ANSWERS - SELF-TEST - EXEMPTION CLAUSES AND UNFAIR TERMS

1. What are the two approaches to the question of the nature of exemption clauses? (2)
   (a) Defence - i.e. construe all the contract terms, except the exemption clause, to determine the breach and then determine if the exemption clause actually operates as a defence to that breach (1). This is the generally accepted view of the nature of exemption clauses;
   (b) Construe as any other term of the contract in order to establish the initial contractual obligations. (1)

2. What does a party need to show in order to rely on an exemption clause in a contract to which he is a party? (3)
   (a) That the clause has been incorporated as a term of the contract; (1)
   (b) That on its construction i.e. natural and ordinary meaning, it covers the loss which has occurred in the circumstances in which the loss has occurred; (1) AND
   (c) That the clause is not rendered unenforceable by statutory provisions (i.e. UCTA 1977 or the CRA 2015) (1).

3. When, if ever, will an exemption clause be construed to cover negligence liability? (4)
   Negligence must, first, be at least ONE form of liability arising on the particular facts. (Negligence means breach of a qualified contractual obligation and/or breach of a duty of care in tort.) (1)

   The clause will then cover that negligence
   (a) If the clause expressly mentions that it covers negligence (or synonym thereof). In these circumstances the clause will extend to cover the negligence liability whether or not there is any other liability on the facts (1).
   (b) If there is no express mention, but the words are wide enough to include liability resulting from negligence, then it appears that the clause must cover negligence liability if this is the only liability on the facts: Alderslade v Hendon Laundry (1).

   If there is no express mention, but the words are wide enough to cover negligence, and there is another liability arising on the facts, the clause will NOT cover the
negligence liability. White v John Warwick. Another example is EE Caledonia Ltd v Orbit Valve Co. Europe.

Note that there is evidence of relaxation of the test in Canada SS v R in the light of the West Bromwich principles. See, e.g., HIH Casualty & General v Chase Manhattan Bank.

4. Explain the liability arising on the facts in Alderslade v Hendon Laundry. (2)
The only liability was negligence liability on these facts. The loss in question was the loss of the handkerchiefs that were to be laundered. The laundry had acquired possession of the handkerchiefs in order to launder them and was therefore in the position of bailee of them (implied duty to exercise reasonable care of the goods – safe custody qualified obligation). The obligation of redelivery of the handkerchiefs was also qualified (i.e. reasonable care) (2). Although Lord Greene appeared to indicate that there was an absolute obligation to launder properly, this would now be covered by statute i.e. s.13 SGSA 1982 (supplying a service in the course of a business, implied obligation to carry out the laundry service with reasonable care and skill). If this qualified obligation were broken in the laundering process, there would be a breach.

5. What is the effect of a fundamental breach on an exemption clause in the contract? (2)
The clause must be construed on its natural and ordinary meaning to see whether it covers such a serious breach and therefore very clear words will be required – but it is possible to argue that a clause is wide enough to cover such a breach. (1) Examples of application of this are Photo Production v Securicor and George Mitchell v Finney Lock Seeds. (1)
Of course, the clause must also not be rendered unenforceable by UCTA 1977 or the CRA 2015.

6. What do we mean by negligence liability in the context of exemption clauses? (3)
In the context of exemption clauses, s. 1 of UCTA and s. 65(4) of the CRA define negligence so as to include a breach of contract, namely breach of a qualified obligation to take reasonable care or exercise reasonable skill (1). It also includes breach of a duty of care in tort (1) and occupier’s liability (1).
7. Give four examples of instances when the reasonableness test will apply under UCTA 1977. (4)

Core examples:
(a) s.2(2) UCTA – negligence liability for loss other than death or personal injury e.g. property damage. (1)
(b) s.3 – strict contractual liability (where one party deals on the other’s standard terms of business – that “other” cannot exclude/restrict liability for breach unless reasonable). (1)
(c) s.6 – sale and hire-purchase, e.g. s.6(1A) subjects attempts to exclude breaches of implied undertakings in ss. 13-15 of the SGA 1979 Act to reasonableness requirement. (1)
(d) s.7 – miscellaneous contracts under which goods pass (e.g. breaches of implied terms of SGSA 1982). (1)

8. In what way does s.13 UCTA 1977 extend the definition of the clauses that are subject to regulation under the Act? (3)

s.13 extends the definition of exemption clause for the purpose of UCTA beyond the traditional definition of a clause that excludes or limits liability to include:
(a) clauses stating that there is no liability unless some restrictive or onerous condition is complied with;
(b) clauses excluding or limiting either rights or remedies, which would otherwise be available;
(c) clauses which exclude or restrict rules of evidence or procedure. (3)

9. What types of breach does s.6 UCTA apply to? (1)

Contracts for the sale of goods (breaches of ss. 12-15 SGA) or hire purchase contracts (ss. 8-11 Supply of Goods (Implied Terms) Act 1973) i.e. obligations as to title, goods conforming with contractual description, satisfactory quality, fitness for purpose, correspondence with sample (1).

10. To what kind of contract does the Consumer Rights Act 2015 apply? (3)

The CRA applies to contracts between a “trader” and a “consumer”. (1)
A “trader” is 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” – s.2(2) CRA. (1)

A “consumer” is “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession” – s.2(3) CRA. (1)

11. List five factors that the courts will consider in assessing reasonableness under UCTA. (5)

Five possible factors of relevance in assessing reasonableness.

(a) the possibility of one party insuring against the risk (availability and cost of insurance);
(b) strength of bargaining positions of the parties/ possibility of making such a contract without having an exemption of this kind;
(c) whether negotiated;
(d) inducement to agree to the term (i.e. lower price if contracted on this basis);
(e) whether the loss was attributable to negligence.

12. How is the “unfairness” of a term determined under the Consumer Rights Act 2015? (5)

According to s. 62(4), a contractual term will be 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.” (2) (One point for recognising the section and one point for the test.)

According to s. 62(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. (2) (One point for recognising the section and one point for the test – need not be verbatim.)

On whom the burden of proof lies is not clear, but, given the requirement in s. 71 for court to consider the fairness of a term even where none of the parties raise the issue, it may well be that the matter is simply one for the court in any event without any burden on the consumer. (1)
13. Explain the distinction between an exclusion clause and a limitation clause. In what way might it be said that the courts treat limitation clauses more favourably? (3)

In a general sense, an exclusion clause is designed to exclude liability completely (1) whereas a limitation clause purports to limit liability to a certain, defined, amount (1).

Limitation clauses are generally construed more favourably by the courts than total exclusion clauses, as the latter purport to deny all liability rather than merely limit liability to a certain amount. This is illustrated by the fact a limitation clause will cover negligence liability where it is ‘clear and unambiguous’: Ailsa Craig Fishing v Malvern Fishing. (1)

Points scored [maximum 40] =