



## LEGAL BRIEFING

### *REGUS (UK) LTD V EPCOT SOLUTIONS LTD*

Rix LJ, Keene LJ, [2008] EWCA Civ 361, Court of Appeal

#### ***The Facts***

This was an appeal from a decision that an exception clause in a set of standard terms was unreasonable and unenforceable under the Unfair Contract Terms Act 1977 (“UCTA”). The Judge’s decision was reported in a previous briefing - see 21 of 2007.

Regus (UK) Limited (“Regus”) supplies serviced office accommodation. Epcot Solutions Ltd (“Epcot”) provides professional IT training. Epcot entered into an agreement with Regus on Regus’ usual terms and conditions for the use of serviced office accommodation at Heathrow for Epcot’s training courses. After Regus closed Heathrow, Epcot were offered, and accepted, alternative accommodation at Stockley Park. Epcot entered into a new agreement with Regus on the same terms and conditions.

The air conditioning system at Stockley Park did not work satisfactorily. Epcot made several complaints to Regus regarding the air conditioning and complained that their training courses were being adversely affected by the extreme hot and cold temperatures generated by the air conditioning. Despite these complaints, Epcot entered into a further agreement with Regus on the same terms and conditions. Epcot continued to make complaints about the air conditioning system. Regus did not take any effective steps to repair the air conditioning and negotiations between the parties failed to resolve the problem. Regus then suspended services to Epcot and claimed unpaid fees up to the end of the agreed term. Epcot counter-claimed for, amongst other things, damages for loss of profits, loss of the opportunity to generate profits, and for distress, inconvenience and loss of amenity suffered by reason of Regus’ failure to provide adequate air-conditioning.

Regus’ usual terms and conditions included an exclusion clause (clause 23) limiting Regus’ liability in any circumstances for “loss of business, loss of profits, loss of anticipated savings, loss of or damage to data, third party claims or any consequential loss.” Clause 23 also limited liability in respect of other losses, damages, expenses or claims. The Judge found that the air-conditioning was defective and that Regus was in breach of contract. In addition the Judge held that clause 23 amount to a total exclusion of any remedy at all and therefore was unreasonable and unenforceable under UCTA.

#### ***The Issue***

Was the Judge correct to hold that clause 23 was unreasonable and breached the UCTA?

#### ***The Decision***

The Judge was incorrect to hold that clause 23 was unreasonable because it left Epcot with no remedy for the breach of which it complained, namely defective air-conditioning. The obvious and primary measure of loss for a breach of clause 23(3) was the diminution in value of the services promised. Therefore, the loss suffered can be measured by asking how much less valuable

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the same services would have been if the suite had not been air-conditioned (or had only been partially air-conditioned). An expert could readily advise on the difference between the value of air-conditioned offices and of non-air-conditioned offices, a well-known market distinction. In this case, the expert would have to take into account that the office services in the present case were in all other respects first class or impressive i.e. of the standard to be expected in modern air-conditioned offices.

Clause 23 as a whole did not purport to exclude liability (in the case of losses identified in clause 23(3)) for fraud or wilful, reckless or malicious damage. Nor would any such clause naturally be construed as purporting to exclude liability for fraud or wilful damage. Therefore clause 23 was not unreasonable on the basis that it left a customer without any remedy whatsoever. In the circumstances, clause 23(3) met the requirement of reasonableness.

***Comments***

In order for an exclusion clause to be unenforceable, it needs to be shown to be unreasonable in accordance with the UCTA. In this case, the appeal court was of the view that there was no inequality of bargaining power as there was local competition of whom Epcot had made good use. Further, Regus' terms and conditions advised its customers to protect themselves by insurance for the losses concerned.

Charlene Linneman  
May 2008

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