STUDENT CASE NOTES

Exclusion Clauses - telecommunication contracts - damages for breach of contract

EE Ltd v Virgin Mobile Telecoms Ltd. [2023] EWHC 1989

Introduction

This case addresses important legal principle under exclusion clauses concerning a breach of an exclusivity clause in a Telecommunication Supply Agreement (TSA). As Clause 34.5 (a) of that agreement provided that ‘’neither party would be liable to the other in respect of anticipated profits’’, the case is particularly important in distinguishing between anticipated profit damages and reliance loss in the law of contract.

The facts

EE was a mobile network operator (MNO) and VM was a mobile virtual network operator (MVNO). VM provided its services to customers using the network of EE pursuant to the TSA whereby EE was required to supply to VM various services, including the provision of access to its mobile network to enable VM’s customers to be provided with 2G, 3G, and 4G, which are network bands that provide network (Internet) as part of mobile services. VM agreed to exclusively use EE’S network during a defined exclusivity period. The TSA was amended in 2016 with a view to enable VM to provide 5G services to its customers. When EE and VM could not agree to provide 5G services, VM sourced 5G services from third-party network providers such as Vodafone, and subsequently O2, where VM would also be entitled to provide its customers with 2G, 3G, and 4G services sourced from the said alternative supplier. EE alleged that VM wrongfully and in breach of exclusivity clause had migrated non-5G customers onto the alternative supplier’s network. EE claimed that by reason of VM’s breach, they had suffered an estimated loss (‘’anticipated profits’’) of around £24.6 million.

The decision

The court gave a decision following a summary judgment application, wherein it was alleged by the claimant that VM had wrongfully precluded EE from providing services to customers through its breach of an exclusivity clause. The claim asserted by EE was distinct from a debt claim for charges due under the TSA, and instead, EE sought damages for diversion of customers and claimed for loss of bargain, or loss of profit. Thus, crux of EE’s claim was to recover the loss of profit it would have made, had VM’s customers used the services offered by EE pursuant to the terms of the TSA.

In arriving at a summary determination, and focused on the interpretation of the clause 34.5 (a) of the TSA, the court held that EE’s claim amounted to a claim for loss of profit, based on legal precedents such as *Omak Maritime Ltd v Mamola Challenger shipping Co Ltd* [2010] EWHC 2026, and *Galtrade Ltd v BP Oil International Ltd* [2021] EWHC 1796. The court thus examined the clause to ascertain whether VM bore liability for damages arising from the alleged diversion of customers. The clause, as construed by the court, excluded liability for damages pertaining to anticipated profits. The language of the clause was deemed to be clear and unambiguous in its exclusion of claims for damages arising from loss of profits, with an exception carved out for damages arising from reckless or wilful breach or gross negligence. The court highlighted that this exclusion recognised that a claim encompassing damages for loss of profits was foreseeable in cases of such breach.

To interpret the clause, the court considered the natural meaning of the phrase ‘anticipated profits’ within the context. It referred to the principle in *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 that clear words are required to rebut the presumption that neither party

intended to abandon any remedies arising by operation of the law. The court also highlighted that the language of the TSA and its surrounding clauses did not indicate a different construction. The TSA, being a bespoke and detailed contract negotiated by sophisticated parties, was deemed interpretable primarily through textual analysis as seen from case of *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752, and *Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd* [2013] EWCA Civ 38.

The court thus concluded that VM's construction of the clause did not render the contract commercially ineffective. The judgment clarified that with EE's claim for damages, loss of profits was excluded by the clause, although it would not preclude other potential claims, such as wasted expenditure or injunctive relief for breach for the exclusivity clause. Hence, the court granted summary judgment in favour of VM, holding that EE's claim was excluded by the clear and unambiguous words of the clause.

Commentary

As pointed out by Professor Beale, subject to several controls, the parties may specify the remedy available to the innocent party following the other's breach:

> In the absence of such tailor-made clause on the remedy, the law on damages fills the gap with 'default' provisions on the assessment of monetary compensation, which apply to all types of contracts. The general principle is that damages for a breach of contract committed by the defendant are compensation to the claimant for the damages, loss, or injury he has suffered through the breach (Hugh Beale, *Chitty on Contracts* (35th edn, Sweet & Maxwell 2023).

Unlike criminal law, damages in contract do not, in general, usually punish the defendant for the breach. The purpose of contractual damages is to restore the innocent party in the position they would have been in had the contract been performed as agreed, thereby compensating them for the loss suffered due to the breach by the defaulting party. The principle is often referred to as the principle of ''restitutio in integrum,'' meaning restoration to the original position of the contract (Paul Richards, *Law of Contract* (14th edn, Pearson 2019). When a party breaches the contract, the innocent party may incur financial losses, and experience a shortfall in the expected benefits, or face additional losses due to the breach. Contractual damages aim to remedy these losses suffered by awarding compensation equivalent to the actual loss/ injury suffered.

There are three limits to availability of damages - causation, remoteness and mitigation. The relevant limit in this case was causation as EE had to establish a causal link between loss and breach as the breach of TSA agreement caused actual loss to EE. In contract law, this loss must be shown to have resulted from the breach. In *C&P Haulage v Middleton* [1983] 1 WLR 1461, the terms of a license provided that fixtures were not to be removed at the end of the license. Thus, when the licensee expended money on fixtures he was not entitled to claim the cost of fixtures as damages when the licensor ejected him in breach of contract. The claimant claimed for the cost of improvements effected by him in the licensed premises. However. the judge held that although the defendant was in breach of contract by ejecting the claimant, the claimant had suffered no loss since he had been able to move to his home rent free and the expenditure on improvements to the premises would still have been lost had the license been validly terminated. His appeal was dismissed, the court holding he had not suffered any loss, since he was in no worse position than if the contract had been performed. To compensate him at the defendant's expense for the bad bargain he had made would leave him in a better position had the contract been performed.

In general, there are four heads of damages awarded to compensate for breach of contract: expectation loss, reliance loss, diminution of value, and cost of cure (Paul Richards, *Law of Contract* (14th edn, Pearson 2019). The two relevant headings in this case were expectation loss (for anticipated profits) and reliance loss. In this case EE sought to claim anticipated loss of profits, which was not granted to EE because such loss was excluded under clause 34.5 (a) of the TSA. The other is reliance loss (wasted expenditure), and had the claimant sought such he may have been awarded provided they were able to establish incurring such loss.

Expectation loss on the other hand are forward looking - to compensate the claimant for the anticipated benefits if the contract was performed properly in line with the terms of the contract. This was seen in *Western Web Offset Printers Ltd v Independent Media Ltd* (''IM'') [1996] CLC 77. In this case, W, a printing company, sought damages representing lost gross profit when IM repudiated a contract to print 48 issues of a weekly newspaper. IM argued that the quantum of damage should be represented by W's anticipated net loss and an award was made on the basis. W appealed, and allowing the appeal it was held that the correct principle in such cases was to compensate for the loss of benefit and bargain caused by the breach. As a result, W was entitled to damages equivalent to gross profit, after deductions for direct expenses. Although W had spare capacity, the recession in the market could not reduce the loss by attracting work from other sources. Accordingly, W had not failed to mitigate its loss and was entitled to the gross profits.

Reliance loss is 'backward looking', meaning that the injured party can claim for expenses incurred because of entering into the contract. This type of remedy is often claimed if the anticipated profits are incalculable even if the contract been performed. This principle was illustrated in *Anglia Television Ltd v Reed* [1972] 1 QB 60. In this case, the defendant, an actor, had entered a contract with the claimants to produce a film. At the last moment, the defendant withdrew from the contract causing the claimants to abandon the whole project. They decided not to sue the defendant for expectation loss, since these would be clearly speculative, but instead sued for loss of expenses (reliance losses) in respect of moneys expended hiring other actors, finding locations, and engaging scriptwriters. The court allowed the claim for these items of expenditure. The court stressed that the claimant can either claim for his loss of profits or wasted expenditure, but must elect between them, but cannot claim for both. Thus, If the claimant has not suffered any loss of profit, or if the cannot prove what his exact profits would have been had the contract been performed, they can claim for the expenditure which has been wasted by reason of the breach.

The court's judgment may have been in EE's favour if they claimed for reliance loss and had substantial evidence (receipts) for costs they incurred to supply the said services. In this situation, the claim was for estimated profit and considering the clause in TSA, it was ruled that it was impermissible for EE to claim for such loss because the clause safeguarded both parties from excessive damages.

The present case also raised the issue of exclusion, or exemption clauses, as the clause in question excluded claims for loss of profits, thus restricting the innocent party's claim to reliance loss. Exclusion clauses is a term representing one of the sub-headings under the umbrella heading of exemption clauses. An exclusion clause, therefore, is the most extreme form of exemption clause, for example, stating that 'regardless of the circumstances the parties are not liable for any damages. Exclusion clauses exclude liabilities for any loss or damage caused by the breach. Exclusion clauses are regarded as the terms of the agreement and must be incorporated into the contract and, on its proper construction, cover the breach. They must also comply with statute law, in our case the Unfair Contract terms Act, 1977 (UCTA), as the contract between EE Ltd and VM Ltd was a business-to-business contract. Once it is established that UCTA is applicable, the Act will have the effect of rendering any clause void if the clause is unreasonable. The reasonableness test lies under the s.11 and the accompanying Schedule.2 of the 1977 Act, and s. 11(5) of the Act states that, the burden of showing reasonableness is on the party seeking to rely on the term.

The party seeking to rely upon on the term is likely to have the clause construed against them – the *contra proferentem* rule. This is because the law tries to maintain a level playing field, and if there is something wrong with a particular term, whether it is vague, or unreasonable, the party relying on the term will have the term construed against them. Schedule 2 of the 1977 Act provides, guidelines that would indicate if a term in the contract is unreasonable, include the bargaining power of the parties in contract. Thus, if there is substantial inequality between the bargaining positions of the parties, it is more likely that the clause fails the test of reasonableness. Other guidelines include the presence of inducements, the knowledge of the parties, and the practicality of complying with the term. This will ensure that the exclusion clause (term) in the contract is not unreasonable/unfair to either party to the contract. In our case, both parties are business people and the relevant clause applied to both parties,

thus appeared to comply with the reasonableness test as well as being sufficiently clear to cover the exclusion of expectation (profit) loss.

Conclusion

The case highlights the critical importance of carefully drafting exclusion (and other) clauses in contracts. The court's ruling in favour of VM was influenced by the unambiguous language of clause 34.5 (a), excluding liability for anticipated profits. The judgment further emphasizes the need for parties to consider alternative remedies, such as reliance loss in breaches of contract under TSA agreements. In essence, this case illustrates the significance of exclusion clauses in commercial agreements. It also neatly illustrates the different heads of damages used in awarding compensation for the innocent party's losses.

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