

# Particularly onerous or unusual contract terms: parties have wide freedom to agree

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[In \*Goodlife Foods Limited v Hall Fire Protection Limited\* \[2018\] EWCA Civ 1371 the English Court of Appeal held that a “stringent” limitation of liability clause was not particularly onerous or unusual.](#)

It is an established common law principle that if a party proposes a contract term that is ‘particularly onerous or unusual’, the term will not be incorporated into the contract unless it has been fairly and reasonably brought to the counterparty’s attention.

The recent decision of the Court of Appeal of England & Wales in *Goodlife v Hall Fire* indicates that common law courts may uphold a clause severely restricting a party’s ability to recover its losses, if the limitation of liability is not excessively onerous or unusual in the context of the contract as a whole.

## Key Facts

Goodlife contracted with Hall Fire for Hall Fire to provide a fire suppressant system for Goodlife’s food factory. After the system was installed, a fire broke out at the factory which the system failed to stop. The factory burned down and Goodlife suffered extensive losses, far in excess of the price of the contract with Hall Fire.

Goodlife sued Hall Fire for damages to recover its losses from the fire. Hall Fire sought to rely on an exclusion clause in its standard conditions of contract, which stated:

“We exclude all liability, loss, damages or expense consequential or otherwise caused to your property, goods, persons or the like, directly or indirectly resulting from our negligence or delay or failure or malfunction of the systems or components provided by HFS for whatever reason.

In the case of faulty components, we include only for the replacement, free of charge, of those defected [sic] parts.

As an alternative to our basic tender, we can provide insurance to cover the above risks. Please ask for the extra cost of the provision of this cover if required.”

As the Court observed, this was a “stringent” limitation of liability that would only allow Goodlife to recover small sums in limited circumstances.

Hall Fire had also stated on the first page of its standard conditions “We draw your particular attention to the following specific conditions... which do not provide for the imposition of any form of damages whatsoever and are based on English Law...”.

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## Decision

The Court ruled that the clause was binding on the parties. The Court:

- decided that the exclusion clause was not “particularly onerous or unusual”, taking the approach that whether a clause is particularly onerous or unusual depends on the “context of the contract as a whole”;
- noted that the English courts had previously upheld an exclusion clause which limited liability to the value of the contract. The Court agreed with the first instance decision that the clause in question was no more onerous than a clause limiting liability to the contract price, because neither clause would have permitted Goodlife to recover a significant proportion of its losses. Neither type of exclusion clause was incapable of being a “reasonable allocation of risk”.
- reviewed a range of exclusion clauses from similar contracts for similar products and services, and decided that even though the clause was “at the far-reaching end of the spectrum”, it could not be described as particularly unusual;
- noted that Hall Fire had offered in the exclusion clause to sell Goodlife insurance, which Goodlife had rejected;
- noted that Goodlife had the opportunity to negotiate the exclusion clause, but had not done so;
- decided that in any event the clause had been “fairly and reasonably” drawn to Goodlife’s attention.

## Comment

The case is a useful reminder that the English courts tend to uphold the strict terms of a contract even in circumstances which produce a severe outcome for one party. This strict approach has recently been demonstrated in cases concerning other types of construction-related clauses, including exclusions of concurrent delay (*North Midland Building Limited v Cyden Homes Limited* [2017] EWHC 2414 (TCC)) and penalty clauses, which are relevant to liquidated damages (*Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67).

It is therefore important to bear in mind that parties choosing to be bound by English law will be unable to argue that a contract term is particularly onerous or unusual if the clause is a reasonable allocation of risk and within the spectrum of normality within the relevant industry. This principle is not merely limited to parties dealing on their own standard terms of business: for example, terms in standard form construction contracts have been found to be particularly onerous or unusual (see e.g. *Picardi v Cuniberti* [2003] BLR 487). Any party seeking to rely on a stringent exclusion clause should describe the liability that it is proposing to exclude in the communication with its counterparty enclosing the proposed contract terms.

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