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Content:
Neutral Citation Number: [2014] EWHC 3045 (QB)
Case No: A40LS073

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
MERCANTILE LIST

The Court House
Oxford Row
Leeds LS1 3BG
3 October 2014

B e f o r e :

His Honour Judge Behrens sitting as a Judge of the High Court in Leeds

____________________

Between:
POLYPEARL LIMITED   Claimant  
- and -  
E.ON ENERGY SOLUTIONS LIMITED   Defendant  

Hugh Preston QC (instructed by SHK Solicitors) for the Claimant  
David Caplan (instructed by Pinsent Masons LLP) for the Defendant  

Hearing date: 17 September 2014  

HTML VERSION OF JUDGMENT  

Judge Behrens:  

1 Introduction  

1. This is the trial of two preliminary issues ordered by HH Judge Raeside QC on 16th June 2014. The preliminary issues concern the applicability of an exclusion or limitation clause to losses allegedly suffered by Polypearl Ltd ("Polypearl") as a result of alleged breaches by E.ON Energy Solutions Ltd ("E.ON") of 2 written agreements entered into by the parties in May 2011.  

2. Polypearl is a company engaged in the business of cavity wall insulation and the manufacture and supply of polystyrene bead and adhesive. E.ON is a supplier of, amongst other things, electricity.  

3. On 10 May 2011 Polypearl and E.ON entered into two written agreements, a Master Agreement ("the Master Agreement") containing general terms and conditions and an Insulation Scheme Event Transaction Document ("the ISETD"). It will be necessary to refer to the terms of each of these agreements in more detail below. For present purposes it is sufficient to note that under clause 2.1 the Master Agreement came into force on 10th May 2011 and was to continue until 31st December 2012 unless otherwise terminated in accordance with the agreement or transaction document.  

4. It is Polypearl's case that under the terms of the ISETD E.ON was obliged to purchase 153,000 m3 Products at £44.44 per m3 during the contract period. Products are defined in the Master Agreement as "Polypearl Platinum Cavity Wall Bead and Polypearl adhesive". In fact only 39,295 m3 of Products were purchased leaving a shortfall of 113,705 m3.  

5. Polypearl claim that E.ON was in breach of contract in failing to purchase the shortfall. It alleges that it has suffered significant loss as a result of the breach of contract. The losses are pleaded in paragraphs 10(i) and (ii) of the Particulars of Claim and may be summarised thus:  

1. Loss of Profit - The loss of revenue from the shortfall is £5,053,050.20 (113,705 x £44.44). The saving of costs amounted to £2,949,508. Thus the loss of profit amounts to £2,103,542.  

2. Loss of opportunity to receive its share of the carbon savings that would have been achieved but for the breach of contract. Polypearl's share of the carbon saving per property is calculated at £171.02. A further 24,664 properties would have been insulated giving a loss of £4,218,037.  

6. In addition to these claims (which total £6,321,579) Polypearl alleges it has suffered further losses of £1,501,381 as a
result of the breach of an oral agreement it entered into with E.ON on 17th May 2012. However none of the issues relating to the alleged oral agreement are the subject of the preliminary issues with which this judgment is concerned. Thus, save for noting that the existence of the oral contract is very much in dispute, it is not necessary to refer to it further.

7. E.ON has filed a detailed Defence to the claim. It does not accept that there was any obligation to purchase 153,000 m3. Products as alleged It accordingly denies that it was in breach of the ISETD as alleged or at all.

8. E.ON puts Polypearl to proof that it suffered the alleged losses and that Polypearl have taken all reasonable steps to mitigate its losses. Furthermore it seeks to rely on clauses 10.1 and 10.7 in the Master Agreement which (in summary) exclude liability for indirect losses and limit liability for direct losses to £1,000,000. Polypearl deny that those clauses limit or exclude liability for the losses it suffered as a result of the breach of the ISETD.

9. Accordingly on 16th June 2014 Judge Raeside QC ordered the following preliminary issues:

(i) Whether clause 10.1 of the Master Agreement ... excludes liability for Polypearl's losses claimed at paragraph 10(i) of the Particulars of Claim and/or at paragraph 10(ii) of the Particulars of Claim; and
(ii) If not, whether clause 10.7 of the Master Agreement limits liability for Polypearl's losses claimed at paragraph 10(i) of the Particulars of Claim and/or at paragraph 10(ii) of the Particulars of Claim to the sum of £1,000,000.

10. The Order also provides that the facts pleaded in the Particulars of Claim are to be assumed for the purposes of the preliminary issue trial.

11. Although the trial of the preliminary issues was listed for a two day hearing, I was provided with clear and helpful skeleton arguments from Counsel and was only referred to three authorities. The area of dispute between the parties was relatively narrow and the oral argument was completed within half a day. I immediately acknowledge the assistance I received from Counsel in the course of their clear and concise submissions.

2 The Agreements

12. During the course of his submissions Mr Caplan referred me to a number of the clauses in the Master Agreement and the ISETD. He pointed out that both agreements were signed on the same day. The ISETD is in fact Annex 1 to the Master Agreement. It is 64 pages long whereas the Master Agreement is 22 pages long. The clauses are such that there is a strong inference that lawyers were involved in at least some of the drafting. There is, however, no evidence as to whether each side was legally advised. Whilst the Agreements are commercial documents between commercial organisations there is no evidence as to the respective bargaining power of the parties.

2.1 The Master Agreement

13. Mr Caplan drew my attention to a number of the provisions of the Master Agreement

Recital A

14. This recital explains that E.ON wishes to develop its outsourcing relationship with Polypearl as part of its Carbon Emission Reduction Target ("CERT") obligations to develop opportunities for supplying residential CERT approved schemes and other energy and energy related products to its customers.

Definitions.

15. Mr Caplan referred me to the definitions of Charges, Event, Products and Transaction Document. He noted that charges meant the sums payable to Polypearl as set out in the Transaction Document. He pointed out that the ISETD was a Transaction Document within the meaning of the definition.

16. He drew my attention to clause 1.5 which made it clear that each Transaction Document forms part of the Agreement and is subject to the terms of the Master Agreement. This point is repeated in clause 1 of the ISETD.

Termination
17. There are two clauses dealing with termination. Under clause 2.1 (as already noted) the agreement terminated on 31st December 2012 unless otherwise terminated. E.ON had an option to extend the term for a further 12 months.

18. Under clause 12 there is provision for early termination in 4 different situations. These include regulatory requirements, material breach by either party, and/or insolvency. Under clause 12.4 E.ON have an express power to terminate on giving 3 months notice.

Obligations
19. There are a number of clauses dealing with the obligations of the parties. These include an obligation on both parties to use their reasonable endeavours to maximise the sale opportunities of the Products (cl 3.3), an obligation on E.ON to pay Polypearl's invoice subject to a detailed procedure (cl 4), obligations to attend regular monthly meetings to review the previous month's performance and include revisions of the forecast (cl 5.1). It is not necessary to refer to the clauses in detail.

Other Clauses
20. Mr Caplan drew my attention to a number of other clauses which, although not directly relevant to the questions of construction that arise in the preliminary issue demonstrated the complex nature of the agreement and the fact that it had been drafted by lawyers. These included a non-exclusivity clause (cl 9), a detailed clause dealing with TUPE (cl 14) and an Entire Agreement clause (cl 16)

Exemption/Limitation Clauses
21. The 7 exemption clauses are set out in clause 10. Clauses 10.1 and 10.7 are, of course, central to this application and must be set out in full:

(10.1) "Neither party will be liable to the other for any indirect or consequential loss, (both of which include, without limitation, pure economic loss, loss of profit, loss of business, depletion of goodwill and like loss) howsoever caused (including as a result of negligence) under this Agreement, except in so far as it relates to personal injury or death caused by negligence"

(10.7) "Subject to the above, the aggregate liability of each Party under this Agreement for any damage or direct loss howsoever caused (other than death or personal injury caused by the indemnifying party's negligence) will (save in respect of E.ON's obligation to pay the Charges or Polypearl's obligation to reimburse any of the charges) be limited to £1,000,000."

22. Mr Caplan also drew to my attention the broad scheme of the other 5 clauses. In summary Polypearl acknowledge that (save for paying the charges) E.ON has no liability in respect of the supply and installation of the Products (cl 10.2); Polypearl is responsible for compliance with statutory regulations (cl 10.3) and is deemed to have acquainted itself with all conditions likely to affect the execution of the Events (cl 10.5).

23. Under clause 10.4 (and subject to cl 10.1) Polypearl is bound to indemnify E.ON in relation to claims by its customers or third parties arising out of the sale supply or installation of the Products.

24. Under clause 10.6 (and also subject to cl 10.1) E.ON gave a reciprocal indemnity to Polypearl in relation to claims by its customers or third parties arising out of the supply of energy or any other goods and services supplied by E.ON.

25. It is immediately to be noticed that the exclusions/limitations in clause 10 apply to both parties and not just to claims by Polypearl. Thus claims by E.ON against Polypearl are also governed by clauses 10.1 and 10.7.

2.2 The ISETD
26. Although the ISETD is, as noted above, a lengthy document containing detailed provisions it is fortunately not necessary to refer to many of the provisions for the purpose of the preliminary issues.
27. The ISETD is described as “Supplemental to the Master Agreement” and expressly incorporates its terms. It is divided into 7 sections all of which form part of the ISETD.

28. In the Introduction in section 1 it is stated that E.ON has 3 main insulation schemes to deliver part of the CERT programme. Polypearl may be engaged on one or more of these schemes at the discretion of E.ON to supply Products.

29. Clause 1.2.5 contains the obligation on E.ON to purchase 153,000 m³ Products under the Agreement at the charges stated in Section 7. However the obligation is qualified as follows:

   This volume shall be reviewed on a quarterly basis and the Parties shall in good faith work together to forecast volumes of demand. Should market conditions conspire to reduce E.ON's level of demand for the Products at the volumes stated in this paragraph 1.2.5 the Parties agree that this volume shall be reviewed accordingly and adjusted to account of any reduction in demand.

30. Section 4 contains Key Performance Indicators. Under the heading "Delivery of Product" it is stated that there is a baseline monthly target of 1,285 m³ Product and that where less is ordered the baseline target shall be reduced accordingly.

31. Section 7 sets out the charges payable by E.ON for a variety of services. Under section D the charge for the Product is £44.44 per m³.

3 The Law

General Principles


   (1) the ultimate aim of interpreting a contractual provision is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant;
   (2) the reasonable person is one who has all the background knowledge which would reasonably be available to the parties in the situation they were at the time of the contract;
   (3) where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense;
   (4) poorly drafted contracts do not attract a different approach, but the poorer the quality of the drafting, the less willing the Court should be to be driven to semantic niceties to attribute to the parties an improbable or unbusinesslike intention;
   (5) however where the parties have used unambiguous language, the court must apply it.

Exclusion/Limitation clauses.

33. There is a great deal of learning on the law relating to exclusion clauses. Thus Sir Kim Lewison devotes a whole chapter (chapter 12) to the topic in The Interpretation of Contracts (5th Edition); equally Chitty on Contracts (31st Edition) devotes the first half of Chapter 14 to the construction of such clauses.

34. It is equally clear that the judicial approach to such clauses has changed since the passing of the Unfair Contract Terms Act 1977 with the result that many of the fine distinctions that can be found in the old cases and the statements of principle – especially about the doctrine of fundamental breach can no longer be relied on. This includes the statement by Lord Reid in Suisse Atlantique [1967] 1 AC 361, 398 to which I was referred by Mr Preston QC. (See Chitty at paragraph 14-022, Lewison at paragraph 12.11 and the cases there cited including Photograph Productions v Securicor [1980] AC 827 and Mitchell v Finney Lock Seeds [1983] 2 AC 803).

35. The modern approach has helpfully been summarised in the recent judgment and citations of Mrs Justice Carr in
Fujitsu v IBM [2014] EWHC 752 to which I was referred in some detail by both Counsel.

36. In paragraph 25 to 28 of her judgment Carr J summarised the position thus:

25. As for exclusion and limitation of liability clauses specifically, it is generally for the party seeking to rely on the exemption or limitation of liability clause, here IBM, to show that the clause, on its true construction, covers the obligation or liability which it purports to restrict or exclude. If there is an exception to the exemption, then the burden rests upon the claimant to establish that his case falls within the exception. But the form is not conclusive and the matter is in every case a question of construction of the instrument as a whole (see generally paragraphs 14-018 and 14-019 of Chitty on Contracts (31st edition))

26. There is no reason to approach the exercise of construing an exemption or limitation of liability clause in any way different to any other term in a contract. In Tradigrain SA v Intertek Testing Services (ITS) Canada Ltd [2007] EWCA Civ 154 Moore-Bick LJ stated at paragraph 46:

"It is certainly true that English law has traditionally taken a restrictive approach to the construction of exemption clauses and clauses limiting liability for breaches of contract and other wrongful acts. However, in recent years it has been increasingly willing to recognise that parties to commercial contracts are entitled to apportion the risk of loss as they see fit and that provisions which limit or exclude liability must be construed in the same way as other terms: see for example Photo Production Ltd v Securicor Ltd...."

Simon J. endorsed this approach recently in Bikam OOD Central Investment Group SA v Adria Cable Sarl [2012] EWHC 621 (Comm) at paragraphs 34 to 36.

27. In Photo Production Ltd v Securicor Transport Ltd [1980] AC 827 at 850-851 Lord Diplock stated:

"... An exclusion clause is one which excludes or modifies an obligation, whether primary, general secondary or anticipatory secondary, that would otherwise arise under the contract by implication of law. Parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract; and must not offend against the equitable rule against penalties; that is to say, it must not impose upon the breaker of a primary obligation a general secondary obligation to pay to the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation. Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only.

My Lords, the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what today would be called consumer contracts and contracts of adhesion. As Lord Wilberforce has pointed out, any need for this kind of judicial distortion of the English language has been banished by Parliament's having made these kinds of contracts subject to the Unfair Contract Terms Act 1977. In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations."
28. In Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd [1974] AC 689 at 717 Lord Diplock stated:

"It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law or such remedy may be excluded by usage binding upon the parties…. But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption."

37. In the course of his submissions Mr Preston QC referred to a passage from the judgment of Lord Wilberforce in Suisse Atlantique [1967] 1 AC 361, 432.

"One may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent. To this extent it may be correct to say that there is a rule of law against the application of an exceptions clause to a particular type of breach."

38. In her judgment Carr J cited two other cases in relation to the "statement of intent" rule including AstraZeneca UK Limited v Albemarle International Corporation [2011] 2 C.L.C. 252 where Flaux J stated, albeit in the context of a very different type of contract and exclusion clause, at paragraph 313:

"In construing an exception clause against the party which relies upon it …the court will strain against a construction which renders that party's obligation under the contract no more than a statement of intent and will not reach that conclusion unless no other conclusion is possible. Where another construction is available which does not have the effect of rendering the party's obligation no more than a statement of intent, the court should lean towards that alternative construction."

4 Submissions

39. As already noted the submissions were extremely clear, well directed and concise.

Mr Caplan's submissions.

40. Mr Caplan first drew my attention to a number of basic principles. He made the point that there was a key conceptual difference between a claim in debt and a claim for damages. He drew my attention to the explanation given by Millett LJ in Jervis v Harris [1996] Ch 195 at 202 F-H:

"… A debt is a definite sum of money fixed by the agreement of the parties as payable by one party to the other in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or condition; whereas damages may be claimed from a party who has broken his primary contractual obligation in some way other than by failure to pay such a debt."

41. He submitted that the Charges payable by E.ON for the Products were debts and the claims by Polypearl in paragraphs 10(i) and (ii) of the Particulars of Claim were claims for damages.

42. He submitted that there is also a clear distinction in law between direct and indirect losses. Indirect losses are losses that fall within what is conventionally described as the second limb of the rule in Hadley v Baxendale [1854] 9 Ex 341. Direct losses fall within the first limb. Mr Caplan accepted that there might be some difficulty in determining whether a claim was a claim for direct or indirect loss but he submitted that the distinction existed.
43. Mr Caplan submitted that the scheme envisaged by clauses 10.1 and 10.7 was clear and unambiguous:

1. Claims in respect of debts are excluded from the scheme. This is because claims for debts are not claims for damages or claims for indirect loss under clause 10.1 and are expressly excluded in clause 10.7.
2. Claims for loss in relation to personal injury or death caused by negligence are expressly excluded under both clauses.
3. (Subject to the exceptions set out above) claims for indirect loss or consequential loss were excluded under clause 10.1.
4. (Subject to the same exceptions) claims for any damage or direct loss are limited to £1,000,000 under clause 10.7.

44. He submitted that the claims in paragraph 10(i) and (ii) of the Particulars of Claim must either be claims for direct or indirect loss. Accordingly they must either be excluded under clause 10.1 or limited to £1,000,000 under clause 10.7. There is no other possibility.

Clause 10.7

45. Mr Caplan submitted that this clause was not ambiguous. It refers to "the aggregate liability of each Party for any damage or direct loss howsoever caused". It is wide terms and plainly is wide enough to cover the loss of profits caused by E.ON's assumed failure to purchase the shortfall of the Products. Accordingly, in so far as the loss is direct the claims are capped in accordance with clause 10.7.

Clause 10.1

46. In fact, however, Mr Caplan submitted that the loss is indirect and that the claims are excluded by clause 10.1. As already noted the relevant part of the clause is:

    any indirect or consequential loss, (both of which include, without limitation, pure economic loss, loss of profit, loss of business, depletion of goodwill and like loss) howsoever caused (including as a result of negligence)

47. Thus he submits that the words in brackets show that claims for loss of profit are to be treated for the purpose of this clause as claims for loss of profit.

48. He drew my attention to points made by Carr J in paragraph 38 of her judgment in upholding an exclusion clause in somewhat different terms. In that case the clause had provided:

    Neither Party shall be liable to the other under this Sub-Contract for loss of profits, revenue, business, goodwill, indirect or consequential loss or damage although it is agreed that …

49. In paragraph 38 Carr J said:

On the contrary, a consideration of all the relevant circumstances provides support for a straightforward application:

(a) the Sub-Contract is a modern, lengthy and detailed contract negotiated by two highly sophisticated commercial parties of equal bargaining power at arms' length with the benefit of legal advice, including advice from experienced commercial solicitors. Ignoring additional amendment pages, the Sub-Contract runs to sixty-five pages in its main body (which itself is divided into four parts) and incorporates multiple schedules (namely twenty-two in the Original Sub-Contract and twenty-four in the Amended Sub-Contract);
(b) Part 3 of the Sub-Contract as a whole contains detailed provisions governing the parties' rights to remedies as between each other. Thus, for example, FSL had rights to reimbursement in the event of delay and service failure under clause 16 and to compensation in the event of a compensation event (as defined) occurring under clause 17;
(c) by clause 20.7 the parties chose to limit their right to claim damages from each other. On the face of the contract they applied their minds to the scope of the clause, providing for detailed and specific exceptions. In other words, it was a tailor-made clause;
(d) clause 20.7 uses clear express words rebutting any presumption that the parties did not intend to abandon their
remedies for loss of profit for breach by the other;
(e) clause 20.7 applies equally to certain categories of loss suffered by both parties, rather than existing for the benefit
of one party alone. It is a clause that affected the rights of IBM and FSL alike.

50. Whilst Mr Caplan did not seek to suggest that this case was on all fours with Fujitsu he submitted that many of the
considerations referred to by Carr J were present here. He also referred me to the decision of Rix J in BHP Petroleum Ltd &
ors v British Steel Plc [1999] 2 Lloyd's Rep. 583. There the exclusion clause was again materially different to clause
20.7. It provided that there would be no liability for "loss of production, loss of profits, loss of business or any other indirect
losses or consequential damages…. " Rix J said (at 600):

"In my judgment the best solution is to construe the clause as though it read "for loss of production, loss of
profits, loss of business or indirect losses or consequential damages of any other kind" and accept that the
parties may have been in error to permit the inference that the former phrases are examples of indirect or
consequential loss. At least in that way, each of the phrases is given its authoritative meaning, which is what the
parties must be supposed to have given their closest attention to. If, however, only production, profit, or business
which is within the second limb of Hadley v. Baxendale is intended to be referred to, then everything in the
clause other than "indirect losses or consequential damages" becomes redundant and the previous phrases
become dangerously misleading and potentially valueless."

51. Whilst Mr Caplan acknowledged that Rix J's approach had been doubted in another first instance decision he invited
me to follow the approach in this case.

Mr Preston QC's submissions

52. Mr Preston QC pointed out that pursuant to Judge Raeside's order the preliminary issues were to be decided on the
basis that the allegations in the Particulars of Claim were true. Thus even though E.ON denies the obligation to purchase
153,000 m3 of Product, the issues are to be decided that there was such an obligation and on the basis that E.ON were
in breach of contract in only purchasing 39,295 m3.

53. He also warned me against attaching too much weight to the views of other judges on clauses which were different
from the clauses in issue in this case. He noted that Carr J had (at paragraph 75 of her judgment) not gained any real
assistance from Rix J's judgment in BHP. In her view the material difference in the wording reduced its value as an
authority.

Clause 10.1

54. Mr Preston QC's starting point is that a claim for loss of profit arising out E.ON's failure to purchase Product is
damage occurring naturally or direct loss within the first limb of Hadley v Baxendale.

55. Thus if and in so far as this loss is within clause 10.1 it can only be because the words in parenthesis take effect as a
deeming provision, in other words they are deeming the loss of profit to be "indirect" loss.

56. He submits that if this is the correct construction it begs the question as to what "direct" loss could be such as to fall
within clause 10.7. He submits that the most obvious direct loss from a failure to purchase is the loss of profit on those
purchases. In those circumstances if there is no liability for any indirect losses and no liability for direct loss of profits the
contract is reduced to a non binding statement of intent.

Clause 10.7

57. Mr Preston QC's submissions on clause 10.7 are set out in paragraphs 14 and 15 of his skeleton argument:

14. It is noted that clause 10.7 is not confined to "direct loss", but also includes "any damage". C submits that
what is contemplated by “any damage” here is property damage or personal injury (see the reference to personal injury specifically).

15. C submits that these terms and conditions were intended to be of general application to cover a range of potential Transaction Documents that the parties might subsequently agree - in some circumstances Polypearl might be responsible for principal contractual performance, in others it might be E.ON that was responsible for performance of the contract. However, what is distinctive about this particular breach is that it represented E.ON's obligation to purchase an agreed quantity of products - this obligation was the central obligation placed upon E.ON and went to the heart of the contract, at least so far as the ISETD is concerned. Just as the parties did not intend to limit E.ON's liability to pay Charges due to Polypearl on products purchased (see the words in parenthesis in clause 10.7), neither did the parties intend to limit E.ON's liability for failure to purchase the products.

5 Discussion and Conclusion

58. It is plain in the light of the authorities that the preliminary issues have to be determined as a matter of construction of clauses 10.1 and 10.7 of the Master Agreement. I agree with Mr Preston QC that in this context the views of different judges on the construction of differently worded clauses are of limited assistance.

59. I also agree with Mr Preston QC that the preliminary issues have to be determined on the basis of the breach by a substantial margin of an obligation by E.ON to purchase 153,000 m3 Products. Thus, as Mr Preston QC pointed out, the clauses in the Master Agreement and/or the ISETD which arguably suggest that there is no such obligation are of no real assistance in the construction of clauses 10.1 and 10.7.

60. I agree with Mr Caplan that the general nature of the scheme envisaged by clauses 10.1 and 10.7 is clear. Liability for indirect losses is (subject to the specified exceptions) excluded. Liability for direct losses is limited to £1,000,000. It seems to me also to be clear that the direct losses in clause 10.7 and the indirect losses in clause 10.1 are, as a matter of construction intended to incorporate the whole spectrum of losses party would suffer as a result of the breach of contract by the other. That, to my mind, is what a reasonable person would have understood the parties to have meant by those clauses.

61. It is part of Mr Preston QC's case that the losses pleaded in paragraphs 10(i) and (ii) of the Particulars of Claim are direct losses. It follows that I cannot accept his submission (in paragraph 14 of his skeleton argument) that the loss and damage in clause 10.7 is limited to property damage or personal injury. In his skeleton argument he refers to E.ON's obligation to purchase as being "central". In his oral argument he referred to it as being "a fundamental term". It is however plain from the cases cited by Carr J referred to above that even if the term is "central" or "fundamental" it is still a question of construction as to whether an exclusion or limitation clause applies.

62. To my mind, however, the reference in clause 10.7 to "any damage or direct loss howsoever caused" is clear and unambiguous. There is no reason to limit it in the way suggested by Mr Preston QC. The words "howsoever caused" are in my view wide enough to include causation as a result of a breach of a central or fundamental term.

63. I have found the construction of clause 10.1 more difficult. Indeed I confess that my mind has wavered on its true construction both during the course of argument and whilst I have been considering the judgment.

64. In my view the wording of clause 10.1 is ambiguous. The starting point is that, as a matter of general law, a claim for loss of profits may be either a direct or an indirect loss. It will be a direct loss if, at the time the contract was entered into, it was likely to result from the breach in question. [See McGregor on Damages 19th Ed at paragraph 18-167]. It will be indirect if there are special circumstances known to the contract breaker at the time of the contract such that a breach would be liable to cause more loss. Mr Preston QC submits that the loss of profits claim in this case is a direct loss. He submits that the most obvious (and likely) loss from the breach of an obligation to purchase Product is loss of profit. I agree with that submission though it would be possible to conceive of other claims of loss of profit arising from other breaches which would be categorised as indirect.

65. The ambiguity in clause 10.1 arises because of the words in parenthesis. It is to my mind not clear whether the words "both of which include, without limitation … loss of profits" mean that all loss of profits claims are included whether or not they are indirect losses (as Mr Caplan contends) or whether it refers only to indirect loss of profits claims (as Mr Preston QC contends).
66. I agree with Mr Preston QC that IBM v Fujitsu is distinguishable. The wording of the exclusion clause was different and I note that in paragraph 35 of her judgment Carr J regarded the wording of clause 20.7 as "clear and unambiguous".

67. Equally, although I am grateful to Mr Caplan for referring to the terms of the Master Agreement and the ISETD I gain little assistance from the other terms.

68. In the end I have come to the conclusion that Mr Preston QC's construction is to be preferred. My reasons are as follows:

1. I agree with Mr Preston QC that Mr Caplan's construction involves the court in effect deeming a claim for direct loss of profits to be a claim for indirect loss profits. The word "include" is not normally appropriate for such a construction. If it had been intended to provide that all loss of profits claims were to be deemed to be indirect and thus excluded it would have been relatively easy to do so.

2. The words relied on by Mr Caplan are in parenthesis and thus subordinate to the phrase "indirect or consequential loss". They are an explanation of it and not an attempt to place a direct loss in the indirect category.

3. As Lord Diplock said in the passage cited from Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd clear express words must be used in order to rebut the presumption that neither party intends to abandon any remedies for a breach of contract arising by operation of law. As already noted the words in clause 10.1 do not clearly indicate that the parties intend to abandon a claim for direct loss of profits.

4. It seems to me that Mr Preston QC's construction is more consistent with business common sense than that of Mr Caplan. As Mr Preston QC pointed out the most likely (and often the only) damage that Polypearl would suffer from a failure to order would be a loss of profits. It seems to me unlikely that a business man would wish to exclude this direct loss. Thus, whilst I do not think that Mr Caplan's construction reduces the Master Agreement to a mere statement of intent, I do think that Mr Preston QC's construction is more in accordance with business common sense.

69. It follows that I would answer the preliminary issues as follows:

(i.) No.
(ii.) Yes.

Referring Principles:

IV.5.1 - Intentions of the parties