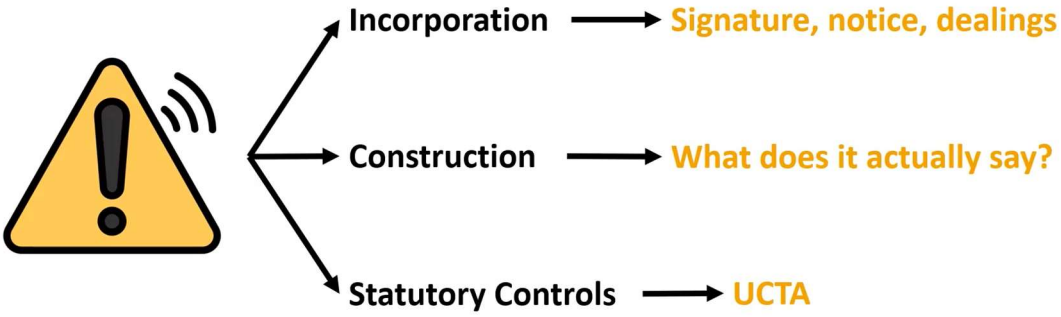
Week 10 : Exclusion Clauses

Introduction to Exemption Clauses

- They attempt to *limit* and/or *exclude* liability
  - E.g. cap on liability of 150% contract price
  - E.g. no liability for loss of profit, loss of revenue
- In order to be enforceable, the clause must:
  - Be incorporated as a term (**incorporation**)
  - Cover the loss which has occurred (**construction**)

The Nature of Terms – Perspective

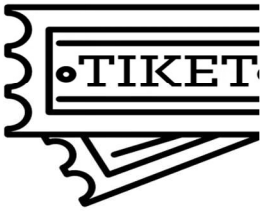


Please find the video from the link: https://youtu.be/1pv19c9bGIo

Week 10 : Exclusion Clauses

Exemption Clauses – Incorporation

- The exemption clause must *"be part of the contract"*
- Incorporation must be *at or before* the time of contracting
- There are three ways in which a term can be incorporated:
  - By signature
  - By notice
  - By a course of dealing



Exemption Clauses – Incorporation

- **[1/3] Incorporation by signature**
  - When a document containing contractual terms is signed, the party signing is bound
  - Does it matter if they read it? Or understood it?
  - ***L'Estrange v Graucob (1934)***

Exemption Clauses – Incorporation

- **[2/3] Incorporation by notice**
  - Were reasonable steps taken to bring the clause to the other party's attention?
  - Actual notice is not required. Only reasonable steps.
    - Exemption clause on the reverse side? – **Henderson v Stevenson (1875)**
    - Exemption clause illegible? – **Sugar v LMS Railway (1941)**
    - Receipt v contract document? – **Chapelton v Barry (1940)**
    - Unexpected / onerous? – **Thornton v Shoe Lane Parking (1971)**

Please find the video from the link: https://youtu.be/1pv19c9bGIo

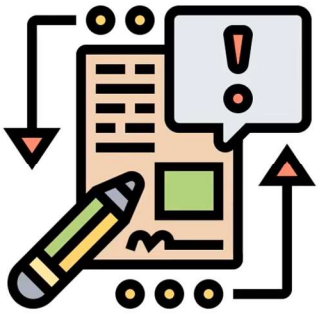
Week 10 : Exclusion Clauses

Exemption Clauses – Incorporation

- **[3/3] Incorporation by a course of dealings**
  - Is the contract one of a number of contracts between the parties?
  - A term can be implied if it appeared during previous dealings
  - Only operates if there is a *"consistent and regular course of dealing"* – **McCutcheon v David MacBrayne (1964)**
    - 3 contracts in 5 years? – **Hollier v Rambler Motors (1972)**
    - 3 per month for 3 years? – **Harry Kendall v William Lillico (1969)**

Exemption Clauses – Construction

- Generally, courts will give the clause its *"ordinary and natural meaning"* – ***George Mitchell v Finney Lock Seeds*** **[1983]**
- Where meaning is ambiguous, the clause may be interpreted contra proferentem
  - Exclusion clause – ***Houghton v Trafalgar Insurance*** **(1954)**



Exemption Clauses – Statute

- There have been a number of attempts by Parliament to control the operation of exemption clauses – quite complicated
  - For B2B contracts – relevant statute is **UCTA 1977**
  - For B2C contracts – relevant statute is **CRA 2015**

Please find the video from the link: https://youtu.be/1pv19c9bGIo

Week 10 : Exclusion Clauses

Exemption Clauses – Statute

- **The Unfair Contract Terms Act 1977**
  - The preamble to UCTA sets out its purpose

    "An Act to impose further limits on the extent to which … liability for breach of contract, of for negligence or other breach of duty, can be avoided by means of contract terms and otherwise…"
  - The purpose is achieved by making certain types of clause unlawful, and others subject to a test of *reasonableness*

Liability	What does UCTA say?
Death or personal injury resulting from negligence	Void – s.2(1) UCTA
Other loss resulting from negligence	Valid if reasonable – s.2(2) UCTA
Breach of statutory implied term re title	Void – s.6(1)(a) UCTA
Breach of statutory implied term re quality	Valid if reasonable – s.6(1A)(a)
Breach of contract	If negotiated… UCTA not applicable If on standard terms – valid if reasonable – s.3 UCTA

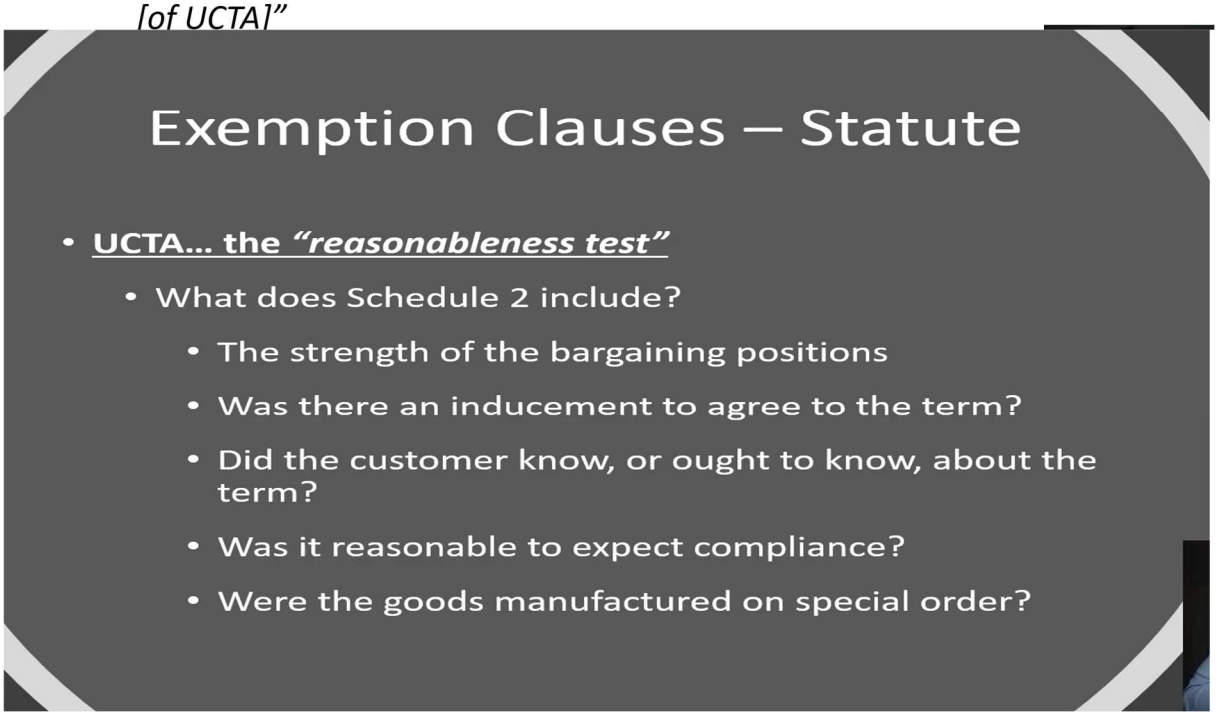
Please find the video from the link: https://youtu.be/1pv19c9bGIo

Week 10 : Exclusion Clauses

Exemption Clauses – Statute

- **UCTA… the *"reasonableness test"***
  - The test is set out at section 11(1). To pass the test, the term:

    "… shall have been a fair and reasonable one to be included 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"
  - Section 11(2) provides that, when considering the reasonableness test, *"regard shall be had in particular to the matters specified in Schedule 2 [of UCTA]"*



Please find the video from the link: https://youtu.be/1pv19c9bGIo

Chapter 7

EXCLUSION CLAUSES

7.1 INTRODUCTION

An exclusion clause is a condition that excludes, qualifies or limits the liability of a party for the wrongful conduct specified in that clause. The important characteristic of an exclusion clause is that it operates for the benefit of one party only. An exclusion clause purports to exclude liability, either in whole ("exclusion" or "exemption" clause), or in part (so-called "limitation of liability" clause), for negligence, for certain breaches of contract or for the occurrence of certain events. The rule at common law is that the party seeking to rely on the clause must show: (a) that it was incorporated as part of the contract; and (b) that on a strict interpretation, it covered the breach complained of. There are also statutory controls on exclusion clauses – most notably, the Unfair Contract Terms Act 1977 (UCTA) and, in certain consumer contracts (mainly for the supply of goods or services), the Unfair Terms in Consumer Contracts Regulations 1999 provide that the consumer will not be bound by any "unfair term".

7.2 STATUTORY INCORPORATION

For the clause contained in a document to be contractual, it must still be incorporated into the contract. A document given *after* the contract has been made cannot contain any terms of the contract and so cannot be binding on the recipient. The clause must be contained in a document which the reasonable person would consider to be contractual (see *Chapelton v Barry Urban District Council* [1940] 1 KB 532).

A distinction is made between signing a written document and the mere receipt of a notice.

7.2.1 SIGNED DOCUMENTS

Where a party signs a written contract which includes an exclusion or limitation clause, he will be bound by the clause even if he is unaware of it (e.g. he has not read the document), *unless* there has been fraud or misrepresentation (e.g. where the party who puts forward the document for signature gives a misleading explanation of its legal effect). Where reasonable steps have been taken to bring a limitation clause to the other side's attention, that information must not be misleading. For example, in *Curtis v Chemical Cleaning & Dyeing Co Ltd* [1951] 1 KB 805, it was held that where only half the truth had been revealed, albeit innocently, the innocent representation negated the signed receipt containing the limitation clause.

By contrast, where the contract is contained in a railway ticket, or some other unsigned document, it is necessary to prove that the injured party was aware, or ought to have been aware, of its terms and conditions (*L'Estrange v Graucob* [1934] 2 KB 394).

Of vital importance for the effectiveness of internet contracting is the fact that, under the Electronic Communications Act 2000, electronic signatures are now deemed to fulfil the same function as a hand-written signature in relation to electronic communications.

7.2.2 UNSIGNED DOCUMENTS

Where the clause is contained in an unsigned document, reasonable steps must have been taken to draw it to the other side's attention. These steps must, normally, have been taken *before* the contract is entered into, unless the parties have had consistent dealings with each other in the

past, and the documents used then contained similar clauses, even if the injured party did not read the clauses. *Parker v South Eastern Railway* (1877) 2 CPD 416 established the principle that in order to rely on an exclusion clause in an unsigned contract, the defendant had to have taken reasonable steps to bring it to the attention of the claimant. In *Parker*, the claimant was given a ticket which read "see back" in exchange for luggage left at a railway cloakroom. He was held to be bound by the exclusion clauses for loss or damage to the luggage contained on the reverse of the ticket, because notice of the clauses had been given, and the notice was sufficient "in all the circumstances of the case"; cf. *Chapelton v Barry Urban District Council* [1940] 1 KB 532, where it was held that no-one would have assumed that the ticket received by the claimant after paying for his deckchair was anything but a receipt.

A limitation clause was ineffective where a hotel guest made a contract for the use of a hotel room at the reception desk, and was afterwards greeted by the notice, displayed in the bedroom, excluding liability for articles lost or stolen unless they were handed to reception for safe custody. Any conditions, or reference to conditions, contained on the notice came too late – the contract was already made (*Olley v Marlborough Court Hotel* [1949] 1 KB 532).

In ascertaining reasonable sufficiency of a notice, in all the circumstances of a case, the courts have held that, where a document contains terms and conditions on the reverse side of a document, it must refer to them, legibly and clearly, on the face of that document. Moreover, the more unusual and onerous the clause, the greater the steps that must have been taken to draw it to the other side's attention; this is, principally, an argument promoted by Lord Denning MR in *Spurling v Bradshaw* [1956] 1 WLR 461, where he suggested that "the more unreasonable the clause is, the greater the notice which must be given of it".

Lord Denning expressed similar views in the celebrated case of *Thornton v Shoe Lane Parking Ltd.* [1971] 2 WLR 585, in which car park premises contained a notice which was visible, on approach, that all cars were parked at the owner's risk. As the driver approached the car park, a ticket was issued from an automatic ticket machine in the car park, which the driver would take and drive on. The ticket contained printed wording, in small print, that it was issued subject to conditions displayed inside the premises. Lord Denning held that the clause was so wide and so destructive of rights that, in order to be effective, it would have to have a red hand pointing to it and be printed in red ink. Where a restriction was particularly onerous or unusual, and would not generally be known to the other party, the defendant seeking to enforce that condition must show that he had fairly brought to the notice of the other party his intention to attach an unusual condition. In *Interfoto Picture Library v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348, the Court of Appeal stated that this was a general principle of law and was not confined to exclusion clauses.[4]

7.2.3 TORT OF NEGLIGENCE – CLEAR WORDS NEEDED TO EXCLUDE LIABILITY

UCTA 1977 renders clauses purporting to exclude liability for negligence largely ineffective. However, even where the Act does not apply, the courts have required clear words to satisfy the exclusion of liability for negligence. Moreover, in deciding what an exclusion clause means, the courts will interpret any ambiguity *against the person at fault who relies on the exemption.* In *Hollier v Rambler Motors* [1972] 2 WLR 401, the claimant's car was being repaired at the defendant's garage, when it was damaged by a fire – caused by the defendant's negligence. The defendants sought to rely on a clause in their standard form for repair that the company was not responsible "for damage caused by fire to customers' cars on the premises". The Court of Appeal held that the clause had to be interpreted against the garage in the narrower sense, i.e. so

[4] The *Interfoto* case and the limitations on the principles laid down in that case are examined in Case Study II (see Appendix I).

as only to exclude *accidental* fire damage, rather than to exclude fire damage due to *negligence*.

7.3 CONSTRUCTION OF EXCLUSION CLAUSES

Rules of construction function to prevent the enforcement of exclusion clauses. The key rules of construction are:

(a) The *contra proferentem* rule

Where there is ambiguity or doubt regarding the meaning of an exclusion clause, the courts will interpret the exclusion clause adversely against the party that inserted it into the contract. This rule was illustrated in the case of *Andrews v Singer* [1934] 1 KB 17, where a clause purporting to exclude liability with regard to implied terms was deemed ineffective to exclude liability for breach of an express term. Similarly, in *Wallis, Son and Wells v Pratt* [1910] 2 KB 1003, a clause claiming that the suppliers of goods did not provide a warranty in relation to them did not shield the suppliers from liability for a breach of condition.

(b) The repugnancy rule

If the exclusion clause is in direct contradiction to the main purpose of the contract, it is repugnant to it. Where repugnancy is present, the exclusion clause is liable to be struck out. In *Pollock v McRae* [1922] SC (HL) 192, the House of Lords struck out an exclusion clause as repugnant to the main purpose of the contract where the items supplied by the defendants where unusable due to inherent defects.

(c) The four corners rule

An exclusion clause can only apply where a contracting party is acting within the four corners of the contract. The exclusion clause may be nullified if the party steps beyond the terms of the contract.

7.4 THE UNFAIR CONTRACT TERMS ACT 1977 (UCTA)

7.4.1 GENERAL EFFECT OF UCTA

UCTA applies to contract terms and to notices which are non-contractual, and which purport to exclude or restrict liability in tort. UCTA seeks to limit those circumstances in which terms and notices restricting or limiting liability may apply. Under UCTA, exclusion clauses are either rendered wholly ineffective, or are ineffective unless shown to satisfy the requirement of reasonableness. UCTA does not affect the issues of incorporation and interpretation, which are left to common law.

The scope of UCTA is restricted. Apart from s. 6 (implied terms in sales of goods and hire purchase agreements), it is concerned with terms which purport to exclude business liability by commercial concerns, or businesses vis-à-vis a consumer. Private persons may, however, restrict liability as much as they wish. Moreover, UCTA does not apply to contracts for insurance, land, patents or company formation.

7.4.2 EXCLUSION OF LIABILITY FOR NEGLIGENCE

Section 2 UCTA states that a person cannot, by reference to any contract term, restrict his liability for death or personal injury resulting from negligence. "Negligence" covers (i) a breach of contractual obligations of skill and care; (ii) the common law duty of skill and care; and (iii)

the common duty of occupiers of premises, under the Occupiers' Liability Act 1957.

Liability for other types of negligence can be excluded or restricted, only insofar as the contract term or notice satisfies the requirement of reasonableness.

7.4.3 LIABILITY ARISING IN STANDARD TERM CONTRACTS

Under s. 3 UCTA, the person who imposes the standard term, or who deals with the consumer on the other's written standard terms of business, cannot – unless the term is reasonable – restrict liability for his own breach. Nor can he claim to be entitled to render substantially different performance (e.g. in the case of a tour operator who arranges accommodation or transport other than that specified), or no performance at all (e.g. reservation by the management of the right to cancel a concert at any time, in the case of a contract for concert tickets).

Even where these standard terms are the terms of a third party, such as the National Conditions of Sale drawn up by The Law Society for the benefit of sellers and purchasers of land, they would seem to come within the scope of s. 3 UCTA.

7.4.4 UNREASONABLE INDEMNITY CLAUSES

An indemnity clause is one where a party agrees to reimburse losses sustained by another, whether on the occurrence of a specified event or not. Section 4 UCTA provides that a clause whereby one party undertakes to indemnify the other for liability incurred in the other's performance of the contract is void if the party giving the indemnity is a consumer, unless it is reasonable. An example would be a clause to indemnify a car hire company against third party claims arising out of the hirer's use of the car.

7.4.5 GUARANTEE OF CONSUMER GOODS

Section 5 UCTA prevents the implementation of terms or notices in manufacturing guarantees which exclude or restrict liability for the negligence of the manufacturer or distributor for loss or damage caused by defects of the goods in consumer use.

7.4.6 SALES AND HIRE PURCHASE (S. 6)

Any contract for the sale or hire purchase of goods cannot exclude the implied condition that the seller has a right to sell or transfer ownership of the goods.

7.4.7 CONTRACTS FOR THE SUPPLY OF GOODS (S. 7)

As mentioned earlier, a consumer contract for the sale of goods, hire purchase, supply of work or materials or exchange of goods cannot exclude or restrict liability for breach of the conditions relating to description, quality, fitness and sample implied by the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. By contrast, in a non-consumer contract, these implied conditions may be excluded, to the extent that the exclusion clause is reasonable.

7.4.8 GUIDELINES FOR REASONABLENESS

In determining whether a contract's terms satisfy the requirement of reasonableness for the purposes of ss. 6-7, regard is to be had, specifically, to those matters specified in Schedule 2 to UCTA. The burden of proving reasonableness rests on the person seeking to rely on the clause. The court will, thus, consider the following guidelines:

- 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;
- whether the customer received any inducement, e.g. a reduced price, 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;
- 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);
- where the term excludes or restricts any relevant liability, if some condition is not complied with, e.g. failure to give notice of a defect within a short period, whether it was reasonable, at the time of the contract, to expect that compliance with that condition would be practicable;
- whether the goods were manufactured, processed or adapted to the special order of the customer.

In regard to all the other sections of UCTA mentioned above, the test of reasonableness for an exclusion clause looks at the resources which the party who seeks to restrict liability has available for the purpose of meeting the liability if it arises, as well as the extent to which that person could cover himself by insurance.

The requirement of reasonableness was considered by the House of Lords in *George Mitchell v Finney Lock Seeds* [1983] 2 All ER 737. The purchasers of cabbage seeds (farmers) were supplied by the defendants, who were seed merchants, with commercially useless seed of the wrong description. The defendants' standard term contract limited their liability to refund of the mere cost of the seeds (some £200). The House of Lords held that, although a limitation clause was to be construed against the interests of the person seeking to rely on it (the "*contra proferentem*" rule), it was not subject to the very strict principles of construction applicable to clauses of *complete* exclusion of liability. At common law, therefore, the exclusion clause would have protected the defendants. However, the test of reasonableness was not satisfied, being that it appeared that the normal practice of the seller was not to rely on the limitation clause, but to negotiate settlements of reasonable claims; the breach was due to the seller's negligence; and the seller could have insured against the loss, without materially raising his charges.

7.5 THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1994 AND 1999

7.5.1 UNFAIRNESS

The 1994 Regulations introduced a new concept of unfairness into UK contract law, over and above the provisions of UCTA 1977. They were repealed and replaced by the Unfair Terms in Consumer Contracts Regulations 1999. In most respects, the 1999 Regulations mirror the 1994 provisions, with the latter continuing to apply to contracts made between the 1st of July 1994 and the 30th of September 1999, and the former to contracts made on or after the 1st of October 1999.

Both sets of the Regulations state that:

> "A contractual term which has not been individually negotiated[5] will be regarded as

[5] e.g. where it has been drafted in advance and the consumer has not been able to influence the substance of the term

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".

The question posed by the Regulations is, thus, always: "Is this particular term unfair?", rather than UCTA's two-tiered approach, declaring some clauses ineffective and subjecting others to a reasonableness test. All the factors and circumstances surrounding the contract will be taken into consideration in deciding the issue of unfairness.

7.5.2 DEFINITIONS OF CONSUMER, SELLER & SUPPLIER

The 1999 Regulations set down a revised definition of "consumer" and "seller or supplier". "Consumer" means a natural person acting for purposes *outside* of his trade, business or profession. Unlike the protection afforded by UCTA[6], a corporation cannot be a natural person in this regard (the rationale being that businessmen are in a position to look after their own interests whatever the type of transaction). "Seller or supplier" means someone acting *for* the purposes of his trade, business or profession, whether publicly or privately owned.

In some circumstances, however, a "business" can be treated as a consumer. Thus, in *R and B Customs Brokers v UDT* [1998] 1 All ER 847, a private company that bought a car for the personal and business use of the directors was held by the Court of Appeal to have bought it as a "consumer" for the purposes of s. 12(1) UCTA, and not to have bought it "in the course of a business", because its business was not that of buying and selling cars. The significance of this ruling is that such a narrowly tailored definition of "course of a business" significantly reduces the situations in which exclusion of the implied terms will be permissible.

7.5.3 GOOD FAITH & UNFAIRNESS

7.5.3.1 Good Faith

Whether or not a term satisfies the requirements of good faith depends on a variety of factors, including:

- the strength of the parties' bargaining positions;
- whether the consumer had an inducement to agree to the term;
- whether the goods or services were sold or supplied to the special order of the consumer;
- the extent to which the seller or supplier has dealt fairly and equitably with the consumer.

7.5.3.2 Unfairness

Whether a contractual term is unfair depends on a variety of factors, including[7]:

- the nature of the goods or services in question, e.g. a term which would be unfair in the sale of new goods may not be unfair in relation to second-hand goods;
- the surrounding circumstances attending the conclusion of the contract, e.g. whether the consumer had, at that time, examined the goods;

(s. 5(2) of the Consumer Contracts Regulations 1999).

[6] Section 12 UCTA was held to apply to businesses where the transaction was not a regular one for the business.

[7] Section 6(1) of the Consumer Contracts Regulations 1999.

- all the other terms of the particular contract, or any other contract on which it is dependent.

7.5.3.3 Prima Facie Unfair Terms

The Regulations list examples of unfair terms. However, the items listed will only be *prima facie* unfair, not automatically unfair. An example is a term which allows a seller to keep any sums paid over by a consumer, if the latter cancels his contract, when no corresponding provision exists that the consumer will receive like sums if the *seller* cancels.

7.5.3.4 Core Provisions not Subject to the Requirement of Fairness

The Regulations do not govern the fairness of any terms which define the *subject matter* of the contract, or which concern the *adequacy* of the price or other remuneration in relation to the goods or services, insofar as such terms are in *plain, intelligible language*. The principle of freedom of contract is, thus, upheld, as is the principle that the courts will not, generally, enquire into the adequacy of consideration.

In fact, the supplier is under a duty to ensure that *all* the terms of the contract are couched in plain and intelligible language; and, if there is any doubt about the meaning of a term, it will be construed in the consumer's favour.

7.5.4 CONTRACTS COVERED

The scope of the 1999 Regulations has been extended to cover contracts relating to employment, succession rights, rights under family law, and the incorporation and organisation of companies or partnerships.

The change in description from "a seller of goods" (under the 1994 Regulations) to merely "a seller" (under the 1999 Regulations) means that the Regulations apply also to the transfer of an interest in land, e.g. a house purchase, transfer of a tenancy, grant of a mortgage, where the consumer is dealing with a business, e.g. a housing developer as the seller, or a business as the landlord.

7.5.5 ENFORCEABILITY

Unfair terms in a contract to which the Regulations apply will not be binding on the consumer, although the rest of the contract will be enforceable, provided the unfair terms are voidable and can be severed from the rest of the contract.

The powers possessed by the Office of Fair Trading were extended by the 1999 Regulations. Certain regulatory bodies, such as the Data Protection Registrar and the Directors-General of Utilities Supplies (and even every local trading standards department), may now exercise these powers; the Consumers' Association has also been given a similar power in respect of seeking injunctions in relation to the continued use of the unfair term.