



Consumer Rights Act 2015 Seminar

GOUGH SQUARE CHAMBERS

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New Remedies in Consumer Contracts

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Key Points

- Chapters 2 & 4 of Part 1 of the CRA merge the rights and remedies formerly found in SOGA 1979, SOG(IT)A 1973, SGSA 1982 for goods and services respectively
- Introduction of tiered remedies married to specific rights



Goods – Tiered Remedies

Tier 1 remedies

- Short-term right to reject (≤ 30 days) – full refund (ss20 & 22)
- Right to **one** repair or replacement (within a ‘reasonable time’)
 - Vendor bears all costs **unless** disproportionate (s23)

Tier 2 remedies

- Right to price reduction (after repair/replacement) (s24)
- Final right to reject (after repair/replacement) – refund (subject to deduction for use by consumer after six months) (s24)



Key Points

- Remedies designed to keep parties out of court
- CRA remedies are in addition to standard remedies (e.g. damages), subject to the general prohibition on double recovery



Overview

- Goods: ss19–32, Chapter 2, Part 1
- Services: ss54–57, Chapter 4, Part 1
- Digital content: ss42–47, Chapter 3, Part 1



Goods

- What are ‘goods’?
 - ‘any tangible moveable item’ (s2(8))
 - Includes water, gas, and electricity **only if** supplied in a ‘limited volume or set quantity’
- Which contracts are covered by “a contract to supply goods”?
 - Sales
 - Hire
 - Hire–purchase
 - Transfer of goods



Goods:

Matching Rights & Remedies

Rights	Remedies
<ul style="list-style-type: none"> • Satisfactory quality • Fitness for purpose • As described • Goods to match sample/model seen or examined • Digital content supplied with goods 	<ul style="list-style-type: none"> • Short-term right to reject • Right to repair or replacement <p>Then:</p> <ul style="list-style-type: none"> • Right to price reduction or • Final right to reject
Conformity with pre-contractual information required under the Consumer Contract Regulations	Recovery of costs incurred as a result of the breach, up to the amount of the price paid
<ul style="list-style-type: none"> • T right to sell/transfer • Goods to be free of charges and encumbrances and right to quiet possession 	<ul style="list-style-type: none"> • Right to reject • No remedy under the CRA



Goods: Matching Rights & Remedies

Rights	Remedies
<ul style="list-style-type: none">• Correct installation• Conformity with requirements stated in the contract	<ul style="list-style-type: none">• Right to repair or replacement <p>Then:</p> <ul style="list-style-type: none">• Right to price reduction or• Final right to reject
Wrong quantity	<ul style="list-style-type: none">• Right to reject where too few are delivered• Right to reject either surplus or all goods if too many are delivered



Goods:

Matching Rights & Remedies

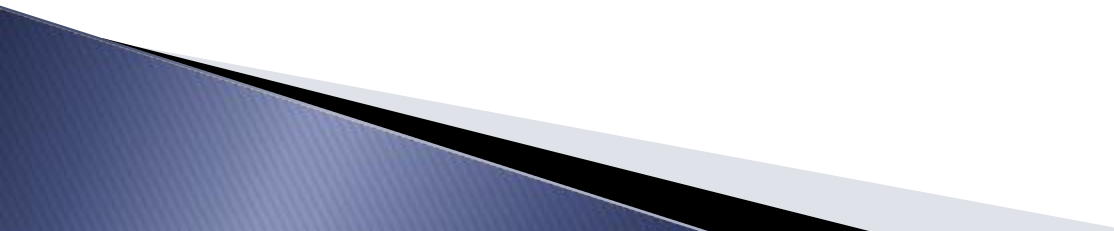
Rights	Remedies
<p>Delivery:</p> <ul style="list-style-type: none">• T to deliver if contract silent• Unless otherwise agreed without undue delay and within 31 days of the contract date	<ul style="list-style-type: none">• Right to cancel the order, reject the goods, and receive refund.• Alternatively, consumer entitled to treat contract at an end if:<ol style="list-style-type: none">1. Trader refuses to deliver;2. Delivery does not take place at agreed time and was essential;3. Prior notification that delivery within period was essential.




Rejection

- 3 rights to reject under CRA: short term, final & failure to supply title/right to possession
- Points common to the rights to reject:
 - Allows C to treat contract as being at an end
 - Exercised by an indication to T that goods rejected and contract at an end
 - Consequences:
 - T duty to refund
 - C duty to make goods available/return if agreed

Refund on rejection

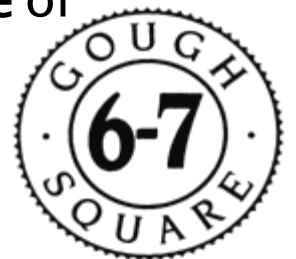
- Money back
 - Non-money consideration: the same amount of the same thing transferred, unless there is no substitute in which case the original thing transferred in its original state must be returned
 - If neither of the above can be done then there is no right to a refund, but a possible claim in damages
 - Specific provisions for hire & hire-purchase
- 

Partial Rejection

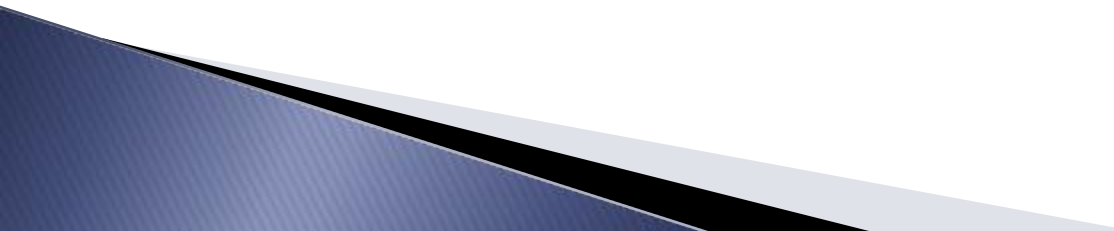
- Right to reject not utilised to reject all and treat contract as at an end
 - Can reject some or all of defective goods
 - Cannot reject non defective goods
 - Does not apply to “commercial units” where the division will impair the value or character of the unit
- 

The Short Term Right to Reject

- 30 days
- Lost if not exercised
- Can agree to extend but not to curtail
- When does time run? (s22)
 - First day **after** all the following have happened:
 - a) Ownership or possession has been transferred
 - b) Goods have been delivered
 - c) (If installation or other action is required) **notice** of installation/action has been given



The Short Term Right to Reject

- If C requests repair or replacement before expiry of the short term right time is suspended for “the waiting period”
 - Waiting period = day of the request/agreement to the repair/replacement to the day of receipt of the goods in response
 - If non-conformity remains then short term right extended to 7 days post waiting period, or, if longer, the original 30 days extended by the waiting period
- 

The Final Right to Reject

- Refund may be reduced by a deduction for use of the goods since delivery
- But:
 - Not for any period C has the goods only because T has failed to collect at the agreed time; and
 - Not for the first 6 months (except motor vehicles and goods specified in an Order)

Repair or Replacement

- Repair = make conform to the contract
- C's choice
- T can refuse if impossible/disproportionate compared to the other
- Remedy must be completed within a reasonable time and without significant inconvenience to C
- T bears cost
- C must provide T with reasonable time to complete before switching options unless significant inconvenience

Price Reduction or Final Rejection

- C's choice (only one)
- 6 month presumption of non-conformity
- Tier 2 = Not before either:
 - 1 repair/replacement to which C agreed AND T has delivered goods in response/indicated repairs complete AND still no conformity
 - Repair/replacement is impossible or disproportionate
 - T in breach of requirement to repair/replace within a reasonable time

Services

- What is a service contract?
 - A ‘contract for a trader to supply a service to a consumer’ (s48(1))
 - No definition of ‘service’ in the CRA
 - Does not include contracts of employment (s48(2))

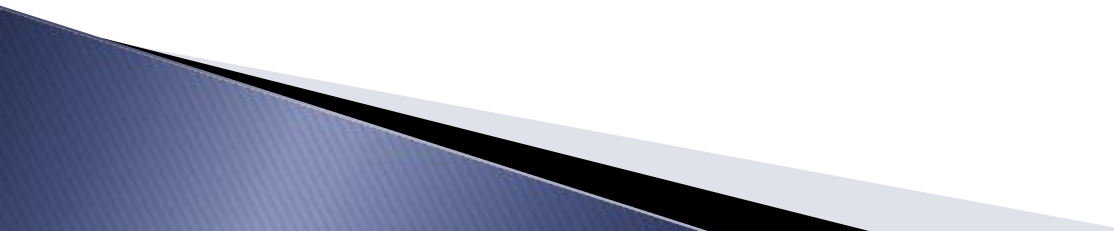


Services – Overview

- Services must be supplied:
 - With ‘reasonable care and skill’
 - For a ‘reasonable price’ (if contract or info incorporated in it by s.50 are silent)
 - Within a ‘reasonable time’ (if contract or info incorporated in it by s.50 are silent)
 - Information about T/the service is binding
- Tiered Remedies:
 - Tier 1: Right to have services repeated (s55)
 - Tier 2: Right to a price reduction (s56)



Right to have services repeated

- To extent necessary to achieve conformity
 - Unless impossible to achieve conformity
 - Within a reasonable time and without significant inconvenience to C
 - T bears costs
- 

Services:

Right to a price reduction

- Only available if:
 - Conformity through repeat performance is impossible;
 - T in breach of requirement to repeat perform within a reasonable period/without significant inconvenience to C

Services: Matching Rights and Remedies

Rights	Remedies
<ul style="list-style-type: none">• Reasonable care and skill• Pre-contractual information <i>relating to performance of the services</i> treated as a term of the contract	<ul style="list-style-type: none">• Right to require repeat performance <p>Then</p> <ul style="list-style-type: none">• Right to refund (up to the contract price where:<ol style="list-style-type: none">1. Right to repeat performance is not available or is impossible2. Trader has not completed repeat performance within a reasonable time and/or without significant inconvenience to the consumer




Services: Matching Rights and Remedies

Rights	Remedies
Pre-contractual information <i>not relating to performance of the service</i> treated as a term of the contract	Right to a price reduction
Consumer to pay a 'reasonable price' unless otherwise agreed	No remedy under the CRA
Services to be performed within a 'reasonable time' where contract silent	Right to price reduction



Conclusion

- 5 key strengths?
 - Clarity in new 30 day short term right to reject
 - If outside 30 days only 1 repair or replacement attempt required before money back
 - No deductions for use of goods within first 6 months after purchase
 - Consolidating and aligning remedies for goods supplied under different types of contracts
 - Consumer friendly; removal of legal language
- 



Contracts for Digital Content

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Dragging Consumer Law into the 21st Century

- ▶ The digital content rights in the CRA are part of a new set of consumer rights which apply to the digital market:
 - Consumer Contracts Regulations 2013;
 - Civil Redress for Misleading Actions and Aggressive Practices under the amended CPUT Regulations;
 - Online Dispute Resolution Regulation (January 2016).
- ▶ Prior to the introduction of these rights, and the CRA in particular, consumer rights in respect of digital content were unclear.
 - Digital content did not fall easily within either the Goods or Services regime.



What is Digital Content?

- ▶ Section 2(9)

“...data which are produced and supplied in digital form.”

- ▶ Expansive definition that cannot be reduced to an exhaustive list of examples. Intention is to “catch” new forms for digital content as it is developed.
- ▶ Digital data supplied in a tangible form (i.e. DVD) will also be covered by the goods regime.



Some Examples of Digital Content

- ▶ Apps
- ▶ Games
- ▶ Music
- ▶ E-books
- ▶ Films
- ▶ Software
- ▶ Newspapers and Magazines (for tablets)
- ▶ Cloud computing services



Contracts to which the implied terms apply

- ▶ From 1 October 2015
- ▶ Section 33
 - Trader
 - Supply
 - Content is supplied at the point it reaches the consumer's device or when it reaches another trader acting under a contract with the consumer (ISP or MNO)
 - Digital Content
 - Consumer
 - Price Paid
 - Alternatively supplied free with goods/services/other digital content for which the consumer pays a price
 - Includes payment by virtual currency/PayPal etc



The Implied Terms

- ▶ Satisfactory Quality (section 34)
- ▶ Fitness for Purpose (section 35)
- ▶ As described (section 36)
 - No other implied terms about quality or fitness (section 38) but there is an implied term that the digital content will confirm with pre-contract information (section 37).
 - Reverse burden of proof (section 42(9)).



Remedies for Breach of the Implied Terms

TIER 1 REMEDIES (section 43)

- ▶ The consumer can require the trader to repair or replace the digital content:
 - Must be completed within a reasonable time and without significant inconvenience to the consumer; and
 - Trader must bear the costs.
- ▶ Consumer cannot insist on repair or replacement if:
 - Impossible; or
 - Disproportionate compared to the other of those remedies.



Remedies for Breach of the Implied Terms

TIER 2 REMEDIES (section 44)

- ▶ Consumer can require the trader to reduce the price paid by an appropriate amount if:
 - Repair or replacement is impossible; or
 - The consumer has required the trader to repair and/or replace the digital content but the trader fails to do so without undue delay and without significant inconvenience to the consumer.
- ▶ Must be given without undue delay (and within 14 days).
- ▶ No fees can be imposed.
- ▶ The statutory remedies do not prevent the consumer from seeking other redress.



Digital Specific Issues

MODIFICATION

▶ Section 40

- Unlike goods and services it is inherent in the nature of some digital content that it will be updated or modified;
- The implied terms do not prevent modification but where a trader plans to modify/update digital content it should reserve this right to do so in the contract.

CONTINUED TRANSMISSION

▶ Section 39

- Covers facilities under which the parties have contracted for the continued exchange of digital content
- Facility must be available for a reasonable time unless specified in the contract.



Digital Specific Issues

RIGHT TO SUPPLY DIGITAL CONTENT

▶ Section 41

- There is a similar implied term in respect of goods but is probably going to be more relevant in the digital sphere.

DAMAGING A DEVICE OR OTHER DIGITAL CONTENT

▶ Section 46

- In contrast to the other rights/implied terms this applies to any contract under which the trader supplies the consumer with digital content (no need to pay);
- Triggered if digital content causes damage to a device or digital content which belongs to the consumer; and
- The damage would not have occurred if the trader had exercised reasonable care and skill.



No Contracting Out

- ▶ Section 47
 - Liability for breach of the following cannot be excluded or restricted:
 - The implied terms of satisfactory quality, fitness for purpose and correspondence with description;
 - Compliance with pre-contract information; and
 - The trader's right to supply the digital content.
- ▶ Subject to restrictions on unfair terms, liability can be excluded/restricted in relation to other breaches.





Enhanced consumer measures

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What are they?

- ▶ Add-ons to the Enterprise Act 2002
- ▶ A set of new obligations which enforcers can require traders to comply with when enforcing under the EA 2002



Background to the EA 2002

- ▶ The Injunctions Directive (98/27/EC)
- ▶ First implemented in the Stop Now Orders (EC Directive) Regulations 2001
- ▶ Now Part 8 of the Enterprise Act 2002



Background to the EA 2002

- ▶ Domestic and Community Infringements
- ▶ a contravention of legislation specified by Order which “harms the collective interests of consumers”
- ▶ most consumer protection provisions are covered, e.g. CPUTRs, unfair contract terms etc.



The sequence of events under EA 2002

- ▶ Receipt of complaints, investigation and collation
- ▶ Consultation with the trader
- ▶ Undertakings given by trader or, if not:
 - Application for an interim or full enforcement order in the High Court or local County Court



Enhanced consumer measures

- ▶ An additional element to EA 2002 and enforcement orders
 - Will apply to orders, court undertakings and undertakings given under s.219 to the enforcer
 - Directed at:
 - Redress
 - Compliance
 - Choice
 - Only such measures as are just, reasonable and proportionate may be included
 - Enforceable by the Court as part of an order or court undertaking



Redress – the most likely candidate?

- ▶ Compensation is available in criminal cases, but not widely used
- ▶ Confiscation has no benefit for individual consumers
- ▶ Redress measures seek to fill that gap
- ▶ Only available in a “loss” case, i.e. where consumers have suffered a loss
- ▶ Types of order which may be made:
 - measures offering compensation or other redress to consumers who have suffered loss as a result of the conduct
 - where the conduct referred to relates to a contract, measures offering such consumers the option to terminate (but not vary) that contract,
 - where such consumers cannot be identified, or cannot be identified without disproportionate cost to the trader, measures intended to be in the collective interests of consumers



Compliance/ choice measures

- ▶ Measures intended to:
 - prevent or reduce the risk of re-offending
 - improve effectiveness of the market by informing consumers about a trader's past performance
- ▶ Such as?
 - appointing a compliance officer;
 - introducing a complaints handling process;
 - improving their record keeping;
 - signing up to an established customer review / feedback site;
or
 - publicising details of the breach or potential breach, and what they have done to put the situation right in the local or national press or on social media.
- ▶ So naming and shaming now has a statutory footing



What does this mean for traders?

- ▶ The stakes are higher if enforcement action is taken or threatened
 - Risk of higher direct financial consequences
 - Risk of enforcers getting involved in running the business
 - Increased risk of adverse publicity
- ▶ But is there also greater flexibility?
 - Trader may prefer to offer redress if this will avoid a court case
 - A “compliance” measure might involve the primary authority scheme, which may have attractions



And for lawyers?

- ▶ All need to be aware of this new enforcement tool
- ▶ Businesses will want to understand the potential additional costs involved
- ▶ Consultation phase will be even more important



Civil for Remedies for Unfair Commercial Practices

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Background

- 2009 : Consumer Focus estimated that misleading and aggressive commercial practices cost consumers £3.3 billion annually. European Parliament asks member states to give direct right of redress for unfair commercial practice
- 2010 : BIS asked the Law Commission to conduct a review to simplify redress
- 2012 : Law Commission Report, in the main accepted by the government
- 2014 : The Consumer Protection (Amendment) Regulations 2014 – amend the Consumer Protection from Unfair Fair Trading Regulations 2008



What are the rights

- A right to unwind or a right to a discount
- A right to damages
- Apply to contracts entered into, or payments made, on or after 1st October 2014



When do they apply?

- There is a sale to, purchase from or payment made by a consumer
- There is a “prohibited practice” by either
 - Trader
 - Producer (for goods and digital content if trader is aware of prohibited practice or should have been aware of it)
- The prohibited practice is a “significant factor” in consumer decision



Exceptions

- Contracts for immovable property
 - Other than assured tenancy or lease for holiday accommodation
- Financial services
 - Other than restricted use credit agreements (unless secured on land)



Prohibited Practices

- It only applies to:
 - Misleading actions (Regulation 5 CPUT)
 - Aggressive practices (Regulation 6 CPUT)
 - Coercion
 - Undue influence
 - Harassment
- Not covered – general unfair commercial practices; misleading omissions; Schedule 1 blacklist



“Transactional Decision”

- A clarification to the general definition to clarify that a transaction decision can include responding to an invalid claim
- A change of definition for the purpose of the additional rights:
“means any decision taken by a consumer to enter into a contract with a trader for the sale or supply of a product by the trader, or for the sale of goods to the trader, or to make payment to a trader for the supply of a product”



Right to unwind

- Have the right to unwind if
 - Do so within 90 days of the “relevant date”
 - The product is capable of being rejected
- Product cannot be rejected if
 - Goods fully consumed
 - Service fully performed
 - Digital content fully consumed
 - Lease expired
 - Right been fully exercised
- Lose right in b2c contract if exercised right to a discount



Effect of right to unwind

- Contract comes to an end
- Both consumer and trader released from obligations
- Consumer to make goods available for collection
- Right to a refund
 - Unless product supplied on regular or continuous basis
 - More than a month passed prior to rejection
 - Then consumer only allowed back difference in market price (unless behaviour or impact on customer make it not appropriate)



Right to a discount

- Applies where not unwound the contract and either
 - 1 or more payment made
 - 1 or payments outstanding
- Gets back (or payments reduced by) the “relevant percentage”



Relevant percentage –over £5000

- If
 - amount payable for product is over £5,000;
 - there was a lower market price for product than contract price; and
 - there is clear evidence of the difference in market price and amount payable for product
- Then the relevant percentage is the percentage difference between the market price and the amount payable under the contract



Relevant percentage – other cases

- The relevant percentage is
 - 25% if the prohibited practice is more than minor
 - 50% if significant
 - 75% if serious
 - 100% if very serious
- Seriousness is to be assessed by reference to:
 - The behaviour of the person who engaged in the practice;
 - The impact on the consumer; and
 - The time elapsed since the prohibited practice took place



Right to damages

- Customer has a right to damages if
 - Has incurred financial loss; or
 - Has suffered alarm, distress or physical inconvenience or discomfort
- Financial loss does not include difference in market value in product
- Damage must be reasonable foreseeable
- Is a due diligence defence



Relationship with existing law

- Misrepresentation Act 1967 amended so that must now go through the additional remedies route for consumer claims
- No amendment to s.75 of the CCA
- Limitation Period the same as contract (6 years from breach)
- Can still bring other legal remedies, but rules preventing double recovery



Will it make a difference?

- Already had law of misrepresentation
 - Scope for omissions potentially wider
 - More clarity on when lose right to unwind
 - Difference in measure of damages (move away from compensation to penalty, easier to recover alarm and distress)
- Had remedies for harassment, undue influence
 - But concepts in CPUTR likely wider
 - Again difference in damages





THE NEW ENFORCEMENT POWERS

Schedule 5 Consumer Rights Act 2015

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Schedule 5 Consumer Rights Act 2015

- Schedule 5 provides a generic new set of investigatory powers for enforcers of consumer law.
- Rationale – to consolidate the powers to create a consistent, transparent and simplified set of rules applying to all consumer law provisions.
- When fully in force will replace all the current enforcement provisions in consumer legislation.
- Three exceptions – certain specific powers retained in product safety, weights and measures and furniture safety.



Enforcers and Consumer Law

- Powers only available to “Enforcers” that enforce “Consumer Law”.
- Enforcers are defined in paras 2–6 of Part 1 to Schedule 5.
- Main enforcers are “Domestic Enforcers” and “EU Enforcers”. Both include Trading Standards and the Competition and Markets Authority.
- “Domestic Enforcers” can use the powers to enforce the Consumer Law provisions known as “Enforcers’ Legislation” paras 10 and 11 of Part 2 to Sch. 5. Includes CPUT 2008 and GPSRs 2005.
- “EU Enforcers” can use the powers to enforce “community infringements” – meaning in s.212 Enterprise Act 2002.



The Powers of the Enforcer

- The Power to require information – Part 3 Sch. 5 paras 13–18 (all enforcers)
- Part 4 Sch. 5 paras 19 – 36 provide further powers for “Domestic” and “EU” Enforcers
- The Power to carry out a test purchase (para 21).
- The Power to observe the carrying on of a business (para 22).
- The Power to enter a trader’s premises to carry out routine inspections on 2 days written notice – unless certain exceptions apply (para 23 (6)).
- The Power to enter a premises with a court warrant – paragraphs 32–33.



The Powers of the Enforcer

- Further Powers that can be exercised after a premises has been entered – paragraphs 24–31.
- “EU enforcers” can only exercise Part 4 powers where there is reasonable suspicion of a Community infringement for purpose of Part 8 functions.
- “Domestic Enforcers” need reasonable suspicion to exercise some of the powers that can be exercised after a premises has been entered.
- Powers of Trading Standards operating outside its local authority area (Part 6, Sch.5, paras 44–46)



The Power to Require Information

Part 3 Sch.5 paras 13–18

- Modelled on sections 224–227 Enterprise Act 2002.
- All enforcers may exercise the powers under the circumstances set out for them in para 13 – mainly concerning enforcement under Part 8 Enterprise Act 2002, but Domestic Enforcers may use them to ascertain breaches of the enforcer’s legislation.
- “Unfair Contract Terms Enforcers” may not exercise the para 14 power without reasonable suspicion nor “Domestic Enforcers” when reasonably suspecting a breach of enforcers legislation.
- Notice must be given in writing (para 15) specifying the purpose for which the information is required, time for giving it and the form in which it must be provided.



The Power to Require Information

Part 3 Sch.5 paras 13–18

- Para 15(6) provides that para 14 does not require a person to provide information or create documents covered by LPP.
- Para 16 provides for application to the Court for an order requiring production in cases of non-compliance with a notice.
- Information obtained cannot be used in criminal proceedings (para 17(3)).



The Power to Carry Out a Test Purchase – Part 4 Sch.5 para 21

- The power can be used by an officer of an enforcer to purchase a product – e.g under age sales, counterfeit goods.
- Para 7 definition of officer would include a volunteer – “a person authorised by an enforcer to exercise powers under Sch. 5”
- “EU enforcer” requires reasonable suspicion of Community Infringement.
- Officer may at any reasonable time enter a premises to which the public has access to inspect products– whether or not the public has access at that time (para 21(2))



The Power to Observe the Carrying On of a Business – Part 4 Sch.5 para 22

- An officer of an enforcer can enter publicly accessible premises and observe the carrying on of a business.
- At any reasonable time whether or not the public has access at that time.
- Power can be used to observe a new business in the area, view products on the shelves and witness sales.
- “EU Enforcer” requires reasonable suspicion.



The Power to Enter a Trader's Premises to Carry Out Routine Inspections – Part 4 Sch.5 para 23

- Enforcer has the power to enter commercial premises at any reasonable time on at least two days' written notice to the occupier setting out why entry is necessary.
- No warrant is needed.
- Applies to routine inspections only – occupier can waive the notice requirement.
- Notice not required where para 23(6) exceptions to meaning of routine inspections apply.



The Paragraph 23(6) Exceptions

- Officer of a “domestic enforcer” reasonably suspects a breach of the enforcer’s legislation (23(6)(a)).
- Officer reasonably considers giving of notice would defeat the purpose of the entry (23(6)(b)).
- Not reasonably practicable to serve the notice because officer reasonably suspects an imminent risk to health or safety (23(6)(c)).
- Enforcer is a market surveillance authority and entry is for those purposes (23(6)(d)).



Power to Enter with a Court Warrant – Part 4 Sch.5 paras 32 –33

- To enter wholly or mainly private dwellings or where the enforcer may need to enter the premises by force.
- Certain conditions must be met before issue.
- First, that products or documents which the officer has power to inspect or seize are on the premises or there has been or is about to be a breach of enforcers legislation or a community infringement (para 32(2) and (3)).
- Second, access to premises is likely to be refused and notice of intention to apply for a warrant has been given or products or documents would be concealed if notice was given or the premises are unoccupied or the occupier is absent and it would defeat the purpose of entry to await the occupier's return (paras 32(4), (5) and (6)).
- Reasonable force may be used to execute a warrant (para 33(1)).



Further Powers After Entry – Part 4 Sch.5 paras 24–31

- Power to inspect products and test equipment (paras 25 and 26).
- Power to require production of documents (para 27).
- Power to seize and detain goods (para 28).
- Power to seize documents (para 29).
- Powers to break open a container including accessing electronic devices in which information may be stored or accessed (para 31).
- “Domestic Enforcer” must reasonably suspect a breach of the enforcer’s legislation or that documents etc are required as evidence before exercising the para 27–31 powers (see para 19 (4–7))



Trading Standards Powers Outside of Area – Part 6 Sch.5 paras 44–46

- A local authority may exercise the powers under part 3 and part 4 of Sch. 5 outside its area (para 44(3)).
- A local authority may bring civil proceedings in respect of conduct in a part of England and Wales outside its area (para 45(4)).
- Criminal proceedings may be brought by a local authority committed in a part of England and Wales outside its area for a “consumer offence”.



Offences – Part 5 Sch.5 paras 36 and 37

- Offence of obstructing an officer (para 36(1)).
- “Nothing [in paragraph 36] requires a person to answer any question or give any information if to do so might incriminate that person”.
- Offence of purporting to act as an officer (para 37(1)).



What Businesses Can Expect – Part 5 Sch. 5 paras 38– 41

- Access to seized goods and documents (para 38).
- Notice of testing of goods (para 39).
- Right to have sample tested (para 39(4))
- Appeal against detention of goods and documents (para 40).
- Compensation (para 41).



Changes to the law on Unfair Terms in Consumer Contracts

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Consolidation

- ▶ The Consumer Rights Act 2015 consolidates the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) and the business to consumer provisions of the Unfair Contract Terms Act 1977 (UCTA).
- ▶ The UTCCR are being repealed.



The Exclusion

- ▶ The UTCCR “exclusion from assessment of fairness” in UTCCR is now at s64(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.*
 - ▶
- ▶ The scope of the exclusion has been restricted in 2 ways:
 - ▶ (i) Prominence
 - ▶ (ii) the “Grey List”



(i) Prominence

- ▶ Currently, the “exclusion” applies if the term is in “plain and intelligible language”.
- ▶ Section 64 of the Act adds two further conditions. It must be:
 - ▶ – “*prominent*” – that is, “*it is brought to the consumer’s attention in such a way that an average consumer (ie one who is reasonably well-informed, observant and circumspect) would be aware of the term*”.
 - ▶ – “*transparent*” – ie it is “*legible*”, if in writing, as well as in plain and intelligible language.



(ii) the “Grey List”

- Section 64(6) now provides that the exclusion does not apply to a term listed in Part 1 of Schedule 2 – ie the grey list



The assessment of unfairness

- ▶ The pivotal provision under the UTCCR – that an unfair term is not binding on the consumer – is now s62(1).
- ▶ The UTCCR definition of unfairness remains unchanged, and now appears at s62(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.*
- ▶ The reach of this provision is being extended in 4 ways:
 - ▶ (i) Individually negotiated terms
 - ▶ (ii) Notices
 - (iii) Secondary Contracts
 - (iv) Duty of court to consider fairness



(i) Individually negotiated terms

- Under the UTCCR, the assessment of unfairness only applied to terms which “*had not been individually negotiated*”. This requirement has been removed from s62(4).



(ii) Notices

- ▶ Section 61(4) of the Act applies the assessment of fairness not only to a term, but also to a “*consumer notice*”, that is:
- ▶ – a notice (which includes an announcement or communication, whether or not in writing);
- ▶ – which it is reasonable to assume is intended to be seen or heard by a consumer;
- ▶ – to the extent that it relates to the rights or obligations as between a trader and consumer, or purports to exclude or restrict a trader’s liability to a consumer.



(iii) Secondary Contracts

- Section 72 of the Act now applies the assessment to any terms which affect the rights remedies or obligations of a party to a consumer contract, even if they appear in a contract with different parties, or a non-consumer contract.



(iv) Duty of court to consider fairness

- section 71: in proceedings which relate to a term of a consumer contract, the court must consider whether the term is fair, even if none of the parties to the proceedings have raised that issue, if it has before it sufficient legal and factual material to enable it to do so.



Contracts of employment and apprenticeship

- clarified by s61(2) that the Act does not apply to contracts of employment or apprenticeship.



The “black list”

- ▶ The UCTA provisions preventing exclusion of liability for:
 - ▶ – death or personal injury caused by negligence, are at s65;
 - ▶ – breach of statutory rights, treated as being included in contracts for the sale of goods, (now extended to include digital content, and services) are at ss31, 47 and 57.



The “grey list”

- ▶ The “indicative list” of terms which may be regarded as unfair is now to be found at Schedule 2 to the Act. Three have been added by the Act. These are terms which have the object or effect of:
- ▶ 5. requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied.
- ▶ 13. enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.
- ▶ 14. giving the trader the discretion to decide the price payable under the contract after the consumer has become bound by it, where no price or method of determining the price is agreed when the consumer becomes bound. [This is subject to paragraphs 23 (contracts which last indefinitely), 24 (sale of securities, foreign currency etc) and 25 (price index clauses).]



The requirement of transparency

- ▶ section 68: an obligation on the trader to ensure that its written terms or consumer notices are “transparent” – ie in plain and intelligible language and legible.
- ▶ Sch 3 paragraph 3(5): the regulator can apply for an injunction to prevent use of a non-transparent term or notice, regardless as to its unfairness.

