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Limitation clauses: construction and reasonableness – Tornado Wire Limited v John Good Logistics Limited [2024] EWHC 212 (KB)

Summary

In dismissing a summary judgment application, the Court considered the interpretation of a limitation clause in the standard terms of the British International Freight Association. The judgment highlights the centrality of the rules of contractual interpretation, even where the result may put one party in a difficult position, and considers the applicability of UCTA 1977 to limitation clauses.

The facts

- The Claimant, Tornado Wire Limited ("**Tornado**") was a manufacturer of wire fencing products. The Defendant, John Good Logistics Limited ("**JGL**") was a freight forwarder. At the relevant time, virtually all steel wire imports into the UK were subject to a quota regime. In order to comply with this regime (and to make the maximum use of the nil rate quota), importers were required to use HMRC's "CHIEF" system. Tornado had neither access to the CHIEF system nor the required expertise to use it, and therefore approached JGL to act as its customs agent. In June 2020, Tornado signed a customs authorisation form appointing JGL as its direct representative (the "**Authorisation Form**").
- JGL processed at least 327 declarations to HMRC in respect of Tornado's imports (the "**Declarations**") until July 2021 when the steel purchased by Tornado was removed from the quota regime. In August 2022, HMRC notified Tornado that it intended to charge import duty of just over £2.6 million in respect of the Declarations, due to the fact that the Declarations had been entered onto the CHIEF system

incorrectly. The liability was later reduced to just over £953,000, which Tornado paid to HMRC in November 2022.

- In May 2023, Tornado issued proceedings against JGL alleging breach of contract and/or negligence, and claiming as damages the sum paid to HMRC.

The contractual terms

- The Authorisation Form incorporated the standard terms and conditions of the British International Freight Association, of which JGL was a member. Clause 27(B) of those terms, upon which JGL relied to defeat the claim as time-barred, read as follows:
- *"...[JGL] shall in any event be discharged of all liability whatsoever and howsoever arising in respect of any service provided for [Tornado], or which [JGL] has undertaken to provide, unless suit be brought and written notice thereof given to [JGL] within nine months from the date of the event or occurrence alleged to have given rise to a cause of action against [JGL]"*

Construction of the terms

- HHJ Worster, sitting as a Judge of the High Court, agreed with JGL's case that, on a true construction, clause 27(B) provided a substantive (rather than a procedural) time bar, which meant that the Defendant was discharged of liability once nine months had elapsed from the date of the relevant event or occurrence. Section 32 of the Limitation Act 1980 (concerning the postponement of the limitation period in cases of fraud, concealment or mistake) therefore did not apply.
- The first stage of the judge's reasoning concerned the true construction of clause 27(B). In this case,

Tornado did not know that it was liable for import duty until well after the clause 27(B) time bar had elapsed. Tornado argued that, as a matter of construction: (i) clause 27(B) could not apply to claims which were not known before the 9-month time bar; and (ii) the limitation period did not start running for a claim in negligence until Tornado had received the letter from HMRC notifying Tornado of the intention to claim duty.

- The judge noted that the contract did not expressly provide an exception for circumstances where it was impossible for Tornado to comply with the time bar, and that this created a problem for Tornado. However, he said, *"that does not mean that the term does not mean what it says"*. As this was a summary judgment application and not a full trial, the judge was not required to decide the time bar point, but he noted that he proceeded to deal with the application on the basis that *"as a matter of construction, knowledge of the event or occurrence giving rise to the cause of action is not necessary to start time running."*¹

Reasonableness

- It was common ground that section 3 of the Unfair Contract Terms Act 1977 ("**UCTA 1977**") applied to the contract, as Tornado had dealt on JGL's written standard terms of business. It was therefore for JGL to demonstrate that clause 27(B) satisfied the requirement of reasonableness in section 11(1) of UCTA 1977.
- The incorporation of standard terms raises a question as to whether the party whose standard terms are used has an advantage in terms of bargaining power. However, UCTA 1977 is clear that the relative bargaining power of the parties must be assessed according to the particular facts of the case, a position that was reinforced recently by the Court of Appeal in *Last Bus v Dawsongroup Bus and Coach Limited*.²
- The judge put the question of reasonableness as follows: *"Would [the parties] have regarded it as fair and reasonable to include a clause which barred a claim which went to failure on the part of [JGL] to take reasonable care to meet the central purpose of the contract, potentially costing [Tornado] a lot of money, in circumstances where [Tornado] could well have had no knowledge of the basis of such a claim until after the limitation period had run out?"* He held that there was a real prospect that the answer would be "no".

- The judge therefore dismissed the application and directed the parties to agree directions for the continuation of the court proceedings.

Comment

- This was a hearing of a summary judgment application and not a full trial, so the judge did not have to finally determine the issues in dispute. However, the judgment is nonetheless a useful example of how the Court is likely to approach the interpretation of a time bar clause. There was a particular emphasis on adhering to the rules of contractual construction, even if that puts the affected party in the position of being unable to comply with the time bar. However, the provisions of UCTA 1977 can apply in ways which may not always be obvious to the drafter of the contract, and may render ineffective any limitation provision which fails the reasonableness test.

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¹ See para. 21

² [2023] EWCA Civ 1297