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Law of Contract Special Study

G156/RM

Pre-release Special Study Material

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- This document consists of **8** pages. Any blank pages are indicated.

G156 LAW OF CONTRACT

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

Extracts from the Unfair Contract Terms Act 1977.

2 Negligence liability

(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

6 Sale and hire purchase

(2) As against a person dealing as consumer, liability for breach of the obligations arising from –

(a) section 13, 14, or 15 of the 1979 Act (sellers' implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose); cannot be excluded or restricted by reference to any contract term.

(3) As against a person dealing otherwise than as consumer, the liability specified in subsection (2) above can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness.

7 Miscellaneous contracts under which goods pass

(1) Where the possession or ownership of goods passes under or in pursuance of a contract not governed by the law of sale of goods ….

(2) As against a person dealing as consumer, liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to any such term.

(3) As against a person dealing otherwise than as consumer, that liability can be excluded or restricted by reference to such a term, but only in so far as the term satisfies the requirement of reasonableness.

11 The "reasonableness" test

(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act … is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; ….

Schedule 2

"Guidelines" for Application of Reasonableness Test

The matters to which regard is to be had in particular for the purposes of sections 6(3), [and] 7(3) … are any of the following which appear to be relevant –

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;

(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealings between the parties');

(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

SOURCE 2

Extract adapted from the judgment of Lord Denning in *Olley v Marlborough Court Hotel Ltd* [1949] 1KB 532 CA.

Text has been removed due to third party copyright restrictions.

SOURCE 3

Extract adapted from the judgment of Lord Denning in *Thornton v Shoe Lane Parking Ltd* [1971] 2 WLR 585 CA.

Text has been removed due to third party copyright restrictions.

SOURCE 4

Extract adapted from the judgment of Lord Wilberforce in *Photo Productions Ltd v Securicor Transport Ltd* [1980] 2 WLR 283 HL.

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SOURCE 5

Extract adapted from 'Limitation Clauses in Standard Term Contracts – are they ever enforceable'. Sylvia Elwes. The Legal Executive Journal September. 1995.

The principle of freedom of contract would dictate that the terms of a contract should stand in their entirety. These are the conditions of trading, whether in standard form contract or otherwise, upon which the seller is willing to supply the goods at the contract price.

The consequences of breach of contract may be enormous and it is obvious that a supplier may only provide the goods if his liability can be excluded or limited by the terms of the agreement.

On the other hand, there may be no real equality of bargaining power. The buyer may not agree to the terms at all but have them imposed upon him. It is the question of which party should bear the risk in the event of a breach of contract and in many cases it is the supplier, who should be adequately covered by insurance.

Current law under the Unfair Contract Terms Act 1977 does not differentiate between contracts in standard terms and those individually negotiated, so far as consumers are concerned.

SI 1994/3159 was made in December 1994 and brought into effect the Unfair Terms in Consumer Contracts Regulations 1994 [now replaced by the 1999 Regulations]. Under the Regulations, 'unfair' terms in standard term contracts between a seller or supplier, and a consumer are not binding on the consumer.

The Regulations define standard terms as those which have not been individually negotiated. They are not negotiated [individually] where they have been drafted in advance and the consumer has been unable to influence the substance of the term.

An 'unfair term' is a term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

Certainly a term excluding or limiting liability would be such an unfair term, but unfair terms are not limited to these terms. Schedule 3 contains a non-exhaustive list of terms that may be regarded as unfair.

For example a term that irrevocably binds the consumer to terms which he had no opportunity of becoming acquainted with before the conclusion of the contract may be unfair.

Unfair terms are not automatically unenforceable against the consumer under the regulations. They must be "contrary to the requirement of good faith". The court must consider:

- the strength of the bargaining position of the parties;
- whether the consumer had an inducement to agree to the terms;
- whether the goods were sold to the special order of the consumer;
- the extent to which the seller had dealt fairly and equitably with the consumer.

The first three are the same factors laid down under Schedule 2 of the UCTA 1977. However, the fourth factor is a different factor.

In addition, the regulations provide that, if there is any doubt about the meaning of a term in a written contract, the interpretation most favourable to the consumer will prevail. This is a statutory reinforcement of the common law "*contra preferentum*" rule.

Further, although a term in a standard term agreement may be unfair, the contract may still be enforceable if it can be carried out without the term.

These regulations are far reaching and erode significantly the principle of freedom of contract in consumer sales.

Whereas at present, an exclusion or limitation clause must be reasonable in any type of contract, standard term or otherwise, with a consumer the new law will mean that additionally it must be entered into in good faith. If not it will not be binding on the consumer.

It is becoming increasingly difficult to have valid limitation clauses in standard term contracts. New regulations will afford additional protection to consumers against these and other unfair terms.

SOURCE 6

Extract adapted from *Contract Law*. Ewan McKendrick. 6th Edition. 2005. Palgrave MacMillan Law Masters. Pp 228-9.

The general approach which the courts have adopted to the interpretation of exclusion clauses is a restrictive one, under which the exclusion clause is interpreted strictly against the party seeking to rely on it. This rule is called the '*contra preferentum*' rule. The effect of the rule is that any ambiguity in the exclusion clause is resolved against the party seeking to rely on it. Although the […] rule is applicable to any ambiguous term in a contract, it has been applied particularly stringently to exclusion clauses….

One consequence of the application of the … rule has been a game of 'cat and mouse' between contract draftsmen and the courts, as draftsmen have sought to evade the restrictive interpretations adopted by the courts. This can be illustrated by … two cases. In *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394, a contract for the sale of seeds contained a clause which stated that sellers gave 'no warranty express or implied' as to the description of the seeds. The seeds did not correspond with the description so the buyers bought an action for damages. The sellers sought to rely on the exclusion clause. It was held that they could not do so because it only covered breach of a 'warranty' and … the sellers had broken a condition. The impact of this ruling can be seen in *Andrews Bros (Bournemouth) Ltd v Singer and Co Ltd* [1934] 1 KB 17. [Here] the exclusion clause stated that 'all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded'. The claimants contracted … to buy … 'new Singer cars'. One of the cars delivered by the defendant was a used car. The claimants sued for damages and the defendants sought, unsuccessfully, to rely on the exclusion clause. Greer LJ said that the defendants were probably trying to escape the effect of *Wallis* but … although they had included the word 'condition', they had omitted the word 'express' and this was fatal because the court held that the defendants had broken an express term of the contract.

However, this strict approach may now be undergoing some reconsideration. In *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 WLR 964, the House of Lords held that, in a case of limitation clauses, the *contra preferentum* rule did not apply with the same rigour as in the case of exclusion clauses.

It would appear that the distinction between a limitation clause and an exclusion clause remains part of English law because the decision in *Ailsa Craig* was followed in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803.