

# Breach of contract and negligence



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1) Mega will be looking to bring an action in breach of contract and negligence against Super for both their failure to install the cash machines until December 2006 and the negligent installation by Tom and Manoj which caused the registers to be out of action over the Christmas period. The problem they will have with this is that Super trade under a standard contract which contains clauses which apparently exclude liability for both delay to installation and consequential loss arising in either contract or tort. This includes the loss of profit which Mega wish to claim from them. However, it may well be that Super are not able to rely on those clauses. For an exclusion clause to be effective it must first be validly incorporated into the contract. Then the construction must be such that on a proper interpretation it covers the type of liability which has arisen. Each of these issues will be discussed in turn to establish whether or not Super will be able to fend off an action by Mega by relying on the exclusion clauses.

To be effective as an exclusion clause the term must be incorporated into the contract at the time when the contract was made. It will not be effective if it is added at a later stage[1]. The terms must be contained or referred to in a document which is intended to have contractual effect. In the case of Super's standard terms they are referred to in brochures, order forms, price lists and quotations and reprinted in invoices and receipts. It is likely that order forms would be considered to be a document with contractual effect. In the present case, however, Super took the order from Mega over the telephone. The contract would have been concluded at that time. It is therefore necessary that the exclusion clauses be incorporated at that time.

For a clause to be validly incorporated the other party must be given notice of its existence. At this stage there is no details of the discussion between Mega and Super when hew order was taken. What is clear is that if the exclusion clauses were not mentioned in the telephone conversation and Mega did not know about them then they will not be validly incorporated by their inclusion in the invoice or receipt[2]. What amounts to reasonable notice will depend on the facts of the case. If it can be shown that Mega had actual knowledge of the terms they will be reasonably incorporated. It might well be for example that they had read the brochure and were therefore alerted to the existence of standard terms and should reasonably have enquired as to what they were. The fact that a party has to take further steps to find out what the terms of which he has been given notice are does not necessarily mean that reasonable notice has not been given.[3]

However, it seems more likely on balance that the courts would hold that a mere reference to the standard terms in these pre contractual documents is insufficient notice of an exclusion clause. The present clauses are particularly onerous as they attempt to exclude a substantial amount of liability on the part of Super. In the case of *Spurling Ltd v Bradshaw*[1956] 1 WLR 461 Lord Denning held that the more onerous the clause the more that would have to be done to bring it to the attention of the other party. He stated that in some cases the clause would have to be printed in bright red ink with a big red hand pointing to it. This has become known as the red hand test. In the present case it would seem that some form of red hand would be required for there to be sufficient notice of the exclusion clauses. Therefore if Super did not specifically draw them to the attention of Mega then they will not be

validly incorporated. I will proceed on the basis that the terms were validly incorporated for the purposes of analysing the terms themselves, but if they were not then Super will not be able to rely on them at all.

The next issue to deal with is the construction of the clauses themselves. The courts have traditionally construed exclusion clauses very restrictively. It must be shown that the clause, properly interpreted does actually cover the damage caused. The ‘contra proferentem’ rule means that any ambiguity will be resolved against the party seeking to rely on the clause. There does not seem to be any ambiguity in Clause 10. 2. It clearly states that they will not be liable for delay howsoever caused. At this stage it seems unlikely that Mega will be able to claim for any losses caused by the delay to the installation.

It might be however that Mega can rely on the Unfair Contract Terms Act 1977 section 3 which protects parties who are either dealing as consumers or dealing on the other’s standard terms of business as Mega are in this instance. Section 3(2) (b) (i) of the Act states that a party is not bound by reference to any term of the contract entitled to:

*“...render a contractual performance substantially different from that which was reasonably expected of him.”*

It is certainly arguable that a delay of two to three months would be outside the sort of delay that would be reasonably expected of a company. On balance I would be of the opinion that the delay will not be sufficient to allow Mega to avail themselves of this protection.

With regards to the loss of profits over the Christmas period, Mega will have to make a claim in negligence against Super. The first point to note is that just as Tom and Manoj will be protected by the clause, Super will be vicariously liable for their actions if the clause is not held to cover negligence. Super will be relying on clause 10. 3 to suggest that they have excluded liability for consequential loss, including loss of profit for the negligence of their employees. The question is whether 10. 3 actually has that effect. The general rule is that if a party wishes to exclude liability for negligence they must do so explicitly[4]. In the present case though Super have not referred specifically to negligence stating:

*“ ... neither the seller nor any of its employees shall be liable for any consequential or indirect loss suffered by the Buyer whether such loss arises in contract or tort.”*

The next step the courts will take is to establish whether the words used are wide enough to cover negligence on the part of the employees of the proferens[5]. It seems likely that Super will be able to show this as they have referred to ‘ tort’

However the final and rather contradictory stage is that the court must consider:

*‘...whether the head of damage may be based on some ground other than negligence’ [6]*

There cannot be any doubt that clause 10. 3 could cover something other than negligence. Even leaving out the contract section it covers every type

of tort. It is clear that where this is the case the proferens (Super) will not be able to rely on the clause to exclude liability for negligence.

If the clause is held to cover exclusion of liability for negligence Mega may be able to rely on the Unfair Contract Terms Act 1977. Section 2(2) of that Act states:

*“ 2 Negligence liability:*

- 1. In the case of other (other than death or personal injury) loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.”*

On the present facts it does not seem to be an unreasonable clause. The bargaining power of the two parties seems relatively even on the face of it and there do not appear to have been any particular inducements to enter the contract with that term included. However there may be circumstances which are not included in the instructions which would render the term unreasonable.

In conclusion I would be of the opinion that subject to the clauses being found to have been validly incorporated, Super will be able to rely on clause 10. 2 to avoid liability of the delay in installation. On balance I would not expect them to be able to rely on clause 10. 3 to save them from liability for the negligence of Tom and Manoj as the terms is not specific enough to negligence. It seems likely that loss of profit is a reasonably foreseeable consequence of negligent installation of cash registers and therefore Super

will be liable for any loss of profit suffered by Mega over the Christmas period which is attributable to the lack of functioning cash registers.

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- Unfair Contract Terms Act 1977
- Canada Steamship Lines Ltd v R [1952] AC 192 at 208

2.

1. Joe

Pain, suffering and loss of amenity

On the assumption that Katy was negligent Joe will be entitled to recover damages from her under two general heads, general damages and special damages. General damages cover the compensation which will be received by Joe for his injuries. This is commonly referred to as damages for pain suffering and loss of amenity. Pain and suffering is viewed separately to loss of amenity and I will discuss them in that order.

Damages are awarded to the claimant for pain and suffering caused by the injury and any treatment relating to the injury both in the run up to trial and in the future if appropriate. It is important to bear in mind that awards for pain and suffering are subjective in that they relate to the actual pain

suffered by the Claimant. In relation to Joe he is therefore unlikely to be able to claim for pain and suffering for the 2 weeks which he was unconscious.

[7]This does not apply to loss of amenity which can be claimed whether the claimant was aware that they had lost amenity or not.

Loss of amenity is an objective measure of the claimant's losses. For example because of the loss of a limb as in Joes case. The fact that Joe can no longer row will be taken into consideration under this section of the head of damage and this is likely to result in an increased award.

Overall damages are awarded for pain suffering and loss of amenity on the basis of what is fair just and reasonable.[8]The Judicial Studies Board issues guidelines as to the level of award based on recent judgments. In relation to amputations below the elbow the award is between £56, 000 and £63, 625. Which end of the scale it will be is determined by factors such as whether it was the claimant's dominant arm.

### Loss of Earnings

The claimant is entitled to be put in the position he would have been in had the injury not occurred.[9]In relation to his pre trial loss of earnings this will be the net figure which he would have earned during that period after national insurance tax and any other deductions which would have been made. We are not told at this stage whether Joe earned £45, 000 per annum before or after tax, but assuming it is after tax this would amount to £22, 500. He will also be entitled to claim the bonuses which he would have received during that period. At the most this will amount to £6000, but Joe



will have to prove that he would have earned his maximum of £1000 per month.

Whilst the £650 does not represent wages from the employer, but a collection on the part of the other employees, I would expect it to be deducted from the loss of earnings because otherwise it would represent double recovery as Joe would not have received it without the injury. Assuming Joe returns to work before the trial there will be a further deduction from his loss of earnings award to take account of the fact that he is receiving wages at a reduced rate. For the period of time between his return to work and the trial he will receive a sum representing the net total amount he would have received as calculated above minus the net total amount he did receive as a result of his new position.

#### Future Loss of Earnings

Joe's future earnings have been substantially reduced by the accident. When calculating the future loss of earnings the courts start with the net annual loss of earnings suffered by the Claimant. This sum is adjusted by taking into account other factors such as the loss of a chance to get promoted and increase earnings etc and the fact that the claimant is receiving a capital lump sum now rather than earning it over the years. The final figure is called the 'multiplicand'. This is multiplied by the 'multiplier' which is the number of years for which the loss is likely to continue, usually the number of years between trial and the likely date of retirement.

#### Other losses

Joe will also be able to claim the money spent on repairing his bike in the sum of £1500. He will have to prove the loss in the form of a repair receipt/invoice. Any savings made as a result of the NHS care will be set off against the income claim.

Joe will not be able to claim for Darinder's loss of earnings as they are not a loss suffered by him. However, the fact that Darinder has had to take time off work to help Joe adjust to the disability suggests that he is no longer able to perform household tasks which he would have been able to perform before the accident. Where a member of the claimant's family voluntarily undertakes to perform those tasks the Claimant is entitled to an award in damages representing the value of those services.[10]The damages will be assessed on the basis of what it would have cost to employ someone else to do the tasks.[11]

### 1. Other claims against Katy

All of the potential claims against Katy will be for psychiatric harm. There are principles to be applied when determining who will be able to claim for psychiatric harm which will be discussed throughout this section. The basic premise is that a duty of care in relation to shock in the sense of psychiatric damage is owed to those foreseeably and directly involved in the horrific event caused by the defendant's negligence.[12]

Charles

Charles was clearly directly involved in the accident as he was in the car at the time. It is not necessary for him to have suffered physical injury to recover damages, the fact that he feared for his own safety and was in fact

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endangered by the event is sufficient.[13]He was a primary victim of the accident and therefore it is not necessary that Katy foresaw psychiatric injury specifically. The fact that injury was foreseeable is sufficient.[14]Lord Lloyd of Berwick in *Page v Smith*[15]reasoned that if the psychiatric injury had been as a consequence of a physical injury it would clearly be recoverable. The fortuitous absence of physical injury did not make a difference.

### Stella

Stella witnessed the accident. Psychiatric damage caused by witnessing an event first hand may be recoverable in certain circumstances. Stella clearly perceived the accident through her own senses and was physically and temporally proximate to it as required by *Alcock*[16]However the third criterion in *Alcock* is that the witness must have a close relationship to the victim of the accident. Stella was a passer by and therefore would not satisfy this criterion. The only other way Stella could recover damages from Katy is if she could prove that she was a primary victim. The fact that she suffers from post traumatic stress disorder suggests that the accident put her in fear for her own safety and the bike did cross her path. She may therefore be in the same position as Charles. However to recover under this head the claimant must actually have been in danger.[17]Stella might have difficulty proving that she was ever in actual danger as the bike mounted the pavement in front of her not towards her.

### Darinder

Darinder did not witness the accident first hand. The fact that she was told about it by the police officer will not be sufficient to give her the proximity required[18]. It is possible to recover damages if you witnessed the immediate aftermath of the event and that includes the hospital scenes[19]. However it is still necessary that the psychiatric injury be brought about by shock so she will have to show that seeing Joe coming out of an operating theatre caused her shock. Incidentally the close relationship tie is assumed in spousal relationships. With regard to the nervous break down brought about by the continued care of Joe, Darinder is unlikely to be able to recover. The injury must be brought about by a sudden assault to the senses rather than an accumulation of feelings and distress.[20]Overall it is unlikely that Darinder will be able to recover damages unless she can prove she was shocked by seeing Joe coming out of the operating theatre and then she will only be able to recover for psychiatric harm caused directly by that shock.

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