EXCLUSIONS AND LIMITATIONS OF LIABILITIES
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1. It is in the interests of suppliers of goods and services to avoid or minimise any potential liability for breach by them of their supply contracts or for negligence. Suppliers therefore frequently try to rely on express exclusion or limitation clauses in the hope that such clauses are effective. Determination of whether such clauses are effective or not requires issues relating to the following to be considered:

   * Incorporation

   * Construction

   * Statutory controls

Incorporation

2. Unsurprisingly, to impact on the liability for contractual loss, the exclusion / limitation term must be part of the parties' contract. Whether a term is incorporated or not depends upon the parties' intentions.

Signed Documents

3. If a contract is signed by the parties then its terms are expressly agreed and usually no problem of incorporation arises. even if the terms have not been read.

4. If the clause appears in a document which has been signed, it is presumed that the party who has signed has read and understood the clause, even if the clause is in small print or in legal jargon.

   "The claimant, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation; cannot be heard to say that she is not bound by the terms of the document because she has not read them." [1]

5. An exception applies not only if there has been fraud or misrepresentation, but also in cases of oral variation and estoppel:

   * A claimant took a wedding dress to the defendant dry cleaners and was asked to sign a ticket headed "*receipt*", which included a clause stating that clothing *"is accepted on condition that the company is not liable for any damage howsoever*

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[1] **L'Estrange v Graucob** [1934] 2 KB 394

arising." Before she signed, however, the claimant was told by the assistant that the document simply excluded liability for certain risks, including the risk of damage to the beads and sequins on the dress. The claimant then signed. When the dress was returned it was stained. It was held that the dry cleaners had misled the Claimant and could only rely on the exclusion clause in relation to beads and sequins not other types of damage. [2]

Course of Dealings

6. A clause may be incorporated by course of dealing between the parties:

   * If on numerous occasions the parties have always contracted on the same terms it may not matter if the terms were not provided on the occasion of the particular contract which is in dispute.[3]

Trade Custom

7. A clause may be incorporated because both parties are aware that it is the practice of a particular trade to contract subject to standard exempting conditions.

8. Where the parties were in the same line of business and the exclusion clause was common, the fact that the defendant had not seen the clause before the work was commenced did not render it ineffective.[4]

Agreements by conduct or performance

9. In **RTS Ltd v Molkerei Alois Muller GmbH & Co**[5] the Supreme Court considered a case where the claimant supplier of automated packaging machines negotiated with the defendant to design and install equipment. The defendant sent the claimant a letter of intent setting out a draft contract, providing that the work had to be completed incorporating standard terms and conditions, published by the Institutes of Mechanical Engineers and Electrical Engineers and referred to as MF/1, which contained liquidated damages provisions and limitations on liability but which, by clause 48, provided that the contract would not be binding unless signed and executed by the parties. The parties did not sign or execute that agreement but proceeded with the project. Following completion of the work, and with the claimant having received stage payments amounting to 70% of

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2 **Curtis v Chemical Cleaning and Dyeing Co Ltd** [1951] 1KB 805

3 eg **Petrotrade Inc v Texaco Ltd** [2002] 1 WLR 947

4 **British Hire Corp v Ipswich Plant Hire** [1974] 1 All ER 1059

5 [2010] UKSC 14

the agreed price, a dispute arose as to whether the equipment supplied by the claimant complied with the agreed specifications and the defendant refused to make any further payments. The claimant commenced proceedings for payment of the balance of the purchase price on the basis that there was a continuing contract on the terms of the letter of intent contract or, alternatively, that it had been replaced by a new contract which incorporated the MF/1 conditions, or that no contract had been formed after the expiry of the letter of intent but it was entitled to a quantum meruit. The defendant counterclaimed for damages of £3m arising out of the performance of the equipment supplied by the claimant, on the basis that the actual contract between the parties was, given clause 48 and the failure to sign the draft contract, a simple contract based on the work having been carried out and payment made, and which had no limitations on liability.

10. The Supreme Court held in **RTS** that the question whether there was a binding contract between parties, and if so upon what terms, required consideration of what was communicated between the parties by words or conduct and whether it led objectively, in accordance with the reasonable expectations of honest sensible businessmen, to a conclusion that the parties had intended to create legal relations and had agreed all the terms which they regarded, or the law required, as essential for the formation of legally binding relations. The Supreme Court decided that the conduct of the parties led to the conclusion that they had made a binding agreement to waive the subject to contract provision in clause 48 and to proceed on the terms set out including the MF/1 terms; and that, accordingly, the parties dispute fell to be determined by reference to that contract. Particular points to note include:

* Even if certain terms of economic or other significance to the parties had not been finalised, an objective appraisal of their words and conduct could lead to the conclusion that they had not intended agreement of such terms to be a precondition to a concluded and legally binding agreement;

* Where a contract was being negotiated subject to contract and work began before the formal contract was executed, it would depend on the circumstances whether the parties had waived the subject-to-contract term and, if so, whether the contract included the particular terms agreed subject to contract;

* The fact that a transaction was performed on both sides would militate against any argument that there had been no intention to create legal relations or that the contract was void for uncertainty;

* Where a draft contract was based on standard terms limiting liability it would be difficult to infer that a party who commenced work before its execution was assuming any liability other than that which the draft contract had envisaged;

* Where a contract had come into existence not as a result of offer and acceptance but during and as a result of performance, it would be possible to hold that such contract impliedly and retrospectively covered pre-contractual performance

Battle of the Forms

11. Problems often arise where no terms are signed. Commercial cases frequently give rise to a "*battle of the forms*" when both the supplier and the customer seek to contract on their own standard terms. The goods or services may then be supplied without either party signing the other's terms of business. The courts then have the difficult situation of deciding which if any of the parties' standard contractual terms apply. Various outcomes can follow including:

* No contract may be concluded [6]- the customer being left with a restitutionary obligation ("*quantum meruit*") to pay a reasonable price for the goods or services.

* A limited contract may be concluded (covering only the basic matters of price, quantity and perhaps delivery date) but not including either party's standard terms.[7]

* The "*last past the post*" approach may apply where the party who sent their terms and conditions last may be deemed to have had their terms accepted by the other.[8]

12. A recent example of the difficulties which can arise is **GHSP v AB Electronic**[9] where the Claimant manufactured vehicle control systems and ordered electronic pedal sensors from the Defendant for onward sale to Ford Motor Company. Faulty sensors were supplied and the Claimant was faced with a large bill from Ford for the costs of inspection/ replacement of the parts which it wanted to pass on to the Defendant. The Claimant wished to rely on its standard terms of purchase which purported to impose unlimited liability on suppliers while the Defendant wished to rely on its standard terms of sale which restricted its liability. During the negotiations before supply neither party accepted the other's standard terms. Both parties were hoping that the other would propose an appropriate cap on liability but this never occurred. It was held that the parties did not contract on either side's standard terms and that the terms of the contract were simply those implied by the Sale of Goods Act 1979.

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6 eg **Midland Veneers Ltd v Unilock HCP Ltd** CA 12/3/98,

7 eg **Hertford Foods Ltd v Lidl** [2001] EWCA Civ 938

8 **British Road Services v Arthur Crutchley Ltd** [1968] 1 AllER 811, **Tekdata Interconnections Ltd v Amphenol Ltd** [2009] EWCA Civ 1209

9 **GHSP v AB Electronic** [2010] EWHC 1828 (Comm)

Sufficient Notice

13. The normal rule (where the document is not signed) is that the party affected by the clause will be bound if the party delivering the document has done what may reasonably be considered sufficient to give notice of the clause to persons of the class to which he belongs.[10]

14. *"If the party sought to be bound knew that the document relied upon contained writing or printing but was unaware that it contained terms or conditions he will be taken to have notice of and thus be bound by the term in question, only if the party seeking to bind him has done all that was reasonably sufficient to bring the terms and conditions to his notice".* [11]

15. What is necessary to bring terms and conditions to a party's attention depends on a number of factors:[12]

    * The situation of the parties (including the strength of their bargaining positions).

    * The layout of the document.

    * The terms of the document (particularly if any term is unusually wide or stringent).

16. How and when the terms are provided is important. For example:

    * Placing the terms on the back of a receipt may be ineffective where the purchaser only receives the receipt after the contract has been agreed and payment provided.[13]

    * Hotels terms which were placed on the back of hotel room door were ineffective to prevent liability for theft of a guest's fur coat. Such terms would not have come to the client's attention until after the contract had been entered into at the hotel reception.[14]

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10 **Thornton v Shoe Lane Parking** [1971] 2 QB 163

11 **John Snow v DBG Woodcroft** [1985] BCLC 54

12 **Interfoto Picture Library v Stiletto Visual Programmes** [1988] 1 All ER 348

13 **Chapleton v Barry UDC** [1940 1 KB 532

14 **Olley v Marlborough Ct** [1949] 1KB 532

* Small print *"legible only to one of tender years"* which was printed on the back of correspondence evidencing an agreement made by telephone was not incorporated. There was nothing on the face of the correspondence which referred to the small print on the reverse and the judge stated:

  "Every time I receive an unsolicited communication from a double glazing company ... I cannot be expected to read the terms and conditions set out in the small print in the advertisement." [15]

* Where a delivery note accompanying some photographs set out conditions including that the photographs should be returned within 14 days or else a charge would be incurred the Court of Appeal held that the relevant condition was unreasonable and not brought to the attention of the customer as it was only one of the many provisions in the conditions and it was not highlighted. If there had been a signed contract then the outcome of the case on the question of incorporation would probably have been different.[16]

17. Particular problems can arise when parties attempt to create contracts via website forms as the spread betting company Spreadex recently discovered when it unsuccessfully applied for summary judgment and its customer argued that he was not liable for unauthorised trades on his account which he said were carried out by a young child. [17] Spreadex applied for summary judgment relying on their standard terms which could be found on their website and which included a provision which stated *"You will be deemed to have authorised all trading under your account number"*. The Court held that the website set out the terms on which a contract would be created if a customer made an offer for a particular spread bet and Spreadex accepted that offer and took the bet. However, the court held that the deemed authorisation provision was not supported by consideration from Spreadex (who had no obligation to accept bets or keep an account open) and had no contractual effect if an individual bet was not concluded or authorised by the customer.

18. Where terms are stated to be available on request but are not actually provided to the customer then they may not be incorporated.[18]

19. Where a term is onerous and there is a failure to highlight or even to print it in a particularly clear font size or colour then it still might be incorporated if it is a standard

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[15] **Lacey's Footwear v Bowler Intn** [1997] 2 Lloyds Rep 369

[16] **Jonathan Wren & Co v Microdec Plc** [1999] 65 Con LR 157

[17] **Spreadex Ltd v Colin Cochrane** [2012] EWHC 1290 (Comm)

[18] **AEG (UK) Ltd v Logic Resources Ltd** [1996] CLC 265

term within the relevant industry. [19]

CONSTRUCTION

General Principles

20. Exemption clauses must be expressed clearly and without ambiguity:

"if a person was under a legal liability and wished to get rid of it he could only do so by using clear words." [20]

21. If an exclusion clause is clear and unambiguous then there is no justification for placing upon the language a strained or artificial meaning so as to avoid its effect. [21]

22. In addition to the general principle that exemption clauses are construed against the party seeking to rely on them, where there is any ambiguity then the *contra proferentem* rule applies - the clause will be construed against the party who drafted it.

Clause must cover the event

23. For an exclusion clause to be effective, the precise circumstances or loss must be covered by the wording which should not be too narrow. For example:

* Provisions that goods are bought *"as seen"* or exclusion of liability for *"latent defects"* will not exclude the terms as to quality and fitness for purpose which are implied by the Sale of Goods Act.

* The exclusion of implied terms will not cover breach of express terms.

* The exclusion of liability for *"consequential loss or damage"* will not cover direct loss or damage.

* A clause providing that *"all goods delivered shall be deemed to be in all respects in accordance with the contract"* unless the buyer gave notice within 14 days of the arrival of the goods was held not to cover a claim in respect of short delivery, i.e. the term did not apply to goods which were not delivered. [22]

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[19] **Motours Ltd v Eurobell (West Kent) Ltd** [2003] All ER (D) 165 (Jan)

[20] **J.Gordon Alilson & Co v Wallsend Shipway** (1927) 43 TLR 323

[21] **Photo Production Ltd v Securicor** [1980] AC 827 at 850

[22] **Beck & Co v Szymanowski & Co** [1924] AC 43

Inconsistency with the purpose of the contract

24. The courts will be reluctant to construe an exemption clause so that it has the effect of absolving one party from all duties or obligations:

"One may safely say that the parties cannot, in a contract have contemplated that the cluase should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force: to dos so would be to reduce the contract to a mere declaration of intent."[23]

25. In the case of **Internet Broadcasting Corporation**[24] NetTV provided interactive internet televisions platforms while Mar LLC provided information to hedge funds. The parties entered into a joint venture contract to provide an internet television channel. The agreement could not be terminated for 3 years except if there was a material breach which was not remedied within 30 days. One year into the agreement Net TV wrongfully repudiated the contract but tried to rely on a clause which stated:

"...neither party will be liable to the other for any damage to software, damage to or loss of data, loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage."

It was held that the starting point in interpreting the clause had to be the rebuttable presumption that it was not intended to cover a deliberate repudiatory breach of contract. There would have to be very clear, strong, language to persuade a court that the parties intended the words to cover such a case. Pointing to a mere literal meaning was not enough. The words used in the clause did not contain strong language or a clear statement that deliberate wrongdoing was intended to be covered, let alone deliberate personal and repudiatory wrongdoing. A reasonable businessman, reading the words with an eye to an allocation of insurable risk, would understand that they did not extend to risks which were uninsurable or very unlikely to be insurable, such as losses flowing from a deliberate, personal, repudiatory breach. The literal meaning in the instant case would defeat the main object of the contract. The clause therefore did not cover the deliberate repudiatory breach.

Liability for Negligence

26. Subject to statutory provisions, liability for negligence can be restricted or excluded by

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[23] **Suisse Atlantique v NV Rotterdamshe Kolen Centrale** [1967] 1 AC 361 at 482

[24] **Internet Broadcasting Corporation (t/a Net TV) v Mar LLC** [2009] EWHC 844 (Ch)

appropriate contractual language. The following tests apply: [25]

* If the clause contains language which expressly exempts the person in whose favour it is made from the consequences of the negligence of his own servants effect must be given to that provision.

  To satisfy the first test, there must be a clear and unmistakable reference to negligence or to a synonym for it. In the absence of such a reference the 2nd test needs to be considered

* If there is no express reference to negligence, the court must consider whether the words used are wide enough, in the ordinary meaning, to cover negligence. If there is doubt then it will be resolved against the party seeking to rely on the exemption.

  Use of words such as "*no liability whatsoever*" "*loss howsoever arising*" or *"any cause whatever*" have been held to be wide enough to cover negligence, but (depending upon the context) will not necessarily be effective. A term merely purporting to exclude liability for "*any loss*" has been held to refer to the kind of losses not their cause and is not effective to exclude liability for negligence.

* If the words are wide enough to cover negligence (but negligence is not expressly referred to) then it is necessary to consider whether the damage may be based on grounds other than negligence. The other ground must not be so fanciful or remote that the party seeking to rely on the exemption cannot be supposed to have desired protection against it; but subject to that qualification the existence of a possible head of damage other than that of negligence is fatal to the party seeking to rely on the exemption even if the words used are, on their face, wide enough to cover negligence. Conversely, where the head of damage in respect of which limitation of liability is sought to be imposed by a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter.[26]

  In applying the 3rd test *"we should not ask now whether there is or might be a technical alternative head of legal liabilty which the relevant exemption clause might cover and, if there is, immediately construe the clause as inapplicable to negligence. We should look at the facts and realities of the situation as they did*

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[25] See the decision of the Privy Council in **Canada Steamship Lines Ltd v** King [1952] AC 192 and that of the House of Lords in **Smith v UMB Chrysler (Scotland Ltd) aka Smith v South Wales Switchgear** [1978] 1 WLR 165

[26] **Alderslade v Hendon Laundry Ltd** [1945] KB 189, applied in **Jose v MacSalvors Plant Hire Ltd** [2009] EWCA Civ 1329

or must be deemed to have presented themselves to the contracting parties at the time the contract was made, and ask to what potential liabilities the one to the other did the parties apply their minds, or must they be deemed to have done so."[27]

Fundamental Breaches

27. The expression "*fundamental breach*" has been used to refer to two distinct things:

* A performance totally different from that which the contract contemplated.

* A breach of contract more serious than one which would entitle the other party merely to damages and which (at least) would entitle him to refuse further performance of the contract.

28. The Courts used to consider that a party to a contract would be prevented from relying on an exemption clause where that party had been guilty of a fundamental breach of contract or the breach of a fundamental term. This was based on the view that there were certain breaches of contract ("*fundamental breaches*") which were so totally destructive of the obligations of the party in default that liability for such a breach could in no circumstance be excluded or restricted by means of an exemption clause. Similarly so called *fundamental terms* were described as those that if not complied with then the performance of the contract became totally different.

29. However the House of Lords has made clear that even if a breach is *fundamental* it can be covered by an appropriate exemption clause. The question is one of construction. [28]

30. Accordingly where a security guard employed by the defendant deliberately lit a fire in the Claimant's factory the House of Lords held that the defendants had effectively modified their contractual obligations to one of exercising due diligence in their capacity as employers. The clause apportioned the risk between the parties and the risk of arson was not accepted by the defendants having regard to the nature and cost of the service provided in circumstances where the claimant could readily and economically obtain appropriate insurance.[29] Similarly, the Court of Appeal held in a case concerning allegations of theft of mobile phones from a warehouse by dishonest employees of the warehouse company that limits on liability contained in industry standard terms and

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[27] **Lamport & Holt Lines v Coubro & Scrutton** [1982] 2 Lloyds Rep 42, 50

[28] **Suisse Atlantique v NV Rotterdamshe Kolen Centrale** [1967] 1 AC 361

[29] **Photo Production Ltd v Securicor** [1980] AC 827

conditions were incorporated and enforceable.[30]

31. Now, if the phrase *fundamental breach* is to be used it ought to be confined to the situation where a breach is sufficiently serious that it entitles the innocent party to elect to treat the contract as repudiated so that the parties' primary obligations no longer need to be performed.

"Non Reliance" Clauses

32. Contracts often include a provision that one party has not entered into the agreement in reliance on any pre-contractual representation. Such provisions are sometimes included even though it is obvious that in fact one party has relied on representations by the other so the term is an attempt to create a *legal fiction*. In those circumstances is a *"non reliance"* clause enforceable?

33. In 2010 the Court of Appeal in **Springwell** [31] considered this issue in the context of the purchase of certain complex financial Notes (purchased from JP Morgan. The Terms and Conditions of the Notes contained a statement that "[the Purchaser] *has not relied* [on]*, and acknowledges that* [the Vendor] *has not made, any representation or warranty with respect to the advisability of purchasing this Note*".

34. The Purchaser argued that such a provision cannot operate as a contractual estoppel if both parties know that representations have in fact been made and that they have in fact been relied on.

35. The Court of Appeal rejected the Purchaser's argument. It held:

    (i) Parties can agree to assume that a certain state of affairs is the case at the time a contract is concluded, even if that is not the case; and

    (ii) The Purchaser was contractually estopped from asserting that any actionable misrepresentations had been made by the Vendor and from claiming reliance on any such misrepresentations.

    (iii) To enforce the estoppel it was not necessary for the Vendor to prove that it would be unconscionable for the Purchaser to resile from the contractual estoppel.

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[30] **Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd** [2004] EWHC 1502 (Comm)

[31] **Springwell Navigation Corpn v JP Morgan Chase Bank & Others** [2010] EWCA Civ 1221

36. **Springwell** is consistent with other recent decisions such as **Titan Steel Wheels** [32] which held that where a commercial customer of a bank enters into a contract on the express basis that the bank will not be assuming responsibility to provide advice and the contractual terms preclude the customer from relying on the bank, the customer will be prevented from pleading actual reliance on the bank or its employee for investment advice.

37. Accordingly, commercial entities which sign *"non reliance"* clauses will generally find that they are bound by them even if there has been substantial reliance on misrepresentations.

STATUTORY CONTROL

The Statutory Framework

38. The main legislation is The Unfair Contract Terms Act 1977 ("UCTA"). For consumer contracts the Unfair Terms in Consumer Regulations 1999 are also relevant.

The Unfair Contract Terms Act 1977

39. UCTA imposes controls over the following main areas (which sometimes overlap):

* Terms which exclude or restrict liability for causing death or personal injury

* Terms which exclude or restrict liability for negligence (other than for death or injury)

* Terms which exclude or restrict liability for breach of terms implied by statute or common law in contracts for the sale or supply of goods and hire purchase.

* Terms which purport to allow a party to render a contractual performance substantially different from that reasonably expected of him or no performance at all.

* Exclusions or restrictions in manufacturers' guarantees.

* Standard terms and conditions

Liability for causing death or personal injury

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[32] **Titan Steel Wheels Ltd v RBS Plc** [2010] EWHC 211

40. Any exclusion of liability for causing death or personal injury is entirely ineffective under section 2(1) of UCTA. This applies whether the victim was a consumer or acting in the course of business.

Liability for Negligence (other than death/ personal injury)

41. For the purposes of UCTA negligence covers:

- Breach of a contractual obligation to exercise skill and care
- Common law obligation to take reasonable care or use reasonable care
- The duty of care imposed by the Occupier's liability Act 1957

42. Clauses which seek to exclude liability for negligence are not effective unless they satisfy the reasonableness test set out in section 2(2) of UCTA.

Excluding statutory implied terms as to title

43. The purpose of a contract of sale is to transfer title from the seller to the buyer. Accordingly (except in rare cases where someone intends to buy the benefit of a mere chance that the seller is the owner) the common law would be reluctant to give effect to a provision that exempts a seller in the event that it cannot pass good title.

44. Statute has clarified this. Section 6(1) of the Unfair Contract Terms Act 1977 invalidates (except in the case of international sales) any term exempting the terms about title which are implied by section 12 of the Sale of Goods Act 1979.

Excluding statutory implied terms as to quality/ fitness/ description

45. Terms as to quality, fitness for purpose, correspondence with description and sample would all have normally been implied by common law. They are also implied by sections 13 to 15 of the Sale of Goods Act.

46. Section 6(2) of UCTA invalidates the exclusion of the terms as to quality, fitness for purpose, correspondence with description and sample if the buyer "*deals as a consumer*"

47. For business to business contracts such an exclusion is only enforceable so far as is reasonable.

Substantially different contractual performance

48. A term which purports to entitle a party to provide a substantially different contractual performance is subject to the reasonableness test if that term is a standard written term or if the other party is dealing as a consumer.

Exclusions in manufacturers' or vendors' guarantees

49. Where goods are of a type usually supplied for private use or consumption then liability cannot be restricted by reference to terms included in guarantee.

What is a "*dealing as a consumer*?"

50. Not every contract made by a busines is made *"in the course of business"*. If the making of the contract was an ancillary transaction not an integral part of the business then the business can be acting as a consumer.

51. Where a company which was a freight forwarding agent bought a second hand car for the use of its directors (and had done so on only a few previous occasions) it was held that the since the company had not held itself out as making the contract for the purchase of the car in the course of business, and since, on the facts, the necessary degree of regularity had not been shown, the company was dealing as a consumer within the meaning of section 12(1) of the Unfair Contract Terms Act 1977, and by virtue of section 6(2) of that Act the implied term of fitness for purpose could not be excluded. [33]

The reasonableness test

52. Schedule 2 of UCTA sets guidelines which courts take into account when determining whether or not a clause is reasonable:

* The strength of the bargaining positions of the parties relative to each other taking into account (amongst other things) alternative means by which the customer's requirements could have been met.

* Whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term.

* Whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, amongst other things, to any custom of the trade and previous course of dealing between the parties)

* Whether the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable

* Whether the goods were manufactured processed or adapted to the special order

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[33] **R&B Customs Brokers Co Ltd v United Dominions Trust Ltd** [1988] 1 WLR 321

of the customer.

53. How the courts decide reasonableness for the purposes of UCTA can be illustrated by the case law.

54. In **Titan Steel Wheels** [34] a manufacturer of steel wheels brought a mis-selling claim against RBS in respect of currency swap derivative products. Titan alleged that RBS had negligently advised it to purchase the swaps and that there had been unfair dealing under the FSA rules. One of the issues that arose was whether or not any of the exclusion clauses in Titan's contract with RBS were subject to UCTA. The contract provided that RBS was not liable for any loss of opportunity, decline in the value of investments, error of fact or judgment or other loss from any act or omission made under or in relation to or in connection with the terms of business or the services provided under these, except to the extent that they resulted from its gross negligence, wilful default or fraud. Mr Justice Steel concluded that this clause satisfied the reasonableness test under UCTA for the following reasons:

* There was complete equality of bargaining power as Titan could choose any other bank for its custom if it wished;

* the terms of the clause were standard terms included in the terms and conditions of many banks;

* Titan was easily able to seek its own independent advice if desired (as was anticipated elsewhere in the terms of business); and

* the terms were clear and regularly brought to the notice of Titan.

55. In **Charlotte Thirty v Croker**[35] the court considered a clause in a contract for the design, supply and installation of a concrete batching plant. The standard conditions included a six month warranty and at clause 3(d) a provision excluding consequential loss or damage together with implied conditions or warranties, statutory or otherwise. The Judge found that the clause was unreasonable and said:

"If Cl 3(d) is effective, then the customer gives up all this protection [under the 1982 Act] for the tightly constrained 6 month warranty of such components as he is prepared to dismantle and send back to Croker. Such an arrangement is absolutely at variance with the needs of fairness in a construction contract and, no doubt for this reason, it is absolutely at variance with the practice of the construction industry."

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[34] **Titan Steel Wheels Ltd v RBS Plc** [2010] EWHC 211

[35] **Charlotte Thirty v Croker** (1990) 24 Con LR 46

56. In **Edmund Murray v BSP International Foundations**[36] the Court of Appeal considered the provisions in a contract for the supply of a piling rig which provided that the seller would make available certain benefits against a third party manufacturer, in lieu of all warranties, with the exclusion of loss of profits, consequential or special loss or damage. In giving a judgment with which the other members of the court agreed Neil LJ said that the provisions were unreasonable and, in particular, stated:

"Condition 12.6 presents its own difficulty. On the face of it a term excluding consequential loss would appear to be fair and reasonable as between parties contracting at arm's length. But this condition goes further and provided (inter alia) that BSP shall not be liable-

'for any damage (whether or not consequential) arising from stoppage or breakdown of the goods or in any other way from the performance of the goods in operation.'

Here again, if the failure of performance is proved to be due to a breach of the obligation to provide a rig which complied with the specification or to provide a rig which was fit for the purpose for which EML required it I consider that this condition would not satisfy the requirement of reasonableness."

57. The Court of Appeal has confirmed the following: [37]

"Generally speaking, where a party well able to look after itself enters into a commercial contract and, with full knowledge of all relevant circumstances, willingly accepts the terms which provide for apportionment of the financial risks of the transaction, I think it is very likely that those terms will be held to be fair and reasonable."

58. In **Balmoral v Borealis**[38] a manufacturer of moulded storage tanks (Balmoral) purchased supplies from Borealis but the product supplied (borecene) was unsuitable for use in storage tanks. The tanks started splitting and leaking and Balmoral suffered substantial losses. It was held that the contract was on Borealis's standard terms. These warranted that the borecene would comply with Borealis's standard specification but that if it did not, Borealis had the option to replace it, repair it, or refund the purchase price. All other conditions and warranties about quality and fitness for purpose were excluded; Borealis accepted no liability for any additional loss or damage which the buyer might suffer; and overall liability was restricted to the purchase price of the goods. Clarke J set out a checklist of relevant factors:

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[36] **Edmund Murray v BSP International Foundations** (1992) 33 Con LR 1

[37] **Watford Electronics v Sanderson CFL Ltd** [2001] 1 All ER Comm 696 at [63], approving **Salvage Association v CAP Financial Services** Ltd [1995] FSR 654 at 676

[38] **First Balmoral Group v Borealis (UK) Ltd** [2006] EWHC 1900 (Comm).

* The relative strengths of the parties' bargaining positions

* Would other suppliers have insisted on similar terms?

* Was any inducement offered to the purchaser to accept the restriction on the seller's liability?

* The availability of appropriate insurance, and the relative cost to each party of obtaining cover

* Had the purchaser contracted on similar terms before?

* Was the purchaser relying on the seller's expertise?

* Was the defect within the seller's expertise?

* Was the exclusion clause purporting to totally exclude liability or simply limit it?

59. It should be noted that:

* Balmoral was a large volume purchaser and had a strong bargaining position and had closed its eyes to the terms and did not try to challenge them.

* The parties had not thought about or negotiated the allocation of risk.

* Balmoral's own standard terms contained similar exclusions to those of Borealis.

60. Nevertheless, Clarke J concluded that (although the issues were finely balanced) the Borealis terms were unreasonable. The buyer should not have to accept the entire risk of a latent defect pursuant to a blanket exclusion where it had in fact relied on the seller's expertise.[39]

61. In **Regus v Epcot**[40] serviced offices were let by Regus to Epcot. The office air conditioning failed to work propertly and Epcot withheld payment which Regus then sued for. Epcot counterclaimed for loss of business and other losses. The Regus terms and conditions included the following:

"(1) We are not liable for any loss as a result of our failure to provide a service as a

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[39] Borealis was more successful in **Kingspan v Borealis** [2012] EWHC 1147 (Comm) where it established that its terms and conditions were governed by Danish Law and as international supply contracts, the UCTA restrictions did not apply and the terms were in any event reasonable

[40] **Regus (UK) Ltd v Epcot Solutions** [2008] EWCA Civ 361

result of mechanical breakdown ..... unless we do so deliberately or are negligent .... (2) You agree (a) that we will not have any liability for any loss, damage or claim which arises as a result of, or in connection with your agreement/ and or your use of the services except to the extent that such loss ... is directly attributable to a deliberate act or negligence (our liability) and (b) that our liability will be subject to the limits set out in the next paragraph.

(3) We will not in any circumstances have any liability for loss of business, loss of profits, loss of anticipated savings, loss of or damage to data, third party claims or any consequential loss. We strongly advise you to insure against all such potential loss, damage, expense or liability.

(4) We will be liable:

* *without limit for personal injury or death*
* *up to a maximum of £1 million (for any one event or series of connected events) for damage to your personal property*
* *up to a maximum of £125% of the total fees paid under your agreement up to the date on which the claim in question arises or £50,000 (whichever is the higher), in respect of all other losses, damages, expenses or claims"*

62. The Court of Appeal in upholding Regus's exclusion clause took account of the following factors:

* The extent of the clause as it did not seek to deprive Epcot of all remedies
* Epcot's managing director was an experienced businessman
* Epcot's managing director was aware of the Regus standard terms and had contracted on them previously
* Epcot used a similar exclusion clause for its own business
* Epcot had *"frequently and energetically"* tried to renegotiate various terms of the Regus contract but had made no attempt to negotiate the exclusion clause
* There was no inequality of bargaining power. Regus was a much larger business but the extent of local competition put Epcot in a strong negotiating position.
* It would probably have been easier for Regus's customers to insure themselves against there own losses than for Regus to try to obtain cover.

63. The reference in the clause to *"in any circumstances"* did not invalidate it despite Epcot's argument that it would then apply to fraud or malice. The Court of Appeal stated that the *"the parties contract with one another in the expectation of honest dealing"* so that the clause would not be construed to be that wide.

64. A recent illustration of how the reasonableness test is applied is **Kingsway Hall Hotel v Red Sky**,[41] a case concerning the provision of computer software to a hotel. The system was not bespoke. The software provided inaccurate information and regularly crashed. After 6 months of complaints which were not resolved the hotel claimed that the software was not of satisfactory quality or fit for purpose. The hotel claimed for the financial losses that it suffered. Red Sky tried to rely on its standard terms which said that all terms as to performance, quality etc were excluded to the fullest extent permitted by law. It was held that the standard terms assumed that a buyer would be able to choose the software by looking at operating documents (which were not supplied) or demonstrations but the Hotel had bought because of a recommendation from a Red Sky employee. The terms were therefore unreasonable and Red Sky was liable for loss of profits, loss of goodwill wasted expenditure etc.

Severance of unreasonable clauses

65. In **Lobster Group v Heidelberg**[42] the Lobster Group claimed damages for defects in a printing press hired from Close Asset Finance who had purchased it from the manufacturer (Heidelberg). Close counterclaimed for hire charges. There were three relevant agreements - the Hire Agreement between Close and Lobster Group which was on Close's standard terms, Heidelberg's standard Warranty Agreement provided to Lobster Group, and Heidelberg's standard Service Agreement entered into with Lobster Group. Each of these contained limits or exclusions on liability. While some of those limits and exclusions were found to be reasonable others were not. It was held that an exclusion of liability clause was unreasonable because one of its three sub-clauses was deemed to be unreasonable. This followed a 1992 High Court decision[43] which adopted the same approach. Nevertheless, the decision in **Lobster** is contrary to the general view (eg as applied in **Regus v Epcot**) that if one sub clause is reasonable it can survive even if another is not.

Unfair Terms in Consumer Regulations 1999

66. The 1999 Regulations apply to unfair terms in contracts if

* The contract is concluded with a consumer; and

* The term was not individually negotiated

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41 **Kingsway Hall Hotel v Red Sky** [2010] EWHC 965 (TCC)

42 **Lobster Group v Heidelberg & Close Asset Finance** [2009] EWHC 1919 (TCC)

43 **Stewart Gill v Horatio Myer** [1992] QB 600 at 607 - 608

67. Consumer for these purposes is limited to natural persons

68. The Regulations are concerned with terms that are *"unfair"*. Such terms (so long as they fulfill other criteria) will not be binding on a Consumer.

69. The test of what is unfair under the Regulations is:

* Does it, contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

70. The test under the 1999 Regulations of what is unfair in relation to an exclusion or limitation of liability clause is likely to be similar if not identical to the test of reasonableness which applies to exemption clauses in consumer contracts and standard form contracts under section 3 of UCTA.

71. In the recent **Spreadex** case [44] the Court held that if, contrary to the finding that the term on the Spreadex website that the customer *"will be deemed to have authorised all trading under* [his] *account number"* did not form part of a contract, such a term was unenforceable pursuant to the 1999 Regulations as *"contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations, to the detriment of the consumer"*. Relevant factors were that:

* The deemed authorisation provision was drafted in absolute terms and, for example, was intended to apply even if the customer could prove that he had not been negligent.

* The relevant provision was part of 49 pages of closely typed and complex terms and conditions. *"It would have come close to a miracle if* [the Customer] *had read the second sentence of Clause 10(3)* [the deemed authorisation provision]*, let alone appreciated its purport or implications, and it would have been quite irrational for the claimant to assume that he had"*

<u>Drafting Exclusion Clauses</u>

72. Do not exclude liability for:

* Death or person injury.

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[44] **Spreadex v Colin Cochrane** [2012] EWHC (Comm)

* Fraudulent misrepresentation/ deceit

* Breach of implied terms as to quality, fitness etc in consumer contracts

Consider expressly stating that such liability is not excluded.

73. To maximise the chances of a clause being upheld as reasonable:

* Highlight the clause so that it is not hidden in the small print.

* Draft with precision and avoid ambiguities.

* Where possible, use limitations on liability rather than exclusions.

* Consider relating the limit on liability to the limit of the available insurance

* Distinguish between different causes of loss (non delivery, late delivery, defective goods, deliberate wrongdoing, fraud etc)

* Distinguish between different types of loss (physical damage, loss of profit etc).

* Distinguish between direct and indirect losses.

* Do not use blanket exclusions

* Recommend that the buyer obtains insurance.

* When setting a financial limit for liability, consider offering to be exposed to greater liability in exchange for an additional payment

* Use separate clauses for each part of the exclusion so that, if necessary, offending terms can be severed but others can still apply.

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