

The Net Effect Of Net Contribution Clauses.

Net contribution clauses are frequently found in collateral warranties. Their aim is to prevent one party ending up bearing responsibility for all losses, even if caused by breaches of a number of parties, on the basis of joint and several liability. The case of Langstane Housing Association Ltd vs., Riverside construction (Aberdeen) Ltd and Others involved innovative arguments seeking to get around the terms of such clauses

The pursuers, Langstane, bought a property in Aberdeen from Granite developments. An earlier fire had caused damage in the building and a renovation scheme to re-instate and develop the property was initiated by Granite Developments and then adopted by Langstane after they purchased the property. In the course of the renovation works, there was a partial collapse in the building.

This action was for damages which Langstane claimed to have suffered in respect of the collapse, they alleged that the collapse resulted from breach of contract and/or negligence of tile contractors, the architect and the consulting engineers, Langstane were claiming against the various defenders for in excess of £3m.

The decision in this part of the case followed a hearing in which there were arguments concerning the consulting engineers' contract. The engineers' contract incorporated the conditions of the Association of Consulting Engineers (ACE). These included a net contribution clause in familiar terms. This operated so that all other parties with any responsibility for the losses were deemed to have paid their share. It meant the engineer could not be held liable for the whole loss, only for their fair share.

Langstane were arguing that this clause fell foul of the provisions within the Unfair Contract Terms Act 1977. They said that the engineer had to show it was fair and reasonable to incorporate the net contribution clause into the contract. They argued the term was unusual and controversial in that it altered the common law position significantly by placing on the client the risk of insolvency of the contractor or one of the consultants, it was relevant to consider the resources of the engineer and ability to cover the position by insurance.

The engineer argued that the net contribution clause was neither particularly onerous nor draconian. Why should the consulting engineer bear the risk that the contractor or other consultant chosen by Langstane might become insolvent or not have adequate insurance leaving the engineer to pick up the tab?

Section 16(1) of the Act is concerned with terms of a contract which purports to "exclude or restrict liability for breach of duty", Section 17 applies to a term in a standard form contract under which a party in breach seeks to exclude or restrict his liability to a "customer". A "customer", in terms of the Act, is a party to a standard form contract who deals on the basis of written standard terms of business of the other party to the contract. That was not the case here because the terms relied upon were standard terms of a professional body, not standard terms of the engineer. Also, it was Langstane who had proposed these terms should apply.

The judge did not consider net contribution clauses were either unusual or onerous. They were clauses which placed a burden on clients and transferred the risk to them that one of the contracting parties might become insolvent. However it is up to the clients to choose who they contract with and they can insist on appropriate Insurance being carried. He also noted that as far as the ACE conditions were concerned, this clause had first been introduced in 1993. Anyone who contracted on the basis of these conditions and was interested in what they said would have been well aware of the existence of this clause.

In terms of the argument related to section 16(1), the judge agreed that the net contribution clause did not seek to exclude or restrict liability but simply ensure that the engineers were only held liable for the consequences of their own breach and not for the breaches of duty by other contractors and consultants.

In relation to the section 17 argument, the client was not dealing on the basis of standard terms of business of the engineer but terms of business of the ACE and so section 17 was not applicable.

On the basis of the decision, net contribution clauses will live to fight another day!

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