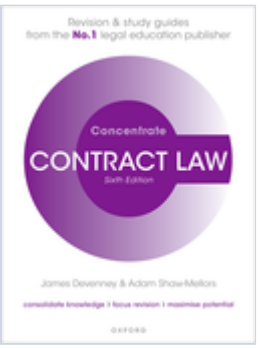

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6. Exemption clauses and unfair contract terms

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter discusses the use and enforceability of exemption clauses (total exclusion or limitation of liability clauses inserted into contracts) and their legislative regulation. Whereas the regulation of such clauses is limited to the common law and UCTA 1977 in the case of commercial contracts (B2B), in the case of consumer contracts (B2C) the law intervenes to control a broader category of terms, 'unfair contract terms' (Consumer Rights Act 2015) with the critical test being 'unfairness'.

Keywords: exemption clause, unfair contract terms, commercial contracts B2B, UCTA 1977, consumer contracts B2C, CRA 2015, incorporation, construction, negligence liability, reasonableness

Key facts

- An exemption clause is a term which purports to exclude (sometimes referred to as an exclusion clause) or limit (sometimes referred to as a limitation clause) the liability and/or the remedies which would otherwise be available to the non-breaching party.
- The *key question* is whether a particular exemption clause can be relied upon as a defence (or partial defence) to liability and/or to preclude reliance on the usual remedies for breach of contract.
- In order to be enforceable as a contractual term on the facts, the exemption clause must be incorporated as a term of the contract (incorporation), cover the liability that has arisen in the circumstances in which it has arisen (construction), and not be precluded from operating by legislation.

- An exemption clause can be incorporated as a result of a signature, reasonable notice in a contractual document to people in general before or at the time of contracting, or as a result of a consistent course of dealing between the parties or their common understanding.

- The **Unfair Contract Terms Act (UCTA) 1977** regulates exemption clauses in business-to-business (B2B) contracts either by rendering the particular clause totally unenforceable or enforceable only if it can be shown to be reasonable. The applicable test turns on the liability.

- In the context of consumer contracts, the **Consumer Rights Act (CRA) 2015** requires contract terms and notices to be fair (**s. 62**). The term or notice is regarded as 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. This is the same wording as under the previous consumer legislation (**Unfair Terms in Consumer Contracts Regulations 1999**) which was repealed by the **CRA 2015**. The assessment for fairness cannot extend to terms which (i) specify the main subject matter of the contract or (ii) relate to an assessment of the appropriateness of the price payable under the contract by comparison with the goods or services received, as long as those terms are transparent and prominent. An unfair term is not binding on the consumer.

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6.1 Introduction

This chapter focuses on the use and enforceability of exemption clauses (exclusion or limitation clauses inserted into contracts). There is evidence of a greater willingness to interfere with the use of such clauses in consumer, rather than commercial, contracts. The **CRA 2015** regulates exemption clauses as well as a larger category of 'unfair terms' **in the context of consumer contracts**. ↵

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Think like an examiner

Since the key issue concerns the ability to rely upon an exemption clause as a defence or partial defence, examiners tend to favour problem questions on this topic. Examiners also want to be helpful. It is relatively easy for you to identify the existence of an exemption clause in the question facts where liability and/or remedies are denied and therefore to appreciate the area of law for discussion.

While examiners appreciate that this topic can be perceived as technical and that it overlaps with knowledge of types of liabilities and the implied terms in the sales and supply (or consumer rights) legislation, we also know that your choice of questions to answer in the examination can make a big difference to your overall result. Law questions possess 'degrees of difficulty', just like the choice of dives in a diving competition. Exemption clauses would be at the top end of the range in terms of technicality so that in relative terms, and with clear knowledge of the basics, particularly the legislation, you can do really well in selecting to answer such a question.

Looking for extra marks?

The first step should be to identify the liability on the facts, i.e. what has happened, whether it amounts to a breach of a strict contractual obligation or negligence liability, and, if contractual liability, the term or terms broken.

Since this makes life so much easier when it comes to applying the legislation, this is probably essential.

Don’t fall into the trap

Imbalance: some students produce an excellent answer on incorporation but misjudge their timing completely (or run out of knowledge) so that they fail to consider either construction or the legislation. Remember that a good percentage of the marks will relate to the correct application of either **UCTA 1977** or the **CRA 2015**.

6.1.1 How to do well in exemption clauses problem answers

- Identify the liability at the outset (and appreciate whether the clause is being relied upon against a consumer or non-consumer).
- Consider each clause separately (if more than one) and each loss/liability issue separately (although the existence of other exemption clauses may be relevant to any question of reasonableness—***Watford Electronics Ltd v Sanderson CFL Ltd*** *(2001)*).
- Follow the structure in the correct order.
- Ensure you have a reasonable working knowledge of the statutory implied terms (or consumer statutory rights) in the sale and supply of goods (or consumer rights) legislation and be precise, e.g. cite the correct section and subsection of the correct piece of legislation. Do not confuse the commercial and consumer regimes or jump between them within a single fact application.
- Ensure you balance your answer so that you leave adequate time to address the legislation.

Essay questions in this area are less popular. The likely issues are discussed in ‘Key debates’.

6.2 Structure for a problem question on exemption clauses

6.2.1 Step 1: Identify the exemption clause question

Does the question involve one or more clauses that seem to deny responsibility, liability, and/or remedies?

If so, the question may well be about the effectiveness of that clause or clauses.

6.2.2 Step 2: What has happened?

There may be more than one incident. This should be easy. At least initially this does not require any legal knowledge but can be seen on the facts.

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Identify the legal liability attaching to each event

The liability may be liability in negligence (qualified contractual liability and/or breach of a duty of care in tort) and/or breach of strict contractual liability.

What does this mean?

If there has been a breach of contract you need to decide whether each obligation broken is a strict or qualified contractual obligation (see Table 5.8). A strict contractual obligation requires a particular result to be achieved or there will be a breach. By contrast, a qualified contractual obligation does not necessarily require a particular result to be achieved but requires the promisor to use reasonable care or skill to try to achieve such a result. If this standard is met, there is no breach even if the desired result is not achieved (see Chapter 5). Qualified contractual obligations are treated as liability in negligence for the purposes of exemption clauses (see the definition of negligence in **s. 1 UCTA 1977** and/or **s. 65(4) CRA 2015**).

This is the hardest part of this topic but there are only a few possibilities that you are likely to meet and these are set out in Table 6.1:

Table 6.1 Identifying types of liability

Negligence Liability	Strict Contractual Liability
If someone has possession of your property for some purpose (cloakroom, laundry, etc.) they owe you a qualified duty of reasonable care so if it is stolen due to a failure to exercise reasonable care there will be liability in negligence.	Breaches of implied obligations under the sales (or consumer rights) legislation are generally *strict* (the *exceptions* are **s. 13 Supply of Goods and Services Act (SGSA) 1982** and **s. 49 CRA 2015**) so breaches of the implied obligations on the seller or supplier to supply goods which are of satisfactory quality and fit for purpose are strict contractual liability (see Chapter 5 for details of these implied terms).
Breach of **s. 13 SGSA 1982** (or **s. 49 CRA 2015**) involves a breach of a qualified contractual obligation. When carrying out a service the obligation is to exercise reasonable care and skill.	Generally contractual duty to supply goods or other performance by a set date and the performance is late.
Falling over an obstacle or unsafe flooring involves a breach by the occupiers of their duty to take reasonable care and skill.	

This analysis should give you one or more liabilities for each event (or loss) which has occurred. Note that sometimes there is concurrent liability, i.e. both contractual (strict) and negligence liability (usually as a result of breach of duty of care in tort) on the facts.

White v John Warwick & Co. Ltd (1953)

A tricycle was hired but it had a defective saddle. This involved both a breach of a strict contractual obligation (to supply a tricycle reasonably fit for the purpose, **s. 9 SGSA 1982**) and a failure to take care to ensure that the tricycle was safe (negligence liability).

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6.2.3 Step 3: The core question—can the exemption clause operate as a defence (or partial defence) to this liability?

In order to be enforceable as a full or partial contractual defence the clause must:

- be incorporated as a term;
- cover what has happened;
- not be rendered ineffective by the operation of legislation.

Don’t fall into the trap

Don’t forget to state that the crucial question is whether the clause can be relied upon as a defence (or partial defence) to the liability—and what must be established for it to do so.

Advice: it is important to follow these steps sequentially. Students often do less well than they think with exemption clauses problem questions because they rush into the legislation when the clause was either not incorporated as a term (e.g. reasonable notice was given too late) or the clause does not cover the liability which has occurred in the circumstances in which it occurred—and so cannot be relied upon in any event.

1. Is the clause incorporated as a term?

(i) Is it contained in a signed *contractual* document?

Has a document been signed and, if so, is the document of a type that would normally be expected to contain contractual terms? Signing a time sheet was not sufficient as it merely evidenced performance under an existing contract: ***Grogan v Robin Meredith Plant Hire*** *(1996)*.

Yes—incorporated. If a party signs a written document containing contractual terms, then they are bound by those terms—even if they have not read them: ***L'Estrange v Graucob Ltd*** *(1934)* and ***Peekay Intermark Ltd v Australia & New Zealand Banking Group Ltd*** *(2006)*. An exception to this rule occurs where the signature was obtained as a result of fraud or misrepresentation (***Curtis v Chemical Cleaning & Dyeing Co.*** *(1951)*). There is also doubt as to the extent to which, if at all, particularly unusual or onerous terms in a signed contract need to be pointed out to the other party by analogy with ***Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*** *(1988)* (discussed later): see ***Woodeson v Credit Suisse (UK) Ltd*** *(2018)*, ***Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd*** *(2019)*, ***Blu-Sky Solutions Ltd v Be Caring Ltd*** *(2021)*, and ***Bedford Investments Ltd v Sellman*** *(2021)*.

No—go to (ii).

(ii) Has reasonable notice of the existence of the clause been given in a contractual document—and in time?

Where the exemption clause is contained in an unsigned document (e.g. a ticket) or notice or is referred to in such a document, incorporation can be achieved by reasonable notice.

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- Is the clause contained in a contractual document?

Chapelton v Barry UDC (1940) (CA)

FACTS: Deckchairs were displayed in a pile as available for hire. The tickets, which might have been obtained later from the deckchair attendant, purported to exclude liability. Was the exemption contained in a contractual document so that the council could rely on it?

HELD: The ticket was not a contractual document, but only a voucher or receipt for money paid. Therefore, the council could not rely on the exemption contained in the ticket.

Revision tip

When assessing whether the document is a contractual document:

(i) The fact that it may be called a 'receipt' is not conclusive.

(ii) The *time* when the contract is made seems to be important in determining whether the document is contractual. The display of deckchairs in ***Chapelton*** was a standing *offer* so that *acceptance* took place when the deckchair was removed from the pile. The ticket could be obtained much later and was therefore only a receipt to prove payment rather than part of the contract formation process.

- Does the document contain writing so that people in general (***Thompson v London, Midland & Scottish Railway***) would reasonably assume that writing to include terms and conditions?

An indication of where conditions can be found in another document is sufficient notice, e.g. 'subject to conditions on timetables': ***Thompson v London, Midland & Scottish Railway*** *(1930)* and ***O'Brien v MGN Ltd*** *(2001)*. The particular clauses do not need to have been read by the other party. However, the writing must be supplied or reference must be made to a place where it can be obtained (***Sterling Hydraulics Ltd v Dichtomatik Ltd*** *(2006)*).

- Has notice of the existence of the clause been given before or at the time of contracting (***Olley v Marlborough Court Ltd*** *(1949)*; ***Thornton v Shoe Lane Parking Ltd*** *(1971)*)?

If yes, go to (iii). If no, go to (iv).

Revision tip

You will need to analyse the formation of the contract, i.e. the offer and acceptance. For example, in the case of the purchase of a train ticket at a railway station the offer is said to be made by the ticket issuer and to be accepted by the passenger if the passenger accepts the ticket containing the terms without objection, although it is acknowledged that the passenger is unlikely to have read those terms. However, where a ticket is issued by an automatic ticket machine, since the machine is the standing offer and acceptance occurs when the passenger enters the booking details, any terms on a ticket which is dispensed will be too late to be incorporated (see the judgment of Lord Denning MR in ***Thornton v Shoe Lane Parking Ltd***).

Thornton v Shoe Lane Parking Ltd (1971) (CA)

FACTS: There was a notice at the entrance of a car park stating that parking was to be 'at owner's risk'. Entry was controlled by means of an automatic barrier and a machine before the barrier dispensed tickets which were 'issued subject to conditions displayed on the premises'. There was a notice inside the car park stating that the car park owners were not liable for injury to customers.

HELD: The exemption on the ticket (referring to exemption from liability for personal injury) came too late. The offer in the notice at the entrance was accepted when the motorist drove up to the machine.

p. 125 ↵ If a contract is made orally and is followed later by a written document, notice on this occasion may be too late: ***Grogan v Robin Meredith Plant Hire***.

(iii) A higher standard of incorporation will apply if the particular clause is considered to be onerous or unusual

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd (1988) (CA)

FACTS: A clause imposed a fee of £5 per day for the late return of photographic transparencies. There were 47 of these transparencies and they had been kept inadvertently for an additional two weeks and a charge of £3,783.50 had been imposed. Had the clause been incorporated as a term of the contract?

HELD: Since the clause was particularly onerous and unusual, it had to be fairly and reasonably brought to the other's attention in order to be incorporated. This had not been achieved and incorporation had not occurred.

(i) **Is the clause onerous or unusual?** If yes, more will need to be done to bring it to the attention of the other party. In ***Goodlife Foods Ltd v Hall Fire Protection Ltd*** *(2018)* the Court of Appeal (CA) noted some of the differences in the language used in the relevant case law (extortionate, draconian etc.) and also provided a reminder that exclusion clauses are not automatically onerous or unusual.

Thornton v Shoe Lane Parking Ltd (1971)

Clause absolving the proprietors of a car park from liability for personal injury, as opposed to damage to the cars, was considered unusual and so calling for special attention.

AEG (UK) Ltd v Logic Resource Ltd (1996) (CA)

FACTS: The clause stated that a purchaser of goods had to pay the cost of returning any defective goods. This was not an unusual clause insofar as it covered an issue normally covered by standard terms (and Hobhouse LJ dissented on this basis). However, with the knowledge of the supplier, the particular contract involved the purchase of the goods for export to a customer.

HELD (majority): The clause was onerous and unusual in the particular context in which it was used.

O'Brien v MGN Ltd (2001)

FACTS: The clause in a document relating to a scratch-card competition stated that if there was more than one winner, lots would be drawn to determine the prize-winner.

HELD: It was neither onerous nor unusual. Note that the claimant did not claim the clause was unfair under the then **Unfair Terms in Consumer Contracts Regulations 1999** (now the **CRA 2015**). In ***Parker-Grennan v Camelot UK Lotteries Ltd*** *(2023)* at [58] Jay J reflected 'How this case [***O'Brien***] would have fared under the [**Unfair Trading in Consumer Contracts Regulations 1999**] raises an interesting issue.'

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(ii) **Has the onerous or unusual clause been fairly and reasonably brought to the attention of the other party** (e.g. ***J Spurling Ltd v Bradshaw*** *(1956)*, Lord Denning's 'red hand')? If yes, the clause is incorporated. If no, the clause will not be incorporated by notice and prima facie cannot be relied upon as a defence to the liability identified at step 2 (although note (iv) below).

(iv) Has the clause been incorporated as a result of a consistent course of dealing including the clause between these parties?

It is easier to find the consistency in dealings between commercial parties (any may be affected by the presence of an entire agreement clause: see ***NHS Commissioning Board (known as NHS England) v Dr Manjul Vasant*** *(2019)*). If yes, the clause is incorporated. If no, the clause will not be incorporated in this way and, unless incorporated in another way, cannot be relied upon as a defence to the liability identified in step 2. The fact-dependent nature of the enquiry was emphasized in ***Dunelm Geotechnical & Environmental Ltd v Bray Cranes Ltd*** *(2023)*.

2. Construction: Does the clause on its natural and ordinary meaning cover the liability in question in the circumstances in which it occurred?

Revision tip

Do not spend too long on construction as it is often easily established due to the width of today's exemption clauses. Equally, it may be a matter of general language, e.g. 'injury or damage' may not cover loss due to theft. **Deal only with any construction issues that are raised by the facts**, e.g. specific issues raised by the presence of negligence liability or a fundamental breach.

The following *may* need to be considered but you should ensure each is relevant on the facts before raising it:

(i) Is the clause ambiguous? If so, the ambiguity may be construed against the party relying on the clause (the *contra proferentem* rule)

Houghton v Trafalgar Insurance Co. Ltd *(1954)*: car insurance policy reference to 'excess load' was ambiguous and therefore construed against the insurers to mean excess weight rather
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↵ than too many passengers. It followed that the insurance policy remained enforceable (note that there are often policy issues underlying outcomes in construction cases, i.e. the need to protect consumers). There has been some debate about the continuing existence of a *contra proferentem* rule in respect of exclusion clauses in commercial contracts (see, e.g., ***Persimmon Homes Ltd v Ove Arup and Partners Ltd*** *(2017)*) although, in cases of ambiguity, it can still probably be supported on the ground that 'parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect' (***Nobahar-Cookson v Hut Group Ltd*** *(2016)*).

(ii) Is there any inconsistent undertaking which may prevent reliance on the clause?

If an exemption clause is inconsistent with another term of the contract or with an oral undertaking given before or at the time of contracting, the exemption clause may be overridden (***Mendelssohn v Normand Ltd*** *(1970)*: inconsistent oral undertaking by garage attendant promising to lock a car (with an implied undertaking as to looking after the goods in the car), whereas the exemption clause purported to exclude any liability for the loss of vehicle contents).

(iii) Limitation clauses (clauses limiting liability to a fixed figure as opposed to denying any liability) were often construed more favourably than total exclusion clauses (which deny all liability)

Traditionally a limitation clause was not be subjected to the same exacting standards as were traditionally applied to exemption clauses: ***Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd*** *(1983)*. More recently in ***McGee Group Ltd v Galliford Try Building Ltd*** *(2017)* Coulson J stated: 'a clause which seeks to limit the liability of one party to a commercial contract, for some or all of the claims which may be made by the other party, should generally be treated as an element of the parties' wider allocation of benefit, risk and responsibility. No special rules apply to the construction or interpretation of such a clause although, in order to have the effect contended for by the party relying upon it, a clause limiting liability must be clear and unambiguous.'

(iv) Is the wording of the clause wide enough to cover a fundamental or serious breach of contract?

If the breach is fundamental, i.e. affecting the very purpose and substance of the contract, then very clear words will be required for the clause to cover it. However, it is common for exemption clauses to be drafted generously (although legislation may control the ability to rely on the clause).

Photo Production Ltd v Securicor Transport Ltd (1980) (HL)

FACTS: A contract involving the provision of security services for a factory contained a wide exemption clause exempting the security provider from loss. The security firm's employee started a fire on the premises and the factory owner suffered significant loss.

HELD: As a matter of construction, on its natural and ordinary meaning the clause in the contract did cover such a deliberate act.

p. 128 **(v) Where there is negligence liability on the facts, it is necessary to determine whether the clause covers this negligence liability or whether the clause is limited to providing a defence to strict contractual liability only**

On negligence liability see '6.2.2 Step 2: What has happened?'.

- If negligence liability is the only liability that can arise on the facts and the clause is wide enough to cover what has happened, then the clause will usually be construed as covering that negligence liability (***Alderslade v Hendon Laundry Ltd*** *(1945)*: loss of handkerchiefs to be laundered involved only a breach of a duty to exercise reasonable care).
- If both negligence and strict contractual liability are possible on the facts, then the clause will cover *both* negligence and strict contractual liability if the clause *expressly* purports to cover the negligence (uses the word negligence or a synonym of negligence) (***Monarch Airlines Ltd v London Luton Airport Ltd*** *(1997)*: 'neglect or default' amounted to express reference to negligence so that the clause covered negligence liability in addition to the strict liability—breach of a statutory duty in relation to the airport runway).
- If such express language of negligence is not used, then traditionally the clause would often be construed so that it covered only the strict contractual liability and so did not operate as a defence to liability in negligence (***White v John Warwick & Co. Ltd*** *(1953)*: both strict contractual liability and negligence involved in hiring a tricycle with a defective saddle and the CA held that the exclusion clause had to be construed as covering only the strict contractual liability and not the negligence).

Bear in mind that in the light of the ***West Bromwich*** principles of contractual construction (***Investors Compensation Scheme Ltd v West Bromwich Building Society (No. 1)*** *(1998)*), the courts are encouraged to avoid the artificial or strained approaches to the construction of exemption clauses in the context of negligence liability that once dominated negligence liability: ***HIH Casualty & General Insurance Ltd v Chase Manhattan Bank*** *(2003)*, ***Kudos Catering (UK) Ltd v Manchester Central Convention Complex Ltd*** *(2013)*, and ***Persimmon Homes Ltd v Ove Arup and Partners Ltd*** *(2017)*. More recently, in ***Triple Point Technology, Inc. v PTT Public Co. Ltd*** *(2021)*, Lord Leggatt (with whom Lord Burrows agreed) went further:

> To the extent that the process has not been completed already, old and outmoded formulas such as the three-limb test in ***Canada Steamship Lines Ltd v The King*** [1952] AC 192, 208, and the 'contra proferentem' rule are steadily losing their last vestiges of independent authority and being subsumed within the wider ***Gilbert-Ash*** principle [presumption that if party wished to give-up particular remedies, clear words would be used].

You should now be left with a clause which, if it applies at all, covers:

- strict *and* negligence liability (word negligence used in the clause); or
- strict liability only; or
- negligence liability only.

and will therefore know which liabilities (or liability) should be considered under UCTA 1977 and whether s. 65 CRA 2015 is relevant in the consumer context.

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3. Does legislation prevent the use of the exemption clause as a defence to this liability on these facts?

Be clear which piece of legislation you need to apply to the facts. The applicable piece of legislation:

- **UCTA 1977** or
- the **CRA 2015 (Part 2, Unfair Terms)**

depends on the nature of the contract, so it is essential to determine whether the contract is B2B or B2C. Table 6.2 explains the key differences between the two pieces of legislation.

Table 6.2 Summary of scope and effect of the legislation

UCTA	Since the **CRA 2015**, **UCTA primarily applies only to B2B contracts, i.e. where one business is using an exemption clause against another business (irrespective of the respective sizes of those businesses).** Depending on the liability which the clause seeks to exclude or limit, **UCTA** renders the clause in question either totally unenforceable or only enforceable if it can be shown to be reasonable (**s. 11** reasonableness requirement).
CRA	**The CRA applies to B2C contracts only—contracts between a trader and a consumer**. The Act defines 'a trader' and 'a consumer'. **'Trader' is a person acting for purposes relating to that person's trade, business, craft, or profession.** **'Consumer' means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft, or profession.** - In ***Ashfaq v International Insurance Co. of Hannover plc*** *(2017)* the CA held that a person who, in addition to being a director of an information technology company, let out a property to students was not a consumer in respect of obtaining insurance for that property. -

In ***Weco Projects ApS v Loro Piana*** *(2020)* a person (Mr Piana) who entered into a contract for the transportation of a yacht was regarded as a consumer (in respect of the **CRA 2015**) as the main purpose of transporting the yacht was to use it for non-business purposes (even though there was also to be some business use which was more than negligible).

- ***Eternity Sky Investments Ltd v Mrs Xiaomin Zhang*** *(2023)* involved a company managed and controlled by Mr Zhang, who had approximately an 18% share in the company. Mrs Zhang had a shareholding of around 0.4% although she was not involved in the running of the company. Mrs Zhang signed a personal guarantee in respect of the company. Subsequently Mrs Zhang argued that aspects of the personal guarantee were contrary to the unfair terms provisions in the **CRA 2015**. The raised the question of whether or not Mrs Zhang was a consumer in relation to the personal guarantee. Bright J held that Mrs Zhang entered the personal guarantee as a consumer. In so doing, he found that she had no 'functional link' in running the company. The learned judge stated: 'Her essential reason for doing so [entering the personal guarantee] was because of her husband's involvement in the company. The effect of her own shareholding on her decision-making could only ever have been marginal.'
- In ***Payward Inc. v Chechetkin*** *(2023)* a lawyer who traded significant amounts of cryptocurrency was a consumer as his profession was still a lawyer.

The **CRA 2015** has potentially wide application since it regulates 'unfair terms' in general. Such 'unfair terms' are not binding on the consumer, i.e. the consumer can avoid the application of an unfair exemption clause.

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6.3 The Unfair Contract Terms Act (UCTA) 1977

Don't fall into the trap

Make sure you use appropriate terminology. Since the ability to rely on a particular exemption clause as a defence often depends on the context in which it is used and the liability which has occurred on the particular facts, it is inappropriate to use overly dramatic terminology. Each case turns on its own particular facts and if a particular clause is unenforceable on the facts it may not follow that the same clause used in a different context would be similarly unenforceable. It is therefore preferable to avoid terminology such as void or 'invalid'.

6.3.1 Step 1: Does the Act apply?

UCTA generally only applies to 'exemption clauses' covering business liability (although note **s. 6(4)**); and since the **CRA 2015** it does not cover exemption clauses that would be covered by that Act, i.e. in contracts between a trader and a consumer. 'Exemption clause' has an extended definition within **s. 13(1)**. You may therefore need to consider the following where it is not clear that the clause is excluding or limiting liability:

- Does the clause state that there is to be no liability unless some condition is complied with, such as identifying and reporting a defect within seven days? If yes, it is probably covered by **UCTA**. Or
- Does the clause exclude or limit any right or remedy that would otherwise be available such as the right to claim damages? If yes, it is probably covered by **UCTA**. Or

- Does the clause exclude or restrict rules of evidence or procedure? If yes, it is probably covered by **UCTA**. Or
- Does the clause exclude or limit the obligation or duty? In other words, does the clause retrospectively seek to deny that there is any contractual promise or responsibility, e.g. a general disclaimer? If yes, it may be covered by **UCTA**. (***Smith v Eric S Bush*** *(1990)*: a contract for a mortgage valuation of a property contained a clause stating that there was 'no acceptance of responsibility for the valuation' being provided. Since this disclaimer purported to exclude a duty of care, it fell within **s. 13(1)** and **UCTA** regulation would apply to it.) By contrast, provisions which merely define, for example, the initial terms on which services are offered and do so in a way which prevents a duty of care arising (as opposed to seeking to subsequently exclude a duty of care) may not be subject to **UCTA** (***Avrora Fine Arts Investment Ltd v Christie, Manson and Woods Ltd*** *(2012)*. The distinction is a fine one and, depending on the facts, it may be unclear which side of the line a particular clause falls: see also ***Carney v NM Rothschild and Sons Ltd*** *(2018)*).

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6.3.2 Step 2: To determine how the Act applies in an individual case we need to identify which section of the Act applies to the liability sought to be excluded

This involves:

- looking at what happened and the liability which arose (see '6.2.2 Step 2: What has happened');
- assessing which of these liabilities is covered by the clause (see '2. Construction, point (v)' in 6.2.3);
- applying the relevant section of **UCTA**.

Is there negligence liability?

Section 1 UCTA states that negligence includes:

(i) breaches of contractual obligations which impose a duty to exercise reasonable care and skill (qualified contractual liability);

(ii) breach of a duty of care in tort.

There may therefore be liability in negligence where a valuer fails to take care when carrying out a valuation of a property: ***Smith v Eric Bush***.

Section 2 UCTA (negligence) must be applied where negligence is a liability on the facts and the clause has been construed (see '2. Construction, point (v)' in 6.2.3) to cover that negligence.

Identify the loss caused by the negligence. (Remember that you have already identified the loss or damage at step 2—what has happened?)

Section 2(1): death or personal injury resulting from negligence. This liability cannot be excluded or limited.

Section 2(2): other loss or damage (property damage or economic loss). This liability can only be excluded or limited if the party seeking to rely on the clause establishes that the clause is reasonable (**s. 11**).

A case example of **s. 2(2)** application is ***Smith v Eric Bush***: financial loss resulting from negligent valuation. It followed that the valuer could rely on the disclaimer only if it could establish that the clause was reasonable.

Is there liability for breach of contract (i.e. strict contractual obligations)?

1. Does the liability which it is sought to exclude or limit involve a breach of any implied obligation relating to goods in the (non-consumer) sale and supply of goods legislation?

p. 132 ↵ Is the contract a contract for the supply of goods or for work and materials and is the term broken a breach of **s. 13**, **14**, or **15 SGA 1979** (or appropriate equivalents) relating to goods obligations, e.g. a breach of **s. 14(2) SGA 1979** where the goods sold are not of satisfactory quality?

If no, consider the application of **s. 3 UCTA** (see question 4). **If yes:**

2. Is the contract a contract for the sale of goods (s. 6 applies) or for the supply of work and materials (s. 7 UCTA applies to attempts to exclude implied obligations concerning the goods in a work and materials contract)?

Looking for extra marks?

You can impress your examiner by being able to identify the type of contract (as well as the correct liability) and applying the correct section of **UCTA—s. 6** or **7**. See Chapter 5 for a discussion of types of contracts and implied terms.

3. Does the applicable section (s. 6 or s. 7) allow the liability in respect of the goods to be excluded or limited?

By s. 6(1A) (sale of goods contracts) or s. 7(1A) (work and materials contracts), the implied terms as to conformity with description, satisfactory quality, fitness for purpose, or correspondence with sample (**ss. 13–15 SGA 1979** and equivalents) **can be excluded or limited but only if the clause in question can be shown to be reasonable.**

Go to the reasonableness requirements (**s. 11**).

4. Other strict contractual liability and the application of s. 3

- If the breach is a breach of some other term of the contract (i.e. other than one of the implied terms as to the goods in the sales and supply legislation), **does s. 3 apply to the clause?**

Section 3 will apply to a B2B contract where one of the businesses is dealing on the other's written standard terms of business.

In ***African Export-Import Bank v Shebah Exploration and Production Co. Ltd*** *(2017)* the CA held that the phrase 'other's written standard terms of business' requires more than the use of model terms; it requires that the other party habitually uses those standard terms. What is the position if some, but not all, of the standard terms have been subject to negotiation in the transaction in question? It was often said that a set of standard terms would remain standard as long as there has been no negotiation of the exemption clauses although other terms, such as the price, may have been the subject of negotiation. This was all subject to the proviso that there must have been no substantial (or material) alterations to the standard form: ***Yuanda (UK) Co. Ltd v WW Gear Construction Ltd*** *(2010)*. In ***African Export-Import Bank v Shebah Exploration and Production Co. Ltd*** *(2017)* the CA agreed that a party could still be said to deal on the 'other's written standard terms of business' if there had been only insubstantial ↵ amendments to those terms. However, the CA was also of the opinion that there was no requirement that there had to be negotiation in relation to the relevant exclusion clauses for **s. 3** to be inapplicable.

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Note that if **s. 3** applies, it can be applied to:

(i) clauses allowing for substantially different contractual performance, e.g. allowing terms to be changed; and

(ii) clauses allowing the party in breach to tender no performance at all (i.e. denials of any contractual obligation in the first place).

If s. 3 applies, the clause can be used to exclude or limit the strict contractual liability (including, for example, allowing a substantially different contractual performance) but only if the clause is shown to be reasonable (s. 11).

If **s. 3** does not apply, then the clause is not subject to **UCTA** control at all.

The reasonableness requirement (s. 11)

If the clause has to be shown to be reasonable (**s. 11**) before it can be relied upon to exclude or limit the liability, can that burden be discharged by the party seeking to rely on the clause (**s. 11(5)**)?

Sections 2(2), **3**,**6(1A)**, and **7(1A)** all require that the clause is shown to be reasonable if it is to be relied upon.

Don’t fall into the trap

Don’t rush into automatically applying the reasonableness test without showing that it is the applicable test for the liability in question. Since the **CRA 2015** has excluded consumer contracts from the application of **UCTA**, it is likely that there will be more applications of the reasonableness test as the context is B2B (but note **s. 2(1)**).

The test is whether the clause is ‘fair and reasonable’ when judged at the time the contract is made (as opposed to in the light of the breach) and on the basis of the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties (**s. 11(1)**).

Reasonableness is determined by adopting a balancing test and placing factors on either side of that balance (per Lord Bridge in ***George Mitchell v Finney Lock Seeds*** *(1983)*). It follows that each case turns on its own facts and findings have no real precedent value.

Assessing reasonableness under s. 11

Traditionally the courts have favoured a finding of reasonableness of a clause where:

- The clause is contained in a commercial contract between commercial parties of equal bargaining power. The courts adopt a policy of non-intervention with the parties’ agreement (***Photo Production Ltd v Securicor Transport Ltd*** and ***Watford Electronics Ltd v Sanderson CFL Ltd*** *(2001)*). The courts take the view that ‘commercial parties of equal bargaining strength … should generally be considered capable of being able to make contracts of their choosing and expect to be bound by their terms’ (per Tuckey LJ in ***Granville Oil & Chemicals Ltd v Davies Turner & Co. Ltd*** *(2003)*).

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- The clause is a **standard operating clause in the particular industry** and has been negotiated by the relevant trade bodies.
- Where it is possible to cover the risk excluded by the exemption clause with *insurance* which could more economically, and should reasonably, be taken out by the non-breaching party, e.g. ***Photo Production Ltd v Securicor Transport Ltd***: insurance cover might be taken out by the owner who would be the person directly sustaining any loss, particularly as the fee for service was modest. See also ***Regus (UK) Ltd v Epcot Solutions Ltd*** *(2008)*.
- The fact that a breaching party’s resources are limited may favour the reasonableness of a limitation clause (**s. 11(4)**).
- There was an inducement to agree to accept the exemption clause, such as a lower price (**Sched. 2(b)**).
- There is a realistic possibility that an alternative contract could have been entered into without the existence of the exemption clause (**Sched. 2(a)**).
- The goods which are the subject of the exemption clause have been manufactured to customer’s special order (i.e. bespoke) (**Sched. 2(e)**).

Traditionally the courts have favoured a finding of unreasonableness where:

- There has been an imbalance in the parties' bargaining positions in favour of the party seeking to rely on the clause (**Sched. 2(a)**).
- A party's negligence may weigh in the balance against the reasonableness of a clause designed to protect that party, e.g. suppliers in ***George Mitchell v Finney Lock Seeds*** had been negligent in supplying incorrect seed. In the 'soft drinks' cases, ***Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging*** *(2002)*, and ***Britvic Soft Drinks v Messer UK Ltd*** *(2002)*, the supply of carbon dioxide for use in carbonated drinks had been contaminated with benzene. This possibility had not been contemplated when drafting the exemption clause denying liability for breaches of implied terms as to satisfactory quality and fitness for purpose. It followed that this risk had not been accepted. In addition, the contamination was the result of negligence on the part of the manufacturer and therefore this risk should not be transferred in the circumstances.
- The insurance cover could more easily and cost-effectively have been secured by the party in breach. In the commercial context the reasonableness of a supplier taking out insurance cover in relation to the fitness of products it supplies may depend on what that party knows of the intended uses for those products. Equally, a purchaser of products might not be expected to take out insurance cover in relation to latent defects in those products: ***Balmoral Group Ltd v Borealis (UK) Ltd*** *(2006)*.
- If the clause is ignored in practice, that may be evidence that it is regarded as unreasonable, e.g. ***George Mitchell***.

George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd (1983) (HL)

FACTS: In breach of a contract for the supply of a specific cabbage seed, the wrong type of seed was supplied and the crop failed, resulting in actual loss of over £60,000. However, the contract contained a limitation clause limiting the supplier's liability to the purchase price (roughly £200).

HELD: Although the breach involved the supply of a different product, the clause was construed to cover it. This clause was unreasonable in the circumstances and could not be relied upon by the supplier.

p. 135 ↵ Where a clause provides that there will be no liability unless a condition is complied with, (i) it will fall for assessment under **UCTA** due to the **s. 13(1)** extended definition and (ii) the question is whether it is reasonable and practicable to expect compliance with the condition imposed: ***RW Green Ltd v Cade Brothers Farms*** *(1978)*: clause required rejection, claim, or complaint within three days of the arrival of the potato seed. However, the defect that occurred (seeds infected with a potato virus) would not be discoverable simply by inspecting the seed. It followed that this clause was unreasonable and could not be relied upon as a ground for denying liability.

Looking for extra marks?

An examiner will always be impressed if you are able to come to some reasoned conclusions, however tentative, on whether the clause is likely to be viewed as reasonable, although it is important to provide reasons by reference to application of the factors listed here.

6.4 The Consumer Rights Act 2015, Part 2 (Unfair Terms)

6.4.1 Does the Act apply to the contract?

This regime regulating unfair terms in consumer contracts applies to contracts between traders and consumers (see Table 6.2 for definitions) and replaces the revoked Unfair Terms in the **Consumer Contracts Regulations 1999**.

Significantly, a 'consumer' must be an individual (and therefore not a company or other legal entity) and that consumer must be acting for purposes which are 'wholly or mainly' outside that individual's business or profession, although the trader has the burden of disproving this position.

6.4.2 How does the Act regulate?

The **CRA 2015** requires contract terms and notices in consumer contracts to be fair (**s. 62**) but not all terms can be assessed for fairness. The assessment for fairness cannot extend to mandatory statutory or regulatory provisions (**s. 73**) although in ***Jones v Roundlistic Ltd*** *(2018)* the CA held ↵ that this meant statutory or regulatory provisions which prescribed the terms *and* the content of those terms. Nor does the assessment of fairness extend to terms which (i) specify the main subject matter of the contract, or (ii) relate to an assessment of the appropriateness of the price payable under the contract by comparison with the goods or services received **as long as those terms are transparent and prominent**. Transparency relates to the way in which the term is expressed (plain and intelligible language—and written terms need to be legible). Prominence relates to the way in which the term is presented. The term is prominent if it is brought to the attention of the consumer so that an average consumer would be aware of it. (Apart from the fact that this is questionable as overlapping with incorporation by reasonable notice, **s. 64(5)** then defines 'average consumer' as 'reasonably well-informed, observant and circumspect'.)

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With the exception of the need for the excluded terms to be transparent and prominent, this exclusion from the assessment for fairness basically existed under the previous legislation and caused difficulties in distinguishing between 'core' and 'ancillary' terms. It seems likely that this will continue.

Director General of Fair Trading v First National Bank plc (2001) (HL)

FACTS: A term of a loan agreement issued by the bank provided that if the debtor defaulted on the loan, contractual interest on the outstanding debt remained payable until the debt was discharged. The debtor was taken to court and the judgment debt was ordered to be paid by instalments. However, the judgment debt and instalments did not include the contractual interest so that having paid the instalments the debtor would find that he or she still owed money in respect of the interest. It was argued that the term could not be challenged as unfair under the previous regulations since the contractual interest term was a 'core term' relating to the price of the goods and therefore the regulations did not apply.

HELD: The interest term was ancillary and not 'core'. It was not concerned with the price since it was not concerned with the bank's remuneration for the service supplied.

However, in ***Office of Fair Trading v Abbey National plc*** *(2009)* the Supreme Court (SC) held that the Regulations could not be applied to bank charges since, in effect, these charges were part of the 'core bargain' (although the SC did not find the language of core or ancillary terms helpful). Similarly in ***Casehub Ltd v Wolf Cola Ltd*** *(2017)* it was held, relying on ***Office of Fair Trading v Abbey National plc*** *(2009)*, that cancellation fees in respect of a 12-month cloud storage contract could not, as a result of **s. 64**, be assessed for fairness if that meant assessing the appropriateness of the price in comparison with the services supplied. However, such clauses might have been challenged as unfair on other grounds.

The terms listed in **Sched. 2, Part 1** (terms which may be unfair—the 'grey list') cannot be subject to exclusion from the fairness evaluation.

6.4.3 Is the term in question unfair?

The term or notice is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer (**s. 62(4)**). (This is basically the same wording as under the previous regulations so that previous interpreting case law will remain relevant.)

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What guidance is there on judging whether a term is 'unfair'?

Section 62(5) contains some guidance regarding how the unfairness of a contractual term shall be assessed. It is necessary to take into account:

- the nature of the subject matter of the contract; and
- all the circumstances existing when the term was agreed, together with all the other terms of the contract or any other contract on which it depends.

Schedule 2, Part 1 contains an 'indicative and non-exhaustive list of terms which *may* be regarded as unfair' (**s. 63(1)** and see ***Britannia Parking Group Ltd v Semark-Jullien*** *(2020)* for a reminder that these terms are not necessarily unfair). This lists 20 examples. (Advice: look at this list and identify the trends in regulation.)

Section 65 CRA 2015 states that a trader *cannot* by a term of a consumer contract or a consumer notice either exclude or restrict liability in negligence for death or personal injury. (This corresponds to **s. 2(1) UCTA** which now applies only in the B2B context.)

When, contrary to the requirement of good faith, does a term cause a significant imbalance in the parties' rights and obligations to the consumer's detriment?

Director General of Fair Trading v First National Bank plc

(For facts see '6.4.2 How does the Act regulate?')

The CA had concluded that the interest term was unfair to the debtor because of the element of unfair surprise, i.e. the judgment debtor would think that the entire debt had been repaid only to discover that interest was also owed. On appeal the HL disagreed and held that the term was not unfair as it stood. The expectation is that interest will be payable on money owed and any unfairness stemmed not from this term but from the fact that the judgment debt instalments did not incorporate the interest due on top of the capital sum owed.

The HL dealt separately with 'significant imbalance' and 'good faith'.

(i) There would be significant imbalance if the term was weighted in its substance (content) so heavily in favour of the trader that the parties' rights and obligations under the contract were tilted significantly in favour of that trader, e.g. a discretion or power granted to the trader or imposition of a disadvantage, risk, or duty on the consumer. To determine this substantive fairness, it is necessary to assess the particular term in the context of the contract as a whole, e.g. there might be a balancing provision in favour of the consumer.

(ii) Good faith meant 'fair and open dealing':

- openness is procedural and requires the terms to be clearly and legibly expressed with no concealed pitfalls or traps. In particular, prominence needs to be given to terms which might operate to the disadvantage of the consumer;

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- 'fair dealing' refers to the fact that the trader should not seek to take advantage of the inequality of bargaining position and the consumer's lack of experience or knowledge. It follows that 'fair dealing' is both procedural and substantive since the substance of a term is relevant to whether advantage has been taken.

More recently in ***Cavendish Square Holding BV v Talal El Makdessi***; ***ParkingEye Ltd v Beavis*** *(2015)* Lord Neuberger and Lord Sumption (with whom Lord Carnwath agreed) referred to a concept of 'legitimate interest' in finding that a parking fine was not unfair (the full facts are given in '7.2.3 Distinguishing liquidated damages and penalty clauses').

What is the consequence if the term is 'unfair' under the CRA 2015?

If a term is 'unfair', it is not binding on the consumer (**s. 62(1) CRA 2015**), although the contract can continue without that term (if this is possible) (**s. 67**).

Duty of court to consider fairness of terms

Where there are proceedings before a court which relate to a term of a consumer contract and the court considers it has sufficient legal and factual material to do so, that court must consider whether the term is fair even if none of the parties has raised this as an issue or indicated that it intends to do so (**s. 71**) although compare ***Cabot Financial UK Ltd v McGregor, Gardner and Brown*** *(2018)* on undefended actions.

Key debates

Essay questions in this area are less common but will now tend to focus on the differing treatment of exemption clauses and unfair terms in commercial and consumer contracts, the history of the legislation, and an evaluation of the provisions in the **CRA 2015**.

This debate involves evaluating different policy objectives in these different contexts and how the main distinction was previously seen in the differing approaches to the application of the reasonableness requirement in **UCTA**. Such a debate may involve looking at the differing scope of **UCTA** and the scope of the previous Regulations, together with the problems of overlap and odd distinctions relating to 'consumers' as 'companies' for the purposes of protections via **UCTA** but not the previous Regulations. Difficulties are posed for 'small businesses' by a simple B2B or B2C divide where 'consumers' are defined as 'individuals'.

It will be necessary to analyse the position with regard to regulation (and protection) in commercial and consumer contracts to determine whether there is appropriate regulation for the respective contexts and parties under the current legislation. In other words, has the recent legislative reform achieved its objectives? How clear, for example, is the drafting in the **CRA 2015**? Has it assisted with the 'core and ancillary terms' distinction?

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Key cases

Case	Facts	Principle
Chapelton v Barry Urban District Council *(CA)*	Deckchairs were displayed in a pile. The tickets for their use, which might have been obtained later, from the deckchair attendant, purported to exclude the council's liability. CA held that the clause had not been incorporated as a term of the contract since the ticket was only a receipt for money paid and not a contractual document.	Incorporation: reasonable notice in time. The offer was the pile of deckchairs and acceptance was removing a deckchair from that pile. The ticket might come later and so was not part of the contract formation process.
Thornton v Shoe Lane Parking Ltd *(CA)*	Notice at the entrance of a car park stating that parking was to be 'at owner's risk'. Entry was controlled by means of an automatic barrier and a machine before the barrier dispensed tickets which were 'issued subject to conditions displayed on the premises'. A notice inside the car park stated that the car park owners were not liable for injury to customers. CA held that the exemption on the ticket came too late. The offer in the notice at the entrance was accepted when the motorist drove up to the machine.	Incorporation by reasonable notice and automatic machines. The notice at the entrance, which was incorporated, was interpreted so that it did not cover personal injury, only damage to or loss from cars.
Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd *(CA)*	A clause imposed a fee of £5 per day for the late return of photographic transparencies. There were 47 of these transparencies and they had been kept inadvertently for an additional two weeks and a charge of £3,783.50 had been imposed. CA held that this term had not been incorporated since it was particularly onerous and unusual and therefore had to be fairly and reasonably brought to the other's attention, which had not happened.	A higher standard of incorporation will apply if the particular clause is considered to be onerous or unusual.
Photo Production Ltd v Securicor Transport Ltd *(HL)*	A contract involving the provision of security services for a factory contained a wide exemption clause exempting the security provider from loss. The security firm's employee started a fire on the premises and the factory owner suffered significant loss. HL held that as a matter of construction on its natural and ordinary meaning the clause in the contract did cover such a deliberate act. This was a commercial contract, the fee was modest compared to any potential liability, and the factory owner was expected to have insurance cover. The parties should be free to allocate their own risks.	Construction of exemption clauses: natural and ordinary meaning with clear words needed to cover a breach of this nature. Commercial contracts where the parties are of equal bargaining power: in general, the parties are free to allocate responsibility for contractual risks through the use of exemption clauses.

Case	Facts	Principle
Director General of Fair Trading v First National Bank plc *(HL)*	Bank's loan agreement provided that if the debtor defaulted on the loan, contractual interest on the outstanding debt remained payable until the debt was discharged. The judgment debt was ordered to be paid by instalments but it did not include the contractual interest so that, having paid the instalments, the debtor would find that he or she still owed money in respect of the interest. HL rejected the argument that 'interest' was a core term relating to price for the service supplied. Therefore, it could be assessed within the legislation regulating unfair terms. Nevertheless, HL concluded that any unfairness to consumers resulted from the inability to add the contractual interest to the judgment debt and not from the term itself.	Legislation governing 'unfair terms': scope of application and meaning of core terms which could not be assessed for fairness as compared to ancillary terms (which could be) and approach to determining unfair contract terms in consumer contracts.

Exam questions

Problem question

Leo is a builder. He often hires equipment and tools from Goff Ltd, a company specialising in construction equipment and tools. Last week Leo hired a portable cement mixer from Goff Ltd. After paying for the hire of the cement mixer, Leo was given a receipt which he put into his pocket without reading. On the back of the receipt were the words: 'Hire subject to our standard terms and conditions, available on our website'. Clause 8 of these standard terms and conditions stated that 'Goff Ltd limits all liability to £50'.

When Leo tried to use the cement mixer, it exploded. Thankfully, Leo was not hurt but his van was badly damaged.

Advise Leo.

Head to the Outline Answers *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-6-outline-answers-to-essay-questions?options=showName>* **section of the online resources for help with this question.**

Essay question

Critically discuss the regulation of 'unfair terms' under the **Consumer Rights Act 2015**.

Online Resources

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

- An outline answer to the essay question <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-6-outline-answers-to-essay-questions?options=showName>
- Interactive key cases <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-6-interactive-key-cases?options=showName>
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