

The Protection of Consumers in Sales Contracts and Unfair Terms

The Consumer Rights Bill

E.1 Introduction

The law of contract is dominated by the philosophy of *laissez-faire*. This is a policy of non-statutory interference with the agreements made between parties. It was widely considered that individuals were able to enter into (most) contracts and were sufficiently protected by the fact that no one could be forced into a contract to which he or she did not agree. Where the resultant contract left one party in a poorer position, it was a bad bargain, or it had been entered into hastily, none of these factors would affect the validity of the contract. Individuals should be aware of the terms of the contract laid before them, they should, where appropriate and necessary, seek expert advice prior to agreeing to such terms, and consequently the state only intervened when necessary.

One area in particular where the state considered that regulation of contracts was necessary, was where the individual entered into a contract to buy goods. Here the courts, and later Parliament, recognised that individuals had a justification in expecting certain standards to be maintained when they purchased goods, these were often unspoken and unwritten, and due to the nature of individuals entering into contracts, these were expectations of consumers, not lawyers. In order to codify these legitimate expectations, Parliament enacted the Sale of Goods Act 1893, which was then updated to the most recent Act (albeit subject to subsequent amendment and revision) - the Sale of Goods Act 1979.

Another major area where protection was deemed necessary and action was to be taken by the state was in the use of exclusion or limitation clauses. These have already been identified in Chapter 10 but it is sufficient to remark in this chapter that increasingly, businesses were seeking to exclude or limit liabilities which they would otherwise hold. Consumers in particular may not necessarily know what those terms meant or the extent of their implications on agreements and contracts. For example, it is not uncommon to approach the till-point of a department store and to see behind the cash desk, a notice or sign which reads something like 'We do not provide refunds. This does not affect your statutory rights'. An individual may have seen such a sign several times and not necessarily understood the implications beyond the instruction that the store does not accept goods to be returned and a refund of the price paid. Remember, the right to return unwanted goods is a relatively recent phenomenon to do with customer service. The statutory rights in question here refer to a suite of consumer rights, including the Sale of Goods Act 1979, which in particular provides consumers the right to return goods for a refund where the good breaches, for example, ss. 13-15. It is not within the gift of the owner of the department store to exclude the rights of a consumer to return and to obtain a refund for goods which transgress the standards established through the Sale of Goods Act 1979. Where the trader misleads the consumer as to their statutory rights, this is a breach of the Consumer Protection from Unfair Trading Regulations 2008.

The legislation relating to consumer protection is very broad, complex and spread between several pieces of legislation. They also provide different definitions of key terms depending upon the source of law and, at times, depending on whether the legislation was domestically inspired or enacted to transpose an EU obligation.¹ As such it is often difficult for a consumer to clearly understand his or her rights and obligations under a contract. Due to this complexity the government initiated a codification of some of these consumer rights by enacting the Consumer Rights Bill, currently progressing through Parliament, with the aim of taking legislative effect through a Consumer Rights Act. The government anticipates that the Act will receive a commencement order from October 1 2015.

E.2 Current National Consumer Rights

¹ Hence why Chapter 10, unlike the other chapters in the book, does not include key terms and definitions as consistency was problematic here.

The sources of consumer protection are listed below. Please note that some of these laws protect further than simply those individuals with the title 'consumer'. However this chapter is focusing on consumer rights and therefore discussion will be largely restricted to this category.

- Supply of Goods (Implied Terms) Act 1973
- Unfair Contract Terms Act 1977
- Sale of Goods Act 1979
- Supply of Goods and Services Act 1982
- Sale and Supply of Goods Act 1994
- Competition Act 1998
- Unfair Terms in Consumer Contracts Regulations 1999.
- Unfair Terms in Consumer Contracts (Amendment) Regulations 2001
- Enterprise Act 2002
- Sale and Supply of Goods to Consumers Regulations 2002

E.3 Brief History

In 2001 the then Department of Trade and Industry made a request to the Law Commission and the Scottish Law Commission to consider the effects of the current legislation on unfair contract terms and to consider establishing a single piece of legislation which would be similar in structure to assist both consumers and businesses in understanding their obligations and rights. This led, later, to the Unfair Terms in Contracts (Law Com No 292) 2005 Report.

Sometimes legislation is passed very quickly by Parliament, and other times it is a slow and possibly arduous journey. Here, whilst the government reported back in 2006 to the Law Commissions that the recommendations in the report were accepted, it wished to undertake an impact assessment of the intended changes. It wasn't until 2011 where the government, confirming that the impending EU Consumer Rights Directive would have potentially significant effects on domestic legislative changes, determined that the reform of the law would be put on hold pending the outcome of the Directive. Therefore, it wasn't until May 2012, that the Department of Business, Innovation and Skills requested the Law Commissions to once again look at this area of law, update as required its findings and recommendations, prior to a newly revised report being presented. In March 2013, the Commissions produced the 'Unfair Terms in Consumer Contracts: Advice to the Department of Business, Innovation and Skills' which led to the introduction of the Consumer Rights Bill 2014 beginning its journey through Parliament.

E.4 The Consumer Rights Bill

As part of the government's initiative to reform consumer rights, in some instances simplifying the current range of legislation, and in other areas seeking to codify and establish a consistent application of the law, the Consumer Rights Bill is currently progressing through Parliament.

The Bill is very wide ranging and covers many aspects of consumer rights, transposing as it does EU Directives² and decisions of the Court of Justice of the European Union, to such an extent that it is introducing a system of collective redress for actions including allegations of anti-competitive behavior by corporations.

The Bill is presented in three parts:

² Directive 99/44/EC of the European Parliament and Council on certain aspects of the sale of consumer goods and associated guarantees; Directive 93/13/EEC of the Council on unfair terms in consumer contracts; Some provisions of Directive 2011/83/EU of the European Parliament and Council on consumer rights.

- Part 1 is concerned with consumer contracts for goods, digital content and services (some of which has already been enacted and is contained in Chapter 10);
- Part 2 deals with the unfair terms; and
- Part 3 considers miscellaneous provisions such as investigatory powers, enforcement mechanisms and collective redress and other private actions relating to anti-competitive behavior in competition law.

It is beyond the scope of this chapter to include all features of the Bill, therefore we concentrate primarily on changes to the sale of goods and unfair contract terms legislation (Part 2 of the Bill).

E.5 Unfair Contract Terms – Part 2

At the time of writing the current laws relating to unfair contract terms are the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999 - these legislative instruments work cooperatively to regulate the use of unfair terms (although they are considered to overlap in some instances and to be inconsistent in their approach - the UTCCR uses EU concepts which are not necessarily used or widely understood nationally). The Unfair Contract Terms Act 1977 relates not to unfair contract terms generally, but rather to the use of exclusion or limitation clauses, some of which will only be applied where they satisfy the test of reasonableness, and others which were made void from the outset due to the nature of what they attempt to do (for example, those terms which seek to exclude liability on the basis of negligence which has led to death or personal injury). UTCCR 1999, by contrast, is concerned with the use of unfair terms generally, although they do only apply to consumer contracts and those contracts which have not been individually negotiated. When enacted, the Consumer Rights Act 2015 will repeal and replace both existing legislative acts.

E.5.1 Scope of the Bill

The Bill establishes protection, applicable in Part 2, on the basis of consumer contracts. A 'consumer contract' is one between a consumer and a trader and it is broad in approach - it covers contractual and non-contractual consumer notices. A 'consumer notice' refers to any announcement or communication which, it may be reasonably assumed, would be read by a consumer. A typical example would be a sign or notice referring to terms as displayed in a car park (for example a notice that reads: 'Cars parked here at owner's risk') (s. 62).

Section 2 of the Bill provides important definitions applicable to this piece of legislation:

- **Trader** - this term refers to a person³ acting for purposes relating to his/her trade, business, craft or profession. The term trader applies whether he/she is acting personally or whether another person is acting in the trader's name or on their behalf.
- **Consumer** - this term refers to an individual acting for purposes that are wholly or mainly outside of that individual's trade, business, craft or profession. The significance of this definition is that it provides certainty and consistency between consumer protection legislation. Any trader who claims that the individual was not a consumer the purposes of this law has the obligation to prove it.⁴
- **Business** - includes the activities of any government department or local or public authority.
- **Goods** - means any tangible, moveable items. This also includes water, gas and electricity if, and only if, they are put up for supply in a limited volume or set quantity.

³ Use of the term 'person' will include both natural (human) and artificial (corporation) entities.

⁴ Such definitions remove the confusion present in the current/previous legislation relating to consumers and traders. The Unfair Contract Terms Act 1977 s. 12 sought to define what 'dealing as a consumer' and acting in 'the course of business' meant in real world scenarios. One need only look to *R & B Customs Brokers Co. Ltd. v Union Dominions Trust Ltd.* [1988] 1 WLR 321 and the need for the transaction to be an integral part of the business to come under the remit of the Act to demonstrate a situation where traders and consumers were often unsure as to the application of the law to their situation. Here, the use of a vehicle, part for the purposes of business, part for social and domestic use, led to a question as to whether the contract invoked the Sale of Goods Act 1979 (the implied terms as applied to consumers), if so, did it cover the entire agreement, part of it, only some of the agreement when the claimant was acting as a consumer but not when the vehicle was being used for business/commercial purposes etc?

For the purposes of Chapter 2 of the Bill a person is not a consumer in relation to a sales contract if:

- (a) the goods are second hand goods sold at public auction, and
- (b) individuals have the opportunity of attending the sale in person.

A person is a consumer in relation to such a contract for the purposes of—

- (a) sections 11, 12, 28 and 29, and
- (b) the other provisions of Chapter 2 as they apply in relation to those 25 sections.

E.5.2 Contracts and Notices Covered by Part 2 (s. 61)

Part 2 of the Bill relates to ‘consumer contracts’ which are contracts between a trader and a consumer. However, this does not include contracts of employment or apprenticeship.

E.6 What are the General Rules About Fairness Of Contract Terms And Notices?

E.6.1 The Requirement for contract terms and notices to be fair (s. 63)

This section of the Bill requires that consumer contracts and consumer notices will only be binding on the consumer where they are deemed ‘fair’. This does not prevent the consumer from seeking to rely on the term the notice if he or she chooses to do so. A term will be held as unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties’ rights and obligations under the contract, and this is to the detriment of the consumer. In establishing what will be considered as ‘fair’, the Bill instructs that this is to be determined by taking into account the nature of the subject matter of the contract; by reference to all the circumstances existing when the contract was agreed; and to all of the other terms of the contract or of any other contract on which it depends. Hence a holistic consideration of the circumstances surrounding the contractual terms will be undertaken.

A notice will be held as unfair, if, again contrary to the requirement of good faith, it causes an imbalance in the parties’ rights and obligations, which is to the detriment of the consumer. The ‘fairness’ of a notice is determined by taking into account the nature of the subject matter of the notice, and by reference to all the circumstances existing when the rights or obligations to which it relates arose under the terms of any contract on which it depends. This replicates the assessment of fairness as in relation to contractual terms above. It is important to note that where the term is void because it relates to the purported (a) exclusion of liability: goods contracts,⁵ (b) exclusion of liability: digital content contracts,⁶ (c) exclusion of liability: services contracts,⁷ or (d) exclusion of negligence liability,⁸ the terms will remain void regardless of any fairness test.

E.6.2 Contract terms which may or must be regarded as unfair (s. 64)

Schedule 2 of the Bill contains an indicative, although non-exhaustive list, of the terms of consumer contracts that may be regarded as unfair for the purposes of this Part. It is important to recognize that the list (which is not included here simply because of the length of the examples contained therein) does not contain automatically unfair terms, but rather they will assist the courts when determining the application of tests distinguishing fair and unfair terms.

E.6.3 Exclusion from assessment of fairness (s. 65)

This section of the Bill relates to the assessment of fairness of terms in a contract. Section 65 identifies that a term of a consumer contract may not be assessed for fairness under section 63 to the extent that it (a) specifies the main subject matter of the contract or (b) the assessment is of the appropriateness of the price payable.

⁵ s. 31.

⁶ s. 48.

⁷ s. 58.

⁸ s. 66.

However, this part of section 65 excludes the term from assessment only if it is transparent and prominent.⁹ Hence, the price paid for a holiday by a consumer would not be subject to a fairness test where this price is transparent and prominent. But, it is quite possible that in ‘the small print’ terms are incorporated relating to cancellation charges or other miscellaneous prices. These would be susceptible to the fairness scrutiny (thus replacing regulation 6(2) of the UTCCRs).

A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.

A term is prominent for the purposes of this section if it is brought to the consumer’s attention in such a way that an average consumer would be aware of the term.

E.7 Bar on exclusion or restriction of negligence liability (s. 66)

One of the most important and well known aspects of the Unfair Contract Terms Act 1977 was s. 2(1) and s. 2(2) making void any attempt to exclude liability for death or personal injury as a result of negligence; and making the attempted exclusion of liability through a term or a notice to be subject to the test of reasonableness. Section 66 continues this protection as a trader cannot, by a term in the consumer contract or by a consumer notice, exclude or restrict liability for death or personal injury resulting from negligence. Further, where a term of a consumer contract, or a consumer notice, purports to exclude or restrict a trader’s liability for negligence, a person is not to be taken to have voluntarily accepted any risk merely because the person agreed to it, or because he/she knew about the term or notice.

For the purposes of this section ‘personal injury’ includes any disease and any impairment of physical or mental condition. Also, ‘negligence’ means the breach of:

- (a) any obligation to take reasonable care or exercise reasonable skill in the performance of a contract where the obligation arises from an express or implied term of the contract,
- (b) a common law duty to take reasonable care or exercise reasonable skill,
- (c) the common duty of care imposed by the Occupiers’ Liability Act 1957 or the Occupiers’ Liability Act (Northern Ireland) 1957, or
- (d) the duty of reasonable care imposed by section 2(1) of the Occupiers’ Liability (Scotland) Act 1960.

It is immaterial whether a breach of duty or obligation was inadvertent or intentional, or whether liability for it arises directly or vicariously.

This section is subject to section 68. Where a court finds a particular term is unfair and thus unenforceable, this may merely result in that term being unfair. This would not affect the entirety of the contract and the remainder of the contract may continue to be enforceable against the consumer.

E.8 Requirement for transparency (s. 69)

Similar to the provision contained in the UTCCR reg. 7(1), a trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent - it is expressed in plain and intelligible language and it is legible.

E.9 Contract terms that may have different meanings (s. 70)

⁹ This has its origins in the rule that terms must be incorporated into a contract to have effect, and incorporation requires that the terms has been reasonably brought to the other party’s attention.

If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favorable to the consumer is to prevail.¹⁰ Some terms in a contract may be ambiguous and therefore this section helps to protect the consumer and ensure that the trader takes appropriate steps when drafting terms.

E.10 How are the general rules enforced? Enforcement of the law on unfair contract terms (s. 71)

On the basis that unfair terms have been used in a consumer contract, this section confers functions on the Competition and Markets Authority and other regulators to enforce the provisions of this Part of the Bill. Schedule 5 outlines the investigatory powers that are available to those regulators and include the ability to apply for injunctions to restrain the use of unfair terms, collate and make public (where appropriate) actions taken by these bodies against such (rogue) traders.

E.11 Duty of the court to consider fairness of a term (s. 72)

In proceedings before a court which relate to a term of a consumer contract, the court has an obligation to consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it. The court's duty here will be removed where the court is of the opinion that it has insufficient legal and factual material to enable it to consider the fairness of the term.

E.12 Application of rules to secondary contracts (s. 73)

It is possible that consumers may establish agreements with traders before, after or in addition to the primary/main agreement. Such 'secondary contracts' may seek to reduce the rights or remedies or increase the obligations of a person under this main contract. The secondary contract, which need not be between a consumer and trader, continues to be subject to the fairness requirement. Note though that this section does not apply if the secondary contract is a settlement of a claim arising under the main contract.

E.13 Consumer Contracts for Goods - Part 1

E.13.1 What 'goods contracts' are covered? (s. 3)

The provisions apply to contracts for a trader to supply goods to a consumer which means the contract must be:

- (a) a sales contract;
- (b) a contract for the hire of goods;
- (c) a hire-purchase agreement;
- (d) a contract for transfer of goods.

Specifically, this Part of the Bill does not apply:

- (a) to a contract for a trader to supply coins or notes to a consumer for use as currency;
- (b) to a contract for goods to be sold by way of execution or otherwise by authority of law;
- (c) to a contract intended to operate as a mortgage, pledge, charge or other security;
- (d) in relation to England and Wales or Northern Ireland, to a contract made by deed and for which the only consideration is the presumed consideration imported by the deed;
- (e) in relation to Scotland, to a gratuitous contract.

E.13.2 What statutory rights are there under a goods contract?

E.13.2.1 Goods to be of satisfactory quality (s. 9)

¹⁰ This, again, follows existing rules regarding the protection of consumers against exclusion clauses by the use of *contra proferentem*.

Every contract for the supply of goods is to be treated as including a term that the quality of the goods is satisfactory (unlike the Sale of Goods Act 1979, the term is not implied but is statutorily guaranteed). Satisfactory quality is assessed according to what a reasonable person would consider 'satisfactory' to mean and thereby will take into account factors such as:

- (a) any description of the goods,
- (b) the price or other consideration for the goods (if relevant), and
- (c) all the other relevant circumstances.

The quality of goods includes their state and condition. A non-exhaustive list of aspects relating to the quality of goods include:

- (a) fitness for all the purposes for which goods of that kind are usually supplied;
- (b) appearance and finish;
- (c) freedom from minor defects;
- (d) safety;
- (e) durability.

Goods will not be deemed to have failed the satisfactory quality requirement where it relates to defects:

- (a) specifically drawn to the consumer's attention before the contract is made,
- (b) where the consumer examines the goods before the contract is made, which that examination ought to reveal, or
- (c) in the case of a contract to supply goods by sample, which would have been apparent on a reasonable examination of the sample.

Further limitations to the issue of satisfactory quality are where a public statement is made about the specific characteristics of the good (which could be by the trader, producer or representative of the trader/producer, and/or in advertising or labeling).

Satisfactory quality adopts a similar standard as under previous legislation. The standards of quality should be what a reasonable person would agree would be satisfactory. Used/second-hand goods will have evidence of wear and tear, they are not likely to be expected to be as durable as a new item (but then this would presumably be reflected in the price). Goods which are advertised and sold at a considerably lower price than comparable goods would likely not be deemed to be unsatisfactory if they did not match the same standards of quality as much more expensive goods (items such as televisions, watches, computers can have 'similar' features, but the price charged may be markedly different. Such differences may reflect the quality of components used in these devices and thereby affect the experience of them - speed, durability, etc.).

E.13.2.2 Goods to be fit for a particular purpose (s. 10)

This requirement applies to a contract to supply goods if, before the contract is made, the consumer makes known to the trader (expressly or by implication) any particular purpose for which the consumer is contracting for the goods. Following the consumer informing the trader of his/her intended use of the good being purchased, the contract is to be treated as including a term that the goods are reasonably fit for that purpose, whether or not that is a purpose for which goods of that kind are usually supplied. Note, however, that this section does not apply if the circumstances show that the consumer did/does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the trader. The obligation in this section also applies to credit-brokers.

E.13.2.3 Goods to be as described (s. 11)

Every contract to supply goods by description is to be treated as including a term that the goods will match the description. Where the supply is by sample as well as by description, it is not sufficient that the bulk of the

goods match the sample if the goods do not also match the description. Further, simply because the goods are selected by the consumer does not prevent them being supplied by description.

E.13.2.4 Goods to match a sample (s. 13)

This section applies to a contract to supply goods where a sample of the goods is seen or examined by the consumer before the contract is made. The requirements are that the goods will match the sample, except to the extent that any differences between the sample and the goods are brought to the consumer's attention before the contract is made. Further, the goods shall be free from any defect that makes their quality unsatisfactory which would not be apparent on a reasonable examination of the sample.

E.13.2.5 Goods to match a model seen or examined (s. 14)

In relation to a contract to supply goods by reference to a model of the goods that is seen or examined by the consumer before entering into the contract, a term is implied to the effect that the goods will match the model. An exception is provided to the extent that any differences between the model and the goods are brought to the consumer's attention before the consumer enters into the contract.

E.13.2.6 Installation as part of conformity of the goods with the contract (s. 15)

It is possible that the trader not only supplies goods but also installs these (or has responsibility for their installation) as part of the contract. In such circumstances, s. 15 provides that where the goods do not conform to that as agreed in the contract and the goods are installed incorrectly, a remedy is available to the consumer.

E.13.2.7 Trader to have the right to supply the goods etc. (s. 17)

This section of the Bill makes it a requirement that the trader has the right to sell, or to transfer the goods, or to transfer possession of them at the point where the transfer of ownership/possession takes place.

E.13.2.8 No other requirement to treat a term about quality or fitness as included (s. 18)

Section 18 provides that unless there exists an express clause included in the contract, and/or unless the contract relates to those identified above in sections 9, 10, 13 and 16, a contract to supply goods is not to be treated as including any term about the quality of the goods or their fitness for any particular purpose.

E.13.3 Can a trader contract out of statutory rights and remedies under a goods contract?

E. 13.3.1 Liability that cannot be excluded or restricted (s. 31)

The following provisions of the Bill may not be excluded from a consumer contract, nor may the trader restrict a liability relating to them. Such a term of a contract which purports to do so is not binding on the consumer:

- Section 9 (goods to be of satisfactory quality);
- Section 10 (goods to be fit for particular purpose);
- Section 11 (goods to be as described);
- Section 12 (other pre-contract information included in contract);
- Section 13 (goods to match a sample);
- Section 14 (goods to match a model seen or examined);
- Section 15 (installation as part of conformity of goods with contract);
- Section 16 (goods not conforming to contract if digital content does not conform);
- Section 17 (trader to have right to supply the goods etc.);
- Section 28 (delivery of goods);
- Section 29 (passing of risk).

A term of a contract to supply goods is not binding on the consumer to the extent that it would:

- (a) exclude or restrict a right or remedy in respect of a liability under the provisions listed above,
- (b) make such a right or remedy or its enforcement subject to a restrictive or onerous condition,
- (c) allow a trader to put a person at a disadvantage as a result of pursuing such a right or remedy, or
- (d) exclude or restrict rules of evidence or procedure.

E.13.4 What remedies are there if statutory rights under a goods contract are not met?

E.13.4.1 Consumer's rights to enforce terms about goods (s. 19)

Having identified the main rights for consumers in the sale of goods, a significant factor in consumers' protection is the extent of their rights to a remedy in light of the breach. Existing/previous legislation sought to categorize the terms as either conditions (which go to the heart of the contract) or warranties (lesser terms), breach of which determined whether the consumer could reject the contract (breach of conditions) or to affirm the contract and seek damages. There was some distinction between the remedies for breach of the terms depending on the piece of legislation which provided the right, and as such the Consumer Rights Bill seeks to add a consistency to the approach of remedies.

The Right	Available Remedy
Section 9 (goods to be of satisfactory quality)	(a) the short-term right to reject (sections 20 and 22); (b) the right to repair or replacement (section 23); and (c) the right to a price reduction or the final right to reject (sections 20 and 24).
Section 10 (goods to be fit for particular purpose)	(a) the short-term right to reject (sections 20 and 22); (b) the right to repair or replacement (section 23); and (c) the right to a price reduction or the final right to reject (sections 20 and 24).
Section 11 (goods to be as described)	(a) the short-term right to reject (sections 20 and 22); (b) the right to repair or replacement (section 23); and (c) the right to a price reduction or the final right to reject (sections 20 and 24).
Section 12 (other pre-contract information included in contract)	The consumer has the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid or the value of other consideration given for the goods.
Section 13 (goods to match a sample)	(a) the short-term right to reject (sections 20 and 22); (b) the right to repair or replacement (section 23); and (c) the right to a price reduction or the final right to reject (sections 20 and 24).
Section 14 (goods to match a model seen or examined)	(a) the short-term right to reject (sections 20 and 22); (b) the right to repair or replacement (section 23); and (c) the right to a price reduction or the final right to reject (sections 20 and 24).
Section 15 (installation as part of conformity of goods with contract)	(a) the right to repair or replacement (section 23); and (b) the right to a price reduction or the final right to reject (sections 20 and 24).
Section 16 (goods not conforming to contract if digital content does not conform)	(a) the short-term right to reject (sections 20 and 22); (b) the right to repair or replacement (section 23); and (c) the right to a price reduction or the final right to reject (sections 20 and 24).
Section 17 (trader to have right to supply the goods etc.)	The consumer has a right to reject (subject to section 20).

E.13.4.2 Right to reject (s. 20)

As noted in the above table, breaches of certain statutory rights allow the consumer to reject the goods. The remedy of a short-term right to reject is subject to s. 22, and the final right to reject is subject to s. 24. These rights entitle the consumer to reject the goods and treat the contract as at an end.

The right of rejection is exercised if the consumer indicates to the trader that he/she is rejecting the goods and treating the contract as at an end. This indication may be something the consumer says or does, but it must be sufficiently clear to be understood by the trader.

Once the right to reject has been invoked, the trader has a duty to give the consumer a refund, and the consumer has a duty to make the goods available for collection by the trader or (if there is an agreement for the consumer to return rejected goods) to return them as agreed. Regardless of whether or not the consumer has a duty to return the rejected goods, the trader must bear any reasonable costs of returning them, other than any costs incurred by the consumer in returning the goods in person to the place where the consumer took physical possession of them.

E.13.4.3 Time limit for short-term right to reject (s. 22)

A consumer who has the short-term right to reject loses it if the time limit for exercising it passes without the consumer exercising the right, unless the trader and the consumer agree that it may be exercised later. The time limit must not be a shorter timeframe than the minimum established in law.

The time limit for exercising the short-term right to reject is the end of 30 days beginning with the first day after these have all happened:

- (a) ownership or (in the case of a contract for the hire of goods, a hire purchase agreement or a conditional sales contract) possession of the goods has been transferred to the consumer,
- (b) the goods have been delivered, and
- (c) where the contract requires the trader to install the goods or take other action to enable the consumer to use them, the trader has notified the consumer that the action has been taken.

In the event that the goods are of a kind that can reasonably be expected to perish after a shorter period than the right to reject above would give, the time limit for exercising the short-term right to reject is the end of that shorter period.

If the consumer requests or agrees to the repair or replacement of goods, the periods outlined above stop running for the length of the waiting period.

E.13.4.4 Right to repair or replacement (s. 23)

Where the right to repair (making the goods conform to the required standard) or replace the goods applies, and where the consumer requires the trader to perform this task, the trader must:

- (a) do so within a reasonable time and without significant inconvenience to the consumer, and
- (b) bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).

The consumer cannot require the trader to repair or replace the goods if that remedy is impossible, or is disproportionate compared to the other of those remedies. 'Disproportionate' involves the imposition of costs on the trader which, compared to those imposed by the other remedies, are unreasonable, taking into account:

- (a) the value which the goods would have if they conformed to the contract,
- (b) the significance of the lack of conformity, and

(c) whether the other remedy could be effected without significant inconvenience to the consumer.

Questions as to what is a reasonable time or significant inconvenience are to be determined taking account of the nature of the goods, and the purpose for which the goods were acquired.

A consumer who requires or agrees to the repair of goods cannot require the trader to replace them, or exercise the short-term right to reject, without giving the trader a reasonable time to repair them (unless giving the trader that time would cause significant inconvenience to the consumer). Likewise, a consumer who requires or agrees to the replacement of goods cannot require the trader to repair them, or exercise the short-term right to reject, without giving the trader a reasonable time to replace them (again, unless giving the trader that time would cause significant inconvenience to the consumer).

E.14 Consumer Contracts for Services – Part 1 Chapter 4

Simply by way of an overview, the Consumer Rights Bill continues to imply various terms into contracts for the supply of a service. The main provisions are included in ss. 50-53 which provide:

E.14.1 Service to be performed with reasonable care and skill (s. 50)

Every contract to supply a service is to be treated as including a term that the trader must perform the service with reasonable care and skill. This, consequently, no longer requires such a term to be referred to as being 'implied' into the contract. Further, the Bill does not provide a definition of what 'care and skill' is, although it will likely follow the previous legislation (the Supply Of Goods And Services Act 1982 s. 13) and case law identifying that this will differ between industries, and 'reasonable' will also be a variable concept, determined presumably with reference to the price paid for the service.

E.14.2 Information about the trader or service to be binding (s. 51)

Every contract to supply a service is to be treated as including, as a term of the contract, anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service. This becomes effective where the information is taken into account by the consumer when deciding to enter into the contract, or where it is taken into account by the consumer when making any decision about the service after entering into the contract.

This is an entirely new provision in the legislation (not previously incorporated in the Supply Of Goods And Services Act 1982) and operates where promises/statements are made by a trader or on their behalf which induces the consumer to enter into the contract. Parallels can be seen with the distinction between terms and representations as outlined in Chapter 9¹¹ and the statement which induces the party to enter into a contract is more likely to be seen as a term rather than a representation due to the proximity between the statement and the conclusion of the agreement forming the contract.

Further, given the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (Chapter 10) and the requirement imposed on traders to supply certain information to consumers, where such information is provided, s. 51 allows the consumer to use that information as forming a term of the contract.

E.14.3 Reasonable price to be paid for a service (s. 52)

This section applies to a contract to supply a service if the consumer has not paid a price for the service, the contract does not expressly identify/establish a price, or the contract is silent on how the price is to be reached. In such circumstances, s. 52 holds that the contract is to be treated as including a term that the consumer must pay a reasonable price for the service, and no more. What is a reasonable price is a question of fact for the courts to determine in the specific circumstances.

¹¹ See section 9.2 of the Chapter.

It is unlikely to play a huge role in the new law given that most people will agree in advance the price to be paid for a particular service, and the requirements for information to be provided relating to the services and what the trader will perform as part of this contract, will generally include consideration of the price.

E.14.3 Service to be performed within a reasonable time (s. 53)

Where a contract to supply a service does not expressly fix the time for the service to be performed, it does not say how it is to be fixed, and the information that is to be treated under section 51 as included in the contract does not fix the time either, the contract is to be treated as including a term that the trader must perform the service within a reasonable time. Reasonableness, as with s. 52, is determined on the basis of a question of fact.

E.14.4 Remedies and implications

The Right	Available Remedy
Service to be performed with reasonable care and skill (s. 50)	The right to require a repeat performance (ss. 56 and 57), and If that is impossible, or not done in a reasonable time or without significant inconvenience the right to a price reduction (s. 57)
Information about the trader or service to be binding (s. 51)	The right to a price reduction in price (s. 57)
Service to be performed within a reasonable time (s. 53)	The right to a reduction in price (s. 57)

Therefore in the event that a trader seeks to exclude his/her liability for breach of these implied terms, such as that relating to the exercise of reasonable care and skill or information about the trader or service to be binding, s. 57 establishes that such a clause will not be binding on the consumer. Further, the consumer will always possess the right to seek a refund of the price of the service where there has been a breach of the terms as identified above. Any term or clause inserted into a contract which seeks to restrict their liability to an amount which is less than a contract price, will not be binding or enforceable. Note also that where the restriction in liability in the contract relates to a price above or in excess of the contract price, such a clause may be accepted where it satisfies the test of fairness (s. 62).

Conclusion

This chapter has been included in the Online Resource Centre due to its significance in relation to consumer protection and the obligations that have been placed on traders in the sale and supply of goods, and the restriction against the use of unfair terms. It has been somewhat difficult to prepare this chapter given that the Bill is currently progressing through Parliament, is subject to many amendments, and will not be provided with a commencement order until (it is expected) 1 October 2015. It is likely some of the provisions explained in this chapter may be subject to change or to further instruction and guidance through supplementary provisions.

Please continue to review the Online Resource Centre as this chapter and its contents will be updated soon after October 2015 to reflect any changes and any specific commentary that will naturally follow from the enactment and application of the law in the courts. The fifth edition of the book will naturally replace the existing chapter 10 to fully reflect the Consumer Rights Act (as it will be known) and this will also have the benefit of incorporating case law and judicial / academic commentary on key issues such as reasonableness, fairness and any differences that become evident between the previous legislation and the wording of the new Act.