REASONABLE TERMS

The Unfair Contract Terms Act has, as its central concept, the stipulation that the term or notice satisfy the requirement of reasonableness.

e.g. s.2(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.

This raises the question, what constitutes reasonableness?

s. 11 provides some of the items necessary to answer this question.

1. Circumstances

Stevenson v Nationwide Building Society [1984] 272 EG 663

P purchased a property relying on the accuracy of a valuation report. However, the report was prepared negligently by the surveyor and P sued for loss. Building Soc. relied on a notice disclaiming liability.

Held - The valuation was negligent, and the Building Society would be vicariously liable unless liability had been excluded. In the absence of some other estoppel, the exclusion term had to pass the test of reasonableness under the Act. Given that the purchaser was himself an estate agent and properly experienced in such matters, the exclusion clause was reasonable.

Harris v Wyre Forest U D C [1989] 2 All ER 514

The proposed lender instructed a valuer to value the proposed security, knowing that the buyer and proposed mortgagee would be likely to rely upon that valuation alone, and not obtain an independent and more detailed report. The valuer sought to rely upon a clause in his terms excluding such responsibility. The potential mortgagor had paid an inspection fee to the building society, to whom a copy of the report was sent and in reliance on that report, purchased the house without further survey. They were ordinary consumers with no special knowledge.
Held - The valuer owed a duty of care to the buyer, it is foreseeable that if the advice is negligent the recipient is likely to suffer damage, and there is a sufficiently proximate relationship between the parties and that it is just and reasonable to impose the liability

As a result it can be said that one particular circumstance of importance is the level of knowledge of the injured party.

George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803

The claimant ordered winter cabbage seed from the defendant at a cost of £201.60; the seed did not match the description and was of inferior quality, the entire crop was lost at a cost of £61,000. The contract limited liability to ""replacement of the goods or a refund in price"
Held – The House of Lords stated this was not reasonable because:
1. the breach arose from the sellers negligence;
2. the seller could have insured against crop failure at a modest cost;
3. in the past the seller had settled claims in excess of the limitation sum;
this indicated that the seller did not always consider the clause fair and reasonable.

R W Green v Cade Bros Farm[1978] 1 Lloyd's Rep 602

A standard terms contract that complied with The National Association of Seed Potato Merchants, restricted the right of rejection of potato seed to: "Three days from delivery" and compensation was restricted to "the return of the contract price". The seed supplied to the buyer was infected with a virus, not detectable until the growing process had started.
Held – The three day limit was not reasonable given the type of damage suffered. The limit on compensation was reasonable: it was usual in the trade, both parties had equal bargaining power, and the buyer received no inducement to accept the limitation. The buyer could have bought guaranteed seed for a higher price.

As a result, agreement of the terms by representative bodies, e.g. NFU, I.C.E. will render a term which would otherwise be unreasonable as reasonable.

This applies even if the exclusion is total.

Southern Water Authority v Carey [1985] 2 All ER 1077

The predecessor of Southern Water Authority (before privatisation), entered into a contract to build a sewage works, the contract had a standard clause known to both parties "that 12 months after completion the main contractors, their subcontractors, servants or agents were not liable for defects in the works or loss attributable to such defects, also the main contractor was deemed to have contracted on their own behalf and for the subcontractors, servants and agents". The main contractor employed the defendants as subcontractors.

The plaintiff sued the subcontractors for negligence; the defendant relied on the clause in the main contract,
Held – The clause was not unfair as it was;

- Agreed on by both parties
- On terms specified by Southern Water

2. Notices

Where the exclusion is by notice, the circumstances when liability arose.

e.g. all cars parked at owners risk;
the company accepts no liability for coats left in this cloakroom.

Business entities cannot rely on a blanket exclusion to cover every outcome. If it is their fault and their negligence they are still liable.

3. Resources and Insurance

Phillips v Hyland & Hampstead Plant Hire Co Ltd [1987] 2 All ER 620

The plaintiffs hired an excavator and driver from the defendants to carry out building work at their factory, the contract incorporated clause 8 of *The Contractors Plant Association Conditions*; which excluded liability for negligence. The driver negligently drove into a wall and caused considerable damage to the plaintiffs factory.
They sued the defendant who relied on "*clause 8*". The plaintiffs alleged that clause 8, was subject to ***s. 2(2) of UCTA*** as it tried to "*exclude or restrict*" liability in negligence.
Held – This was an Unfair Contract Term. It was more reasonable for the owner of the vehicle to have insurance rather than the factory owner.

Thompson v Lohan (Plant Hire) Ltd and Another[1987] 2 All ER 631

The contract was essentially the same as in Phillips v Hyland, and the plaintiff's husband drove an earth mover at a quarry for Lohan Ltd. He was killed falling

from the vehicle. His Widow, the plaintiff sued both the owners and the hirers of the excavator, and succeeded against the hirer.
Held – As the machines were based at the quarry, it was more reasonable for Lohan to insure them rather than the plant hire Co.

Photo Productions Ltd v Securicor [1980] AC 827

See previously

Buying as a consumer

Rasbora Ltd v J C L Marine Ltd [1976] 2 Lloyd's Rep 645
The plaintiffs bought a power boat for £22,000, but they were not in the business of pleasure cruisers. When the boat sank on its maiden voyage Rasbora sued. JCL relied on an exclusion clause.

Held – Rasbora bought the boat as a consumer, hence the exclusion clause was not valid.

Although the other tests apply only to sales of goods etc., they have been imported into other areas. These are contained in Schedule 2 and are:

a) Strength of Bargaining Position, relative to each other

e.g. Green v Cade Bros.
Mitchell v Finney Lock Seeds

b) Inducement

Was the party agreeing to the term for a consideration.

e.g. Stevenson v Nationwide
Woodman v Photo Trade Processing [1981] 131 NLJ 933

The plaintiff took photographs of a friend's wedding, and took the film to the defendants for processing. A sign on the counter “limited liability for lost or damaged films to the cost of replacement”.
The films were lost through the defendant’s negligence, and the plaintiff sued for the distress caused by the loss, as these were the only photographs taken at the wedding in question.

Held - The judge said the limitation was unreasonable; it allowed the defendants to provide a cheap service for the majority of photographers whose films were not valuable, but there was no alternative service available for the minority who might be prepared to pay more for greater protection. “The industry offered a 2 tier system, where customers paid a lower price that excluded liability; in this case the customer was offered no such choice”

c) Knowledge

Did the customer know, or ought they to have known?
Were they customs of the trade?
Was there a history of previous dealings between the parties?
Was the language clear?

e.g. Thompson v Lohan
Phillips v Hyland

d) Practicability

Was it reasonable at the time of the contract to expect that compliance with the condition would be practicable?

e.g. Green v Cade Bros.
Mitchell v Finney Lock Seeds

e) Special Order
Goods may have been manufactured, processed or adapted to the special requirements of the customer.