

## Consequential Damages: Are They Inconsequential?

## Jurisprudence

- \* Canada
  - \* little definitive case law
  
- \* UK
  - \* evisceration of the term “consequential damages”
  
- \* Australia
  - \* new blood to a business approach

## Tips for Drafting

- \* Do not take comfort in an exclusion of “consequential damages”
- \* If you want an exclusion for lost profits or any other loss, then specify it or define “consequential damages” to include it
- \* Do not use “including, but not limited to” after “indirect” or “consequential” before reference to economic loss

## *Hadley v. Baxendale (1854)*

This case is important because it set out for the first time the difference between:

- (A) losses that arise naturally (direct damages); and
- (B) losses derived from special circumstances communicated to the party who breached the contract (indirect or consequential damages)



## Select English Cases 1935 to 1978

Case	Type of Action
<i>Millar's Machinery Company, Limited v. David Way and Son</i> (1935), 40 Com. Cas. 204 (C.A.)	Defective equipment
<i>Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd. (Coulson &amp; Co., Ltd. [third party])</i> , [1949] 2 KB 528 (C.A.)	Delay arising from damaging equipment during transportation
<i>The Heron II; C. Czarnikow, Ltd. v. Koufos</i> , [1967], 3 All E.R. 686 (H.L.)	Late delivery of merchantable goods (sugar)
<i>Croudace Construction Ltd. v. Cawoods Concrete Products Ltd.</i> , [1978] 2 Lloyd's Rep. 55 (C.A.)	Late delivery of goods

## Select English Cases 1997 to 2000

Case	Type of Action
<i>British Sugar plc v. NEI Power Projects Ltd.</i> , [1997] EWJ No. 1127	Defective design and installation
<i>Deepak Fertilisers and Petrochemical Corporation v. Davey McKee (London) Ltd.</i> , [1998] EWJ No. 3092	Defective design and construction
<i>Hotel Services Ltd. v. Hilton International Hotels (UK) Ltd.</i> , [2000] 1 All E.R. 750 (Comm) (C.A.)	Defective equipment

*Syncrude Canada Ltd. v. Babcock & Wilcox Canada Ltd, [1997] 7 W.W.R. 343 (Alta. C.A.)*

49.CONSEQUENTIAL DAMAGES: The Subcontractor will not be liable in any event for loss of anticipated profits, loss by reason of plant shutdown, non-operation or increased expense of operation of other equipment, or other consequential loss or damage of any nature arising from any cause whatever.”

*“Any reasonable calculation of the worth of what was delivered would have to deduct the capitalized value of the extra expenses involved in uneconomical but safe simple cycle operation.”*

## What is not included in “consequential damages”?

- \* loss of profits
- \* delay damages: wages paid to workers who cannot be productive (stand-by time), inflation costs and indemnification of subcontractor delay claims
- \* incremental cost of new equipment over the cost of supplied defective equipment
- \* increased production costs
- \* additional cost of energy caused by defective equipment
- \* overhead
- \* costs to remove defective equipment
- \* mental distress

*Agfa photo Canada Inc v  
Overwaita Food Group Ltd* 2008 BCSC 1287

- \* Claim for loss of profit as a direct loss
- \* 25. Limitation of Liability

The Buyer agrees that in no event will the Seller or Seller's affiliates be liable to the Buyer or anyone else for loss of profit, indirect, special, punitive or consequential damages arising out of any breach of the Agreement, or arising out of the sale, use or improper functioning of the Equipment, including, without limitation: Loss of profit, goodwill or revenue ...

- \* The Court:

*Clause 25 is not expertly drawn: it includes the redundancy I have mentioned, and some of its punctuation (notably its use of the colon) is inept. However, the expressed intent of the clause to exclude all claims for "loss of profit, indirect, special, punitive or consequential damages", including, without limitation, claims for "[l]oss of profit, goodwill, or revenue" and "business interruption" is unambiguous and clear. Clause 25 thus bars most of Overwaita's claims.*

*Environmental Systems Pty Ltd. v.  
Peerless Holdings Pty Ltd. [2008] VSCA 26  
from the Victoria Court of Appeal of Australia*

8.9 LIQUIDATED DAMAGES AND/OR CONSEQUENTIAL LOSS

As a matter of policy, Environmental Systems does not accept liquidated damages or consequential loss. Environmental Systems is motivated to achieving agreed milestones through respect for the client's needs and the obvious financial advantage gained from completion of projects in the shortest possible period.

## Justice Nettle of the Victoria Court of Appeal (2008)

[90] ... the conception of consequential loss should be restored to 'the natural meaning of which commercial and legal usage in exclusion clauses has long since robbed it'.

[93] In my view, ordinary reasonable business persons would naturally conceive of 'consequential loss' in contract as everything beyond the normal measure of damages, such as profits lost or expenses incurred through breach. ... It follows as I see it that, although the judge's approach in this case was in accordance with the English cases, it was not correct to construe 'consequential loss' as limited to the second rule in *Hadley v Baxendale*.

## *McCain Foods Gb Ltd v Eco-Tec (Europe) Ltd*

[2011] EWHC 66

- \* Supply and purchase agreement with Eco-Tec for system to remove hydrogen sulphide/sulfide from waste water treatment for £263,531.35
- \* System was to produce renewable energy and then McCain could sell certificates for renewable energy production to electricity suppliers ("ROC")
- \* Failure resulted in the loss of ROC revenue stream and McCain also had to purchase the electricity that would have been produced by the system elsewhere

*McCain Foods Gb Ltd v Eco-Tec (Europe) Ltd*

[2011] EWHC 66

*"Seller will indemnify and hold McCain ... harmless from and against any and all losses, liabilities, damages and expenses whatsoever (in no event however will Seller be responsible for indirect, special, incidental and consequential damages) arising out of any breach by Seller of any commitment or other obligation contained in this Agreement ..."*

- \* McCain claimed and was awarded £1,693,183.00 for:
  - \* Additional Utility Costs
  - \* Lost revenue from loss of ROC
  - \* Replacement Equipment
  - \* Contractors, Site Managers and Health and Safety Personnel
  - \* Attempted mitigation
  - \* Auxiliary equipment and civil works
  - \* Employee time
  - \* Third Party experts and laboratory testing
  - \* Purchase of auxiliary equipment from Defendant

## What does the Future Hold?

- \* A narrow or broad interpretation of "consequential damages"?
- \* Which will prevail in the UK, Canada and Australia?
  - \* *Peerless* was followed in *Oceania Furniture Limited v. Debonaire Products Limited*, [2009] NZHC 1139
- \* If you are litigating in Canada, you have a fighting chance whichever side of the argument that you have

## Drafting Tip

- \* Avoid language such as:  
*... damage which is of an indirect or consequential nature including without limitation the following:*
  - (a) *loss of profit;*
  - (b) *loss of business ...*
  
- \* Beware of:
  - \* *Ferryways NV v. Associated British Ports, [2008] EWHC 225 (Comm.)*
  - \* *ESL Consulting Ltd. Trading as VOIP*
  - \* *Ireland v. Verizon (Ireland) Ltd. and Anor, [2008] EHC 369*

## For further information see:

E. Jane Sidnell, "Consequential Damages: Are Exclusions of Consequential Damages Inconsequential?" (2010) 1 J.C.C.C.L. 109