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# REDEFINING EXCLUSIVITY: A CASE ANALYSIS OF EE V VIRGIN MEDIA

AUTHORED BY - AKSHANSH PANDEY

## Facts

1.	EE (Everything Everywhere), is one of the leading companies when it comes to the mobile operating industry in the UK (United Kingdom).
2.	Virgin Media, is a major broadband and cable television provider in the same territorial region.
3.	The issue revolves around a major merger of the aforementioned into a powerful telecommunications giant.
4.	The Merger which took place in 2021, allowed for Virgin Media and it's patented technologies for highspeed broadband and TV services to use EE's robust mobile infrastructure and network.
5.	The merger allowed for the new entity to become more effective and adapt to the evolving digital market in the converged mobile and fixed-line sectors.

## Issue

*“The exclusion clause in the undertaken agreement excludes any and all liability arising from anticipated profits”.*

The amendment at the center of this dispute allowed Virgin Media to use 5G mobile services from other networks for its customers. If 5G services for a customer were provided by an alternative network, then 2G, 3G, and 4G services could also be supplied by the same alternative network.

This amendment thus introduced an exception to the original exclusivity clause. Following this change, Virgin Media entered into an agreement with Vodafone to provide 5G services and started migrating its customers to Vodafone's network.

<b>EE</b>	The argument was founded on the basis that V.M had directed non-5G customers from E.E to their Vodafone network, thereby breaching the exclusivity clause.
<b>Virgin Media</b>	It was argued that Virgin Media did not breach the undertaken exclusivity clause and that E.E's claim for losses fell under the clear and ordinary meaning of "anticipated profits," making the claim excluded by the Agreement's exclusion clause.

### Ratio

The Court determined that the **wording of the exclusion clause in the Agreement precluded EE's claim for damages against Virgin Media.**

The Court determined that the only possible outcome for EE's allegation of "charges unlawfully avoided" was loss of profit. The Court then considered whether the exclusion clause applied to loss of profits in this particular situation.

The Court determined that **Virgin Media's exclusion clause did apply to any culpability for damages resulting from customers switching to an alternate network.** As a result, Virgin Media was awarded a summary judgment, and EE was unable to pursue damages.

The Judge stated that the *underlying premise* in evaluating exclusion clauses is that neither party wishes to give up on their legal options. In this case, the judge determined that the exclusion clause's *plain language was adequate* to refute the assumption that the parties did not want to give up their claims for lost profits.

The court in lieu of the exclusion clause delved deep into the well-established general approach to contractual interpretation, and additionally the purposive and contextual principles applicable to the interpretation of exclusion clauses as laid down in the case of *Drax v. Wipro*.<sup>1</sup>

In doing so, the Court recognized the exclusion clause's attempt to bar damage claims for any type of profit loss and granted the terms "anticipated profits," as written, their ordinary meaning. The court concluded that there was **no difference in this case between "lost profits" and "anticipated profits."**

<sup>1</sup> Drax Energy Solutions Limited v Wipro Limited [2023] EWHC 1342 (TCC)

The fact that the case involved a "*bespoke, lengthy and detailed contract*" that had been negotiated by "*sophisticated parties*" and that, as a result, each party's risks and rewards had been carefully assessed were among the many considerations that the judge gave weight to. The Court further pointed out that the clause did not aim to favor just one side.

### Analysis

The interpretation of an exclusion clause in EE and Virgin Media's contract is at the heart of the decision, which specifically looks at whether or not EE's claim for damages was precluded by this clause. The interpretation of the exclusion clause's contents was crucial to the Court's reasoning, especially in light of claims for lost or expected profits. The Court's initial ruling determined that EE's claim for damages against Virgin Media was clearly barred by the agreement's exclusion clause, which specifically excluded claims pertaining to "anticipated profits." As a claim for lost earnings, EE's allegation of "charges unlawfully avoided" was deemed to fall under this exclusion.

The Court also talked about the general rule used to interpret exclusion clauses. According to this presumption, unless expressly stated otherwise, parties to a contract do not often intend to abandon their rights to pursue legal remedies. In this instance, the Court determined that the exclusion clause's wording was sufficiently explicit and unequivocal to overcome this presumption. The language's clarity proved that both parties had meant for claims for lost profits to fall inside the purview of the exclusion clause.

The Court also highlighted the significance of understanding contractual phrases in their plainest form, defining "anticipated profits" to include any type of lost profit. The idea that "lost profits" and "anticipated profits" could meaningfully differ in the context of this exclusion provision was rejected by the judge. The idea that words in a contract should be given their natural and usual meaning—especially when they are written clearly—was supported by this view.

The Court also took into account the character of the contract itself, emphasizing that it was drafted by "sophisticated parties" and described as a "bespoke, lengthy, and detailed contract." The fact that both parties had carefully weighed the risks and rewards throughout the contract's drafting was given weight by the judge. This historical information suggested that the parties understood the ramifications of the exclusion provision. The Court further supported the desire

to allow claims for loss of profits within its scope by noting that the exclusion provision was not biased and was instead designed to apply to both parties equally. The exclusion clause's clarity ultimately resulted in a summary decision in Virgin Media's favor, preventing EE from obtaining damages.

### **Conclusion**

The Court concluded by upholding the exclusion clause and declaring that EE was not entitled to any damages from Virgin Media. The provision's precise and unequivocal wording—which included losses from projected profits—was adequate to overcome the general rule against giving up legal recourse. The ruling stressed how crucial it is to uphold the basic meaning of phrases in contracts, especially when sophisticated parties are involved in complicated agreements. In doing so, the Court upheld the legality of exclusion clauses in cases where they are drafted plainly, supporting Virgin Media's summary judgment and excluding EE from obtaining damages for lost profits.

