

What's my claim  
worth?

Perhaps less than you thought ...

## **There's a duty of care, but:**

- What about the contract?
- What about the Limitation Act 1980?

# Contractual provisions and notices

- Provisions excluding liability for negligence
- Provisions excluding liability for indirect or consequential loss
- Provisions limiting liability
- Provisions indemnifying the defendant

## Excluding liability for negligence

- Contractual provision may purport to exclude liability to other contracting party (unlikely) or to third party.
- May be made binding on third party by ensuring notice of exclusion is given.
- Statutory protection for would-be claimant, but depends in part on date contract made or notice given or communicated:
  - Before 1<sup>st</sup> October 2015; or
  - On or after 1<sup>st</sup> October 2015.

## Before 1<sup>st</sup> October 2015

Unfair Contract Terms Act 1977, s.2

Cannot exclude liability for death or personal injury: subs.(1)

Can rely on exclusion of other liability only if term or notice satisfies “the requirement of reasonableness”: subs.(2). See s.11:

- Was the term a fair and reasonable one to be included, having regard to the circumstances which were or ought reasonably to have been known to the parties or in their contemplation when the contract was made?
- Is it fair and reasonable to allow reliance on the notice, having regard to the circumstances when the liability arose or, but for the notice, would have arisen?
- For those claiming that the term or notice satisfies the requirement of reasonableness to show that it does.

## On or after 1<sup>st</sup> October 2015

Consumer Rights Act 2015, ss. 62 and 65 – if a consumer contract or consumer notice

Cannot exclude liability for death or personal injury: s.65

Term or notice not binding if “unfair”: s.62. Does it:

- Contrary to the requirement of good faith, create a significant imbalance in the parties’ rights and obligations to the detriment of the consumer?

If not a consumer contract or consumer notice, Unfair Contract Terms Act still applies.

# Whether a consumer contract or consumer notice

Consumer Rights Act 2015

S.61: a contract between a consumer and a trader or a notice given to a consumer by a trader

S.2(3) "consumer" – an individual acting for purposes wholly or mainly outside his trade, business, craft or profession

S.2(2) "trader" – a person acting for the purposes of his trade, business, craft or profession, whether or not through another person

What about unincorporated bodies composed of individuals, e.g. trustees, a committee of management?

## Excluding liability for indirect or consequential loss

- Loss falling within second limb of *Hadley v. Baxendale* (not the direct and natural consequence of the breach, but may reasonably be supposed to have been in the contemplation of the parties)
- E.g. loss of profit, business interruption losses, cost of management time?
- Question of construction. Cases recently discussed in 2 *Entertain Video Ltd. v. Sony DADC Europe Ltd.* [2020] EWHC 972 (TCC).



## Limiting liability (1)

- Prima facie valid against contracting party and not against third party. But:
- If contract is a consumer contract, is term unfair?  
Consumer Rights Act Sch. 2, para. 2: a term which inappropriately excludes or limits the legal rights of the consumer in the event of inadequate performance by the trader of contractual obligations.
  - Disproportionate risk to consumer?
  - Relevance of availability of insurance?

## Limiting liability (2)

- Assume liability to contracting party appropriately limited. Should liability to third party be similarly limited?
  - General view in textbooks limitation does not apply. But compare disappointed beneficiary cases – *White v. Jones* [1995] 2 A.C. 207:
    - Sir Donald Nicholls (Court of Appeal), citing Robert Goff L.J. in *Leigh & Silavan Ltd. v. Aliakmon Ltd.* [1985] Q.B. 350 at 397F-398B, “no overriding reasons” why not limited: 225C
    - Lord Goff of Chieveley (House of Lords): assumption of responsibility subject to contractual terms: 368G
    - Lord Nolan left open: 394G
    - Lord Browne-Wilkinson silent
  - What if both contracting party and third party have claims?

## Indemnity provisions

- Unfair Contract Terms Act, s.4: person dealing as a consumer could not be obliged to indemnify other contracting party against third party liability unless term satisfied the requirement of reasonableness.
- Consumer Rights Act, s.62: is the term unfair?
- For purposes of s.4 person deals as a consumer if (1) neither makes contract in course of business nor holds self out as doing so (2) other party makes contract in course of a business: s.12. Likely to have effect similar to Consumer Rights Act test.
- Possible deterrent effect for third party. Possible ratchet effect on contracting party's loss?

## Limitation Act 1980

Not saying anything about primary limitation periods. Points relate to s.14A alternative limitation period:

- Whose knowledge is relevant
- Whether there can be a preliminary state of knowledge
- “Halfway house” knowledge

## Whose knowledge

A quick reminder:

- Cannot stitch together the knowledge possessed by various of the claimant's officers and employees
- Knowledge of a responsible person is sufficient.

See *3M United Kingdom Plc v. Linklaters & Paines* [2005] EWHC 1382 (Ch), affirmed [2006] EWCA Civ 530.

# Preliminary knowledge

- Knowledge of a question mark, not of a real problem.

# Halfway house knowledge

A partial limitation defence:

- The professional fails to notice the point on the first occasion when it is relevant.
- The professional fails again to notice it on subsequent occasions.
- Assuming a new duty arose on the later occasions, but a certain delay by the claimant in pursuing a claim, knowledge may be acquired for s.14A purposes which gives a limitation defence in respect of the first occasion but not later occasions.
- A similar situation could arise when a claim relating to the first occasion is barred by s.14B.
- Effect on quantum?

# Radcliffe Chambers

Radcliffe Chambers  
11 New Square  
Lincoln's Inn  
London WC2A 3QB

T: 020 7831 0081  
F: 020 7405 2560  
DX: 319 London  
[clerks@radcliffechambers.com](mailto:clerks@radcliffechambers.com)

[www.radcliffechambers.com](http://www.radcliffechambers.com)

