



Commercial Law Concentrate: Law Revision and Study Guide (6th edn) Eric Baskind

p. 76 5. Exclusion and limitation clauses

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter, which focuses on clauses designed to exclude or limit a party's liability, first considers exclusion or limitation clauses in the UK under common law rules, the Unfair Contract Terms Act 1977, and the Consumer Rights Act 2015. It explains the distinction between an exclusion clause and a limitation clause before discussing the two main methods of controlling exclusion clauses adopted by the courts. The chapter examines the exclusion or restriction of the statutory implied terms under the Sale of Goods Act 1979, the Supply of Goods (Implied Terms) Act 1973, and the Supply of Goods and Services Act 1982. Finally, it considers the rules introduced by the Consumer Rights Act 2015 in relation to consumer transactions.

Keywords: liability, breach of contract, exclusion clauses, limitation clauses, exemption clauses, unfair contract terms, implied terms, sale of goods, consumer, unfair term

Key facts

- One party to a contract may seek to reduce or avoid their liability for certain breaches of the contract by referring to exclusion or limitation clauses in the contract. These are subject to legal control both by the common law and by statute, namely, the **Unfair Contract Terms Act 1977**.
- 'Exemption clauses' is the term used to describe both exclusion and limitation clauses.
- Exemption clauses are frequently found in 'standard form' contracts.
- Some exemption clauses will be allowed if they are reasonable; others are void.
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Some statutes imply certain terms into different kinds of contracts. It is important to understand whether it is possible for parties to exclude or limit the effects of these statutorily implied terms.

- In consumer cases, exclusion of liability is governed by the **Consumer Rights Act 2015**.

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Introduction

One party to a contract may seek to exclude or limit liability for certain breaches of the contract. It does this by inserting **exclusion or limitation clauses** into the contract. Whether such clauses are effective in excluding or limiting liability is another matter. Exclusion or limitation clauses are strictly controlled by:

- common law rules;
- the **Unfair Contract Terms Act 1977**; and
- the **Consumer Rights Act 2015**.

Exclusion and limitation clauses distinguished

The difference between an **exclusion clause** and a **limitation clause** can be simply stated:

- exclusion—where the party to the contract seeks to *exclude* all liability for certain breaches of the contract;
- limitation—where the party to the contract seeks to *limit* their liability for certain breaches of the contract.

An **exemption clause** is the term often used to describe both exclusion and limitation clauses.

A clause which *limits* liability will not be construed as strictly as one which *excludes* liability altogether and may be valid notwithstanding a complete failure by the party seeking to rely upon it to perform the contract (*Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd & Securicor (Scotland) Ltd* (1983)).

Common law controls of exemption clauses

The courts adopt two main methods of controlling **exemption clauses**:

1. Has the exemption clause been incorporated into the contract?
2. Does the exemption clause cover the alleged breach of the contract?

Incorporation

An **exemption clause** may be incorporated into a contract in a number of ways:

By signature

The general rule is that if a party to a contract signs it, then they will be bound by its terms whether or not they have read them or understood them (*L'Estrange v Graucob Ltd (1934)*).

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Looking for extra marks?

The 'incorporation-by-signature' rule does not apply in cases where the seller has misrepresented the nature of the document that the buyer has signed (*Curtis v Chemical Cleaning and Dyeing Co (1951)*).

By reasonable notice

Cases where **exemption clauses** were said to be incorporated by reasonable notice are often ticket cases or those where the exemption clause was displayed on a notice or sign. Whether these clauses are incorporated into the contract will depend on whether or not the recipient had reasonable notice of them (*Parker v The South Eastern Railway Company (1876–77)*).

The courts will consider the following matters when determining whether reasonable steps have been taken to bring the exemption clause to the notice of the buyer or user of the service:

When the notice was given

Generally, any term (which, of course, includes **exemption clauses**) will only be incorporated into a contract if was brought to the other party's attention before the contract was made (*Olley v Marlborough Court Ltd (1949)* and *Thornton v Shoe Lane Parking Ltd (1971)*).

What form the notice took

A court will not be likely to uphold an **exemption clause** unless it is in a form or document that a reasonable person would consider likely to contain contractual terms (*Chapelton v Barry Urban District Council (1940)*).

Unusual or onerous clauses

exemption clauses that are unusual or particularly onerous will require a greater degree of notice to be given. Unless such specific notice has been given, they will not be incorporated and therefore will not have contractual effect (*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd (1989)*).

Just because the document in question refers to another document for the terms does not in itself prevent those terms from being incorporated into the contract by reasonable notice (*O'Brien v MGN Ltd (2001)*).

Looking for extra marks?

When considering unusual or particularly onerous clauses, you should mention the so-called ‘red hand’ test from *Spurling Ltd v Bradshaw (1956)*, where Denning LJ stated that:

the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.

p. 79 By a previous course of dealing

Where the parties have previously dealt together and their previous dealings have contained **exemption clauses**, then those clauses may apply to subsequent dealings between them even where the clauses have not been expressly incorporated into those subsequent dealings (*Spurling Ltd v Bradshaw (1956)*).

Does the exemption clause cover the alleged breach of the contract?

Even where the **exemption clause** has been incorporated into the contract, in order for it to be effective, it must cover the specific breach of the contract. Any ambiguity in the wording of the clause will be construed *contra proferentem*, that is, construed against the party seeking to rely on it.

Andrews Bros (Bournemouth) Ltd v Singer & Co Ltd [1934] 1 KB 17

Singer appointed Andrews Bros as sole dealers within a named area for the sale of ‘new Singer cars’. The contract contained a clause which excluded ‘all conditions, warranties and liabilities implied by statute, common law or otherwise’. One of the cars delivered had already covered more than 550 miles and was therefore not new within the meaning of the contract. Resisting a claim for breach of contract in supplying a car which was not new, D sought to rely on the **exclusion clause** as exempting it from liability. The Court of Appeal held that the words ‘new Singer car’ constituted an **express** and not an **implied term** of the contract, and that as a new Singer car had not been delivered, D was liable for breach of contract and could not claim exemption from liability by its contract, which only covered implied terms.

Fundamental breach

At one time, the courts held that some breaches of contract were so serious that no **exclusion clauses** could ever excuse them (*Karsales (Harrow) Ltd v Wallis (1956)*). So, if a seller was contracted to sell 100 chairs but instead supplied 100 tables, it would not appear sensible to allow them to rely on a term in their contract that permitted them to substitute the goods ordered for the same quantity of other goods. The courts considered the promise to supply 100 chairs as a fundamental term of the contract and such a significant breach of it, as noted above, would provide the buyer with a remedy irrespective of any exclusion clause in the seller's contract.

However, the so-called doctrine of fundamental breach was rejected by the House of Lords in *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale (1967)*, where their Lordships stated (*obiter*) that there was no rule of substantive law that a fundamental breach of a contract nullifies an **exemption clause** and that it is a matter of construction whether the clause was intended to apply to such a breach as has occurred. If a breach by one party entitles the other to **repudiate** the contract, but they affirm it, the exemption clause continues in force unless on its construction it was not intended to operate in those circumstances.

p. 80 ↵ Any doubts remaining from the decision in *Suisse Atlantique* were finally put to bed by the House of Lords in *Photo Production Ltd v Securicor Transport Ltd (1980)*.

Photo Production Ltd v Securicor Transport Ltd [1980] AC 827

Securicor contracted with Photo Production to provide a night-patrol service at its factory. The contract excluded Securicor's liability for any injurious act or default of any of its employees unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the employer. The contract further provided that Securicor shall not be responsible for any loss suffered through fire or any other cause except insofar as is solely attributable to the negligence of the company's employees acting within the cause of their employment. One of Securicor's employees deliberately started a fire in the factory that destroyed it. The House of Lords held that whether an **exclusion clause** was able to exclude or limit liability was a matter of construction of the contract and that, generally, parties to a contract, when they bargained on equal terms, should be free to apportion liability in the contract as they see fit. Their Lordships confirmed that there was no rule of law that a fundamental breach of the contract prevented an exclusion clause from being effective. As a result, it was held that the wording of the exclusion clause was adequate to exclude liability for what occurred.

Looking for extra marks?

As well as explaining the ruling in *Photo Production*, you should explain that it serves as a strong affirmation of the freedom-to-contract approach to commercial contracting, as opposed to the interventionist approach seen in some of the earlier cases (*Karsales (Harrow) Ltd v Wallis*).

Furthermore, unlike these earlier cases, we now have the **Unfair Contract Terms Act 1977 (UCTA)**, which prevents **exemption clauses** from being used freely in consumer contracts. The problem is not as serious in commercial transactions because many parties are likely to be of similar bargaining power and more able to negotiate their own contracts. They are also more able to protect their own risks by insurance.

Intentional and deliberate breaches

A question arose in *Mott Macdonald Ltd v Trant Engineering Ltd (2021)* as to the correct interpretation of exemption clauses in relation to deliberate and intentional breaches of contract. HHJ Eyre QC endorsed the principles set out in *Photo Production* and held that exemption clauses, including those purporting to exclude or limit liability for deliberate and repudiatory breaches, are to be construed by reference to normal principles of contractual construction without the imposition of a presumption and without requiring any particular wording or level of language to achieve the effect of excluding liability. Accordingly, a party that has fundamentally and intentionally breached a contract could rely on an exemption clause to absolve itself or limit its liability.

Exclusion or restriction of the statutory implied terms

We saw in Chapter 2, 'Statutory implied terms', that some statutes imply certain terms into different kinds of contracts. We will now consider whether it is possible to exclude or limit the effects of these statutorily implied terms.

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The Sale of Goods Act 1979 and the Supply of Goods (Implied Terms) Act 1973 (SGITA)

As we saw in Chapter 2, 'Statutory implied terms', the **Sale of Goods Act 1979 (SGA)** and the **Supply of Goods (Implied Terms) Act 1973 (SGITA)** statutorily imply certain terms into **contracts of sale** of goods (the **SGA**) and **hire purchase** (the **SGITA**). This means that the parties need not agree such terms expressly. But can a party effectively exclude or restrict their liability under these statutory implied terms?

Unfair Contract Terms Act 1977 (UCTA)

A seller may wish to exclude or restrict their liability in respect of the terms implied under the **SGA** or the **SGITA** (or the **Supply of Goods and Services Act 1982** in respect of the other kinds of transaction noted in Chapter 1, 'Contracts other than of sale of goods', Table 1.1, p 7). Whether they may do this depends on the term in question and the status of the parties. In relation to non-consumer sales, **s 55(1) SGA** provides that 'where a right, duty or liability would arise under a contract of sale of goods by implication of law, it may (subject to **UCTA 1977**) be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract'.

Table 5.1 explains whether or not a seller may exclude or restrict their liability under the **SGA** or the **SGITA** (ss 6 and 20 UCTA):

Table 5.1 Can a seller exclude or restrict their liability under the SGA or the SGITA?

IMPLIED TERM AS TO	AS AGAINST A PERSON DEALING OTHERWISE THAN AS A CONSUMER
title s 12 SGA s 8 SGITA	Cannot exclude or restrict
description s 13 SGA s 9 SGITA	Can exclude or restrict but only if reasonable
quality/fitness for purpose ss 14(2) and 14(3) SGA ss 10(2) and 10(3) SGITA	Can exclude or restrict but only if reasonable
Sample s 15 SGA s 11 SGITA	Can exclude or restrict but only if reasonable

See 'The Supply of Goods and Services Act 1982 (SGSA)', p 83, for the rules on excluding the terms implied by the **Supply of Goods and Services Act 1982**.

Revision tip

As you can see in Table 5.1, it is not possible to exclude or restrict the term implied by s 12 SGA. However, as we saw in Chapter 2, 'Section 12(1): a condition that the seller has the right to sell the goods', p 18, s 12(3) allows a seller to contract to sell only such title as they (or a third person) might have.

Reasonableness

You can see from Table 5.1, p 81 that certain terms may be excluded but only if reasonable. Terms which may be excluded or restricted only if reasonable are subject to s 11(1) UCTA, which lays down guidance as to the meaning of reasonableness for these purposes. It is for the party claiming that the term satisfies the requirement of reasonableness to show that it does (s 11(5) UCTA).

Under s 11(1) UCTA, the court should ask itself whether the term is 'a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made'.

The guidelines for the application of reasonableness can be found in Schedule 2 to UCTA. These are:

Schedule 2 to UCTA:

1. the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
2. 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 a similar term;
3. whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
4. where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
5. whether the goods were manufactured, processed, or adapted to the special order of the customer.

p. 83

A court may be particularly unwilling to find a clause reasonable if it purports to exclude all potential liability (*Lease Management Services Ltd v Purnell Secretarial Services Ltd (1994)*). In *Phoenix Interior Design Ltd v Henley Homes plc and Union Street Holdings Ltd (2021)*, the clause provided that ‘The Seller shall be under no liability under the above warranty (or any other warranty, condition or guarantee) if the total price of the Goods has not been paid by the due date for payment.’ The intended effect of this clause was to excuse the supplier completely of any liability in the event of any innocent mistake by the buyer as to the total payment made, a delay in payment due, or non-payment due to concerns with quality. A dispute arose as to whether the goods and services provided by the supplier (an interior design company) to the buyer (a hotel in Scotland) were defective. Pending resolution of this dispute, the buyer retained the balance of the monies owed to the supplier, who sought to rely on the above exclusion clause. There was ambiguity with regard to a portion of the sum owed as this was not referable to a calendar date but instead to the event of completion, which the judge found did not carry the same level of certainty as a specified calendar date. In these circumstances, it would not always be clear to the buyer that completion had occurred and therefore when it was obliged to make payment and, for a variety of reasons, payment on the day of completion may be impractical. The judge also determined it was ‘exorbitant’ that the consequences of any slight delay in payment or deduction meant that the supplier was absolved from any liability. Accordingly, the judge determined that the clause failed to satisfy the reasonableness requirements of UCTA.

The Supply of Goods and Services Act 1982 (SGSA)

Section 7 UCTA sets out the rules on excluding or restricting the statutory implied terms for other types of contract where goods pass from one party to another, for example, where goods are supplied with a service:

s 7 UCTA:

s 7(3) As against a person dealing otherwise than as consumer, that liability can be excluded or restricted by reference to such a term but only insofar as the term satisfies the requirement of reasonableness.

s 7(3A) Liability for breach of the obligations arising under **s 2 SGSA** (implied terms about title, etc in certain contracts for the transfer of the property in goods) cannot be excluded or restricted by reference to any such term.

s 7(4) Liability in respect of:

- (a) the right to transfer ownership of the goods, or give possession; or
- (b) the assurance of quiet possession to a person taking goods in pursuance of the contract, cannot be excluded or restricted by reference to any such term except insofar as the term satisfies the requirement of reasonableness.

Section 13 SGSA

The rules in relation to excluding the implied terms contained in **s 13 SGSA** are necessarily different.

- p. 84 ↵ It was noted (in Chapter 2, ‘Sections 12–16 SGSA’, pp 39–40) that in order for liability to be established against the supplier, **s 13 SGSA** requires them to be at fault. It is tort-based and requires the supplier to exercise reasonable care and skill. The required fault amounts to negligence: **s 1(1)(a) UCTA** explains that ‘negligence means the breach ... of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract’. As a result, any exclusions of **s 13 SGSA** will be subject to **ss 2(1) and 2(2) UCTA**, which provide that:

ss 2(1) and 2(2) UCTA:

- | | |
|---------------|--|
| s 2(1) | A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence. |
| s 2(2) | In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except insofar as the term or notice satisfies the requirement of reasonableness. |

We have already considered the meaning of reasonableness under ‘Reasonableness’, p 82.

Consumer sales

Where the **Consumer Rights Act 2015** applies, **s 31** sets out the extent of a trader’s liability to the consumer that cannot be restricted or excluded. With contracts for digital content, the relevant section is **s 47**.

The purpose of **s 31** is to prevent traders from contracting out of the consumer’s statutory rights under **ss 9–16**, as well as **ss 28 and 29** on time of delivery and the passing of risk and, for contracts other than hire, the requirement on right to title contained in **s 17**. This section also has the effect that any term in a contract which seeks to prevent the consumer from having access to the statutory rights and remedies or to make exercising these rights less attractive to the consumer by either making it more difficult and onerous to do so, or by placing the consumer at a disadvantage after doing so, will also be void. For hire contracts, **ss 31(5) and (6)** provide that **s 31** does not prevent the parties from contracting out of the protection that the trader must have the right to transfer possession or that the consumer must enjoy quiet possession (under **s 17**), but a term seeking to exclude or limit these protections is subject to the test of fairness in **s 62**.

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Section 47 sets out the position for contracts for digital content and prevents a trader from attempting to contract out of the provisions in ss 34–37 and 41. A trader can exclude or restrict their liability arising under s 46 (remedy for damage to device or to other digital content) to the extent that any limitation or exclusion is fair. Any such exclusions ↵ would be subject to s 62, which provides for the requirements for contract terms and notices to be fair.

An unfair term in a consumer contract is not binding on the consumer (s 62(1)), nor is an unfair consumer notice (s 62(2)). However, the consumer may, should they decide to do so, rely on the term or notice (s 62(3)). A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer (s 62(4)). Whether a term is fair is to be determined taking into account the nature of the subject matter of the contract, and by reference to all the circumstances existing when the term was agreed, and to all of the other terms of the contract or of any other contract on which it depends (s 62(5)). A notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer (s 62(6)). Similarly, whether a notice is fair is to be determined taking into account the nature of the subject matter of the notice, and by reference to all the circumstances existing when the rights or obligations to which it relates arose, and to the terms of any contract on which it depends (s 62(7)).

Although 'good faith' is not defined in the CRA 2015, it was considered by the House of Lords in *Director General of Fair Trading v First National Bank plc* (2002), where Lord Bingham explained:

The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the [Unfair Terms in Consumer Contracts] Regulations.

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Schedule 2 to Part 1 of the CRA 2015 contains a non-exhaustive indicative list of terms which *may* be regarded as unfair. This list is based on the equivalent list laid down in the **Unfair Terms in Consumer Contracts Regulations 1999**, under which there were two kinds of term that were not subject to the fairness requirement: (a) terms which are individually negotiated; and (b) core terms of the contract (insofar as they are in plain and intelligible language). The CRA 2015 has removed the limitation on individually negotiated clauses but not that relating to core terms. This is set out in s 64(1), which provides that, provided it is transparent and prominent (s 64(2)), a term of a consumer contract may not be assessed for fairness (under s 62) to the extent that it specifies the main subject matter of the contract or the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content, or services supplied under it. For these purposes, a term is transparent if it is expressed in plain and intelligible language and, in the case of a written term, is legible (s 64(3)), and a term is prominent if it is brought to the consumer's attention in such a way that an average ↵ consumer would be aware of the term (s 64(4) and 64(5)). A number of these provisions were considered in the following case:

Green v Petfre (Gibraltar) Ltd t/a Betfred [2021] EWHC 842 (QB)

In January 2018, Mr Green (G) played an online game 'Frankie Dettori's Magic Seven Blackjack' on Betfred's (B's) mobile casino app. At the end of the session, the app showed that he had won £1,722,500.24. The app would not allow him to withdraw his winnings so he called B's customer service team, who told him that they would need to carry out certain checks, which included speaking with the game provider, Playtech (P). P advised B that there was a glitch in the game and B informed G that, as a result, his winnings would not be paid. The glitch (of which neither B nor G were aware) meant that players who played the game for long periods of time without a break enjoyed better than intended odds of winning. G had been playing for around five hours. G sued B for his winnings. B sought, inter alia, to rely on various terms contained in its general terms and conditions and on the doctrine of mistake, which it said meant that the contract between them was void. In response, G asserted that there was no malfunction in the software but rather a malfunction of the game which was not covered by B's exclusion clause; that the relevant exclusion term was not sufficiently notified to him, was inaccessible, and unclear; and that the doctrine of mistake was not applicable to the specific circumstances of the case. As a result, G sought summary judgment, alternatively to strike out B's defence. Foster J held that the wording of each of B's clauses it sought to rely upon was inadequate '*as a matter of the natural meaning of the language in context*' to exclude liability to pay G as a result of the game's fault. Further, none of B's terms seeking to exclude liability were sufficiently brought to G's attention, nor were they transparent or fair, meaning they were not enforceable against him. B was not entitled to rely on the clauses pursuant to the **CRA 2015**. The judge also rejected B's argument that the contract was void for mistake. Consequently, G succeeded in his application for summary judgment.

The Supreme Court considered the question of core and ancillary terms in ***Office of Fair Trading v Abbey National plc and others (2010)***, where it was held that bank charges levied on personal current account customers in respect of unauthorised overdrafts constituted part of the price or remuneration for the banking services provided within the meaning of **reg 6(2)(b) of the Unfair Terms in Consumer Contracts Regulations 1999** (the predecessor to **s 64 CRA 2015**) and the Office of Fair Trading was not entitled to assess the fairness of such charges in relation to its adequacy as against the services supplied.

ParkingEye Ltd v Beavis (Consumers' Association intervening) (2016) concerned a parking charge of £85 imposed for overstaying the permitted period of free parking. It was noted that motorists regularly used the car park knowing of the charge and that this provided some evidence of its reasonableness since they clearly regarded the risk of having to pay £85 for overstaying as an acceptable price to pay for the convenience of parking there. Furthermore, it was held that a reasonable motorist in Beavis's position would have agreed to the term imposing the charge had there been individual contract negotiations. Although the clause was subject to the fairness test, the majority of the Supreme Court (Lord Toulson dissenting) held that the charge was not unfair under the **Unfair Terms in Consumer Contracts Regulations 1999**. This was because the charge was not contrary to the requirement of good faith since ParkingEye had a legitimate interest in

operating the car park efficiently by charging overstaying motorists which extended beyond the recovery in damages of any loss they might suffer. Further, there was no reason to suppose that £85 was out of all proportion to ParkingEye's legitimate interests in achieving this objective. The charge was held not to be a penalty.

p. 87 ↵ A term of a contract to supply digital content is not binding on the consumer to the extent that it would exclude or restrict the trader's liability arising under any of these provisions:

- s 34 (digital content to be of satisfactory quality);
- s 35 (digital content to be fit for particular purpose);
- s 36 (digital content to be as described);
- s 37 (other pre-contract information included in contract); and
- s 41 (trader's right to supply digital content).

A term of a contract to supply digital content is not binding on the consumer to the extent that it would exclude or restrict a right or remedy in respect of a liability under a provision listed above (s 47(2)(a)), make such a right or remedy or its enforcement subject to a restrictive or onerous condition (s 47(2)(b)), allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy (s 47(2)(c)), or exclude or restrict rules of evidence or procedure (s 47(2)(d)). However, s 47(4) makes plain that any agreement in writing to submit present or future differences to arbitration is not to be regarded as excluding or restricting any liability for the purposes of s 47.

Conclusion

The problems that previously existed as a result of the coexistence of the UCTA and the **Unfair Terms in Consumer Contracts Regulations 1999** leading to often inconsistent, overlapping, and unnecessarily complex rules have now largely been remedied as a result of the **CRA 2015**.

Key cases

CASE	FACTS	HELD/PRINCIPLE
Director General of Fair Trading v First National	The Bank entered into consumer credit agreements on its standard form terms. The term that gave rise to the case provided that if the bank obtained judgment against its customer for default, then it would be entitled to charge interest at the same contract rate until the full amount had been paid.	The House of Lords stated that reg 6 Unfair Terms in Consumer Contracts Regulations 1999 should be interpreted restrictively. Their Lordships distinguished terms that were 'ancillary' from those that were 'core' and held

CASE	FACTS	HELD/PRINCIPLE
<i>Bank plc</i> [2002] 1 AC 481		that terms ‘ancillary’ to the ‘core’ of the contract should be subject to an assessment for fairness.
p. 88 ↩ <i>Karsales (Harrow) Ltd v Wallis</i> [1956] 1 WLR 936	The supplier contracted to supply a Buick car, which had been inspected and found to be in good working order. However, when it was delivered late at night it had been towed to its destination as it was incapable of being driven. The cylinder head had been removed, some of the pistons were broken, and the valves were burned out. The supplier sought to rely on a term of his contract that provided that ‘no condition or warranty that the vehicle is roadworthy, or as to its age, condition or fitness for any purpose is given by the owner or implied herein’.	The Court of Appeal held that as there had been such a fundamental breach of the contract, the supplier was not entitled to rely on the exclusion clause in the agreement. There was a substantial deviation between what had been contracted for and what was eventually delivered.
<i>O’Brien v MGN Ltd</i> [2001] EWCA Civ 1279	C purchased a Sunday newspaper containing a scratch-card game relating to a competition being held the following week in the <i>Daily Mirror</i> . The scratch card told readers to refer to the <i>Daily Mirror</i> for the full rules and how to claim. Rule 5 provided that in the event of more prizes being claimed than were available, a simple draw would take place to determine the winner. C had a winning scratch card and called the claims line, where he was told that he had won a £50,000 prize. However, due to an error, 1,472 other people had also claimed this prize. The newspaper then held a draw in accordance with Rule 5 and added a further £50,000 to be shared amongst the other winners. C won only a £34 share. In C’s claim against the newspaper for the full £50,000 prize money, the issue was whether the contract incorporated the rules, and in particular, Rule 5.	The test was whether the newspaper had reasonably brought the rules to the attention of its readers and further whether Rule 5, which in effect turned an apparent winning card into a losing one, was unusual or particularly onerous. The Court of Appeal held that the rules were incorporated into the parties’ contract as they had been referred to on the face of C’s scratch card and could also be ascertained from back issues of the newspaper or by means of an enquiry to the newspaper offices. Hale LJ said that Rule 5 could not by any normal use of language be called ‘onerous’ or ‘outlandish’ since ‘it merely deprives the claimant of a windfall for which he has done very little in return’. She went on to say that the rules were not unusual or uncommon in the field of such games and competitions and ‘indeed it would have been surprising if there had been no protection on the lines of Rule 5’.
p. 89 ↩ <i>Office of Fair Trading v Abbey National plc</i>	The Office of Fair Trading began an investigation, under the Unfair Terms in Consumer Contracts Regulations 1999 , into the fairness of certain personal current account charges levied by banks on transactions for which their customers did not have sufficient	The Supreme Court focused on reg 6(2)(b) . In reaching a contrary view to the decision of the Court of Appeal, the Justices concluded that if a term concerned only a part of the price, it should fall within the ambit of reg 6(2)(b) .

CASE	FACTS	HELD/PRINCIPLE
<i>and others</i> [2010] 1 AC 696	funds in their accounts to meet the payments. It then issued proceedings against the defendants, seeking a declaration that the standard terms and charges in question were not excluded by reg 6(2)(b) of the 1999 Regulations and could therefore be assessed for fairness.	Therefore, since the charges in question were a part of the price the bank received in exchange for providing its customers with a current account, the relevant terms fell within reg 6(2)(b) as ‘ core terms ’ which are excluded from the Regulations and therefore could not be assessed for fairness.

Key debates

Topic	Bank charges in the Supreme Court
Author/ academic	Paul Davies
Viewpoint	Discusses <i>Office of Fair Trading v Abbey National plc</i> on whether bank charges for the unauthorised use of overdraft facilities were part of the bank’s price for offering current account services and so fell within the scope of reg 6(2)(b) Unfair Terms in Consumer Contracts Regulations 1999, reg 6(2)(b) and could not be assessed for fairness. Calls for a reappraisal of the law on unfair consumer contract terms in the light of the ruling.
Source	(2010) 69(1) <i>Cambridge Law Journal</i> 24
Topic	Companies ‘dealing as consumers’—a missed opportunity?
Author/ academic	Christian Twigg-Flesner
Viewpoint	Comments on the Court of Appeal decision in <i>Feldarol Foundry plc v Hermes Leasing (London) Ltd</i> on whether the rejection of a sports car which was unsatisfactory was valid in the light of an exclusion clause which sought to exclude all liability. Considers whether the company had been dealing as a consumer within the meaning of s 12 UCTA and the effect of the ruling in <i>R&B Customs Brokers Co Ltd v United Dominions Trust Ltd</i>
Source	(2005) 121 <i>Law Quarterly Review</i> 41

Exam questions

Problem question

Peter is a musician and makes copies of his own music, which he sells via the internet. He needs a new machine to speed up the copying of his music. He contacts Music Copy Machines Ltd, who recommend a machine which they claim is more than ten times quicker than his old machine. Peter buys this machine for cash and takes it with him. When he tries it, he finds it to be no quicker than his old one. He also finds that it starts making loud grinding noises when it is being used.

Peter returns the machine to the store and asks for his money back. The store manager, Mr Grumpy, reminds him that the contract he signed contained a clause stating: 'Music Copy Machines Ltd excludes all conditions relating to the quality or description of equipment purchased.' Peter tells him that when he signed it he wasn't wearing his glasses and therefore didn't read the clause. Mr Grumpy then points out that it is his company's policy to post a copy of contracts to customers immediately following purchase and therefore Peter should have been aware of the clause from this. Peter says that he did receive a copy of the contract containing this clause and that although he read it he didn't appreciate its significance until now.

Advise Peter.

Essay question

The coexistence of the **Unfair Contract Terms Act 1977** and the **Unfair Terms in Consumer Contracts Regulations 1999** often produced inconsistent, overlapping, and unnecessarily complex rules.

Critically evaluate this statement in light of the **Consumer Rights Act 2015**.

Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- multiple-choice questions <https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-5-multiple-choice-questions?options=showName>>;
- key facts checklists <https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-5-key-facts-checklists?options=showName>>;
- interactive flashcards of key cases <https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-5-interactive-flashcards-of-key-cases?options=showName>>;
- problem question guidance <https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-5-problem-question-guidance?options=showName>>;

- outline answers to essay questions [_<https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-5-outline-answers-to-essay-questions?options=showName>.](https://iws.oup.support.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-5-outline-answers-to-essay-questions?options=showName)

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