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UNFAIR CONTRACT TERMS

General

1. The regulation of unfair terms in contracts can be found in two pieces of legislation namely the Unfair Contract Terms Act 1977 (1977 Act) (business contracts) and the Consumer Rights Act 2015 (2015 Act) (consumer contracts). A consumer is defined in the 2015 Act as “an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession”. A trader is defined as “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”. “Business” includes the activities of any government department or local or public authority. Thus a local council is a trader for these purposes.

Business to Business Contracts.

2. The 1977 Act regulates two contractual principles which had developed over the centuries which enabled:
 - contracts to contain clauses which exempted one party from any liability to the other even where the other had been killed or injured by the fault of the first party; and
 - notices to be used to disclaim liability for actions or situations not arising from contract.
3. These rules had been used to impose unreasonable contractual conditions on another party and to avoid liability in cases where any ordinary person would have thought it fair that liability should exist. The 1977 Act redresses the balance.

Negligence Liability

4. By section 2(1) of the 1977 Act no one can exclude or restrict their liability for the death or personal injury of another resulting from their negligence. By section 2(2) liability for negligence in other cases of loss or damage can be excluded or restricted only if it is reasonable so to do. (See below for 'reasonableness').

Liability in Contract

5. Where the contract is made on one party's written standard terms that party cannot in the contract exclude or restrict his liability for a breach of the contract by him or for failure to perform the contract at all except where the exclusion term is 'reasonable' (see below).

Reasonableness

6. By section 11 of the 1977 Act the test of reasonableness of a contract term is whether it was a fair and reasonable term to be included having regard to the circumstances which were, or ought reasonably to have been known to, or in the contemplation of the contracting parties.
7. For a notice which does not have a contractual effect the test is whether it is fair and reasonable to allow it to be relied upon having regard to all the circumstances at the time when the liability which is to be restricted or excluded arose.

Consumer Contracts

8. The aim of the 2015 Act is to provide protection for consumers in a similar way to that for business to business contracts but in an enhanced form.

Negligence liability

9. By section 65 of the 2015 Act no trader can exclude or restrict their liability for the death or personal injury of a consumer resulting from their negligence. This does not affect the trader's ability to exclude or restrict liability for negligence in other cases of loss or damage unless that term is unfair. (See below for unfairness).

Liability in contract

10. Where a trader (including a local council) contracts with a consumer (see definition in paragraph 1) the local council will not be entitled to rely on any term of the contract which is unfair.

Unfair term

11. Under section 62 of the 2015 Act a “term is 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.” In judging this a court would have to take into account the nature of the subject matter of the contract; all the circumstances when the term was agreed and all of the other terms of the contract or of any other contract on which it depends. In other words the test is a general one of equality between the parties whilst bearing in mind all the circumstances at the time that the contract was made.
12. The test of fairness cannot be applied to the main subject of the contract or the price. In other words it is not a method for a consumer to get out of a contract once made.
13. Where a term is found to be unfair it cannot be enforced against the consumer but it does not affect any other part of the contract. But the consumer could rely on the unfair term against the trader if they wish.
14. A trader is required to make all the terms of the contract “transparent” that is legible and in plain and intelligible language. Very small print and complex language must therefore be avoided (section68 of the 2015 Act).
15. Any term that is doubtful in meaning will be interpreted in the most favourable way for the consumer (section69 of the 2015 Act).
16. If a court is considering any dispute about a contract it must consider the fairness of the terms even if neither party raises that issue (section71 of the 2015 Act).
17. Any terms in a secondary, associated, contract will be treated as if they were in the main contract to stop the law being circumvented in that way (section72 of the 2015 Act).

Action by Local Councils

18. Councils should take out of their business and consumer agreements and notices any references to limiting their liability for causing death or injury by negligence. Phrases such as “liability howsoever caused” are too wide because they exclude liability for negligence as well as other situations.
19. Councils should look at their standard business agreements and notices and consider whether the extent of the exclusion or restriction they are seeking to impose is reasonable. They should also look at the terms of any contracts and notices with consumers (e.g. recreation) to check that none of the terms are unfair.
20. It is not possible to give definitive guidance on what is “reasonable” or “unfair” because the concept depends on the circumstances of each case and there have so far been no useful leading cases on the meaning of either the 1977 Act or the 2015 Act.

Other Legal Topic Notes (LTNs) relevant to this subject:

LTN	Title	Relevance
35	Contracts	Sets out the legal provisions in respect of unfair contractual terms.
42	Occupiers’ Liability	Sets out how the 1977 Act relates to occupiers’ liability and the content of warning signs.

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