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On the Adequacy of the Protection of Consumer Rights in the English Legal System

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Abstract

The English legal system has evolved over the past few decades in order to better protect the rights of the consumers while not putting the large corporations in an overly disadvantaged position. The Unfair Contract Terms Act 1977 and the more recent Consumer Rights Act 2015 were the major legislations released to fulfil this goal; the updated case law from several precedents also geared towards the protection of consumers. This essay attempts to explore the adequacy of consumer rights protection offered by the Consumer Rights Act, the Red Hand Rule, the rejection of penalty clauses, and the contra proferentem rule. It aims to explore the possible remedies for the flaws in the current system and to identify aspects of the law that may be overprotecting consumers.

Keywords

Consumer rights; Consumer Rights Act 2015, Red Hand Rule; Contra proferentem; Penalty clause.

1. Introduction

In the face of the fast technological and commercial developments which came to epitomize the recent decades, the rights of consumers became increasingly menaced as businesses held growing powers in bargains. As this issue unveiled itself to the public and the court, several measures were adopted both in the common law and in additional legislations. In the common law, the Red Hand Rule, the rejection of penalty clauses, and the contra proferentem principle all strive to compensate the consumers for their disadvantage in bargaining power. Further, the Consumer Rights Act sets limits on what liabilities the firms are able to exclude. In this essay, I will argue that while the Consumer Rights Act and the legal treatment of penalty clauses offer reasonable protection for consumers, the contra proferentem principle overprotects them and the Red Hand Rule should be perfected and made stricter.

There are some underlying principles that must be clarified before analysing the legitimacy of the current rules regarding consumer protection. First, it should be recognized that the English court is concerned with procedural fairness but not substantive fairness. This can be observed from how the common law deals with consideration. Chappell & Co Ltd v The Nestlé Co Ltd [1] illustrates how the English court does not assess the economic value of consideration but merely decides whether there is one. This exemplifies how the common law tries not to interfere with parties' freedom of contract and only sets procedural requirements in order to ensure fairness. Secondly, most attempts to protect consumer rights should aim to address the business's huge advantage in its bargaining power or the absence of the consumer's genuine agreement to the contract. In order to do this, the law can express tendency to assist the consumers in legal procedure, limit companies' bargaining power, and induce consumers into reading the contract to be aware of what terms they are accepting.

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2. Consumer Rights Act 2015

The Consumer Rights Act 2015 sufficiently achieves its goal in restricting the firms' superior power in bargains. It is stated that 'a trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence'. (s.65(1)) The act further stipulates that even in situations in which the consumer agrees or is aware of the term or notice, the consent cannot be taken as voluntary acceptance. (s.65(2)) This rule may appear to undermine the notion of mutual consent, since it disregards the consumer's willingness to be bound by their acceptance of the exclusion clause. However, this stipulation highlights the importance of human life and reflects the idea that the preservation of one's own life should always be their priority which they should never renounce. This resonates with Thomas Hobbes' view in his Leviathan, Chapter 14 [2].

This doctrine is justified in its core values and it provides significant support for consumers whose conditions would be treated differently if not for the Consumer Rights Act. Several cases that came before the act received questionable rulings. In Thomson v London, Midland & Southern Railway [3], the plaintiff bought an excursion ticket, and the exclusion clause stated that 'excursion tickets… are issued subject to the general regulations and to the condition that the holders… shall have no rights of action against the company… in respect of.... injury (fatal or otherwise)… however caused'. The plaintiff was injured due to the defendant company's negligence. The court ruled that the clause was incorporated into the contract and was therefore enforceable. This outcome seems unreasonable, given that the plaintiff had very few options other than accepting the clause, not to mention her illiteracy, which meant that she could not have agreed to the words which she failed to understand in the first place. Under the Consumer Rights Act, however, this exclusion clause would be nullified, because it excludes the defendant's liability for the consumer's personal injury that arises from the defendant's negligence. Similarly, the act would automatically invalidate the exclusion clause in Chapelton v Barry [4]. This offers consumers legitimate protection and incentivizes businesses to avoid negligence by holding them responsible for their clients' physical well-being.

3. Case Law

The rule against penalties contributes to preventing the businesses from abusing their larger bargaining power. Penalty clauses are terms that seek to deter the other party from breaching the contract by demanding liquidated damages. A clause would be deemed as a penalty if the sum or remedy stipulated as a consequence of a breach is overly exorbitant or unconscionable regarding the innocent party's interest in the performance of the contract. (Cavendish Square Holding BV v Talal El Makdessi [5]) This allows parties to withdraw from contracts which they determine to be unfavorable to them without being overly penalized for their breach, which is necessary especially in consumer contracts, given that many consumers enter contracts without paying attention to the liquidated damages. Nevertheless, it does not go so far as to put the firm in a state of detrimental loss, for the rule still permits reasonable compensation. (ParkingEye Ltd v Beavis [5]) Thus, the rule against penalties is largely fair in balancing the bargaining positions of the consumer and the business.

Despite the efforts the common law made for the protection of consumers, the Red Hand Rule still requires improvement in order to address the conundrum that consumers rarely read the contracts. Red Hand Rule has its origin in J Spurling Ltd v Bradshaw [6], in which Lord Denning voiced that 'the more unreasonable the clause, the greater the notice which must be given of it'. This rule was to a certain extent effective, holding parties unaccountable for onerous terms that are not adequately brought to their notice. (Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [7]) However, sometimes it may be hard to determine whether a term is exceptionally onerous (O'Brien v Mirror Group Newspapers Ltd [8]). In addition, the current

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situation in which consumers seldom read through contracts, especially the electronic ones, is a dilemma that the Red Hand Rule may fail to fully resolve. Since it would still take time to find the red hands buried in the long, never-ending contract carefully worded by professional lawyers, a considerable portion of consumers simply 'agree' to the terms without knowing what the terms are.

Ian Ayres and Alan Schwartz tackled this issue in their 'The No-Reading Problem in Consumer Contract Law' [9]. They came up with an upgraded version of Lord Denning's Red Hand Rule, promoting the idea of a 'warning box' with a standard border provided by the government, which excludes terms that meet or exceed an average consumer's expectations and orders the terms in descending order of consumer importance. Instead of focusing on whether the terms are onerous, their method puts emphasis on the consumer expectation. Ayres and Schwartz's solution manages to minimize the time it takes for consumers to read the contract and thereby induces them to be well-informed before clicking 'I agree to the terms and conditions', making their consent genuine and legally binding.

While the current Red Hand Rule may be lacking, the contra proferentem rule goes to the extreme to unreasonably favor parties that voluntarily agree to the exclusion clauses. According to TT Arvind's Contract Law (2nd edn) Chapter 13 [10], contra proferentem stipulates that when there is an ambiguous exclusion clause, it will be construed against the party seeking to rely on the exclusion of liability, and in favor of the party trying to impose liability. Even though this principle sounds reasonable, it may have been stretched and overused in practice. In Houghton v Trafalgar Insurance Co Ltd [11], the exclusion clause excluded liability for the damage 'caused or arising whilst the car is conveying any load in

excess of that for which it was constructed'. Six people were riding in the car while its capacity was five, but the court decided that the exclusion clause was not applicable, because the term 'load' was interpreted to apply only to a limit on the weight carried by the car, not the amount of passengers. The ruling seemed to be very unfair to the insurance company, since any average consumer would have recognized that it was equally possible that 'load' referred to the weight or the number of passengers. Thus, the contra proferentem rule may be overused in court to provide unfair advantage for consumers who do not take seriously the exclusion clauses which they agree to.

4. Conclusion

The common law system and additional statutory regulations have been striving to enhance consumer protection. While some rules manage to locate the balance between the rights of the business and the consumer, others either overly or insufficiently favor the consumers. It is easy for people to fall into the misconception that consumers are invariably the weaker party (since we are consumers ourselves), but it should be acknowledged that sometimes the law may be unfair to companies, which is why it is good to see the applicable ranges of cases for contra proferentem rule has diminished. (Investors Compensation Scheme v West Bromwich Building Society).

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