

CONSTRUCTION AND ENGINEERING

Construction case law update: spotlight on Force Majeure and Indirect and Consequential Loss

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In April 2020, the Technology and Construction Court in the UK handed down judgment in the case of [2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd](#) [2020] EWHC 972 (TCC).

The case concerned a claim by a group of BBC subsidiaries (the “Claimants”) for damages incurred comprising loss of profits, business interruption costs and increased cost of working arising as a result of a fire at a warehouse of the defendant, (“Sony”), during the 2011 riots in London. Under a logistics services agreement (the “Logistics Contract”), Sony agreed to provide services to the Claimants including storage and distribution facilities. The Claimants received payment from Sony’s insurers for loss of stock destroyed in the fire but were not satisfied that this amount adequately compensated them for all their losses and instituted proceedings in August 2017 to recover their other losses.

Part of Sony’s defence was that clauses in the Logistics Contract excused them from liability for the other losses sought. The Court disagreed. It found that Sony was in breach of the Logistics Contract, its common law duty of care and its obligations as Bailee of the goods.

Force Majeure

The Logistics Contract had a force majeure clause which provided that: “Neither party shall be liable for its failure or delay in performing any of its obligations hereunder if such failure or delay is caused by circumstances beyond the reasonable control of the party affected including but not limited to ... fire ... riot, civil commotion, malicious damage ...”. Sony contended that it was not liable to the Claimants

for the losses claimed because the riots causing the fire and the destruction of the warehouse were a force majeure event.

Mrs Justice O’Farrell dismissed Sony’s argument and held that, while the riots themselves were an unforeseen event, the risk of intruders was foreseeable: unauthorised entry had been attempted / achieved at other times before the riot, and the risk of arson and consequent destruction of the warehouse and stock was, or should have been, foreseen, based on safety standards and other guidance documents available to Sony. The possibility of intruders gaining access to the warehouse and the consequent fire and resulting loss were not circumstances beyond the reasonable control of Sony: adequate security measures and reasonable fire precautions would have delayed or deterred the attack, suppressed the fire, and reduced damage to the warehouse and its contents.

Comment: in circumstances where the COVID-19 pandemic may trigger force majeure claims, this judgment is a timely reminder that, while force majeure clauses are typically drafted in fairly broad terms, their application to the relevant facts and circumstances may be more complex. It is important that:

- appropriate risk mitigation measures are in place in a project and, if a force majeure event occurs (or is about to occur), actions to mitigate its impact are taken where appropriate, and

- a party records with precision the events or factors that are impacting its ability to perform its obligations: for example, what was the situation previously, what has happened, and how exactly is that impacting work on a site?

Indirect and consequential loss

The clause excluding liability for indirect and consequential loss or damage provided that: “Neither party shall be liable under this Agreement in connection with the supply of or failure to supply the Logistics Services for any indirect or consequential loss or damage including (to the extent only that such are indirect or consequential loss or damage only) but not limited to, loss of profits, loss of sales, loss of revenue, damage to reputation, loss or waste of management or staff time or interruption of business.” (emphasis added)

The Claimants argued that the clause did not exclude any of its loss; the words “indirect or consequential loss or damage” were a reference to loss falling within the second limb of *Hadley v Baxendale*. On a proper construction of the clause, loss of profits and business interruption losses could be recovered because they arose *directly* as a result of the fire and destruction of the goods and warehouse.

Sony argued that the loss of profits and business interruption losses claimed were consequential on the loss of the goods and therefore excluded by the clause.

The Judge considered that the direct and natural result of the fire was the destruction of the goods and warehouse which caused lost profits and business interruption losses to the claimants. The claims for loss of profit and business interruption were direct losses and therefore were not excluded by the clause.

The Judge commented that the clause was unhappily drafted. The words in parenthesis had the effect of negating the illustration intended by the words of inclusion. The only way in which these words could be given effect was to treat the reference to specific categories as losses that might or might not fall within the exclusion. They were of no assistance

in determining whether the losses claimed in this case came within the exclusion or not. However, the meaning of the clause was reasonably clear on the facts.

Notably, following a discussion of relevant authorities, the Judge stated that *“any general understanding of the meaning of “indirect or consequential loss” must not override the true construction of that clause when read in context against the other provisions in the Logistics Contract and the factual matrix”*.

Comment: case law abounds in commentary on the meaning of direct and indirect or consequential loss. In this judgment, the clause could be interpreted such that the illustrative categories in

the clause could fall within or without the exclusion of liability for indirect and consequential loss.

The types of category listed are capable of being direct and indirect or consequential loss. Drafting should be clear and precise about the liability that parties wish to exclude. Lists of exclusions should relate to heads of loss and should not be linked to whether the loss is direct, indirect or consequential.

Judgments of the Technology and Construction Court are not binding in Irish courts but may be persuasive in litigation in the construction sector.

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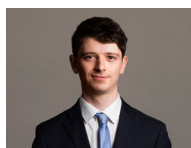
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