



CPA Model Conditions fail to protect owner of construction plant

Summary and implications

The Construction Plant Hire Association's Models Conditions for Plant Hire 2001 (CPA Model Conditions) are widely used throughout the construction industry. The CPA Model Conditions are rarely varied by parties. Often they are simply relied upon as being capable of covering all eventualities.

Regularly, owners of plant hire out their plant, together with one of their employees to operate it. They often work under the illusion that if anything goes wrong (that results in a legal claim for damages), the CPA Model Conditions will successfully protect them from liability. This is simply not always the case, as the recent case of *Jose v MacSalvors Plant Hire Ltd [2009]* vividly illustrates.

The MacSalvors case raises the following key points:

1. Do not assume that the CPA Model Conditions will cover you for all possible liabilities.
2. Review the CPA Model Conditions carefully in line with your expectations and intentions for the transaction.
3. Propose variations to the CPA Model Conditions if you consider them necessary (you are entitled and able to do this.)
4. If you intend to exclude liability for breach of a duty on your part, make sure that you do so clearly in your terms and conditions.

The MacSalvors case: the facts

Brush Transformers Ltd (Brush) hired a crane from MacSalvors Plant Hire Limited (MacSalvors). MacSalvors also provided one of their experienced crane operating employees to work the crane.

MacSalvors' employee fell from the crane, whilst descending it. The fall was due to a missing section of the crane, which the experienced employee relied upon being present during his regular descents. The section had not been fitted by MacSalvors prior to its hire to Brush.

Ask a question

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The failure to fit the section was a breach of health and safety law and, as a result, the employee brought a personal injury claim against MacSalvors. MacSalvors settled the employee's claim and paid him substantial compensation.

MacSalvors then brought a claim against Brush, requiring Brush to indemnify it for the compensation that it had paid out to its employee. MacSalvors did so on the basis that clause 8 of the CPA Model Conditions put responsibility on Brush for "all claims" arising from the use of the crane, and that it was entitled to the benefit of the indemnity provided under clause 13 of the CPA Model Conditions.

Clarity Matters: no protection for those in breach of a duty

MacSalvors had breached health and safety law. However, it wanted to pass on its resulting losses to Brush. It was, in principle, possible for MacSalvors to do so, but it is established law that a party wishing to exclude liability for a breach of duty must do so by use of clear words. An owner of plant cannot hide behind ambiguous wording to the detriment of the hirer.

In the absence of clear and unambiguous wording, it is likely that a court will find that a clause seeking to exclude an owners' breaches of duty will fail, as it did in the MacSalvors case (a decision affirmed by the Court of Appeal).

Model conditions generate model outcomes: for proper protection, tailor the conditions

Model conditions, like the CPA Model Conditions, are tried and tested and reliable. They are also widely used throughout the industry.

Model conditions are not, however, necessarily suitable for all eventualities. Their greatest strength (certainty and reliability) can, in turn, be their greatest weakness (inflexibility and irrelevance). On that basis, irrespective of the model conditions and the industry in question, parties should always consider tailoring them to their specific needs. If they do not, they cannot assume the protection that they seek will in reality be in place.

Relevant Clauses in the CPA Model Conditions

Clause 8 states:

"When a driver or operator or any person is supplied by the Owner with the plant, such person shall be under the direction and control of the Hirer. Such drivers or operators or persons shall for all purposes in connection with their employment in the working of the plant be regarded as the servants or agents of the hirer (but without prejudice to any of the provisions of Clause 13) who shall also be responsible for all claims arising in connection with the operation of the plant by the said drivers/operators/persons..."

Clause 13 states:

"a) For the avoidance of doubt it is hereby declared and agreed that nothing in this Clause affects the operation of clauses 4, 5, 8 and 9 of this Agreement.

b) During the continuance of the hire period the Hirer shall subject to the provisions referred to in sub-paragraph (a) fully and completely indemnify the Owner in respect of all claims by any person whatsoever for injury to person or property caused by or in connection with or out of the use of the plant."

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