

## Diagram 11E

The Unfair Contract terms Act 1977 controls terms that exclude or limit liability, we'll call these 'exemption clauses' for short. Diagram 11E shows how the Act **increases** its reach by expanding the definition of what constitutes an 'exemption clause'.

1. The 1977 Act expressly applies to three types of exemption clauses.

- 1.1 Those exempting liability for negligence,
- 1.2 breach of specific statutory implied terms and
- 1.3 for breach of contract generally.

These are extended in three ways.

2. First, all these *exemptions clauses* are extended by **sections 11(1)(a)–(c) excluding the last two lines** to cover terms that make claims more difficult to prove. A term may have this effect e.g.:

- By stipulating that claims must be made in an unreasonably short time limit or in a special way which is difficult to comply with.
- It may also exclude certain remedies or change the normal rules of evidence.

3. The second extension is that the scope of exemption clauses controlled by sections 2 and 5–7 cover duty-defining clauses. **The last two lines of section 11(1)(c)** says that: 'section 2 and 5 to 7 *also prevent* excluding or restricting liability by reference to terms and notices which *exclude or restrict the relevant obligation or duty*'. This is clear recognition that any exemption clause can be redrafted as a duty-defining term and it reinforces Professor Coote's argument that promising much but then disclaiming or limiting liability for not keeping the promise, amounts to the same thing as promising very little to begin with. In both cases, the promisee is deprived of his 'reasonable expectations' from the contract. This explains why the Act *must deem* certain duty-defining terms as exemption clauses. But which ones are they? Which ones are subject to UCTA and which ones are not? *Smith v Eric Bush* and *Phillips Products v Hyland* support the '**but for**' test: so, the question is whether liability would arise 'but for' the term in question. But this is obviously quite difficult to apply, it

assumes that it's possible to decide what a party's normal rights should be, so that any duty-defining term that undercuts them is caught. How would you classify a term which says that kitchen utensils are unsuitable for non-stick fry pans; or says that a survey only relates to valuation and not structural soundness? Are they duty-defining or are they really exemptions of liability?

4. The third extension is analogous but applies to terms exempting liability for any breach of contract. **Section 3(2)(a)** requires these terms to be reasonable and **section 3(2)(b)** extends this reasonableness requirement to terms that give one party the *discretion to give no performance*, to give *only partial performance*, or to give *substantially different performance* from that reasonably expected by the other party. An example is the holiday contract which allows the holiday provider to substantially vary the accommodation or destination of the holiday, or to cancel the holiday in whole or in part. If this is set aside as unreasonable, then the provider's non, partial, or substantially different performance is a breach of contract which can make them liable in expectation damages.

The UCTA assumes that there should be certain *minimum obligations* owed by reference to the nature and circumstances of the contract, quite apart from its specific terms. The Act enforces this minimal duty by invalidating terms that allow a significant departure from it.

The Consumer Rights Act 2015 has similar provisions discussed in the textbook at 11.6.1.