FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Issue 281 - November 2023

Dispatch

Interpreting exclusion clauses

Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies Plc

[2023] EWHC 2506 (TCC)

Pinewood contracted with PTAP to market dealer management software in the Asia-Pacific region. The agreement was terminated and PTAP made a number of claims, including damages for loss of profit and wasted expenditure. Pinewood, relied on an exclusion clause 16.2, which excluded liability for, amongst other things: "*(2) loss of profit, bargain, use, expectation, anticipated savings, data, production, business, revenue, contract or goodwill; (3) any costs or expenses, liability, commitment, contract or expenditure incurred in reliance on this Agreement or representations made in connection with this Agreement.*"

PTAP said that, in accordance with clauses 3 and 11 of the Unfair Contract Terms Act, the clause was part of Pinewoods' written standard terms and was unenforceable because it was unreasonable. PTAP further said that the exclusion clause was only intended to cover indirect or consequential losses, i.e., not those claimed by PTAP.

The Judge did not consider that UCTA applied. There were four amendments to the agreement, which the Judge considered were substantive and directly affected the obligations of the parties. For example, one amendment to clause 18 which the Judge considered was "*plainly the subject of negotiation*" had the effect of ensuring symmetrical provisions in relation to assignment and was not, as suggested a "*nitpicky clarification.*" It was clear that negotiations took place involving email exchanges and calls. It was also clear that both sides had access to legal advice. The draft agreement went backwards and forwards between the parties on several occasions and changes were proposed by PTAP, some of which were rejected by Pinewood but others accepted. Pinewood made at least one substantive addition of its own accord.

The result was that it was impossible to say that the terms ultimately agreed were Pinewood's standard business terms. It could not be said that the terms were "effectively untouched" or that none of the changes were material or that the changes left the agreement to all intents and purposes unchanged.

The Judge summarised the approach to be taken by the court to the construction of exclusion clauses as follows:

a. The exercise of construing an exclusion clause must be undertaken in accordance with the ordinary methods of contractual interpretation. Commercial parties are free to make their own bargains and to allocate risks as they think fit. Exclusion and limitation clauses are an integral part of pricing and risk allocation.
b. The court will start from the presumption that in the absence of clear words, the parties did not intend to derogate from those normal rights and obligations.
c. The more valuable the right, the clearer the language of the exclusion clause will need to be if it is to be given effect
d. However, it is "*wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only.*"
e. Notwithstanding (a)-(d) above, an exclusion clause will not normally be interpreted as extending to a situation which would defeat the main object of the contract or create a commercial absurdity, notwithstanding the literal meaning of the words used.

Pinewood said that the wording of clause 16.2 was clear. It was intended to exclude liability for specified heads of loss. Amongst other things, it was intended to exclude "*any liability... for breach*" of contract for "loss of profit" and for "*costs or expenses...incurred in reliance on the ...Agreement.*" It was not intended to exclude all and any liability for breach of contract, only liability that gave rise to the specified heads of loss.

Smith J agreed saying that on a true interpretation of clause 16.2, any liability on the part of Pinewood for breach of the agreement giving rise to damage in the form of loss of profit and wasted expenditure fell within the terms of the exclusion.

The language of clause 16.2 was on its face clear and unambiguous. It excluded "in relation to any liability it may have for breach of this Agreement", loss of profit and costs or expenses incurred in reliance on the agreement. There was no suggestion that the word "breach" was qualified or limited in scope. Indeed the approach of clause 16.2 (which also excluded the identified heads of loss for any liability in respect of "negligence under, in the course of or in connection with this Agreement, misrepresentation in connection with this Agreement or otherwise howsoever arising in connection with this Agreement") was that it was intended to exclude the specified heads of loss arising by reason of any liability on the part of Pinewood.

The obvious implication was that, with the exception of the liability identified in 16.1, the parties were intending to cast the net as widely as possible.

There was also an issue about set-off. Clause 8.10, headed: "*Deductions and Withholding Taxes*" stated that the "*Pinnacle User Account Monthly Fees (and all value added taxes and sales taxes thereon) shall be the net amount payable by the Reseller, and shall be made in full without withholding, deduction or set-off, including in respect of any taxes, charges, and other duties that may be imposed by any law or country on the same or on either party...*"

Pinewood said that the wording of clause 8.10 was clear. The requirement to pay Monthly Fees was a requirement that they be paid "in full" without set off. There was nothing in the clause to suggest that this wording should apply to legal as opposed to equitable set off as a matter of language and no commercial reason why the parties should have intended the reference to "set off" to be limited to legal as opposed to equitable set off. Even if equitable set off was not included within the concept of "set off", it would plainly be included within the broader concepts of "withholding" or "deductions".

It was common ground that the court must approach a clause said to restrict rights of set off with caution. If a set off is to be excluded by contract, clear and unambiguous wording is required. PTAP said that clause 8.10 was primarily concerned with prohibiting the deduction of taxes, charges and other duties from amounts payable by PTAP to Pinewood, hence the words "*including in respect of taxes, charges and other duties*" in the clause. The Judge could see no basis for this. The clause provided that payment "*shall be made in full without withholding deduction or set off, including in respect of taxes, charges and other duties*."

It was plain from the use of the word "including" that "taxes, charges and other duties" were not exhaustive of the items which may not be withheld, deducted or set off. Not only was this obvious as a matter of ordinary language, it was made even clearer by clause 1.2(e) of the agreement which provided that "the word 'including' shall be deemed to be followed by '(without limitation)'".

Adjudication: construction operations

Crystal Electronics Ltd v Digital Mobile Spectrum Ltd [2023] EWHC 2243 (TCC)

DMSL was set up in 2012 as a joint venture to carry out remedial works to digital terrestrial television. DMSL engaged Crystal as a contractor for an area covering the East Midlands and parts of Wales. However, DMSL terminated the agreement by notice with effect from 15 February 2023. On 10 February 2023, Crystal raised an invoice for £550k plus VAT for unpaid charges. DMSL disputed liability and, on 29 March 2023,Crystal sent to DMSL a notice of adjudication.

The question for Keyser J was whether or not the contracts were contracts for construction operations as defined by section 105 of the HGCRA as amended. If they were not, the adjudicator did not have jurisdiction. DMSL said that none of the works were construction operations and, alternatively, that, if some of the works were construction operations, others were not, then the contract was just a hybrid contract. Crystal submitted that, if any part of the works were construction operations, the adjudicator's jurisdiction was limited to awarding payment of the notified sum; any issue of severance or apportionment would be a matter for the court on an application for enforcement. The adjudicator accepted this submission and did not consider the "construction operations" issue any further.

The adjudicator went on to decide in favour of Crystal for the entire claim, plus interest and their fee. DMSL did not pay. Crystal commenced enforcement proceedings. DMSL resisted the application, which accordingly proceeded to a hearing. Before the hearing for summary judgment, Crystal referred a second adjudication to the same adjudicator. Again, Crystal was successful although the adjudicator ordered Crystal to pay their fees and DMSL to reimburse Crystal in that sum.

The Judge refused Crystal's application for summary judgment and gave directions for an expedited trial. In considering "hybrid contracts", the Judge noted that following cases such as *Severfield (UK) Ltd v Duro Felguera UK Ltd* [*Dispatch* Issue 186], a claimant who seeks to enforce an adjudication award must satisfy the court that all matters included in the award (save for what can properly be considered de minimis matters) were "construction operations." A decision that includes other matters will be completely unenforceable, unless the part of the decision relating to such matters can be severed. No question of severance arose here.

Here, Crystal said that all the work it did under its contract with DMSL was either actual construction operations, within the scope of section 105(1), or a form of surveying work and engineering advice in relation to construction operations, within the scope of section 104(2). Crystal submitted that section 105(1)(b) of the 1996 Act, read with the relevant provisions of the Communications Act 2003, made clear that work on apparatus for use in connection with a digital television network was deliberately brought within the potential scope of construction operations. The Judge agreed. However, the Judge did not agree that this meant that all Crystal's work fell within that potential scope.

In summary, the Judge said that the position was as follows. On every job, Crystal's installers carried out a basic visual inspection of the exterior of the property and its environs, identified the receiving equipment inside the property and took signal readings at the location of the receiving equipment. Sometimes, nothing more would be required than to retune the television set or other equipment, or to fit a set-back filter. Sometimes, other work would be required: this could involve taking signal readings in the loft or on the roof, installing an internal amplifier, fitting a filter to an aerial, fitting a mast head amplifier adjacent to the aerial, or realigning, moving, or installing an aerial.

The critical question under section 105(1) was whether the structures or other apparatus on which the works were undertaken form, or were to form, part of the land. The description of Crystal's work at viewers' households made it clear that a substantial proportion of the work was not on structures or works forming part of the land and, therefore, did not constitute construction operations. The clearest examples of this were the fitting of set-back filters to television sets and the retuning of television sets and other devices.

Television sets, recording devices and amplifiers "obviously" do not form part of the land, though sockets and face plates may do so. In the parliamentary debate on the 1996 HGCRA, at bill stage, with regard to the meaning of the phrase "*fittings forming part of the land,*" Lord Lucas had said: "*The dividing line between things which are fixed and not fixed might be the telephone on one's desk, which is not fixed to the land, and the socket in the wall, which is.*" The evidence showed that, at the very least, a substantial proportion of the works to which the adjudication decisions related comprised operations that were not construction operations. The decision was not enforced.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN