Liability caps in the current construction market

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Construction analysis: Will Buckby, partner at Beale & Company Solicitors LLP, explores the current use of liability caps in construction contracts, including the most common caps being agreed and the interplay with professional indemnity insurance.

What are the most common caps being agreed in construction contracts in the current market?

While there remains a small number of circumstances where consultants and contractors are forced to sign an appointment with unlimited liability if they wish to be involved in a particular commission, by and large our consultant and contractor clients will have caps of liability in their appointments.

In our experience, the approach to financial limits of liability largely depends on by who and how the project is procured. Liability is typically limited to a given financial amount on a 'per claim' or an 'aggregate' basis at an amount ranging between the fee and ten times the fee.

How does this fit in with the contractor’s/consultant’s professional indemnity cover?

It goes without saying that one cannot confuse an obligation to maintain insurance to a specified limit of indemnity and a limitation of liability clause. A minimum limit of indemnity in respect of an insurance policy is not a liability limit.

In respect of consultants or contractors limiting their liability for design, we are seeing a move towards agreeing a financial limit of liability at the same level of the professional indemnity insurance limit of indemnity required on the project. This is rather than, say, the limit of liability being capped at the fee. This is perhaps a hangover from the tough contractual terms coming out of the recession, but also following the case of Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd [2012] EWHC 2137 (TCC), [2012] All ER (D) 57 (Sep) in which a financial limit of liability agreed at the lower of a consultant’s fees (£111,321) or £1m was held not to be ‘reasonable’ under the Unfair Contract Terms Act 1977 (UCTA 1977), and therefore unenforceable, because, among other things, a much higher limit of indemnity in respect of professional indemnity insurance was required to be maintained.

Are consultants and contractors finding it easy to get employers to agree them?

As noted above, by and large contractors and consultants will agree limits of liability in their appointments.

An area of difficulty might be in respect of public sector contracts. Many public sector appointments are procured pursuant to the ‘restricted procedure’ under the Public Contract Regulations 2015, SI 2015/102, which prohibit material changes to the appointment issued by the client. In some instances no limit of liability is included and consultants and contractors bidding for such work will agree to such terms.

What are the common express carve outs?

There are of course those areas where liability cannot be excluded or restricted:

- death or personal injury resulting from negligence (pursuant to UCTA 1977), or
- fraud or fraudulent misrepresentation (as a matter of public policy)

Some standard industry appointments include carve outs. For example, the NEC3 Professional Services Contract April 2013 includes a number of excluded matters, which include, among other things:

- delay damages (if applicable)
- infringement of third party rights, and
loss or damage to third party property

Where possible, clients will try to delete the ‘excluded matters’ under the NEC3 PSC so they are also included within the overall cap on liability.

Some clients are seeking to carve-out losses covered under insurance policies, but this should be, and generally is, negotiated out of the appointment.

What is the position in relation to collateral warranties?

Collateral warranties typically include a ‘no greater liability’ and ‘equivalent rights of defence’ clause, which seek to limit liability under the collateral warranty on the same basis as under the appointment as if the beneficiary under the collateral warranty was party to the appointment. This seeks to achieve a ‘one glass’ limit of liability in respect of the appointment and collateral warranties.

Very rarely is liability under collateral warranties unlimited.

What other forms of limitations of liability are commonly being agreed in the current market?

Exclusion clauses

Exclusions clauses by reference to particular losses such as indirect and consequential losses are usually included in appointment documents, but these are less common than the inclusion of a financial limit of liability.

Net contribution

Where joint liability can arise, a net contribution clause can be helpful as these clauses limit a consultant’s or contractor’s liability to an amount that is fair and reasonable given the extent of their liability for the loss suffered. These clauses are often seen in professional consultancy appointments, traditional contractor appointments (not design and build), and in collateral warranties.

Time limits

Appointments usually include a limitation in time for liability, such as six or 12 years from the earlier of the date of practical completion or termination.

Asbestos exclusion

Due to the limited insurance cover for losses arising out of asbestos, consultants and contractors typically exclude all such liability. Such an exclusion was upheld in Persimmon Homes Ltd and others v Ove Arup & Partners Ltd and another [2015] EWHC 3573 (TCC), [2015] All ER (D) 81 (Dec).

Generally, does this represent a change from the previous position? What is driving it?

The decreased level of work during the recession meant a more competitive market and consultants and contractors were more willing to accept onerous appointments, which omitted typical limitation clauses. Despite a significant improvement in the UK market, there is still a slight hang-over of recessionary contracting, particularly in the public sector.

Nevertheless, the market has now improved and it continues to do so. In most cases we are seeing our clients agreeing limits of liability.

Interviewed by Susan Ghaiwal.

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