# **Exclude me in:** when is an exclusion clause not an exclusion clause?

An exclusion clause is the last recourse of the negligent. It seeks to be the safety net for the stronger contracting party that has failed in the subject matter of his undertaking, but wants to walk away unscathed. Given that an exclusion clause seeks to exculpate the stronger party from his responsibility, it invariably is submerged in the boilerplate provisions of the contract, as if the small print will hide its purposes. Small print or no, the exclusion clause is an extremely important provision, and care must be given when drafting the clause to ensure that well-established principles of law and interpretation are abided by.

The principles of law relating to exclusion clauses are at this stage well known by experienced professionals in all walks of life. A valid exclusion clause must be reasonable, and cannot be such that the entire benefit of the contract is excluded. Liability for personal injuries, death or fraud cannot be excluded. Any limitation on monetary liability must also be reasonable. Also, the principle of *contra proferentem* will be applied to interpreting the provision. Thus, if there is any ambiguity in the provision, the party suffering the loss will receive the benefit of the doubt to the detriment of the party seeking to avoid liability.

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While economists and insurers will argue that exclusion clauses serve a useful purpose in the allocation of risk in commercial contracts, their reception in Court is like that of an unwelcome guest to whom politeness must be shown, but not warmth or affection. To survive this chilly reception, the applicable principles of law must be adhered to, and clear and unambiguous language must be used.

The exclusion clause is, in short, a trap for the unwary, and so it proved to be for Price Waterhouse ('PW') in the recent case of *University of Keele –v- Price Waterhouse*. PW had been instructed to advise and establish a profit-related pay scheme for the University of Keele. This scheme could yield tax savings for both the University and its employees, if properly implemented. Unfortunately it was not and PW accepted that its advice was negligent.

The Court had to decide whether PW could rely on provisions seeking to limit its liability from negligence contained in its terms of engagement. The issues were reduced to a consideration of two provisions, namely:

'*in no circumstances shall any liability (whether arising in contract, negligence or otherwise) of Price Waterhouse "relating to the Services provided in connection with the engagement".exceed GBP1,700,000 being twice the anticipated saving to [University of Keele] from the implementation of the Profit-Related Pay Scheme.*' (the 'Limitation Clause')

and:

'*Subject to the preceding paragraph, we accept liability to pay damages in respect of loss or damage suffered by you as a direct result of our providing the Service.* ('Limb One') *All other liability is expressly excluded, in particular consequential loss, failure to realise anticipated savings or benefits and a failure to obtain registration of the scheme.*' ('Limb Two', and together with Limb One, the 'Exclusion Clause')

The provisions in short amounted to (a) a cap on liability to a multiple of twice the anticipated savings; (b) an acceptance of loss arising as a direct result of providing the contracted services; and (c) an exclusion of liability for all '*other*' loss expressly referring to a failure to realise anticipated savings.

PW sought to avoid liability entirely, as failure to realise anticipated savings was expressly excluded in Limb Two, whereas the University of Keele sought to recover unrealised savings in the amount of GBP1,250,000 (being less than the cap of GBP1,700,000). At first instance, the trial judge found Limb One and Limb Two to be contradictory and that, on an application of the *contra proferentem* rule or purely for repugnancy, Limb Two was struck out and primacy was given to Limb One. PW appealed.

## An exclusion clause is the last recourse of the negligent

On appeal, the outcome was no different, but a different approach was adopted in reaching that outcome. In the leading judgment, Arden LJ rejected the trial judge's finding that the provisions were contraditory, or that the principles of *contra proferentem* or repugnancy need be applied. For one clause to be inconsistent with another, it must contradict that other clause. This is different to a situation where one clause merely qualifies or modifies another.

Arden LJ considered that Limb One was the primary sentence that took precedence in the Exclusion Clause and that Limb Two merely qualified Limb One. She based this judgment on the inclusion of the word '*other*' in Limb Two. Her view was that PW had accepted liability for losses resulting from its contracted services up to the cap on liability of GBP1,700,000, but that any '*other*' liability in excess of GBP1,700,000 was excluded. On this interpretation, the exclusion of liability for a failure to

realise anticipated savings only kicked in once the GBP1,700,000 cap was reached. Arden LJ stressed that this was not an application of *contra proferentem* principles. She simply did not view the Exclusion Clause as being ambiguous.

So there it is. A warning for the wise to take heed, though it took some burned fingers to learn the lesson. There are several useful reminders from this case. The most critical is that the law restricts the basis on which exclusion clauses are considered to be valid to very limited grounds. If the party seeking to avoid liability wishes even to reach those limited grounds, it must make sure that the exclusion clause actually excludes the liability that is intended. This case highlights how even one misplaced word can be the instrument that destroys the entire benefit of the provision. The Court did not even need to involve itself in this case in a consideration of whether the Exclusion Clause and the Limitation Clause were reasonable. The way in which the provisions were drafted deprived PW of the chance that the Exclusion Clause would have survived a consideration of that principle of law.

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Another point worth taking from this case is that it highlights the disfavour that the Court shows to a party seeking to avoid liability on its bargain. This case passed through the hands of four judges. All found reason to find in favour of the University of Keele, but achieved that outcome by three different routes, like a river springing from the same source that branches into tributaries before converging at the same estuary.

Of course exclusion clauses serve a useful purpose in allocating risk and the availability of insurance for most risks means that the injured party can often recover. Nonetheless it would be foolish to ignore the attitude of the Courts and to recklessly pursue litigation based on ambiguous exclusion clauses.

DAVID SMYTH, PARTNER AND PADRAIG WALSH, SOLICITOR, BARLOW LYDE & GILBERT