(b) how far it was open to him to cover himself by insurance.

This provision gives statutory force to the general notion that a clause limiting liability has a better chance of being treated as reasonable than a clause which seeks to exclude liability altogether. But, this is only the case under s 11(4) if the seller can show that the limit of liability is reasonably related to the resources which he or she has available. In other words, a small business can more readily defend a low limit of liability than a large one. However, many liabilities are, of course, insured and it is therefore relevant to consider whether the seller can cover himself or herself by insurance. In general, it is difficult for sellers effectively to insure against the cost of replacing the goods but they can insure against the possibility of having to pay damages for loss caused by defective goods. However, such insurance is commonly written with a premium which is calculated in relation to the maximum which the insurer will cover. It would seem that it is probably open to a seller to show that it was not economically possible for him or her to insure for liability for more than, say, £100,000 for any one claim. This would be relevant to the decision as to whether limitation of liability was reasonable under s 11(4).

The court is also required to have regard to five guidelines which are set out in the second schedule to the Act. These are:

(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 to accept a similar term;
(c) whether the customer knew or ought reasonably to have known of the existence and 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 is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition could be practicable;
(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

9–10 Some comments may be offered on the guidelines. Obviously, as far as (a) is concerned, the more equal the bargaining position of the parties the more likely it is that the court could be persuaded that the clause is reasonable. Similarly, if one party is in a monopoly position it is likely to have considerable difficulty in persuading the court that the terms are reasonable, whereas, if there is a wide range of possible suppliers,

this is likely to point in the other direction and particularly if some of them offer more favourable terms. There is an overlap here with (b), so that, if a buyer has a choice of paying a higher price and getting a contract without exclusion clauses, whether that is from the same seller or different sellers, the buyer who chooses the lower price may find that the clause is regarded as reasonable.

Guideline (c) calls for some comment. If the term is incorporated in the contract it must, in some sense, be the case that the buyer knows or has the opportunity of knowing it. It seems clear that more is required for the guideline to apply. It is thought that what is envisaged here is the case of an experienced buyer who knows the terms common in a particular trade and is not taken by surprise by them. (The reasoning in the *Stiletto* case above is obviously relevant here.) An example of the application of guideline (d) would be where the contract requires the buyer to complain of defects in the goods within a short period. Such a requirement might well be held reasonable in regard to defects which are obvious on delivery, particularly if the goods are to be delivered by a third party carrier, since notice may enable the seller to claim against the carrier. On the other hand, such a clause would usually not be reasonable if the defect was not immediately obvious.[8]

9–11 The guidelines do not exhaust the factors which may be taken into account in deciding on what is reasonable. The leading decision is *George Mitchell (Chester Hall) Ltd v Finney Lock Seeds Ltd* (1983).[9] In this case, the defendant was a firm of seed merchants which agreed to supply the plaintiff, a farming concern, with 30 pounds of Dutch winter cabbage seed for £192. The contract was treated as subject to an invoice which contained a clause purporting to limit liability if the seed were defective to a replacement of the seed or refund of the price and to exclude:

> All liability for any loss or damage arising from the use of any seeds or plants supplied by us and for any consequential loss or damage arising out of such use…or for any other loss or damage whatsoever.

In fact, the seed delivered was not winter cabbage seed and was also defective. The plaintiff's crop was therefore a total failure. The plaintiff claimed that the cash value of the crop would have been some £63,000. The defendant claimed to be liable only to repay £192. If one looks at the guidelines in such a case, guidelines (b), (d) and (e) have little or no impact; there is probably not much to choose in the bargaining strength of the parties and clauses of this kind are well known in the seed trade so that it is unlikely that the reasonable farmer would be taken by

8 *RW Green Ltd v Cade Bros Farm* [1978] 1 Lloyd's Rep 602.
9 [1983] 1 All ER 10; [1983] 2 AC 803.

surprise. On the other hand, it might be difficult to find a seed merchant who would supply a seed on substantially different terms.

The House of Lords held that the clause was unreasonable. The principal factor relied on by the House of Lords was that the defendant had led evidence that, in practice in such cases, it commonly made *ex gratia* payments. The purpose of leading this evidence was to show that the defendant was reasonable. Instead, the House of Lords took it as evidence that even the defendant did not regard its own clause as reasonable. These rather special circumstances are perhaps unlikely to arise again because in future sellers will not be so incautious as to lead such evidence. Other factors to which significant weight was attached included the fact that the breach by the sellers was a particularly clear and substantial one and that there was evidence that it was easier for sellers to insure against losses of this kind than for buyers. Undoubtedly, which parties can most economically and efficiently insure is often a critical factor in deciding whether a clause is reasonable. So, if a seller could show that a particular loss was of a kind against which buyers commonly insure, this would significantly increase his or her chances of persuading a court that the clause was reasonable.[10] Similarly, if the task being undertaken is relatively simple and its consequences fall within a modest compass, it will be less easily shown to be reasonable to seek to exclude liability.[11]

Another interesting case which is worth mentioning is *Walker v Boyle* (1982),[12] where Dillon J held that neither the fact that the contract (for the sale of land) was on standard nationally used terms, nor the fact that both parties were represented by solicitors throughout, prevented the clause being unreasonable. This was because the clause in question sought to shift from seller to buyer the risk of the seller giving an inaccurate answer to questions, the answers to which were entirely within the seller's control.

Section 2 of the Unfair Contract Terms Act

Section 2 provides: **9–12**

> (1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

10 *Smith v Eric S Bush* [1990] 1 AC 831; [1989] 2 All ER 514.
11 *Ibid.*
12 [1982] 1 All ER 634; [1982] 1 WLR 495. This was a case on the Misrepresentation Act 1967, but it is thought that the reasoning applies equally to the Unfair Contract Terms Act.

> (2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
> (3) Where a contract term or notice purports to exclude or restrict liability for negligence, a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.

Although this section is aimed at liability in negligence it is capable of applying to sellers and other suppliers of goods because, in some cases, the buyer may be able to formulate a claim against them as based on negligence. For instance, where the seller has negligently given pre-contract advice or, as discussed above, has carried out a negligent pre-delivery inspection of a motor car. It will be seen that s 2 forbids contracting out of liability when negligence causes death or personal injury and subjects contracting out for negligence which causes other forms of loss to the test of reasonableness. What is said above about reasonableness will apply here also. Strictly speaking, the Act provides that the guidelines should only be taken into account in respect of s 6 or 7 of the Act. However, in practice, it seems that the courts have had regard to guidelines whenever questions of reasonableness arise. It would really be absurd to try to operate two different tests of reasonableness under the same Act.[13]

Section 3 of the Unfair Contract Terms Act

9–13 Section 3 provides:

> (1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
> (2) As against that party, the other cannot be reference to any contract term:
> (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
> (b) claim to be entitled:
> (i) to render a contractual performance substantially different from that which was reasonably expected of him; or
> (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all except in so far as (in any of the cases mentioned above in this sub-section) the contract term satisfies the requirement of reasonableness.

13 *Flamar Interocean Ltd v Denmac Ltd* [1990] 1 Ll R 434, p 439.

This provision is of very general scope. It will be seen that it applies either where one of the contracting parties is a consumer or where the contract is on one party's written standard terms of business. Obviously, there will be very many contracts of sale where the buyer is a consumer and many, both commercial and consumer contracts, where the contract is on the seller's standard written terms of business. So, many contracts of sale will be subject so s 3. This section is therefore very important in relation to obligations under contracts of sale other than those covered by the implied terms in ss 13, 14 and 15. It would apply, for instance, to the questions of when the seller is to deliver the goods. Many sellers state in their written standard terms of business that the dates of delivery are estimates only and so on. It would certainly be open to a court to enquire whether such a provision was reasonable. In practice it is very difficult to see that it can be reasonable simply to have a blanket excuse for being late in delivery. It would be a different matter if the seller inserted a clause excusing failure to deliver on time for specified events which were outside the seller's control. Such clauses are, of course, very common and in principle they would appear reasonable.

9–14 It should be noted that the scope of s 3 is potentially very wide because it covers not only attempts to exclude liability for breach of contract but also attempts to provide in the contract to be able to deliver a contractual performance substantially different from that which was reasonably expected or to render no performance at all. A careful draftsman might seek to formulate the contract so as to give the seller the right to offer an alternative performance or in certain circumstances not to perform at all without these acts being breaches, but it seems that such clauses would still be subject to the test of reasonableness. If one applied this literally, it would mean that a clause, providing that the seller need not deliver the goods until the buyer had paid for them in advance, was subject to the test of reasonableness. In practice, it is unlikely that a court would be at all anxious to construe the words in this sense and in any case it would usually hold that such a clause was reasonable.

Unfair Terms in Consumer Contracts Regulations 1999

9–15 The Directive on Unfair Terms in Consumer Contracts was adopted by the Council of Ministers on 5 April 1993. Member States were required to implement its provisions by 31 December 1994. The Directive was not mandatory as to its precise terms; it laid down a minimum standard which Member States must reach for protection of consumers against unfair terms in consumer contracts. Most Member States of the European Union already had legislation in place which dealt with this area. In the case of the United Kingdom, the relevant legislation is the

Unfair Contract Terms Act 1977. The Act is both wider and narrower than the Directive. It would have been possible for the government to identify those areas at which the Directive is aimed, which the Act has not reached and to legislate to expand consumer protection to these areas. The government decided not to do this and, instead, to introduce secondary legislation under s 2(2) of the European Communities Act 1972.

The Unfair Terms in Consumer Contracts Regulations 1994 came into force on 1 July 1995. They were replaced with effect from October 1999 by the Unfair Terms in Consumer Contracts Regulations 1999.

To what contract terms do the Regulations apply?

9–16 The Regulations apply only to consumer contracts, only to contracts for sale and supply of services and only to terms (such as standard form terms) which have not been individually negotiated. Let us consider each of these limitations in turn.

Although the concept of consumer contracts is used in the Act, it is clear that the Act is much wider in scope. It should be noted also that the Regulations define a consumer as 'a natural person who in making a contract to which these Regulations apply, is acting for purposes which are outside his business'.

The Regulations do not apply to contracts which have been individually negotiated. They typically apply to contracts which have been 'drafted in advance'. Of course, it is extremely common in consumer contracts, if there is a written document, for the document to have been drafted in advance by the businesses' advisers. Nevertheless, even in such contracts, there may be some negotiation, particularly about the price. The Regulations say that: 'A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.'

The 1994 Regulations applied only to contracts for the supply of goods and services. The provision producing this limitation does not appear in the 1999 Regulations and it is probable, therefore, that the Regulations apply to transactions involving land. This appears more in accord with the wording of the Directive (especially the French version). The limitation to consumer contracts would exclude most international sales.

The effect of the Regulations

9–17 Under the Regulations, terms classified as unfair are not binding on the consumer. In principle, the rest of the contract would be left in being

unless the effect of striking out the offending term is to leave a contract which makes no sense. There are two important differences here between the Regulations and the Unfair Contract Terms Act 1977. The first is that, despite its name, the Act is not concerned with unfair terms. Whether a term is unfair is never a test of its validity under the Act. Some terms are simply struck out. Other terms are valid if reasonable. Invalidity does not depend on fairness or unfairness.

The second difference is that, subject to arguments about the precise scope of s 3, the Act applies only to clauses which seek to exclude or limit liability. In principle, the Regulations can be used to attack any term which can be argued to be unfair.

Powers of the Director General of Fair Trading

Under the 1994 Regulations, the Director General was given powers to try to prevent the continued use of unfair terms, including in particular the power to seek a court injunction to prevent a trader using an unfair term. The Office of Fair Trading (OFT) issues regular bulletins to report progress on these questions. The 1999 Regulations extended these powers to statutory regulators and trading standards departments. They have also extended to the Consumers' Association the power to seek injunctions.

Unfairness under the Regulations

9–18 Regulation 8(1) of the 1999 Regulations provides that 'an unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer' and 8(2) 'the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term'. Unfairness is defined by reg 5(1) which provides that 'unfair term' means any term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. So, the possible scope for arguments about unfairness is very wide. However, there is one very important limitation which is contained in reg 6(2) which provides that, in so far as it is in plain intelligible language, no assessment shall be made of the fairness of any term which (a) defines the main subject matter of the contract or (b) concerns the adequacy of the price or remuneration as against the goods or services sold or supplied. This means that it will not be open to a consumer to argue that a contract is unfair because he or she has been charged too much. This provision represents a vital decision as to a central part of the application of the unfairness concept. It is perfectly easy to understand why it was thought not expedient to leave judges

with the task of deciding whether the price was fair. This would be the sort of question which could often not be answered without hearing complex economic evidence of a kind which many lawyers and judges are not trained to evaluate. On the other hand, questions of price must often be an important ingredient in questions of fairness and unfairness. Supposing I sell you a car which has been badly damaged in an accident, requires extensive repair work and is totally unroadworthy as it stands. If I sell you the car at a price which reflects all these defects, it is hard to say that the contract is unfair. If I sell you the car at a price which would be appropriate for the same car in perfect second hand condition, but seek to conceal the defects and to exclude liability by the words in the small print, it is much more plausible to regard the contract as unfair.

Regulation 7 provides that 'A seller or supplier shall ensure that any written term of a contract is expressed in plain intelligible language'. Where 'there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail'. The second sentence is simply a statement in statutory form of a rule which the English courts have always applied and which indeed is to be found in virtually all legal systems. The wording of the first sentence of reg 7 is, however, of great practical importance. Many businesses operate at the moment by making glowing statements in their marketing and trying to weasel out of them in the small print by obscure and complex jargon. Regulation 7 will make this ineffective and certainly therefore requires consumer contracts to be carefully re-read and, in many cases, extensively rewritten.

Finally, it should be noted that reg 5(5) provides that Sched 2 contains 'an indicative and non-exhaustive list of the terms which may be regarded as unfair' (see Appendix II, p 181). There is no corresponding list in the Unfair Contract Terms Act 1977, but such lists are a common feature of continental legislation. It should be noted that the list is not a black list, in that the Regulations do not say in terms that inclusion on the list means that the clause is unfair. It is rather a grey list in the sense that inclusion on the list raises a strong inference that, in most circumstances, a clause of this kind should be treated as unfair.

CHAPTER 10

REMEDIES

GENERAL PRINCIPLES

10–01 This chapter is intended to discuss what remedies may be available to either the buyer or the seller if the other party breaks the contract. The positions of buyer and seller in a contract of sale are not, of course, symmetrical; the seller's obligation is to deliver the goods and the buyer's obligation is to pay the price. The failure of the seller to deliver the goods or to deliver goods of the right quality and so on will have different results from the failure of the buyer to pay the price, and may call for some difference in remedies. Nevertheless, the remedies available to the parties do derive very largely from the general law of contract and it seems more convenient, therefore, to approach the problem first by considering the general principles and then by considering how the position of the buyer and seller may differ.

It is important to make clear from the beginning that there will be a number of cases in which the injured party has no effective remedy for the other party's breach. This is because the most usual remedy is damages to compensate for the financial loss flowing from the breach and it will quite often be the case that little or no financial loss has flowed. Suppose, for instance, that a seller has contracted to deliver 1,000 tons of coffee beans at £525 per ton on 1 January and fails to deliver them. The buyer's remedy, as we shall see, is primarily measured in terms of what it would cost the buyer to buy substitute goods on the market on that date. It may be, however, that the price has fallen and, in that case, the buyer will actually profit from the seller's failure to perform, though, of course, the buyer does not have to account to the seller for the profit! Even if the price remains steady, the buyer will only have lost the cost of going out to the market to buy substitute goods which will often not amount to much. So the buyer will be entitled to an action for nominal damages but perhaps not much more.

10–02 Let us consider in turn what the possible remedies are. One party may be entitled to withhold performance until the other has performed. So, if the seller has agreed to give the buyer credit, the buyer is not obliged to pay until the seller has delivered the goods. In a sense, the right to withhold performance is a right rather than a remedy but it is

also often the most effective way of concentrating the mind of the other party. In certain circumstances, one party will be entitled not only to withhold performance but to bring the contract to an end—to terminate it. A particular and very important example of this is the buyer's right to reject the goods, though the right to reject the goods is not exactly the same as the right to terminate and is not subject to exactly the same rules. Withholding performance, termination and rejection are discussed more fully later.

In certain circumstances, one party may be entitled to get the contract specifically enforced. This is the standard remedy for contracts for the sale of land because, from an early time, English courts have taken the view that each parcel of land is unique and a disappointed buyer cannot simply be compensated by damages since he or she cannot go out and buy an identical parcel of land elsewhere. This explanation is no doubt stretched when confronted by a typical English modern housing development, but it appears to remain intact. A buyer may be able to obtain specific performance of a contract for the sale of goods but this is very much more an exceptional remedy. The Sale of Goods Act 1979 does not contemplate an action for specific performance brought by the seller, but it does provide that, in certain circumstances, the seller may bring an action for the price and though this action is historically different from the action for specific performance it produces, from the seller's point of view, many of the same consequences. Specific performance and the action for the price are discussed later under 'Specific enforcement'.

In practice, the most common remedy for breach of a contract of sale of goods will be an action for damages. If the contract has been broken by one party, the other party will always have an action for damages though, as pointed out above, the damages may only be nominal in amount. The critical question is how much can be recovered by a buyer or seller in an action for damages. This will be considered in detail later under 'Actions for damages'.

10–03 The remedies we have discussed so far are what we may call the standard remedies provided by the general law. However, the law permits the parties to make further provisions about remedies. We have already seen, in Chapter 9, the rules which have developed where the contract seeks to limit the remedies which would normally be available. It is possible, on the other hand, to seek to extend the range of remedies. So, the contract may provide that if the seller is late in delivering he or she shall pay so much a day by way of liquidated damages for each day of delay. Conversely, the contract may provide that the buyer is to pay a deposit or that he or she is to pay part of the price in advance. Some of these possibilities are so common that substantial bodies of rules have been developed about them. These will be discussed more fully later under 'Party provided remedies'. 'Sellers' remedies against

the goods' discusses certain special remedies which the seller has against the goods where the buyer is insolvent. In practice, the seller's most effective remedy is to have retained ownership. That we have already discussed in Chapter 6.

WITHHOLDING PERFORMANCE, TERMINATION AND THE BUYER'S RIGHT TO REJECT

10–04 Withholding performance and termination are analytically separate but in practice there is a major degree of overlap. This is because the factual situations which lead one party to wish to withhold performance or to terminate are very similar. In practice, the threat by one party to withhold performance will either lead the other party to attend to his or her performance, in which case the contract will go on, or not, in which the case the innocent party would usually have to decide a little later whether to terminate or not. So, litigation is much more commonly about termination but no doubt withholding performance takes place very often in practice and has the desired result.

A critical question in deciding whether one party is entitled to withhold performance is to consider what the contract says or implies about the order of performance. So, for example, s 28 of the 1979 Act says:

> Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

So, in this standard case, neither the seller nor the buyer can withhold performance; each must be ready and willing to perform his or her side if he or she is to call on the other side to perform. In practice, however, other arrangements about payment and delivery are often made. The buyer may agree, and commonly does in an international sale, to open a banker's letter of credit and it has commonly been held that in such a situation the seller's obligation to ship the goods is conditional upon the buyer having opened the letter of credit for the right amount and the right currency with the right payment periods and so on. So, if the buyer fails to do this, the seller can withhold performance.[1] Conversely, the seller may have agreed to give the buyer credit. Suppose an oil company agrees to supply a filling station with all its requirements of oil for three years, payment to be made seven days after delivery. It is

1 *WJ & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189; [1972] 2 All ER 127.