Third, pollution liability insurance has a future provided you can identify the polluter.

Fourth, insurers will have to decide how they are going to satisfy demand for broader cover. It is not enough to adopt a "take-it-or-leave-it" stance.

The conventional market must be ready to re-think its policy conditions (cover on a damage-manifestation basis of any environmental impairment provided such impairment is fortuitous).

Will it do so?

If it does not then new ways will have to be found to handle what is still very much a new area of liability. But if liability insurers are unable to deliver the goods – what then?

Private insurance will only have a future if it can show that it can continue to offer the public a better deal than that offered by the state or any other compensation system.

SURVEYORS' AND VALUERS' LIMITATION OF LIABILITY AND THE UNFAIR CONTRACT TERMS ACT 1977 ("UCTA").

by Karen Willis,
Solicitor Barlow Lyde & Gilbert

It is a common feature of written contracts that one party may try either wholly or in part to absolve himself of liability under the contract or from a tort connected with the contract.

Where the parties' bargaining strength is not equal, for example where a person is dealing as a consumer or where a small business is dealing with a powerful company, the Courts have tried to correct the imbalance by adopting rules of construction notwithstanding the general principle of freedom to contract. These rules include the "contra proferentem" rule i.e. a clause is construed against the party whose clause it is and who is seeking to rely upon it. Clauses must be clear and unambiguous stating what the party's intention is and refer to all instances that are intended to be covered, especially if liability for negligence is sought to be excluded or restricted. Clauses must extend to the exact contingency or loss which has occurred. These rules of construction have been complemented by the Unfair Contract Terms Act ("UCTA").

In addition to the requirements of UCTA, the effectiveness of exclusion and restriction of liability clauses is also regulated at common law, for example by rules of fiduciary duties and natural justice. In addition, other statutes may also be applicable depending on the circumstances including the Misrepresentation Act 1967.

The Unfair Contract Terms Act.

UCTA came into force on the 1st February 1978. It is of general application to most business contracts (except contracts of insurance) and contracts for the sale or supply of goods or services. However, the title of the Act is somewhat misleading as control extends to both contractual terms and non-contractual notices seeking to exclude or restrict liability in tort. Further, the Act does not seek to control unfair contract terms in general but only those terms purporting to exclude or restrict liability. The Act does not affect the basis of liability and follows the traditional approach of the Courts, i.e. to ascertain the liability of the Defendant apart from the clause and then to consider whether the clause is sufficient to constitute a Defence to that liability.

The Act provides three broad divisions of control (although the provisions of the Act may overlap) over contractual terms which seek to exclude or restrict liability for:

1. Negligence, which embraces both the tort of negligence and breach of any contractual obligation to exercise reasonable care and skill.

2. Breach of certain terms implied by statute or common law regarding the sale or supply of goods or hire purchase.

3. Breach of contract.

   In relation to points 2 and 3 above, one party must be "dealing as a consumer", although in the case of *Peter Symmons & Co v. Cook* (1981) 131 NLJ a partnership of surveyors were held to have dealt as a consumer when purchasing a Rolls Royce from a car dealer.

Section 2 (1) absolutely prohibits the parties' ability to exclude or restrict liability for negligence resulting in death or personal injury whether by contract or notice. Under Section 2 (2) in the case of other loss or damage, liability can only be excluded or restricted in so far as the term satisfies the requirement of reasonableness in accordance with Section 11.

The requirement of reasonableness set out in Section 11 varies depending on the facts at issue. A contractual term is reasonable if the term is "fair and reasonable in regard to the circumstances which were or ought reasonably to have been known or in the contemplation of both parties when the contract was made" – Section 11 (1).

Section 11 (2), lays down 5 guidelines for the court which are not exhaustive but include the relative strengths of the parties' bargaining positions and whether an inducement was given to the customer to agree to the clause. Under Section 11 (3) a non-contractual notice will be reasonable if it would be "fair and reasonable to allow reliance upon it having regard to all circumstances obtaining when the liability arose or (but for the notice) would have arisen".

Much will depend whether a contract is commerical i.e. one where the parties are of equal bargaining strength at arms length. However, even in a contract with a consumer, a professional may be able to limit his liability for negligence if he takes steps to bring that person's attention to the clause, explains the effect of the clause, explains whether another alternative level of services is provided at additional cost and whether insurance is available. The extent to which professionals may offer a "two tier" service e.g. where a professional offers a full service at full price and a reduced service with exclusion or restrictions of liability at a lower price is relevant to the requirement of reasonableness under the provisions of UCTA.

Can a professional exclude liability for negligence if the reduced service fails to reveal a fundamental fault if the client was aware that a full service was available on payment of an increased fee? The following cases consider this point but also illustrate how a duty may be owed to a third party who is not privy to the contract in which the exclusion or restriction of liability

In the case of *Yianni v. Edwin Evans* (1982) 1QB 438, the Building Society's surveyor valued the property and the purchasers paid for the report although they did not see the report. Subsidence occurred and the Defendants admitted negligence in the preparation of the report but argued that they only owed a duty of care to the Building Society and not to the Plaintiffs, that the building Society's notice did not warrant the purchase price to be reasonable and further the Plaintiffs contributed to their loss in failing to obtain an independent survey. The Court held in favour of the Plaintiffs on the basis that there was sufficient proximity between the parties, the Defendants knew or ought reasonably to have known that the Plaintiffs relied on the fact that

the advance had been given thus indicating that the report was satisfactory and due to the Plaintiff's reliance on the report, they were not contributorily negligent in failing to instruct an independent surveyor. However, Park J. indicated that if the Building Society's literature had warned in stronger terms that the Plaintiffs relied on the report at their own risk, the Plaintiffs may have been found to be contributorily negligent.

In the case of *Stevenson v. Nationwide Building Society* (1984) 272 EJ 663 which was based on similar facts, the report had been disclosed to the purchaser, an estate agent. The report contained a strong disclaimer. It was held by Judge Wilmers Q.C. sitting as Deputy Judge that while the Building Society's surveyor's report was intended solely for the benefit of the Building Society a duty of care was owed to the purchaser; the survey had been carried out negligently and the Building Society was therefore vicariously liable subject to the disclaimer. However, he held that the non contractual disclaimer was reasonable under Section 2 (2) and Section 11 (3) of UCTA. This case also confirmed that the reasonableness test is subjective, i.e. whilst it might be reasonable to disclaim against "X" it may not be reasonable to disclaim against "Y". The reasoning behind the decision included the fact that the Building Society had adopted a fairly standard practice, had given the applicant full warning and offered an alternative survey at extra cost, the applicant was familiar with disclaimers and the difference between a valuation and a survey and that the Building Society had an interest in keeping fees to applicants as low as possible.

In *Harris v. Wyre Forest District Council* (1987) 1EGR 231, the local authority lent 90% of the valuation and the local authority's surveyor when valuing the property at the asking price stated that there had been no recent settlement. It was held at first instance that the local authority's in-house valuer's duty should be the same whoever he is acting for and both he and the local authority were held liable for negligence since the Plaintiffs had relied upon the report and the local authority had impliedly represented that the loan was one they were empowered to make. The judge considered that the disclaimer was not relevant. However, in the Court of Appeal this judgment was reversed and it was held that although the local authorities' valuation was negligent and the Plaintiffs had relied on the valuation, neither the local authority nor its surveyor owed a duty of care to the Plaintiffs because the mortgage application signed by the Plaintiffs included an effective disclaimer preventing a duty of care arising. Further, it was held the disclaimer was not subject to the requirements of reasonableness under Section 2 (2) UCTA since the Act only applied if a duty of care already existed and it had been held that the Defendants did not owe a duty of care to the Plaintiffs. This decision is to be appealed to the House of Lords.

Contrast the above case with the case of *Smith v. Eric S. Bush* (1987) 3WLR 889 which involved the purchase of a property for approximately £17,500 with the aid of a Building Society mortgage of £3,500. The external surveyor consulted by the building society noticed that the chimney breast within the property had been cut away but failed to examine the roof space to check whether the remainder of the stack was properly supported. A disclaimer appeared in both the mortgage application form and the surveyor's report. Eighteen months later, the chimney breast in the roof space collapsed. At first instance, the Plaintiff was successful in the Norwich County Court where the disclaimer was held to be ineffective. On appeal, the Defendants argued that the disclaimers were sufficient to negate their liability. The Court of Appeal held that there was no duty to carry out a full structural survey but:

1. The property was at the lower end of the market and the surveyor knew the Plaintiff might well rely on the report without obtaining an independent valuation/survey.

2. The valuer owed the purchaser a duty to make a reasonably careful visual inspection.

3. The disclaimer would have negated liability but under UCTA it was not fair and reasonable to rely on an automatic blanket exclusion of all liability for negligence unrelated to any specific factors affecting the property.

Dillon LJ indicated that if the intending purchaser was a surveyor or lawyer who understood more about disclaimers, the situation *might* be different (the Plaintiff being a nurse). The Court of Appeal accepted that, were it not for UCTA, the disclaimers would have been effective since they were clear and the purchaser had notice. The decision is broad and far reaching and is being appealed to the House of Lords.

In the case of *Davies and Another v. Idris Parry* (The Times 12th April 1988) which also concerned an alleged negligent Building Society valuation, McNeill J. held that there was sufficient proximity between the purchasers and the valuer, reliance was known to have been placed on the valuation and the valuer could not rely on automatic blanket exclusion of all liability for negligence when his visual inspection was not carefully performed particularly when dealing with the lower end of the market where purchasers would not instruct their own surveyor. McNeill J. referred to the "plain differences of judicial opinion upon the effect of a disclaimer in a mortgage application" and to the Court of Appeal's different conclusions as to

whether the disclaimer was subject to the test of reasonableness under Section 2 (2) of UCTA in the cases of *Smith v. Eric Bush* and *Harris v. Wyre Forest D.C.* referred to above. His Lordship favoured the approach adopted in *Smith v. Eric Bush* on the particular facts. It is not yet known whether this decision will be appealed.

As can be seen from the above, in assessing the reasonableness test under UCTA the Judges have done little more than decide the problem directly in issue and much therefore depends on judicial interpretation in each case. In that sense, no case is a precedent for any other. Further, the appellate courts have been reluctant to provide the lower courts with guidelines. Bridge LJ in *George Mitchell (Chesterhall) Limited v. Finney Lock Seeds Limited* (1983) 2AER 737 (HL) case stated that in determining whether a contractual term was fair and reasonable "an appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly or obviously wrong". It was also stated in this case that the courts are reluctant to re-write a clause and that whether a clause is reasonable will depend on all the circumstances of the case.

THE UNITED STATES JURY SYSTEM – OUT OF CONTROL?

by C. Thomas Ross, Esq.
Craige, Brawley, Liipfert & Ross
Winston-Salem, North Carolina U.S.A.

This brief article will not resolve the debates raging in America over the problems of the U.S. legal and judicial systems, including the alarming increase in the criminal case load, the status of Tort Reform Legislation, limitations on contingent fees, abuses of discovery, merit selection versus political appointment of judges, certification of legal specialists nor the debates over litigation versus mediation versus arbitration. Nor will it go into exhaustive details or attempt to persuade the reader of the merits of what is set forth hereafter. This is one trial lawyer's opinion of the U.S. jury system, based on 21 years of practical experience and exposure to a wide variety of cases and lawyers from around the United States.

To begin, the right to a trial by jury is guaranteed by the U.S. Constitution – the Sixth Amendment for criminal trials and the Seventh Amendment for civil trials. The several states have enacted constitutions which ratify this basic principle of American constitutional law, though in civil cases the right to jury trial can be waived under the various Rules of Civil Procedure or