Exemption clauses: the latest word from the Court of Appeal

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THE *PERSIMMON HOMES LTD* DECISION

A consortium of developers sued their consulting engineers after discovery of unexpected asbestos at an old dock site. The engineers relied upon an exemption clause to protect them from liability and were successful both at first instance and in the Court of Appeal in the case of **(1) PERSIMMON HOMES LTD (2) TAYLOR WIMPEY UK LTD (3) BDW TRADING LTD v (1) OVE ARUP & PARTNERS LTD (2) OVE ARUP & PARTNERS INTERNATIONAL LTD [2017] EWCA Civ 373**l.

3PB's ANALYSIS

As is so often the case with major projects involving numerous parties and developing over time there were several contractual issues to resolve. However the key issue became whether the engineers could rely upon a clause contained in a 2009 agreement. This clause limited their liability for negligence and then stated:

"… with the liability for pollution and contamination limited to £5,000,000 (five million pounds) in the aggregate. Liability for any claim in relation to asbestos is excluded."

The Claimants/Appellants sought to rely upon the principle drawn from *Canada Steamship Lines Ltd v The King* [1952] AC 192 (Privy Council) that, if there was no direct reference to negligence in the clause, then the Court would need to consider whether the words used covered negligence claims and in that case the clause should be construed *contra proferentem* – that is, against the party putting forward the clause.

The judge at first instance and the Court of Appeal disapproved of this approach. Lord Justice Jackson in giving the judgment of the Court of Appeal pointed out that there had been a softening of approach towards exemption clauses in recent years (since the Unfair Contract Terms Act 1977). He concluded that the words used were wide enough to cover negligence claims: *"… any claim in relation to asbestos"* bore its clear and obvious meaning.

Jackson LJ noted that:

"The contra proferentem rule requires any ambiguity in an exemption clause to be resolved against the party who put the clause forward and relies upon it. In relation to commercial contracts, negotiated between parties of equal bargaining power, that rule now has a very limited role."

The real thrust of Jackson LJ's judgment was that businessmen are well able to allocate and price risk. How they choose to do that, the particular risks which are accepted and by whom are all matters for them and not for the Courts.

The secondary but important practical ruling was that the guidelines laid down by Lord Morton in the *Canada Steamship Lines* case, previously seen as applicable to both exemption and indemnity clauses, should now be seen as more relevant to the construction of indemnity clauses.

THE IMPACT OF THE DECISION

It is an important part of business negotiations to allocate risk and with professional advisers they will charge appropriately for doing so. In the commercial context there is no need to approach exemption clauses with caution and aim to cut them

down. No longer can one safely rely upon the *contra proferentem* rule. Businessmen and lawyers have to have regard to the words used and note that exemption clauses are more likely to be accepted by the Court than before.

This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

3PB's Business and Commercial Group are specialist commercial barristers that provide advice and legal representation on all aspects of business and commercial law. The Group advise on a broad range of issues, including commercial contracts, the law of business entities, professional negligence, and insolvency.

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