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14. Unfair Terms in Consumer Contracts

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Abstract

This chapter focuses on Part 2 of the Consumer Rights Act 2015. The Act gives to the courts much broader powers to regulate terms in contracts which have been concluded between traders and consumers. Section 4.2 examines the individual sections of Part 2 of the Act and the leading cases decided under the Regulations which preceded the Act. Particular attention is given to key concepts such as 'significant imbalance', 'good faith', the exclusion of certain terms from assessment for fairness, the indicative and non-exhaustive list of terms that may be regarded as unfair (often referred to as the 'grey list'), and the role of regulators in the enforcement of the legislation. Section 4.3 draws on work done by Professor Susan Bright in relation to the role of the Unfair Contract Terms Unit in the early days of the enforcement of the legislation.

Keywords: English contract law, unfair contract terms, consumers, significant imbalance, good faith, the grey list, regulator

Central Issues

1. Part 2 of the Consumer Rights Act 2015 implements a European Directive on Unfair Terms in Consumer Contracts (93/13/EC) into English law. The Directive was first implemented into English law in the Unfair Terms in Consumer Contracts Regulations 1994 and then in the Regulations of the same title enacted in 1999. The legislation has made far-reaching changes to English contract law in that it has given to the courts (and to regulatory agencies) broad powers to regulate unfair terms in consumer contracts.

2. The aim of the legislation is to regulate unfair terms rather than unfair contracts. Consequently, terms which specify the main subject matter of the contract and terms which relate to the appropriateness of the price payable under the contract by comparison with the goods supplied under it do not fall within its scope. Consumers tend, on the whole, to be aware of these terms and they can decide for themselves whether or not to accept them. Matters are otherwise in relation to the 'small print' that often accompanies consumer contracts. Consumers tend to be unaware of the content of these terms and, consequently, are taken by surprise when they discover their content. The legislation seeks to protect consumers against such 'unfair surprise'.
3. The definition of an unfair term in section 62(4) of the 2015 Act is a complex one. It consists of two principal elements. The first is that the term must be 'contrary to the requirement of good faith' and the second is that the term must cause 'a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer'. When interpreting these phrases it is necessary to bear in mind their European origin. This is particularly so in relation to the definition of 'good faith'. It must be interpreted from a European and not an English perspective, although the strength of the influence of EU law is likely to wane now that the UK has left the EU.
4. Schedule 2, Part 1 to the Consumer Rights Act 2015 sets out an indicative and non-exhaustive list of terms that may be regarded as unfair (the so-called grey list). The reach of this Schedule is extremely broad.

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5. Initially, a key role in the enforcement of the legislation was played by the Unfair Contract Terms Unit of the Office of Fair Trading rather than the courts and now by the Competition and Markets Authority. Consumers tend to be reluctant to resort to the courts for the purpose of vindicating their rights. Thus it has fallen to regulatory agencies to play a leading role in persuading business to withdraw or re-draft unfair terms.

14.1 Introduction

The European Directive on Unfair Terms in Consumer Contracts (93/13/EC) was the first major European intervention into the heartland of domestic contract law. As such, it has attracted a considerable amount of academic comment. The Directive was initially implemented into English law by the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159). The 1994 Regulations came into force on 1 July 1995 but were revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), which came into effect on 1 October 1999 and were in turn revoked on 1 October 2015 when Part 2 of the Consumer Rights Act 2015 came into effect.

The European origin of the legislation is important. First, it has had an impact on the quality of its drafting. The 1999 Regulations in particular adhered closely to the text of the Directive. This 'copy-out' technique does, however, have its drawbacks. In particular, it has the effect of discouraging national Parliaments from taking steps to improve the quality of the drafting of the Directive or to clarify any obscurities. The Directive on Unfair Terms has been criticized for the poor quality of its drafting (see generally T Hartley, 'Five Forms of

Uncertainty in European Community Law' [1996] *CLJ* 265). However, Part 2 of the Consumer Rights Act departs from the text of the Directive in some significant respects. In particular, the Directive only applies to a contract term 'which has not been individually negotiated' (Article 3(1)), but this requirement has not been incorporated into the 2015 Act so that it is applicable to a contract term even if it has been individually negotiated between the trader and the consumer. Such a term may, given the fact of negotiation, be more likely to survive the challenge that it is unfair but it is nevertheless within the scope of the Act. Secondly, the fact that the origins of the legislation lie in a Directive has important consequences for its interpretation. This is particularly so in relation to phrases such as 'good faith'. The courts in such a case ought to have regard to the European origin of the Directive and not interpret the UK legislation as if it were a domestic statute. Thus far it would appear that the courts have been sensitive to these European origins (although it should be acknowledged that the UK courts have been criticized for failing to make references to the Court of Justice of the European Union ('CJEU') on important matters relating to the scope of the legislation and the Directive: see M Dean, 'Defining Unfair Terms in Consumer Contracts—Crystal Ball Gazing? *Director General of Fair Trading* v. *First National Bank plc*' (2002) 65 *MLR* 773, esp pp. 780–781). However, now that the UK has departed from the EU, it is no longer possible for the UK courts to make a reference to the CJEU on a matter relating to the interpretation of the Directive, the UK courts are not required to follow any decisions of the CJEU made after the date of the UK's departure from the EU and, in relation to decisions made prior to the UK's departure, the Supreme Court can depart from existing EU law but must when doing so apply the test which it would apply when deciding whether or not to depart from its own case law. It is therefore possible that the EU origins of Part 2 of the Consumer Rights ↵ Act 2015 will become less important in the future, particularly if the paths of the UK and the EU begin to diverge sharply.

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The remainder of the chapter is divided into two sections. Section 2 of the Consumer Rights Act 2015. The text of the legislation will be set out and annotated. Section 14.3 will draw briefly on work done by Professor Susan Bright in relation to the role of the Unfair Contract Terms Unit in the early days of the enforcement of what was then the 1994 Regulations.

14.2 Part 2 of the Consumer Rights Act 2015

The text of sections 61–76 of the Consumer Rights Act 2015 is set out in full together with Schedule 2 to the Act. Most of the sections are the subject of brief explanatory comment but, where the meaning of the particular section is clear, no commentary has been provided.

61 Contracts and notices covered by this Part

(1) This Part applies to a contract between a trader and a consumer.

(2) This does not include a contract of employment or apprenticeship.

(3) A contract to which this Part applies is referred to in this Part as a 'consumer contract'.

(4) This Part applies to a notice to the extent that it—

(a) relates to rights or obligations as between a trader and a consumer, or

(b) purports to exclude or restrict a trader's liability to a consumer.

(5) This does not include a notice relating to rights, obligations or liabilities as between an employer and an employee.

(6) It does not matter for the purposes of subsection (4) whether the notice is expressed to apply to a consumer, as long as it is reasonable to assume it is intended to be seen or heard by a consumer.

(7) A notice to which this Part applies is referred to in this Part as a 'consumer notice'.

(8) In this section 'notice' includes an announcement, whether or not in writing, and any other communication or purported communication.

Commentary

A trader is defined in section 2(1) of the Consumer Rights Act as a 'person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf' (which definition is applicable to Part 2 of the Act by virtue of section 76(2), see later). The term 'trader' has been used in preference to 'seller or supplier' which is used in the Directive and was used in both the 1994 and the 1999 Regulations. But the change appears to be one that is related primarily to the choice of label and it is unlikely to have significant effects in terms of substantive outcomes. A 'business' for this purpose includes the activities of any government department or local or
p. 465 public authority (section 2(7)). The definition of trader is therefore ↵ broad. A 'consumer' is defined in section 2(3) as 'an individual acting for purposes that are wholly or mainly outside the individual's trade, business, craft or profession' (which definition is also applicable to Part 2 of the Act by virtue of section 76(2)). Given that a consumer must be an 'individual', it follows that a company cannot be a consumer for the purposes of Part 2. The requirement that the consumer act for purposes that are 'wholly or mainly' outside his or her trade or business may give rise to some difficulty but (in particular via the insertion of 'mainly') has the effect of extending the scope of the legislation to protect the individual who is acting in the course of his or her business but the contract which has been entered into with a trader is an incidental or infrequent part of the individual's business. The words 'wholly or mainly' are not to be found in the Directive. This extended protection is further enhanced by the fact that it is for the trader to prove that an individual was not acting for purposes wholly or mainly outside the individual's trade, business, craft, or profession (section 2(4)). It should also be noted that section 61 excludes certain contracts entered into by consumers from the scope of Part 2. Thus contracts of employment or apprenticeship do not fall within its scope (section 61(2)). Finally, it should

be noted that Part 2 extends beyond 'consumer contracts' and can encompass a 'consumer notice' (section 61(4)) and this extension may be of particular importance in relation to notices that purport to exclude or restrict the liability of a trader in negligence (on which see section 65).

62 Requirement for contract terms and notices to be fair

(1) An unfair term of a consumer contract is not binding on the consumer.

(2) An unfair consumer notice is not binding on the consumer.

(3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.

(4) 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.

(5) Whether a term is fair is to be determined—

(a) taking into account the nature of the subject matter of the contract, and

(b) 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.

(6) 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.

(7) Whether a notice is fair is to be determined—

(a) taking into account the nature of the subject matter of the notice, and

(b) 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.

(8) This section does not affect the operation of—

(a) section 31 (exclusion of liability: goods contracts),

(b) section 47 (exclusion of liability: digital content contracts),

(c) section 57 (exclusion of liability: services contracts), or

(d) section 65 (exclusion of negligence liability).

Commentary

In many ways section 62 is the heart of the legislation and it therefore requires more by way of explanation. There are a number of points to note here.

The first is section 62(1), which sets out the consequences of a finding that a term in a consumer contract is unfair (and section 62(2) does the same for a consumer notice). An unfair term is not binding on the consumer. But it does not follow from this that the contract is not binding. In most cases the contract will continue to bind the parties with the exception of the unfair term (see section 67). The court is not, however,

given a power to re-write the term of the contract in order to make it conform with the fairness requirement. Although the term is not binding on the consumer, the consumer is not prevented from relying on the term or notice should he or she wish to do so (section 62(3)). Thus the term cannot be enforced against the consumer, but the consumer is not deprived of the ability to rely upon the term.

Section 62(4) is perhaps the most important provision in Part 2, containing as it does the essential definition of an 'unfair term' and the key ingredients of 'good faith' and 'significant imbalance' (and see section 62(6) for the equivalent provision applicable to consumer notices). The meaning of both of these ingredients requires further explanation.

Perhaps the more straightforward of the two is the requirement that there be a 'significant imbalance' in the parties' rights and obligations under the contract to the detriment of the consumer. Although more straightforward than the 'requirement of good faith', the precise meaning of 'significant imbalance' remains elusive. But it is important to note that it does not suffice for there to be an 'imbalance'. The imbalance must be 'significant' and the hurdle created by the requirement that the imbalance be 'significant' is not one that is easy to overcome (*Longley* v. *PPB Entertainment Ltd* [2022] EWHC 977 (QB), [102.8]). It would appear to involve an examination of the content of the term rather than the procedure which led to the conclusion of the contract (in other words, it is directed at 'substantive' rather than 'procedural' unfairness—the difference between these two categories is explored in more detail at 20.1). So in *Director General of Fair Trading* v. *First National Bank* [2001] UKHL 52, [2002] 1 AC 481, [17] Lord Bingham stated that 'the requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour'. In *Aziz* v. *Caixa d'Estalvis de Catalunya, Tarragona I Manresa* (Case C-415/11) [2013] 3 CMLR 89 the European Court of Justice had regard to the extent to which the consumer was being deprived of an advantage which he or she would enjoy under national law in the absence of the contractual term. But the appearance of an exclusive focus on substantive unfairness may be misleading to the extent that it cannot be assumed that the courts will not have regard to procedural matters when deciding whether or not a term is unfair. Thus in *Director General of Fair Trading* v. *First National Bank* (earlier) Lord Steyn, after referring to the observation of Professor Collins that the test 'of a significant imbalance of the obligations obviously directs attention to the substantive unfairness of the contract' ('Good Faith in European Contract Law' (1994) 14 *Oxford Journal of Legal Studies* 229, 249), proceeded to observe (at [37]) that 'it is … also right to say that there is a large area of overlap between the concepts of good faith and significant imbalance'. In the latter statement one can see a judicial reluctance to provide us with water-tight definitions of 'significant imbalance' and 'good faith' and instead a preference to adopt a much more fluid approach to the interpretation of these concepts with an emphasis on their inter-dependency rather than their independence.

These difficulties become even more apparent when we turn to the phrase 'contrary to the requirement of
p. 467 good faith'. There are two principal problems here. The first relates to the ↵ relationship between 'good faith' and 'significant imbalance'. Are these two entirely separate requirements, two related requirements, or only one requirement? It can be argued that there is only one requirement on the basis that the crucial test is whether or not there has been a 'significant imbalance' to the detriment of the consumer and that the conclusion that the requirement of good faith has not been satisfied follows inevitably from a finding that there has been such a significant imbalance. On this view good faith has no independent role to play at all and is practically redundant. A second view is that 'significant imbalance' operates as a threshold requirement, which serves to exclude cases where the imbalance is insignificant. On this view good faith becomes the

predominant test to be applied by the courts. A third view is that 'good faith' and 'significant imbalance' are both important and that one should not be subordinated to the other. The difficulty with this view lies in distinguishing between 'good faith' and 'significant imbalance'. What is the difference between the two tests? Does 'significant imbalance' focus on the substantive content of the term, while 'good faith' looks to the procedure by which the contract was concluded?

The second problem relates to the meaning of 'good faith'. This is not an easy issue for the English courts because English contract law does not, as yet, recognize a doctrine of good faith (although there have been some tentative signs that it may develop a doctrine of good faith in the performance of a contract, on which see further Chapter 15). There is therefore no national law from which the English courts can draw. The courts must therefore draw upon the European origin of 'good faith' and they have been willing to do so. The leading example is the decision of the House of Lords in *Director General of Fair Trading* v. *First National Bank* [2001] UKHL 52, [2002] 1 AC 481. Two extracts from the judgments of their Lordships are worthy of particular note in this context. The first is Lord Bingham who stated (at [17]):

> 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[1] of the regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice.

To similar effect is the judgment of Lord Steyn who stated (at [36]):

> The twin requirements of good faith and significant imbalance will in practice be determinative. Schedule 2[2] to the Regulations, which explains the concept of good faith, provides that regard must be had, amongst other things, to the extent to which the seller or supplier has dealt fairly and
> p. 468 equitably with the consumer. It is an objective criterion. Good faith imports, ↵ as Lord Bingham has observed in his opinion, the notion of open and fair dealing: see also *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433. And helpfully the commentary to the 2000 edition of Principles of European Contract Law, prepared by the Commission of European Contract Law, explains that the purpose of the provision of good faith and fair dealing is 'to enforce community standards of fairness and reasonableness in commercial transactions': at 113; a fortiori that is true of consumer transactions. Schedule 3[3] to the Regulations (which corresponds to the Annex to the Directive) is best regarded as a check list of terms which must be regarded as potentially vulnerable. The examples given in Schedule 3 convincingly demonstrate that the argument of the bank that good faith is predominantly concerned with procedural defects in negotiating procedures cannot be sustained. Any purely procedural or even predominantly procedural interpretation of the requirement of good faith must be rejected.

In considering whether the imbalance is contrary to the requirements of good faith, the court will also have regard to whether the trader, dealing fairly and equitably with the consumer, could reasonably have assumed that the consumer would have agreed to the disputed term in individual contract negotiations (*Aziz* v. *Caixa d'Estalvis de Catalunya, Tarragona I Manresa* (Case C-415/11) [2013] 3 CMLR 89; *Longley* v. *PPB Entertainment Ltd* [2022] EWHC 977 (QB), [102.10]).

Section 62(5) sets out the matters to be taken into account in determining whether a term in a consumer contract is unfair (and a similar provision applicable to consumer notices is to be found in section 62(7)). The matters to be taken into account are broad and include the nature of the subject matter of the contract and 'all the circumstances' existing when the term was agreed. It should be noted that the assessment is to be conducted at the time that the term was agreed, not the time of any alleged breach or the time of the hearing before a court (although the court can take account of circumstances known at the time of entry into the contract as being likely to affect the future performance of the contract, see *Andriciuc* v. *Banca Românească SA* (Case C-186/16)). It is the fairness of the allocation of rights and liabilities at the moment of entry into the contract that is subject to scrutiny. This being the case, the question that has to be answered is whether or not the clause is potentially fair or unfair, not whether on the facts of the particular case it operated in a fair or unfair manner. Further, the assessment is not confined to the term which is alleged to be unfair but extends to encompass 'all of the terms of the contract or of any other contract on which it depends'. In other words, the term must be considered in the context of the contract as a whole. Section 62(5) bears some resemblance to the factors taken into account by the courts when deciding whether or not a clause is reasonable under the Unfair Contract Terms Act 1977 (on which see 13.3). The factors listed are very broad in scope. Indeed, they are so broad that it can be said with some justification that they are likely to be of little assistance in resolving individual cases.

However, a body of case-law is beginning to build up which will provide guidance on the circumstances in which a court is likely to find that a contract term is unfair. Where a term is one-sided and its terms have not been sufficiently drawn to the attention of the consumer, the term is more likely to be held to be an unfair term (see, for example, *Munkenbeck & Marshall* v. *Harold* [2005] EWHC 356 (TCC), [2005] All ER (D) 227 (Apr)). On the other hand, where the consumer has substantial experience of the issue or knowledge of the risks
p. 469 covered by the disputed term (*West* v. *Ian Finlay & Associates (a firm)* [2014] EWCA Civ 316, ↵ [2014] BLR 324) or the term has been put forward by the consumer's professional adviser, it is less likely that it will be held to be an unfair term (*Bryen & Langley Ltd* v. *Boston* [2005] EWCA Civ 973, [2005] BLR 508), although it is not impossible that the term might still be held to be unfair, particularly in the case where the adviser did not inform the consumer of the drawbacks of the clause (*Harrison* v. *Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), [2011] All ER (D) 140 (Jul)).

The most important recent decision of the courts in the UK is the decision of the Supreme Court in *ParkingEye Ltd* v. *Beavis* [2015] UKSC 67, [2016] AC 1172. Mr Beavis refused to pay a charge of £85 for overstaying the permitted period of free parking in a car park at a retail park. The signs displaying this information were accepted to be reasonably large, prominent, and legible so that any reasonable user of the car park would be aware of their existence and had a fair opportunity to read them. The notice stated: '2 hour max stay … Failure to comply … will result in a Parking Charge of £85.' Mr Beavis exceeded the time limit by one hour but declined to pay the £85 charge and maintained that the term which sought to impose the charge was an unfair term. The Supreme Court held that it was not an unfair term. Although the charge could be said to

reflect an imbalance in the rights of the parties, it did not arise 'contrary to the requirement of good faith'. ParkingEye were held to have a legitimate interest in making this charge given that their business model also conferred on users of the car park an entitlement to park free of charge for two hours. Although the court recognized that the concept of a negotiated agreement to enter a car park was somewhat artificial, the majority of the court concluded that a reasonable motorist in the position of Mr Beavis would have agreed to a charge of £85 if they overstayed in return for free parking for a two-hour period. Lord Toulson dissented. In his judgment ParkingEye had failed to adduce the evidence necessary to establish that the consumer would have agreed to the £85 charge, given that £85 is a substantial sum of money for many people (especially those living on low incomes) and it was payable even if the consumer 'overstayed for a minute'. This view was not, however, shared by the majority who concluded that the charge was not disproportionately high and, to the extent that it exceeded the compensation that would have been payable to ParkingEye, the amount was justifiable and not contrary to the requirements of good faith.

A wide range of contract terms has been found to be unfair since the time of the first enactment of the legislation in 1994. As we shall see (14.3) the principal role in the enforcement of the legislation to date has been played by the Unfair Contract Terms Unit in the Office of Fair Trading ('OFT'). Professor Bright has stated (S Bright, 'Unfairness and the Consumer Contract Regulations' in A Burrows and E Peel (eds), *Contract Terms* (Oxford University Press, 2007), p. 176) that:

> [o]ver the five-year period 2000–2005, more than 5,000 terms were changed or abandoned following investigation by the OFT. The unfair terms most frequently found are those excluding or limiting liability for shortcomings in the quality of goods or services, those imposing financial penalties, and failure to use plain and intelligible language. Also referred to frequently are unfair price variation clauses, cancellation clauses, and clauses disclaiming liability for employee statements.

Finally, section 62(8) avoids a potential conflict between section 62(4) and those sections in the Act which expressly provide that a liability cannot be excluded. So, for example, section 31 of the Act provides that a term of a contract to supply goods is not binding on the consumer to the extent that it would exclude or restrict the trader's liability arising in respect of a breach of, for example, the obligation to supply goods of satisfactory
p. 470 quality or which are fit ↵ for their purpose. In such a case a trader cannot seek to maintain that the term is one which is fair because it satisfies the requirements of section 62(4). Section 31 thus trumps section 62(4) with the consequence that the term is not binding on the consumer.

63 Contract terms which may or must be regarded as unfair

(1) Part 1 of Schedule 2 contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair for the purposes of this Part.

(2) Part 1 of Schedule 2 is subject to Part 2 of that Schedule; but a term listed in Part 2 of that Schedule may nevertheless be assessed for fairness under section 62 unless section 64 or 73 applies to it.

(3) The Secretary of State may by order made by statutory instrument amend Schedule 2 so as to add, modify or remove an entry in Part 1 or Part 2 of that Schedule.

(4) An order under subsection (3) may contain transitional or transitory provision or savings.

(5) No order may be made under subsection (3) unless a draft of the statutory instrument containing it has been laid before, and approved by a resolution of, each House of Parliament.

(6) A term of a consumer contract must be regarded as unfair if it has the effect that the consumer bears the burden of proof with respect to compliance by a distance supplier or an intermediary with an obligation under any enactment or rule implementing the Distance Marketing Directive.

(7) In subsection (6)—

'the Distance Marketing Directive' means Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC;

'distance supplier' means—

(a) a supplier under a distance contract within the meaning of the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095), or

(b) a supplier of unsolicited financial services within the meaning of regulation 15 of those regulations;

'enactment' includes an enactment contained in subordinate legislation within the meaning of the Interpretation Act 1978;

'intermediary' has the same meaning as in the Financial Services (Distance Marketing) Regulations 2004;

'rule' means a rule made by the Financial Conduct Authority or the Prudential Regulation Authority under the Financial Services and Markets Act 2000 or by a designated professional body within the meaning of section 326(2) of that Act.

Commentary

The most important provision here is section 63(1), which refers to Part 1 of Schedule 2 which gives what is called an 'indicative and non-exhaustive list' of terms that may be regarded as unfair (see later in this section). Inclusion on the list does not therefore entail a finding that the term is unfair. The precise status of the list is

unclear. It could be said to raise a presumption that the term is unfair. On the other hand, it has been said that the list is only a 'guide' and that it does not create rebuttable presumptions of unfairness. In the case of a term
p. 471 that is not listed ↵ in Part 1 of Schedule 2, the onus of proof of establishing that the term is unfair is likely to be on the consumer. Where the term is listed in Part 1 of Schedule 2 the position is less clear. The answer probably depends upon the status of the list in Part 1. If it creates a rebuttable presumption that the term is unfair then the burden of proof is likely to shift to the trader to show that the term is fair. On the other hand, if the list is no more than a guide, then the burden of proof will probably remain with the consumer, although the fact that the term is included in the list will doubtless make it easier for the consumer to establish that the term is unfair.

> **64 Exclusion from assessment of fairness**
>
> (1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
>
> (a) it specifies the main subject matter of the contract, or
>
> (b) 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.
>
> (2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.
>
> (3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.
>
> (4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.
>
> (5) In subsection (4) 'average consumer' means a consumer who is reasonably well-informed, observant and circumspect.
>
> (6) This section does not apply to a term of a contract listed in Part 1 of Schedule 2.

Commentary

This is another difficult provision and it has been the subject of a considerable amount of case-law, not all of which is easy to reconcile. Its essential effect is to exclude certain terms from certain forms of assessment. The terms which are exempt are identified in section 64(1), and the extent of the exemption is identified in section 64(2) (although in the case of section 64(1)(b) the distinction between an excluded term and exclusion from certain forms of assessment is not entirely easy to draw).

There are three principal points to note. The first is that section 62 operates to exclude certain terms from assessment in so far as the term is 'transparent and prominent' (section 62(2)). The requirement that the term be 'transparent and prominent' is a new one, replacing the previous test, which exempted certain terms from assessment provided that they were 'in plain intelligible language'. It can be seen that the 'plain intelligible language' requirement has effectively been incorporated into the requirement that the term be 'transparent' (section 64(3)). So the change that has been made here may be a change of label rather than substance. The

'plain intelligible language' requirement proved to be a rather demanding test. Thus the Court of Justice of the European Union has stated on a number of occasions that the requirement cannot be reduced to a requirement that the term be formally and grammatically intelligible. Thus in *GT* v. *HS* (Case C-38/17), [33] the Court stated that the requirement 'means that the contract should indicate transparently and specifically how
p. 472 the mechanism to which the relevant term relates is to function and, where appropriate, the ↵ relationship between that mechanism and that provided for by other contractual terms, so that the consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him of entering into the contract'. The requirement that the term be transparent and prominent in section 64(2) is thus not to be equated with the *contra proferentem* rule (*Office of Fair Trading* v. *Abbey National plc* [2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625, [87]). It is a more demanding test and so it is not the case that a written term is necessarily 'transparent' unless there is a doubt about its true meaning. When considering whether a term is 'prominent' the court is directed to consider whether the reasonably well-informed, observant, and circumspect consumer would have been aware of the term. The requirement is that steps are taken to make such a consumer 'aware' of the term. There is no requirement that the consumer be given all the information that he or she needs in order to make an informed decision whether or not to enter into the contract. Nor is there a requirement that a trader give the consumer advice about the contract terms that he or she is offered. In other respects the requirement that the term be 'transparent and prominent' is likely to be a demanding one. A party does not discharge its obligations by making a 'commendable effort' to make the terms plain and intelligible (*Office of Fair Trading* v. *Abbey National plc* [2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625, [121]). A term is exempt from assessment as to its fairness only if it *is* transparent and prominent.

The second point relates to the exclusion to be found in section 64(1)(a). The exclusion is of a term which 'specifies the main subject matter of the contract'. The wording of section 64(1)(a) differs slightly from the equivalent provision in the 1999 Regulations (regulation 6(2)(a)) which applied to terms that relate to the 'definition of the main subject matter of the contract'. Once again, the change (from 'definition' to 'specifies') would appear to be a change of label which does not have much by way of substantive effect. It is the word 'main' that is important here. It is not any term that specifies any aspect of the subject matter of the contract which is exempt from review: it is only a term which specifies the 'main' or essential subject matter of the contract (*Andriciuc* v. *Banca Românească SA* (Case C-186/16)).

The third point relates to the exclusion to be found in what is now section 64(1)(b), which has generated the case-law which is not easy to reconcile. The case-law has arisen under the equivalent provisions in the 1994 and the 1999 Regulations. Regulation 6(2)(b) of the 1999 Regulations provided that the assessment of fairness of a term shall not relate to 'the adequacy of the price or remuneration, as against the goods or services supplied in exchange' (the equivalent term in the 1994 Regulations was to be found in regulation 3(2)(b)). Unlike section 64(1)(a), this subsection is not confined to the 'main' or 'essential' price term. In principle it catches any term that purports to assess the appropriateness of the price payable under the contract by comparison with the goods, digital content, or services supplied under it. Before turning to a consideration of the scope of section 64(1)(b), it is important to have regard to the two leading decisions on the predecessors to section 64(1)(b), namely the decision of the House of Lords in *Director General of Fair Trading* v. *First National Bank* [2001] UKHL 52, [2002] 1 AC 481 and the decision of the Supreme Court in *Office of Fair Trading* v. *Abbey National plc* [2009] UKSC 6, [2010] 1 AC 696.

In the *First National Bank* case clause 8 of the bank's standard terms of business provided that, should the customer default on repayments to it, the bank was to be entitled to recover from the customer the whole of the balance on the customer's loan account together with outstanding interest and the costs of seeking judgment. The particular provision to which the Director of Fair Trading objected was one which applied in the case where a customer of the bank paid off an outstanding loan pursuant to an instalment scheme that
p. 473 had been approved by a court. The effect of clause 8 was that interest ↵ continued to accrue on the unpaid balance of the debt so that payment pursuant to the instalment scheme did not necessarily have the effect of discharging the debt. Thus many customers were faced with a demand for further payment in relation to the interest which had accrued under the relevant clause on completion of their payments pursuant to the instalment scheme that had been approved by the court. One of the points taken by the bank by way of defence was that clause 8 was a term which concerned the adequacy of the price or remuneration, as against the goods or services supplied in exchange and thus was exempt from assessment. The House of Lords rejected this submission. Particularly important was Lord Steyn's observation at [34] that what is now section 64(1)(b) should be interpreted 'restrictively', otherwise it would 'enable the main purpose of the scheme to be frustrated by endless formalistic arguments as to whether a provision is a definitional or an exclusionary provision'.

The second case is the decision of the Supreme Court in *Office of Fair Trading* v. *Abbey National plc* [2009] UKSC 6, [2010] 1 AC 696, where the issue before the court was whether the fairness of bank charges levied on personal current account customers in respect of what may broadly be termed unauthorized overdrafts could be challenged under the 1999 Regulations. An example of the type of charge under scrutiny was an 'overdraft excess charge' which is levied if, during a specified period, an account is or goes overdrawn (and there is no overdraft facility) or the debit balance is or goes above the limit of an existing facility, in both cases irrespective of the reason why the excess has occurred. The terms were held at first instance and in the Court of Appeal to fall within the scope of the Regulations so that they were subject to assessment on the grounds of fairness. But, on appeal, the Supreme Court held, rather surprisingly, that the relevant charges constituted part of the price or remuneration for the banking services provided by the banks and, in so far as the terms had been found to be in plain intelligible language, any assessment of the fairness of those terms which related to their adequacy as against the services supplied was excluded by regulation 6(2)(b) of the 1999 Regulations. The words 'related to their adequacy as against services supplied' were held to be important because they underlined the fact that it was not the term itself which was excluded from assessment. Rather the term was excluded from certain forms of assessment (namely on grounds of price/quality ratio) but it could be subject to challenge on other grounds, for example on the ground that it was unfair because of its other, discriminatory effects (see *Abbey National* at [57]).

One difficulty with the decision in *Abbey National* is that, as Lord Steyn pointed out in *First National Bank* (at [34]), 'in a broad sense all terms of the contract are in some way related to the price or remuneration'. Does this mean that the Supreme Court in *Abbey National* has in effect departed from its own decision in *First National Bank*? The formal answer is that it has not, but that the effect of *Abbey National* was considerably to limit the scope of the decision in *First National Bank*. That the decision in *First National Bank* remains good law emerges from the following passage from the speech of Lord Walker in *Abbey National* (at [43]):

> The House of Lords' decision in the *First National Bank* case shows that not every term that is in some way linked to monetary consideration falls within regulation 6(2)(b) … But the relevant term in the *First National Bank* case was a default provision. Traders ought not to be able to outflank consumers by 'drafting themselves' into a position where they can take advantage of a default provision. But … the court can and will be astute to prevent that. In the *First National Bank* case Lord Steyn … indicated
> p. 474 that what is now regulation 6(2) should ↵ be construed restrictively, and Lord Bingham said … that it should be limited to terms 'falling squarely within it'. I respectfully agree. But in my opinion the relevant terms and the relevant charges do fall squarely within regulation 6(2)(b).

While the words are consistent with the approach of the House of Lords in *First National Bank*, the spirit is not and it is possible that after *Abbey National* the exclusion will only apply to 'default provisions' or to terms which 'require ancillary payments to be made which are not part of the price or remuneration for goods or services to be supplied under its terms' (*Abbey National* at [113]).

What impact will the changes made to section 64(1)(b) have on the decisions in *First National Bank* and *Abbey National*? The change from 'adequacy' to 'appropriateness' is probably not a change of substance given that 'adequacy' has been held to mean 'appropriateness or reasonableness (in amount)' (*Office of Fair Trading* v. *Abbey National plc* [2009] UKSC 6, [2010] 1 AC 696, [94], per Lord Mance). Once again we seem to be in the realms of a change of label rather than substance. It would therefore appear that neither decision has been affected by the changes to section 64(1)(b) and that the latter provision has not attempted to over-rule one or other decision. However, at this point it is important to remember that terms are now only exempt from assessment if they are 'transparent and prominent' (section 64(2)). To the extent that these requirements are more exacting than the requirement that the term be in 'plain intelligible language', it is possible that the terms that were in issue in *Abbey National* would be subject to a more searching assessment.

65 Bar on exclusion or restriction of negligence liability

(1) A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence.

(2) Where a term of a consumer contract, or a consumer notice, purports to exclude or restrict a trader's liability for negligence, a person is not to be taken to have voluntarily accepted any risk merely because the person agreed to or knew about the term or notice.

(3) In this section 'personal injury' includes any disease and any impairment of physical or mental condition.

(4) In this section 'negligence' means the breach of—

(a) any obligation to take reasonable care or exercise reasonable skill in the performance of a contract where the obligation arises from an express or implied term of the contract,

(b) a common law duty to take reasonable care or exercise reasonable skill,

(c) the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957, or

(d) the duty of reasonable care imposed by section 2(1) of the Occupiers' Liability (Scotland) Act 1960.

(5) It is immaterial for the purposes of subsection (4)—

(a) whether a breach of duty or obligation was inadvertent or intentional, or

(b) whether liability for it arises directly or vicariously.

(6) This section is subject to section 66 (which makes provision about the scope of this section).

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66 Scope of section 65

(1) Section 65 does not apply to—

(a) any contract so far as it is a contract of insurance, including a contract to pay an annuity on human life, or

(b) any contract so far as it relates to the creation or transfer of an interest in land.

(2) Section 65 does not affect the validity of any discharge or indemnity given by a person in consideration of the receipt by that person of compensation in settlement of any claim the person has.

(3) Section 65 does not—

(a) apply to liability which is excluded or discharged as mentioned in section 4(2)(a) (exception to liability to pay damages to relatives) of the Damages (Scotland) Act 2011, or

(b) affect the operation of section 5 (discharge of liability to pay damages: exception for mesothelioma) of that Act.

(4) Section 65 does not apply to the liability of an occupier of premises to a person who obtains access to the premises for recreational purposes if—

(a) the person suffers loss or damage because of the dangerous state of the premises, and

(b) allowing the person access for those purposes is not within the purposes of the occupier's trade, business, craft or profession.

Commentary

Sections 65 and 66 are the consumer equivalent of section 2(1) of the Unfair Contract Terms Act (on which see 13.3.2) in so far as section 65(1) provides that a trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence. There is therefore no need for a court to consider whether or not such a term is fair: it is declared by statute to be a term which does not have effect.

67 Effect of an unfair term on the rest of a contract

Where a term of a consumer contract is not binding on the consumer as a result of this Part, the contract continues, so far as practicable, to have effect in every other respect.

Commentary

It follows from this section that, in most cases, the contract will continue to bind the parties with the exception of the unfair term. However, if the term is fundamental to the contract and it is held to be unfair, the consequence may be that the contract will cease to bind the parties on the basis that the contract is not capable of continuing in existence without such a fundamental term.

68 Requirement for transparency

(1) A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.

(2) A consumer notice is transparent for the purposes of subsection (1) if it is expressed in plain and intelligible language and it is legible.

Commentary

This section only applies to written terms and it applies to all written terms, even to those that specify the main subject matter of the contract or the appropriateness of the price. Thus 'core terms' must be transparent. The insertion of the word 'transparent' is new. Previously the requirement was that the term be expressed in 'plain, intelligible language' (regulation 7(1) of the Unfair Terms in Consumer Contracts Regulations 1999). But it can be seen that the requirement that the term be expressed in plain and intelligible language has been incorporated into the requirement that the term be 'transparent' (section 68(2)). The change is therefore a change of label rather than substance. The section does not formally state the consequence of a failure to

ensure that a written term is transparent. However, it is likely that a failure to ensure that the term is transparent will be taken into account by the court when deciding whether or not a term is unfair. Although one would expect a court to take into account any lack of transparency when considering the fairness of a contract term, the two inquiries are formally separate. Thus in *Longley* v. *PPB Entertainment Ltd* [2022] EWHC 977 (QB), [102.2] Ellenbogen J stated that 'as a matter of construction, the statutory requirement of transparency is separate from the assessment of fairness under section 62 and a breach of the former requirement would not necessarily render the term in question unfair, and, thus, unenforceable against the consumer, though it might give rise to regulatory action'. The question whether a particular contract term is transparent or not is a fact-sensitive inquiry and so it is always important to have regard to the facts and circumstances of the particular case (see *Longley* v. *PPB Entertainment Ltd,* [102.6]).

69 Contract terms that may have different meanings

(1) If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.

(2) Subsection (1) does not apply to the construction of a term or a notice in proceedings on an application for an injunction or interdict under paragraph 3 of Schedule 3.

Commentary

Section 69 should be a familiar provision to English lawyers because *contra proferentem* is a general rule of construction in English law. According to this rule any ambiguity in a term must be resolved against the party who is relying upon it. In so far as section 69(1) provides that the consumer must be given the benefit of any doubt about the meaning of a written term, it would appear to be no more than a statutory form of the *contra proferentem* rule.

70 Enforcement of the law on unfair contract terms

(1) Schedule 3 confers functions on the Competition and Markets Authority and other regulators in relation to the enforcement of this Part.

(2) For provision about the investigatory powers that are available to those regulators for the purposes of that Schedule, see Schedule 5.

p. 477 ## Commentary

Schedule 3 sets out in some detail the duties and responsibilities of various regulators in the enforcement of Part 2. This section and Schedule 3 are important because consumers tend to be unwilling or unable to enforce their private law rights. A regulator on the other hand is not so constrained and can therefore take steps which consumers would not be able to take themselves in order to ensure that the legislation is effective in practice. In the early days of the Unfair Terms in Consumer Contracts Regulations the role of regulator was played by the Office of Fair Trading and in particular by the Unfair Contract Terms Unit of the Office of Fair Trading (see the extract from the article by Professor Bright, on which see 14.3). The role of the principal

regulator has now been given to the Competition and Markets Authority ('CMA'). However, the CMA is not the sole regulator. Paragraph 8 of Schedule 3 to the 2015 Act contains the current list of regulators. In addition to the CMA, the regulators now include the Department of Enterprise, Trade and Investment in Northern Ireland, a local weights and measures authority in Great Britain, the Financial Conduct Authority, the Office of Communications, the Information Commissioner, the Gas and Electricity Markets Authority, the Water Services Regulation Authority, the Office of Rail and Road, the Northern Ireland Authority for Utility Regulation, and the Consumers' Association. The most notable inclusion in the list is the Consumers' Association because it is not a public body and so permits what is essentially a consumer advocacy group to play a role as regulator under the Act. A regulator may consider a complaint about a term which is alleged to be unfair. In order to ensure a degree of coordination between the possible regulators, if a regulator other than the CMA intends to consider a relevant complaint, it must first notify the CMA that it intends to do so, and must then consider the complaint. If a regulator considers a complaint but decides not to make an application for an injunction to restrain the continued use of the term, it must give reasons for the decision to the person who made the complaint.

Regulators are given the power to apply to court for an injunction to restrain the continued use of unfair terms (paragraph 3 of Schedule 3) and also have considerable investigatory powers (see Schedule 5). Where a contract term is found to be unfair as a result of a general challenge, a court not only has the power to prevent the use of the unfair term in the future, it can also, in an appropriate case, prevent the seller or supplier from continuing to enforce the term in current or existing contracts (*Office of Fair Trading* v. *Foxtons Ltd* [2009] EWCA Civ 288, [2010] 1 WLR 663). But it is important to note that the failure of a general challenge does not mean that an individual challenge will necessarily fail. If an individual can demonstrate that the term is unfair in accordance with section 62, he or she is entitled to succeed with his or her claim notwithstanding the fact that the term has survived a general challenge.

Supplementary provisions

71 Duty of court to consider fairness of term

(1) Subsection (2) applies to proceedings before a court which relate to a term of a consumer contract.

(2) The court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it.

(3) But subsection (2) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term.

Commentary

In most litigation involving issues of contract law, it is the responsibility of the parties to put the relevant issues before the court. But, exceptionally, public policy may put the onus on the court to raise the issue, so that it is not left to the parties to do so. This is such a case and it will operate to benefit the consumer who was not aware that he or she could challenge the contract term on the ground that it was unfair. However, the duty

of the court to raise the issue is not absolute: it depends upon the court having before it sufficient legal and factual material to enable it to consider the fairness of the term. It is unlikely that this section will be invoked frequently in practice. But on the (rare) occasions on which it is invoked, it has the potential to ensure that justice is done in the case where the consumer is unaware of the existence of his or her right to challenge a contract term.

72 Application of rules to secondary contracts

(1) This section applies if a term of a contract ('the secondary contract') reduces the rights or remedies or increases the obligations of a person under another contract ('the main contract').

(2) The term is subject to the provisions of this Part that would apply to the term if it were in the main contract.

(3) It does not matter for the purposes of this section—

(a) whether the parties to the secondary contract are the same as the parties to the main contract, or

(b) whether the secondary contract is a consumer contract.

(4) This section does not apply if the secondary contract is a settlement of a claim arising under the main contract.

Commentary

Section 72 is the equivalent of section 10 of the Unfair Contract Terms Act 1977 (on which see 13.3). The purpose of the provision is to prevent the evasion of the protections afforded by Part 2 by the creation of a secondary contract (whether or not that contract is between the same parties) the effect of which would otherwise be to deprive the consumer of his or her rights under Part 2.

73 Disapplication of rules to mandatory terms and notices

(1) This Part does not apply to a term of a contract, or to a notice, to the extent that it reflects—

(a) mandatory statutory or regulatory provisions, or

(b) the provisions or principles of an international convention to which the United Kingdom is a party.

(2) In subsection (1) 'mandatory statutory or regulatory provisions' includes rules which, according to law, apply between the parties on the basis that no other arrangements have been established.

p. 479 **Commentary**

The intention behind this provision is to make clear that contract terms inserted into a contract in order to give effect to a statutory requirement or an international convention cannot be challenged under the Act. The wording chosen to give effect to this policy is, however, rather unusual. The first point relates to the meaning of the word 'mandatory'. It would appear that it does not mean 'mandatory' in the sense of a rule of law out of which the parties cannot contract. Recital 13 to the Directive states that the words 'mandatory statutory or regulatory provisions' also 'cover[] rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established'. The latter appear to be 'default' rules rather than 'mandatory' rules and, this being the case, the word 'mandatory' in the Act appears misleading and possibly redundant. It would appear to suffice that the term in question is permitted or authorized by statute: it need not be required by statute. However, it does not extend to a term that was initially freely made by the parties but was then extended as a result of a statutory mechanism. The extension of the term by legislation does not take a term that would otherwise have been within the Act beyond its reach (*Roundlistic Ltd* v. *Jones* [2018] EWCA Civ 2284, [2019] 1 WLR 4461). Secondly, the word 'reflects' is rather vague. But it may be important. Take the case of a regulator who approves contract terms while acting in the course of a statutory jurisdiction. Is such a term exempt from the Act? The term itself is not 'authorised' by the statute but the Directive in Recital 13 refers to 'statutory or regulatory provisions … which directly or indirectly determine the terms of consumer contracts' and the reference to indirect authorization may be sufficient to catch our regulator example. Finally, the word 'principles' in section 73(1)(b) has given rise to some difficulty. Although the point is not free from doubt, it is suggested that the mere fact that the term reflects an international convention should not suffice to take it outside the scope of the Act where the relevant convention does not apply to the contract that has been concluded between the parties.

74 Contracts applying law of a country other than the UK

(1) If—

(a) the law of a country or territory other than the United Kingdom or any part of the United Kingdom is chosen by the parties to be applicable to a consumer contract, but

(b) the consumer contract has a close connection with the United Kingdom,

this Part applies despite that choice.

(2) For cases where the law applicable has not been chosen, see Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations as that Regulation has effect as retained direct EU legislation (including that Regulation as applied by regulation 5 of the Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009 and regulation 4 of the Law Applicable to Contractual Obligations (Scotland) Regulations 2009), unless the case is one in respect of which Regulation (EC) No 593/2008 has effect by virtue of Article 66 of the EU withdrawal agreement, in which case see that Regulation as it has effect by virtue of that Article.

p. 480 ## Commentary

The aim of this provision is to prevent traders avoiding the application of the Act by inserting a choice of law clause into the contract. Take the case where a trader inserts into its standard form contract a choice of law clause and the law chosen is the law of an African or a South American country. Such a choice of law is not effective where the consumer contract has a close connection with the United Kingdom.

75 Changes to other legislation

Schedule 4 (amendments consequential on this Part) has effect.

Commentary

Schedule 4 contains a number of amendments to other legislation, such as the Unfair Contract Terms Act 1977 and the Misrepresentation Act 1967, which are required in order to give effect to the changes which have been made by Part 2. These changes to the Unfair Contract Terms Act 1977 and the Misrepresentation Act 1967 have been incorporated into Chapters 13 and 17 respectively.

76 Interpretation of Part 2

(1) In this Part—

'consumer contract' has the meaning given by section 61(3);

'consumer notice' has the meaning given by section 61(7);

'transparent' is to be construed in accordance with sections 64(3) and 68(2).

(2) The following have the same meanings in this Part as they have in Part 1—

'trader' (see section 2(2));

'consumer' (see section 2(3));

'goods' (see section 2(8));

'digital content' (see section 2(9)).

(3) Section 2(4) (trader who claims an individual is not a consumer must prove it) applies in relation to this Part as it applies in relation to Part 1.

Commentary

These definitions have been incorporated into the discussion of the relevant sections.

Schedule 2 Consumer Contract Terms Which May be Regarded as Unfair

Part 1 List of terms

1. A term which has the object or effect of excluding or limiting the trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader.

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2. A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.
3. A term which has the object or effect of making an agreement binding on the consumer in a case where the provision of services by the trader is subject to a condition whose realisation depends on the trader's will alone.
4. A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract.
5. A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.
6. A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.
7. A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract.
8. A term which has the object or effect of enabling the trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so.
9. A term which has the object or effect of automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express a desire not to extend the contract is unreasonably early.
10. A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.
11. A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.

12. A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.
13. A term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.
14. A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.
15. A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.

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16. A term which has the object or effect of giving the trader the right to determine whether the goods, digital content or services supplied are in conformity with the contract, or giving the trader the exclusive right to interpret any term of the contract.
17. A term which has the object or effect of limiting the trader's obligation to respect commitments undertaken by the trader's agents or making the trader's commitments subject to compliance with a particular formality.
18. A term which has the object or effect of obliging the consumer to fulfil all of the consumer's obligations where the trader does not perform the trader's obligations.
19. A term which has the object or effect of allowing the trader to transfer the trader's rights and obligations under the contract, where this may reduce the guarantees for the consumer, without the consumer's agreement.
20. A term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, in particular by—
    (a) requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,
    (b) unduly restricting the evidence available to the consumer, or
    (c) imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.

Part 2 Scope of Part 1

Financial services

21 Paragraph 8 (cancellation without reasonable notice) does not include a term by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, if the supplier is required to inform the consumer of the cancellation immediately.

22 Paragraph 11 (variation of contract without valid reason) does not include a term by which a supplier of financial services reserves the right to alter the rate of interest payable by or due to the consumer, or the amount of other charges for financial services without notice where there is a valid reason, if—

(a) the supplier is required to inform the consumer of the alteration at the earliest opportunity, and

(b) the consumer is free to dissolve the contract immediately.

Contracts which last indefinitely

23 Paragraphs 11 (variation of contract without valid reason), 12 (determination of characteristics of goods etc after consumer bound) and 14 (determination of price after consumer bound) do not include a term under which a trader reserves the right to alter unilaterally the conditions of a contract of indeterminate duration if—

(a) the trader is required to inform the consumer with reasonable notice, and

(b) the consumer is free to dissolve the contract.

Sale of securities, foreign currency etc

24 Paragraphs 8 (cancellation without reasonable notice), 11 (variation of contract without valid reason), 14 (determination of price after consumer bound) and 15 (increase in price) do not apply to—

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(a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control, and

(b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.

Price index clauses

25 Paragraphs 14 (determination of price after consumer bound) and 15 (increase in price) do not include a term which is a price-indexation clause (where otherwise lawful), if the method by which prices vary is explicitly described.

Commentary

Part 1 of Schedule 2 contains the so-called grey list of terms that may be regarded as unfair. As has been noted (earlier in this section), there is some uncertainty as to whether the list is for guidance only or whether it creates a rebuttable presumption that a term included in the list is unfair. Whatever its precise legal status, it is clear that Part 1 of Schedule 2 plays an important role when deciding whether or not a particular term is

unfair. It is therefore necessary to explain, albeit briefly, the likely scope of the different paragraphs set out in this Schedule. Most of the paragraphs were in the original Regulations but three new additions (paragraphs 5, 12, and 14) were added by the Consumer Rights Act.

Paragraph 1 applies to terms that purport to exclude or limit the trader's liability for death or personal injury. Where the death or personal injury is a consequence of the negligence of the trader, then the term is regulated by section 65 and will not be given effect. Therefore, this paragraph is confined to cases where the death or personal injury results from a non-negligent act or omission of the trader.

Paragraph 2 has wide potential application, yet its scope is uncertain. There is no definition of 'inappropriately', notwithstanding its importance to the paragraph as a whole. The paragraph appears to be in the nature of a wrap-up or catch-all provision.

Paragraph 3 applies to conditional service provisions. Terms which purport to bind one party to the contract before binding the other may now be unfair. What will be the effect of a finding that such a term is unfair? It will not be binding on the consumer (section 62(1)). But will the contract continue to bind the parties? One possibility is that the invalidity of the term will have the effect of making the contract binding on both parties to the contract from the same point in time. This paragraph will have considerable impact on hire-purchase transactions and leasing agreements, where it was not uncommon for the contract to provide for the consumer to be bound before the trader was bound to the transaction.

Paragraph 4 applies to deposits. Attempts by traders to retain deposits are already regulated by the common law (see 23.12) and, in the case of consumer contracts, by the Consumer Credit Act 1974. The novelty in this particular provision is the requirement that the consumer receive equal protection through being entitled to compensation of an 'equivalent amount' from the trader in the event of the trader cancelling the contract. It has been stated (Treitel, *The Law of Contract* (15th edn, Sweet & Maxwell, 2020, edited by Edwin Peel), paragraph 20-177) that this provision is based on 'the civil law institution (which has no counterparty in the
p. 484 common law) by which a contract can, in effect, be dissolved on forfeiture ↵ of a deposit or on the return by the payee of double the amount'. It is also suggested that the consumer will have the right to the return of any sum paid on the basis that the use of the word 'retain' suggests the availability of a remedy for the recovery of the pre-payment. Finally, Treitel notes (paragraph 20-177) that the paragraph does not apply to rights of forfeiture conferred by law, the scope of the Act being confined to 'contract terms'.

Paragraph 5 is a new addition, which was inserted for the first time in the 2015 Act. It extends protection to the consumer who decides not to conclude or perform the contract and who is required to pay to the trader a disproportionately high sum in compensation or for services which have not been supplied. In the case of the consumer who has not performed the contract, such non-performance may be a breach of contract and so the paragraph would appear to overlap with the penalty clause rule. But to the extent that it applies to the consumer who decides not to conclude the contract, it would appear that this protection is over and above that to be found in the existing common law.

Paragraph 6 overlaps with the existing common law rules relating to penalty clauses (which are discussed at 23.11), but it is not clear to what extent, if at all, this paragraph differs from the common law rules and the courts may draw upon the common law rules when seeking to interpret this provision (see, for example, *ParkingEye Ltd* v. *Beavis* [2015] UKSC 67, [2016] AC 1172, where some of the factors taken into account by the

Supreme Court in deciding that the term was not unfair were similar to those considered when deciding that the clause was not a penalty clause). The word 'disproportionately' is not defined. At what time is the disproportion to be assessed: is it the time of formation or the time of breach? This paragraph may be wider than the penalty clause rules because the Act may not be confined to sums payable on breach: a consumer who 'fails to fulfil his obligation' might not be in breach of contract because he may have an excuse for his non-performance. It may also catch a clause requiring payment of a holding charge, of the type used in *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433 (see 9.3).

Paragraph 7 is likely to have considerable impact because many traders give themselves the right to dissolve the contract where the consumer does not have the same right. Such a term may now be unfair unless it gives the consumer an identical right to dissolve the contract. The latter part of the paragraph overlaps with paragraphs 4, 5, and 6 but this paragraph only applies to the retention of sums paid for 'services not yet supplied'.

The subject matter of paragraph 8 is terms which purport to entitle a trader to terminate a contract without notice. There are three critical phrases in this provision: (i) 'indeterminate duration', (ii) 'reasonable notice', and (iii) 'serious grounds'. None of these phrases is defined. Treitel points out (paragraph 18-082) that the fact that the Schedule is non-exhaustive 'would not preclude the court from holding that a cancellation clause in a fixed-term contract was also unfair'. The reference to 'serious grounds' may catch force majeure clauses which purport to bind consumers. The scope of this paragraph is limited by paragraphs 21 and 24 of Part 2 of Schedule 2, which make particular provision for the financial services industry.

Paragraph 9 applies to terms which purport to give to traders the right unilaterally to extend contracts of fixed duration and will probably have the greatest impact on long-term hire contracts. In this way the legislation appears to introduce a test of fairness into the renewal period for certain contracts. This paragraph may also catch a holding-fee of the type used in *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433 (see 9.3). The effect of a finding that such a term is unfair will be that it is not binding on the consumer so that the contract will not be extended in the manner contemplated by the term.

p. 485 ↵ Paragraph 10 is important, albeit that its scope is rather unclear. It applies to a contract term which purports to incorporate the terms of other documents not accessible to the consumer. But it does not appear to challenge the rule in *L'Estrange* v. *Graucob* [1934] 2 KB 394 (see 9.2) because the subject matter of this paragraph is the term which seeks to incorporate the other terms into the contract rather than the term which it is sought to incorporate into the contract.

Paragraph 11 applies to unilateral alteration clauses. The scope of this paragraph is limited by paragraphs 22, 23, and 24 of Part 2 of Schedule 2 which make particular provision for the financial services industry. Paragraph 23 provides that a trader can reserve the right unilaterally to alter the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

Paragraph 12 is another new addition and in many ways it can be said to supplement paragraph 11 in so far as it also applies to unilateral alteration clauses, although this time the alteration is one that relates to the characteristics of the subject matter of the contract. So, for example, where the seller of goods reserves the

right, after the conclusion of the contract of sale, to alter the characteristics of the goods that are the subject of the contract of sale.

Paragraph 13 applies to terms which enable the trader to alter without a valid reason any characteristics of the goods, digital content, or services to be provided. This paragraph only applies where the trader does not have a 'valid reason' for making the alteration. 'Valid reason' is not defined in the Act.

Paragraph 14 is the final new provision which has been inserted into the 2015 Act and it deals with the case where the price or the method of determining the price has not been agreed when the consumer became bound by the contract and the term confers a discretion upon the trader to decide the price payable under the contract. The consumer in such a case is not left to the mercy of the trader but may be able to challenge the term conferring such a discretion upon the trader.

Paragraph 15 applies to terms which purport to entitle the trader to make unilateral changes to the price of goods, digital content, or services. Thus, while the adequacy of the price cannot be challenged as an unfair term provided that it is transparent and prominent (see section 64(2)), the same cannot be said of terms which purport to entitle one party to make changes to the agreed price of the goods, digital content, or services. Such terms are susceptible to challenge under the Act. It is not entirely clear what will happen in the event that such a term is found to be unfair. While the term will not bind the consumer, what price will be payable for the goods, digital content, or services? Is there no contract, a contract to pay for the goods, digital content, or services at a 'reasonable price', or a contract to pay for the goods, digital content, or services at the originally agreed price? The scope of this paragraph is also limited by paragraphs 24 and 25 of Part 2 to Schedule 2. The former makes special provision for the financial services industry, while the latter states that paragraph 15 is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is 'explicitly' described. In other words, the emphasis is placed on the clarity and quality of the information given in relation to the price index.

Paragraph 16 catches unilateral interpretation terms. It is not unknown for traders to attempt to confer upon themselves the entitlement to determine whether or not they have complied with their own obligations under the contract. Terms which purport to confer such a right (or a right of exclusive interpretation) fall within the scope of this paragraph.

Paragraph 17 applies to formality requirements. This paragraph would appear not to apply to exclusion clauses
p. 486 because it opens with the word 'limiting'. On the other hand, the ↵ fact that the list does not purport to be exhaustive may enable a court to conclude that an exclusion clause cast in these terms is also unfair.

Paragraph 18 applies to terms obliging the consumer to fulfil all of his obligations where the trader does not perform his. This paragraph could apply to a rental agreement under which the hirer is obliged to pay the hire, when the owner is not under an obligation to repair the goods hired.

Paragraph 19 applies to a term which purports to entitle the trader to transfer his rights and obligations under the contract and the effect of this is to reduce the guarantees for the consumer without the consumer's consent. The reference to the transfer of obligations in this paragraph is a little puzzling to an English lawyer because English law does not allow one party to transfer his obligations under a contract to a third party

without the consent of his contracting party. This being the case, an attempt by a seller to transfer his obligations to a third party without the consent of the consumer would be invalid irrespective of this particular provision.

Paragraph 20 applies to terms which seek to restrict the availability of legal remedies. Treitel (paragraph 7-115) analyses this provision in the following terms:

> Terms 'excluding or hindering' the consumer's right to take legal action or exercise any other legal remedy are included in the list of prima facie unfair terms. In this context, the list refers, in particular, to terms 'requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions' ... The reference to arbitration clauses ... is, however, restricted by the words 'not covered by legal provisions' and the purpose of this restriction may be to narrow the category of prima facie unfair arbitration clauses to those in which the parties have agreed to exclude the powers of the courts to control the arbitrator's decision.

14.3 Enforcement

As has been noted, the primary role in the enforcement of the Regulations was played initially not by the courts but by the Unfair Contract Terms Unit of the Office of Fair Trading. As has been noted, that role has now been assumed by the Competition and Markets Authority. Although the regulator has now changed, the following assessment of the role of the Unfair Contract Terms unit remains of interest:

S Bright, 'Winning the Battle Against Unfair Terms'
(2000) 20 *Legal Studies* 331, 333–338

Enforcement of the Unfair Terms in Consumer Contracts Regulations

Although the UK Regulations can be relied on in private law disputes involving consumers, it is the Unfair Contract Terms Unit that has been at the forefront of action against unfair contract terms. Private law enforcement does not provide an effective way of regulating the standard inclusion of unfair terms in adhesion contracts: it is true that success in an individual action will mean that the term is not binding upon that consumer, but its impact beyond that consumer will be limited, and there is no significant pressure on the business to discontinue future use of that term. Further, there will only ever be a trickle of private law actions as most consumers prefer to deal with matters informally, or not at all, rather than ↵ pursue complaints by formal legal mechanisms in which the costs of litigation (financial and otherwise) exceed the benefits that stand to be achieved. So far there has only been a handful of cases in which the consumer has, with mixed success, relied upon the 1994 Regulations.

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The administrative model of enforcement created by the 1994 Regulations (and extended by the 1999 Regulations) is a much more effective way of preventing the continuing use of unfair terms and changing contracting practice. Investigation into allegedly unfair terms usually follows a complaint made to the Director General of Fair Trading, who is under a duty to investigate unless it is 'frivolous or vexatious'. There is a strong flow of complaints made to the Unfair Contract Terms Unit, about half of which come from local authority trading standards departments and consumer advice organisations. The Unit have adopted a pro-active response to complaints; not only will the particular term complained about be looked into, but the contract as a whole will be investigated. Indeed, investigations often spread beyond the particular contract to involve trade associations, and the Unit has initiated a number of sectoral investigations so that contracts used by traders in a similar line of business can be looked at together. So, for example, there has been notable success in securing the amendment of terms in mobile phone contracts, the sector about which there has been most complaint. By way of illustration, numerous amendments were agreed in relation to Vodafone contracts, including adjustment of the notice requirement (which had required three months' notice additional to the minimum twelve month term), deletion of a clause providing for a substantial disconnection charge, and a reduction in the level of compensation payable by a consumer who terminates early. Other sectors which have been focused upon include the home improvement industry, vehicle rental, package holidays and, most recently, the Director General of Fair Trading has announced that he is investigating conditions of airline use. Discussions with trade associations are not always a response to complaints and may be on the initiative of the Office of Fair Trading.

In practice, the vast majority of cases are dealt with by negotiation and if the contract term is found to be unfair the Unfair Contract Terms Unit will require the business to provide an undertaking to discontinue the use of the unfair term. Court action has been seen as a last resort. … It is interesting to speculate just why this course of action has been so successful and why traders have, with varying degrees of willingness, complied with the requests to abandon or amend terms without forcing the

issue to court. Presumably the fear of bad publicity plays a part. There is also the fact that many of the terms are fair in part—by rewriting them the trader can still secure the protection needed whilst also being fair to the consumer; if left unamended the terms may be wholly unenforceable against the consumer. Dealing with trade associations is also an efficient way of reaching businesses: as the representative figure within that sectoral activity, associations will often be anxious to present a positive public image and to maintain good working relationships with the Office of Fair Trading. Agreements reached at this level will be passed through to the trading bodies who use the association's standard contract. By way of example, the Office of Fair Trading agreed a revised model contract for use by members of The British Vehicle Rental and Leasing Association. About 85% of companies in this industry belong to this association. It is also less costly to proceed by way of undertaking than by paying the costs of going to court. However, what has been the practice over the last five years will not necessarily be the pattern of the future; if it emerges over time that the courts adopt a less consumer-oriented interpretation of the Regulations, there is the possibility that fewer cases will be settled by negotiation alone.

This administrative model of enforcement was not prescribed by the Directive. Although the Directive specifies that mechanisms must be in place to prevent the continued use of unfair terms in consumer contracts, the method deployed to achieve this end is left to Member ↵ States. States could therefore select not only to hand this role to a public official (as in the United Kingdom and in Nordic countries), but to permit consumer organisations to bring actions to prevent the continued use of unfair terms (as in Germany and France), or (possibly) to use criminal sanctions. The route chosen in the United Kingdom has proven effective, as already seen, but there were complaints that the 1994 Regulations failed to give a voice to consumer organisations. Article 7 of the Unfair Terms Directive requires Member States to ensure that 'adequate and effective means exist to prevent the continued use of unfair terms' and that the means shall 'include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers' may take action to have terms declared unfair. In 1995, the Consumers' Association sought to have the exclusion of bodies such as theirs declared to be an unlawful implementation of the Directive. The judge, Hidden J, referred the question raised by the Consumers' Association's action to the European Court of Justice for a ruling on the Community law, but the point was never pursued as the UK government announced its intention to address their concerns through an amendment to the 1994 Regulations.

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There are various models that could have been used to extend the enforcement powers beyond the Director General of Fair Trading. The approach adopted in the 1999 Regulations is to list additional specific bodies (statutory regulators, trading standards departments and the Consumers' Association) as having powers to apply for an injunction to prevent the continued use of unfair terms. With the exception of the Consumers' Association, these bodies can also notify the Director General of Fair Trading that they will investigate a complaint, and will then be under an obligation to do so. An alternative model would have been to facilitate action by any body that is able to show that it fulfils certain criteria—depending upon the criteria selected, this would have enabled organisations such as the National Consumers' Council, Citizens' Advice Bureaux and the Financial Services Authority, to apply to bring actions. This route was the preferred approach of the Department of Trade and Industry in its Consultation Paper, which set out at some length the criteria

that could be used by a court in deciding whether or not to recognise bodies. Nevertheless, this route proved to be impractical. It entailed the risk of wasted expenses for traders, who could be put to the trouble and expense of defending claims from bodies who might later turn out not to fulfil the specified criteria. Implementation would also have necessitated changes to the rules of court, which would have generated further delay. There is a risk, however, that having selected the list approach, non-listed bodies might bring fresh challenges. Although the emphasis of the Consumers' Association case lay in the claim that it was unlawful to have empowered only one public body to bring actions, there must be some doubt as to whether it is within the Directive to deny this option to any body which can show that it has a 'legitimate interest under national law in protecting consumers' (Article 7). It is likely, however, that there will be a second wave of listing: the Department of Trade and Industry have invited consumer bodies who wish to have enforcement powers under the Regulations to contact them.

The extension of powers beyond the Director General of Fair Trading meant that measures had to be put in place to ensure that there would be consistent approaches taken to unfair terms, effective co-ordination between the enforcement bodies, and to protect traders from multiple challenges. To this end, if a qualifying body intends to apply for an injunction, it must give the Director General of Fair Trading notice and then, unless a shorter period is authorised, cannot commence the action within fourteen days. In addition, the qualifying body must inform the Director General of Fair Trading of all undertakings it receives and of the result of any applications for an injunction. The fact that there is only a small number of bodies authorised to act does minimise the risk of a trader being in negotiation with several 'enforcers'. The Director General of Fair Trading will remain the primary
p. 489 investigator and, as all investigations have to be ↵ reported to him, he will have an overview of all complaints. He retains a duty to disseminate information about the operation of the Regulations, not only about his own actions but also reporting on undertakings given to, and actions brought by, other qualifying bodies. In practice, dissemination has taken place through the issue of regular bulletins containing details of case reports, coupled with press releases reporting significant 'triumphs'.

It is anticipated that the widening of the enforcement provisions, and the ability to apply for injunctive relief in the County Court, will increase the number of cases taken to court. This may well impact upon the application of the Regulations. To date, the Office of Fair Trading has largely operated with a free hand, exercising a wide discretion to apply the Regulations in the interests of consumers. Judicial intervention may impose more checks and balances into their application. … Although the Office of Fair Trading has largely operated in isolation, the source of the Regulations lies in the European Unfair Terms Directive. Questions of interpretation will ultimately be for the European Court of Justice, but it is unlikely that vast numbers of cases will be referred. Much of the wording of the Directive is based upon Continental notions and yet there is no obvious procedure in place to facilitate the sharing of experiences between Member States … if the Directive is to lead to a more harmonised approach towards unfair terms in consumer contracts there needs to be a regular mechanism to ensure a consistency of approach, such as an advisory panel, spearheaded by the Directorate responsible for consumer affairs, DG XXIV.

Commentary

There are at least three important lessons that we can learn from this extract. The first is that it is a mistake to focus too much attention on the courts and to assume that if there is no case-law then the legislation cannot be working. The real enforcement of the Regulations did not take place in the courts but in the Office of Fair Trading. The second point to note is the importance of administrative regulation to the enforcement of the legislation. As Professor Bright observes, 'private law enforcement does not provide an effective way of regulating the standard inclusion of unfair terms in adhesion contracts.' The third point is that the extension of enforcement powers beyond the Office of Fair Trading (and now the Competition and Markets Authority) may not necessarily operate in the interests of consumers. Much will depend on the ability of these different qualifying bodies to forge a coherent and effective enforcement strategy.

Further Reading

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Notes

[1] Schedule 2 to the 1994 Regulations was not re-enacted in either the 1999 Regulations or the 2015 Act. Schedule 2 provided that, in making an assessment of good faith, regard shall be had in particular to (a) the strength of the bargaining positions of the parties; (b) whether the consumer had an inducement to agree to the term; (c) whether the goods or services were sold or supplied to the special order of the consumer; and (d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer.

[2] As noted, this Schedule was not re-enacted in the 1999 Regulations or the 2015 Act.

[3] Now to be found in Schedule 2 to the Consumer Rights Act 2015.

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