



# Contents of a contract 2: and unfair terms

Contract Law

# Learning objectives

1. Distinguish between an exemption clause and a limitation clauses
2. Explain how a term may be incorporated into a contract by signature, notice or a previous course of dealings
3. Explain how exemption clauses are interpreted under the contra proferentem rule, and
4. Explain the controls on exemptions clauses in the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015.

# Introduction

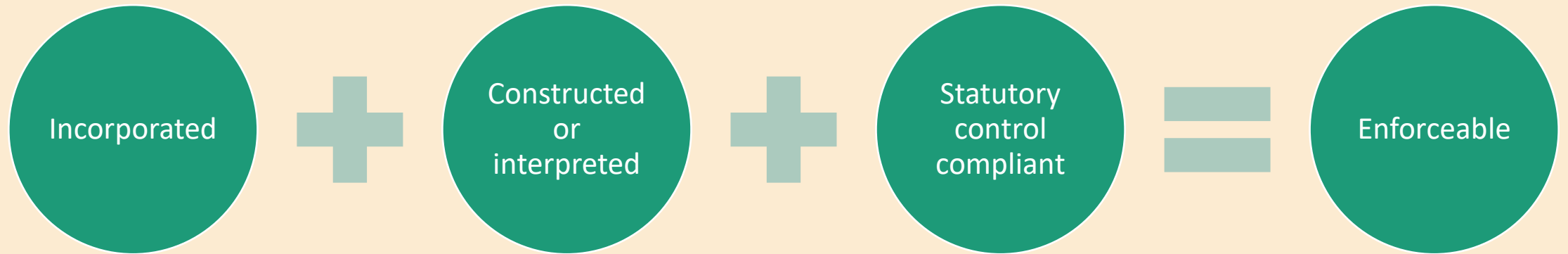
- It is two weeks before Kelly's wedding and she is talking to her friend in the canteen:
- Sue: "You look upset. What's the matter?"
- Kelly: "I went to pick up my wedding dress from the cleaners and it's damaged".
- Sue: "That's awful. Will they pay for the repair?"
- Kelly: "The problem is they are refusing to pay for the damage and pointed to a sign in the shop which they say means they don't have to pay. It was so small I didn't even notice it when I left my dress with them. They didn't point it out to me either. It just seems wrong".

# What are exemption clauses?

- Sometimes also referred to as exclusion clauses
- Commercial suppliers often include clauses in contracts to limit, or exclude, their liability for loss or damage in the event of failure to perform the contract properly (eg if goods are delivered late, or a service is performed badly).
- - Often hidden in the 'small print'
- Exemption: seeks to remove all liability
- Limitation: seeks to reduce amount of liability



# Relying on an exemption clause



# Common law rules

- The common law has developed two tests relating to exemption clauses, namely incorporation and construction.
- **A) INCORPORATION:** is an exemption clause truly is part of the contract between the parties.
- **B) CONSTRUCTION:** Does the clause exempt liability for the particular breach and loss suffered?'



# INCORPORATION

- These were discussed in the last lecture in more detail
- A) Signature
- B) Reasonable notice
  - - How onerous the term is
  - Legibility
  - Position of the clause
  - Timing
- C) Previous consistent course of dealings
- **Kelly's wedding dress:** A court would have to decide whether the shop took reasonable steps to draw the notice to Kelly's attention. But the failure of the shop to draw it to her attention would not necessarily mean that there was insufficient notice.



# Activity 1: Kelly's wedding dress

- Recall Kelly's Wedding dress. Was the clause the company is seeking to rely on incorporated into the agreement between her and the cleaners? If so, how?

# CONSTRUCTION

- Questions whether the clause was intended to exclude or otherwise limit liability for the particular breach and loss that has occurred.
- 'Cars parked at owners risk'
- Contra Proferentem Rule
- Rule for excluding/limiting liability for negligence
- Misrepresentation



| Clause                                                                                                                                                      | Facts                                                                                                                         |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------|
| 'The Company is not responsible for damage caused by fire to customers' cars on the premises.'                                                              | Claimant's car was being repaired at the defendants' garage when it was damaged by fire caused by the defendants' negligence. |
| Car insurance policy excluded liability for damage 'caused or arising whilst the car is conveying any load in excess of that which it was constructed for'. | At the time of the accident there were six people in a car with seating accommodation for only five.                          |

Construction: Areas of ambiguity

## Activity 2: Kelly's wedding dress (2)

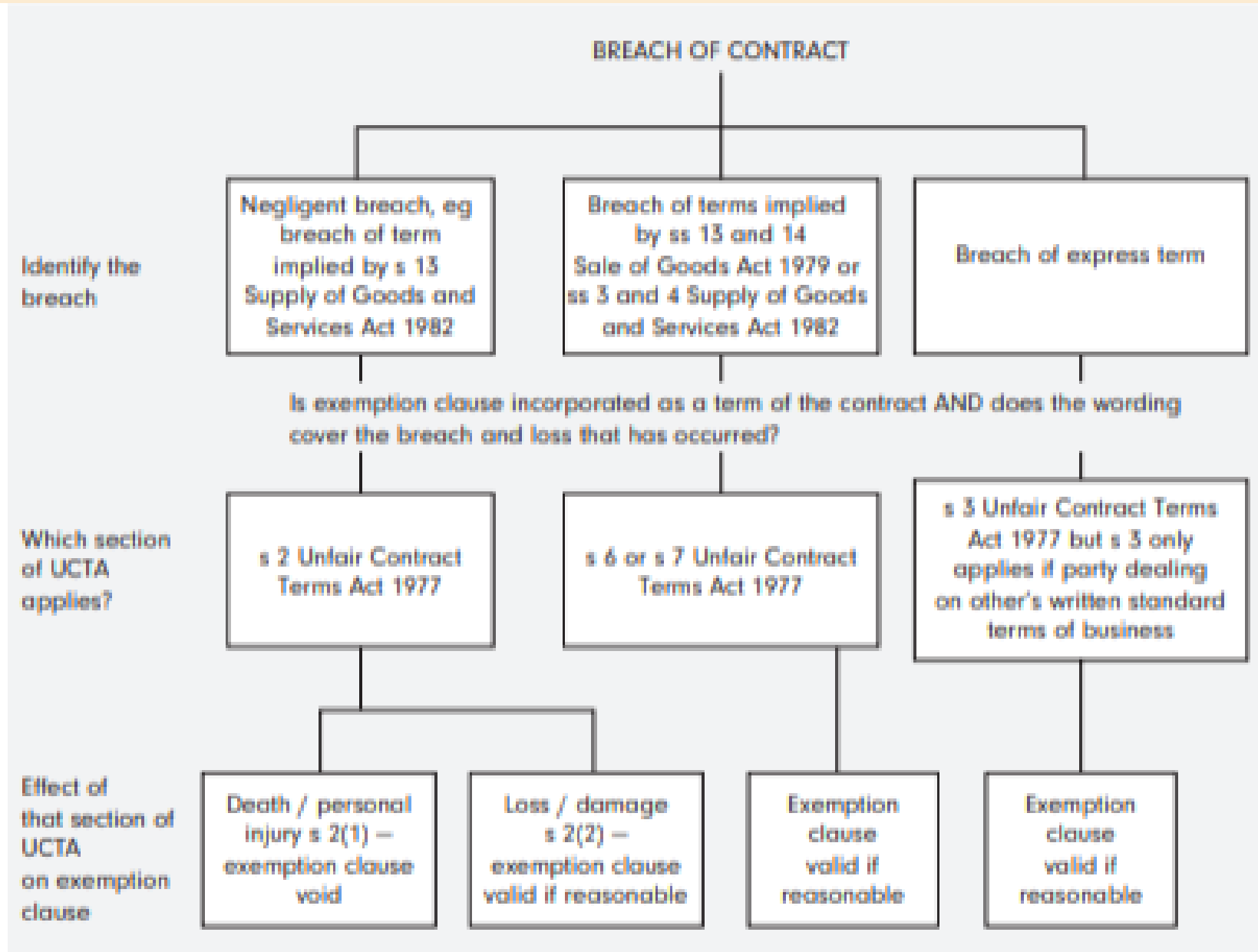
- The notice in Kelly's case read:
- "The cleaning company is absolved of all liability in respect of damage caused to garments presented for cleaning, whether caused, intentionally, by negligence or any other cause."
- Can the clause be constructed (interpreted) to cover the circumstances.

# Statutory controls

- The two main statutes that govern limitation and exclusion clauses are the **Unfair Contract Terms Act (UCTA) 1977** and the **CRA 2015**.
- UCTA 1977 governs exemption clauses in **business-to-business** contracts
- CRA 2015 governs exemption clauses in **business-to consumer** contracts.

# Unfair Contract Terms Act 1977

- Aim: to restrict the effectiveness of certain types of exemption clauses.
- When applied, UCTA 1977 will provide one of three results:
- (a) it prevents the defendant from excluding or restricting their liability by reference to the term (eg in relation to death/personal injury caused by negligence – UCTA 1977, s 2(1)); or
- (b) it has no effect on the term, and so the defendant can rely on the term (eg a clause in a freely negotiated contract that exempts liability for breach of an express term – UCTA 1977, **s 3**); or
- (c) it subjects the term to a ‘requirement of reasonableness’.



# The reasonableness test s.11(1) UCTA 1977

- The reasonableness test applies to most exemption clauses in business-to-business contracts and in particular to clauses exempting liability for:
  - loss or damage (other than death and personal injury) caused by negligence (including breach of the term implied by SGSA 1982, s 13) – UCTA 1977, s 2(2);
  - breach of the statutory implied terms relating to goods – description, quality and fitness for purpose – UCTA 1977, ss 6 and 7 (s 6 applies to sale of goods contracts and s 7 applies to goods supplied under a work and materials contract); and
  - breach of an express term contained in the standard written terms of the person seeking to exempt liability – UCTA 1977, s 3.

# Applying the reasonableness test

| SITUATION                                                                                                                                                                  | CLAUSE MORE OR LESS LIKELY TO BE REASONABLE?                                                                                                                                                                                                                                           |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| The seller is a large company that insists on selling goods on its own standard terms and conditions, which contain exemption clauses similar to those of other suppliers. | The buyer is in a weaker bargaining position than the seller and the seller may be taking advantage of the buyers position. <i>Less likely to pass the reasonableness test.</i>                                                                                                        |
| The seller agreed to reduce the price of goods if the buyer was prepared to accept the exemption clause.                                                                   | The buyer has chosen to get the lower price in exchange for the exemption clause. It would be a touch harsh on the seller to deny them the benefit of the exemption clause, when in effect the seller has paid for the protection of the exemption clause. <i>More likely to pass.</i> |
| The exemption clause is set out in small print at clause 76(3)(i)(d) and headed 'Other matters'                                                                            | Whether the customer knew- or even ought to have known about the clause is relevant to determining its reasonableness. Here the clause is buried in the small print and <i>Less likely to be reasonable.</i>                                                                           |
| Experience businessmen representing substantial companies enter into a freely negotiated contract including exemption clauses.                                             | <i>More likely to be reasonable.</i> The courts have shown reluctance to find clauses unreasonable where they have been agreed between substantial businesses.                                                                                                                         |

# Schedule 2 guidelines

The matters to which regard is to be had in particular for the purposes of sections **[F16(1A), 7(1A) and (4),]** 20 and 21 are any of the following which appear to be relevant—

- (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
- (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term;
- (c) whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
- (d) where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
- (e) whether the goods were manufactured, processed or adapted to the special order of the customer.

# The court should also have regard to . . .

- The resources that the defendant could expect to be available to them for the purpose of meeting the liability should it arise;
- How far it was open to the defendant to take out insurance cover.



# Consumer Rights Act 2015

- CRA applies in B2C only
- Part 2 of CRA deals with Unfair terms in contract and consumer notices
- CRA 2015 Some clause automatically void, subject to test of fairness (similar to UCTA approach for B2B)
- CRA also deals with consumer notice: e.g. those in shops and car parks, as well as online documentation
- Notices must be fair, s62

# Test of fairness (1)

- S62(4)
  - A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer
- S62(5)
  - Fairness is determined by "taking into account the nature of the subject matter of the contract and by reference to all the circumstances existing when the term was agreed".
- Written terms must be transparent (s68(1)). This requires it to be in plain and intelligible language and it is legible. This gives statutory effect to the *contra proferentem* rule

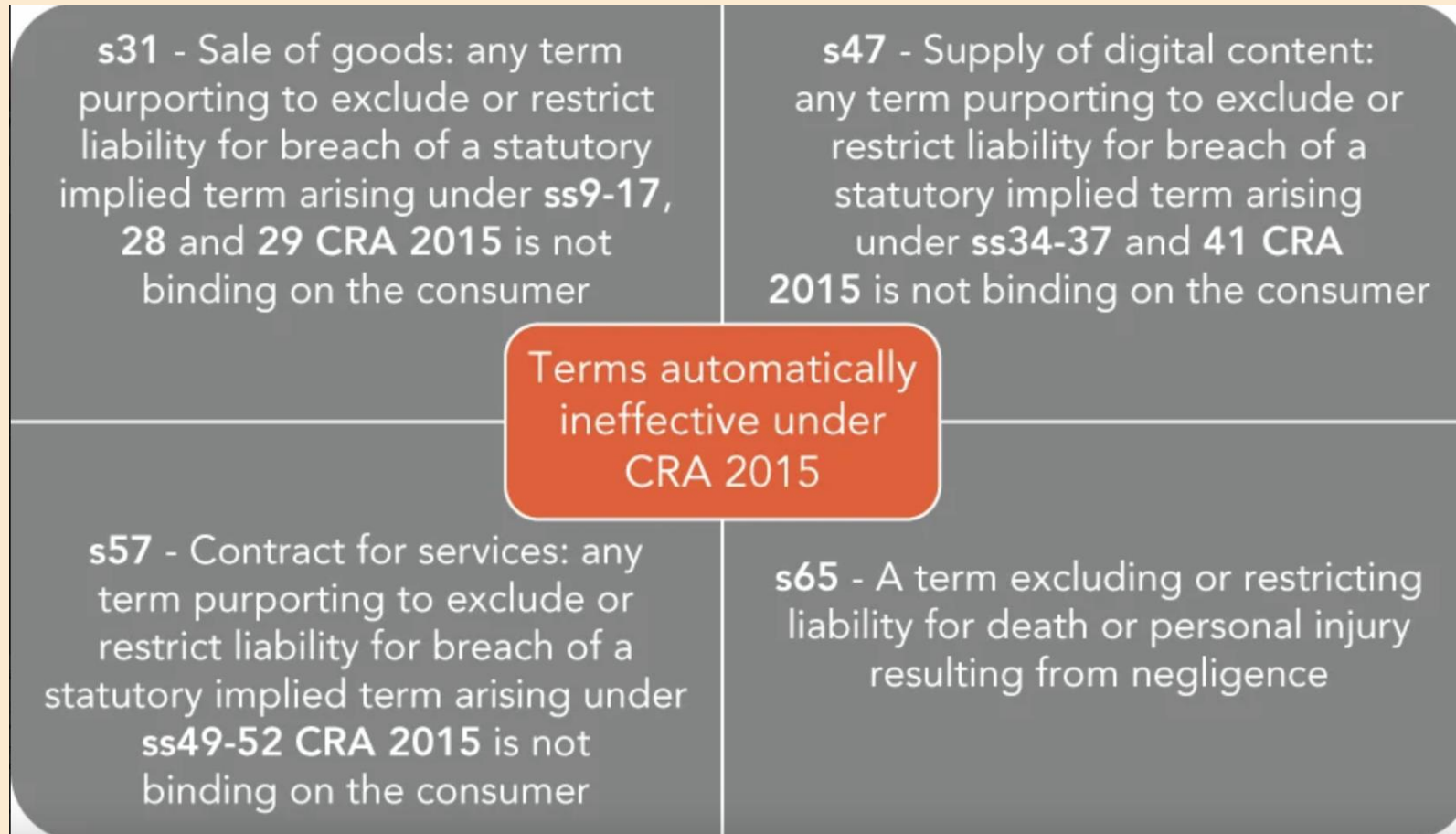
# Test of fairness (1)

- S64, two circumstances where fairness test not applied:
  - where the clause specifies the main subject matter of the contract; or
  - where the clause refers to the price – here the appropriateness of the price in comparison with the goods or services supplied under the contract term will not be subject to the fairness test.
- In both these circumstances, the fairness test will be applied if the term is not transparent and prominent.
- The meaning of the term “significant imbalance” is not defined in CRA 2015 and is somewhat elusive, but it is clear that good faith embodies a general principle of ‘fair and open dealing’.
- Director General of Fair Trading v First National Bank plc [2002]

# Traders and consumers (s2)

- Trader: a person acting for purposes relating to their trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf
- Consumer: an individual acting for purposes that are wholly or mainly outside that individual's trade, business craft or profession

# Terms automatically invalidated



# Terms that may be unfair... (grey list)

- Schedule 2:
- Some examples of grey list terms that may be unfair are:
- A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.
- A term that has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it.
- A term which has the object or effect of giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound.

## Activity 3: Kelly's wedding dress (2)

- Assuming that the clauses were incorporated and can be interpreted to cover the damage caused, can Kelly rely on any statutory provisions to receive a remedy to damage caused to her wedding test?

## Activity 4: Jordan's case

- Jordan took his taxi cab to Car Care Ltd to be serviced. When he drove the taxi away from Car Care Ltd, the brakes failed and the taxi crashed into a tree. The taxi was damaged and Jordan was injured. Jordan has now discovered that the reason the brakes failed was negligence on the part of George, a mechanic employed by Car Care Ltd.
- Clauses in the contract between Jordan and Car Care Ltd provide:
  - 8.1 Neither Car Care Ltd nor any of its employees will be liable for loss or damage to property howsoever caused (including negligence).
  - 8.2 Neither Car Care Ltd nor any of its employees will be liable for personal injury, unless caused by negligence.

# Are the following statements true/false?

- Jordan could sue Car Care for breach of contract
- If clause 8.1 is found to be incorporated into the contract and reasonable, Car care Ltd could rely in it to protect it from liability in respect of the injury
- If clause 8.2 is found to be incorporated into the contract and reasonable, Car Care Ltd could rely on it to protect it from liability in respect of the injury
- Jordan could sue George for breach of contract
- Jordan could sue George in the tort of negligence
- If clause 8.1 is incorporated into the contract and reasonable, George could rely on it to avoid liability in respect of the taxi because of the C(RTP)A 1999
- George cannot rely on the clauses as he is not named in the contract

# Activity 5: Knowledge check (1)

- Which one of the following statements most accurately describes the principle established in *Chapelton v Barry UDC* [1940]:
  - a) An exclusion clause will only be enforceable if it is included in a document that might reasonably be expected to include contractual terms
  - b) An exclusion clause will only be enforceable if the other party was given reasonable notice of its contents before any liability arose
  - c) Any ambiguity in an exclusion clause will be construed against the party seeking to rely on it
  - d) An onerous exclusion clause requires special highlighting

## Activity 5: Knowledge check (2)

- Which of the following statements most accurately describes the contra proferentem rule:
  - a) Any ambiguity in a clause will be interpreted in favour of the party seeking to enforce it
  - b) Any ambiguity in a clause will be interpreted in the light of the prevailing custom
  - c) Any ambiguity in a clause will be interpreted in favour of the person against whom the clause is being enforced
  - d) Any ambiguity in a clause will be interpreted in the light of a reasonable person's understanding of the words used in the clause

## Activity 5: Knowledge check (3)

- What is the effect under CRA 2015 of a clause in a contract which excludes liability for death:
  - a) The term will not be binding on the consumer, but the rest of the contract will remain in force
  - b) The whole contract will become unenforceable against the consumer
  - c) The consumer will have the option to terminate the contract
  - d) The consumer will be entitled to damages

# Summary

- To be upheld exemption clauses must clear three hurdles
  1. An exemption clause must be **incorporated** as a term of the contract
  2. As a matter of **construction**, it must purport to exclude liability for the particular breach and loss
  3. Does a relevant statutory control apply? **UCTA 1977** or **CRA 2015**

