Concentrate Questions and Answers Contract Law: Law Q&A Revision and Study Guide (3rd edn)

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5. Exemption Clauses and Unfair Terms

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Abstract

The *Concentrate Questions and Answers* series offers the best preparation for tackling exam questions. Each book includes typical questions, answer plans and suggested answers, author commentary, and other features. This chapter focuses on the regulation of exclusion/exemption clauses and other potentially unfair terms. It discusses both common law (such as approaches to incorporation and interpretation) and statutory regulation (such as the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015). It also explores two key debates: the nature of an exemption clause, and the tension between freedom of contract and judicial and statutory intervention in the context of exemption clauses.

Keywords: common law, contract law, implied terms, Unfair Contract Terms Act 1977, Consumer Rights Act 2015

Are you ready?

In order to attempt the questions in this chapter you must have covered the following areas in your revision:

- The purpose of exemption clauses;
- The types of exemption clause, particularly exclusion and limitation clauses;
- How exemption clauses are incorporated into a contract—particularly through signature, notice, and a previous course of dealings;

- Common law rules on the interpretation of exemption clauses;
- The impact of legislation on exemption clauses—eg the Unfair Contract Terms Act 1977;
- Protection of consumers from unfair terms—Part 2 of the Consumer Rights Act 2015.

Key debates

Debate: what is the nature of an exemption clause?

Does an exemption clause act as a defence to liability for a breach of contract or does an exemption clause define obligations under the contract and thus determine if there is liability in the first place (compare ***Impact Funding Solutions Ltd v Barrington Support Services Ltd (formerly Lawyers at Work Ltd)*** [2016] UKSC 57)?

Debate: freedom of contract versus judicial intervention.

Why does the law seek to control the use of exemption clauses in consumer contracts (eg the Consumer Rights Act 2015)? Should the law seek to control the use of exemption clauses in contracts where both parties are businesses? This debate is of particular significance in the application of the test of reasonableness under the Unfair Contract Terms Act 1977.

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Question 1

Harvey, a businessman, buys a country hotel in Gloucestershire and decides to have the gardens landscaped. He contacts Capability Ltd after seeing their advertisement in the local newspaper stating: ‘Paths, fencing and garden maintenance our speciality—also quotations given for larger jobs.’ Before concluding any contract, Harvey discovers that there is a local builder, Scrapitt, who offers to do the work at ‘5 per cent less than whatever price Capability quotes’. Harvey has little confidence in Scrapitt and he therefore decides to enter into a contract with Capability Ltd.

A price of £10,000 is agreed and Harvey is given a document headed ‘Memorandum of Terms’. This document sets out the job specification, price, and date of completion. The reverse has the following clauses added by rubber stamp:

> Clause 1: The company accepts no responsibility for personal injury to the customer during performance of the contract.
>
> Clause 2: Liability for any damage to the customer's property is limited to the sum of £500, and no liability can be accepted for loss of, or damage to, the customer's goods.

Reckless, employed by Capability Ltd, drives a dumper truck through the wall of Harvey's hotel. As Harvey returns in his car that night, he collides with the dumper truck which Reckless has left in the middle of the driveway. The car is completely ruined and Harvey is injured.

Advise Harvey.

Caution!

■ Address the issue of liability: for example, has there been a breach of contract and/or has a party been negligent? The facts of the question will determine how much you can say about the issue of liability.

■ There are two main areas for evaluation in this problem; first, the common law controls over the use of exemption clauses and, secondly, the relevant sections of the Unfair Contract Terms Act 1977 (UCTA 1977).

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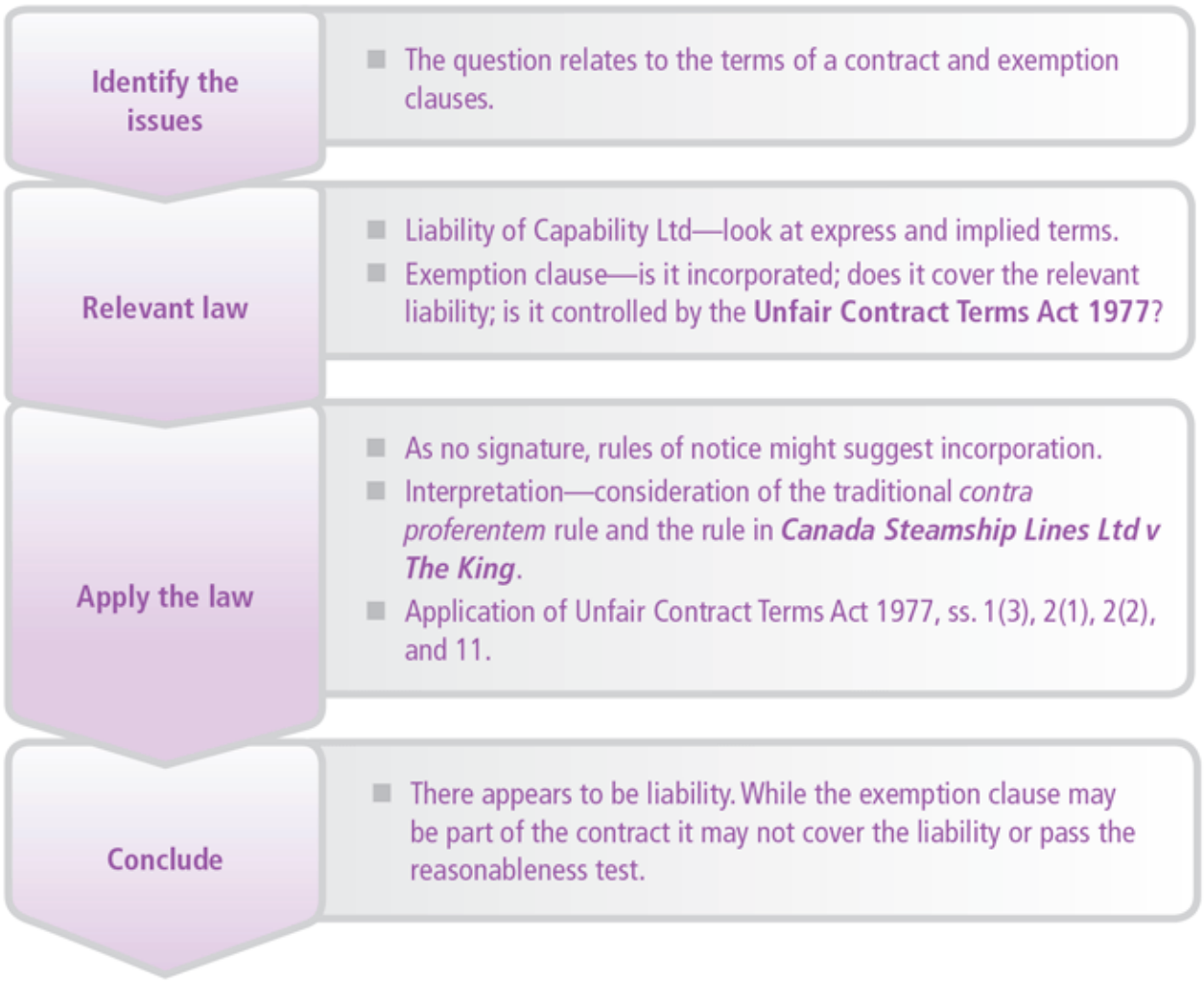
Diagram answer plan



Suggested answer

This question concerns the extent to which Harvey (H) is bound by the attempted exemption of Capability Ltd's (C's) liability. A first issue to consider is that of C's liability[1] in relation to the damaged wall, damaged car, and the personal injuries suffered by H. While the facts of the question do not fully explain the circumstances of the events, it may be argued that there has been a failure by C to exercise reasonable care and skill either under the contract (see **Supply of Goods and Services Act 1982, s. 13**, which implies such a term) or by arguing negligence at common law. Should such liability exist, then C may seek to rely on the exemption clauses in the contract.

[1] The issue of liability is considered first, but only briefly.

For an exemption clause to be effective as a matter of contract law it must be incorporated into the contract.[2] There are various ways in which an exemption clause can be incorporated into a contract. In the absence of a signature,[3] the exemption may be incorporated by notice; H must be given reasonable notice of the terms.[4] It was emphasized in ***Parker v South Eastern Ry* (1877) 2 CPD 416** that it is notice of the terms which is important, not their actual reading or ↵ understanding, and it follows that if the notice is illegible or obscured by a date stamp as in ***Richardson, Spence & Co. v Rowntree* [1894] AC 217**, it will be ineffective. The clauses in the problem appear to be quite legible but they are on the reverse of the document and there may be no notice such as 'See over for conditions' on its face. This may well be fatal to C, for in ***Henderson v Stevenson* (1875) LR 2 HL (Sc) 470** the court held that the absence of a notice on the front of a ticket referring to clauses printed on its back rendered the clauses invalid. Moreover, in ***Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433**, the court emphasized that if the clause is particularly unusual, or onerous, extra care must be taken to draw its attention to the other party. On the facts it may be argued that the terms are neither unusual nor onerous (and in ***Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371** the Court of Appeal stressed that an exemption clause is not per se onerous or unusual) but, if they were, it would seem that C has not taken any further steps to draw the terms to H's attention. Furthermore, the notice that is given must be, at the latest, contemporaneous with the contract's formation (see ***Olley v Marlborough Court Ltd* [1949] 1 KB 532**). It is not entirely clear when the exclusion clauses in the problem are presented to H and so there is some uncertainty over whether or not this requirement is satisfied.

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[2] Here one of the major issues raised by the question is identified.

[3] In explaining the rules of incorporation concentrate on the method of incorporation relevant to the facts, ie notice.

[4] This paragraph shows the rules and application part of IRAC; state the rule and immediately apply it to the facts.

Additionally, the document containing the clauses must be a contractual document; that is, one which a reasonable person would expect to contain the conditions of the contract. In ***Chapelton v Barry Urban District Council*** **[1940] 1 KB 532**, a receipt which was given for the hire of a deckchair was not such a contractual document. The courts preserve great flexibility when deciding this question (see ***McCutcheon v MacBrayne (David) Ltd*** **[1964] 1 WLR 125**) and it may be that the 'Memorandum of Terms' in the problem will suffice. However, there might be a full, written contract elsewhere which would mean that the court could strike down this 'Memorandum'. In conclusion,[5] the argument as to incorporation by notice seems to particularly turn on whether or not steps had been taken to draw H's attention to the clauses at the time of contracting. The lack of an indication that H should turn to the reverse of the document may be fatal to C's reliance on the exemption clauses.

[5] A short conclusion highlights the main point of the argument in relation to incorporation.

Before leaving the common law, it must be emphasized that, should the clauses be successfully incorporated in the contract, the question then becomes one of interpretation[6]—does the exemption clause cover the liability that has arisen? A traditional rule of construction was that any ambiguity in a clause would be construed against C (ie *contra proferentem*). Similarly, clauses attempting to exclude all liability for negligence needed to be clear and the law traditionally ↵ preserved this head of liability wherever possible (see ***Alderslade v Hendon Laundry Ltd*** **[1945] 1 KB 189**; ***White v John Warwick & Co. Ltd*** **[1953] 1 WLR 1285**). The question is ultimately one of construction of the contract, but if the defendant disclaims liability for 'any loss' the court may consider that he is attempting to exclude all *types* of loss without being sufficiently specific as to their *cause* (see ***Price v Union Lighterage Co.*** **[1904] 1 KB 412**) and in commercial contracts, between parties of comparable strength, it seems the *contra proferentem* rule is now of limited use (see ***Persimmon Homes Ltd v Ove Arup & Partners Ltd*** **[2017] EWCA Civ 373**). The clauses in the problem make no express reference to negligence and, as such, they would traditionally have been construed against C following the tests laid down by Lord Morton in ***Canada Steamship Lines Ltd v The King*** **[1952] AC 192**. However, the common law's powers to circumvent clauses by deft interpretation are now of less significance in the light of the **Unfair Contract Terms Act 1977 (UCTA 1977)** and in ***Persimmon Homes Ltd v Ove Arup & Partners Ltd*** **[2017] EWCA Civ 373** Jackson LJ was of the opinion that Lord Morton's test is much less relevant today (see also in a similar vein ***The Federal Republic of Nigeria v JP Morgan Chase Bank, N.A.*** [2019] EWHC 347 (Comm) at [64]).

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[6] Another issue is identified, that of interpretation of the exemption clause, followed by an explanation and application of the rules.

The UCTA 1977[7] seeks to control the use of exemption clauses and generally applies where there is 'business liability'. **Section 1(3)** defines 'business liability' as 'liability for breach of obligations or duties … arising from things done or to be done by a person in the course of a business (whether his own or another's)'. As C's liability arises from their undertaking landscaping work in the course of his business the 1977 Act would apply.

[7] It is important to explain when the **UCTA 1977** applies.

Section 2(1) of the UCTA 1977[8] invalidates any attempt by a contract term or notice to exclude or restrict liability for death or bodily injury *resulting from negligence*. It is clearly arguable that it was negligent to leave the dumper truck in the driveway and, if the basis of H's claim is negligence, clause 1 of the contract would be ineffective as regards H's claim for his injuries.

[8] Some exemptions are rendered ineffective by the **Unfair Contract Terms Act 1977**.

Section 2(2) further provides that in the case of 'other loss or damage' a person cannot exclude or restrict his/her liability *for negligence* except insofar as the term or notice satisfies the test of reasonableness. This seems applicable to C, as liability seems to have arisen due to negligence (including an implied term to take reasonable care). It must be decided whether clause 2 can pass the reasonableness test. Section 11(1) provides that the time for determining whether the clause is reasonable is the time at which the contract is made.[9] Thus the seriousness of the loss or damage caused should not be ↵ considered except to the extent to which it was, or ought reasonably to have been, in the contemplation of the parties at the time of contract. Following the interpretation given to **s. 11** in ***Stewart Gill Ltd v Horatio Myer & Co. Ltd*** **[1992] 1 QB 600**, it seems unlikely that C could justify the insertion of the exclusion clause in the contract. ***Stewart Gill*** also decides that the *whole* clause must be reasonable, not merely the part relied upon by the defendant: clause 2 may therefore fail in its entirety (see also ***Watford Electronics Ltd v Sanderson CFL Ltd*** **[2001] EWCA Civ 317**, which would clearly support the view that clauses 1 and 2 were separate for the purposes of applying s. 11 of the UCTA 1977, and compare ***Goodlife Foods Ltd v Hall Fire Protection Ltd*** **[2017] EWHC 767**, **affirmed on appeal [2018] EWCA Civ 1371**). **Section 11(4)** provides that if the defendant limits liability to a specific sum of money, regard shall be had, in assessing reasonableness, to the resources which he/she could expect to be available to him for meeting the liability and how far it was open to him/her to cover himself by insurance. This provision was designed to alleviate undue hardship to small businesses but it is arguable that C could and should have insured against the risk in question and this would certainly be the case if C could insure without any material increase to H in the contract price.

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9 The test of reasonableness requires detailed consideration.

It is also vital to consider the guidelines for assessing reasonableness in Sch. 2 to the Act. Particularly relevant to this problem is the question of whether the customer was given any inducement to agree to the clause or had the opportunity of doing business elsewhere without having to accept the clause. As C charges more than one of its competitors (Scrapitt would give a 5 per cent discount on C's prices), it is legitimate to ask whether Scrapitt would use any exclusion clauses and, if so, whether they are more or less onerous than C's. C's exclusion clause might, therefore, be condemned using such a comparative assessment.

In ***Watford Electronics Ltd v Sanderson CFL Ltd*** it was said that where commercial parties of equal bargaining power negotiate and arrive at a bargain, then the courts should not interfere. Both H and C are in business. However, it would seem that there was no negotiation in relation to the terms and, indeed, even if at common law the exemptions had been incorporated, the facts do not suggest that H was aware of the clause before contracting (see Sch. 2, guideline (c)). In these circumstances, on balance, it is suggested that C's clause might not be regarded as a reasonable one. Indeed, by **s. 11(5)** the burden of proof lies on C to show that the clause is reasonable.

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Looking for extra marks?

■ Few questions in this area can be answered simply by reference to common law principles: allocate a reasonable proportion of your answer to the law contained in the UCTA 1977, citing and applying specific subsections wherever possible. Consider whether clauses which define obligations can be covered by UCTA 1977 (see ***Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd*** **[2012] EWHC 2198** and ***McClean v Thornhill*** **[2022] EWHC 457 (Ch)**).

■ The question of reasonableness under the UCTA 1977 is a matter for the discretion of a trial court. While the law has identified a number of factors that may be taken into account in assessing reasonableness, ultimately the weight to be attached to the factors in an individual case is for the trial court to assess. In consequence, it is difficult to predict if an exemption clause will satisfy the test of reasonableness.

Question 2

Patrick, a director of Dartsma Ltd, which manufactures computers, decided that the company should purchase a prestigious car which could be used principally for entertaining the company's customers but which would also be suitable for private use by Patrick and the other directors. Accordingly, the company bought a second-hand 'Lynx' car from Dependable Motors Ltd (DM), a motor dealership. Patrick managed to negotiate a 15 per cent 'trade discount' on the price of the car. The lengthy contract for the sale of the car, which Patrick signed, contained the following clause on p. 10:

DM Ltd will refund the price of any defective goods provided that such defects are communicated to the company in writing no later than 3 days after the contract of sale is concluded but the Company shall not otherwise be liable for any loss or damage caused by defects in the goods.

Before leaving DM's premises, Patrick noticed that the car's windscreen wiper blades needed replacing. He therefore purchased two new blades from the parts department of DM Ltd, fitting them himself. The sales invoice contained the same exclusion clause as that in the contract for the sale of the car and was also signed by Patrick. After using the car for two weeks, Patrick had a minor accident while driving the car in wet weather and the car was damaged. He discovered that the rubber wiper blades had perished and had consequently failed to clear the windscreen of rain. In the third week of using the car, its gearbox seized up and was ruined. DM Ltd had failed to refill the gearbox with oil during the pre-delivery service of the car.

a Advise Patrick.

(Ignore any issues relating to acceptance of breach and remedies.)

b Would your answer differ, and if so how, if Patrick bought the car from Chemcall plc, a chemical processing manufacturer, that had a car which was surplus to requirements, and the car had serious mechanical problems?

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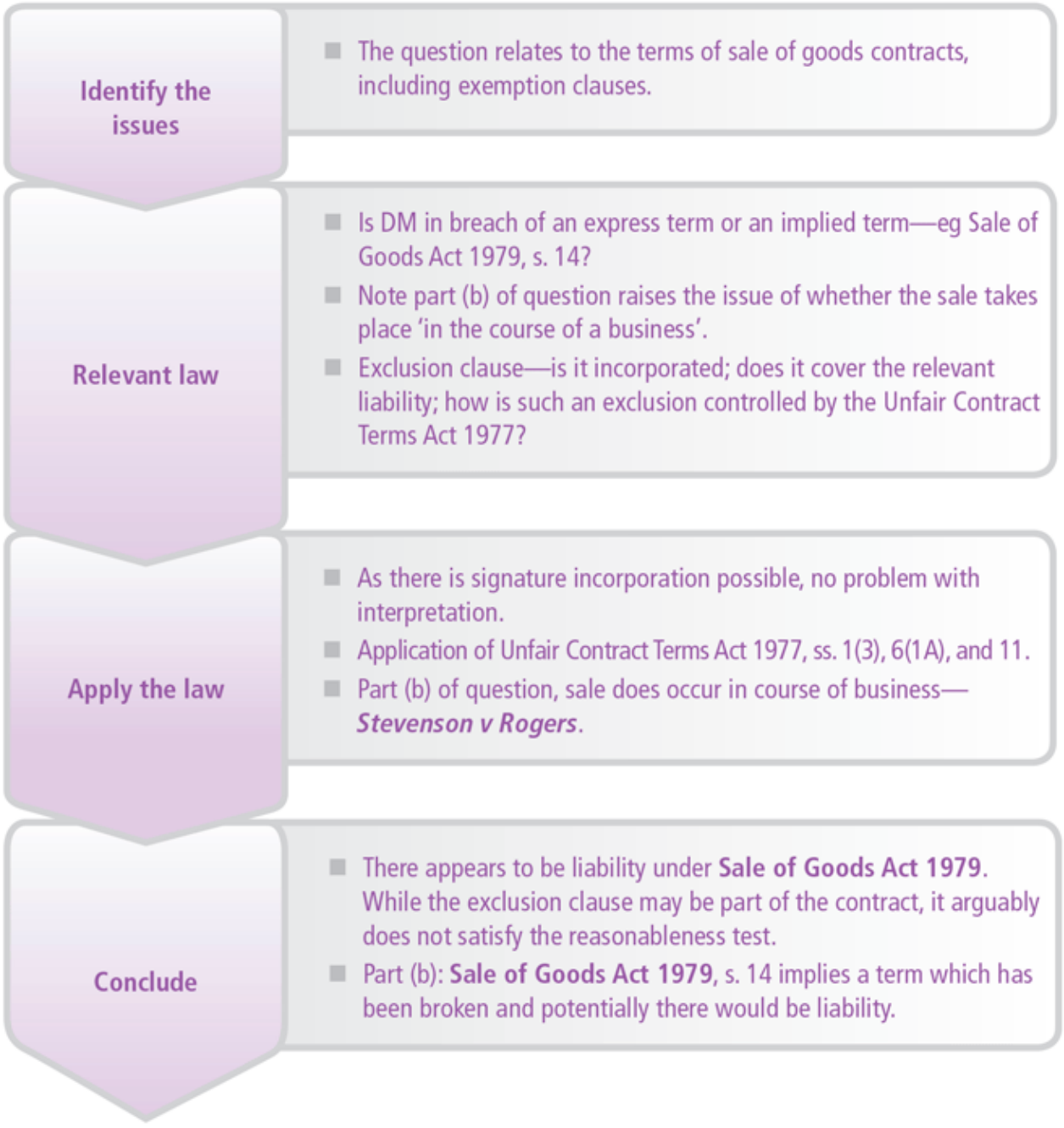
Caution!

■ Consider the extent to which the implied terms emanating from the Sale of Goods Act 1979 can be excluded in business sales. Section 6 of the Unfair Contract Terms Act 1977 (UCTA 1977) must be considered.

■ Note that the UCTA 1977 does not create liability. To establish liability, you must look to the terms of a contract and breach. Should liability exist then the 1977 Act may regulate attempts to exempt liability.

Diagram answer plan



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Suggested answer

(a) This problem raises issues concerning implied terms, breach of contract, and the operation of exemption clauses.[1] The answer will address whether the exemption clause in issue protects Dependable Motors from any breach of the implied terms of s. 14 of the Sale of Goods Act 1979 (SGA 1979), which covers the quality and fitness for any particular purpose of the goods sold.

[1] The opening sentence indicates the areas of law raised by the question.

First, what are the terms of the contract[2] between Patrick (P) and Dependable Motors (DM)? The question does not indicate that express terms provide for the events that have occurred, in consequence it is necessary to consider the potential implied terms contained in s. 14 of the SGA 1979. This section implies, in some situations, conditions that the goods sold are of satisfactory quality and, where relevant, fit for any particular purpose. By s. 14(2A) of the SGA 1979 goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking into account any description, price, and other relevant circumstances (see also the SGA 1979, s. 14(2B)). However, for the terms to be implied the goods must be sold 'in the course of a business'.[3] As DM is a motor dealer, both the car and the wiper blades were sold 'in the course of a business' by DM and the goods seem to be both unsatisfactory and unfit for their purpose. It is arguable that DM is in breach of s. 14 of the SGA 1979.

[2] The logic of this question requires that the terms of the contract and possible breach are considered to establish potential liability.

[3] The answer considers whether the requirement of s. 14 of the SGA 1979 that the goods are sold in the course of a business is satisfied.

Secondly, DM will seek to rely upon the exemption clauses in answer to any claim by P.[4] For such clauses to be effective as a matter of contract law, they must be incorporated in the contracts. There can scarcely be any dispute regarding the incorporation of these exemption clauses. The terms in the contracts of sale seem to be advanced by DM at the moment of the formation of both contracts (compare ***Olley v Marlborough Court Ltd*** **[1949] 1 KB 532**, where an exclusion clause was only notified after the formation of the contract and was therefore ineffective). Also, both documents are probably contractual in nature (see ***Chapelton v Barry Urban District Council*** **[1940] 1 KB 532**, where an exclusion clause contained in a receipt was not incorporated in a contract as the receipt was not

intended to be contractual in nature). The lengthy document signed by P in relation to the purchase of the car appears to be contractual and certainly would so appear to a reasonable person (***Thompson v LM & S Ry* [1930] 1 KB 41**). There might only be some doubt in this respect regarding the 'sales invoice' for the wiper blades (see ***Grogan v Robin Meredith Plant Hire* [1996] CLC 1127**, where signature of a time sheet, ↵ containing terms, did not incorporate the terms because the document was not contractual) but the problem does not provide enough information to decide the issue. More importantly, as both documents are signed[5] by P and, in the absence of any misrepresentation or duress and irrespective of whether or not P has read the documents, the exemption clauses may be incorporated as terms of the contract (see ***L'Estrange v F Graucob Ltd* [1934] 2 KB 394**). It is arguable, therefore, that at common law these exemption clauses would bind P.

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[4] Once liability is established the effectiveness of the exemption clauses must be considered, starting with whether or not the clauses are incorporated in the contract.

[5] While there are three methods of incorporation, the answer concentrates on the method of incorporation raised by the question, that of signature.

At common law it may be argued that an exemption clause is ineffective as its wording does not cover the liability that has arisen. On the facts of the problem this interpretation question does not appear to be an issue.

However, the Unfair Contract Terms Act 1977 (UCTA 1977) seeks to control the use of exemption clauses between businesses.[6] By s. 1(3) the 1977 Act applies (subject to s.6(4)) where there is 'business liability'; that is, 'liability for breach of obligations … arising from things done or to be done by a person in the course of a business'. As DM is a motor dealership the sale of the car and liability is in the course of a business. Although the clause on page 10 arguably does not directly exclude or limit liability, the 1977 Act nonetheless applies as by s. 13 an exemption clause includes an attempt to 'make the liability or its enforcement subject to restrictive or onerous conditions'.[7] DM, by making liability subject to communication in writing to them of any defects in the goods within three days, seeks to impose a restrictive condition. Section 6(1A) of the UCTA 1977 restricts the extent to which ss. 13–15 of the SGA 1979 may be excluded. Section 6(1A) provides that liability for breach of obligations arising from ss. 13–15 of the SGA 1979 can be excluded but only 'in so far as the term satisfies the requirement of reasonableness'.[8] The exclusions will be subject to the test of reasonableness. By s. 11(1) of the UCTA 1977 it is provided that in relation to a contract term reasonableness is assessed at the time *the contract is made*, having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties at that time. By s. 11(2) of the UCTA 1977 guidelines concerning reasonableness are found in Sch. 2 to the UCTA 1977. It will be for DM to

establish that the exemptions are reasonable as s. 11(5) of the UCTA 1977 places the burden of proof on the party who claims the clause is reasonable.[9] So, will the exemptions relied upon by DM be able to pass the 'reasonableness' test? Having regard to the Sch. 2 guidelines concerning reasonableness,[10] the parties have roughly equal bargaining power and P has been given 15 per cent discount, both of which favour DM, pointing to the reasonableness of the clause. However, is it likely that P could have bought the same model of car elsewhere without such ↵ a restrictive clause but with as generous a discount? Schedule 2(c) provides that for the purposes of assessing reasonableness, regard is to be had as to whether the customer knew or ought reasonably to have known of the existence and extent of the term and (d) where 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. It may be argued that perhaps P ought not reasonably to have known of the existence of the term in this lengthy document at page 10 and it seems that the time limit of three days for notifying defects could not be justified at the date the contract was entered into, this being the time that an evaluation is made under s. 11 of the UCTA 1977. It is quite unreasonable to expect defects to manifest themselves and then be notified within three days (see ***RW Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep 602**). Furthermore, in ***Rees Hough Ltd v Redland Reinforced Plastics Ltd* (1984) 1 Const LJ 67**, a clause in a contract between two businesses was held to be unreasonable because it provided that the sellers of piping excluded all liability unless notified of complaints within three months.

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[6] An indication is given of the scope of the UCTA 1977.

[7] The answer refers to the definition of such clauses in s. 13 to ensure that the clauses in the question are within the ambit of the 1977 Act.

[8] Section 6(1A) provides that the clause, in its attempt to exempt liability for breach of contract, will be subject to the test of reasonableness.

[9] How the test of reasonableness applies is to be explored in some detail. Note also on whom the burden of proof is placed.

[10] By considering the matters relevant to the facts of the question, and explanatory case law, the answer analyses how reasonableness is to be determined.

More generous protection exists under the Consumer Rights Act 2015 (CRA 2015)[11] against exclusion of liability in relation to the (essentially implied) terms of satisfactory quality or fitness for purpose of goods. By **s. 31(1)** an attempt to exclude such liability is not binding on a consumer. However, as P is contracting on behalf of Dartsma Ltd, a company, the transaction will not be a 'consumer contract' as only individuals, not companies, fall within the definition of a 'consumer' (see the **CRA 2015, s. 2** where a consumer is defined as 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession').

[11] A brief paragraph explains why Dartsma cannot claim the protections contained in the CRA 2015.

(b) As Chemcall plc's business is chemical manufacturing, not selling cars, would the terms in s. 14 of the SGA 1979 be implied in the contract between P and Chemcall plc?[12] In ***Stevenson v Rogers*** **[1999] QB 1028**, the Court of Appeal held that the phrase 'sells goods in the course of a business' in s. 14(2) of the SGA 1979 must be given a literal interpretation. In the case, the defendant had an established business as a fisherman and he sold a fishing vessel which he used in the course of his business, replacing that vessel with a new one. The defendant's business was thus not that of buying and selling ships or boats. The Court of Appeal ruled that, having regard to the legislative history of the SGA 1979, the wording in s. 14(2) of the Act had been deliberately changed to widen the protection conferred upon a buyer of goods from a business seller. Thus, it was held that s. 14(2) must be construed at face value and the sale of the fishing vessel was in the course of a business: the wording of the section did not demand ↵ any element of regularity of dealing and so there was no reason 'to re-introduce some implied qualification, difficult to define, in order to narrow what appears to be the wide scope and apparent purpose of the words' (at 623 per Potter LJ). This reasoning would clearly apply to the sale of the car by Chemcall to P and the terms of **s. 14 of the SGA 1979** would be implied in the contract. Liability arises if the serious mechanical problems breach the implied term of satisfactory quality.

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[12] The alteration of the facts allows further consideration of the statutory phrase 'in the course of a business'.

Looking for extra marks?

■ As the question raises issues concerning legislation it is essential that you explain the circumstances in which the legislation applies. This is true of both the SGA 1979 and the **UCTA 1977**. The question requires you to explain the meaning of the legislation. In so doing, appropriate reference to the aids to interpretation, for example, the literal rule, the purposive approach, and so on, would strengthen your answer.

Question 3

The statutory framework for policing the enforceability of exemption clauses and unfair terms in contracts has been thoroughly overhauled by the **Consumer Rights Act 2015** to provide clear, effective, and comprehensive protection for consumers.

Discuss.

Caution!

■ You must have a reasonable knowledge of the main provisions contained in the UCTA 1977 and the (now repealed) Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999), as well as the changes made by the CRA 2015.

■ The ambit of the question is wide so you will need to consider the major issues by sacrificing some detail. Clearly, given the constraints of time in an examination, examples cannot be used in relation to every point made.

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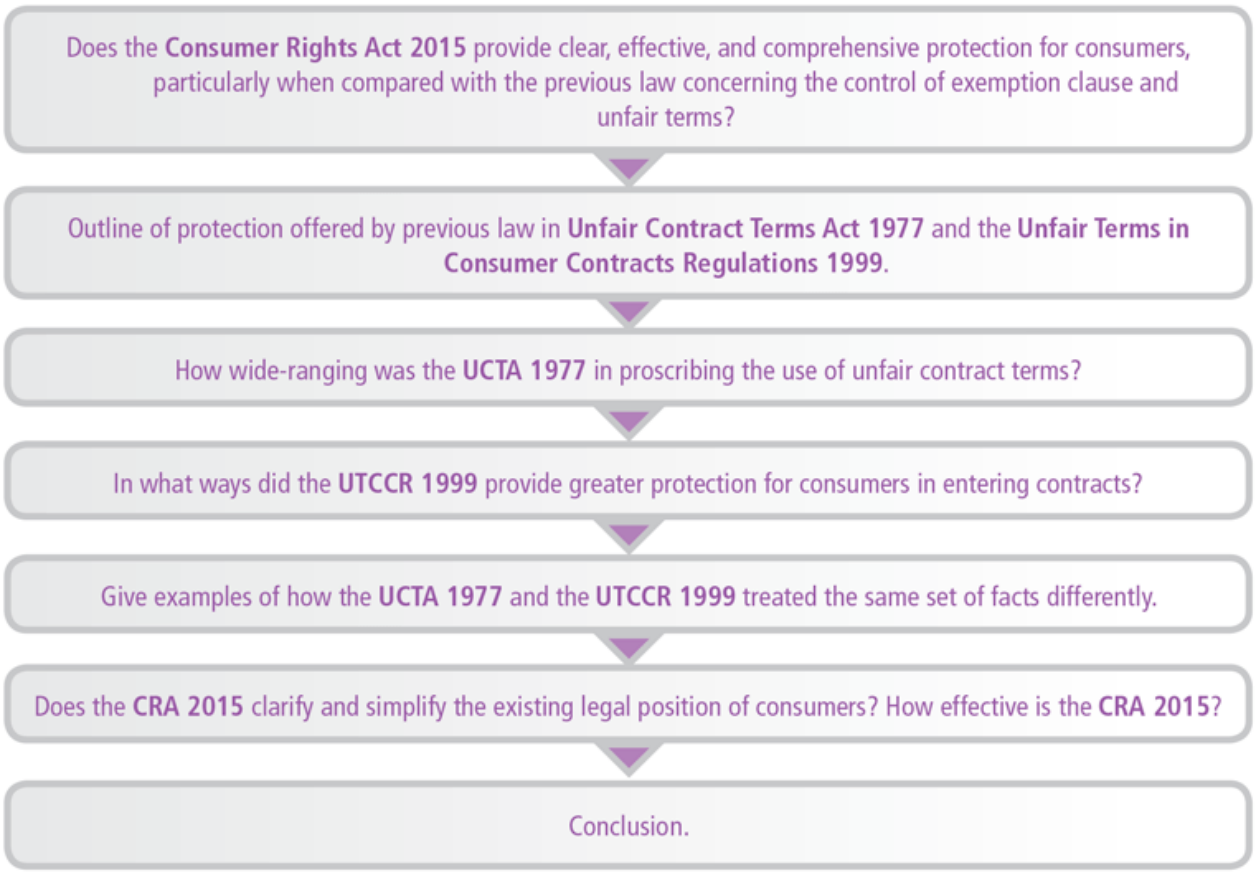
Diagram answer plan



Suggested answer

The previous statutory framework for regulating the enforceability of exemption clauses and unfair terms within contracts was primarily contained in the Unfair Contract Terms Act 1977 (UCTA 1977) **and the** Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999).[1] Both operated independently of one another but their provisions overlapped considerably. The potential for conflict and confusion was exacerbated by their different styles and approaches. Whilst the UCTA 1977 acknowledged and built upon the heritage of the common law, using tests which would clearly be part of the vocabulary of any English contract lawyer (eg the 'reasonableness' test contained in s. 11), the UTCCR 1999 adopted a much more European approach, placing (some would argue) alien concepts such as 'good faith' at the heart of its regulatory design. The Consumer Rights Act 2015 (CRA 2015) amended the UCTA 1977, so that the 1977 Act focuses on contracts between businesses. The CRA 2015 also revoked the UTCCR ↵ 1999 and replaced them with a unified scheme of protection for consumers from the use by traders of particular exemption clauses and unfair terms.[2]

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[1] The previous law affecting consumers is stated and will form the basis for comparison with the new law.

[2] The relationship between the old and new law is outlined.

The types of contracts covered by the UCTA 1977,[3] prior to the CRA 2015, included consumer, business, and employment contracts, albeit with numerous limitations; for example, where businesses contracted with each other, the general section on breach of contract (s. 3) only applied to the extent that one party dealt on the other's 'standard terms'. More importantly, the title of the UCTA 1977 was and is misleading insofar as it suggests that the reasonableness or validity of *any* term can be the subject of litigation. The reality was that the UCTA 1977 focused on a relatively narrow range of clauses, for example those seeking to exclude or limit common law or statutory liability for negligence (see s. 2) or breach of contract (see ss. 3, 6, and 7), or which assert a right to 'render a contractual performance substantially different from that which was reasonably expected' (see s. 3). Where the Act was applicable, the relevant term either would be automatically unenforceable (eg s. 2(1)) or would only be adjudged valid if found to be fair and reasonable (see s. 11 for the applicable test). Finally, the UCTA 1977 was written in a dense style that makes its understanding by lawyers, let alone the average consumer, somewhat problematic. As the Law Commission noted: 'Pity the poor adviser who has to work out that s. 6 applies to exemption clauses in two types of contract (sale and hire-purchase) in four possible patterns: business to consumer, consumer to business, business to business, and "private" contracts where neither party acts in the course of a business.'

[3] This paragraph highlights the important provisions of the **UCTA 1977** ready for comparison later in the essay.

The UTCCR 1999, on the other hand, applied to consumer contracts made with a business seller or supplier, but not to business to business or purely private contracts.[4] Apart from the main subject matter or the price (and some other exceptions), UTCCR 1999 covered all terms that had not been individually negotiated. Any term found to contravene the requirement of 'good faith' and which created a significant imbalance between the parties was unfair and not binding on the consumer. The UTCCR 1999 contained an indicative list of terms that were potentially considered unfair but, unlike the UCTA 1977, generally terms were not automatically considered invalid (compare former reg 5(5)). Finally, the Competition and Markets Authority and other bodies were empowered to prevent unfair terms from being used by businesses against consumers, unlike the provisions of the UCTA 1977 which applied only as between the parties.

[4] The ambit and important provisions of the UTCCR 1999 are indicated, highlighting the overlap with the **UCTA 1977**.

The overlap between the UCTA 1977 and the UTCCR 1999 was confusing, especially where similar words or concepts were being used.[5] For example, in both the UCTA 1977 and the UTCCR 1999, to qualify ↵ as a 'consumer' a party to the contract must not have been acting in the course of his/her business, yet the case law suggested that the meaning of 'consumer' differed in important respects. As regards the UCTA 1977, in ***R & B Customs Brokers Co. Ltd v United Dominions Trust Ltd*** **[1988] 1 WLR 321** it was recognized that a company might be treated as a 'consumer'[6] where the contract (to purchase a car for the personal and business use of its directors) was incidental to the main activity of that business. However, the UTCCR 1999 only recognized a 'natural person' as being consumers, narrowing the meaning of consumer. Nevertheless, as the 'person' was still to be 'acting for purposes which are outside his trade, business or profession', similar difficulties were encountered when dealing with the activities of sole traders. Did the accountant who bought a computer primarily for personal entertainment, but then used it for business purposes when working from home, act as a consumer under the UTCCR 1999?[7]

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[5] The point here is that the organization of the legislation was unclear.

[6] Examples are given of the different definitions used by the legislation and associated problems.

[7] A problem in the application of the law is highlighted.

There were also major differences in the way the UCTA 1977 and the UTCCR 1999 approached the use of 'standard terms' in consumer contracts. The latter applied only to terms that had 'not been individually negotiated' (reg. 5); thereby distinguishing those terms that have been drafted in advance from those where their substance had been influenced by the consumer. These two examples are symptomatic of a range of linguistic and interpretational differences that existed between the UCTA 1977 and the UTCCR 1999. Even the burden of proof was arguably different: the UCTA 1977 either rendered a clause totally unenforceable or required the party seeking to rely upon it to establish its reasonableness, whereas under the UTCCR 1999 it is arguable that it was for the consumer to prove the term was 'unfair'.

After much consideration the UK government introduced a Bill to create a single, unifying Act covering all exemption clauses and unfair terms contained in trader-to-consumer contracts (T2C) which led to the passing of the CRA 2015. The UTCCR 1999 was revoked (with most of its provisions being transferred to the CRA 2015), while the UCTA 1977 was amended so as not to apply to T2C contracts but to focus on exemption clauses in business-to-business (B2B) contracts.

In principle, this separation of T2C and B2B is welcome. The skills and expectations of consumers and businesses when contracting are often very different, so any legal rules impacting on the content and enforceability of the resultant contracts need to reflect such variances.[8] The new CRA 2015 applies irrespective of whether those terms were pre-formulated or negotiated. Only 'individuals' acting for purposes wholly or mainly outside that individual's trade, business, craft, or profession, will fall within the definition of consumers. In consequence, companies and partnerships cannot be consumers, thereby avoiding the problem raised in ***R & B Customs Brokers Co. Ltd v United Dominions Trust Ltd*** **[1988] 1 WLR 321**. Provisions in the UCTA 1977 which *automatically* prohibited certain exclusion clauses from being enforced, such as s. 2(1) (death or personal injury caused negligently) or **s. 6** (excluding liability for breach of the standard implied terms in the Sale of Goods Act 1979), are transferred across (in respect of T2C contracts) to the CRA 2015 (s. 65(1) and s. 31, respectively)—automatic prohibitions that were surprisingly not included in the UTCCR 1999. Moreover, by s. 57 a trader supplying a service now cannot exclude liability for a failure to take reasonable care and skill (previously subject to a test of reasonableness) or for information provided about the trader or service. Also, a trader cannot limit liability: (a) as to reasonable care and skill; (b) information about trader or service; (c) reasonable time; or (d) price, to a sum less than the contract price. If a trader otherwise limits liability, for example, liability beyond the contract price, then this may be subject to the control of unfair terms under the CRA 2015. Lastly, any clause will need to be 'legible' (CRA 2015, s. 64(3)), a requirement that was missing in the UTCCR 1999.

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[8] This point lies at the heart of the question that the law must address the needs of two very different audiences—businesses and consumers.

The previous paragraph gives a flavour of the greater rights consumers enjoy as well as acknowledging that the new framework, with its separation of B2B and T2C contracts, should aid clarification and better understanding by consumers.[9] However, some changes are not so clear (and indeed some of the drafting has been criticized—see ***Salt v Stratstone Specialist Ltd*** **[2015] EWCA Civ 745**).[10] For example, a term specifying the main subject matter of a contract or price will not be assessed for fairness (CRA 2015, s. 64(1)). The exclusion of such terms caused problems under the **UTCCR 1999** and it does not appear that the CRA 2015 has changed this position (see also ***Casehub Ltd v Wolf Cola Ltd*** **[2017] EWHC 1169 (Ch)**). This exclusion only operates so long as such terms are 'transparent and prominent': s. 64(2). In s. 64(4) a term is 'prominent' where it has been 'brought to the consumer's attention in such a way that an average consumer would be aware of the term'. In s.

64(5) such a consumer is described as 'reasonably well-informed, observant and circumspect'. It is therefore quite possible that the common law would find notice of an exclusion clause unreasonable (see generally ***Thornton v Shoe Lane Parking Ltd*** **[1971] 2 QB 163**) whilst under s. 64(4) and (5) notice of the clause is considered reasonable as the consumer 'ought' to have seen it if 'observant and circumspect'.

9 In the light of changes made by the **CRA 2015** the answer states that consumers are better protected and some clarification of the law has resulted.

10 The issue of clarity is considered. PEA is apparent in the remainder of the paragraph, highlighting some uncertainties that the new law may have created.

In conclusion, the previous law on unfair contract terms, which affected ordinary people in their everyday lives, was unnecessarily complicated and difficult to understand. It led to widespread confusion among consumers, businesses, and their advisers. The passing of the CRA 2015 has simplified the existing legal framework for consumers, and enhanced their rights to some extent, for instance, the regime of control applies to pre-formulated and negotiated contract terms, but some of its provisions will require judicial clarification. Moreover, in relation to establishing the reasonableness of an exemption clause, the burden of proof under the UCTA 1977 was more advantageous to consumers than is possibly the case under the CRA 2015 (where it may be on the consumer although a court has a duty, in certain circumstances, to consider the question of unfairness of its own motion: see s. 71).

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Looking for extra marks?

■ Consider whether the CRA 2015 addresses the deficiencies in the pre-existing law or simply substitutes one set of problems with another.

■ As the question is broad you may focus on different examples by way of comparison. For example, the issue of s. 64 of the CRA 2015 and the exclusion of terms defining subject matter and price from an assessment of fairness might be explored. Note the criticisms made of the decision in ***Office of Fair Trading v Abbey National plc*** **[2009] UKSC 6**; consideration may be given to the question 'has the CRA 2015 addressed these criticisms'?

Question 4

The Smiths want to hold a party in a marquee to be erected in their garden. After contacting a number of companies, they decide to sign a contract with Christent Ltd for the supply and erection of a marquee.

It is agreed that for a sum of £2,000 the marquee will be erected by Friday evening, so as to allow for decoration by the Smiths in time for the party on Saturday. The marquee will be dismantled and removed by Christent Ltd on Sunday. As part of the agreement Christent Ltd will also supply 30 tables and 100 chairs. The contract which the Smiths sign is a standard form contract produced by Christent Ltd. The terms of the contract are in general use within the trade.

The contract signed by the Smiths includes the following terms:

> 5. The contractor accepts no liability for damage to trees, garden ornaments, walls and other garden features, howsoever caused ...
> 9. The contractor accepts no liability for harm or injury to the customer, his family or his guests, howsoever caused . .
> 15. The contractor reserves the right to alter the times of erection and dismantling of the marquee.
> 16. The quantity of goods supplied for use in marquees is wholly at the discretion of Christent Ltd.

Christent Ltd fail to erect the marquee on Friday as agreed and arrive on Saturday morning to erect the marquee. The van driver delivering the marquee approaches the Smiths' lawn too fast and skids into a greenhouse, destroying it.

The marquee is erected by early afternoon leaving the Smiths insufficient time to decorate the tent as they had planned. Also, Christent Ltd delivers an insufficient number of tables and chairs.

On Sunday Christent Ltd fail to dismantle the marquee.

p. 89 ↲ Christent Ltd arrives on Monday to dismantle the marquee. Mr Smith complains to the Christent Ltd foreman of the service provided, but while doing so Mr Smith is hit by a tent pole thrown by a Christent Ltd worker.

Mr Smith wants to claim against Christent Ltd. Christent Ltd refuses to accept any claim, relying on the terms of the agreement.

Advise Mr Smith.

Caution!

■ An answer to this type of question needs to be carefully planned as there are a number of issues raised by the question.

■ The type of terms must be identified and their effect considered. Some of the terms are exemption clauses, others may have an unfair effect.

Diagram answer plan

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Suggested answer

This question raises issues relating to exemption clauses and unfair terms.[1] In advising Mr Smith consideration must be given, first, to the potential liabilities of Christent Ltd and, secondly, to the effectiveness of the relevant terms of the agreement in protecting Christent Ltd against such

liabilities. Assessment of the effectiveness of the terms requires explanation of the common law controls on the use of such terms and, more importantly, the legislative controls to be found in the Consumer Rights Act 2015 (CRA 2015).

[1] Outlines the subject matter raised by the question.

The contract between Mr Smith and Christent Ltd is to provide a service (or a "mixed contract—see **s 1(4)**) and consists of express terms and terms to be included in the contract under the CRA 2015.[2] The express terms include the dates for the erection and dismantling of the marquee, and the number of tables and chairs to be supplied; these terms appear to have been broken by Christent Ltd. For any additional terms to be included in the contract by virtue of the CRA 2015, it must be established that the Act applies. The Act applies as between a trader and a consumer.[3] By s. 2 a trader is a person acting for purposes relating to that person's trade, business, craft, or profession: this definition clearly applies to Christent Ltd. A consumer is defined as an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft, or profession: this would apply to Mr Smith hiring a marquee in a domestic capacity. By s. 49 of the CRA 2015 Christent Ltd is under a duty to perform the service with reasonable care and skill. It may be argued that there has been a breach of the duty in both driving too fast and destroying the greenhouse and during the dismantling of the marquee by throwing a tent pole causing personal injury to Mr Smith.

[2] It is necessary to establish the terms of the contract, both express and implied (although the CRA 2015 does not use the phrase 'implied terms'), in order to discuss any liability on the part of Christent Ltd.

[3] You must establish that the CRA 2015 applies, in the first instance to identify which terms are included in a contract.

Should liability be established, the effectiveness of the terms in Christent Ltd's standard terms needs to be addressed. Clauses 5 and 9 seek to exempt liability and clauses 14 and 15 permit Christent Ltd to alter, at its discretion, performance under the contract and may be viewed as potentially unfair terms.[4] The common law controls[5] on such clauses may be considered first.

[4] Having established liability, the impact of clauses 5, 9, 15, and 16 on such liability must be explored.

[5] The common law controls, in spite of legislative controls, remain as additional arguments in relation to the validity of exclusions and other potentially unfair terms.

Christent Ltd would have to establish that their standard terms have been incorporated into the contract with Mr Smith.[6] A clause may become a term of a contract, regardless of whether the document has been read or not, if it is in a contractual document which has been signed: ***L'Estrange v Graucob* [1934] 2 QB 394**. Mr Smith has assented to the clauses by signature and is thereby bound.

[6] This paragraph relating to incorporation is an illustration of IRAC.

The next common law control is that of interpretation, do the words of the clause cover the liability that has arisen?[7] The first question to ↵ be asked is do the words of clause 5, 'damage to trees, garden ornaments, walls and other garden features' exempt liability for the destruction of the greenhouse? The greenhouse does not fall within the specific words used—that is, trees, ornaments, and walls—but is it a garden feature and might these words have to be read using the *ejusdem generis* rule of construction? As trees, ornaments, and walls do not seem to create a class which gives meaning to the words 'garden features', the words may be given an ordinary meaning; a greenhouse is a feature of a garden. However, if there is any doubt over the meaning of these words, the *contra proferentem* rule traditionally provides such doubt is to be resolved against the party seeking to rely on the clause; that is, Christent Ltd. In ***Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373** the Court of Appeal expressed doubts about the modern usefulness of such a rule although that was in the context of a purely commercial contract (and see **s. 69 of the CRA 2015,** and ***Earl of Plymouth v Rees* [2019] EWHC 1008 (Ch)** at **[56]** for the view that the rule is rational in cases on ambiguity). Additionally, as Christent Ltd is arguably liable for negligence, is the use of 'howsoever caused' in clauses 5 and 9 apt to cover such liability? The courts have traditionally taken a strict approach as is seen in ***Canada Steamship Lines Ltd v The King* [1952] AC 192** (although, at least in a commercial context, some doubt was expressed about the approach in that case in ***Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373** (compare ***The Federal Republic of Nigeria v JP Morgan Chase Bank, N.A.* [2019] EWHC 347 (Comm)** at **[64]** where the 'test' in ***Canada Steamships*** was regarded as a flexible guide rather than a rigid rule)). In the absence of an express reference to negligence or the use of a synonym for negligence, as is the case in this scenario, the words must be sufficiently wide to cover negligence. 'Howsoever caused' are wide words and may cover negligence so

long as there is no liability other than negligence. If there is an alternative source of liability the courts might construe the clause as only applying to that other liability and not to negligence: ***White v John Warwick & Co. Ltd*** **[1953] 1 WLR 1285**.

[7] The second common law control of interpretation of terms of a contract is considered here.

The CRA 2015 offers extensive protection to consumers as against traders. By s. 57(1), a term seeking to exclude a trader's liability under s. 49(1) for a failure to take reasonable care and skill in the performance of a contract is not binding. In consequence, clause 5 would not be binding on Mr Smith. The attempt by Christent Ltd to exclude liability for personal injury resulting from negligence would also fail as s. 65 provides that such liability cannot be excluded. However, clauses 15 and 16 would be subject to a test of unfairness. By s. 62(4) a term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the rights and obligations ↵ of the parties to the detriment of the consumer.[8] In determining the fairness of a term, account is to be taken of the nature of the subject matter of the contract, and all the circumstances existing when the term was agreed and to all of the other terms of the contract and any other contract on which it depends: s. 62(5). As the CRA 2015 replaces and, to some extent, replicates the Unfair Terms in Consumer Contracts Regulations 1999, it would seem that the previous case law may still be used in interpreting the Act.

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[8] The test of unfairness is a key provision which must be stated and then its elements identified, explained, and applied to the facts of the question.

The first part of the test requires an absence of good faith.[9] This appears to relate primarily to how the contract is formed. In ***Director General of Fair Trading v First National Bank*** **[2001] UKHL 52**, the House of Lords said that 'good faith' requires fair and open dealing. Lord Bingham said openness requires that 'the terms should be expressed fully, clearly and legibly, containing no pitfalls or traps'. There should be no unfair surprises, so prominence should be given to terms disadvantageous to the consumer. Also, fair dealing requires that the trader does not take advantage of a consumer by using a superior bargaining position, exploiting a consumer's lack of experience, or by failing to take into account the consumer's legitimate interests. An absence of choice is also indicative of a lack of good faith. It may be argued there is an absence of good faith, as Christent did not draw Smith's attention to clauses 15 and 16, the clauses were not prominent, Smith was given no choice, and the contract terms are one-sided; that is, in favour of Christent, in their operation.

[9] Good faith is an important concept that must be explained using relevant case law.

Next it must be established that the term causes a significant imbalance in the rights and obligations of the parties.[10] This inquiry considers the substance of the term. The imbalance in favour of the trader must be 'significant', ***Office of Fair Trading v Ashbourne Management Services Ltd*** **[2011] EWHC 1237 (Ch)**. The indicative but non-exhaustive list of potentially unfair terms in Part 1 of Sch. 2 to the 2015 Act may be used to help establish unfairness. Terms which permit a trader to unilaterally vary the terms of a contract in the absence of a valid reason in the contract are considered potentially unfair. As clauses 15 and 16 allow Christent Ltd to unilaterally alter the contract, and there is no counterbalancing provision in Smith's favour, it may be argued that there is a significant imbalance in the rights and obligations of the parties.

[10] This requirement allows reference to be made to the indicative but non-exhaustive list of potentially unfair terms in Sch. 2, which may aid a consumer in establishing a term to be unfair.

Finally, the term must be to the detriment of the consumer. Clearly clauses 15 and 16 are to the detriment to Smith.

The CRA 2015 does not allocate the burden of proof for establishing the fairness of a term. It will arguably be for Mr Smith to present a case arguing that clauses 15 and 16 are unfair.

It ought to be noted that the test of unfairness does not apply to terms that define the main subject matter of the contract or the ↵ appropriateness of the price payable: s. 64(1).[11] On the facts it would seem that the express terms stating dates for the erection and dismantling of the marquee and the number of tables and chairs defined the main subject matter of the contract. However, it may be argued that clauses 15 and 16 do not define the main subject matter of the contract and are therefore not excluded from an assessment of fairness. Note also that such a term only avoids an assessment of fairness to the extent it is transparent and prominent: s. 64(2).

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[11] This issue gives rise to difficulties of interpretation. The answer acknowledges the issue but as the facts do not raise it as an issue it is dealt with briefly.

Having argued that clauses 15 and 16 are unfair, the consequence of such a finding is that the terms will not be binding on Mr Smith (s. 62(1)) but the remainder of the contract will continue to have effect, so far as is practicable (s. 67). As clauses 15 and 16 are not essential to the existence of the contract, it would seem that the contract could continue to have effect.

In conclusion, Mr Smith has a strong claim in respect of the damage to the greenhouse and the personal injury sustained, and the exemptions in clauses 5 and 9 will have no effect. In relation to the delayed erection and dismantling of the marquee and the reduced number of tables and chairs, again there appears to be a good claim. However, clauses 15 and 16 could prevent liability if the terms are fair, but there is a strong argument for challenging the clauses as unfair under the CRA 2015.

Looking for extra marks?

■ The case law decided under the UTCCR 1999 may be used where the words of the CRA 2015 are similar. Being aware of these similarities and differences gives scope for developing arguments relating to the interpretation of the 2015 Act.

■ As the CRA 2015 implemented the EC Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, decisions of the Court of Justice of the European Union (CJEU) could be used to interpret the relevant sections in Part 2 **of the 2015 Act**. See, for example, ***Aziz v Caixa d'Estalvis de Catalunya, Tarragona, i Manresa (Catalunyacaixa)* (C-415/11) [2013] 3 CMLR 5**. Does Brexit affect this position (see **European Union (Withdrawal) Act 2018, s 6(3)**)?

Taking things further

■ Adams, J. and Brownsword, A., 'The Unfair Contract Terms Act: A Decade of Discretion' (1988) 104 LQR 94.

Considers the test of reasonableness and the approach of intervention and non-intervention apparent in the cases of ***Photo Production Ltd v Securicor Transport Ltd*** **[1980] AC 827** *and* ***George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*** **[1983] 2 AC 803**, *respectively.*

p. 94 ↵ ■ Davies, P., 'Bank Charges in the Supreme Court' (2010) 69 CLJ 21.

Considers the decision of the Supreme Court in ***Office of Fair Trading v Abbey National plc*** **[2009] UKSC 6, [2009] 3 WLR 1215** *where the court interpreted* **reg. 6 of UTCCR 1999** *based on consumer choice rather than consumer protection.*

■ Dean, M., 'Defining Unfair Terms in Consumer Contracts—Crystal Ball Gazing?' (2002) 65 MLR 773.

Reviews the case of the ***Director General of Fair Trading v First National Bank plc*** **[2001] UKHL 52** *which was the first House of Lords decision on the* **UTCCR 1994** *and an opportunity to consider the test of unfairness.*

■ Devenney, J., 'The Legacy of the Cameron-Clegg Coalition Programme of Reform of the Law on the Supply of Goods, Digital Content and Services to Consumers' [2018] JBL 485.

Reflects on some of the reforms introduced by the Consumer Rights Act 2015.

■ Peel, E., 'Reasonable Exemption Clauses' (2001) 117 LQR 545.

Reviews the case of ***Watford Electronics Ltd v Sanderson CFL Ltd*** **[2001] EWCA Civ 317** *which concerns the application of the test of reasonableness under the* **UCTA 1977** *and concludes that the court struck the correct balance in promoting freedom of contract and the parties' allocation of risk.*