Excluding liability for negligence: "All care, no responsibility" in Livingstone *v* Roskilly

Cassandra Nicholson*

This article addresses the tensions inherent in the courts' examinations of exclusion clauses. It is submitted that although the ostensible purpose of these rules is to ascertain the parties' intentions, the courts use them to implement policy objectives. The complex interplay that results is examined in the context of the High Court decision of Livingstone *v* Roskilly. *Thomas J's judgment is discussed in relation both to his application of the orthodox approach to exclusion clauses and the difficulties this reveals, and to his development of an alternative approach. Ultimately, it is submitted that the failures of the orthodox analysis remain as yet unresolved.*

I INTRODUCTION

The law permits a party to a contract to exclude his or her liability for negligence, if, and only if, certain requirements are met. Traditionally these requirements have been formulated as rules by which the court can gauge the parties' intentions regarding an exclusion of liability in making the contract. Throughout their development, however, these rules have been used to apply considerations of fairness to exclusion clauses. The interplay between the concept of the parties' intentions and the achievement of a fair result complicates the application of the rules concerning exclusion clauses.

The fairness of excluding liability for negligence depends on the surrounding circumstances. Where the contract is freely negotiated between commercial parties of equal bargaining power and the exclusion clause itself is not oppressive, it is easy to regard exclusion clauses as a useful and fair means of resolving the ambiguity of contractual obligations and efficiently apportioning the risks. At the other extreme, where the exclusion clause is far-reaching, the receiving party did not know of it, and the party enforcing it is in a stronger bargaining position, the exclusion clause may seem a harsh and oppressive device. The same rules used mechanically in the first instance, might need to be used robustly to achieve a just result in the second.

The application of these rules is further complicated because each court differs in their conceptions of justice and fairness. The Court of Appeal has recently

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demonstrated, in *Shipbuilders Ltd* v *Benson*,[1] a willingness to enforce exclusion clauses without the reluctance and dislike expressed in earlier cases. This may be contrasted with the approach in *Livingstone* v *Roskilly*,[2] where Thomas J considered virtually the same clause and reached a very different conclusion.

This paper examines *Livingstone* v *Roskilly* as a useful illustration of the difficulties which confront a court in a case concerning exclusion clauses. Thomas J's decision canvasses not only the traditional approach taken to exclusion clauses, but also suggests another approach. Taken as a whole, the judgment clearly reveals the subtle relationship between the stated purpose of the rules concerning exclusion clauses and the use to which they have been put. More fundamentally, it raises issues as to the function of contract law - whether the courts should continue to enforce contracts on the basis that they are solely giving effect to the parties' intentions or whether there is a place also for the open application of concepts of good faith and fairness. One's view on the complex interplay between the enforcement of the parties' intentions and the

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1 [1992] 3 NZLR 549. There has been a complete shift in the Court of Appeal's attitude towards exclusion clauses. Compare *Producer Meats (North Island) Ltd* v *Thomas Borthwick & Sons (Australia) Ltd* [1964] NZLR 700, 703, where North P states that "the common law ... has always frowned on such provisions and insisted on construing them strictly" with the statement in *DHL International Ltd* v *Richmond Ltd* [1993] 3 NZLR 10, 17 that, where there is no unequal economic power, there is no excuse for a strained construction of the exclusion clause to protect one party.

2 [1992] 3 NZLR 230. The direct applicablity of this case has been narrowed, subsequent to the writing of this paper, by the enactment of the Consumer Guarantees Act 1993. The Act has the effect of requiring reasonable care and skill to be taken in the supply of all services to consumers. If the exact facts of this case arose again today, Roskilly would be unable to contract out of this duty (section 43). The Act only applies, however, where a service has been supplied to a consumer: see A Fraser "The Liability of Service Providers Under the Consumer Guarantees Act 1993" (1994) 16 NZULR 23. The service must be of a kind ordinarily acquired for personal, domestic or household use in order for it to have been acquired by a consumer, under the definition of "consumer" in section 2(1). Therefore, as Fraser points out, the applicability of the Act in a case such as this may depend on how broadly the relevant service is defined. If 90% of the vehicles stored by Roskilly were commercial trucks and vans and this service was therefore narrowly defined as the "storage of commercial vehicles", arguably Livingstone would not be a consumer within the meaning of the Act. Roskilly would then be perfectly entitled to contract out of his mere common law duty to take reasonable care of the car. Moreover, even if Livingstone was classed as a consumer, if the car had been stored for the purposes of Livingstone's business, Roskilly would be within his rights to contract out of the Act under section 43(2), provided the exclusion clause did not purport to affect consumer contracts. In any case, Thomas J's analysis remains relevant to the development of contract law generally. The tension seen in this judgment between the stated purpose of interpreting the parties' intentions and the use to which such rules are put in the case of exclusion clauses, can be perceived in the contra proferentem rule in general. In addition, as is pointed out in Part VI, throughout his judgment Thomas J draws on the latent premise of good faith that he perceives in areas of the law of contract, such as the requirement of notice of an exclusion clause, the rules for the implication of terms, and the rule which invalidates a penalty provision.

achievement of a fair result largely depends on how far one believes contract law is, or should be, a tool used by judges to achieve a just result.

II *LIVINGSTONE* V *ROSKILLY*

A Facts

This case concerned the contractual relations between a garage owner, Roskilly, and his customer, Livingstone. Livingstone bought a 1961 Daimler Dart sports car from Roskilly, and returned it several times for repairs. At one point in their dealings Livingstone pointed out a notice displayed in Roskilly's workshop and made some jocular comments about it. The notice read:

ALL VEHICLES
STORED and DRIVEN
at
OWNERS RISK

All Care Taken - No Responsibility

On the occasion in question, the car was in the garage for more repairs, which were duly completed before the long weekend. The car was stored in Roskilly's workshop over the weekend. During that weekend the car was stolen.

B District Court[3]

Livingstone sued Roskilly for breach of the implied duty of care in a contract of bailment. The existence of a contractual bailment of the car and the loss of the car were not at issue. The plaintiff alleged that Roskilly had failed to take reasonable care of the car because the locks to the workshop were inadequate and the key was left in the car's ignition. He argued, and Elliott DJ accepted, that Roskilly had therefore acted negligently, and that this negligence caused the loss of the car.

Roskilly argued that, even if he had been negligent, the motor vehicle was stored entirely at Livingstone's risk, by virtue of the notice displayed in his workshop. Elliott DJ upheld the defendant's submission. He found that, on a common-sense reading, the notice clearly excluded Roskilly's liability for failing to take reasonable care in storing the car.

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3 *Livingstone* v *Roskilly* Unreported, 21 March 1991, District Court Auckland Registry PLT 7186/90.

C *High Court*[4]

The only issue on appeal was whether the notice was effective to exclude Roskilly's liability for his negligence. Thomas J adopted two different approaches in answering this question, and held on both that the notice did not exempt Roskilly from liability.

1 *The traditional approach*

First, his Honour adopted the approach taken by counsel. The question was whether the notice was sufficiently clear and unambiguous to be effective to exclude Roskilly's liability for negligence. Thomas J held that it was not, on four grounds:

(i) the words in the notice could have been intended merely to clarify that the garage owner bore no risk for accidental loss or damage;
(ii) the notice could also mean that the garage owner was not undertaking any responsibility for insuring the risk;
(iii) the notice was not clear as to what kind or scope of risk was intended to be covered by the notice;
(iv) the words "all care taken" introduced uncertainty into the notice, so that it was inherently ambiguous.

Therefore, under the contra proferentem principle, the notice was too ambiguous to be an effective exclusion clause.

2 *The alternative approach*

Thomas J, however, preferred to base his conclusion on a different analysis. He held that the correct approach was to construe the contract as a whole, in order to determine the parties' intentions with respect to their positive obligations and the exclusion clause. The question was whether the parties intended to exclude the defendant from liability for failing to perform, or negligently performing, what the defendant had otherwise undertaken to do under the contract. Only if the contract as a whole confirmed that an exclusion clause was intended to operate on this basis, could it do so.

His Honour held that Roskilly had undertaken to take reasonable care in storing the car under the bailment contract. He stated that if the exclusion clause was effective, it would render the obligation to store nothing more than a statement of intent. Therefore, he held that the parties did not intend to exempt Roskilly from liability for negligently storing the car.

3 *A general principle of good faith*

The above conclusions were sufficient to decide the case. Thomas J went on, however, to examine the requirement, usually addressed earlier in exclusion clause cases, that there be notice of an exclusion clause before it can be part of the contract between

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4 Above n 2.

the parties. It was clear on the facts that Livingstone knew of, and had even commented on, the purported exclusion clause in his dealings with Roskilly. This would normally be sufficient to constitute notice.

Thomas J said, however, that there is a latent premise informing the notice requirement that, in general, parties to a contract must act in good faith in making and carrying out that contract. Therefore, where clauses in a contract contain particularly onerous or unusual conditions, the party enforcing these conditions must show that they have been fairly and reasonably brought to the attention of the other party. If it had been at issue in this case, fairness would have required that Roskilly explicitly clarify the meaning of the notice to Livingstone.

Thomas J bolstered the rest of his decision by reference to the general principle of contractual good faith. It provided support for his analysis of the rules of formation and construction of contracts as based on cardinal notions of fairness.

4 Conclusion

It is proposed to discuss the development and the current state of the law relating to exclusion clauses in contracts, in relation to the analysis in *Livingstone* v *Roskilly* .

III GENERAL LEGAL PRINCIPLES

Traditionally, whether one party is bound by terms which the other party claims are part of the contract, is said to depend "on the reasonable expectations of the parties as assessed by the court on an objective examination of the particular circumstances".[5] Generally, it would be reasonable for parties to expect an exclusion clause to be effective where, first, it has affected the parties' obligations and, second, it has done so clearly and unequivocally.

A The Requirement of Notice[6]

According to orthodox statements by the courts, an exclusion clause must be incorporated in the contract between the parties in order for it to affect the parties' obligations. Therefore, the question is whether the purported exclusion clause is contained in a contractual document, and has been sufficiently brought to the notice of the party receiving it.[7]

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5 D Greig & J Davis *The Law of Contract* (Law Book Co Ltd, Sydney, 1987) 602.

6 This area of the law relating to exclusion clauses is discussed here for the sake of completeness. In *Livingstone* v *Roskilly*, the issue arises only in Thomas J's obiter statements. See above Part II C 3.

7 *Harvey* v *Ascot Dry Cleaning Co* [1953] NZLR 549, 553. F B Adams J did not think there was a separate requirement that the relevant term be on a contractual document, in addition to the requirement of sufficient notice. But see J Burrows, J Finn and S Todd *Cheshire & Fifoot's Law of Contract* (8 ed, Butterworths, Wellington, 1992) 178, n 147.

The relevant clause must be in a document which a reasonable person would expect, or the receiving party knows, to contain contractual terms.[8] Therefore, in *Chapelton* v *Barry UDC*,[9] the court held that a reasonable person would assume that a ticket received in exchange for the hire price of deck chairs and required to be retained for inspection, was only a receipt and not an integral part of the contract.

Furthermore, the conditions must be brought to the notice of the party to be bound in such a way that the recipient has a choice whether or not to accept them, before the contract is irrevocably concluded.[10] If a document is to be part of the contract, there must be reasonably sufficient notice of it.[11] What constitutes reasonable notice depends on the facts, including the nature of the exclusion clause.[12] In *Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd*,[13] the clause setting the level of penalty payments was unusual and onerous. It was not sufficient that it was amongst the printed conditions on the delivery note. It was held that the receiving party could not conceivably have known of the clause if its attention was not drawn to it.

A prominent public notice, which contains the exclusion clause and can be plainly seen before the parties conclude the contract, will usually be sufficient to give notice of an exclusion clause.[14] In *Livingstone,* however, Thomas J considered that, had it been at issue, the clause was sufficiently stringent to require Roskilly to draw his customers' attention to it and explain its meaning before accepting a car for storage. This is an unusually high standard. Traditionally, it is not necessary for the receiving party to have read the term or to be subjectively aware of its content or effect.[15]

B The Requirement of Clarity

If the initial requirement of notice is satisfied, the extent to which the clause will have an impact on the parties' contractual obligations depends on its clarity. The

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8 J Chitty and A Guest (eds) *Chitty on Contracts* (26 ed, Sweet & Maxwell, London, 1989) 498.

9 [1940] 1 KB 532; [1940] 1 All ER 356.

10 Above n 5, 617. See also *Olley* v *Marlborough Court Ltd* [1949] 1 KB 532; [1949] 1 All ER 127; *Thornton* v *Shoe Lane Parking Ltd* [1971] 2 QB 163; [1971] 1 All ER 686.

11 *Parker* v *South Eastern Rly* (1877) 2 CPD 416. Where the document is signed, the parties are generally bound. See *Cheshire & Fifoot's Law of Contract*, above n 7, 184.

12 See *Spurling Ltd* v *Bradshaw* [1956] 1 WLR 461; [1956] 2 All ER 121, 125. Lord Denning comments that some clauses he had seen would need to be "printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

13 [1989] 1 QB 433; [1988] 1 All ER 348.

14 *Olley* v *Marlborough Court Ltd*, above n 10, 134. Where a notice does not contain the exclusion clause, but refers to it, as in *Chapleton* v *Barry UDC*, above n 9, or where the notice comes after the contract is fully concluded, as in *Olley* v *Marlborough Court Ltd*, it may be ineffective.

15 Above n 8, 499.

traditional approach is expressed in terms of assessing and giving effect to the parties' intentions, as indicated by the language they have used and the circumstances of the case. The principle is that it is "wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning... ."[16] Where there is ambiguity, however, the guiding principle of construction is the contra proferentem rule. Under this rule, any ambiguity in the interpretation of the clause must be resolved against the party for whose benefit the clause was designed. This overarching principle of construction has several specific effects.

In general, an exclusion clause must extend to the exact event which has occurred.[17] Therefore, a clause excluding liability for the breach of a warranty will not cover the breach of a condition of a contract.

In the case of clauses purporting to exclude liability for negligence, the contra proferentem principle requires the clause to be clear and unequivocal for it to be effective.[18] Where a clause expressly refers to negligence, or uses some synonym, this will usually suffice.[19] Express references to negligence are rare,[20] but words such as "at sole risk", "at owner's risk" and "no liability whatever" will normally cover negligence.[21]

Where a clause is wide enough in its terms to cover negligence, but does not expressly refer to it, the court may ask whether there are alternative grounds of liability to which the clause could refer. If there are, the clause's scope is ambiguous, and it will usually be construed not to extend to negligence under the contra proferentem principle.[22] In *Hawkes Bay & E C Aero Club* v *McLeod*, North P referred to the case of common carriers, by way of example.[23] Common carriers' liability is not necessarily based in negligence and therefore an exclusion clause in broad terms could be intended only to exclude strict liability, and not liability in negligence.

Where, however, it is clear that the liability of one party can only be in negligence, the clause will more readily operate to exempt that party, according to *Rutter* v *Palmer*.[24] The rationale for this principle is that if the clause did not exempt the party from liability it would have no legal effect at all.[25] Most recently, the Court of Appeal

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16 *Photo Productions Ltd* v *Securicor Transport Ltd* [1980] AC 827; [1980] 1 All ER 556, 568; see also *Kaniere Gold Dredging Ltd* v *Dunedin Engineering & Steel Co Ltd* (1985) 1 NZBLC 99,024, 102,228; *DHL International Ltd* v *Richmond Ltd*, above n 1, 8.

17 Above n 8, 572.

18 *Producer Meats*, above n 1, 703.

19 *Canada Steamship Lines Ltd* v *R* [1952] AC 192; [1952] 1 All ER 305, adopted in New Zealand by *Hawkes Bay & East Coast Aero Club Inc* v *McLeod* [1972] NZLR 289.

20 *Hollier* v *Rambler Motors Ltd* [1972] 2 QB 71; [1972] 2 WLR 401, 406.

21 See above n 8, 577-578.

22 *Hawkes Bay & East Coast Aero Club Inc* v *McLeod*, above n 19, 295-296.

23 Above n 19, 295.

24 [1922] 2 KB 87.

25 *Producer Meats*, above n 1, 703.

in *Shipbuilders Ltd* v *Benson* has stated unequivocally that "where the bailee's liability is only in negligence the term *must* be taken as excluding that".[26] This statement suggests that the principle in *Rutter* is now to be applied as a rigid rule.

The strong words of the Court of Appeal in *Benson* are at odds with the general understanding that, in these cases, an exclusion clause will more readily, but not necessarily, be effective. North P noted, in *Producer Meats (North Island) Ltd* v *Thomas Borthwick & Sons (Australia) Ltd*, that the principle in *Rutter* does not detract from the requirement that clear words must be used to exempt a party from liability for negligence.[27] The court's duty above all is said to be to construe the relevant clause.[28] Therefore, in some cases, general clauses have been held not to exclude negligence, even though that was the only potential head of liability. Instead, the relevant clause has been construed as containing words of warning. In *Producer Meats*, the notice read:[29]

> The wool meat and skins are uninsured and are held at owners risk.

This was held to be only a notification of the insurance position. *Producer Meats* illustrates that the rule in *Rutter* may be displaced by the particular facts of a case. In this case, the mention of insurance in the notice narrowed its scope. Alone, the words "owners risk" could have covered negligence. In *Benson*, the Court of Appeal noted, confirming this interpretation of *Producer Meats*, that "all three Judges said with varying degrees of certainty that had it been a clause directed to liability the expression 'at owners risk' would have excluded the bailee's liability for negligence."[30]

In *Moran* v *Lipscombe*,[31] the rule in *Rutter* was also limited, although on the basis of the public's understanding of the notice in this context, rather than by its wording. In this case, a car was stored in a garage for repairs. The relevant clause was held not to exclude the garage owner's liability in negligence. Although negligence was the only potential ground of liability, the court held that a person taking a car to the garage for repairs might not appreciate this. Therefore, this person would not expect that a notice in general terms was intended to exclude liability for negligence. Both in this case and in *Hollier* v *Rambler Motors Ltd*,[32] the class of person to whom the relevant notice was addressed was taken into account in determining and restricting the notice's meaning. These cases limit and qualify the principle in *Rutter* v *Palmer*.

The rule in *Rutter* is generally justified in terms of the parties' intentions. It is said that when negligence is the only liability, the inherent improbability of the parties intending to exclude liability for negligence is reduced.[33] This rule has been limited,

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26 [1992] 3 NZLR 549, 561. Emphasis added.
27 Above n 1, 703.
28 Above n 20, 407.
29 Above n 1, 702. The punctuation is reproduced as in the original.
30 Above n 26, 561.
31 [1929] VLR 10, 15. See also above n 20, 411.
32 Above n 20.
33 N Palmer *Bailment* (Law Book Co, North Ryde, NSW, 1991).

however, ostensibly because of the courts' concern that it artificially assumes that every clause in a contract must add something to the general law, and therefore it may in fact ignore the particular context, intentions and knowledge of the parties. Sales argues that "it seems a false conclusion that, because a clause is inserted in a contract, that clause must cover some point on which the general law is silent".[34]

It is submitted that the real debate, however, comes down to whether the court should be more ready to enforce an exclusion clause or not. Coote has commented that the rule in *Hollier* could be a useful tool of consumer protection.[35] This advantage has to be weighed up against considerations of commercial convenience, which justify the rule in *Rutter*. Determining the effect of an exclusion clause on the basis of community understanding of the legal nature of a particular transaction, would severely limit the cases where the principle in *Rutter* would operate. The rule in *Hollier* would logically require express words to exclude negligent liability. Barendt comments that this requirement runs counter to the traditional rules of construction.[36] Another commentator suggests that *Hollier* is "perhaps an example of strict construction degenerating into hostile construction".[37]

At present in New Zealand, after the Court of Appeal's decision in *Benson*, the principle in *Rutter* is likely to be applied in the interpretation of exclusion clauses in most, if not all, cases in which negligence is the only potential ground for liability.

C The Contra Proferentem Principle

The governing rule in the construction of an exclusion clause is the contra proferentem principle. Swanton considers this principle to have a two-fold rationale.[38] First, she suggests that it is generally thought to be inherently unlikely that one party should intend to relieve the other from liability for failing to take reasonable care. Second, she argues that the rule is explained by the likelihood that the parties intend a reasonable result. This suggests that the court's underlying attitude is that "normally excluding liability for one's own negligence would be unfair and unreasonable".[39] The first aspect of the rationale, as it is formulated, is based on the parties' intentions; the second, on the court's attitude towards exclusion clauses.

These two aspects are clearly linked by the objective nature of the court's assessment of the parties' intentions and the concept of reasonableness. It is only possible to justify a statement that an intention to exclude negligent liability is "inherently

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34 H Sales "Standard Form Contracts" (1953) 16 MLR 318, 323.

35 "Exception Clauses and Those To Whom They Are Addressed" [1973] CLJ 14, 15. The need for the rules concerning exclusion clauses to implement consumer protection measures has been obviated now by the enactment of the Consumer Guarantees Act 1993. See above n 2.

36 "Exemption Clauses: Incorporation and Interpretation" (1972) 35 MLR 644, 646.

37 *Cheshire & Fifoot's Law of Contract*, above n 7, 189.

38 J Swanton "Exclusion of Liaiblity for Negligence" (1989) 15 UQLJ 157, 159.

39 Above n 38, 159.

improbable", if one is making the judgement that the parties will behave reasonably and that exclusion clauses are unreasonable. Nonetheless, the courts continue to state that they are only relying on the parties' intentions. Of course in practice however, the distinction between what the reasonable person would intend, as judged by the court, and a judicial test of reasonableness, is very fine.

The contra proferentem rule is therefore problematic because it reflects the courts' attitudes towards the reasonableness of exclusion clauses, and yet is justified by reference to the parties' intentions. Lord Denning has strenuously criticised the contra proferentem principle for its "array of difficult linguistic distinctions, confused constructions and massive conceptualisms such as the 'implied intention', the 'presumed intention' and the 'contemplation of the parties'".[40] His Lordship states that "in those cases where the courts have twisted the ordinary and natural meaning of words to find that they were not sufficiently clear, the rejection of those clauses was really justified by the unreasonableness of the clauses".[41] Lord Denning's argument is that the pretence should be abandoned and that these mechanisms, ostensibly for divining the parties' intentions, should be reformulated as the test of reasonableness they really are.

Given the underlying tension between the myth that the court is trying to ascertain the parties' intentions and the actual application of a test of reasonableness, it is hardly surprising that how strictly the contra proferentem principle is applied depends very much on the circumstances of the case. It may depend on the status and relationship of the parties, the type of liability sought to be excluded, the other facts of the case, and, perhaps most of all, the personal philosophy of the judge. This tension and its consequences are now examined in the context of *Livingstone* v *Roskilly*.

IV THOMAS J'S TRADITIONAL APPROACH

A Introduction

Livingstone v *Roskilly* concerns a generally worded clause, which purports to exclude liability for negligence, where that is the only liability potentially falling on the defendant. His Honour applies the orthodox requirement: that clauses which purport to exclude liability for negligence must do so clearly and unambiguously. His application of this requirement, however, raises questions as to its arbitrary and artificial nature and as to its true rationale. Nonetheless, the result in this case has an intuitive appeal.

B The Purpose of the Notice - Words of Warning?

Thomas J demonstrates the notice's ambiguity by giving two other possible interpretations of its purpose. It could be meant to confirm, for the benefit of the garage's lay customers, that the garage owner is not liable for purely accidental loss or damage to stored cars. Moreover, it might be meant as a warning that the garage owner,

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40 N Chin *Excluding Liability in Contracts* (Butterworths, Singapore, 1985) 124.
41 Above n 40, 120.

as bailor, does not insure for damage to stored cars and that the cars' owners should insure themselves against any loss. In this way his Honour interprets the notice to give it a purpose, which yet does not impact on Roskilly's contractual obligations. Thomas J thereby supports his analysis of the notice as having no legal effect.[42]

Thomas J emphasises that such a notice is not simply declaratory, but has the "substantial purpose of confirming" the incidence of risk.[43] He thus anticipates and counters the statement of the Court of Appeal in *Benson* that it would be unrealistic to confine the reference to storage, in the relevant clause, to accidental loss or damage "for which a bailee would not normally be liable in any event".[44] His Honour gives the notice a realistic, non-contractual purpose. He thereby also impliedly rejects the principle in *Rutter* v *Palmer*. His rejection of this principle, however, is based on his construction of the notice itself, rather than on the *Hollier* approach of relying on the community's knowledge of law in the particular context.

Nonetheless, his Honour does not address the issue of whether this interpretation is plausible on the facts. He goes no further than to say that the "words are quite capable of meaning" that there is no responsibility accepted for accidental loss, or that "the terms of the notice can reasonably be construed" as an insurance notification.[45] He gives no convincing reason for choosing these interpretations over one which would give the notice a legal effect. To this extent, his reasoning is problematic.

If this case is compared to *Producer Meats*,[46] Thomas J's reading of the notice does not appear plausible. In *Producer Meats*, it was the notice's reference to insurance that meant it could not cover negligent liability. There is no similar reference in this notice which might narrow the scope of the words "owners risk" and "no responsibility". Generally, other cases cannot provide authority for the interpretation of particular clauses.[47] However, the comparison of these two cases does suggest that Thomas J's non-contractual interpretation of the notice in *Livingstone* is less than convincing.

It is submitted that Thomas J does not explain why the non-contractual interpretations are to be preferred over those that would give the notice legal effect, because he uses these interpretations simply to expand the potential meaning of the notice. By stating these interpretations, without resolving whether or not they are convincing, his Honour effectively demonstrates that the notice's language alone cannot determine beyond doubt whether or not its purpose is contractual. It is contended, however, that this only illustrates that the clause is in general terms, not that it is

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42 Arguably, Thomas J's two non-contractual interpretations of the notice only amount to one. On this interpretation, the notice warns that the garage owner is not liable for accidental loss and notifies customers that there is, therefore, a need to insure against such loss.

43 Above n 2, 234.

44 Above n 26, 561.

45 Above n 2, 233-4.

46 Above n 1.

47 Above n 38, 162.

ambiguous. The courts usually take a more robust approach to ambiguity, in view of the fact that the parties are generally ordinary men and women, not lawyers.[48] Thomas J's unsupported statements that the notice *can* be interpreted as having no legal effect, do not go further to prove that a reasonable person *would* find the clause ambiguous. It is necessary to examine the rest of Thomas J's reasoning to assess whether it is more convincing.

C The Clarity of the Notice

Thomas J argues that the scope of the notice is not clear, and, above and beyond this, that the words of the notice are inherently contradictory, and therefore ambiguous.

1 The scope of the notice

Thomas J holds that it is not clear what kind or scope of risk was intended to be covered by the notice. His Honour objectively assesses what it would be reasonable for the notice to cover. He asks whether it could be interpreted as covering a deliberate act of damage to the cars by setting fire to the building. He asks whether the ordinary man or woman would consider that the notice excluded liability if the vehicle was damaged as a result of the garage owner's reckless or drunken driving. He thereby seeks to demonstrate the difficulty of fixing at which point the notice would cease to protect the garage owner from liability.

This difficulty, however, is a consequence of the notice's general terms. Thomas J does not try to narrow its scope by reference to the liability potentially falling on Roskilly. It is submitted that his Honour's refusal to use the rule in *Rutter* v *Palmer*, and his implicit assumption that if a clause has more than one reasonably possible interpretation it is ambiguous, mean that the notice would have had to refer expressly to negligence to be clear enough.[49] This approach does not admit of the commercial reality, noted in *Hollier*,[50] that express references to negligence in exclusion clauses are rare. Moreover, it is contrary to the usual principles of construction of exclusion clauses.[51] The approach verges on a hostile attitude towards exclusion clauses, and not simply a strict interpretation of them.[52]

This reasoning and its logical consequence contrast starkly with that of the Court of Appeal in *Benson*. However, while Thomas J's approach to the interpretation of exclusion clauses may be criticised as overly harsh, the Court of Appeal's mechanical application of *Rutter* v *Palmer* is equally unsatisfactory. The Court of Appeal insists on interpreting and defining the scope of a generally worded exclusion clause by

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48 See above n 16.

49 This conclusion depends on the assumption that Thomas J saw each one of his four reasons as a sufficient basis on which to conclude that the notice was ambiguous. Arguably, if each is not, the sum total is no more convincing than the parts.

50 Above n 20, 406.

51 Above n 36, 646.

52 See *Cheshire & Fifoot's Law of Contract*, above n 7, 189.

reference to the liability potentially falling on the defendant. The Court risks developing a new and unhelpful rule of law by its inflexible application of the rule in *Rutter*. Such an approach does not take into account the particular clause, or its context.

Moreover, the way in which the Court of Appeal distinguishes *Livingstone* creates further difficulties. The Court distinguishes *Livingstone* from *Benson* on the basis that in the latter case there was a "reference to insurance responsibility separate from responsibility for storage".[53] In *Benson*, insurance was discussed orally, and was a separate issue from the written notice, which referred only to liability. On the Court of Appeal's reasoning, the decision in *Livingstone* is justified because insurance was not discussed elsewhere in the contract between Livingstone and Roskilly, so that the notice in *Livingstone* did not necessarily only refer to liability in negligence. It could have referred to insurance instead and was therefore ambiguous. This reasoning is problematic. Surely insurance will not have been provided for elsewhere, and hence have not been explicitly excluded from the ambit of a general exclusion clause, in many cases.[54] If the Court of Appeal's assessment of *Livingstone* is correct, all such clauses will be ambiguous, and therefore ineffective. This seems too harsh a conclusion, both in terms of commercial reality and orthodox legal analysis.

2 *"All care taken"?*

Thomas J finally concludes that the notice is inherently ambiguous because it contains contradictory expressions of intent. Thomas J argues that if the words "all care taken" are focused on and attributed legal significance, as the "ordinary" person is entitled to do, then the notice becomes ambiguous, as it cannot both promise to take care and absolve the garage owner from failing to do so. His Honour states that, to give legal effect to the first and third sections of the notice, which refer to risk and responsibility, he must deprive the second, which refers to taking care, of legal significance. In other words, to prevent the notice being ambiguous, he would have to construe the words "all care taken" as no more than words of comfort, and yet, "the author has not made it clear that the words are not intended to have legal significance".[55] Thomas J then relies on the English High Court decision in *Carreras Rothmans Distribution Services Ltd* v *Containerway & Roadferry Ltd* to say that this type of notice is inherently ambiguous.[56]

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53 Above n 26, 561.

54 For example, in *Rutter* v *Palmer* itself, the relevant clause stated "Customers' cars are driven by your staff at customers' sole risk". On the facts, there was no discussion of insurance elsewhere in the contractual negotiations. Yet, the court held that this clause excluded the defendant's liability in negligence. It was enough that the notice was sufficiently wide to cover negligence, and that there was no other liability potentially falling on the bailee.

55 Above n 2, 234.

56 See the LEXIS transcript of *Carreras Rothmans Distribution Services Ltd* v *Containerway & Roadferry Ltd* Unreported, 14 February 1986, Queen's Bench Division, Tudor Evans J.

In *Carreras Rothmans*, there was a series of letters between the plaintiff manufacturer of cigarettes and the defendant carriers concerning a large number of trailers carrying cigarettes that the carrier was storing for the plaintiff. There were repeated assurances in the letters that the carriers would use their "best endeavours", alongside statements that the goods were stored entirely at the owner's risk. Tudor Evans J held that there were two valid interpretations of the words of these letters. They could mean that, while the carriers would take every precaution with the goods, they were nevertheless held entirely at the plaintiff's risk. Alternatively, the words could mean that the carrier would take every precaution with the goods, but otherwise the goods were held entirely at the plaintiff's risk. Given the ambiguity, stated his Honour, "[t]hese, being words of exclusion, must be construed strictly".

Thomas J argues that, by analogy, the notice in *Livingstone* has two alternative interpretations, and is therefore ambiguous. It could mean that all reasonable care would be taken, but, if it was not, no responsibility would be accepted for any loss or damage. Alternatively, it could mean that, assuming and as long as all reasonable care was taken, no responsibility would be accepted for any loss or damage. Thomas J holds that the second of the two potential explanations must be accepted, under the contra proferentem rule.

It is submitted that this application of the contra proferentem rule is in accordance with the orthodox rules. Once these two meanings are perceived, it is difficult to deny the clause's ambiguity, and if it is ambiguous, it must be construed to favour the recipient of the notice. It is with the divining of these two meanings that, it is contended, his Honour's reasoning is problematic. To arrive at these two interpretations, his Honour must sever and highlight three words from the rest of the notice. Although he later emphasises the necessity of examining the contract "at large", at this point he does not look at the totality of the notice.[57] Moreover, although Thomas J refers to "the ordinary person", it is submitted that this is not the test which his Honour adopts in practice. He says that "the ordinary person is *entitled* to ..." or "*could well* " read the notice thus.[58] He does not say the ordinary person would do so. This suggests Thomas J is not looking realistically at the natural and ordinary meaning of the words. Instead, he is focusing on different reasonably possible interpretations of the notice, in order to highlight its ambiguity. This approach contrasts with that taken in both the later Court of Appeal decision, *Benson*, which involved similar facts, and Elliot DJ's decision, on *Livingstone*, in the court below.

In *Benson*, the Court of Appeal distinguishes *Livingstone* on the basis that the reference to insurance in the contract in *Benson* was separate from the reference to

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57 See Part II A for the format of the notice (taken from a reproduction kindly supplied by counsel for the defendant Haigh Lyon & Co), in contrast to the reproduction of the notice in the judgment at above n 2, 232. In light of the visual subordination of the words "all care taken, no responsibility" to the rest of the notice, his Honour's focus on these words in particular seems even more difficult to understand.

58 Above n 2, 234. Emphasis added.

storage. Nonetheless, it is clear that the Court of Appeal disagrees with the approach taken by Thomas J. The Court states definitively that:[59]

> to the average non-lawyer launch owner the expression "all care and no responsibility" would convey that while the storage company would take care it was undertaking no responsibility to do so or for the consequences of failing to do so. *It is the very antithesis of a legal obligation to take reasonable care.*

The Court of Appeal does not dissect the relevant clause and analyse each part. It implies that the "average non-lawyer" would look at the thrust of such a notice as a whole. Under this analysis, there is no ambiguity because the reasonable person would "read up" one part of the notice and "read down" another, to make sense of it. The reasonable person would, according to the Court, read down the words "all care taken". Therefore, there is only one possible interpretation of the notice.

Elliot DJ states this view more explicitly in the District Court decision on *Livingstone*. He found that the notice in *Livingstone* excluded liability for negligence and said:[60]

> To me any other meaning defies the normal construction to be implied from the totality of the message conveyed by the notice and I do not see that it is possible to sever the words, "All care taken" from the context of the immediately preceding words, "owners risk"... .

He suggests that to examine the notice by parts, rather than as a whole, is the approach, not of the ordinary consumer, but of a "well educated or perspicacious lawyer".

Therefore, while Thomas J purports to follow the traditional approach, his Honour differs from it in some respects in this part of his judgment. Most importantly, throughout his application of this approach - in interpreting the notice as having a non-contractual purpose, in holding that its scope is unclear, and in determining that it has two possible meanings - Thomas J interprets the notice, not by reference to what the reasonable person *would* take it to mean, but by stating all the possible meanings a reasonable person would be *entitled* to place on the notice.

D Conclusion

In summary, Thomas J's reasons for his decision that the clause was too ambiguous to exclude Roskilly's liability for negligence, are focused on two separate problems with the clause. First, it was a generally stated clause which was wide enough to refer to negligence but did not expressly do so. Unlike the Court of Appeal in *Benson*, Thomas J would not determine the meaning and scope of the clause by reference solely to the liability potentially falling on a bailee,[61] and this affected both his finding of a non-

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59 Above n 26, 561. Emphasis added.
60 Above n 3, 12.
61 See above n 26, 561.

contractual purpose and his decision that the clause was not sufficiently clear. In effect, Thomas J would have required a clause which expressly stated that it exempted the garage owner from liability in negligence. His Honour's reasoning is, with respect, flawed both because his conclusion that the notice has a non-contractual purpose is unsupported, and because the logical result of his approach, that parties must expressly exclude liability for negligence, is unsupportable.

Second, Thomas J found the use of the phrase "all care taken" to be problematic. In essence, his Honour says that one cannot offer with one hand and take away with the other. This conclusion contrasts with the decision of the Court of Appeal that the phrase "all care, no responsibility" implies no acceptance of any legal obligation to take reasonable care.

Both in *Livingstone* and *Benson*, the courts purported to adopt the viewpoint of the ordinary person or the average non-lawyer. The difference in result and reasoning depends in part on how harshly the contra proferentem rule was applied in interpreting the notice. This in turn, however, revolves around the two courts' different attitudes towards exclusion clauses, and illustrates the relationship between the myth that the court ascertains the parties' actual intentions and the actual application of considerations of fairness.

Thomas J justifies his application of the contra proferentem rule on the following basis:[62]

> The idea that a person can obtain such a generous exemption from his or her common law liability by holding out the inducement that, in any event, all care *will* be taken does not accord with commonly held notions of fairness.

In words reminiscent of estoppel, Thomas J talks of inducement and reliance and of holding the person to their deliberate assurance. This was a case where the term was part of a standard form contract and the liability supposedly excluded was, his Honour noted, "a generous exemption from his or her common law liability". His Honour finds that the words "all care taken" are used, by the garage owner, to induce customers to contract with him. He describes the use of this phrase as patently unfair and unreasonable, if the promise to take care was not legally enforceable. At times, Thomas J's characterisation of the garage owner even verges on being hostile: "[a]fter all, the party seeks to have it both ways".[63] He states that the garage owner wanted the benefit of the inducement, without any commitment to it in contract. These notions of fairness and justice clearly influenced Thomas J's interpretation of the exclusion clause. He states that the ordinary person would expect the notice to be fair and that it would not be fair to allow this exclusion clause to operate. Thus his Honour utilises the

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62 Above n 2, 235. Original emphasis.

63 Above n 2, 235. This despite the fact that his Honour notes that this type of exclusion clause is "commonly adopted by small trade or service businesses". Above n 2, 233.

orthodox concept of the reasonable person. However, considerations of fairness plainly define what is reasonable.

The neutral tone of *Shipbuilders Ltd* v *Benson* is in stark contrast to the tone in *Livingstone*. The "average non-lawyer" invoked by the Court of Appeal does not disapprove of the exclusion clause in question. There is a noticeable abstention from any statements as to the reasonableness of the clause. The various guidelines in the authorities are briskly applied to conclude that the clause extended to cover negligence. The abstract, clinical tone and more robust approach of the Court of Appeal is not necessarily due to the Court not applying a test of reasonableness, however, but to its very different concept of what is reasonable.

Other recent decisions by the Court of Appeal indicate the Court's attitude to exclusion clauses. In *Brownlie* v *Shotover Mining Ltd*, the Court was happy to conclude that there was nothing inherently unfair in the exclusion clause at issue.[64] The Court stated that the negotiated contract in question was between commercial parties, and that the clause simply resolved any ambiguity in the contractual relations, by excluding pre-contractual oral statements from the contract. More recently, the Court of Appeal, in *DHL International Ltd* v *Richmond Ltd*, stated:[65]

> In international commercial arrangements of this kind involving major commercial organisations, it would be unsafe to approach the interpretation of their contract on the footing that it was the product of unequal economic power or to regard standard terms and limitation provisions as somehow suspect and so give them a strained construction to protect the shipper. Such provisions are to be given their natural plain meaning read in the light of the contract as a whole. Only in that way will the reasonable expectations of the parties as expressed in their contract be fulfilled.

The Court of Appeal has referred to the commercial context of these cases to justify a less harsh attitude to the exclusion clauses in question. Although there has been no discussion of whether a different rule should be applied in consumer contracts, a distinction is impliedly drawn.[66] Arguably, it is difficult, and not particularly helpful, to distinguish commercial from consumer contracts. At the very least, however, considerations, such as the status and relationship of the parties and the type of clause at issue, are obviously part of the analysis. These cases reveal a rolling back of the contra proferentem rule because commercial or community interests demand a freedom to contract out of the common law duties. It is too simple to say that the task of the court, in these cases, is only to divine the intentions of the parties.

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64 Unreported, 21 February 1992, Court of Appeal CA 181/87, 31.

65 Above n 1, 17.

66 This distinction has been given legislative sanction by the Consumer Guarantees Act 1993. Indeed, given that the needs of consumers have been catered for by this Act, courts may now perhaps point to the Act to justify a non-hostile approach to commercial exclusion clauses. It needs to be queried, however, whether the distinction between commercial and consumer contracts can be clearly drawn even now: see the discussion of the definition of "consumer" in Fraser, above n 2, 25-26.

Therefore at present, *Benson*, rather than *Livingstone*, is the leading authority on the approach to be taken to "all care, no responsibility" exclusion clauses. As a consequence of *Benson*, a garage owner may promise to take care, while, at the same time, exempting him or herself from liability for failing to do so. This result seems unattractive. By contrast, the result in *Livingstone* strikes a chord of sympathy, even if his Honour's reasoning is problematic in terms of the traditional understanding of the reasonable person. Once it is accepted that the notice has two possible interpretations, the common-sense reaction is that it is, therefore, ambiguous. The Court of Appeal's definition of ambiguity is somewhat different. The Court would only have found the notice ambiguous if it could not be made sense of and there was not one interpretation more likely than another. Surely, however, the possible ambiguity is justification in itself for striking down the clause and therefore sending out a clear message that, while a general notice might be effective, a general notice which promises two apparently mutually exclusive things is not.[67] This type of clause is fundamentally objectionable. While the Court of Appeal's rationale, that parties should be able to contract out of their common law duties, should be upheld, a contradictory expression of intent should not be. Exclusion clauses should give clear and not mixed signals to their recipients. If exclusion clauses are seen as a method by which the ambiguity of contractual relations can be resolved and the risks efficiently apportioned, such tasks, as a matter of business ethics, should be accomplished with the utmost clarity and good faith.

V THOMAS J'S ALTERNATIVE APPROACH

Although it is not clear from the judgment itself, Thomas J emphasises in his decision to grant leave to appeal that he principally decided the case on the second approach. This, rather than the question whether the clause was clear or unambiguous was "[t]he main rationale of [his] decision" and it "applied irrespective of whether the notice was clear and unambiguous or not...".[68] It is also this alternative approach that is, with respect, the most controversial.

His Honour's alternative approach is a response to the inadequacies which he perceives in the traditional analysis of exclusion clauses. Thomas J criticises the orthodox method of construction for resulting in forced or artificial interpretations. He argues that, more seriously, the traditional approach leaves a gap in the law: "the situation where obligations apparently solemnly undertaken by one party are, in effect, then negated by an exclusion clause".[69]

Thomas J states his alternative approach as: "the question ... whether the clause, interpreted in the light of the contract as a whole, was intended by the parties to take

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67 Under Thomas J's alternative approach, however, even an explicit notice which excluded liability for negligence in these circumstances, would not be effective. This is discussed further below.

68 *Livingstone* v *Roskilly* Unreported, 16 September 1992, High Court Auckland Registry M568/91, 5.

69 Above n 2, 235.

effect notwithstanding the default of the defendant."[70] First, under this method, one must examine the terms of the contract, other than the exclusion clause, to determine what obligations the parties intended to undertake. Then one must ask whether the parties intended the clause to govern breaches of these obligations. Only if the meaning of the unambiguous exclusion clause is confirmed by the whole contract, will the clause operate. Even if unambiguous, therefore, the clause cannot be effective if it would then render the solemn obligations under the contract mere declarations of intent, without legal effect.

A *The Function of the Exclusion Clause*

Under this approach, one must read the notice as quite distinct from the rest of the contract. One must construe the parties' obligations without reference to the notice. This approach adopts one of the two competing theories of the function ascribed to exclusion clauses:[71]

> All exception clauses ... fall into one of two categories according to their true juristic function, both of which affect the rights concerned from their inception. There are the exception clauses which directly or indirectly determine the content of a contractual promise... . The other category comprises exception clauses which qualify "primary" or "secondary" rights without preventing the accrual of any particular primary right.

Under Thomas J's analysis, exclusion clauses do not define the content of the obligations. Obligations accrue elsewhere in the contract and exclusion clauses are defences to a breach of these obligations.

When combined with the ability to ignore the clear words of a purported exclusion clause, this theory of the function of exclusion clauses may be problematic.[72] It enables Thomas J to subordinate the exclusion clause to the rest of the contract. Only this clause, out of all the contract, has no part to play in determining the positive obligations of the parties. Furthermore, if the exclusion clause would have so wide an effect as to render the parties' obligations mere statements of intent, it may be ignored altogether, even if it is clearly worded. Although the approach purports to determine the parties' intentions by looking at the contract as a whole, the exclusion clause plays virtually no role in this assessment.

The principle seems based on the concept that the parties intended to assume legal obligations, and that they did not intend to undermine these by a sweeping exclusion clause. However, such an approach seems difficult to justify on the basis of the parties' intentions when the relevant clause is clear and express, albeit sweeping. A clearly worded exclusion clause might be intended by the parties to define the limits of their

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70 Above n 2, 235.

71 Above n 40, 59.

72 Chin states that judges have not noticeably attached too much importance to the distinction in itself. Above n 40, 65.

respective obligations. Lay parties are unlikely to appreciate the significance of the difference between modifying the extent of their undertakings by an exclusion clause, and defining their positive obligations more narrowly from the outset.

Thomas J's approach seems to necessitate the very artificial interpretation which his Honour wanted to avoid. It skews the analysis of the contract heavily against the operation of an exclusion clause. It is one thing to interpret an ambiguous clause consistently with a contract's purpose, but quite another to divorce a clear clause from the rest of the contract and ignore it. It is submitted that a more holistic approach is necessary to accord with commercial reality.

B A Reintroduction of the Doctrine of Fundamental Breach?

A second consequence of separating the exclusion clause from the rest of the contract is that it paves the way for a reintroduction of the doctrine of fundamental breach as a rule of law.

1 The development and decline of fundamental breach

The doctrine of fundamental breach was originally conceived as a rule of substantive law "that there were categories of breach and types of contractual term so fundamental that no exception clause, however drawn, could exclude liability for them."[73] The courts construed the obligations of the parties, without reference to the purported exclusion clause, to determine whether or not there was a fundamental breach or a breach of a fundamental term. It was said that fundamental breaches were those breaches of a contract which were "so totally destructive of the obligations of the party in default that liability for such a breach could in no circumstances be excluded or restricted by means of an exemption clause".[74] Whether there was a breach of a fundamental term depended on "whether the promisor ha[d] performed the obligation which form[ed] the essential character and base of the contract".[75] If either event occurred,[76] an exclusion clause could not apply, regardless of how clearly the parties expressed their intention to exclude liability for this type of breach in the exclusion clause.

This doctrine flourished in the English courts for some time. Its demise was heralded, however, by *UGS Finance Ltd* v *National Mortgage Bank of Greece*,[77] where Pearson LJ held that there was a rule of construction "that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract". He stated, that this rule is "not an independent rule of law imposed by the court on the parties willy-nilly in disregard of their contractual intention."

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73 B Coote "The Second Rise and Fall of Fundamental Breach" (1981) 55 ALJ 788, 790.

74 Above n 8, 583.

75 D Yates *Exclusion Clauses in Contracts* (2 ed, Sweet & Maxwell, 1982) 189.

76 According to one author, the "two expressions 'fundamental breach' and 'breach of a fundamental term' were used to some extent interchangeably... ". Above n 8, 583.

77 [1964] 1 Lloyd's Rep 446, 453.

The House of Lords approved Pearson LJ's statement in *Suisse Atlantique Société d'Armement Maritime SA* v *NV Rotterdamsche Kolen Centrale*.[78] In that case, shipowners sued the charterers of their ship for damages for the charterers' delays in loading and discharging cargo. The defendants argued that the amount of the plaintiff's claim was limited to the amounts expressed in a demurrage clause. The plaintiff contended that the delays were a fundamental breach of the contract; that the demurrage clause did not, therefore, apply; and that they could recover full damages.

Their Lordships held that the demurrage clause was not an exclusion clause, but an agreed damages provision. Since the shipowners had not treated the contract as repudiated, they were still bound by the clause. The House of Lords went on, nonetheless, to address the issues that would have been raised if the clause had been an exclusion clause. Their Lordships stated that the clause plainly covered the alleged breach, even if there was a fundamental breach of the contract. They thought that the application of an exclusion clause to a breach of contract was only a matter of construction, rather than a rule of law.

Their Lordships' speeches, however, did not decisively settle the issue of whether there were any special rules in the case of a fundamental breach of contract.[79] This allowed the English Court of Appeal to reformulate and continue to apply the substantive doctrine in another form. In *Harbutt's 'Plasticine' Ltd* v *Wayne Tank & Pump Co Ltd*,[80] the court stated that a fundamental breach was one that entitled the innocent party to terminate the contract, which in turn ended the exclusion clause. Therefore, the exclusion clause could not be relied on by the guilty party.

The House of Lords finally laid the doctrine to rest in *Photo Production Ltd* v *Securicor Transport Ltd*.[81] Their Lordships held that there was no longer a rule of law that an exclusion clause should not apply to a fundamental breach of contract. The exclusion clause, in that case, clearly covered the breach of contract caused by the defendant's employee's deliberate act of burning down the plaintiff's premises. The defendants were therefore protected from liability by the exclusion clause.

In New Zealand, Holland J doubted whether the substantive doctrine of fundamental breach ever became part of New Zealand law.[82] In *Richmond Ltd* v *DHL International (NZ) Ltd*,[83] the High Court stated that even if the doctrine has been adopted in New Zealand, it is definitely not a rule of law.

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78 [1967] 1 AC 361.

79 The House of Lords left certain avenues open. See above n 8, 585-6; and above n 73, 793.

80 [1970] 1 QB 447.

81 Above n 16.

82 *Kaniere Gold Dredging Ltd* v *Dunedin Engineering & Steel Co Ltd*, above n 16.

83 (1991) 3 NZBLC 102,118. This case was overturned by the Court of Appeal at above n 1, but on another point. The Court of Appeal did not refer to the statement in question.

Debattista has discussed the problems in the reasoning underlying the doctrine of fundamental breach and the rationale for its eventual rejection.[84] According to him, the doctrine involves three elementary fallacies. First, the doctrine links the two quite distinct issues of an innocent party's discharge for breach and a guilty party's reliance on an exclusion clause. It is not disputed that an innocent party gets an immediate right of rescission if there is a fundamental breach of contract. The corollary of this, however, is not that a guilty party is necessarily excluded from relying on an exclusion clause.

Second, Debattista states that "the rule was also guilty of conflating the two quite separate concepts of 'rescission ab initio' and 'termination'."[85] If a party terminates a contract due to a fundamental breach, this does not mean the contract has been rescinded ab initio, and therefore never existed. Therefore, when a contract is terminated, the exclusion clause continues to exist and govern the parties' relations.

Third, if, as the doctrine required, the whole contract disappeared, surely the plaintiff would have no cause of action at all in contract.

These logical objections to the reformulated doctrine are compounded by two more criticisms of any version of fundamental breach. Coote argues that the doctrine depends on the theory that exclusion clauses are merely defences to the breach of obligations.[86] He contends that the true function of exclusion clauses is to qualify contractual obligations at their inception. Under this theory, the question of fundamental breach does not arise, because the exclusion clause has already operated at the formation of the contract.

The most basic objection, however, is that, because the doctrine was a substantive rule of law, it was too inflexible. It failed "to take adequate account of the intentions of the parties in the construction of the terms of the contract and their application to the circumstances that had arisen... ."[87]

2 *A new doctrine of fundamental breach?*

Thomas J's alternative approach bears a certain resemblance to the doctrine of fundamental breach, despite his Honour's statements to the contrary.[88]

First, Thomas J adopts the same theory of the defence function of exclusion clauses. Under both approaches, the court construes the obligations of the parties without reference to the purported exclusion clause to determine whether there is a fundamental breach, or, under Thomas J's approach, to determine the core obligation, without which

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84 C Debattista "Fundamental Breach and Deviation in the Carriage of Goods by Sea" [1989] JBL 22, 25 - 26.

85 Above n 84, 25.

86 Above n 73, 792.

87 Above n 5, 659.

88 Above n 2, 235-236.

the contract would be a mere statement of intent. The exclusion clause is not conceived as defining these obligations at the outset.

Second, the rationale for Thomas J's approach is reminiscent of one of the formulations of the doctrine of fundamental breach. Admittedly, Thomas J does not expressly base his approach on the existence of a fundamental breach or the destruction of the exclusion clause by the innocent party's rescission of the contract. Instead, his Honour bases his approach on the parties' intentions as to their positive obligations:[89]

> In interpreting the contract as a whole it admits of the possibility that the parties did not intend that an exclusion clause, however clear and emphatic on its face, would take effect in such a way as to negate or modify the obligation of the defendant to otherwise properly perform his part of the contract.

Although referring to the parties' intentions, this idea echoes the concept of the breach of a fundamental term. A fundamental term was said to be "part of the 'core' of the contract, the non-performance of which destroys the very substance of the agreement".[90] The doctrine of fundamental breach was sometimes formulated as the rule of law that no exclusion clause "could exonerate a party from failure to perform the fundamental term of an agreement".[91] Here, Thomas J conceives of positive obligations without which there is no contract.

Third, under both approaches, if a threshold conclusion is reached, the exclusion clause cannot apply, regardless of how clearly it is worded. Although Thomas J bases his approach on the intentions of the parties and states that it is not a rule of law, this rule of construction can apparently operate to ignore the intentions of the parties as stated in the exclusion clause, even when clearly expressed. Thomas J uses the presence or absence of a core obligation as the sole determinant of whether an exclusion clause can be effective.

Therefore, Thomas J's alternative approach cannot be absorbed into the orthodox analysis of exclusion clauses. It is not merely a development of the line of authority that an exclusion clause is unlikely to have been intended to operate to deprive one party's stipulations of all contractual force. In New Zealand at least, this approach is confined to cases of ambiguity, where it is a matter of construction of the relevant clause in the context of the contract as a whole. For example, in *SGS (NZ) Ltd* v *Quirke Export Ltd*, Cooke P stated that "[e]ven accepting that there is no special doctrine of fundamental breach, it may be that a Court should be especially slow to interpret a clause as in effect totally negating contractual liability...".[92] Therefore, only generally stated exclusion clauses will be construed consistently with the main purpose of a contract, in order to avoid the absurdity of a literal interpretation of the clause

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89 Above n 2, 237.
90 Above n 8, 502.
91 Above n 8, 502.
92 [1988] 1 NZLR 52, 55.

defeating this purpose.[93] Thomas J, however, does not confine his approach to general and ambiguous exclusion clauses, and, in utilising the notion of primary and impregnable obligations, echoes the doctrine of fundamental breach.

Thomas J's approach appears, at the least, to introduce something with a similar effect to the doctrine of fundamental breach and, at the worst, to reinstate the substantive doctrine, in one of its forms, to all practical intents and purposes.

C A Critical Analysis of the Alternative Approach

The logic of Thomas J's alternative approach is initially attractive. If the parties intend to contract, they cannot have intended to be unable to enforce legally the performance of their contractual obligations. Howarth has discussed a similar approach of overriding the literal wording of an exclusion clause if it conflicts with the purpose of a contract, and calls this method "purposive construction".[94] He justifies such construction on the basis of:[95]

> the absurdity of permitting a party to both enter a contract and at the same time to evacuate his contractual duty... . Essentially a contract is a device for the assumption of mutual legal obligations between the parties. Without this essence it is difficult to see how an alleged contract can be a contract in fact, as opposed to some lesser kind of agreement.

The fallacy in this argument is that if an exclusion clause can only operate as a defence to the breach of obligations, it will always evacuate contractual duty to some extent. In the case where an exclusion clause would undermine fundamentally the substance of the contractual obligations, the wording would surely have to be very clear to be effective. However, if the court is adhering to the notion that it is enforcing the intentions of the parties, it cannot ignore a clear statement of their actual intention, either to modify their core undertakings or not to commit themselves to legally enforceable obligations.[96]

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93 This approach is confirmed by the recent decision of *Catt* v *ANZ* Unreported, 12 February 1993, High Court Wellington Registry CP587/92, 15, where "whether the effect of the clause will result in the agreement lacking the legal characteristics of a contract" was stated to be a factor in the analysis of an exclusion clause, but only when the words of the clause were "unclear, ambiguous or only apply uncertainly to the events on which the claim is based".

94 W Howarth "Some Common Law Limitations to the Construction of Exclusion Clauses" (1985) 36 NILQ 101, 110.

95 Above n 94, 110.

96 This might be analogous to situations involving "letters of comfort". These letters are usually sent by the directors of a company to a prospective lender to induce the loan of funds. They often contain clear promises, but have been held not to contain any legally binding guarantee of the company's debts. See *Cheshire & Fifoot's Law of Contract*, above n 7, 146 and *Kleinwort Benson Ltd* v *Malaysia Mining Corporation Berhad* [1989] 1 WLR 379; [1989] 1 All ER 785.

Three further criticisms may be made of Thomas J's approach, which arise out of its similarity to the doctrine of fundamental breach.

First, it too might be criticised for its potential inflexibility. If this approach ignores the intentions of the parties as expressed in the exclusion clause, the exclusion clause cannot operate to modify the core obligations of a contract. Therefore, Livingstone and Roskilly are effectively barred from lowering the level of care expected of Roskilly in storing the car. This is a substantial restriction of their freedom to contract and ignores the possible economic benefits of risk allocation, even if the court is willing to take the circumstances of each case into account in defining the core obligations. Furthermore, this conclusion is inconsistent with Thomas J's earlier holding that the exclusion clause was ineffective because it was ambiguous. There, his Honour implied that the clause would have been effective if it had expressly excluded liability for negligence. Here, even an express exclusion of liability would not have been effective.

Second, although in theory the parties' intentions determine whether there are core obligations that cannot be modified, in practice it is left to the court to define what part of the contractual obligations are fundamental to the very existence of the contract. This creates the potential for difficulties of classification. In the context of fundamental terms, one commentator states that, "[t]here may ... be difficulties in identifying the 'core' of the particular contract: is it to supply 'peas' or 'leguminous vegetables' or 'agricultural produce'?"[97]

Such attempts to classify terms seem both futile and fraught with difficulties in practice. The court may be lead into a "barren enquiry as to whether the essential object of the contract has not been fulfilled at all or whether it has been fulfilled, but not in a way that the contract requires".[98] In the end, the definition of the essential object of a contract may depend more on the convenience of the moment than on any indication of the parties' intentions.

In this case, for example, Roskilly's stated obligation was to "store" the car. Thomas J relies on "common sense" and the dictionary definition of "store" to hold that it connotes "reasonable safe-keeping". He also uses a more extreme example of negligence to indicate that a reasonable person would infer that the parties intended the notice not to excuse Roskilly's obligation to take some care of the car. Thomas J states that, "[t]here is more than adequate evidence to support the conclusion that the construction which I have adopted represents the actual intention of the parties objectively interpreted."[99] His Honour, however, does not elaborate on the substance of this evidence.[100]

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97 Above n 8, 503.

98 Above n 8, 503.

99 Above n 2, 237.

100 As a matter of interest, other facts in the notes of evidence indicate a contrary intention. Roskilly's usual practice was not to store cars that could be moved. Livingstone's car could be moved and Roskilly rang him to ask him to take it away

His Honour's statement that, without the obligation of reasonable safe-keeping, the undertaking to store is no more than a declaration of intent, is surprising in itself. According to *Halsbury's Laws of England*,[101]

> the common law duty of every bailee is to take reasonable care of his bailor's goods, and not to convert them. The standard of care required is therefore the standard demanded by the circumstances of each particular case... . The parties may always vary the incidents by the terms of the contract.

Later, it is accepted that the bailee "may limit or relieve himself from his common law liability by special conditions in the contract", although to exclude liability for losses due to negligence the words of the clause must be clear.[102] Therefore, the obligation to store a car and the duty to take reasonable care in doing so, is not a unitary concept which is necessarily entirely excluded by an exclusion clause. For example, in *Benson*, the Court of Appeal distinguished possession and control, the characteristics of an obligation to store in the bailment context, from reasonable safe-keeping.[103] On this analysis, an undertaking to store Livingstone's car without taking reasonable care of it is more than a declaration of intent. It is an undertaking to keep the car in Roskilly's possession and under his control. Under this interpretation, the exclusion clause would operate to reduce Roskilly's liability, but not render it illusory.

At the least, this analysis indicates the difficulties inherent in the inquiry, required by Thomas J's approach, into a contract's core obligations.

The third criticism of Thomas J's approach is that it obscures the role reasonableness plays in the analysis, by purporting to be a purely intention-based test. His Honour states that he is not applying a rule of law and that not even the devices of presumed intent or implied terms are used. He says that his interpretation "represents the actual intention of the parties objectively interpreted".[104] Yet, as has already been argued, Thomas J attributes no significance to an express statement of the parties' intentions in the exclusion clause. This suggests that the approach is more than simply based on the parties' intentions. Furthermore, by interpreting the obligation to store by relying on an objective construction of one word, rather than on any particular facts, Thomas J effectively closes the gap between what the parties actually stated and his perception of what it would be reasonable for them to have stated.

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before the long weekend. The two men, however, had had an extensive course of dealing and Roskilly agreed to store the car at the special request of Livingstone. These facts indicate that Roskilly did not usually undertake any responsibility for movable vehicles. Moreover, Livingstone specifically requested that the car be stored in the workshop, rather than in the yard. This fact might suggest that the care Roskilly was expected to take was limited to placing the car in the agreed place of storage.

101 (4ed, Butterworths, London, 1991) vol 2, Bailment, para 1803.

102 Above n 101, para 1840.

103 Above n 26, 557.

104 Above n 2, 237.

The danger of applying notions of reasonableness by means of a rule of construction is that the law becomes unclear and logically strained. In the context of implied terms, Atiyah comments:[105]

> [T]he extreme reluctance of courts to acknowledge openly that they are trying to ensure that a contract operates as a fair exchange means that the conceptual apparatus of the law is highly complex and often obscures what is actually going on.

While this criticism might as readily be made of the more traditional approach,[106] Thomas J's stated objective in devising the alternative approach is to alleviate these problems of strained interpretation. It is preferable, perhaps, for the judiciary to control exclusion clauses overtly, rather than to apply rules of construction to achieve hidden policy objectives. If, behind Thomas J's approach, there is a test of reasonableness, perhaps this criterion should be openly applied.

In conclusion, the alternative approach is highly problematic. Thomas J is attempting to remedy the problem of artificial or strained interpretations of exclusion clauses, and yet, in doing so, skews the analysis against the operation of the exclusion clause and strains the concept of the objective test of the parties' intentions. The alternative approach requires a highly artificial and perhaps barren inquiry into the contract's primary obligations. Moreover, it has the potential of being unduly restrictive of parties' ability to allocate risk and modify their obligations. Therefore, the approach recalls the problems encountered under the doctrine of fundamental breach, yet does not satisfactorily resolve those apparent in the traditional method of construction.

VI CONCLUSION

Throughout his judgment, Thomas J aims to achieve a fair result and so avoid an injustice in the individual case.[107] To this end, he endeavours to reformulate the law of contract pertaining to exclusion clauses, to reflect community standards and expectations of fairness, as he sees them. The common thread in his analysis is stated explicitly in his obiter comments on the requirement of notice of exclusion clauses. Thomas J propounds that there is a latent premise of common law that "in general, the parties to a contract must act in good faith in making and carrying out the contract".[108]

It is beyond the bounds of this paper to fully discuss the ramifications of such a principle. The concept that contractual power begets responsibility is not a completely novel idea. It has rarely been stated, however, with this boldness or in such general

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105 P Atiyah *Essays on Contract* (Clarendon Press, New York; Oxford University Press, Oxford, 1986) 201-202.

106 See above III C.

107 See above n 2, 239.

108 Above n 2, 237-238. He reformulates the traditional requirement of notice by reference to a general principle of contractual good faith as "the question ... whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions, or by a particular condition, of an unusual and stringent nature." Above n 2, 238.

terms. Thomas J's concept of good faith affecting all aspects of contractual relations is, one commentator has remarked, "contrary to previous perceptions".[109] However, there is both increasing recognition of the elements of fairness in existing rules[110] and a growing trend to heighten the standards of conduct required of people in their contractual dealings with others.[111] The perception of the content of such a principle differs according to the writer.[112] According to Thomas J the principle of good faith is couched in terms of fairness and reasonableness. It is this principle that informs his application of the traditional approach to exclusion clauses and that propels his alternative analysis.

His Honour's strained application of the orthodox approach, however, reveals that, while existing rules can provide a means for the application of considerations of fairness, they are an imperfect mechanism when fairness cannot be equated with sanctity of contract. Thomas J must stretch the boundaries of the contra proferentem principle to achieve what his Honour considers to be the just result.

By contrast, the recent judgments of the Court of Appeal, which seem more willing to give effect to exclusion clauses, sit more comfortably within the orthodox rules. This illustrates, not that reasonableness does not play a part in these decisions, but that "[o]ne's judgement as to what is reasonable is dependent on one's life experience, philosophical starting-points, and moral values."[113] While it is reasonable to uphold exclusion clauses, the existing rules will be sufficient. Yet, the result of Thomas J's reasoning has far more intuitive appeal than that reached by the Court of Appeal in

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109 J Hodder "All care, no responsibility" (1992) 15 TCL 23/1. In *Amann Aviation Pty Ltd* v *Commonwealth of Australia* (1988) 80 ALR 35, the applicant was denied leave to amend its pleading to include an allegation that the respondant exercised its contractual rights in bad faith. Beaumont J denied the existence of any general duty of contractual good faith.

110 Even the traditional method of objective assessment of the parties' intentions can be interpreted as "an instrument for the imposition of an objective standard of reasonableness on the parties, independently of their particular intentions." B Coote "The Essence of Contract" (1988/89) 1-2 JCL 183, 190.

111 P Finn "Australian Developments in Common and Commercial Law" [1990] JBL 265, 267.

112 See H Lücke "Good Faith and Contractual Performance" in P Finn (ed) *Essays on Contract* (Law Book Co Ltd, Sydney, 1987) 155, 171, 160. Lücke postulates at 162-5 that good faith should be interpreted as the obligation to act loyally. McLauchlan refers to the notion that the court imposes just solutions which can be ascribed to reasonable people in the position of the parties: "The 'New' Law of Contract in New Zealand" [1992] NZ Recent Law Review 436, citing Lord Wilberforce's statement in *National Carriers Ltd* v *Panalpina (Northern) Ltd* [1981] 1 AC 675, 696. Beck speaks in terms of linking power with obligation, or a notion of responsibility: A Beck "Contract" in Borrowdale and Rowe (eds) *Essays in Commercial Law* (The Centre for Corporate and Commercial Law Inc, Christchurch, 1991) 49. Brennan talks of "the values of equality, fair dealing and good faith": G Brennan "Opening Address" (1990/91) 3 JCL 85.

113 Above n 113, 461.

Benson. If community values develop as Thomas J suggests they will,[114] the creation of new rules to allow the further imposition of notions of fairness and reasonableness is perhaps inevitable.[115]

However, Thomas J's solution, his alternative approach, is highly problematic, and his comments on a principle of contractual good faith and on the importance of the fair result remain undeveloped. If Thomas J had utilised these principles, rather than looking back to the difficult notion of fundamental breach, a more helpful solution might have been produced. His Honour's decision points out clearly the gaps left by a pure construction approach to exclusion clauses. However, the question of whether there is a role for the courts in the open application of considerations of fairness, without needing to take refuge in the myth that they are purely and simply enforcing the parties' actual intentions, is not addressed by his Honour. Ultimately therefore Thomas J, with respect, fails to address the very issues he raises. His judgment does not ask whether fairness should be the openly acknowledged judicial objective.

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114 Above n 2, 238-9.

115 Indeed, the requirement in the Consumer Guarantees Act 1993 that traders take reasonable care in the provision of services to consumers at once gives a statutory sanction for the community values which Thomas J declares to exist at above n 2, 238-239 and, to some extent, removes the need for the common law to cater for them (but see above n 66). However, Thomas J does not necessarily suggest at above n 2, 239 that his alternative approach is to be restricted to consumer contracts. Rather, the fundamental notions of fairness Thomas J espouses, appear to find objectionable any situation where the primary obligation of the defendant is reduced to a mere statement of intent, irrespective of whether it is a consumer or commercial context. Certainly the Consumer Guarantees Act does not go this far.