CRIMINAL LIABILITY

8–41 Many of the changes which have taken place in the law discussed in this chapter in recent years have been driven by consumerism, that is, the development of consumers as an organised group able to lobby for laws which protect their interests. One of the major problems with protecting the consumer is that changes in the substantive law of contract and tort do not help very much if the sums at issue are small and the cost of using lawyers is large. One way of dealing with this has been to provide special systems for trying small consumer cases in county courts from which lawyers are excluded. Another important development has been the building up of criminal law in the field of consumer protection. The great advantage of this from the consumer's point of view is that it has no cost since the operation of the criminal law is a service provided by the state. The disadvantage is that usually one does not receive financial compensation for one's own particular loss, though the courts have been given power in the course of criminal proceedings to make compensation orders for those who have been injured by criminal behaviour. Nevertheless, at the prevention level, it is clear that the criminal law is of fundamental importance. Dishonest second hand car dealers are much more likely to refrain from turning back the mileometers of cars they sell because of the fear that they may be caught and prosecuted than because of the fear that a customer to whom they sell a car will sue.

The notion that criminal law had a role to play in the fair regulation of the market is very old since it goes back to rules designed to produce fair weights and measures which have existed since medieval times. Again, it is not possible to do more here than pick out a few salient points.

The most important Act in practice is the Trade Descriptions Act 1968 which gives rise to over 30,000 prosecutions a year. This makes it a criminal offence to apply a false trade description to goods in the course of a trade or business or to offer to supply any goods to which a false trade description is applied. The concept of trade description is very wide and has been treated as embracing eulogistic statements such as describing a car as a beautiful car or in 'immaculate condition' which would probably be regarded as not giving rise to liability in contract at all. Section 11 contains elaborate provisions about false or misleading indications as to the price of goods which have been replaced by Pt III

of the Consumer Protection Act 1987. Section 20(1) of that Act introduces a general offence of giving misleading price information and establishes a code of practice.

Another important step is to take power to prevent certain kinds of dangerous goods coming on the market at all. Extensive powers were granted to Ministers to make orders under the Consumer Protection Act 1961 and the Consumer Safety Act 1978. These have been used to regulate such matters as unsafe electric blankets and flammable nighties. These powers now exist under Pt II of the Consumer Protection Act 1987. This part of the 1987 Act also introduced a general safety requirement which in s 10(1) creates an offence if a person:

(a) supplies any consumer goods which fail to comply with the general safety requirements;
(b) offers or agrees to offer to supply any such goods; or
(c) exposes or possesses any such goods for supply.

A similar offence was subsequently created by the General Product Safety Regulations 1994, which are now the primary piece of legislation on this matter.

Under the Fair Trading Act 1973, the Director General of Fair Trading has important powers to promote fair trading practices. An important example of secondary legislation arising out of this Act is the Consumer Transactions (Restrictions on Statements) Order 1976 which prohibits traders from putting up notices which purport to exclude liability. As we shall see in the next chapter, there have been important changes in the law of contract which have made many attempts to exclude liability ineffective. If matters stopped here, however, it would be open to a trader to put up a notice purporting to exclude liability hoping that many customers would not realise that it had no legal effect. Using the criminal law to prohibit putting up of the notice is, therefore, a very important reinforcing mechanism.

CHAPTER 9

EXEMPTION AND LIMITATION CLAUSES

INTRODUCTION

9–01 During the last 150 years, English law has come, principally by means of developing the implied terms discussed in Chapter 8, to impose substantial obligations on the seller particularly as to the quality of the goods. A natural response of sellers is to seek to qualify these obligations by inserting into the contract terms which seek to exclude, reduce or limit liability. Over the last 50 years, English law has come to impose very considerable restrictions on the ability of the seller to do this, even where he or she can persuade the buyer to agree to a contract which contains such a clause or clauses. This chapter will be concerned with explaining the devices which have been developed for this purpose.

It is important, however, to start by emphasising that such clauses are remarkably heterogeneous in form. It would be a mistake to assume that the underlying policy questions in relation to all types of clause are identical. Most clauses operate so as to qualify the results of the seller breaking the contract. This may be done in a wide variety of ways:

(a) the contract may provide that none of the implied terms set out in Chapter 8 shall be implied;
(b) the contract may provide that, if the seller breaks the contract, its liability should be limited to a particular sum, say £100;
(c) the contract may provide that, if the seller breaks the contract, it should only be liable to replace or repair the goods;
(d) the contract may provide that the seller shall not be liable for particular kinds of loss. So, for instance, contracts often provide that the seller is not liable for consequential loss so that, if it fails to deliver the goods, it will not be liable for loss of profit which the buyer suffers through not having the goods;
(e) the contract may provide that if the buyer wishes to complain it must do so within, say, 14 days;
(f) the contract may provide that if the buyer wishes to complain it must do so by means of arbitration;

(g) the contract may provide that, if the goods are defective, the buyer is not to be entitled to reject them but only to have the price reduced, and so on.

9–02 On the other hand, a clause may operate to define what it is that the seller is agreeing to do. Suppose an auctioneer of horses says that one of the horses which is up for sale is 'Warranted sound except for hunting'. This could be regarded as excluding liability if the horse would not hunt but it is more properly regarded as making it clear that the seller is not assuming any liability for the soundness of the horse as a hunter though it is warranting that the horse is sound in other respects. This distinction is fundamental since there is a great difference between saying from the outset that one does not assume an obligation and accepting an obligation and then seeking to qualify the consequences of it. This distinction was recognised in a different context in *Renton v Palmyra* (1957),[1] where the contract provided for timber to be carried from British Columbia to London but contained a clause permitting the master of the ship, in the event of industrial disputes in London, to discharge at the port of loading or any other convenient port. Because of a dock strike in London, the master delivered the goods in Hamburg. The House of Lords held that in the circumstances delivery in Hamburg was a performance of the contract because, properly construed, the contract provided alternative means of performance and not an excuse for non-performance. This was important because the contract was subject to the Hague Rules which forbid most forms of contractual limitation on liability. It must be admitted that much more commonly courts have chosen to ignore this distinction and to assume that all clauses operate by way of defence, so as first of all to consider what the rest of the contract says and then to consider whether the clause is effective to qualify that obligation. The difference in approach is not merely technical because it colours the whole flavour of the process of interpretation.

Common law and statute have developed rules which control the ability of the parties to exclude or qualify liability. Although, as regards contracts of sale, the statutory regime is much more extensive and important it is convenient to consider the common law position first, both because it provides the historical context in which the statutory regime exists and also because in order to be valid a contractual exclusion clause must survive both the common law and statutory tests.

1 [1957] AC 149.

THE POSITION AT COMMON LAW

Is the excluding clause part of the contract?

9–03 This question is assumed to be easy to answer where there exists a contractual document which has been signed by the parties. In this position, the basic rule is that the parties can be taken to have agreed to what the contract means, even though they have never read it and would not understand it if they had. Some commentators have criticised this rule on the grounds that, in many cases, the agreement on which it is based is wholly artificial. It is no doubt true that those who sign contracts embrace a range from those who can understand nothing up to those who are perfectly familiar with the contract and understand precisely its legal effect. It is probably not sensible, however, to make the binding force of the contract turn on where in the spectrum particular contracting parties stand. To enquire into these questions on a regular basis would be to consume vast amounts of judicial time without any obvious benefit.

More difficult questions arise where there is no signed contract but it is argued that excluding terms have been incorporated into the contract by notices or the delivery of non-contractual documents like tickets. There is no doubt that, in certain circumstances, one can incorporate terms into a contract by displaying a notice at the point at which the contract is made or, as on the railway, by handing over a ticket which contains references to the contractual conditions. These conditions need not be set out in the ticket provided they are sufficiently identified. So, almost ever since the railways began, tickets have borne on the front the words 'For conditions see back' and on the back a reference to the company's timetable. In principle, this is perfectly acceptable. Similarly, there is no reason why one of the parties should not say by notice or ticket that all the contracts it makes are subject to the rules of a particular trade association. The critical test was that laid down in *Parker v South Eastern Railway* (1877),[2] that is, whether or not in the circumstances the delivery of the ticket is sufficient notice of the terms referred to on it. In principle, it appears that the standard of reasonable notice is variable, so that, the more surprising the term, the greater the notice required. So, in *Thornton v Shoe Lane Parking* (1971),[3] the plaintiff wished to park his car in the defendant's multi-storey car park. Outside the park was a notice stating 'All cars parked at owner's risk'. The ticket she received contained references to terms displayed inside. Inside the car park, there were notices which purported to exclude not only

2 (1877) 2 CPD 416.
3 [1971] 2 QB 163.

liability for damage to cars but also liability for damage to drivers. This is a much less common clause and the Court of Appeal held that, in the circumstances, the plaintiff was not bound by it because he had not been given adequate notice so that he could make a real choice whether to park his car in that car park or somewhere else. It was obviously an important part of this reasoning that, whereas car parks very commonly carry notices excluding liability for damaged cars, it is much less usual for them to carry notices excluding liability for damage to drivers. In the later case of *Interfoto Picture Library v Stiletto Visual Programs* (1988),[4] the Court of Appeal stated it as a general proposition that, where contracts were made by processes which involved the delivery by one side to the other of standard printed terms, the author of the terms was under a general duty to draw to the attention of the other side any terms which were unusual. Of course, it follows that in a contested case it may be necessary to produce evidence of what terms are usual in a particular profession, trade or industry.

Limitations imposed by the common law on the effectiveness of exemption clauses

9–04 The principal tool used by common law to control exemption clauses has been the process of construction, that is, the process by which the court construes (decides the meaning of) the contract. Courts have traditionally approached this process of construction by making a number of assumptions. These assumptions may often overlap but are probably analytically distinct. So, it is assumed that it is unlikely for one party to agree that the other party shall not be liable even where he or she is negligent; similarly, it is thought that the more serious a breach of contract has been committed by one party, the less likely it is that the other party will have agreed in advance that such a serious breach does not matter. Indeed, it was thought during much of the 1960s and 1970s that, if the breach was sufficiently fundamental, even the clearest words could not exclude liability for it, but this was eventually decided by the House of Lords to be a heresy. The thrust of both of these assumptions is that, if one party wishes to exclude its liability for negligence or a serious breach of the contract, it needs to say so in clear terms. Of course, in practice, what that party wants to do is to make expansive promises in the big print and cut them down by 'weasel words' in the small print. Few car parks would think it good business to put a large sign over the entrance saying 'Abandon hope all ye who enter here'; it is quite a different matter to put a wide exclusion clause in small print on the back of the ticket. A third assumption which overlaps with these

4 [1988] 1 All ER 348; [1989] QB 433.

two but may have separate application is the *contra proferentem* principle which says that, if one party has drafted or is responsible for the drafting of a document and the document is ambiguous, then any ambiguities should be resolved in favour of the other party. All three of these assumptions are perfectly sensible within their proper limits; undoubtedly, courts have, from time to time, gone over the top and used the devices to reject the effect of excluding clauses, not because they were not clearly drafted but because the court did not like them. More recent decisions have suggested that now that there is the statutory regime described below it is much less appropriate than it was in the past to take these techniques beyond their proper limits. It has also been suggested by the House of Lords that the force of the presumptions does depend very considerably on the type of clause which is employed. So, clauses which impose financial limits on liability should not be treated with the same degree of hostility as clauses which exclude liability altogether. (Of course, this distinction can hardly apply where the financial limit is so low as in effect to exclude liability altogether.)

9–05 It has also been said that where one party has only entered into the contract because he or she has been misled by the other about the effect of the exclusion clauses then the exclusion clauses are without effect. This principle would obviously apply where the misrepresentation was fraudulent but it seems to apply even if the misrepresentation was entirely innocent. So, in *Curtis v Chemical Cleaning and Dyeing Co* (1951),[5] the plaintiff took a wedding dress to the defendant for cleaning. Usually at a dry cleaner one would simply receive some kind of ticket by way of receipt but this particular cleaner had documents headed 'receipt' which it was the practice to ask the customer to sign. The plaintiff asked the assistant what was in the document and was told that it excluded liability for certain risks, for instance, damage to the beads and sequins which were on the wedding dress. In fact, the receipt contained a clause 'The Company is not liable for any damage, however caused'. The dress was in fact stained while being cleaned and the defendant sought to rely on the clause as a defence. The Court of Appeal held that it could not do so because of the misstatement by the shop assistant about the effect of the document. There was no evidence in the case as to the assistant's understanding of the document and it is obviously entirely possible that the assistant understood it no better than the customer. This does not appear to matter.

It is not clear whether the principle that surprising clauses should be specifically drawn to the attention of the other party applies where the document is signed. The cases in which it has arisen have not been

5 [1951] 1 KB 805.

cases of signed documents but the underlying rationale would seem to be equally applicable in such a case.

STATUTORY CONTROL OF EXEMPTION AND LIMITATION CLAUSES

9–06 There is a history of statutory control of exemption clauses going back to the middle of the 19th century when there were controls over the terms on which carriers of goods could seek to exclude liability. It is only much more recently, however, that general statutory regulation of such clauses has become accepted as an appropriate technique. A major step was the Supply of Goods (Implied Terms) Act 1973 which made major changes in the possibility of excluding clauses in the fields of sale and hire purchase. These changes were re-enacted but with major additions in the Unfair Contract Terms Act 1977. This Act has provisions dealing specifically with contracts for the supply of goods and also provisions of general application which may affect contracts for the supply of goods.

Sections 6 and 7 of the Unfair Contract Terms Act

9–07 Section 6 of the Act applies to contracts of sale and hire purchase. Section 7 of the Act applies to other contracts under which ownership or possession of goods passes. Both sections deal with clauses which seek to exclude liability for failure to transfer ownership and this has already been discussed in Chapter 6. The main thrust of the sections is in relation to the implied terms as to the quality of the goods. Section 6 lays down the same rule for contracts of hire purchase as for contracts of sale. Section 7 lays down the same rules for other contracts under which ownership or possession is to pass. For simplicity of exposition, the rest of this account talks of contracts of sale but there is a uniform regime for all of these contracts.

Section 6 divides contracts into two groups; those where the buyer is dealing as a consumer and those where the buyer is not. Where the buyer is dealing as a consumer, ss 13, 14 and 15 cannot be excluded. If the buyer is not dealing as a consumer, ss 13, 14 and 15 can be excluded if the term satisfies the requirement of reasonableness. In effect, therefore, the implied terms become mandatory in consumer sales and, even in commercial sales, the seller will only be able to exclude them if he or she is able to satisfy a court that the term excluding or limiting liability was, in all the circumstances, reasonable. The operation of this scheme obviously involves two questions:

(a) who is a consumer?; and
(b) what is reasonable in this context?

The answer to the first question is to be found in s 12 which provides:

> (1) A party to a contract 'deals as consumer' in relation to another party if:
>
> (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
>
> (b) the other party does make the contract in the course of a business; and
>
> (c) in the case of a contract governed by the Law of Sale of Goods or Hire Purchase, or by s 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.
>
> (2) But, on a sale by auction or by competitive tender, the buyer is not in any circumstances to be regarded as dealing as consumer.

9-08 Setting aside then the special cases of auction and competitive tender which can never be consumer sales, we see that a consumer sale requires three elements: a consumer buyer, a non-consumer seller and consumer goods. So, a sale by one consumer to another is not for this purpose a consumer sale. In any case, of course, a consumer seller does not attract liability under s 14 of the Sale of Goods Act 1979. It is thought, however, that a consumer seller who seeks to exclude liability under s 13 of the Sale of Goods Act would be subject to the test of reasonableness. There is no definition of consumer goods and there are obvious marginal cases—for example, someone who buys a van intending to use it as his or her means of family transport. It is thought that courts will take a broad view of consumer goods for this purpose. The most difficult question is whether the buyer is making the contract in the course of a business or holding himself or herself out as doing so. There are many cases where a buyer buys goods partly for business and partly for non-business use. A typical example is the purchase of a car by a self-employed person. It is very likely that such a person would use the car substantially for family and social purposes but it is also very likely that for tax reasons it would be bought through the business. Many commentators had assumed that this would have made the transaction a non-consumer transaction but the contrary view was taken by the Court of Appeal in *R and B Customs Brokers v United Dominions Trust* (1988).[6] In this case, the plaintiff was a limited company, owned and controlled by Mr and Mrs Bell. The company conducted the business of shipping brokers and freight forwarding agents. It decided to acquire a Colt Shogun four wheel drive vehicle which turned out to be defective. The question was whether the

6 [1988] 1 All ER 847.

transaction was a consumer transaction, in which case the exclusion clauses in the defendant's standard printed form would be totally ineffective. The defendant argued that the transaction must be a business transaction because companies only exist for the purpose of doing business. (This is obviously a stronger case on this point than if the plaintiffs had not incorporated themselves but had simply done business as a partnership having no separate legal personality.) The Court of Appeal held, however, that the company was a consumer and not a business for the purpose of s 12. The principal reason for this decision was that the company was not in the business of buying cars. This decision has attracted a good deal of criticism since it appears to fly in the face of the wording of the Act (in particular, it is difficult to see what effect can be given with this approach to the words 'nor holds himself out as doing so'). It is also very difficult to see how the regularity with which the plaintiffs bought cars was relevant to the character of the plaintiffs as consumers or non-consumers.[7] Nevertheless, sellers would be prudent to assume that the decision is likely to be followed and its effect is clearly significantly to widen the notion of what is a consumer for this purpose.

9–09 The second question is what is reasonable? Section 11(1) says that whether the term is reasonable depends on:

> Having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

At the time when the Act was passed, there was a debate about whether reasonableness should be determined at the time the contract was made or at the time the dispute arose. The Act adopts the former solution but in practice, of course, the question will not arise until there has been a breach of contract and a dispute. The court will, in practice, be able to approach the question in the context which has actually arisen. This provision is less important in practice than it is in theory.

Section 11(4) provides:

> Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to sub-s (2) above in the case of contract terms) to:
>
> (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

7 The reasoning is also hard to reconcile with that of the Court of Appeal as to 'course of business' under s 14 of the SGA in *Stevenson v Rogers* [1999] 1 All ER 613.

(b) how far it was open to him to cover himself by insurance.

This provision gives statutory force to the general notion that a clause limiting liability has a better chance of being treated as reasonable than a clause which seeks to exclude liability altogether. But, this is only the case under s 11(4) if the seller can show that the limit of liability is reasonably related to the resources which he or she has available. In other words, a small business can more readily defend a low limit of liability than a large one. However, many liabilities are, of course, insured and it is therefore relevant to consider whether the seller can cover himself or herself by insurance. In general, it is difficult for sellers effectively to insure against the cost of replacing the goods but they can insure against the possibility of having to pay damages for loss caused by defective goods. However, such insurance is commonly written with a premium which is calculated in relation to the maximum which the insurer will cover. It would seem that it is probably open to a seller to show that it was not economically possible for him or her to insure for liability for more than, say, £100,000 for any one claim. This would be relevant to the decision as to whether limitation of liability was reasonable under s 11(4).

The court is also required to have regard to five guidelines which are set out in the second schedule to the Act. These are:

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
(b) whether the customer received an inducement to agree to the term or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition could be practicable;
(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

9–10 Some comments may be offered on the guidelines. Obviously, as far as (a) is concerned, the more equal the bargaining position of the parties the more likely it is that the court could be persuaded that the clause is reasonable. Similarly, if one party is in a monopoly position it is likely to have considerable difficulty in persuading the court that the terms are reasonable, whereas, if there is a wide range of possible suppliers,