Our regular review of cases of most importance to construction comes from Andrew Croft and Simii Sivapalan of Beale & Company Solicitors LLP, including one highlighting the potential dangers of giving ad hoc and free advice as a business development initiative; and another showing how a widely drafted limit of liability clause may still be reasonable and therefore enforceable under unfair contract terms legislation.

Lejonvarn v Burgess
[2017] EWCA Civ 254; CA; Gloster, Hamblem and Irwin LJJ

Mr and Mrs Burgess (the Burgesses) owned a residential property and were looking to have a major landscape gardening project carried out at their property (the Project). The Burgesses were close friends with Mrs Lejonvarn (Lejonvarn), their neighbour and a professional architect.

Lejonvarn offered to provide and provided ‘professional’ services in respect of the Project identifying the proposed contractor, discussing the scope of work with that contractor and providing quantified estimates for the work (the Services). No written formal contract was executed between the Burgesses and Lejonvarn.

Lejonvarn stated that for the early stages of the Project, Lejonvarn would not charge for the Services. Lejonvarn intended to charge for subsequent services in respect of the ‘soft’ elements of the Project, such as lighting and planting. No such ‘soft’ services were provided.

Disagreements arose as to the costs of the Project; the Burgesses understood that the cost of the groundworks would be c £78,000 whereas Lejonvarn was working to an alleged budget of c £138,000.

The Burgesses were unhappy with the quality and progress of the Services and contended that the construction works under Lejonvarn’s supervision were defective. Lejonvarn’s involvement came to an end in 2013.

The Burgesses commenced proceedings against Lejonvarn seeking damages of c £265,000 as a result of negligence in the provision of the Services.

At first instance, the TCC found that, whilst there was no contract between the parties, Lejonvarn owed the Burgesses a duty of care in tort in relation to the Services.

Lejonvarn appealed against this decision and alleged that no duty of care arose as there was uncertainty as to what Lejonvarn had agreed to do. Lejonvarn also argued that no duty of care should be implied (in the absence of a contract) because the parties had not intended to be bound by a contractual relationship, so Lejonvarn had not assumed responsibility to the Burgesses.

Decision
In a trial of preliminary issues, Hamblem LJ (in the leading judgment) upheld the TCC’s decision.

The court confirmed that a duty of care in respect of professional services can be assumed in tort, even where the parties had no intention of forming a contract for the provision of those services; the absence of a contract was relevant but not determinative of whether there had been an assumption of responsibility.

The court highlighted that it was appropriate and fair, just and reasonable to find that a duty of care arose.

There were a number of factors in favour of finding that Lejonvarn assumed a duty of care to the Burgesses. The context was a professional one, not social.

In addition, neither party saw this as a favour given without legal responsibility, as Lejonvarn used the word ‘professional’ in the description of her role on more than one occasion.

This was also not a case of brief ad hoc advice; the Services were provided over a relatively lengthy period of time and involved significant commercial expenditure on the part of the Burgesses.

The court concluded that Lejonvarn’s duty was to:

‘... exercise reasonable skill and care in providing the professional services which Lejonvarn did in fact provide ... she did not have to provide any such services, but to the extent that she did she owed a duty to exercise reasonable skill and care ...’
Significance

This case highlights that a professional can assume responsibility when providing his or her services even if the parties do not intend to enter into a contract and even if the services are provided gratuitously.

The decision is particularly important for consultants who provide ad hoc and free advice to potential clients and actual clients, perhaps as a business development initiative.

Goodlife Foods Ltd v Hall Fire Protection Ltd
[2017] EWHC 767 (TCC); TCC; HHJ Stephen Davies

In 2001, Hall Fire Protection Ltd (Hall) sent a quotation (the Quotation) to Goodlife Foods Ltd (Goodlife) to design, supply, install and commission a fire suppression system at Goodlife’s factory.

The Quotation, amongst other things, stated that ‘Standard (Hall) terms and conditions apply’ (the Terms). A copy of the Terms were attached with the quotation and sent to Goodlife.

Clause 11 of the Terms stated:

‘[Hall] exclude[s] all liability, loss, damage or expense consequential or otherwise caused to [Goodlife’s] property, goods, persons or the like, directly or indirectly resulting from [Hall’s] negligence or delay or failure or malfunction of the systems or components provided by [Hall] for whatever reason.’

Goodlife submitted a purchase order on or around 2 April 2002. In 2002, Hall designed and installed the fire suppression system.

Ten years later, a fire occurred at the factory. Goodlife alleged that the fire should have been prevented by the fire suppression system.

Subsequently, in 2016, Goodlife commenced proceedings against Hall in negligence for property damage and business interruption losses in excess of £6 million as a result of the fire. It was common ground that a claim in contract was statute barred.

Hall sought to rely on cl 11 of the Terms and contended that this excluded any claim in negligence.

Goodlife alleged that cl 11 of the Terms failed to satisfy the ‘reasonableness’ requirement in the Unfair Contract Terms Act 1977 (UCTA) and was therefore invalid. Under s 2 of UCTA liability for negligence cannot be excluded unless the test of reasonableness is satisfied. Goodlife also alleged that cl 11 was extremely wide and attempted to exclude all civil liability including for fraud, death and personal injury, which is prohibited as a matter of public policy and under s 2(1) of UCTA, respectively.

Decision

In a trial of preliminary issues, HHJ Stephen Davies held that cl 11 was effective to exclude any liability by Hall for negligence.

The court concluded that attaching a copy of the Terms to the Quotation had been sufficient to incorporate the Terms as a whole into the resultant contract.

The words ‘for whatever reason’ in cl 11 were not considered wide enough to encompass fraud and therefore did not make cl 11 invalid.

The court also found that the reference to excluding liability for ‘damage ... caused to ... persons’ sought to exclude liability for personal injury or death (which is not permitted under s 2(1) of UCTA) and was therefore ineffective under s 2(1) of UCTA. Nevertheless, this did not make the remainder of cl 11 invalid.

The remainder of cl 11 was considered to be ‘reasonable’ under UCTA as, amongst other things, (i) the loss resulting from a fire is the type of loss which Goodlife should be expected to insure against; (ii) Hall and Goodlife had equal bargaining power; and (iii) Goodlife could have obtained a fire suppression system from a different supplier who was prepared to contract on the basis of a ‘less stringent exclusion or limitation clause’.

Significance

This case demonstrates that a widely drafted limit of liability clause may still be reasonable and therefore enforceable under UCTA. It also confirms that even if parts of an exclusion clause are unenforceable, the courts may enforce the rest of the clause to the extent that it is reasonable.

This is an interesting judgment which needs to be considered alongside a number of other recent cases in which the validity of limits on liability under UCTA has also been issue. These include Persimmon Homes Ltd v Ove Arup & Partners Ltd [2015] EWHC 3573 (TCC) which was the subject of a recent hearing in the Court of Appeal, whose judgment is keenly awaited. CL