EXCLUDING EXCLUSIONS IN CONTRACT LAW: JUDICIAL RELUCTANCE TO ENFORCE EXCLUSION CLAUSES

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The author undertakes an examination of exclusion clauses within contracts, and the judiciary's reluctance to enforce them with particular detail paid to the weapons available to the judiciary to side step or even strike them down altogether. The author submits that while certain procedural and substantive exclusion clauses are needed for the efficient and practical running of a business, the vast majority of substantive clauses seek to take advantage of the consumer.

In this essay I will use legal reasoning to critically analyse the judiciary's approach in assessing exclusion clauses. In particular I shall argue that the judiciary are justifiably reluctant to give effect to such clauses and, in doing so, I shall highlight the tools the judiciary use in denying effect of said clauses. Furthermore I will argue that substantive exclusion clauses applied by commercial interests against consumers are largely unjustifiable.

Exclusion clauses are terms included in a contract that exclude or limit, or purport to exclude or limit, a liability that would otherwise arise.[1] The judiciary has tended to identify two types of exclusion clauses: procedural and substantive. A procedural clause is one that regulates entitlement to damages. Examples of such clauses include notifying non-compliance within a time limit or the limiting of damages to a fixed sum.[2] A substantive clause is one where no liability is entertained.[3] Clark notes, however, that the judiciary seem to confuse the two.[4] In the case of *British Leyland Exports Ltd v Brittain Group Sales Ltd*[5] an exclusion clause in their contract stated that while they would endeavour to meet orders placed they would not be liable for any failure, delay, error in delivery or any consequential loss there from, however caused. O'Hanlon J held that this did not exclude the primary obligation to deliver complete and satisfactory kits, only the obligation to pay damages when defective kits were delivered. With respect, this would appear to be an exercise in semantics. Indeed Clark holds that this analysis ignores the purpose of the clause that the implied obligation was excluded.[6] Furthermore, it is submitted that the judiciary tend to construe a substantive clause as a procedural one in order to limit the scope of such clauses and deny the drafters of the ability to not honour their commitments with the other

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[1] J.C. Smith & J.A.C. Thomas, *A Casebook on Contract*, (London: Sweet and Maxwell 1992, 9th edition) p.444.
[2] R. Clark *Contract Law in Ireland* (Dublin: Round Hall Sweet & Maxwell 1998 4th edition) p.138.
[3] R.J. Friel *The Law of Contract*, (Dublin: The Round Hall Press 2000 2nd edition), p.197.
[4] *supra* fn 2.
[5] [1981] IR 335.
[6] *supra* fn 2.

party.[7] Indeed the judiciary would almost go so far as to acknowledge this as is discussed later under the "*contra-proferentem*" rule.[8]

I feel it is important to note at this point that while exclusion clauses would seem to have the potential to cheat a party to the contract out of what he has contracted for, some such clauses are nonetheless a necessary evil. Procedural exclusion clauses in contracts between businesses, such as those requiring notification of the defect within a reasonable time, serve to make identification of the problem and proving it easier, thus enabling timely resolution of the problem.[9]

They may also establish procedures for the making of claims and provide for the allocation of risk between the parties or may simply determine which of the parties is to insure against a particular risk.[10] Substantive exclusion clauses can also be essential. Let us take the example of a car park.[11] If the owner of a car park were not to limit his liability and refuse to cover the cost of damage to vehicles parked in his lot, the insurance costs for covering every vehicle therein would be so prohibitive that such a service would probably not be available. Also, staying with this example, such cars may already be so insured. The exclusion clause simply prevents duplication of insurance costs. The owner of the car park is able to stay in business and provide a useful service to the public while the owner of a damaged car is taken care of by his insurer. What of cases where the owner of the parked car does not have insurance? Shouldn't the exclusion clause be invalid in that case? No, it would seem unreasonable that he would gain the benefit of insurance that he himself was unwilling to pay for, especially when this benefit comes from the increased cost that other patrons of the car park would have to pay for the increased cover. Therefore it is submitted that moderate procedural clauses and those substantive clauses necessary to facilitate the availability of services both serve a social good.

Therefore exclusion clauses can potentially play a necessary role in contract law. Nevertheless the distinction should be drawn between necessary exclusion clauses (such as those mentioned above) and those unnecessary clauses that seek to take advantage of consumers. Such unnecessary clauses include:

(i) those that seek to allow the foisting of shoddy products/services upon consumers who have no avenue of relief whatsoever;
(ii) those that exclude liability simply to increase profits for the drafter and do not lead to any lower costs for the consumer;

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[7] For the purposes of simplicity, it will be assumed that the person who relies on the exclusion clause is the person who drafted it unless otherwise stated.
[8] Discussed below at 32.
[9] *supra* fn 3 at p197.
[10] J. Beatson *Anson's Law of Contract* (Oxford: Oxford University Press 2000 28th edition) p.169.
[11] The arguments that follow this example have their origins in the case of *Hollins v Davy* [1963] 1 QB 844.

(iii) those that use the imbalance of power between the drafter and the consumer to leave the latter no alternative but to accept.

An example of a contract involving a category (iii) exclusion clause is where a customer attempts to contract with a monopoly such as the ESB. Any exclusion clause in the service provider's contract is not freely negotiable; the only 'choice' is to accept the contract as a whole or go without. This of course is not a real choice because electricity is undoubtedly a necessity in the modern world. Furthermore it breaches classical contract theory as there exists no equality of bargaining power. However in the particular preceding example the ESB's redeeming quality of providing a social necessity would save any exclusion clause in its contracts that is necessary for its continued existence, though no such justification would exist for monopolies involving non-necessities. It is submitted that such substantive exclusion clauses mentioned above are largely unjustifiable and that the judiciary are right to be suspicious of them and interpret them stringently for the benefit of the weaker party.

The judiciary's use of "incorporation" reflects their inclination to introduce a greater element of fairness with regard to exclusion clauses. Under this rule an exclusion clause must be incorporated into a contract before this clause will be valid. Treitel notes that incorporation may occur by way of "signature, notice or course of dealing."[12] In the case of *L'Estrange v Graucob*,[13] the plaintiff bought an automatic cigarette vending machine. She signed the contract without reading it. It contained an exclusion clause disallowing her to sue for any money on defects of the machine. This clause was upheld upon failure of the machine to work. Scrutten LJ held that it was immaterial that she had not read the contract once she had signed it providing no fraud or misrepresentation had taken place. Chapman voices some concerns about this based on the disparity between the parties actual subjective understanding of her rights and the objective written terms of a contract.[14] Indeed Collins thinks that the law pays too much attention to external indicators rather than the parties' states of mind.[15] The case is interesting as the court did uphold the exclusion clause, even though the person did not know of its existence.

Nevertheless, it could be argued that the approach in the case is correctly decided on its facts. A person is bound by terms of which she is unaware when the document she signs is one which can reasonably be expected to contain contractual terms. This author would tend to share this view to a certain extent because otherwise a person could avoid a contractual term simply by not reading the contract. However the fact that the contractual term in question was a substantive exclusion clause leads this author to believe that the clause should not have been incorporated. As Hedley correctly

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[12] G.H. Treitel *The Law of Contract* (London: Sweet & Maxwell 1999 10th edition) p.197.
[13] [1934] 2 KB 394.
[14] M. Chapman (1998) "Common Law Contract and Consen: Signature and Objectivity" 1998 49 Northern Ireland Legal Quarterly p.363.
[15] H. Collins *The Law of Contract* (London: Butterworths 1997 3rd edition) p.132.

states, it is a good principle to hold people to their promises but this should not be taken too far. It should not be an excuse for insufficient attention to other moral principles.[16] More recent case law alluded to later in this essay would suggest that the same conclusion would not be reached in Ireland were the case to be tried today. The plaintiff's attention would have to be drawn to the clause (though she would not necessarily have to read it) before it would be operative.[17]

Short of incorporation by signature, Friel points out that specifically bringing the clause to the attention of the other person will suffice.[18] In the case of *Thornton v Shoe Lane Parking*[19] the clause was not incorporated where the entry ticket to the car park had printed on it that the plaintiff had entered into a contract on the terms and conditions displayed, since the displayed terms could not be read until after the plaintiff had entered the car park. They simply did not give fair notice to the other contracting party. The policy behind the judgement is that any such clauses should be placed clearly on public display at a location which affords a reasonable opportunity to resile from the contract.

In *Parker v South Eastern Railway Co*[20] the Court of Appeal held that the party proffering printed terms had a duty to bring them to the attention of the customer before he would be so bound. Upon this it would then be the duty of the customer to inform himself of the particular terms. Such guidelines are the source of much debate and it shall be argued below that they are fundamentally flawed. In the case of *Early v Great Southern Railway*[21] the ticket provided did refer to the existence of terms and conditions of the contract however these terms and conditions could only be inspected at the head office of the railway company. However the guidelines were satisfied. The customer's attention was drawn to the terms and it was up to him to inform himself. The clause was thus incorporated. It is submitted that this result borders on the preposterous. I will demonstrate this by example. Let us assume a person wishes to catch a bus from Cork to Dublin. The potential passenger steps onto the bus and purchases the ticket. Even supposing the potential passenger discovers the exclusion clause on the back of the ticket, the clause refers to terms and conditions only available in the Dublin head office. Thus, to familiarise himself with the terms of the contract prior to travel, the passenger would have to disembark from the bus and find alternative transport (without such an exclusion clause) to take him to Dublin to the bus headquarters and back again to Cork, just so that he may catch the bus to Dublin (assuming the ticket purchased earlier is still valid) with knowledge of the contract he is entering. Any judgement that supports such an outlandish scenario has absolutely no concept of the realities of daily life and the transport system. This is not the only problem with the judgement as I outline below.

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[16] S. Hedley "Contracts as Promises" 1993 44 Northern Ireland Legal Quarterly at p.12.
[17] Discussed at 24 and 25 below.
[18] *supra* fn 3 at, p.198.
[19] [1971] 1 All ER 686.
[20] (1877) 2 CPD 416.
[21] [1940] IR 409.

The reader will have noticed that in the *Parker* case, as in the *Early* case that followed it, the judiciary were not reluctant to give effect to the exclusion clauses in question however it is submitted that both cases were erroneously decided.

Firstly it is impractical to expect that someone could be bound by the terms of a contract that are not immediately and conveniently available as demonstrated in the bus example above. Secondly there is the obvious discrepancy with Thornton where-by such terms must be clearly on display to afford the customer the option of resiling from the contract. Thirdly the notice is not in a contractual document; it is unreasonable to expect that important contractual terms would be present on a ticket stub or receipt. Fourthly, and most importantly, tickets or receipts are often given at a stage when the contact is completed so that there is certainly no chance to find out about such terms anyway until you have no opportunity to resile from them. It is submitted by this author that any exemption clause printed on a ticket/receipt should be invalid for these reasons.

It would be wrong to suggest that the judiciary is eager to enforce such clauses even in light of *Parker* and the *Early* case which followed it. A large volume of case law demonstrates this. In *Olley v Marlborough Court*[22] the exclusion clause written on a notice in the hotel room not made known to guests earlier was not incorporated. In *Burnett v Westminister Bank*[23] the court held it was not reasonable to expect the cover of a chequebook to contain contractual terms of any importance therefore the clause therein was not incorporated. In fact it is submitted that the courts are becoming even stricter in determining the validity of exclusion clauses as they now place a heavier onus on the drafter of the exclusion clause to draw the other parties' attention to the existence of such clauses. In the case of *Interfoto Picture Library v Stiletto Visual Programmes*[24] a particularly unusual clause that imposed an excessive penalty for delay in returning photographs was required to be fairly drawn to the attention of the customer. This new approach was furthered again in the Irish case of *Carroll v An Post, National Lottery*[25] when Costello J in the High Court held that where it was known that other parties were not likely to read or be aware of such clauses, the defendant would have to take all reasonable steps to bring the clause to the attention of the other parties for the clause to be enforceable. Perhaps the *obiter dictum* of Denning LJ is instructive here when he said in the English case of *Spurling Ltd v Bradshaw*[26] that some clauses would need to be printed in red ink on the face of a document with a red hand pointing to it before such notice would be sufficient. It is submitted in the light of these judgements that the *L'Estrange* case may be decided differently were it to come before the judiciary today.

Clearly it can be seen that the judiciary is wary of exclusion clauses that are grossly disadvantageous to the consumer. The use of the "*contra-*

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[22] [1949] 1 All ER 127.
[23] [1965] 3 All ER 81.
[24] [1988] 1 All ER 348.
[25] [1996] 1 IR 443.
[26] [1956] 1 WLR 461.

proferentem" rule by the judiciary is evident of the desire to protect consumers. The rule states that where there is any doubt as to the scope or meaning of the exclusion clause, the resulting ambiguity is to be resolved against those who drafted it.[27] It is submitted that this is only just as the drafter is in a position to frame the clause in a manner most favourable to himself with the benefits of time, advice and choice on his side especially as the same is not true of the person who is bound to accept the clause.[28] The Judiciary are quick to adopt this rule as is evident in case law. In *Andrews v Singer*[29] the clause which excluded any warranty or condition implied by common law, statute or otherwise was not held to apply to an express term where the car was described as new when in fact it had 500 miles on the clock. The rule only covers cases of genuine ambiguity. In the case of *Morecraft Estate v Prudential Assurance*,[30] Drapeau JA in the New Brunswick Court of Appeal warns that the courts must not strain the wording of the policy to create artificial ambiguity however it is submitted by this author that they do so all the same. In *Hollier v Rambler Motors (AMC)*[31] a term that excluded liability to owners of vehicles arising from damage caused by fire was held to be sufficiently ambigious, as it didn't specify negligent or deliberate fire. Therefore it was interpreted against the drafter. With respect, it is submitted that the reason it did not specify the particular type of fire it covered was because it was meant to cover all fires, however caused.

The courts did not like the wide scope of the clause and invented an ambiguity to limit it accordingly. *Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co Ltd*[32] links the judicial use of the *contra-proferentem* rule with the first point made in this essay; that the judiciary will construe a substantive clause as a procedural one in order to limit the scope of the clause. Here the courts admit that the *contra-proferentem* rule will be applied less rigorously to cases that merely limit the compensation payable (procedural) than to those that totally exclude liability (substantive). This suggests that the judiciary are willing to use both approaches in partnership to limit the effectiveness of the exclusion clause. Clark has called the *contra-proferentem* rule a useful but limited tool of interpretation as clever drafting can withstand it.[33] Indeed each case that strikes down an exclusion clause for ambiguity teaches lawyers how to draft it better for next time to the extent that certain clauses are now seen as "bullet proof."[34]

In some cases exclusion clauses try to exclude liability from the core obligation of the contract. The judiciary created the principle of fundamental breach to prohibit the drafter from doing this even when the clauses were

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[27] G.C. Cheshire, C.H.S. Fifoot & M.P. Furmston *Law of Contract* (Dublin: Butterworths 1996 13th edition) p.169.
[28] *McNally v Lancashire and York Railway* (1880) 8 LR (IR) 81.
[29] [1934] 1 KB 17.
[30] [1999] v175 DLR 4th p.138.
[31] [1972] 1 All ER 399.
[32] [1983] 1 WLR 964 (HL).
[33] *supra* fn 2 p.150.
[34] J. Wightman *Contract: A Critical Commentary* (London: Pluto Press 1996 1st edition), p5.

extremely carefully drafted.[35] In the case of *O'Connor v McCowen*[36] where turnip seeds were not guaranteed, it transpired that the seeds produced rare weeds and not turnips. The wording of the clause was interpreted so as to only cover the quality of the turnip seeds and not their very identity. In *Karsales (Harrow) v Wallis*[37] a car was supplied that was incapable of self-propulsion and despite the exclusion clause the defendants were not allowed to rely on it as the entire contract had been breached. He had failed to supply what had been contracted for. Friel explains the rationale for the judgement particularly well: the defendant had stepped so far outside the contract that he couldn't claim any benefit or protection that it might bestow upon him.[38] This approach has been upheld here in Ireland in the case of *Clayton Love v B & I*[39] when the Supreme Court adopted the concept as outlined by Denning MR in *Spurling Ltd v Bradshaw*[40] that fundamental breach prevents the defendant from relying on the exclusion clause. *Photo Production v Securicor Transport*[41] has affirmed this doctrine as one of construction rather than of operation of law. In other words the doctrine is not imposed by the court on the parties regardless of their intentions but it instead allows the courts to determine what the parties agreed. This provides the courts particular discretion in choosing to set aside or give effect to exclusion clauses if they so wish.

The doctrine of privity bars the enforcement of contractual provisions by persons that are not parties to the contract however Quill points out there are a number of recognised exceptions such as agency, trusts and assignments among others.[42] To discuss these in further detail would be outside the scope of this essay, however two cases are of note regarding the judicial interpretation of exclusion clauses concerning privity. Firstly the case of *Scruttons v Midland Silicones*[43] sets out the general principle. Here stevedores subcontracted by a shipping company negligently damaged the plaintiff's goods. They sought to rely on an exclusion clause between the plaintiff and the shipping company. They were denied this because they could not avail of a contractual term to which they were not a party. Secondly the *Eurymedon* case[44] has clearly sidestepped the doctrine of privity regarding exclusion clauses. Here the exclusion clause was clearly drafted in such a manner which specifically included independent contractors within its protection. The Privy Council used existing principles of contract to establish this third party protection without breaching privity. The rationale employed was per Lord Wilberforce in another case to give effect to the commercial intentions of the parties. It is submitted that the *Scruttons* case represents

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[35] *supra* fn 10 p.174.
[36] (1943) 77 ILTR 64.
[37] [1956] 1 WLR 936.
[38] *supra* fn 3 p.206.
[39] [1970] 104 ILTR 157.
[40] *supra* fn 26.
[41] [1980] All ER 556.
[42] E. Quill, "Subcontractors, Exclusion Clauses and Privity", accessed as a draft paper at http://www.law.ul.ie in 04/2003 however it has since been withdrawn from this site.
[43] [1962] 1 All ER 1.
[44] [1974] 1 All ER 1015.

sound law in the circumstances, as the doctrine of privity should prohibit the enforcement of exclusion clauses applying to third parties.[45] However it would seem the doctrine is being "pruned back."[46] This is an area in which, contrary to all their other actions, the judiciary are becoming more willing to give effect to exclusion clauses for the purposes of recognising business realities and expectations.

Finally, the Unfair Contract Terms Directive[47] has had a considerable impact on exclusion clauses. It is - in the words of Clark – "the most important piece of consumer protection legislation to emanate from the European Community."[48] It covers all consumer transactions and was transposed into Irish law by virtue of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.[49] Under this directive a contractual term will be considered unfair if two conditions are fulfilled:

(i) If the term has not been individually negotiated;
(ii) If the term causes a considerable imbalance in the parties rights and obligations to the detriment of the consumer.[50]

An example of such an unfair term would be the exclusion of liability for death or serious injury to a customer. Therefore Beale's example of an exclusion clause being a sign on a fairground that seeks to limit liability for death or serious injury would no longer be legally recognised in Ireland.[51] It would also appear from the first condition that standard form contracts - those contracts that are mass produced for a large number of customers e.g. those issued by telecommunication companies for bill pay phones – are in greater danger of being construed as unfair.

The directive requires written terms to be drafted in plain intelligible language to enable transparency.[52] This attempts to avoid the unfair surprise of the plaintiff in that he will be aware of the unfair clause and judge its acceptability. Friel points out that there are three presumptions behind this:

(i) If the plaintiff were made aware, he would understand its full meaning;
(ii) The plaintiff would be in a position to assess the risk involved;
(iii) The plaintiff has a real choice in entering the contract.[53]

Friel takes issue with each of these.[54] He holds that presumption one and two require customer savvy but those that have this are the least in need

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[45] *supra* fn 3 p.208.
[46] *supra* fn 2 p.160.
[47] Council Directive 93/13/EEC [1993].
[48] *supra* fn 2 p.194.
[49] SI No 27 of 1995.
[50] Art. 3(1).
[51] H. Beale "Legislative Control of Fairness: The Directive on Unfair Contract Terms in Consumer Contracts" in Beaton and Friedman (eds), *Good Faith and Fault in Contract Law*, (Oxford: Clarendon Press 1995), p.248.
[52] Art. 4(2).
[53] *supra* fn 3 p.223.
[54] *ibid.*

of customer protection. On the third presumption, he argues that plaintiffs lack real choice. It is true that classical contract theory emphasises freedom of contract, choice etc however this simply doesn't hold true when dealing with monopolies like the ESB in Ireland.

Nevertheless it is submitted by this author that the directive is a strong and positive step towards consumer protection. It seeks to invalidate certain unjustifiable exclusion clauses that take advantage of consumers.

In conclusion, both procedural and substantive exclusion clauses can be vitally important in terms of efficiency and availability of services respectively. However it is submitted that a large number of substantive exclusion clauses are unjustifiable. The judiciary are right to be suspicious of exclusion clauses and to assess them strictly; especially those clauses that seek to take advantage of consumers by:

(i) foisting shoddy products/services upon them while ensuring they have no remedy;
(ii) excluding liability simply for the profitability of the drafter; or
(iii) using the power/position of the drafter to leave the consumer no alternative but to accept.

The courts have a number of weapons in their arsenal to tackle this. Firstly, they often construe a substantive exclusion clause as a procedural one to limit the effect of the clause. Secondly they require the clause to be incorporated into the contract whether by signature, notice or course of dealing. Recent developments in case law suggest that even where the contract containing the clause is signed, it may not be effective where the drafter has not reasonably drawn the other party's attention to the clause specifically. Thirdly, the judiciary use the *contra-proferentem* rule to strike down a clause of any ambiguity and it is submitted that the judiciary sometimes stretch the circumstances in which they may use this rule and invent ambiguities where there are none. Fourthly the judiciary tend not to recognise those clauses that seek to exclude liability from the core obligation of the contract. Fifthly, the doctrine of privity should prohibit the judiciary from giving effect to exclusion clauses that involve the liability of third parties though there is now evidence that the doctrine is being sidestepped. The sixth and last weapon is the Unfair Contract Terms Directive which strikes down certain exclusion clauses that are to the detriment of the consumer and requires that such clauses be drafted in a plain intelligible manner.

Finally it is submitted that the *Parker* guidelines be abandoned in their entirety and that any exclusion clauses which appear on ticket stubs or receipts be considered invalid, as:

(i) it is impractical to expect that someone could be bound by terms of a contract that are not immediately and conveniently available
(ii) such terms should be clearly on display to afford the customer the option of resiling from the contract

(iii) the notice is not in a contractual document and it is unreasonable to expect that important contractual terms would be present on a ticket stub or receipt and
(iv) tickets or receipts are often given at a stage when the contact is concluded so that there is no chance to find out about such terms until you have no opportunity to resile from them.

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