

**Exemption Clauses In Contractual Obligation Need For A
Judicial Rethink:
Yusuf O. Ali Esq. (SAN)**

INTRODUCTION

This article was provoked by the decision of the Nigerian Supreme Court in the case of **Narumal & Sons Ltd. Vs N.B.T.C. Ltd.**¹ on the doctrine of fundamental breach in a contract and the pervading nature of exemption clauses to neutralise the said doctrine.

This paper would not attempt to state all that are the law on the doctrine of fundamental breach and principle of exemption causes in the law of contract. Rather this is an attempt to look at the issues in other jurisdictions especially England and the position taken by our own Supreme Court on the matter. There are standard texts, both Nigerian and foreign that a researcher on the point can refer to for full exemption on the matter.²

However what we intend to do in this paper is to examine the doctrine of fundamental breach and the effect of exemption clauses in modern day commercial transactions, with particular reference to how the courts had promoted or curtailed the principles and the position of the law

in Nigeria on the point. Furthermore, we shall prefer area of law reform that is important and critical in the light of modern developments elsewhere.

It is a common axiom that the world has become a global village due to the advancement in science and technology. In the same vein, the law on any subject cannot remain static. International businessmen are always in search of the best terrain to conduct their various deals, in doing this, they are more likely to do business with other nationals of other countries that have similar rules guiding commercial relationship like their own countries. More so, they would prefer places where the laws are as developed as their own countries.

Thus no nation can afford to remain static in a world of dynamic changing laws and rules on business matters.

DEFINITION OF TERMS

The phrases "exemption clauses" and "fundamental terms" have the meanings assigned to them in the many Judicial decisions to

which allusion will be made in this paper. However, as working tools, the following can be taken as the writer's definition of the terms after having taken liberty with other definitions of the phrases.

An "exemption clause" could be said to be a clause in an agreement inserted therein by the person that it to be bound, the effect of which is to exclude all the things which ordinarily he will be bound to make contingency plans for. In other words, the party relying on an exemption clause seeks to rely on it to shy away from his contractual liability thereby depriving the other party his remedy for the breach of the term in the contract.

"Fundamental breach" on the other hand is an event resulting from the failure of one party to perform a primary obligation which has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract.³

These definitions, as earlier stated are meant as working tools in this paper.

THE POSITION OF THE LAW

For ease of comprehension, the position of the law in England and that of Nigeria will be discussed together in this paper since the development

of the law in Nigeria on the matter did not occur independently of the position in England. Nigerian courts seemed to have relied on English decisions in forming their impressions on what the law should be on the doctrine of fundamental breach and principle of exemption clauses.

It was not until 1966 that there was a significant change on the stand of the courts in both Jurisdiction on their perception of fundamental breaches and their effect on exemption clauses. We shall now endeavour to look at the law before 1966 in the two jurisdictions.

The position of the law from the late 19th century seem to be that where a party was in breach of a term that was said to be fundamental to a contract, an exemption clause on matter how widely drawn cannot avail that party. In other words, where a party sets out to perform not the contract he entered to perform but something different therefrom, he could not claim the benefit of an exemption clause.

In Tattersall vs. national Steamship CO.4, the plaintiff shipped cattle on board the defendant's ship for carriage from London to New York under a bill of lading which contained an exemption clause to the effect that the ship owners

were not to be responsible "under no circumstance" for any damage, injury or death of the cattle. The cattle were infected with foot and mouth disease because the ship which was previously used to carry that had such diseases was not disinfected by the servants of the defendants.

The plaintiffs suffered damage and sued. The defendants relied on the exclusion clause but the court held per Day J. that:

"In this case it is clear that the ship was not reasonably fit for the carriage of these cattle. There is therefore a breach of their implied engagement by the defendants ... the plaintiffs are entitled to damages unless the defendants are protected by any express stipulation."

He held that there was no such stipulation in the bill of lading to restrict or qualify the defendant's liability thus they were held liable to the plaintiff. This trend continued all through the 19th century when the English Court of Appeal started to develop what it termed "the rule of law" doctrine approach to the issue.⁵

In the case of **Karsales (Harrow) Ltd. Vs. Walls** Lord Denning expounded the theory as follows⁷

"It is now settled that exempting clauses, of this kind, no matter how

widely they are expressed, only avail the party when he is carrying out contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract. It is necessary to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, then he cannot rely on the exemption clauses."

The Privy Council deciding an appeal from Nigeria adopted the above dictum in the case of **Adel Boshalli vs. Allied Commercial Exporters Ltd.**⁸

The Privy Council reversing the Nigerian Federal Supreme Court held that an exemption clause "can only avail a party if he is carrying out the contracts in its essential respect. A breach which goes to the root of the contract disentitles a party from relying on an exemption clause".

This position was maintained in a long line of cases both in England

and Nigeria until 1966⁹.

The House of Lords in 1966 blew the apparently settled balloon of "the rule of Law" doctrine developed by the English Court of Appeal¹⁰.

In the *Susie Atlantique* case the House of Lords held that once the words of an exemption clause are clear and wide enough, the doctrine of fundamental breach cannot defeat its efficacy in protecting the party that invokes it. The House of Lords reached this position in the following words:

"There is no rule of law that an exemption clause is nullified by a fundamental breach of contract or breach of fundamental term but in each case the question is one of the construction of the contract whether the exception clause was intended to give exemption from the consequences of the fundamental breach".

Further, **Lord Klimur** the Lord Chancellor drummed home the new approach at page 67 of the report in the following dictum:

"In my view, it is not right to say that the law prohibits and nullifies a clause exempting of limiting liability for a fundamental breach or breach of fundamental term. Such a rule of law would involve a restriction on freedom of contract, and in

the older cases I can find no trace of it. In exempting clause to be considered but also the contract as a whole. In the cases that I have cited above, I think that, on construction of the contract as a whole, it is apparent that exemption clauses were not intended to give exemption from the consequences of the fundamental breach. Any provision that does so must be expressed in clear and unambiguous terms. See **Cunard S.S. Ltd. V. Buerger** (1926) All E.R. Rep. 103, 108; (1927) A.C. 1 at 13: **London and North Western Railway Co. V Neilson** (1922) All E.R. Rep. 395, 400, 1922 A.C. 263, 272.

In spite of the above dicta, the English Court of Appeal relied on some passages in the **Sussie Atlantique** case to follow its "Rule of Law" doctrine in a number of decisions¹¹.

This was short lived. The House of Lords stamped its feet of authority in the latter case of **Photo Production Ltd. Vs. Securicor Transports Ltd.**¹²

In this case the issue was whether an exemption clause covered the negligence of the agent of the party who committed the act that led to the burning down of the factory of the other party. The House of Lord gave effect to the wide exemption clause which runs thus:

"Under no circumstances shall the company be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of diligence on the part of the company as his employer nor in any event, shall the company be held responsible for..."

That Court while affirming and explaining its earlier decision in the **Sussie Atlantique** case held inter alia:

"that the doctrine of fundamental breach by virtue of which the termination of a contract brought it, and with it, any exclusion clause to an end was not good law: that the question whether and to what extent and exclusion clause was to be applied to any breach of contract was a matter of construction of the contract and normally when the parties were bargaining on equal terms they should be free to apportion the risks as they thought fit making provision for their respective risks according to the terms they chose".

We would like to recall however that in 1976, the Supreme Court had upheld "the Rule of Law" doctrine in the case of **Niger Insurance Ltd. Vs. Abed Brothers**¹³. In that case,

the appellant insured a trailer lorry owned by the respondents and used by them for the haulage of goods. The lorry was involved in an accident in 1967, and was not finally repaired, claiming damages for loss of profit. They relied on a term in the contract that, in the event of an accident, the appellants were obliged to repair it within a reasonable time. The court of first instance found in favour of the respondents on the ground that the appellants had committed a breach of this term. In their appeal to the Supreme Court, the appellants argued that the High Court erred in holding them liable in spite of a clause in the insurance agreement exempting the appellants from liability for damages arising from consequential loss and loss of profit. This led the Court to consider whether an exception or limitation clause in a contract was applicable where there had been a fundamental breach.

Referring to the House of Lord's "extensive review of the leading authorities on the matter" in the **Suisse Atlantique** case, it then turned to **Harbutts Plasticine** and **Farnworth Finance Facilities v. Attryde** noting that in the latter cases, "the Court of Appeal applied the test of fundamental breach and dismissed the appeal of the

appellants, who in the first case relied on a limitation of the liability clause and on an exception clause in the other case, which pleas were rejected in the Court below".

The Court then concluded the issue thus:

"Now the question in the case in hands is therefore this:

Was the Appellant guilty of a fundamental breach which brought the (insurance) policy to an end? If the answer is yes then the Appellant cannot rely on the limitation and exceptions clauses in the policy.

It follows therefore that upon the true construction of the policy, the learned Judge, had he adverted his mind to the question would have concluded that, in the event of an accident, reasonable time for the repair of the motor vehicle was an essential fact which went to the root of the contract and as such. It was a fundamental term of the policy.

This is a question of law, and this Court is therefore entitled to construe the terms of the policy. We accordingly hold that the implied term to repair the vehicle within a reasonable time was a fundamental term of the policy to absolve

itself from the consequences of the breach".

This decision led a learned author to take the following position on the principles of fundamental breach when he stated thus¹⁴.

"It is clear therefore that in contrast to the position of the United Kingdom, the rule of law approach applies to Nigeria namely that a person who has committed a fundamental breach of a contract cannot rely on an exemption clause introduced into the contract for his benefit".

The above view would appear to be the correct position of Nigerian law on the point until the decision Supreme Court in the **Narumai & Sons Ltd.** Case in 1989.

The brief facts of the case are as follows:

The defendants, Narumai & Sons (Nig.) Ltd. Hired the plaintiffs company's tug **Annie** and two **Barges, B6 and B12** to transport 45,600 cartons of Amstel Beer and 4,320 cartons of champagne from Warri to Lagos. The total amount due to the plaintiffs for the hire of tug and Barges was ~~₦~~89,356.45. The defendant did not pay the sum thus the action.

The defendant company

counter-claimed in the sum of ₦407,911,20 being damages it allegedly suffered by leakages in the Barges which destroyed the goods consigned in them.

At the end of the trial, the Judge Anyaegbunam C.J. gave Judgement on the plaintiff for the sum of ₦89,356.45 as claimed and also awarded ₦120,256.00 to the counter-claimant for damages suffered as a result of the leakages in the Barges which damaged the goods.

The basis for the award of the money on the counter-claim was that the trial judge found that the Barges were not seaworthy and that the exemption clauses contained in the carriage agreement could not avail the plaintiff.

The plaintiff appealed to the Court of Appeal on the issue of the counter-claim. That Court allowed the appeal and held that the Barges were seaworthy.

There was a further appeal to the Supreme Court. The issue raised which is important to our discourse was framed as follows:

"whether a party in fundamental breach of a term of warranty can rely upon an exclusion clause in a contract?"

The Supreme Court dealt with other issues which are not quite relevant to this

paper before coming to the issue quoted above. The Court held, agreeing with the Court of Appeal that the Barges were seaworthy thus no fundamental breach was committed but went ahead to hold further that even if the Barges had been unseaworthy, the exemption clause in the contract would have availed the plaintiff.

The exemption clause that was considered in the case runs that:

"Niger Benue Transport Co. accepts no responsibility or liability for any damage or loss however caused to goods carried on their crafts or vessels towed by their tugs either during transit or when loading or off loading. Hirers are responsible for insurance of goods on their vessels and cost of insurance is for cost of hirer".

Honourable Justice Nnamani J.S.C. (of blessed memory) delivering the judgment of the Court with which the other 4 Justices concurred did a lengthy exposition on the relative area of the law and reviewed at length the various English decisions already alluded to earlier. Having done that, his lordship held that the position of the Nigerian Law on the point is like the position in England as held by the House of Lords in the **Photo**

Production vs. Securricor
case supra.

At pages 753 to 754 of the report, his lordship articulated the position thus:

"The result of the authorities appears to me to be that, while in the earlier cases a fundamental breach of an express or implied warranty would have led to an exclusion of an exception clause, the latter cases appear to hold that such an intention must be deduced from the construction of the terms of the contract between the parties. In other words, having regard to the terms and circumstances of the contract, was it the intention of the parties that even if a fundamental term of the contract (in this case an express or implied warranty) had been breached, the exclusion or exemption clause would nevertheless apply?"

If one applies all this to the instance case, as I have said, there was an express warranty in Clause 5 of Exhibit B (a fundamental term). But as I have found that Barge B66 was seaworthy, there is in fact no breach of any fundamental term of the contract. The exemption

clause 4 of Exhibit B was therefore a complete answer to the appellant's unseaworthy, I would have come to the same conclusion. Construing the terms of the contract as a whole, I see an intention to grant respondents escape from liability even if there had been breach of Clause 5. The words "accepts no responsibility or liability for any damage or losses however caused to goods" are so wide that they were intended to grant exemption notwithstanding Clause 5. This must be so for "however caused" must in its wide sense include loss or damage caused because the vessel was unseaworthy".

His lordship Kawu J.S.C. lent his voice on the point by stating at page 759 of the report.

"In my view there was no breach of any fundamental obligation on the part of respondents as the appellants have failed to establish that the vessel provided was unseaworthy. In the circumstances I am of the view that the respondents are fully covered by clause 4 of Exhibit B".

In the same vein Oputa J.S.C. at page 269 held

thus:

"In any event having held that Barge 6 was seaworthy even on the authority of Steel (supra), it will be logical to hold also that the "Exemption clause 4 in the Hire Agreement Exhibit B and D is wide enough to protect the plaintiff/respondent against any liability for the loss incurred by the defendant/appellant".

It is the view of this writer that the Supreme Court needed not to have gone to the trouble of making any exposition on the principle of fundamental breach and exemption clauses in the circumstances of the case. Having held that the ship was seaworthy, there was no breach of the hire agreement to have warranted the excursion into the principles of fundamental breach and exemption clauses.

There were words even from the leading Judgement which suggested that a decision on the principle of fundamental breach and exemption clauses was not necessary for a just decision on the matter. Oputa J.S.C. when commenting on the issue that touched on exclusion clause in the case even stated that:

"The above is an academic and somewhat hypothetical question. If a hypothetical answer is required, that answer will be..."

The fact also that Obaseki J.S.C. and Belgore J.S.C. who took part in the case did not express an opinion on the principle show clearly that a decision thereon was uncalled for in the case.

At any event the decision of the Supreme Court in the 1976 **Abed Brother** case (supra) was not adverted to at all. It was possible that if the Court's attention had been drawn to it, the decision under consideration could have been different.

SUGGESTED LAW REFORM

The very harsh reality of the Principle of exemption clauses had been greatly tempered by legislation in England 15. Sadly, the Nigerian Law remains the same as it had been from the **Photo Production** case (supra).

The purpose of the Unfair Contract Terms Act 1977 was stated in its preamble to be:

"...to impose further limits on the extent to which under the law civil liability for breach of contract, negligence or other breach of duty, can be avoided by means of

contract terms and otherwise..."

It cannot be over emphasized that Nigeria is overripe for this type of law to protect its largely illiterate citizens against the very crippling effect of exemption clauses.

Moreover as earlier stated, in a changing world economic order, Nigeria cannot decide to marked aspects of its commercial law static. It is a matter of common knowledge that Britain is Nigeria's largest business partner. Is it then not necessary to bring our law touching on commercial transaction to nearly as near the English law as possible?

At any rate, Nigeria and Nigerians will be at the receiving end of unrestricted exemption clauses especially in the area of external trade where people other than Nigerians are the ship owners and carriers of goods to Nigerian shores. This writer shares the view of Professor Sagay when he stated as follows.¹⁶

"In an undeveloped country, in which standards of production of goods and other conditions for the protection of the consumer have either not been established, or if established remain unimplemented or unenforced, the

rejection of any right to be protected against the consequences of a fundamental breach of contract, is surely to be welcomed. The rule of law doctrine of fundamental breach and breach of fundamental terms is a healthy rule of public policy. An unrestricted principle of "freedom of contract" would be dangerous and contrary to the public interest at the present stage of Nigeria's industrial and commercial development and culture".

CONCLUSION

It is our submission that the Supreme Court if it has the opportunity should revert to the position it took in the **Abed Brother's** case (supra). Otherwise the Legislature should come in to place some checks on the unrestrained inclusion of exemption clauses in commercial agreements in Nigeria. That is the only path to keep our law in constant relevance to the yearnings of international trade and practice. So also, the largely illiterate citizens of Nigeria would stand to lose much if the position upheld by the Supreme Court in the **Narumai & Sons** case (supra) is to persist. Even in England with its sophisticated Citizenry, it was found desirable to curtail the right of a party to insert wide

exemption clauses in agreements since 1977. Nigeria cannot afford to look the other way when it comes to the protection of consumers.

The path of honour is to amend relevant laws and introduce new legislation in that regard.

FOOTNOTES

1. (1989) 2 NWLR (pt. 106) 730.
2. See generally:
 - (a) Sagay: Nigerian Law of Contract: Pp. 124
 - (b) Cheshire and Flfoot's Law of Contract. 9th Edition by M.P. Furmston PP; 144 - 169.
 - (c) Anson's Law of Contract: 24th Edition Edited by A.C. Guest. PP. 150 - 187.
 - (d) Chitty on Contracts. General Principles: 24th Edition. Pp. 361 - 390.
3. See Lord Diplock in Photo Production Ltd vs. Securicor Transport Ltd. (1980). A.C. 827.
4. (1884 - 1884) 12 Q.B.D. 297.
5. See
 - (a) Owners of the Cargo on ship "Maorilling" vs. Hughes (1895)2 Q.B. 550.
 - (b) Karsales (Harrow) Ltd. Vs. Walls

(1956). I.W.L.R. 936.

6. Op. Cit.
7. Op. Cit. P. 968.
8. (1961) All N.L.R. 917.
9. See

(a) Shotayo and Arukegbe vs. Nigerian Technical Co. (1970) 2 A.L.R. 159.

(b) Alexander vs. Railway Executive. N.R.N.L.R. 115.

10. See: **Suissee Atlantique Societe d' Armements Martine S.A. vs. Rotterdamsche Kolen Centrade (1966) 2 All E.R. 161.**

11. See:

(a) Harbutts Plasticine Ltd. Vs. Wavne Tank and Pump Co. (1970) All E.R. 225.

(b) Farnworth Finance Facilities vs. Attryde (1970)2 All E.R. 774.

12. (1980) All E.R. 556.
13. (1976) 6 U.I.L.R. (pt 1) 61.
14. See: Sagay: Nigerian Law of Contract. P. 155.
15. See: The Unfair Contract Terms Act 1977 (United Kingdom). Nigerian Law of Contract. P. 155.