Limiting liability via a credit application form

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Speed read

Credit application forms are common ways to get customers to accept Ts and Cs. A March 2016 case confirms they can work for B2B (there are additional considerations for B2C) and that rules such as the notice of onerous terms rule won't necessarily apply. But the case highlights the need to exclude negligence liability clearly: otherwise the supplier can end up being liable, beyond capped breach of contract liability.

The Detail

Summit did some servicing work on a cylinder in Iceland Drilling's geothermal drilling rig. Iceland says that substandard work by Summit led to the rig failing, with $1.3M of losses. But in March 2016, the Court decided[1] that the limitation of liability (LOL) clause, signed up by way of a credit application form, was effective in limiting liability to around $40,000, which was the price for doing the services.

The words

The LOL clause reads:

> *"AT NO TIME shall the liability of the Company exceed the purchase price of the goods or services in question".*

That and the other terms were attached to a credit application form signed by a Summit representative, in the block for signing below these words:

> *"DECLARATION:*
>
> *I the undersigned, referred to herein this Application for Credit Account as 'the Customer', have read the Terms and Conditions of Trade set out over page and agree that those terms and conditions form an Agreement between the Customer and Summit Hydraulic Solutions Ltd.... "*

In dealing with some detailed interpretation arguments, the Court rejected them, relying on the established cases that give effect to LOL clauses, and to a more neutral interpretation of such clauses. Essentially, this is a useful case to summarise those rules.

The case is most useful however, for confirming (again) that, in B2B transactions at least:

- Where the signed document includes the terms, the party signing is stuck with the terms (it doesn't matter that the document was a credit application form, because the place where there was a signature clearly referred to contract terms).
- It is not necessary to clearly refer to onerous terms (often called the Lord Denning red hand test): that rule

applies where the terms are contained in an unsigned document, not where it is signed.

The position as to B2C contracts can differ, particularly due to the B2C statutory regimes in New Zealand.

Why has Iceland conceded no uncapped liability for negligence?

It looks like Iceland sued Summit not only for breach of contract but also, as is commonplace in cases like this, pursuant to the tort of negligence too. Poorly drafted LOL clauses can leave liability uncapped outside breach of contract liability, because claims that negligence caused the loss are common. That's why most well drafted clauses expressly refer to excluding liability for negligence (the same outcome can be achieved by wide words such as "No liability of any kind whatsoever").

It looks like Summit's lawyers concluded that the clause here (which stated that "AT NO TIME" is there liability beyond the purchase price) is effective in limiting negligence liability. We haven't reviewed this closely, but generally drafters of LOL clauses should be clearer than this to de-risk the issue.

1 *Jardboranir trading as Iceland Drilling v Summit* [2016] NZHC 490

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