EXCEPTION CLAUSES IN CONSUMER SALES

"Exception" seems to be a dirty word nowadays. Few legal provisions can have aroused stronger emotions in modern times than have exception clauses and these emotions seem invariably to be unfavourable to them. The very title to which this paper is addressed (set out on page 2 of your Programme) carries the inevitable pejorative slant.

Yet there is a case of sorts to be made for exception clauses. More importantly, the cause of law reform might be the better served if instead of merely striking an attitude we could pierce the clouds of emotion and assess the problems raised by these clauses on their merits.

As part of this process it is first necessary to set the problem in its context. According to the Programme, we are here concerned with the use of exception clauses by manufacturers, importers, distributors and retailers to avoid responsibility for defective products to us, the ultimate consumers. As a start, therefore, we have to discover what those responsibilities would otherwise be.

Manufacturers' Liability

It is perhaps surprising, but nonetheless true, that under today's conditions the manufacturer has in general no responsibility in contract to the consumer. This is because the actual contract of sale is made by a retailer and no one can be liable under a contract to which he is not a party.

However, though the manufacturer cannot be made liable under the contract of sale, he can sometimes be party to a second, collateral, contract for which the retail sale is the consideration. This situation can arise in two ways. In 1891, a manufacturer of a patent medicine advertised that it would pay £100 to anyone who contracted influenza after using its "Carbolic Smoke Ball" in the prescribed manner. Relying on this advertisement, a Mrs Carlill bought a Smoke Ball from the chemist, used it, but nevertheless contracted influenza. She claimed her £100 and the English Court of Appeal held that she was entitled to have it. From this case, we can deduce that where a manufacturer makes clear and definite claims for his product in terms which import an intention on his part to be bound, consumers who buy that product on the faith of his claims will be able to enforce them in contract. Of course, the lesson of Carlill v. Carbolic Smoke Ball Co. was not lost on manufacturers and most of them are careful to avoid advertising in terms which would be enforceable against them. Still, an advertisement, for example, that a certain brand of paint will last seven years might well be enforceable in this way.

The other way in which a manufacturer may be liable in contract directly to the consumer is through his "guarantee". Such guarantees are very probably contractual where their existence is brought to the attention of the consumer before he actually buys the article.

It follows in practice that the consumer usually has no rights in contract against a manufacturer apart from such "guarantee" as the manufacturer chooses to give. There is no obligation in law on the manufacturer to give such a guarantee, and in consequence, anything which the consumer obtains under the guarantee is more than the law requires of the manufacturer.

A manufacturer can also be liable in tort in certain circumstances. These are dealt with in Mr Beattie's paper. Generally speaking, there will be liability where goods are dangerous and the manufacturer is negligent in allowing them to have circulation.

The Liability of Importers and Distributors

The position of importers and distributors *vis-à-vis* the consumer is very like that of the manufacturer. Like him, they will not be liable in contract unless some collateral agreement can be established. Like him, too, they will be liable in tort only if they are careless in allowing the goods to have circulation.

The Retailers' Liability

Under our law, it is primarily to the retailer that the consumer must look. His rights are chiefly those which derive from the contract of sale. Most consumer sales are, of course, oral and it is for the buyer to establish whether and what undertakings were given by the retailer concerning the goods being sold. In the absence of such undertakings, the sale is governed by the Sale of Goods Act, 1908. In the absence of agreement to the contrary, this Act implies into the sale certain provisions in favour of the buyer. These are:

(a) That the seller is able to give the buyer good title to the goods (s. 14);

(b) That where the goods are sold by description, they correspond with the description (s. 15);

(c) That where the purchase is of goods which it is in the course of the seller's business to supply and the buyer makes known the purpose for which the goods are required so as to show that he relies on the seller's skill and judgment, the goods are reasonably fit for such purpose (s. 16 (a)). This rule does not apply where the buyer asks for the goods by their brand name;

(d) That where the sale is by description from a dealer in such goods, the goods are of a "merchantable quality" (s. 16 (b)). This rule does not apply, where the buyer has examined the goods, to any defect which such examination should have revealed;

(e) That where the sale is by sample, the bulk corresponds with the sample and is free from any defect rendering it unmerchantable which would not be apparent on a reasonable examination of the sample (s. 17).

Well suited though these rules may have been to the exigencies of the retail trade in the nineteenth century, they appear rather less appropriate today.

The first rule, the condition as to title, is not likely to be of much practical consequence to the ordinary consumer. Today's retailers do not often attempt to sell goods not their own under conditions where they cannot pass title.

The second, requiring the correspondence of goods with the description by which they are sold, is self evident and hardly requires the Sale of Goods Act to reinforce it. It relates to the case where

the buyer defines the goods he wants in the abstract. Unless the articles delivered correspond with that definition, there has been no sale. But though it has been held to apply in some retail contracts, this provision is really more appropriate to the order placed from a distance for the sale of goods not yet ascertained. It finds no place in the modern supermarket. The last provision, that dealing with sales by sample, is again of little practical consequence to the consumer.

The two remaining provisions are those of greatest importance to the consumer. Only one of them goes to the quality of the goods. An article is said to be merchantable when it is "of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy". As a "consumer's" charter however, s. 16 (b) suffers the defects:

(a) That it is confined to sales by description and though these have been held to include some over-the-counter sales, they do not cover them all; and,

(b) That it is confined to purchases from dealers in the particular commodity; and,

(c) That in the ordinary case, by the operation of rules relating to the passing of property, the remedy of the buyer will not be rejection of the goods or replacement of defective parts, but merely an action for damages.

Of course, sales are not the only contracts between consumers and retailers. A substantial proportion of dealings in consumer durables are by hire purchase and hire agreements. To certain of these (the hire purchase as distinct from the conditional purchase agreements) the Sale of Goods Act and its implied terms do not apply at all. In practice, the Courts do imply into such agreements terms equivalent to those under the Sale of Goods Act, with the exception, so far, of any implied undertakings as to quality.

Finally, the retailer, like the manufacturer, can be liable in tort if he negligently puts dangerous goods into circulation.

The Problems of the Parties

This, then, is the background of obligation against which the effect of exception clauses must be measured. On the one hand, there is the liability of the manufacturer which would not usually exist at all apart from anything voluntarily undertaken in his guarantee. On the other, there is a set of implied terms which gives the consumer some recourse in damages against the retailer in some circumstances.

It is probably true to say that the law as it stands is adequate to meet the needs of none of the parties to a sale of manufactured goods. In effect, it imposes no liability on the manufacturer yet most manufacturers seem prepared to assume some responsibility for the quality of their products. Most of them are interested in quality control. On the other hand, no system of quality control yet devised is perfect. The human factor is too strong. It is often cheaper and easier to provide for a basic minimum of quality control in the factory and, for the rest, rather than fruitlessly to pursue perfection, to repair and replace defective parts in articles returned by the consumer under guarantee. Nevertheless, while responsibility for quality control is widely recognized, at least in the field of consumer

durables, few manufacturers seem prepared to accept liability for defects arising from faulty design. It may be unreasonable to expect them to do so.

Under existing law, the consumer in most cases will get, at best, only a right of action for damages. What he wants, however, is not a law suit for a sum of money, but the repair or replacement of the defective article. From this angle, the guarantee system suits him well and certainly better than the provisions of the Sale of Goods Act. His claim to some guarantee of quality is the greater when the article concerned is a sophisticated consumer durable, the working parts of which he would be unlikely to understand even if he were able to inspect them. It is, of course, in this field that guarantees are primarily to be found.

As things stand, the retailer seems to be the worst placed, since it is he who, under the Sale of Goods Act, has to bear the responsibility for defective goods. This may have been appropriate once but the retailer would probably claim it was less so now that he has no longer any direct control over the quality of the goods supplied to him.

The Function of Exception Clauses

There is one further background matter which has to be considered, and that is the function that exception clauses serve.

There are two basic types of exception clauses. The first type is a method by which a party defines directly, but in a negative way, the obligations he is prepared to undertake. To take a very old example, on a sale of a horse warranted sound "except for hunting" the seller is undertaking that horse is sound for most purposes, but he is refusing to undertake that it is suitable for hunting. The use of this negative form of definition is forced on the seller because we have no single word in English to cover a horse which is unsuitable for hunting but is otherwise sound. But even if there were such a word, it should not matter whether or not one used it in preference to the exception form. The end result should be the same. So that, to use a mathematical illustration, if $a + b + c + d = x$, then $x - d = a + b + c$. A modern example is the sale of a car "as is". Here, the seller is undertaking in sell the particular vehicle but he is saying in effect that he does not give any undertaking as to its quality or condition.

The other type of exception clause does not purport to exclude the obligations undertaken by the proferens but it does set out to limit the remedies available to the buyer. Typical examples are the clause which says that claims must be made within fourteen days of delivery of the goods and the clause, most commonly found in contracts of carriage and bailment, which limits liability to (say) £10 per package or unit.

The point to be stressed here is that there is nothing <u>intrinsically</u> unfair or reprehensible about the exception clause as such. It can of course be abused. Claims in large print followed by exceptions in print so small as to be unreadable would be an example. But as a form, it is no more than one mode of expressing the obligations of the parties.

The Use of Exception Clauses in Consumer Sales

It tends to be forgotten in controversies of the present kind that the use of exception clauses in consumer sales is by no means universal. Retailers, apart perhaps from car salesmen and auctioneers, do not appear to use them at all in respect of cash sales. Their chief and almost exclusive use in practice is by manufacturers in connection with the guarantees issued by them on consumer durables and by retailers in connection with hire purchase agreements.

In the case of the manufacturer's guarantee, the exception clause is not a cynical disregard of the rights of the consumer. We have seen that, in contract, the consumer ordinarily has no such rights against the manufacturer anyway. The exception clause is rather a delimination of the obligations which the manufacturer is voluntarily prepared to assume, expressed negatively rather than positively. In the case of hire purchase agreements, the purpose is again not to defraud the consumer but to give adequate security to the finance company which is finding the money.

Over the years, the courts have sought to promote consumer protection by attacking exception clauses. They have used several devices, notably collateral contracts, restrictive interpretation, and (over the last fifteen years or so) the doctrine of fundamental breach. None of these devices, however, really gets to the root of the problem. Restrictive interpretation can always be met by skilful drafting. Fundamental breach was a clumsy weapon in the extreme because it denied the buyer relief unless the goods delivered were "different in kind" from those purportedly sold; the difference, that is, between peas and beans and one which would not be likely to arise very often. All these devices had the effect of increasing the liability of the manufacturer beyond what he was prepared (and presumably had budgeted) to assume. They also had the effect of impairing the finance company's security.

Suggestions for Reform

In the light of all this, to attempt to solve the problems of the consumer by banning exception clauses is simply to evade the real issue. To meet the real issue, it is submitted, society must decide:

(1) In what circumstances and to what extent consumers need to be protected;

(2) What obligations must be imposed in order to effect this protection and upon whom they should be imposed;

(3) By what means these obligations are to be enforced.

The answers to these questions are not easy. Who, for example, is the manufacturer in cases where the article is assembled from parts all of which are made by other suppliers? Should the required standards be left to be determined by litigation under some such rubric as "merchantable quality" or should a code of standards be laid down? Should there be liability for defects in design as well as in quality? What would be the effect of an enforced guarantee on the cost of the products concerned? Should the consumer be permitted, in return for a reduced price, to take the risk of quality upon himself? What part of the risk should rest upon the retailer or the finance company? How should the scheme be administered and enforced? Should the sanctions be criminal or civil?

Should society decide that there is no satisfactory answer to these problems, certain compromise solutions may be possible. They involve to one degree or another the standardising or supervision of manufacturer's guarantees while leaving the retailer liable as at present and the manufacturer free to issue at least a proportion of his products without guarantee.

One possibility would be to require that all guarantees be approved by an agency constituted for the purpose. Another would be to require manufacturers to offer alternative rates, or, in other words, to charge a lesser price for unguaranteed goods. Such a scheme would, of course, involve a system of price control.

A third possibility and one which, it is submitted, comes closest to meeting the needs of the situation, would be the enactment of a model form of guarantee. Manufacturers using this form would be free to advertise that their goods carried a "Statutory Guarantee". Granted an adequate programme of public education in the meaning of the expression (which would of course have to be protected) such a scheme could be expected to generate its own momentum.

Conclusion

The purpose of this paper has been to suggest that in concentrating on exception clauses, the friends of consumer protection are flogging the wrong horse. To ban exception clauses and leave it at that would do little to meet the real needs of the consumer. It could even "kill" the manufacturer's guarantee altogether. It would do nothing to remedy the deficiencies in the Sale of Goods Act.

At some stage, it must be decided affirmatively what rights consumers should have. The reformers should also think very carefully indeed before making any such rights absolute and invariable. Exception clauses have economic consequences and a valid economic function. Moreover the dealings of men are infinitely various. Only by allowing scope for flexibility can all their needs be met. It was precisely on the grounds that it lacked this necessary flexibility that Lord Reid in the Suisse Atlantique case rejected the doctrine of fundamental breach.

> "Exemption clauses" he said, "differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.
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> At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason. But this rule appears to treat all cases alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the customer. And it does not seem to me to be satisfactory that the decision must always go one way

if, e.g., defects in a car or other goods are just sufficient to make the breach of contract a fundamental breach, but must always go the other way if the defects fall just short of that. This is a complex problem which intimately affects millions of people and it appears to me that its solution should be left to Parliament."

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