Exclusion Clauses

This article first appeared in "National Builder", November 1980 and is reprinted by kind permission.

Builders frequently suffer the imposition of exclusion clauses in contracts for the supply of materials. The legal status of such clauses has for many years been the subject of argument and changing judicial opinion and the topic is now so confused that a review is necessary.

Many Disguises

An exclusion clause is a provision whereby one party to a contract seeks to restrict his liability to less than that which he would normally have to accept under the general law of contract. They come in many disguises, frequently dressed up as "guarantees"; e.g. "if defects in any product supplied by us are notified in writing within seven days of delivery, our liability will extend to replacing the said product without further charges".

This, of course, takes no account of the cost of installing and removing, the cost of delay and inconvenience, nor the likelihood of the defect being discovered within seven days. In effect, it says to the purchaser he must test the goods immediately, otherwise under the British postal services he has no chance of notifying the defect in writing within seven days, and he must conduct the unsuccessful test and accept the consequent expenses himself.

Politicians' Blindness

Under the Unfair Contract Terms Act, 1977, such exclusion clauses are unenforceable in contracts with private consumers but may be valid in commercial contracts if they are reasonable in the context of the commercial contact—particularly having regard to the bargaining strength of the two parties concerned.

This piece of legislation serves only to illustrate the blindness of politicians. The NFBTE publishes an admirable booklet which summarises this Act in about 40 pages, and contains examples from the commercial building contract situation showing how and where the Act can affect such contracts. Briefly, in practice, the operation of the Act does not yet seem to have had any effect on the fact that smaller builders have to obtain essential materials from large—even "monopolistic" suppliers, and the builder in turn has to enter into a contract which may be a "private consumer contract". This means that the builder may well have to accept the terms laid down by his supplier, and find himself unable to restrict his liability in the same way *vis-a-vis* the consumer client for whom he is building.

Where the building contract is itself a commercial contract, the position under the Unfair Contract Terms Act is that the builder may impose exclusion of liability in respect of fitness for purpose, or quality of materials, provided this is reasonable. Basically, he will seek to restrict his liability to that of the supplier who is his sole source of redress. Commonly, the commercial contract is on terms and conditions which are imposed by the Client as his conditions of contract, e.g. the JCT Form; so the Act does not have the same effect on the builder as it would for private domestic work carried out on less formal contract documents.

Warranties

Apart, however, from the legislation, the Courts themselves have over the years had to consider the effect of exclusion clauses in commercial contracts. The Sale of Goods Act sets out certain warranties which will be implied, *unless the parties exclude them*. This means that one party can impose conditions excluding the warranties; if the other party accepts them then to that extent the Sale of Goods Act will not apply. The principal warranties concerned are that the goods will be good examples of their kind (merchantable quality, in legal terms) and fit for their purpose if the purchaser made it known that he required them for a particular purpose and relied on the seller's skill and judgment of his product. To relate this in detail to claims made in catalogues or specifications by clients or architects would require a book in itself, but it is the exclusion of these two warranties which builders will most commonly experience.

Another common exclusion is the refusal to accept liability for statements made by salesmen, or even for the actions of persons provided to service or operate a product. In the contracting world, a common example is the hire of plant with an operator provided by the owner—the firm from whom the plant is hired. The CPA conditions stipulate that such operators become the employee of the hirer (the builder) during the period of hire, so a situation is created whereby the hired plant is operated by a person who in the long term looks to the plant hire firm for employment wherever they send him and his machine; but at present any injuries he inflicts on others in the course of his work are basically the responsibility of his present temporary employer—the builders. Fortunately, this apparent anomaly is well understood by insurers experienced in the field of building contract insurance, and under the latest revision to the CPA conditions of hire the plant owner gives a warranty of competence in respect of operators provided by him.

This question of responsibility for other peoples' men on the premises gave rise to a recent House of Lords decision which re-opened yet again the problem of exclusion clauses in commercial contracts. In the particular case an outside security firm provided a night patrol at the plaintiff's factory. The Security Officer, an employee of the outside security firm, lit a fire in the factory, assumedly for his own comfort. However, the fire burnt down the entire factory. The security firm hired out their services, including their men, on the basis that they were not liable for act or default of their employees unless it could be foreseen or prevented by due diligence by the security firm; also they were not liable for fire except where caused solely by the negligence of their employees acting within the scope of their employment.

Liability Excluded

In this case, the Court upheld the exclusion clause—whatever the negligence of the patrol officer, it was not an act which the security firm could have foreseen or prevented, nor was the lighting of a fire an act carried out within the course of his employment.

The judgments emphasised that the parties to a contract are free to agree whatever exclusion or modification of obligations they please provided the agreement retains the legal characteristics of a contract. Thus, in this case, the security firm was able to exclude liability for its own employee who was on the other party's premises under the security firm's contract with that other party.

The decision makes it clear that in commercial contracts the Courts are not willing to outlaw exclusion clauses automatically—they must be construed in the context of each contract.

Cont. from page 92

20. *ibid.*
21. *Hudson's*, 10th ed. at p. 639. 646.
22. [1952] 2 All E.R. 452 at 455.
23. *ibid.*
24. (1870) L.R. 5 C.P. 310; 39 L.J.C.P. 129; 22 L.T. 132; 34 J.P. 831; 7 Digest 346.
25. *Supplement to Hudson's 10th ed.* (1979) under entry to p. 664–645 of the main work.
26. *ibid.*
27. [1979] 1 N.Z.L.R. 515.
28. [1979] 1 N.Z.L.R. 556.
29. [1979] 1 N.Z.L.R. 515, at 540.
30. *ibid.* at 551.
31. *ibid.*
32. *ibid.*
33. [1979] 1 N.Z.L.R. 556.
34. [1979] 1 N.Z.L.R. 556 at 568.
35. *ibid.*
36. It is possible to reply to this contention on the terms set out in the following passage from Edward, J.'s judgment in *Anderson* v. *Tuapeka County Council* (1900) 19 N.Z.L.R. 1, at 17: "They could not, under that [the employer's] construction, know until the final completion of the works whether they were incurring any and if so what penalties and they could not therefore make extraordinary efforts to avoid incurring such penalties as otherwise they might do." However such a view will lose much of its force when considered in the light of the result in *Amalgamated Building* since applying the *ratio* in that case while the time extensions relating to delays attributable to the default of the employer may be certified before completion, it is still not possible to ascertain the effect of other causes of delay if the architect decides to defer the certification of such time extensions till after physical completion.
37. [1979] 1 N.Z.L.R. 556 at 568.
38. *op cit.*