

Legal framework essay sample



**ASSIGN
BUSTER**

1. Definition of Clause

According to Legal dictionary, clause is referring to a section, phrase, paragraph, or segment of a legal document, such as a contract, deed, will, or constitution, that relates to a particular point. A document is usually broken into several numbered components so that specific sections can be easily located. The Supremacy Clause, for example, is part of Article IV of the U. S. Constitution. An exclusion clause is a term in a contract that seeks to restrict the rights of the parties to the contract. Traditionally, the district courts have sought to limit the operation of exclusion clauses. In addition to numerous common law rules limiting their operation, in England and Wales, the main statutory interventions are the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. The Unfair Contract Terms Act 1977 applies to all contracts, but the Unfair Terms in Consumer Contracts Regulations 1999, unlike the common law rules, do differentiate between contracts between businesses and contracts between business and consumer, so the law seems to explicitly recognize the greater possibility of exploitation of the consumer by businesses.

I. INCORPORATION

The person wishing to rely on the exclusion clause must show that it formed part of the contract. An exclusion clause can be incorporated in the contract by signature, by notice, or by a course of dealing.

2. SIGNED DOCUMENTS

If the plaintiff signs a document having contractual effect containing an exclusion clause, it will automatically form part of the contract, and he is bound by its terms. This is so even if he has not read the document and regardless of whether he understands it or not. See: • *L'Estrange v Graucob* [1934] 2 KB 394.

However, even a signed document can be rendered wholly or partly ineffective if the other party has made a misrepresentation as to its effect. See: • *Curtis v Chemical Cleaning Co* [1951] 1 KB 805.

3. UNSIGNED DOCUMENTS

The exclusion clause may be contained in an unsigned document such as a ticket or a notice. In such a case, reasonable and sufficient notice of the existence of the exclusion clause should be given. For this requirement to be satisfied: (i) The clause must be contained in a contractual document, ie one which the reasonable person would assume to contain contractual terms, and not in a document which merely acknowledges payment such as a receipt. See: • *Parker v SE Railway Co* (1877) 2 CPD 416

- *Chappleton v Barry UDC* [1940].

(ii) The existence of the exclusion clause must be brought to the notice of the other party before or at the time the contract is entered into. See: • *Olley v Marlborough Court* [1949] 1 KB 532.

(iii) Reasonably sufficient notice of the clause must be given. It should be noted that reasonable, not actual notice is required. See: • *Thompson v LMS Railway* [1930] 1 KB 41.

What are reasonable are a question of fact depending on all the circumstances and the situation of the parties. The courts have repeatedly held that attention should be drawn to the existence of exclusion clauses by clear words on the front of any document delivered to the plaintiff, eg “ For conditions, see back”. It seems that the degree of notice required may increase according to the gravity or unusualness of the clause in question.

4. PREVIOUS DEALINGS

Even where there has been insufficient notice, an exclusion clause may nevertheless be incorporated where there has been a previous consistent course of dealing between the parties on the same terms. Contrast: • *McCutcheon v MacBrayne* [1964] 1 WLR 125.

As against a private consumer, a considerable number of past transactions may be required. See: • *Hollier v Rambler Motors* [1972] 2 AB 71.

Even if there is no course of dealing, an exclusion clause may still become part of the contract through trade usage or custom. See: • *British Crane Hire v Ipswich Plant Hire* [1974] QB 303.

5. PRIVITY OF CONTRACT

As a result of the doctrine of privity of contract, the courts held that a person who is not a party to the contract (a third party) was not protected by an exclusion clause in that contract, even if the clause purported to extend to him. Employees are regarded in this context as third parties. • *Scruttons v Midland Silicones* [1962] AC 446.

Now see the provisions in the Contracts (Rights of Third Parties) Act 1999 (Handout on Privity of Contract).

6. COLLATERAL CONTRACTS

Even where an exclusion clause has been incorporated into a contract, it may not have been incorporated in a collateral contract. See: • *Andrews v Hopkinson* [1957] 1 QB 229.

7. THE BATTLE OF THE FORMS

A problem arises if one party sends a form saying that the contract is made on those terms but the second party accepts by sending a form with their own terms on and stating that the contract is on the second party's terms. The “rule of thumb” here is that the contract will be made on the last set of terms sent.

B. INTERPRETATION

Once it is established that an exclusion clause is incorporated, the whole contract will be construed (ie, interpreted) to see whether the clause covers the breach that has occurred. The basic approach is that liability can only be excluded by clear words. The main rules of construction are as follows:

1. CONTRA PROFERENTEM

If there is any ambiguity or uncertainty as to the meaning of exclusion clause the court will construe it contra proferentem, ie against the party who inserted it in the contract. See: • *Baldry v Marshall* [1925] 1 KB 260

- Houghton v Trafalgar Insurance Co (1954).

Very clear words are needed in a contract to exclude liability for negligence.

See: • White v John Warwick [1953] 1 WLR 1285.

2. THE MAIN PURPOSE RULE

Under this rule, a court can strike out an exemption clause which is inconsistent with or repugnant to the main purpose of the contract. See: •

Glynn v Margetson [1893] AC 351

- Evans Ltd v Andrea Merzario Ltd [1976] 1 WLR 1078.

3. THE DOCTRINE OF FUNDAMENTAL BREACH

• Prior to 1964, the common law considered that a fundamental breach could not be excluded or restricted in any circumstances as this would amount to giving with one hand and taking with the other. This became elevated to a rule of law.

• However, the rule of law approach was rejected in UGS Finance v National Mortgage Bank of Greece [1964] 1 Lloyd's Rep 446, on the basis that it conflicted with freedom of contract and the intention of the parties. The question of whether a clause could exclude liability for a fundamental breach was held to be a question of construction.

• The UGS case was unanimously approved by the House of Lords in the Suisse Atlantique case [1967] 1 AC 361, and Photo Production Ltd v Securicor Transport [1980] AC 827.

C. THE UNFAIR CONTRACT TERMS ACT 1977

The basic purpose of UCTA 1977 is to restrict the extent to which liability in a contract can be excluded for breach of contract and negligence, largely by reference to a reasonableness requirement, but in some cases by a specific prohibition.

1. THE SCOPE OF UCTA 1977

The Act does not apply to insurance contracts; the sale of land; contracts relating to companies; the sale of shares; and the carriage of goods by sea (Schedule 1); or to international supply contracts (s26). Business Liability and Dealing as a Consumer

Most of the provisions of the Act apply only to what is termed “ business liability”. This is defined by s1(3) as liability arising from things done by a person in the course of a business or from the occupation of business premises. The exceptions are ss6 and 7 where the Act also applies to private contracts. The Act gives the greatest protection to consumers. Under s12(1) a person “ deals as a consumer” if he does not contract in the course of a business while the other party does contract in the course of a business; and if it is a contract for the supply of goods, they are of a type ordinarily supplied for private use or consumption. But see: • Peter Symmons & Co v Cook [1981] 131 NLJ 758

- R & B Customs Brokers v United Dominions Trust Ltd [1988] 1 WLR 321.

2. THE MAIN PROVISIONS

s2, Exemption of Liability for Negligence

- Under s2(1) no one acting in the course of a business can exclude or

restrict his liability in negligence for death or personal injury by means of a term in a contract or by way of notice. • Under s2(2) liability for negligence for any other kind of loss or damage can be excluded provided the term or notice satisfies the requirement of reasonableness. s3, Exemption of Liability for Breach of Contract

- Where one party deals as a consumer or on the other party's written standard terms of business, then the other party cannot exclude or restrict his liability for breach of contract, non-performance of the contract or different performance of the contract unless the exemption clause satisfies the requirement of reasonableness. s4, Unreasonable Indemnity Clauses

- Indemnity clauses in contracts where one of the parties deals as a consumer are unenforceable unless they are reasonable. s5, Guarantees of Consumer Goods

- A manufacturer or distributor cannot exclude or restrict his liability in negligence for loss arising from defects in goods ordinarily supplied for private use or consumption by means of a term or notice contained in a guarantee. s6, Exemption of Implied Terms in Contracts of Sale and Hire-Purchase • In contracts for the sale of goods and HP, the implied terms as to title cannot be excluded or restricted by a contract term: s6(1). • The implied terms as to correspondence with description or sample, fitness for purpose and satisfactory quality cannot be excluded or restricted by any contract term against a person dealing as a consumer: s6(2).

- Where the person is not dealing as a consumer, such liability can only be excluded or restricted in so far as the term is reasonable: s6(3). s7,

Exemption of Implied Terms in other Contracts for the Supply of Goods •

Exclusion clauses relating to title in contracts of hire are subject to the reasonableness test. • The implied terms as to correspondence with description or sample, fitness for purpose and satisfactory quality cannot be excluded or restricted at all in consumer contracts. • Where the person is not dealing as a consumer the exemption is subject to the requirement of reasonableness. s8, Exemption of Liability for Misrepresentation

- Any clause which excludes or restricts liability for misrepresentation is ineffective unless it satisfies the requirement of reasonableness. s10,

Exclusion Clauses in Secondary Contracts

- Section 10 contains an anti-avoidance provision which prevents the rights preserved under one contract from being removed by a secondary contract.

3. THE REQUIREMENT OF REASONABLENESS

Under s11(1) the requirement of reasonableness is that “ 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, in determining whether the clause is a reasonable one for the purposes of ss6 and 7, regard shall be had to the Guidelines set out in Schedule 2 of the Act, which are as follows: • (1) The bargaining strengths of the parties relative to each other and the availability of alternative supplies.

- (2) Whether the customer received an inducement to agree to the term.

(The supplier may have offered the customer a choice: a lower price but subject to an exemption clause or a higher price without the exemption.)

- (3) Whether the customer knew or ought reasonably to have known of the existence and extent of the term.
- (4) 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 would be practicable.
- (5) Whether the goods were manufactured, processed or adapted to the special order of the customer.

Under s11(3) in relation to a notice (not being a notice having contractual effect), the requirement of reasonableness is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.

This provision applies a test of reasonableness to disclaimers for tortious liability. Under s11(4) where the exclusion clause seeks to limit liability rather than exclude it completely, the court must have regard to two factors: the resources available to meet the liability, and the extent to which insurance cover was available to the party aiming to limit liability. Section 11(5) provides that it is up to the person who claims that a term or notice is reasonable to show that it is.

4. s13 CLAUSES

A party to a contract may try to disguise an exclusion clause, even though the effect of such a clause is to exclude liability. Section 13(1) tries to stop this and prevents:

- (a) making the liability or its enforcement subject to restrictive or onerous conditions;
- (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
- (c) excluding or

restricting rules of evidence or procedure. Such clauses are void or must be reasonable if they exclude or restrict liability respectively. Section s13, for example, will apply to terms: (a) imposing a time limit for making claims; (b) limiting a buyer's right to reject defective goods; and (c) stating that acceptance of goods shall be regarded as proof of their conformity with the contract.

D. UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1999

These Regulations revoke and replace the Unfair Terms in Consumer Contracts Regulations 1994 which implemented the Council Directive on unfair terms in consumer contracts. They came into force on 1st October 1999. They re-enact Reg. 2 to Reg. 7 of those Regulations with modifications to reflect more closely the wording of the Directive. The Regulations apply, with certain exceptions, to unfair terms in contracts concluded between a consumer and a seller or supplier and provide that an unfair term is one which has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. An unfair term shall not be binding on the consumer. Schedule 2 contains an indicative list of terms which may be regarded as unfair. Provision in a contract under which one party's liability (that would arise by implication of law) is excused in the listed conditions, circumstances, or situations (called exclusions). See also exculpatory clause, exemption clause, and indemnity clause.

L'Estrange v Graucob [1934] 2 KB 394

The plaintiff bought a cigarette machine for her cafe from the defendant and signed a sales agreement, in very small print, without reading it. The agreement provided that “ any express or implied condition, statement or warranty... is hereby excluded”. The machine failed to work properly. In an action for breach of warranty the defendants were held to be protected by the clause. Scrutton LJ said: “ When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.” *Curtis v Chemical Cleaning Co* [1951]

1 KB 805

The plaintiff took a wedding dress to be cleaned by the defendants. She signed a piece of paper headed ‘ Receipt’ after being told by the assistant that it exempted the cleaners from liability for damage to beads and sequins. The receipt in fact contained a clause excluding liability “ for any damage howsoever arising”. When the dress was returned it was badly stained. It was held that the cleaners could not escape liability for damage to the material of the dress by relying on the exemption clause because its scope had been misrepresented by the defendant’s assistant. *Parker v South Eastern Railway* (1877)

2 CPD 416

The plaintiff deposited a bag in a cloak-room at the defendants’ railway station. He received a paper ticket which read ‘ See back’. On the other side were printed several clauses including “ The company will not be responsible

for any package exceeding the value of £10.” The plaintiff presented his ticket on the same day, but his bag could not be found. He claimed £24 10s. as the value of his bag, and the company pleaded the limitation clause in defence. In the Court of Appeal, Mellish LJ gave the following opinion: • If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; • If he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; • If he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was reasonable notice that the writing contained conditions.

Chappleton v Barry UDC [1940] 1 KB 531

Deck chairs were stacked by a notice asking the public who wished to use the deck chairs to get tickets and retain them for inspection. The plaintiff paid for two tickets for chairs, but did not read them. On the back of the ticket were printed words purporting to exempt the council from liability. The plaintiff was injured when a deck chair collapsed. The clause was held to be ineffective. The ticket was a mere receipt; its object was that the hirer might produce it to prove that he had paid and to show him how long he might use the chair. Slessor LJ pointed out that a person might sit in one of these chairs for an hour or two before an attendant came round to take his money and give him a receipt. Olley v Marlborough Court [1949] 1 KB 532

The plaintiff booked in for a week's stay at the defendants' hotel. A stranger gained access to her room and stole her mink coat. There was a notice on the back of the bedroom door which stated that "the proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody." The Court of Appeal held that the notice was not incorporated in the contract between the proprietors and the guest. The contract was made in the hall of the hotel before the plaintiff entered her bedroom and before she had an opportunity to see the notice. *Thompson v LMS Railway* [1930] 1 KB 41

The plaintiff who could not read gave her niece the money to buy an excursion ticket. On the face of the ticket was printed "Excursion, For Conditions see back"; and on the back, "Issued subject to the conditions and regulations in the company's time-tables and notices and excursion and other bills." The conditions provided that excursion ticket holders should have no right of action against the company in respect of any injury, however caused. The plaintiff stepped out of a train before it reached the platform and was injured. The trial judge left to the jury the question whether the defendants had taken reasonable steps to bring the conditions to the notice of the plaintiff.

The jury found that they had not but the judge, nevertheless, entered judgment for the defendants. The Court of Appeal held that the judge was right. The Court thought that the verdict of the jury was probably based on the fact that the passenger had to make a considerable search to find the conditions; but that was no answer. Lord Hanworth MR said that anyone who took the ticket was conscious that there were some conditions and it was

obvious that the company did not provide for the price of an excursion ticket what it provided for the usual fare. Having regard to the condition of education in this country, it was irrelevant that the plaintiff could not read.

McCutcheon v MacBrayne [1964]

1 WLR 125

Exclusion clauses were contained in 27 paragraphs of small print contained inside and outside a ferry booking office and in a 'risk note' which passengers sometimes signed. The exclusion clauses were held not to be incorporated. There was no course of conduct because there was no consistency of dealing. Hollier v Rambler Motors [1972]

2 AB 71

The plaintiff had used the defendant garage three or four times over five years and on some occasions had signed a contract, which excluded the defendants from liability for damage by fire. On this occasion nothing was signed and the plaintiff's car was badly damaged in a fire. It was held that there was not a regular course of dealing, therefore the defendants were liable. The court referred to Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association (1969) in which more than 100 notices had been given over a period of three years, which did amount to a course of dealing.

British Crane Hire v Ipswich Plant Hire [1974] QB 303

Both parties were companies engaged in hiring out earth-moving equipment. The plaintiffs supplied a crane to the defendants on the basis of a telephone

contract made quickly, without mentioning conditions of hire. The plaintiffs later sent a copy of their conditions but before the defendants could sign them, the crane sank in marshy ground. The conditions, which were similar to those used by all firms in the business, said that the hirer should indemnify the owner for all expenses in connection with use. The court held that the terms would be incorporated into the contract, not by a course of dealing, but because there was a common understanding between the parties, who were in the same line of business, that any contract would be on these standard terms. The defendants were liable for the expense involved in recovering the crane.

Scruttons Ltd v Midland Silicones [1962] AC 446

A shipping company (the carrier) agreed to ship a drum of chemicals belonging to the plaintiffs. The contract of carriage limited the liability of the carrier for damage to £179 per package. The drum was damaged by the negligence of the defendants, a firm of stevedores, who had been engaged by the carriers to unload the ship. The plaintiffs sued the defendants in tort for the full extent of the damage, which amounted to £593. The defendants claimed the protection of the limitation clause. The House of Lords held in favour of the plaintiffs. The defendants were not parties to the contract of carriage and so they could not take advantage of the limitation clause.

Andrews v Hopkinson [1957] 1 QB 229

The plaintiff saw a car in the defendant's garage, which the defendant described as follows: " It's a good little bus. I would stake my life on it". The plaintiff agreed to take it on hire-purchase and the defendant sold it to a

finance company who made a h-p agreement with the plaintiff. When the car was delivered the plaintiff signed a note saying he was satisfied about its condition. Shortly afterwards, due to a defect in the steering, the car crashed. The plaintiff was stopped from suing the finance company because of the delivery note but he sued the defendant. It was held that there was a collateral contract with the defendant who promised the car was in good condition and in return the plaintiff promised to make the h-p agreement. Therefore the defendant was liable.

Baldry v Marshall [1925] 1 KB 260

The plaintiff asked the defendants, who were motor dealers, to supply a car that would be suitable for touring purposes. The defendants recommended a Bugatti, which the plaintiff bought. The written contract excluded the defendant's liability for any "guarantee or warranty, statutory or otherwise". The car turned out to be unsuitable for the plaintiff's purposes, so he rejected it and sued to recover what he had paid. The Court of Appeal held that the requirement that the car be suitable for touring was a condition. Since the clause did not exclude liability for breach of a condition, the plaintiff was not bound by it.

White v John Warwick [1953] 1 WLR 1285

The plaintiff hired a tradesman's cycle from the defendants. The written agreement stated that "Nothing in this agreement shall render the owners liable for any personal injury". While the plaintiff was riding the cycle, the saddle tilted forward and he was injured. The defendants might have been liable in tort (for negligence) as well as in contract. The Court of Appeal held

that the ambiguous wording out of the exclusion clause would effectively protect the defendants from their strict contractual liability, but it would not exempt them from liability in negligence. *Glynn v Margetson* [1893] AC 351

Carriers agreed to take oranges from Malaga to Liverpool under a contract which allowed the ship to call at any port in Europe or Africa. The ship sailed 350 miles east from Malaga to pick up another cargo. When it arrived in Liverpool the oranges had gone bad. The defendants attempted to rely on an exclusion clause. The House of Lords held that the main purpose was to deliver a perishable cargo of oranges to Liverpool and in the light of this the wide words of the clause could be ignored and the ship could only call at ports en route. Therefore the carriers were liable. *Evans v Andrea Merzario* [1976] 1 WLR 1078

The plaintiffs had imported machines from Italy for many years and for this purpose they used the services of the defendants, who were forwarding agents. The plaintiffs were orally promised by the defendants that their goods would continue to be stowed below deck. On one occasion, the plaintiff's container was stored on deck and it was lost when it slid overboard. The Court of Appeal held that the defendants could not rely on an exemption clause contained in the standard conditions of the forwarding trade, on which the parties had contracted, because it was repugnant to the oral promise that had been given. The oral assurance that goods would be carried inside the ship was part of the contract and was held to override the written exclusion clause.

THE UNFAIR CONTRACT TERMS ACT 1977

Peter Symmons & Co v Cook (1981) 131 NLJ 758

The plaintiff firm of surveyors bought a second-hand Rolls Royce from the defendants which developed serious defects after 2, 000. It was held that the firm was acting as a consumer and that to buy in the course of a business ‘ the buying of cars must form at the very least an integral part of the buyer’s business or a necessary incidental thereto’. It was emphasised that only in those circumstances could the buyer be said to be on equal footing with his seller in terms of bargaining strength.

R & B Customs Brokers v United Dominion Trusts Ltd [1988] 1 WLR 321

The plaintiff company, which was a shipping agency, bought a car for a director to be used in business and private use. It had bought cars once or twice before. The sale was arranged by the defendant finance company. The contract excluded the implied conditions about merchantable quality. The car leaked badly. It was held by the Court of Appeal that where a transaction was only incidental to a business activity, a degree of regularity was required before a transaction could be said to be an integral part of the business carried on and so entered into in the course of that business. Since here the car was only the second or third vehicle acquired by the plaintiffs, there was not a sufficient degree of regularity capable of establishing that the contract was anything more than part of a consumer transaction. Therefore, this was a consumer sale and the implied conditions could not be excluded.

Phillips Products v Hyland [1987] 1 WLR 659

The plaintiff hired an excavator from the second defendants on the latter's standard terms which provided that the driver should be regarded as employed by the plaintiff, the plaintiff thereby remaining liable for any loss arising from the machine's use. The driver negligently damaged the plaintiff's factory whilst carrying out work at the plaintiff's request. It was held that several factors meant that the clause failed to pass the reasonableness test: (1) the plaintiff did not regularly hire machinery of this sort whereas the defendants were in the business of equipment hire. (2) the clause was not the product of any negotiation between the parties: rather it was simply one of the defendant's 43 standard conditions. (3) the hire period was very short and the plaintiff had no opportunity to arrange insurance cover. (4) the plaintiff played no part in the selection of the driver and had no control over the way in which he performed his job. Reasonable Clause

The term reasonable is a generic and relative one and applies to that which is appropriate for a particular situation. In the law of Negligence, the reasonable person standard is the standard of care that a reasonably prudent person would observe under a given set of circumstances. An individual who subscribes to such standards can avoid liability for negligence. Similarly a reasonable act is that which might fairly and properly be required of an individual.

A reasonable Clause is a section, phrase, paragraph, or segment of a legal document that is in law, just, rational, appropriate, ordinary or usual in the circumstances

Contra proferentem is a doctrine of contractual interpretation which provides that an ambiguous term will be construed against the party that imposed its inclusion in the contract – or, more accurately, against the interests of the party who imposed it. The interpretation will therefore favour the party that did not insist on its inclusion. The rule applies only if, and to the extent that, the clause was included at the unilateral insistence of one party without having been subject to negotiation by the counter-party. Additionally, the rule applies only if a court determines the term to be ambiguous, which often forms the substance of a contractual dispute, and such ambiguity is “latent” (i. e., not so glaring, or “patent”, as to put the other party on clear notice of a problem with the wording or interpretation).

It translates from the Latin literally to mean “against (contra) the one bringing forth (the proferens).”

The reasoning behind this rule is to encourage the drafter of a contract to be as clear and explicit as possible and to take into account as many foreseeable situations as it can.

Additionally, the rule reflects the court’s inherent dislike of standard-form take-it-or-leave-it contracts also known as contracts of adhesion (e. g., standard form insurance contracts for individual consumers, residential leases, etc.). The court perceives such contracts to be the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, legal systems apply the doctrine of contra proferentem; giving the benefit of any doubt in favor of the party upon whom the contract was foisted. Some courts when seeking a particular result will

use contra proferentem to take a strict approach against insurers and other powerful contracting parties and go so far as to interpret terms of the contract in favor of the other party, even where the meaning of a term would appear clear and unambiguous on its face, although this application is disfavored.

Contra proferentem also places the cost of losses on the party who was in the best position to avoid the harm. This is generally the person who drafted the contract. An example of this is the insurance contract mentioned above, which is a good example of an adhesion contract. There, the insurance company is the party completely in control of the terms of the contract and is generally in a better position to, for example, avoid contractual forfeiture. This is a longstanding principle: see, for example, California Civil Code §1654 (“ In cases of uncertainty ... the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist”), which was enacted in 1872. Numerous other states have codified the rule as well.

“ Contra Proferentem” is a rule courts use when interpreting contracts. In plain English it means that if there is an ambiguous clause in a contract it will be interpreted against the party responsible for drafting the clause. In an interesting use of this rule reasons for judgement were released today by the BC Supreme Court, Victoria Registry, applying this rule to a Court order. Today’s case (Horne Coupar v. Velletta & Company) involved a dispute between two Victoria law firms. A lawyer left the first firm (Velletta & Company) and joined the second (Horne Coupar). A few months prior to leaving the first firm the lawyer renegotiated compensation terms with her

employer from a salaried position to one which entitled her to a percentage of her “collected professional fees” on the files that she worked on.

Upon joining the second firm “a dispute arose as to what files and clients (the lawyer) would take with her and how (the first firm) would be reimbursed for loss of those files”. Ultimately a Court motion was brought and the parties entered into a consent order with the direction that “(the second firm is) to pay over professional fees to (the first firm), on a proportionate basis for those hours which had accrued while the matter was under (the first firm’s) conduct”. This consent order was prepared by the lawyer who left the first firm and joined the second. The lawyer then “deducted 50% from the payments made by (the second firm) to (the first firm)” as money owing to her under the percentage clause she negotiated prior to parting company with the first firm. The first firm disputed the propriety of this deduction arguing that the Court order that was agreed to left no such option. Mr. Justice Romilly agreed with the first firm and ordered that money be paid to the first firm without this deduction. In coming to this decision the Court used the *Contra Proferentem* doctrine.

Specifically the Court reasoned as follows: [10] *Contra proferentem* is a rule of contractual interpretation which provides that an ambiguous term will be construed against the party responsible for its inclusion in the contract. This interpretation will therefore favour the party who did not draft the term presumably because that party is not responsible for the ambiguity therein and should not be made to suffer for it. This rule endeavours to encourage the drafter to be as clear as possible when crafting an agreement upon which the parties will rely. This rule also encourages a party drafting a

contract to turn their mind to foreseeable contingencies as failure to do so will result in terms being construed against them.

That there is ambiguity in the contract is a requisite of the application of this rule, however, once ambiguity is established; the rule is fairly straightforward in application. [11] In my view the contra proferentem rule clearly applies in this case. It was Ms. Newman who prepared the consent order signed by herself and Velletta. As quoted above, that consent order directs inter alia: ...Horne Coupar to pay over professional fees to Velletta & Company, on a proportionate basis for those hours which had accrued while the matter was under Velletta & Company's conduct... [12] This provision provides only for payment, not for deduction of " fees" to which Ms. Newman feels she is entitled (and has since deducted).

Ms. Newman's failure to include a provision or stipulation for deduction of her own fees has resulted in an ambiguity which is to be construed against her by application of the rule of contra proferentem. Therefore, the clear interpretation of this provision (as against the drafter) is that fees are not deductible. Horne Coupar is bound by the consent order to pay the professional fees to Velletta in accordance with this order and without deduction for work done by Ms. Newman.