

Contracts Exam 2011 Q 4

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Prior to the introduction of statutory controls for unfair contract terms and exclusion clauses, English and Australian courts used a variety of devices to limit the operation of exclusion clauses and protect consumers. In Australia cases such as *Sydney City Council v West* exemplified the tendency of courts to find innovative ways of ensuring exclusion clauses did not apply to protect those who drafted them. In England, the enactment of the Unfair Contract Terms Act put an end to this method of interpretation. In *George Mitchell v Finney Lock Seed*, Denning MR outlined the history of the construction and treatment of exclusion clauses, and explained that after cases like *Securicor*, there was a shift in the attitude towards exclusion clauses.

Australian law has followed the trend of English law in this area, and no longer applies special principles of construction to exclusion clauses. There is one exception, however. Courts will, by the *contra proferentem* principle, always construe exclusion clauses against the party seeking to rely on it (*Darlington v Delco* is an example).

This seems to be a fair state of affairs. There are now provisions in the Australian Consumer Law which deal with unfair contract terms, and ACL s 64 and s 64A prevent certain ACL guarantees from being expressly excluded by broad exclusion clauses. It is proper for statute to set the limits on what constitutes an unfair or unjust contract. These are, broadly speaking, questions of policy, to which the judiciary is not necessarily well suited. There is also the fact that setting the limits on the exclusion of liability is a very commercially sensitive endeavour, and courts do not necessarily possess the business acumen or information needed to make these decisions.

The status quo, then, is fair. Principles of ordinary construction should be applied, along with the *contra proferentem* principle to ensure ambiguity is resolved against the party seeking to rely on the clause. This encourages the drafters of contracts to avoid overly wide or ambiguous exclusion clauses, and also effects a principle of justice: parties should not be able to benefit from ambiguity they themselves created. The rest should be left to the legislature.