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CASES ON EXCLUSION CLAUSES

A. INCORPORATION

L'Estrange v Graucob [1934] 2 KB 394

The plaintiff bought a cigarette machine for her cafe from the defendant and signed a sales agreement, in very small print, without reading it. The agreement provided that "any express or implied condition, statement or warranty … is hereby excluded". The machine failed to work properly. In an action for breach of warranty the defendants were held to be protected by the clause. Scrutton LJ said:

"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."

Curtis v Chemical Cleaning Co [1951] 1 KB 805

The plaintiff took a wedding dress to be cleaned by the defendants. She signed a piece of paper headed 'Receipt' after being told by the assistant that it exempted the cleaners from liability for damage to beads and sequins. The receipt in fact contained a clause excluding liability "for any damage howsoever arising". When the dress was returned it was badly stained. It was held that the cleaners could not escape liability for damage to the material of the dress by relying on the exemption clause because its scope had been misrepresented by the defendant's assistant.

Parker v South Eastern Railway (1877) 2 CPD 416

The plaintiff deposited a bag in a cloak-room at the defendants' railway station. He received a paper ticket which read 'See back'. On the other side were printed several clauses including "The company will not be responsible for any package exceeding the value of £10." The plaintiff presented his ticket on the same day, but his bag could not be found. He claimed £24 10s. as the value of his bag, and the company pleaded the limitation clause in defence. In the Court of Appeal, Mellish LJ gave the following opinion:

- If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions;
- If he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions;
- If he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was reasonable notice that the writing contained conditions.

Chappleton v Barry UDC [1940] 1 KB 531

Deck chairs were stacked by a notice asking the public who wished to use the deck chairs to get tickets and retain them for inspection. The plaintiff paid for two tickets for chairs, but did not read them. On the back of the ticket were printed words purporting to exempt the council from liability. The plaintiff was injured when a deck chair collapsed. The clause was held to be ineffective. The ticket was a mere receipt; its object was that the hirer might produce it to prove that he had paid and to show him how long he might use the chair. Slesser LJ pointed out that a person might sit in one of these chairs for an hour or two before an attendant came round to take his money and give him a receipt.

Olley v Marlborough Court [1949] 1 KB 532

The plaintiff booked in for a week's stay at the defendants' hotel. A stranger gained access to her room and stole her mink coat. There was a notice on the back of the bedroom door which stated that "the proprieters will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody." The Court of Appeal held that the notice was not incorporated in the contract between the proprietors and the guest. The contract was made in the hall of the hotel before the plaintiff entered her bedroom and before she had an opportunity to see the notice.

Thompson v LMS Railway [1930] 1 KB 41

The plaintiff who could not read gave her niece the money to buy an excursion ticket. On the face of the ticket was printed "Excursion, For Conditions see back"; and on the back, "Issued subject to the conditions and regulations in the company's time-tables and notices and excursion and other bills." The conditions provided that excursion ticket holders should have no right of action against the company in respect of any injury, however caused. The plaintiff stepped out of a train before it reached the platform and was injured.

The trial judge left to the jury the question whether the defendants had taken reasonable steps to bring the conditions to the notice of the plaintiff. The jury found that they had not but the judge, nevertheless, entered judgment for the defendants. The Court of Appeal held that the judge was right. The Court thought that the verdict of the jury was probably based on the fact that the passenger had to make a considerable search to find the conditions; but that was no answer. Lord Hanworth MR said that anyone who took the ticket was conscious that there were some conditions and it was obvious that the company did not provide for the price of an excursion ticket what it provided for the usual fare. Having regard to the condition of education in this country, it was irrelevant that the plaintiff could not read.

Thornton v Shoe Lane Parking [1971] 1 All ER 686

The plaintiff drove into the defendant's car park and was given a ticket by an automatic machine, which stated that it was issued subject to conditions displayed inside the car park. The conditions inside the car park were in small print and one of them excluded liability for damages to vehicles or injury to customers. The plaintiff was injured due partly to the defendant's negligence. The plaintiff was not held to be bound by the notice displayed inside the premises.

Lord Denning said that the clause was so wide and destructive of rights that "In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it - or something equally startling".

Interfoto Picture Library v Stiletto Ltd [1988] 1 All ER 348

The defendants, an advertising agency, ordered 47 photographic transparencies from the plaintiff operators of a photo library. The transparencies were accompanied by a delivery note which contained a number of conditions. Condition 2 provided that a holding fee of £5 per day was payable in respect of each transparency retained after 14 days. The defendants did not return the transparencies on time and the plaintiffs sued for the holding fee payable under Condition 2 which amounted to £3785.

The Court of Appeal held that Condition 2 had not been incorporated into the contract. Interfoto had not taken reasonable steps to bring such an unusual, unreasonable and onerous term to Stiletto's notice. The plaintiffs were awarded £3.50 per transparency per week on a *quantum meruit* basis.

Spurling v Bradshaw [1956] 2 All ER 121

The defendant delivered eight barrels of orange juice to the plaintiffs who were warehousemen. A few days later the defendant received a document from the plaintiff which acknowledged receipt of the barrels. It also contained a clause exempting the plaintiffs from liability for loss or damage "occasioned by the negligence, wrongful act or default" caused by themselves, their employees or agents. When the defendant collected the barrels some were empty, and some contained dirty water. He refused to pay the storage charges and was sued by the plaintiffs.

It was held that although the defendants did not receive the document containing the exclusion clause until after the conclusion of the contract, the clause had been incorporated into the contract as a result of a regular course of dealings between the parties over the years. The defendant had received similar documents on previous occasions and he was now bound by the terms contained in them.

McCutcheon v MacBrayne [1964] 1 WLR 125

Exclusion clauses were contained in 27 paragraphs of small print contained inside and outside a ferry booking office and in a 'risk note' which passengers sometimes signed. The exclusion clauses were held not to be incorporated. There was no course of conduct because there was no consistency of dealing.

Hollier v Rambler Motors [1972] 2 AB 71

The plaintiff had used the defendant garage three or four times over five years and on some occasions had signed a contract, which excluded the defendants from liability for damage by fire. On this occasion nothing was signed and the plaintiff's car was badly damaged in a fire. It was held that there was not a regular course of dealing, therefore the defendants were liable. The court referred to *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* (1969) in which more than 100 notices had been given over a period of three years, which did amount to a course of dealing.

British Crane Hire v Ipswich Plant Hire [1974] QB 303

Both parties were companies engaged in hiring out earth-moving equipment. The plaintiffs supplied a crane to the defendants on the basis of a telephone contract made quickly, without mentioning conditions of hire. The plaintiffs later sent a copy of their conditions but before the defendants could sign them, the crane sank in marshy ground. The conditions, which were similar to those used by all firms in the business, said that the hirer should indemnify the owner for all expenses in connection with use.

The court held that the terms would be incorporated into the contract, not by a course of dealing, but because there was a common understanding between the parties, who were in the same line of business, that any contract would be on these standard terms. The defendants were liable for the expense involved in recovering the crane.

Adler v Dickinson [1954] 3 All ER 396

The plaintiff was a passenger on a P & O ship under a contract which excluded the liability of employees for negligence. The plaintiff fell off the gangplank due to the negligence of employees and sued the captain. It was held by the Court of Appeal that the captain was a third party as regards the contract between the plaintiff and P & O and could not rely on the exclusion clause in the contract.

Scruttons Ltd v Midland Silicones [1962] AC 446

A shipping company (the carrier) agreed to ship a drum of chemicals belonging to the plaintiffs. The contract of carriage limited the liability of the carrier for damage to £179 per package. The drum was damaged by the negligence of the defendants, a firm of stevedores, who had been engaged by the carriers to unload the ship. The plaintiffs sued the defendants in tort for the full extent of the damage, which amounted to £593. The defendants claimed the protection of the limitation clause. The House of Lords held in favour of the plaintiffs. The defendants were not parties to the contract of carriage and so they could not take advantage of the limitation clause.

Andrews v Hopkinson [1957] 1 QB 229

The plaintiff saw a car in the defendant's garage, which the defendant described as follows: "It's a good little bus. I would stake my life on it". The plaintiff agreed to take it on hire-purchase and the defendant sold it to a finance company who made a h-p agreement with the plaintiff. When the car was delivered the plaintiff signed a note saying he was satisfied about its condition. Shortly afterwards, due to a defect in the steering, the car crashed. The plaintiff was stopped from suing the finance company because of the delivery note but he sued the defendant.

It was held that there was a collateral contract with the defendant who promised the car was in good condition and in return the plaintiff promised to make the h-p agreement. Therefore the defendant was liable.

British Road Services v Arthur Crutchley Ltd [1968] 1 All ER 811

BRS delivered whisky to AC's warehoue. BRS's driver gave AC a delivery note which contained BRS' conditions. AC stamped the note "Received under AC's conditions". The whisky was stolen. It was held that AC stamping the delivery note was a counter offer which was accepted by BRS handing over the whisky. The contract was made on AC's conditions.

B. INTERPRETATION

Baldry v Marshall [1925] 1 KB 260

The plaintiff asked the defendants, who were motor dealers, to supply a car that would be suitable for touring purposes. The defendants recommended a Bugatti, which the plaintiff bought. The written contract excluded the defendant's liability for any "guarantee or warranty, statutory or otherwise". The car turned out to be unsuitable for the plaintiff's purposes, so he rejected it and sued to recover what he had paid.

The Court of Appeal held that the requirement that the car be suitable for touring was a condition. Since the clause did not exclude liability for breach of a condition, the plaintiff was not bound by it.

Houghton v Trafalgar Insurance [1953] 2 All ER 1409

The plaintiff's motor insurance policy provided that the defendant insurers would not be liable, if the plaintiff carried an "excess load". The plaintiff had an accident while carrying six people in a five seater car. The Court of Appeal held that the term "excess load" could mean either too many people or too much weight. It was given the latter meaning, which meant that the defendants were liable on the policy.

White v John Warwick [1953] 1 WLR 1285

The plaintiff hired a trademan's cycle from the defendants. The written agreement stated that “Nothing in this agreement shall render the owners liable for any personal injury". While the plaintiff was riding the cycle, the saddle tilted forward and he was injured. The defendants might have been liable in tort (for negligence) as well as in contract. The Court of Appeal held that the ambiguous wording out of the exclusion clause would effectively protect the defendants from their strict contractual liability, but it would not exempt them from liability in negligence.

Glynn v Margetson [1893] AC 351

Carriers agreed to take oranges from Malaga to Liverpool under a contract which allowed the ship to call at any port in Europe or Africa. The ship sailed 350 miles east from Malaga to pick up another cargo. When it arrived in Liverpool the oranges had gone bad. The defendants attempted to relyon an exclusion clause. The House of Lords held that the main purpose was to deliver a perishable cargo of oranges to Liverpool and in the light of this the wide words of the clause could be ignored and the ship could only call at ports en route. Therefore the carriers were liable.

Evans v Andrea Merzario [1976] 1 WLR 1078

The plaintiffs had imported machines from Italy for many years and for this purpose they used the services of the defendants, who were forwarding agents. The plaintiffs were orally promised by the defendants that their goods would continue to be stowed below deck. On one occasion, the plaintiff's container was stored on deck and it was lost when it slid overboard.

The Court of Appeal held that the defendants could not rely on an exemption clause contained in the standard conditions of the forwarding trade, on which the parties had contracted, because it was repugnant to the oral promise that had been given. The oral assurance that goods would be carried inside the ship was part of the contract and was held to override the written exclusion clause.

C. THE UNFAIR CONTRACT TERMS ACT 1977

Peter Symmons & Co v Cook (1981) 131 NLJ 758

The plaintiff firm of surveyors bought a second-hand Rolls Royce from the defendants which developed serious defects after 2,000. It was held that the firm was acting as a consumer and that to buy in the course of a business ‘the buying of cars must form at the very least an integral part of the buyer’s business or a necessary incidental thereto’. It was emphasised that only in those circumstances could the buyer be said to be on equal footing with his seller in terms of bargaining strength.

R & B Customs Brokers v United Dominion Trusts Ltd [1988] 1 WLR 321

The plaintiff company, which was a shipping agency, bought a car for a director to be used in business and private use. It had bought cars once or twice before. The sale was arranged by the defendant finance company. The contract excluded the implied conditions about merchantable quality. Thecar leaked badly.

It was held by the Court of Appeal that where a transaction was only incidental to a business activity, a degree of regularity was required before a transaction could be said to be an integral part of the business carried on and so entered into in the course of that business. Since here the car was only the second or third vehicle acquired by the plaintiffs, there was not a sufficient degree of regularity capable of establishing that the contract was anything more than

part of a consumer transaction. Therefore, this was a consumer sale and the implied conditions could not be excluded.

Smith v Eric Bush [1989] 2 All ER 514

The plaintiff applied to a building society for a mortgage and signed an application form which stated that a copy of the survey report and valuation would be given to the plaintiff. The form contained a disclaimer to the effect that neither the society nor its surveyor warranted that the report and valuation would be accurate, and that they would be supplied without any acceptance of responsibility. The report itself contained a similar disclaimer. The report stated that no essential repairs were required. On the strength of that report, and without obtaining an independent survey, the plaintiff purchased the house. The surveyor negligently failed to check that a chimney breast which had been removed was properly supported. When the chimney collapsed the plaintiff sued the valuer.

The House of Lords held that a valuer who valued a house for a building society owed a duty of care to the purchaser of the house. However, the valuer could disclaim liability to exercise reasonable skill and care by an express exclusion clause, but such a disclaimer had to satisfy the requirement of reasonableness in s2(2) of UCTA 1977. In this case, it would not be fair and reasonable to impose on the purchaser the risk of loss arising from the incompetence or carelessness on the part of the valuer. The disclaimer was, therefore, not effective to exclude liability for the negligence of the valuer.

Lord Griffiths said that it was impossible to draw up an exhaustive list of factors to be taken into account in deciding whether an exclusion clause met the requirement of reasonableness, but certain matters should always be considered. These were:

1. Were the parties of equal bargaining power?
2. In the case of advice, would it have been reasonably practicable to obtain the advice from an alternative source, taking into account considerations of costs and time?
3. How difficult is the task being undertaken for which liability is being excluded?
4. What are the practical consequences of the decision on the question of reasonableness? This involves the sum of money at stake and the ability of the parties to bear the loss, which raises the question of insurance.

In this case, (1) the purchaser could not object to the clause; (2) the purchaser was buying a modest house and could not afford a second survey; (3) the task of the surveyor was fairly simple and excluding liability was unreasonable; and (4) the valuer was better able to bear the loss.

Ailsa Craig Fishing Co v Malvern Fishing Co [1983] 1 All ER 101

ACF engaged Securicor to watch their ship in a harbour. The contract provided that Securicor's liability was "not to exceed £1,000 in respect of any one claim not related to fire or theft". One night Securicor's guard did not bother patrolling and ACF's ship hit MF's ship and both ships sank.

The House of Lords held that a clause limiting rather than excluding liability should not be judged by the "specially exacting standards" applied to exclusion clauses. Here the clause was clear and Securicor's liability was limited to the amount stated.

George Mitchell v Finney Lock Seeds Ltd [1983] 2 All ER 737

The plaintiff farmer bought cabbage seeds from the defendant national seed company. The plaintiff planted the seed but the seed was defective and the crop was a total failure. The plaintiff claimed over £60,000 damages for breach of contract, based on the loss of the crop. The defendants attempted

to rely on a clause in the contract which purported to limit their liability to the cost of the seeds at £201-60.

The House of Lords held that although the clause was part of the agreement and covered this event, it was however, unreasonable. The reasons for this were: that it appeared that the normal practice of the seller was not to rely on the limitation clause, but to negotiate settlements of reasonable claims; the breach was due to the seller's negligence; and the seller could have insured against the loss without materially raising his charges.

St Albans District Council v ICL [1996] 4 All ER 481

A computer firm was sued by the local authority that had hired them to assess population figures on which to base community charges. The standard contract used by the computer firm contained a limitation clause restricting liability to £100,000. The database supplied to the plaintiffs was seriously inaccurate and resulted ultimately in the local authority sustaining a loss of £1.3m. The judge at first instance had held that this clause was ineffective because it failed the reasonableness test in UCTA 1977. Some of the factors that led to this finding were as follows: (1) the parties were of unequal bargaining power; (2) the figure of £100,000 maximum liability was small in relation to the potential risk and the actual loss in the case; (3) the defendants held an aggregate of £50m insurance cover world-wide; and (4) the defendants were in a better position to insure (indeed had done so and no doubt passed the cost on to their customers).

In the Court of Appeal ICL had two arguments: *First* they argued that the Council did not "deal" on ICL's written standard terms of business, since the Council had negotiated over the term of the contract before entering it. This failed because, it was held, that a party "deals" when he enters the contract, irrespective of whether there had been prior negotiations. Furthermore, ICL's general conditions remained effectively untouched at the end of the negotiations. *Secondly*, they argued - again unsuccessfully - that the clause satisfied the reasonableness test. The Court of Appeal, reiterated what was said by the House of Lords in *George Mitchell v Finney Lock Seeds*, to the effect that the trial judge in balancing the various factors in deciding the test of reasonableness is satisfied is doing something very close to exercising a discretion.

Note: However, the amount of damages was reduced.

Stewart Gill v Horatio Myer [1992] 2 All ER 257

The plaintiff made a contract to provide a conveyor system for the defendant, with payment by instalments. The plaintiffs claimed the last 10% but as the conveyor had faults, the defendant wished to set off its claim against the payment. The plaintiff's standard terms provided that customers could not withhold payment because of any "payment, credit, set-off, counterclaim, allegation of incorrect or defective goods or any other reason whatsoever".

The Court of Appeal held that the clause was not within s3 but as it restricted remedies it was within s13 (s13(1)(b)). It was subject to the test of reasonableness and reading the clause as a whole, it was too wide and stopped the defendant using a genuine set-off. The clause was therefore unreasonable and the plaintiff could not rely on it.

Phillips Products v Hyland [1987] 1 WLR 659

The plaintiff hired an excavator from the second defendants on the latter's standard terms which provided that the driver should be regarded as employed by the plaintiff, the plaintiff thereby remaining liable for any loss arising from the machine's use. The driver negligently damaged the plaintiff's factory whilst carrying out work at the plaintiff's request.

It was held that several factors meant that the clause failed to pass the reasonableness test: (1) the plaintiff did not regularly hire machinery of this sort whereas the defendants were in the business of equipment hire. (2) the clause was not the product of any negotiation between the parties: rather it was simply one of the defendant's 43 standard conditions. (3) the hire period was very short and the plaintiff had no opportunity to arrange insurance cover. (4) the plaintiff played no part in the selection of the driver and had no control over the way in which he performed his job.