Chapter 5: Exclusion Clauses and Unfair Terms

Question 1

Scott, the owner of a hotel, takes bedroom curtains to Kent Dry Cleaners to be cleaned. She explains that the curtains have various small stains. The Kent Dry Cleaners assistant says that the marks can be removed quite easily and that the cleaning of the curtains will cost £250. Scott agrees and hands over the curtains to the assistant. Scott is given a receipt for the curtains which states on the front “See reverse”. On the back of the receipt is the following term: “Items are accepted for cleaning on the basis that Kent Dry Cleaners are not liable for any damage howsoever caused”. Scott puts the receipt in her bag, unread.

When Scott returns to collect the curtains she discovers that in removing the stains the curtains’ colour has also been removed, ruining the curtains. Scott wants to claim for the ruined curtains, but Kent Dry Cleaners says that all liability has been excluded.

Advise Scott.

Answer guidance

This question concerns liability and Kent Dry Cleaners attempt to exempt liability. Having identified the subject-matter of the question, the first consideration is whether Kent Dry Cleaners has incurred liability to Scott. Liability depends upon the terms of the contract and based on the facts an implied term to take care in supplying a service (see Supply of Goods and Services Act 1982). Arguably this term has been broken and liability arises. It may be noted that the liability is that for negligence.

Kent Dry Cleaners will seek to rely on the exemption clause by way of defence. For the clause to successfully exempt liability it will have to be established that the clause is part of...
the contract, that its wording covers the liability that has arisen and that it satisfies the Unfair Contract Terms Act 1977. First, the issue of incorporation by notice must be considered and cases such as Parker v South Eastern Rly (1877) 2 CPD 416, Henderson v Stevenson (1875) LR 2 Sc & Div 470 and Olley v Marlborough Court Ltd [1949] 1 KB 532 need to be explained and applied.

Secondly, the issue of construction must be addressed. The main issue is to consider whether liability for negligence is exempted. The rule in Canada SS Lines Ltd v R [1952] AC 192 guides the courts in assessing whether a clause covers liability for negligence.

Thirdly, it must be explained how the Unfair Contract Terms Act 1977 applies. Consideration must be given to when the Act applies, how the Act applies and the operation of the test of reasonableness.
Question 2

The rule in L'Estrange v Graucob is difficult to justify, particularly where a business contracts with a consumer. Discuss.

Answer guidance

The question gives an opportunity to consider the rule that terms may be incorporated into a contract by signature. The terms of the rule must be explained, including the limitations on its operation, e.g., it does not apply where the document signed is not contractual.

The rule is problematic in that it may be obvious to the other party that a party signing has not read the document, cannot be aware of the contents and yet is bound. This may be particularly so when a consumer signs a contractual document without reading it. The Canadian case of Tilden Rent-a-Car Co v Clendenning (1978) 83 DLR (3d) 400 a party was not bound by the terms of a signed document in circumstances where the party seeking to rely on the terms had not taken steps to draw onerous provisions to that other’s attention and it was plain that the document had not been read prior to signature. A comparison may be made with the rules as to notice in Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433, although the English courts have not applied the reasoning from this case to signed documents. The justification for the rule in L’Estrange v Graucob may lie in the need for certainty in the commercial world; the rule is a general one applying to transactions between businesses as well as between businesses and consumers. It may be argued that the rule promotes certainty and is thus justifiable particularly given that the law seeks to address...
injustice arising from the rule by potential legislative control under the Unfair Contract Terms Act 1977 (as between businesses) and the Consumer Rights Act 2015 (as between traders and consumers).
Question 3

Under the *Unfair Contract Terms Act 1977* the application of the test of reasonableness leaves too much discretion to the courts.

Discuss.

**Answer guidance**

The ambit of the *Unfair Contract Terms Act 1977* should be outlined indicating that it applies to exemption clauses, exclusions and limitations, and in relation to exemption clauses in contracts is largely confined to contracts between businesses (an unfair term in a contract between a trader and consumer is subject to the *Consumer Rights Act 2015*).

Section 11 *Unfair Contract Terms Act 1977* gives some guidance on how the test is to be applied. Section 11(1) defines the test of reasonableness; in relation to ss. 6 and 7 the five guidelines in Schedule 2 are to be considered (these have also been used in applying the test of reasonableness under ss.2 and 3); and the burden of proof lies on the person seeking to rely on the clause (s.11(5)). The courts have developed a number of additional factors in considering the reasonableness of an exemption clause which must be explored. However, the weight given to each factor depends upon the circumstances of each case. How the test is to be applied is subject to little guidance from the higher courts, although there is an unwillingness to interfere with first instance decisions on reasonableness; see *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 for the basis for appellate intervention. Some judicial guidance may be found in *Watford Electronics Ltd v Sanderson Ltd* [2001] EWCA Civ 317.
In consequence, it is difficult to predict if a clause will be found to be unreasonable although the indication is that as between businesses of equal bargaining power the courts the bargain made should be enforced.