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Know Your Limits!

Webinar

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Introductions

- + Will Buckby
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- + Simii Sivapalan
 - Solicitor, Projects and Contracts Advisory + Dispute Resolution

Agenda

- + The basics:
 - Limits of liability – why relevant?
 - Enforceability
 - Types of limit and exclusion of liability clauses
- + Standard Form Agreements – approach to limits
- + Market Approach and Trends
- + Client's policies and procedures - approach to risks relating to limitation
- + Practical Considerations



The Basics: Limits of Liability – Why Relevant?

- + A party who is in breach of contract / negligent will be liable for all losses which:
 - arise naturally from the breach; and
 - were reasonably in the contemplation of both parties at the time the contact was made
 - (*Hadley v Baxendale* (1854) 9 Ex. 341)
- + In the absence of a financial limit of liability, such losses will be **unlimited**
- + Losses may also exceed the limit of indemnity on the consultant's professional indemnity insurance policy
- + A cap on liability limits the amount of the professional consultant's liability to the client
- + Limit of liability vs limit of indemnity



The Basics: Enforceability of Limitation Clauses

- + Limitation clauses are enforceable under UK law but subject to a few exceptions/controls
- + Controls on limits of liability:
 - Unfair Contract Terms Act 1977 (“UCTA”) - Test of “reasonableness”; and
 - ‘standard terms of business’ / consumer contracts must also satisfy the test of ‘reasonable’ – Section 3, UCTA
- + Example case: *St Albans City and District Council v International Computers Limited (1996)*
- + *Moore v Yakeley Associates (1999)*
- + Matters for which liability cannot be excluded:
 - + Death or personal injury resulting from negligence;
 - + Fraud or fraudulent misrepresentation (as a matter of public policy)



The Basics: *Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd [2012]*

- + Financial limit of liability agreed at the lower of consultant's fees (£111,321) or £1 million
- + Held not to be reasonable under UCTA and therefore was unenforceable
- + The judgment highlighted that a liability cap may be unreasonable if it is far below the amount of professional indemnity insurance required under the professional appointment, in this case £10 million
- + It is best practice for a professional consultant to draw the client's attention to any cap on liability
- + **Consultants should also ensure that any cap on liability is in line with the PI insurance.** It may not always be appropriate simply to cap liability by reference to a percentage of the contract sum or the consultant's fees



Types of Limits of Liability

+ The most common examples of limit of liability clauses are:

- Financial cap on liability;
- Exclusion of indirect / consequential losses;
- Net contribution clause;
- Time limits on claims;
- Exclusions of losses relating to particular risks; and
- Evaporation clauses



Financial Limits of Liability – General Approach

- + Liability generally limited to a given financial amount
- + The amount of the cap may be expressed as:
 - Fixed amount;
 - “aggregate”
 - “each and every claim”
 - “annual”
 - By reference to consultant's professional indemnity insurance
 - Percentage of the fee - amount ranging between the fee or 10 times the fee
- + Ensure consistency with the terms of the insurance policy
- + “One glass” limit across whole of project?



Exclusion for Indirect / Consequential losses (1)

- + What is indirect /consequential loss?
- + *Hadley v Baxendale (1854)*:
 - losses arising naturally or according to the usual course of things (“direct loss”): see *Victoria Laundry (Windsor) Limited v Newham Industries Limited [1949]*
 - other losses at date of contract reasonably expected to arise from a particular breach (“consequential” or “indirect” loss): see *British Sugar plc v NEI Power Projects Ltd [1997]*
- + Misunderstanding the legal distinction between “direct” and “consequential” losses can lead to exclusion clauses that do not achieve intended aims!
- + Lots of case law on this issue



Exclusion for Indirect / Consequential losses (2)

+ Drafting tips:



- Clearly identify the liability to be excluded – are you happy with an exclusion of consequential loss only or do you also want to exclude certain direct losses such as loss of profit?
- List precisely as possible the categories of losses – e.g. loss of opportunity, loss of profit, loss of production and loss of business
- Be wary of “other” and “including” – may have a limiting effect on clause
- Use “indirect” instead of “consequential”
- Consider other provisions that establish liability to ensure likely losses covered

Net Contribution Clause (1)

- + Where a loss occurs for which two or more parties happen to be responsible, party suffering a loss can sue any party responsible for the full value of the loss, regardless of the extent of their responsibility
- + An NCC limits a party's financial liability, where they are not solely responsible for the loss, to an amount that is deemed just and reasonable in the circumstances
 - ACE Agreement 2009, Clause F7.5
 - RIBA Standard Consultant's Appointment 2010, Clause 7.3
 - NEC3 Professional Services Contract; Clause 82.2



Net Contribution Clause (2)



- + *Stephen & Carol West v Ian Finlay & Associates (a firm) [2014]*
- + *“Our liability for loss or damage will be limited to the amount that it is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you.”*

Limitation Periods

- + Limitation Act 1980 - imposes various limitation periods depending on the type of claim:
 - Six years for claims arising from **simple contracts** and tort
 - 12 years for breaching an obligation in a **deed**
- + Parties are free to agree a different period imposed by law – look out for extensions to the time period
- + Use unambiguous wording and “clear terms”: *The Oxford Architects Partnership v The Cheltenham Ladies College* [2006]:
 - "No action or proceedings for any breach of this Agreement or arising out of or in connection with all or any of the Services undertaken by the Architect in or pursuant to this Agreement, **shall be commenced against the Architect** after the expiry of [six] years from completion of the Architect's Services, or, where the Services specific to building project Stages K-L are provided by the Architect, from the date of Practical Completion of the Project"



Particular Risks



- + May be “reasonable” to exclude liability in respect of particular matters
- + Common exclusions:
 - pollution and contamination
 - asbestos: see *Persimmon Homes Ltd & Ors v Ove Arup & Partners Ltd & Anor* [2015]
 - Terrorism claims
- + Professional indemnity insurance

Evaporation Clauses

- + Limit of liability is “limited” to what is recovered/recoverable under professional indemnity insurance
- + E.g. ACE Agreement 1:
 - “... provided always that such **pollution and contamination liability** ... shall not exceed in respect of any one claim or series of claims arising out of the same occurrence or series of occurrences the amount, if any, recoverable by the Consultant ... against the claim or claims in question under any professional indemnity insurance”
- + Market/commonly used?



Standard Forms – NEC3 PSC



- + Limit of Liability? Yes (Clause 82.1)
 - a limit on the consultant’s liability to the amount stated in the Contract Data
 - Does not apply to the “excluded matters” which include amongst other things, delay damages (if applicable), infringement of third party rights, and loss or damage to third party property
- + Ensure Contract Data completed – risk unlimited liability
- + Remove the “exclude matters” from clause 82.1
- + Exclusion of indirect/consequential losses? No, but:
 - an “option” to limit liability for indirect and consequential loss to an agreed amount (Option X18); and
- + Ensure the appropriate Option X clauses are selected or add exclusion clause
- + NCC? Yes (Clause 82.2), but brief/vague

Standard Forms – ACE Agreement 1 (2009 Revision)

- + Limit of Liability? Yes
 - Limit on the consultant’s aggregate liability to the lesser of the sum stated and “ten times the fee payable” (if no sum is stated the limit is ten times the fee) (clause B12)
 - There are also limits of liability in respect of matters for which liability is often excluded or limited under professional indemnity insurance policies, such as pollution and contamination, asbestos and terrorism (clauses B13, B14 and B15)
- + Exclusion of indirect/consequential loss? No
- + NCC? Yes (clause F7.5)
- + Liability Period? Yes - outlined in clause F7.8
 - The period stated in clause B17 of the particulars or such earlier date as may be prescribed by law
- + Other limits/exclusions?



Standard Forms – RIBA 2010



- + Limit of Liability? Yes (Clause 7.2.1)
 - The maximum liability of the architect is to the level of insurance which the architect agrees to carry
 - ‘Each and every claim’ limitation
- + Architect’s total liability for separate and distinct breaches or acts of negligence is subject to the agreed cap in each and every case
- + Exclusion of indirect/consequential loss? No
- + NCC? Yes (Clause 7.3)
 - Without the usual “bells and whistles”

Other limits/exclusions?

Standard Forms – PPC 2000

- + Limit of Liability? No
- + Exclusion of Indirect/ consequential loss? No
- + NCC? Yes (Options to Clause 22.1):
 - E.g. *“The responsibility of each of the following Partnering Team members for loss or damage suffered by any other Partnering Team member shall be limited to that proportion of the other Partnering Team member’s loss or damage as it would be just and equitable to require that Partnering Team member to pay having regard to the extent of that Partnering Team member’s responsibility for such loss or damage and on the basis that each other Partnering Team member shall be deemed to have paid such proportion as it would be just and equitable for them to pay having regard to the extent of their responsibility”*
 - Variant to above also include as option to Clause 22.1



Standard Forms – ACA Alliance Contract



- + Limit of Liability? No
- + Exclusion of Indirect/ consequential loss? No
- + NCC? No

Market Approach - Generally

- + UK market approach is complex; generally depends on by who and how the project is procured
- + More often on not – “per claim” or “aggregate” basis, at an amount between fee and 10xs fee
- + **However** consultants can be forced to agree unlimited liability if they wish to be involved in a particular commission
- + Exclusions for indirect and consequential and net contribution clauses not always included
- + Market/”norm”: approach in ACE Agreement 1 or NEC3 PSC



Approach by Public Sector and Private Developer Clients

- + The approach to limitation clauses will depend on the client procuring the project
- + Public Sector clients:
 - Difficult to negotiate
 - Appointments issued by clients usually do not include limitation clauses
 - “restricted procedure” and “open procedure” under the Public Contract Regulations 2015 - prohibit any material changes to the contract
 - Public sector clients now see this as the “norm”
 - Exceptions to this!
- + Private Developers:
 - Often agree limitation clauses (particularly a financial limit on liability)
 - BUT depends on client is e.g. “sophisticated” developers



Approach by Contractors

- + D&B Projects - contractors generally agree to limits of liability
- + Building Contract limits flowed down e.g.:
 - Option X18 of the NEC3 ECC allows for the contractor’s liability to be limited to a given sum; and
 - Clause 2.17 of the JCT DB allows for liability to be limited in respect of design
- + But can be challenging if no limit in Building Contract + contractor wants “back-to-back” position
- + Some contractor’s policy – no limit!



Trends in UK Market



- + Limits of liability common before 2008 recession
- + Recession meant more competitive market and consultants often having to accept more onerous appointments
- + Still a “hang-over” of recessionary contracting, particularly in the public sector
- + The market has now improved and it continues to do so
- + Consultants able to agree limits of liability more commonly
- + Consultants focusing on improving their risk management measures
- + Move towards including a financial limit of liability linked to level of PI insurance required on the project

Policies/Procedures

- + Starting point – must have limitation clauses (and a net contribution clause)
- + Corporate Governance to require appointments which do not contain (i) an exclusion for indirect and consequential losses and/or (ii) financial limits of liability clauses, to be approved by the board, a risk committee, and/or the General Counsel
- + Undertake the usual commercial risk assessment and obtain necessary approvals - if departing from the Corporate Governance
- + Triggers and example approaches (e.g. distinction between public and private sector/contractors)
- + “No-bidding” on projects when unable to achieve limitation clauses and the overall risk profile justifies this



Practical Considerations – our view



- + Marked increase in recent years of non-standard appointments including no limit or unreasonable limits
- + Remains a misapprehension that this gives greater recoverability in event of claim
- + Unlimited liability is a myth – depends on assets
 - Professional indemnity insurance major part of that
- + Caps protect client as well as the consultant
 - If financial caps were not used, a single claim could result in liquidation + what is the position in relation to other clients?
- + Financial caps create a better chance that claims will be satisfied
- + Effect of insurance premiums?



GHN Seminar – Working in Uncertain Times

- + Analysis and comment on the results of Beale & Company's Construction Consultants Brexit Impact survey – **Nathan Modell, Partner for Beale & Company**
- + Key risks, challenges and opportunities the infrastructure and construction industry faces post-Brexit – **Andrew Wescott, Head of Policy and Public Affairs, ICE**
- + Payment: mitigating the risk of late/non-payment in construction projects – **Will Buckby, Partner for Beale & Company**
- + Risk Management: key issues to consider in the project planning stage post-Brexit – **Stephen Hargreaves, Director, Griffiths & Armour**

- + **Date:** Thursday, 10th November 2016
- + **Times:** 5.30pm – Registration | 6.00pm – Seminar | 7.00pm - Drinks and networking
- + **Venue:** The Little Ship Club, Bell Wharf Lane, Upper Thames Street, London EC4R 3TB
- + **RSVP:** Please email Jonathan Roscoe at marketing@beale-law.com or call 020 7469 0400

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