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Proportionate liability clauses upheld

Need a small slip make you liable for the whole loss?

For many years, businesses have been trying to limit liability according to their fair share of the fault. Among the first to argue for "proportionate liability" were the big accountants, who are regularly sued over corporate failures because their insurers had deep pockets. The issue frequently arises in the constructions industry, where there are often several firms of contractors and professionals who might share responsibility for a fault or delay.

In most cases, where there are two or more possible defendants, they will be jointly and severally liable for the loss. that means the claimant can sue any or all of them, and recover the whole of his loss from the chosen defendant, leaving the defendants to sort out contributions amongst themselves. that can be very unfair to defendant if the others have gone bust or disappeared. In the very worst cases it can even make claimants careless about the choice of contractors: so long as they have one solid defendant, they need not worry about the competence or financial strength of the others.

"Net contribution clauses" have often been inserted in contracts, but lawyers have doubted whether they worked. Now the Court of Appeal has confirmed that they do - even in consumer contracts.

In [West v Ian Finlay & Associates](#) a very simple term was held to work: "Our liability for loss or damage will be limited to the amount that it is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you". The clause protected an architect from liability for the part of the claimant's loss fairly attributable to the defective work by the (insolvent) building contractor. It survived challenges under the [Unfair Terms in Consumer Contracts Regulations](#) and the [Unfair Contract Terms Act 1977](#).

All businesses which could potentially share liability with others should review their contract terms and consider whether they should be using a net contribution clause. That includes most businesses in the

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construction industry and most professional firms. It remains to be seen whether the same approach can be extended to exclude liability for the defaults of your own sub-contractors.

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