



Welcome to the November edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue find out about professional appointments

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Professional appointments - What's the limit?

This seventeenth issue of *Insight* discusses liability caps in light of the decision in *The Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Limited* [2012] EWHC 2137 (TCC) and provides practical tips on how to ensure a liability cap is effective.

The Ampleforth case

The facts

The Trustees of the Ampleforth Abbey Trust ("the Trust") engaged Turner & Townsend Project Management Limited ("T&T") to project manage building works at Ampleforth College in Yorkshire between 2000 and 2005. The building works included three accommodation blocks.

T&T provided a fee proposal for the third accommodation block in November 2002. The fee proposal was headed 'Terms of Appointment' and included a liability cap which provided:

"Liability for any negligent failure by Us [T&T] to carry out Our duties under these Terms shall be limited to such liability as is covered by Our Professional Indemnity Insurance Policy terms. . . . and in no event shall Our liability exceed the fees paid to Us or £1million, whichever is the less."

The Terms of Appointment further provided:

"We shall take out a policy of Professional Indemnity Insurance with a limit of indemnity of £10 million for any one occurrence or series of occurrences arising out of any one event ... and maintain such insurance for a period of 6 years from the date of completion of the services providing such insurance remains available in the market on reasonable rates and terms."

The Terms of Appointment for the other two accommodation blocks did not limit T&T's liability but the Trust nevertheless confirmed its acceptance to the Terms of Appointment for the third block without reading them.

Tender documents were issued in July 2003. By October 2003, it had been agreed that Kier Northern ("Kier") would be selected as contractor and the works

proceeded under a series of letters of intent.

During 2004, the works fell into delay. The relationship between the Trust and T&T ended during 2005 and T&T claimed some £62,000 of additional fees in addition to the £111,000 it had already been paid. The Trust subsequently issued proceedings against T&T alleging T&T was in breach of contract and / or negligent for failing to procure an executed contract which deprived the Trust of the opportunity of obtaining a better outcome in its negotiations with Kier. The sum claimed by the Trust was in excess of the liability cap which T&T then sought to rely on to limit its liability.

Could T&T rely on its liability cap?

The issue then was whether the liability cap was effective to limit T&T's liability. The court held that T&T was not entitled to rely on the liability cap as it was unreasonable. In reaching this decision, the court emphasised that the Terms of Appointment required T&T to take out professional indemnity insurance to a level of £10 million. The court found that as a matter of commercial reality, the cost of this insurance would be passed on to the Trust as part of T&T's fees. Yet, if effective, the liability cap would limit T&T's liability to its fees (also paid by the Trust) of £111,321. There was no obvious explanation as to why insurance cover of £10 million was stipulated against a liability limit of £111,321 and the court found it was therefore unreasonable for T&T to try and limit liability in this way. If the liability cap had been upheld, the majority of the insurance protection provided for the Trust's benefit would have been incapable of being used to its full extent and would be rendered irrelevant.

The Judge did not find it surprising the Trust had not read the Terms of Appointment more closely as it was the third of a series of three contracts.



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The Trust had simply asked for a fee proposal and it was reasonable for the Trust to assume that the terms that had applied to the previous two accommodation blocks would also apply to the third block.

What can we learn from the Ampleforth case and how can you ensure that any liability cap you might have in place is effective?

How to ensure your liability cap is effective

- Firstly, great care needs to be taken when drafting your liability cap. If your cap is contested, it will be construed against you so make sure the wording is clear and unambiguous.
- If you are including a liability cap for the first time, if there is a pre-existing business relationship, or if the other party is inexperienced or naive, you must discuss and agree the liability cap with the other party. This is particularly the case if the contract is to proceed on your standard terms. Explain how the cap will operate and the basis upon which it is calculated having regard to your insurance arrangements.
- Where repeat work is carried out, the liability cap should be re-negotiated and the discussions recorded.
- You must ensure your liability cap is fair and reasonable having regard to all the circumstances. In deciding on the level of your cap, a multiple of the fee is a good starting point (ten times the fee is often used) but you must assess each project on its own merits. Consider (i) the likely nature and extent of the risks of the

project having regard to its size and complexity (ii) assess the damages that would be payable in the event of a claim in negligence (for example, the costs of making good) and (iii) consider any resources and insurance that might be available to you to meet any eventual liability.

- Avoid limiting liability to the fee you are paid because, other than the fee, you would not be taking any other factors into consideration. This would make it difficult for you to argue your liability cap is fair and reasonable having regard to *all* the circumstances.
- If the services relate to works in connection with which there is limited aggregate insurance cover available (for example, asbestos works) then a lower liability cap might be reasonable due to the possibility other claims might be brought which might eat into the cover. If this is the case, the justification for a lower cap should be explained in the contract.
- Avoid committing to maintain professional indemnity ("PI") insurance for an amount vastly higher than the amount of the liability cap.
- If you cannot avoid the level of PI insurance being substantially higher than the liability cap (you may, for example, have a block policy), then you should discuss the reason for the disparity and the reason for the disparity should be recorded in the contract.
- Where possible, try and take advantage of the employer's own insurance cover and use that to try and reduce your own liability.

Conclusion

It might be that the Judge's finding in the Ampleforth case that T&T's liability cap was invalid because the Trust was

paying for the cover in the form of T&T's fees was misguided. PI policies are usually paid for on an annual basis and where the company is the subsidiary of a group company, on a group basis. It would therefore be very difficult to state with any degree of certainty that the Trust was making a proportionate contribution to T&T's PI cover. Indeed, had the level of PI cover been halved, T&T's fee would probably not have been much different as the cost of PI policies tends to be absorbed in contractors' overheads.

Whether the Judge was right on this point or not, there can be very little argument that T&T's failure to draw the new limitation of liability clause to the Trust's attention was fatal in light of the pre-existing business relationship between the two and the fact that no cap applied to the two previous accommodation blocks T&T had project managed.

T&T's introduction of a draconian term with no advance notice or discussion was entirely inconsistent with a contractual requirement for substantial professional indemnity insurance. This constituted an abuse of trust and this was what probably influenced the Judge's decision most. Along with the other practical tips listed above, it is crucial therefore that you bring any liability cap to the other party's attention if it is to be enforceable.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. lkingston@fenwickelliott.com. Tel +44 (0) 207 421 1986

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