

CONTRACT – Exemption clauses (lecture 12)

STATUTORY REGULATION

Unfair Contract Terms Act 1977 (UCTA)

Covers business liability: exemption or limitation clauses re contractual and tortious liability (s1(3)) and for PI and death, non-contractual notices (s2(1)).

S1(1) Negligence – ‘breach of any term to take reasonable care or exercise reasonable skill’. NB s13 SGSA 1982

S2 Control over terms that exclude or restrict liability for **negligence**. S2(1) cannot exclude or restrict liability for death or PI resulting from negligence BUT S2(2) dealing with other loss or damage from resulting negligence can be excluded BUT clause/notice will be subject to reasonableness test (s11 & sch.2). S11(3) specifically for notices.

S1(3) Act applies to Business Liability – liability arising from things done in the course of business AND from the occupation of business premises (see also s14).

S3 Control over terms that exclude or restrict liability for **breach of contract**.

S6 Control over terms that exclude or restrict liability in contracts for the **sale and supply of goods**.

S12 Dealing as Consumer – where NOT dealing in course of business AND other party IS dealing in course of business – *R & B Customs Brokers v United Dominions Trust* (decided the company car was a consumer purchase as it was not integral to the business)/ *Stevenson Rogers v Feldaroll Foundry plc* (Hermes Leasing Ltd).

S13 Varieties of exemption clauses – a) making liability subject to restrictive or onerous conditions b) Excluding or restricting any right or remedy c) Excluding or restricting rules of evidence or procedure – *Stuart Gill v Horatio Myer*

The Reasonableness Test

S11(1) ‘a fair and reasonable one to have been 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**’

Reasonableness of a clause is a question of fact left to the discretion of the court (*George Mitchell v Finney Lock Seeds*)

Reasonableness broadly unaffected by the seriousness of the loss or damage sustained. Also, the circumstances known to one party only are irrelevant eg market difficulties involved in procuring product.

S11(4) Limitation Clauses: Relevant factors in determining reasonableness. S11(4)(a) Resources of party relying on clause. S11(4)(b) Whether party relying could have insured – *St Albans v International Computers Ltd* (policy decision and international companies have insurance so they should pay)

S11(3) – non-contractual notices. **Burden of proving that a contract term is reasonable rests upon the person claiming that it is** (s11(5))

Guidelines schedule 2 (note s11(2)), but “the considerations there set out are normally regarded as being of general application to the requirement of reasonableness” – *Stewart Gill v Horatio Myer*.

a) strength of bargaining positions; b) inducement to agree to term; c) knowledge of the term; d) compliance with condition; e) special order

CASES: *George Mitchell v Finney Lock Seeds*/ The software cases eg *Watford Electronics v Sanderson* – reasonable JCs negotiated by experienced business people/ The ‘soft drinks’ cases eg *Price v Mitchell* *Soft Drinks v Messer UK Ltd* – reasonable EC in standard form contract not bearing non-contemplated risk.

Liability arising in contract – S3

Breach of general contract term (NOT implied by SGA/SGSA), where business to consumer contract on standard terms. Can only exclude/restrict liability and render substantially different/no performance IF terms satisfies reasonableness test (S11 & sch.2)

Cases: *R & B Customs Brokers v United Dominions Trust*/ *Stevenson Rogers v Feldaroll Foundry plc v Hermes Leasing Ltd*.

Liability from breach of Sale and Supply of Goods – S6

S6-where excluding liability for breach of terms implied by SGA 79 & SGSA 82.

S6(1)(a) – s12 SGA 79 (ie title) can NEVER be excluded or restricted.

S6(2)(a)- as against CONSUMERS as ss13,14 and 15 SGA 79 cannot be excluded or restricted.

S6(3) – as against NON-CONSUMERS, ss13-15 of the SGA 79 can be excluded or restricted in so far as it is reasonable to do so. Requirement of the of reasonableness (s11 & sch 2). All above are true for corresponding SGSA terms.

Unfair Terms In Consumer Contract Regs 99 (UTCCR)

Main distinctions from UCTA:

Reg 3 Consumer – only natural or legal person acting for purposes outside his trade, business or profession – narrower than UCTA 77.

Reg 4 Scope of Regs – Business to consumer. Apply to all unfair terms in contracts – wider than UCTA 77.

Reg 5 Unfair – Not ‘individually negotiated’ ‘contrary to good faith’, which causes ‘significant imbalance’ in the parties’ rights to the consumer’s detriment.

Reg 6 Unfairness assessed taking account – subject matter; all circumstances surrounding conclusion of contract; all other terms of contract.

Reg 7 Plain, intelligible language

Reg 8 Effect of unfair term – shall not be binding; contract continues if possible.

Sch.2 – indicative/non-exhaustive list unfair terms (terms in the past that have decided to be unfair) – *Director General of Fair Trading v First National Bank*

Sch2(1)(a) – limiting liability where death or PI.

Sch2(1)(e) – requiring a **disproportionately high sum in compensation (penalty clause)**

NB UCTA ONLY APPLIES TO EXEMPTION CLAUSES