

## EXEMPTION CLAUSES CONTINUED

A contracting party seeking to rely on an exemption clause to avoid or limit liability must show that the act complained of comes strictly within the terms of the clause. If it is in any way ambiguous then it will be interpreted against the party attempting to enforce it this is referred to as the **contra proferentem rule**.

### **Andrews Bros. v Singer [1934] 1 KB 17**

There was a contract to purchase new Singer Cars; the contract contained a clause excluding "*guarantees or warranties, statutory or otherwise*". One of the cars delivered to the dealer was a used car. The plaintiff sued Singer (*defendants*); they tried to rely on the exemption clause.

Held – The stipulation as to the suitability of the car was a condition, not a guarantee or a warranty, and as such was not covered by the exemption clause. The term "new singer cars" was an express term.

An exclusion of liability in respect of **implied** terms could not cover liability under the **express** term.

This is particularly so if there is any ambiguity in the term

### **White v John Warwick & Co Ltd [1953] 2 All ER 1021**

The plaintiff hired a bicycle from the defendant under a written agreement which included a provision that "*nothing in this agreement shall render the owners liable for any personal injuries*". The plaintiff was injured when the saddle tilted forward,

Held - The Court of Appeal found the defendant liable in negligence. The exclusion clause was sufficient to exclude liability for supplying a defective bicycle, but it was not sufficient to exclude liability for negligence, only liability for implied terms.

However it must be stressed that, although the rule is used to limit the effectiveness of exclusions and limitations, it is not an excuse for so twisting a clause to defeat its obvious meaning.

### **Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd & Securicor Scotland [1983] 1 All ER 101**

Securicor agreed to provide a security service for Ailsa Craig's boats in Aberdeen harbour. Because of their negligence one of the boats sank and took with it another boat belonging to R. The main issue at the trial was the third party liability of Securicor, whose contract with Ailsa Craig included a clause limiting

their liability "for any loss or damage of whatever nature arising out of ... failure in the provision of the services contracted for" to £1000.

Held - The House of Lords unanimously upheld the validity of this limitation; Lord Fraser said the strict principles applied when construing exclusion clauses are not applicable in their full rigour when considering clauses merely limiting liability. The contra proferentem rule still applies, but so long as the clause is clear and unambiguous there is no reason to doubt that the other party assented to it. No matter how extreme the breach was in the particular case as in Photo Productions Ltd v Securicor Ltd.

This case finally disposed of the notion that a fundamental breach not only destroyed the contract but also destroyed any exemption clause within it.

## **THE UNFAIR CONTRACT TERMS ACT 1977 (applies to both businesses and consumers)**

The title of the Act is something of a misnomer as;

a) it is not, strictly speaking about fairness

b) it is not only about contract terms.

The aims of the Act are broadly,

i) to invalidate certain types of provision excluding or restricting liability;

ii) to limit the extent to which a contracting party can rely on exemptions or exclusions.

### **Business liability**

Some of the sections of the Act ss2-5 and 7, apply only to business liability which is defined as:

"a) from things done or to be done by a person in the course of a business (whether his own business or another's); or

b) from the occupation of premises used for business purposes of the occupier;"

There is no other definition so it would appear that this is wide enough to cover government departments, local authorities and other statutory bodies and **excluding only a private individual.**

### **Negligence**

s2. Is concerned with clauses which attempt to exclude or restrict business liability for negligence by use of:

i) a contract term

ii) a notice

The strength of the restriction varies, in particular:

1. Death or personal injury-absolute prohibition, in other words it CANNOT be disclaimed
2. Other loss or damage- cannot exclude ***except so far as the term or notice is reasonable.***
3. Acceptance of the term or notice does not imply acceptance of the risk.

A classic example of public notices that we see regularly are those signs in gyms or car parks that state

***“This company accept no liability for anyone who uses this gym/car park”***

## **Standard Term Contracts**

s.3 a applies to contract where a business is dealing with “**a consumer**” on its own ‘Standard Terms’ it cannot:

1. exclude or restrict liability for breach
2. claim to be entitled to render a performance substantially different from that expected  
or
3. claim to render no performance at all

EXCEPT so far as is reasonable.

This section looks at situations where there is an **inequality of bargaining power** and the “consumer” or business may have been forced to accept a wide ranging exclusion or restriction, which may operate unfairly.

Ss, 4 & 5 are less important but, in outline, protect consumers from attempts to evade the principal provisions by reference to :

a) indemnity clauses

b) guarantees

s.10 further provides that a secondary contract cannot be used to evade liability imposed by the Act.

Ss 6,7 & 8 are covered later

## **UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS SI 2008/12772083 (applies to consumer contracts only)**

These Regs. replace the 1990 Regs. and extend the range of terms and circumstances that can be ruled to have no effect.  
They apply to any term in a contract not individually negotiated by the consumer.

“Unfair term” means any term which contrary to the requirements of good faith causes significant imbalance to the parties’ rights and obligations under the contract to the detriment of good faith”

The term that is thought to be ‘unfair’ can be referred to the Office of Fair Trading (O.F.T.) or a qualifying body such as The Consumers Assn. or a TS Dept. who can ask that the term be struck out of the contract, **the contract will persist without the relevant term**. The qualifying body may apply for an injunction to rule that the term is struck out if no satisfactory outcome can be negotiated. Schedule 1 to the Regulations lays down the Qualifying Bodies for the purpose of this legislation. Schedule 2 gives a list of some of the areas that could be deemed unfair.

A number of referrals have taken place where The OFT have asked for the contracts to be amended voluntarily by the business concerned. Many of these relate to mobile phones, double glazing and photocopiers. Latterly the banks have had to be taken to task by the OFT over their excessive charges

### **Office of Fair Trading v Abbey National Plc [2009] EWCA Civ 116, [2009] 2 W.L.R. 1286**

A case about bank charges in the United Kingdom, concerning the situation where a bank account holder goes into unauthorised overdraft.  
The Office of Fair Trading ('OFT'), acting on behalf of consumers, challenged these fees under the 1999 ('UTCCR'), which implements European Union Unfair Contract Terms Directive. OFT claimed the sizeable fees charged were not a fair reflection of the banks' costs but were instead a penalty, hence unlawful. If these fees were confirmed to be a penalty for breach of contract then under UK law the amount that could be charged would be limited to reflect the actual (and considerably lower) costs which were incurred by the bank.  
The High Court held that although the charges were not penal, they fell within the remit of the legislation and hence their fairness could be assessed by the OFT.

The Court of Appeal agreed. But the UK Supreme Court reversed this decision, holding that the charges could not be assessed for fairness by the OFT, or the courts. They held that UTCCR 1999 r 6(2), as the United Kingdom chose to implement the European Directive, precluded any assessment of the "core terms" of a contract, and because overdraft fees related to a bank's remuneration, the fees charged to consumers could not be challenged. The Supreme Court denied any reference to the European Court of Justice (through art 234 TEC), so bringing to an end the litigation.

**Office of Fair Trading v Ashbourne Management Services [2011] EWHC 1237 (Ch), [2011] All ER (D) 276**

The Defendant Company acted on behalf of around 700 gyms and health clubs nationwide. It recruited and signed up potential members (believed to number around 300,000) on standard form contracts and collected payments. Going as far back as 2000, the OFT received complaints from consumers about Ashbourne's conduct. Not satisfied by assurances given (and seemingly broken), the OFT issued proceedings to restrain Ashbourne's practices, alleging that the standard form agreements ("the Agreements") which it executed were regulated by the Consumer Credit Act 1974 ("the Act") and improperly executed, contained unfair terms within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR") and that the Defendant Company's practices (recommending unfair terms, exaggerating the impact of credit reference agency reporting, and chasing payments which were not payable) infringed the Consumer Protection from Unfair Trading Regulations 2008 ("CPR").