACT?

By Ben Graff

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The short answer to this question is yes. But matters become slightly more complicated when considering how this can be done.

In *Mott MacDonald Ltd v Trant Engineering Ltd* [2021] EWHC 754 (TCC), the Claimant ("MM"), an engineering contractor, brought a claim for alleged non-payment of its fees by the Defendant ("Trant") for the provision of design consultancy services in relation to the construction of a power station in the Falkland Islands. Trant raised a substantial counterclaim, alleging that MM *"had positively and deliberately refused to perform its obligations and had done so in order to put improper pressure on [Trant] to pay sums which were not due to [MM]."*

MM denied any such breaches but contended that in any event, the exclusion and limitation clauses in the parties' agreement would operate to exclude or limit its liability, irrespective of whether Trant could establish that such breaches were fundamental, wilful or deliberate. MM applied for summary judgment on this point.

The starting point

There is no rule of law preventing an exemption clause applying to a fundamental breach. This has been clear since the decision in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 in which the House of Lords categorically rejected the suggestion that such a rule existed. Lord Wilberforce said at 842H:

> *"I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construction of the contract."*

Accordingly, in this case, the parties were agreed that the question for the Court was one of construction: whether the clauses in question, when properly construed, limited or excluded liability for fundamental breaches of contract. The parties differed however on the rules of construction that should be applied.

Construing exemption clauses

MM argued that an exemption clause is to be construed by reference to the ordinary principles of contractual construction as articulated, for example, in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

Trant submitted that special rules of construction apply to exclusion and limitation clauses and that there was a strong presumption against an exclusion clause operating to preclude liability for a deliberate repudiatory breach of contract. Trant said that this presumption could only be rebutted by strong language. It relied in this regard on the judgment of Gabriel Moss QC in *Internet Broadcasting Corporation Ltd & others v MAR LLC* [2009] EWHC 844 (CH) ("*Marhedge*") in which the Court suggested at [33] that in order for an exemption clause to apply to deliberate wrongdoing, the clause must refer to this category of breach expressly: *"[l]anguage such as 'including the deliberate repudiatory acts by [the parties to the contract] themselves…' would need to be used in such a case."*

HHJ Eyre QC rejected this analysis and found that the clauses in question applied to fundamental breaches. The judge held that Marhedge provided an inaccurate summary of the law, which risked reintroducing the rule of law previously rejected by the House of Lords in by the back door and preferred the more recent first instance decision of Flaux J in *Astrazeneca UK Ltd v Albermarle International Corporation & another* [2011] EWHC 1574 (Comm). HHJ Eyre QC stated that the law had not changed since Photo Production and could be summarised as follows:

> *"Exemption clauses including those purporting to exclude or 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."*

HHJ Eyre QC did not go so far as to say that an exemption clause will be construed in the same manner as any other clause. In fact, he considered the exclusion of a liability that would otherwise and ordinarily arise (such as a liability for a deliberate breach) to constitute a departure from the norm and an outcome that the court will not readily expect. For this reason, the judge held that clear words will be required to achieve this effect. He added that the limitation of a liability is less of a departure from the norm as it reflects an agreed allocation of risk. As such, the court is more likely to conclude that a limitation of liability was intended than it would a total exclusion.

Concluding thoughts

This judgment suggests that where an exemption clause is properly capable of only one meaning, then effect will be given to that meaning, irrespective of whether this means excluding or limiting liability for fundamental breaches of contract. This includes clauses (as in this case) that are deliberately drafted in broad terms so as to refer to all breaches without referring to any one kind of breach expressly.

However, where an exemption clause is at all ambiguous, there is a risk that the court will find that it does not contain the clear words required to demonstrate the unusual intention to exclude or limit liability for fundamental breaches of contract. For the reasons stated above, this risk will be more pronounced for exclusion clauses.

This analysis is subject to the important caveat that a party cannot exclude all possible liability under the contract as this would be to *"reduce [its] obligations to the level of a mere declaration of intent"*. The courts will not accept that this was what the parties intended.