

REFORMING THE LAW ON CONSUMER REMEDIES FOR FAULTY GOODS

AN INTRODUCTION TO THE LAW COMMISSIONS' PROJECT

INTRODUCTION

- 1.1 On 3 December 2007, the Law Commission and the Scottish Law Commission started a new project on the remedies available to consumers when they buy faulty goods.
- 1.2 It is fairly clear what standards goods should meet. There is a general awareness that goods must, for example, be of satisfactory quality, fit for purpose and correspond with their description. However, there is much less understanding about what remedies are available to consumers if goods are not of satisfactory quality, or not fit for purpose. It is often not clear when a consumer is entitled to return goods and get their money back, and when they must accept a repair or replacement, or some form of monetary compensation.
- 1.3 This document briefly sets out the current legal situation and some of the difficulties that exist.

CONSUMER SALES LAW - TRADITIONAL UK REMEDIES OVERLAIN WITH EUROPEAN RIGHTS

UK domestic law

- 1.4 The traditional UK "common law" approach is set out in the Sale of Goods Act 1979. Essentially, it allows the consumer to "reject" faulty goods, and obtain a full refund. This is referred to as the "right to reject". However, the right to reject is lost once the consumer is deemed to have accepted the goods, which may happen "after the lapse of a reasonable time".¹
- 1.5 There has been a long debate about what constitutes "a reasonable time". In *Bernstein*, for example, it was suggested that the right to reject a new car might be lost within three weeks.² However, in *Clegg*,³ the Court of Appeal doubted this, and held that the right to reject continued while the buyer was reasonably waiting for information.

¹ Sale of Goods Act 1979, s 35 (4).

² *Bernstein v Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220.

³ *Clegg v Olle Andersson* [2003] EWCA Civ 320, [2003] 1 All ER (Comm) 721.

- 1.6 This question is complicated further where the consumer does not examine the goods for a long time after purchase. A typical example is a consumer who buys skis in the end of season sale in April and does not try them out until the following January.⁴ In this scenario, can the consumer be said to have had “a reasonable time” to test the skis? The answer is far from clear.
- 1.7 The traditional UK approach is that once the right to reject has been lost, the consumer’s main remedy lies in damages for breach of contract - that is, cash compensation for the difference between what the consumer received and what they were entitled to. This is subject to the normal limitation period of six years (or, in Scotland, the five year period of prescription).
- 1.8 It is for the purchaser who is trying to reject goods or seek damages to prove that they were defective at the time of purchase.

The Consumer Sales Directive

- 1.9 The European “civil law” approach has been set out in the Consumer Sales Directive, which was implemented into UK law in 2002.
- 1.10 These provisions provide four new rights, split into two tiers:
- (1) The “first tier rights” enable the consumer to demand the repair or replacement of the faulty goods. The seller must comply with this demand unless it is impossible or disproportionate, when compared with the other remedies.
 - (2) The consumer may rely on the “second tier rights” if repair or replacement is impossible or disproportionate, or if the seller has failed to comply with the consumer’s demand within a reasonable time and without significant inconvenience. The “second tier” rights allow the consumer to demand a reduction in the purchase price of an appropriate amount or to rescind the contract. Where the consumer rescinds the contract the seller is entitled to reduce the sum refunded to take account of the purchaser’s use of the goods. It is not clear how this is to be calculated.
- 1.11 These remedies are available for much longer than the right to reject. Furthermore, the consumer can rely on the presumption that any fault that arises in the six months after purchase was present when the goods were purchased, providing that such a presumption is consistent with the nature of the goods. A seller who wishes to dispute this must prove that the fault arose after purchase.
- 1.12 After six months has expired, this presumption no longer applies. Consumers who want to pursue these remedies for longer must prove that the defect existed at the time of purchase. Where consumers are able to do this, they can bring a claim for up to six years after purchase (five years in Scotland).

⁴ J K Macleod, *Consumer Sales Law* (2002), para 29.07.

Contracts similar to sales

- 1.13 The Consumer Sales Directive remedies also apply to contracts for the supply of goods. However, the law relating to rejection is different with respect to contracts for the supply of goods that are not sales (such as part-exchange, barter or work and materials contracts). As explained above, in sales contracts the right to reject is lost after a short period of time, when goods are deemed to be “accepted”. However, there is no such limitation with other contracts for the supply of goods. Here the right to reject continues until the contract has been “affirmed”. In Scots law, the right to reject continues until it has been lost through acts which amount to acquiescence, waiver or other form of personal bar. Providing the limitation period (or, in Scots law, the prescriptive period) has not elapsed, any discovery that the goods were faulty at the time of the contract entitles the consumer to return them and receive the contract price back. The right to return the goods is only lost if the consumer “affirms” the contract by recognising its continuing validity. In Scotland, the right to return the goods is lost where, through the consumer's conduct, the consumer is personally barred from insisting on the return of the goods.

Hire purchase contracts

- 1.14 With regard to hire purchase agreements, there is a right to reject similar to that for work and materials contracts. However, there is no right to benefit from the European remedies because hire purchase contracts are not included within the Consumer Sales Directive.

Computer software

- 1.15 It is unclear what remedies are available to a consumer who claims that computer software they have purchased is faulty. It seems that software on disks may constitute “goods” for the purposes of the Sale of Goods Act 1979, but that downloaded software does not.⁵

THE LAW IN PRACTICE

- 1.16 It is not surprising that some consumers who buy goods are unsure of their legal position when they find that goods they have bought are faulty. The first question is whether the contract was for the sale of goods, or some other similar type of contract.
- 1.17 Secondly, assuming that the contract was one for the sale of goods, consumers are faced with at least six possible remedies. Even a consumer who was aware of all their different rights would find the different time limits a challenge. For example, if seeking to rely on the right to reject goods they would have to work out the “reasonable period” for rejection. These are not merely theoretical problems – they prove to be problems in practice.

⁵ *St Albans City v International Computer Limited* [1996] 4 All ER 481, and *Beta Computers v Adobe Systems* [1996] SCLR 587.

- 1.18 Surveys show that consumer problems are extremely common. In the Legal Services Commission's large-scale survey of justiciable problems, 13% of the population reported a problem with faulty goods and services that had been difficult to solve.⁶ Most people try to sort out their problems directly with the retailer. However, there is also a high demand for advice. Hazel Genn's research, *Paths to Justice*, found that 30% of those with a problem over faulty goods and services had sought advice. It was also relatively common for consumers to threaten legal action (18% had done so), though far fewer people had started legal proceedings (3%).⁷
- 1.19 It is clearly important that the law in this area is readily understood by those involved. Consumers need a broad understanding of what remedies they may be entitled to, while sales managers and consumer advisers will need a more comprehensive understanding. It is worrying that both retail and consumer organisations report difficulties in training their staff in this area of law. In the absence of full understanding, both sides are likely to reach a partial and not wholly accurate view of what the law requires, aggravating the potential for disputes.
- 1.20 It is also a problem if there is a mismatch between lay views of what consumers are entitled to and what the law provides. Where possible, the law should reflect generally accepted standards of good practice.

THE DAVIDSON REVIEW

- 1.21 The Davidson Review was set up by the Chancellor of the Exchequer, Gordon Brown, in 2005 to look at the way EU Directives were implemented. The Review found that whilst consumer sales affects millions of people, it is now too complex for sales staff and consumer advisers to understand. Retailers who gave evidence to the Review said that the lack of shared understanding of legal rights between consumers and retailers leads to too much litigation; and large retail chains have to employ teams of lawyers to defend legal actions.⁸
- 1.22 The Review recommended that the DTI should ask the Law Commission and the Scottish Law Commission to produce a report "on the reform and simplification of remedies available to consumers relating to the sale and supply of goods".

SCOPE FOR REFORM – A FOCUS ON THE RIGHT TO REJECT

- 1.23 The complexity of consumer remedies led the Davidson Review to call for reform. Looking firstly at sales, much of the complexity has arisen because there are two regimes in operation: traditional UK remedies have been overlain with European rights. The Consumer Sales Directive was implemented by adding the new remedies on top of the existing ones, without unifying the rules that govern the two regimes.

⁶ P Pleasance and others, *Causes of Action: Civil Law and Social Justice* (2004) p 14.

⁷ H Genn, *Paths to Justice: what people do and think about going to law* (1999) p 39.

⁸ *Davidson Review, Final Report* (November 2006) para 3.21.

- 1.24 The lack of unity between the two systems cannot, however, be corrected by a radical overhaul of the European remedies. The UK is not permitted to remove the rights specified in the Consumer Sales Directive. This means that any significant reform in this area will need to focus on UK domestic law, specifically the common law right to reject and damages. We are particularly interested in establishing stakeholders' views on rejection as a consumer right.

Abolishing the right to reject?

- 1.25 The first question is whether to retain the right to reject at all. One possible reform would be for UK law to adopt a more European approach, in which the primary remedies would be repair or replacement. This would mean that consumers only "got their money back" if there was some reason why repair or replacement were unsuitable. We will look at whether the right to reject should be retained.

A standard time limit for the right to reject?

- 1.26 Secondly, if we were to retain the right to reject as a distinct and immediate remedy, should the law be clarified by specifying a fixed period in which it must be used? This would overcome the current ambiguity over how long a consumer has before the right to reject is lost. If the law were to set a standard period, how long should that period be? And would the law need to set different time limits for different types of goods?

Extending the right to reject?

- 1.27 A third option would be to extend the right to reject faulty goods. Currently, the right to reject goods must be used quickly or lost. A long-term right to reject would effectively give consumers a full choice between repair, replacement, rejection or reduction in price, whenever the right was exercised. In practice, this would extend the right of rejection to at least six months, but with the possible proviso that some value would have to be given for the consumer's use of the goods.

Uniform remedies for all consumer contracts that supply goods?

- 1.28 We will consider whether there should be uniform remedies, whether the contract is one of sale or for the supply of goods. This would involve abolishing the current distinction between "acceptance" and "affirmation". In Scotland, this might involve abolishing the distinction between "acceptance" in contracts for the sale of goods and "waiver" and other forms of personal bar in relation to other contracts for the supply of goods. The Consumer Sales Directive does not apply to hire purchase agreements or software contracts. We will ask whether this position is justified.

The importance of damages

- 1.29 Our project will also consider the position of the common law right to damages within a reformed system. In particular, we are interested to know whether stakeholders see this as a valuable right, given the other remedies available to consumers.

THE EU REVIEW OF THE CONSUMER ACQUIS

- 1.30 The European Commission is currently consulting on the future of consumer law within Europe. It is undertaking a general review of the many directives designed to protect consumers (“the consumer acquis”). The Department for Business, Enterprise and Regulatory Reform has asked the Law Commissions to advise it on any issues that appear relevant to the current EU discussions.

TIMETABLE FOR THE PROJECT

- 1.31 We are currently engaging with stakeholders, before drafting a Consultation Paper. We hope to publish this Paper in the summer of 2008. In the meantime we would welcome contact from anyone with an interest in this area. Please contact us:

Via email: commercialandcommon@lawcommission.gsi.gov.uk

By post: Donna Birthwright
Law Commission
Conquest House
37-38 John Street
Theobalds Road
London WC1N 2BQ

- 1.32 We intend to publish a report by the middle of 2010.

20 February 2008