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In *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hese GmbH* [2008] EWHC 6 (TCC); [2008] BLR 155, Mr Justice Ramsey summarized the law relating to the exclusion or limitation of liability in negligence in the following terms:

- (1) Limitation of liability clauses are construed with less rigour than exclusion of liability clauses or indemnity clauses.
- (2) The guidelines in *Canada Steamship* provide helpful guidance on the proper approach to interpretation but do not lay down a code which prescribes rigid rules to be applied mechanically to interpret a particular clause.
- (3) The relevant clause must be construed in the context of the whole instrument and against the admissible background, to ascertain whether the wording, although literally wide enough to cover negligence, did not do so.
- (4) In the case of exclusion clauses or indemnity clauses it is inherently improbable that one party intended the clause to release the other party from liability for negligence or impose an indemnity for the other party's negligence. But, in the case of a limitation of liability clause there is no such high degree of improbability.

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The Court of Appeal in *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361, has allowed an appeal from the decision of Judge Mackie (referred to on page 442 of the textbook) and held that the exclusion clause in the contract between the parties was reasonable. Much of the reasoning of the Court of Appeal is devoted to the proper interpretation of the clause alleged to be unreasonable (in particular, the meaning of the words 'in any circumstances'). It is of vital importance that the meaning of the clause in issue between the parties is ascertained before the reasonableness test is applied to the term in question. On the present facts, the Court of Appeal adopted a narrower construction of the clause in issue between the parties and this was an important factor in the conclusion that the clause was reasonable. The Court of Appeal also concluded that one paragraph in the clause was severable from another paragraph so that, had they

reached the conclusion that one paragraph was unreasonable, that conclusion would not, in itself, have invalidated the other paragraph.

The claimant, Regus (UK) Ltd, is a supplier of serviced office accommodation while the defendant, Epcot Solutions Ltd, is a small company which provides professional IT training. The parties entered into a contract under which the defendant agreed to use premises supplied by the claimant for a period of time. The defendant alleged that the air conditioning in the premises was defective and it withheld fees otherwise due to the claimant. The claimant brought proceedings to recover the sums it alleged were due to it, while the defendant responded by making a counterclaim which included a claim for some £626 million.

At first instance, there were two issues before the court. The first was whether the air conditioning was defective. Judge Mackie concluded that it was. There was no appeal from this finding. The second issue was whether the claimant was entitled to rely on clause 23 of its standard terms and conditions in order to defeat the defendant's counterclaim. Judge Mackie concluded that the claimant was not so entitled because clause 23 was unreasonable and hence invalidated by the Unfair Contract Terms Act 1977. The claimant appealed against the latter finding. The Court of Appeal allowed the claimant's appeal.

Clause 23 of the claimant's standard terms provided as follows

We are not liable for any loss as a result of our failure to provide a service as a result of mechanical breakdown, strike, delay, failure of staff, termination of our interest in the building containing the business centre or otherwise unless we do so deliberately or are negligent. We are also not liable for any failure until you have told us about it and given us a reasonable time to put it right.

You agree (a) that we will not have any liability for any loss, damage or claim which arises as a result of, or in connection with, your agreement and/or your use of the services except to the extent that such loss, damage, expense or claim is directly attributable to our deliberate act or our negligence (our liability); and (b) that our liability will be subject to the limits set out in the next paragraph.

We will not in any circumstances have any liability for loss of business, loss of profits, loss of anticipated savings, loss of or damage to data, third party claims or any consequential loss. We strongly advise you to insure against all such potential loss, damage expense or liability.

We will be liable:

- . without limit for personal injury or death;
- . up to a maximum of £ 1 million (for any one event or series of connected events) for damage to your personal property;
- . up to a maximum equal to 125% of the total fees paid under your agreement up to the date on which the claim in question arises or £ 50,000 (whichever is the higher), in respect of all other losses, damages expenses or claims.

Judge Mackie held that the exclusion clause was too broad to be reasonable. He so concluded that the clause was unreasonable for a number of reasons. First, clause 23 deprived the defendant 'of any remedy at all for failure to provide a basic service like air conditioning in what is the business equivalent of an hotel, not the lease of a flat.' Second, he stated that clause 23 provided 'an illusion of a remedy.' On its face, clause 23 provided for a limitation of 125% of the total fees paid or £50,000 but, when account was taken of the 'broad wording of the exclusion of financial losses,' Judge Mackie stated that 'a business will be unable to establish the liability which [the claimant] seeks to limit.' Damages for loss of amenity was held to be 'frail....remote and uncertain.' The possibility of such a claim did not suffice to persuade Judge Mackie that the clause was reasonable.

The Court of Appeal took a different view. In concluding that the clause was unreasonable, the court had regard to a number of factors. First, it held that the clause did not purport to deprive the defendant of any remedy at all. It left the claim for damages assessed on a diminution in value basis intact and only sought to exclude liability in respect of consequential losses. Second, it held that the words 'in any circumstances' did not purport to exclude liability for fraud or for wilful, reckless, or malicious damage. This reflects a reluctance on the part of the courts to conclude that a draftsman would intend to exclude liability in respect of such losses. Third the parties were of roughly equal

bargaining power, were aware of the terms of the contract, and the standard terms of both parties sought to exclude liability for indirect or consequential losses.

The final issue considered by the Court of Appeal concerned the severance of the third paragraph in clause 23, assuming it to be unreasonable. As has been noted, it was conceded by the defendant that the third paragraph was severable from the fourth paragraph (and it had never been suggested that the fourth paragraph was unreasonable on its own terms). Lord Justice Rix stated that the concession was 'well made.' While clause 23 was not divided up into separate sub-clauses, he held that it was 'plain' that the fourth paragraph was 'independent' of the third paragraph. He also noted that the fourth paragraph was a limitation clause rather than an exclusion clause and, as such, served a different purpose.