

BETWEEN

FD
APPLICANT

AND

TW
RESPONDENT

Date of Order:

21/03/2018

Referee:

Referee: Robertshawe

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that TW Limited is to pay to FD Limited the sum of \$500.00 on or before Wednesday, 4 April 2018.

Facts

[1] FD Limited (FD) purchased toughened and laminated XX from TW Limited (TW) for a door installation it was undertaking for a client. When the doors were installed, it was obvious that the XX was cloudy, and that some fault had occurred in the lamination process. TW replaced the XX. However, FD also sought the costs of remaking the doors, and installing the replacements (\$1,890.60).

[2] TW accepted the original XX was faulty. However, it defended the claim on the grounds that the defect was visible before the doors were made up and installed, and that in any event, it had an exclusion and limitation clause protecting it from any liability for any loss.

Issues

[3] The issues to be resolved are:

- (a) Was the defect able to be identified before the XX doors were made and installed?
- (b) If not, does the contract contain an exclusion and/or limitation clause?
- (c) If so, does the contract protect TW against this claim?

Reasons

Was the defect able to be identified before the XX doors were made and installed?

[4] FD purchased the XX from a business for resupply in trade. It was therefore not a consumer contract to which the Consumer Guarantees Act 1993 applies, but a commercial contract for the sale of goods to which Part 3 of the Contract and Commercial Law Act 2017 applies.

[5] There was no dispute that the XX did not meet the implied conditions of quality and fitness in s135 of the Act, and that it had to be replaced (s132). Generally, this would also give rise to a right to claim consequential loss, being the costs claimed. However, it was submitted that FD's staff should have identified the flaw, and thus saved the company from

any consequential loss. Their installation of the doors was viewed as an acceptance of the product, or at least of any consequences of not noticing the defect (s169, s170).

[6] I am not able to make a finding on the evidence that FD ought to have been able to identify the defect before the doors were made up and installed. A photo was supplied showing cloudiness, but this photo was taken from the inside with the outside light behind. In a factory, where XX is not likely to be viewed in daylight conditions, it was not established that this was an obvious defect that staff could have noticed without taking steps to specifically check for it.

Does the contract contain an exclusion clause?

[7] Nonetheless, TW may be able to defend the claim for damages if it has successfully excluded or limited its liability in the contract. The contract did contain both an exclusion clause (13.1, 13.2) and a limitation clause (13.3).

[8] FD purchased its doors through an account with TW in the name of CD, which has the same owner and director as FD, Mr AB. It is this company which was the commercial vehicle through which Mr AB made up and installed the doors, albeit for FD. In this context, nothing turns on the distinction between the two. The existence of the Terms of Trade for CD binds FD.

[9] Mr AB signed Terms and Conditions of Trade with TW on 26 June 2015.

[10] Those terms include the following clause (reproduced in part only):

13.1 The Consumer Guarantees Act 1993, the Fair-Trading Act 1986 and other statutes may imply warranties or conditions or impose obligations upon Veridian which cannot by law (or which can only to a limited extent by law) be excluded or modified. In respect of any such implied warranties, conditions or terms imposed on Veridian, Veridian's liability shall, where it is allowed, be excluded or if not able to be excluded only apply to the minimum extent required by the relevant statute. Except as otherwise provided by clause 13.1, Veridian shall not be liable for:

13.2.1 Any loss or damage of any kind whatsoever, arising from the supply of Products and Services by Veridian to the Customer, including consequential loss whether suffered or incurred by the Customer or another person and whether in contract or tort (including negligence) or otherwise and irrespective of whether such loss or damage arises

*directly or indirectly from Products and Services provided by Veridian to the Customer;
and*

13.2.2 The Customer shall indemnify Veridian against all claims and loss of any kind whatsoever however caused or arising and without limiting the generality of the foregoing of this clause, whether caused or arising as a result of the negligence of Veridian or otherwise, brought by another person in connection with any matter, act, omission, or error by Veridian its agents or employees in connection with the Products and Services

13.2.2 If, contrary to the disclaimer of liability contained in these terms and conditions of trade Veridian is deemed to be liable to the Customer, following and arising from the supply of Products and Services by it to the Customer, then it is agreed between Veridian and the Customer that such liability is limited in aggregate to \$500.00.

[11] As these clauses were incorporated in the terms which were signed prior to the supply of these XX, and the XX was supplied on the basis of that contract, I find that this clause formed part of the contract between the parties, whether directly between CD and TW, or by application of the indemnity in 13.2.2 in relation to any claim by FD.

[12] In a commercial context, the general rule is that in the absence of fraud or misrepresentation a party is bound by a clause even if he or she has not read it. A signature conveys a representation that the person who signs has either read and approved the contents of the document or is willing to take a chance of being bound by those contents whatever they might be. There is no requirement that the other party must show that due notice was given of the terms of the contract.

[13] As a result, both the exclusion clause and limitation clause apply to the supply of the defective XX.

Does the contract protect TW against this claim?

[14] However, a party who seeks to rely on such clauses must be able to show not only that that the clause formed part of the contract, but that the effect of the clause is not negated by statute, and that the wording of it is sufficiently clear that it covers the events that have happened.

[15] As this was not a consumer contract, there is no statutory bar to the exclusion clause. Parties are free to contract out of the rules that would otherwise apply under Part 3 of the CCLA (s197).

[16] The next question is therefore whether the clauses were sufficiently clear to negate liability.

[17] Words in a contract are to be given their natural and ordinary meaning, if this can be ascertained from the words used. However, given that an exclusion clause will enable a party to escape liability for a breach, it will be assumed that a party will not have intended to limit liability unless clear and unambiguous language is used. The more valuable the right being abandoned, or the more significant the departure from obligations imposed by law, the clearer the language needs to be. Where the contract is governed by sales legislation, such as the CCLA, the courts have traditionally taken the view that any attempt to contract out must make direct and clear reference to the statutory conditions being negated. If there is an ambiguity, exclusion clauses will be read "*contra proferentum*", meaning that any ambiguity is to be construed against the interest of the party seeking to enforce it.

[18] However, it should be noted that courts have drawn a distinction between exclusion clauses and limitation clauses, applying a stricter approach to the interpretation of the former given the higher likelihood of confusion in ascertaining their meaning.

[19] Applying these rules of construction, I find that clauses 13.1 and 13.2 are not sufficiently clear to be relied on by TW to deny liability for the defective XX. This is so for the following reasons:

- (a) *Clause 13.1 notes that various statutes may imply conditions which are not able to be excluded in a contract. It then states that in relation to any such conditions, TW's liability shall be excluded to the extent allowed, or so as to apply the minimum liability that can be achieved. Perhaps it is an error in drafting to attempt to only exclude conditions that cannot by law be excluded, but in any case, this clause could not apply to implied conditions in the CCLA. There is no direct reference to the implied conditions of the CCLA, and the CCLA does not prohibit contracting out. The wording applies only to those conditions that cannot be contracted out of.*
- (b) *Clause 13.2 deals with liability that can be contracted out of. It states that TW shall not be liable for "any loss or damage of any kind whatsoever" arising from the supply of XX. Whilst the clause refers to negligence expressly, it does not refer to the implied statutory*

conditions of the CCLA. The literal meaning of this clause is that TW is not responsible for any amount for defective XX, or for any consequential loss. This clearly was not the intention of TW, as it replaced the defective XX. Perhaps TW's intention was only to exclude consequential losses. By using a catch-all phrase to exclude all liability, the clause becomes ambiguous by failing to make it clear implied statutory duties are also negated. It has been held that the failure to make clear reference to statutory responsibilities when a "catch-all" phrase is used cuts across the usual commercial intention of the parties' agreement and turns it into a "lucky dip", where the customer would have to pay potentially significant sums for goods, regardless of the quality supplied. This is potentially negotiable, but so contrary to usual obligations that it has been determined that this must be more clearly defined to be enforceable.

- (c) *In short, the literal wording relied upon by TW is asking a customer to take all risk of defective XX. Under that interpretation, it can supply defective product and be paid for it. It is open to TW to state in plain English exactly what it is contracting out of, including the Act it refers to, and that it is consequently not standing behind its product, or any loss associated with it. This would be very unusual commercial terms. Without reference to the CCLA, the wording is not clear enough to achieve that end, and it has not relied on this interpretation in its own actions. More commonly clauses limit liability to the value of the product supplied, which is how TW acted, and no doubt what TW intended all along. However, as the clause is ineffective to achieve its stated purpose, I find it is not effective to exclude liability either for the product or for the consequential loss claimed.*

[20] However, I find that clause 13.3 is simple and effective as a limitation clause, formed part of the contract that was signed, and contains no ambiguity. It states that if the exclusion clause is not effective, TW's liability is limited. For the nature of the contract between these parties, such a clause is not unusual, and given that TW replaced the XX, essentially shares and limits the risk of any remaining consequences in a not unexpected manner.

[21] It is arguable that the \$500.00 referred to includes the replacement XX and has thus already been satisfied. However, this would be an onerous interpretation, and without express clarification in the clause that this is what was meant, could not be enforceable in that manner. There was no dispute about liability for the XX, and liability was only ever disclaimed in relation to consequential losses. Therefore, the \$500.00 limit would only be interpreted as applying to any outstanding consequential liability which is being sued upon.

[22] FD proved its losses exceeded \$500.00. Whilst FD may have sought a slightly higher labour rate than was recoverable, nothing turns on this, as the costs were clearly in excess of the maximum sum that could be claimed.

Conclusion

[23] An order has therefore been made for TW to pay FD the sum of \$500.00.