

CHAPTER 6: THE TERMS OF A CONTRACT

QUESTION 1

Distinguish between:

- a) A puff, a representation, and a term.
- b) A condition, a warranty, and an innominate term.

Answer:

- (a) A puff, sometimes called trader's hype, is a mere boast, often a gimmick used to advertise a product. Buyers are not expected to take such statements as literally true. Examples of trader's hype include statements such as a washing powder 'washes whiter than white'. A representation is a pre-contractual statement that induces a party to enter into a contract. It is not a term of a contract. A statement that forms part of a contract is a term of a contract. A term might be a condition, a warranty or an innominate term.
- (b) Conditions are fundamental terms of a contract. If a condition is broken the innocent party can treat the contract as discharged and claim damages, or can continue with the contract and claim damages. Warranties are minor terms of the contract. If a warranty is broken damages can be claimed but party claiming damages must continue with the contract or that party will be in breach. There are instances where it is difficult to assign a term as either a condition or a warranty, until the effect of the breach of the term is established. Terms which cannot be assigned into either category are referred to as innominate terms. If the breach is relatively minor only damages can be claimed but if the breach is fundamental the injured party can treat the contract as discharged.

QUESTION 2

Explain the effects of the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015 in relation to exclusion clauses.

Answer:

- Exemption clauses must comply with the Unfair Contract Terms Act 1977. Under this Act some clauses are made totally ineffective and others are subject to a reasonableness test.
- The Act only applies to business liability and does not apply to transactions between private parties or contracts between a trader and a consumer. Terms which exclude or restrict liability for negligence resulting in death or personal injury are invalid (s.2(1)), whilst other loss or damage is subject to the reasonableness test (s.2(2)).
- The reasonableness test has been considered in a number of cases, such as *George Mitchell v Finney Locke Seeds* (1983), *St Albans City and District Council v International Computers Ltd* (1996), *Regus (UK) Ltd v Epcot Solutions Ltd* (2008).
- The Consumer Rights Act 2015 governs contracts between a trader and a Consumer. Terms which exclude or restrict liability for negligence resulting in death or personal injury are invalid (s65).

- An unfair term in a contract is not binding on a consumer (s62). Where a term is unfair is determined the nature of the subject matter of the contract, and 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.
- Schedule 2 of the CRA contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair.

QUESTION 3

Dr Know, a well-known academic, is due to speak at the Annual Brighton Small Business Conference. She arrives early and books into the Ship Hotel, owned by Leisure Ltd. She has stayed there on a number of occasions in previous years. Her room is not ready so she asks the receptionist if she can leave her overnight bag with him. He takes her bag and gives her a cloakroom ticket, which she stuffs into her pocket without reading. The back of the cloakroom ticket reads 'All items left at reception at owner's risk.' When Dr Know returns to the hotel she is informed that her bag has gone missing but will be returned to her as soon as it is found.

Dr Know goes up to her bedroom and sees a large notice which states: 'Leisure Ltd accepts no responsibility for loss of property or injury to persons, howsoever caused'. Dr Know decides to carry her laptop computer to dinner in case it is stolen from the hotel room. Unfortunately, on her way to dinner, Dr Know catches her shoe in a large hole in the stair carpet, and falls down the stairs breaking her arm and damaging her laptop.

Advise Dr Know whether she can claim, in law of contract, for the loss of her overnight bag (which has never been found), the damage to her laptop, and for the injury caused to her arm.

Answer:

- The advice to Dr Know is concerned with the legal validity of exemption clauses. An exemption clause is a clause attempting to exclude or limit liability.
- In order to be valid a clause must be incorporated into the contract; it must cover the liability sought to be excluded and survive scrutiny under statute. Where the contract is between a trader (Leisure Ltd) and a consumer (Dr Know) the law set out in Consumer Rights Act 2015 applies. A clause may be incorporated through notice, given before or at the time of the contract through a previous course of dealings. For incorporation by notice, reasonable steps must have been taken to bring the clause to the other party's attention before the contract is made. What is reasonable is measured objectively. If the clause is brought to a party's attention after the contract is made, as in *Olley v Marlborough Court* (1949), the clause will not be incorporated into the contract.
- The ticket for the bag - is it a contractual document, *Chapleton v Barry UDC* (1940)? If it is not a contractual document Dr Know will not be bound by its terms.
- The notice in the hotel room - has this come to Dr Know's attention after the contract has been made? In which case it will not be incorporated into the contract.

- A clause may be incorporated by course of dealing, *Spurling v Bradshaw* (1956), *Hollier v Rambler Motors* (1972). Dr Know may have stayed at the hotel before, as she has attended the conference for the last 5 years, but would this be enough to constitute past dealings?
- If an exemption clause has been incorporated then it must cover the loss in question. The courts generally require that attempts to exclude liability for negligence should be absolutely clear.
- Discuss the application of the Consumer Rights Act 2015 in respect of terms in a contract between a trader and consumer. Terms that are unfair will not be enforceable by the trader. Terms which exclude or restrict liability for negligence resulting in death or personal injury will be invalid s65 CRA 2015.. Terms excluding other loss or damage will only be enforceable if they are fair.
- Even if the clause has been incorporated into the contract it will not be effective as regards the injury to Dr Know's arm. With regard to the other losses the clauses are valid if they are fair.

QUESTION 4

- a) Hari took a lease for 10 years of a garage from British Petrol plc. The lease stated that Hari could only sell petrol provided by British Petrol plc. Hari has now discovered he could buy Ecco petrol cheaper. Advise Hari if he is bound by the solus agreement with British Petrol plc.
- b) Gerald is employed by Dairy Ltd and has learnt their trade secret of making chocolate that does not melt in temperatures below 40°C. His contract states that if he leaves Dairy Ltd he must not be involved in the manufacture of chocolate or any other confectionery in the UK or the rest of the world for five years.

Discuss whether this restraint clause is lawful.

Answer:

- (a) A solus agreement is where a seller of a product agrees with a supplier that he will obtain a product solely from him usually for a special discount. Such clauses in contracts are *prima facie* (initially) void because it is not in the public interest to impede competition or freedom of movement. However, such clauses may be valid, if the person seeking to enforce them can show that in their particular circumstances the restraint is reasonable. British Petrol PLC would have to show that the restraint was reasonable, *Esso Petroleum v Harpers Garage* (1968). Hari will only be bound by the restraint clause if the courts decide that it is reasonable taking into the account time limit etc.
- (b) A restraint clause may restrict an employee's freedom to contract both during his period of employment and after the termination of his employment. The courts determine reasonableness in the way most likely to produce a fair outcome for both parties, recognising the unequal bargaining strength of the employer and the employee. A restraint will only be reasonable if it is no wider than needed to protect the employer's legitimate interests, such as trade secrets and does not place unreasonable restraints on the employee. If Dairy Ltd can show the clause is reasonable then Gerald will be bound by it, *Forster & Sons Ltd. v Suggett* (1918). If a restraint clause is too wide, the court may agree to sever part of

the clause allowing the reasonable part of the clause to continue. *Goldstoll v Goldman* (1915). For example the court may decide to sever 'any other confectionary' and leave the remaining part of the clause.