

Exclusion clause



A. Introduction Joe (“ J”) is attempting to sue Dazzle Dry Cleaners (“ D”) for compensation for the loss occurred due carelessness of D. D will defend itself likely by proving exclusion clause as a part of the terms of its contract with J. In order to advise J it necessary to determine whether the clause has a contractual effect. Secondly it is necessary to determine the terms of the contract and analyse if creation of such clause protects the party relying on it from the consequence of breach. Finally if it’s rendered ineffective by any statute which make D liable for damage, should be discussed.

Contractual Effects of the Contract In this case main question that arises is whether the exclusion clause is part of terms of contract. Exemption clause can be part of the contract if the plaintiff “ J” signs a document having contractual effect with an exclusion clause in it, it will automatically become the part of the contract . Though this is not case here as there is no formal written contract between “ J” and “ D”. Exclusion clause may also be contained in and unsigned documents such as a ticket or a notice. Even here “ J” gets a ticket from “ D” for the cloths given for dry cleaning and receives a ticket.

But exclusion clause will only exist if that ticket is such that a reasonable person would assume to contain contractual terms and not mere a receipt . Reasonable notice of the clause must given . Exclusion clause should also be put to the notice of the other party before or at the time of getting in the contract . Question arising out of above arguments is whether: a) Ticket is an unsigned document assumed to contain contractual terms of a contract. OR b) Has “ D” done enough to put the clause in reasonable notice of “ J” and was the clause known to “ J” while getting into the contract.

Similar incident happened in the in the case of Thornton v Shoe Lane Parking Ltd . The case stress on the point taking reasonable steps to put the clause in notice and also succeeded because of no frequent course of dealing.

However there were previous four previous dealings between J and D, but it is important to recognise if number of dealing are sufficient enough for exclusion clause to be a part of a contract . Even if D proves exclusion clause part of the contract does not save it from claiming of damages.

In order to defend itself D has to prove the damage caused by negligence of the staff members in handling the shirt and losing to a customer who claims to have lost his ticket is a part of exclusion clause. Therefore there is a need of proper interpretation of exclusion clause by examining its language . The clause here mentions the words “ any loss or damage” and “ regardless of how that loss caused” may protects D from any claims, but the meaning of the words used is too vast and does not specify nature of the damage and loss thus clause is construed Contra proferentem .

Whereas, following White v John Warwick , ambiguous wording out of exclusion clause would effectively protect D from their strict contractual liability towards J, but it would not exempt them from liability in negligence. Liability of negligence can only be excluded if clearly expressed . Thus the facts show there was negligence by the staff of D leading to loss cause to J. There is a stress on exclusion clause as a part of contract which might be a deciding factor in this case.

Also it is a business contract so it is assumed to create a legal relation between parties (J and D). Protection against the Breach In order to

determine the terms of the contract it is important to analyse if making exclusion clause saves D against the claims for damage. The argument that D can rely upon is that it took reasonable steps in order to draw a condition to the notice of J and the damage caused comes within the scope of the clause. However to further determine the scope clause it is necessary to closely examine the wording of the terms.

The clause states that D takes “ exceptional care” of your clothing but will not be liable for any loss or damage to clothing left for cleaning “ regardless” of how the loss or damage may be caused. Facts deal with loss and damage of J’s cloths by D’s staff. Statement mentioned in the clause is not clear and absurd so does not clear the extent of loss. Thus one assumes that the loss occurred was due to the negligence and not while cleaning of the cloths. As a result the exclusion clause seems to be ineffective to shield D from liability. J can run a strong case by saying D did not take exceptional care of the clothing.

D is misrepresenting its functions and ignorance is no defence against the effect of exclusion clause . In case above facts are used against D it can only save itself under the rule of “ non est factum” and must demonstrate that D took every trouble to understand the term of the contract in handling of cloths but failed to do so owing radical incapacity . Statue Rendered Ineffective Exclusion clause can only be effective if it does not attempt to negate the effect of the statute. The Unfair Contract Terms Acts 1977 restricts the extent to which liability in the contract can be excluded.

Facts in this case shows the negligence of D does under the s2(2) liability for negligence for loss and damage can be excluded provided the terms or the notice satisfies the requirement of the reasonableness. Similarly under s3 and s4 D cannot exclude his liability of Breach of contract and Indemnity Clause unless the exclusion clause satisfies the requirement of reasonableness. D can also be liable for misrepresentation of its functions under s8 unless it satisfies the requirement of reasonableness. The key words use in all the above sections is the “ requirement of reasonableness”.

Thus it is very important to understand the meaning of reasonableness in order to analyse the extent of exclusion clause. The requirement of the reasonableness is explain in the s11 of the Act. In s11(1) the clause should be fair and know to J while getting in to the contract with D which is not the case as it never came to the notice of J. Under s11(2) there are guidelines which determines the reasonability of exclusion clause according to which J receives and inducement to agree to the terms of the contract or ought to know the extent of the clause.

Section 11(3) of the act deals with the reasonability of the notice, it should fair and reasonable enough to allow reliance on it. Provision applies on the test of reasonability to disclaimer for tortuous liability (Smith v Eric Bush). Whereas s11(5) provides that it is up to the person who claims that a term or notice is reasonable to show that it is. At the time of contracting with D for the cleaning the cloths exclusion clause was never brought in notice of J. Thus exclusion clause cannot possibly be treated as a part of the contract and unlikely to succeed.

Finally seeing all the facts of the case it's likely for J to succeed in getting the claims from D. However if D is able to prove that all efforts was made to put clause in notice of J then exclusion clause may become protection provided the judge is convinced with the argument. Usually in these types of cases judges try to protect the interest of the consumer and get them claim for their damages. B. But if at the time of leaving his cleaning J noticed the sign and asked for the meaning and scope of the clause and was told by assistant that exclusion clauses aim in avoiding D's liability for damage cause by fire and flood.

In this case the meaning told to J becomes the part of contract that is any loss of J's cloths from fire in the shop or flood D is not liable to pay for damages. However damage cause here is by the negligence of the D's staff which does not forms part of the contract. Thus there was misrepresentation of functions by D. Facts of this case is similar to Curtis v Chemical Cleaning and Dyeing Co Ltd (1951) which demonstrate that although ignorance of an exclusion clause will not normally prevent an injured party being bound by its terms, misrepresentation might.

D on the other hand can argue that misrepresentation was innocent and was made through negligence of the staff member at the time J asked the meaning of the clause and not with the intention to deceive or fraudulent misrepresentation. Though the remedy available could only be effective if it satisfy the requirement of reasonableness . As exclusion clause came to the notice of J and was accepted at the time of getting into the contract.

Thus exclusion clause becomes the part of the contract but only for the loss occurred due to fire or flood and not by the way the loss actually occurred in the case and will be liable for compensation by D (Curtis v Chemical Cleaning and Dyeing) . Bibliography •Terry and Giugni, Business and Law, 4th ed. , 2008, Para 12. 18, page 315. •<http://www.lawhandbook.sa.gov.au/ch08s02s07.php> •<http://www.lawteacher.net/Exclusion%20Clauses%20Lecture.php> •<http://www.lawteacher.net/Exclusion%20Clauses%20Cases.php> •http://www.kevinboone.com/lawglos_ExclusionClause.html •Cases and Acts mentioned in footnotes.