Fujitsu's own goal on limitation of liability – spooky stuff

Speed read

A clause aimed at limiting a supplier's liability has been used to stop payment of fees to the supplier. Fujitsu didn't get all the work it expected under an IT supply contract with IBM, meaning it lost fees and profit. So Fujitsu sued IBM. But the limitation of liability provision, mainly drafted to protect Fujitsu from damages claims by IBM, by excluding loss of profits claims, etc, has successfully been used by IBM for a difference purpose: to kill a loss of profit claim by Fujitsu, because it didn't get the work it expected to get. The LOL worked both ways.

Ouch.

This is a real warning to suppliers to think hard about how their LOL provisions would work. The courts can't always rescue them.

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The Detail

PWC had a big contract with UK Government agency, DVLA, to provide IT and business process change services. It subcontracted day to day management, support and maintenance of the DVLA IT infrastructure to Fujitsu. Soon after, PWC sold its business to IBM, and, thereafter the work going to Fujitsu dried up.

The subcontract was a partnering agreement, features of which raised additional issues specific to partnering which we deal with in our sister article, Fujitsu's problems with partnering agreements.[1]

Based on its argument that the subcontract/ partnering agreement required IBM to feed plenty of work to it, Fujitsu sued IBM for loss of profit. The English High Court[2] decided that, with one exception, the limitation of liability (LOL) clause stopped liability. Here is what the clause said, in a way that is typical of many LOL provisions:

> *"Neither Party shall be liable to the other under this Sub-Contract for loss of profits, revenue, business, goodwill, indirect or consequential loss or damage, although it is agreed [certain exceptions apply]"*

Although there was analysis as to whether some of the exceptions applied, in the end they didn't.

The court read this clause literally and concluded that it didn't just apply to damages for negligence and so on: it also precluded claims for loss of profits where the customer failed to give required work to the supplier.

Contract interpretation principles are largely the same in NZ as in England.[3] Broadly, the interpretation approach will consider overall context, what a reasonable bystander would understand, etc.

But in the end, unambiguous words will generally be given effect to. And that is what happened here, taking into account too that the parties were both lawyered up on this. The judge said that the LOL clause unambiguously cut out loss of profit claims based on the supplier not being asked do required work.

Having noted that, our view is that many lawyers would miss this possible outcome when drafting a contract, given the focus on damages claims such as for negligence and errors in performance, rather than on claims for not getting the work in the first place.

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And many clients would not think this was the intended outcome. The judge's view to the contrary can be debated. But in the end, the words are the words and they were held to be unambiguous and decisive.

The Judge took a literal black-letter law approach in the analysis. While it is hard to fault that from a black letter law perspective, this strikingly contrasts with how the English Court of Appeal creatively solved a similar problem, in the face of clear wording, where a supplier again didn't get the work it contracted for: see our article, Limitation of liability, Houdini and the Court of Appeal.[4]

The court also, for similar reasons found that the backstop LOL, limiting any liability to a maximum sum, also cut out the claim above that backstop. Same issue. Same problem.

Both cases by the way are a treasure trove for litigators trying to think of innovative ways to argue that black is white in the world of LOL clauses (something the lawyers pulled off in the Court of Appeal case).

The big takeaway

These cases tend to be fact specific while also applying important and universally applicable contract interpretation principles. Rather than comparing the two cases, the big takeaway is to try and think about various scenarios when drafting LOL, including when you could be on the wrong side of the clause. LOL clauses will never be a 100% panacea, but they can go a long way. And now of course there is the additional issue around carving out Fair Trading Act liability under the June 2014 legislative changes. See our article, New law from June 2014: Reducing exposure under NZ B2B supply contracts.[5]

For litigators, there's a nifty takeaway: Fujitsu succeeded in arguing that a claim based on an account for profits is not precluded, and therefore this claim was open to Fujitsu (but subject to the backstop LOL noted above). Suppliers might add the account for profit to their clauses, although that type of claim tends to be quite challenging.

1. http://www.wigleylaw.com/assets/Uploads/Fujitsus-problems-with-partnering-agreements-it-aint-all-it-seems.pdf

2. In a trial on preliminary issues before the full trial, in Fujitsu v IBM [2014] EWHC 752 (TCC)

3. A key difference being that a single case here differs from the English authorities that limit "consequential loss" so as to exclude normal loss of profit due to breach: see our article, http://www.wigleylaw.com/assets/Uploads/Limitation-of-liability-Houdini-and-the-Court-of-Appeal.pdf

4. http://www.wigleylaw.com/assets/Uploads/Limitation-of-liability-Houdini-and-the-Court-of-Appeal.pdf

5. http://www.wigleylaw.com/assets/Uploads/New-law-from-June-2014-Reducing-exposure-under-NZ-B2B-supply-contracts.pdf

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