

Practice questions for Chapter 9 – Exclusion clauses and unfair terms

Essay question

'The Consumer Rights Act 2015 was a much-needed piece of legislation, and has dramatically improved the protection afforded to consumers in relation to unfair terms.'

Do you agree with this quote? Provide reasons for your answers.

Introduction

- This essay involves a discussion of the reforms relating to unfair terms that were introduced by the Consumer Rights Act 2015 (CRA 2015). In order to answer this question, you will need to discuss the pre-CRA 2015 law and then look at the changed introduced by the 2015 Act.

Comparing the 1977 Act and the 1999 Regulations

- Start off by looking at the regulation of unfair terms prior to the CRA 2015. This will involve a discussion of the scope of the Unfair Contract Terms Act 1977 (UCTA 1977) and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999)>
- The first thing to point out is that the two pieces of legislation were not mutually exclusive and it was common for a claimant to have a claim under both pieces of legislation. However, there were notable differences between the two. In some respects, the Act was wider in scope, but in other respects it was narrower. The tests employed under the two pieces of legislation were different meaning that a term could comply fully with the Act, but breach the Regulations and vice versa.
- Notable differences between the Act and the Regulations included:
 1. The Act only applied to exclusion/limitation clauses and indemnity clauses, whereas the Regulations were not limited in this way and could apply to almost any type of term.
 2. The Act could apply to non-contractual notices, whereas the Regulations only applied to contractual terms.
 3. The Regulations could apply to contracts that the Act did not apply to (e.g. contracts of insurance).
 4. The Act offered protection to natural persons and legal persons, whereas the Regulations only offered protection to natural persons.
 5. The Regulations only applied where the terms were not individually negotiated, whereas the Act could apply to individually negotiated terms.
 6. The Regulations do not apply to terms relating to the contract price (providing that they are expressed in clear language), whereas the Act could apply to such terms.
 7. Under the Act, the burden of proof was placed on the proferens to establish that the clause was reasonable. Conversely, under the Regulations, the burden of proof was placed on the consumer to show that the term was unfair.
 8. The Act rendered unenforceable terms that were unreasonable, whereas the Regulations rendered unenforceable terms that were unfair. The tests of

reasonableness and fairness were different, so a term could satisfy one test, but fail the other.

9. Under the Act, certain types of term were automatically rendered unenforceable (e.g. terms that exclude liability for death or personal injury caused by negligence), whereas the Regulations did not automatically prohibit terms, but indicated that certain types of terms *may* be unfair.

Unifying the Act and the Regulations

- Accordingly, it can be seen that substantial differences existed between the two pieces of legislation, but the overlap between them meant that the law was overly complex and unclear. The Law Commission argued that this can result in uncertainty and confusion for several reasons:
 1. The statutory controls are split between two pieces of legislation and interested persons will need to consult both pieces of legislation
 2. The Act and the Regulations contain overlapping and inconsistent provisions
 3. The scope of the Act differs from the scope of the Regulations
 4. The Act uses different language and terminology when compared to the Regulations
 5. The Act is drafted in a much more technical and dense manner than the Regulations.¹
- It is therefore unsurprising that there have been calls to unify the two regimes and have a single piece of legislation regulating unfair terms. The question is as to the content of such a piece of legislation. Where differences exist between the Act and the Regulations, which should be favoured? The Law Commission took the sensible approach of not favouring either the Act or the Regulations, but instead aimed to unify the two pieces of legislation without significantly reducing the level of consumer protection.
- For example, the Act provides that certain terms are of no effect, whereas the Regulations do not automatically invalidate certain terms, but instead provides that certain terms may be unfair. The Law Commission's Draft Unfair Contract Terms Bill adopts both of these approaches by providing a list of terms that will have no effect, with a list of other terms being branded as potentially unfair.
- In other areas, however, the Act and the Regulations conflict to such an extent that compromise cannot be achieved. For example, under the Act, a legal person could amount to a consumer, whereas under the Regulations, only natural persons could be classified as consumers. Whether a business can be classified as a consumer has proved to be a controversial issue with many persons believing that the definition of consumer should be uniform. Accordingly, under the Law Commission's draft Bill, only natural persons could be classified as consumers.

The Consumer Rights Act 2015

- The Law Commission's proposals were not acted upon and instead the government decided to repeal the UTCCR 1999 and replace them with the CRA 2015. The UCTA 1977 was heavily amended to better clarify the scope of each piece of legislation.

¹ Law Commission, *Unfair Terms in Contracts* (Law Com No 292, Cm 6464, HMSO, London, 2005) [2.4].

- The scope of the two pieces of legislation has been improved, so that there is no overlap. The UCTA 1977 would be substantially amended so that it would only apply to business-to-business contracts and consumer-to-consumer contracts.
- Contracts between consumers and businesses would then be governed by the CRA 2015, the provisions of which are extremely similar to those of the UTCCR 1999. In fact, the only substantial amendment is the new requirement for transparency found in s 68 of the ct.

Conclusion

- There was certainly a need to clarify and simplify the law relating to unfair terms, and there is no doubt that the current legislative framework is more straightforward than the framework that existed prior to the CRA 2015. However, it could be argued that the unified framework recommended by the Law Commission would have been clearer still.
- Whilst the enactment of the CRA 2015 might have clarified the law, it has not, however, substantially improved it. The relevant provisions of the CRA 2015 are largely identical to those found in the UTCCR 1999.