CONSUMER PROTECTION

See Paula Giliker, The Consumer Rights Act 2015—A Bastion of European Consumer Rights? (2017) 37 *Legal Studies* 78.

Over the last 75 years, the notion that the law should seek to protect the consumer has had important effects on the law of contract (see CFF 17th edn, pp 28–30). However, it is important to see that this idea has had major effects on many other parts of the law.

THE LAW OF TORT

In *Donoghue v Stevenson*[1] the plaintiff, perhaps the most famous consumer of all time, did not have a contract action because her friend had paid for tea. Her friend undoubtedly had a contract with the café and if there was a snail in the ginger beer she clearly had an action. But she would only recover her own loss, the price of the tea. If the plaintiff had paid for tea, she would have had a contract action against the café and the case would never have been reported. The decision of the majority that the plaintiff had a tort action for negligence against the manufacturer of the ginger beer opened the door to many possible actions. It should be noted that, although this development was very helpful to consumers, it is not in any sense limited to consumers.

CRIMINAL LAW

It has long been the case that some dishonest market transactions are criminal. So it would be criminal for a merchant to adjust his scales so that 15.5 ounces weighed a pound. The modern trend has been substantially to expand such rules and also to take more effective steps to enforce them. So there are now bodies in both central and local government charged with such enforcement. The consumer who gets less than the full pound will usually have a contract action but is in practice unlikely to know this.

[1] [1932] AC 562.

PUBLIC LAW

In relatively recent times there has been legislation creating bodies at both central and local levels charged with keeping under review business practices which are damaging to consumers. An important example is bank practices with regard to overdrafts. Most banks now operate a system in which no charge is made for an account which is always in credit but significant charges are made for small short-term overdrafts. So a customer's account may be debited £30 if he is overdrawn £5 for one day. The terms, which are of course drafted by the bank, normally avoid making going overdrawn a breach of contract, thereby in England (though not in Australia) avoiding the penalty rule (see *Cavendish Square Holding BV v Talal El Makdesi*[2] and discussion at pp 782–90). The system was reviewed by the House of Lords in *Office of Fair Trading v Abbey National Plc*.[3]

CONSUMER PROTECTION AND THE LAW OF CONTRACT

What is a consumer?

Many of the rules discussed above benefit consumers in practice without any need to define a consumer. So definition of a consumer is not part of the law of negligence. This is not true of rights created by statute which need to define what a consumer is. So in relation to the duty of disclosure which is central to Insurance Law, the position of the non-consumer insured is fundamentally different from that of consumer insured. This is discussed at pp. 389–90.

Contracts are sometimes divided into consumer contracts and commercial contracts. This is an oversimplification. A consumer contract is one in which one party is a consumer as defined in relevant legislation. There are areas of activity in which goods or services are only provided by businesses. So in insurance all, or virtually all, insurance is provided by insurance companies or Lloyds syndicates to either individuals or businesses. Therefore insurance contracts can be divided into consumer contracts and commercial contracts. However, this is not true of all contracts. For example, if I sell my car to a garage this is not a consumer contract, but most people would not describe it as a commercial contract and certainly would not do so if I sold it to my son.

Consumer Insurance is governed by the Consumer Insurance (Disclosure and Representation) Act 2012,[4] section 1 of which defines a consumer as an individual contracting 'wholly or mainly for purposes unrelated to the individual's trade, business or profession'. Different statutory provisions may draw the line in different places.

[2] [2015] UKSC 62.

[3] [2009] UKSC 6, [2008] EWHC 875 (Comm).

[4] Non-consumer insurance is dealt with by the Insurance Act 2015.

A common problem is when goods are bought partly for private and partly for business purposes. A typical example is when a car is bought by someone who will use it partly for business and partly for private purposes. In *R&B Customs Brokers Co Ltd v United Dominions Trust Ltd*[5] the Court of Appeal held that a company owned by a husband and wife which bought a car for such mixed purposes was a consumer. This was a doubtful decision but many statutory provisions expressly provide that only human beings (as opposed to companies) can be consumers.

The two most important areas have been implied terms and exclusion clauses.

Implied terms

(See pp 183–203.)

When the typical shopper goes to the supermarket, he or she will fill the trolley with groceries and take them to the cash-out and pay. Little, if anything, will be said but there is an elaborate contract based on the provisions in the Sale of Goods Act, which gives the consumer extensive protection. It is important to see that this protection did not start out as consumer protection. The Sale of Goods Act in its original form as passed in 1893 was a restatement of the way the law had developed through the cases in the nineteenth century but those cases were almost entirely non-consumer ones because only business people had the time, the money and sufficient at stake to make it worthwhile fighting the cases. Today's consumers get the benefit of this.

This is less true of more modern cases. One of the most important modern cases is *Liverpool City Council v Irwin*.[6] This case clearly reflected a view that the tenants of flats in high rise buildings were entitled to a minimum of protection. Note that the landlord in this case was a local authority, whose function should surely have been to provide this protection.

Exemption, exclusion and limitation clauses

(See pp 213–63.)

Over the last 150 years there has been extensive litigation and now legislation over clauses designed to qualify liability. The nature of these clauses was examined by Brian Coote in his classic book, *Exception Clauses*. It is important to see that not all of the possible clauses are of the same nature.

Some clauses seek to define what it is that is promised. The classic example is the sale of a horse 'warranted sound except for jumping': the purpose of this clause is to make it clear that the seller is making no promises about the horse's ability to jump (important if the buyer plans to use the horse for hunting). This clause does not exclude a liability which would otherwise exist because many horses cannot effectively jump. An important application of this principle is *GH Renton v Palmyra Trading Corporation of Panama*.[7] In this case the contract was subject to legislation which prohibited exclusion

[5] [1988] 1 WLR 321.

[6] [1977] AC 239. See pp 193–4.

[7] [1957] AC 149.

clauses but this did not apply to the relevant clause which was treated by the House of Lords as defining the destination.

Most the litigated cases do involve provisions designed to exclude a liability which would otherwise arise. The first major examples are the so-called 'ticket cases' which arose in the 1860s and 1870s as railway companies sought to limit the liability they would otherwise be under, for instance, by negligence in the operation of the railway. The railway museum in Swindon has a fine collection of tickets from this period. The leading decision is *Parker v SE Railway*.[8]

In practice this decision was very favourable to the railways and tickets bearing the words 'for conditions see back' and on the back a reference to the company's conditions are still in daily use. That line of cases now seems indulgent to the railways but it took a long time for this view to develop. This was possibly in part because railways were in general very safe, so that not many things went wrong.

The twentieth-century equivalent was the hire purchase of second-hand cars, where things went wrong all the time. In the 1950s and 1960s there were a series of Court of Appeal decisions, largely inspired by Lord Denning holding that some defects were so serious that liability could not be excluded. *Karsales v Wallis*[9] is a leading example. The doctrine was eventually rejected by the House of Lords in *Photo Production v Securicor*[10] but note that this case was not a consumer case and although it was surprising at the first sight, it is in fact sensible since Photo Production will have insured their factory and it would only increase the cost of inspection if Securicor also had to insure. Further, by this time it was clear that legislative control was the answer.

Legislation

English Law has had legislative provision dealing with particular forms of contract at least since 1677 when the Statute of Frauds required a number of contracts be evidenced in writing but provisions applying to all contracts are rare. Perhaps an exception is the Law Reform (Frustrated Contracts) Act 1943[11] but parties do not usually foresee that their contract will be frustrated.

The Unfair Contract Terms Act 1977 was a major exception to this. It does not in fact apply to all contracts[12] but it applies to so many that it is clearly a central part of the law of contract. Originally the Act applied to both consumer and non-consumer contracts but the consumer provisions have now all been transferred to Consumer Rights Act 2015 (discussed later). The details of the Act are considered at pp 243–59.

[8] (1877) 2 CPD 416.
[9] [1957] 2 All ER 866.
[10] [1980] AC 827.
[11] See pp 731–9.
[12] See pp 243–5.

European influence

Under the constitutional arrangements of the European Union, the law of contract is a matter for individual states but consumer protection is a matter for the Union. In fact a substantial amount of work towards the production of a European Contract Law has taken place. The departure of the UK from the European Union may well make it easier for the remaining members to agree since Ireland will be the only Common Law country left.

The organ of the European Union responsible for consumer protection had been active and a Directive lay down minimum standard was adopted in 1993. The provision of the Directive overlapped with those of the Unfair Contract Terms Act, being in some respects wider and in others narrower. It would have been possible to amend the Unfair Contract Terms Act to comply but it was decided instead to do this by secondary legislation under section 2(2) of the European Community Act 1972. The results were the unfair terms in Consumer Contract Regulations 1994 and 1999. This decision has effectively been reversed by the Consumer Rights Act 2015.

Consumer Rights Act 2015

(See pp 259–63.)

The Act runs to 101 sections and occupies some 143 pages in the statute book. It cannot easily be summarised in a few pages. There is a helpful guide produced by the Competition and Market Authority entitled 'Unfair Contract Terms Guidance' (CMA 37, 31 July 2015). The principal purpose of the Act is to bring the relevant law together in one place. This means that much of the Act is effectively a restatement of the existing law although there will be borderline cases where it is possible to argue whether the words used are intended to produce a change. There is also a substantial amount of public law consumer protection which does not alter the law of contract. The Act does not for most purposes alter the whole law of contract but only the law for those contracts that are within its scope. Although exemption clauses are central they are not the whole. So sections 19 to 24 contain extensive provisions about remedies. To take a simple example, English common law has treated the buyer's primary remedy for seriously defective goods as rejection but some continental systems have thought of it in terms of repair or replacement. The Act seeks to marry these possibilities. The Act is in three parts.

Part 1 (sections 1–60)

This Part sets out the terms for consumer contracts for goods, digital content and services. Sections 1–8 set out the contracts to which the Part applies. Sections 9–57 set out the statutory rights which are treated as included in such contracts. In most cases there is a provision that the terms cannot be excluded. So, for instance, in the case of sale of goods, this produces results similar to, but not necessarily identical with, those previously achieved by the combination of the Sale of Goods Act and the Unfair Contract Terms Act. Sections 31, 47 and 57 deal with exclusion of liability.

Part 2 (sections 61–76)

This is the central part dealing with exception clauses for consumers. Its practical effect seems to be similar to that of the Unfair Contract Terms Act and the Unfair Terms in Consumer Contract Regulations but the wording is different and the effect will need to be worked out in practice. The basic requirement is of fairness. This is stated by section 62 which provides:

> Requirement for contract terms and notices to be fair
>
> (1) An unfair term of a consumer contract is not binding on the consumer.
>
> (2) An unfair consumer notice is not binding on the consumer.
>
> (3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.
>
> (4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
>
> (5) Whether a term is fair is to be determined –
>
> (a) taking into account the nature of the subject matter of the contract, and
>
> (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.
>
> (6) A notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.
>
> (7) Whether a notice is fair is to be determined –
>
> (a) taking into account the nature of the subject matter of the notice, and
>
> (b) by reference to all the circumstances existing when the rights or obligations to which it relates arose and to the terms of any contract on which it depends.
>
> (8) This section does not affect the operation of –
>
> (a) section 31 (exclusion of liability: goods contracts),
>
> (b) section 47 (exclusion of liability: digital content contracts),
>
> (c) section 67 (exclusion of liability services contracts), or
>
> (d) section 65 (exclusion of negligence liability).

Section 63 introduces terms listed in Schedule 2 which are or may be treated as unfair. This list is long and comprehensive.

Section 64 contains a very important qualification:

> Exclusion from assessment of fairness
>
> (1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that –
>
> (a) it specifies the main subject matter of the contract, or

(b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

(2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

(3) 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.

(4) 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.

(5) In subsection (4) 'average consumer' means a consumer who is reasonably well-informed, observant and circumspect.

(6) This section does not apply to a term of a contract listed in Part 1 of Schedule 2.

This will mean that there will be cases where the consumer cannot argue that the price is too high. For this purpose the terms must be transparent. Transparency is both part of fairness and in some cases, such as this, a separate requirement. The core exemption is helpfully discussed in Part 3 of the guidance note.

The guidance note produced by the CMA contained much helpful explanation. Para 1.46 says:

> As from 1 October 2015, the Act supersedes the UTCCRs, and the UCTA so far as applicable to consumer contracts. Generally, however, it carries forward rather than changing the protections provided to consumers under earlier legislation. Changes are mainly in the scope rather than substance. The fairness and transparency provisions of Part 2 are effectively the same as those of the UTCCRs – save in applying to consumer notices and negotiated terms – as is to be expected, since it mainly serves to give effect to the Directive which remains unchanged. Similarly, Part 1 largely continues the effect of the UCTA, save that the scope of its protection is selectively extended to services and digital content.

The guidance note also includes a very helpful flow chart as an attachment to para 1.58, which shows how the various rules interact. This is reproduced below in Figure 1.

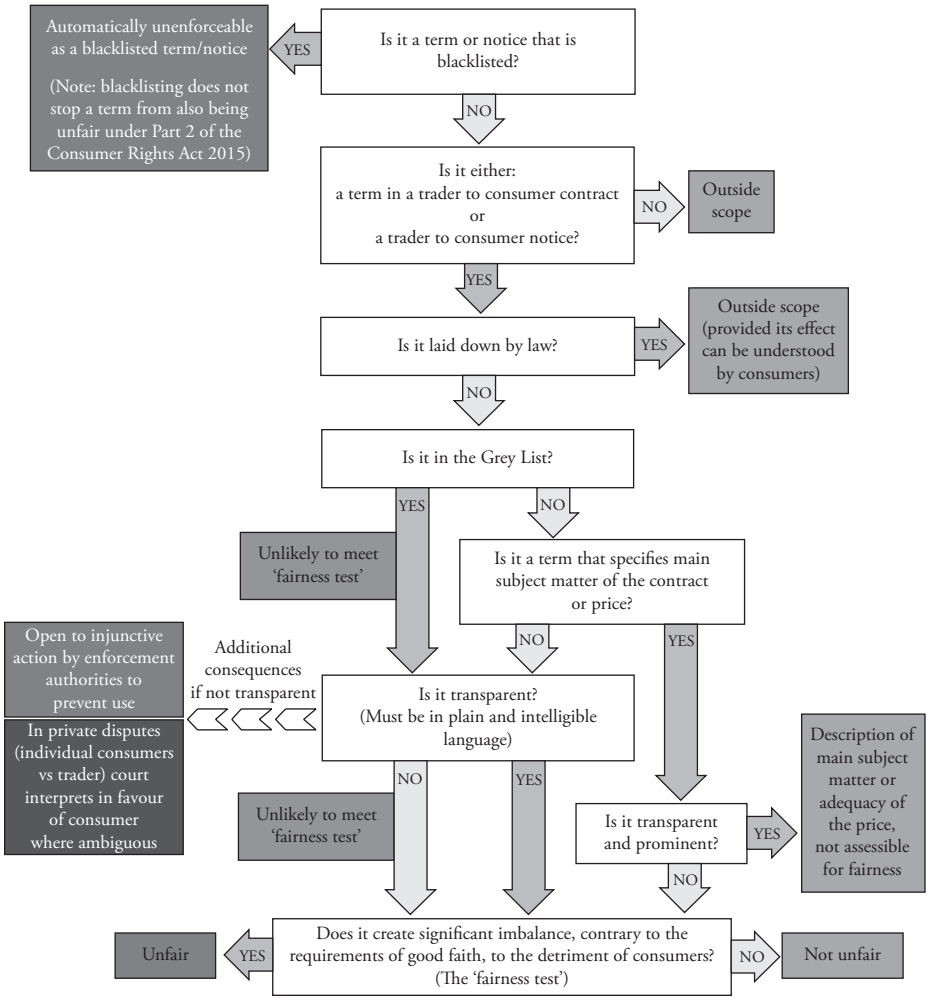

Figure 1 Unfair contract terms flowchart

Part 3 (sections 77–101)

This Part is entitled 'Miscellaneous and general' and has little effect on the law of contract.