

Exclusion of Consequential/Indirect Losses: McCain Foods (GB) Limited v Eco-Tec (Europe) Limited (2011)

It is a common misconception that a party would be able to avoid substantial liability by including an exclusion clause in respect of its liability for the other party's "indirect" or "consequential" losses. There is a myth that by excluding liability for indirect and consequential losses a party would escape liability for loss of profit and economic loss. Loss of profits and economic losses are not restricted to being "indirect" or "consequential" losses. Loss of profits and economic losses are also capable of being recovered by a party as "direct" losses if such losses were the natural consequence of the breach. There is therefore no certainty that exclusion of "indirect" or "consequential" loss will lead to exclusion of liability for loss of profit and economic loss. On the contrary, exclusion of liability for indirect or consequential loss will not exclude liability for lost profit etc, if it is found on the facts of the case that these losses arose directly in the natural course of events.

In this case, the court decided that all of the losses claimed by the claimant were direct losses arising naturally from the breach (which included significant lost profits and various economic losses). The exclusion clause in the contract, excluding the respondent's liability for "indirect" losses, did not reduce the claimant's claim at all; since the court decided that the amounts claimed were all direct losses.

It is dangerous to assume that a clause excluding liability for indirect/consequential losses will protect a party against large financial losses. Exclusion clauses need to be carefully drafted and tailored in line with the particular circumstances of the agreement, and where the "indirect and consequential loss" formula is used, clear provisions should be included to exclude any further or additional types of loss.