Defences
Online content (part of chapter only)

EXCLUSIONARY CLAUSES

The operation of exclusion and limitation notices in the context of occupiers’ liability is con-
sidered separately in Chapter 12. This section considers exclusion clauses in the context of
commercial contracts, specifically.

The terminology of the typical clause

§10.1 Where C and D enter a contractual relationship, D may have a defence to negligence pursuant
to an appropriately-drafted exclusion clause.

The typical exclusion clause precludes D’s liability for actions in negligence or in negligent
misstatement, and may read something like the following:

_Except to the extent that loss or damage results from D’s gross negligence, wilful default or fraud, D_
_(its directors, officers, employees and agents) shall not be liable for any loss or damage resulting from_
_an act or omission made in relation to [a nominated transaction]._

‘Fraud’ and ‘wilful default’ on D’s part are rarely pleaded or proven, and hence, do not com-
monly serve as triggers for the operation of an exclusion clause – albeit that both can give rise
to dispute (e.g., as to whether ‘fraud’ encompasses common law _and_ equitable fraud, and what
‘wilful default’ precisely means¹).

However, the operation of this type of clause, insofar as it relates to ‘gross negligence’, is
more commonly litigated. One interpretative problem is whether such a clause can exclude
liability for negligence at all, if indeed there is no differentiation between ‘mere’ and ‘gross’
negligence. If that is so, then an exclusion clause of the type above would not exclude liability
for any form of negligence on D’s part.

Several judicial statements give some support to that view, when courts have had to consider
the term, whether in the context of a contract, a trust deed, or a business prospectus. For ex-
ample, in _Sucden Financial Ltd v Fluxo-Cane Overseas Ltd_, Blair J noted that ‘gross negligence’
was ‘not a term of art at common law, and that such a standard may amount to little more in

practice than simple negligence’,\textsuperscript{2} whilst in \textit{Marex Financial Ltd v Fluxo-Cane Overseas Ltd}, Steel J remarked that, ‘[q]uite what the epithet “gross” adds is not at all clear’.\textsuperscript{3} In \textit{Tradigrain SA v Intertek Testing Services (ITS) Canada Ltd}, Moore-Bick LJ noted that the term was ‘often found in commercial documents’, and was ‘a concept recognised by German law’ which had two elements to it: ‘(a) an objective element involving a failure to exercise ordinary care in circumstances where the risk of harm was plain for all to see (the kind of situation which … “makes one clap one’s hand to one’s head and ask “How can it happen?”’); and (b) a subjective element in the form of an absence of anything which renders the act or omission in question excusable from the point of view of the person concerned.’\textsuperscript{4} On the basis of such views, it is arguable that ‘gross’ negligence and ‘mere’ negligence is a distinction without a real difference, and it was neither the intention nor effect of the abovementioned clause to exclude D’s liability for either.

Alternatively, D will typically argue that ‘gross’ negligence is something worse than ‘mere’ negligence, that there is a differentiation between the two concepts, and that D will be protected against liability for ‘mere’ negligence by the operation of the clause. Again, there are numerous authorities which support a differentiation. In \textit{Camerata Property Inc v Credit Suisse Securities (Europe) Ltd (Rev 1)},\textsuperscript{5} Andrew Smith J remarked that, where both ‘negligence’ and ‘gross negligence’ are used in a contractual document, then ‘some distinction between them was clearly intended’, and that the difference may be one of degree and not of kind, but a distinction could nevertheless be drawn. He endorsed the view of Lord Mance in \textit{Red Sea Tankers Ltd v Papachristidis (The Ardent)}, that ‘gross’ negligence means ‘something more fundamental than failure to exercise proper skill and/or care constituting negligence’, and that it embraces, for example, a ‘serious [dis]regard of or indifference to an obvious risk’.\textsuperscript{6} In \textit{Deutsche Bank AG v Sebastian Holdings Inc}, Cooke J noted that ‘gross negligence’ ‘is different in kind, and not just degree, from ordinary negligence. It amounts to conduct which evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing.’\textsuperscript{7} Under this view, D can effectively oust liability for common law negligence or negligent misrepresentation, via an exclusion clause.

As discussed in Chapter 11, the term, ‘gross negligence’, is capable of bearing different meanings in the context of exemplary damages too. In the present context of a commercial contract, Lord Mance clearly favoured the ‘reckless disregard’ interpretation in \textit{The Ardent}. On the other hand, in \textit{ICDL GCC Foundation FZ-LLC v European Computer Driving Licence Foundation Ltd}, the Irish Supreme Court considered that the phrase meant ‘a degree of negligence involving a breach of the relevant duty of care by a significant margin’.\textsuperscript{8} That meaning obviously focuses upon the degree of departure from the relevant standard of care. Hence, even adopting the \textit{Camerata Property} view that an exclusion clause can exclude liability for mere negligence, precisely what is meant by gross negligence is not clear. It is an inherently imprecise phrase, to which English law has struggled to ascribe a definitive meaning.

### The UCTA effect

\textbf{§10.1.L} Where D seeks to oust liability for negligence or negligent misrepresentation (except for ‘gross negligence, wilful default, or fraud’), the clause must not infringe the statutory requirement of reasonableness contained in the Unfair Contract Terms Act 1977.

\begin{itemize}
  \item [2] [2010] EWHC 2133 (Comm) [54]. \hfill \item [3] [2010] EWHC 2690 (Comm) [93].
  \item [4] [2007] EWCA Civ 154, [23]-[24].
  \item [5] [2011] EWHC 479 (Comm) [160]-[161]. \hfill \item [6] [1997] 2 Lloyd’s Rep 547 (HL) 586.
  \item [7] [2013] EWHC 3463 (Comm) [236]. \hfill \item [8] [2012] IESC 55, [59].
\end{itemize}

In any circumstance where D seeks to exclude liability for common law negligence via an exclusion clause, the 1977 Act potentially applies. The Act only applies to ‘business liability’, i.e., liability arising from ‘things done ... in the course of a business’ or ‘from the occupation of premises used for business purposes of the occupier’ (per s 1(3)). Whilst exclusion or limitation of liability for personal injury or death caused by negligence is not permitted (per s 2(1)), any exclusion or limitation for other types of loss (economic loss, property damage) depends upon whether that exclusion or limitation was ‘reasonable’. In that context, ‘reasonableness’ depends upon all the facts and circumstances (s 11).

In *Camerata Properties*[^9] Mr Ventouris, C, suffered financial losses after the collapse of the Lehman Brothers Holdings bank, and he blamed Credit Suisse Securities (Europe), D, for providing him with negligent investment advice. D’s standard terms of business excluded liability for dishonesty, gross negligence or wilful default. **Held:** the exclusion clause was reasonable and valid, having regard to the following: (i) C was a wealthy businessman who approached D for advisory services; (ii) C entered the agreement with D with the help of a commercial lawyer, X, who had often advised C, and C was aware of the sort of terms that might be included in a contract with a bank for advisory services; (iii) if C wished to avoid this exclusion clause, then he could have used another bank with less onerous terms; (iv) the exclusion clause did not exclude all liability for fault; (v) D was advising clients in relation to adventurous and inherently risky investments, and in such a climate, it was only natural that D would want to avoid ‘protracted disputes about what amounts to reasonable skill and care’, by inserting this exclusion clause. It was a reasonable course to adopt to protect itself. In *Titan Steel Wheels Ltd v The Royal Bank of Scotland plc*[^10], Titan, C, claimed for losses arising from the alleged mis-selling of two derivative products by Royal Bank of Scotland, D. D’s contract with the client excluded liability for wilful default, gross negligence, or fraud. **Held:** the clause was reasonable, having regard to the following: (i) C and D had complete equality of bargaining power, as C ‘was a substantial entity’; (ii) the clause was not simply standard for D but was also used by many banks, including Irish banks from which Titan also bought products; (iii) C could easily have sought advice from elsewhere if desired (as the agreement actually expected); and (iv) the terms were clear, and were regularly brought to C’s notice.

Plainly, the fact that the term, ‘gross negligence’, is not easily defined (‘or even to describe with any precision’, per *Camerata Properties*) does not render the exclusion clause which contains it unreasonable. The entire circumstances of the case must be considered, when assessing the reasonableness threshold.

### The Motor Insurers’ Bureau exclusion clause

In 1999[^11], the Motor Insurers’ Bureau (MIB) entered into an agreement with the Government of the day (the MIB Agreement), which provided that wherever C has an unsatisfied judgment in respect of a motor vehicle claim, then the MIB will pay that judgment amount to C. That agreement was recently superseded by the ‘MIB Uninsured Agreement’ of 2015[^12]. This type of

[^9]: [2011] EWHC 479 (Comm) [168].
[^10]: [2010] EWHC 211 (Comm) [105]–[106].
[^11]: Dated 13 Aug 1999; between the MIB (incorporated under the Companies Act), and the Secretary of State for the Environment, Transport and the Regions.
[^12]: For accidents occurring on or after 1 Aug 2015, the 2015 Uninsured Drivers’ Agreement England, Scotland and Wales (dated 3 Jul 2015) applies. For a useful ‘correlation table’ for the 1999 and 2015 agreements, see: https://www.mib.org.uk/making-a-claim/claiming-against-an-uninsured-driver/uninsured-drivers-agreements/.

agreement applies, say, where D is an unlicensed and uninsured driver, or where D’s insurer has avoided liability because of some material non-disclosure by D, or where D’s insurer becomes insolvent. Coverage of this sort dates back to World War II, although these days, this type of agreement gives effect to the European Motor Insurers Directive, which requires Member States to provide compensation for damage to property or person caused by an unidentified vehicle or an uninsured vehicle. Where MIB has to pay, then the monies come out of public funds which the Government sets aside for that purpose.

There are various exclusionary provisions in the MIB Agreements (whatever the version), whereby MIB is not liable to meet an unsatisfied judgment. Where they apply, this will leave C, the injured party, without any compensation at all. Perhaps the most important exclusion in the 1999 MIB Agreement was contained in cl 6(1)(e), which provided that any liability to pay the judgment of C will be excluded, where C was travelling in a vehicle, and either before the journey started, or during the journey and when he could have reasonably left the vehicle, he ‘knew or ought to have known’ that the vehicle: (i) had been stolen; (ii) was being driven by an uninsured driver; (iii) was ‘being used in the course or furtherance of a crime’; or (iv) was being used to escape or avoid lawful apprehension. These statutory exclusions in the 1999 MIB Agreement (which were wider than the Directive – the only exclusion there was that payment of the judgment amount was precluded where C knew that the vehicle/driver was uninsured) gave rise to some interpretative issues.

For example, wherever a vehicle was being used as an integral part of a crime, rather than merely just incidental to it, then the exclusion in 6(1)(e)(iii) applied, and C (who was injured whilst travelling in that vehicle) would not recover anything from the MIB. Also, the exclusion applied, whether the crime was minor or serious. Otherwise, to say that the exclusion should only apply to serious crimes would ‘involve a value judgment, as to the use of what are effectively public funds, which the court is ill-equipped to make’ (per Delaney v Pickett); and it would sit uncomfortably with the language used in the MIB Agreements, in which C’s ‘culpability’ does not feature. Furthermore, the words, that C ‘knew or ought to have known’, were to be interpreted restrictively, so as to connote a high degree of personal fault by C, before he lost his compensation. C ‘ought to have known’, where he deliberately refrained from asking questions that would have revealed that knowledge; but it did not cover scenarios where C was merely careless or negligent in not acquiring the information (per White v White).

In Delaney v Pickett, facts previously, the purpose of C’s and D’s journey was to buy and resupply cannabis. Held (2:1): C could not recover against the MIB, because the exclusion clause applied. Their car was an ‘essential element in the crime’, because they would hardly have wanted to carry such a large packet of illegal drugs with a distinctive herbal smell on public transport. As other hypothetical examples, the use of a vehicle for ram-raiding, or where it has been significantly adapted for people or drug smuggling, would also fall within the clause. In White v White, Brian White, C, was a front seat passenger in a car being driven by his brother, Shane White. They were headed to a late-night party shortly after midnight along a country road near Hereford, when the car crashed and rolled due to D’s negligent driving. C was very seriously injured. D was driving whilst uninsured, unlicensed and disqualified from driving. At the time of this accident, C did not know his brother was unlicensed and, hence, uninsured, but he knew previously that his brother had driven without

---

13 Per Delaney v Pickett [2011] EWCA Civ 1532, [75], between the MIB and the Minister of War Transport.  
15 [2011] EWCA Civ 1532, [78].  
a licence. **Held (CA):** C did not know that his brother was uninsured; but it ‘stands out a mile’ that C ought to have known. C’s claim against the MIB was excluded. **Held (HL):** C was only careless in not checking his brother’s status of licence, but nothing more. Hence, his claim was not excluded under the MIB Agreement.

Clauses 6(1)(e)(i) and (ii) (but not clauses (iii) and (iv)) are now reproduced in cl 8(1) of the 2015 MIB Uninsured Agreement. Analysis of the new exclusionary clauses in the 2015 Agreement is beyond the scope of this book, given the timing of its implementation (1 August 2015).