

## **Negligence construction: does anything remain of *Canada Steamship*?**

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### **Introduction**

There was once a time when a clear judicial reticence could be identified when it came to allowing exemption clauses to be construed in a way that would allow an effective denial of a contracting party's liability for negligence. The courts' general policy in approaching such matters of so-called negligence construction was reflected in the guidelines of Lord Morton in *Canada Steamship Lines Ltd v The King*.<sup>1</sup> The introduction of the Unfair Contract Terms Act 1977 provided an additional layer of protection for parties against whom such clauses were relied on, and there then followed a more relaxed judicial attitude in relation to the construction of clauses purporting to exclude liability for negligence.<sup>2</sup>

Certain observations by the Court of Appeal in *Persimmon Homes Ltd v Ove Arup and Partners Ltd*,<sup>3</sup> and at first instance in that case,<sup>4</sup> suggest the earlier judicial hostility has now eased to the point that the *Canada Steamship* guidelines are no longer of application in the context of negligence construction. This note considers *Persimmon* and the modern approach to the construction of exemption clauses in connection with negligence liability.

### **Facts and issues in *Persimmon***

The defendants were two companies who can be referred to singularly as "Arup". In 1992, Arup was engaged as a civil engineer in connection with a regeneration project at a site where it was recognised that contamination and pollution would be potential problems. On the completion of the regeneration work, the claimants, comprising three companies (collectively, "the Consortium"), expressed an interest in purchasing the site. In 2007, the Consortium engaged Arup to provide consultancy engineering services in respect of the Consortium's bid for the site. The Consortium eventually acquired the site for £53m in September 2007 and on doing so engaged Arup to provide further engineering services via a written contract of engagement ("the 2009 agreement"). The 2009 agreement also required that Arup enter into individual deeds of warranty ("the warranties") with each of the members of the Consortium.

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<sup>1</sup> [1952] A.C. 192.

<sup>2</sup> See eg *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; [2003] 1 C.L.C. 358 at [11] per Lord Bingham.

<sup>3</sup> [2017] EWCA Civ 373 (judgment of Jackson LJ, with whom Moylan and Beatson LJJs agreed).

<sup>4</sup> [2015] EWHC 3573 (TCC); [2016] B.L.R. 112.

In July 2012, asbestos was discovered at the site at a level the Consortium claimed was substantially more than expected. Accordingly, the Consortium alleged that Arup had been negligent in failing to identify and report the asbestos, and sought damages on that basis.<sup>5</sup>

Arup contented that any liability regarding the presence of asbestos was excluded via two exemption clauses, namely clause 6.3 of the 2009 agreement and clause 4.3 of each of the warranties. Clause 6.3 was expressed as follows:

“[Arup’s] aggregate liability under this Agreement whether in contract, tort (including negligence), for breach of statutory duty or otherwise (other than for death or personal injury caused by [Arup’s] negligence) shall be limited to £12,000,000.00 ... with the liability for pollution and contamination limited to £5,000,000.00 ... in the aggregate. Liability for any claim in relation to asbestos is excluded.”

Clause 4.3 of each of the warranties was in the same terms, save that the overall limit was £5m and not £12m.

As explained by the Court of Appeal,<sup>6</sup> each of the exemption clauses comprised three separate limbs: (i) an overall limit of liability (of £12m in the 2009 agreement and of £5m in the warranties); (ii) a limit on liability for pollution and contamination (of £5m); and (iii) an exclusion in relation to negligence. The relevant distinction between the limbs was thus that limb (i) imposed an overall limit on Arup’s potential liability,<sup>7</sup> limb (ii) imposed a limit on liability for contamination, and limb (iii) denied liability altogether for a specific form of contamination, namely asbestos.<sup>8</sup>

The Consortium’s approach before the court was essentially twofold. Its first argument focused on the wording of the relevant clauses. Its second argument concerned broader issues relating to exemption clauses and negligence construction.

The first argument focused on the word “for” as it appeared in limbs (ii) and (iii). Thus, as to limb (ii), it was said that, on its proper construction, the phrase “liability for pollution and contamination” meant “liability *for causing* pollution and contamination”. As to limb (iii), it

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<sup>5</sup> *Persimmon* [2017] EWCA Civ 373 at [30]-[31].

<sup>6</sup> *Persimmon* [2017] EWCA Civ 373 at [40].

<sup>7</sup> There was no dispute as to the construction of limb (i), with the parties accepting that its effect was to limit Arup’s total liability under the claims to the amount specified ([2017] EWCA Civ 373 at [40]), although it remained a separate – and ultimately unresolved – question whether the effect of limb (i) as it appeared in clause 4.3 of the warranties was to limit the overall claim in respect of the Consortium as a whole or whether it applied separately to each of the individual companies comprising the Consortium ([2017] EWCA Civ 373 at [43]).

<sup>8</sup> *Persimmon* [2017] EWCA Civ 373 at [41] and [47].

was, similarly, contended that “liability for any claim in relation to asbestos” should properly be construed as an exclusion of liability for any claim against Arup *for causing* the presence of asbestos.<sup>9</sup> Accordingly, as the allegation was not that Arup had *caused* the asbestos, but, rather, related to the fact Arup had not carried out a proper investigation as to the presence of asbestos, the allegations fell outside the scope of the exemption clauses.

Arup contended that such a construction did not make sense. Thus, it was argued that limb (ii) was concerned not with Arup’s *causing* contamination, but, rather, related to Arup’s potential liability for failing to identify contamination. Similarly, limb (iii) concerned a denial of liability in respect of any claim concerning asbestos and was not concerned with the cause.<sup>10</sup>

At first instance, Stuart-Smith J found that clause 6.3 of the 2009 agreement and clause 4.3 of the warranties amounted to an effective exclusion of liability for negligence. For reasons based on the language of the clauses and the broader contractual context, the Court of Appeal agreed. As to these reasons, first, Arup’s interpretation reflected the natural meaning of the words in the clauses. Second, to read “for” as meaning “for causing” would be “bizarre, if not ungrammatical” (essentially requiring limb (iii) to be construed as saying “Liability for causing any claim in relation to asbestos is excluded”). Third, it would be nonsensical for the parties to have agreed that Arup was not liable if asbestos was moved from one part of the site to another, but was liable if asbestos was left in place. Fourth, an additional requirement within clause 6 of the 2009 agreement and clause 4 of the warranties requiring to Arup obtain professional indemnity insurance showed that clause 6.3 and clause 4.3 were intended to limit Arup’s liability to the extent of the insurance cover and as such it would be “absurd” to read limbs (ii) and (iii) as confined to claims for moving contamination from one place to another.<sup>11</sup>

### **Exemption clauses and negligence construction**

As noted above, the Consortium’s second argument related to the broader issue of the construction of exemption clauses in the context of alleged negligence liability. Thus, it was said that even if the respective clauses did not have the narrow meaning contended, the effect of the application of the *contra proferentem* rule and the courts’ general approach to the construction of exemption clauses was such that the clauses could not be construed so broadly

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<sup>9</sup> *Persimmon* [2017] EWCA Civ 373 at [37] and [44]-[47].

<sup>10</sup> *Persimmon* [2017] EWCA Civ 373 at [45]-[46].

<sup>11</sup> *Persimmon* [2017] EWCA Civ 373 at [48].

as to amount to an effective exemption from liability.<sup>12</sup> The Court of Appeal rejected this argument.

As to the *contra proferentem* rule, that is, the rule that ambiguity in an exemption clause will be construed *against* the proferens (i.e. party seeking to rely on the clause), the court noted that such a rule, in “commercial contracts, negotiated between parties of equal bargaining power ... now has a very limited role.”<sup>13</sup> Reference was made to the observations of Lord Neuberger MR in *K/S Victoria Street v House of Fraser (Stores Management) Ltd*<sup>14</sup> that:

“Quite apart from raising abstruse issues as to who is the proferens (and, in particular, whether the issue turns on the precise facts of the case or hypothetical analysis), “rules” of interpretation such as *contra proferentem* are rarely decisive as to the meaning of any provisions of a commercial contract. The words used, commercial sense, and the documentary and factual context, are, and should be, normally enough to determine the meaning of a contractual provision.”<sup>15</sup>

Such a dilution of the *contra proferentem* rule reflects the recent observations in *Transocean Drilling U.K. Ltd v Providence Resources Plc*.<sup>16</sup> In that case, the trial judge had accepted that a construction *contra proferentem* was the appropriate starting point in determining the scope of the relevant clause, thereby charging the party seeking to rely on the clause with the immediate requirement of establishing its effectiveness. Rejecting that approach on appeal, Moore-Bick LJ explained the *contra proferentem* rule in terms that:

“It is an approach to construction to which resort may properly be had when the language chosen by the parties is one-sided and genuinely ambiguous, that is, equally capable of bearing two distinct meanings. In such cases the application of the principle may enable the court to choose the meaning that is less favourable to the party who introduced the clause or in whose favour it operates.”<sup>17</sup>

On the logic of this approach, the court in *Persimmon* held that its finding as to the absence of ambiguity in respect of clauses 6.3 and 4.3 precluded the possibility that an ambiguity might

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<sup>12</sup> *Persimmon* [2017] EWCA Civ 373 at [51].

<sup>13</sup> *Persimmon* [2017] EWCA Civ 373 at [52].

<sup>14</sup> [2011] EWCA Civ 904; [2012] Ch. 497.

<sup>15</sup> *K/S Victoria* [2011] EWCA Civ 904 at [68]; *Persimmon* [2017] EWCA Civ 373 at [52].

<sup>16</sup> [2016] EWCA Civ 372.

<sup>17</sup> *Transocean Drilling U.K. Ltd* [2016] EWCA Civ 372 at [20].

then be found to justify a different interpretation via the *contra proferentem* rule.<sup>18</sup> It follows that the relevance of the rule in the commercial context now appears confined to circumstances of genuine ambiguity, that is, cases where the prior question of construction produces an unclear outcome.<sup>19</sup>

The Consortium in *Persimmon* nonetheless argued that the courts' general approach to matters of negligence construction was one of hostility and that this could defeat Arup's attempts to rely on the clauses as an exemption from liability. The orthodox approach to the question whether an exemption clause could be construed in such a way as to amount to an effective defence to liability for negligence was set out in Lord Morton's guidelines in *Canada Steamship Lines v The King*<sup>20</sup> and can be summarised as follows:

- (1) If the clause contains language which expressly exempts the person in whose favour it is made ("the proferens") from the consequence of the negligence of his own servants, effect must be given to that provision.
- (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens.
- (3) If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some ground other than that of negligence", to quote Lord Greene MR in *Alderslade v Hendon Laundry Ltd.*<sup>21</sup> The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if

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<sup>18</sup> This reflects the observations as to the primacy of the words used in *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619. The similar point is also found in the observation of Stuart-Smith J at first instance in *Persimmon* [2015] EWHC 3573 (TCC) at [21] that "The Court should not strain to find ambiguity where none exists. If at the end of the normal interpretative process, the meaning remains unclear and ambiguous, the Court has as a last resort various presumptions to assist it, such as the *contra proferentem* rule. But such presumptions, as it seems to me, only fall to be applied if the true meaning of the contract has not emerged from the normal iterative process of interpretation."

<sup>19</sup> In the consumer context, the rule's applicability is given statutory footing by way of section 69 of the Consumer Rights Act 2015.

<sup>20</sup> [1952] A.C. 192 (PC).

<sup>21</sup> [1945] K.B. 189 (CA) at 192.

the words used are prima facie wide enough to cover negligence on the part of his servants.<sup>22</sup>

Subsequent courts nonetheless stressed the importance of recognising that these guidelines were intended to do no more than ensure a court exercised caution before arriving at the conclusion that a contracting party had given up a right to an action in negligence.<sup>23</sup> Thus, the guidelines were not to be applied mechanistically in such a way as to deny the possibility of a party relying on an exemption clause avoiding liability for negligence where it was clear from the parties' intentions that such avoidance properly reflected the purpose for which the clause had been included.<sup>24</sup> Indeed, it was on this basis that Lord Fraser had concluded in *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*<sup>25</sup> that Lord Morton's guidelines were "not applicable in their full rigour when considering the effect of clauses merely limiting liability" as opposed to excluding liability altogether.<sup>26</sup> Moreover, in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*,<sup>27</sup> Lord Bingham observed that "Lord Morton was giving helpful guidance on the proper approach to interpretation and not laying down a code" and thus the guidelines

"[do] not provide a litmus test which, applied to the terms of the contract, yields a certain and predictable result. The courts' task of ascertaining what the particular parties intended, in their particular commercial context, remains."<sup>28</sup>

At first instance in *Persimmon*, Stuart-Smith J had pointed to two factors that had triggered "a shift in the approach" of the courts in the context of the construction of exemption clauses.<sup>29</sup> First, the Unfair Contract Terms Act 1977 ("UCTA") introduced a new set of controls designed

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<sup>22</sup> *Canada Steamship* [1952] A.C. 192 (PC) at 208.

<sup>23</sup> See eg *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400 at 419 per Buckley LJ; *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2014] EWHC 2197 (Comm) at [15] per Popplewell J.

<sup>24</sup> See *Lictor Anstalt v Mir Steel UK Ltd* [2012] EWCA Civ 1397; [2013] 2 All E.R. (Comm) 54 at [35] where Rimer LJ observed that Lord Morton's three principles were "not be applied mechanistically and ought to be regarded as no more than guidelines. They do not provide an automatic solution to any particular case. The court's function is always to interpret the particular contract in the context in which it was made. It would be surprising if it were otherwise."

<sup>25</sup> [1983] 1 W.L.R. 964 (HL).

<sup>26</sup> *Ailsa Craig* [1983] 1 W.L.R. 964 (HL) at 970 per Lord Fraser.

<sup>27</sup> [2003] UKHL 6; [2003] 1 C.L.C. 358.

<sup>28</sup> *HIH Casualty* [2003] UKHL 6; [2003] 1 C.L.C. 358 at [11] per Lord Bingham.

<sup>29</sup> [2015] EWHC 3573 (TCC) at [25].

to police the effect of such clauses (by subjecting them to a statutory requirement of “reasonableness”).<sup>30</sup> Second, the judge referred to the

“increasing recognition that parties to commercial contracts are and should be left free to apportion and allocate risks and obligations as they see fit, particularly where insurance may be available to one or other or both parties to cover the risks being so allocated.”<sup>31</sup>

Reflected in this proposition was recognition of the fact parties to commercial contracts “may choose to allocate risks and liabilities in a way that may at first sight seem unlikely to an outsider”.<sup>32</sup> Similarly, in *Persimmon* the Court of Appeal observed that, “especially since the enactment of UCTA, the courts have softened their approach” to exemption clauses, before recording that, in commercial contracts, “the *Canada Steamship* guidelines (in so far as they survive) are now more relevant to indemnity clauses than to exemption clauses”.<sup>33</sup>

It thus appears to be no longer necessary for contracting parties to navigate any special rules in considering questions of negligence construction. The suggestion in *Persimmon* is that the approach to the interpretation of an exemption clause is to be found within the courts’ ordinary approach to contractual interpretation. The task, when interpreting an exclusion or limitation clause, as noted by Stuart-Smith J:

“...is essentially the same ... as it is when interpreting any other provision of a contract: it is to identify what a reasonable person having all the background knowledge which would reasonably have been available to the parties would have understood the parties to have meant. And in pursuing that task, the commercial and contractual context may make it improbable that one party would have agreed to assume responsibility for the relevant negligence of another, so that clear words are needed.”<sup>34</sup>

This has the merit of aligning the approach to negligence construction with the courts’ increasingly apparent willingness to recognise parties’ freedom to allocate contractual risk

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<sup>30</sup> See also *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 (HL) at 851 per Lord Diplock and *George Mitchell (Chesterhall) Ltd. v Finney Lock Seeds Ltd* [1983] Q.B. 284 (CA) at 297-298 per Lord Denning MR.

<sup>31</sup> [2015] EWHC 3573 (TCC) at [25], citing in support the observations of Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 (HL) at 851.

<sup>32</sup> [2015] EWHC 3573 (TCC) at [26].

<sup>33</sup> *Persimmon* [2017] EWCA Civ 373 at [56].

<sup>34</sup> [2015] EWHC 3573 (TCC) at [33].

however they so wish, at least where those parties of a similar size and equal bargaining power.<sup>35</sup>

Thus, where ambiguity exists as to the scope of any purported exclusion of negligence liability, an analysis of the contract, including the scope of the rights and obligations within it, will be instructive as to whether the parties' contractual intention included the giving up of any right to an action in negligence.<sup>36</sup> Indeed, as the Court of Appeal observed in *Persimmon*, a party's acceptance of large risks under a contract will no doubt be reflected in the contract price and any requirement as to the taking out of appropriate insurance. To that end, there should be "no need to approach [exemption] clauses with horror or with a mindset determined to cut them down."<sup>37</sup>

Indeed, the *Canada Steamship* guidelines have not been without difficulty in their practical application. For example, a strict application of the guidelines carried the risk of defeating the contracting parties' actual intentions, in particular in connection with the third guideline. Thus, according to that guideline, where both negligence liability and some additional liability had arisen on the facts, a court was to construe the exemption clause as covering only the additional liability (even where the words were otherwise wide enough to cover negligence liability in accordance with the second guideline). Relatedly, it has been recognised as a problem for the party seeking to rely upon the exemption clause "that if he over stresses the width of the relevant [clause] in order to pass test (2) [i.e. the second *Canada Steamship* guideline], he might make it more difficult to argue that the provision does not founder on test (3)."<sup>38</sup> Moreover, the guidelines had the effect of encouraging an unnecessary protraction of the interpretative process that in practice came about via the third guideline and its invitation to parties to identify and plead additional liabilities so as to narrow the scope of the exemption to clause to only cover those liabilities. Indeed, this can be illustrated by Stuart-Smith J's description in

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<sup>35</sup> In this connection, Stuart-Smith J (*Persimmon* [2015] EWHC 3573 (TCC) at [27]) noted the approach to the application of non-reliance clauses in *E A Grimstead & Son Ltd v McGarrigan* (Court of Appeal, unreported, 27 October 1999), where Chadwick LJ had referred to the importance of commercial certainty and observed: "it is reasonable to assume that the price to be paid reflects the commercial risk which each party ... is willing to accept." See also *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 (HL) at 843 per Lord Wilberforce and 851 per Lord Diplock.

<sup>36</sup> See the approach of Stuart-Smith J in *Persimmon* [2017] EWHC 767 (TCC) at [38]-[45] and [49].

<sup>37</sup> *Persimmon* [2017] EWCA Civ 373 at [57]. See also the flexible approach to the question whether a broadly drafted exemption clause could amount to an effective defence to negligence liability taken in *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC).

<sup>38</sup> Jane Swanton, "Exclusion of Liability for Negligence" (1989) 15 Univ Qld Law J 157 at 162, referring to the observation in *Lamport & Holt Lines v Coubro & Scrutton (M&I) Ltd (The Raphael)* [1982] 2 Lloyd's Rep 42 (CA) at 52 that "many a party putting forward such a clause to protect him might find it has got him out of the frying pan of the Privy Council's second principle [in *Canada Steamship*] into the fire of its third".



*Persimmon* of a submission made by the Consortium as to alternative grounds of liability as “tenuously based” before commenting “[i]f there was any substance or merit in the submission, I have been unable to understand it”.<sup>39</sup>

It follows that where the issue at hand concerns negligence construction in a negotiated contract between two commercial parties, there appears little reason for judicial reluctance to find that the relevant clause amounts to an effective denial of negligence liability on the facts. To the extent that safeguards are required, they can be suitably administered via the UCTA regime without any need to encroach on the separate process of an exemption clause’s construction.

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<sup>39</sup> *Persimmon* [2015] EWHC 3573 (TCC) at [37] and see also [2017] EWCA Civ 373 at [60].