



## USING EXCLUSION CLAUSES TO LIMIT YOUR BUSINESS RISKS: HOW EFFECTIVE ARE THEY?

*Nicole Ferreira-Aaron & Stacy-Lee Daniell*



It is standard practice for businesses, when entering into contracts, to attempt to manage their risks and limit their potential liabilities by the insertion of clauses generally called ‘exclusion’ clauses. Exclusion clauses come in a variety of shapes and sizes. Some may:

- Seek to exclude obligations that might otherwise be implied into the contract, e.g. implied warranties of fitness for purpose;
- Impose restrictions on the circumstances in which a party may exercise contractual remedies, e.g. in a contract for the sale of goods, requiring claims for damaged goods to be made within 7 days of delivery;
- Limit liability to a specified sum of money, e.g. the contract price;
- Exclude liability for certain types of losses, e.g. indirect and consequential losses; or
- Attempt to exclude liability altogether.

In Trinidad & Tobago, the Unfair Contract Terms Act 1985 (the ‘UCTA’), however, restricts (but does not eliminate) the ability of businesses to enforce such exclusion clauses. It is important for businesses to be aware of the circumstances under which their standard terms may be subject to attack in a court and to draft them in a way which reduces this risk.

The enforceability of an exclusion clause contained in a rental agreement was recently considered in the English Court of Appeal case of **Regus (UK) Limited v Epcot Solutions Limited [2008] EWCA Civ 361**. Since the Trinidad & Tobago UCTA is modeled on the English UCTA, there are a number of practical lessons which businesses can draw from this case.

### The Case

Epcot provided professional IT training. Regus was in the business of supplying serviced accommodation to

businesses worldwide. The parties entered into a contract for the use of such accommodation. The contract included an exclusion clause, which provided that Regus would not "in any circumstances have any liability for any loss of business, loss of profits, loss of anticipated savings, loss of or damage to data, third party claims or any consequential loss. We strongly advise you to insure against all such potential loss, damage, expense or liability." The exclusion clause also limited Regus' liability to "a maximum equal to 125% of the total fees paid under your agreement up to the date on which the claim in question arises or £50,000 (whichever is higher), in respect of all other losses damages expenses or claims".

The air-conditioning system at the premises was inadequate and Epcot withheld service charges. Regus served a notice of suspension of services to Epcot and issued proceedings for the unpaid service fees. Epcot, arguing that failure to provide adequate air conditioning amounted to a breach of contract, counterclaimed damages for loss of profits, loss of opportunity to develop its business, distress, inconvenience and loss of amenity.

### The High Court Ruling

The High Court Judge found that the air-conditioning was defective and that Regus was in breach of contract. He also found that Regus' contract terms dealing with liability amounted to a total exclusion of any remedy at all and on that ground held that they were unreasonable and unenforceable under UCTA. Regus appealed.

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# DO PATIENTS HAVE A RIGHT TO THEIR MEDICAL RECORDS?

*M. Glenn Hamel-Smith & Luke Hamel-Smith*



Medical records often contain extremely sensitive information about patients. Medical professionals owe a duty of confidentiality to their patients not to reveal the patient's records without their consent except in very limited circumstances – the so called “doctor-patient confidentiality” derived from English common law.

However, where does the medical professional's duty lie when the person requesting the records is the actual patient? Medical professionals may be reluctant to hand over medical records to their patients for, amongst other reasons, fear of causing alarm to the patient, or due to the risk of the patient misconstruing the information. Also, medical records may contain information about persons other than the patient, for example it may name the person who has divulged the information. Medical professionals may be reticent to divulge such information for fear of discouraging persons from providing information, especially if the information is of a sensitive nature such as substance abuse. In this article we discuss a patient's right of access to his/her medical records and the corresponding duty of medical professionals.

### **The basic position**

The question of a patient's right of access to her medical records was examined in the land mark case of *R v. Mid Glamorgan Family Health Services Authority, ex p. Martin [1995]*.

In that case it was held that ownership of the medical records belongs to the medical professional. This ownership is, however, not unrestricted; the medical professional cannot make whatever use of the records she may choose. Neither is it the case that the patient has unrestricted access to her records. The medical professional's ownership is subject to a contract between the patient

and the medical professional. Under this contract, there is an implied term that the medical professional will always act in the best interest of the patient.

### **What is the patient's best interest?**

There is no simple or definitive answer to this question. Determining the patient's best interest is a process of weighing a number of competing factors against one another. The person best placed to carry out this evaluation is the medical professional directly responsible for the patient's treatment.

The courts have provided guidelines to the relevant factors that must be weighed, though this list is by no means conclusive. The starting position is that it is in the patient's best interest to have access to her records out of respect to her right of self-determination. This presumption may be rebutted if the medical professional believes that disclosure of the records will cause the patient serious physical or mental harm, for example, the information in the reports may alarm or distress the patient; it may confuse or anger her or even induce her to give up her treatment. The possible harm, however, must be weighed against the possible benefit to the patient. In assessing the likely effect of the medical records on the patient, and to balance the benefits of disclosing medical records against the possible harm, the medical professional should determine the reason the patient is seeking access to the records: there is a strong presumption that access to the records will be to the patient's benefit if she needs it for litigation or for medical reasons.

### **Third parties providing information**

If, in the view of the medical professional, divulging medical records to the patient is likely to lead to the

patient harming the information provider, the medical professional has a duty not to divulge the information, as to provide the records would not be in the best interest of the patient, not to mention the best interest of the information provider. Should there be no likelihood of harm to the information provider, the medical professional may still owe a duty of confidentiality to the information provider if, when the information was given, it was assumed that the information would be kept confidential.

In such a situation the duty to act in the patient's best interest conflicts with the equal duty to protect the confidentiality of the information provider. In attempting to resolve the conflict, the medical professional should seek the consent of the information provider to disclose the information. If the information provider is unwilling to provide consent, it may be appropriate to seek the assistance of the Court.

### **Summary**

- Medical records are the property of medical professionals, who owe their patients a duty to act in the patients' best interests. Such duty may require the medical professional to provide the patient with access to her records if doing so is in the patient's best interest.
- The medical professional directly responsible for the patient is best placed to determine the best interests of the patient.
- The initial assumption is that it is in the patient's best interest to have access to her records. If the patient intends to use her records for litigation or medical treatment there is a strong presumption that it is in her best interest to have access.

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### **UCTA & the Application of the Reasonableness Test**

Section 6 of UCTA provides that where one contracting party deals as consumer or on the other's written standard terms of business, as against that party, the other cannot by reference to any contract term - when himself in breach of contract, exclude or restrict any liability of his in respect of the breach...except in so far as the contract term satisfies the requirement of reasonableness.

The statute provides guidelines for satisfying the test of reasonableness. In particular it provides that 'the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in contemplation of the parties when the contract was made.' The onus of establishing that the clause was reasonable in the circumstances will generally rest with the party seeking to rely on it.

The Act contains a non-exhaustive list of factors which may be taken into account in assessing reasonableness including: the strength of bargaining position of parties; knowledge; any alternative sources/choices; the availability of insurance; and contract inducements.

### **The Court of Appeal's decision**

The Court of Appeal concluded that based on the history of negotiations between both parties there was no inequality in bargaining power between them; that Epcot's CEO was an "intelligent and experienced businessman" who admitted that he was well aware of Regus' standard terms when he entered into the contract and who also accepted that he used a similar exclusion of liability for indirect and consequential losses in his own business. There were alternative local service office providers available to Epcot. Insurance which Regus

recommended to Epcot could be more economically and practically procured by Epcot than by Regus.

The trial judge had erred in concluding that the clause had deprived Epcot of any remedy and noted that the primary measure of loss for a breach of such a kind is the diminution in value of the service. Epcot's loss could be measured by asking how much less valuable the same services would have been if the suite had not been or had only been partially air-conditioned.

The court also rejected Epcot's argument that the clause was unreasonable because it purported to exclude liability "in all circumstances" and found that the exclusion clause as a whole did not purport to exclude for fraud or willful, reckless or malicious damage. The term "in any circumstances" was not intended or effective to exclude liability for fraud or malice. Even if the exclusion clause were found to be unreasonable it would be possible to sever it from a limitation of liability provision contained in the following sub-clause provided the latter was independent of the former.

The Court of Appeal thus held that the exclusion clause did meet the requirement of reasonableness and upheld the appeal.

### **What does this mean for you?**

Given the similarities between the English UCTA and the Trinidad & Tobago UCTA, the findings of the English Court of Appeal in the Regus case will be of highly persuasive influence on a Trinidad court construing similar provisions. The Regis case demonstrates that businesses can obtain effective protection from potential liabilities by making appropriate use of exclusion clauses. To maximize the chances of an exclusion clause being enforceable, there are, however, some important

matters that should be considered, including the following:

- **The Requirement of Reasonableness:** Applying the reasonableness factors to your exclusion clause, does it satisfy the reasonableness requirement? Can the clause be drafted any differently, or can the structure of the business relationship be altered in any way, so as to maximize the chances that your exclusion clause will be considered to be reasonable?
- **Exclusion of all Remedies:** Be wary of over-reaching. Instead, try to draft the clause to give you the protection you need while maintaining as much balance as possible. If an exclusion clause purports to exclude all remedies for a fundamental breach of contract, it will likely be rendered unenforceable;
- **Severability:** If any part of your exclusion clause can be said to be independent from the other parts, it can be severed from any unenforceable part, rendering it valid and enforceable by the courts. Again, consider how the clause may be drafted so as to emphasize as far as possible the independence (and therefore severability) of its different parts.

If used carefully and properly, exclusion clauses are valuable and effective tools to manage and limit your business and legal risks. Used without thought and care, however, they will frequently not worth the paper on which they are written.

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Eleven Albion, Cor. Dere & Albion Streets  
Port of Spain, Trinidad & Tobago  
Tel: 1(868) 821-5500  
Fax: 1(868) 821-5501

E-mail: [mhs@trinidadlaw.com](mailto:mhs@trinidadlaw.com) / WEB: [www.trinidadlaw.com](http://www.trinidadlaw.com)  
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