

Are All Indirect Losses Now Direct Losses?

In the recent case of **McCain Foods (GB) Ltd v Eco-Tec (Europe) Ltd** (2011), the High Court has once again considered the meaning of direct and indirect losses. The court's judgment shows that it is dangerous for suppliers to assume that excluding "indirect loss" will protect them from large claims for financial loss.

In this case, McCain had purchased a system from Eco-Tec for removing hydrogen sulphide from a biogas in order that it could be used as fuel to generate heat and electricity. The system was found to be defective and McCain claimed damages for breach of contract including:

Claim Category	Claim Amount (£)
Additional Utility Costs	372,431
Loss of profits of ROCs	609,319
Replacement equipment	389,750
Contractors, site managers, health and safety managers	108,801
Attempted mitigation	93,337
Auxillary equipment	65,572
Employee time	28,968
Third party experts and laboratory testing	19,728
Purchase of auxiliary equipment from Eco-Tec	5,273
Total claimed	1,693,183

Eco-Tec disputed the above claims as indirect losses and consequential losses which had been excluded under the terms of the contract. The court held as follows:

1. The test of whether the cost of replacement equipment is what it would cost McCain to obtain an equivalent system in 2010 to replace the system provided by Eco-Tec in breach of contract. McCain had disputed the amount and claimed that the only additional costs should be the cost reflecting the purchase price of the system of £224,282. The court held that an equivalent replacement of the Eco-Tec system would cost them £389,750. This latter figure was upheld by the court.
2. The claim for lost revenue from the Certificates of Renewable Energy Production (ROCs) was further considered to be a direct loss. Under this system an accredited generator of renewable energy can use the renewed energy itself and

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sell on to another electricity supplier the ROCs issued for the renewable energy produced and used. Thus had the system been commissioned, McCain would have obtained certificates which had a market value of £609,319. This loss of profit was considered to be a direct loss following the guidance from the Court of Appeal decision in 1999 of *Deepak v ICI*.

3. McCain further claimed for the additional utility costs arising because they are the costs of electricity which McCain had purchased elsewhere which ought to have been generated by the new system. The costs of buying electricity instead of generating its own resulted in the claim of £372,431. Again this was not considered to be a consequential damage but one that resulted directly from the defective system.
4. The court further held that the cost of mitigation of £93,337 was considered to be reasonable mitigation of loss bearing in mind how those costs arose and what was done.
5. As for the claim for employee time, the court once again held that the costs were reasonable and considered to be direct costs.

Conclusion:

This judgment follows a long line of case law showing that exclusions of indirect losses do not always serve to limit liability. Courts are willing to hold even loss of profits to be direct losses. Although parties should give careful consideration to limitation of liability provisions in their contracts, it is equally important that parties maintain proper contact and discussions in the event that there are breaches of contract. Where there is a breach of contract, you should make clear to the defaulting party that failure to make good or rectify defects, may result in you having to mitigate the losses and that certain losses will directly result from such a breach. Itemising foreseeable and direct losses to the defaulting party can set the scene for any future claims.

For further information

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