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A2 GCE LAW

G156/01/RM Law of Contract Special Study

PRE-RELEASE SPECIAL STUDY MATERIAL

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G156 LAW OF CONTRACT
SPECIAL STUDY MATERIAL

SOURCE MATERIAL**SOURCE 1*****Exemption Clauses in Contract Law, Peter Blood, A-level Law Review, January 2014, pp24–27***

Exemption clauses are viewed unfavourably by the law for four main reasons:

- because of what they do – they allow a person to break a contract without incurring liability
- because of who they are used by – they tend to be used by big businesses and large organisations 5
- because of who they are used against – they tend to be used against private individuals and small businesses
- because of how they are imposed – they tend to be imposed via standard form take-it-or-leave-it contracts, which the other party has no choice but to accept...

The main way in which the common law controls exemption clauses is by insisting that those who rely on one must prove clearly that it has been incorporated into the contract. If they cannot prove incorporation the clause will fail. 10

To prove incorporation, the party relying on the exemption clause must do one of the following:

- produce a written document, agreed to in writing by the other party, that contains the clause as one of its terms. See for example *L'Estrange v Graucob* (1934) in which the claimant was held bound by an exemption clause in an agreement she had signed to rent a slot machine, even though the clause was printed in small print and the court accepted that she had not read it 15
- prove that the other party was aware of the exemption clause at the time they contracted 20
- prove that the other party ought reasonably to have been aware of the exemption clause at the time they contracted

Proving the last of these will normally be impossible if the other party could not reasonably have become aware of the exemption clause until after they had entered into the contract. 25

- In *Olley v Marlborough Court Hotel* (1949) the clause was contained in a notice in the hotel bedroom, which the customer had no way of reading until after he had checked into the hotel.
- In *Chapelton v Barry UDC* (1940) the clause was contained in a deck chair ticket, which the customer had no way of reading until after he had hired the chair. 30
- In *Thornton v Shoe Lane Parking* (1971) the clause was contained in a sign within a pay-as-you-enter car park, which the customer had no way of reading until after he had paid and entered the car park... 35

In some cases, however, the courts have held that a person's awareness of an exemption clause can be inferred from a 'consistent previous course of dealing'. [As in] **Spurling v Bradshaw** (1956) for example...

The other way in which the common law controls exemption clauses is by using a number of restrictive rules of interpretation when construing them, as follows... 40

Where C's agreement to an exemption clause has been obtained as a result of a misrepresentation (innocent or otherwise) by D as to the meaning of the clause, D will not be allowed to rely on the clause's true meaning, but only the meaning given to it by D...

Any ambiguity in the meaning of an exemption clause will be construed against the party seeking to rely on it... 45

The common law's approach to the control of exemption clauses can be criticised on a number of specific grounds:

- It places too great a significance on the fact that a party has signed a document... 50
- It allows a person to be held bound by an exemption clause because of a 'consistent previous course of dealing', but leaves unclear as to what this means. Compare, for example, **Spurling v Bradshaw** above with ... **Hollier v Rambler Motors** (1972).
- The *contra proferentum* rule can only be used where there is an ambiguity in the meaning of the exemption clause, but whether there is an ambiguity in any given set of words is notoriously subjective... 55

However tough the common law is on exemption clauses, its approach to them is too heavily influenced by its approach to contract law as a whole. It is grounded in a belief in freedom of contract ... and it is not for the courts to interfere with this freedom by saying whether a particular clause is fair or reasonable. 60

At the end of the day, therefore, if incorporation is proved and the rules of interpretation are satisfied, an exemption clause will be valid at common law, however unfair the result might be.

SOURCE 2

Extract from *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1987] EWCA Civ 6

LORD JUSTICE BINGHAM: In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as “playing fair”, “coming clean” or “putting one’s cards face upwards on the table”. It is in essence a principle of fair and open dealing. In such a forum it might, I think, be held on the facts of this case that the plaintiffs were under a duty in all fairness to draw the defendants’ attention specifically to the high price payable if the transparencies were not returned in time and, when the 14 days had expired, to point out to the defendants the high cost of continued failure to return them. 5 10

English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways. 15

The well known cases on sufficiency of notice are in my view properly to be read in this context. At one level they are concerned with a question of pure contractual analysis, whether one party has done enough to give the other notice of the incorporation of a term in the contract. At another level they are concerned with a somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual and stringent nature... 20 25

J. Spurling v. Bradshaw concerned an exemption clause in a warehousing contract. The case is now remembered for the observations of Lord Justice Denning at page 466:

“This brings me to the question whether this clause was part of the contract. Mr. Sofer urged us to hold that the warehousemen did not do what was reasonably sufficient to give notice of the conditions... I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.” 30

Here, therefore, is made explicit what Lord Justice Bramwell had perhaps foreshadowed, that what would be good notice of one condition would not be notice of another. The reason is that the more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given... 35

The crucial question in the case is whether the plaintiffs can be said fairly and reasonably to have brought condition 2 to the notice of the defendants. The judge made no finding on the point, but I think that it is open to this court to draw an inference from the primary findings which he did make. In my opinion the plaintiffs did not do so. They delivered 47 transparencies, which was a number the defendants had not specifically asked for. Condition 2 contained a daily rate per transparency after the initial period of 14 days many times greater than was usual or (so far as the evidence shows) heard of. For these 47 transparencies there was to be a charge for each day of delay of £235 plus VAT. The result would be that a venial period of delay, as here, would lead to an inordinate 40 45

liability. The defendants are not to be relieved of that liability because they did not read the condition, although doubtless they did not; but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention.

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SOURCE 3

Extract from *Consumer Rights Act 2015*, Lorraine Conway, BRIEFING PAPER, Number CBP6588, 18 May 2017

The Consumer Rights Act 2015 (CRA 2015) came into force on 1 October 2015. The Act represents the biggest overhaul of consumer law for many decades...

The main aim of the CRA 2015 is to consolidate consumer rights into one place, whilst enhancing consumer protections for consumers and modernising the law to take into account digital advances... [The] Act is in three parts... 5

- **Part 2** replaces and expands on the current rules regarding **unfair terms** in consumer contracts and notices. In so doing, it draws on the recommendations of the Law Commission...

Why was there a need for a new Act?...

In respect of **Part 2**, prior to the coming into force of the CRA 2015, the law on unfair terms was contained in two separate pieces of legislation, the Unfair Contract Terms Act 1977 (UCTA 1977) and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs). The UCTA 1977 contained particular rules about 'business to consumer' contracts. It made some terms in contracts automatically non-binding and subjected others to a test of reasonableness. The UTCCRs enabled consumers to challenge most non-negotiated terms of a contract on the grounds that they were unfair. The difficulty was that the UCTA 1977 and the UTCCRs had inconsistent and overlapping provisions, creating uncertainty for consumers and businesses. 10 15

In particular, there was uncertainty attached to the construction of Regulation 6(2) of the UTCCR, by which a term in plain, intelligible language would not be subject to assessment for fairness if it relates to the definition of the main subject matter of the contract or the adequacy of the price (the so called 'core terms exemption'). The Law Commission described it as having proved difficult to interpret, with regulators and business expressing different views. Following the Supreme Court decision in *Office of Fair Trading v Abbey National plc* [2009] UKSC 6 in which the Court held that bank charges for unauthorised overdrafts were not subject to assessment, there were calls to reform this core terms exemption... 20 25

Outlining the economic rationale for the [Consumer Rights] Bill, the Government said that it should make markets work effectively and drive economic growth..

It was the Government's view that the reforms should deliver market-wide changes which, in turn, should drive innovation and greater competitiveness, and help to build a stronger economy: 30

"...Well-functioning competitive markets encourage growth by creating incentives for firms to become more efficient and innovative. Markets can only be fully competitive if consumers are active and confident, meaning that they are willing to challenge firms to provide a better deal, switch between suppliers, and take up new products. Consumer law reform can play a central role in empowering consumers and hence supporting more effective competition." ... 35

The CRA 2015 also needs to be viewed within the context of other important changes to the consumer landscape. In April 2012, the Government announced a series of reforms to the bodies carrying out consumer functions. 40

Significantly, on 31 March 2014, the Office of Fair Trading (OFT) passed responsibility for consumer law enforcement to Trading Standards and to the new Competition Markets Authority (CMA). Trading Standards is responsible for preventing unfair trading practice (for instance, in advertising, promotion and selling practices) while the CMA is responsible for unfair terms enforcement (for instance, unfair ticket terms and conditions). 45

SOURCE 4**Extracts from the Unfair Contract Terms Act 1977 (as amended)****s2 – 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.

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(4) This section does not apply to (a) a term in a consumer contract...

s3 – Liability arising in contract.

(1) This section applies as between contracting parties where one of them deals on the other's written standard terms of business.

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(2) As against that party, the other cannot by reference to any contract term—

(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or

(b) claim to be entitled—

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(i) to render a contractual performance substantially different from that which was reasonably expected of him, or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness

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s11 – The “reasonableness” test.

(1) In relation to a contract term, the requirement of reasonableness ... 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.

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(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...

SOURCE 5**Extracts from the Consumer Rights Act 2015****Section 2**

(2) “Trader” means a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf.

(3) “Consumer” means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession. 5

Section 31

(1) A term of a contract to supply goods is not binding on the consumer to the extent that it would exclude or restrict the trader’s liability arising under any of these provisions—

- (a) section 9 (goods to be of satisfactory quality); 10
- (b) section 10 (goods to be fit for particular purpose);
- (c) section 11 (goods to be as described);
- (d) section 12 (other pre-contract information included in contract);
- (e) section 13 (goods to match a sample);
- (f) section 14 (goods to match a model seen or examined); ... 15

Section 61

(1) This Part applies to a contract between a trader and a consumer

Section 62

(1) An unfair term of a consumer contract is not binding on the consumer.

(2) An unfair consumer notice is not binding on the consumer. ... 20

(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.

(5) Whether a term is fair is to be determined—

- (a) taking into account the nature of the subject matter of the contract, and 25
- (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.

Section 64

(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that— 30

- (a) it specifies the main subject matter of the contract, or
- (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

(2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent. 35

(3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.

(4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.

Section 65 40

(1) A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence.

Section 68

(1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent. 45

(2) A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible.

SOURCE 6

Extract from *Contract Law*, 12th Edition, McKendrick, pp341–346

Not all terms in consumer contracts are subject to assessment for their fairness. ... The most difficult exemption in practice has proved to be the exemption that relates to what have been called 'core terms' of the contract. ...

Although expressed in slightly different language [to Article 4(2) of the European Directive on Unfair Terms in Consumer Contracts (93/13EEC)], the essence of [Section 64 of the Consumer Rights Act 2015] is to exclude from review terms which define the main subject-matter of the contract or which determine the price as long as they are in plain intelligible language (or, to use the language of the Consumer Rights Act 2015, are transparent and prominent)...

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The second exclusion relates to the [price]... the nature of this exemption ... has proved to be an issue of some controversy. That controversy is best illustrated by reference to the leading cases concerned with the interpretation of this particular exemption.

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The first such case is the decision of the House of Lords in [2002] where Lord Steyn stated that the definition of a 'core term' must be interpreted 'restrictively' so that the main purpose of the scheme is not 'frustrated by endless formalistic arguments as to whether a provision is a definitional or exclusionary provision'... [The House of Lords held that a term entitling the bank to the costs of seeking judgement to secure outstanding loans and interest] was not a term which expressed the substance of the bargain between the parties. ...

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The second case is the decision of the Supreme Court in *Office of Fair Trading v Abbey National plc* (2009)... In broad terms, the litigation raised the question whether the fairness of bank charges levied on personal current account holders in respect of what may be termed 'unauthorized overdrafts' could be challenged under the 1999 Regulations. To the surprise of many, the Supreme Court held that they could not be so challenged. ...

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The decision of the Supreme Court in *Abbey National* has been criticised on a number of grounds, principally: (i) it adopted a literal approach to the interpretation of the Regulations; (ii) it failed to pay sufficient attention to the purpose behind the Directive; (iii) it failed to protect consumers from unfair surprise; and (iv) the scope of the decision was not clear and it thus introduced considerably uncertainty into the law. ...

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It is, however, important to remember that the term is only excluded from assessment if it is in 'plain intelligible language' (as required by the Directive) or is 'transparent and prominent' (as required by the Consumer Rights Act). The terminological change which was introduced by the Consumer Rights Act was heavily influenced by the work of the Law Commission who were asked to review the exclusion in Regulation 6(2) of the 1999 Regulations after the decision of the Supreme Court in *Office of Fair Trading v Abbey National plc*. Their conclusion was that the law should be simplified and that a price term should only be excluded from review if it is transparent and prominent. The essential idea was that if a term was transparent and prominent, it would be subject to competitive pressures (because consumers would be aware of the term and so better able to compare it with other terms on offer) and so should not be assessed for fairness...

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Although the change may be largely one of terminology, it may be that English lawyers will find the labels 'transparent and prominent' easier to use than the 'plain intelligible language' test. As the Law Commissions stated (2013 at 3.16):

the emphasis on prominence ... offers a practical way of distinguishing between a headline price and what are commonly thought of as incidental or ancillary terms. It also emphasises that whether a term is exempt is within the control of the trader. A trader may ensure that a price is exempt from review by making it prominent.

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