

CONTRACT – Exemption clauses (lecture 11)

An exemption clause is a term 'which excludes or modifies an obligation, whether primary (in the contract) or general secondary (obligation to pay compensation)...that would otherwise arise under the contract by implication of law.' – *photo productions v securicor*. Effect of an exemption clause – the definitional view (*laissez faire*) OR the exclusory approach (paternalistic and interventionist). Controlling exemption clause: incorporation, construction and statutory regulations

INCORPORATION

SIGNATURE

Usually binds (*L'Estrange v Graucob*), unless exceptions apply: if there has been a misrepresentation (*Curtis v Chemical Cleaning*); if the document has no contractual effect eg a time sheet (*Grogan v Robin Meredith Plant hire*); if the defence of Non est factum (the deed is not mine eg fraud) applies (*Saunders v Anglia Building Society*).

REASONABLE NOTICE

Proferens must take reasonable steps to bring the term to the other party's notice – *Parker v South Eastern Railway*

Incorporation by reference? (refer to another document). This is classed as reasonable notice - *Thompson v London, Midland & Scottish Railway*; *O'Brien v MGN Ltd*

Timing

Notice must be given before or at the time of contracting – *Olly v Marlborough Court Hotel* (EC was on back of hotel door, so D could not rely on it); *Thornton v Shoe Lane Parking* (machine sales)

Onerous clause

If onerous clause, greater notice required - *Thornton v Shoe Lane parking*; *Interfoto picture library v stiletto visual programming*.

NB. Signature will incorporate onerous clause except in extreme circumstances (non est factum – fraud/misrep) – *Chemical Transport Inc. Exnor Craggs Ltd* or fraud.

Contractual document

A written document or notice which includes the clause must be one which has contractual effect (not time sheets or receipts) – *Chapleton v Barry UDC*; *Grogan v Meredith*. However, the ct will look at each case.

COURSE OF DEALING

Must be consistent and regular – *McCutcheon v David MacBrayne*

3/4 times in 5yrs – not incorporated – *Hollier v Rambler Motors*

3-4 times a month for 3 years – incorporated – *Harry Kendall & Sons v William Lillico & Sons*

5 times over 13 months – incorporated – *Petrotrade inc v Texaco*. It was regular for that type of business.

CONSTRUCTION

It is the courts interpretation. They will give the clause its natural and ordinary meaning ie does the clause cover the breach, whether fundamental or otherwise? – *George Mitchell v Finney Lock Seeds*. So does the wording cover the breach? Does it exclude or limit liability?

1. Contra Proferentum: any ambiguity in the clause will be construed against the proferens – *Andrews brother v singer & co*; *Houghton v Trafalgar insurance co ltd*.

2. Excluding liability for negligence. Negligence here is breach of duty of care in tort and breach of contractual duty to exercise reasonable care and skill eg *S13 SGSA 1982*.

Apply: *The Canada Steamship Test* per Lord Morton

a) Does clause specifically refer to negligence OR synonym of negligence? – *Monarch Airlines Ltd v London Luton Airport* 'any act or omission, neglect or default'.

b) If no clause, is the clause wide enough to cover negligence? Eg 'any loss or damage' or 'we accept no liability'.

c) If yes, is the clause too wide? Is there one ground other than negligence which is not too far from the rest of the clause? *White v Warwick*; *EE Caledonia Ltd v Orbit Valve Co*. If negligence is too wide, it fails. Where clauses ONLY excluding negligence it will work - *alderlade v hendon v laundry*.

NB Recent approach to *Canada Steamship* – 'broad guidelines not prescribing rigid rules' (*HIH Casualty & general insurance v chase manhattan bank*)

A clause which limits rather than excludes liability is read less restrictively – *Aisla Craig v Malvern Shipping*.

The (obsolete) doctrine of fundamental breach

Cannot exclude liability for 'fundamental breach'. Doctrine finally consigned to history – *photo productions v securior*

Third party and exemption clauses

work – *Scruttons Ltd v Midland Silicones Ltd*; *NZ Shipping Co Ltd v AM Satterthwaite*. Also Contract (Rights of Third Parties Act) 1999 – s1(6) and s6(5) can exempt third parties.