Introduction

The interpretation of exclusion clauses is always a contentious issue. In circumstances where large sums of money, if not the entire question of liability, can turn on their meaning, even the most clearly drafted exclusion clauses can often be the subject of substantial disagreement between parties when contractual disputes arise.

It is therefore noteworthy that already this year the Court of Appeal has had the opportunity to consider arguments surrounding the interpretation of exclusion clauses in two separate cases: Nobahar-Cookson & Anor v The Hut Group Ltd¹; and Transocean Drilling U.K. Ltd v Providence Resources Plc².

The Court of Appeal ultimately reached very different decisions in the two cases: in Nobahar-Cookson the Court applied the narrowest reading of the exclusion clause, minimising its effect on the defendant’s liability; in contrast, in Transocean the Court preferred the wider interpretation of the relevant clause, affording the defendant the greatest possible protection.

However, despite the divergence in the ultimate outcomes of the cases, the approaches taken by the Court in reaching its decisions give helpful guidance on how exclusion clauses are to be interpreted. This briefing note will set out the key lessons to be drawn from these cases, and what they mean for the interpretation of exclusion clauses in the future.

¹ [2016] EWCA Civ 128
² [2016] EWCA Civ 372
Nobahar-Cookson & Anor v The Hut Group Ltd

Nobahar-Cookson was an appeal which revolved around the application of a clause which excluded the defendant’s liability for claims under the relevant agreement by way of a contractual time-bar. Specifically, the contract provided that the defendant would only be liable to the claimant if they were notified of the claim within 20 days of the claimant becoming “aware of the matter”.

The dispute which the Court had to determine was essentially what “aware of the matter” meant, as this would determine when the time period for notification had commenced. The Court considered that there were three possible meanings, two of which would result in the claimant’s claim being time-barred and one (the narrowest interpretation) which would not.

Is contra proferentem still a relevant principle for the interpretation of exclusion clauses?

In determining which meaning should be preferred, Lord Justice Briggs began by considering whether the contra proferentem principle remains relevant to the interpretation of exclusion clauses. The contra proferentem principle essentially states that ambiguities in the drafting of clauses should be resolved against the person who prepared either the contract as a whole or the specific clause in dispute, or against the person for whose benefit the clause operates. In the case of exclusion clauses this means the narrower interpretation should be applied.

This principle has largely fallen away, particularly in relation to commercial contracts made between sophisticated parties which are usually heavily negotiated on both sides, and the judge at first instance had rejected arguments that it should be applied in this case.

However, Lord Justice Briggs concluded that in relation to exclusion clauses specifically there remains a principle that in the face of ambiguity the narrower interpretation should be preferred. In Lord Justice Briggs’ view this principle was not derived from which party had imposed and/or sought to rely upon the clause. Rather, he considered that this principle arose out of the fact that an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law; parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations, and so should not be taken to have done so without using clear words having that effect.

In this respect Lord Justice Briggs indicated that this may be a separate principle to that of contra proferentem, referring to the decision in Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd3 in support of this principle. However, he nevertheless appears to have endorsed the use of the contra proferentem principle as an approach to interpreting exclusion clauses.

That said, Lord Justice Briggs was clear that this principle is not a presumption. He emphasised that commercial parties are entitled to allocate between them the risks of something going wrong in their contractual relationship in any way they choose, and the principle should not be mechanistically applied wherever an ambiguity is identified in an exclusion clause.

3 [1974] AC 689

“IN RELATION TO EXCLUSION CLAUSES SPECIFICALLY THERE REMAINS A PRINCIPLE THAT IN THE FACE OF AMBIGUITY THE NARROWER INTERPRETATION SHOULD BE PREferred.”
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The pre-eminence of the literal or natural meaning of language used and/or the relative “commerciality” of competing interpretations

Lord Justice Briggs was therefore clear that the court must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means before resorting to principles such as contra proferentem to interpret exclusion clauses.

Accordingly, he began his analysis of the exclusion clause in question by considering whether the clause could be interpreted with sufficient clarity on the face of the words used, or, failing that, whether one interpretation was clearly more “commercial” or in keeping with the purpose of the clause. In this case Lord Justice Briggs ultimately felt unable to reach a clear answer to the question of which interpretation of the words “aware of the matter” was to be preferred looking at the matter linguistically. Similarly, whilst he was comfortable in concluding that one of the three possible interpretations was sufficiently uncommercial as to be easily dismissed, he considered that the remaining two were both sufficiently commercial as for either meaning to be plausible.

Decision

Ultimately, Lord Justice Briggs found in favour of the narrower interpretation of the clause. In doing so, he stated that he was considerably assisted by his perception that the ambiguities should properly be resolved by having recourse to the narrower of two available interpretations.

It therefore appears that the Court of Appeal in this decision has endorsed the application of the contra proferentem and/or Gilbert-Ash principles in the interpretation of exclusion clauses. However, it should be noted that the Court was only willing to do so in the absence of any clearly more appropriate linguistic or commercial interpretation.

In fact even in this case the other two judges, Lady Justice Hallett and Mr Justice Moylan, were of the view that they would have placed greater emphasis on the relative commerciality of the interpretations in coming to the same result. It therefore seems likely that contra proferentem and Gilbert-Ash will only be applied in relation to the most ambiguous of clauses, and although frequently argued, will be of limited general applicability.

Transocean Drilling U.K. Ltd v Providence Resources Plc

The Transocean case related to the interpretation of a complex series of interlocking provisions by which the parties had apportioned liability, including the exclusion of liability for certain types of loss, arising out of the hire of a semi-submersible drilling rig.

The question before the Court was whether or not the specific loss claimed fell within the categories of loss for which liability was excluded. In this case the Court held that the loss was within the natural meaning of the exclusion clause, and in doing so adopted the broader reading of the exclusion clause argued for by the defendant over the narrower reading argued for by the claimant.

Application of contra proferentem and Gilbert-Ash

In reaching this conclusion the Court again considered whether the principle of contra proferentem should be applied, and a narrower interpretation approved. Lord
Justice Moore-Bick accepted (with reference to Lord Justice Briggs’ decision in Nobahar-Cookson) that the contra proferentem and/or the Gilbert-Ash principles are ones to which resort may properly be had in interpreting exclusion clauses when the language chosen by the parties is one sided and genuinely ambiguous (i.e. equally capable of bearing two distinct meanings).

However, he highlighted that these are two separate principles, and that the Gilbert-Ash case does not separately support the application of the contra proferentem principle. In his view Gilbert-Ash does no more than emphasise that if a party is to be taken to have given up its rights it must be apparent from the language they have used, fairly construed, that this was their intention.

He emphasised that these principles have no part to play when the meaning of the words is clear. Further, he went on to say that they also have no role to play in relation to a clause which favours both parties equally, especially where they are of equal bargaining power. In doing so, he appears to have narrowed the relevance of the contra proferentem principle to circumstances where a clause is both ambiguous and one sided.

Removal of any “meaningful obligations” from a party

Lord Justice Moore-Bick also considered the argument (which was not considered by the Court of Appeal in Nobahar-Cookson) that a narrower interpretation must be preferred if the broader interpretation would “effectively denude the contract of any meaningful obligations as far as [the benefitting party] is concerned”. Again, he accepted that where the language of an exclusion clause leaves room for doubt as to its meaning this principle may provide a valuable tool for ascertaining its correct meaning and in some cases it may lead to the conclusion that a restricted meaning must be given.

However, he emphasised that this is very much a principle of last resort, to be relied upon only where the effect of the clause would be to relieve a party from all liability for breach of any obligation. He went on to say that it does not provide sufficient justification for overriding the parties’ intentions where they have been clearly expressed. Ultimately he considered that the principle of freedom of contract required the Court to respect and give effect to the parties’ agreement.

In any event, the Court of Appeal concluded that the clause in question did not have the necessary consequences for this principle to be relevant.

Decision

Ultimately the Court of Appeal considered that the meaning of the exclusion clause was clear on its face, and it was readily apparent that the losses for which damages were sought fell within the category of losses for which liability was excluded. The Court of Appeal therefore held that it was bound to uphold this interpretation of the clause.

Key conclusions

In reaching its decisions in these cases the Court of Appeal discussed the relevance of a number of considerations for the interpretation of exclusion clauses.

It is clear that the Court considers that the literal and natural meaning of the words used in the clause is to be of primary importance in interpreting exclusion clauses. If,
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on consideration, the wording used supports more than one meaning, the relative “commerciality” of the possible interpretations of the clause and/or the extent to which they uphold the purpose of the clause should be considered.

In circumstances where the wording is truly ambiguous and cannot be interpreted by reference to commerciality or the purpose of the clause, the Court has indicated that it is willing to consider the application of the contra proferentem and/or Gilbert-Ash principles that the narrower (i.e. less exclusionary) interpretation should be preferred.

However, the Court’s decisions make clear that, whilst these principles remain relevant to the interpretation of exclusion clauses, they should only be applied in circumstances where a conclusion cannot be reached on the basis of either the literal meaning of the words or the commercial appropriateness of the competing interpretations.

Further, the decision in Transocean strongly suggests that in circumstances where both parties enjoy the benefit of the same exclusion clauses these principle will have no application. However, in Nobahar-Cookson Lord Justice Briggs commented that in his view the mere fact that both parties enjoyed separate exclusion clauses was not a bar to the application of these principles.

The Transocean decision also suggests that, in some cases, it may be relevant to consider whether applying a broader interpretation would effectively leave the contract, or one party to it, without meaningful legal obligations. However, this will apply only in very limited circumstances, and the Court has indicated that in all but the most extreme circumstances the parties’ freedom to agree such contractual terms as they wish will take priority and their clauses should be upheld.

These decisions therefore emphasise that where the wording of an exclusion clause is clear and precise courts will be very reluctant to look past that clear meaning, regardless of the implications for the parties. This is particularly so where the parties are of similar bargaining power, and/or enjoy similar rights under the relevant contract.

This approach is in line with the growing trend within the courts towards the preservation of parties’ freedom of contract, and upholding the literal meaning of the words used and/or the commercial intention of the parties. This can also be seen, for example, in the Supreme Court’s recent decisions in Mokdessi v Cavendish Square Holding and ParkingEye Ltd v Beavis, in which it upheld contractual provisions which may previously have been considered to be penalty clauses.

Parties would therefore be well advised to consider carefully the wording of any exclusions clauses before they are agreed, and take care to ensure that their intended application is clearly and unambiguously expressed.
FOR MORE INFORMATION

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