

ANSWERS - SELF-TEST - EXEMPTION CLAUSES AND UNFAIR TERMS

1. What are the two approaches to the question of the nature of exemption clauses?

(2)

(a) Defence - i.e. construe all the contract terms, except the exemption clause, to determine the breach and then determine if the exemption clause actually operates as a defence to that breach (1). This is the generally accepted view of the nature of exemption clauses;

(b) Construe as any other term of the contract in order to establish the initial contractual obligations. (1)

2. What does a party need to show in order to rely on an exemption clause in a contract to which he is a party? (3)

(a) That the clause has been incorporated as a term of the contract; (1)

(b) That on its construction i.e. natural and ordinary meaning, it covers the loss which has occurred in the circumstances in which the loss has occurred; (1) AND

(c) That the clause is not rendered unenforceable by statutory provisions (i.e. UCTA 1977 and/or the 1999 Regulations) (1).

3. When, if ever, will an exemption clause be construed to cover negligence liability?

(4)

Negligence must firstly be at least **ONE** form of liability arising on the particular facts. (Negligence means breach of a qualified contractual obligation and/or breach of a duty of care in tort). (1)

The clause will then cover that negligence

(a) If the clause expressly mentions that it covers negligence (or synonym thereof).

In these circumstances the clause will extend to cover the negligence liability whether or not there is any other liability on the facts (1).

(b) If there is no express mention, but the words are wide enough to include liability resulting from negligence, then it appears that the clause must cover negligence liability if this is the only liability on the facts. Alderslade v Hendon Laundry (1)

If there is no express mention, but the words are wide enough to cover negligence, and there is another liability arising on the facts, the clause will NOT cover the

negligence liability. White v John Warwick (1). Another example is EE Caledonia Ltd v Orbit Valve Co. Europe.

Note that there is recent evidence of relaxation of this test in Canada SS v R in the light of a more relaxed approach to contractual interpretation in general (i.e. the West Bromwich principle). See, e.g. HIH Casualty & General v Chase Manhattan Bank.

4. Explain the liability arising on the facts in *Alderslade v Hendon Laundry*. (2)

The only liability was negligence liability on these facts.

The loss in question was the loss of the handkerchiefs that were to be laundered.

The laundry had acquired possession of the handkerchiefs in order to launder them and was therefore in the position of bailee of them (implied duty to exercise reasonable care of the goods- safe custody qualified obligation). The obligation of redelivery of the handkerchiefs was also qualified (i.e. reasonable care)(2).

Although Lord Greene appeared to indicate that there was an absolute obligation to launder properly, this would now be covered by statute i.e. s.13 SGSA 1982 (supplying a service in the course of a business, implied obligation to carry out the laundry service with reasonable care and skill). If this qualified obligation were broken in the laundering process, there would be a breach.

5. What is the effect of a fundamental breach on an exemption clause in the contract? (4)

The clause must be construed on its natural and ordinary meaning to see whether it covers such a serious breach and therefore very clear words will be required - but it is possible to argue that a clause is wide enough to cover such a breach. (1)

Examples of application of this are Photo Production v Securicor and George Mitchell v Finney Lock Seeds. (1)

However, the clause must also not be rendered unenforceable by UCTA 1977 or the 1999 Regulations (3rd requirement) and UCTA in particular, states that it is not possible to exclude or limit liability for some breaches which would be regarded as fundamental e.g. breach of satisfactory quality obligation as against a consumer (s.6(2) UCTA). (2).

6. What do we mean by negligence liability in the context of exemption clauses? (3)

In the context of exemption clauses s. 1 of UCTA defines negligence so as to include a breach of contract, namely breach of a qualified obligation to take reasonable care or exercise reasonable skill (1). It also includes breach of a duty of care in tort (1) and occupier's liability (1).

7. Give 4 examples of instances when the reasonableness test will apply under UCTA 1977. (4)

Core examples :

(a) s.2(2) UCTA - negligence liability for loss other than death or personal injury e.g. property damage.

(b) s.3 - strict contractual liability (where the clause is sought to be used as against a consumer or a party dealing on the other's standard form of contract)

(c) s.6(3), 7(3) - breaches of ss.13-15 SGA (and equivalents) as against a party NOT dealing as consumer. (This can be taken as 2 separate examples where the nature of the contracts in s.6 and 7 is distinguished, i.e. s.6 sale of goods and H.P., s.7 obligations as to goods in work and materials contracts and hire contracts).

(d) s.8 - excluding or limiting liability or remedies for misrepresentation.

8. In what way does s.13 UCTA 1977 extend the definition of the clauses that are subject to regulation under the Act? (3)

s.13 extends the definition of exemption clause for the purpose of UCTA beyond the traditional definition of a clause that excludes or limits liability to include

(a) clauses stating that there is no liability unless some condition is complied with;

(b) clauses excluding or limiting either rights or remedies, which would otherwise be available;

(c) clauses which exclude or limit the obligation or duty itself. (3)

9. What types of breach does s.6 UCTA apply to? (1)

Contracts for the sale of goods (breaches of ss.12-15 SGA) or hire purchase contracts (ss.8-11 Supply of Goods (Implied Terms) Act 1973) i.e. obligations as to title, goods conforming with contractual description, satisfactory quality, fitness for purpose, correspondence with sample. (1)

10. Why is the decision in *R & B Customs Brokers v UDT* significant? (3)

It extends the definition of dealing as consumer, in the sense of a person who does not make a contract in the course of a business, under s.12 UCTA(1). *Note: s.12(1)(c) does not apply to "individuals"*.

The contract was made by a company but the company did not make the contract in the course of a business because the contract was not an integral part of the company's business, it was merely incidental. In addition, this incidental contract was not carried out with sufficient regularity to render it a contract in the course of a business. (1) The result was that the company was dealing as a consumer within that meaning in the Act and could rely on s.6(2) rather than s.6(3). Compare with the 1999 Regulations which apply only to "natural persons" and which cannot therefore be used to protect companies. (1)

See note 6 page 300, Casebook (7th ed) for a discussion of the law Commission Report's recommended definition of "consumer contract". How would this alter the R & B Customs result if similar factors were to occur if this proposed definition were to be given legislative form?

11. List 5 factors that the courts will consider in assessing reasonableness under UCTA. (5)

5 possible factors of relevance in assessing reasonableness.

- (a) the possibility of one party insuring against the risk (availability and cost of insurance);
- (b) strength of bargaining positions of the parties/ possibility of making such a contract without having an exemption of this kind;
- (c) negotiated;
- (d) inducement to agree to the term (i.e. lower price if contracted on this basis);
- (e) whether the loss was attributable to negligence.

12. When will a term be unenforceable under the 1999 Regulations? (4)

The term was not individually negotiated (1) and is contained in a contract between a seller/supplier and a consumer (1). In addition, the term must be an "unfair term" in that contrary to the requirement of good faith it causes a significant imbalance in the parties' rights and obligations under the contract to the consumer's detriment (1). (See Director General of Fair Trading v First National Bank for a HL assessment of the meaning of "contrary to good faith" and "significant imbalance"). Regulation 6

provides that the unfairness of a term is to be assessed “taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time the contract was concluded, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another dependent contract”. Schedule 2 contains an indicative and non-exhaustive list of terms that MAY be unfair in the particular context. (1) However, by Reg. 8(2) only the unfair term is unenforceable – not the contract as a whole.

13. What is the role of the Office of Fair Trading under the Regulations? (2)

By Regulation 10 the DGFT is given the statutory responsibility of considering complaints relating to unfair terms in general use [(1)] and (Reg. 12) applying for an injunction to prevent the continued use of the term (so called “pre-emptive challenge) (1). This is currently achievable under secondary legislation introduced under the terms of the Enterprise Act 2002.

Points scored [maximum 40] =