Missing the Last Bus: Rethinking Exclusion Clauses

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This article provides analysis on the case of Last Bus Ltd v Dawsongroup Bus and Coach Ltd [2023] EWCA Civ 1297 and the application of UCTA 1977.

1. This case revolves around the enforceability of a standard form exclusion clause in a hire purchase agreement. Specifically, it addresses the approach to assessing the reasonableness of such clauses, and the assessment of the parties' bargaining power, under the Unfair Contract Terms Act 1977 (UCTA) in the context of commercial contracts.

Background

2. Last Bus Ltd entered into hire purchase agreements with Dawsongroup (**"Dawson"**) for Mercedes Tourismo coaches. These agreements, which were on Dawson's standard terms of business, contained a clause purporting to exclude the statutorily-implied term that the hired goods would be of satisfactory quality (**"the Exclusion Clause"**). By section 6(1A) of UCTA, that statutory liability cannot be excluded or restricted by reference to a contract term, except insofar as the term satisfies the requirement of reasonableness.
3. Last Bus had also entered into contracts with the supplier of the vehicles, Evobus, which envisaged that Last Bus might finance the purchase through hire purchase and similarly contained exclusion of liability clauses. Subsequently, Last Bus faced significant issues with the coaches. Four of the coaches suffered fires, and Last Bus alleged that three of those fires were caused by defective cooling systems amongst other problems.
4. Last Bus commenced proceedings against both Dawson and the supplier, claiming damages and asserting that the Exclusion Clause in the hire purchase agreements did not satisfy the requirement of reasonableness. Dawson applied for summary judgment, asserting that the claim need not proceed to trial as the exclusion clause was reasonable.

Analysis

Reasonableness: The High Court's Decision

5. At first instance, the Commercial Court Judge had granted summary judgment, on the basis that:

    a. The more recent authorities on UCTA in the Court of Appeal show a marked reluctance to interfere, by concluding that an exclusion clause has not been shown to satisfy the requirement of reasonableness, in substantial commercial transactions entered into by parties of equal bargaining strength [para 31].

    b. It was factually indisputable that Last Bus was a significant commercial entity with extensive experience of purchasing buses under hire purchase agreements. Indeed, across 45 prior hire purchase agreements with Dawson, over 20 years or so, covering some 200 vehicles, and containing an exclusion clause materially similar to the Exclusion Clause, Last Bus had never given the slightest hint that it had been unaware of or unhappy about the terms it was signing. Last Bus was in a strong bargaining position: it could have obtained hire purchase terms from others (albeit that was likely to contain a term similar to the Exclusion Clause), or could have financed the vehicles through loan funding. Had it done the latter, any terms offered by the manufacturer (under the relevant supply contract) would have similarly excluded any implied obligation of satisfactory quality or fitness for purpose. Last Bus was consequently in no different or worse position.

    c. It consequently followed that: (i) there was no inequality of bargaining power between Last Bus and Dawson; (ii) any hire purchase terms available in the market would have come with a similar exclusion; and (iii) Last Bus ought reasonably to have known of the existence and extent of clause 5(b) given previous dealings with Dawson. Moreover, the Exclusion Clause was not so unreasonable so as to suggest to Dawson that Last Bus might not have understood it.

    d. Bearing in mind the approach taken in cases between substantial commercial parties of equal bargaining power, those factors meant that there was no real prospect of Last Bus resisting Dawson's argument that the Exclusion Clause was a fair and reasonable one to include.

6. Last Bus appealed, and the matter was heard before the Court of Appeal.

Reasonableness: The Court of Appeal's Decision

7. The Court of Appeal approached the question differently:

   a. The scope of UCTA had been determined by Parliament and was not limited to consumer contracts. Although Last Bus's challenge was based on section 6, it could equally have been based on section 3 which applies the requirement of reasonableness to situations where one of the parties deals on the other's written standard terms of business. The route of the analysis was immaterial and demonstrated, contrary to earlier *dicta*, that UCTA "*applies with full force… to commercial contracts where one party is dealing on the other's standard terms…*" (paras. [16], [20], [26]). The obvious rationale of that legislative scheme was that customers contracting with a business on its standard terms were to be considered "*on the face of it, not to be of equal bargaining power, at least in relation to the terms of business which have not been individually negotiated…*". Businesses seeking to rely on those terms to exclude what would otherwise be their liability under the contract must *prove* the reasonableness of those terms (at [46]).

   b. The three Court of Appeal cases relied on by the Judge, were ones in which the parties had negotiated not only as to price, but as to the risks reflected in the specific exclusion clauses. They were therefore cases in which the customer had been *proved* to be of equal bargaining power after a trial (paras [47]-[48]). It was necessary to make a crucial distinction when assessing the requirement of reasonableness: even where the parties are large commercial concerns and of equal bargaining strength as regards the *price* to be paid under the contract, that does not mean that they are of equal bargaining strength in respect of the *terms* [para 49].

   c. The Judge had consequently been wrong to approach the question of reasonableness of the Exclusion Clause on the basis that the parties were of equal bargaining strength and the 'marked reluctance to interfere' was engaged. As regards Dawson's standard terms, the parties had *not* been on an equal footing given that: (i) Dawson would not have contracted on any other basis, i.e. without the Exclusion Clause; and (ii) no materially different terms were available in the market.

   d. The starting point ought to have been that the Exclusion Clause was contained in written standard terms and purported to exclude any and all liability for the quality of the coaches supplied to Last Bus, leaving Last Bus without a remedy even if it received no value at all whilst having to pay for the hire. Such clauses are *prima facie* unreasonable under UCTA. There was some debate as to the application of *Lease Management Services Limited v Purnell Secretarial Services Limited* [1993] Tr.L.R.

337. The Court of appeal took the view that "*Purnell makes it clear that such clauses* [which deny the claimant any other remedy] *are prima facie unreasonable under UCTA, an approach adopted in both Sovereign and Danka and which the Judge should have followed in this case*" [para 51].

e. The absence of evidence (at the summary judgment stage) regarding the insurance positions of the parties was also significant. The Court of Appeal suggested that if Dawson or EvoBus had insurance covering the relevant risks, this could affect the reasonableness assessment.

8. With the above factors considered, the High Court's decision was overturned and the matter would proceed to trial.

Key Takeaways

9. One would be forgiven for treating the original decision of the Commercial Court Judge as uncontroversial. A number of Court of Appeal decisions had given the impression that the scope for challenging the reasonableness of exclusion clauses in commercial contracts, under UCTA, was limited, and that that assessment would prioritise the parties' freedom of contract. *Last Bus* is a significant clarification that both explains the context of those historic decisions (they are largely examples of specifically-negotiated terms), and reiterates the coverage of UCTA (which applies "with full force" to commercial contracts where one party is dealing on the other's standard terms).

10. Importantly, strength of bargaining power is not a matter of balance sheet comparisons. One should not assume that because the counterparties to an agreement are comparable in their financial positions, or because they have negotiated the price, that they will be of equal bargaining position for the purposes of UCTA 1977. Party A may still be at a significant bargaining disadvantage if Party B's standard terms are particularly onerous and Party A has no alternative. The requirement of reasonableness has to be proved, and the actual (or theoretical) willingness of the supplier to negotiate, in respect of the specific terms that are subject to challenge, is likely to be important to that question.

11. The decision was, of course, decided on a summary judgment application, and demonstrates the difficulty (except in a plain case) of determining the factual question of reasonableness, on that basis. This decision may still prompt some businesses to reevaluate the enforceability of exclusion clauses in their standard contracts. This could lead to i) specifically drawing a counterparty's attention to particularly onerous terms and having them acknowledge their reasonableness; or ii) terms being drafted more equitably.

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