

Section 1. - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 1. - Introduction

Simon Whittaker

Development of the law

- 40-001 The English common law of contract has rarely been developed by the courts in a way which regulates directly and specifically contracts between traders and consumers, although many developments of the law more generally have had the incidental effect of providing protection for consumer parties to such contracts. So, for example, the general requirement that standard terms can be incorporated into a contract only on reasonable notice, while not restricted to the case where the person to be bound by the term is a consumer, has had an significant role in protecting consumers from unfair contract terms.¹ Similarly, implied terms in contracts of sale of goods where the seller contracts in the course of business protected consumer buyers as well as buyers contracting in the course of business,² a breadth of application which continued when these terms were given legislative expression in the *Sale of Goods Act 1893*.³ And a consumer party to a contract can exercise a right to rescission of a contract concluded as a result of a misrepresentation made by the other party as can a misrepresentee who is not a consumer.⁴ A rare example of the restriction of a development of the common law for the benefit of consumers, or at least of non-traders, can be seen in *Barclays Bank Plc v O'Brien*,⁵ *Royal Bank of Scotland v Etridge (No.2)*⁶ and the case-law following these leading decisions.⁷ In these cases, the courts recognised that a surety may defeat a claim under the contract of suretyship by a bank which has extended credit to that surety's spouse or partner on the ground of misrepresentation or undue influence by that spouse or partner, but they have restricted this protection to the situation where the relationship between the surety and the spouse/debtor is non-commercial.⁸

Legislative protection for consumer contractors

- 40-002 The beginnings of modern protection for consumers in relation to the contracts which they conclude can be seen in the 1970s. So, first, in [1973 the Supply of Goods \(Implied Terms\) Act](#) controlled the exclusion by a seller of his liability arising from breach of the statutory implied terms in respect of title, description and quality and fitness for purpose set out in the [Sale of Goods Act 1893](#).⁹ Under the [1973 Act](#), while any exemption clauses in respect of the implied warranty of title were rendered void,¹⁰ as regards the other liabilities a distinction was drawn between “consumer sales” (where an exemption clause was rendered void) and other cases (where the term was “not enforceable to the extent that it is shown that it would not be fair and reasonable to show reliance on the term”).¹¹ The [1973 Act](#) defined “consumer sale” for the purposes of this rule, in terms of a sale of goods concluded by a

“... seller in the course of business where the goods—

- (a)are of a type ordinarily bought for private use or consumption; and
- (b)are sold to a person who does not buy or hold himself out as buying them in the course of a business.”¹²

However, when this tentative control of exemption clauses was extended by the [Unfair Contract Terms Act 1977](#), the protection for consumers was rearranged and the reference to “consumer sales” was not replaced by reference to “consumer contracts”, but instead by the notion of a person “dealing as consumer”.¹³ As the courts made clear, this definition could apply so as to protect not merely consumers in the sense defined by the [1973 Act](#), but also to businesses (even if incorporated) where the contract is neither an integral part of their business nor, if incidental to their business, of a type which they regularly enter.¹⁴ Further important legislation for the protection of consumers was enacted by the [Consumer Credit Act 1974](#), where the protection extended (and still extends) to a range of individuals including sole traders, small partnerships and unincorporated associations.¹⁵ Moreover, in 1994 the well-known provisions in the [Sale of Goods Act 1979](#) (which replaced the [1893 Act](#)) implying terms as to the quality and fitness for purpose of the goods sold were amended so as to make them more appropriate for consumers, in particular, the reference to “merchantable quality” being replaced by one to “satisfactory quality”.¹⁶

The importance of European law

- 40-003



However, from the late 1980s EEC (later EC and then EU) law became increasingly important as a source of legislative protection for consumer contractors, typically by way of directive and therefore requiring implementation by the UK into national law, whether by statute or, as was more usual, by secondary legislation under the [European Communities Act 1972](#).

17

U Some of these legislative instruments required national rules governing consumer contracts which are concluded in particular ways (as in the case of “doorstep selling”

18

U and “distance contracts”

19

U); some required rules governing aspects of particular types of contracts (as in the case of contracts for the sale of goods,

20

U timeshare contracts,

21

U package travel contracts,

22

U consumer credit

23

U and passenger transport

24

U); and perhaps the most prominent example, the Unfair Terms in Consumer Contracts Directive 1993, which subjected most contract terms which have not been “individually negotiated” in *all* consumer contracts to a test of unfairness.

25

U At this earlier stage in its development, EU contract law generally required only “minimum harmonisation”, that is to say, the European legislation required only minimum rights or protections for the consumer, thereby allowing Member States to enact national laws which are more protective of consumers than the EU law required.

26

U However, at the beginning of the present century, the European Commission started a wide-ranging review of EC/EU legislation in the area of contract law, with particular reference to consumer law,

27

U and this had a number of consequences for EU (and therefore UK) consumer contract law. First, the Commission sought (and to an extent achieved) the reform and consolidation of existing

directives so as to provide greater consistency between them, this being noticeable particularly in the Consumer Rights Directive 2011,

28

U which, inter alia, consolidated the information duties required by the directives concerning “doorstep selling” (later “off-premises contracting”)

29

U and “distance contracts”,

30

U though it did not consolidate the requirements contained in directives on guarantees in contracts for the sale of goods

31

U nor on unfair contract terms

32

U as had earlier been proposed.

33

U Other earlier consumer contract directives were also subject to reform and consolidation, for example, on timeshare contracts

34

U and package travel contracts.

35

U Secondly, the Commission sought to move directives in the area of consumer protection from requiring “minimum harmonisation” to requiring “full harmonisation”, that is to say, the European legislation sets rights or protections for the consumer for which Member States must provide but which they must not exceed in the interests of greater protection for the consumer.

36

U Thirdly, and related to this, by the Unfair Commercial Practices Directive 2005 the European legislator enacted an important, general and “fully harmonised” framework for the regulation of unfair commercial practices business-to-consumer.

37

U While the 2005 Directive was expressly stated as being “without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract”

38

U and the UK’s first implementation reflected this scope,

39

U in 2014 the UK legislator nonetheless chose to give some “contract law” effects to certain aspects of the 2005 Directive’s requirements, thereby creating new rights to redress for consumers against their trader contracting partners.

40

U Fourthly, the EU has itself put in place, and also required Member States to put in place, various enforcement mechanisms for the protection of consumers.

41

U Fifthly, the EU legislator brought earlier European Conventions on jurisdiction and the recognition and enforcement of judgments (the “Brussels Convention”)

42

U and on the law applicable to contractual obligations (the “Rome Convention”)

43

U directly within the fold of EU law by enacting regulations to replace them.

44

U These regulations set uniform rules of private international law governing applicable law for “contractual obligations” and jurisdiction, recognition and the enforcement of judgments in “matters relating to a contract”

45

U as well as special rules for, for example, consumers in these contexts.

46

U The present significance of these private international law rules governing consumer contracts is that the European Court of Justice has interpreted the concepts which they use (notably, “consumer”), and this case-law may be helpful in the interpretation of the same or similar concepts in the EU substantive law legislation governing consumer contracts.

47

U

Impact of the UK’s leaving the EU on consumer contract law ⁴⁸

- 40-004 On 24 January 2020 the UK Government concluded a Withdrawal Agreement with the EU under which the UK left the EU at 11.00pm on 31 January 2020 (“exit day”),

49

U but it was further agreed that there would be a transition period running from exit day until 11pm on 31 December 2020

50

U under which EU law would still apply in the UK (with certain exceptions).

51

U The principal legislation governing the withdrawal of the UK from the EU is contained in the European Union (Withdrawal) Act 2018 (“2018 Act”) as amended by the European Union (Withdrawal Agreement) Act 2020 (“EU (WA) Act 2020”), which refers to the transition period as the “implementation period” (“IP”) and the date on which it expires as “IP completion day”.

52

U On IP completion day the 2018 Act in principle preserved the EU law applicable in the UK as part of UK law (“retained EU law”) including almost all of the relevant law governing consumer contracts.

53

U The body of EU law which was, as the case may be, incorporated or saved as “retained EU law” was the law operative immediately before the end of that period (IP completion day) rather than immediately before exit day as it had earlier been provided.

54

U Moreover, directly applicable EU law coming into force *after* IP completion day does not form part of “retained EU law”; nor is the UK under any obligation to implement any EU Directive which requires Member States to adopt measures to implement it after IP completion day.

55

U A considerable body of subordinate legislation has been made under the 2018 Act to amend the body of EU law which was retained.

56

U As is explained in Vol.I of the present work,

57

U a number of issues relating to the significance of EU law after IP completion day have been settled by the 2018 Act and the EU (WA) Act 2020, notably, the status of past and future decisions of the Court of Justice of the EU for the interpretation of EU legislation implemented in UK law.

58

U The general significance of the Trade and Cooperation Agreement

59

U and its implementation in the UK by the European Union (Future Relationship) Act 2020 are also noted there.

60

U The present chapter will explain the background in EU law to the relevant UK laws affecting consumer contract law, including relevant case-law of the Court of Justice. In this respect, it should be noted that, in principle, the case-law of the European Court (both principles laid down and decisions made) *before* IP completion day remains binding for the interpretation of relevant provisions of retained EU law, subject to the ability of the Supreme Court and the Court of Appeal (and certain other listed appellate) courts to depart from it.

⁶¹

U In contrast, principles laid down or decisions made by the European Court *on or after* IP completion day do not bind UK courts or tribunals, though they may have regard to them where relevant.

⁶²

U The dates of European Court decisions therefore possess a new and particular importance.

Earlier approaches to UK implementation of European directives

40-005 For a long time UK implementation of the various European directives governing consumer contracts was often effected in a piecemeal way. Indeed, in many instances, directives were implemented by standalone statutory instrument, thereby creating new and distinct bodies of legislative controls; this can be seen in the context of package travel, package tours and package holidays,⁶³ doorstep selling⁶⁴ and distance contracts.⁶⁵ In the case of the Unfair Terms in Consumer Contracts Directive 1993, the resulting standalone statutory instrument created a set of legislative rules which overlapped considerably with, but formally were entirely separate from, the existing domestic legislation in the area, the [Unfair Contract Terms Act 1977](#). In the context of unfair contract terms, the resulting complexity attracted a good deal of criticism, and, in turn, a recommendation from the Law Commissions that the legislation should be recast into a single enactment.⁶⁶ In the case of other directives, the UK legislature sought to integrate their requirements within existing legislative frameworks. In the case of timeshare contracts, this was easily achieved as these had already been the subject of regulation by UK statute.⁶⁷ However, in other cases, the process was more difficult, a particularly striking example being found in the legislative implementation of the Consumer Sales Directive of 1999, which was first effected in English law principally by the insertion of a new Pt 5A into the [Sale of Goods Act 1979](#).⁶⁸ This amendment created a series of dedicated rights for consumer buyers in respect of the “contractual non-conformity” of the goods in addition to (and in an awkward relationship with) the classic rights of rejection of the goods, restitution of the price and damages for breach of the implied statutory conditions governing satisfactory quality and fitness for purpose also foreseen by the [Sale of Goods Act](#).⁶⁹ Here, therefore, implementation of the European directive lead to very considerable substantive complexity and, to an extent, overlap, even though it was effected by change to existing wider legislation.

Major reforms to UK consumer contract legislation: (i) the Consumer Rights Act 2015⁷⁰

- 40-006 More recent legislation has sought to remedy some of the problems caused by this piecemeal and overly complex approach to legislative implementation of EU consumer law, prompted to an extent by the requirement to implement the Consumer Rights Directive of 2011 (which sought to bring more consistency into the underlying EU framework as regards pre-contractual information duties imposed on sellers and suppliers to consumers), but even more by a view in government that UK legislative implementation should be consistent, easier to find and easier to understand.⁷¹ The principal result of this view was the [Consumer Rights Act 2015](#), whose provisions re-implemented earlier EU directives requiring consumer rights in respect of contractual non-conformity of goods sold to consumers and the control of unfair contract terms, but did so in a way which sought to integrate their requirements into a wider framework, in part drawn from other domestic UK legislation (notably, the [Unfair Contract Terms Act 1977](#),⁷² the [Sale of Goods Act 1979](#),⁷³ and the [Supply of Goods and Services Act 1982](#)⁷⁴) and in part developed specially for the purpose (as in the case of the new rules governing contracts for the supply of “digital content”⁷⁵). In this way, the [2015 Act](#) reflects a broad strategy of separating the most prominent special rules governing contracts between traders and consumer from the legislative schemes applicable to contracts between other categories of contractor. So, notably, since its amendment in 2015 the [Unfair Contract Terms Act 1977](#) no longer contains any rules restricted to the situation where one party “deals as consumer”.⁷⁶

(ii) Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013⁷⁷

- 40-007 However, the UK legislature did not seek to place all relevant consumer contract law in the [Consumer Rights Act 2015](#). So, rather confusingly, the UK implemented the Consumer Rights Directive 2011 principally by the enactment of standalone regulations, the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) (“2013 Regulations”), rather than in the [Consumer Rights Act](#).⁷⁸ The [2013 Regulations](#) are principally concerned with rules governing a trader’s information duties and the consumer’s rights of cancellation in off-premises contracts and distance contracts other than relating to financial services, though they also created other particular consumer protection rules, notably, in relation to inertia selling and additional charges.⁷⁹

(iii) Creating rights to redress in respect of certain unfair commercial practices

- 40-008 As earlier noted, in 2014 the UK legislator chose to give some “contract law” effects to certain aspects of the Unfair Commercial Practices Directive 2005’s prohibitions by inserting new provisions into the [Consumer Protection from Unfair Trading Regulations 2008](#) (“the 2008 Regulations”) which had earlier implemented the directive, thereby creating new rights to redress for consumers against their trader contracting partners.⁸⁰ As a result, a consumer to whom a misleading statement has been made by a trader or who has been subject to an aggressive commercial practice may enjoy a short-lived “right to unwind in respect of a business to consumer contract”, a “right to a discount” and/or a right to damages.⁸¹ These rights for individual consumers are related to the wider provisions governing unfair commercial practices from which they spring in the [2008 Regulations](#), but they are separate from the broader framework of consumer rights against traders established by the [2015 Act](#). Moreover, the rights to redress under the amended [2008 Regulations](#) bear a complex relationship with traditional rights for contracting parties established by the common law⁸² and by the [Misrepresentation Act 1967](#).⁸³ These complexities, which will be explained below, are hardly welcome, even if the new provisions create rights for consumers which they would not otherwise enjoy.⁸⁴

(iv) Special rules governing consumer contracts of insurance

- 40-009 In parallel to these developments specifically relating to consumer protection and principally concerned with legislation implementing EU directives, the English and Scottish Law Commissions undertook a series of studies into the law governing misrepresentation and non-disclosure in contracts of insurance.⁸⁵ The first tranche of legislation resulting from their recommendations was the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#), which made new provision governing a consumer assured’s duty of utmost good faith and the insurer’s remedies for breach. The second tranche of legislation was the [Insurance Act 2015](#), which, inter alia, abolished the rule permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party,⁸⁶ set out new rules governing non-consumer insurance contracts and supplemented the [2012 Act](#)’s provisions governing consumer insurance contracts. These provisions are discussed in Ch.44 (Insurance) of the present work.⁸⁷

The relationship between “contract law” and prohibitions or preventive measures

- 40-010 This chapter will follow the general approach of this work in focussing on “contract law” in the sense of the law which sets out the circumstances in which consumer contracts are concluded, the grounds of their invalidity and/or of the invalidity of their terms, the relative rights and obligations which they create for their parties, and the remedies which arise on their breach (“contract law” in the narrow and usual sense), rather than on the wider laws which regulate the behaviour of contracting parties, whether through structures such as the regulation of financial services, administrative powers of control and review or the criminal law.⁸⁸ However, in the case of consumer law, this contrast is blurred in a number of important ways, since modern consumer protection legislation has often combined rules governing contract law in the narrow sense (for example, providing a consumer with a right of cancellation of the contract, rendering unfair terms not binding on consumers, or creating special rights in respect of breach of contract) with preventive measures of the behaviour of traders with which these contract law rules are concerned.⁸⁹ Many of these preventive measures were required by European directives which also set out the “contract law” consumer protection measures, and this combination has been relied on by the European Court of Justice as a reason for national courts having a duty to raise the issue of the consumer’s protection of their own motion.⁹⁰ At the same time, the Unfair Commercial Practices Directive 2005, which requires a fully harmonised framework of the control of unfair commercial practices business-to-consumer distinguishes expressly between its own concern with the prohibition of unfair commercial practices and “contract law and, in particular, … the rules on the validity, formation or effect of a contract”, this being the case whether those rules are EU or national,⁹¹ though, as earlier indicated, UK law has recently chosen to enact legislation which provides rights to redress for consumers in respect of certain unfair commercial practices by traders.⁹²

The structure and scope of this chapter

- 40-011 This chapter will consider the law governing consumer contracts under the following headings: the relationship of EU and UK consumer contract law; definitions of consumer contract; information requirements and consumers’ rights of cancellation; unfair commercial practices and the consumer’s rights to redress; the control of unfair contract terms; and contracts for the supply of goods, digital content or services. This chapter will not discuss the law governing consumer credit agreements, which is discussed in Ch.41, nor, as already noted, rules governing consumer insurance contracts, which are discussed in Ch.44. Chapters 37 Carriage by Air and 36 Carriage by Land discuss the law governing these contracts including for the protection of passengers.⁹³

Moreover, the present chapter will not discuss the legislative and regulatory frameworks governing the provision of financial services put in place by the [Financial Services and Markets Act 2000](#) and the [Financial Services Act 2012](#).

Changes in the law

- 40-012 The preceding paragraphs make clear that there has been very considerable change in the legislation governing consumer contracts in the course of the last decade. In general, this chapter will set out the law as it is in force at the time of writing,

⁹⁴

U with some reference to the earlier law where this is helpful to understand its development. In the case of the regulation of unfair contract terms the relevant provisions in the [Consumer Rights Act 2015](#) (on which there is still little direct case-law) need to be seen in the context of the EU directive from which they stemmed, the interpretation of that directive by the Court of Justice of the EU and the case-law of English courts in relation to its earlier implementation by the UK, highlighting similarities and differences between them.⁹⁵ Moreover, in general, this chapter will also note any amendments of the legislation that now forms part of retained EU law, which came into force on IP completion day when the UK's departure from the EU came into full effect.⁹⁶

Footnotes

- 1 An early example may be found in *Parker v South Eastern Ry* (1877) 2 C.P.D. 416, 421, 423 and see Vol.I, paras 15-011—15-014. There remain the important exceptions to this general requirement of reasonable notice where the other party has signed a document containing, or incorporating by reference, the terms in question (*L'Estrange v F Graucob* [1934] 2 K.B. 394) or where standard terms form part of a course of dealing and see Vol.I, paras 15-005, 15-015.
- 2 *Jones v Bright* (1829) 5 Bing. 533; *Jones v Just* (1868) L.R. III Q.B. 197.
- 3 Sale of Goods Act 1893 ss.12–15, which were repealed and replaced by the [Sale of Goods Act 1979](#) ss.12–15.
- 4 See Vol.I, paras 9-120 et seq. Until 2014, a consumer misrepresentee could also have the possibility of claiming damages under s.2(1) of the [Misrepresentation Act 1967](#), but in that year this possibility ceased where the consumer has a right to redress under the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) Pt 4A; [Misrepresentation Act 1967](#) s.2(4) and see below, para.40-220.
- 5 [1994] 1 A.C. 180.

- 6 [2001] UKHL 44, [2002] 1 A.C. 773.
- 7 [2001] UKHL 44, [2002] 1 A.C. 773 at [87] and [89] and see Vol.I, paras 10-139 et seq.
- 8 Vol.I, para.10-147.
- 9 Sale of Goods Act 1893 ss.12–15.
- 10 1973 Act s.4 creating new Sale of Goods Act 1893 s.55(3).
- 11 1973 Act s.4 creating new Sale of Goods Act 1893 s.55(4).
- 12 1973 Act s.4 creating new Sale of Goods Act 1893 s.55(7).
- 13 Unfair Contract Terms Act 1977 s.12 (definition). Reference to a person “dealing as consumer” was then made relevant to the controls in s.3(1) (contractual liability generally), s.4 (indemnity clauses), s.6(2) (statutory implied terms in sale of goods) and s.7(2) (statutory implied terms in miscellaneous contracts under which goods pass).
- 14 *R. B. Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321 and see Vol.I, para.17-072.
- 15 See below, para.41-005.
- 16 Sale and Supply of Goods Act 1994 s.1. This change was recommended by Law Commission, Sale and Supply of Goods, Law Com. No.160 § 3.27.
- ①17 European Communities Act 1972 s.2(2). On the impact of the UK’s leaving the EU, see below, para.40-004 and more generally Vol.I, paras 1-016 et seq.
- ①18 Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises [1985] O.J. L372/31 implemented in UK law by the Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 (SI 1987/2117), which were replaced by the Cancellation of Contracts made in a Consumer’s Home or Place of Work, etc. Regulations 2008 (SI 2008/1816). The law is now contained in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) (“2013 Regulations”) on which see below, paras 40-064 et seq.
- ①19 Directive 97/7/EC on the protection of consumers in respect of distance contracts [1997] O.J. L144/19 implemented in UK law by the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) (the current law is contained in the 2013 Regulations, on which see below paras 40-064 et seq.); Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16 art.3(2) implemented principally by the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) on which see below, para.40-143.
- ①20 Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/12 (“Consumer Sales Directive”, “1999 Directive”) (repealed by Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/28) and see below, paras 40-461 and 40-464.
- ①21

- Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] O.J. L280/83 and see for the current legislation below, paras [40-157](#)—[40-163](#).
- ②22 Directive 90/314/EEC on package travel, package holidays and package tours [1990] O.J. L158/59; [1994] O.J. L280/83, repealed and replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1. See below, paras [40-144](#)—[40-156](#).
- ②23 Directive 87/102/EEC on consumer credit [1987] O.J. L42/48 repealed and replaced by Directive 2008/48/EC on credit agreements for consumers [2008] O.J. L133/66 on which see below, para. [41-011](#).
- ②24 e.g. Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] O.J. L46/1 on which see above, paras [37-054](#) et seq.
- ②25 Directive 93/13/EEC [1993] O.J. L95/29 (“1993 Directive”), below, para. [40-225](#).
- ②26 See, notably, Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, art.8 and see below, para. [40-023](#).
- ②27 See Communication from the Commission to the Council and the European Parliament on European Contract Law COM(2001) 398 final; Communication from the Commission to the European Parliament and the Council, A more coherent European Contract Law, An Action Plan COM(2003) 68 final; European Contract Law and the revision of the acquis: the way forward COM(2004) 651 final; EU Commission, Green Paper from the Commission on policy option for progress towards a European Contract Law for consumers and businesses COM(2010) 348 final.
- ②28 Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 (“Consumer Rights Directive” or “2011 Directive”), below, para. [40-063](#).
- ②29 Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises [1985] O.J. L372/31.
- ②30 Directive 97/7/EC on the protection of consumers in respect of distance contracts [1997] O.J. L144/19. The Consumer Rights Directive did not, however, include elements from the Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16.
- ②31 Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/12 (the “Consumer Sales Directive”).

- ③2 Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] O.J. L95/29 (“Unfair Terms in Consumer Contracts Directive” or “1993 Directive”).
- ③3 Proposal for a Directive of the European Parliament and of the Council on Consumer Rights of 8 October 2008 COM(2008) 614/3 final, Chs IV and V.
- ③4 Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] O.J. L33/30 repealing and replacing Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] O.J. L280/83; Directive 2008/48/EC on credit agreements for consumers [2008] O.J. L133/66.
- ③5 Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1 revoking and replacing Directive 90/314/EEC on package travel, package holidays and package tours.
- ③6 e.g. Directive 2011/83/EU on consumer rights art.4; Directive 2008/48/EC on credit agreements for consumers recital 9, though as the following recitals explain, the directive leaves a good deal of competence in Member States as regards matters outside its carefully delineated scope; Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1 art.4 (full harmonisation with exceptions). See also Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, etc. [2019] O.J. L136/28 art.4 (which repealed the earlier “minimum harmonization” Consumer Sales Directive 1999) and Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] O.J. L136/1 art.4 (both of these directives were due to be implemented in the laws of Member States by 1 July 2021 and therefore after the departure of the UK from the EU has taken full effect: see Vol.I, paras 1-016 et seq. esp. at para.1-019 and below, para.40-004).
- ③7 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices [2005] O.J. L149/22 (“Unfair Commercial Practices Directive” or “2005 Directive”) especially art.4. The Directive excludes certain areas from “full harmonisation”, notably, art.3(9) (financial services) and see generally below, paras 40-168 et seq.
- ③8 Directive 2005/29/EC art.3(2), on which see Whittaker in Weatherill and Bernitz (eds), The Regulation of Unfair Commercial Practices under EC Directive 2005/29, New Rules and New Techniques (2007), Ch.8.
- ③9 The [Consumer Protection from Unfair Trading Regulations 2008 \(SI 2008/1277\)](#) (“2008 Regulations”) reg.29 (as enacted) provided explicitly that “an agreement shall not be void

or unenforceable by reason only of a breach of these regulations” but said no more as to the wider lack of effect of the Regulations on the “law of contract”, apparently on the basis that they set out the consequences of the new controls and did not need to set out other non-consequences.

④0 [Consumer Protection \(Amendment\) Regulations 2014 \(SI 2014/870\)](#) inserting, notably, new Pt 4A Consumers’ Rights to Redress in the [Consumer Protection from Unfair Trading Regulations 2008 \(SI 2008/1277\)](#). See further, below paras 40-181 et seq. However, this position changed within the EU as a result of Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 art.3(5) (inserting a new art.11a in the 2005 Directive) which requires the introduction of redress for consumers harmed by unfair commercial practices: see further below, para.40-185. The 2019 Directive must be implemented by 28 November 2021 (i.e. after IP completion day) and as a result the UK is not required to do so: cf. above, para.40-004 and Vol.I, para.1-019.

④1 Some of these enforcement mechanisms are required by the directives which affect contract law directly, as is notably the case with the Unfair Terms in Consumer Contracts Directive 1993 art.7, on which see below, paras 40-441 et seq. However, more general enforcement of EU consumer protection is provided for by Directive 2009/22/EC on injunctions for the protection of consumers’ interests [2009] O.J. L110/30 and Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) 2006/2004 [2017] O.J. L345/1 on which see below, paras 40-136—40-138 (explaining the UK position after IP completion day). With effect from 25 June 2023 Directive 2009/22/EC will be repealed and replaced by Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC O.J. L409/1 (see esp. art.21); as the 2020 Directive is to be implemented by Member States by 25 December 2022 (art.24), the UK is not required to do so: above, para.40-004 and Vol.I, para.1-019.

④2 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.

④3 Rome Convention on the Law Applicable to Contractual Obligations 1980.

④4 Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6; Regulation (EC) 864/2007 applicable to non-contractual obligations (“Rome II Regulation”) [2007] O.J. L199/40 (some of whose provisions bear an important relationship with contract, notably art.12 “culpa in contrahendo”); Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L12/1 (“Brussels I Regulation”) first replaced the Brussels Convention

and then was itself replaced as from 10 January 2015 by Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels I bis Regulation”). The status of these European private international law instruments changed on the UK’s departure from the EU coming into effect: see Vol.I, para.[1-024](#).

[①45](#) Brussels I bis Regulation art.7(1); Rome I Regulation generally.

[①46](#) Brussels I bis Regulation arts 17–19; Rome I Regulation art.6.

[①47](#) See below para.[40-017](#).

[48](#) See generally Vol.I, paras [1-016](#) et seq.

[①49](#) Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (24 January 2020) (the “Withdrawal Agreement 2020”) art.185.

[①50](#) Under the Withdrawal Agreement 2020 art.132.

[①51](#) Withdrawal Agreement 2020 art.127.

[①52](#) [2018 Act s.1A\(6\)](#) (as inserted by the [EU \(WA\) Act 2020 Act s.1](#)) referring for “IP completion day” to [s.39\(1\)–\(5\) of the 2020 Act](#).

[①53](#) [2018 Act ss.2–7](#) and see Vol.I, paras [1-021](#)—[1-024](#) and Whittaker (2021) 137 L.Q.R. 477.

[①54](#) CMA, UK Exit from the EU, Guidance on the Functions of the CMA under the Withdrawal Agreement (CMA113, 28 January 2020), para.2.19.

[①55](#) See Vol.I para.[1-019](#). This applies, for example, to Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, etc. [2019] O.J. L136/28 art.24 of which requires its implementation by 1 July 2021 (on which see below, para.[40-464](#)) and to Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 art.7 of which requires its implementation by 28 November 2021.

[①56](#) The operative provisions of earlier instruments were generally expressed as due to come into force on “exit day”, but the [EU \(WA\) Act 2020](#) provides that any subordinate legislation made under the 2018 Act or any other enactment “which provides, by reference to exit day (however expressed), for all or part of that or any other subordinate legislation to come into force immediately before exit day, on exit day or at any time after exit day is to be read instead as providing for the subordinate legislation or (as the case may be) the part to come into force

immediately before IP completion day, on IP completion day or (as the case may be) at the time concerned after IP completion day": EU (WA) Act 2020 s.39(1), s.41(4), Sch.5 para.1. Sch.5 makes further provision regarding, in particular, exceptions to be made to this general position. Later subordinate legislation made under the 2018 Act may be expressed directly as coming into force by reference to IP completion day: e.g. the Alternative Dispute Resolution for Consumer Disputes (Extension of Time Limits for Legal Proceedings) (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1139) reg.1(2). Where appropriate, the amending secondary legislation provides that relevant provisions leave unaffected contracts entered into before IP completion day. For example, the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.11 (as amended by the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1347) reg.4(8)) provides that "nothing in regulation 3 [which amends the Consumer Rights Act 2015] or regulation 6(2) [which amends the Consumer Protection from Unfair Trading Regulations 2008] applies to a contract entered into before IP completion day". On these amendments see below, paras 40-241 and 40-174 (note) respectively.

①57 Vol.I, paras 1-025—1-027.

①58 Vol.I, paras 1-027—1-028.

①59 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (24 December 2020).

①60 Vol.I, para.1-030.

①61 2018 Act s.6(3)–(6A), and see Vol.I, para.1-027.

①62 2018 Act s.6(1)(a) and (2), and see Vol.I, para.1-027.

63 Package Travel and Linked Travel Arrangements Regulations 2018 (SI 2018/634) revoking and replacing Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) on which see below, paras 40-144—40-156.

64 Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 (SI 1987/2117) later replaced by the Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations 2008 (SI 2008/1816). As will be explained, the latter were revoked and replaced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134): below, paras 40-064 et seq.

65 Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) which have been revoked and replaced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) (below, paras 40-064 et seq.); Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) (below, para.40-143).

- 66 Law Commission, Scottish Law Commission, Unfair Terms in Contracts (Law Com. No.292, Scot Law Com. No.199, 2005) and see below, para.[40-228](#).
- 67 Timeshare Act 1992, which preceded the Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. The 1994 Directive was implemented by amendment of the Timeshare Act 1992 by regulation: Timeshare Regulations 1997 (SI 1997/1081). Subsequently, the UK's treatment of timeshare and related contracts has been made by the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) on which see below, paras [40-157](#)—[40-163](#).
- 68 See below, para.[40-462](#).
- 69 s.14.
- 70 On general differences between the law applicable to consumer contracts and the general law after these legislative changes see *Whittaker* (2017) 133 L.Q.R. 47.
- 71 BIS, Enhancing consumer confidence by clarifying consumer law (July 2012); BIS, Enhancing consumer confidence through effective enforcement, consultation on consolidating and modernising consumer law enforcement powers (March 2012).
- 72 e.g. Consumer Rights Act 2015 s.65 reflecting Unfair Contract Terms Act 1977 s.2(1), below, para.[40-423](#).
- 73 Consumer Rights Act 2015 ss.9–11, 13 reflecting Sale of Goods Act 1979 ss.13–15: below, paras [40-499](#)—[40-501](#), [40-503](#).
- 74 Consumer Rights Act 2015 ss.9–11, 13 reflecting Supply of Goods and Services Act 1982 ss.3–5 (on which see below, paras [40-499](#)—[40-501](#), [40-503](#)); Consumer Rights Act 2015 ss.49, 51–53 reflecting Supply of Goods and Services Act 1982 ss.13–16: below paras [40-575](#), [40-581](#)—[40-582](#).
- 75 Consumer Rights Act 2015 ss.33–47: below, paras [40-544](#) et seq.
- 76 Consumer Rights Act 2015 s.75, Sch.4 paras 5–11 on which see Vol.I, Ch.17 where it is noted that after the 2015 Act certain persons who “deal as consumer” so as to be protected under the 1977 Act before its amendment but do not count as “consumer” under the 2015 Act and are therefore no longer protected under either the 1977 or the 2015 Act: see especially paras [17-072](#)—[17-073](#).
- 77 SI 2013/3134 (“2013 Regulations”).
- 78 An exception is found in the Consumer Rights Act 2015 ss.28 (delivery of goods) and 29 (passing of risk), which re-implemented the Consumer Rights Directive 2011 arts 18 and 20 (which had formerly been implemented by the 2013 Regulations regs 42 and 43): below paras [40-529](#)—[40-530](#). A further exception is that the 2015 Act gives contractual force to information supplied by a trader as was required by the 2011 Directive art.6(5): 2015 Act s.11(4)–(5), 12 (goods contracts); s.36(3)–(4), 37 (digital content contracts); and s.50(3) and (4) (services contracts), on which see below, paras [40-501](#)—[40-502](#), [40-552](#)—[40-553](#) and [40-579](#) respectively.
- 79 SI 2013/3134 Pt 4 see below, paras [40-064](#) et seq.
- 80 Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) inserting, notably, new Pt 4A Consumers' Rights to Redress in Consumer Protection from Unfair Trading

Regulations 2008 (SI 2008/1277). Rights were also created for consumers in respect of payments which they have made: for the details see below paras 40-181 et seq.

81 **Consumer Protection from Unfair Trading Regulations 2008 Pt 4A.**

82 e.g. the relationship between the right to rescind a contract for misrepresentation and the “right to unwind” the contract for a misleading statement under the 2008 Regulations (as amended).

83 e.g. the relationship between the rights to/possibility of award of damages for misrepresentation under the Misrepresentation Act 1967 s.2(1) and 2(2) and the right to damages in respect of a misleading statement under the 2008 Regulations (as amended).

84 Below, paras 40-181 et seq.

85 See below, para.44-045 (note).

86 **Insurance Act 2015 s.14.**

87 See below, paras 44-030—44-032, 44-046—44-050 (2012 Act) and 44-051—44-060 (2015 Act).

88 See Vol.I, para.1-001.

89 See below, paras 40-135—40-141 (in relation to “off-premises contracts” and “distance contracts”); paras 40-441—40-451 (unfair contract terms) and para.40-538 (remedies for non-conformity in the context of sale of goods, etc.).

90 See below, para.40-020.

91 Directive 2005/29 art.3(2), recital 9. cf. Consumer Rights Directive 2011 art.3(5) below, paras 40-066—40-068. However, this position changed at the EU level on the coming into force of Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7, art.3(5) of which inserts a new art.11a in the 2005 Directive which requires the introduction of redress for consumers harmed by unfair commercial practices: see further below, para.40-185.

92 **Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) Pt 4A** (as inserted by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) and see below, paras 40-181 et seq.

93 See above, paras 37-054—37-072.

94 i.e. 31 July 2022.

95 See below, paras 40-243—40-451 and 40-460 et seq. respectively.

96 On this generally see above, para.40-004 and Vol.I, paras 1-016 et seq.

(a) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 2. - The Relationship of EU and UK Consumer Contract Law

(a) - Introduction

- 40-013 The general impact of the departure of the UK from the EU on English consumer contract law has already been noted.⁹⁷ This section concerns various aspects of EU law and its interpretation by the European Court which remain relevant to the interpretation of UK law derived from EU law even after its departure. The fundamental reason for this continuing relevance is that the general approach of the [European Union \(Withdrawal\) Act 2018](#) was to incorporate or to save the EU law applicable in the UK immediately before IP completion day as part of UK law, this being termed by the Act “retained EU law”. Moreover, the [2018 Act](#) then sought to ensure a considerable degree of continuity in interpretation of that body of retained EU law with the way in which it would have been interpreted before the UK left the EU. Thus, as earlier noted, principles laid down and decisions made by the European Court before IP completion day remain in general binding on UK courts in relation to the interpretation of relevant retained EU law, though with the possibility of the Supreme Court and listed appellate courts departing from this body of retained EU case-law.⁹⁸ What this means is that approach of the Court of Justice of the EU to the European directives which UK consumer legislation earlier implemented (such as the reference to the purposes of the legislation, the principle of conforming interpretation, etc.) remain relevant to the proper interpretation of UK law after its departure from the EU.

Footnotes

⁹⁷ Above, para.[40-004](#) and see Vol.I, paras 1-016—1-030.

⁹⁸ Above, para.[40-004](#).

(b) - The Continuing Interpretative Significance of EU Directives

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 2. - The Relationship of EU and UK Consumer Contract Law

(b) - The Continuing Interpretative Significance of EU Directives

EU regulations and directives

- 40-014 The vast majority of EU legislative instruments governing the substantive law of consumer contracts has been in the form of directives rather than regulations,⁹⁹ unlike EU private international law which has been enacted by EU regulation.¹⁰⁰ As the European treaties have made clear, a regulation has “general application” and is “binding in its entirety and directly applicable in all Member States”.¹⁰¹ By contrast, a directive is “binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.¹⁰² Use of directives by the EU legislator therefore allows a Member State a degree of leeway in terms of the juristic or procedural mechanisms by which it is to be implemented. This degree of choice in the “form and methods” of implementation of a directive must be distinguished from the question of whether it allows a Member State to go further than the directive requires, which, in the context of consumer protection, turns on the distinction between “minimum” and “full harmonisation” and on the scope of the particular instrument.¹⁰³ While the UK legislator’s earlier approach to the implementation of EEC consumer protection law sought to take full advantage of the degree of leeway allowed by directives (as can be seen in the “domestication” of the Product Liability Directive’s requirements by the [Consumer Protection Act 1987](#)),¹⁰⁴ from the 1990s the UK legislator generally preferred to take a more cautious route, sometimes following almost word for word the text of a directive, an approach sometimes known as “copy-out”, of which the [Unfair Terms in Consumer Contracts Regulations](#) provide a well-known example.¹⁰⁵ An important exception to this general pattern (though not one which affects the rights of individual consumers) can be seen in relation to the measures put in place by the UK legislature for the enforcement of European consumer protection rules. Here, the various directives require Member States to put in place “adequate and effective means” for the prevention of the practices controlled by them (for example, the use by traders of unfair contract

terms) and this has given Member States very considerable discretion as to the mechanisms by which they do so.¹⁰⁶ The [Consumer Rights Act 2015](#) followed a similar route as regards the preventive and enforcement measures which it consolidated and reformed, but its provisions which set out the consumer's substantive rights against traders did not follow the earlier pattern of UK implementation and instead sought to integrate, at least to an extent, the European rules within earlier domestic legislative rules, while at the same time "improving" and adding to them so as to conform to UK consumer protection policy.¹⁰⁷

Significance of EU source of English consumer contract law for its interpretation¹⁰⁸

40-015 EU directives remain important even after their implementation into English law by statute or statutory instrument. This importance stems from the fact that as a matter of EU legal principle and of English judicial practice UK implementing legislation must "as far as possible" be interpreted by English courts so as to give effect not merely to the terms but also the purposes of a directive, this principle of conforming interpretation sometimes being said to lead to the "indirect effect" of directives.¹⁰⁹ Thus, where the terms of a directive (on their proper, i.e. EU, interpretation) have one significance, this must wherever possible prevail over any significance which is apparently intended by the words of the United Kingdom's implementing legislation.¹¹⁰ The Court of Justice of the EU has recognised, however, that:

"… the obligation for a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law *contra legem* [i.e. contrary to the clear words of the legislation]."¹¹¹

Moreover, the Court of Justice has consistently held that "even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties".¹¹² So, in the usual case of a dispute arising from consumer contract law (which seeks to confer rights on consumers against traders), where a national court considers itself unable to interpret national implementing legislation so as to conform to the requirements of the underlying EU directive, then it must apply the national legislation: directives do not have "horizontal effects".¹¹³ Finally, as regards the UK position after its departure from the EU, where UK legislation implemented a EU directive, and the Court of Justice of the EU¹¹⁴ has, before IP completion day, ruled on the meaning of or laid down principles in relation to that directive, in principle UK courts must follow that ruling or those principles, subject to what has been said about the ability of the Supreme Court or listed appellate courts to depart from this "retained EU case-law".¹¹⁵ On the other hand, UK courts are not bound

by principles laid down or decisions made by the European Court after IP completion day, though they may have regard to them.¹¹⁶ This important temporal distinction must be borne in mind in the following discussion.

“Autonomous” and national interpretations

- 40-016** In interpreting the terms of a directive, an important distinction is to be drawn according to whether the Court of Justice has treated a particular issue as one on which a European view should be taken (giving rise to an “autonomous” or “independent” interpretation) or as one which should be left to the national laws of the Member States. For this purpose, the Court of Justice has stated that:

“According to settled case-law, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union.”¹¹⁷

For those issues where a particular legal concept is itself defined (at least in part) by a directive or regulation, it is clear that an “autonomous” interpretation is at least to this extent to be taken.¹¹⁸ So, for example, in *Kásler* the Court of Justice held that the terms used by art.4(2) of the Directive on unfair terms in consumer contracts (which create an exclusion from its general test of unfairness) must be given an autonomous interpretation, and the Court then set out “the criteria that the national court may or must apply when examining a contractual term” for this purpose.¹¹⁹ In some contexts in constructing such an autonomous interpretation, the Court of Justice may rely on academic instruments setting out “European contract law”¹²⁰ on the basis that these reflect principles common to the laws of Member States.¹²¹ However, as the passage from the Court of Justice recognises, the Court’s development of autonomous interpretations of concepts used by EU legislation finds an exception in the case of provisions which expressly refer to the law of the Member States for the purpose of determining its meaning and scope. An important example of this in the context of consumer contracts may be found in the Consumer Rights Directive 2011 art.3(5) of which states that:

“This Directive shall not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive.”

As will be explained, this rather opaque provision was intended to allocate the interpretation of *some* of the “contract law” concepts used by the Directive to national law, even though the Directive requires the enactment of contract law rules.¹²² Moreover, even in the absence of a provision such as art.3(5) of the 2011 Directive, the Court of Justice may depart from its normal approach requiring an autonomous interpretation as regards some concepts used by a directive, principally on the ground of the difficulty of construction of an autonomous interpretation (as may be the case for the definition of “contract” itself).¹²³ Where this is the case, the Court may allow national legislation or national courts to take their own view of the meaning of a concept, subject in particular to the principle of the effectiveness of the protection for consumers.¹²⁴

Interpretative approach of Court of Justice

- 40-017 As is well known, the Court of Justice of the EU takes a less literal and more teleological approach to the interpretation of legislation than is traditional in English law, this meaning that the purposes of a directive, especially as set out in its recitals, must be kept in mind in resolving any question of interpretation of its provisions.¹²⁵ Furthermore, the recitals to directives often seek to explain provisions in their main text and the Court of Justice takes these explanations into account in its interpretation of the text, although it will not allow the recitals to contradict that text.¹²⁶ So, for example, the text of the Consumer Rights Directive of 2011 followed earlier European legislative practice in providing that:

“... ‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.”¹²⁷

However, recital 17 of the Directive glossed this definition by adding that:

“... in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.”

Given the interpretative significance given by the Court of Justice to a directive’s recitals, the definition in the text of the 2011 Directive must therefore be read subject to this gloss.¹²⁸ The Court may also take into account the *travaux préparatoires* of a regulation or directive in interpreting its provisions.¹²⁹ Moreover, the different language versions of regulations and directives are equally authoritative and so recourse may need to be had at times to language versions other than English.¹³⁰ The Court of Justice also takes in account wider EU legal principle (such as the principles of legal certainty, effectiveness or the “principle of the procedural autonomy” of national

laws¹³¹); and more recently, it has also taken into account relevant provisions of the Charter of Fundamental Rights of the European Union.¹³² Finally, as part of its seeking to interpret every provision of EU law in the light of EU law as a whole,¹³³ the Court of Justice sometimes takes into account its case-law interpreting a concept in one context in deciding the interpretation of the same or a similar concept in another. This quest for consistency of interpretation can be seen in relation to some of its decisions in the area of EU consumer contract law.¹³⁴

Interpretation, application and “guidance” by the Court of Justice

- 40-018 In reading decisions of the Court of Justice in relation to retained EU law, it is important to bear in mind its approach to the lines between the interpretation of EU law, its application to the facts of cases and “guidance” which it gives to national courts. While in principle the Court of Justice holds that the interpretation of EU law is ultimately for itself, it recognises that the application of EU law is for the national courts of Member States, a division of function reflected in the preliminary ruling procedure by which a national court may or, where a question of interpretation is raised in a case before a national court “against whose decisions there is no judicial remedy under national law”, must ask the Luxembourg court for its interpretative view.¹³⁵ However, the line between interpretation and application can be blurred, especially in the case of evaluative concepts such as the “unfairness of a contract term” (as set out in the Unfair Terms in Consumer Contracts Directive 1993). In this particular context, the approach of the Court of Justice was for long quite restrained, holding that while it:

“... may interpret general criteria used by the Community legislation in order to define the concept of unfair terms ... it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question.”¹³⁶

However, while still formally adhering to this position, since 2011 the Court has chosen to explain in some detail the considerations that a national court should take into account in applying the test of unfairness, by way of “guidance”.¹³⁷ The Court has taken a similar view of other provisions within the Unfair Terms in Consumer Contracts Directive, so in *Matei v SC Volksbank România SA* the Court ruled, in relation to the exclusion from the test of unfairness of terms which reflect the main subject matter of the contract and in relation to the price/quality ratio in art.4(2),¹³⁸ that:

“... although it is for the national court alone to rule on the classification of [the relevant terms] in accordance with the particular circumstances of the case, the fact remains that the Court has jurisdiction to elicit from the provisions of Directive 93/13, in this case the provisions of Article 4(2), the criteria that the national court may or must apply when examining a contractual term.”¹³⁹

Approach of English courts ¹⁴⁰

- 40-019** Until the UK's departure from the EU was brought into full effect on IP completion day,¹⁴¹ English courts sought to follow the interpretative practice of the Court of Justice and, where necessary or helpful, look at the recitals to a directive as an aid to its interpretation,¹⁴² consider other language versions of its text,¹⁴³

U and, of course, apply the interpretations and guidance of the Court of Justice in their own decision-making.¹⁴⁴ In the following discussion, therefore, while primary reference will be made to the UK legislation which implemented an EU directive in English law on the general assumption that it reflects that directive, where necessary reference will be made to this wider body of authoritative material. These references should, however, be read in the light of the changes to the interpretative status of principles laid down by and decisions made by the European Court as well as general principles of EU law.¹⁴⁵

The duty of national courts to intervene of their own motion to protect EU consumer rights

- 40-020** In a series of cases starting with *Océano Grupo Editorial*, the European Court of Justice has held that national courts have both a power and a duty to raise of their own motion the question of the unfairness of a term in a consumer contract falling within the Unfair Terms in Consumer Contracts Directive,¹⁴⁶ as long as the national court "has available to it the legal and factual elements necessary for that task".¹⁴⁷ This position is justified by the Court by the need to ensure that the consumer enjoys effective protection in view of the real risk that he is unaware of his rights or encounters difficulties in enforcing them.¹⁴⁸ This line of cases appeared at first to be distinct from the Court's general case-law governing the question whether a national court must raise an issue of EU law of its own motion under *Van Schijndel*,¹⁴⁹ according to which national procedural rules on this question must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by EU law.¹⁵⁰ Moreover, in *Rampion*¹⁵¹ the Court of Justice extended this special judicial protection for consumers, holding that a national court must have the power to raise the

rights of the consumer under the Consumer Credit Directive 1986¹⁵² of its own motion, given that that directive's purpose was to ensure the creation of a common consumer credit market and the protection of consumers.¹⁵³ On the other hand, in *Martín Martín* the Court held that a national court of appeal may, of its own motion, declare void a contract which infringes the Doorstep Selling Directive's provisions on consumer protection,¹⁵⁴ even though the issue had not been raised at first instance,¹⁵⁵ but in doing so it preferred to follow its approach in *Van Schijndel*, seeing this limitation on the power of national courts as "justified by the principle that, in a civil suit, it is for the parties to take the initiative, and that, as a result, the court is able to act of its own motion only in exceptional cases where the public interest requires intervention".¹⁵⁶ According to the Court, the Doorstep Selling Directive 1985 seeks to redress the imbalance and, therefore, disadvantage with which consumers, as "weaker parties" are faced with in the circumstances of doorstep selling by providing them with a right of cancellation, notice of which the business must give to them.¹⁵⁷ This notice of the consumer's rights "plays a central role in the overall scheme of the directive ... for the exercise of that right and, therefore, for the effectiveness of consumer protection sought by the Community legislature"¹⁵⁸: positive intervention allows the national court to "compensate for the imbalance between the consumer and the trader" in the context.¹⁵⁹ More recently, this approach has been adopted by the Court in the context of the Unfair Contract Terms Directive itself¹⁶⁰ as well as to the availability of different rights for the consumer in respect of non-conformity of goods bought under the Consumer Sales Directive 1999.¹⁶¹

A wider duty to request information from parties?

40-021



In *Faber v Autobedrijf Hazet Ochten BV*¹⁶² the Court of Justice of the EU considered whether a national court has a duty to consider of its own motion whether a party to a contract subject to a dispute was a "consumer" so as to attract the application of national legislation implementing the Consumer Sales Directive 1999. In doing so, the Court followed its own general approach under *Van Schijndel*, so as to subject any national procedural rules to the principles of equivalence and effectiveness.¹⁶³ According to the Court:

"In that regard, it is, in principle, for the national court, for the purpose of identifying the legal rules applicable to a dispute which has been brought before it, to assign a legal classification to the facts and acts on which the parties rely in support of their claims. That legal classification is a prerequisite in a case in which, like that in the main proceedings, the guarantee or warranty in respect of the goods sold, on which the applicant is relying, may be governed by different rules depending on the purchaser's status. Such a classification does not, in itself, imply that the court is, of its own motion,

exercising a discretion, but merely that it is establishing and ascertaining whether there is a statutory condition which determines the applicable legal rule.”¹⁶⁴

This view reflects a general approach in many continental national procedural laws according to which it is the role of a civil court to classify the facts and transactions (“acts”¹⁶⁵) on which parties base their claims following the principle *iura novit curia* (“the court knows the law”), but it contrasts sharply with the approach of the common law generally (and English law in particular) where in principle it is for the parties to characterise in legal terms the basis of their claims.¹⁶⁶ Following *Van Schijndel*, the Court of Justice did not treat the court’s duty here as one governed merely by national law to be applied in the EU law context by way of application of the principle of equivalence,¹⁶⁷ but rather one which may need to reflect the principle of effectiveness:

“... the principle of effectiveness requires a national court before which a dispute relating to a contract which may be covered by that directive has been brought to determine whether the purchaser may be classified as a consumer, even if the purchaser has not expressly claimed to have that status, as soon as that court has at its disposal the matters of law and of fact that are necessary for that purpose *or may have them at its disposal simply by making a request for clarification.*”¹⁶⁸

To decide otherwise would be “tantamount to making the consumer subject to the obligation to carry out a full classification of his situation himself, failing which he would lose the rights which the EU legislature intended to confer on him” by the 1999 Directive.¹⁶⁹ Moreover, in *Lintner* in the context of the Unfair Contract Terms Directive, the Court of Justice required that, where a national court has serious doubts from the case before it as to the fair nature of particular terms which are related to the subject matter of the dispute even if they are not invoked by the consumer, but it cannot *determine* the issue of fairness it must “take, if necessary of its own motion, investigative measures in order to complete that case file, by asking the parties, in observance of the principle of *audi alteram partem*, to provide it with the clarifications or documents necessary for that purpose”.¹⁷⁰

U As will be seen, from the point of view of English law the radical aspect of these cases is the requirement that, where a national court cannot on the facts as otherwise available to it determine whether a case before it falls within the scope of national legislation implementing an EU consumer protection directive or allow it to decide an issue relevant to the consumer’s rights, then it may be required as a matter of retained EU law to request a party to clarify the factual position so as to be able to do so.¹⁷¹

Significance for English law

In the context of the regulation of unfair contract terms, the significance of the case-law following *Océano Grupo Editorial*¹⁷² has long been recognised and this was given legislative expression in the UK by the *Consumer Rights Act 2015* which provides that, in proceedings before a court which relate to a term of a consumer contract¹⁷³:

“The court must 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”¹⁷⁴

provided that:

“... the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term.”¹⁷⁵

Outside this context, the UK legislation (primary and secondary) which implemented EU consumer contract directives does not refer to any power or duty in courts to raise the issue of any rights which the consumer may have under EU law of their own motion. However, given the case-law in *Rampion*,¹⁷⁶ *Martín Martín*,¹⁷⁷ *Faber v Autobedrijf Hazet Ochten BV*¹⁷⁸ and *Lintner*,¹⁷⁹ it is clear that a court in England and Wales may have a duty to raise of its own motion the issue whether a party to proceedings is a “consumer” and, if so, what rights he or she may enjoy under the legislation which implemented EU consumer contract law, subject principally to the condition that the right is important for the effectiveness of the particular consumer protection which is foreseen by the EU directive; and a court may even be required to request a party to clarify the facts to do so.

Footnotes

- 99 An example of an EU regulation creating rights for consumers (though not formally limited to consumers) is Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] O.J. L46/1 (the “Denied Boarding Regulation”), on which see above, paras 37-054 et seq.
- 100 Notably, Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6; Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L012/1 (“Brussels I Regulation”) which was itself replaced by Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels Ibis Regulation”); Regulation (EC) 864/2007 applicable to non-contractual obligations (“Rome II Regulation”) [2007] O.J. L199/40 (some of whose provisions bear an important relationship with contract, notably art.12 “culpa in

- contrahendo”). The position of these instruments after IP completion day is noted in Vol.I, para.1-024.
- 101 art.288 TFEU (formerly art.249 EC).
- 102 art.288 TFEU (formerly art.249 EC).
- 103 Below, paras 40-023—40-029.
- 104 Directive 1985/374/EEC concerning liability for defective products. HL Deb. Vol.483 col. 851 (Lord Lucas) (government’s purpose was “to make clear those of [1985 Directive’s] provisions which are unfamiliar to our law or might otherwise give rise to debate”).
- 105 **Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159)**, which were revoked and replaced by the **Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)** (“**1999 Regulations**”). For criticisms of “copy-out” in this context see *Bright and Bright (1995) 111 L.Q.R. 655; Reynolds (1994) 111 L.Q.R. 1.*
- 106 e.g. Directive 93/13/EEC art.7; *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt (C-472/10) EU:C:2012:242, 26 April 2012* at para.38 and see below, paras 40-441 et seq.
- 107 Below, paras 40-233—40-238.
- 108 However, see above, para.40-005 and Vol.I, paras 1-027—1-029 on the changing significance of the principles laid down by and decisions made by the CJEU for the interpretation of “retained EU law”, this significance differing as between those laid down before and on or after IP completion day. As noted in Vol.I, para.1-028, the principle of conforming interpretation provides an important example of a “retained general principle of EU law”: *European Union (Withdrawal) Act 2018 s.6(7)*.
- 109 For the main European decisions see *Von Colson and Kammann v Land Nordrhein-Westfalen (C-14/83) EU:C:1984:153 [1984] E.C.R. 1891*, *Marleasing SA v La Comercial Internacionale de Alimentacion SA (C-106/89) EU:C:1990:395, [1990] E.C.R. I-4135*, *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV (C-397–403/01) EU:C:2004:584, [2004] E.C.R. I-8835*, *Schulte v Deutsche Bausparkasse Badenia AG (C-350/03) EU:C:2005:637, [2005] E.C.R. I-9215* at para.71 and see Prechal, Directives in EC Law, 2nd edn (2005), Ch.8; Craig and De Búrca, EU Law, 7th edn (2020), pp.252 et seq. For the UK see in particular *Robertson v Swift [2014] UKSC 50, [2014] 1 W.L.R. 3438* at [20]–[23] approving the summary of the impact of this principle by Sir Andrew Morritt C at *Vodafone 2 v Commissioners for Her Majesty’s Revenue and Customers [2010] Ch. 77* at [37]; *United States of America v Nolan [2015] UKSC 63, [2016] A.C. 463* where Lord Mance (with whom Lord Neuberger of Abbotbury, Baroness Hale of Richmond and Lord Reed agreed) at [14] described the principle of conforming interpretation as “a cardinal principle of European Union and domestic law”. On the changed status of decisions of the CJEU after the UK’s departure from the EU, see Vol.I, paras 1-025—1-027.
- 110 *Robertson v Swift [2014] UKSC 50, [2014] 1 W.L.R. 3438* at [30]–[33] provides a good example of this in the context of the **Cancellation of Contracts made in a Consumer’s Home or Place of Work, etc. Regulations 2008 (SI 2008/1816)** which implemented the Doorstep Selling Directive 1985.
- 111 *Kásler v OTP Jelzálogbank Zrt (C-26/13) EU:C:2014:282, 30 April 2014* para.65 (in the context of Directive 93/13 on unfair terms in consumer contracts).

- 112 *Faccini Dori v Recreb Srl* (C-91/92) EU:C:1994:292, [1994] E.C.R. I-03325 paras 22–25 (in the context of the consumer’s right of cancellation under the Doorstep Selling Directive 85/577/EEC); *Association de médiation sociale v Union locale des syndicats CGT* (C-176/12) EU:C:2014:2, 15 January 2014, para.36.
- 113 *Marshall v Southampton and South-West Hampshire Area Health Authority* (152/84) EU:C:1986:84, [1986] E.C.R. 723 para.48; Craig and De Búrca, EU Law, 7th edn (2020) pp.245–249.
- 114 Formerly the European Court of Justice.
- 115 European Union (Withdrawal) Act 2018 s.6(3)–(6A) (as amended) and see above, para.40-005.
- 116 European Union (Withdrawal) Act 2018 s.6(1)(a) and (2) (as amended).
- 117 *Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees* (C-327/82) EU:C:1984:11; [1984] E.C.R. 00107 para.11; *UsedSoft GmbH v Oracle International Corp* (C-128/11) EU:C:2012:407 para.39 and see similarly *Infopaq International* (C-5/08) EU:C:2009:465, [2009] E.C.R. I-6569 para.27; *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)* (C-245/00) EU:C:2003:68, [2003] E.C.R. I-1251 para.23; *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* (C-59/12) EU:C:2013:634, 3 October 2013 para.25.
- 118 Other examples of the ECJ/CJEU taking autonomous interpretations of concepts in EU consumer directives may be found in *easyCar (UK) Ltd v Office of Fair Trading* (C-336/03) EU:C:2005:150; [2005] E.C.R. I-1947 paras 20–24 (“contract for the provision of transport services” under Directive 97/7/EC on the protection of consumers in respect of distance contracts art.3(2)); *Leitner v TUI Deutschland GmbH & Co KG* (C-168/00) EU:C:2002:163, [2002] E.C.R. I-02631 (“damage” for the purposes of Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours art.5); *Wallentin-Hermann v Alitalia-Linee Aeree Italiane SpA* (C-549/07) EU:C:2008:771, [2008] E.C.R. I-11061 (“extraordinary circumstances” for the purposes of the Denied Boarding Regulation).
- 119 *Kásler v OTP Jelzálogbank Zrt* (C-26/13) EU:C:2014:282, 30 April 2014 at paras 38, 45–51 and see below, paras 40-358—40-359.
- 120 Notably, Lando and Beale (eds) Principles of European Contract Law Pts I and II (1999), Lando, Clive, Prüm and Zimmermann, Principles of European Contract Law Pt III (2003); Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), 2010, six volumes. Although subsequently withdrawn by the EU Commission, the CJEU could nevertheless take into account the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final, whose Annex I setting out a Common European Sales Law (“CESL”) contains provisions on many issues applicable to contracts generally. On the CESL and its possible remaining significance see Vol.I, para.1-015.
- 121 See, e.g. *Masdar (UK) Ltd v EC Commission* (T-333/03) [2007] 2 All E.R. (Comm) 261 where the Court of First Instance accepted reference to the work of the *Study Group on a European Civil Code* in order to develop a EU law of restitution for unjustified enrichment under art.288 (formerly 215) EC; *Hamilton v Volksbank Filder eG* (C-412/06)

- EU:C:2008:215* (AG Poires Maturo at para.24 referring to time limits for the exercise of a right as being a “principle common to the laws of the Member States” and citing the possible future DCFR); AG Trstenjak’s reference to art.167(3) CESL in the context of the 1993 Directive in *Banco Español de Crédito SA v Calderón Camino (C-618/10) EU:C:2012:349*, para.42.
- 122 See below, paras [40-066—40-068](#). Identical provision to art.3(5) of the 2011 Directive is found in Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1 art.2(3) (this Directive repeals and replaces Directive 90/314/EEC on package travel, package holidays and package tours [1990] O.J. L158/59). On this see below, paras [40-150—40-156](#).
- 123 See below, paras [40-253—40-257](#).
- 124 cf. e.g. *Veedfald v Århus Amtskommune (C-203/99) EU:C:2001:258, [2001] E.C.R. I-03569* at para.27 (in the context of Directive 85/374/EEC concerning liability for defective products [1985] O.J. L210/29 art.9).
- 125 See, e.g. in the context of the Denied Boarding Regulation *Sturgeon v Condor Flugdienst GmbH (C-402/07 and C-432/07) EU:C:2009:716, [2009] E.C.R. I-10923* paras 40–42.
- 126 *Société d’Importation Edouard Leclerc-Siplec v TF1 Publicité SA (412/93) EU:C:1995:26, [1995] E.C.R. I-00179* at paras 45–47.
- 127 Directive 2011/83/EU on consumer rights, art.2(1). See similarly Directive 93/13/EEC on unfair terms in consumer contracts art.2(b) (in the same terms, except without reference to “craft”).
- 128 This is the case in the context of the UK’s implementation of the Consumer Rights Directive 2011 which defines “consumer” explicitly in this way: [2013 Regulations reg.4](#); [Consumer Rights Act 2015 s.2\(3\)](#) and see below, para.[40-043](#). It remains a more controversial question whether this gloss on the standard definition of “consumer” should be read over to other EU secondary legislation: below, para.[40-036](#).
- 129 *Schønberg and Frick (2003) 28 European Law Review 149*. For an example in the consumer law context see *Faber v Autobedrijf Hazet Ochten BV (C-497/13) EU:C:2015:357, 4 June 2015* at paras 54, 61 and 72 (referring to the European Commission’s explanatory memorandum to the proposal for the Consumer Sales Directive 1999, COM(95) 520 final).
- 130 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health (C-283/81) EU:C:1982:335, [1982] E.C.R. 03415* at para.18; *Kyocera Electronics Europe GmbH v Hauptzollamt Krefeld (C-152/01) EU:C:2003:623, [2003] E.C.R. I-13821* at paras 32–33 and see below, para.[40-053](#) (“trader”).
- 131 e.g. *Asturcom Telecommunicaciones SL v Rodríguez Nogueira (C-40/08) EU:C:2009:615, [2009] E.C.R. I-9579*, below para.[40-393](#). It is submitted that these principles qualify as “retained general principles of EU law” within the meaning of the [European Union \(Withdrawal\) Act 2018 s.6\(3\) and \(7\)](#), on which see above, para.[40-004](#).
- 132 e.g. *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España SL (C-413/12) EU:C:2013:800*; *Walbusch Walter Busch GmbH & Co KG v Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV (C-430/17) EU:C:2019:47*, 23 January 2019 at paras 34 and 42 (balancing art.38 (requiring a high level of consumer protection) and arts 11 (freedom of expression and information) and 16 (freedom to

conduct business); *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl* (C-649/17) EU:C:2019:576, 10 July 2019 esp. at para.44. However, after IP completion day, the legal status in the UK of the European Charter of Fundamental Rights has changed as the *European Union (Withdrawal) Act 2018* specifically provides that it is not part of domestic law on or after IP completion day, though the *2018 Act* further provides that this “does not affect the retention in domestic law on or after IP completion day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case-law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles)”: *European Union (Withdrawal) Act 2018* s.5(4) and (5) (as amended by the *European Union (Withdrawal Agreement) Act 2020* s.25(4)(a)).

- 133 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (C-283/81) EU:C:1982:335, [1982] E.C.R. 03415 at para.20.
- 134 e.g. *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* (C-59/12) EU:C:2013:634, 3 October 2013 at [33]–[35] where the CJEU analogised between definitions of “consumer” for the purposes of Directive 2005/29/EC concerning unfair business-to-consumer commercial practices [2005] O.J. L149/22 art.2(b) and the Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgments in Civil and Commercial Matters of 27 September 1968 art.13 (jurisdiction on consumer contracts).
- 135 art.267 TFEU (formerly art.177 EC). The most important qualification on the duty to refer is found in the doctrine of *acte clair*, where “the correct application of Community law [is] so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved”: *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* (283/81) EU:C:1982:335, [1982] E.C.R. 03415 at para.16; Craig and De Búrca, EU Law, 7th edn (2020) 529–533. On or after IP completion day, in principle a UK court or tribunal cannot refer any matter to the European Court: *European Union (Withdrawal) Act 2018* s.6(1)(b) (as amended by the *European Union (Withdrawal Agreement) Act 2020* s.26(1)(a); and see Vol.I, para.1-027 (note)).
- 136 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* (C-237/02) EU:C:2004:209, [2004] 2 C.M.L.R. 13 at para.22.
- 137 *Pereničová v SPS finance spol. sro* (C-453/10) EU:C:2012:144, para.44; *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (C-472/10) EU:C:2012:242 at para.22; *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* (C-92/11) EU:C:2013:180, para.48; *Aziz v Caixa d'Estalvis de Catalunya, Tarragona I Manresa* (C-415/11) EU:C:2013:164 at para.66; *Constructora Principado SA v Menéndez Álvarez* (C-226/12) EU:C:2014:10, 16 January 2014 at para.20; *Sebestyén v Kővári* (C-342/13) EU:C:2014:1857, 3 April 2014, para.25. See further below, paras 40-281—40-283, 40-314 and 40-340.
- 138 Below, paras 40-351 et seq.

- 139 *Matei v SC Volksbank România SA* (C-143/13) EU:C:2015:127, 26 February 2015, para.53, referring to *Kásler v OTP Jelzálogbank Zrt* (C-26/13) EU:C:2014:282, 30 April 2014 para.45.
- 140 On the changing significance of the case-law of and general principles laid down by the CJEU for the interpretation of “retained EU law” by UK courts, see Vol.I, paras 1-027—1-029.
- 141 Above, para.40-004 and Vol.I paras 1-020 et seq.
- 142 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* (C-237/02) EU:C:2004:209, [2004] 2 C.M.L.R. 13 at para.22 (unfair contract terms). For examples in the English courts see: *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 A.C. 481 (Unfair Terms in Consumer Contracts Directive 1993); *Sean Titshall v Qwerty Travel Ltd* [2011] EWCA Civ 1569, [2011] C.T.L.C. 219 at [5] (Package Travel Directive 1990).
- ① 143 e.g. Lord Rodger of Earlsferry’s discussion of the German and French texts of art.4(2) of Directive 93/13/EEC in *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52 at [64]. On the practical difficulties of this in the UK context after its departure from the EU see *Greenaway v Covea Insurance Plc* [2021] EWHC 1506 (QB), [2021] 4 W.L.R. 97 esp. at [44]–[51], in the context of a court’s granting permission for a party to obtain suitable expert evidence on the significance of a concept used by the other language versions of directive.
- 144 e.g. *Robertson v Swift* [2014] UKSC 50, [2014] 1 W.L.R. 3238 at [23]–[24], [27]–[28]; *ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [105]–[106], [208] and [308] (although the learned Justices of the SC differed as to the proper application of the CJEU’s case-law): see below, paras 40-287—40-289.
- 145 On which see above, para.40-004 and Vol.I, paras 1-027—1-029.
- 146 *Océano Grupo Editorial SA v Murciano Quintero* (C-240/98 to C-244/98) EU:C:2000:346, [2000] E.C.R. I-4941; *Mostaza Claro v Centro Móvil Milenium SL* (C-168/05) EU:C:2006:675, [2006] E.C.R. I-10421. On this case-law see below, paras 40-390—40-397. For a general discussion of these questions see Whittaker in Leczykiewicz and Weatherill (eds) *The Involvement of EU Law in Private Relationships* (2013) Ch.6.
- 147 *Pannon GSM Zrt v Erzsébet Sustikné Györfi* (C-243/08) EU:C:2009:350, [2009] E.C.R. I-4713 at para.32; *Bucura v SC Bancpost SA* (C-348/14) EU:C:2015:447, 9 July 2015 para.44. See also below, para.40-021 on the circumstances in which a national court has a duty to request further information in support of its protection of consumers.
- 148 *Océano Grupo Editorial SA v Murciano Quintero* (C-240/98 to C-244/98) EU:C:2000:346 at para.26.
- 149 *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* (C-430/93 and C-431/93) EU:C:1995:441, [1995] E.C.R. I-4705 (“*Van Schijndel* (C-430/93 and C-431/93)”; *Peterbroeck, Van Campenhout & Cie SCS v Belgium* (C-312/93) EU:C:1995:437; [1995] E.C.R. I-4599; *Heemskerk BV and Firma Schaap v Productschap Vee en Vlees* (C-455/06) EU:C:2008:650, [2008] E.C.R. I-08763).
- 150 *Van Schijndel* (C-430/93 and C-431/93) at para.17.

- 151 *Rampion v Franfinance SA* (C-429/05) EU:C:2007:575, [2007] E.C.R. I-8017 (“*Rampion* (C-429/05)”).
- 152 Directive 87/102/EEC [1987] O.J. L42/48.
- 153 *Rampion* (C-429/05) at para.59; *Radlinger v Finway a.s.* (C-377/14) EU:C:2016:283, 21 April 2016 at paras 62–74 (information duties) and see below, para.40-071.
- 154 Directive 85/577/EEC. The Directive itself requires only that the consumer be given a right of cancellation of the contract, but the Court held that a national court was entitled to declare a contract void in these circumstances: first, because the Directive allows national authorities a discretion in determining the consequences which follow the infringement in question; and second, because the Directive puts in place only a minimum level of harmonisation: *Martín Martín v EDP Editores SL* (C-227/08) EU:C:2009:792, [2009] E.C.R. I-11939, paras 32–33. On this directive generally and its replacement by the Consumer Rights Directive 2011 see below, paras 40-062—40-063.
- 155 *Martín Martín v EDP Editores SL* (C-227/08) EU:C:2009:792, [2009] E.C.R. I-11939, para.18.
- 156 C-227/08 para.20.
- 157 C-227/08 paras 21–26.
- 158 C-227/08 para.27.
- 159 C-227/08 para.28.
- 160 *Banif Plus Bank Zrt v Csipai* (C-472/11) EU:C:2013:88; [2013] W.L.R. (D) 76 at para.27; *Asturcom Telecommunicaciones SL v Rodriguez Nogueira* (C-40/08) EU:C:2009:615, [2009] E.C.R. I-9579, below, para.40-393. cf. *Bankia SA v Merino* (C-109/17) EU:C:2018:735, 19 September 2018 at paras 33–34 and 49 (national court has no *duty* to raise the existence of an unfair commercial practice of its own motion even where it is allegedly related to the existence of an unfair term in a consumer contract, in part because the finding of an unfair commercial practice has no direct impact on the validity of the contract or its terms, on the latter see below, para.40-027). In *Salvoni v Fiermonte* (C-347/18) EU:C:2019:661, 14 September 2019 the CJEU refused to extend the approach in its case-law on the 1993 Directive to the context of the recognition of judgments, holding that a national court requested to issue a certificate under Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the Brussels Ibis Regulation) [2012] O.J. L351/1 art.53 in respect of a judgment which has acquired the force of res judicata is *precluded* from considering of its own motion whether there has been breach of the special rules on jurisdiction for consumers in that Regulation so as to inform the consumer of this and thereby allow the latter to rely on the remedy in art.45 which permits refusal of recognition on this ground: art.45(1)(e)(i).
- 161 Directive 1999/44/EEC; *Duarte Hueros v Autociba SSA and Automóviles Citroen España SA* (C-32/12) EU:C:2013:637, [2014] 1 C.M.L.R. 53 especially at paras 31–43 (in the context of a national rule denying a court the power recognise the consumer’s right to reduction of the price on the ground of non-conformity where the consumer had claimed unsuccessfully rescission of the contract). cf. *Radlinger v Finway a.s.* (C-377/14) EU:C:2016:283, 21 April 2016 at paras 62–74 where the CJEU recognised an obligation on the national court to consider whether the information duties of the trader under the Consumer Credit Directive

2008 had been complied with simply by reference to the need to ensure the protection of the consumer and to its earlier case-law.

- 162 *C-497/13 EU:C:2015:357, 4 June 2015 (“Faber (C-497/13)”).*
- 163 *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten (C-430/93 and C-431/93 EU:C:1995:441, [1995] E.C.R. I-4705* above, para.40-020.
- 164 *Faber (C-497/13)* at para.38.
- 165 cf. the French version of para.38, which refers to “faits et actes”.
- 166 See generally Whittaker in Leczykiewicz and Weatherill (eds), *The Involvement of EU Law in Private Relationships* (2013) Ch.6.
- 167 *Faber (C-497/13)* at para.39.
- 168 *Faber (C-497/13)* at para.46 (emphasis added). cf. the more cautious approach of AG Sharpston, advising that the national court should not have a duty to go beyond the ambit of the dispute as defined by the parties and not, therefore, where the legal and factual elements are neither already part of the file nor are obtainable in accordance with *national* procedural law: Opinion in *Faber (C-497/13)* of 27 November 2014, especially at paras 70–73.
- 169 *Faber (C-497/13)* at para.44. For this purpose, the Court held that it is irrelevant whether or not a consumer is assisted by a lawyer: *Faber (C-497/13)* at para.47.
- 170 *Lintner v UniCredit Bank Hungary Zrt. (C-511/17 EU:C:2020:188*, 11 March 2020 at para.37. This approach to the role of a national court is reminiscent of the position of German civil courts: see Whittaker in Leczykiewicz and Weatherill (eds), *The Involvement of EU Law in Private Relationships* (2013) Ch.6, pp.98–101 referring to *Zivilprozessordnung*, para.139.

- 171 On the notion and status of retained EU law and retained EU case-law, see above, para.40-004 and Vol.I, paras 1-020 et seq.
- 172 *Océano Grupo Editorial SA v Murciano Quintero (C-240/98 to C-244/98) EU:C:2000:346, [2000] E.C.R. I-4941.*
- 173 Consumer Rights Act 2015 s.71(1) and see below, paras 40-394—40-395 in particular on the question whether restricting the court’s duty to the situation where “proceedings before a court *relate to* a term of a consumer contract” is compatible with the case-law of the CJEU.
- 174 Consumer Rights Act 2015 s.71(2).
- 175 Consumer Rights Act 2015 s.71(3).
- 176 *Rampion v Franfinance SA (C-429/05 EU:C:2007:575, [2007] E.C.R. I-8017.*
- 177 Directive 85/577/EEC; *Martín Martín v EDP Editores SL (C-227/08 EU:C:2009:792, [2009] E.C.R. I-11939* paras 32–33.
- 178 *C-497/13 EU:C:2015:357*, above, para.40-021.
- 179 *Lintner v UniCredit Bank Hungary Zrt (C-511/17 EU:C:2020:188*, above, para.40-021.

(c) - The Intensity of Harmonisation Required by EU Legislation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 2. - The Relationship of EU and UK Consumer Contract Law

(c) - The Intensity of Harmonisation Required by EU Legislation

“Minimum harmonisation”

- 40-023 As earlier noted, earlier European directives seeking to harmonise consumer contract law did so in a way which explicitly required only “minimum harmonisation”. The typical example¹⁸⁰ may be found in the case of the Unfair Terms in Consumer Contracts Directive 1993, art.8 of which allows Member States to

“... adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer.”

Provision to this effect has consequences for the lawfulness of any national extension of protections as a matter of EU law.¹⁸¹ For example, in *Caja de Madrid*¹⁸² the Court of Justice held that Spanish legislation implementing the 1993 Directive in a way which did not include the exclusion from the requirement of fairness of terms provided by art.4(2) of the 1993 Directive is compatible with that Directive and with EU law more generally, as the exclusion falls within the “material scope” of the Directive and therefore within art.8’s minimum harmonisation clause.¹⁸³ As regards the condition in art.8 of the Directive that any such extension of the protection of consumers must be “compatible with the Treaty”, the Court of Justice ruled that the Treaty provisions cited for this purpose by one of the parties to the national litigation as precluding the omission of art.4(2) of the Directive from its national implementing legislation did not give rise to clear and unconditional obligations on Member States and therefore could not have this effect.¹⁸⁴ As a result, in principle, art.8 allows Member States to extend the scheme of control required by the 1993 Directive where these fall within the “material scope” of the Directive, that is to say, “the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller

or supplier and a consumer”¹⁸⁵ with the exception of “contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party”.¹⁸⁶ However, the power of the legislatures of Member States to extend the protection set out by minimum harmonisation directives does not mean that issues not expressly covered by a directive remain within the competence of these legislatures and, therefore, national law, at least if the issue is implicitly covered by the Directive as correctly interpreted. So, for example, in *Leitner* the European Court of Justice rejected the argument that the lack of the inclusion of “non-material damage” (notably, loss of enjoyment) as a damage for which a package tour operator is responsible under the Package Travel Directive 1990 in cases where it has failed to perform its contract with the consumer does not mean that the issue of the recoverability of “non-material damage” was within the competence of national legislatures, holding instead that “damage” must be interpreted as including “non-material damage” in this context.¹⁸⁷

“Minimum harmonisation” and national legislation beyond the scope of the instrument

- 40-024 The power recognised by a “minimum harmonisation” clause in a EU directive to maintain or introduce stricter provisions to extend the protection for consumers is restricted to the scope of that directive.¹⁸⁸ However, after the enactment of a directive, in principle Member States remain competent to enact laws outside its scope, subject to any other EU law obligation to the contrary. To give a very clear example, the enactment of the (minimum harmonisation) Unfair Terms in Consumer Contracts Directive did not (and does not) prevent Member States from enacting rules to govern unfair terms in contracts falling outside its scope, notably, commercial contracts or contracts between two private individuals neither of whom are acting in the course of business, as is the case in English law in the [Unfair Contract Terms Act 1977](#). Moreover, there is no reason why a Member State should not for this purpose adopt the regulatory framework used by a directive.¹⁸⁹

Examples of “minimum harmonisation” directives

- 40-025 Apart from the 1993 Directive, a number of EU legislative instruments in the area of consumer contract law implemented in UK law required only “minimum harmonisation”, notably, the Consumer Sales Directive 1999.¹⁹⁰

“Full harmonisation”

- 40-026 In the later 1990s the European Commission became dissatisfied with the effect of “minimum harmonisation” as a tool for the development of the internal market, seeing the extensions of protection for consumers (and others) by national laws which this allows as creating “legal fragmentation” between those laws and, therefore, distortions in competition and inhibitions to the development of the internal market.¹⁹¹ The Commission has therefore sought to move from minimum harmonisation to “full harmonisation” both as regards areas already covered by EU legislation and in new areas of EU legislative intervention. In the context of consumer law, “full harmonisation” requires Member States to put in place the rights which the relevant instrument requires for their protection, but it prohibits Member States from going further than these requirements and putting in place stricter consumer protection. This means that a directive held to require “full harmonisation” does not merely prohibit Member States from enacting implementing legislation which goes beyond the instrument’s requirements, but also requires them to cut down any existing national rules for the protection of consumers which do so. Here, therefore, the “material scope” of the EU legislative instrument becomes of crucial importance, for any “full harmonisation” required by it applies only within the scope of the instrument and not beyond it. For example, in 2002 the Court of Justice held that the Product Liability Directive 1985¹⁹² required “complete harmonisation” of national laws within its scope.¹⁹³ In its implementing legislation France had imposed liability on producers in respect of damage to property caused by their defective products without the restrictions contained in the Directive which set a lower threshold of 500 ECU and which concern only an item of property which “is of a type ordinarily intended for private use or consumption” which “was used by the injured person mainly for his own private use or consumption” (which will be termed here “consumer property”).¹⁹⁴ The Court of Justice held first that the omission of the lower threshold was incompatible with the Directive’s requirement of “complete harmonisation”,¹⁹⁵ but in a later case, it held that French implementing legislation’s imposition of liability on producers in respect of *any* damage to property caused by a defective product including property intended for business use and employed for that purpose (and therefore without the restrictions in the Directive) did not fall foul of the “complete harmonisation” required by the Directive: the Directive does not seek exhaustively to harmonise the field of liability for defective products beyond the matters regulated by it and the definition of “damage” in the Directive is restricted to consumer property.¹⁹⁶ Moreover, even if an issue is not regulated by a provision in a directive which requires full harmonisation, but the issue is nevertheless held to fall within its scope, then Member States are in principle precluded from regulating that issue as the directive has to this extent a “pre-emptive” effect.¹⁹⁷

Examples of “full harmonisation” and “partial full harmonisation”: Unfair Commercial Practices Directive 2005 ¹⁹⁸

- 40-027 Perhaps the most important example of “full harmonisation” in EU consumer protection law is found in the Unfair Commercial Practices Directive 2005, which contains a so-called “internal market clause” according to which:

“Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive.” ¹⁹⁹

The Court of Justice has held that this provision means that the 2005 Directive requires “full harmonisation” of “the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers’ economic interests” within its scope, except where the 2005 Directive itself recognises exceptions to, or qualifications on, this position.²⁰⁰ Crucially, therefore, in principle, Member States *must not* prohibit business-to-consumer commercial practices within the scope of the 2005 Directive *unless* they are prohibited under the controls set out by the 2005 Directive itself.²⁰¹ However, the 2005 Directive is stated as being “without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract”, this being the case whether those rules are EU or national.²⁰² As a result, the 2005 Directive neither requires any changes to “contract law” nor, equally importantly, prohibits any changes to “contract law” even if they would otherwise appear to fall within its scope.²⁰³ This means, *inter alia*, that Member States remain competent to use the framework of control of the 2005 Directive (or just one or more of its controls) as the basis of “contract law” remedies in national legislation despite the Directive’s generally required “full harmonisation”. While the UK did not do so in its original implementation of the 2005 Directive,²⁰⁴ in 2014 its implementing legislation was amended so as to create a series of “rights to redress” for consumers against traders in respect of *some* unfair commercial practices, thereby taking advantage of this remaining competence.²⁰⁵ Moreover, as will be seen, the relationship between the 2005 Directive’s requirement of full harmonisation and national laws which implement directives in the area of contract law (such as the Directive on unfair terms in consumer contracts) and which take advantage of their “minimum harmonisation” is not straightforward.²⁰⁶

Financial Services Distance Contracts Directive 2002

- 40-028

This Directive²⁰⁷ sets full harmonisation as its general rule, but then exempts from this rule its central provisions imposing information requirements, thereby imposing there only minimum harmonisation.²⁰⁸

Consumer Rights Directive 2011

- 40-029 As originally proposed in 2008 the Consumer Rights Directive would have moved four existing directives from minimum to full harmonisation (including the Consumer Sales Directive and the Unfair Terms in Consumer Contracts Directive),²⁰⁹ but the Consumer Rights Directive 2011²¹⁰ as enacted has a more restricted ambit, reworking earlier provisions concerning “off-premises contracts” and “distance contracts”²¹¹ (though not in the area of financial services²¹²), adding new provisions governing pre-contractual information requirements for consumer contracts more generally,²¹³ and making other particular changes.²¹⁴ Article 4 declares that:

“Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.”

It will be seen, therefore, that the Consumer Rights Directive sets a general rule of “full harmonisation” but then notes that the Directive itself provides for some exceptions to this effect, for example, in relation to information requirements applicable to contracts other than “off-premises contracts” or distance contracts.²¹⁵ Moreover, the Consumer Rights Directive defines its scope elaborately, stating generally that it applies to “any contract concluded between a trader and a consumer” but then setting out a series of qualifications and restrictions.²¹⁶

Footnotes

- 180 This was seen as the typical example by the ECJ in *Commission v France* (C-52/00) EU:C:2002:252, [2002] E.C.R. I-3827, 25 April 2002 at para.18 (where Directive 85/374/EEC on liability for defective products was held to require “complete harmonisation”).
- 181 After IP completion day, questions as to the validity of retained EU law (including, therefore, of UK legislation implementing EU directives) are in principle governed by retained case-law (which includes retained EU case-law) and retained general principles of EU law, subject to the qualifications earlier noted: European Union (Withdrawal) Act 2018 s.6(3) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1)(a); and see generally above, para.40-004 and Vol.I, paras 1-027—1-029.

- 182 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc) (C-484/08)* EU:C:2010:309, [2010] E.C.R. I-04785 (“*Caja de Madrid (C-484/08)*”). The CJEU has also accepted that national legislation which prohibits the terms listed in the annex to the 1993 Directive rather than constituting an “indicative list” is also compatible with EU law given the minimum harmonisation foreseen by that Directive: *Matei v SC Volksbank România SA (C-143/13)* EU:C:2015:127, 26 February 2015, paras 60–61.
- 183 *Caja de Madrid (C-484/08)* at paras 30–35. In *Profi Credit Polska SA v QJ (C-84/19, C-222/19 and C-252/19)* EU:C:2020:631, 3 September 2020 at paras 83–85 the CJEU held that a provision of national law which confers a stricter scope on the exception laid down in art.4(2) of the 1993 Directive contributes to the objective of consumer protection pursued by that directive and so may fall within art.8’s minimum harmonisation clause. For an example in the UK context see *Robertson v Swift* [2014] UKSC 50, [2014] 1 W.L.R. 3438 at [18] approving in this respect the decision of the CA sub. nom. *Swift v Robinson* [2013] EWCA Civ 1794, [2013] Bus. L.R. 479 at [48]–[54] (holding intra vires the extension by UK regulations made under the *European Communities Act 1972* s.2(2) so as to include contracts made when a trader visits the consumer’s house at the latter’s request which was not required by the Doorstep Selling Directive 85/577/EEC (the SC reversed the CA’s decision on other grounds)).
- 184 *Caja de Madrid (C-484/08)* at paras 45–49 in relation to arts 2, 3(1)(g), 4(1) EC. See also *Buet v Ministère public (C-382/87)* EU:C:1989:198, [1989] E.C.R. 1235; *Gysbrechts and Santurel Inter BVBA (C-205/07)* EU:C:2008:730, [2008] E.C.R. I-09947. cf. *Alemo-Herron v Parkwood Leisure Ltd (C-426/11)* EU:C:2013:521 especially at para.32 qualifying the impact of a “minimum harmonisation” clause in Directive 2001/23 relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] O.J. L82/16 arts 3(1) and (8) by reference to art.16 of the EU Charter of Fundamental Right which “covers, inter alia, freedom of contract”, on which see Vol.I paras 2-007—2-008.
- 185 1993 Directive art.1(1).
- 186 1993 Directive art.1(2), on which see below, paras 40-264—40-272.
- 187 *Leitner v TUI Deutschland GmbH & Co KG (C-168/00)* EU:C:2002:163, [2002] E.C.R. I-02631 paras 16, 23 and 24.
- 188 *Caja de Madrid (C-484/08)* paras 29–35.
- 189 e.g. *Di Pinto (C-361/89)* EU:C:1991:118, [1991] E.C.R. I-01189 at para.22 (national extension of protection of Directive on “doorstep selling” for the benefit of businesses not precluded by Directive as this extension falls outside its scope).
- 190 Directive 99/44/EC art.8(2). The 1999 Directive was first implemented in UK law by amendment of the *Sale of Goods Act 1979*, but was later re-implemented by the *Consumer Rights Act 2015*, esp. Ch.2, on which see below, paras 40-060—40-063. cf. Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, etc. [2019] O.J. L136/28 [2019] O.J. L136/28, which repeals and replaces Directive 99/44/EC and which requires full harmonisation (art.4) although with exceptions, recognising notably “the freedom of Member States to allow consumers to choose a specific remedy, if the lack of conformity of the goods becomes

apparent within a period after delivery, not exceeding 30 days" (art.3(7)). The 2019 Directive must be implemented by 1 January 2022 (art.24) and so after IP completion day, and this means that the UK does not have to implement it: see Vol.I, para.1-019. The 2019 Directive is noted further below, para.40-464.

- 191 This is clearly set out in the Consumer Rights Directive 2011 (as enacted) recitals 6 and 7.
- 192 Council Directive 1985/374/EEC concerning liability for defective products, [1985] O.J. L210/29.
- 193 *Commission v France* (C-52/00) EU:C:2002:252, 25 April 2002; [2002] E.C.R. I-3827; *Commission v Greece* (C-154/00) EU:C:2002:254, 25 April 2002; *González Sánchez v Medicina Asturiana SA* (C-183/00) EU:C:2002:255, 25 April 2002.
- 194 Directive 85/374/EEC art.9(b).
- 195 *Commission v France* (C-52/00) EU:C:2002:25, paras 26–34.
- 196 *Moteurs Leroy Somer v Dalkia France* (C-285/08) EU:C:2009:351, [2009] E.C.R. I-4733 paras 25–32.
- 197 See Weatherill, EU Consumer Law and Policy, 2nd edn (2013), 84–85 on "pre-emptive effect". For the impact of full harmonisation on issues within a EU legislative instrument but not overtly regulated by it see *Whittaker (2009) European Review of Contract Law* 2.
- 198 See also Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1: art.4 sets a general principle of full harmonisation, with certain exceptions which the Directive itself sets out.
- 199 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices [2005] O.J. L149/22 ("2005 Directive") art.4.
- 200 Directive 2005/29/EC art.1. On the scope of the 2005 Directive see recitals 6–9 and art.3.
- 201 *VTB-VAB NV Total Belgium NV* (C-261/07 and C-299/07) EU:C:2009:244, [2009] E.C.R. I-2949 at para.63; *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v "Österreich"-Zeitungsverlag GmbH* (C-540/08) EU:C:2010:660, [2010] E.C.R. I-10909 at para.27, *Zentrale sur Bekämpfung unlauteren Weebewerbs eV v Plus Warenhandelsgessellschaft mbH* (C-304/08) EU:C:2010:12, [2010] E.C.R. I-00217 at para.41, *Wamo BVBA v JBC NV* (C-288/10) EU:C:2011:443, [2011] E.C.R. I-5835 at para.33. There is an important exception to "full harmonisation" in relation to "financial services": 2005 Directive art.3(9).
- 202 2005 Directive art.3(2), recital 9.
- 203 However, Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 art.3(5) (inserting a new art.11a in the 2005 Directive) requires the introduction of redress for consumers harmed by unfair commercial practices, but as the 2019 Directive must be implemented on 28 November 2021 (i.e. after IP completion day) the UK is not required to do so: see above, para.40-004 and below, para.40-185.
- 204 *Consumer Protection from Unfair Trading Regulations 2008* (SI 2008/1277) (as originally enacted).

- 205 Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) inserting, notably, new Pt 4A Consumers' Rights to Redress in the 2008 Regulations (SI 2008/1277). See further below, paras [40-181](#) et seq.
- 206 See below, paras [40-451](#)—[40-454](#) in relation to the [Consumer Rights Act 2015](#).
- 207 Directive 2002/65/EC concerning the distance marketing of consumer financial services art.4(2) (relating to the Directive's information requirements). The Directive was implemented in UK law by the [Financial Services \(Distance Marketing\) Regulations 2004 \(SI 2004/2095\)](#) see below, para.[40-143](#).
- 208 2002 Directive recital 13, arts 3 and 4.
- 209 Proposal for a Directive of the European Parliament and of the Council on Consumer Rights of 8 October 2008 COM(2008) 614/3 final.
- 210 Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 and see below, para.[40-063](#).
- 211 Directive 2011/83/EU on consumer rights arts 6–16.
- 212 Directive 2011/83/EU art.3(3)(d). Directive 2002/65/EC concerning the distance marketing of consumer financial services remains in force and, as earlier noted, its information provisions require only minimum harmonisation: art.4(2).
- 213 Directive 2011/83/EU art.5.
- 214 Directive 2011/83/EU Ch.IV (“Other consumer rights”). Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 art.4 makes a number of amendments to the 2011 Directive, but as the 2019 Directive must be implemented by 28 November 2021 (i.e. after IP completion day) the UK is not required to do so: cf. above, para.[40-004](#) and below, para.[40-185](#). The 2011 Directive art.4 (quoted in the text following this note) is not amended by the 2019 Directive.
- 215 Directive 2011/83/EU art.5(4).
- 216 Directive 2011/83/EU art.3.

(a) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 3. - Definitions of Consumer Contract

(a) - Introduction

Definition by reference to contracting parties

- 40-030 As will be seen, each UK statute or statutory instrument governing consumer contracts defines the ambit of the protections which it provides specially for its own purposes. In terms of their subject matter, some protections apply to particular types of contracts, such as “contracts to supply goods to a consumer”²¹⁷ or “holiday accommodation contracts”,²¹⁸ while others apply in principle to *all* types of contract in this sense, notably protections against unfair terms,²¹⁹ and in respect of “on-premises contracts”, “off-premises contracts” or “distance contracts”.²²⁰ However, whatever the subject matter of the contracts which they govern, the contracts affected by these statutes and statutory instruments are also restricted by reference to the categories of contracting party: broadly speaking, consumers on the one hand, and traders (or persons acting in the course of a business) on the other. While there remain significant differences in the ways in which these two categories of party are described in the legislation, the modern UK law (following to an extent EU law in this respect) has become increasingly consistent. The following paragraphs will therefore explain the background (UK and EU) to the definitions of the parties to consumer contracts in UK legislation, leaving any particular points of qualification or refinement to later paragraphs dealing with the particular statutes or statutory instruments to which they relate.

Footnotes

217 Consumer Rights Act 2015 Pt 1 Ch.2.

218 Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) regs 3 and 4, below, para.40-158.

- 219 Consumer Rights Act 2015 Pt 2, below, para.[40-249](#).
- 220 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
(SI 2013/3134) reg.[7\(1\)](#), with the exclusions set out in the remainder of reg.[7](#). The categories of contract are themselves defined by reg.[5](#): below paras [40-072](#) et seq.

End of Document

© 2022 SWEET & MAXWELL

(b) - "Consumer"

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 3. - Definitions of Consumer Contract

(b) - "Consumer"

Background

- 40-031 Although until quite recently the approach of English law to the definition of the person to be protected by its consumer protection legislation was particular and contextual, three broad approaches could be identified.²²¹ First, the *Consumer Credit Act 1974* applied (and still applies) its principal controls to “consumer credit agreements”, defined as agreements between an individual (the “debtor”) and any other person (the “creditor”) by which the creditor provides the debtor with credit of any amount.²²² Secondly, the *Unfair Contract Terms Act 1977* protected persons “dealing as consumer” against exemption clauses and indemnity clauses.²²³ Thirdly, a number of particular statutes and statutory instruments implementing EU directives protected “consumers” defined in a near-standard form of words derived from their parent directives, as in the case of the *Doorstep Selling Regulations 1987*²²⁴ and the *Unfair Terms in Consumer Contracts Regulations 1999*.²²⁵ Of these three approaches, the *Consumer Credit Act*’s definition of the ambit of its controls by reference to the person provided with credit remains distinct and special for its purposes, the established domestic approach being subject to a further layer of complexity by the restricted scope of controls required by the *Consumer Credit Directive 2008*.²²⁶ This law is discussed in Ch.41 of the present work.²²⁷ By contrast, since 2012 UK legislation has sought to bring a considerable degree of consistency to the definition of the “protected party” (the consumer) in its consumer contract protection law, these changes being inspired in part by the concern to provide a consistent approach to the interpretative gloss given to “consumer” at the EU level by the *Consumer Rights Directive 2011*.²²⁸ The following paragraphs will therefore discuss earlier case-law of the European Court of Justice on the standard definition of “consumer” in EU legislation and English case-law on UK implementing legislation; they will then explain the significance of

the reformulation given to the definition in the UK legislation, itself reflecting the model set by the Consumer Rights Directive.

"Consumer" in EU law

- 40-032 While the precise (English) form of words defining "consumer" in the text of the directives of the consumer acquis varies, the definition found in the Doorstep Selling Directive of 1985 set a pattern which was much used. It provided that:

"Consumer' means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession."²²⁹

Given the extent of its use, this will be termed here the EU standard definition.²³⁰

"Natural persons"

- 40-033 This standard definition restricts consumers to "natural persons"²³¹ and therefore, unlike a person "dealing as consumer" under the Unfair Contract Terms Act as enacted, a company cannot rely on UK regulations implementing a directive containing this definition, even if it acts "for purposes which are outside [its] business",²³² unless the implementing legislation (or other UK legislation) extends the scope of its controls to persons contracting in this way.²³³ The Court of Justice of the EU has ruled that an association of natural persons (such as a "commonhold association" of real property) which is considered by national law to be a "legal subject" which is neither a natural nor a legal entity, cannot be considered to be a "consumer" within the meaning of the Unfair Contract Terms Directive as it is not a "natural person", though this does not prevent a national court from interpreting its implementing legislation as extending to such an association, as the Directive requires only minimum harmonisation.²³⁴

European case-law

- 40-034 More generally, the Court of Justice of the EU has taken an autonomous view of the definition of the concept of "consumer" for the purposes of the EU secondary legislative instruments which use this term.²³⁵ In this respect, the Court of Justice is likely to take into account the purpose of

this body of legislation, which it sees as being protective of consumers, while still acknowledging that the need for harmonisation is justified by the requirements of the internal market.²³⁶ So, for example, the Court has explained in relation to the Unfair Terms in Consumer Contracts Directive that:

“... the system of protection established by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the trader as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the trader without being able to influence the content of those terms.”²³⁷

However, the Court has taken a fairly restrictive view of “consumer” for these purposes, particularly when contrasted with the expansive view which was taken by English law for the purposes of the *Unfair Contract Terms Act*, where it was held that a business which makes a contract of a kind which does not form a regular part of its business might “deal as consumer”.²³⁸ So, for example, in *Di Pinto*²⁴⁰ the question arose whether a trader could ever be a “consumer” for the purposes of the Doorstep Selling Directive, which used the standard defining language for “consumer” earlier noted.²⁴¹ The European Court held that:

“... the criterion for the application of protection lies in the connection between the transactions which are the subject of the canvassing and the professional activity of the trader: the latter may claim that the directive is applicable only if the transaction in respect of which he is canvassed lies outside his trade or profession. Article 2, which is drafted in general terms, does not make it possible, with regard to acts performed in the context of such a trade or profession, to draw a distinction between normal acts and those which are exceptional in nature.”²⁴²

The Court added that:

“Acts which are preparatory to the sale of a business, such as the conclusion of a contract for the publication of an advertisement in a periodical, are connected with the professional activity of the trader although such acts may bring the running of the business to an end, they are managerial acts performed for the purpose of satisfying requirements *other than the family or personal requirements of the trader.*”²⁴³

The last italicised phrase could be seen as suggesting that a person does not act as a consumer unless contracting for their “family or personal needs”. In *Benincasa v Dentalkit*²⁴⁴ the European Court considered the concept of consumer for the purposes of art.13 of the Brussels Convention,²⁴⁵

 upholding its previous view that this referred to “private final consumer” in this context²⁴⁶.

"Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically."²⁴⁷

The Court of Justice has held that, in order to determine whether a person was acting as a consumer for the purposes of the Directive on unfair terms in consumer contracts, a national court should take into account:

"... all the circumstances of the case, particularly the nature of the goods or service covered by the contract in question, capable of showing the purpose for which those goods or that service is being acquired."²⁴⁸

This was seen as a "functional criterion".²⁴⁹ However, the concept of "consumer" is:

"... objective in nature and is distinct from the concrete knowledge the person in question may have, or from the information that person actually has."²⁵⁰

As a result, while lawyers may constitute "traders" in their contracts with their own clients,²⁵¹ they may, even if they are technically knowledgeable, nonetheless act as consumers in other transactions as they may be weaker parties compared to the traders with whom they deal.²⁵² For example, in *Bachman* a transport company (of which A was director) concluded a contract of loan with a finance company, B, the loan being guaranteed by A's mother, C, and secured on her home. When the company was faced with insolvency, D (A's brother) concluded a contract of novation of the original loan contract with B under which he undertook to pay back the loan over a period at interest.²⁵³ Subsequently, D sought to establish that he had entered this contract of novation as a consumer and was therefore entitled to challenge some of its terms as unfair under national legislation implementing the 1993 Directive. The Court of Justice of the EU held that a physical person in D's position could be a consumer if the national court found that he acted for private purposes (notably, to save his mother from the imminent enforcement of the guarantee of the original loan) rather than for business or professional purposes or in "manifest connection" with a role in the (insolvent) transport company.²⁵⁴ Finally, in *Petruchová* the Court of Justice considered the circumstances in which an individual who had concluded a "framework contract" with a broker to enable her to make transactions on the international FOREX (foreign exchange) market can count as a "consumer" for the purposes of the special consumer jurisdiction provided by art.17 of the Brussels Regulation.²⁵⁵ The Court of Justice reaffirmed that the concept of "consumer" has to be interpreted restrictively for this particular purpose and that the question whether a person is a consumer has to be decided "by referring to the position of that person in a given contract, in relation to the nature and purpose of the contract, and not to the subjective situation of that person".²⁵⁶ In the context, the individual was a University student working part-

time and there was nothing in the court file which suggested that she concluded the contract as part of a professional activity.²⁵⁷ Moreover, in deciding whether such a person was actually acting “outside and independently of any professional activity”, a national court should *not* take into account factors such as the value of the transactions carried out under contracts such as framework contracts, the extent of the risks of financial loss associated with the conclusion of such contracts, that person’s possible knowledge or expertise in the field of financial instruments or their active conduct in connection with such transactions.²⁵⁸

Contracts with mixed purposes

40-035 In *Gruber v Bay Wa AG*²⁵⁹ the European Court of Justice held that, for the purposes of the special consumer jurisdiction under art.13 of the Brussels Convention, a person who concludes a contract for goods intended for purposes which are in part within and in part outside of his trade or profession (in the case itself, a farmer who bought tiles to roof a building used both for agricultural and for domestic purposes) may not rely on the special rules in the Convention provided for consumer contracts:

“... unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect.”²⁶⁰

The Court further held that a national court must assess whether this is the case by reference to all the evidence, but it:

“... must not take account of facts or circumstances of which the other party to the contract [the business supplier] may have been aware when the contract was concluded, unless the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business.”²⁶¹

While this observation was made in the context of a person (the alleged “consumer”) acting partly for business and partly for non-business purposes, it suggests more generally that a person who in fact contracts as a consumer but gives the trader the impression that he acts in the course of a business cannot rely on his status as consumer.²⁶²

The Consumer Rights Directive and its possible wider influence

- 40-036 On the other hand, while the Consumer Rights Directive of 2011 (which principally repealed and replaced the earlier Doorstep Selling Directive and Distance Contracts Directive²⁶³) uses an almost identical form of words to define consumer as is used by the EU standard definition as earlier identified,²⁶⁴ recital 17 states:

“... in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.”

While rather awkwardly phrased, this recital therefore includes a person as a “consumer” where they act mainly for non-trade purposes and it therefore reflects a more extensive view of the understanding of “consumer” by the EU legislature than was taken by the Court of Justice in the context of the Brussels Convention in *Gruber v Bay Wa AG*,²⁶⁵ where any business purpose other than one which is “so limited as to be negligible” deprives a person of their status as consumer.²⁶⁶ The Consumer Rights Directive sought to achieve this by indicating the proper interpretation to be taken to the standard form of words defining consumer and, owing to the significance of the recitals to a directive for the interpretation of its text,²⁶⁷ this gloss on “consumer” therefore clearly governs the definition in the Consumer Rights Directive itself; and this directive did make an insertion into the 1993 Directive, though not one of substantive significance.²⁶⁸ Moreover, this gloss may well have a wider significance as it could encourage the Court of Justice to hold that “consumer” can include persons *mainly* acting outside their trade or profession for the purposes of other substantive law directives in the consumer *acquis*, distinguishing its more restrictive approach in *Gruber* on the basis that it concerned the special (and therefore exceptional) provisions in the Brussels Convention governing international jurisdiction.²⁶⁹ This way of thinking was, indeed, adopted by Advocate General Crux Villalón in *Costea v SC Volksbank România SA*.²⁷⁰ On the other hand, the recent Directive on sale of goods to consumers (which repealed and replaced the Consumer Sales Directive 1999) retains the standard definition of “consumer”²⁷¹ but its preamble provides in respect of this definition that:

“Member States should also remain free to determine in the case of dual purpose contracts, where the contract is concluded for purposes that are partly within and partly outside the person’s trade, and where the trade purpose is so limited as not to be predominant in the overall context of the contract, whether, and under which conditions, that person should also be considered a consumer.”²⁷²

Given this contrast with the Consumer Rights Directive 2011, the position would appear to be that there is no single approach in EU legislation to the question whether a natural person contracting a “dual purpose contract” counts as a consumer.

- 40-037 **U** Most recently in *Schrems v Facebook Ireland Ltd* the Court of Justice again considered the issue of a contract with mixed purposes for the purposes of the special international jurisdiction for consumers provided by arts 15 and 16 of the Brussels Regulation, though in a very different context from its earlier decision in *Gruber*.²⁷³ In *Schrems*, the applicant for various declarations had been a user of the social network Facebook for some years, initially using it for his own personal purposes (such as exchanging photographs and chatting), but later opening a “Facebook page” so as to report to internet users on his legal proceedings against Facebook Ireland, his lectures, media appearances, etc. and to publicise his books in relation to alleged infringements of data protection. He founded an association to uphold the fundamental right to data protection and had assigned to him, by more than 25,000 people worldwide, claims to be brought in the proceedings from which a reference was made to the Court of Justice. In terms of its interpretation of “consumer” for these purposes, the Court of Justice in *Schrems* recognised that, while the concepts in the Brussels Regulation had to be interpreted:

“... independently, by reference principally to the general scheme and objectives of that regulation ... account must, in order to ensure compliance with the objectives pursued by the legislature of the European Union in the sphere of consumer contracts, and the consistency of EU law, also be taken of the definition of ‘consumer’ in other rules of EU law.”²⁷⁴

One issue before the Court of Justice was the proper approach to a case where an individual acted partly outside his trade or profession and party within it.

²⁷⁵

- U** In this respect, the Court expressly followed its earlier decision in *Gruber* to the effect that the link between an individual and his trader or profession must be:

“... so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety.”²⁷⁶

As regards the particular case before it, the Court considered that where digital social network services are used over a long time, changes in their use are relevant to the user’s status as (or as not) “consumer”. The Court added that:

"... [t]his interpretation implies, in particular that a user of such services may, in bringing an action, rely on his status as a consumer only if the predominantly ²⁷⁷ non-professional use of those services, for which the applicant initially concluded a contract, has not subsequently become predominantly professional."²⁷⁸

With respect, use of a criterion of "predominance" of one purpose over another differs significantly from the approach in *Gruber* (which the Court had expressly adopted) where any non-negligible business or professional purpose rules out a person's being a consumer; instead this approach is that adopted by the Consumer Rights Directive as earlier explained.²⁷⁹ The Court of Justice's position in *Schrems* on the understanding of "consumer" in relation to mixed purpose contracts is therefore somewhat equivocal, although it might be thought to be moving towards including as a "consumer" a person who acts predominantly for non-business purposes.²⁸⁰ In the particular circumstances of *Schrems* itself, the Court considered that neither the actual expertise of the applicant which he might have acquired in the field covered by Facebook's services²⁸¹ nor his various activities (publishing, lecturing, etc.) undertaken for the purposes of representing the rights and interests of service users (including as to personal data) could deprive him of the status of "consumer", not least as the contrary interpretation would disregard the objective set out in art.169(1) TFEU of promoting the right of consumers to organise themselves in order to safeguard their interests.²⁸² Here, therefore, wider EU law principle was used to guide the application of the concept of "consumer".

Earlier UK standard definition of "consumer" and its interpretation by English courts

- 40-038 As earlier noted, until quite recently, the UK legislature implemented the standard EU definition of "consumer" faithfully, in general not seeking to extend it to cover non-human persons nor those acting partly in the course of business.²⁸³ So, for example, the *Unfair Terms in Consumer Contracts Regulations 1999* (which preceded the *Consumer Rights Act 2015* in implementing the 1993 Directive) provided that:

"... 'consumer' means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession."²⁸⁴

Later versions of this standard definition in other instruments have replaced "natural person" with "individual", but this was clearly not intended to make any substantive difference.²⁸⁵

United Kingdom case-law on earlier definition

- 40-039 In *Standard Bank London Ltd v Apostolakis*²⁸⁶ the proper understanding of the standard definition of “consumer” in the *Unfair Terms in Consumer Contracts Regulations 1999* arose in unusual circumstances. The defendants were wealthy individuals (a civil engineer and a lawyer) who had used their personal funds for dealings in foreign exchange under an “umbrella contract” with a bank in Athens, where they resided. The question arose as to the validity of an exclusive jurisdiction clause of the English courts in this contract, either under art.13 of the Brussels Convention or the *1999 Regulations*. It was held first that this was a “consumer contract” for the purposes of art.13.²⁸⁷ According to Longmore J:

“It is certainly not part of a person’s trade as a civil engineer or a lawyer ... to enter into foreign exchange contracts. They were using the money in a way which they hoped would be profitable but merely to use money in a way which they hoped would be profitable is not enough ... to be engaging in trade.”²⁸⁸

Even if the wording used by the European Court in *Benincasa*²⁸⁹ were applied literally, the foreign exchange contracts:

“... were for the purpose of satisfying the needs of [the defendants], defined as an appropriate use of their income, and that that need was a need in terms of private consumption. Consumption cannot be taken as literally consumed so as to be destroyed but rather consumer in the sense that a consumer consumes, viz. he uses or enjoys the relevant product.”²⁹⁰

It was later assumed that the defendants were also “consumers” for the purposes of the Unfair Terms in Consumer Contracts Directive 1993 and held that, apart from this decision under the Convention, the choice of jurisdiction clause was “unfair” within the meaning of the *1999 Regulations*.²⁹¹

- 40-040 However, in *Maple Leaf Macro Volatility Master Fund v Rouvroy*²⁹² Andrew Smith J questioned the conclusion of Longmore J as regards the status as consumer of the defendants in the *Apostolakis* case, which he saw as concerning the question whether the dealing of the defendants there was of a nature that they were to be regarded as carrying on a trade. Andrew Smith J distinguished the case before him, which instead concerned the question whether an agreement made by directors of (and major shareholders in) a company for funding of a securities transaction to regain control of that company was so connected with their business activities as not to be regarded as outside

their trade. He held that it was not to be so regarded, so that the directors did not qualify as “consumers” either for the purposes of art.15 of the Brussels I Regulation or of the *Unfair Terms in Consumer Contracts Regulations 1999*.²⁹³ In commenting on the contrast between the *Apostolakis* and *Rouvroy* decisions, the High Court in *AMT Futures Ltd v Mazillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbH* considered that the dividing line between investors who count as “consumers” and those who do not “is likely to be heavily dependent on the circumstances of each individual and the nature and pattern of investment”.²⁹⁴

- 40-041 However, this UK case-law should be read in the light of the decision of the Court of Justice of the EU in *Petruchová* earlier noted,²⁹⁵ where that Court held (in the context of a framework contract concluded by an individual with a broker to enable her to engage in the FOREX market) that the issue whether such a person was a “consumer” for the purposes of the Brussels Regulation turned on whether she was acting “outside and independently of any professional activity”, and that for this purpose a national court should *not* take into account factors such as the value of the transactions carried out under contracts such as framework contracts, the extent of the risks of financial loss associated with the conclusion of such contracts, that person’s possible knowledge or expertise in the field of financial instruments or their active conduct in connection with such transactions.²⁹⁶ In doing so, the Court of Justice approved the position adopted by its Advocate General, who had expressly preferred the approach of the High Court in *Standard Bank London Ltd v Apostolakis (No.1)*²⁹⁷ to that taken in *AMT Futures Ltd v Mazillier, Dr Meier & Dr Guntner Rechtsanwaltsgesellschaft mbH*.²⁹⁸
- 40-042 In *Prostar Management Ltd v Twaddle*,²⁹⁹ a professional footballer claimed that he acted as “consumer” for the purposes of the *1999 Regulations* in relation to his receipt of services under a management agreement for the promotion of his career, profile and sponsorship. The Glasgow and Strathkelvin Sheriff Court had regard to the decisions of the European Court in *Di Pinto*³⁰⁰ and *Benincasa*³⁰¹ and rejected this claim, holding that being a footballer was the defender’s “trade or profession” and that the contract in question could not be regarded as being outside it.³⁰² In *Overy v PayPal (Europe) Ltd*³⁰³ the High Court, having reviewed the European case-law on the proper understanding of “consumer” including the Court of Justice’s decision in *Gruber*,³⁰⁴ held that the claimant, a professional photographer who opened a “business account” with an online provider of electronic payment services and who used it partly for the purposes of his photography business and partly to sell his house by means of an online competition, did not count as a “consumer” so as to be protected by the *1999 Regulations*: first, while the competition was “not an adventure in the nature of trade”, he also intended to use it for his photography business and “that purpose could not reasonably be regarded as one which was insignificant or negligible”³⁰⁵; and, secondly, by the nature of the application which he made online and the information which the claimant provided in so doing, “he clearly conducted himself in such a way as to lead to the obvious conclusion that he was acting in his trade or professional capacity”.³⁰⁶ Finally, in *Ashfaq v International Insurance*

Co of Hannover Plc the Court of Appeal applied the approach of the High Court in *Overy v PayPal (Europe) Ltd* to the context of an individual who had concluded a contract of insurance on a house which he let to tenants as part of a letting business.³⁰⁷ In these circumstances, the individual did not contract as a “consumer” within the meaning of the *1999 Regulations*, not least as the contract was in the form of a business insurance.³⁰⁸ These decisions,³⁰⁹ it should be noted, were all made before the Court of Justice had given judgment in *Schrems v Facebook Ireland Ltd.*³¹⁰

The UK standard legislative definition of “consumer”

- 40-043 In 2012 the Law Commissions recommended that any new Acts on consumer law should specify that an individual who uses a product *wholly or mainly* for non-business use should be protected, considering the approach of the European Court of Justice in *Gruber v Bay Wa AG*³¹¹ to be too narrow and noting that this approach had already been adopted by the Consumer Insurance (Disclosure and Representations) Bill then before Parliament.³¹² As enacted, the *Consumer Insurance (Disclosure and Representations) Act 2012* defines the consumer party to a contract of insurance as being:

“... an individual who enters into the contract wholly or mainly for purposes unrelated to the individual’s trade, business or profession.”³¹³

The same, more extensive approach was adopted by the *Consumer Rights (Payment Surcharges) Regulations 2012*³¹⁴ and the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* on their implementing the Consumer Rights Directive.³¹⁵ The *2013 Regulations* provide that:

“‘Consumer’ means an individual acting for purposes that are wholly or mainly outside the individual’s trade, business, craft or profession.”³¹⁶

The *Consumer Rights Act 2015* adopted an identical definition³¹⁷ and, furthermore, abolished the special protection for those “dealing as consumer” contained in the *Unfair Contract Terms Act 1977* and the *Sale of Goods Act 1979*, instead placing the substance of these protections within the framework of its own protection of “consumers”.³¹⁸ In this way, the UK legislator has adopted the definition of consumer in the Consumer Rights Directive 2011 even though that directive does not impose any requirements as regards unfair contract terms or consumer guarantees in contracts of sale of goods.³¹⁹

The key change here from the earlier standard UK definition is the addition of the words “wholly or mainly”, allowing to this extent an individual who contracts partly for business purposes to be protected.³²⁰ The new definition of “consumer” in the [Consumer Rights Act 2015](#) applies to its provisions on the rights of consumer buyers and other transferees of goods earlier provided by the [Sale of Goods Act 1979](#) and the [Supply of Goods and Services Act 1982](#),³²¹ and to the new rights of consumers under “digital content contracts”.³²² This adoption by the [2015 Act](#) of the definition of consumer drawn from the Consumer Rights Directive 2011 therefore allows a consistent definition between the [2015 Act](#) and the UK secondary legislation implementing the Consumer Rights Directive itself, viz the [Consumer Rights \(Payment Surcharges\) Regulations 2012](#)³²³ and the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#).³²⁴ Finally, when in 2014 the UK legislator created “rights to redress” for consumers in respect of certain unfair commercial practices, it changed the definition of “consumer” both for these particular purposes and for the wider purposes of the regulation of unfair commercial practices.³²⁵ As a result, the definition of “consumer” in the UK legislation which implemented the Unfair Commercial Practices Directive 2005 (which establishes “full harmonisation” within its scope) defines “consumer” for this purpose following the approach of the Consumer Rights Directive 2011 rather than the 2005 Directive itself.

Compatibility with EU law

- 40-045 It has earlier been suggested that the interpretative gloss of the EU legislation’s standard definition of “consumer” provided by the Consumer Rights Directive 2011 may persuade the Court of Justice of the EU to extend the protection of other consumer protection directives in the area of contract law to persons acting wholly or mainly for purposes which are outside that person’s business or profession³²⁶ and it has been seen that the Court of Justice in [Schrems](#) may appear to have moved in this direction.³²⁷ If this were the case, then clearly the new standard UK definitions would merely reflect the EU position. However, if this were *not* the case, it is submitted that the UK extension of the scope of its earlier implementing legislation (where the latter now forms part of retained EU law³²⁸) would in principle be compatible with this retained EU case-law,³²⁹ as the UK law would have extended the scheme of the relevant directives to persons outside their scope. As earlier explained, such an extension is permissible in EU law, whether a directive requires “full harmonisation” or merely “minimum harmonisation”.³³⁰

The “average consumer”

- 40-046 EU legislation and case-law has been seen as reflecting various “standards” by which consumers’ behaviour or understanding should be viewed: “confident” or sophisticated consumers; “average”

consumers; and “vulnerable” consumers.³³¹ However, of these approaches, the dominant one in the Court of Justice has been the standard of the “average consumer” who is “reasonably well informed and reasonably observant and circumspect”, a standard well established by it in the context of legislation on misleading advertising and the marketing of particular products.³³² This standard is not, however, a uniform one and this was reflected in the way in which the concept of “average consumer” was described and used by the Unfair Commercial Practices Directive 2005.³³³ As earlier noted, the 2005 Directive creates a fully harmonised “general framework” for preventive measures of consumer protection though it is “without prejudice to contract law”.³³⁴ For this purpose, the 2005 Directive distinguishes between: (i) the average consumer; (ii) the average member of the group where a commercial practice is directed to a particular group of consumers; and (iii) the average member of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.³³⁵ Given this background, the “average consumer” is therefore a necessary element in the UK’s legislation on unfair commercial practices, which, as earlier noted, was extended to create certain rights to redress for consumers against traders.³³⁶

The wider significance of “average consumer” in EU and UK consumer protection law

40-047 As earlier noted, the 2005 Directive’s treatment of the standard of average consumer reflected the Court of Justice’s established case-law and the Court has seen it as relevant to other EU consumer protection legislation.³³⁷ A key example may be found in relation to the Unfair Terms in Consumer Contracts Directive 1993, where the standard by which the consumer (and particular the consumer’s understanding) is to be assessed has been held by the Court of Justice of the EU to be relevant to the requirement of fairness and of “plain, intelligible language”.³³⁸ So, in *Banco Español de Crédito, SA v Calderón Camino* Advocate General Trstenjak referred to the Court’s general case-law on average consumer in the context of the procedural position of a consumer in relation to the assessment of the fairness of terms under the 1993 Directive.³³⁹ And in *Kásler* the Court of Justice of the EU adopted the standard of “the average consumer, who is reasonably well informed and reasonably observant and circumspect” for the purposes of the application of the requirements of plain, intelligible language in arts 4(2) and 5 of the 1993 Directive.³⁴⁰ The “transparency” of terms is also relevant to their fairness under art.3 of that Directive.³⁴¹ This interpretative approach of the Court of Justice was adopted explicitly by the *Consumer Rights Act 2015*, which uses the standard of the “average consumer”, meaning “a consumer who is reasonably well-informed, observant and circumspect” for the purpose of determining the “prominence” of a term, “prominence” being a new condition for the “core exemption” of terms from the test of fairness of terms which specify the main subject matter of the contract, etc.³⁴²

Other legislative contexts

- 40-048 The “average consumer” may be a useful benchmark for assessing the demands of requirements in other EU consumer protection directives and therefore potentially relevant to the interpretation of the retained EU law which implemented them. So, for example, the Consumer Rights Directive 2011 (implemented in UK law mainly by the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#)) imposes a general information requirement on traders in relation to consumer contracts that they provide the consumer with various information “in a clear and comprehensible manner”.

³⁴³

- U On the other hand, where UK legislation neither implements nor is based on a scheme provided by EU legislation, then the idea of the “average consumer” has no direct relevance, stemming, as it does, from European case-law and thinking. So, for example, the UK legislation governing consumer insurance (which does not reflect EU law) itself defines those things which a consumer/insured ought to know for the purposes of their duty of fair representation,³⁴⁴ rather than appealing to a general standard such as the “average consumer assured”.

Consumers as the supplier of goods or services?

- 40-049 Typically, a “consumer” is a person who receives goods or services from a trader,³⁴⁵ but the standard definition of consumer (both in EU directives and in more recent UK legislation³⁴⁶) is not explicitly restricted in this way, since an individual who acts for purposes that are (wholly or mainly³⁴⁷) outside his or her trade, business, craft or profession may equally *supply* goods or services to a trader, for example, in the case of a person who sells their second-hand car to a dealer or a person who guarantees a relative’s debts to a bank. Moreover, in the case of consumer contract law derived from EU law, its declared purpose of the protection of consumers as the weaker or less informed party³⁴⁸ may apply equally to an individual who *supplies* goods or services to a trader as to one who receives them. It is submitted, however, that the question whether such an individual is included within the various legislative schemes of protection in EU or UK law cannot be given a general answer, but must instead be considered in the context of each scheme, for while some legislation is clear on the question, other legislation is more open to argument. For example, the Unfair Commercial Practices Directive 2005 states that it applies to “unfair *business-to-consumer* commercial practices”,³⁴⁹ defined as:

"... act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers."³⁵⁰

The general test of an unfair commercial practice also suggests that it applies only to commercial practices in relation to "products" supplied *to* a consumer³⁵¹ and the European Commission has expressed the view that the 2005 Directive does not apply to "consumer-to-business relations".³⁵² On the other hand, the main examples of unfair commercial practices in the 2005 Directive (misleading statements, misleading omissions and aggressive behaviour) are not worded in a way which suggests such a restriction.³⁵³ Moreover, the 2005 Directive is concerned with commercial *practices* business-to-consumer, both from the point of view of fairness of competition between traders and of the protection of "consumers",³⁵⁴ and unfair commercial practices can take place where an individual supplies goods or services to a trader on the basis of, for example, a misleading statement, omission or aggressive practice. But if the Commission's view is correct on the proper interpretation of the 2005 Directive, then the [Consumer Protection from Unfair Trading Regulations 2008](#) went further than the 2005 Directive required, as they define "commercial practice" as any act, etc. "by a trader, which is directly connected with the promotion, sale or supply of a product *to or from* consumers".³⁵⁵ This extension also applies to the rights to redress for consumers against traders created by amendment in [2014 of the 2008 Regulations](#).³⁵⁶ By contrast, the [Consumer Rights Act 2015 Pt 1](#) states explicitly that its provisions governing "goods contracts" apply only to "contracts for a trader to supply goods *to a consumer*".³⁵⁷ This restriction makes sense, of course, given that these provisions create rights for *buyers* and other customers.³⁵⁸ And while the wording of the Unfair Terms in Consumer Contracts Directive 1993 (formerly implemented in UK law by the [Unfair Terms in Consumer Contracts Regulations 1999](#) and later by the [Consumer Rights Act 2015](#))³⁵⁹ is not completely clear, the Court of Justice has held that there is no requirement that the "consumer" be the recipient of goods or services and so the Directive (and therefore also the relevant provisions of the [2015 Act](#)) may apply to a contract under which a natural person acting other than in the course of business guarantees a loan made by a creditor to a commercial company.³⁶⁰

Burden of proof as to "consumer"

- 40-050 Before its amendment by the [Consumer Rights Act 2015](#), the [Unfair Contract Terms Act 1977](#) provided expressly that "it is for those claiming that a party does not deal as consumer to show that he does not" and this burden of proof applied both to the [1977 Act](#)'s provisions controlling exemption clauses and indemnity clauses, and to the provisions in the [Sale of Goods Act 1979](#) creating rights for buyers "dealing as consumer".³⁶¹ By contrast, earlier UK legislation

implementing other EU directives governing consumer contracts did not set express burdens of proof as to whether a person was a “consumer” so as to benefit from their provisions, following in this respect the directives themselves.³⁶² It is not entirely clear how EU law would treat the issue of burden of proof on this issue for the purposes, for example, of the Unfair Terms in Consumer Contracts Directive 1993³⁶³ or the Consumer Rights Directive 2011.³⁶⁴ It may be that the Court of Justice of the EU would hold that, given the absence of any provision in the European legislation on this issue especially where this is in contrast to other issues,³⁶⁵ the issue of burden of proof lies with national laws as part of the law of procedure and following the general principle of the autonomy of national laws in this area.³⁶⁶ On the other hand, the Court could hold that the issue requires an autonomous European view and therefore place the burden of proof as to the issue on the consumer following the general principle common to national laws that it is in general for a person alleging something to prove it (*actori incumbit probatio*).³⁶⁷ However, case-law of the Court of Justice in the context of the Consumer Sales Directive (which now forms part of retained EU case-law³⁶⁸) imposed a duty on national courts to consider whether a party to litigation is a “consumer” as part of its role in the classification of facts in legal terms and in order to give proper effect to the directive’s policy of consumer protection, and this case-law strongly suggests that while in principle it is for the parties to adduce and establish the *facts* on which such a classification is founded (supplemented as needs be by the court requesting clarification), the classification of a party as “consumer” itself is for the court by way of neutral assessment rather than being appropriate to the allocation of a burden of proof.³⁶⁹

UK legislation

- 40-051 More recent UK consumer protection legislation differs in relation to the issue of burden of proof as to “consumer”. For example, the legislation governing consumer insurance contracts sets no express burden of proof on this issue.³⁷⁰ This is also the case as regards the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#), which, *inter alia*, impose duties of information on traders and provides consumers with rights of cancellation in certain circumstances,³⁷¹ and the [Consumer Protection from Unfair Trading Regulations 2008](#), both as regards its provisions prohibiting unfair commercial practices and its provisions creating rights to redress for consumer in respect of certain such practices.³⁷² The reason for this lack of express provision as to burden of proof in these sets of regulations is that they implemented EU directives which require “full harmonisation” and such a rule could be seen as extending the protection for consumers within their respective scopes.³⁷³ In contrast, the [Consumer Rights Act 2015](#) provides that:

“A trader claiming that an individual was not acting for purposes wholly or mainly outside the individual’s trade, business, craft or profession must prove it.”³⁷⁴

This burden of proof applies for the purposes of Pt 1 of the Act (which provides rules governing contracts between a trader and a consumer for the trader to supply goods, digital content or services) and of Pt 2 of the Act (which provides rules governing unfair contract terms). Some of these rules are new and original (not being drawn from EU law),³⁷⁵ but the majority are drawn either from earlier domestic UK legislation³⁷⁶ or from EU directives which required only minimum harmonisation.³⁷⁷ The main exception to this pattern is found in the 2015 Act's provisions governing the delivery of and passing of risk in goods in contracts to supply goods³⁷⁸ which implemented provisions in the Consumer Rights Directive 2011 which requires (generally and in these cases) "full harmonisation".³⁷⁹ In these situations, it is therefore possible that the 2015 Act failed properly to implement this Directive in that, to this extent, it went beyond its requirements within its scope.

Footnotes

- 221 cf. above, para.40-002.
- 222 Consumer Credit Act 1974 s.8(1) (as amended) and see below, para.41-016.
- 223 On this law (abrogated by the Consumer Rights Act 2015) see Vol.I, paras 17-071—17-073.
- 224 Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 (SI 1987/2117) reg.2(1) ("Doorstep Selling Regulations 1987") ("consumer" means a person, other than a body corporate, who, in making a contract to which these Regulations apply, is acting for purposes which can be regarded as outside his business") and cf. Directive 85/577/EEC art.2 ("consumer" means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession").
- 225 SI 1999/2083 reg.3(1) ("consumer" means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession") and cf. Directive 93/13/EEC art.2(b) ("consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession").
- 226 Directive 2008/48/EC concerning credit agreements for consumers [2008] O.J. L133/66, replacing Directive 87/102/EEC concerning consumer credit O.J. L42/48.
- 227 See below, para.41-011.
- 228 Consumer Rights Directive 2011 recital 17; art.2(1) and see below, paras 40-036, 40-043.
- 229 Directive 85/577/EEC art.2 (repealed and replaced by Directive 2011/83/EU on consumer rights, Ch.III and art.31).
- 230 The following directives followed this definition, with very minor variations: Directive 93/13/EC on unfair terms in consumer contracts art.2(b); Directive 97/7/EC on the protection of consumers in respect of distance contracts art.2(2) (directive repealed and replaced

by Directive 2011/83/EU on consumer rights, Ch.III and art.31); Directive 98/6/EEC on consumer protection in the indication of the prices of products offered to consumers [1998] O.J. L80/27 art.2(e); Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees art.1(2)(a); Directive 87/102/EEC concerning consumer credit, art.1(2)(a) (repealed and replaced by Directive 2008/48/EC concerning credit agreements for consumers art.3(a)); Directive 2000/31/EC "Directive on electronic commerce" [2000] O.J. L178/1 art.2(e); Directive 2002/65/EC concerning the distance marketing of consumer financial services art.2(d). More complex versions of the same approach to definition of "consumer" can be seen in Directive 94/47/EEC art.2 (first Timeshare Directive). Directive 90/314/EEC on package travel, package holidays and package tours, art.2(4) adopted a much more elaborate definition specific to its context (*Cape Snc v Idealservice Srl (C-541/99) EU:C:2001:625, [2001] E.C.R. I-09049*), but the 1990 Directive was repealed (as of 1 January 2018) by Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1 and the 2015 Directive substitutes for "consumer" the new category of "traveller" which "means any person who is seeking to conclude a contract, or is entitled to travel on the basis of a contract concluded, within the scope of [the] Directive": art.3(6). As recital 7 explains, the majority of travellers buying packages or linked travel arrangements are "consumers within the meaning of Union consumer law", but the Directive's protections should extend to "business travellers including members of liberal professions, or self-employed or other natural persons where they do not make travel arrangements on the basis of a general agreement". See below, para.40-151.

- 231 *Cape Snc v Idealservice Srl (C-541/99 and C-542/99) EU:C:2001:625, [2001] E.C.R. I-09049.*
- 232 *Cape Snc v Idealservice Srl (C-541/99 and C-542/99) EU:C:2001:625*; 1999 Regulations reg.3(1). On "dealing as consumer" under the 1977 Act (before it was amended by the Consumer Rights Act 2015) see Vol.I, para.17-072.
- 233 For English law, the 1999 Regulations were extended to consumer arbitration agreements defining "consumer" for this purpose as legal as well as natural persons: *Arbitration Act 1996 s.90; Heifer International Inc v Christiansen [2007] EWHC 3015 (TCC), [2008] All E.R. (D) 120 (Jan)* and this extension remains in place under the Consumer Rights Act 2015, below, para.40-426.
- 234 *Condominio di Milano, via Meda v Eurothermo SpA (C-329/19) EU:C:2020:263* at paras 25–38 distinguishing (at para.30) the position in its earlier judgment in *EVN Bulgaria lofikatsia Sofia v Dimitrov (Joined Cases C-708/17 and C-725/17) 5 December 2019 EU:C:2019:1049* at para.59 where a contract for the supply of energy to a building held in commonhold was held to be a "consumer contract" within the meaning of the Consumer Rights Directive 2011 on the basis that the contracts there had been concluded with the "unit holders" rather than with the commonhold association through its administrator. cf. the decision of the First Chamber of the French Cour de cassation of 4 June 2014, [2014] Bull. civ.1 no.102, [2014] E.C.C. 30 which held that a co-ownership association (a syndicat de copropriétaires) which is treated as having legal personality by French law could not count as a "consumer" for the purposes of French legislation implementing Directive 93/13/EEC art.7 both on the ground of its possessing legal personality and on the ground

that such an association (even though formed by private individuals) has as its object an economic activity in the upkeep and management of the property and therefore was not “*non-professionnel*” (non-business).

- 235 e.g. *Cape Snc v Idealservice Srl (C-541/99) EU:C:2001:625, [2001] E.C.R. I-09049* paras 16–17 (Unfair Terms in Consumer Contracts Directive); *France v Di Pinto (361/89) EU:C:1991:118, [1991] E.C.R. I-1189* (Doorstep Selling Directive). The CJEU has assumed that the irregular position of a person travelling by rail without a ticket (and refusing to buy a ticket when asked) can be a “consumer” for the purposes of the 1993 Directive: *Nationale Maatschappij der Belgische Spoorwegen (NMBS) v Kanyeba, Nijs. Dedroog (C-349 to C-351/18) EU:C:2019:936* at paras 55 et seq. on which see above, para.40-016 and below, para.40-255.
- 236 This is typically required by the competence on which the directives have been made, this being art.114 TFEU (formerly art.95 EC).
- 237 *Pereničová v SOS finance, spol. sro (C-453/10) EU:C:2012:144, [2012] 2 C.M.L.R. 28* para.27 repeating similar formulations in earlier judgments from *Mostaza Claro v Centro Móvil Milenium SL (C-168/05) EU:C:2006:675, [2006] E.C.R. I-10421* (which used “seller or supplier” rather than “trader”). See similarly *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (C-59/12) EU:C:2013:634, 3 October 2013* para.35 in the context of the Unfair Commercial Practices Directive 2005. It is partly on this ground that a “consumer” does not lose this capacity on the completed performance of the contract: *SC Raiffeisen Bank SA v JB (C-698/18 and C-699) EU:C:2020:537*, paras 73–74.
- 238 *Reich (1995) 4 European Review of Private Law 285, 292–293.*
- 239 Unfair Contract Terms Act 1977 s.12; *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd [1988] 1 W.L.R. 321*; s.12 and the references in the 1977 Act to persons “dealing as consumer” were deleted by the Consumer Rights Act 2015: see Vol.I, para.17-072.
- 240 *France v Di Pinto (361/89) EU:C:1991:118, [1991] E.C.R. I-1189.*
- 241 Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] O.J. L372/31 art.2 (repealed and replaced by Directive 2011/83/EU on consumer rights [2011] O.J. L304/64).
- 242 *EU:C:1991:118, [1991] E.C.R. I-1189* at [15].
- 243 *EU:C:1991:118, [1991] E.C.R. I-1189* at [16] (emphasis added).
- 244 *C-269/95 EU:C:1997:337, [1997] E.C.R. I-3767.*
- 245 Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgments in Civil and Commercial Matters of 27 September 1968 replaced by Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L12/1, which was itself replaced as from 10 January 2015 by Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels Ibis Regulation”). After IP completion day, the Brussels Ibis Regulation did not become part of retained EU law (see Vol.I, para.1-024), but new sections modelled on its articles providing for a special jurisdiction for “consumer contracts” were inserted into the *Civil Jurisdiction and Judgments*

Act 1982 for cases where the consumer is domiciled in the UK: ss.15A–15B, 15D–15E (inserted by Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479) reg.26). For this purpose, in determining any question as to the meaning or effect of any of these new provisions, regard is to be had to any relevant principles laid down before IP completion day by the European Court in connection with the relevant provisions of the Brussels Convention or the Brussels Ibis Regulation: 1982 Act s.15E(2)(a).

- 246 *EU:C:1997:337*, [1997] E.C.R. I-3767 at para.15; *Shearson Lehman Hutton* (C-89/91) *EU:C:1993:15*, [1993] E.C.R. I-139 at paras 20 and 22.
- 247 *EU:C:1997:337*, [1997] E.C.R. I-3767 at [17].
- 248 *Costea v SC Volksbank România SA* (C-110/14) *EU:C:2015:538*, 23 April 2015 at para.23.
- 249 *Tarcău v Banca Comercială Intesa Sanpaolo România SA* (C-74/15) *EU:C:2015:772*, Order of CJEU 19 November 2015 at para.27.
- 250 *Costea v SC Volksbank România SA* (C-110/14) *EU:C:2015:538*, 23 April 2015 at para.21. See similarly, *Tarcău v Banca Comercială Intesa Sanpaolo România SA* (C-74/15) *EU:C:2015:772*, Order of CJEU 19 November 2015 para.27 on which see below, paras 40-250 and 47-161. See also *Petruchová v FIBO Group Holdings Ltd* (C-208/18) *EU:C:2019:825*, above, para.40-034.
- 251 *Šiba v Devēnas* (C-537/13) *EU:C:2015:14*, 15 January 2015 [2015] Bus. L.R. 291 paras 23 and 24.
- 252 *Costea v SC Volksbank România SA* (C-110/14) *EU:C:2015:538*, 23 April 2015 at paras 20–27. See also *Pouvin and Dijoux v Électricité de France (EDF)* (C-590/17) *EU:C:2019:232*, 21 March 2019 at para.28, referring to this “broad definition” which therefore allows the protection granted by the 1993 Directive to all natural persons finding themselves in the weaker position as regards their bargaining power or level of knowledge. The CJEU held that an employee could be a “consumer” in relation to a financial service provided by his employer (a loan for the purchase of property used for private purposes): *C-590/17* at paras 29–32.
- 253 *Bachman v FAER IFN SA* (C-535/16) *EU:C:2017:321* (Order of the Court of 27 April 2017, available in French).
- 254 See similarly *Dumitraş v BRD Groupe Société Générale* (C-534/15) *EU:C:2016:700*, Order of the CJEU of 14 September 2016 at paras 38-29 (absence of “functional links” between guarantor and company debtor (such as being a director or holding non-negligible shares) could justify national court in finding that the guarantor was a consumer).
- 255 *Petruchová v FIBO Group Holdings Ltd* (C-208/18) *EU:C:2019:825* (“Petruchová (C-208/18)”).
- 256 *Petruchová* (C-208/18) at para.41 referring to *Schrems v Facebook Ireland Ltd* (C-498/16) *EU:C:2018:37*, para.29 on which see further below, para.40-037.
- 257 *Petruchová* (C-208/18) at para.46.
- 258 *Petruchová* (C-208/18) at para.59, following the advice of AG Tanchev who (at paras 58–63) had expressly preferred the approach of the HC in *Standard Bank London Ltd v Apostolakis (No.1)* [2000] I.L. Pr. 766 to that taken in *AMT Futures Ltd v Mazillier, Dr Meier & Dr Guntner Rechtsanwaltsgeellschaft mbH*, on which see below, paras 40-039—40-042. The CJEU followed its decision in *Petruchová* (C-208/18) in *AU v Reliantco Investments*

- Ltd (C-500/18) EU:C:2020:264* and *A.B., B.B. v Personal Exchange International Ltd (C-774/19) EU:C:2020:1015, 10 December 2020* (the latter in the context of an allegedly “professional” poker player contracting with an internet gambling provider).
- 259 *C-464/01 EU:C:2005:32, [2005] E.C.R. I-439*.
- 260 *EU:C:2005:32, [2005] E.C.R. I-439* at [54]. This approach was followed at first instance by *Turner & Co (GB) Ltd v Abi [2010] EWHC 2078 (QB), [2011] 1 C.M.L.R. 17* at [32]–[41]. In *Ali v Spirit Motor Transport Ltd Unreported 24 January 2014* (Leeds County Court) it was held a purchase for dual purposes was not a consumer contract with the meaning of the *Cancellation of Contracts made in a Consumer’s Home or Place of Work, etc. Regulations 2008 (SI 2008/1816)* unless the trade purpose was negligible, 75 per cent not being negligible for these purposes.
- 261 *EU:C:2005:32, [2005] E.C.R. I-439* at [54].
- 262 cf. *Unfair Contract Terms Act 1977 s.12(1)(a)* which provided that a person “deals as consumer” if “he neither makes the contract in the course of a business nor holds himself out as doing so”.
- 263 Below, para.[40-063](#).
- 264 “‘Consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession”. The main difference is the additional reference to “craft”: cf. above, para.[40-032](#).
- 265 *C-464/01 EU:C:2005:32, [2005] E.C.R. I-439 (“Gruber (C-464/01)”)*.
- 266 Above, para.[40-035](#).
- 267 Above, para.[40-017](#).
- 268 The 2011 Directive art.32 inserted a new art.8a in the 1993 Directive which requires Member States to inform the EU Commission of any exercises of their power to extend the protection for consumers by way of art.8. See also Directive 2013/11/EU of 21 May 2013 on ADR for consumer disputes [2013] O.J. L165/63 art.4(1)(a) of which defines “consumer” in the standard way, but its recital 18 then glosses this definition in an almost identical way as 2011 Directive recital 17. A similar pattern is found in Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to immovable property [2014] O.J. L60/34 (the “Mortgage Credit Directive”) recital 12 and art.4(1), referring to the definition of “consumer” in Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers [2008] O.J. L133/66 art.3(a).
- 269 Above, para.[40-035](#). cf., however, *Schrems (C-498/16)* at para.28 quoted below, para.[40-037](#); *A.B., B.B. v Personal Exchange International Ltd (C-774/19) EU:C:2020:1015, 10 December 2020* at para.44.
- 270 *(C-110/14) EU:C:2015:538, 23 April 2015* especially at paras 35–47 in the context of the 1993 Directive and distinguishing the position for the purposes of the special international jurisdiction in *Gruber*. The CJEU in its judgment of 3 September 2015 did not address this issue.
- 271 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, etc. [2019] O.J. L136/28 art.2(2).
- 272 Directive (EU) 2019/771 recital 22. Identical provision is made by Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/1 on certain

aspects concerning contracts for the supply of digital content and digital services recital 17 and art.2(6). On these directives, see below, para.40-464.

273 *C-498/16 EU:C:2018:37, 25 January 2018 ("Schrems (C-498/16)").*

274 *Schrems (C-498/16)* at para.28 referring to its observations in *Vapenik v Thurner (C-508/12) EU:C:2013:790, 5 December 2013* which concerned Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] O.J. L143/15. See also *A.B., B.B. v Personal Exchange International Ltd (C-774/19) EU:C:2020:1015, 10 December 2020* at para.44.

275 The CJEU also held that where consumers assign their claims to another individual, the latter cannot rely on the special provisions in the Brussels Regulation provided for "consumers" as regards those assigned claims, as art.16(1) assumes that the action being brought is by the consumer against the other party to the contract: *Schrems (C-498/16)* at paras 42–49. See similarly *Flowers v Centro Medico & Berkley Espana (t/a Hospital Clinica Benidorm) [2021] EWHC 2437 (QB), [2021] I.L.Pr. 35* at [116]–[117] (the estate or heirs of a deceased consumer are not entitled to use the "consumer gateway" in the Brussels Regulation Sect.4).

276 *Schrems (C-498/16)* at para.32, citing *Gruber (C-464/01)* at para.39. The CJEU in *Schrems (C-498/17)* at para.30 had earlier stated apparently more strictly that "only contracts concluded outside and independently of any trade or professional activity or purpose, *solely* for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules laid down by the regulation to protect the consumer as the party deemed to be the weaker party" (emphasis added). However, in *Milivojević v Raiffeisenbank St Stefan-Jagerberg-Wolfsberg eGen (C-630/17) EU:C:2019:123, 14 February 2019* at para.91, the CJEU repeated the formula in *Schrems* quoted in the text clearly seeing it as representing its earlier decision. In *Weco Project ApS v Loro Piana [2020] EWHC 2150 (Comm), [2021] 2 All E.R. (Comm) 383* at [48] the HC held (obiter) that the relevant test of "consumer" under the Brussels Ibis Regulation was contained in the CJEU's decisions in *Schrems* and *Milivojević* as set out in the text and held on the facts that the wealthy individual who had concluded a contract to arrange the carriage of a luxury sailing yacht with a freight forwarder from the Caribbean to the Mediterranean was *not* a "consumer" as the yacht was to be used for significant business purposes as well as personal leisure: at [75]–[76]. However, the HC further held that the individual *was* a "consumer" under the test in the *Consumer Rights Act 2015 Pt 2* (at [107]) as "the purpose of the transport was mainly for non-business purposes, even though the business use could not be said to be negligible". See also *Heriot-Watt University v Schlamp 2021 Scot (D) 12/3, [2021] SAC (Civ) 12* (Sheriff Appeal Ct), noted below.

277 The original here and later in the paragraph states "predominately".

278 *Schrems (C-498/16)* at para.38.

279 Above, para.40-036.

280 In *Heriot-Watt University v Schlamp [2020] SC EDIN 15 (24 February 2020)*, the Sheriff Ct (Lothian and Borders) held that a contracting party "must be regarded as a consumer if the trade or professional purpose is not predominant" for the purposes of the Brussels Ibis Regulation art.17, but the Sheriff Appeal Ct *2021 Scot (D) 12/3, [2021] SAC (Civ) 12*

reversed this decision and followed the approach of the CJEU in *Gruber (C-464/01)*, which had been endorsed in *Schrems (C-498/16)*: [2021] SAC (Civ) 12 at [28] and [32]–[33]. The court noted that the statement in *Schrems* at para.38 which refers to the predominantly non-professional activity of the alleged consumer quoted in the text is “difficult to reconcile” with this endorsement, but did not think that this represented a movement towards a test of predominance, suggesting that this “apparent dissonance” may be explained by the fact that in *Schrems* the contract clearly started as a consumer contract and it was only later that a professional activity emerged, and that “the party who had the status of having entered into a consumer contract at the beginning of the contract should only lose that status where the professional or trade use becomes, at a later point, predominant”: [2021] SAC (Civ) 12 at [29] and [32].

- 281 Citing *Costea v SC Volksbank România SA (C-110/14) EU:C:2015:538*, above, paras 40-034 and 40-360.
- 282 *Schrems (C-498/16)* at paras 39–40. The CJEU in *Petruchová (C-208/18) EU:C:2019:825* followed its earlier approach in *Schrems* on the interpretation of “consumer” for the purposes of the Brussels Regulation art.17, though not in the particular context of a contract for mixed purposes: see above, para.40-034.
- 283 This was not the universal practice. For example, when the Consumer Sales Directive 1999 was implemented by inserting a new Pt 5A Additional rights of buyer in consumer cases, it applied where “the buyer deals as consumer” rather than merely to a “consumer” buyer, thereby applying to the wider category of person identified by the *Unfair Contract Terms Act 1977: Sale of Goods Act 1979 s.61(5A)* referring to the construction of “dealing as consumer” under the *Unfair Contract Terms Act 1977 Pt 1; s.61(5A)* was repealed by the *Consumer Rights Act 2015 s.60* and Sch.1 para.35(3)). See also below, para.40-462.
- 284 SI 1999/2083 reg.3(1) “consumer”. See similarly *Consumer Protection (Distance Selling) Regulations (SI 2000/2334) reg.3(1) “consumer”*; *Cancellation of Contracts made in a Consumer’s Home or Place of Work, etc. Regulations 2008 (SI 2008/1816) reg.2(1) “consumer”*.
- 285 *Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) reg.2(1)*.
- 286 *Standard Bank London Ltd v Apostolakis (No.1) [2000] I.L. Pr. 766* (Longmore J); *Standard Bank London Ltd v Apostolakis (No.2) [2001] Lloyd’s Rep. Bank. 240* (Steel J).
- 287 [2000] I.L. Pr. 766.
- 288 [2000] I.L. Pr. 766, 771, per Longmore J.
- 289 *Benincasa v Dentalkit (C-269/95) EU:C:1997:337, [1997] E.C.R. I-3767*, above, para.40-034.
- 290 [2000] I.L. Pr. 766, 773.
- 291 *Standard Bank London Ltd v Apostolakis (No.2) [2001] Lloyd’s Rep. Bank. 240*.
- 292 [2009] EWHC 257 (Comm), [2009] 1 Lloyd’s Rep. 475.
- 293 [2009] EWHC 257 (Comm) at [209] and [270]. The Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters 1968 art.13 was replaced by Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels Ibis Regulation”) art.17.

- 294 [2014] EWHC 1085 (Comm), [2015] 2 W.L.R. 187 at [58]. This issue was not discussed on appeal to the CA or the SC: [2015] EWCA Civ 143, [2015] Q.B. 699; [2017] UKSC 13, [2017] 2 W.L.R. 853. In *Ang v Reliantco Investments Ltd* [2019] EWHC 879 (Comm), [2020] 2 Q.B. 582 at [23]–[70] esp. at [63] and [65], the HC considered that the making of investments by a private individual of her personal surplus wealth in the hope of generating good returns does not generally count as business activity and expressly approved the view just noted of the HC in *AMT Futures Ltd*, though adding that the spread, regularity and value of investment activity cannot determine the issue as this would replace the non-business purpose test in the Regulation. For the application of the Consumer Rights Act 2015 in this case, see *Ang v Reliantco Investments Ltd* [2020] EWHC 3242 (Comm), below, para.40-334.
- 295 Above, para.40-034.
- 296 *Petruchová* (C-208/18) EU:C:2019:825, above, para.40-034 at para.59.
- 297 [2000] I.L. Pr. 766, above.
- 298 Opinion of AG Tanchev in *Petruchová* (C-208/18) EU:C:2019:825; CJEU judgment of 3 October 2019 paras 58 and 59.
- 299 [2003] S.L.T. (Sh. Ct.) 11.
- 300 *France v Di Pinto* EU:C:1991:118, [1991] E.C.R. I-1189.
- 301 C-269/95 EU:C:1997:337, [1997] E.C.R. I-3767.
- 302 [2003] S.L.T. (Sh. Ct.) 11 at [12]–[14].
- 303 [2012] EWHC 2659 (QB), [2013] Bus. L.R. Digest D1.
- 304 C-464/01 EU:C:2005:32, above, paras 40-034—40-035.
- 305 [2012] EWHC 2659 (QB) at [174]–[175] per Judge Hegarty QC and cf. *Gruber v Bay Wa AG* (C-464/01) EU:C:2005:32, [2005] E.C.R. I-439 at para.54 discussed above, para.40-035.
- 306 [2012] EWHC 2659 (QB) at [176] per Judge Hegarty QC and cf. *Gruber v Bay Wa AG* (C-464/01) EU:C:2005:32, [2005] E.C.R. I-439 at para.54 discussed above, para.40-035.
- 307 [2017] EWCA Civ 357, [2017] H.L.R. 29.
- 308 [2017] EWCA Civ 357 at [45]–[57]. cf. *Chesterton Global Ltd v Finney* Unreported 30 April 2010, Lambeth County Ct where an individual who leased a “buy-to-let” property was held to have done so as a “consumer”.
- 309 For further decisions see *Barclays Bank Plc v Kufner* [2008] EWHC 2319 (Comm), [2009] 1 All E.R. (Comm) 1 at [31] (person entering guarantee contract to acquire (through an offshore company) the component parts of a ship chartering business not a “consumer”); *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC), [2008] All E.R. (D) 120 (Jan) at [243]–[250] (offshore company set up to purchase a residential property for its beneficial owners acted “for purposes outside [its] trade, business, or profession” when it entered contracts for the purchase and renovation of the property in question); *Wilson v MF Global UK Ltd* [2011] EWHC 138 (QB) at [129]–[131] (claimant trading through defendant in volatile financial market apparently held not a “consumer”); *Turner & Co (GB) Ltd v Abi* [2010] EWHC 2078 (QB), [2011] 1 C.M.L.R. 17 at [42] (shareholder director of a business commissioning an agent to sell the business not acting as a “consumer” but for the purposes of that business); *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), [2009] 29 E.G. 98 (C.S.) at [28] (owners of property seeking to lease it acted as “consumers” in entering a letting agency contract with an estate agent, although other “professional” or

"commercial" landlords would not); *RTA (Business Consultants) Ltd v Bracewell [2015] EWHC 630 (QB), [2015] Bus. L.R. 800* at [51]–[60] (person contracting with estate agent for the sale of his business not a "consumer" for the purposes of the Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations 2008 (SI 2008/1816)); *R. (on the application of Bluefin Insurance Services Ltd) v Financial Ombudsman Service Ltd [2014] EWHC 3413 (Admin), [2015] Bus. L.R. 656* at [121]–[128] (director of company taking out a Directors and Officers Insurance Policy was not a "consumer" for the purposes of the Financial Ombudsman Service's jurisdiction (which was defined by reference, inter alia, to the definition of "consumer" in the 1993 Directive) as the insurance concerned his liability for acts in the course of his trade, business, or profession); *Kinloch v Coral Racing Ltd [2017] CSOH 43, 2017 S.L.R. 856* at [158]–[159] (claimant held to be a professional gambler and therefore not a "consumer" for the purpose of the 1999 Regulations). cf. *Evans v Cherry Tree Finance Ltd Unreported 13 April 2007*, Ch D (concession that if any purposes for which the claimant contracted were outside his trade or business, then he was a consumer as defined by the regulations).

- 310 Above, para.[40-037](#).
- 311 *C-464/01 EU:C:2005:32, [2005] E.C.R. I-439*, on which see above, para.[40-035](#).
- 312 Law Commission and Scottish Law Commission, Consumer Redress for Misleading and Aggressive Practices Law Com. No.332, Scot. Law Com. No.226 (2012), paras 6.11–6.13.
- 313 *Consumer Insurance (Disclosure and Representations) Act 2012 s.1* "consumer insurance contract" and "consumer", and see below, para.[44-031](#).
- 314 SI 2012/3110 reg.2 "consumer".
- 315 SI 2013/3134 reg.4: see below, para.[40-072](#).
- 316 SI 2013/3134 reg.4 "consumer" (which refers to "craft" as foreseen by the 2011 Directive).
- 317 *Consumer Rights Act 2015 s.2(3)*. In the case of "sales contracts" the *2015 Act s.2(5)* and (6) qualify this definition in some situations: see below, para.[40-489](#).
- 318 Below, paras [40-235](#) and [40-244](#).
- 319 *Consumer Rights Act 2015 s.76(2)* referring to *s.2(3)*. See also the *Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542)* reg.3 "consumer" on which see below, para.[40-164](#).
- 320 See, e.g. *Weco Project ApS v Loro Piana [2020] EWHC 2150 (Comm)* at [75]–[76], [107] where it was held that an individual who contracted to arrange the carriage of a luxury sailing yacht with a freight forwarder did so as a "consumer" within the meaning of *Pt 2 of the 2015 Act*, even though he was not a "consumer" for the purposes of the special jurisdiction provisions in the Brussels Ibis Regulation as "the purpose of the transport was mainly for non-business purposes, even though the business use could not be said to be negligible". cf. above, para.[40-037](#) (note).
- 321 *Consumer Rights Act 2015 ss.2(3), 3–32; 48–57* ("goods contracts").
- 322 *Consumer Rights Act 2015 ss.2(3), 33–47*.
- 323 SI 2012/3110 reg.2 "consumer": and see generally below, paras [40-455](#)—[40-456](#).
- 324 SI 2013/3134. See *Christopher Linnett Ltd v Harding (t/a MJ Harding Contractors) [2017] EWHC 1781 (TCC), [2018] Bus. L.R. 179* at [84] (sole trader not a "consumer" for the

- purposes of the [2013 Regulations](#) when contracting with an adjudicator for services as acting “wholly (or at least mainly) inside [his] trade or business”).
- 325 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.2(1) (as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) reg.2(3) below, para.[40-177](#).
- 326 Above, paras [40-036](#)—[40-037](#).
- 327 Above, para.[40-037](#).
- 328 Above, para.[40-004](#) and Vol.I, paras [1-020](#) et seq.
- 329 In this respect, in principle the validity of retained EU law remains to be decided by reference to *retained* EU case-law and retained general principles of EU law (i.e. those laid down or recognised before IP completion day), and a court or tribunal may have regard to later case-law of the European Court: [European Union \(Withdrawal\) Act 2018 s.6](#) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1) and see further above, para.[40-004](#) and Vol.I, paras [1-027](#)—[1-029](#)).
- 330 Above, paras [40-024](#) and [40-026](#). This was the view earlier taken by the Law Commissions in relation to the position before the UK left the EU: Law Com. No.332, Scot. Law Com. No.226 (2012), para.6.13.
- 331 See further Weatherill in Weatherill and Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (2007), Ch.7.
- 332 The case-law in question can be seen in *Pippig Augenoptik GmbH & Co KG v Hartlauer Handelsgesellschaft mbH* (C-44/01) EU:C:2003:205, [2003] E.C.R. I-3095 at [55]; *De Landsheer Emmanuel SA v Comite Interprofessionnel du Vin du Champagne* (381/05) [2007] Bus. L.R. 1484; *Lidl Belgium GmbH & Co KG v Etablissementen Franz Colruyt NV* (356/04) [2007] Bus. L.R. 492 at [78] (misleading advertising); *Gut Springenheide GmbH and Rudolf Trusky v Oberkreisdirektor des Kreises Steinfurt-Amft fur Lebensmitteluberwachung* (C-210/96) EU:C:1998:369, [1998] E.C.R. I-4657 (marketing standards for eggs); *Estée Lauder Cosmetics GmbH & Co OHG v Lancaster Group GmbH* (C-220/98) EU:C:2000:8, [2000] E.C.R. I-0117 (marketing of cosmetics); *Mundipharma v Office for Harmonisation in the Internal Market (Trade Marks and Designs)—Altana Pharma (RESPICUR)* (T-256/04) EU:T:2007:46, [2007] E.C.R. II-449 (trademarks); *Tifosi Optics Inc v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (T-531/12) EU:T:2014:855 (trade marks). See also the discussion of “average consumer” in *OFT v Purely Creative* [2011] EWHC 106 (Ch), [2011] E.C.C. 20 at [73]–[74]; *Secretary of State for Business, Innovation and Skills v PLT Antimarketing Ltd* [2015] EWCA Civ 76, [2015] C.T.L.C. 8 at [30]–[31] for the purposes of the [Consumer Protection from Unfair Trading Regulations 2008](#) (SI 2008/1277).
- 333 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices [2005] O.J. L149/22, recitals 18 and 19; arts 5(2)(b) and (3), 6(1) and (2), 7(1) and (2), and 8. This directive was implemented in UK law by the [Consumer Protection from Unfair Trading Regulations 2008](#) (SI 2008/1277), on which see below, paras [40-166](#) et seq.
- 334 Directive 2005/29 art.3(2), below, para.[40-166](#) but cf. paras [40-181](#) et seq.
- 335 These distinctions are drawn from 2005 Directive art.5(2) and 5(3), below, para.[40-178](#).
- 336 Above, para.[40-003](#) and see below, paras [40-181](#) et seq.

- 337 cf. Whittaker in Weatherill and Bernitz at Ch.8.
- 338 Directive 93/13/EEC arts 3 and 5 respectively. The standard of the average consumer has also been held by the CJEU as relevant to the information requirements imposed by Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16: *Romano v DSL Bank – a branch of DB Privat- und Firmenkundenbank AG (C-143/18)* EU:C:2019:701, 11 September 2019 at paras 53–54; and see below, para.40-143.
- 339 *Banco Español de Crédito, SA v Calderón Camino (C-618/10)* EU:C:2012:349, Opinion of 14 February 2012 para.73.
- 340 *Kásler v OTP Jelzálogbank Zrt (C-26/13)* EU:C:2014:282, 30 April 2014 at para.74. On the other hand, the CJEU did not adopt the perspective of the “average consumer” for the purposes of *identification* of the clauses to which art.4(2) of the 1993 Directive applied: see below, paras 40-362 and 40-370, 40-371.
- 341 Below, paras 40-301—40-302.
- 342 Consumer Rights Act 2015 s.64(4) and (5) on which see below, paras 40-379—40-384.
- ⑤ 343 Consumer Rights Directive 2011 art.5(1), 6(1) and 7(1) (“plain, intelligible language”); Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) regs 9(1), 10(1) and 13(1). See also *Verbraucherzentrale Berlin v Unimatic Vertriebs GmbH (C-485/17)* EU:C:2018:642, 7 August 2018 where the CJEU referred to the understanding of the “average consumer” for the purposes of the definition of “business premises” under art.2(9) of the 2011 Directive, on which see below, para.40-084, and *absoluts -bikes and more- GmbH & Co KG v the-trading-company GmbH (C-179/21)* EU:C:2022:353, 5 May 2022 (“*Victorinox* case”) at para.41 where the CJEU referred to “the legitimate interest of the average consumer” in relation to the trader’s information duties under the Consumer Rights Directive 2011 art.6(1)(m). In his Opinion of 23 September 2021 in *DS v Porsche Inter Auto GmbH & Co KG, Volkswagen AG (C-145/20)* at para.146, AG Rantos referred to the position of the average consumer in assessing “the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect” for the purposes of art.2(2)(d) of the Consumer Sales Directive 1999; the CJEU did not, however, refer to the average consumer in its judgment though it followed its AG’s substantive advice in the context: EU:C:2022:572, 14 July 2022 at paras 55–56. See further below, para.40-499A.
- 344 Insurance Act 2015 ss.3 and 4 and see below, paras 44-046—44-047.
- 345 cf. “dealing as consumer” under the *Unfair Contract Terms Act 1977* before this concept was abolished by the *Consumer Rights Act 2015* (as noted in Vol.I, paras 17-072—17-073). Under the *1977 Act*, a person might “deal as consumer” in supplying goods or services to a person contracting in the course of business: Peel (ed.), *Treitel on The Law of Contract*, 14th edn (2015), para.7-054.
- 346 Above, paras 40-032, 40-043.
- 347 On this point, see above, paras 40-036—40-037 and 40-043—40-044.
- 348 See above, para.40-034.
- 349 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices [2005] O.J. L149/22 art.1.

- 350 Directive 2005/29/EC art.2(d).
- 351 Directive 2005/29/EC art.5, especially 5(2)(b).
- 352 First Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2005/29/EC, etc. accompanying Communication Com (2013) 138 final, p.10.
- 353 Directive 2005/29/EC arts 6–8.
- 354 Directive 2005/29/EC recitals 1–5.
- 355 SI 2008/1277 reg.2(1). It is submitted that this extension of the scheme of the 2005 Directive was compatible with its general requirement of “full harmonisation” as, on the narrower view taken by the Commission, consumer-to-business commercial practices fall outside the 2005 Directive’s scope and therefore beyond the force of this requirement: cf. above, para.40-026.
- 356 SI 2008/1277 reg.27A(2)(b) referring to “consumer to business contract” (though restricted to sale of goods) and see below, para.40-188.
- 357 Consumer Rights Act 2015 s.3(1). See similarly s.33(1) (“contract for a trader to supply digital content to a consumer”) and s.48(1) (“contract for a trader to supply a service to a consumer”): below, paras 40-467 et seq.
- 358 The main exception to this is 2015 Act s.51’s provision regarding the imposition of a reasonable price on the consumer under “services contracts”: below, para.40-582.
- 359 See below, paras 40-223 et seq.
- 360 *Tarcău v Banca Comercială Intesa Sanpaolo România SA* (C-74/15) Order of CJEU 19 November 2015, on which see below, para.40-250 and para.47-161. In *Harvey v Dunbar Assets Plc* [2017] EWCA Civ 60, [2017] Bus. L.R. 784 at [69]–[70] the CA was prepared to assume from this decision (without deciding) that an individual who guarantees a company debt *can* be a consumer, provided that he is not connected to the company and has been acting outside his business, trader or profession, though it held that the individual before them was held not to satisfy those conditions.
- 361 Sale of Goods Act 1979 Pt 5A s.61(5A) which expressly applied the same burden of proof. Similar provision was made for provisions applying to those “dealing as consumer” under the Supply of Goods and Services Act 1982 s.18(4). These provisions were repealed and replaced by the Consumer Rights Act 2015, on which see below, paras 40-051, 40-246.
- 362 e.g. Unfair Terms in Consumer Contracts Regulations 1999.
- 363 Directive 93/13/EEC.
- 364 Directive 2011/83/EU.
- 365 cf. e.g. the position as to the “individual negotiation” of a term under Directive 93/13/EEC art.3(2).
- 366 cf. below, paras 40-397—40-398.
- 367 See, e.g. *Systran SA and Systran Luxembourg SA v Commission* (T-19/07) 16 December 2010, para.206 (where the General Court stated in the context of the Commission’s non-contractual liability that “[a]s a general rule, as the Commission claims, where there is a dispute over the existence of a right, it is for the person claiming that the right does or does not exist to substantiate that claim (actori incumbit probatio”)).
- 368 European Union (Withdrawal) Act 2018 s.6(7) (this follows from the date of the decision of the CJEU in *Faber v Autobedrijf Hazet Ochten BV* (C-497/13) EU:C:2015:357, 4 June

- 2015). On the significance of retained EU case-law and the contrast with decisions of the European Court *after* IP completion day, see above, para.40-004 and Vol.I, para.1-038.
- 369 *Faber v Autobedrijf Hazet Ochten BV (C-497/13) EU:C:2015:357, 4 June 2015*, above, para.40-021. cf. below, para.40-399.
- 370 Consumer Insurance (Disclosure and Representations) Act 2012 s.1 defining “consumer insurance contract” and adopted by Insurance Act 2015 s.1.
- 371 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) reg.4 “consumer”.
- 372 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.2(1) “consumer” as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870).
- 373 The 2008 Regulations (SI 2008/1277) implemented the Unfair Commercial Practices Directive 2005 on whose “full harmonisation” see below, para.40-168; the 2013 Regulations (SI 2013/3134) implemented the Consumer Rights Directive 2011 on whose “full harmonisation” see below, para.40-065.
- 374 Consumer Rights Act 2015 s.2(4).
- 375 e.g. Consumer Rights Act 2015 ss.33–47 (contracts to supply digital content).
- 376 Unfair Contract Terms Act 1977; Sale of Goods Act 1979; Supply of Goods and Services Act 1982.
- 377 Directive 93/13/EEC art.8; Directive 99/44/EEC art.8, above, paras 40-023—40-025.
- 378 2015 Act s.28–29.
- 379 Consumer Rights Directive 2011/83/EEC arts 18 and 20. As will be explained, the 2015 Act also implemented the Directive 2011 art.6(5) to the extent to which it gives contractual force to the information required of and given by traders to consumers under those Regulations: 2015 Act ss.11(4)–(6), 12; 36(3)–(4); and 50(3), below, paras 40-501—40-502, 40-552—40-553 and 40-579 respectively.

(c) - The Other Party to Consumer Contracts—“Traders”

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 3. - Definitions of Consumer Contract

(c) - The Other Party to Consumer Contracts—“Traders”

Background

- 40-052 The fact that one of the parties to a contract has concluded it in the course of a business has long been significant in English contract law, the best-known example being the restriction of the statutory implication of terms as to quality and fitness for purpose of goods sold to sellers so acting.³⁸⁰ Whether a person does or does not contract “in the course of a business” is also relevant under the [Unfair Contract Terms Act 1977](#), many of whose controls are restricted to exemption clauses governing “business liability”,³⁸¹ and some of whose controls were formerly for the benefit of persons “dealing as consumer”, an element of whose definition contained a requirement that the other party does have to make the contract in the course of a business.³⁸² While the [Consumer Rights Act 2015](#) abolished the category of persons “dealing as consumer”³⁸³ and repealed and reformed some of the “business liabilities” contained in the [Sale of Goods Act 1979](#), the notion of a party contracting “in the course of a business” remains significant in some non-consumer contracts, as discussed elsewhere in the present work.³⁸⁴ For present purposes, modern legislation governing consumer contracts (both EU and UK) defines the non-consumer party to a consumer contract by reference, broadly speaking, to that person’s acting in the course of a business, but the precise wording used has differed considerably depending on the context.

EU legislation

- 40-053 Unlike the relatively consistent approach to the definition of “consumer” in EU consumer protection legislation,³⁸⁵ EU directives have used a wide variety of terms and definitions to

describe the party to a consumer contract other than the consumer depending on the particular subject matter of that legislation. So, for example, the Unfair Terms in Consumer Contracts Directive refers to the “seller or supplier” of goods and services, meaning:

“... any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.”³⁸⁶

The term “seller or supplier” is not, however, reflected in some other language versions of the 1993 Directive, which instead refer to a “professional” or “tradesman”, defined in a similar manner.³⁸⁷ Other directives refer to the trader party to a consumer contract by reference to the type of contract in question, as in the case of a “seller” under the Consumer Sales Directive 1999 which principally concerns contracts for the sale of goods, and who is then defined in a similar way to the 1993 Directive except that it omits the reference to public or private ownership.³⁸⁸ The UK’s implementation of these directives reflected this diversity of terminology and of definition.³⁸⁹ However, the Unfair Commercial Practices Directive 2005 may be seen as marking the beginning of a more consistent approach in this respect at the EU level, providing that:

“... ‘trader’ means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.”³⁹⁰

This general form of words was taken up by the Consumer Rights Directive 2011, which provides that:

“... ‘trader’ means any natural or legal person, *irrespective of whether privately or publicly owned*, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive.”³⁹¹

It will be seen, though, that while “trader” is used in both cases, there remains no textual consistency in relation to the question whether the trader is public or private (in activity or ownership) and whether the trader acts personally or through an agent.

European case-law

- 40-054 The Court of Justice has taken a very broad approach to the expression acting “in the course of business” and “trader” in the context of EU consumer protection legislation. In *Veedfald v Århus*

*Amtskommune*³⁹² the Court of Justice considered the meaning of a defence to liability in a producer in art.7(c) of the Product Liability Directive 1985 where the producer can prove that “the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business”.³⁹³ In *Veedfald* a public hospital argued that, as it had produced and used the product in question in the course of providing publicly funded health care for which its patient did not pay, it therefore did not do so for an economic purpose or in the course of [its] business within the meaning of art.7(c).³⁹⁴ However, the European Court disagreed, holding that the fact that products are manufactured for a service for which the patient has not paid and which is financed from public funds:

“... cannot detract from the economic and business character of that manufacture. The activity in question is not a charitable one which could therefore be covered by the exemption from liability provided for in Article 7(c) of the Directive. Besides, the [defendant hospital] itself admitted at the hearing that, in similar circumstances, a private hospital would undoubtedly be liable for the defectiveness of the product pursuant to the provisions of the Directive.”³⁹⁵

This last point was clearly addressed to the argument put to the Court that the application of the 1985 Directive’s scheme of liability to public hospitals would have harmful consequences for public health care and place them at a disadvantage in relation to private health schemes.³⁹⁶ While this decision concerned a provision in a defence to liability and the European Court interprets such defences narrowly (especially where they reduce the protection of consumers³⁹⁷), it suggested that the Court was likely to interpret “course of business” in other consumer protection directives so as to further their purposes of the facilitation of the internal market by reducing distortions of competition and the furtherance of the protection of consumers.³⁹⁸

BKK Mobil Oil and Šiba v Devėnas

- 40-055 This broad approach was confirmed by *BKK Mobil Oil* where the Court of Justice of the EU considered the proper approach to be taken to the definition of “trader” and “business” for the purposes of the Unfair Commercial Practices Directive,³⁹⁹ in the context of the question whether a health insurance fund established as a public law body in German law is subject to the controls in that Directive. As earlier noted, the Directive provides:

“... ‘trader’ means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader.”⁴⁰⁰

First, the Court held that an “autonomous and uniform” European interpretation must be given to this definition, and, as a result, “the classification, legal status and specific characteristics of the body at issue under national law are irrelevant”.⁴⁰¹ The Court further held that the definition of “trader” is “particularly broad” not excluding “either bodies pursuing a task of public interest or those which are governed by public law” and must be determined “in relation to the related but diametrically opposed concept of ‘consumer’, which refers to any individual not engaged in commercial or trade activities”.⁴⁰² In the Court’s view, given that the health insurance fund’s members were manifestly consumers, the fund must be treated as a “trader” and “whether the body at issue or the specific task it pursues are public or private is irrelevant”.⁴⁰³ In this respect, the Court of Justice did *not* follow the advice of Advocate General Bott, who saw “the common thread” running through a number of EU consumer protection directives, including the Unfair Terms in Consumer Contracts Directive 1993 and the Consumer Rights Directive 2011, as being:

“... that a trader may be a natural person or a public-law or private-law body who, in his relations with consumers, is acting for purposes relating to his trade or profession, *which presupposes that he acts within the framework of a regular profit-making activity.*”⁴⁰⁴

Moreover, in *Šiba v Devėnas* the Court of Justice applied its approach to “trader” in the 2005 Directive to “seller or supplier” under the 1993 Directive, holding therefore that the public or private nature of the specific task which forms the subject matter of the contract cannot determine the Directive’s application.⁴⁰⁵ It has later been confirmed that this is the case whether or not the would-be trader is acting for profit.⁴⁰⁶ This case-law strongly suggests that the Court of Justice would take a similarly very broad interpretation of the definition of the trader party to a consumer contract for the purposes of other directives in the consumer acquis, without the need for any explicit reference to a business being “publicly owned or privately owned”.⁴⁰⁷ Clearly, where case-law of the Court of Justice decided before IP completion day has ruled on the proper interpretation of a particular directive, then this ruling forms part of retained EU case-law for the purposes of the interpretation of the (retained EU) UK implementing legislation.⁴⁰⁸ On the other hand, case-law of the Court of Justice *after* IP completion day does not enjoy the same status, though a UK court may have regard to it.⁴⁰⁹ As will be seen from the above discussion, sometimes the position is not as binary as this suggests, as retained EU case-law may apply *by analogy* outside its direct context, and this may be confirmed by later case-law of the Court of Justice itself.

A regular part of his business?

- 40-056 For the purposes of domestic legislation, English courts have come to contrasting views on the question whether, in order to act “in the course” of a business, a person must contract in a way which forms part of the regular course of dealing of that business. On the one hand, in *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd* the Court of Appeal held that a person

may “deal as consumer” within the meaning of the [Unfair Contract Terms Act 1977](#), even though contracting as part of its business if the contract was neither integral to its business nor forms a regular part of it.⁴¹⁰ On the other hand, in *Stevenson v Rogers* the Court of Appeal held that a person who contracts as part of his business does so “in the course of” that business for the purposes of the implication of the term as to quality of goods sold in the [Sale of Goods Act 1979](#),⁴¹¹ this decision being influenced by the change in wording from the [1893 Act](#) which required that the “goods [were] bought by description from a seller who deals in goods of that description”.⁴¹² While apparently inconsistent, these two decisions have in common that they extended the ambit of the legislative controls in question, whether in terms of the imposition of liability for failures in quality of goods sold or the control of exemption clauses. As regards consumer contracts, the legislative contexts of these earlier decisions have changed, since the [Consumer Rights Act 2015](#) now provides for the statutory terms to be included in consumer contracts for the supply of goods, digital content and services and the rules governing unfair contract terms, using a single definition of “trader” for both these purposes.⁴¹³ In doing so, the [2015 Act](#) thereby implemented EU directives affecting sales of goods and unfair contract terms.⁴¹⁴

EU case-law

- 40-057 This then raises the question as to the view of the Court of Justice as to the need for regularity in contracting for a trader to act in the course of a business for the purposes of EU consumer protection legislation. This may, of course, be influenced by the particular wording or context of the directive in question, but the Court of Justice of the EU would resolve the question by reference to its purposes in the light of general EU principle. In this respect, the relevant EU legislation is intended to create protection for consumers as “weaker” and less well-informed parties throughout the European Union and by this means increase consumer confidence and thus the facilitation of the establishment of the internal market.⁴¹⁵ For present purposes, a consumer may often not be aware or be able to become aware of the nature of the business of a supplier of goods or services and, therefore, whether or not the contract which he intends to conclude does or does not form a regular part of its business. In terms of authority, as has been seen, the Court of Justice in *BKK Mobil Oil* did not require a trader’s act to fall “within the framework of a regular profit-making activity” as had its Advocate General.⁴¹⁶ Moreover, in *Pouvin and Dijoux v Electricite de France (EDF)*, the Court of Justice held that an employer whose main activity consists of supplying energy and not in offering financial instruments, may still be a “seller or supplier” in relation to a contract of loan which it concluded with its employee and his spouse as “that employer has technical information and expertise, and human and material resources that a natural person, namely the other party to the contract, is not deemed to have”.⁴¹⁷ For the Court of Justice, the concept of “seller or supplier” for the purposes of the 1993 Directive is “objective in nature and does not depend on whether the professional decides to act in the context of its main activity or a secondary and ancillary one”.⁴¹⁸

- 40-058 Finally, in *Kamenova* the question arose as to the circumstances in which a natural person who simultaneously offers to sell new and second-hand goods through a website may be classified as a “trader” for the purposes of the Unfair Commercial Practices Directive or the Consumer Rights Directive.⁴¹⁹ The Court of Justice held that this depends on whether the person acts “for purposes relating to his trade, business or profession”, a question which requires a “case-by-case approach”.⁴²⁰ For this purpose, the Court set out a non-exhaustive list of criteria relevant to the particular context: whether the platform was organised and set up for profit; whether the seller had technical information and expertise relating to the products offered for sale not necessarily possessed by the consumer; whether the seller had a legal status enabling her to engage in commercial activities and the extent to which the online sale was connected to the seller’s commercial or professional activity⁴²¹; whether the seller was subject to VAT; whether the seller, acting on behalf of a particular trader or on her own behalf or through another person acting in her name and on her behalf, received remuneration or an incentive (as in the case of “influencers”); whether the seller purchased new or second-hand goods in order to resell them, so as to make it a regular, frequent and/or simultaneous activity when compared to her usual commercial or business activity; whether the goods for sale were all of the same type or value, and, in particular, whether the offer was concentrated on a small number of goods.⁴²² The Court explained that compliance with one or more of these criteria (such as the regularity of the activity compared to a person’s usual commercial or business activity, or that the person is selling with the view to profit) does not, in itself, mean that the online seller is a “trader”.⁴²³

Trader as “intermediary” of non-trader

- 40-059 In *Wathelet v Garage Bietheres & Fils SPRL*

U

U a consumer had bought a second-hand car from a garage, the car in fact being owned by a private individual on behalf of whom the garage sold the car. Although the issue was disputed, the national court held that there was “strong, specific and circumstantial evidence indicating that [the private individual] was not informed that it was a private sale”.⁴²⁵ The question arose as to whether a trader who acts as intermediary on behalf of a non-professional seller counts as a “seller” within the meaning of the Consumer Sales Directive 1999 so as to bear the liabilities which that directive imposes on “sellers”, whether or not the trader is remunerated and whether or not the trader informed the prospective buyer that the seller is a private individual.⁴²⁶ The Court of Justice of the EU held in this respect that the sale was a “private sale” as the owner of the vehicle was a private individual, the garage acting as a trader and as authorised intermediary.⁴²⁷ The concept

of “seller” must be given an autonomous interpretation for the purposes of the 1999 Directive and, while the definition in the Directive does not cover intermediaries, it should be interpreted as covering:

“... a trader acting as intermediary on behalf of a private individual who has not duly informed the consumer of the fact that the owner of the goods sold is a private individual”,

which is for the national court to decide on the facts,⁴²⁸ taking into account the degree of participation and the amount of effort employed by the intermediary in the sale, the circumstances in which the goods were presented to the consumer, and the latter’s behaviour.⁴²⁹ This interpretation of the Directive was explicitly said not to depend on whether the intermediary is remunerated for so acting.⁴³⁰ This result was justified by the Court of Justice by the need to ensure the high level of consumer protection required by the 1999 Directive which would be put at risk if the consumer’s ignorance concerning the capacity in which the trader acts were allowed to deprive him of the rights provided by the Directive.⁴³¹ In English law, it would seem that in these circumstances the trader would be considered to be the agent of an undisclosed principal,⁴³² and so could be sued on the contract of sale as “seller” on this basis.⁴³³

More recent UK legislation: a standard approach to “trader”

- 40-060 The [Consumer Rights \(Payment Surcharges\) Regulations 2012](#),⁴³⁴ the [Consumer Contracts \(Information, Cancellation and Additional Payments\) Regulations 2013](#) and the [Consumer Rights Act 2015](#) all refer to the non-consumer party to the contracts to which they apply as a “trader” and state that:

“... ‘trader’ means a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf.”⁴³⁵

Business includes the activities of any government department or local or public authority.⁴³⁶ While the form of the definitions of “trader” and “business” in the [Consumer Protection from Unfair Trading Regulations 2008](#) (as amended in 2014) differ slightly from this form of words, the substance of all the new statutory definitions is identical except that a “trader” is stated as including “a person acting in the name of or on behalf of a trader”⁴³⁷ except for the purposes of the consumer’s new rights to redress against “traders”.⁴³⁸

EU and UK legislative interpretation

- 40-061 All the more recent UK consumer contract legislation where these definitions of “trader” are encountered reflect EU directives which use and define the “trader”.⁴³⁹ In this respect, as earlier noted, the Court of Justice of the EU has adopted a broad approach to the definition of “trader” for the purposes of two of these directives⁴⁴⁰ and is likely to take the same approach to the other relevant consumer protection directives.⁴⁴¹ In particular, the Court has recognised that public authorities can be “traders” and that there is, therefore, no requirement that a trader acts with a view to profit.⁴⁴² Moreover, the Court’s case-by-case approach to a person being a *trader* means that the notion does not itself require a contract made with a consumer to form an integral part of the trader’s business or be concluded with any degree of regularity by him.⁴⁴³

Footnotes

- 380 [Sale of Goods Act 1893 s.14\(2\)](#) (which required that the goods are of a description which it is in the course of the seller’s business to supply); [Sale of Goods Act 1979 s.14\(2\)](#) and (3) (sale of goods in the course of a business).
- 381 [Unfair Contract Terms Act 1977 s.1\(3\)](#) (as amended).
- 382 [Unfair Contract Terms Act 1977 s.12\(1\)\(b\)](#) and see Vol.I, para.17-083. As earlier noted, the [Consumer Rights Act 2015 s.75](#), Sch.4 para.11 deleted the notion of “dealing as consumer” from the 1977 Act: see below, para.40-235 and see Vol.I, paras 17-071—17-073.
- 383 [Consumer Rights Act 2015 s.75](#), Sch.4 para.11 and see below, para.40-235.
- 384 e.g. [Sale of Goods Act 1979 s.14](#) (amended by the [2015 Act s.60](#), Sch.1 para.13); [Supply of Goods and Services Act 1982 s.4](#) (as amended by the [2015 Act s.60](#), Sch.1 para.40), s.13. See below, para.46-096.
- 385 Above, para.40-032.
- 386 Directive 93/13/EEC art.2(c). The French version of this provision refers to “business activity, whether public or private” (“*activité professionnelle, qu’elle soit publique ou privée*”).
- 387 The non-consumer party to the contract is termed *professionnel* in the French and *Gewerbetreibender* in the German versions of Directive 93/13/EEC art.2(c).
- 388 Directive 99/44/EEC art.1(2)(c). cf. the definition of “seller” used by Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods [etc.] of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/28 (which repeals and replaces the 1999 Directive) art.2(3), which includes reference to “any natural person or any legal person, irrespective of whether privately or publicly owned”. For similar treatments to the 1999 Directive, see the Timeshare Directive 94/47 art.2 (“vendor”) and Package Travel Directive 90/314/EEC art.2(2) and (3) (“organizer” and “retailer”), though this approach was

amended by Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1, which revokes and replaces the 1990 Directive. Art.3 of the 2015 Directive defines “organiser” and “retailer” as categories of “trader”, which is itself defined and which extends to persons facilitating a “linked travel arrangement”: see below, paras 40-150 et seq. The directives differ also as to whether they mention that the business party acts through an agent: cf. the Doorstep Selling Directive 85/577/EEC art.2 (“anyone acting in the name or on behalf of a trader”) and the Unfair Terms in Consumer Contracts Directive 93/13/EEC art.2(c) which makes no such reference.

- 389 The 1999 Directive was first implemented in English law by amendment of the Supply of Goods (Implied Terms) Act 1973, the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982 (as explained below, para.40-462), all of which define the trader party to the contract as “seller”, “bailor” or “supplier” as the case may be.
- 390 Directive 2005/29/EC art.2(b).
- 391 Directive 2011/83/EU art.2(2) (emphasis added) and see also recital 16.
- 392 *Veedfald v Århus Amtskommune* (C-203/99) EU:C:2001:258, [2001] E.C.R. I-3569.
- 393 Directive 1985/374/EEC art.7(c).
- 394 EU:C:2001:258, [2001] E.C.R. I-3569 at [20].
- 395 EU:C:2001:258, [2001] E.C.R. I-3569 at [21].
- 396 EU:C:2001:258, [2001] E.C.R. I-3569 at [20].
- 397 EU:C:2001:258, [2001] E.C.R. I-3569 at [15].
- 398 See, e.g. 1993 Directive recitals 1–2.
- 399 *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* (C-59/12) EU:C:2013:634, 3 October 2013 (“BKK Mobil Oil (C-59/12”).
- 400 Directive 2005/29/EC art.2(b).
- 401 *BKK Mobil Oil (C-59/12)* at paras 25–26.
- 402 *BKK Mobil Oil (C-59/12)* at paras 32–33 citing by analogy *Shearson Lehman Hutton v TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* (C-89/91) EU:C:1993:15, [1993] E.C.R. I-00139 at para.22 on art.13 of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.
- 403 *BKK Mobil Oil (C-59/12)* at paras 36–38.
- 404 *BKK Mobil Oil (C-59/12) AG* Opinion 12 February 2014 at para.42 (emphasis added). cf. Vol.I, para.17-083 where it is said that “business” for the purposes of s.1(3) of the Unfair Contract Terms Act 1977 does not require acting with the view to profit relying principally on *Town Investments Ltd v Department of Environment* [1978] A.C. 359 (government department could conclude a “business tenancy”).
- 405 C-537/13 EU:C:2015:14, 15 January 2015 [2015] Bus. L.R. 291, para.28.
- 406 *Karel de Grote-Hogeschool Katholieke Hogeschool Antwerpen VZW v Kuijpers* (C-147/16) EU:C:2018:320, 17 May 2018 at paras 44–60 (not-for-profit independent educational institution subsidised mostly by public funds can be a “seller or supplier” in relation to a contract by which the student agrees to repay sums due in respect of registration fees and a study trip, though the CJEU apparently distinguished such a contract from the provision of the education itself on the basis that it is not a “service” within the meaning of TFEU art.57).

See also *Pouvin and Dijoux v Electricite de France (EDF) (C-590/17) EU:C:2019:232, 21 March 2019* at paras 35–38.

407 cf. *Karel de Grote-Hogeschool Katholieke Hogeschool Antwerpen VZW v Kuijpers (C-147/16) EU:C:2018:320, Opinion of AG Sharpston, 30 November 2017* at para.50.

408 Above, para.40-004 and see Vol.I, para.1-038.

409 Above, para.40-004 and see Vol.I, para.1-039.

410 [1988] 1 W.L.R. 321.

411 [1999] Q.B. 1028; *Feldarol Foundry Plc v Hermes Leasing (London) Ltd [2004] EWCA Civ 747, (2004) 101 (24) L.S.G. 32.*

412 Sale of Goods Act 1893 s.14(2); [1999] Q.B. 1028, 1035–1040.

413 Consumer Rights Act 2015 ss.2(2) and (7) (Pt 1); s.76(2) (applying the Pt 1 definitions for Pt 2), below, paras 40-223 et seq. and esp. 40-247; 40-467 et seq. and esp. 40-484.

414 i.e. Unfair Terms in Consumer Contracts Directive 1993; Consumer Sales Directive 1999.

415 e.g. 1993 Directive recitals 5, 6 and 10. On the role of EU consumer law as protecting the consumer as weaker party and less well-informed party see further *Pereničová v SOSfinance, spol. sro (C-453/10) EU:C:2012:144, [2012] 2 C.M.L.R. 28* para.27.

416 *BKK Mobil Oil (C-59/12)* and cf. AG Bott’s Opinion at para.42 quoted more fully above, para.40-055.

417 *C-590/17, EU:C:2019:232, 21 March 2019* at para.40.

418 *C-590/17, EU:C:2019:232, 21 March 2019* at para.41.

419 *Komisjaza zashitta na potrebeitelite v Kamenova (C-105/17) EU:C:2018:80, 4 October 2018 (“Kamenova (C-105/17)”) at para.24.*

420 *Kamenova (C-105/17)* at paras 36–37.

421 In some national laws, “commercial activities” (translating “*actes de commerce*”) are defined by law and may be restricted to persons enjoying the status to do so.

422 *Kamenova (C-105/17)* at paras 37–38 following the Opinion of AG Szpunar at paras 50–51.

423 *Kamenova (C-105/17)* at paras 39–40.

424 *C-149/15 EU:C:2016:840, [2017] 1 W.L.R. 865 (“Wathelet (C-149/15)”).* cf, however, *UAB ‘Tiketa’ v M. Š. (C-536/20) EU:C:2022:112*, 24 February 2022 at paras 26–36, where the CJEU distinguished the positions under the 1999 Directive and under the Consumer Rights Directive 2011, holding that for the purposes of art.2(2) of the latter an intermediary who acts on behalf of a trader in concluding contracts with consumers is itself a trader simply by so acting and without itself also providing a service and that both, therefore, must fulfil the information requirements imposed by the 2011 Directive.

425 *Wathelet (C-149/15)* at para.22.

426 *Wathelet (C-149/15)* at para.23. According to the 1999 Directive art.1(1)(c) “*seller*: shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession”. On the significance of the 1999 Directive and its implementation in English law see below, paras 40-461 et seq.

427 *Wathelet (C-149/15)* at paras 24–26.

428 *Wathelet (C-149/15)* at paras 28–30 and 45.

- 429 *Wathelet (C-149/15)* at para.44.
- 430 *Wathelet (C-149/15)* at para.45. Remuneration was seen as part of the contractual relationship between the individual owner of the goods and the intermediary and therefore outside the scope of the Directive: *Wathelet (C-149/15)* at para.43.
- 431 *Wathelet (C-149/15)* at paras 36–42.
- 432 There is a degree of uncertainty here as the AG’s Opinion refers to an intermediary acting *in the name of* as well as on behalf of the individual and the former suggests that the agency is disclosed, whereas the CJEU states the facts as being that the consumer was told that her apparent seller acted as an intermediary only after the contract had been concluded: *Wathelet (C-149/15)* at para.14.
- 433 See Vol.I, para.21-070. The general law of agency applies to contracts for the sale of goods: *Sale of Goods Act 1979 s.62(2)*; Benjamin’s *Sale of Goods* 11th edn (2020), para.3-002.
- 434 SI 2012/3110 reg.2 “trader” (as amended by SI 2013/3134 Sch.4 para.15(2)) and see generally below, para.40-456.
- 435 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) reg.4 “trader”; Consumer Rights Act 2015 s.2(2).
- 436 The Consumer Rights (Payment Surcharges) Regulations 2012 (SI 2012/3110) reg.3 “business” (as inserted by SI 2013/3134 Sch.4 para.15(3)(a)); Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) reg.5 “business”; Consumer Rights Act 2015 s.2(7).
- 437 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.2(1) “business” and “trader” (as amended by SI 2014/870). The effect of this inclusion is to subject a trader’s agent to a possible personal responsibility in respect of the commission of an unfair commercial practice, as foreseen by reg.8 (offences relating to unfair commercial practices).
- 438 Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.2(1) “trader” (b) (as amended by SI 2014/870). The definition of the non-consumer party to “consumer insurance contracts” under the Consumer Insurance (Disclosure and Representations) Act 2012 and Insurance Act 2015 (neither of which implement EU legislation) differs, designating that party as “a person who carries on the business of insurance and who becomes a party to the contract by way of that business (whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000)” (2012 Act s.1(b) “consumer insurance contract”); Insurance Act 2015 s.1: and see below, para.44-031.
- 439 In the case of the Consumer Rights (Payment Surcharges) Regulations 2012, the Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013 and the Consumer Rights Act 2015 the UK legislation implemented the relevant directive; in the case of the Consumer Protection from Unfair Trading Regulations 2008 (as amended in 2014), the regulations as a whole implemented a directive (the Unfair Commercial Practices Directive 2005), even though the consumer’s rights to redress were not required by that directive: below, paras 40-166 et seq.
- 440 *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (C-59/12) EU:C:2013:634, 3 October 2013* (Unfair Commercial Practices

Directive 2005); *Šiba v Devėnas* (C-537/13) EU:C:2015:14 (Unfair Terms in Consumer Contracts Directive 1993) above, paras 40-054—40-055.

441 i.e. the Consumer Sales Directive 1999 and the Consumer Rights Directive 2011.

442 Above, para.40-055.

443 Above, paras 40-057—40-058.

(a) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(a) - Introduction

Rationale

- 40-062 In the context of the protection of the economic interests of consumers, the European legislator  has long seen the use of duties of information in traders towards consumers before the conclusion of a contract as an important regulatory technique.⁴⁴⁴ As Weatherill observes:

“These techniques do not address directly the content of the bargain between trader and consumer. Contractual terms remain to be fixed by private negotiation.⁴⁴⁵ The assumption underlying [this] type of regulatory technique ... is that an imbalance of economic power can be sufficiently corrected by adjusting the environment within which the bargain is struck by giving the consumer extra information in advance and extra time to consider the implications.”⁴⁴⁶

Rather than a single regime, the EU legislator enacted a series of distinct regimes dealing with contracts made in particular circumstances or with particular categories of contract. As a result, duties of information were imposed on traders in relation to contracts made in particular circumstances (notably, contracts made away from business premises (“doorstep selling”)⁴⁴⁷ and contracts made at a distance⁴⁴⁸) or contracts where the consumer is seen as particularly at risk of abuse, as in the case of timeshare contracts⁴⁴⁹ and package holidays.⁴⁵⁰ Other information requirements were imposed on the providers of “information society services” (such as selling goods online) which apply for the benefit of all their recipients, but in the case of consumers cannot be excluded by agreement.

⁴⁵¹

U Often the imposition of information duties on the trader before the conclusion of a contract has been combined with the provision of a cooling-off period within which consumers are entitled to cancel⁴⁵² the contract.⁴⁵³ The justifications for these rights of cancellation have differed according to context: in timeshare contracts, the right was provided so as to give consumers the “opportunity of fully understanding their rights and obligations under the contract”⁴⁵⁴; in distance contracts, it was justified on the ground that the consumer is not able to see the goods before concluding the contract,⁴⁵⁵ and in off-premises contracts because of the risk of surprise and the frequent inability of consumers to compare the offer made with other offers.⁴⁵⁶ Following the then general pattern, these directives required merely “minimum harmonisation”.⁴⁵⁷

The Consumer Rights Directive 2011⁴⁵⁸

- 40-063 The main provisions of the 2011 directive are concerned with the reformulation of the information requirements and rights of cancellation for door-step selling (renamed “off-premises contracting”) and distance contracts generally (but not distance contracts related to financial services⁴⁵⁹), but the directive also introduced new information requirements in traders to consumers in contracts which are neither off-premises contracts nor distance contracts, and required certain other measures for the protection of consumers in relation to contracts (for example, in relation to the imposition of “additional payments”).⁴⁶⁰ After implementation of the 2011 Directive in UK law by the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) (the “2013 Regulations”),⁴⁶¹ these regulations contain the general and most important information and cancellation provisions governing consumer contracts. However, there are other, special provisions governing particular categories of contract: “distance contracts” for the supply of financial services,⁴⁶² timeshare,⁴⁶³ package travel⁴⁶⁴ and contracts concluded by electronic means.⁴⁶⁵ There are also information requirements imposed on traders in relation to alternative dispute resolution (ADR).⁴⁶⁶ This section will focus on the [2013 Regulations](#), but its final paragraphs will outline the legislation governing these special categories.⁴⁶⁷

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

- 40-064 The UK implemented most (though not all) of the requirements of the Consumer Rights Directive by the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) (the “2013 Regulations”).

U The [2013 Regulations](#) therefore revoked and replaced earlier UK regulations implementing the directives which the 2011 Directive itself replaced, the [Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations 2008](#)⁴⁶⁹ and the [Consumer Protection \(Distance Selling\) Regulations 2000](#).⁴⁷⁰ This section will principally explain the provisions of the [2013 Regulations](#) governing information and cancellation,⁴⁷¹ and will note the special rules governing, for example, timeshare contracts,⁴⁷² but will leave until later in this chapter the UK's legislation implementing the Consumer Rights Directive's requirements other than those relating to information and cancellation.⁴⁷³ As yet there is little case-law on either the 2011 Directive or the [2013 Regulations](#), but, where still relevant, reference will be made to European and English case-law on the directives and regulations which they respectively replaced.

“Full harmonisation” with qualifications

- 40-065 The Consumer Rights Directive makes clear that, in principle, it requires “full harmonisation” of the matters within its scope, but adds “unless otherwise provided for in this Directive”.⁴⁷⁴ There are a number of matters which remain required only as a matter of “minimum harmonisation”, notably, the information requirements imposed on traders where the contracts which they conclude with consumers are neither off-premises contracts nor distance contracts⁴⁷⁵ (termed “on-premises contracts” by the [2013 Regulations](#)⁴⁷⁶) and the 2011 Directive also provides expressly for options for Member States in relation to some of its provisions. For example, while in the case of the effect of cancellation by a consumer on “ancillary contracts” the Directive provides the general rule that cancellation shall automatically terminate such ancillary contracts “without any costs for the consumer”, it adds that “Member States shall lay down detailed rules on the termination of such contracts”.⁴⁷⁷ The following discussion will explain how the [2013 Regulations](#) relate to the underlying provisions in the 2011 Directive only where this is relevant to their interpretation or application.

Autonomous interpretations and “national general contract law”

- 40-066 Article 3(5) of the Consumer Rights Directive states that:

“This Directive shall not affect national general contract law such as the rules on the validity, formation or effect of a contract, in so far as general contract law aspects are not regulated in this Directive.”

This provision is contained within an article entitled “scope” and, at first sight, resembles closely art.3(2) of the Unfair Commercial Practices Directive 2005 which states that it is “without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract”.⁴⁷⁸ It is true that art.3(5) of the Consumer Rights Directive and art.3(2) of the Unfair Commercial Practices Directive rest on a distinction between “(general) contract law” and other aspects of their respective requirements (and notably the compliance measures for the enforcement of the duties and prohibitions imposed on traders⁴⁷⁹), but the functions of the two provisions differ significantly. For while art.3(2) of the Unfair Commercial Practices Directive excludes “contract law” entirely from its scope and, therefore, from the impact of the full harmonisation which the 2005 Directive generally imposes in respect of its prohibitions on unfair commercial practices business-to-consumer,⁴⁸⁰ art.3(5) of the 2011 Directive implicitly acknowledges that *some* of its provisions *do* regulate “(general) contract law”. As Recital 14 to the 2011 Directive explains:

“This Directive should not affect national law in the area of contract law for contract law aspects that are not regulated by this Directive. Therefore, this Directive should be without prejudice to national law regulating for instance the conclusion or the validity of a contract (for instance in the case of lack of consent). Similarly, this Directive should not affect national law in relation to the general contractual legal remedies, the rules on public economic order, for instance rules on excessive or extortionate prices, and the rules on unethical legal transactions.”

So, art.3(5) of the 2011 Directive does not put aside “contract law” from its scope, but rather specifies that “contract law” issues raised by its own provisions (and therefore within its scope) but *not regulated* by it, are to be regulated by “national general contract law”. The 2011 Directive therefore expressly allocates this category of unregulated contractual issues to national law with the result that, under its own case-law, the Court of Justice of the EU should not seek to construct “autonomous” European views as to these issues.⁴⁸¹ This was confirmed by the Court of Justice in *Stichting Waternet v MG*, decided after IP completion day.⁴⁸² There, under national law a water company had an exclusive right and obligations relating to the connection of the domestic supply of water in a designated area. The company had supplied water to a householder who had not informed the company that he was moving into a house in the company’s area. The Court held that it was for national law to determine whether the supply of water by the company to the householder was contractual in the absence of the latter’s express consent, and that the provision of the 2011 Directive governing inertia selling do not regulate the formation of contracts.⁴⁸³ It will be seen, therefore, that the 2011 Directive’s allocation of “unregulated” contractual issues to national contract law has a direct impact on the way in which the *2013 Regulations* are to be interpreted and applied.

Contract law issues regulated by the 2011 Directive

- 40-067 Three examples may be provided of issues of contract law regulated by the 2011 Directive. A first example may be found in the provision stating that information given by traders to consumers before the consumer is bound by an off-premises or distance contract in performance of the duties which the Directive imposes “shall form an integral part” of the contract in question “and shall not be altered unless the contracting parties expressly agree otherwise”. ⁴⁸⁴ A second set of examples may be found in the Directive’s provisions that the exercise by a consumer of a right of cancellation “shall terminate the obligations of the parties … to perform the distance or off-premises contract” ⁴⁸⁵ with consequential obligations for both the trader and the consumer. ⁴⁸⁶ A third possible example may be found in relation to inertia selling, which had earlier been prohibited when practiced business-to-consumer by the Unfair Commercial Practices Directive 2005. ⁴⁸⁷ Given that the 2005 Directive did not create any contractual remedy in respect of this practice, the 2011 Directive required that the “consumer shall be exempted from the obligation to provide any consideration in cases of unsolicited supply of goods” ⁴⁸⁸ and according to its preamble, the Directive thereby introduced “the contractual remedy of exempting the consumer from the obligation to provide any consideration for such unsolicited supply or provision”. ⁴⁸⁹ It may be doubted, though, whether such a “remedy” is contractual in the usual sense of one arising from a contract given that an unsolicited supply of goods arises only in the absence of consent by the consumer. ⁴⁹⁰

Contract law issues within the 2011 Directive but not regulated by it

- 40-068 Recital 14 of the 2011 Directive quoted above refers to the conclusion or validity of a contract on the ground of lack of consent as examples of contract law aspects not regulated by its provisions which are therefore left to national contract law. ⁴⁹¹ This is relevant to the Directive’s central provisions which require traders to provide consumers with information “[b]efore the consumer is bound by a contract … or any corresponding offer”, ⁴⁹² as the issues whether and, if so, when the consumer is so bound are not regulated by the Directive itself; these issues therefore fall to be determined by the common law rules governing the conclusion of a contract. ⁴⁹³ In this respect, while the 2011 Directive refers to the possibility of a consumer being bound by an *offer* (as is recognised in some European national laws ⁴⁹⁴), the **2013 Regulations** reflect the general English common law position that a person is not bound by an offer until it is accepted, thereby concluding a contract. ⁴⁹⁵

Mandatory nature of 2013 Regulations

- 40-069 While the [2013 Regulations](#) do not themselves provide that the information requirements which they impose are mandatory, the Consumer Rights Directive does so, providing that where the law applicable to the contract is the law of a Member State, “consumers may not waive the rights conferred on them by the national measures transposing” the Directive.⁴⁹⁶ The Directive further provides that any contract terms “which directly or indirectly waive or restrict the rights resulting” from it “shall not be binding on the consumer”.⁴⁹⁷ As a result, and following the principle of the conforming interpretation of national measures implementing a directive,⁴⁹⁸ any contract term seeking to exclude or restrict the trader’s duties of information or any of the legal consequences set out by the [2013 Regulations](#) for the provision of or failure to provide information which they require would not be binding on a consumer.⁴⁹⁹ Similarly, any mere waiver by the consumers of their rights under the Regulations would not be binding on them.⁵⁰⁰ What is less clear, however, is whether the waiver provisions in the directive also apply to waiver of the consumer’s rights after they have arisen, especially if that waiver forms part of a wider settlement agreement.⁵⁰¹

Express consent or agreement of consumer

- 40-070 On the other hand, a number of provisions in the Regulations set out the legal position which would apply to a situation generally, but then provide for a different position if the consumer expressly agrees with the trader, or requests or consents otherwise. This is the case, for example, as regards any change to the information supplied by the trader before concluding a contract which must be “expressly agreed between the consumer and the trader”,⁵⁰² an express choice of a more expensive kind of delivery of goods,⁵⁰³ and an express request by the consumer for services to be supplied before the end of the cancellation period,⁵⁰⁴ and an express consent by the consumer for digital content to be supplied before the end of the cancellation period.⁵⁰⁵ These examples are all expressly foreseen by the 2011 Directive and therefore form qualifications on the mandatory nature of its provisions.

Duty of court in relation to compliance with information duties

- 40-071 The Court of Justice of the EU has held that the purpose of consumer protection pursued by a number of directives requires national courts to raise of their own motion issues relating to possible rights for the consumer under national laws implementing those directives.⁵⁰⁶ In *Radlinger*

v Finway a.s.⁵⁰⁷ the Court of Justice applied this case-law to the context of the information requirements imposed on traders to consumers by the Consumer Credit Directive 2008. The particular justification for such a duty as regards information requirements was that the consumer is in

“... a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge, which leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms.”⁵⁰⁸

The Court of Justice continued:

“In that regard, information, before and at the time of concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is, in particular, on the basis of that information that the consumer decides whether he wishes to be bound by the conditions drafted in advance by the seller or supplier.”⁵⁰⁹

There is a real risk, moreover, that the consumer may not rely on a legal rule protecting him owing to lack of awareness.⁵¹⁰ Effective consumer protection therefore requires national courts to consider whether the information duties in the 2008 Directive have been complied with and, if that have not, they must draw all the consequences provided by national law, in the context, as regards penalties imposed as required by that directive.⁵¹¹ It is submitted that this reasoning applies by analogy to other information requirements imposed on traders by EU directives for the benefit of consumers and, therefore, that the Court of Justice would equally require national courts to raise the question whether these other information requirements have been fulfilled and, if not, with what effect. As regards the position relating to the [2013 Regulations](#), although there was no decision of the Court of Justice before IP completion day on the duty of national courts in relation to the information duties required by the Consumer Rights Directive (which the [2013 Regulations](#) implemented) and therefore no “decision” of the European Court to be retained.⁵¹² However, the Court of Justice justified its decisions in the context of other consumer directives by reference to the need to protect consumers as weaker and less knowledgeable parties in a way which applies equally to other directives requiring information for consumers: these earlier decisions could, therefore, count as the laying down by the Court of a “principle laid down” so as to form part of “retained EU case-law” on this basis.⁵¹³ If this line of reasoning holds good, the special role of UK courts in relation to information duties must be borne in mind when considering the range of legal consequences of non-compliance with the information requirements under the [2013 Regulations](#).⁵¹⁴

Footnotes

- 444 Weatherill, EU Consumer Law and Policy, 2nd edn (2013), Ch.4.
- 445 cf. though, the important controls on unfair contract terms put in place by Directive 93/13/EEC on unfair terms in consumer contracts, below, para.[40-224](#).
- 446 Weatherill, EU Consumer Law and Policy, 2nd edn (2013), p.92, who also considers criticisms of this technique.
- 447 Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises [1985] O.J. L372/31 (“Doorstep Selling Directive 1985”).
- 448 Directive 97/7/EC on the protection of consumers in respect of distance contracts [1997] O.J. L144/19; Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16.
- 449 Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, revoked and replaced by the Timeshare Directive 2008/122/EC (“Timeshare Directive 2009”), below, paras [40-157](#) et seq.
- 450 Directive 90/314/EEC on package travel, package holidays and package tours repealed and replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1 and see below, paras [40-144](#) et seq. esp. at paras [40-146](#) and [40-152](#).
- ④51 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”) [2000] O.J. L178/1 art.10. This requirement was implemented in UK law by the [Electronic Commerce \(EC Directive\) Regulations 2002 \(SI 2002/2013\)](#), below, para.[40-165](#). The Trade and Cooperation Agreement 2020 concluded by the UK and EU art.208 (formerly art.DIGIT.13) Online consumer trust requires suppliers of goods or services to provide consumers engaging in electronic commerce transactions with clear and thorough information. It is submitted that this requirement reflects existing provisions of UK law in the [Electronic Commerce \(EC Directive\) Regulations 2002 \(SI 2002/2013\)](#) (on which see below, para.[40-165](#)) and the [2013 Regulations](#) (especially in relation to “distance contracts” (below, paras [40-089](#), [40-099](#)—[40-102](#))). On the Trade and Cooperation Agreement 2020 and its implementation in UK domestic law, see Vol.I, para.[1-030](#). The UK government has announced its intention of introducing legislative changes to enhance the protection of consumers who have taken out subscriptions, including as regards pre-contractual information: Secretary of State for Business, Energy and Industrial Strategy, Reforming competition and consumer policy, CP 656 (20 April 2022) Ch.2.
- 452 The EU directives refer here to “withdrawal” rather than “cancellation” of a contract, but the relevant UK secondary legislation refers to “cancellation” when the directives refer to “withdrawal” and instead use “withdrawal” to describe a consumer’s right to revoke his offer: [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations](#)

- 2013 (SI 2013/3134) (“2013 Regulations”) regs 29(3), 32(1), 33, 34 and 38 and see below, para.40-116. This chapter will follow the usage in these UK regulations.
- 453 Weatherill, EU Consumer Law and Policy, 2nd edn (2013), p.92.
- 454 Timeshare Directive 2009 recital 11.
- 455 Directive 97/7/EC recital 14 and see similarly Consumer Rights Directive 2011 recital 37.
- 456 Directive 85/577/EEC recital 3 and see similarly Consumer Rights Directive 2011 recital 37 which refers also to the risk of psychological pressure. See also *Martín Martín v EDP Editores SL (C-227/08) EU:C:2009:792, [2009] E.C.R. I-11939* para.22 where the ECJ stated that the Doorstep Selling Directive was “designed to protect consumers against the risks inherent in the conclusion of contracts away from business premises … as the special feature of those contracts is that as a rule it is the trader who initiates the contract negotiations, and the consumer has not prepared for such door-to-door selling by, inter alia, comparing the price and quality of the different offers available”, a passage relied on by the SC in *Roberton v Swift [2014] UKSC 50, [2014] 1 W.L.R. 3438* at [9]. The ECJ has held that where a consumer was in one of the situations of “doorstep selling” as set out by the Doorstep Selling Directive 1985, then he enjoyed a right of renunciation of the contract even though “specific conduct or an intention to manipulate on the part of the trader” are not established: *Travel Vac SL v Antelm Sanchis (C-423/97) EU:C:1999:197, [1999] E.C.R. I-2195* at para.43.
- 457 Directive 85/577/EEC art.8; Directive 97/7/EC art.14; Directive 94/47/EC art.11. On the significance of “minimum harmonisation” generally see above, paras 40-023—40-024.
- 458 The 2011 Directive is subject to considerable amendment by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 … as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 art.4, including requiring new definitions of “sales contract” and “service contract”, additional specific information requirements for contracts concluded on online marketplaces and making more elaborate provision on penalties. However, as the 2019 Directive must be implemented by Member States on 28 November 2021 (i.e. after IP completion day) the UK is not required to implement these changes: see above, para.40-004 and Vol.I, para.1-019. The changes at the EU level required by this directive will, however, be noted in the footnotes to the following paragraphs for reference.
- 459 These remain governed by Directive 2002/65/EC on which see below, para.40-143.
- 460 Consumer Rights Directive 2011 Ch.IV “Other Consumer Rights”. On the 2011 Directive generally see European Commission, DG Justice Guidance Document concerning Directive 2011/83/EU, etc. (June 2014) (“DG Justice Guidance Document on 2011 Directive”) available at http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf [Accessed 1 September 2021]. See also European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU, COM(2017) 259 final (with accompanying Commission Staff Working Document SWD (2017) 169 final). In *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV v Amazon EU Sarl (C-649/17) EU:C:2019:576, 10 July 2019* esp. at para.44, the CJEU observed that, where an information requirement in the Directive was not clear, in determining its proper interpretation it was necessary to “ensure the right balance between a high level of consumer

protection and the competitiveness of undertakings, as stated in recital 4 [of the Directive] while respecting the undertaking’s freedom to conduct a business, as set out in Article 16 of the Charter [of Fundamental Rights]”. The Charter of Fundamental Rights does not form part of UK domestic law after IP completion day, but this does “not affect the retention in domestic law on or after IP completion day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case-law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles)”: European Union (Withdrawal) Act 2018 s.5(4) and (5) and Vol.I, para.1-021 (note).

461 SI 2013/3134.

462 Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) below, para.40-143.

463 Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) below, paras 40-157—40-163.

464 The Package Travel and Linked Travel Arrangements Regulations 2018 (SI 2018/634) revoking and replacing the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288); see below, paras 40-144—40-156.

465 Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) reg.9, below, para.40-165. There are two further situations foreseen by the Consumer Rights Act 2015 in which traders must provide information to consumers and others. First, ss.83–88 (as amended in particular by the Tenant Fees Act 2019) impose a duty on letting agents to publicise their fees, though the enforcement measures provided by s.87 of the Act do not affect the validity of any contract made. Secondly, ss.90–95 (as amended by the Digital Economy Act 2017 s.105 as from 6 April 2018) impose on persons who resell tickets for a recreational, sporting or cultural event in the UK through a secondary ticketing facility a number of information duties (e.g. as to the ticket, the venue, etc.), prohibit the original seller from cancelling resold tickets or blacklisting persons reselling (in both cases subject to conditions), but again the enforcement measures provided by s.93 do not affect the validity of any contract made.

466 Directive 2013/11/EU of 31 May 2013 on alternative dispute resolution for consumer disputes [2013] O.J. L165/63, below, para.40-164.

467 See below, paras 40-142 et seq.

④ 468 SI 2013/3134 (in force 13 June 2014). These regulations were subject to very minor amendment on IP completion day: Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.8 (the reference in reg.1(3) to reg.8’s coming into force on “exit day” must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 ss.39(1), 41(4) and Sch.5 para.1: on IP completion day see above, para.40-004 and Vol.I, para.1-021. The Consumer Rights Act 2015 ss.11(4) and (5), 12 (goods contracts), s.36(3) and (4), 37 (digital content contracts) and s.50 (services contracts) gave effect to the Consumer Rights Directive 2011 art.6(5)’s requirement that information provided by traders as required by the 2011 Directive (in relation to off-premises and distance contracts) forms part of the contract: see below, paras 40-108, 40-501—40-502, 40-552—40-553 and 40-579. The Consumer Rights (Payment Surcharges) Regulations 2012

- (SI 2012/3110) (as amended by the [Payment Services Regulations 2017 \(SI 2017/752\)](#)) gave effect to the Consumer Rights Directive 2011 art.19 on which see below, para.[40-456](#).
- 469 SI 2008/1816, itself replacing [Consumer Protection \(Cancellation of Contracts Concluded away from Business Premises\) Regulations 1987 \(SI 1987/2117\)](#) implementing the Directive 85/577/EEC. The [2008 Regulations \(SI 2008/1816\)](#) therefore do not apply to contracts entered into on or after 13 June 2014, being the date of coming into force of the [2013 Regulations: 2013 Regulations reg.2\(b\)](#).
- 470 SI 2000/2334 implementing Directive 97/7/EC. The [2000 Regulations \(SI 2000/2334\)](#) therefore do not apply to contracts entered into on or after 13 June 2014, being the date of coming into force of the [2013 Regulations: 2013 Regulations reg.2\(a\)](#).
- 471 They also note the earlier provisions governing information and cancellation in the [Financial Services \(Distance Marketing\) Regulations 2004 \(SI 2004/2095\)](#) which implemented the Distance Contracts for Financial Services Directive 2002 [2002] O.J. L271/16. On these regulations see below, para.[40-143](#).
- 472 See below, paras [40-157](#) et seq.
- 473 The Consumer Rights Directive's provisions (arts 18 and 20) on delivery of goods and the passing of risk in "sales contracts" were implemented in UK law first by the [2013 Regulations](#) [regs 42](#) and [43](#), but were reimplemented by the [Consumer Rights Act 2015](#) ss.[28](#) and [29](#). The Consumer Rights Directive's provisions on fees for the use of means of payment (art.19) were implemented by the [Consumer Rights \(Payment Surcharges\) Regulations 2012 \(SI 2012/3110\)](#) (on which see below, para.[40-456](#)) and its provision on "communication by telephone", "additional payments" and inertia selling (arts 21, 22 and 27 respectively) were implemented by the [2013 Regulations](#) [regs 41](#), [40](#) and [39](#) respectively (on which see below, paras [40-458](#)—[40-459](#)).
- 474 Consumer Rights Directive 2011 art.4.
- 475 Consumer Rights Directive 2011 art.5(4).
- 476 [2013 Regulations](#) [reg.5](#) "on-premises contract".
- 477 Consumer Rights Directive 2011 art.15. Further examples may be found in art.6(7) (language requirements) and art.7(4) (off-premises contracts concerning certain works of repairs or maintenance where payment does not exceed €200).
- 478 Directive 2005/29/EC art.3(2), on which see Whittaker in Weatherill and Bernitz (eds), [The Regulation of Unfair Commercial Practices under EC Directive 2005/29, New Rules and New Techniques](#) (2007), Ch.8 and below, para.[40-169](#). The guidance provided by the European Commission on art.3(5)'s application is limited, as it provides merely two particular examples ("if national contract law makes it possible for rights and obligations under an existing contract to be transferred from one consumer to another, no new contract would be concluded to which the Directive would apply" and "how a trader may enforce a consumer's liability for the diminished value of the goods under art.14(2)": DG Justice Guidance Document on 2011 Directive, paras 2.7 and 6.4.4. respectively).
- 479 Consumer Rights Directive 2011, especially arts 23–24. The central example of the duties on traders to be so enforced are found in relation to duties of information under arts 5 and 6.
- 480 Unfair Commercial Practices Directive 2005 arts 4, 5 and 11 and see above, para.[40-027](#) and below paras [40-453](#)—[40-455](#) on the significance of this for aspects of the [Consumer](#)

Rights Act 2015. Article 3(2) of the 2005 Directive does not prevent Member States from giving “contract law” significance to its provisions, as the UK did in 2014 by amending the [Consumer Protection from Unfair Trading Regulations 2008 \(SI 2008/1277\)](#) by the [Consumer Protection \(Amendment\) Regulations 2014 \(SI 2014/870\)](#) inserting, notably, new Pt 4A Consumers’ Rights to Redress, on which see below, paras 40-181 et seq.

- 481 cf. above, para.[40-016](#). Presumably, however, this allocation of contract issues left unregulated by the 2011 Directive to national contract law would be subject to the general principles of EU law, notably, the principle of effectiveness. cf. for this purpose, the approach of the CJEU to the principle of the autonomy of national procedural law, above, paras [40-020](#)—[40-021](#).
- 482 *Stichting Waternet v MG (C-922/19) EU:C:2021:91, 3 February 2021 (“Stichting Waternet v MG (C-922/19)”).* On the significance of its decision after IP completion day, see above para.[40-004](#) and Vol.I, para.[1-029](#).
- 483 *Stichting Waternet v MG (C-922/19)* at paras 41–46.
- 484 Consumer Rights Directive 2011 art.6(5). On this see below, para.[40-108](#).
- 485 Consumer Rights Directive 2011 art.12(a) (referring to “withdrawal” rather than “cancellation”, on which see below, para.[40-068](#)).
- 486 Consumer Rights Directive 2011 arts 13 and 14.
- 487 Consumer Rights Directive 2011 art.27; Unfair Commercial Practices Directive 2005 2005/29/EC art.5(5), Annex point 29, implemented in UK law by the [Consumer Protection from Unfair Trading Regulations 2008 \(SI 2008/1277\)](#) reg.3(4)(d), Sch.1 para.29.
- 488 Consumer Rights Directive 2011 art.27. This change was effected in UK law by insertion of the [Consumer Protection from Unfair Trading Regulations 2008 \(SI 2008/1277\)](#) reg.27M by the [2013 Regulations](#) reg.[39](#) (as itself renumbered by SI 2014/870).
- 489 Consumer Rights Directive 2011 recital 60.
- 490 Consumer Rights Directive 2011 art.27. The CJEU has ruled that the question whether the supply of goods or services without the express consent of the consumer is “contractual” is a matter for national law: *Stichting Waternet v MG (C-922/19) 3 February 2021 EU:C:2021:91* at paras 41–46 (decided after IP completion day, on the significance of which see above, para.[40-004](#) and Vol.I, para.[1-029](#)).
- 491 Above, para.[40-066](#).
- 492 Consumer Rights Directive 2011 arts 5(1) and 6(1) and see the [2013 Regulations](#) regs 9(1), [\(10\)\(1\)](#) and [12\(1\)](#).
- 493 See Vol.I, Ch.4. Examples in relation to the earlier [Cancellation of Contracts made in a Consumer’s Home or Place of Work, etc. Regulations 2008 \(SI 2008/1816\)](#) may be found in *Cox v Woodlands Manor Care Home Ltd [2015] EWCA Civ 415, [2015] 3 Costs L.O. 327*, where the Court of Appeal held that a conditional fee agreement had been made at a consumer’s home where it was signed, even though it was subject to a condition depending on the possibility of funding from legal expenses insurance and *Howes Percival Ltd v Page [2013] EWHC 4104 (Ch)* at [237] unreported where it was held to be “little more than happenstance” that one of the meetings between parties took place at the consumers’ home, neither the contract nor an offer being made there.

- 494 e.g. French law where the *Code civil* so provides: arts 1114–1116 C. civ. (as created by *Ordonnance* No.2016/131 of 10 February 2016).
- 495 See Vol.I, para.[4-114](#). Following its earlier pattern in arts 5(1) and 6(1), the 2011 Directive later provides for the effects of consumer withdrawal from the contract in cases of concluded contracts and “in cases where an offer was made by the consumer”: art.12. In implementing these provisions, the UK Regulations distinguish between a consumer’s right of *cancellation of his contract* (following here the 2011 Directive’s provisions to this effect) and the possibility of a consumer *withdrawing his offer*. In the case of the latter, the circumstances in which a consumer can withdraw his offer will be set by the common law, but the [2013 Regulations](#) (following the 2011 Directive) set some of the effects of the consumer’s exercise of such a power of withdrawal, notably, as to recovery of any sums paid in advance: below, para.[40-126](#).
- 496 2011 Directive art.25, first sentence. The Department of Business Innovation & Skills, Directive 2011/83/EU on consumer rights, Draft Transposition Note (August 2013) p.14 states that “no specific implementation” is required for 2011 Directive art.25 as the provisions of the Regulations are mandatory. cf. the express provisions on “no contracting-out” in the [Consumer Protection \(Distance Selling\) Regulations 2000 \(SI 2000/2334\) reg.25](#) and the [Cancellation of Contracts made in a Consumer’s Home or Place of Work, etc. Regulations 2008 \(SI 2008/1816\) reg.15](#). The 2011 Directive makes no explicit anti-avoidance provision as regards choice of applicable law (unlike, e.g. the Unfair Terms in Consumer Contracts Directive 1993 art.6(2), below, para.[40-439](#)) with the result that the controls on choice of law are those generally applicable under the Rome I Regulation arts 3 and 6: see Vol.I paras [33-083](#) et seq. and [33-109](#) et seq.
- 497 2011 Directive art.25, second sentence.
- 498 Above, para.[40-015](#).
- 499 cf. the position as regards information actually supplied by the trader which, under the [Consumer Rights Act 2015](#), is treated as included as a term of the contract, liability for breach is subjected to stringent controls by the same Act: [2015 Act ss.11\(3\), 12, and 31\(1\)\(c\) and \(d\)](#) (goods contracts) below, para.[40-535](#); [s.36\(3\), 37](#) and [47\(1\)\(c\) and \(d\)](#) (digital content contracts), below, para.[40-543](#); and [s.50\(3\)](#) and [57\(2\)](#) (services contracts), below, paras [40-589—40-591](#).
- 500 See below, para.[40-123](#).
- 501 See below, para.[40-123](#) and cf. on consumer settlement agreements in the context of unfair contract terms, below, para.[40-406](#).
- 502 [2013 Regulations reg.9\(4\)](#) (on-premises contracts); [reg.10\(6\)](#) (off-premises contracts) and [13\(7\)](#) (distance contracts), below, para.[40-108](#).
- 503 [2013 Regulations reg.34\(2\)](#), below, para.[40-127](#).
- 504 [Regulations reg.36\(1\)](#).
- 505 [2013 Regulations reg.37\(1\)](#) and see below, para.[40-118](#). Other examples are found in [reg.11\(2\)](#) (consumer expressly agrees for information to be on another durable medium rather than on paper in the case of off-premises contracts in connection with repair or maintenance); and [reg.34\(7\)](#) (express agreement of consumer to different means of payment for reimbursement of payments made). cf. *Stichting Waternet v MG (C-922/19) 3 February 2021 EU:C:2021:91*

at paras 55–59 on the importance that any consent of a consumer to as supply of goods or services is free and informed in the context of the prohibition of inertia selling by the 2005 Directive Annex 1 para.29 (the case was decided after IP completion day, on the significance of which see above, para.[40-004](#) and Vol.I, para.[1-029](#)).

506 Above, paras [40-020](#)—[40-022](#).

507 *C-377/14 21 April 2016 (“Radlinger (C-377/14)”)*.

508 *Radlinger (C-377/14)* at para.63, referring to *ERSTE Bank Hungary Zrt v Sugár (C-32/14)* EU:C:2015:637, 1 October 2015 at para.39 (which concerned the 1993 Directive).

509 *Radlinger (C-377/14)* at para.64, referring to *Constructora Principado SA v Menéndez Álvarez (C-226/12)* EU:C:2014:10, 16 January 2014 at para.25 (which concerned the 1993 Directive).

510 *Radlinger (C-377/14)* at paras 65, 70 and 74 (an obligation and not merely a power).

511 *Radlinger (C-377/14)* at para.73.

512 European Union (Withdrawal) Act 2018 s.6(3) and see the definition of “retained EU case-law” in s.6(7); cf. above, para.[40-004](#).

513 See the definition of “retained EU case-law” in s.6(7) of 2018 Act.

514 See below, paras [40-107](#) et seq.

(i) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(b) - Contracts Covered by the 2013 Regulations

(i) - Introduction

All consumer contracts

40-072 Article 3(1) of the 2011 Directive as enacted stated that:

U

“This Directive shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer. It shall also apply to contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.”⁵¹⁵

As a result, and although it is nowhere stated explicitly, the [2013 Regulations](#) also apply in principle to *all types of consumer contract*, defined by reference to their parties, although some provisions have a more restricted ambit.⁵¹⁶ For this purpose, the [2013 Regulations](#) use the standard definitions of “trader” and of “consumer” adopted by recent UK consumer law:

“... ‘consumer’ means an individual acting for purposes that are wholly or mainly outside the individual’s trade, business, craft or profession.”⁵¹⁷

“... ‘trader’ means a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf.”

518



“... ‘business’ includes the activities of any government department or local or public authority.”⁵¹⁹

The background to these definitions and their likely significance have already been discussed.⁵²⁰

“A contractual basis”

- 40-073 As just noted, art.3(1) of the 2011 Directive specifically includes within its scope:

“... contracts for the supply of water, gas, electricity or district heating, including by public providers, to the extent that these commodities are provided on a contractual basis.”

This statement reinforces the definition of “trader”, which includes a “legal person, irrespective of whether privately or publicly owned”,⁵²¹ but it also makes a further point, that is, that these commodities must be supplied under a *contract*, as distinct from, in particular, a public law or statutory basis. Given that the Directive does not explain for these purposes what *contractual basis* means, it would appear that art.3(5)’s allocation of contract law issues raised (but not regulated) by the Directive to national contract law would include the issue whether these commodities are supplied under a “contract”, rather than determining this issue on the basis of an autonomous view of “contract” and this has indeed been confirmed by the Court of Justice of the EU (though after IP completion day) in the context of the public domestic supply of water.⁵²² In English law where commodities are supplied under a statutory duty to do so, the courts have held this supply to be non-contractual.⁵²³ Depending on the current statutory regime of supply, it would follow that the supply of a commodity may be held non-contractual so that the **2013 Regulations** would not apply.

Distinctions according to the circumstances in which the contracts are made

- 40-074 Within the broad category of consumer contracts, the most prominent distinction in the **2013 Regulations** is between “off-premises contracts”, “distance contracts” and “on-premises contracts”, all three of which are defined by reference to the circumstances in which they are

concluded, as well as by the status of their parties. The detailed definitions of each of these categories will be set out later,⁵²⁴ but at this stage it is helpful to note that “on-premises contracts” is a residual category, defined simply as “a contract between a trader and a consumer which is neither a distance contract nor an off-premises contract”.⁵²⁵

Footnotes

- 515 This provision is amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 art.4(2)(a) so as to restrict the first sentence to contracts “where the consumer pays or undertakes to pay the price” and it is supplemented by new provision (art.11a of the 2011 Directive) concerning the supply to the consumer of digital content not supplied on a tangible medium or of a digital service. On the significance of the 2019 Directive for UK law, see above, para.[40-063](#) (note to heading).
- 516 cf. below para.[40-082](#) on the question whether the 2011 Directive (and therefore the [2013 Regulations](#)) apply (at least sometimes) to contracts consumer-to-business as well as business-to-consumer.
- 517 [2013 Regulations reg.4](#) “consumer”.
- ⑤18 [2013 Regulations reg.4](#) “trader”. In this respect, art.2(2) of the 2011 Directive (which was implemented by this definition in the [2013 Regulations](#)) has been interpreted to the effect that an intermediary who acts on behalf of a trader in concluding contracts with consumers is itself a trader simply by so acting and without itself also providing a service and that both, therefore, must fulfil the information requirements imposed by the 2011 Directive: *UAB ‘Tiketa’ v M. Š. (C-536/20) EU:C:2022:112*, 24 February 2022 at paras 26–36.
- 519 [2013 Regulations reg.5](#) “business”.
- 520 Above, paras [40-031](#)—[40-051](#), [40-052](#)—[40-061](#) respectively.
- 521 2011 Directive art.2(2), reflected in substance by the definition of “trader” and “business” in the [2013 Regulations](#) regs 4 and 5 respectively.
- 522 *Stichting Waternet v MG (C-922/19) EU:C:2021:91*, 3 February 2021; see also above, para.[40-068](#).
- 523 *Read v Croydon Corp [1938] 4 All E.R. 631*; *Norweb Plc v Dixon [1995] 1 W.L.R. 637* and see Vol.I, para.[2-012](#).
- 524 Below, paras [40-084](#)—[40-093](#).
- 525 [2013 Regulations reg.5](#) “on-premises contracts”.

(ii) - Subject Matter of the Contract

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(b) - Contracts Covered by the 2013 Regulations

(ii) - Subject Matter of the Contract

Distinctions according to the subject matter of the contract

40-075 The 2011 Directive which the [2013 Regulations](#) implemented distinguishes *four* categories of contract according to their subject matter: (i) sales contracts, (ii) services contracts, (iii) contracts for the supply of digital content not on a tangible medium,
[526](#)

U and (iv) contracts for the supply of water, gas or electricity where they are not put up for sale in a limited volume or set quantity, or district heating.⁵²⁷ However, this four-fold classification was not followed entirely by the [2013 Regulations](#), which instead include within “service contracts” the contracts falling within the Directive’s category (iv).⁵²⁸ As a result, the [2013 Regulations](#) distinguish between three distinct categories of consumer contract defined according to their subject matter and, at times, regulate them specially: “sales contracts”, “service contracts” and “contracts for the supply of digital content not on a tangible medium”.⁵²⁹ While it is nowhere clearly stated by the Regulations, it would seem clear from the requirements of the 2011 Directive, that the provisions in the Regulations which impose requirements on traders in respect of information apply to all these three types of contract, even though some of the elements of their definitions appear to be restricted to sales and services contracts.⁵³⁰ As will be seen, though, some of the rules governing consumer contracts apply only to sales contracts,⁵³¹ service contracts,⁵³² or contracts for the supply of digital content not on a tangible medium,⁵³³ and this three-fold distinction is particularly clear in the rules governing the commencement of the “normal period”

for cancellation in off-premises and distance contracts,⁵³⁴ and in the way in which some particular information requirements are described.⁵³⁵ As will later be explained, this three-fold distinction according to the subject matter of consumer contracts is also reflected in the [Consumer Rights Act 2015](#), though it is treated there differently.⁵³⁶

“Sales contract” and “service contract”

40-076 The [2013 Regulations](#) define “sales contract” as:

“... a contract under which a trader transfers or agrees to transfer the ownership of goods to a consumer and the consumer pays or agrees to pay the price, including any contract that has both goods and services as its object.”⁵³⁷

“Goods” for these purposes are defined as:

“... any tangible moveable items, but that includes water, gas and electricity if and only if they are put up for sale in a limited volume or set quantity”.⁵³⁸

“Service contract” is defined as:

“... a contract, other than a sales contract, under which a trader supplies or agrees to supply a service to a consumer and the consumer pays or agrees to pay the price.”⁵³⁹



And “service” is stated as including:

“(a)the supply of water, gas or electricity if they are not put up for sale in a limited volume or a set quantity, and

(b)the supply of district heating.”⁵⁴⁰

The Court of Justice of the EU has held in respect of the definitions of “sales contract” and “service contract” in the 2011 Directive art.2(5) and (6) as made

[541](#)

(which the 2008 Regulations implemented faithfully) that:

“The term ‘service contract’ is broadly defined ... as covering any contract other than a sales contract under which the trader supplies or undertakes to supply a service to

the consumer and the consumer pays or undertakes to pay the price thereof. It follows from the wording of that provision that that term must be understood as including all contracts which do not come within the scope of the term ‘sales contract’.”

⁵⁴²



As a result, the Court of Justice has held that as a contract under which a ticketing agent (not being itself the event organiser) agrees to transfer a “right of access to a leisure activity” does not involve a transfer of “goods”, it therefore “falls by default within the concept of ‘service contract’”.

⁵⁴³



Contracts for the supply of goods and services

- 40-077 It will be seen from the definition of “sales contract” set out above, that this category includes “any contract that has both goods and services as its object”. This appears to mean that the rules governing “sales contracts” rather than the rules governing “service contracts” apply to these mixed contracts. ⁵⁴⁴ At first sight, this would not follow recital 50 of the 2011 Directive, according to which:

“For contracts having as their object both goods and services, the rules provided for in this Directive on the return of goods should apply to the goods aspects and the compensation regime for services should apply to the services aspects.”

However, on turning to the relevant provisions in the [2013 Regulations](#), it will be seen that while [reg.35](#) governing the return of goods in the event of cancellation is restricted to “sales contracts”, the provisions in [reg.36](#) which set out the “compensation regime for services” supplied are not restricted to “service contracts” but rather to the situation where “a service has been supplied in the cancellation period”. ⁵⁴⁵ This therefore allows the nuanced approach required by the 2011 Directive to be applied under the [2013 Regulations](#).

Contracts for the supply of digital content

- 40-078



“Digital content” is defined by the [2013 Regulations](#) as “data which are produced and supplied in digital form”.

546

 As recital 19 to the 2011 Directive explains:

“Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means.”

547



However, neither the [2013 Regulations](#) nor the 2011 Directive define contracts for the supply of digital content even though they regulate them specially,

548

 but recital 19 explains that:

“If digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive.”

This fits with the definitions of “sales contracts” in both the Directive and the Regulations as the tangible medium would constitute “goods” (“tangible moveable item”) and the digital content would form an element of those goods.

549

 On the other hand, “contracts for digital content which is not supplied on a tangible medium” would not fall within the definition of sales contracts nor are they specifically included within service contracts, unlike contracts for the supply of water, gas or electricity where they are not put up for sale in a limited volume or set quantity, or district heating.

550

 Reflecting this view, the [2013 Regulations](#) make special provision governing this category of contract as regards the consumer’s loss of the right to cancel if he or she has consented to the beginning of performance.

551

 Moreover, in the view of the European Commission, the distinction drawn by recital 19 of the 2011 Directive between digital content supplied under a sales contract or services contract and digital content supplied in non-tangible digital form means that contracts for online digital content are subject to the Directive even if they do not involve the payment of a price by the consumer, as

there is no requirement as to contracts for the supply of digital content in digital form equivalent to the requirement of payment of a price as regards sales and service contracts.

552

U As the Commission acknowledged, this view leads not merely to a considerable expansion of the scope of the application of the Directive, but it also leads to the drawing of difficult lines as to the application of the Directive in relation to the free supply of digital content (i.e. without payment of a price), but the Commission argued that the Directive should not apply to online digital content provided by means of broadcasting of information on the internet “without the express conclusion of a contract” nor “in itself” to access to a website or a download from a website. In this respect, it may be that the Court of Justice would consider it necessary to find an autonomous definition of contract for this purpose, but it could hold that the definition of a “contract” should instead fall under art.3(5)’s general allocation of issues not governed by the Directive to “national general contract law” as earlier explained.

553

U Moreover, there remains a difficult line between the supply of free digital content online (which, according to the Commission, is covered by the Directive) and free online services, such as cloud storage or webmail, where the main contractual obligation of the trader is not to provide digital content but rather a service allowing the creation, processing, storing or sharing of data that is produced by a consumer.

554

U Such free online services are clearly not covered by the 2011 Directive (nor by the 2013 Regulations) since “service contracts” are defined as contracts for the supply of a service to the consumer in return for a price.

555

U In this respect, the position under the [Consumer Rights Act 2015](#) differs. The [2015 Act](#) identifies a distinct legislative category of “a contract for the supply of digital content” for the purposes of its own provisions in [Ch.3 of Pt 1](#), being “a contract for a trader to supply digital content to a consumer” where “it is supplied for a price paid by the consumer” or where:

“... it is supplied free with goods or services or other digital content for which the consumer pays a price, and ... it is not generally available to consumers unless they have paid a price for it or for goods or services or other digital content,”

556



where “price” is specially defined so as to include “the consumer using, by way of payment, any facility for which money has been paid”.

557

U This leaves contracts for the supply of digital content for some consideration other than for a price as so understood outside the provisions of Ch.3, but they may well fall within the scope of Ch.4's provisions on "services contracts" which (unlike the 2013 Regulations) are *not* defined so as to require the payment of a *price* by the consumer.

558

U And of course, where the digital content is supplied on a tangible medium (such as on a CD) which can count as "an item that includes digital content", then Ch.2's provisions on "goods contracts" may apply.

559

U

Exclusions from the scope of the 2013 Regulations

- 40-079 The 2013 Regulations exclude from their general scope a number of types of contracts and of contracts concluded in certain ways,⁵⁶⁰ as well as excluding certain types of contracts from their provisions requiring traders to give consumers information,⁵⁶¹ and from their provisions governing the consumer's right of cancellation.⁵⁶² In terms of exclusions from their general scope, reg.6 provides that the 2013 Regulations do not apply to gambling contracts⁵⁶³; contracts for services of a banking, credit, insurance, personal pension, investment or payment nature⁵⁶⁴; contracts for the creation of immovable property or of rights in immovable property⁵⁶⁵; contracts for rental of accommodation for residential purposes⁵⁶⁶; contracts for the construction of new buildings or the construction of substantially new buildings by the conversion of existing buildings⁵⁶⁷; contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household and which are supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace⁵⁶⁸; package travel within the meaning of the Package Travel and Linked Travel Arrangements Regulations 2018⁵⁶⁹; and regulated contracts within the meaning of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.⁵⁷⁰ Moreover, the 2013 Regulations do not apply to contracts concluded by means of automatic vending machines or automated commercial premises⁵⁷¹; contracts concluded with a telecommunications operator through a public telephone for the use of the telephone⁵⁷²; contracts concluded for the use of one single connection, by telephone, internet or fax, established by a consumer⁵⁷³; or to contracts under which goods are sold by way of execution or otherwise by authority of law.⁵⁷⁴ Finally, the Consumer Rights Directive 2011 (which the 2013 Regulations implemented) provides that:

“[i]f any provision of this Directive conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and shall apply to those specific sectors.”⁵⁷⁵

In making the [2013 Regulations](#), the UK government considered that “no specific implementation [was] required in national legislation” to implement this provision and that the [2013 Regulations](#) “do not preclude” the rule which it expresses.⁵⁷⁶ The possible effect of the provision in the Directive may be illustrated by reference to the decision of the Court of Justice in *Acea Energia SpA*, where the Court considered whether consumer protection rules in two sectoral directives governing the electricity and gas markets “conflicted” with the consumer protection rules governing the conclusion of distance contracts or off-premises contracts in the 2011 Directive, and held that they did not do so.⁵⁷⁷ If they had conflicted, however, this would in principle have prevented the application of the general controls in the national legislation which implemented the 2011 Directive.⁵⁷⁸

Contracts not excluded (or not excluded entirely) by the 2013 Regulations though excluded from the 2011 Directive

- 40-080 Contracts for social services, including social housing, childcare and support for families and persons permanently or temporarily in need, including long-term care are excluded from the 2011 Directive,⁵⁷⁹ but are not excluded from the [2013 Regulations](#).⁵⁸⁰ The 2011 Directive also excludes generally contracts for healthcare,⁵⁸¹ but the [2013 Regulations](#) exclude only contracts for the supply of a medicinal product by administration by a prescriber, or under a prescription or directions given by a prescriber or for the supply of a product by a health care professional in certain circumstances from the effect of its provisions governing information requirements and the consumer’s right of cancellation.⁵⁸²

Contracts for passenger transport services

- 40-081 While not excluded from the scope of the [2013 Regulations](#) as a whole,⁵⁸³ “contracts to the extent that they are for passenger transport services” are excluded from the provisions governing the consumer’s rights of cancellation⁵⁸⁴ and are excluded from their provisions governing information requirements, with the exception of requirements applicable to distance contracts concluded by electronic means.⁵⁸⁵ For this purpose, “contracts for the provision of transport services” in the predecessor to this exclusion in the Distance Contracts Directive⁵⁸⁶ was interpreted very broadly

by the European Court of Justice as referring to all contracts governing services in the field of transport and not merely to contracts of carriage, and as a result included a contract for hire of a car.⁵⁸⁷ However, recital 27 to the 2011 Directive explains that while passenger transport is generally excluded from the scope of the Directive,⁵⁸⁸ “in relation to transport of goods *and car rental which are services*, consumers should benefit” from the Directive’s protection, with the important exception of the right of cancellation.⁵⁸⁹ Moreover, even if the notion of a “contract for passenger transport services”⁵⁹⁰ in the part-exclusion from the scope of the 2011 Directive generally follows the interpretation earlier given to “contracts for the provision of transport services” by the Court in relation to the Distance Contracts Directive, it has been held not to cover a contract whose object is to entitle the consumer to a price reduction when passenger transport contracts are subsequently concluded (for example, a “rail card”).⁵⁹¹

Consumer-to-business contracts?

- 40-082 As noted above, the Consumer Rights Directive 2011 (which the [2013 Regulations](#) implemented) states that it “shall apply, under the conditions and to the extent set out in its provisions, to any contract concluded between a trader and a consumer”,⁵⁹² thereby expressing itself in a way which is neutral as to whether it is the trader or the consumer who supplies goods or services under a contract.⁵⁹³ The definitions of “trader” and “consumer” used by the 2011 Directive (and also the [2013 Regulations](#)) are equally neutral on this point.⁵⁹⁴ However, as has been seen, the definitions of “sales contract” and “service contract” are cast in terms under which the trader supplies the goods or services to the consumer and on this ground the European Commission has tentatively argued that the 2011 Directive does not apply to contracts under which the consumer transfers goods to a trader.⁵⁹⁵ On the other hand, the definitions of “off-premises contract”, “distance contract”, and “on-premises contract” differ as to whether they are expressed in a way which suggests that contracts under which a consumer supplies goods or services to a trader are included or excluded from their scope. The issue will therefore be addressed in the context of each category of contract in turn.⁵⁹⁶

Footnotes

- ⑤26 As the 2011 Directive recital 19 states: “[i]f digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive”. cf. *Software Incubator Ltd v Computer Associates UK Ltd [2018] EWCA Civ 518, [2018] 2 All E.R. (Comm) 398* where the CA held that a contract for the supply of software does not constitute a “sale of goods” for the purposes of the [Commercial Agents](#)

(Council Directive) Regulations 1993 (SI 1993/3053) which implemented Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] O.J. L382/17 (on which see generally below, paras 21-020 et seq.), but on a preliminary reference by the SC, the CJEU ((*C-410/19*) *EU:C:2021:742*, 16 September 2021 at paras 32–51) held that a contract for the supply of computer software together with a perpetual licence in return for payment of a fee *does* fall within the autonomous EU interpretation of “sale of goods” for the purposes of the 1986 Directive whether the software was supplied by electronic means or on a tangible medium, following its earlier case law holding that “goods” “is to be understood as meaning products which can be valued in money and which are capable, as such, of forming the subject of commercial transaction” (citing, at para.34, *Commission v Greece (C-65/05)* *EU:C:2006:673*, 26 October 2006 at para.23 in the context of the Treaty provisions on free movement of goods). (On the position of decisions of the CJEU after IP completion day on preliminary references pending before it on IP completion day see Vol.I, para.1-027 (note)).

- 527 This is made clear by recital 19, which states that the latter two types of contract “should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts”. This is then followed through by its definitions of “goods”, “sales contract” and “service contract” in art.2(3), (5) and (6) respectively. The definitions in the 2011 Directive are amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 (“Directive (EU) 2019/2161”) art.4(1). However, as the 2019 Directive must be implemented by Member States on 28 November 2021 (i.e. after IP completion day) the UK is not required to implement these changes: see above, para.40-004 and Vol.I, para.1-019.
- 528 2013 Regulations reg.5 “service”. This treatment in the 2013 Regulations is compatible with the 2011 Directive’s requirements as it applies the same rules to supplies of water, gas or electricity where they are not put up for sale in a limited volume, etc. as to services: arts 5(2), 7(3), 8(8), 9(2)(a) and (c), 14(4)(a) and 17(2).
- 529 “Tangible medium” is not explicitly defined by the Directive nor by the Regulations, but reg.5 defines “goods” as “any tangible moveable items, but that includes water, gas and electricity if and only if they are put up for sale in a limited volume or a set quantity”.
- 530 See notably, element (d) of the definition of “off-premises contract” in reg.5 which refers to the trader’s intended “selling goods or services to the consumer”; and the requirement in the definition of “distance contract” also in reg.5 that the contract should be concluded under “an organised distance sales or service-provision scheme”: for these, see below, paras 40-084—40-088, 40-089—40-092.
- 531 2013 Regulations reg.12(4)(a); reg.28(3) (below, para.40-115); reg.30(3)–(6) (below, para.40-120); reg.34(5) and (9) (below, para.40-117) and reg.35(1) (below, para.40-129).
- 532 2013 Regulations reg.30(2)(a) (below, para.40-076) and reg.36(2) (below, para.40-077).
- 533 2013 Regulations reg.12(5) (below, para.40-104), 16(3)(below, para.40-104), 30(2)(b) (below, para.40-120) and 37 (below, para.40-131).
- 534 2013 Regulations reg.30 (below, para.40-120).

- 535 2013 Regulations Sch.1 paras (a), (c), (e); Sch.2 paras (a), (f), (j), the references to “digital content” being added by SI 2014/870 reg.9(3) and (4).
- 536 Consumer Rights Act 2015 Pt 1 Ch.2 (goods contracts); Ch.3 (digital content contracts, though the exclusion from this category of digital content contracts supplied on a tangible medium is inherent in the definition of “goods contracts” and these contracts require a price, below, para.40-545) and Ch.4 (“services contracts”). In particular, the 2015 Act does not distinguish sharply as regards the different types of contract under which digital content is supplied, but rather allows its categories of contract (and therefore their regulation) to overlap (either with “goods contracts” or “services contracts”) as its subject matter requires. See below, paras 40-486, 40-506 and 40-547.
- 537 2013 Regulations reg.5 “sales contract” reflecting closely 2011 Directive art.2(5). The definition in the 2011 Directive is amended by Directive (EU) 2019/2161 art.4(1)(c) (on this directive generally see above, para.40-063 (note)). cf. Consumer Rights Act 2015 s.5, below, paras 40-488—40-490.
- 538 2013 Regulations reg.5 “goods”; 2011 Directive art.2(3). The definition in the 2011 Directive is amended by Directive (EU) 2019/2161 art.4(1)(a) (on this directive generally see above, para.40-063 (note)).
- 539 2013 Regulations reg.5 “service contract”; 2011 Directive art.2(6). The definition in the 2011 Directive is amended by Directive (EU) 2019/2161 art.4(1)(a) (on this directive generally see above, para.40-063 (note)). cf. Consumer Rights Act 2015 s.48, below, para.40-572.
- 540 2013 Regulations reg.5 “service”, picking up the explanation in 2011 Directive recital 25 of its own use of “service” in the definition of “service contract” in art.2(6). Recital 25 continues by noting that “district heating refers to the supply of heat, inter alia, in the form of steam or hot water, from a central source of production through a transmission and distribution system to multiple buildings, for the purpose of heating”. From the point of view of legislative drafting, the inclusion of these types of contract within “service contract” allows the Regulations to state the relevant cancellation period in a single provision (2013 Regulations reg.30(2)(a), on which see below, para.40-120) whereas the 2011 Directive makes specific provision for them which is identical to service contracts as more generally understood: Directive 2011/83/EU arts 9(2)(a) and (c). cf. the different treatment of “service contracts” under the Consumer Rights Act 2015 s.48, below, para.40-572.
- ⑤41 The definitions in the 2005 Directive were amended by Directive (EU) 2019/2161 art.4(1) (a) as explained in earlier notes in this paragraph.
- ⑤42 *NK v MS (C-208/19) EU:C:2020:382*, 14 May 2020 para.62. It is submitted, however, that this statement must be read in the context of the 2011 Directive recital 19’s explanation that “contracts for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, or of district heating, contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts”, on which see above, para.40-075 (note) and below para.40-078.

⑤43

CTS Eventim AG & Co KGaA (C-96/21) EU:C:2022:238, 31 March 2022 at paras 33 and 34.

- 544 See above, para.40-076. cf. DG Justice Guidance Document on 2011 Directive, para.2.2 which argues that contracts which contain elements of both goods and services should be classified either as “sales contracts” or “services contracts” depending on which element reflects their main purpose, relying in particular on case-law of the CJEU governing the Treaty provisions on free movement of goods and the freedom to provide services: *Burmanjer (C-20/03) EU:C:2005:307 [2005] E.C.R. I-4133* at paras 34–35.

- 545 2013 Regulations reg.36(3)–(6) (on which see below, paras 40-131—40-132). cf. reg.36(2) which concerns the loss of the consumer’s right to cancel a “service contract”.

- 546 2013 Regulations reg.5 “digital content”; 2011 Directive art.2(11). This definition was adopted by the *Consumer Rights Act 2015* s.2(9), below, para.40-544.

- 547 2011 Directive recital 19, first sentence.

- 548 2013 Regulations reg.12(5) (below, para.40-104); reg.16(3) (below, para.40-104); reg.30(2) and 30(6) (below, para.40-120); reg.37 (below, para.40-131). cf. *Consumer Rights Act 2015* s.33 which defines “contract to supply digital content” for the purpose of Ch.3 of the Act specially for its purposes: below, para.40-545. The position has changed at the EU level as a result of the amendments to the 2011 Directive provided by Directive (EU) 2019/2161 art.4 take effect. As recital 30 to Directive (EU) 2019/2161 explains, it aligns the definitions of digital content and digital services in the 2011 Directive with those contained in the recent Directive (EU) 2019/770 of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content and digital services and “[d]igital content covered by Directive (EU) 2019/770 covers a single act of supply, a series of individual acts of supply, or continuous supply over a period of time”. However, the UK does not require to implement these directives as they did not require to be implemented before IP completion day: on Directive 2019/2161 see above, para.40-063 (note); on Directive (EU) 2019/770 generally see below, para.40-464.

- 549 On which see above, para.40-076.

- 550 See above, para.40-076.

- 551 2013 Regulations reg.37; 2011 Directive art.14(4)(b) and see below, para.40-118.

- 552 DG Justice Guidance Document on 2011 Directive (2014), para.12.1. See also EU Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU (etc.) COM(2017) 259 final, para.5 noting that “some interested parties consider that the application of the [2011 Directive] to ‘free’ digital content is not absolutely clear”. This is reflected in the treatment of “digital content contracts other than for a price paid by the consumer” in the 2013 Regulations regs 9(3), 10(5) and 13(6), below, para.40-108 (note). Directive (EU) 2019/2161 art.4(2) changes this position at

the EU level by inserting a new art.3(1a) into the 2011 Directive so that it applies “where the trader supplies or undertakes to supply digital content which is not supplied on a tangible medium or a digital service to the consumer and the consumer provides or undertakes to provide personal data to the trader, except where the personal data provided by the consumer are exclusively processed by the trader for the purpose of supplying the digital content which is not supplied on a tangible medium or digital service in accordance with this Directive or for allowing the trader to comply with legal requirements to which the trader is subject, and the trader does not process those data for any other purpose”: on the 2019 Directive, see above, paras [40-063](#) (note) and [40-072](#) (note).

[①553](#) Above, paras [40-066](#)—[40-070](#) and [40-073](#).

[①554](#) EU Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU (etc.) COM(2017) 259 final, para.5 (arguing that the 2011 Directive should be amended so as to include such free online digital services).

[①555](#) 2011 Directive art.2(6); [2013 Regulations reg.5](#), above, para.[40-076](#).

[①556](#) [2015 Act s.33\(1\)](#) and [\(2\)](#), and see below, paras [40-545](#)—[40-546](#).

[①557](#) [2015 Act s.33\(3\)](#), below, para.[40-545](#).

[①558](#) [2015 Act s.48](#), below, para.[40-572](#); cf. [2013 Regulations reg.5](#) “service contract”, above, para.[40-076](#) and see above, para.[40-077](#).

[①559](#) See below, para.[40-489](#) and esp. in relation to [2015 Act s.16](#), below, para.[40-506](#).

[560](#) [2013 Regulations reg.6](#).

[561](#) [2013 Regulations reg.7\(2\)–\(4\)](#), below, para.[40-080](#). The information requirements for off-premises contracts are also excluded as regards repair or maintenance contracts” as defined: [2013 Regulations reg.11](#).

[562](#) [2013 Regulations regs 27\(2\)–\(3\), 28](#) on which see below, para.[40-115](#).

[563](#) [2013 Regulations reg.6\(1\)\(a\)](#) which explains this category.

[564](#) [2013 Regulations reg.6\(1\)\(b\)](#); 2011 Directive arts 2(12) and 3(3)(d). There are two exceptions for the case of the effect of cancellation or withdrawal on “ancillary contracts” ([reg.38\(4\)](#)) and “additional payments” ([reg.40\(3\)](#), discussed below, para.[40-458](#)): [2013 Regulations reg.6\(3\)](#). In the case of off-premises contracts, this exclusion marks a significant difference from the [2008 Regulations \(SI 2008/1816\)](#) which applied to contracts of consumer credit with certain exclusions: [regs 5](#) and [6](#). In the case of “distance contracts” (but not off-premises contracts), duties of information and rights of cancellation are provided by the [Financial Services \(Distance Marketing\) Regulations 2004 \(SI 2004/2095\)](#) reg.2(1) of which defines “financial service” identically to the excluded contracts in [reg.6\(1\)\(b\)](#) of the [2013 Regulations](#): [SI 2004/2095](#) which implemented Directive

- 2002/65/EC concerning the distance marketing of consumer financial services, on which see below, para.[40-143](#).
- 565 2013 Regulations reg.6(1)(c), which implemented 2011 Directive art.3(3)(e). In *Travel Vac SL v Antelm Sanchis (C-423/97) EU:C:1999:197, [1999] E.C.R. I-2195* at para.25 the ECJ held that the Doorstep Selling Directive 1985 could apply to a contract of timeshare despite an exclusion of contracts relating to immovable property (art.3(2)(a)) identical to the one provided by the 2011 Directive art.3(3)(e) as long as the contract “concerns the provision of separate services of a value higher than that of the right to use the property”. However, in *Schulte v Deutsche Bausparkasse Badenia AG (C-350/03) EU:C:2005:637, [2005] E.C.R. I-9215* paras 77–80 the ECJ held that this did not mean that the 1985 Directive could apply to a separate contract of sale of immovable property even though it formed part of a single economic unit in which service elements predominated. This point is now resolved in its specific context by 2011 Directive art.3(3)(h) (implemented in UK law by 2013 Regulations reg.6(1)(h)) which excludes from its scope contracts falling under the Timeshare Directive 2008/122/EC. Similarly, in *Friz GmbH v von der Heyden (C-215/08) EU:C:2010:186, [2010] E.C.R. I-02947* the ECJ held that Directive 85/577 could apply to a contract under which the consumer entered a “real property fund by means of the acquisition of holdings in a partnership in exchange for a capital investment” despite its exclusion of contracts concerning rights to immovable property, but such a contract is likely to fall within the exclusion of “contracts for services of a banking, credit, insurance, personal pension, investment or payment nature” in the 2011 Directive art.3(3)(d) as explained by art.2(12) (implemented by the 2013 Regulations reg.6(1)(b)).
- 566 2013 Regulations reg.6(1)(d).
- 567 2013 Regulations reg.6(1)(e). The CJEU has held that a contract under which an architect agrees merely to draw up plans for a house for an individual consumer does not fall within this exception: *NK v MS (C-208/19) EU:C:2020:382, 14 May 2020* at para.48.
- 568 2013 Regulations reg.6(1)(g).
- 569 2013 Regulations reg.6(1)(g) (as amended on IP completion day by the *Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326)* reg.8(3)(a)), referring to a “package travel contract” within the meaning of the *Package Travel and Linked Travel Arrangements Regulations 2018*. The exclusion in reg.6(1)(f) therefore does not apply to “linked travel arrangements”, which are equally not excluded from the scope of the 2011 Directive: 2015 Directive art.3(2), (3) and (5) and art.27(2) (amending the 2011 Directive art.3(3)). See below, paras [40-144](#)—[40-150](#). While art.12(5) of the 2015 Directive provides that, as regards off-premises contracts, Member States may provide in their national laws that the traveller has the right to withdraw from a package travel contract within a period of 14 days *without giving any reason*, unlike the general position provided for termination by travellers under the 2015 Directive, the UK government decided not to make provision to this effect in the *Package Travel and Linked Travel Arrangements Regulations 2018*: see Department of Business, Energy & Industrial Strategy, Updating Consumer Protection in the Package Travel Sector, Government Response (April 2018), paras 79 and 84.
- 570 2013 Regulations reg.6(1)(h) as amended on IP completion day (on which see above, para.[40-004](#) and Vol.I, paras [1-016](#) et seq.) by the *Consumer Protection (Amendment etc.)*

- (EU Exit) Regulations 2018 (SI 2018/1326) reg.8(3)(b). On the 2010 Regulations see below, paras 40-157—40-163.
- 571 2013 Regulations reg.6(2)(a).
- 572 2013 Regulations reg.6(2)(b).
- 573 2013 Regulations reg.6(2)(c).
- 574 2013 Regulations reg.6(2)(d).
- 575 2011 Directive art.3(2).
- 576 UK Government, Transposition Note; Directive 2011/83/EU on consumer rights, para.5 Table.
- 577 *Acea Energia SpA v Autorità Garante della Concorrenza e del Mercato* (C-406/17 to C-408/17 and C-417/17) EU:C:2019:404, Order of the Court of 14 May 2019 (available in French) (“*Acea Energia SpA (C-406/17 to C-408/17 and C-417/17)*”) at paras 56, 58–62. The CJEU held that the conflict provision in art.3(2) of the 2011 Directive was “in substance identical” to the conflict provision in art.3(4) of the Unfair Commercial Practices Directive 2005 and therefore applied its own case-law on the latter by analogy for the purposes of art.3(2) of the 2011 Directive: *Acea Energia SpA (C-406/17 to C-408/17 and C-417/17)* at paras 48–51, 57–61; and see *Autorità Garante della Concorrenza e del Mercato v Wind Tre SpA and Vodafone Italia SpA (Joined Cases C-54/17 and C-55/17)* EU:C:2018:710, 13 September 2018 at paras 60–62 (art.3(4) was also in issue in *Acea Energia SpA*). On art.3(4) of the 2005 Directive, see further below, paras 40-114 and 40-170.
- 578 There was a further element in the case as the sectoral directives in question themselves provided that they were without prejudice to EU consumer protection legislation: *Acea Energia SpA (C-406/17 to C-408/17 and C-417/17)* at para.57.
- 579 2011 Directive art.3(3)(a).
- 580 On the lawfulness of this extension as a matter of EU law, see above, para.40-026.
- 581 2011 Directive art.3(3)(b) “healthcare” being defined by reference to Directive 2011/24/EU on the application of patients’ rights in cross-border healthcare [2011] O.J. L88/45 art.3(a), which provides that: ““healthcare’ means health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices”.
- 582 2013 Regulations reg.7(2) and reg.27(2) and (4) (with definitions provided by reg.7(5)).
- 583 The 2011 Directive art.3(3)(k) excludes generally contracts for passenger transport services from its scope with the exceptions of art.8(2) (information requirements for distance contracts concluded by electronic means), art.19 (fees for the use of means of payment) and art.22 (additional payments). As a result, the provisions in the 2013 Regulations governing information requirements for distance contracts concluded by electronic means (reg.14(1)–(5)), additional payments (reg.40) and help-line charges over basic rate (reg.41) apply to contracts for passenger transport services. The 2011 Directive art.19’s provisions (fees for the use of means of payment) were implemented by the Consumer Rights (Payment Surcharges) Regulations 2012 (SI 2012/3110) reg.5 of which does not exclude payments made for the purposes of contracts for the passenger transport services: on which see below, para.40-456.
- 584 2013 Regulations reg.27(2)(c).

- 585 2013 Regulations reg.7(3); reg.14(1)–14(5) (both as set out by 2011 Directive arts 3(3)(k) and 8(2)). The 2011 Directive recital 27 justifies this exclusion on the basis that these contracts are already subject to EU legislation or to regulation at a national level.
- 586 Directive 97/7/EC art.3(2).
- 587 *easyCar (UK) Ltd v Office of Fair Trading (C-336/03) EU:C:2005:150; [2005] E.C.R. I-1947* especially at paras 22–27.
- 588 The exceptions are noted above in this paragraph.
- 589 (emphasis added). This particular exclusion is effected by art.16(l) referring explicitly to “car rental services”, implemented in UK law by 2013 Regulations reg.28(1)(h): see below, para.40-115.
- 590 2011 Directive art.3(3)(k).
- 591 *Verbraucherzentrale Berlin eV v DB Vertrieb GmbH (C-583/18) EU:C:2020:199, 12 March 2020* at paras 29–39.
- 592 2011 Directive art.3(1), first sentence, on which see above, para.40-072.
- 593 The English version of recital 7 to the 2011 Directive refers to its regulating “certain aspects of business-to-consumer contracts across the Union” which suggests that it applies only to contracts under which the trader supplies goods or services *to* the consumer, but this terminology is not reflected in all the language versions. For example, the French version of recital 7 refers merely to its governing “certains aspects des contrats entre les entreprises et les consommateurs au sein de l’Union”, the Italian version to “taluni aspetti dei contratti tra imprese e consumatori nell’Unione” and the German version to “bestimmte Aspekte von Verträgen zwischen Unternehmen und Verbrauchern unionsweit” (all of which can be translated as “certain aspects of contracts between businesses and consumers across the Union”). It is submitted, therefore, that no significance should be attached to the use of the convenient English jargon expression “business-to-consumer” in this recital or in recitals 5 and 9.
- 594 Above, para.40-072.
- 595 Above, para.40-076; 2011 Directive art.2(4) and (6) (2013 Regulations reg.5); DG Justice Guidance Document on 2011 Directive, para.2.1.
- 596 Below, paras 40-086 and 40-091.

(iii) - Date of Conclusion of Contract

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(b) - Contracts Covered by the 2013 Regulations

(iii) - Date of Conclusion of Contract

The temporal application of the 2013 Regulations

- 40-083 The [2013 Regulations](#) apply generally in relation to contracts entered into on or after 13 June 2014.⁵⁹⁷ Given what has earlier been said in relation to the Consumer Rights Directive's acknowledgement of the role of national contract law for contract law issues not regulated by the Directive,⁵⁹⁸ it is submitted that the question when a contract was "entered into" for the purposes of this regulation must be determined by reference to the general English law of contract, rather than on the basis of an autonomous European rule or rules.⁵⁹⁹ As noted above, earlier UK regulations may apply to off-premises contracts and distance contracts (but not to on-premises contracts which were not included in earlier EU or UK legislative schemes) made on or before 12 June 2014, though the scope of the contracts to which these regulations apply and the content of their requirements differ.⁶⁰⁰

Footnotes

⁵⁹⁷ 2013 Regulations reg.1(2). The minor amendments to the [2013 Regulations](#) made by regulation under s.8(1) of the [European Union \(Withdrawal\) Act 2018](#) came into force on IP completion day: [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.8 (reg.1(3)) (the reference to exit day must be read as referring to IP completion day: [European Union \(Withdrawal\) Agreement Act 2020](#) s.39(1), s.41(4) and Sch.5 para.1). As these amendments do not affect the substantive provisions of the [2013](#)

Regulations, the transitional provision in the 2018 Regulations reg.11 (which applies some changes made to other regulations by them only to contracts entered into on or after IP completion day) does not apply to the amendments made to the 2013 Regulations.

- 598 2011 Directive art.3(5), above, paras 40-066—40-068.
- 599 For which see, in particular, Vol.I, Ch.4 of the present work.
- 600 Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations 2008 (SI 2008/1816) replacing Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 (SI 1987/2117); Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334).

(iv) - “Off-Premises Contracts”

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(b) - Contracts Covered by the 2013 Regulations

(iv) - “Off-Premises Contracts”

“Off-premises contracts”

40-084 The [2013 Regulations reg.5](#) provides that:

Regulation 5

“... ‘off-premises contract’ means a contract between a trader and a consumer which is any of these—

(a) a contract concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;

(b) a contract for which an offer was made by the consumer in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;

(c) a contract concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer;

(d) a contract concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer."

Regulation 5 further explains that:

Regulation 5

... business premises⁶⁰¹ in relation to a trader means—

(a) any immovable retail premises where the activity of the trader is carried out on a permanent basis, or

(b) any movable retail premises where the activity of the trader is carried out on a usual basis."

These definitions reflect very closely the Consumer Rights Directive 2011, which the [2013 Regulations](#) implemented.⁶⁰² Taken together, they mean that “off-premises contract” is a wider category than the contracts covered by the earlier UK [Cancellation of Contracts made in a Consumer’s Home or Place of Work, etc. Regulations 2008](#), and these Regulations were themselves of broader application than the Doorstep Selling Directive 1985 which the Consumer Rights Directive 2011 replaced.⁶⁰³ In this respect, the [2013 Regulations](#) define the contracts negatively, so as to cover all contracts which are *not* concluded on the trader’s premises, rather than seeking to set out (as did the [2008 Regulations](#)) the situations in which contracts are not so made (notably, those made “during a visit by the trader to the consumer’s home or place of work, or to the home of another individual”⁶⁰⁴). The exception to this approach is that the [2013 Regulations](#) specifically include contracts concluded “during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer” (as, for example, where a trader organises an apparently recreational coach or boat trip and then seeks to sell goods or services on the coach or boat).⁶⁰⁵ Clearly, though, the main example of the application of the general negative definition is the case where the trader visits the consumer at the latter’s home or place of work.⁶⁰⁶ While aspect (d) of the definition of “off-premises contracts” looks as though it is restricted to sales contracts or service contracts, it is submitted that it also includes contracts for the supply of digital content not on a tangible medium⁶⁰⁷ as these attract special regulation regarding their confirmation.⁶⁰⁸

40-085 Moreover, the definition of “off-premises contracts” in the [2013 Regulations](#) specifically seeks to prevent the trader being able to make technical points as to where (according to national contract law⁶⁰⁹) a contract was concluded, by including contracts “for which an *offer* was made by the

consumer in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader"⁶¹⁰ and contracts concluded "immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer" even though the contract was itself "*concluded on* the business premises of the trader or through any means of distance communication".⁶¹¹ For these purposes, it makes no difference that the trader was or was not invited to the home or workplace of the consumer (the non-business premises).⁶¹² As recital 21 explains:

"In an off-premises context, the consumer may be under potential psychological pressure or may be confronted with an element of surprise, irrespective of whether or not the consumer has solicited the visit."⁶¹³

It is submitted that, for these purposes, the Supreme Court's view in *Robertson v Swift* that earlier UK regulations implementing the Doorstep Selling Directive 1985 were not restricted to contracts which were negotiated and concluded during a *single* visit to the consumer's home⁶¹⁴ remains valid, as there is no requirement either in the 2011 Directive or in the **2013 Regulations** that an off-premises contract is concluded during a single visit on non-business premises.⁶¹⁵ On the other hand, recital 22 of the 2011 Directive also explains that:

"The definition of an off-premises contract should not cover situations in which the trader first comes to the consumer's home strictly with a view to taking measurements or giving an estimate without any commitment of the consumer and where the contract is then concluded only at a later point in time on the business premises of the trader or via means of distance communication on the basis of the trader's estimate. In those cases, the contract is not to be considered as having been concluded immediately after the trader has addressed the consumer if the consumer has had time to reflect upon the estimate of the trader before concluding the contract."⁶¹⁶

Consumer-to-business contracts?

- 40-086 The definition of "off-premises" contract is ambivalent as to whether contracts under which a consumer supplies goods or services to a trader are included. For while the first three of the situations falling within an "off-premises contract" are neutral on this point, the fourth is expressly concerned with contracts:

"... concluded during an excursion organised by the trader with the aim or effect of promoting and selling goods or services to the consumer."⁶¹⁷

This means, therefore, that *this* example of an “off-premises contract” appears to be restricted to contracts business-to-consumer, but, at a purely textual level, this example could either support an argument that this reflects the general position for off-premises contracts or that the other examples provided by the definition are not so restricted. In any event, much of the information required of traders and the consequences of the exercise of the consumer’s right to cancel is appropriate only to the provision of goods or services by traders to consumers.⁶¹⁸

Dietzinger

- 40-087 For this purpose the European Court of Justice’s decision in *Dietzinger* may be significant, as there it held that the earlier Doorstep Selling Directive 1985 (which the 2011 Directive’s provisions on off-premises contracts replaced) applied to a contract of guarantee concluded by a person other than in the course of his trade or profession which guaranteed a contract supplying goods or services by a person in the course of his trade, etc. to a person who was *not* acting in the course of his trade, etc. despite the fact that the 1985 Directive was expressed as applying to “contracts under which a trader supplies goods or services to a consumer”,⁶¹⁹ the Court observing that “nothing in the wording of the directive requires that the person concluding the contract under which goods or services are to be supplied be the person to whom they are supplied”,⁶²⁰ as long as the “consumer assumes obligations towards the trader with a view to obtaining goods or services from him”.⁶²¹ The reason for this inclusive approach by the Court of Justice was the purpose of the 1985 Directive, which was “to protect consumers by enabling them to withdraw from a contract concluded on the initiative of the trader rather than of the customer, where the customer may be unable to see all on the implications of his act”.⁶²² Given that the 2011 Directive’s provisions governing off-premises contracts share this purpose with the 1985 Directive, it could be argued that these provisions (and therefore the [2013 Regulations](#)) should also apply to off-premises contracts under which a consumer agrees to provide goods or services to a trader, as well to contracts under which a trader agrees to provide goods or services to a consumer. Moreover, given the changed and generally more neutral wording used to describe the contracts to which the 2011 Directive generally applies, it is submitted that this may be the case even if the consumer does not also conclude a contract for the provision of goods or services from the trader as required by the Court in *Dietzinger*.

Examples

- 40-088 If the 2011 Directive and therefore also the [2013 Regulations](#) apply in principle to contracts under which a consumer supplies goods or services to a trader as well as to one under which a consumer

receives goods or services from a trader, then the information and cancellation provisions in the [2013 Regulations](#) would apply, for example, to a contract under which a consumer sells goods to an antique dealer who has visited him at home. However, the position of contracts of guarantee made by a consumer to a trader who provides credit to a third party (whether or not that third party was also a consumer) is less certain. For even if in principle such a contract qualifies as a “consumer contract” for the purposes of the 2011 Directive and the [2013 Regulations](#), it may fall within the exclusion from their scope of “contracts for financial services”, that is, “contracts for services of a banking, credit, insurance, personal pension, investment or payment nature”.⁶²³ On the other hand, it could be argued that a contract of guarantee undertaken by a “consumer” does not count as a “contract for services of a banking … nature” and therefore falls outside this exclusion, particularly given that exclusions to schemes of consumer protection in EU legislation are to be interpreted strictly.⁶²⁴

Footnotes

- 601 Consumer Rights Directive 2011 recital 22 explains that “[b]usiness premises should include premises in whatever form (such as shops, stalls or lorries) which serve as a permanent or usual place of business for the trader. Market stalls and fair stands should be treated as business premises if they fulfil this condition. Retail premises where the trader carries out his activity on a seasonal basis, for instance during the tourist season at a ski or beach resort, should be considered as business premises as the trader carries out his activity in those premises on a usual basis. Spaces accessible to the public, such as streets, shopping malls, beaches, sports facilities and public transport, which the trader uses on an exceptional basis for his business activities as well as private homes or workplaces should not be regarded as business premises. The business premises of a person acting in the name or on behalf of the trader as defined in this Directive should be considered as business premises within the meaning of this Directive”. In *Verbraucherzentrale Berlin eV v Unimatic Vertriebs GmbH (C-485/17) EU:C:2018:642*, 7 August 2018 the CJEU held that the relevant protections for the consumer in the 2011 Directive do not apply where the consumer is on the trader’s “business premises” because there “the consumer can expect to be solicited by the trader so that, should the case arise, he could not properly claim subsequently that he was surprised by the offer made by the trader” (at para.34). For this reason, inter alia, the CJEU held that “the expression ‘on a usual basis’ … must be understood as referring to the fact that the activity at issue being carried out on the premises is a normal activity” (at para.39). Therefore, a national court considering whether a stand at a trade fair for a few days was “business premises” must have regard to “the actual appearance of that stand in the eyes of the public and, more specifically, whether, in the eyes of the average consumer, it is presented as a place where the trader occupying it carries out his activities, including seasonal activities, on a usual basis, with the result that such a consumer may reasonably expect, by visiting it, to be solicited by the trader” (at para.43).
- 602 Consumer Rights Directive 2011 art.2(8) and (9) respectively.

- 603 Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations 2008 (SI 2008/1816) reg.5 (defining the scope of the contracts to which the Regulations apply); Doorstep Selling Directive 1985 art.1(1).
- 604 SI 2008/1816 reg.5(a).
- 605 2013 Regulations reg.5 "off-premises contract" (d); cf. SI 2008/1816 reg.5(b). In *Travel Vac SL v Antelm Sanchis (C-423/97) EU:C:1999:197, [1999] E.C.R. I-2195* at para.38 the ECJ held (in relation to the equivalent provision in Directive 85/577/EEC (art.1(1)) that a contract "concluded in a situation in which a trader has invited a consumer to go in person to a specified place at a certain distance from the place where the consumer lives, and which is different from the premises where the trader usually carries on his business and is not clearly identified as premises for sales to the public, in order to present to him the products and services he is offering, must be considered to have been concluded during an excursion organised by the trader away from his business premises within the meaning of Directive 85/577".
- 606 Consumer Rights Directive 2011 recital 21.
- 607 Above, para.40-078.
- 608 2013 Regulations reg.12(5).
- 609 See above, paras 40-066—40-068 on the role of national contract law here.
- 610 2013 Regulations reg.5 "off-premises contract" (b) (emphasis added); cf. SI 2008/1816 reg.5(c).
- 611 2013 Regulations reg.5 "off-premises contract"(c) (emphasis added), e.g. where a trader's representative approaches a particular consumer in the street with an offer for a subscription magazine and the contract is immediately signed on the trader's nearby business premises: DG Justice Guidance Document on 2011 Directive, para.3.3.
- 612 Consumer Rights Directive 2011 recital 21. The earlier UK *Regulations (SI 2008/1816)* implemented Directive 85/577/EEC (art.1(1) of which provided that it did not apply to contracts concluded during a visit made at the consumer's express request) "so as to embrace visits a trader made to the consumer's home at the request of the consumer" and this extension was held lawful both as a matter of EU law (as the 1985 Directive art.8 allowed "more favourable provision" to protect consumers) and under s.2(2) of the European Communities Act 1972: *Swift v Robertson [2013] EWCA Civ 1794, [2013] Bus. L.R. 479* at [48]–[54] approved (though no longer in issue) by the SC sub. nom. *Robertson v Swift [2014] UKSC 50, [2014] 1 W.L.R. 3438* at [18].
- 613 2011 Directive recital 21, second sentence.
- 614 *Robinson v Swift [2014] UKSC 50, [2014] 1 W.L.R. 3438* at [17], describing as "plainly right" the decision of the Court of Appeal below sub. nom. *Swift v Robinson [2013] EWCA Civ 1794, [2013] Bus. L.R. 479* at [40]–[43], [67] and [68], though the point was no longer in issue before the SC.
- 615 2013 Regulations reg.5 "off-premises contract".
- 616 2011 Directive recital 22, fourth and fifth sentences.
- 617 2011 Directive art.2(8)(d); 2013 Regulations reg.5 "off-premises contract" (d). Above, para.40-084 and see generally above, para.40-082.
- 618 Below, paras 40-094 et seq.

- 619 Directive 85/577 art.1(1); *Bayerische Hypotheken- und Wechselbank AG v Dietzinger* (*C-45/96 EU:C:1998:111, [1998] E.C.R. I-1199*).
- 620 *C-45/96 EU:C:1998:111, [1998] E.C.R. I-1199* at para.19.
- 621 *C-45/96 EU:C:1998:111, [1998] E.C.R. I-1199* at para.22.
- 622 *C-45/96 EU:C:1998:111, [1998] E.C.R. I-1199* at para.19.
- 623 2013 Regulations reg.6(1)(b); 2011 Directive art.3(3)(d), "financial service" being defined by art.2(12).
- 624 *Veedfald v Århus Amtskommune (C-203/99) EU:C:2001:258, [2001] E.C.R. I-3569* at para.15; *easyCar (UK) Ltd v Office of Fair Trading (C-336/03) EU:C:2005:150; [2005] E.C.R. I-1947* at para.21; *Kásler v OTP Jelzálogbank Zrt (C-26/13) EU:C:2014:282, 30 April 2014* at para.42; *Kušionová v SMART Capital a.s. (C-34/13) EU:C:2014:2189, 10 September 2014* at para.77.

(v) - “Distance Contracts”

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(b) - Contracts Covered by the 2013 Regulations

(v) - “Distance Contracts”

Definition

40-089 The [2013 Regulations](#) provide that:

“... ‘distance’ contract means a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.”⁶²⁵

This definition reflects word-for-word the definition found in the 2011 Directive.⁶²⁶ It contains a number of elements.

“A contract concluded ... under an organised distance sales or service-provision scheme”

40-090 Neither the [2013 Regulations](#) nor the text of the 2011 Directive defines these notions, but recital 20 of the Directive explains that:

"The notion of an organised distance sales or service-provision scheme should include those schemes offered by a third party other than the trader but used by the trader, such as an online platform. It should not, however, cover cases where websites merely offer information on the trader, his goods and/or services and his contact details."

A clear example of a "distance contract" would be where the consumer views goods offered for sale on a seller's website and is able to buy those goods online, paying through secure pages,⁶²⁷ but it would not apply where the consumer views goods on a seller's website, yet cannot buy them online. However, as recital 20 to the Directive explains, it also includes cases where a:

"... consumer visits the business premises merely for the purpose of gathering information about the goods or services and subsequently negotiates and concludes the contract at a distance."⁶²⁸

On the other hand, according to recital 20, "distance contract" does not include contracts negotiated at the business premises of the trader and finally concluded by distance communication, contracts initiated by means of a distance communication but finally concluded at the business premises of the trader, and contracts where a consumer makes a reservation by means of a distance communication to request the provision of a service, giving as an example a consumer telephoning to request an appointment with a hairdresser. These cases would, therefore, fall outside both "distance contracts" and "off-premises contracts" and therefore, under the [2013 Regulations](#), into the residual category of "on-premises contracts".⁶²⁹ Finally, the contract must be concluded under an "organised distance sales or service-provision scheme" and the requirement of an organised scheme means that:

"... if a trader only exceptionally concludes a contract with a consumer by e-mail or telephone, after being contacted by the consumer, such a contract should not be considered a distance contract under the Directive."⁶³⁰

It has been held that a scheme whereby, for a fee, the Royal Institute of Chartered Surveyors nominates adjudicators as part of its statutory function as an adjudicator nomination body is not an "organised distance sales scheme" so that a contract concluded with the adjudicator does not count as a "distance contract" for the purposes of the [2013 Regulations](#).⁶³¹ While the form of words used in this aspect of the definition of "distance contract" suggests that it is restricted to sales contracts and services contracts, it is submitted that it should be seen as extending to schemes under which contracts for the supply of digital content not on a tangible medium (which are neither sales contracts nor services contracts⁶³²) are provided, since they attract a special rule governing confirmation.⁶³³

Contracts consumer-to-business?

- 40-091 While the definition of distance contract makes clear the breadth of the contracts covered by the provisions in the [2013 Regulations](#) on distance contracts, it is expressed in a way which indicates that the contracts involve the provision of goods or services by a trader *to a consumer*.⁶³⁴ At a purely textual level, therefore, this suggests these provisions do not apply to contracts under which a consumer supplies goods or services to a trader.

"Means of distance communication"

- 40-092 Unlike the earlier legislation on distance contracts,⁶³⁵ the [2013 Regulations](#) (following the text of the 2011 Directive) do not define or illustrate what is meant by "means of distance communication", but recital 20 of the Directive explains that:

"The definition of distance contract should cover all cases where a contract is concluded between the trader and the consumer under an organised distance sales or service-provision scheme, with the exclusive use of one or more means of distance communication (such as mail order, Internet, telephone or fax) up to and including the time at which the contract is concluded."

Footnotes

625 [2013 Regulations reg.5](#) "distance contract".

626 2011 Directive art.2(7).

627 cf. the guidance provided by AG Sharpston on the related concept of a "organised distance sales scheme" in art.2(a) of Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16, concluding that "if the system has been conceived so that everything can take place at distance, there is an organised distance service-provision scheme": Opinion (*C-639/18*) at para.65 and see also at paras 63–68.

628 2011 Directive recital 20.

629 Above, paras [40-074](#) and below, para.[40-093](#).

630 DG Justice Guidance Document on 2011 Directive, para.5.1.

631 *Christopher Linnett Ltd v Harding (t/a MJ Harding Contractors) [2017] EWHC 1781 (TCC), [2018] Bus. L.R. 179* at [86].

632 Above, para.[40-078](#).

633 2013 Regulations reg.16(3).

634 cf. above, para.40-082.

635 Directive 97/7/EC art.2(4) "means of distance communication" referring to an "indicative list" in Annex I, implemented by SI 2000/2334 reg.3(1) "means of distance communication"; Sch.1.

(vi) - “On-Premises” Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(b) - Contracts Covered by the 2013 Regulations

(vi) - “On-Premises” Contracts

A residual category

40-093 The 2013 Regulations provide that:

“... ‘on-premises contract’ means a contract between a trader and a consumer which is neither a distance contract nor an off-premises contract.”⁶³⁶

The 2011 Directive does not refer to “on-premises contracts”, but instead imposes information requirements on traders in respect of contracts other than distance or off-premises contracts.⁶³⁷ The use by the 2013 Regulations of the notion of “on-premises contracts” as they define it achieved the same result, but given the breadth and relative complexity of the definitions of “off-premises contract” and “distance contract”, the term “on-premises contract” risks causing confusion. For example, as has been seen, the 2013 Regulations include within an “off-premises contract”:

“... a contract concluded on the business premises of the trader ... immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer.”⁶³⁸

Therefore, some contracts concluded on the business premises of the trader do *not* count as “on-premises contracts” for the purposes of the 2013 Regulations. Moreover, some contracts concluded entirely by means of distance communication⁶³⁹ (such as email or telephone) will not constitute

a “distance contract” as they are not made “under an organised distance sales or service-provision scheme”.⁶⁴⁰ Confusingly, such a contract would count as an “on-premises contract” within the meaning of the 2013 Regulations.

Footnotes

636 2013 Regulations reg.5 “on-premises contract”.

637 2011 Directive art.5.

638 2013 Regulations reg.5 “off-premises contract” (c) (emphasis added), above, para.40-084.

639 On which see above, para.40-092.

640 2013 Regulations reg.5, above, para.40-090.

(i) - General

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(c) - Information Requirements

(i) - General

“Giving information”, “providing it” and “making it available”

- 40-094 The 2011 Directive requires some information to be given, some provided and some made available by the trader to the consumer.⁶⁴¹ The differences between the provision and giving of information and merely making it available was considered by the Court of Justice of the EU in *Content Services Ltd*⁶⁴² in the context of the earlier Distance Contracts Directive, which required the trader to give the consumer written confirmation of information which he should receive.⁶⁴³ The Court held that for this purpose the words “given” and “receive” should be given their usual meaning in everyday language, taking into account their context and, therefore, “refer to a process of transmission”.⁶⁴⁴ As a result, and taking into account the directive’s purpose of consumer protection, a trader who merely provides a hyperlink on a website or within an email which allows the consumer to access the relevant information does not give that information, nor does the consumer receive it, as the consumer “must act in order to acquaint himself with the information in question and he must, in any event, click on that link”.⁶⁴⁵ In so holding, the Court contrasted this position with the Directive’s requirements as to pre-contractual information, with which the consumer was to be “provided” by the trader, considering that this was a “more neutral formulation” in the vast majority of its linguistic versions.⁶⁴⁶

The terminology in the Consumer Rights Directive

- 40-095

In turning to the Consumer Rights Directive 2011, the terminology has changed. As regards all three types of contract (off-premises contracts, distance contracts and other contracts) the trader is generally required to *provide* the consumer with the listed information before the consumer is bound⁶⁴⁷; but for off-premises contracts the Directive then requires the information to be *given*, though their confirmation is to be *provided*.⁶⁴⁸ By contrast, in the case of distance contracts, the trader must *give* the necessary information before the consumer is bound “or make that information available to the consumer in a way appropriate to the means of distance communication”,⁶⁴⁹ although there is no similar alternative as regards the confirmation which the trader must provide after the distance contract is concluded.

650

U As recital 36 explains:

“In the case of distance contracts, the information requirements should be adapted to take into account the technical constraints of certain media, such as the restrictions on the number of characters on certain mobile telephone screens or the time constraint on television sales spots. In such cases the trader should comply with a minimum set of information requirements and refer the consumer to another source of information, for instance by providing a toll free telephone number or a hypertext link to a webpage of the trader where the relevant information is directly available and easily accessible.”⁶⁵¹

The terminology in the 2013 Regulations

- 40-096 This special treatment of distance contracts is reflected in the *2013 Regulations*⁶⁵²’ rules governing pre-contractual information requirements, explaining that, for these purposes “something is made available to a consumer only if the consumer can reasonably be expected to know how to access it”.⁶⁵³ However, the *2013 Regulations* then add that the confirmation to be given to the consumer “is treated as provided as soon as the trader has sent it or done what is necessary to make it available to the consumer”⁶⁵⁴ and they also allow information governing “on-premises contracts”⁶⁵⁵ and information in connection with repair or maintenance contracts concluded off-premises⁶⁵⁶ to be made available instead of being given. It will be seen, therefore, that while the “making available” of information as an alternative to its provision is foreseen by the 2011 Directive as regards pre-contractual information for distance contracts,⁶⁵⁷ the other examples of use of this phrase in the *2013 Regulations* find no counterpart in the 2011 Directive, and therefore must be vulnerable to the argument that to this extent they failed properly to implement the minimum requirements of the 2011 Directive.

Vulnerable consumers

- 40-097 While neither the [2013 Regulations](#) nor the text of the 2011 Directive refer to the type of consumer the trader must have in mind in providing information which they require, recital 34 of the Directive states:

“In providing that information, the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee. However, taking into account such specific needs should not lead to different levels of consumer protection.”

A trader must therefore bear in mind the particular needs of vulnerable consumers, in particular in the manner in which information is provided.⁶⁵⁷ This echoes the treatment of the “average consumer” by the Unfair Commercial Practices Directive 2005, which similarly requires traders to take into account in their business-to-consumer practices the particular vulnerability of consumers which the trader can reasonably be expected to foresee.⁶⁵⁸ In this respect, it should be noted that the Court of Justice has seen the standard of the “average consumer” as appropriate to assess the clarity and comprehensibility of information supplied by a trader under the Distance Marketing of Consumer Financial Services Directive 2002,⁶⁵⁹ whose information duties are closely analogous to those imposed by the Consumer Rights Directive.

Burden of proof

- 40-098 In case of dispute about a trader’s compliance with the provisions in [Pt 2 of the 2013 Regulations](#) imposing information and confirmation requirements in relation to off-premises and distance contracts, it is for the trader to show that the provision in question was complied with, though this rule does not apply to proceedings relating to an offence relating to a trader’s failure to give notice of the right to cancel nor to proceedings relating to compliance with an injunction to secure compliance with the Regulations.⁶⁶⁰

Footnotes

- 641 2011 Directive arts 5(1), 6(1), 7(2), 7(4)(a) (“the trader shall provide”); arts 7(1) and 8(1) (“the trader shall give”); and art.8(1) (“the trader shall … make that information available”): see further below, para.[40-095](#).
- 642 *Content Services Ltd v Bundesarbeitskammer (C-49/11), 5 July 2012 (“Content Services Ltd (C-49/11)”)*.
- 643 Directive 97/7/EC art.5(1).
- 644 *Content Services Ltd (C-49/11)* paras 32–33.
- 645 *Content Services Ltd (C-49/11)* paras 33 and 37.
- 646 *Content Services Ltd (C-49/11)* para.35, referring to Directive 97/7/EC art.4(1).
- 647 2011 Directive arts 5(1) and 6(1).
- 648 2011 Directive art.7(1) and 7(2).
- 649 2011 Directive art.8(1).
- 650 2011 Directive art.8(7), which requires the trader to provide confirmation “on a durable medium within a reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the performance of the service begins”.
- 651 2011 Directive recital 36.
- 652 *2013 Regulations* reg.13(1) and reg.8.
- 653 *2013 Regulations* reg.16(5).
- 654 *2013 Regulations* reg.9(1).
- 655 *2013 Regulations* reg.11(2).
- 656 2011 Directive art.8(1), though art.8(7) does not so refer as regards confirmation of the contract.
- 657 The 2011 Directive art.6(7) (relating to off-premises and distance contracts) also provides that Member States may maintain or introduce in their national laws language requirements regarding contractual information, so as to ensure that such information is easily understood by the consumer.
- 658 Unfair Commercial Practices Directive 2005/29/EC art.5(3), recital 18 glossing the notion of “average consumer”: see above, para.[40-046](#).
- 659 Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16 art.3(2) as discussed in *Romano v DSL Bank – a branch of DB Privat- und Firmenkundenbank AG (C-143/18)* EU:C:2019:701, 11 September 2019 at paras 53–54; and see below, para.[40-143](#).
- 660 *2013 Regulations* reg.17; 2011 Directive art.6(9). There is no equivalent provision in the *2013 Regulations* setting a burden of proof as to the information requirements in relation to “on-premises contracts”, following the 2011 Directive.

(ii) - Off-Premises Contracts and Distance Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(c) - Information Requirements

(ii) - Off-Premises Contracts and Distance Contracts

Application of the requirements

40-099 Part 2 of the 2013 Regulations imposes a series of requirements on traders⁶⁶¹ to give or (in the case of distance contracts) to make available⁶⁶² to consumers⁶⁶³ information before they are bound by an off-premises contract⁶⁶⁴ or distance contract⁶⁶⁵ and to provide consumers with a copy or confirmation of any resulting contract.⁶⁶⁶ In principle, these requirements apply to all types of “consumer contract” with the exceptions already noted,⁶⁶⁷ but in addition Pt 2 excludes from its scope certain contracts for the supply of medicinal or other health care products⁶⁶⁸ and off-premises contracts under which the payment to be made by the consumer is not more than £42.⁶⁶⁹

Information requirements

40-100 The 2013 Regulations provide that, before the consumer is bound by an off-premises contract, the trader must give the consumer in a clear and comprehensible manner a list of required information.⁶⁷⁰ In the case of distance contracts, the trader must give or make available⁶⁷¹ the information in a clear and comprehensible manner and in a way appropriate to the means of distance communication used.

⁶⁷²

U According to the Court of Justice, the 2011 Directive (which the 2013 Regulations implemented) thereby:

“... seeks to ensure the communication to consumers, before the conclusion of a contract, both of information concerning the contractual terms and the consequences of that conclusion, allowing consumers to decide whether they wish to be contractually bound to a trader ... and of information necessary for proper performance of that contract and, in particular, for the exercise of their rights, in particular the right of withdrawal.”⁶⁷³

Furthermore, according to that Court:

“In order for the consumer to be able to benefit from that information to that end, the consumer must receive that information in good time before the contract is concluded and not simply at the stage of concluding the contract, given that the information provided before the contract is concluded is of fundamental importance for a consumer.”⁶⁷⁴

Moreover, it is submitted that the requirement that the information be provided or made available in a clear and comprehensible manner should be assessed from the point of view of the “average consumer”, taking into account any particular vulnerability of consumers in the context which the trader can reasonably be expected to foresee.⁶⁷⁵

The information required ⁶⁷⁶

⁴⁰⁻¹⁰¹ Schedule 2 to the 2013 Regulations⁶⁷⁷ lists the information so required:



“(a)the main characteristics of the goods, services or digital content,⁶⁷⁸ to the extent appropriate to the medium of communication and to the goods, services or digital content⁶⁷⁹;

(b)the identity of the trader (such as the trader’s trading name);

(c)the geographical address at which the trader is established and, where available,⁶⁸⁰ the trader’s telephone number, fax number and e-mail address, to enable the consumer to contact the trader quickly and communicate efficiently⁶⁸¹;

- (d)where the trader is acting on behalf of another trader, the geographical address and identity of that other trader;
- (e)if different from the address provided in accordance with paragraph (c), the geographical address of the place of business of the trader, and, where the trader acts on behalf of another trader, the geographical address of the place of business of that other trader, where the consumer can address any complaints;
- (f)the total price of the goods, services or digital content inclusive of taxes, or where the nature of the goods, services or digital content is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated;
- (g)where applicable, all additional delivery charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
- (h)in the case of a contract of indeterminate duration or a contract containing a subscription, the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs;
- (i)the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate;
- (j)the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods, to perform the services or to supply the digital content;
- (k)where applicable, the trader's complaint handling policy;
- (l)where a right to cancel exists, the conditions, time limit and procedures for exercising that right in accordance with [regulations 27 to 38](#);
- (m)where applicable, that the consumer will have to bear the cost of returning the goods in case of cancellation and, for distance contracts, if the goods, by their nature, cannot normally be returned by post, the cost of returning the goods;
- (n)that, if the consumer exercises the right to cancel after having made a request in accordance with [regulation 36\(1\)](#), the consumer is to be liable to pay costs in accordance with [regulation 36\(4\)](#);
- (o)where under [regulation 28, 36 or 37](#) there is no right to cancel or the right to cancel may be lost, the information that the consumer will not benefit from a right to cancel, or the circumstances under which the consumer loses the right to cancel;
- (p)in the case of a sales contract, a reminder that the trader is under a legal duty to supply goods that are in conformity with the contract;
- (q)where applicable, the existence and the conditions of after-sale customer assistance, after-sales services and commercial guarantees

682



- (r)the existence of relevant codes of conduct, as defined in regulation 5(3)(b) of the Consumer Protection from Unfair Trading Regulations 2008, and how copies of them can be obtained, where applicable;
- (s)the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;
- (t)where applicable, the minimum duration of the consumer's obligations under the contract;
- (u)where applicable, the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
- (v)where applicable, the functionality,⁶⁸³ including applicable technical protection measures, of digital content⁶⁸⁴;
- (w)where applicable, any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of⁶⁸⁵;
- (x)where applicable, the possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.”⁶⁸⁶

 686

The information relating to the consumer's cancellation right in paras (l), (m) and (n) above may be provided by means of the “model instructions on cancellation” set out by the Regulations, and if the trader uses this model correctly filled in, this is to be treated as compliance with those requirements.⁶⁸⁷ The Regulations also provide that, if a right to cancel exists, the trader must give (or, in the case of distance contracts, make available to) the consumer a cancellation form which they set out.⁶⁸⁸ In the case of off-premises contracts, the information and any cancellation form must be given on paper or, if the consumer agrees, on another durable medium and must be legible⁶⁸⁹; for distance contracts, it must be legible in so far as the information is provided on a durable medium.⁶⁹⁰ In the case of distance contracts, the 2013 Regulations qualify the general rules as to the provision of information where they are concluded through a means of distance communication which allows limited space or time to display the information.⁶⁹¹

Distance contracts concluded by electronic means

- 40-102 There are special information requirements for distance contracts concluded by electronic means.



692

U Moreover, where the contract places the consumer under an obligation to pay, the trader must ensure that “the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay”, failing which the consumer is not bound by the contract or order.

693

U

Telephone calls to conclude a distance contract

- 40-103 If a trader makes a telephone call to the consumer with a view to concluding a distance contract, the trader must, at the beginning of the conversation with the consumer, disclose the trader's identity, where applicable, the identity of the person on whose behalf the trader makes the call, and the commercial purpose of the call.⁶⁹⁴

Provision of copy or confirmation of contract

- 40-104 In the case of off-premises contracts, the trader must give the consumer a copy of the signed contract or confirmation of the contract on paper or, if the consumer agrees, on another durable medium⁶⁹⁵; in the case of distance contracts, the trader must give or make available⁶⁹⁶ to the consumer confirmation of the contract on a durable medium.

697

U In either case, the trader must act within a reasonable time after the conclusion of the contract and, in any event, not later than the time of delivery of any goods or beginning of the performance of any service supplied under the contract,⁶⁹⁸ and any confirmation must include all the information which should have been provided before the contract was concluded, unless already so provided in a durable medium.⁶⁹⁹

Footnotes

661 On the meaning of “trader” see above, paras 40-072, 40-052—40-061.

662 On the significance of “make available to” see above, paras 40-094—40-096.

663 On the meaning of “consumer” see above, paras 40-072, 40-031 et seq.

- 664 On the definition of “off-premises contract” see above, paras [40-084](#)—[40-088](#).
- 665 On the definition of “distance contract” see above, paras [40-089](#)—[40-092](#).
- 666 [2013 Regulations reg.12](#) (off-premises contracts); [reg.16](#) (distance contracts): below, para.[40-104](#).
- 667 For the contracts to which [Pt 2](#) applies, see [reg.7\(1\)](#) and above, paras [40-072](#)—[40-082](#), which notes the contracts excluded from the scope of the Regulations as a whole.
- 668 [2013 Regulations reg.7\(2\)](#).
- 669 [2013 Regulations reg.7\(4\)](#) reflecting an option for Member States provided by the 2011 Directive art.3(4) and explained by recital 28 on the basis that to this extent it would relieve traders from an administrative burden.
- 670 [2013 Regulations reg.10\(1\)](#) (off-premises contracts).
- 671 See above, paras [40-094](#)—[40-065](#) on the significance of “make available”.
- 672 [2013 Regulations reg.13\(1\)](#), and see above, para.[40-092](#) on “means of distance communication”. In [UAB ‘Tiketa’ v M. Š. \(C-536/20\) EU:C:2022:112](#), 24 February 2022 at para.46 the CJEU held that art.6(1) of the 2011 Directive (implemented by [reg.13\(1\) of the 2013 Regulations](#)) therefore allows the provision of information in distance contracts to be “brought to the consumer’s attention, prior to the conclusion of the contract, in the general terms and conditions for the provision of services on the intermediary’s website, which that consumer accepts by ticking the box provided for that purpose”. However, the provision of the information in this way cannot “act as a substitute for the confirmation which must be provided to the consumer on a durable medium after the conclusion of the contract” as required by the 2011 Directive art.8(7) (implemented by [2013 Regulations reg.16](#)): [C-536/20](#) at paras 48–51 and see below, para.[40-104](#).
- 673 [Bundesverband der Verbraucherzentralen und Verbraucher–erbände – Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl \(C-649/17\) EU:C:2019:576, 10 July 2019](#) para.33 (in relation to art.6(1) of the 2011 Directive).
- 674 [Bundesverband der Verbraucherzentralen und Verbraucher–erbände – Verbraucherzentrale Bundesverband eV v Deutsche Apotheker- und Arztekbank eG \(C-380/19\) 25 June 2020](#) at para.34 in the context of the information requirement in the 2011 Directive art.6(1)(t) as to the possibility of consumer recourse to an out-of-court complaint and redress mechanism, this being found in the [2013 Regulations Sch.2 para.x](#), on which see below, para.[40-101](#).
- 675 See above, para.[40-097](#).
- 676 The Trade and Cooperation Agreement 2020 concluded by the UK and EU art.208(1) (formerly art.DIGIT.13(1)) Online consumer trust requires the parties to ensure that suppliers of goods or services are to provide consumers engaging in electronic commerce transactions with clear and thorough information. It is submitted that this requirement reflects existing requirements concerning information in the [2013 Regulations](#) in relation to “distance contracts” as well as in the [Electronic Commerce \(EC Directive\) Regulations 2002](#) (on which see below, para.[40-165](#)). On the Trade and Cooperation Agreement 2020 and its implementation in UK domestic law generally, see Vol.I para.[1-030](#).
- 677 As amended by [SI 2014/870](#) and implementing 2011 Directive art.6 as enacted. Article 6 itself is subject to amendment by Directive (EU) 2019/2161 of the European Parliament and

of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 art.4(4), whose art.4(5) inserts a new art.6a into the 2011 Directive setting out additional specific information requirements for distance contracts concluded on online marketplaces. However, the 2019 Directive must be implemented by 28 November 2021 (i.e. after IP completion day) and as a result the UK is not required to do so: cf. above, para.[40-063](#) (note) and Vol.I, para.[1-019](#) and on IP completion day more generally above, para.[40-004](#) and Vol.I, para.[1-020](#) et seq.

- 678 “Digital content” means “data which are produced and supplied in digital form”: [2013 Regulations reg.5](#) “digital content”.
- 679 On the special significance of this requirement under the [Consumer Rights Act 2015](#) s.11(4) (goods contracts) and [s.36\(3\)](#) (digital content contracts), see below, paras [40-501](#) and [40-552](#) respectively.
- 680 On this see *EIS GmbH v TO (C-266/19) EU:C:2020:384, 14 May 2020*.
- 681 On this requirement see *Bundesverband der Verbraucherzentralen und Verbraucher-erbände – Verbraucherzentrale Bundesverband eV v Amazon EU Sàrl (C-649/17) EU:C:2019:576*, 10 July 2019 (although the main point in issue was a qualification on the information requirement in art.6(1)(c) of the 2011 Directive which was not retained by the [2013 Regulations](#)).
- 682 According to [reg.5](#) (which implemented the 2011 Directive art.2(14)), “‘Commercial guarantees’ in relation to a contract, means any undertaking by the trader or producer to the consumer (in addition to the trader’s duty to supply goods that are in conformity with the contract) to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of the contract or before it is entered into”. In *absoluts -bikes and more- GmbH & Co KG v the-trading-company GmbH (C-179/21) EU:C:2022:353*, 5 May 2022 (“*Victorinox* case”) at para.53 (emphasis added) the CJEU held that “as regards the *manufacturer*’s commercial guarantee, the information requirement imposed on the trader ... does not arise from the mere fact that that guarantee exists, but only where the consumer has a legitimate interest in obtaining information concerning that guarantee in order to decide whether to enter into a contractual relationship with the trader. Such a legitimate interest is established, *inter alia*, where the trader makes the manufacturer’s commercial guarantee a central or decisive element of its offer”. The CJEU further held (at para.65) that “the information which must be provided to the consumer with regard to the conditions of the manufacturer’s commercial guarantee includes all details relating to the conditions of application and implementation of such a guarantee which allow the consumer to decide whether or not to enter into a contractual relationship with the trader”.
- 683 [2013 Regulations reg.5](#) provides that “‘functionality’ in relation to digital content includes region coding, restrictions incorporated for the purposes of digital rights management, and other technical restrictions”.
- 684 On the particular significance of this category of information under the [Consumer Rights Act 2015](#) s.[36\(3\)](#), see below, para.[40-552](#).

- 685 On the particular significance of this category of information under the Consumer Rights Act 2015 s.36(3), see below, para.[40-552](#).
- ❶ 686 2013 Regulations Sch.2, which notes that in the case of a public auction (as defined by reg.5 “public auction” and explained by the 2011 Directive recital 24) the information listed in paras (b) to (e) may be replaced with the equivalent details for the auctioneer.
- 687 2013 Regulations reg.10(3) (off-premises contracts); reg.13(3) (distance contracts), referring to the “Model instructions for cancellation” in Sch.3 Pt A.
- 688 2013 Regulations reg.10(1)(b) (off-premises contracts); reg.13(1)(b) (distance contracts); Sch.3 Pt B.
- 689 2013 Regulations reg.10(2). Regulations 10(3), (4), and (6) makes further incidental provision as to these requirements. Regulation 11 makes special provision for the provision of information in connection with repair or maintenance contracts. “Durable medium” is defined by reg.5 as: “paper or email, or any other medium that—(a) allows information to be addressed personally to the recipient, (b) enables the recipient to store the information in a way accessible for future reference for a period that is long enough for the purposes of the information, and (c) allows the unchanged reproduction of the information stored”. On “durable medium” see *Content Services Ltd v Bundesarbeitskammer (C-49/11) 5 July 2012* paras 39–50 in the context of the Distance Contracts Directive 1997: “a durable medium must ensure that the consumer, in a similar way to paper form, is in possession of the [relevant] information … to enable him to exercise his rights where necessary”: (C-49/11) at para.42.
- 690 2013 Regulations reg.13(2).
- 691 2013 Regulations reg.13(4) implementing Consumer Rights Directive art.8(4) as explained by the CJEU in *Walbusch Walter Busch GmbH & Co KG v Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV (C-430/17) EU:C:2019:47*, 23 January 2019, paras 37–47. Directive (EU) 2019/2161 art.4(7)(a) will replace art.8(4): on the 2019 Directive see above, para.[40-063](#) (note).
- ❶ 692 2013 Regulations reg.14 and see above, para.[40-101](#) (note to heading) on the significance of the Trade and Cooperation Agreement 2020 art.208 (formerly art.DIGIT.13) in this respect. See also Directive (EU) 2019/2161 art.4(5) inserting a new art.6a into the 2011 Directive setting out additional specific information requirements for distance contracts concluded on online marketplaces on which see above, para.[40-101](#) (note).
- ❶ 693 2013 Regulations reg.14(3)–(5) and see *Fuhrmann-2 GmbH v B (C-249/21) EU:C:2022:269*, 7 April 2022 at paras 24–34 (on art.8(2) of the 2011 Directive, implemented by reg.14).
- 694 2013 Regulations reg.15 which implemented Consumer Rights Directive 2011 art.8(5). On the sanctions for a trader failing to do so, see 2013 Regulations regs 44 et seq., below, paras 40-135 et seq.
- 695 2013 Regulations reg.12(1) and (3). On the definition of “durable medium” in reg.5, see above, para.[40-101](#) (note). In the case of off-premises contracts for the supply of digital content not on a tangible medium and the consumer has given the consent and

acknowledgment in respect of its supply during the cancellation period, then the copy or confirmation must include confirmation of the consent and acknowledgment: [2013 Regulations reg.12\(5\)](#) and see below, para.[40-118](#).

- 696 See above, paras [40-094—40-096](#) on the significance of “make available to”.
- 697 [2013 Regulations reg.16\(1\)](#) and [\(5\)](#). On the definition of “durable medium” in [reg.5](#), see above, para.[40-101](#) (note). In the case of distance contracts for the supply of digital content not on a tangible medium where the consumer has given the consent and acknowledgment in respect of its supply during the cancellation period, then the copy or confirmation must include confirmation of the consent and acknowledgment: [2013 Regulations reg.16\(3\)](#) and see below, para.[40-118](#). See also *UAB ‘Tiketa’ v M. Š. (C-536/20) EU:C:2022:112*, 24 February 2022 at paras 48–51.
- 698 [2013 Regulations reg.12\(4\)](#) (off-premises contracts); [reg.16\(4\)](#) (distance contracts).
- 699 [2013 Regulations reg.12\(2\)](#) (off-premises contracts) and [reg.16\(2\)](#) (distance contracts) referring to [Sch.2](#). The relevant information is detailed at para.[40-101](#) above.

(iii) - On-Premises Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(c) - Information Requirements

(iii) - On-Premises Contracts

- 40-105 In principle, the information requirements imposed on traders in respect of on-premises contracts apply to all types of “consumer contracts” with the exceptions already noted.⁷⁰⁰ In this respect, the trader must give or make available⁷⁰¹ the information to the consumer in a clear and comprehensible manner⁷⁰² if that information is not already apparent from the context.⁷⁰³ However, the information requirements do:

“... not apply to a contract which involves a day-to-day transaction and is performed immediately at the time when the contract is entered into.”⁷⁰⁴

As the Departmental Implementing Guidance explained:

“The principle behind the exemption for day-to-day transactions sold on premises is that the consumer will be very familiar with the goods or services and their cost, so that the level of information required by the Regulations would be superfluous. Thus buying a cup of coffee, the daily paper, weekly groceries, a tube of toothpaste, etc. would all constitute day-to-day transactions. By their nature, such transactions are likely to be low cost items.”⁷⁰⁵

Presumably, the question whether a contract is an example of a “day-to-day transaction” is to be judged by its frequency in the practice of the average consumer. Although this exclusion may be justified (as does the Department’s Guidance) on the basis of the likely familiarity of the consumer with the subject matter of such a transaction, it may also reflect a concern for the practical

inconvenience and administrative cost of the imposition of information requirements on traders in relation to such transactions.

The information required

40-106

Schedule 1 to the 2013 Regulations⁷⁰⁶ lists the information required:

U

“(a)the main characteristics of the goods, services or digital content, to the extent appropriate to the medium of communication and to the goods, services or digital content⁷⁰⁷;

(b)the identity of the trader (such as the trader’s trading name), the geographical address at which the trader is established and the trader’s telephone number;

(c)the total price of the goods, services or digital content inclusive of taxes, or where the nature of the goods, services or digital content is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated;

(d)where applicable, all additional delivery charges or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

(e)where applicable, the arrangements for payment, delivery, performance, and the time by which the trader undertakes to deliver the goods, to perform the service or to supply the digital content;

(f)where applicable, the trader’s complaint handling policy;

(g)in the case of a sales contract, a reminder that the trader is under a legal duty to supply goods that are in conformity with the contract;

(h)where applicable, the existence and the conditions of after-sales services and commercial guarantees

⁷⁰⁸**U**;

(i)the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract;

(j)where applicable, the functionality,⁷⁰⁹ including applicable technical protection measures, of digital content⁷¹⁰;

(k)where applicable, any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.”⁷¹¹

Footnotes

- 700 For the contracts to which Pt 2 of the 2013 Regulations applies, see above, paras 40-072, 40-075—40-082, which note the contracts excluded from the scope of the Regulations as a whole. On the definition of “on-premises contracts” see above, para.40-093.
- 701 See above, paras 40-094—40-096 on the significance of “make available”.
- 702 See above, para.40-100.
- 703 2013 Regulations reg.9(1).
- 704 2013 Regulations reg.9(2).
- 705 Department for Business Innovation & Skills, Consumer Contracts (Information, Cancellation and Additional Charges) Regulations, Implementing Guidance (December 2013) C, para.6. The inclusion of this exemption in the Regulations reflected the exercise of an option for Member States under the Consumer Rights Directive 2011 art.5(3).
- 706 As amended by SI 2014/870 and implementing 2011 Directive art.5. Article 5 is subject to amendment by Directive (EU) 2019/2161 art.4(3), but the 2019 Directive must be implemented by 28 November 2021 (i.e. after IP completion day) and as a result the UK is not required to do so: cf. above, para.40-063 (note) and Vol.I, para.1-019 and on IP completion day more generally above, para.40-004 and Vol.I, paras 1-020 et seq.
- 707 On the special significance of this requirement under the Consumer Rights Act 2015 s.11(4) (goods contracts) and s.36(3)(digital content contracts), see below, paras 40-501 and 40-552 respectively.
- 708 On the equivalent information applicable to distance contracts see *absoluts -bikes and more-GmbH & Co KG v the-trading-company GmbH (C-179/21) EU:C:2022:353*, 5 May 2022 (“Victorinox case”) at para.53, noted above, para.40-101 (note).
- 709 2013 Regulations reg.5 provides that “‘functionality’ in relation to digital content includes region coding, restrictions incorporated for the purposes of digital rights management, and other technical restrictions”.
- 710 On the particular significance of this category of information under the Consumer Rights Act 2015 s.36(3), see below, para.40-552.
- 711 On the particular significance of this category of information under the Consumer Rights Act 2015 s.36(3), see below, para.40-552.

(iv) - The Effects of the Information Requirements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(c) - Information Requirements

(iv) - The Effects of the Information Requirements

General

40-107 The information requirements imposed on traders as outlined above may have a number of different consequences: the provision of inaccurate information and the failure to provide information are both made to constitute breach of contract⁷¹²; in the context of off-premises contracts and distance contracts, a trader's failure to provide information on the consumer's right to cancel affects the period within which the consumer may cancel⁷¹³; and, in the context of off-premises contracts, this failure may constitute a criminal offence.⁷¹⁴ In addition, the various requirements imposed on traders may be enforced by injunction on the application of a weights and measures authority.⁷¹⁵ Finally, the provision of inaccurate information or the failure to provide information may constitute an unfair commercial practice within the meaning of the *Consumer Protection from Unfair Trading Regulations 2008*.⁷¹⁶ As earlier noted, in *Radlinger v Finway a.s.* the Court of Justice held that the effectiveness of the protection provided by information requirements for consumers in the Consumer Credit Directive 2008 means that a national court must raise of its own motion the issue whether these requirements have been fulfilled and, if they have not, must "draw all the consequences provided for under national law".⁷¹⁷ Although there was no decision of the Court of Justice before IP completion day applying this approach in the context of the information duties imposed by the Consumer Rights Directive, a UK court may nonetheless hold that such a duty exists in relation to the *2013 Regulations*, either by analogy with other consumer protection legislation where the duty applies or by way of application of a "principle laid down" before IP completion day and so part of retained EU case-law.⁷¹⁸

The contractual significance of information supplied

- 40-108 For all three types of contracts (off-premises contracts, distance contracts and on-premises contracts), the [2013 Regulations](#) as made provided that any information which is given by a trader to a consumer as they require “is to be treated as included as a term of the contract”⁷¹⁹ and that:

“... a change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.”⁷²⁰

In general English law, the effect of making the information given a term of the contract would in principle be that the trader is held to have promised that the information is accurate, with the result that any inaccuracy would constitute a breach of contract by the trader, with the normal set of remedies for breach at common law. However, as regards those goods contracts and digital content contracts to which it applies,⁷²¹ the [Consumer Rights Act 2015](#) made provision for this purpose by stating that information concerning the main characteristics of the goods or digital content provided by the trader as required by the [2013 Regulations](#)⁷²² is to be included as a term of the contract under its provisions on sale or supply by description,⁷²³ with the result that breach of these terms gives rise to the rights for consumers which the Act then sets out⁷²⁴; and the [2015 Act](#) further provided that other information required by the [2013 Regulations](#) for these contracts and for services contracts, is to be treated as a term of these contracts⁷²⁵ with the result that breach gives rise to rights for the consumer which vary according to the category of contract in question.⁷²⁶ After the enactment of these provisions in the [2015 Act](#), the [2013 Regulations](#) were amended so that their own broad provisions governing the contractual significance of information were replaced with a residual provision to similar effect but applicable only to contracts for the supply of digital content *other than* for a price paid by the consumer.⁷²⁷

Effect on the contract of failure to provide information

- 40-109 Under the earlier [Cancellation of Contracts made in a Consumer’s Home or Place of Work, etc. Regulations 2008](#),⁷²⁸ a trader’s failure to provide the information to the consumer as they required rendered a contract unenforceable against the consumer.⁷²⁹ There is no equivalent provision in the [2013 Regulations](#), but they do provide that every contract to which Pt 2 applies⁷³⁰ is to be treated as including a term that the trader has complied with the information requirements which it sets out, with the exception of those required of traders by telephone with a view to concluding a distance contract.⁷³¹ This provision has no equivalent in the 2011 Directive, but can be seen as part of the

UK's provision of "adequate and effective means" to ensure compliance with the Directive,⁷³² and/or as setting out "general contract law" effects of the Directive's provisions which the latter does not itself regulate.⁷³³ The use by the Regulations of the technique of deemed contract term means that any failure to provide information as required by the Regulations would constitute a breach of contract, with the consequences set out by the general common law.⁷³⁴ In addition to these effects on the contract, as regards off-premises contracts and distance contracts, failure in a trader to provide information on the consumer's right to cancel results in an extension of the period of cancellation from 14 days to a year, unless in the meanwhile the trader provides the consumer with the requisite information.⁷³⁵

Criminal law: off-premises contracts

- 40-110 In the case of off-premises contracts (but not distance contracts or on-premises contracts), the [2013 Regulations](#) create an offence for a trader who enters into an off-premises contract but fails to give the consumer the required information on the consumer's right of cancellation.⁷³⁶ A person guilty of such an offence is liable on summary conviction to an unlimited fine.⁷³⁷ The Regulations make further and incidental provision on the creation of this offence, including a defence of due diligence for the trader.⁷³⁸ In England and Wales, this offence is to be enforced and prosecuted by weights and measures authorities, often known as the local trading standards service.⁷³⁹

Enforcement of information requirements

- 40-111 The information requirements set out by the [2013 Regulations](#) attract the general enforcement measures available to weights and measures authorities for the enforcement of the Regulations generally, as noted later in this section.⁷⁴⁰

Relationship between information requirements and law governing unfair commercial practices

- 40-112 In principle, a trader's failure to provide the information required by the [2013 Regulations](#) or, as the case may be, a failure to provide such information accurately, may constitute (respectively) a "misleading omission" or "misleading action" within the meaning of the [Consumer Protection from Unfair Trading Regulations 2008 \("2008 Regulations"\)](#), subject in particular to the condition that doing so caused, or was likely to cause, the average consumer to take a transactional decision

he would not have taken otherwise and to the other conditions which the [2008 Regulations](#) set out.⁷⁴¹ Where this is the case, then the consequences of such failures would give rise to the enforcement measures and (in the case of misleading actions but not misleading omissions) to the rights to redress for consumers which those Regulations provide in addition to the consequences and enforcement measures already noted in relation to the [2013 Regulations](#) themselves.⁷⁴²

Misleading omissions

- 40-113 In this respect, the position as regards misleading omissions is clear, as [reg.6\(1\)](#) of the [2008 Regulations](#) provides that:

Regulation 6

“(1) A commercial practice is a misleading omission if, in its factual context, taking account of the matters in paragraph (2)—

- (a) the commercial practice omits material information,
- (b) the commercial practice hides material information,
- (c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or
- (d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,

and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.”

And for this purpose, [reg.6\(3\)](#) provides that “material information” means:

Regulation 6

“(a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and

(b) any information requirement which applies in relation to a commercial communication as a result of an EU obligation.”

As a result, for example, a trader's failure to provide the information required by the [2013 Regulations](#) (which implemented the Consumer Rights Directive 2011) falls within [reg.6\(3\)\(b\)](#) so as to satisfy the "material information" element of the [2008 Regulations](#)' definition of a "misleading omission".⁷⁴³ This means that such a failure could give rise to the enforcement measures available under the [2008 Regulations](#),⁷⁴⁴ though not to any right to redress for consumers under these Regulations as these do not extend to "misleading omissions".⁷⁴⁵

Misleading actions

- 40-114 Similarly where a trader provides a consumer with false information of the types required by the [2013 Regulations](#), this could in principle constitute a "misleading action" within the meaning of the [2008 Regulations](#), subject to the other conditions for the incidence of this particular form of unfair commercial practice.⁷⁴⁶ As will be seen, the definition of a "misleading action" under the [2008 Regulations](#) is quite complex, but its central element concerns a commercial practice where "it contains false information and is therefore untruthful" in relation to a series of matters which it then specifies,⁷⁴⁷ these matters being drawn directly from the 2005 Directive on which the [2008 Regulations](#) are based.⁷⁴⁸ In this respect, it is submitted that this possibility is not prevented by art.3(4) of the Unfair Commercial Practices Directive 2005 (which the [2008 Regulations](#) implemented), according to which:

"In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects."

As recital 10 of the 2005 Directive explains, art.3(4) seeks to ensure that the Directive's relationship with existing Community law is coherent, and so

"... applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer."

In the result,⁷⁴⁹ art.3(4) therefore resolves:

"... irreconcilable conflict between substantive norms, i.e. situations where the same business-to-consumer commercial practice would qualify as 'unfair' under one provision and 'non-unfair' ... under another provision. In such cases, the EU special provision shall 'prevail'."⁷⁵⁰

While the information requirements in the 2011 Directive must “prevail” over the more general information requirements set out by the 2005 Directive, a failure accurately to provide this information *may* constitute a “misleading action” under the 2005 Directive (subject to its other conditions, notably, that the information “deceives or is likely to deceive the average consumer” and “causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise”⁷⁵¹). In the result, in the UK context the provision of false or misleading information of the types required by the [2013 Regulations](#)⁷⁵² may constitute a “misleading action” and so give rise to the enforcement measures set out by the [2008 Regulations](#) and they may also give rise to a right to redress for individual consumers, as these rights can arise in respect of the commission of a misleading action.⁷⁵³ Where this is the case, the consumer’s rights to civil redress in respect of a misleading action and the consumer’s rights for breach of contract in respect of information provided by a trader under the [2013 Regulations](#) (and treated as a term of the contract under the [Consumer Rights Act 2015](#))⁷⁵⁴ may in principle co-exist, though it is submitted that the courts would so interpret the two regimes that the consumer could not in these circumstances obtain double recovery.

Footnotes

712 Below, paras [40-108—40-109](#).

713 [2013 Regulations](#) reg.31, below, para.[40-121](#).

714 Below, para.[40-110](#).

715 Below, paras [40-111, 40-135](#).

716 Below, paras [40-112—40-114](#).

717 *Radlinger v Finway a.s. (C-377/14) 21 April 2016* at paras 62–74 and see above, para.[40-071](#).

718 Above, para.[40-071](#).

719 [2013 Regulations](#) reg.9(3) (on-premises contract); [reg.10\(5\)](#) (off-premises contract); and reg.13(6) (distance contract).

720 [2013 Regulations](#) reg.9(4) (on-premises contract); [reg.10\(4\)](#) (off-premises contract); and reg.13(7) (distance contract). While the Consumer Rights Directive 2011 art.6(5) required these provisions only for off-premises and distance contracts, art.5 concerning contracts other than off-premises and distance contracts does not do so. It is submitted, though, that, art.3(5) of the Directive left the issue of the contractual force of information duties to national contract law where this is not regulated by the Directive itself, and that national law to this effect is reflected in the [2013 Regulations](#) reg.9(4): on the significance of art.3(5) of the 2011 Directive see above, paras [40-066—40-068](#). The 2011 Directive art.6(5) states generally that information forming a part of the contract “shall not be altered unless the contracting parties expressly agree otherwise”, and the [2013 Regulations](#) explain that no changes can be made without express agreement to “any of that information, made before entering into the contract *or later*”. A simple example of a later change to information may be found in the case of the parties agreeing by exchange of emails after contract to a different

time of delivery of the goods. It may also be thought that the wording of the Regulations is broad enough to forbid changes by the trader to information provided even where these changes are made under an express variation clause in the contract. However, according to the European Commission, while a provision in a trader's standard terms stating that it may derogate from the information provided would not satisfy art.6(5)'s requirement for the express agreement of the parties to any change, art.6(5) would not prevent changes made to the *terms* of a contract after it has been concluded (apparently) under an express variation clause, though the latter would be subject to control under the Unfair Terms in Consumer Contracts Directive 1993: DG Justice Guidance Document on 2011 Directive, para.4.2.5 and see below on the control of variation clauses under the [Consumer Rights Act 2015 Pt 2](#) (paras 40-223 et seq. and esp. at paras [40-338](#)—[40-341](#)) (which implemented the 1993 Directive). If this interpretation of the 2011 Directive holds good, if possible, the terms of the [2013 Regulations](#) must be read so as to conform to this reading of the 2011 Directive, as here it requires "full harmonisation": 2011 Directive art.4 and above, para.[40-065](#).

- 721 The [2013 Regulations](#) apply to contracts entered into on or after 13 June 2014: [reg.1\(2\)](#), above, para.[40-083](#). The relevant provisions of the [Consumer Rights Act 2015 Pt 1](#) came into force on 1 October 2015: below, paras [40-241](#) and [40-465](#).
- 722 [2013 Regulations Sch.1 para.\(a\)](#) or [Sch.2 para.\(a\)](#) (goods contracts); [Sch.1 paras \(a\), \(j\) and \(k\)](#) or [Sch.2 paras \(a\), \(v\) or \(w\)](#) (digital contents contracts), which make clear that the categories of information are wider as regards digital content contracts.
- 723 [Consumer Rights Act 2015 s.11\(4\)–\(6\)](#) (goods contracts); [s.36\(3\)–\(5\)](#) (digital content contracts).
- 724 [Consumer Rights Act 2015 ss.11\(7\)](#) and [19](#) (goods contracts); [ss.36\(5\)](#), [42](#) (digital content contracts): see below, paras [40-495](#), [40-501](#) and [40-514](#) et seq.; [40-548](#), [40-552](#) and [40-561](#) et seq.
- 725 [2015 Act s.12](#) (goods contracts) on which see below, para.[40-502](#); [s.37](#) (digital content contracts) on which see below, para.[40-553](#); and [s.50](#) (services contracts) on which see below, paras [40-576](#)—[40-580](#).
- 726 [2015 Act s.19\(5\)](#) (goods contracts) on which see below, paras [40-495](#), [40-514](#) et seq.; [s.42\(4\)](#) (digital content contracts) on which see below, paras [40-548](#), [40-561](#) et seq.; and [s.54](#) (services contracts) on which see below, paras [40-574](#), [40-584](#) et seq.
- 727 [Consumer Contracts \(Amendment\) Regulations 2015 \(SI 2015/1629\)](#) regs 4–6 (replacing [2013 Regulations reg.9\(3\)](#) (on-premises contracts), [reg.10\(5\)](#) (off-premises contracts) and [reg.13\(6\)](#) (distance contracts)). (These amendments to the [2013 Regulations](#) apply to contracts entered into on or after 1 October 2015: [SI 2015/1629 reg.1](#).) The intention was that the [2013 Regulations](#) should still apply to contracts under which digital content is supplied which do not fall within the definition of "digital content contracts" in the [2015 Act](#): Explanatory Note to [SI 2015/1629](#), which states that the amendments are "in consequence of the Act and revoke provisions of the [2013 Regulations](#) to the extent they are replicated in the Act". The retention of the residual category of contracts for the supply of digital content in the [2013 Regulations](#) as amended is required by their broad scope following in this respect the Consumer Rights Directive 2011: see above, para.[40-078](#). Under the [2015 Act Pt 1 Ch.3](#), "a contract for a trader to supply digital content to a consumer" is of two types: where digital

- content “is supplied for a price paid by the consumer” ([s.33\(1\)](#)) and where “(a) it is supplied free with goods or services or other digital content for which the consumer pays a price, and (b) it is not generally available to consumers unless they have paid a price for it or for goods or services or other digital content” ([s.33\(2\)](#)): below, paras [40-545](#)—[40-546](#).
- 728 There was no equivalent provision in the [Consumer Protection \(Distance Selling\) Regulations 2000](#) (SI 2000/2334).
- 729 SI 2008/1816 reg.7(6); *W v Veolia Environmental Services (UK Plc) [2011] EWHC 2020 (QB), [2012] 1 All E.R. (Comm) 667; Allproperty Claims Ltd v Tang [2015] EWHC 2198 (QB)* at [45] and cf. *Kell v Department of Energy and Climate Change Unreported 23 July 2015 (Newcastle upon Tyne County Ct)*.
- 730 i.e. off-premises contracts, distance contracts and on-premises contracts: [2013 Regulations reg.7](#) and see paras [40-072](#)—[40-082](#).
- 731 [2013 Regulations reg.18](#) referring specifically to the information requirements in [regs 9–14](#) and [16](#).
- 732 2011 Directive art.23(1).
- 733 As permitted by 2011 Directive art.3(5) as explained above, paras [40-066](#)—[40-068](#).
- 734 See Vol.I, Chs [27](#), [29](#) and [30](#). In particular, this could lead to termination for breach of contract subject to the normal requirement that breach by the trader substantially deprived the consumer of the benefit of the contract and/or damages: Vol.I, para.[27-012](#).
- 735 [2013 Regulations reg.31](#), on which see below, para.[40-121](#).
- 736 [2013 Regulations reg.19](#), referring to the information listed in [paras \(l\), \(m\) or \(n\)](#) of Sch.2 (on which see above, para.[40-101](#)).
- 737 Until 12 March 2015 the maximum fine available on summary conviction was £5,000 (level 5 on the standard scale), but on that date this was changed to an unlimited fine by the [Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) s.85.
- 738 [2013 Regulations](#) regs 20–23. [Regulations 24–26](#) (powers of investigation, obstruction of authorised officers, and freedom from self-incrimination, respectively) were revoked by the [Consumer Rights Act 2015 \(Consequential Amendments\) Order 2015](#) (SI 2015/1726) art.2, Sch. Pt 2 para.7; the [2015 Act](#) was amended so as to include the [2013 Regulations](#) in the list of legislation to which the investigatory powers in that Act ([Sch.5](#)) apply: [SI 2015/1726 art.2, Sch. Pt 1 para.6](#).
- 739 [2013 Regulations reg.23](#).
- 740 [2013 Regulations Pt 6](#), below, paras [40-135](#)—[40-141](#).
- 741 SI 2008/1277 reg.5 and especially [5\(2\(b\)\)](#) (misleading actions) and [reg.6](#) especially [6\(1\)](#) (misleading omissions), below, paras [40-174](#) et seq.
- 742 [2008 Regulations](#) (as amended by [SI 2014/870](#)), [Pt 4 Enforcement](#); [Pt 4A Consumers' Rights to Redress](#): on the latter, see below, paras [40-181](#) et seq.
- 743 This reflected accurately the Unfair Commercial Practices Directive 2005 art.7(5), which refers to a “non-exhaustive list” in its Annex II, and the latter includes Directive 97/7/EC on distance contracts, arts 4 and 5 of which were the predecessor provisions to the information requirements contained in the Consumer Rights Directive 2011 arts 6 and 7 which were implemented in UK law by the [2013 Regulations](#) regs [13](#) and [14](#). For the “complementary nature” of information obligations under specific EU legislation and the provision in art.7(5)

of the 2005 Directive (implemented by [reg.6\(3\)\(b\) of the 2008 Regulations](#)), see *Abcur AB v Apoteket Farmaci, Apoteket AB and Apoteket Farmaci AB (C-544/13 and C-545/13) 16 July 2015* at paras 78–82 (medicinal products for human use). For discussion of the significance of “misleading omission” under [reg.6\(3\)\(a\) of the 2008 Regulations](#) see *Secretary of State for Business, Innovation and Skills v PLT Antimarketing Ltd [2015] EWCA Civ 76, [2015] C.T.L.C. 8* at [30]–[31] where the Court of Appeal identified the “critical question” as being “whether the average consumer can be said to need to obtain that information from the trader in question, rather than obtain it (for example) by shopping around, and finding out for himself whether something better, or cheaper, is on offer”: *Secretary of State for Business, Innovation and Skills v PLT Antimarketing Ltd* at [31] per Briggs LJ (with whom Ryder and Richards LJJ agreed) later referring to this as “the “needs” test”: *Secretary of State for Business, Innovation and Skills v PLT Antimarketing Ltd* at [40]. cf. the approach of the CJEU to art.6 of the 2005 Directive’s requirements as regards “misleading actions” in *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország Kft (C-388/13) 18 April 2015* at paras 53–54 (where a trader provides erroneous information to the consumer, the fact that the consumer could himself have obtained the correct information is irrelevant). Where an information requirement is not established by EU law, then its omission cannot be deemed to be material by way of application of art.7(5) of the 2005 Directive (which was implemented in UK law by [reg.6\(3\)\(b\) of the 2008 Regulations](#)): *Dyson Ltd v BSH Home Appliances NV (C-632/16) EU:C:2018:599* 25 July 2018 at paras 42–45.

- 744 On which see below, paras [40-179](#)—[40-180](#).
- 745 Below, para.[40-196](#).
- 746 [2008 Regulations reg.5](#) and see below, paras [40-190](#)—[40-194](#).
- 747 [2008 Regulations reg.5\(2\)\(a\)](#) and [5\(4\)](#).
- 748 Unfair Commercial Practices Directive 2005 art.6(2). On the 2005 Directive, see below, paras [40-168](#) et seq.
- 749 See also below, para.[40-452](#).
- 750 *Orlando (2011) European Review of Contract Law 25* at 50–51 (emphases omitted), and see below, para.[40-170](#).
- 751 [2008 Regulations reg.5\(2\)\(a\)](#) and [\(b\)](#). In *Abcur AB v Apoteket Farmaci, Apoteket AB and Apoteket Farmaci AB (C-544/13 and C-545/13) 16 July 2015* the CJEU held that art.3(4) of the 2005 Directive “applies only in so far as there are no specific EU law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer” in relation to medical products for human use (at para.79) and that, where the specific provisions conflict with the provisions in the 2005 Directive, the former “take precedence and apply to those specific aspects of unfair commercial practices” (at para.81), but in the result, this allowed advertising practices relating to such medical products to fall within the scope of the 2005 Directive “provided that the conditions for the application of that directive are satisfied” (at para.83). Moreover, the CJEU has explained that “the term ‘conflict’ [in art.3(4)] refers to the relationship between the provisions in question which goes beyond a mere disparity or simple difference, showing a divergence which cannot be overcome by a unifying formula enabling both situations to exist alongside each other without the need to bring them to an end”:

Autorità Garante della Concorrenza e del Mercato v Wind Tre SpA and Vodafone Italia SpA (Joined Cases C-54/17 and C-55/17) EU:C:2018:710, 13 September 2018 at para.60; *Acea Energia SpA v Autorità Garante della Concorrenza e del Mercato (C-406/17 to C-408/17 and C-417/17) EU:C:2019:404, Order of the Court of 14 May 2019* (available in French) at paras 44–49. For an example of the application of art.3(4) see *Citroën Commerce GmbH v Zentralvereinigung des Kraftfahrzeuggewerbes zur Aufrechterhaltung lauterer Wettbewerbs eV (ZLW) (C-476/14) 7 July 2016* at paras 44–46 where the CJEU held that the provision in the 2005 Directive regarding the materiality of certain information in invitations to purchase for the purposes of misleading omissions (which included “the price inclusive of taxes” (art.7(4)(c))) could not apply to the case before them “as the aspect relating to the selling price referred to in an advertisement”, as that issue was governed by Directive 98/6/EC on consumer protection in the indication of the prices of products offered to customers [1998] O.J. L80/27 art.3(1)’s provision on “selling price”: the 1998 Directive governed this “specific aspect” within the meaning of art.3(4) of the 2005 Directive, which therefore “cannot apply as regards that aspect” (*C-476/14* judgment at para.45). See also *Dyson Ltd v BSH Home Appliances NV (C-632/16) EU:C:2018:59*, 25 July 2018 at paras 32–41 (EU legislation required a “uniform energy label” for vacuum cleaners and the effect of art.3(4) of the 2005 Directive meant that the omission of certain information not required by this label therefore could not constitute a “misleading omission” within the meaning of art.7 of that Directive); *Konsumentombudsmannen v Mezina AB (C-363/19) EU:C:2020:693, 10 September 2020* at paras 55–63 (EU regulation contained specific rules on health claims in respect of foodstuffs, which therefore constituted a “special rule” as compared with the general rules under the 2005 Directive). By contrast in *Acea Energia SpA v Autorità Garante della Concorrenza e del Mercato (C-406/17 to C-408/17 and C-417/17)* at paras 52–62, the CJEU held that two sectoral directives governing the electricity market and common rules concerning the transport, distribution, supply and storage of natural gas did not fall within the exclusion of art.3(4) of the 2005 Directive: while these directives did require measures of consumer protection, the latter did not govern particular aspects of commercial practices within the meaning of the 2005 Directive and, moreover, they specified that their provisions were without prejudice to EU rules on consumer protection; as a result there was no “conflict” between the two sectoral directives and the 2005 Directive.

- 752 See above, paras [40-101](#) (off-premises and distance contracts) and [40-106](#) (on-premises contracts).
- 753 [2008 Regulations](#) regs 27A(4)(a), 27B(1)(a) below, paras [40-181](#) et seq. esp. at [40-189](#).
- 754 Above, para.[40-108](#).

(i) - The Situations in Which the Right Arises and its Duration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(d) - The Consumer's Right of Cancellation or Withdrawal

(i) - The Situations in Which the Right Arises and its Duration

The contracts affected

40-115



Part 3 of the 2013 Regulations creates rights of cancellation for consumers, and regulates the effect of their exercise and of the withdrawal of an offer by a consumer, in respect of off-premises and distance contracts but not on-premises contracts.⁷⁵⁵ Part 3 excludes the same types of contracts from the application of these provisions as they exclude from Pt 2's information requirements,⁷⁵⁶ in addition to those types of contracts or contracts made in particular circumstances which are excluded entirely from the scope of the 2013 Regulations.⁷⁵⁷ Part 3 also excludes from its scope contracts for the supply of goods or services of certain types or supplied in certain circumstances, for example, for the supply of goods that are made to the consumer's specifications or are clearly personalised,⁷⁵⁸ wine bought en primeur,⁷⁵⁹ newspapers, periodicals or magazines supplied other than under a subscription,⁷⁶⁰ contracts for the supply of accommodation, transport of goods, vehicle rental services, catering or services relating to leisure activities, if the contract provides for a specific date or period of performance

⁷⁶¹

U and contracts concluded at a public auction.⁷⁶² Moreover, the rights conferred by Pt 3 cease to be available to the consumer in the case of contracts for the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons, if they become unsealed after delivery; contracts for the supply of sealed audio or sealed video recordings or sealed computer software, if the goods become unsealed after delivery; and any sales contract, if the goods become mixed inseparably (according to their nature) with other items after delivery.⁷⁶³

The right to cancel the contract and the right to withdraw an offer

- 40-116 The [2013 Regulations](#) distinguish between the consumer's right to cancel the off-premises contract or distance contract after it has been concluded and the consumer's right to withdraw an offer which he or she has made.⁷⁶⁴ The right to cancel itself is created and delineated by the Regulations in terms of when it starts, how long it exists and the effects of its exercise. As [reg.29\(1\)](#) provides, “[t]he consumer may cancel a distance or off-premises contract at any time in the cancellation period without giving any reason, and without incurring any liability” except in the circumstances which the Regulations themselves set out.⁷⁶⁵ By contrast, [reg.29\(3\)](#) provides that:

Regulation 29

“(3) Paragraph (1) does not affect the consumer’s right to withdraw an offer made by the consumer to enter into a distance or off-premises contract, at any time before the contract is entered into, without giving any reason and without incurring any liability.”

This provision does not create any right in a consumer to withdraw an offer, but rather implicitly recognises that such a right exists (as it does in English law at common law⁷⁶⁶) and that this right is not affected by the recognition of the right to cancel the contract recognised by the Regulations. As explained in Vol.I of the present work, at common law a person (the offeror) has a general right to withdraw his or her offer before it has been accepted by the offeree; and this right of withdrawal is subject to a requirement of communication of the withdrawal to the offeree, though this may be satisfied by communication other than from the offeror and is subject to exceptions.⁷⁶⁷ By contrast, the Regulations require the consumer to inform the trader of the decision to withdraw any offer made to a trader in respect of the contracts covered by [Pt 3](#), and provides that, where a consumer does so, the trader must in principle reimburse payments received from the consumer (subject to exceptions and qualifications), and that any “ancillary contract” made by the consumer is automatically terminated.⁷⁶⁸ As a result, while the circumstances in which a consumer may withdraw an offer to contract in respect of an off-premises or distance contract are determined by the common law, the Regulations set both a legal requirement of informing the trader that is distinct from the requirement of communication of a withdrawal or revocation of offer at common law and two distinct legal consequences of its exercise. In both respects, the [2013 Regulations](#) therefore seek to harmonise the circumstances in which a consumer can withdraw an offer and can cancel any concluded contract. This is clearly sensible in terms of legislative policy, as otherwise a trader could argue that the Regulations’ provisions on the reimbursement of payments made by a consumer and on ancillary contracts do not apply to offers made but not accepted by the trader, since no contract was concluded and, therefore, no right of cancellation of *the contract* was

generated. This is all the more the case as a trader could seek to rely either on the general common law position or on its own standard terms of business to claim that its own communications constitute mere invitations to treat and a communication to it from a consumer constitutes an offer accepted only on further communication by the trader.⁷⁶⁹ On the other hand, the Regulations make no provision in respect of any possible right in a consumer to revoke an acceptance which he or she has posted,⁷⁷⁰ except by way of its own right of cancellation.

The right to cancel: general

- 40-117 As earlier noted, the [2013 Regulations](#) provide that:

“... [t]he consumer may cancel a distance or off-premises contract at any time in the cancellation period without giving any reason, and without incurring any liability”,⁷⁷¹

though they then provide four circumstances in which the consumer may incur some liability as a result of the exercise of the right to cancel.⁷⁷² While the Consumer Rights Directive 2011 justifies the right to cancel in distance contracts on the basis that, as the consumer has not seen the goods, he or she “should be allowed to test and inspect the goods he has bought to the extent necessary to establish the nature, characteristics and the functioning of the goods” and the right to cancel in off-premises contracts “because of the potential surprise element and/or psychological pressure” in this situation, the Directive (and in turn the Regulations) do not attempt to restrict the right to cancel to cases where these grounds are relevant, but instead allow the consumer to cancel “without giving any reason”.⁷⁷³

Supply of services or digital content in cancellation period

- 40-118 The [2013 Regulations](#) provide that the trader must not begin the supply of a service before the end of the cancellation period⁷⁷⁴ unless the consumer has made an express request to this effect and, in the case of an off-premises contract, this was made on a durable medium.⁷⁷⁵ Where the trader begins performance of the service at such a request by the consumer, the latter ceases to have the right to cancel the contract once the service has been fully performed, provided that he or she acknowledged that this would be the case when performance of the service began.⁷⁷⁶ Similarly, a trader must not begin to supply digital content not on a tangible medium⁷⁷⁷ unless the consumer has given express consent and has acknowledged that the right to cancel will be lost.⁷⁷⁸ Where these conditions are satisfied, however, the consumer ceases to have a right to cancel the contract.⁷⁷⁹

The cancellation period

- 40-119 The earlier directives on doorstep selling and distance contracts set a period of seven days within which the consumer could cancel these types of contract,⁷⁸⁰ but their requirement of only “minimum harmonisation”⁷⁸¹ led to differing cancellation periods in the laws of Member States.⁷⁸² The Consumer Rights Directive 2011 saw these differences as causing legal uncertainty and compliance costs for traders, and so requires instead a uniform period of 14 days,⁷⁸³ this being faithfully reflected in the [2013 Regulations](#).⁷⁸⁴ Under the Directive, this period refers to 14 days after the relevant day (“days” referring to calendar days),⁷⁸⁵ and this was given effect by the [2013 Regulations](#) by referring to each cancellation period as ending, for example, “at the end of 14 days *after the day on which* the contract is entered into”.⁷⁸⁶ However, this apparent simplicity is then marred by the considerable complexity of the provisions governing the commencement of this period and its extension by up to a year for the situation where the trader has not notified the consumer of the existence of the right.⁷⁸⁷ This scheme is set by the [2013 Regulations](#) by means of provision in [reg.30](#) governing the “normal cancellation period” and in [reg.31](#) governing the extended cancellation period where the information requirement is breached.

Normal cancellation period

- 40-120 The [2013 Regulations](#) set the day relevant to the start of the 14-day cancellation period differently according to the particular type of contract in question and by reference to the ending of that period. So, in the case of service contracts⁷⁸⁸ and contracts for the supply of digital content which is not supplied on a tangible medium, the cancellation period ends at the end of 14 days after the day on which the contract is entered into,⁷⁸⁹ the latter to be determined by the application of the normal rules at common law governing the formation of contract.⁷⁹⁰ In the case of “sales contracts”,⁷⁹¹ the Regulations set a basic rule according to which the cancellation period ends at the end of 14 days after the day on which the goods come into the physical possession of either the consumer or of a person, other than the carrier, identified by the consumer to take possession of them.⁷⁹² This rule is then nuanced for the cases where the sales contract concerns multiple goods ordered in one order but delivered on different days (the day on which the last of the goods comes into the possession of the consumer, etc.); multiple lots of goods or pieces of something delivered on different days (the day on which the last of the lots or pieces come into the possession of the consumer, etc.); and for the regular delivery of goods during a defined period of more than one day (the day on which the first of the goods comes into the possession of the consumer, etc.).⁷⁹³ For these purposes, it is submitted that the notion of goods “coming into the physical possession

of the consumer” attract an autonomous European significance, since the 2011 Directive (which the Regulations implemented) uses this notion in relation to sales contracts in the context of the consumer’s right of cancellation⁷⁹⁴ and in relation to its provisions governing the delivery of goods and the passing of risk.⁷⁹⁵ In this respect, in the case of the passing of risk, recital 55 of the Directive explains that “a consumer should be considered to have acquired the physical possession of the goods when he has received them”.⁷⁹⁶ In order to achieve a coherent interpretation of the Directive, this explanation should also be used as regards “coming into physical possession of the consumer” for the purposes of the consumer’s right of cancellation. On this basis, as a matter of EU law the question whether goods have come into the physical possession of a consumer would become whether he has received them, but the precise significance of this in a particular case would remain for national courts as a matter of the application of the law to the facts as they find them.⁷⁹⁷ It is submitted that a UK court should follow this approach in the application of the 2013 Regulations.

Cancellation period extended for breach of information requirement

- 40-121 Where a trader did not provide the consumer before the conclusion of the contract with information on the right to cancel as the Regulations require,⁷⁹⁸ the cancellation period ends at the end of 12 months after the day on which it would otherwise have ended under the normal cancellation periods (for example, for service contracts the day of the conclusion of the contract),⁷⁹⁹ unless in the meanwhile the trader provides the consumer with that information, when the cancellation period ends 14 days after the consumer receives that information.⁸⁰⁰ These rules marked a significant change from the unsatisfactory position under the earlier directives, under which the period for exercise of the right of cancellation in doorstep selling contracts started only on receipt by the consumer of notice of that right⁸⁰¹ and was therefore held to be inconsistent with any temporal limitation in national law⁸⁰²; and in distance contracts where a trader’s failure to inform led to the right lasting for three months or until seven days after the information had been supplied.⁸⁰³ The 2011 Directive instead required a uniform period of 12 months throughout the EU in the interests of legal certainty,⁸⁰⁴ and this was reflected in its implementation by the 2013 Regulations.⁸⁰⁵

Exercise of the right to cancel

- 40-122 The 2013 Regulations provide generally that “to cancel a contract ... the consumer must inform the trader of the decision to cancel it”,⁸⁰⁶ either by using a “form following the model cancellation form” which the Regulations themselves provide⁸⁰⁷ or by making “any other clear statement setting out the decision to cancel the contract”.⁸⁰⁸ Where a trader gives consumers the

option of using such a form or other statement on the trader's website, the Regulations provide that the consumers need not use it, but if they do, the trader must communicate to them an acknowledgement of receipt of the cancellation on a durable medium⁸⁰⁹ without delay.⁸¹⁰ Where a consumer cancels by making "any other clear statement setting out the decision to cancel the contract", the Regulations provide that:

"... the consumer is to be treated as having cancelled the contract in the cancellation period if the communication is sent before the end of that period."⁸¹¹

It is for a consumer to show that the contract was cancelled in the cancellation period which the Regulations set out.⁸¹²

No effective waiver of right by consumer

⁴⁰⁻¹²³ As earlier noted, under the [2013 Regulations](#), where the right to cancel exists, the consumer may choose to cancel without giving any reason. In other situations where English law recognises a right in a party to a contract to set that contract aside (whether rescission for misrepresentation or termination for breach of contract), such a party may instead choose to affirm the contract and so lose the right to set it aside.⁸¹³ While the [2013 Regulations](#) do not so provide, the 2011 Directive (which they implemented) states expressly that, where the law applicable to the contract is the law of a Member State, "consumers may not waive the rights conferred on them by the national measures transposing this Directive".

⁸¹⁴

U Given the duty of national courts to interpret the national legislation implementing a directive so as to conform to EU law,⁸¹⁵ it is submitted that a consumer would not lose any right of cancellation under the Regulations by any purported affirmation of the contract or waiver of the right to do so. On the other hand, this position is unlikely to be of great practical significance given the short-lived nature of the right of cancellation, except in the case where the trader has not informed the consumer of the right of cancellation, but in that case it is unlikely that the consumer would know of it and therefore be found in possession of the knowledge of the right requisite for affirmation or waiver.⁸¹⁶

Contract unenforceable where right of cancellation exists

⁴⁰⁻¹²⁴

Under the earlier [Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations 2008](#), a trader's failure to provide the information to the consumer rendered a contract unenforceable against the consumer and, as a result, it was held that a company which hired a car to a consumer could not recover the hire costs from an insurer liable for damage caused to the consumer's car which the hired car replaced.⁸¹⁷ While the [2013 Regulations](#) do not make express provision as to the unenforceability of an off-premises contract or distance contract in these circumstances,⁸¹⁸ it is submitted that, where a right of cancellation in a consumer exists, then the contract is unenforceable against the consumer, with the potential for similar effects on the liability of a third party.⁸¹⁹

Footnotes

- 755 2013 Regulations reg.27(1) (referring to [Pt 3](#)). For the definition of these contracts see above, paras [40-084](#) (off-premises contract); [40-089](#) (distance contract) and [40-093](#) (on-premises contract).
- 756 2013 Regulation [reg.27\(2\)–\(4\)](#) and cf. [reg.7\(2\)–\(5\)](#) whose contents are noted above, para. [40-080](#). The only qualification on this position is that contracts for passenger transport services are wholly excluded from [Pt 3 of the 2013 Regulations](#), whereas their exclusion from [Pt 2](#) finds an exception in the case of distance contracts concluded by electronic means: see above, para. [40-081](#).
- 757 Above, para. [40-079](#).
- 758 2013 Regulations [reg.28\(1\)\(b\)](#). A contract under which an architect agrees merely to draw up plans for a house for an individual consumer does not fall within this exception, even though the plans themselves are "goods" and are "made to the consumer's specification or clearly personalised" (as set out by art.16(c) of the 2011 Directive) as this is secondary compared to the main subject-matter of the contract which is the supply of an intellectual service ("une prestation intellectuelle"), though it could count as a "service contract" so as fall within the exception to the right of cancellation in art.16(a) (implemented by [2013 Regulations reg.36\(2\)](#) on which see below, para. [40-118](#)) where such a contract is fully performed (and subject to other conditions): *NK v MS (C-208/19) EU:C:2020:382, 14 May 2020* at paras 58–65. According to the CJEU, the exception in art.16(c) is "inherent in the very subject matter of such a contract, namely the production of goods manufactured to the consumer's specifications" and therefore applies irrespective of whether the trader has begun to produce those goods: *Mobel Kraft GmbH & Co KG v M.L. (C-529/19) EU:C:2020:846, [2020] Bus. L.R. 2402, 21 October 2020*.
- 759 2013 Regulations [reg.28\(1\)\(d\)](#) as explained by 2011 Directive recital 49.
- 760 2013 Regulations [reg.28\(1\)\(f\)](#).
- 761 2013 Regulations [reg.28\(1\)\(h\)](#). On this exception (which implemented the 2011 Directive art.16(l)) see *CTS Eventim AG & Co KGaA (C-96/21) EU:C:2022:238*, 31 March 2022 at paras 36–55.

- 762 2013 Regulations reg.28(1)(g); “public auction” is defined by reg.5 “public auction”. The full list is contained in 2013 Regulations reg.28.
- 763 2013 Regulations reg.28(3). Following its general approach to exceptions from rules of consumer protection (above, para.40-088), the CJEU has held that these exclusions must be interpreted strictly: *slewo – schlafen leben wohnen GmbH v Ledowski (C-681/17) EU:C:2019:255*, 27 March 2019 at para.34. In that case, the CJEU held that the exception of “contracts for the supply of sealed goods which are not suitable for return due to health protection or hygiene reasons” applies “only if, after the packaging has been unsealed, the goods contained therein are definitively no longer in a saleable condition due to genuine health protection or hygiene reasons, because the very nature of the goods makes it impossible or excessively difficult, for the trader to take the necessary measures allowing for resale without affecting either of those requirements”: *C-681/17* at para.40. As a result, a mattress covered with a protective film which the consumer has removed cannot fall within this exception any more than does a garment, which may also come in contact with the human body when it is tried on by a consumer. For this purpose, the CJEU clearly envisaged that the goods in these situations would still be “saleable” for this purpose even if they had to be cleaned and sold second-hand: *C-681/17* at paras 41–48. See also *EU v PE Digital GmbH (C-641/19) EU:C:2020:808, 8 October 2020* at paras 43–47 in the context of the exclusion of the right to cancellation in contracts for the supply of digital content not supplied on a tangible medium, where the performance began with the consumer’s express consent and acknowledgment that the right of cancellation will thereby be lost, on which see below, para.40-118.
- 764 The terminology adopted by the Regulations for this purpose differs from the terminology used by the 2011 Directive, which refers to a right to withdraw where the Regulations refer to a right to cancel. As earlier noted at para.40-068, the Directive also provides for the case (as recognised by some national laws) of a consumer being bound by *an offer* (art.5(1), art.6(1)) and therefore appears to extend the consumer’s right to withdraw to the situation where he would otherwise be bound by his offer to *conclude* a distance or off-premises contract: art.12(b) describing the effects of withdrawal, even though arts 9 to 11 which describe the right of withdrawal itself and its exercise do not refer to this.
- 765 2013 Regulations reg.29(1) referring to regs 34(3) and (9), 35(5) and 36(4), on which see below, paras 40-127, 40-128, 40-130 and 40-132.
- 766 Vol.I, para.4-114. Withdrawal of an offer is often described as its revocation.
- 767 Vol.I, paras 4-115—4-120.
- 768 2013 Regulations regs 32(1), 34 and 38.
- 769 On the general rules at common law, see Vol.I, paras 4-015—4-018 (offer and invitation to treat); paras 4-031 et seq. (acceptance).
- 770 Vol.I, paras 4-078—4-079.
- 771 2013 Regulations reg.29(1).
- 772 2013 Regulations reg.29(1), referring to reg.34(3), 34(9), 34(5) and 36(4) on which see below, paras 40-127, 40-128, 40-130 and 40-132.
- 773 2011 Directive recital 37.
- 774 On which, see below, paras 40-119—40-120.

- 775 2013 Regulations reg.36(1). On the definition of “durable medium” in reg.5, see above, para.40-101 (note).
- 776 2013 Regulations reg.36(2) and see the example foreseen by the CJEU in *NK v MS (C-208/19) 14 May 2020 EU:C:2020:382* at paras 58–65, above, para.40-115 (note). This restriction on the availability of the right of cancellation does not apply to contracts for the supply of water, gas, electricity or district heating (on which see above, para.40-076). For the consequences of a consumer’s exercise of a right to cancel falling outside this restriction where services are supplied during the cancellation period; see 2013 Regulations reg.36(3)–(6), below, paras 40-131—40-133.
- 777 For “digital content” see 2013 Regulations reg.5, above, para.40-078. On “tangible medium” see above, para.40-078.
- 778 2013 Regulations reg.37(1).
- 779 2013 Regulations reg.37(2). For the consequences of a consumer’s exercise of a right to cancel falling outside this restriction, see reg.37(3)–(4). The CJEU has held that this exception to the availability of the right to cancel (found in art.16(m) of the Consumer Rights Directive 2011) must be interpreted strictly. As a result, a service, such as that provided by a dating website (the trader) to consumers, that allows the consumer “to create, process, store or access data in digital form and allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service” is not the supply of digital content so as to fall within the exception provided by art.16(m), read in conjunction with the definition of digital content provided by art.2(11) and recital 19 of that directive, and nor is the generation of a “personality report” on the consumer by the trader: *EU v PE Digital GmbH (C-641/19) EU:C:2020:808, 8 October 2020* at paras 43–46.
- 780 Directive 85/577/EEC art.5(1); Directive 97/7/EC art.6(1).
- 781 On which see above, para.40-023.
- 782 Directive 2011/83/EU recital 40.
- 783 Directive 2011/83/EU art.9. Directive (EU) 2019/2161 art.4(8) will insert a new art.9a into the 2011 Directive allowing Member States (subject to certain conditions) to extend the withdrawal period to 30 days for contracts concluded in the context of unsolicited visits by a trader to a consumer’s home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers: on the 2019 Directive see above, para.40-063 (note).
- 784 2013 Regulations regs 30 and 31.
- 785 Directive 2011/83/EU recital 41 referring to Council Regulation (EEC, Euratom) 1182/71, [1971] O.J. L124/1.
- 786 2013 Regulations reg.30(2) (emphasis added). A similar formulation is used in regs 30(3), (4), (5) and (6) and 31(2) and (3).
- 787 Directive 2011/83/EU arts 9 and 10.
- 788 For the definition of “service contract” see above, para.40-076.
- 789 2013 Regulations reg.30(1) and (2). “Digital content” means “data which are produced and supplied in digital form”: 2013 Regulations reg.5 “digital content”.
- 790 This results from Directive 2011/83/EU reg.3(5) as explained by paras 40-066—40-068, above.

- 791 For the definition of “sales contract” see above, para.[40-076](#).
- 792 [2013 Regulations reg.30\(1\)](#) and [\(3\)](#).
- 793 [2013 Regulations reg.30\(1\)](#) and [\(4\)–\(6\)](#).
- 794 Directive 2011/83/EU art.9(2)(b).
- 795 Directive 2011/83/EU arts 18 and 20, which were first implemented by [2013 Regulations](#) [regs 42](#) and [43](#), but were then re-implemented by the [Consumer Rights Act 2015 ss.28](#) and [29](#): see below, paras [40-529](#)—[40-530](#). These provisions all refer to goods coming into the possession of the consumer or a person identified by the consumer to take the possession of the goods.
- 796 The explanation in this recital supports the view that the Directive requires an autonomous view of the notion of “goods coming into the physical possession” of the consumer and this means that art.3(5)’s saving of *unregulated* contract law issues for national law would not apply, even if this notion were seen as belonging to “contract law”: on the significance of art.3(5), see above, paras [40-066](#)—[40-068](#).
- 797 Above, para.[40-018](#).
- 798 [2013 Regulations](#) [regs 10\(1\)](#) (off-premises contracts); [13\(1\)](#) (distance contracts). The information requirement is contained in Sch.2 para.(l). In *Hamilton v Volksbank Filder eG (C-412/06) EU:C:2008:215, [2008] E.C.R. I-02383* at paras 34–36 the ECJ held that the supply of incorrect information on the consumer’s right of cancellation is equivalent to no information and this was confirmed by the form of words used by Directive 2011/83/EU art.10, [2013 Regulations](#) [reg.31\(1\)](#).
- 799 [2013 Regulations](#) [reg.31\(1\)](#) and see above, para.[40-120](#) for the normal cancellation periods applicable to other types of contract.
- 800 [2013 Regulations](#) [reg.31\(2\)](#).
- 801 Directive 85/577/EEC art.5.
- 802 *Heininger v Bayerische Hypo- und Vereinsbank AG (C-481/99) EU:C:2001:684, [2001] E.C.R. I-09945* at paras 44–48.
- 803 Directive 97/7/EC art.6.
- 804 Directive 2011/83/EU recital 43. The uniform nature of this period stems from the Directive’s general requirement of “full harmonisation” in art.4, see above, para.[40-065](#). See, however, the possibility for Member States to extend the period to 30 days in some circumstances provided by Directive 2019/2161 art.4(8): above, para.[40-119](#) (note).
- 805 [2013 Regulations](#) [reg.31\(2\)](#).
- 806 [2013 Regulations](#) [reg.32\(2\)](#), referring to cancellation under [reg.29\(1\)](#). cf. above, para.[40-116](#) on the position as regards the consumer’s right to withdraw an offer.
- 807 [2013 Regulations](#) [reg.32\(3\)\(a\)](#); Sch.3 Pt B.
- 808 [2013 Regulations](#) [reg.32\(3\)\(b\)](#).
- 809 On “durable medium” see [2013 Regulations](#) [reg.5](#) as noted above, para.[40-101](#) (note).
- 810 [2013 Regulations](#) [reg.32\(4\)](#).
- 811 [2013 Regulations](#) [reg.32\(5\)](#).
- 812 [2013 Regulations](#) [reg.32\(6\)](#).
- 813 See Vol.I, paras 9-141—9-142 (misrepresentation) and [27-056](#) (breach of contract).

- ⑧14 Directive 2011/83/EU art.25, first sentence. Article 25 distinguishes this from the exclusion of cancellation by agreement by its second sentence providing that “any contractual terms which directly or indirectly waive or restrict the rights resulting from the Directive shall not be binding on the consumer”. cf. *Salat v Barutis [2013] EWCA Civ 1499, [2014] E.C.C. 2* at [22] (CA “inclined to agree” that under the **Cancellation of Contracts made in a Consumer’s Home or Place of Work, etc. Regulations 2008 (SI 2008/1816)** (which were replaced by the **2013 Regulations**) a consumer cannot affirm a contract that would otherwise be unenforceable against him).
- 815 Above, para.[40-015](#) and on the continuing significance of this “principle of conforming interpretation” after IP completion day see above, para.[40-004](#) and Vol.I, para.[1-028](#).
- 816 See Vol.I, paras [9-142](#) and [27-056](#).
- 817 *SI 2008/1816 reg.7(6); W v Veolia Environmental Services (UK Plc) [2011] EWHC 2020 (QB), [2012] 1 All E.R. (Comm) 667* at [49] and [54] applying to this context *Dimond v Lovell [2000] UKHL 27, [2002] 1 A.C. 384*.
- 818 Above, para.[40-109](#).
- 819 This would follow by analogy the approach of the CJEU to the application of national legislation implementing directives governing consumer credit and unfair terms in disputes between parties other than the original trader and consumer who concluded the consumer contract, and in particular where the consumers had assigned their claims to traders specialising in the furtherance of individual consumers’ rights: see *Lexitor sp. z o.o. v Spółdzielcza Kasa Oszczędnościowo – Kredytowa im. Franciszka Stefczyka (C-383/18), EU:C:2019:702, 11 September 2019* at para.20 (consumer credit); *Ryanair DAC v DelayFix (C-519/19) EU:C:2020:933, 18 November 2020* at paras 53–54 (unfair terms in consumer contracts).

(ii) - The Effects of Cancellation or Withdrawal

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(d) - The Consumer's Right of Cancellation or Withdrawal

(ii) - The Effects of Cancellation or Withdrawal

General effect of cancellation

- 40-125 The [2013 Regulations](#) provide that where a consumer exercises the right of cancellation which they create, “cancellation ends the obligations of the parties to perform the contract”. ⁸²⁰ This form of words, which followed closely the 2011 Directive, ⁸²¹ is restricted to the parties’ obligations to *perform* the contract, but it is submitted that the notion of “performance” for these purposes should not be interpreted narrowly so as to include only the main obligations of the parties to supply goods or services (on the one hand) or to pay (on the other), but should be seen as extending at least to certain types of incidental obligations, such as an obligation in a consumer to take a dispute to arbitration (to the extent to which a contract term creating such an obligation were otherwise to be binding on the consumer ⁸²²) as well, of course, to any secondary obligation to pay damages for non-performance which might otherwise have arisen. On the other hand, the [2013 Regulations](#) assume that cancellation by the consumer does not terminate *all* the obligations arising from the contract itself, as they provide that the trader must bear the direct cost of returning the goods where he has agreed to do so ⁸²³ and the “contract is to be treated as including a term that the trader must bear the direct cost of the consumer returning the goods” where the trader failed to provide the consumer with the information about the consumer bearing those costs as the Regulations elsewhere provide. ⁸²⁴ These provisions therefore assume that the intended effect of these contract terms survives cancellation. Moreover, the [2013 Regulations](#) provide that cancellation by the consumer gives rise to obligations in the trader to reimburse payments received from the consumer and obligations in the consumer to return goods received and to pay an amount in respect of any diminution in the value of the goods as a result of their handling beyond what is necessary to establish their nature, characteristics and functioning, in both cases subject to a series of provisos

and qualifications⁸²⁵ or, in the case of some services, to pay to the trader a proportionate amount for the supply of the service during the cancellation period,⁸²⁶ though it is earlier provided that, apart from these specified situations, the consumer may cancel “without any liability”.⁸²⁷ Overall, in this way the [2013 Regulations](#) seek to set out the principal consequences of cancellation for both the parties and to preclude any other “liabilities” in the consumer, this reflecting the 2011 Directive’s concern to address these issues at a European level in contrast to the earlier directives whose provisions gave rise to uncertainty as to whether they were to be settled by the Court of Justice by the development of autonomous interpretations or by national laws.⁸²⁸ On the other hand, where cancellation of the contract gives rise to issues between the parties other than those regulated by the 2011 Directive (as implemented by the [2013 Regulations](#)), then art.3(5) of the Directive allocates them to national contract law for resolution.⁸²⁹

Reimbursement by the trader of payments received from the consumer

- 40-126 As regards *all* the types of contract (sales contracts, service contracts and contracts for the supply of digital content not on a tangible medium) which may give rise to a right of cancellation,⁸³⁰ on cancellation or withdrawal of an offer by the consumer, the trader must reimburse “all payments, other than payments for delivery,⁸³¹ received from the consumer”, subject only to the possibility of some allowance being made in respect of the diminution in value of the goods as a result of their handling by the consumer.⁸³² This general right of restitution of monies paid is clearly not dependent on the normal rules of English common law in similar circumstances, notably the requirement of total failure of consideration.⁸³³ Under the Regulations, reimbursement must be made without delay, and in any event not later than the following specified days: in the case of sales contracts, if the trader has not offered to collect the goods, the end of 14 days after the day on which the trader receives the goods back or, if earlier, the day on which the consumer supplies evidence of having sent the goods back; otherwise, the end of 14 days after the day on which the trader is informed of the consumer’s decision to withdraw the offer or cancel the contract.⁸³⁴ The trader must make the reimbursement using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise; and the trader must not impose any fee on the consumer in respect of the reimbursement.⁸³⁵

Payments for delivery

- 40-127 The trader must reimburse any payment for delivery⁸³⁶ received from the consumer, unless the consumer expressly chose a kind of delivery costing more than the “least expensive common and generally acceptable kind of delivery offered by the trader”, in which case the trader must

reimburse any payment for delivery received from the consumer up to the amount the consumer would have paid if the consumer had chosen that kind of delivery.⁸³⁷

Allowance for diminution in value as a result of handling

- 40-128 In the case of sales contracts, if the value of the goods is diminished:

“... by any amount as a result of handling of the goods by the consumer beyond what is necessary to establish the nature, characteristics and functioning of the goods, the trader may recover that amount from the consumer, up to the contract price.”⁸³⁸

For these purposes, the Regulations explain that handling of this kind takes place in particular if “it goes beyond the sort of handling that might reasonably be allowed in a shop”.⁸³⁹ While not so restricted by the Regulations, a trader’s right of recovery on this ground will normally apply only to cases of cancellation of the contract as distinct from withdrawal of an offer, as it assumes that the trader has already supplied the goods to the consumer and such a supply will normally take place only after a contract is concluded (and therefore after the consumer’s right to withdraw his or her offer has ceased⁸⁴⁰). This “recovery” by the trader may take the form either of a deduction from any payment to be reimbursed from the consumer or by a payment to be made by the consumer to the trader.⁸⁴¹ A trader who has failed to provide the consumer with information on the right to cancel as required by the Regulations has no right to recovery on this ground.⁸⁴²

Return of goods by the consumer in the event of cancellation

- 40-129 In general, where a contract is cancelled by the consumer, the latter must send back the goods to the trader or hand them over to the trader or to a person authorised by him to receive them⁸⁴³ without undue delay and in any event not later than 14 days after the day on which the consumer informs the trader that he or she is cancelling the contract.⁸⁴⁴ The consumer must bear the cost of doing so (but no other cost),⁸⁴⁵ unless the trader has agreed to bear them or unless the trader has failed to provide the consumer with the information about the consumer bearing those costs as the Regulations require.⁸⁴⁶ The exceptions to this position are found in the cases where the trader has offered to collect the goods or where in the case of an off-premises contract, the goods were delivered to the consumer’s home when the contract was entered into and could not, by their nature, normally be returned by post.⁸⁴⁷ In these cases, it is the trader’s responsibility to collect the goods and the consumer is not required to bear any cost of returning them unless the trader offered to collect the goods and the consumer has agreed to bear the cost of his or her doing so.⁸⁴⁸

Trader's duties have contractual force

- 40-130 The 2013 Regulations provide that in the case of cancellation of a contract, the contracts are “to be treated as including a term” that the trader must reimburse payments (including, where applicable, delivery payments) according to the rules earlier noted⁸⁴⁹ and to bear the direct cost of the consumer returning the goods where he or she has agreed to do so.⁸⁵⁰ There is no equivalent provision in the Consumer Rights Directive, but the Directive permits Member States to give contractual force to the duties which it requires for traders, either as a matter of their general duty to put in place adequate and effective means to ensure compliance with the Directive or as a matter of their residual competence as regards “contract law” issues raised by the Directive but not regulated by it since the latter means that the remedial consequences of giving the trader’s duties contractual force rests with general English law on this subject.⁸⁵¹ For this purpose, it is not clear whether breach of a trader’s duties of reimbursement and to bear the cost would be remedied by the action for the agreed sum or damages, the difference being that the latter would extend to losses caused by the breach rather than simply the sum in question, subject to the restrictions generally applicable for this purpose.⁸⁵² It should be noted that the Regulations do not include any parallel provision setting the *consumer’s* duty (viz to send back the goods⁸⁵³ at his or her own cost) as a term of the contract.⁸⁵⁴

Supply of services or digital content in cancellation period

- 40-131 As earlier explained, where services or digital content not on a tangible medium are supplied during the cancellation period at the request of the consumer, the consumer may lose the right to cancel the contract which would normally be available.⁸⁵⁵
- 40-132 In the case of services supplied during the cancellation period where the consumer does not lose the right to cancel in this way and the consumer chooses to exercise this right, the 2013 Regulations distinguish two situations. On the one hand, where the service is supplied in response to an express request (made, in the case of an off-premises contract, on a durable medium), in principle the consumer must pay the trader an amount for the supply of the service for the period for which it is supplied, ending with the time when the trader is informed of the consumer’s decision to cancel, in proportion to what has been supplied in comparison with the full coverage of the contract.⁸⁵⁶ This amount is to be calculated on the basis of the total contract price or, if this is excessive,⁸⁵⁷ on the basis of the market value of the service that has been supplied at the time of the conclusion of the contract calculated by comparing prices for equivalent services supplied by other traders.⁸⁵⁸

On the other hand, where the service is not supplied in response to a request by the consumer as outlined above or where the trader has failed to provide the consumer with information on his or her right to cancel or on his or her liability to pay the reasonable cost⁸⁵⁹ of any services requested, then “[t]he consumer bears no cost for the supply of the service, in full or in part, in the cancellation period”.⁸⁶⁰

- 40-133 Special provision is made for contracts under which digital content is supplied not on a tangible medium.⁸⁶¹ In this case, where the digital content is supplied during the cancellation period in circumstances in which the consumer does not lose the right to cancel by reason of his express request that it should be so supplied,⁸⁶² and the consumer chooses to exercise this right, the **2013 Regulations** provide that the consumer bears no cost for the supply (whether in full or in part) of the digital content in the cancellation period⁸⁶³ as long as the consumer did not give “prior express consent to the beginning of the performance of the digital content before the end of the 14 day cancellation period” (as explained earlier⁸⁶⁴), the consumer gave that consent but did not acknowledge when giving it that the right to cancel would be lost, or the trader failed to provide confirmation of the consumer’s consent or acknowledgment.⁸⁶⁵ Where none of these situations apply, then under 2011 Directive the consumer is liable to pay a reasonable cost in respect of receipt of the digital content,⁸⁶⁶ but the provision in the Regulations governing liability in the consumer to pay a reasonable cost is worded in a way which is restricted to contracts for the supply of a service,⁸⁶⁷ which are generally distinguished in the Regulations from contracts for the supply of digital content not on a tangible medium.⁸⁶⁸ It may be thought, however, that the fact that the Regulations provide that the consumer bears no cost for the supply of digital content in the cancellation period if one of the three situations apply suggests that the consumer *must* bear the cost of supply where they do not. There is, though, no provision in the relevant regulation to this effect.⁸⁶⁹

Effect of withdrawal or cancellation on ancillary contracts

- 40-134 Regulation 38 makes special provision for the effect of withdrawal of an offer or cancellation of a consumer contract on “ancillary contracts”. For this purpose:

Regulation 38

“An ‘ancillary contract’, in relation to a distance or off-premises contract (the ‘main contract’), means a contract by which the consumer acquires goods or services related to the main contract, where those goods or services are provided—

- (a)** by the trader, or

(b) by a third party on the basis of an arrangement between the third party and the trader.”

870

Regulation 38 makes clear that such an ancillary contract may include the provision of a financial service.⁸⁷¹ Examples of such an “ancillary contract” include an extended warranty, insurance (for example, for a purchase of jewellery) or a credit agreement to finance goods or services,⁸⁷² but not all contracts of this type concluded at the same time as the purchase of goods or services from a trader are “ancillary contracts” for the purposes of reg.38 as the latter requires that the ancillary contract is provided either by that trader or by a “third party on the basis of an arrangement between the third party and the trader”. Where these conditions are satisfied, reg.38 provides that where a consumer withdraws an offer or cancels the main contract, then “any ancillary contracts are automatically terminated, without any costs for the consumer” other than the costs foreseen by the provisions governing the consumer’s liability for “costs” on cancellation of that main contract.⁸⁷³ When a trader is informed by a consumer of a decision to withdraw an offer or cancel a contract, the trader must inform any other trader with whom the consumer has an ancillary contract that it is terminated.⁸⁷⁴ In terms of payments, the Departmental Implementing Guidance explained that “responsibility for refund should follow the original flow of funds”, so that if the money for the ancillary contract was paid directly to the trader the latter should reimburse the consumer and recover from the third party; but if the money was paid directly by the consumer to the third party, the third party should refund the money to the consumer.⁸⁷⁵

Footnotes

820 2013 Regulations reg.33(1)(a).

821 Directive 2011/83/EU art.12(a).

822 In English law, such an arbitration clause would not be binding on a consumer where a claim refers to a “modest amount”, currently £5,000, under the Arbitration Act 1996 ss.89, 90 on which see below, para.40-324 (unfair contract terms).

823 2013 Regulations reg.35(5)(a).

824 2013 Regulations reg.35(5)(b), 35(6); the information requirement is contained in Sch.2 para.(m).

825 2013 Regulations regs 34 and 35 on which see below, paras 40-126 et seq.

826 2013 Regulations reg.36(3)-(6), below, para.40-132.

827 2013 Regulations reg.29(1).

828 For the earlier case-law on these issues see: *Travel Vac SL v Antelm Sanchis (C-423/97 EU:C:1999:197, [1999] E.C.R. I-2195* at paras 53–60, *Schulte v Deutsche Bausparkasse Badenia AG (C-350/03) EU:C:2005:637, [2005] E.C.R. I-9215* at paras 67–69, 82–93,

Hamilton v Volksbank Filder eG (C-412/06) EU:C:2008:215, [2008] E.C.R. I-02383 at paras 37–49 (all doorstep selling), *Messner v Firma Stefan Krüger* (C-489/07) EU:C:2009:502, [2009] E.C.R. I-07315, *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV* (C-511/08) EU:C:2010:189; [2010] E.C.R. I-03047 (both distance contracts).

- 829 Above, paras 40-066—40-068.
- 830 Above, para.40-115.
- 831 On which see below, para.40-127.
- 832 2013 Regulations reg.34(1) referring to reg.34(10).
- 833 On which see Vol.I, paras 32-063 et seq.
- 834 2013 Regulations reg.34(4)–(6) (as amended by SI 2015/1629 reg.7).
- 835 2013 Regulations reg.34(7) and (8).
- 836 “Delivery” means “voluntary transfer of possession from one person to another”: 2013 Regulations reg.5. And see above, para.40-120.
- 837 2013 Regulations reg.34(2) and (3).
- 838 2013 Regulations reg.34(9).
- 839 2013 Regulations reg.34(12); 2011 Directive recital 47.
- 840 Above, para.40-116.
- 841 2013 Regulations reg.34(10).
- 842 2013 Regulations reg.34(11). On this information requirement see above, para.40-121.
- 843 2013 Regulations reg.35(2). Regulation 35(3) explains that the consumer must send them back to any address specified by the trader for this purpose or for the consumer to contact him and, failing this, any place of business of the trader.
- 844 2013 Regulations reg.35(4).
- 845 2013 Regulations reg.35(5)(a) and (7).
- 846 2013 Regulations reg.35(5). The information requirement is set out by Sch.2 para.(m), above, para.40-101.
- 847 2013 Regulations reg.35(1).
- 848 2013 Regulations reg.35(1) and (8) (as amended by SI 2013/3134 reg.9(2)).
- 849 2013 Regulations reg.34(1), (2) (on which see above, paras 40-126—40-127); reg.34(13).
- 850 2013 Regulations reg.35(2) and (5)(a) (on which see above, para.40-129); reg.35(6).
- 851 2011 Directive art.3(5), above, paras 40-066—40-068.
- 852 See Vol.I, paras 24-038, 29-010.
- 853 2013 Regulations reg.35(2)(a).
- 854 2013 Regulations reg.35(5).
- 855 2013 Regulations regs 36(1)–(2), 37(1)–(2), above, para.40-118 (which set out the further conditions for the application of this restriction).
- 856 2013 Regulations reg.36(4). In principle, the amount to be paid by the consumer for services rendered must be calculated by taking in account *all* the services covered by the contract (that is, where applicable, both the principal service and any ancillary services necessary to ensure its performance) and therefore on the basis of the price agreed for the full coverage of the contract according to the proportion of time the services were enjoyed (“*pro rata temporis*”).

The only exception to this is where the contract expressly provides that one or more of the services are to be provided in full from the beginning of the performance of the contract and separately, for a price which must be paid separately, where the full price for that separate service should be taken into account in calculating the amount owed for services rendered: *EU v PE Digital GmbH (C-641/19) EU:C:2020:808, 8 October 2020* at paras 28–32.

- 857 Directive 2011/83/EU recital 50 suggests that the burden of proof as to the excessive character of the price lies on the consumer. In assessing whether the total price is potentially excessive, a court should consider all the circumstances relating to the market value of the service, comparing the price charged both with prices charged by the trader concerned to other consumers under the same conditions and with the price of an equivalent service provided by other traders: *EU v PE Digital GmbH (C-641/19) EU:C:2020:808, 8 October 2020* at paras 36–37.
- 858 2013 Regulations reg.36(5) which implemented Directive 2011/83/EU art.14(3). The reference to the time of the conclusion of the contract reflects the gloss contained in recital 50 of the Directive.
- 859 This description is not used by 2013 Regulations reg.36(4) but is used by Sch.2 para.(n).
- 860 2013 Regulations reg.36(6). In this form of words “in full or in part” could refer either to the supply or the cost, whereas Directive 2011/83/EU art.14(4)(a) makes clear that it refers to the supply. The categories of information referred to in the text are required to be supplied by the trader under regs 10(1)(a) and 13(1)(a) as set out in Sch.2 paras (l) and (n), on which see above, para.40-101.
- 861 At the EU level, there is a further special treatment as Directive 2019/2161 art.4(11)(a) inserts a new art.14(2a) into the 2011 Directive providing that “in the event of withdrawal from the contract, the consumer shall refrain from using the digital content or digital service and from making it available to third parties”. On the 2019 Directive generally see above, para.40-063 (note).
- 862 On which see 2013 Regulations reg.37(1) and (2), above, para.40-118.
- 863 2013 Regulations reg.37(4) which refers confusingly to “no cost for supply of the digital content, in full or in part” in which “in full or in part” could refer either to the supply or the cost, whereas Directive 2011/83/EU art.14(4)(b) makes clear that it refers to the supply.
- 864 Above, para.40-118 referring to 2013 Regulations reg.30.
- 865 2013 Regulations reg.37(4) referring to regs 12(5) and 16(3).
- 866 2011 Directive art.14(3).
- 867 2013 Regulations reg.36(4) and (5), above, para.40-132.
- 868 Above, paras 40-076 and 40-078.
- 869 cf. reg.36(4) and (5) (supply of service in cancellation period) and reg.37(4) (supply of digital content in cancellation period).
- 870 2013 Regulations reg.38(3).
- 871 2013 Regulations reg.38(4) (which effects this technically by putting aside the general exclusion of financial services contracts from the scope of the Regulations in reg.6(1)(b)).
- 872 Department for Business Innovation & Skills, Consumer Contracts (Information, Cancellation and Additional Charges) Regulations, Implementing Guidance (December 2013) A, para.5.

- 873 2013 Regulations reg.38(1), referring to reg.34(3) (on which see para.40-127); reg.34(9) (on which see para.40-128); reg.35(5) (on which see para.40-129); and reg.36(4) (on which see para.40-132).
- 874 2013 Regulations reg.38(2).
- 875 Department for Business Innovation & Skills, Consumer Contracts (Information, Cancellation and Additional Charges) Regulations, Implementing Guidance (December 2013) G, para.20.

(e) - Enforcement

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(e) - Enforcement

The scheme in the 2013 Regulations

- 40-135 The [2013 Regulations](#) provide their own dedicated regime for the enforcement of the requirements which they set out. Under this regime, local weights and measures authorities are designated as “enforcement authorities”⁸⁷⁶ and it is provided that it is their duty to consider any complaint made to them about contravention of the Regulations unless it appears to be frivolous or vexatious or another enforcement authority has notified the Competition and Markets Authority (CMA) that it agrees to consider the complaint, in which case that other authority comes under a duty to do so.⁸⁷⁷ An enforcement authority may apply for an injunction against any person who appears to it to be responsible for a contravention of the Regulations and a court hearing such an application may grant an injunction “on such terms as it thinks fit to secure compliance with these Regulations”.⁸⁷⁸ However, the Regulations envisage that an enforcement authority may instead seek an undertaking from a person in respect of its contravention and/or future compliance with the Regulations as they provide that an enforcement authority must notify the CMA of “any undertaking given to it by or on behalf of any person who appears to it to be responsible for a contravention of these Regulations”.⁸⁷⁹ An enforcement authority must also notify the CMA of the outcome of any application to a court for an injunction and of the terms of any undertaking given to the court or order made by it, or the outcome of any application made by such an authority to enforce a previous court order.⁸⁸⁰ For all these purposes, clearly the main concern is with the enforcement of the various requirements made of traders by the Regulations,⁸⁸¹ but the enforcement regime in the Regulations is not restricted to this context and could in principle extend to the enforcement of the duties which they impose *on consumers*, notably, the duty to return goods after cancellation of a distance or off-premises contract.⁸⁸² This is specifically foreseen by the 2011 Directive’s preamble, which provides that:

“In situations where the trader *or the consumer* does not fulfil the obligations relating to the exercise of the right of withdrawal, penalties provided for by national legislation in accordance with this Directive should apply as well as contract law provisions.”⁸⁸³

However, it will surely be very rare for an enforcement authority to seek to exercise its enforcement powers under the [2013 Regulations](#) against a consumer.

“Enforcement orders” under the Enterprise Act 2002 Part 8

- 40-136 Under [Pt 8 of the Enterprise Act 2002](#), the CMA (replacing the Office of Fair Trading or OFT)⁸⁸⁴ and other persons or bodies termed “enforcers”, may apply to the court for an “enforcement order”⁸⁸⁵ against a person to stop breaking legislation enacted for the benefit of consumers.

Infringements and enforcers: the position before IP completion day

- 40-137 Until IP completion day (i.e. 31 December 2020),

U

U the [2002 Act](#) distinguished for this purpose between “domestic infringements”⁸⁸⁷ (concerned with the enforcement of national protections by UK-based enforcers) and “Community infringements” (for which cross-border enforcement was created and which also covered domestic action by UK enforcers in respect of breaches of specified UK laws implementing the directives specified by the Consumer Injunctions Directive).⁸⁸⁸ A number of the directives and their UK implementing legislation which are the subject of this chapter were included for the purposes of “Community infringements” and these included, for present purposes, the Consumer Rights Directive 2011⁸⁸⁹ and the [2013 Regulations](#).⁸⁹⁰ Under [Pt 8 of the 2002 Act](#), “enforcers” were divided into “general enforcers”,⁸⁹¹ which include the CMA and local weights and measures authorities in Great Britain; “designated enforcers”, which are any public or private body in the United Kingdom which the Secretary of State designates as a person or body one of whose purposes is the protection of the collective interests of consumers and which include the Civil Aviation Authority, the Information Commissioner and the Rail Regulator⁸⁹²; “Community enforcers”, which were qualified entities listed for this purpose by the EU, the list including a number of public and private bodies (notably, consumers’ associations)⁸⁹³; and “CPC enforcers”, which were bodies or persons designated by the Secretary of State under the EU Regulation on consumer

protection co-operation,⁸⁹⁴ these including the CMA, local weights and measures authorities and certain other public bodies and persons.⁸⁹⁵ The inclusion of “Community enforcers” within the class of those entitled to apply for enforcement orders reflected the policy of the EU to promote cross-border policing under its own consumer protection legislation.⁸⁹⁶ The designation of “CPC enforcers” sought to give effect to a policy of encouraging and facilitating co-operation between European national authorities in the enforcement of consumer protection.⁸⁹⁷

Infringements and enforcers: the position after IP completion day

40-138 As outlined in the previous paragraph, until IP completion day the scheme of control set out in Pt 8 of the 2002 Act distinguished between “domestic infringements” and “Community infringements” and set out a series of categories of enforcers which included “Community enforcers” and “CPC enforcers”. However, on the full coming into effect of the UK’s leaving the EU on IP completion day this scheme was subject to significant change,
⁸⁹⁸

U reflecting in particular the fact that European cross-border enforcement of EU consumer protection legislation no longer applies after that date.

⁸⁹⁹

U First, while the category of “domestic infringement” remained the same,
⁹⁰⁰

U the category of “Community infringement” was replaced with one of “Schedule 13 infringement” and the existing lists of EU legislation (and UK legislation implementing EU legislation) giving rise to Community infringements were replaced with a new list in a substituted Sch.13 to the 2002 Act.

⁹⁰¹

U Accordingly, a *Schedule 13 infringement* is defined as “an act or omission which contravenes a listed enactment and which harms the collective interest of consumers”, it being provided that “[a]n enactment is a listed enactment if it is specified in Schedule 13 or to the extent that it is so specified”.

⁹⁰²

U Secondly, while the Act’s recognition of “general enforcers” and “designated enforcers” remains,
⁹⁰³

U its inclusion of “Community enforcers” is deleted as is its reference to the Secretary of State designating persons under the CPC Regulation,

904

U there being substituted instead a list of “[Schedule 13](#) enforcers”.

905

U As this scheme foresees, the content of [Sch.13 of the 2002 Act](#) was therefore replaced with a list of enactments which (or parts of which) can give rise to “[Schedule 13](#) infringements”, these consisting of 46 UK legislative instruments, both primary and secondary and whether or not they implemented EU legislation,

906

U and seven EU regulations “retained” on IP completion day by the [European Union \(Withdrawal\) Act 2018](#),

907

U notably, the Denied Boarding Regulation.

908

U The UK legislation contained in [Sch.13](#) includes the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#), as well as the [Consumer Protection from Unfair Trading Regulations 2008](#) and many provisions in [Pts 1 and 2 of the Consumer Rights Act 2015](#).

909

U Overall, therefore, the CMA has advised that, after IP completion day, “businesses based in the UK or elsewhere that trade with UK consumers must comply with UK consumer protection laws” although it will seek “to continue to develop relationships and work with all our international counterparts”.

910

U Relevant for this purpose is the provision in the Trade and Cooperation Agreement 2020’s title on Digital Trade according to which:

“... [t]he Parties recognise the importance of entrusting their consumer protection agencies or other relevant bodies with adequate enforcement powers and the importance of cooperation between these agencies in order to protect consumers and enhance online consumer trust.”

911

U

The powers of enforcers and the range of enforcement orders

- 40-139** Where a domestic or a Sch.13 infringement (including therefore an infringement of the requirements of the 2013 Regulations) harms the collective interest of consumers,⁹¹² an “enforcer” can apply to the court for an enforcement order. The conditions for these applications differ as between “domestic infringements” and “Schedule 13 infringements” as it is provided that:

Schedule 13

“(1) An application for an enforcement order must name the person the enforcer thinks—

(a) *has engaged or is engaging in conduct* which constitutes a domestic or Schedule 13 infringement, or

(b) *is likely to engage in conduct* which constitutes a Schedule 13 infringement.”

913

An enforcer must not make such an application until after engaging in appropriate consultation with the person against whom the order would be made and, if the enforcer is not the CMA, after the enforcer has given notice to the CMA of the enforcer’s intention to apply for the enforcement order, and the appropriate minimum period has elapsed.⁹¹⁴ Following the position as regards applications, a court to which an application for an enforcement order has been made may make such an order where it finds that the person named in the application *has engaged* in conduct which constitutes the infringement or, in the case of Sch.13 infringements, where it finds that the person named in the application *is likely to engage* in conduct which constitutes the infringement.⁹¹⁵ Such an order may include an order directing a person not to continue or (as the case may be) repeat conduct constituting an infringement.⁹¹⁶ Moreover, the Consumer Rights Act 2015 amended Pt 8 so as to provide new powers to allow a court in certain circumstances to require a person against whom an “enforcement order” is made to take “enhanced consumer measures”,⁹¹⁷ and to these were added in 2020 a power to make an “online interface order” so as to give effect to a requirement of the EU Consumer Protection Cooperation (“CPC”) Regulation 2017.⁹¹⁸ It may be, moreover, that there will be further extension of the range of orders available to the court under Pt 8 of the 2002 Act. In 2018 the then government announced its intention to introduce legislation under which consumer law enforcers, including the CMA and Trading Standards, would be able to ask the courts to impose fines:

“... either as a standalone remedy, or in conjunction with the existing civil remedies such as injunctive relief, enforcement orders or enhanced consumer measures. The financial penalty will be subject to a total cap of 10% of a firm’s worldwide turnover, in line with the limits for fines that can already be imposed in some of the regulated markets.”

⁹¹⁹



The idea of imposing fines with maxima based on a percentage of trader turnover in fact reflects a reform to the law of consumer enforcement required for Member States by the EU legislator in a directive which does not require to be introduced until after IP completion day.⁹²⁰ In that directive, a penalty may be imposed in the context of the use of unfair contract terms or unfair commercial practices with a maximum of “at least 4% of the seller or supplier’s annual turnover in the Member State or Member States concerned”.⁹²¹

“Online interface orders”

- 40-140 In 2020, Pt 8 of the 2002 Act was amended so as to introduce a power in the CMA to apply to the High Court or County Court for an “online interface order” or an “interim online interface order”⁹²² and so give effect to provisions of the CPC Regulation 2017,⁹²³ which explains that:

“In the digital environment in particular, the competent authorities should be able to stop infringements covered by this Regulation quickly and effectively ... In cases where there is a risk of serious harm to the collective interests of consumers, the competent authorities should be able to adopt interim measures in accordance with national law, including the removal of content from an online interface or ordering the explicit display of a warning to consumers when they access an online interface.”⁹²⁴

Reflecting the Regulation,⁹²⁵ an “online interface” is defined by the 2002 Act (as amended) as “any software, including a website, part of a website or an application, that is operated by or on behalf of a trader, and which serves to give consumers access to the trader’s goods and services”.⁹²⁶ The Act provides that, on the application of the CMA, the court may make an “online interface order”

“if it finds that

- (a)there has been or is likely to be a Schedule 13 infringement,⁹²⁷

- (b)there are no other available means of bringing about the cessation or prohibition of the infringement which, by themselves, would be wholly effective, and
- (c)it is necessary to make the order to avoid the risk of serious harm to the collective interests of consumers.”⁹²⁸

Such an order

“must direct the person against whom it is made to do, or to co-operate with another person so that other person may do, one or more of the following—

- (a)remove content from or modify content on an online interface;
- (b)disable or restrict access to an online interface;
- (c)display a warning to consumers accessing an online interface;
- (d)delete a fully qualified domain name and take any steps necessary to facilitate the registration of that domain name by the CMA.”⁹²⁹

Provision is also made for “interim” online interface orders subject to certain conditions including that “it is expedient to bring about the cessation or prohibition of the **Schedule 13** infringement immediately”.⁹³⁰

“Enhanced consumer measures”

40-141

U The **Consumer Rights Act 2015**⁹³¹ amended the **Enterprise Act 2002 Pt 8** so as to extend a court’s power to make an “enforcement order” under the **2002 Act** so as to require a person against whom the order is made to take “enhanced consumer measures”.⁹³² The provisions were then amended in 2020 so as to give effect to provisions of the Consumer Cooperation Regulation 2017.⁹³³ There are three categories of enhanced consumer measures: the “redress category”, the “compliance category”, and the “choice category”.⁹³⁴ Each of these categories of measure is defined by the legislation.⁹³⁵ Measures in the “redress category” are:

- “(a)measures offering compensation or other redress to consumers—
 - (i)who have suffered loss as a result of the conduct which has given rise to the enforcement order or undertaking,
⁹³⁶
- U** or

- (ii)where that conduct constitutes a Schedule 13 infringement,⁹³⁷ who have been affected in any other way by that conduct,
- (b)where the conduct which has given rise to the enforcement order or undertaking relates to a contract, measures offering consumers falling within paragraph (a)(i) or (ii) the option to terminate (but not vary) that contract,
- (c)where consumers falling within paragraph (a)(i) or (ii) cannot be identified without disproportionate cost to the subject of the enforcement order or undertaking, measures intended to be in the collective interests of consumers.”⁹³⁸

It will be seen that this power allows a court to order a trader to offer compensation to consumers who have suffered loss as a result of an infringement of a legislative provision for their protection or the option of terminating any contract to which that infringement relates. However, this power is subject both to the conditions of the availability of an enforcement order under Pt 8 generally (and in particular that an infringement harms the *collective* interests of consumers⁹³⁹) and to a general requirement that such enhanced consumer measures may be ordered only as the court considers to be just and reasonable⁹⁴⁰ and to a series of particular conditions set by the 2002 Act for this purpose.⁹⁴¹

Footnotes

- 876 This is true of Great Britain; in Northern Ireland, the enforcement authority is the Department of Enterprise, Trade and Investment in Northern Ireland: 2013 Regulations reg.44(3).
- 877 2013 Regulations reg.44(1) and (2).
- 878 2013 Regulations reg.45(1) and (2).
- 879 2013 Regulations reg.46(a).
- 880 2013 Regulations reg.46(b) and (c).
- 881 Notably, the information requirements (above, paras 40-094 et seq.) and the trader’s responsibilities to reimburse payments made by the consumer following the latter’s cancellation of a contract (above, para.40-126).
- 882 2013 Regulation reg.35, above, para.40-129.
- 883 2011 Directive recital 48, second sentence (emphasis added). The Directive expresses the consequences of withdrawal by the consumer in terms of obligations on the trader and the consumer (arts 13 and 14); its provisions on enforcement and penalties are found in arts 23 and 24.
- 884 As from 1 April 2014, the OFT was abolished and its functions under Pt 8 of the 2002 Act (as more generally in respect of the enforcement of consumer legislation) were taken over by the Competition and Markets Authority (“CMA”): Enterprise and Regulatory Reform Act 2013 (Competition) (Consequential, Transitional and Saving Provisions) (No.2) Order 2014 (SI 2014/892) Sch.1(1) para.6.

- 885 The Enterprise Act 2002 Pt 8 came into force on 20 June 2003: The Enterprise Act 2002 (Commencement No.3, Transitional and Transitory Provisions and Savings) Order 2003 (SI 2003/1397) art.2. It replaced the Fair Trading Act 1973 Pt III and the Stop Now Orders (EC Directive) Regulations 2001 (SI 2001/1422). Its provisions concerning “Community infringements” implemented into UK law Directive 2009/22/EC on injunctions for the protection of consumers’ interests [2009] O.J. L110/30. It has been held that the conduct of a person taking place *before* the coming into force of Pt 8 of the Enterprise Act 2002 can form the basis of granting an order under it: *Office of Fair Trading v MB Designs (Scotland) Ltd [2005] S.L.T. 691* at [23], OH of the Ct of Sess., where Pt 8 is discussed more generally. The powers contained in the Enterprise Act 2002 were extended (in particular) by the Enterprise Act 2002 (Amendment) Regulations 2006 (SI 2006/3363) implementing arts 4(6) and 13(4) of the Regulation 2006/2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection co-operation), as amended by Directive 2005/29/ EC. The Consumer Rights Act 2015 s.79 Sch.7 changed the powers contained in Pt 8 of the 2002 Act, as noted in the present and following paragraphs, in relation to conduct which occurs, or which is likely to occur, after its commencement: 2015 Act s.79(2). This section (together with the other provisions in Pts 1 and 2 of the Act) came into force on 1 October 2015: see below, para.40-241. For general guidance on the use of the Pt 8 powers by the CMA see CMA, Consumer Protection: enforcement guidance (CMA58, 17 August 2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546521/cma58-consumer-protection-enforcement-guidance.pdf [Accessed 1 September 2021].
- ⑧86 On IP completion day see generally above, para.40-004 and Vol.I, paras 1-016 et seq. The version of the law which governed the position before IP completion day remains applicable to infringements committed before that day even though coming before a court after that day: *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd [2021] EWHC 2088 (Ch)* at [43].
- 887 Enterprise Act 2002 s.211 (which was amended on the coming into force of s.75 and Sch.7 of the 2015 Act).
- 888 Enterprise Act 2002 s.212 (before its amendment on IP completion day by the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.3(3)) (reg.1’s reference to the 2019 Regulations coming into force on “exit day” must be read as referring to “IP completion day”: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4), Sch.5 para.1); OFT, Enforcement of consumer protection legislation, Guidance on Pt 8 of the Enterprise Act (2003), para.3.15. The first consumer injunctions directive (98/27/EC) of 1998 was revoked and replaced by the Directive 2009/22/EC on injunctions for the protection of consumers’ interests (2009) O.J. L110/1 whose list in Annex I of relevant directives is much amended. With effect from 25 June 2023 Directive 2009/22/ EC will be repealed and replaced by Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC O.J. L409/1 (see esp.

- art.1); as the 2020 Directive is to be implemented by Member States by 25 December 2022, the UK is not required to do so: above, para.[40-004](#) and Vol.I, para.[1-019](#).
- 889 Enterprise Act 2002 ss.[210](#) and [212](#) (before their amendment on IP completion day by SI 2019/203 regs [3\(2\)](#) and [\(3\)](#); Sch.13 Pt 1 para.[9F](#) (before its repeal and replacement on IP completion day by SI 2019/203 regs [3\(20\)](#) as substituted by [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(SI 2020/1347\)](#) reg.[3\(3\)](#) [\(h\)](#)). The list in Sch.13 also included the Package Travel Directive 2015 (“Directive (EU) 2015/2302”) ([Sch.13 Pt 1 para.4](#); see below, paras [40-144](#)—[40-145](#)); the Unfair Terms in Consumer Contracts Directive 93/13 ([Sch.13 Pt 1 para.5](#); see below, para.[40-225](#)); the Consumer Sales Directive 1999/44/EC ([Sch.13 Pt 1 para.8](#); see below, para.[40-461](#)) and the Unfair Commercial Practices Directive 2005/29/EC ([Sch.13 Pt 1 para.9C](#); see below, para.[40-168](#)); and art.62 of Directive 2015/2366/EU of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market ([Sch.13 Pt 1 para.16](#): see below, para.[40-456](#)).
- 890 Enterprise Act 2002 (Part 8 EU Infringements) Order 2014 (SI 2014/2908) art.4, Sch. (repealed on IP completion day by SI 2019/203 reg.[7\(d\)](#)).
- 891 Enterprise Act 2002 s.[213\(1\)](#).
- 892 Enterprise Act 2002 s.[213\(2\)](#)–[\(4\)](#); the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated and Transitional Provisions) Order 2003 (SI 2003/1399) art.[5](#), Sch.1.
- 893 Enterprise Act 2002 s.[213\(5\)](#) (before its repeal by SI 2019/203 reg.[3\(4\)\(a\)](#)); Directive 2009/22/EC on injunctions for the protection of consumers’ interests). The list of qualified bodies is listed by the EU Commission and published in the Official Journal.
- 894 The “CPC Regulation” in the [2002 Act](#) referred first to Regulation (EU) 2006/2004 on co-operation between national authorities responsible for the enforcement of consumer protection laws [2004] O.J. L364/1. However, Regulation (EU) 2006/2004 was repealed and replaced with effect from 17 January 2020 by Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) 2006/2004 [2017] O.J. L345/1 and from 2 June 2020 references to the “CPC Regulation” in the [2002 Act](#) refer to the 2017 Regulation: [Consumer Protection \(Enforcement\) \(Amendment etc.\) Regulations 2020 \(SI 2020/484\)](#) reg.[2\(14\)](#) substituting (until IP completion day) a new [s.235A](#) in the [2002 Act](#) ([s.235A](#) was deleted on IP completion day by SI 2019/203 reg.[3\(17\)](#)). As the CMA explained, the 2017 Regulation “preserves the main features of the 2006 CPR Regulation, but strengthens the cooperation mechanisms and provides for a wider range of investigation and enforcement powers for national authorities”: CMA, UK Exit from the EU, Guidance on the Functions of the CMA under the Withdrawal Agreement (CMA113, 28 January 2020), para.5.10. In order to ensure the effective operation of the 2017 Regulation in the UK, the [Consumer Protection \(Enforcement\) \(Amendment etc.\) Regulations 2020 \(SI 2020/484\)](#) were made (in force 2 June 2020), amending, inter alia, the [2002 Act Pt 8](#) in certain respects. The principal innovation of these amendments was to give the CMA new powers enabling them to facilitate the removal of online content from or restrict access to websites by applying to a court for an “online interface order” (on

which see below, para.40-140), to amend the list of Directives and Regulations in Sch.13 of the Act and to amend the provisions as to “enhanced consumer measures” (on which see below, para.40-141): see SI 2020/484 reg.2. On the position after IP completion day, see below, para.40-138).

895 Enterprise Act 2002 s.213(5A) (as amended by the Consumer Protection (Enforcement) (Amendment etc.) Regulations 2020 (SI 2020/484) reg.2(2)(a) and before its amendment on IP completion day by SI 2019/203 reg.3 and the Consumer Protection (Enforcement) (Amendment etc.) Regulations 2020 (SI 2020/484) reg.2(2)).

896 Directive 2009/22/EC recitals 4–8.

897 Regulation 2006/2004 recitals.

①898 These changes were effected by the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203), which came into force on IP completion day (the reference in reg.1 to exit day must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4), Sch.5 para.1, and see above, para.40-004 and Vol.I, paras 1-016 et seq.). Transitional provision is made by the SI 2019/203 regs 9 and 10.

①899 See *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd [2021] EWHC 2088 (Ch)* at [39]–[43].

①900 Enterprise Act 2002 s.211. Domestic infringements are specified by order on conditions set by s.211 of the 2002 Act. See esp. the Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003 (SI 2003/1593) specifying a number of UK Acts) and the Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2015 (SI 2015/1727) (specifying Pts 1, 2 and Ch. 5 of Pt 3 of the Consumer Rights Act 2015).

①901 As a result, the orders specifying the relevant UK and EU laws were revoked: SI 2019/203 reg.7 specifying the following orders: SI 2003/1374, SI 2005/2418, SI 2006/3372, SI 2014/2908 and SI 2015/1628. Transitional provision was also made by SI 2019/203 for Community infringements or suspected Community infringements occurring before IP completion day: regs 9 and 10 (as amended by Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1347) reg.3(8)(a)).

①902 Enterprise Act 2002 s.212 as amended by SI 2019/203 reg.3(3), referring to s.210(6A) and (6B) as inserted by SI 2019/203 reg.3(2)(b).

①903 Enterprise Act 2002 s.213(1)–(4).

①904 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) 2006/2004 [2017] O.J. L345/1: 2002 Act s.235A (as substituted by the Consumer Protection (Enforcement) (Amendment

- etc.) Regulations 2020 (SI 2020/484) reg.2(14)). The CPC Regulation 2017 does not form a practical part of “retained EU law” as it was revoked on IP completion day: SI 2019/203 reg.8.
- ⑨05 Enterprise Act 2002 s.213(5), deleted by SI 2019/203 reg.3(4)(a); s.213(5A), amended by SI 2019/203 reg.3(4)(b); s.213(10) and (11), deleted by SI 2019/203 reg.3(4)(c). Other references in the Act to Community infringement, Community enforcer and CPC infringement were also replaced accordingly or the relevant provision deleted: SI 2019/203 reg.3(5)–(19).
- ⑨06 SI 2019/203 reg.3(20) (as substituted by SI 2020/1347 reg.3(3)(h)), referring to the Schedule to these regulations. Some of the UK regulations had already themselves been revoked except as regards contracts made before their date of revocation, as in the case of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083): SI 2019/203 Sch. para.1, inserting new Sch.13 para.9 to the 2002 Act. Others remain fully in force: e.g. the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277): SI 2019/203 Sch. para.1, inserting new 2002 Act Sch.13 para.19.
- ⑨07 2018 Act s.3(1) and (2), on which see above, para.40-004 and Vol.I, paras 1-016 et seq.
- ⑨08 SI 2019/203 Sch. para.1 referring to Regulation (EC) 261/2004. Otherwise, a number of examples are found in retained EU regulations governing transport; Sch.13 para.28 (as substituted by SI 2019/203 Sch. para.1) refers to art.10(4) of Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions.
- ⑨09 SI 2019/203 Sch. para.1, inserting new 2002 Act Sch.13 paras 25, 19 and 27 respectively.
- ⑨10 CMA, UK Exit from the EU, Guidance on the Functions of the CMA under the Withdrawal Agreement (CMA113, 28 January 2020), paras 5.19–5.21.
- ⑨11 Trade and Cooperation Agreement 2020 art.205(2) (formerly art.DIGIT.13(2)). On this Agreement generally, see Vol.I, para.1-030.
- 912 Enterprise Act 2002 ss.211(1)(c), 212(1). On the requirement of “harming the collective interest of consumers” see *Office of Fair Trading v MB Designs (Scotland) Ltd [2005] S.L.T. 691* at [23], [1], [13]–[16].
- 913 Enterprise Act 2002 s.215(1) (as amended on IP completion day by SI 2019/203 reg.3(6)(a)) (emphasis added); s.215(2)–(5) specify which enforcers may apply for orders in respect of which infringements and also set the jurisdiction of the courts of this purpose.
- 914 Enterprise Act 2002 s.214(1) as replaced by the Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013 (SI 2013/783) art.9(2) and amended by the Enterprise and Regulatory

Reform Act 2013 (Competition) (Consequential, Transitional and Saving Provisions) Order 2014 (SI 2014/892) Sch.1 para.7.

- 915 Enterprise Act 2002 s.217(1)–(3) (as amended on IP completion day by SI 2019/203 reg.3(8)). The question whether proceedings under Pt 8 of the 2002 Act should be brought under Pt 7 or Pt 8 of the CPR will depend on whether they involve a “substantial dispute of fact”: *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd [2019] EWHC 2828 (Ch)* at [31]–[35].
- 916 2002 Act s.217(5)–(7). 2002 Act s.219 provides a power in enforcers to accept an undertaking from a person who has engaged, is engaging or who is likely to engage in conduct constituting an infringement in specified circumstances.
- 917 Enterprise Act 2002 s.217(10A) as inserted by the Consumer Rights Act 2015 s.79, Sch.7 para.7, on which see below, para.40-141.
- 918 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) 2006/2004 [2017] O.J. L345/1 and see below, para.40-140. The 2017 Regulation itself was revoked on IP completion day: SI 2019/203 reg.8.
- ⑨19 Department for Business, Energy and Industrial Strategy, Modernising Consumer Markets, Consumer Green Paper Cm 9595 (April 2018), Ch.4 at para.165. This proposal was welcomed by the CMA: CMA Response to government consultation Modernising consumer markets green paper (July 2018) paras 55–58. See also Secretary of State for Business, Energy and Industrial Strategy, Reforming competition and consumer policy, CP 656 (20 April 2022), Ch.3 which announced, inter alia, an intention to introduce a series of legislative changes which would allow the CMA itself to award redress to consumers and impose penalty fines *directly* on traders for infringements of certain consumer protection legislation up to 10 per cent of the enforcement subject’s global annual turnover.
- 920 See Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 (“Directive (EU) 2019/2161”) art.3. The 2019 Directive must be implemented by Member States by 28 November 2021 (i.e. after IP completion day) and as a result the UK is not required to do so (see above, para.40-004 and Vol.I, paras 1-016 et seq. esp. at para.1-019).
- 921 See Directive (EU) 2019/2161 recitals 10–13, art.1 (inserting new art.8b(4) into the Unfair Terms in Consumer Contracts Directive 1993) and art.3 (inserting new art.13(3) into the Unfair Commercial Practices Directive 2005).
- 922 See Enterprise Act 2002 esp. s.218ZA–218ZD (as inserted by SI 2020/484 reg.2(5)) (in force 2 June 2020: reg.1(2)).
- 923 Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) 2006/2004 [2017] O.J. L345/1 esp. reg.9(4). The 2017 Regulation applied on 17 January 2020, i.e. while the UK was still a

Member State of the EU and before IP completion day. The 2017 Regulation itself was revoked on IP completion day: [SI 2019/203 reg.8](#).

924 Regulation (EU) 2017/2394 recital 14.

925 Regulation (EU) 2017/2394 art.3(15).

926 [2002 Act s.218ZD\(1\)](#) (as inserted by [SI 2020/484 reg.2\(5\)](#)).

927 On “Schedule 13 infringements” see above, para.40-138.

928 [2002 Act s.218ZB\(1\)](#) (as inserted by [SI 2020/484 reg.2\(5\)](#)).

929 [2002 Act s.218ZB\(2\)](#) (as inserted by [SI 2020/484 reg.2\(5\)](#)).

930 [2002 Act s.218ZC\(1\)](#) (as inserted by [SI 2020/484 reg.2\(5\)](#)).

931 The relevant provisions came into force on 1 October 2015: [2015 Act s.79](#) and [Sch.7](#); [Consumer Rights Act 2015 \(Commencement No.3, Transitional Provisions, Savings and Consequential Amendments\) Order 2015 \(SI 2015/1630\)](#) art.3(e) and (i). The amendments to the provisions made by the [Consumer Protection \(Enforcement\) \(Amendment etc.\) Regulations 2020 \(SI 2020/484\)](#) (“SI 2020/484”) came into force on 2 June 2020 (reg.1(2)). Further amendments on IP completion day substituted “Schedule 13 enforcer” and “Schedule 13 infringement” for “CPC enforcer” and “Community infringement” respectively: [Consumer Protection \(Enforcement\) \(Amendment etc.\) Regulations \(SI 2019/203\)](#) reg.3(12) and (12A) and see above, para.40-138.

932 [2002 Act s.217\(10A\)](#) as inserted by [2015 Act Sch.7](#) para.6. The power also extends the court’s power in relation to taking undertakings: [2002 Act s.217\(10B\)](#).

933 [Consumer Protection \(Enforcement\) \(Amendment etc.\) Regulations 2020 \(SI 2020/484\) reg.2](#) (in force on 2 June 2020) and see Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) 2006/2004 [2017] O.J. L345/1 esp. art.9(4). The 2017 Regulation itself was revoked on IP completion day: [SI 2019/203 reg.8](#).

934 See [2002 Act s.219A\(2\)-\(5\)](#) as inserted by [2015 Act s.79, Sch.7](#) para.8.

935 [2002 Act s.219A\(1\)](#) as inserted by [2015 Act s.79, Sch.7](#) para.8.

936 e.g. a claim by the CMA that the trader defendant should repay “administration fees” paid under allegedly unfair contract terms and compensate the consumers’ loss in respect of the defendant’s unfair commercial practices, though the HC rejected these claims on the ground that neither the unfairness of the terms nor the unfairness of the commercial practices had been established: [Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd \[2021\] EWHC 2088 \(Ch\)](#) at [2]-[3] and [168]-[169].

937 On IP completion day, the reference to ‘Schedule 13 Infringement’ replaced a reference to ‘Community Infringement’ as explained above, para.40-138.

938 [2002 Act s.219A\(2\)](#) as inserted by [2015 Act s.79, Sch.7](#) para.8 and as amended by [SI 2020/484 reg.2\(9\)](#) (in force 2 June 2020).

939 [2002 Act ss.211\(1\) and 212\(2\)](#), above, para.40-137.

940 [2002 Act s.219B\(1\)](#) as inserted by [2015 Act s.79, Sch.7](#) para.8.

941 [2002 Act s.219B and 219C](#) as inserted by [2015 Act s.79, Sch.7](#) para.8 and as amended by [SI 2020/484 reg.2\(1\)](#). Similar conditions are imposed on the taking of undertakings by an

enforcer: 2002 Act ss.219(5ZA) and (5ZB), 219A and 219B as inserted by 2015 Act s.79, Sch.7 paras 7 and 8.

End of Document

© 2022 SWEET & MAXWELL

(i) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(f) - Special Rules for Financial Services Contracts, Timeshare Contracts, Package Travel Contracts, Contracts Concluded by Electronic Means and ADR

(i) - Introduction

Special rules governing particular contracts in EU law

⁴⁰⁻¹⁴² As outlined above,⁹⁴² the general framework for the information requirements imposed on traders and rights of cancellation for consumers required by the Consumer Rights Directive 2011 and implemented by the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) is supplemented by a series of other special rules which were required by EU legislation governing particular categories of contract or governing particular situations. This is the case as regards the rules governing “distance contracts” for the supply of financial services, which are excluded from the scope of the 2011 Directive and also from the 2013 Regulations, and remain subject to the dedicated regime provided by the [Financial Services \(Distance Marketing\) Regulations 2004](#)⁹⁴³ which implemented the Financial Services Distance Marketing Directive 2002.⁹⁴⁴ Moreover, EU directives on timeshare⁹⁴⁵ and package travel⁹⁴⁶ impose special information requirements and rights of cancellation which were implemented in UK law by regulation and in the case of both of these types of contracts, the directives added other special rules governing these contracts which it will be convenient to discuss here.⁹⁴⁷ EU legislation has required Member States to ensure that ADR is available for consumer disputes⁹⁴⁸ and, in doing so, has required them to impose on trader’s information as to the availability of ADR.⁹⁴⁹ Finally, the [Electronic Commerce \(EC Directive\) Regulations 2002](#) (implementing the relevant provisions of the Electronic Commerce Directive 2000) impose pre-contractual information requirements in respect of contracts made by electronic means by persons providing an

information service to all whether or not their recipient is a consumer, but disallow their exclusion where the recipient is a consumer.⁹⁵⁰ Each of these sets of rules, which were derived from EU law, became part of “retained EU law” on IP completion day when the UK’s leaving the EU came into full effect and were subject to amendment where this was considered necessary to remedy their “deficiencies” caused by the UK’s departure from the EU⁹⁵¹; these changes will be noted in the following paragraphs.⁹⁵²

Footnotes

942 Above, paras 40-063 et seq.

943 SI 2004/2095.

944 Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16 below, para.40-143.

945 The UK first imposed legislation in this context by the [Timeshare Act 1992](#), which preceded Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. The 1994 Directive was implemented by amendment of the [Timeshare Act 1992](#) by regulation: [Timeshare Regulations 1997 \(SI 1997/1081\)](#). Subsequently, the UK’s regulation of timeshare and related contracts has been made by the [Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 \(SI 2010/2960\)](#) which implemented the later Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] O.J. L33/30 (which itself replaced the 1994 Directive). See below, paras 40-157—40-163.

946 Directive (EU) 2015/2302 on package travel and linked travel arrangements [2015] O.J. L326/1 implemented in UK law by the [Package Travel and Linked Travel Arrangements Regulations 2018 \(SI 2018/634\)](#) which replaced the [Package Travel, Package Holidays and Package Tours Regulations 1992 \(SI 1992/3288\)](#) which had implemented Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] O.J. L158/59; [1994] O.J. L280/83. See below, paras 40-144—40-156.

947 The international conventions and UK and EU laws providing for the protection of passengers are discussed in [Ch.37](#), Carriage by Air and [Ch.38](#) Carriage by Land, paras 38-079 et seq.

948 Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes [2013] O.J. L165/63; Regulation (EU) 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR) [2013] O.J. L165/1.

949 Directive 2013/11/EU art.13 implemented in UK law by the [Alternative Dispute Resolution for Consumer Disputes \(Competent Authorities and Information\) Regulations 2015 \(SI 2015/542\)](#) reg.19 below, para.40-164.

950 SI 2002/2013 reg.9, below, para.40-165.

951 European Union (Withdrawal) Act 2018 s.8 on which see Vol.I, para.1-021.

952 On “retained EU law” and the significance of IP completion day generally see above, para.[40-004](#) and Vol.I, paras [1-016](#) et seq.

(ii) - The Distance Marketing of Financial Services

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(f) - Special Rules for Financial Services Contracts, Timeshare Contracts, Package Travel Contracts, Contracts Concluded by Electronic Means and ADR

(ii) - The Distance Marketing of Financial Services

U After title, add new footnote 946a: On 20 July 2022, the government introduced the Financial Services and Markets Bill 2022 which provides, inter alia, for the repeal of the [Financial Services \(Distance Marketing\) Regulations 2004 \(SI 2004/2095\)](#) as part of a wider revocation of retained EU law governing financial services: cl.1 and, specifically, Sch.1 Pt 1. According to its explanatory notes, para.2, the Bill enables HM Treasury and the financial services regulators to replace the revoked retained EU legislation with “legislation designed specifically for UK markets, in a way that builds on the UK’s existing approach to financial services regulation”.

Summary

- 40-143 As earlier noted, contracts for the provision of financial services are excluded from the scope of the **U** [2013 Regulations](#),⁹⁵³ but the earlier [Financial Services \(Distance Marketing\) Regulations 2004](#)
[954](#) make very broadly similar provision for distance contracts for the provision of financial services⁹⁵⁵ as the [2013 Regulations](#) make in relation to other contracts. So, a “distance contract” under the [2004 Regulations](#) is defined as:

“... any contract concerning one or more financial services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier or by an intermediary, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded.”⁹⁵⁶

The [2004 Regulations](#) impose information requirements on the supplier of the service which are similar to those under the [2013 Regulations](#) though tailored to suit the subject matter of the contracts, and this information is to be provided:

“... in a clear and comprehensible manner appropriate to the means of distance communication used, with due regard in particular to the principles of good faith in commercial transactions and the principles governing the protection of those who are unable to give their consent such as minors.”⁹⁵⁷

However, certain categories of financial service contracts are excluded from these pre-contractual requirements⁹⁵⁸ and the [2004 Regulations](#) also exclude more generally from their principal provisions governing information duties and the consumer’s right to cancel some contracts for and supplies of financial services where equivalent provision is made by other regimes, notably, contracts and supplies made by a supplier who is an “authorised person, the making or performance of which constitutes or is part of a regulated activity carried on by him” within the meaning of the [Financial Services and Markets Act 2000](#).⁹⁵⁹ On IP completion day, the [2002 Regulations](#) were amended with the result that their principal provisions⁹⁶⁰ do not apply in relation to any contract made between an EEA supplier contracting from an establishment in an EEA State and a consumer in the UK unless the EEA supplier is a payments supplier, a relevant EEA alternative investment fund manager (AIFM), or the operator, trustee or depositary of a relevant recognised scheme.⁹⁶¹ The [2002 Regulations](#)’ provisions on cancellation by the consumer are also similar to those under the [2013 Regulations](#) (though they make a series of detailed exceptions to the availability of the consumer’s right to cancel⁹⁶²) and so provide that the consumer may cancel within a period of 14 days from the conclusion of the contract, unless the supplier has failed to provide information as they require, in which case the period is 14 days after the day of supply of that information.⁹⁶³ The effect of an exercise of the right to cancel is that the notice of cancellation terminates the contract at the time when it is given,⁹⁶⁴ with a consequential refund of monies paid by the consumer subject to a charge made by the supplier in respect of a “service actually provided by the supplier in accordance with the contract”.⁹⁶⁵ Equally, the consumer must refund any sums or return any property transferred to him or her under the contract.⁹⁶⁶ The [2004 Regulations](#) specify that any contract term which is inconsistent with their application is void⁹⁶⁷ and that they will apply notwithstanding any contract term which applies or purports to apply the law of a country other than the UK, if the contract or supply has a close connection with the UK or any part of the

UK.⁹⁶⁸ The [2004 Regulations](#) entrust their enforcement to the Financial Conduct Authority,⁹⁶⁹ the Competition and Markets Authority and local weights and measure authorities, depending on the nature of the alleged breach,⁹⁷⁰ and this enforcement may include an application for an injunction.⁹⁷¹

Footnotes

[953](#) [2013 Regulations reg.6\(1\)\(b\)](#), above, para.[40-079](#).

[954](#) [SI 2004/2095](#), which implemented Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16 (“2002 Directive”), cf. above, para.[40-028](#). On IP completion day (on which see above, para.[40-004](#) and Vol.I, paras [1-016](#) et seq.), the [2004 Regulations](#) (regs [2](#), [4](#), [7](#), [8](#), [16](#) and [Sch.1](#)) were amended in particular so as to address issues arising in relation to distance contracts for financial services made by suppliers in the EEA and consumers in the UK and in relation to financial services supplied by such suppliers to consumers in the UK: see [Financial Services \(Distance Marketing\) \(Amendment and Savings Provisions\) \(EU Exit\) Regulations 2019 \(SI 2019/574\)](#) (reg.1(3)’s reference to Pt 3’s amendments coming into force on “exit day” must be read as referring to “IP completion day”: [European Union \(Withdrawal Agreement\) Act 2020 s.39\(1\), s.41\(4\), Sch.5 para.1](#)) and see above, para.[40-004](#) and Vol.I, paras [1-016](#) et seq. See in particular [reg.4](#) as so amended, noted below. See also the note to the heading of this section referring to the Financial Services and Markets Bill 2022.

[955](#) “Financial service” means any service of a banking, credit, insurance, personal pension, investment or payment nature: [2004 Regulations reg.2\(1\)](#).

[956](#) [2004 Regulations reg.2\(1\)](#) “distance contract”. In [KH v Sparkasse Sudholstein \(C-639/18 18 June 2020 EU:C:2020:477](#) at paras 25–34 the CJEU held that an agreement for a new interest rate amending an existing loan agreement with a fixed interest rate without either extending the term of the loan or altering its amount and doing so under a term in the existing loan agreement which provided for the agreement of such an amendment or, failing such agreement, for the application of a variable rate of interest, does not count as a “contract concerning financial services” as it came within the qualification in art.1(2) of the 2002 Directive (implemented by the [2004 Regulations reg.5\(1\)](#)) governing “an initial service agreement followed by successive operations or a series of separate operations of the same nature performed over time”. In doing so, the CJEU held (at para.27) that “the characteristic obligation of [a credit agreement] is the actual granting of the sum loaned, while the borrower’s obligation to repay that sum is merely a consequence of the performance of the service by the lender”, relying on [Kareda v Benko \(C-249/16\) 15 June 2017 EU:C:2017:472](#) at para.41 to this effect in the context of Regulation (EU) 1215/2012 art.7(1) (the Brussels Ibis Regulation).

[957](#) [2004 Regulations reg.7](#) especially [reg.7\(2\)](#) and [Sch.1](#); [reg.7\(2\)](#) implemented the 2002 Directive art.3(2) and the CJEU has held that the clear and comprehensible nature of

the information must be assessed by reference to the standard of the average consumer: *Romano v DSL Bank – a branch of DB Privat- und Firmenkundenbank AG* (C-143/18) EU:C:2019:701, 11 September 2019 at paras 53–54. On the concept of the average consumer, see above, paras 40-046—40-047. A restricted range of information is required where a financial services distance contract is also a contract for payment services to which the Payment Services Regulations 2017 apply: 2004 Regulations reg.7(1A) and reg.8(1A) as amended by the Payment Services Regulations 2017 (SI 2017/752) (in force generally 13 January 2018).

- 958 2004 Regulations reg.7(6) and (7) (consumer credit agreements and authorised non-business overdraft agreements).
- 959 2004 Regulations reg.4(2) referring to regs 7–11, 15 (with the qualifications made by reg.4(5)). Regulation 4(3) disapplies the 2004 Regulations regs 7 and 8 (i.e. the main information requirements) as regards contracts made by a supplier who is an “appointed representative” within the meaning of s.39(2) of the Financial Services Markets Act 2000, where the making or performance of that contract constitutes or is part of a regulated activity within the meaning of s.22 of the 2000 Act (apart from an “exempt regulated activity” within the meaning of s.325(2) of that Act) carried on by the supplier, with similar exclusions as regards supplies by such persons as regards reg.15 (which concerns unsolicited services). Regulation 4(4) makes the same exclusions as regards contracts or supplies where the supplier is bound, etc. by “rules of a designated professional body which are equivalent to those regulations” and the making or performance of that contract or the supply constitutes or is part of an exempt regulated activity carried on by the supplier. Regulation 6(3) and (4) make certain saving provisions in respect of these exclusions.
- 960 i.e. 2004 Regulations regs 7–11.
- 961 2004 Regulations reg.4(1); moreover, regs 12 and 13 do not apply to such a contract unless the EEA supplier is an authorised person, or a payments supplier; and reg.15 does not apply in relation to any supply of financial services by an EEA supplier from an establishment in an EEA State to a consumer in the UK unless the EEA supplier is a payments supplier, a relevant EEA AIFM, or the operator, trustee or depositary of a relevant recognised scheme: reg.4(1A) and (1B) and reg.4(1C) defines “payments supplier” and AIFM for these purposes and reg.4(6) (as amended) defines “operator”, “trustee”, “depositary” and “relevant recognised scheme”. These changes were made by the Financial Services (Distance Marketing) (Amendment and Savings Provisions) (EU Exit) Regulations 2019 (SI 2019/574) reg.6(a) and (b).
- 962 2004 Regulations reg.11 (as much amended), e.g. contract where the price of that service depends on fluctuations of the money market outside the supplier’s control.
- 963 2004 Regulations regs 9 and 10.
- 964 2004 Regulations reg.9(2).
- 965 2004 Regulations reg.13, especially reg.13(3) and (6). On art.7 of the 2002 Directive (which these provisions implemented) see *Leonhard v DSL-Bank – a branch of DB Privat- und Firmenkundenbank AG* (C-301/18) EU:C:2020:427 4 June 2020 at paras 32–37.
- 966 2004 Regulations reg.13(11) and (12).
- 967 2004 Regulations reg.16(1) reflecting 2002 Directive art.12(1).

- 968 2004 Regulations reg.16(3) reflecting 2002 Directive art.12(2). To this extent, reg.16(3) thereby qualifies the general rules in the retained EU Rome I Regulation: Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I Regulation”) on which see Vol.I, paras 33-018 et seq. On IP completion day (on which see above, para.40-004 and Vol.I, paras 1-016 et seq.), the references in reg.16(3) to “the law of a country other than the United Kingdom” etc. replaced references to the “law of a State which is not an EEA State”: **Financial Services (Distance Marketing) (Amendment and Savings Provisions) (EU Exit) Regulations 2019 (SI 2019/574) reg.9.**
- 969 2004 Regulations reg.17.
- 970 2004 Regulations reg.17.
- 971 2004 Regulations reg.19. Further enforcement provisions are set out in **regs 20–23.**

End of Document

© 2022 SWEET & MAXWELL

(iii) - Package Travel, Package Holidays, Package Tours and Linked Travel Arrangements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(f) - Special Rules for Financial Services Contracts, Timeshare Contracts, Package Travel Contracts, Contracts Concluded by Electronic Means and ADR

(iii) - Package Travel, Package Holidays, Package Tours and Linked Travel Arrangements

Introduction

- 40-144 The Package Travel Directive 1990⁹⁷² (the “1990 Directive”) made a series of “minimum harmonisation” requirements for the protection of consumers⁹⁷³ and was implemented into UK law by the [Package Travel, Package Holidays and Package Tours Regulations 1992](#)⁹⁷⁴ (“1992 Regulations”). However, the 1990 Directive was repealed and replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements,⁹⁷⁵ and its requirements were made on the general basis of “full harmonisation” of the laws of Member States.⁹⁷⁶ The UK implemented the 2015 Directive by the [Package Travel and Linked Travel Arrangements Regulations 2018](#) (the “2018 Regulations”),⁹⁷⁷ which came into force generally on 1 July 2018⁹⁷⁸ and apply to contracts made on or after that date.⁹⁷⁹ The following paragraphs therefore continue to discuss the [1992 Regulations](#) (which implemented the 1990 Directive) but will then outline the provisions of the [2018 Regulations](#) (which were themselves subject to amendment on IP completion day).⁹⁸⁰

Footnotes

- 972 Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours: [1990] O.J. L158/59.
- 973 1990 Directive art.8. On the nature of “minimum harmonisation” see above, para.[40-023](#).
- 974 [SI 1992/3288](#).
- 975 [2015] O.J. L326/1 (“2015 Directive”). Repeal of the 1990 Directive is with effect from 1 July 2018: 2015 Directive art.29.
- 976 2015 Directive art.4 on which see above, para.[40-026](#).
- 977 [\(SI 2018/634\)](#).
- 978 2018 Regulations reg.1. See also the documents available at <https://www.gov.uk/government/consultations/updating-consumer-protection-in-the-package-travel-sector> [Accessed 1 September 2021] including Department of Business, Energy & Industrial Strategy, Updating Consumer Protection in the Package Travel Sector, Government Response (April 2018).
- 979 2018 Regulations reg.1(2); reg.37(2) (preserving the 1992 Regulations in relation to contracts concluded under them before 1 July 2018).
- 980 Below, para.[40-150](#).

(aa) - Package Travel, Package Holidays and Package Tours Regulations 1992

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(f) - Special Rules for Financial Services Contracts, Timeshare Contracts, Package Travel Contracts, Contracts Concluded by Electronic Means and ADR

(iii) - Package Travel, Package Holidays, Package Tours and Linked Travel Arrangements

(aa) - Package Travel, Package Holidays and Package Tours Regulations 1992

Scope of the 1992 Regulations ⁹⁸¹

- 40-145 The **1992 Regulations** apply to “packages” defined as the “pre-arranged combination”⁹⁸² of at least two of three components (transport, accommodation or other tourist services not ancillary to either) and “accounting for a significant proportion of the package”, when sold or offered for sale at an inclusive price⁹⁸³ and the service covers a period of more than 24 hours or includes overnight accommodation.⁹⁸⁴ The “organiser” refers to the person who “otherwise than occasionally, organises packages and sells or offers them for sale, whether directly or through a retailer”; the “retailer” refers to “the person who sells or offers for sale the package put together by the organiser”; and the “consumer” generally refers to “the person who takes or agrees to take the package”.⁹⁸⁵ In addition to the rules outlined below, the Regulations protect the consumer in the event of the insolvency of the organiser or retailer.⁹⁸⁶

Information, withdrawal and cancellation

- 40-146 The 1992 Regulations prohibit the organiser and the retailer from supplying to the consumer any “descriptive matter concerning a package, the price of a package or any other conditions applying to the contract” which contains any misleading information.⁹⁸⁷ The Regulations require organisers of package travel, etc. to provide brochures which set out information about the price and other matters which they set out in a Schedule,⁹⁸⁸ and in principle any particulars supplied in such a brochure are contractually binding on the organiser and may give rise to a claim for damages.⁹⁸⁹ The Regulations also impose on the organiser and/or the retailer a duty to provide specified travel information (such as visa requirements, health formalities or security for money paid over) before the contract is concluded and further practical travel information before the start of the journey: breach of these duties constitutes a criminal offence.⁹⁹⁰ The Regulations impose requirements as to the contents and form of the contracts to which they apply,⁹⁹¹ and they make provision to allow consumers to transfer their bookings and governing price revision and notice to the consumer of any significant alterations to essential terms.⁹⁹² As regards the last of these, the Regulations insert into the contract an implied term to the effect that where the organiser is constrained before departure to alter significantly an essential term of the contract, such as the price (to the extent to which the Regulations allow him to do so under their price revision rules), the organiser will notify the consumer to enable him to decide what to do and, in particular, to “withdraw from the contract without penalty or to accept a rider to the contract specifying the alterations made and their impact on the price”.⁹⁹³ Where the consumer withdraws from a contract under this provision or where the organiser cancels the package for any reason other than the fault of the consumer, the consumer is entitled to take a substitute package (either of equivalent or superior quality or, if lower quality, with a reduction in price) or to repay him all monies paid as soon as possible,⁹⁹⁴
- U** together with compensation.⁹⁹⁵ Other terms are implied into the contract to provide for cases where, after departure, a significant proportion of the services contracted for are not provided or the organiser realises that this will be the case; here, the organiser must make suitable alternative arrangements with compensation as appropriate.⁹⁹⁶

Liability for proper performance of the contract

- 40-147 The 1992 Regulations reg.15(1) also makes the organiser and retailer of a package:

“... liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services.”⁹⁹⁷

And under reg.15(2) the organiser and retailer are liable for “any damage caused” to the consumer as a result of the improper performance of the contract,⁹⁹⁸ unless it is due neither to their own fault nor to that of another supplier of services because:

- “(a)the failures which occur in the performance of the contract are attributable to the consumer;
- (b)such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or
- (c)such failures are due to—
 - (i)unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or
 - (ii)an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.”⁹⁹⁹

It has been held that “improper performance” depends on the terms of the contract and in the absence of an assumption of an absolute obligation on the part of the supplier of the service, reasonable care will be required¹⁰⁰⁰ and such reasonable care must be judged by the standards of the place where the service is provided.¹⁰⁰¹ In *X v Kuoni Travel Ltd* the question arose as to the liability under reg.15 of the organiser of a package holiday to a consumer where the latter was raped and sexually assaulted by an electrician employee of a hotel in guiding the consumer through the hotel grounds to the reception.¹⁰⁰² The Supreme Court referred certain questions to the Court of Justice of the EU in this respect,¹⁰⁰³ these questions being premised on the assumption that the action of the employee in the case fell within the scope of the “holiday arrangements” which the organiser had agreed to provide and that the rape and assault constituted improper performance of the contract at issue.¹⁰⁰⁴ For the Court of Justice, the key question was therefore whether the exemption in the third indent in art.5(2) of the Directive (which was implemented by reg.15(2)(c) of the 1992 Regulations quoted above) should be interpreted as meaning that, in the event of non-performance or improper performance of those obligations as a result of the actions of an employee of a supplier of services (such as the hotel) performing that contract (i) that employee must be regarded as a supplier of services for the purposes of applying that provision and (ii) the organiser can avoid its liability arising from such non-performance or improper performance, pursuant to that provision.¹⁰⁰⁵ In this respect, the Court of Justice noted that “[o]ne of the special features of ... liability [in the organiser under art.5 of the 1990 Directive] is that it extends to the proper performance of the obligations arising under the package travel contract by suppliers of

services".¹⁰⁰⁶ For this purpose, the autonomous meaning of a "supplier of services" is "a natural or legal person who provides services for remuneration" and the Court held that this does not include an employee of such a supplier of services as the employee has not concluded any agreement with the organiser to provide services for them and is in a relationship of subordination to the supplier who has so agreed.¹⁰⁰⁷ However, the employee's actions can be treated in the same way as those of the supplier of services employing him or her where there is a link between the act or omission which caused damage to that consumer and the organiser's obligations arising from the package travel contract.¹⁰⁰⁸ Moreover, the obligations arising from a package travel contract "may be performed by suppliers of services who may themselves act through their employees, who are under their control. The performance or failure to perform certain actions by those employees may, therefore, constitute non-performance or improper performance of the obligations arising from the package travel contract" with the result that "that non-performance or improper performance, although caused by acts committed by employees under the control of a supplier of services, is such as to render the organiser liable".¹⁰⁰⁹ Given the premise of the Supreme Court's questions that the employee's action was a "service" falling within the scope of the holiday arrangements and that the rape and assault constituted improper performance of that contract:

"… a travel organiser such as Kuoni may be held liable to a consumer such as X for improper performance of the contract between the parties, where that improper performance has its origin in the conduct of an employee of a supplier of services performing the obligations arising from that contract."¹⁰¹⁰

As regards the question whether the employee's rape and assault may constitute an event that cannot be foreseen or forestalled within the meaning of art.5(2) third indent, this exemption differs from force majeure (which is separately defined)¹⁰¹¹ and "exempts the organiser from the obligation to compensate the consumer for damage resulting either from events which cannot be foreseen, irrespective of whether they are usual, or from events which cannot be forestalled, irrespective of whether they are foreseeable or usual" and refers (as do the other cases of exemption in art.5(2)) to an absence of fault in either the organiser or the supplier and so "must be interpreted as referring to a fact or incident which does not fall within the sphere of control of the organiser or the supplier of services"¹⁰¹² As the acts or omissions of an employee of a supplier of services in the performance of obligations arising from a package travel contract which result in the non-performance or improper performance of the organiser's obligations vis-à-vis the consumer fall within that sphere of control, those acts or omissions cannot be regarded as events which cannot be foreseen or forestalled within the meaning of this exemption.¹⁰¹³



On receipt of the Court of Justice's decision, the Supreme Court delivered its own judgment.

¹⁰¹⁴

U First, it considered whether the rape and assault of X constituted improper performance of the obligations of Kuoni under the package travel contract.¹⁰¹⁵ For this purpose, it accepted that the purpose of the agreement, namely to confer an enjoyable experience, encouraged a broad, not a narrow, interpretation of the holiday services contracted for and that, in the case of any contract for a package holiday, the provider of the holiday necessarily undertakes to provide not merely transport, accommodation and meals but also other ancillary services.¹⁰¹⁶ There was, moreover, an express term in the contract under which Kuoni undertook to provide a holiday of a reasonable standard, which was to be judged against its description of the hotel,¹⁰¹⁷ and it was an integral part of the services to be provided on a holiday of such a standard that hotel staff should provide guests with assistance with ordinary matters affecting them at the hotel as part of their holiday experience and, therefore, “guidance by a member of the hotel’s staff of Mrs X from one part of the hotel to another was clearly a service within the ‘holiday arrangements’ which Kuoni had contracted to provide”.¹⁰¹⁸ Secondly, the Supreme Court noted¹⁰¹⁹ that the Court of Justice had stated that, while an employee of a supplier of services is not himself a supplier of services for the purposes of art.5(2) of the Directive, “non-performance or improper performance, although caused by acts committed by employees under the control of a supplier of services, is such as to render the organiser liable in accordance with article 5(1) of the Directive”.¹⁰²⁰ And, thirdly, the Supreme Court applied the Court of Justice’s binding ruling¹⁰²¹ (noted above) on the proper interpretation of the exemption from liability in art.5(2) third indent (implemented by reg.15(2)(c) of the 1992 Regulations) to the effect that acts or omissions of an employee of a supplier of services, in the performance of obligations arising from a package travel contract which result in the non-performance or improper performance of the organiser’s obligations vis-à-vis the consumer fall within that sphere of control and therefore cannot be regarded as events which cannot be foreseen or forestalled.¹⁰²² On the facts before it, the Supreme Court therefore held that Kuoni was liable to X as Kuoni’s improper performance of the holiday contract was caused by the acts of an employee of the hotel which was a supplier of services performing those obligations with the result that the exemption did not apply.¹⁰²³

Recoverable “damage”

- 40-148 Damages in respect of “damage” suffered by the consumer recoverable against the organiser under the Regulations may include compensation for personal injuries and, following the position established at common law, physical discomfort and mental distress, including for disappointment and loss of enjoyment.¹⁰²⁴ The Regulations provide that liability on this basis cannot be excluded in respect of personal injury or death, but a term of the contract may limit the amount of compensation in respect of other damage unless the limitation is unreasonable.¹⁰²⁵

Enforcement

- 40-149 The [1992 Regulations](#) made no dedicated provision for enforcement of their requirements by injunction, but the [Enterprise Act 2002](#) included the 1990 Directive in the list of instruments which might give rise to a “Community infringement” and so applied [Pt 8 of the 2002 Act](#) for their purposes ¹⁰²⁶ and the [1992 Regulations](#) were specified as the UK law which gave effect to this Directive for this purpose. ¹⁰²⁷ On IP completion day, “Community infringements” were replaced by “[Schedule 13](#) infringements” and the [1992 Regulations](#) were included within the substituted Sch.13 of the [2002 Act](#) to the extent to which those Regulations remain in force. ¹⁰²⁸

Footnotes

- 981 As noted above, para.[40-144](#), on the coming into force of the [2018 Regulations](#) which implemented the Package Travel Directive 2015, the [1992 Regulations](#) (and their amending regulations) were revoked, but they continue to apply to contracts concluded before the commencement date of the new regulation, i.e. 1 July 2018: [2018 Regulations reg.37](#).
- 982 On which see *Club-Tour, Viagens et Turismo SA v Gonçalves Garrido* (C-400/00) EU:C:2002:272, [2002] E.C.R. I-4051 applied by *O'Donnell v On the Beach Ltd 2021 S.L.T. (Sh. Ct) 70* (a contract with a total price charged for various elements (flights, hotels, transfers) selected by the consumer on the defendant's website was a “package” within the meaning of the [1992 Regulations](#)).
- 983 On which see *Sean Titshall v Qwerty Travel Ltd [2011] EWCA Civ 1569, [2011] C.T.L.C. 219*.
- 984 [1992 Regulations reg.2\(1\)](#) “package”, with further refinements.
- 985 [1992 Regulations reg.2\(1\)](#) “organiser” and “retailer” and [\(2\)](#) (specifying other uses of “consumer”).
- 986 [1992 Regulations regs 16–22](#).
- 987 [1992 Regulations reg.4\(1\)](#). Breach of this duty may give rise to liability to compensate the consumer for any resulting loss: [reg.4\(2\)](#).
- 988 [1992 Regulations reg.5](#).
- 989 [1992 Regulations reg.6\(1\)](#), with exceptions set out in [reg.6\(2\)](#) and [\(3\)](#). The consumer's claim is limited to damages by the stipulation that the particulars take effect as contractual warranties: [reg.6\(1\)](#).
- 990 [1992 Regulations regs 7 and 8](#). For incidental provision as to these and the other offences created by the Regulations see [regs 24–27](#).
- 991 [1992 Regulations reg.9](#).
- 992 [1992 Regulations regs 10–12](#).

- 993 1992 Regulations reg.12(a). It will be noted that the 1992 Regulations refer to a right to *withdraw* in the consumer, rather than a right to *cancel* in the consumer (unlike the 2013 Regulations which distinguish between a right to cancel a contract and a right to withdraw an offer, above, para.40-116). The 1992 Regulations instead use cancellation to refer to the organiser's act of cancellation of the package as set out in regs 13(1)–(2).
- 994 1992 Regulations reg.13(1)–(2). Where the consumer has a right to reimbursement under the 1992 Regulations, he cannot claim reimbursement of the cost of his air ticket which forms part of this package under Regulation (EC) 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or of long delays in flights (reg.8(2) of which refers explicitly to the right to reimbursement arising under the 1990 Directive), but he can claim compensation: *HQ v Aegean Airlines (C-163/18) EU:C:2019:585* para.31; *Králová v Primera Air Scandinavia (C-215/18) EU:C:2020:235* at paras 33–38: and on the 2004 Regulation generally see above, paras 37-054 et seq. The 2015 Directive is not referred to by art.8(2) of the 2004 Regulation and itself states (art.14(5)) that “any right to compensation or price reduction under this Directive shall not affect the rights of travellers under Regulation (EC) No 261/2004”; this is reflected in the 2018 Regulations reg.16(7) on which see below, para.40-155 (note).
- 995 1992 Regulations reg.13(3)–(4). Compensation is not available where the package is cancelled owing to the package not reaching a minimum number of persons where this was indicated to the consumer in its description or where it is cancelled by reason of “unusual and unforeseeable circumstances beyond the control of the party by which could not have been avoided even if all due care had been exercised”, but the latter does not include overbooking.
- 996 1992 Regulations reg.14.
- 997 1992 Regulations reg.15(1) which implemented 1990 Directive art.5(1). The contract must oblige the consumer to communicate to the supplier of the services concerned or to the organiser or retailer any failure in the services at the place where they are supplied: 1992 Regulations reg.15(9).
- 998 In *Committeri v Club Mediterranee SA [2018] EWCA Civ 1889, [2019] I.L.Pr. 19* at [46] it was held that liability arising from (French) national law implementing the 1990 Directive and therefore arising in respect of “the proper performance of the obligations arising from the contract” is contractual rather than non-contractual for the purposes of the EU private law instruments on applicable law, i.e. Regulation 593/2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6 (on which see Vol.I, paras 33-019 et seq.) and Regulation 864/2007 of the European Parliament and of the Council law applicable to non-contractual obligations (“Rome II Regulation”) [2007] O.J. L199/40.
- 999 1992 Regulations reg.15(2) which implemented 1990 Directive art.5(2).
- 1000 *Hone v Going Places Leisure Travel Ltd [2001] EWCA Civ 947* at [15]–[16]; applied in *Evans v Kosmar Villa Holidays Plc [2007] EWCA Civ 1003, [2008] 1 W.L.R. 297* at [21].
- 1001 *Lougheed v On the Beach Ltd [2014] EWCA Civ 1538* at [16], applying *Wilson v Best Travel Ltd [1993] 1 All E.R. 353* (which was decided at common law); and see similarly *TUI UK Ltd v Morgan [2020] EWHC 2944 (Ch)* at [17].
- 1002 [2018] EWCA Civ 938, [2018] 1 W.L.R. 3777; [2019] UKSC 37.

1003 [2019] UKSC 37 at [22] and [23]. The reference by the SC to the CJEU in this case was made before IP completion day (31 December 2020) and the CJEU continued therefore to have jurisdiction to give a preliminary ruling even after IP completion day; and its decision has “binding force in [its] entirety on and in the United Kingdom”: Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (24 January 2020) arts 86 and 89, implemented in UK domestic law by s.7A of the European Union (Withdrawal) Agreement Act 2018 as inserted by the European Union (Withdrawal Agreement) Act 2020 s.5: see Vol.I, para.1-027 (note).

1004 *X v Kuoni Travel Ltd* (C-578/19) EU:C:2021:213, 18 March 2021 (“*X v Kuoni Travel Ltd (C-578/19)*”) at para.21.

1005 *X v Kuoni Travel Ltd (C-578/19)* at para.31.

1006 *X v Kuoni Travel Ltd (C-578/19)* at para.35.

1007 *X v Kuoni Travel Ltd (C-578/19)* at paras 35–42.

1008 *X v Kuoni Travel Ltd (C-578/19)* at paras 43–46.

1009 *X v Kuoni Travel Ltd (C-578/19)* at paras 47 and 48.

1010 *X v Kuoni Travel Ltd (C-578/19)* at para.52.

1011 *X v Kuoni Travel Ltd (C-578/19)* at paras 53–58. The definition of force majeure is contained in art.4(6)(ii) of the 1990 Directive implemented by reg.13(3)(b) without referring to the concept of force majeure.

1012 *X v Kuoni Travel Ltd (C-578/19)* at paras 59 and 60.

1013 *X v Kuoni Travel Ltd (C-578/19)* at paras 61 and 62.

① 1014 [2021] UKSC 34, [2021] 1 W.L.R. 3910.

1015 [2021] UKSC 34 at [27] et seq.

1016 [2021] UKSC 34 at [29]–[30].

1017 [2021] UKSC 34 at [31].

1018 [2021] UKSC 34 at [32] per Lord Lloyd-Jones JSC: (with whom Lord Hodge DPSC, Lady Arden JSC and Lord Kitchin JSC agreed) and see further at [33]–[36] noting that the CJEU had made clear that a “broad approach should be adopted when seeking to identify the scope of ancillary obligations undertaken under a package travel contract” (at [36]).

1019 [2021] UKSC 34 at [38]–[42].

1020 [2021] UKSC 34 at [42].

1021 [2021] UKSC 34 at [45]. See note above in this paragraph relating to the transitional provisions in the Withdrawal Agreement between the UK and the EU 2020 as to the jurisdiction of the CJEU in respect of requests for preliminary rulings from UK courts made before IP completion day.

1022 [2021] UKSC 34 at [45].

1023 [2021] UKSC 34 at [45].

1024 See *Milner v Carnival Plc* [2010] EWCA Civ 389, [2010] P.I.Q.R. Q3. For the common law position see *Jarvis v Swann Tours Ltd* [1973] Q.B.233; *Jackson v Horizon Holidays* [1975] 1 W.L.R. 1468 and see Vol.I, para.29-162. In *Leitner v Tui Deutschland GmbH & Co KG* (C-168/00) EU:C:2002:163, [2002] E.C.R. I-2631 the ECJ held that “damage” under the

- Package Travel Directive 1990 includes loss of enjoyment and therefore national laws must allow recovery for this type of loss in their national legislation implementing the Directive.
- 1025 **1992 Regulations** reg.15(4)–(5). The contract may also provide for compensation to be limited in accordance with international conventions which govern the relevant services forming part of the package: reg.15(3).
- 1026 Enterprise Act 2002 ss.210(6)(b) and (7), 212; Sch.13 Pt 1 para.4 (before 1 July 2018); Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003 (SI 2003/1374) Sch.1 para.3 (the 2003 Order was itself revoked on IP completion day: Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.7(a)).
- 1027 Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003/1374 Sch.1 (which was revoked on IP completion day by the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.7(a)).
- 1028 Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.3(20) and Sch. para.1 inserting new 2002 Act Sch.13 para.8. On this change more generally see above, para.40-138.

(bb) - Package Travel and Linked Travel Arrangements Regulations 2018

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(f) - Special Rules for Financial Services Contracts, Timeshare Contracts, Package Travel Contracts, Contracts Concluded by Electronic Means and ADR

(iii) - Package Travel, Package Holidays, Package Tours and Linked Travel Arrangements

(bb) - Package Travel and Linked Travel Arrangements Regulations 2018

Package Travel Directive 2015 and the 2018 Regulations

- 40-150 As earlier noted, the 1990 Directive was repealed and replaced by Directive (EU) 2015/2302 on package travel and linked travel arrangements.¹⁰²⁹ A principal aim of the new directive was to adapt the protection for consumers in relation to package travel earlier required by the 1990 Directive in the light of major changes in the market, notably, as a result of the increasing importance of the internet as a medium through which travel services are made available.¹⁰³⁰ As earlier noted, the UK government issued regulations for the implementation of the 2015 Directive in UK law, the [Package Travel and Linked Travel Arrangements Regulations 2018](#) (the “2018 Regulations”¹⁰³¹) which revoked the [1992 Regulations](#) and which came into force generally on 1 July 2018,¹⁰³² applying to contracts made on or after that date.¹⁰³³ The following paragraphs will outline the most significant of their features for the purposes of contract law, noting relevant amendments made on IP completion day when the UK’s leaving the EU came into full effect.¹⁰³⁴

Scope of the Regulations

- 40-151 The [2018 Regulations](#) govern “packages offered for sale or sold by traders to travellers” and to “linked travel arrangements” facilitated by traders for travellers. ¹⁰³⁵ “Trader” is defined generally for this purpose, and refers to the organiser or retailer of package travel, the facilitator of a linked travel arrangement, or a travel service provider. ¹⁰³⁶ The protection of “travellers” (rather than “consumers” as under the [1992 Regulations](#), though this was specially defined ¹⁰³⁷) means that individuals who are business travellers are included except where their travel arrangements are made on the basis of a general agreement. ¹⁰³⁸ The key notion of a “package” is redefined extensively when compared to the [1992 Regulations](#), requiring a combination of two different elements of “travel services” for the purpose of the same trip or holiday, subject to a series of particular conditions. ¹⁰³⁹

“‘Travel service’ means

- (a)the carriage of passengers;
- (b)accommodation which is not intrinsically part of the carriage of passengers and is not for residential purposes;
- (c)rental of
 - (i)cars;
 - (ii)other motor vehicles [as defined by reference];
 - (iii)or motorcycles [as defined by reference];
- (d)any other tourist service not intrinsically part of a travel service within the meaning of paragraph (a), (b) or (c).” ¹⁰⁴⁰

According to recital 18 of the Directive, “any other tourist service” would include, for example:

“... admission to concerts, sport events, excursions or event parks, guided tours, ski passes and rental of sports equipment such as skiing equipment, or spa treatments.”

The [2018 Regulations](#) introduce the notion of a “linked travel arrangement”, defined as:

“... at least two different types of travel service purchased for the purpose of the same trip or holiday, not constituting a package, resulting in the conclusion of separate contracts with the individual travel service providers, if a trader facilitates—

- (a)on the occasion of a single visit to, or contact with, a trader's point of sale, the separate selection and separate payment of each travel service by travellers; or
- (b)in a targeted manner, the procurement of at least one additional travel service from another trader where a contract with such other trader is concluded at the latest 24 hours after the confirmation of the booking of the first travel service.”¹⁰⁴¹

Recital 9 of the 2015 Directive explains that this is:

“... where online or high street traders facilitate the procurement of travel services by travellers leading the traveller to conclude contracts with different travel services providers, including through linked booking processes, which do not contain the features of a package and in relation to which it would not be appropriate to apply all of the obligations applicable to packages.”¹⁰⁴²

As regards both the definition of “package” and “linked travel arrangement”, where not more than one type of travel service of the kind listed in the first three paragraphs of its definition ((a) to (c)) is combined with one or more “other tourist service” as referred to in para.(d) of the definition of “travel service”, then the arrangement will not count as a “package” or, as the case may be, a “linked travel arrangement” if those services do not account for a significant proportion of the value of the combination (or combined value of the services) and are not advertised as, and do not otherwise represent, an essential feature of package combined, or the combination, trip or holiday and, moreover, in the case of packages, subject to a further condition that the “other tourist service” or services are not selected or purchased after the performance of a travel service of the kind listed in paras (a), (b) or (c) of the definition of “travel service” has started.¹⁰⁴³ According to recital 9 of the 2015 Directive, linked travel arrangements take place:

“... where online or high street traders facilitate the procurement of travel services by travellers leading the traveller to conclude contracts with different travel services providers, including through linked booking processes, which do not contain the features of a package.”

In terms of the first example, it may thought to be unusual in practice for the “separate selection and separate payment of each travel service” to take place “on the occasion of a single visit, or contact with, a trader's point of sale”. More generally, many respondents to the government's consultation on the implementation of the 2015 Directive expressed concern as to the lack of clarity of what constitutes a “linked travel arrangement”.¹⁰⁴⁴ However, very few of the requirements of the Directive or the [2018 Regulations](#) apply to “linked travel arrangements”, the most significant examples being that a traveller will benefit from requirements concerning the protection of travellers from the insolvency of the facilitator of the arrangement,¹⁰⁴⁵ and that a trader has a duty to inform the traveller that he will not benefit from any of the rights applying exclusively to *packages* under the Regulations and that each service provider will be solely responsible

for the proper contractual performance of the service, though he will benefit from insolvency protection.¹⁰⁴⁶

Information requirements for package travel contracts

- 40-152 The [2018 Regulations](#) set out a detailed list of information to be provided to the traveller by the organiser or, where applicable, retailer¹⁰⁴⁷ by means of standard forms before the traveller is bound by a package travel contract, including as to the main characteristics of the travel service (as set out), details about the trader, the total price of the package together with arrangements for payment and a number of other matters.¹⁰⁴⁸ The information must be provided “in a clear, comprehensible and prominent manner” and, if in writing, in legible form.¹⁰⁴⁹ The most important of this information (notably as to the main characteristics of the travel service and the price) “forms an integral part of the package travel contract” and “must not be altered unless the traveller expressly agrees otherwise” with the organiser or, as the case may be, retailer.¹⁰⁵⁰ The [2018 Regulations](#) also provide that the organiser or retailer must provide the traveller with a copy or confirmation of the contract, setting out the “full content of the package”, including the information which should have been (or was) supplied in advance of the contract and further information about the travel service (e.g. special requirements of the traveller accepted by the organiser) and practical matters (such as the name, etc. of the organiser’s local representative or equivalent, and of the traveller’s right (created by the Regulations and subject to conditions) to transfer the contract on reasonable notice to another traveller before the start of the package).¹⁰⁵¹ The Regulations set out a series of strict controls on the circumstances in which the price of a package travel contract may be increased or other terms of the contract changed.¹⁰⁵²

Termination of the contract

- 40-153 The [2018 Regulations](#) provide that in general a traveller “may terminate the package travel contract at any time before the start of the package” though he may be required to pay “an appropriate and justifiable termination fee to the organiser” (concerning which further details are specified)¹⁰⁵³ and may also terminate the contract without paying any termination fee:

“... in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and which significantly affect—

- (a)the performance of the package, or

(b)the carriage of passengers to the destination.”¹⁰⁵⁴

- 40-154 In these circumstances, the traveller can obtain a full refund of any payments made for the package but no additional compensation.¹⁰⁵⁵ Conversely, the organiser is also empowered to terminate the contract where he:

“... is prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the traveller of the termination of the contract without undue delay before the start of the package.”¹⁰⁵⁶

Where this is the case, the organiser must refund any payments made by the traveller for the package, but is not liable for any additional compensation.¹⁰⁵⁷

Responsibility for the performance of the package

- 40-155 The **2018 Regulations** set a general principle that the organiser¹⁰⁵⁸ is liable for the performance of the travel services included in the package travel contract “irrespective of whether those services are to be performed by the organiser or by other travel service providers”¹⁰⁵⁹ and imposes on him a duty to remedy any lack of conformity of the service with the contract within a reasonable period set by the traveller, unless this is impossible or entails “disproportionate costs, taking into account the extent of the lack of conformity and the value of the travel services affected”.¹⁰⁶⁰ The Regulations make further detailed provision as to the traveller’s remedies for non-conformity of the travel service with the contract, including a power in the traveller to remedy it himself where the organiser refuses to remedy the lack of conformity or where immediate remedy is required¹⁰⁶¹; a duty in the organiser to make suitable alternative arrangements if a significant proportion of the travel service cannot be provided as agreed¹⁰⁶²; a power in the traveller to terminate the contract without paying a termination fee where “a lack of conformity substantially affects the performance of the package” and “the organiser fails to remedy the lack of conformity within the reasonable period” set by the traveller¹⁰⁶³; a general right to:

“... an appropriate price reduction for any period during which there is a lack of conformity, unless the organiser proves that the lack of conformity is attributable to the traveller”,¹⁰⁶⁴

and a right to “appropriate compensation for any damage which the traveller sustains as a result of any lack of conformity”, unless the latter was attributable to the traveller, to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable, or was due to unavoidable and extraordinary circumstances.

¹⁰⁶⁵



Effectiveness of traveller's protection and enforcement

- 40-156 Part 5 of the 2018 Regulations makes provision for the effectiveness of the protection of travellers from the insolvency of the organisers of package travel and linked travel arrangements.¹⁰⁶⁶ The Regulations make it an offence in an organiser or retailer of a package, or a facilitator of a linked travel arrangement, to fail in their respective duties of information and, in the case of the former, in respect of the content of the package travel contract, and in respect of certain failures as regards the traveller's insolvency protection.¹⁰⁶⁷ The Regulations specify that local weights and measures authorities and the Civil Aviation Authority are the enforcement authorities for these purposes.¹⁰⁶⁸ In addition, before IP completion day, the Regulations substituted the 2015 Directive for the 1990 Directive in the list of instruments which might give rise to a “Community infringement” under Pt 8 of the Enterprise Act 2002 and they substituted the 2018 Regulations as the regulations specified as the UK law giving effect to the 2015 Directive for these purposes.¹⁰⁶⁹ As earlier explained, on IP completion day the category of “Community infringements” in the 2002 Act was replaced by “Schedule 13 infringements” and the 2018 Regulations were included for this purpose within the substituted Sch.13 of the 2002 Act, so as to allow the application of the enforcement measures provided by Pt 8 of that Act.¹⁰⁷⁰ Finally, the Regulations render any waiver or contractual arrangement purporting to restrict the application of the Regulations not binding on the traveller.¹⁰⁷¹

Footnotes

- 1029 [2015] O.J. L326/1 (“2015 Directive”). Repeal of the 1990 Directive is with effect from 1 July 2018: 2015 Directive art.29. On the 2015 Directive, see Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements COM/2021/90 final.
- 1030 2015 Directive recital 2.
- 1031 SI 2018/634.
- 1032 2018 Regulations reg.1(2) (with the exception there noted).

- 1033 [2018 Regulations reg.1\(2\); reg.37\(2\)](#) (preserving the [1992 Regulations](#) in relation to contracts concluded under them before 1 July 2018).
- 1034 On this see generally above, para.[40-004](#) and Vol.I, paras [1-016](#) et seq. The amendments to the [2018 Regulations](#) were made by the [Package Travel and Linked Travel Arrangements \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1367\)](#) (the reference in [reg.1\(1\)](#) to “exit day” must be read as referring to “IP completion day”: [European Union \(Withdrawal Agreement\) Act 2020 s.39\(1\), s.41\(4\), Sch.5 para.1](#)). These amendments do not apply to a package travel contract nor a linked travel arrangement concluded before IP completion day: [SI 2018/1367 reg.1\(2\)](#) (as amended by the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(SI 2020/1347\) Pt 3 reg.5\(2\)](#)).
- 1035 [2018 Regulations reg.3\(1\)](#) (with the exceptions set by [reg.3\(2\)](#)); cf. 2015 Directive art.2(1) (with the exceptions set by art.2(2)).
- 1036 [2018 Regulations reg.2\(1\)](#) “trader”.
- 1037 Above, para.[40-145](#).
- 1038 This is the combined effect of the definition of “traveller” in [reg.2\(1\)](#) and the exclusion from the scope of the [Regulations in reg.3\(2\)\(c\)](#) of “packages and linked travel arrangements purchased on the basis of a general agreement”, defined ([reg.3\(3\)](#)) as an “agreement which is concluded between a trader and another person acting for a trade, business, craft or profession, for the purpose of booking travel arrangements in connection with that trade, business, craft or profession”. cf. 2015 Directive arts 2(2) (c), 3(6) and recital 7.
- 1039 [2018 Regulations reg.2\(5\) and \(6\)](#); cf. 2015 Directive art.3(2) (“package”) and recitals 10 and 11, 17 to 19.
- 1040 [2018 Regulations reg.2\(1\)](#) “travel service”; cf. 2015 Directive art.3(1). On IP completion day (on which see above, para.[40-004](#)), the legislative definitions of “other motor vehicles” and “motorcycles” were changed so as to refer to UK regulations rather than to EU directives: [SI 2018/1367 reg.3\(a\)\(ii\)](#).
- 1041 [2018 Regulations reg.2\(3\)](#); cf. 2015 Directive art.3(5).
- 1042 See further explanations of “linked travel arrangement” and how it differs from other arrangements see the 2015 Directive, recitals 12 to 17.
- 1043 [2018 Regulations reg.2\(4\)](#) (in relation to “linked travel arrangement”) and [reg.2\(6\) \(b\)](#) (in relation to “package”); cf. 2015 Directive art.3(2)(b) (“package”); 3(5) (“linked travel arrangement”). Recital 18 of the 2015 Directive explains that “[i]f other tourist services account for 25% or more of the value of the combination, those services should be considered as representing a significant proportion of the value of the package or linked travel arrangement”.
- 1044 Department of Business, Energy & Industrial Strategy, Updating Consumer Protection in the Package Travel Sector, Government Response (April 2018), paras 50–51 and 54.
- 1045 [2018 Regulations reg.26\(1\)–\(6\)](#). cf. 2015 Directive art.19, recitals 16, 43 and 44. See also [2018 Regulations reg.28](#) (liability for booking errors).
- 1046 [2018 Regulations reg.26\(7\) and \(8\)](#); the [2018 Regulations](#) set out the required form of words for this information in different circumstances in [Schs 6 to 10](#).

- 1047 Where a package is sold through a retailer, the [2018 Regulations reg.4](#) determines the responsibility for the provision of the information as between its organiser and the retailer by reference to the notion of a “relevant person”, which is then used by the subsequent provisions ([regs 5 to 7](#)).
- 1048 [2018 Regulations regs 4 and 5](#) referring to [Schs 1 to 4](#); cf. 2015 Directive art.5(1) and (2).
- 1049 [2018 Regulations reg.5\(4\)](#): cf. 2015 Directive art.5(3). On the possible relevance of the standard of the “average consumer” for this purpose, see above, paras [40-046](#)—[40-047](#).
- 1050 [2018 Regulations reg.6\(1\)](#). [Regulation 6\(4\)](#) provides that it is an implied condition that the organiser or retailer complies with [reg.6](#)’s provisions and this means that a failure to do so would constitute a breach of contract in the organiser or retailer entitling the traveller to terminate the contract. Art.6(1) of the 2015 Directive requires contractual force to be given to pre-contractual information in a similar way to the general scheme contained in the Consumer Rights Directive 2011 art.6(5) on which see above, para.[40-108](#).
- 1051 [2018 Regulations reg.7; Schs 1 and 5](#); cf. 2015 Directive art.7. For the right to transfer itself see [2018 Regulations reg.9](#).
- 1052 [2018 Regulations regs 10 and 11](#); cf. 2015 Directive arts 10 and 11.
- 1053 [2018 Regulations reg.12\(2\)–\(6\)](#). The provisions of [reg.12](#) are implied as a term in every package travel contract: [reg.12\(1\)](#), cf. 2015 Directive art.12(1).
- 1054 [2018 Regulations reg.12\(7\)](#).
- 1055 [2018 Regulations reg.12\(8\)](#).
- 1056 [2018 Regulations reg.13\(2\)\(b\)](#) and [\(3\)](#) and see [reg.14](#) on refunds in the event of termination; cf. 2015 Directive art.12(3)(b). The organiser may also terminate the contract where the package was stated as being for a minimum number of persons and that number is not enrolled at various times before its start depending on the duration of the package: [reg.13\(2\)\(a\)](#) and [\(3\)](#).
- 1057 [2018 Regulations reg.13\(3\)](#) and see [reg.14](#) on refunds in the event of termination; cf. 2015 Directive art.12(3).
- 1058 The UK government decided not to extend responsibility for performance of package contracts to their retailers as well as their organisers: Department of Business, Energy & Industrial Strategy, Updating Consumer Protection in the Package Travel Sector, Government Response (April 2018), paras 88–91.
- 1059 [2018 Regulations reg.15\(2\)](#); cf. 2015 Directive art.13(1).
- 1060 [2018 Regulations reg.15\(4\)](#). Where the exceptions apply, the traveller enjoys the possibility of a price reduction or compensation: [reg.15\(5\)](#) referring to [reg.16](#), cf. 2015 Directive art.13 and specifically art.13(3).
- 1061 [2018 Regulations reg.15\(6\)](#), which entitles the traveller to a reimbursement of the expenses necessary to do so; see also [reg.15\(7\)](#) (no requirement in these circumstances for the traveller to set a period nor to wait the expiry of any reasonable period in fact set).
- 1062 [2018 Regulations reg.15\(8\)–\(10\)](#) and [\(12\)](#).
- 1063 [2018 Regulations reg.15\(11\)](#); cf. 2015 Directive art.13(6). Further detailed provision is made where in certain circumstances the traveller requires repatriation or is unable to

- return as agreed in the contract owing to unavoidable and extraordinary circumstances: reg.15(12)–(16).
- 1064 2018 Regulations reg.16(2); cf. 2015 Directive art.14(1).
- 1065 2018 Regulations reg.16(3) and (4); cf. 2015 Directive art.14(3) and above, para.40–408 under the 1992 Regulations discussing in particular *X v Kuoni Travel Ltd [2018] EWCA Civ 938, [2018] 1 W.L.R. 3777; (C-578/19) EU:C:2021:213, 18 March 2021; [2021] UKSC 34, [2021] 1 W.L.R. 3910*. The 2018 Regulations reg.16(7) provides that any right to compensation or price reduction under these Regulations does not affect the rights of travellers under listed EU passenger rights legislation (defined in reg.2(1) and including Regulation (EC) 261/2004 on denied boarding) and the international conventions.
- 1066 cf. 2015 Directive arts 17 to 18, and 19(1). 2018 Regulations regs 19–23 and 26–27 were subject to amendment on IP completion day by SI 2018/1367 regs 5–11 with the effect that traders facilitating linked travel arrangements established in a Member State of the EU are no longer exempted from the requirement to provide security under Pt 5 of the 2018 Regulations.
- 1067 As regards package travel, see 2018 Regulations regs 5(5) (information); reg.7(12) (failure in respect of the content of the contract, etc.), and regs 19(9) and 25 (insolvency requirements); as regards linked travel arrangements, see reg.26(10) (information and insolvency requirements). See further regs 32–34 (due diligence defence, liability of persons other than the principal offender, and prosecution time limit).
- 1068 2018 Regulations reg.31 (in Northern Ireland, the enforcement authority is the Department for the Economy in Northern Ireland).
- 1069 2018 Regulations reg.38(3) referring to 2002 Act Sch.13 Pt 1 para.4; reg.38(7) amending the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003 (SI 2003/1374) Sch.1 (which was itself revoked on IP completion day by the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.7(a)).
- 1070 Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.3(20) and Sch. para.1 inserting new 2002 Act Sch.13 para.29. On this change to the scheme of the 2002 Act more generally see above, para.40–138.
- 1071 2018 Regulations reg.30(2) and (3).

(iv) - Timeshare and Related Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(f) - Special Rules for Financial Services Contracts, Timeshare Contracts, Package Travel Contracts, Contracts Concluded by Electronic Means and ADR

(iv) - Timeshare and Related Contracts

Timeshare and related contracts

40-157 The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the “Timeshare Regulations” or “2010 Regulations”) ¹⁰⁷² implemented in the UK the EU Timeshare Directive 2009, revoking and replacing earlier legislation. ¹⁰⁷³ The Timeshare Directive 2009 provides generally for “full harmonisation”, and the 2010 Regulations followed its substantive requirements closely, though with considerable reordering and rephrasing. ¹⁰⁷⁴ Very broadly, the 2010 Regulations impose on the trader a range of pre-contractual information duties, make specific and demanding formal and language requirements for the contracts affected, and, in addition, provide the consumer with a 14-day right of withdrawal which is extended where the trader fails to provide the consumer with a withdrawal form and/or “key information”. ¹⁰⁷⁵ On IP completion day ¹⁰⁷⁶ the 2010 Regulations were amended so as to deal with “deficiencies” caused by the UK’s departure from the EU ¹⁰⁷⁷; these amendments do not apply to contracts entered into before IP completion day. ¹⁰⁷⁸ Where relevant, the effect of these changes will be summarised in the notes to the following paragraphs.

The contracts affected

40-158

The **2010 Regulations** govern two types of contract (“timeshare contracts” and “long-term holiday product contracts”),¹⁰⁷⁹ together with two further types of contract which are related to them: “resale contracts” and “exchange contracts”.¹⁰⁸⁰ A timeshare contract is defined as

“... a contract between a trader and a consumer—

(a)under which the consumer, for consideration, acquires the right to use overnight accommodation for more than one period of occupation, and

(b)which has a duration of more than one year, or contains provision allowing for the contract to be renewed or extended so that it has a duration of more than one year.”¹⁰⁸¹

For this purpose, “accommodation” includes a reference to “accommodation within a pool of accommodation”.¹⁰⁸² A “long-term holiday product contract” is defined as:

Regulation 7:(2)

“... a contract between a trader and a consumer—

(a) the main effect of which is that the consumer, for consideration, acquires the right to obtain discounts or other benefits in respect of accommodation, and

(b) which has a duration of more than one year, or contains provision allowing for the contract to be renewed or extended so that it has a duration of more than one year,

irrespective of whether the contract makes provision for the consumer to acquire other services.”

1083

The two related contracts which are also affected by the **2010 Regulations** are resale contracts defined as:

“... a contract between a trader and a consumer under which the trader, for consideration, assists the consumer in buying or selling rights under a timeshare contract or under a long-term holiday product contract”¹⁰⁸⁴

and exchange contracts defined as:

“... a contract between ... a consumer who is also party to a timeshare contract, and ... a trader, under which the consumer, for consideration, joins a timeshare exchange system.”¹⁰⁸⁵

Timeshare contracts and long-term holiday product contracts and these two related contracts are together termed “holiday accommodation contracts” by the Regulations and, if they satisfy a series of conditions and do not fall within a series of exclusions, then qualify as “regulated contracts”.¹⁰⁸⁶ For the purposes of the four contracts described above, the definitions of “trader” and “consumer” follow closely the definitions of the 2009 Directive, without any extension to the consumer acting “wholly or mainly” for non-business purposes.¹⁰⁸⁷ In addition to these four “regulated contracts”, “ancillary contracts” and “related credit agreements” are automatically terminated if the consumer withdraws from a regulated contract under the Regulations.¹⁰⁸⁸

Information requirements

- 40-159 The [2010 Regulations](#) impose a number of requirements on traders to give¹⁰⁸⁹ “key information in relation to the contract” to the consumer in good time before entering a “regulated contract”.¹⁰⁹⁰ The “key information” is defined by reference to “standard information forms” which the [2010 Regulations](#) themselves provide, the four forms (for timeshare contracts, long-term holiday product contract, resale contracts and exchange contracts respectively¹⁰⁹¹) consisting of a series of headings under which the trader is required to fill in the relevant particular information, so, for example, in relation to timeshare contracts this includes a short description of the immovable property, the exact nature and content of the consumer’s rights under the contract, and summaries of the services and facilities which the consumer will enjoy, and the consumer’s right of withdrawal.¹⁰⁹² The information must be provided by the trader using the relevant form,¹⁰⁹³ must be “clear, comprehensible and accurate” and “sufficient to enable the consumer to make an informed decision about whether or not to enter into the contract”,¹⁰⁹⁴ and must be provided in English and may, in addition, be provided in another language.¹⁰⁹⁵ A trader’s failure in any of these requirements constitutes a criminal offence.¹⁰⁹⁶ The Regulations make further requirements as to the advertising and marketing of a “regulated contract”, again buttressed by criminal penalties.¹⁰⁹⁷

Formalities

- 40-160 The [2010 Regulations](#) require that a regulated contract¹⁰⁹⁸ must be in writing and include the identity, place of residence and signature of the parties, the date and place of conclusion of the

contract, must include the “key information” in relation to the contract¹⁰⁹⁹ as “terms of the contract, and with no changes, other than permitted changes”,¹¹⁰⁰ and must include the standard withdrawal form which they set out.¹¹⁰¹ The trader must draw the consumer’s attention to three important matters (the consumer’s right of withdrawal and its length, and the prohibition on “advanced consideration”¹¹⁰²) and obtain the consumer’s signature in relation to *each* section of the contract dealing with them, and the trader must provide the consumer with a copy of the contract.¹¹⁰³ Any failure by the trader in any of these respects constitutes a criminal offence and the contract is rendered unenforceable against the consumer.¹¹⁰⁴ The Regulations require that the contract must be drawn up in English and may, in addition, be drawn up in another language¹¹⁰⁵ and, in the case of timeshare contracts whose subject is a “single item of specific immovable property situated in a EEA State” a certified translation of the contract into an official language of that State.¹¹⁰⁶

Consumer’s right to withdraw

⁴⁰⁻¹⁶¹ The 2010 Regulations provide that a consumer may withdraw¹¹⁰⁷ from a “regulated contract”¹¹⁰⁸ by written notice¹¹⁰⁹ without giving any reason and may use the standard withdrawal form which should have been included in the contract to do so.¹¹¹⁰ The basic withdrawal period is 14 days beginning with the date of conclusion of the contract or the date on which the consumer receives a copy of the contract, whichever is later,¹¹¹¹ but if no standard withdrawal form is included in the contract the period is extended until the form is provided to the consumer plus 14 days up to a limit of a year and 14 days¹¹¹²; and if the “key information”¹¹¹³ is not provided by the trader, the period is extended until that information is provided plus 14 days up to a limit of three months and 14 days.¹¹¹⁴ The exercise of this right of withdrawal by a consumer terminates the parties’ obligations under the relevant “regulated contract”¹¹¹⁵; and where this is a timeshare contract or long-term holiday accommodation contract, it terminates their obligations under any “ancillary contract” by which the consumer acquires services which are related to the main contract either provided by the trader or by a third party under an arrangement between the latter and the trader¹¹¹⁶; withdrawal by the consumer from a timeshare contract also terminates the parties’ obligations under any exchange contract which is related to it.¹¹¹⁷ On withdrawal, the consumer is not liable for any costs or charges in respect of the regulated contract or any ancillary contract affected, including any costs or charges corresponding to services provided before withdrawal,¹¹¹⁸ and any related credit agreement is automatically terminated at no cost to the consumer.¹¹¹⁹ As regards timeshare contracts, long-term holiday product contracts and exchange contracts, it is an offence for a person to accept any consideration (and notably, any payment¹¹²⁰) before the end of the period for withdrawal allowed for the consumer and, in the case of resale contracts, to accept any consideration before the sale of those rights takes place or the contract in question is otherwise

terminated.¹¹²¹ In addition to a right of withdrawal, in the case of a long-term holiday product contract which is a “regulated contract”, the consumer may terminate the contract without penalty by giving notice of termination no later than 14 days after any day on which the consumer receives a request for payment of an instalment (other than the first instalment) as set out by the payment schedule which the Regulations require for this category of contract.¹¹²²

Exclusion by agreement or choice of law

⁴⁰⁻¹⁶² The [2010 Regulations](#) provide that a term of a “regulated contract”¹¹²³ is void to the extent that it purports to allow the consumer to waive the rights conferred on them by these Regulations.¹¹²⁴ Article 12 of the 2009 Directive makes overt provision for its application “in international cases”, but in the scheme of the [2010 Regulations](#) these special controls on choice of applicable law are given effect by [reg.5](#)’s provisions specifying the “holiday accommodation contracts” to which the Regulations apply.¹¹²⁵ The background to this special provision is that under the Rome I Regulation, the contracts falling within the scope of the 2009 Directive¹¹²⁶ may fall under art.3’s general provisions allowing choice of law and art.6’s special provisions governing consumer contracts¹¹²⁷ or, where they do not, art.4’s default provisions governing contracts even where (as in the case of timeshare contracts) they concern rights in rem in immovable property and tenancies.¹¹²⁸ In very broad terms, the 2009 Directive¹¹²⁹ (and so also the [2010 Regulations](#)) seek to give consumers additional protection to that provided by the Rome I Regulation¹¹³⁰ so as to prevent the avoidance of their controls by choice of applicable law, in a similar way to the anti-avoidance provisions in the Unfair Terms in Consumer Contracts Directive 1993¹¹³¹ and the Consumer Sales Directive 1999.¹¹³² As a result, [reg.5](#) provides that the [2010 Regulations](#) apply to a “holiday accommodation contract”¹¹³³ in any one of three circumstances. First, where the contract is to any extent governed by the law of the United Kingdom, or of a part of the United Kingdom.¹¹³⁴ Secondly, where the contract is to any extent governed by the law of a third country (defined as a country other than the United Kingdom¹¹³⁵), the relevant accommodation¹¹³⁶ is in immovable property situated in the United Kingdom or an EEA State, and “the parties to the contract are to any extent subject to the jurisdiction of a court in the United Kingdom in relation to the contract”.¹¹³⁷ And thirdly, where the contract is to any extent governed by the law of a third country (as earlier defined), is not directly related to immovable property, and the trader carries on commercial or professional activities in the United Kingdom or by any means directs such activities to the United Kingdom and the contract falls within the scope of those activities.¹¹³⁸ Finally, it would appear that an express choice of law clause in a contract falling within the scope of the [2010 Regulations](#) may be assessed for its fairness under the general controls on unfair contract terms implementing the Unfair Terms in Consumer Contracts Directive 1993, i.e. the [Consumer Rights Act 2015 Pt 2](#) (and formerly the [Unfair Terms in Consumer Contracts Regulations 1999](#)).¹¹³⁹

Enforcement

40-163 The [2010 Regulations](#) provide that the offences which they create are to be punished by fines,¹¹⁴⁰ and make further incidental provision relating to these offences¹¹⁴¹; their enforcement is entrusted to local weights and measures authorities.¹¹⁴² Obligations owed by traders to consumers under the Regulations in relation to the key information requirements and to the form, formalities, language and translation of the contract are “duties owed” by them and are actionable accordingly and any civil liability arising as a result cannot be excluded by any contract term, notice or other provision.¹¹⁴³ While the [2010 Regulations](#) make no dedicated provision for enforcement of their requirements by injunction, before IP completion day the [Enterprise Act 2002](#) included the Timeshare Directive 2009 in the list of directives and regulations which might give rise to a “Community infringement” and so apply [Pt 8 of the 2002 Act](#) for their purposes¹¹⁴⁴; and the [2010 Regulations](#) were specified as the UK law which gave effect to the 2009 Directive.¹¹⁴⁵ As earlier explained, on IP completion day¹¹⁴⁶ the category of “Community infringements” in the [2002 Act](#) was replaced by “[Schedule 13](#) infringements” and the [2010 Regulations](#) were included for this purpose within the substituted [Sch.13 of the 2002 Act](#) so as to allow the application of the enforcement measures provided by [Pt 8 of the Act](#).¹¹⁴⁷ As a result, where an infringement by a trader of any of the requirements for consumers in the [2010 Regulations](#) harms the collective interest of consumers,¹¹⁴⁸ an “enforcer” may apply to the court for an enforcement order, subject to the conditions set out earlier.¹¹⁴⁹

Footnotes

- 1072 [SI 2010/2960](#). On IP completion day, the [2010 Regulations](#) were amended as noted later in this paragraph.
- 1073 Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (“Timeshare Directive 2009”). The earlier UK legislation was the [Timeshare Act 1992](#) and the [Timeshare Regulations 1997 \(SI 1997/1081\)](#) (as amended in 2003), which were revoked by the [2010 Regulations](#) reg.36.
- 1074 Timeshare Directive 2009 recital 3. On full harmonisation, see above, para.40-026. The text of the Directive allows exceptions to the general requirement of full harmonisation, so, e.g. art.5(1)(a)–(b) allow Member States in which the consumer is resident to make further requirements as to the language in which the contract is provided to the consumer than are required by art.5(1), first sentence of the Directive itself. This option was exercised by the UK in the [2010 Regulations](#) reg.18.

- 1075 [2010 Regulations](#) [regs 12–15](#) (information requirements), [regs 15–18](#); [regs 20–24](#) (right of withdrawal for consumer, below, paras [40-159](#)—[40-161](#)).
 1076 On which see above, para.[40-004](#) and Vol.I, paras [1-020](#) et seq.
- 1077 [Timeshare, Holiday Products, Resale and Exchange Contracts \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1397\)](#) (the reference in reg.1 to “exit day” must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) s.39(1), s.41(4), Sch.5 para.1). The [2018 Regulations](#) were made under s.8(1) and Sch.7 para.21 of the [European Union \(Withdrawal\) Act 2018](#); on the s.8 amendment power see Vol.I, para.[1-021](#).
- 1078 [SI 2018/1397](#) reg.3 (as amended by the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(SI 2020/1347\)](#) reg.6).
- 1079 [2010 Regulations](#) [regs 3](#) and [4–6](#). On the related contracts, see below.
- 1080 [2010 Regulations](#), defined in [regs 9](#) and [10](#). The [2010 Regulations](#) came into force on 23 February 2011: [2010 Regulations](#) reg.1(2).
- 1081 [2010 Regulations](#) reg.7(1).
- 1082 [2010 Regulations](#) reg.7(2).
- 1083 [2010 Regulations](#) reg.8.
- 1084 [2010 Regulations](#) reg.9.
- 1085 [2010 Regulations](#) reg.10(1). [Regulation 10\(2\)](#) explains that “[a] “timeshare exchange system” is a system which allows a consumer access to overnight accommodation or other services in exchange for giving other persons temporary access to the benefits deriving from the consumer’s timeshare contract.
- 1086 The structure of the UK legislation is quite complex. Technically, the four types of contract (timeshare, long-term holiday product contract, resale contract and exchange contract) are all “holiday accommodation contracts”: [reg.4](#). [Regulation 5](#) then determines to which holiday accommodation contracts the Regulations apply, the relevant rules in fact determining the Regulations’ application as a matter of private international law: this is discussed below, para.[40-162](#). A “regulated contract” refers to “a holiday accommodation contract” to which the Regulations apply in this technical sense, as long as it is not an “excluded arrangement” within the meaning of [reg.6](#). The provisions on “excluded arrangements” reflect recitals 6 and 7 of the Timeshare Directive 2009 which explain that timeshare contracts for its purposes do not cover the arrangements excluded by [reg.6\(1\)–\(4\)](#): these consist of multiple reservations of accommodation to the extent that they do not imply rights and obligations beyond those arising from the separate reservations; lease agreements which provide for a single continuous period of occupation and hotel loyalty schemes (which it defines). [Regulation 6\(5\)](#) also excludes contracts of insurance where the effecting or the carrying out of the contract constitutes a regulated activity for the purposes of the [Financial Services and Markets Act 2000](#) (which do not appear to fall within the scope of the 2009 Directive).
- 1087 [2010 Regulations](#) reg.11(1): “... ‘consumer’ means an individual who is not acting for the purposes of a trade, business, craft or profession” and: “... ‘trader’ means (a) a person acting for purposes relating to that person’s trade, business, craft or profession,

- or (b) anyone acting in the name of, or on behalf of, a person falling within paragraph (a)". [Regulation 11\(2\)](#) adds that this applies where either of these is either the party or a would-be party to the "regulated contract". The definitions in the [2009 Directive](#) are found in art.2(1)(e) and (f). For discussion of the treatment of "consumer" and "trader" in EU law, see above, paras [40-034—40-037](#) and [40-053—40-059](#).
- 1088 [2010 Regulations](#) [regs 22\(2\)\(b\)](#) and [\(6\)–\(7\)](#) (ancillary contracts) and [23](#) (related credit agreements), below, para.[40-161](#).
- 1089 The information must be provided in writing, free of charge, and "in a manner which is easily accessible to the consumer": [2010 Regulations](#) [reg.12\(5\)\(b\)–\(c\)](#). cf. the discussion above, para.[40-094](#) as to the difference between a trader "providing" (or giving) and "making available" information. The 2009 Directive art.4 requires the trader to "provide the consumer" with the information in question. As explained earlier, the CJEU has held in the context of a number of other EU directives that the appropriate standard by which the clarity and comprehensibility of information should be assessed is the standard of the "average consumer" (see above, para.[40-046](#)) and it is submitted that a UK court should properly use this standard by analogy in the present context.
- 1090 For the significance of "regulated contract" see [2010 Regulations](#) [regs 3–4](#) as explained by para.[40-158](#), above.
- 1091 [2010 Regulations](#) [reg.13\(2\)](#). The forms are set out in [2010 Regulations](#) [Schs 1–4](#) (for timeshare contracts, long-term holiday product contract, re-sale contracts and exchange contracts respectively). [Regulation 13\(1\)](#) imposes further rules as to the completion of these forms. On IP completion day, the forms were subject to minor amendments reflecting the changes in scope of the Regulations themselves as set out in [reg.5: SI 2018/1397](#) [reg.2\(5\)–\(8\)](#). The changes in scope are explained below, para.[40-162](#).
- 1092 [2010 Regulations](#) [reg.12](#), referring to [Sch.1 Pts 1–3](#).
- 1093 [2010 Regulations](#) [reg.12\(5\)\(a\)](#).
- 1094 [2010 Regulations](#) [reg.12\(4\)](#).
- 1095 [2010 Regulations](#) [reg.12\(6\)](#)(as amended by the [Timeshare, Holiday Products, Resale and Exchange Contracts \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) (SI 2018/1397) [reg.2\(3\)](#)). On IP completion day, this language requirement replaced a requirement that the information be in an official language of an EEA State in which the consumer is resident or is a national: [2010 Regulations](#) [reg.12\(6\)](#) and [\(7\)](#) as made. The 2018 Regulations reg.2(5)–(8) made further amendments to the Standard Information Forms in Schs 1–4. On these amending regulations see above, para.[40-158](#) (note).
- 1096 [2010 Regulations](#) [reg.12\(5\)](#) and [\(8\)](#). Further provision for these offences is made by [regs 27–32](#).
- 1097 [2010 Regulations](#) [reg.14](#). Further provision for these offences is made by [regs 27–32](#).
- 1098 On which, see above, para.[40-158](#).
- 1099 As defined by [2010 Regulations](#) [reg.12](#), above, para.[40-159](#).
- 1100 [2010 Regulations](#) [reg.15\(4\)](#). "Permitted changes" are defined as: "changes to the key information which were communicated to the consumer in writing before the conclusion of the contract and which (a) were expressly agreed between the trader and the consumer, or (b) resulted from unusual and unforeseeable circumstances beyond

the trader's control, the consequences of which could not have been avoided even if all due care had been exercised". "Permitted changes" must be expressly mentioned in the contract: reg.15(6). cf. the similar provisions affecting the information provided under the requirements in the **Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013**, above para.40-108.

- 1101 2010 Regulations reg.15(7); Sch.5.
- 1102 On this prohibition see 2010 Regulations reg.25, below, para.40-161.
- 1103 2010 Regulations reg.16(1)–(3).
- 1104 2010 Regulations reg.15(8) (referring to the reg.15 requirements) and reg.16(4) (referring to the reg.16 requirements). Further provision for these criminal offences is made by regs 27–32.
- 1105 2010 Regulations reg.17 as amended on IP completion day by the **Timeshare, Holiday Products, Resale and Exchange Contracts (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1397)** reg.2(4). This requirement replaced more complex provision in reg.17 as it was made which turned in particular on whether the consumer was resident in, or a national of, an EEA State, see above, para.40-157.
- 1106 2010 Regulations reg.18 (these references to a EEA State remained on IP completion day).
- 1107 Notice that, unlike the **2013 Regulations** which distinguish between a right to cancel a contract and a right to withdraw an offer (above, para.40-116), the **2010 Regulations** refer to the right of the consumer to withdraw from a contract (reg.20(1)) and to a right to terminate long-term holiday product contracts (reg.24).
- 1108 On which see 2010 Regulations regs 3–6 and above, para.40-158.
- 1109 Written notice is deemed as given at the time it is sent by the consumer: 2010 Regulations reg.20(2).
- 1110 2010 Regulations reg.20. The requirement of inclusion of the form is made by reg.15(7).
- 1111 2010 Regulations reg.21(1)–(2).
- 1112 2010 Regulations reg.21(3)–(4).
- 1113 On which see 2010 Regulations reg.12 and above, para.40-159.
- 1114 2010 Regulations reg.21(5) and (6). Regulation 21(7) provides that where the trader has failed in both requirements the withdrawal period ends with the later of the two dates set. Where an exchange contract is related to a timeshare contract and offered to the consumer at the same time, the withdrawal period for both contracts is the one applicable to the timeshare contract: reg.21(8)–(10).
- 1115 As defined by 2010 Regulations regs 3–6 and see above, para.40-158.
- 1116 2010 Regulations reg.22(2)(b) and (6). In the case of long term holiday product contracts, withdrawal terminates an obligation to pay any penalty or further instalments of the payment schedule as required by reg.26: reg.22(3).
- 1117 2010 Regulations reg.22(7) referring to reg.21(10) and deeming such a contract to be "ancillary" for the purposes of reg.22(6).
- 1118 2010 Regulations reg.22(4) and (5).
- 1119 2010 Regulations reg.23(1) and (2). Regulation 23(4) defines such a related credit agreement as being one "under which credit which fully or partly covers any payment

- under the regulated contract is granted to the consumer by (a) the trader, or (b) a third party on the basis of an arrangement between the third party and the trader".
- 1120 "Consideration" includes payments, guarantees, reservations of money on account, and acknowledgements of debt: [2010 Regulations reg.25\(6\)](#).
- 1121 [2010 Regulations reg.25](#) ("advance consideration").
- 1122 [2010 Regulations reg.24](#). The requirements for a payment schedule are set out by reg.26.
- 1123 Above, para.[40-158](#).
- 1124 [2010 Regulations reg.19](#).
- 1125 [2010 Regulations reg.5](#) (which was subject to amendment on IP completion day by [SI 2018/1397 reg.2\(2\)](#)); "holiday accommodation contracts" are defined by [reg.4](#). These two elements, together with the provisions in [reg.6](#) excluding certain arrangements, are then put together for the definition of "regulated contract" by [reg.3](#), as explained above, para.[40-158](#).
- 1126 Regulation (EC) 593/2008 on the law applicable to contractual obligations ("Rome I Regulation") art.6(4)(b) refers to the repealed Timeshare Directive 1994, but the 2009 Directive art.18 requires this reference to be construed as referring to the 2009 Directive.
- 1127 Rome I Regulation art.6(4)(b).
- 1128 Rome I Regulation art.4(1)(c) and (d) on which see Dicey, Morris and Collins, The Conflict of Laws, 15th edn (2012), Vol.II, paras 35-044, 35-047–35-048. On these provisions of the retained EU law Rome I Regulation generally see Vol.I, para.[33-105](#).
- 1129 2009 Directive art.12(2).
- 1130 2009 Directive recital 17.
- 1131 1993 Directive art.6(2) below, para.[40-439](#).
- 1132 1999 Directive art.7(2) below, para.[40-537](#).
- 1133 Defined by [2010 Regulations regs 4 and 7-10](#), above, para.[40-158](#).
- 1134 [2010 Regulations reg.5\(1\) and \(2\)](#).
- 1135 [2010 Regulations reg.5\(5\)\(b\)](#). On IP completion day (on which see above, para.[40-004](#) and Vol.I, paras [1-020 et seq.](#)) [reg.5\(5\)\(b\)](#) was amended so as to substitute the definition of "third country" stated in the text for its earlier definition as "a country other than an EEA state": [Timeshare, Holiday Products, Resale and Exchange Contracts \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1397\) reg.2\(2\)\(b\)](#). On these amending regulations see above, para.[40-157](#).
- 1136 Defined as "(i) the accommodation which is the subject of the contract, or (ii) in a case where a pool of accommodation is the subject of the contract, some or all of the accommodation in that pool": [2010 Regulations reg.5\(5\)\(a\)](#).
- 1137 [2010 Regulations reg.5\(1\), \(3\) and \(5\)\(b\)](#). On IP completion day (on which see above, para.[40-004](#) and Vol.I, paras [1-020 et seq.](#)), [reg.5\(3\)\(b\)](#) was amended so as to include the reference to the UK as well as the existing reference to "an EEA State": [Timeshare, Holiday Products, Resale and Exchange Contracts \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1397\) reg.2\(2\)\(a\)](#). On these amending regulations see above, para.[40-157](#).

- 1138 2010 Regulations reg.5(1), (4) and (5)(b) (as amended on IP completion day by the Timeshare, Holiday Products, Resale and Exchange Contracts (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1397) reg.2(2)(b)).
- 1139 cf. *Verein für Konsumenteninformation v Amazon EU Sàrl (C-191/15) 28 July 2016*, see below, para.40-348.
- 1140 2010 Regulations reg.27.
- 1141 2010 Regulations regs 28–32.
- 1142 2010 Regulations reg.32 (in Northern Ireland, the Department of Enterprise Trade and Investment in Northern Ireland).
- 1143 2010 Regulations reg.35(1)–(2), (4)–(5).
- 1144 Enterprise Act 2002 ss.210(6)(b) and (7), 212; Sch.13 Pt 1 para.9E, 212(1) (immediately before IP completion day).
- 1145 Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003 (SI 2003/1374) Sch.1 para.1 (which was revoked on IP completion day: Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.7(a)).
- 1146 On which see above, para.40-004 and Vol.I, paras 1-020 et seq.
- 1147 Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.3(20) and Sch. para.1, inserting new 2002 Act Sch.13 para.22. On this change more generally see above, para.40-138.
- 1148 Enterprise Act 2002 s.212.
- 1149 Enterprise Act 2002 s.214(1). See above, paras 40-135—40-141 where it is noted (at para.40-138) that the list of “enforcers” for this purpose changed on IP completion day.

(v) - Trader's Information Duties in Relation to ADR

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(f) - Special Rules for Financial Services Contracts, Timeshare Contracts, Package Travel Contracts, Contracts Concluded by Electronic Means and ADR

(v) - Trader's Information Duties in Relation to ADR

EU law and ADR

40-164 EU legislation has provided for the establishment of a European online dispute resolution (ODR) platform

U

1150

U and has required Member States to ensure that ADR is available for consumer disputes by the “ADR Directive”,

1151

U although the legislation does not make ADR mandatory.

1152

U The European ODR platform was established by the EU Commission and is available to allow consumers and traders in the EU and the EFTA states to resolve disputes relating to the online purchase of goods and services without going to court.

1153

U While the UK was a Member State and during the transition period, this platform was therefore available to UK consumers and traders, but on IP completion day when the UK’s departure from the EU came into full effect it ceased to be so available.

1154

U As part of the wider EU scheme, the ADR Directive required Member States to impose on traders a duty to inform consumers as to the availability of ADR.

1155

U Following its general scope, in the Directive itself this requirement applies to domestic and to cross-border disputes

1156

U relating to contractual obligations stemming from sales contracts or service contracts

1157

U between traders and consumers, where the consumer claims against the trader.

1158

U The UK implemented this information requirement by the [Alternative Dispute Resolution for Consumer Disputes \(Competent Authorities and Information\) Regulations 2015](#) (the “2015 Regulations”)

1159

U and on IP completion day these regulations formed part of retained EU law subject to certain amendments reflected in the following outline.

1160

U As regards the trader’s information requirements, the [2015 Regulations](#) distinguish between two situations.

1161

U First, where a trader is obliged to use ADR services provided by an ADR entity

1162

U under an enactment, the rules of a trade association to which the trader belongs, or a term of a contract, the trader must provide the name and website address of the ADR entity on its website, if it has one and in the “general terms and conditions of sales or service contracts between the trader and a consumer where they exist”.

1163

U Secondly, where a trader has exhausted its internal complaint handling procedure when considering a complaint from a consumer relating to a sales contract or a service contract:

“... the trader must inform the consumer, on a durable medium:

(a)that the trader cannot settle the complaint with the consumer;

(b)of the name and website address of an ADR entity that would be competent to deal with the complaint, should the consumer wish to use alternative dispute resolution; and

(c)whether the trader is obliged, or prepared, to submit to an alternative dispute resolution procedure operated by that ADR entity.”

¹¹⁶⁴



These requirements apply in addition to any information requirements applicable to traders regarding out-of-court redress procedures contained in any other enactment.

¹¹⁶⁵

U The [2015 Regulations](#) formerly made similar provision as to the supply of information by online traders and online marketplaces to consumers regarding the ODR platform, but this requirement became inappropriate on IP completion day given that the ODR regulation itself no longer applied in the UK and did not become part of retained EU law, and the provision was therefore deleted.

¹¹⁶⁶

U In addition to these information requirements, the ADR Directive makes other requirements in relation to consumer contracts, including that Member States must ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute.

¹¹⁶⁷

U This requirement was also implemented in the UK by the [2015 Regulations](#) and was retained on IP completion day except that the Regulations were amended so as to restrict its scope to “domestic disputes”

¹¹⁶⁸

U so as no longer to apply also to “cross-border disputes”.

¹¹⁶⁹



Footnotes

1150 Regulation (EU) 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR) [2013] O.J. L165/1.

1151 Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes [2013] O.J. L165/63.

1152

- ADR Directive art.1 referring to the availability of ADR procedures to consumers “on a voluntary basis”, though adding that the Directive is without prejudice to national legislation making participation in such procedures mandatory provided that such legislation does not prevent the parties from exercising their right of access to the judicial system: see further *Menini and Rapanelli v Banco Popolare Societa Cooperativa (C-75/16) 14 June 2017* at paras 45 et seq. On consumer ADR in the UK more generally see Department for Business, Energy and Industrial Strategy, Modernising Consumer Markets, Consumer Green Paper Cm 9595 (April 2018), Ch.4 paras 141–155; Secretary of State for Business, Energy and Industrial Strategy, Reforming competition and consumer policy, CP 656 (20 April 2022), Ch.3.
- 1153 See <https://ec.europa.eu/consumers/odr/main/?event=main.home.show> [Accessed 1 September 2021].
- 1154 On IP completion day (on which see generally above, para.40-004 and Vol.1, paras 1-020 et seq.), the ODR Regulation (which in principle would have formed part of retained EU law under *s.3 of the European Union (Withdrawal) Act 2018*) was revoked: *Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326)* reg.10 (reg.1(3)’s reference to reg.10’s coming into force on “exit day” must be read as referring to IP completion day: *European Union (Withdrawal Agreement) Act 2020* s.39(1), s.41(4), Sch.5 para.1). ODR and ADR are not specifically mentioned by the Trade and Cooperation Agreement 2020 (on which see generally Vol.I, para.1-030), but art.208(1) (formerly art.DIGIT.13(1)) provides in very general terms: “Recognising the importance of enhancing consumer trust in digital trade, each Party shall adopt or maintain measures to ensure the effective protection of consumers engaging in electronic commerce transactions, including but not limited to” (emphasis added) a list of measures that do not refer to ODR or ADR.
- 1155 ADR Directive art.13.
- 1156 ADR Directive art.2(1).
- 1157 “Sales contracts” and “services contracts” are defined by the ADR Directive art.4(1) (c) and (d) (as implemented by the *2015 Regulations* reg.5). Recital 16 explains that this means that the Directive applies to disputes between traders and consumers “in all economic sectors, other than the exempted sectors” and includes “disputes arising from the sale or provision of digital content for remuneration”.
- 1158 ADR Directive recital 16; art.2 (with exclusions there made), especially art.2(2)(g).
- 1159 *Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542)*.
- 1160

The 2015 Regulations formed part of retained EU law under the European Union (Withdrawal) Act 2018 s.2 (“EU-derived domestic legislation”) on which see Vol.I, para.1-023. The 2015 Regulations were amended by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.9, which came into force on IP completion day (the reference in reg.1(3) of the 2018 Regulations to “exit day” must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4), Sch.5 para.1). On IP completion day see generally above, para.40-004 and Vol.I, paras 1-020 et seq.

1161 Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542) reg.19 (as amended by the Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (SI 2015/1392) and, on IP completion day (on which see generally above, para.40-004 and Vol.I, paras 1-020 et seq.) by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.9(14) (the reference in reg.1(3) of the 2018 Regulations to “exit day” must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4), Sch.5 para.1).

1162 2015 Regulations (as amended by SI 2015/1392) reg.4 provides that an “ADR entity” means a person whose name appears on a list maintained by the Secretary of State or other person specified by the Regulations (reg.5 referring to Sch.1 Pt 1 col.1; Pt 2) as satisfying a list of requirements: reg.9(4), 10 and Sch.3. Reg.19(1) formerly referred also to an “EU listed body”, but these references were deleted on IP completion day (on which see above, para.40-004 and Vol.I, paras 1-020 et seq.): Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.9(14).

1163 2015 Regulations reg.19(1). On IP completion day (on which see above, para.40-004 and Vol.I, paras 1-020 et seq.), the earlier references in reg.19 to “EU listed body” were deleted: Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.9(14). The information obligation imposed by art.13(1) and (2) of the ADR Directive (which was implemented by the 2015 Regulations reg.19(1)) is not satisfied where a trader does not include this information in terms and conditions published on its website, even where that website is not used to conclude contracts and even though the information is available elsewhere on the website; nor is it enough in these circumstances for the trader to provide the information to the consumer in a separate document from the general terms and conditions upon conclusion of the contract subject to those general terms and conditions: *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV v Deutsche Apotheker- und Arztektenbank eG (C-380/19) EU:C:2020:498*, 25 June 2020 at paras 24–36.

1164

- 2015 Regulations reg.19(2) as amended by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.9(14) which deleted additional references to "EU listed body".
- 1165 2015 Regulations reg.19(3).
- 1166 2015 Regulations reg.19A (as amended by SI 2015/1392) was deleted by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) regs 9(15); reg. 10 revoked the ODR regulation itself.
- 1167 ADR Directive art.10(1).
- 1168 As defined by the 2015 Regulations reg.5.
- 1169 2015 Regulations reg.14B (inserted by SI 2015/1392 reg.2(8)) and as amended by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.9(10).

(vi) - Contracts Concluded by Electronic Means

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 4. - Information Requirements and Consumer Rights of Cancellation

(f) - Special Rules for Financial Services Contracts, Timeshare Contracts, Package Travel Contracts, Contracts Concluded by Electronic Means and ADR

(vi) - Contracts Concluded by Electronic Means

Summary

- 40-165 The Electronic Commerce (EC Directive) Regulations 2002 (the “Electronic Commerce Regulations 2002”)
1170
- U reg.9 (which implemented art.10 of the Electronic Commerce Directive 2000
1171
- U) imposes a duty on providers of information society services, such as selling goods online,
1172
- U to provide information on specified matters before the conclusion of contract to be concluded
by electronic means.
1173
- U The matters on which information must be provided “in a clear, comprehensible and
unambiguous manner”
1174
- U relate to the different technical steps to follow to conclude the contract, whether or not the
concluded contract will be filed by the service provider and whether it will be accessible, the

technical means for identifying and correcting input errors prior to the placing of an order, and the languages offered for the conclusion of the contract

1175

U; the provider must make available

1176

U any terms and conditions applicable to the contract to recipients in a way which allows them to store and reproduce them

1177

U; and it must also indicate any relevant code of conduct to which it subscribes and how they may be accessed.

1178

U The provider must acknowledge receipt of any order without undue delay and by electronic means and must make available

1179

U the technical means which allow the identification and correction of input errors.

1180

U With the exception of the duty to make terms and conditions available, these duties do not apply to “contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications”.

1181

U Moreover, while the duties apply for the benefit of all “recipients” of the service, they may be excluded by agreement only where the parties are not consumers.

1182

U The [Electronic Commerce Regulations 2002](#) provide that the duties which they impose on service providers in this respect

1183

U shall be enforceable by the recipient of the service in the tort of breach of statutory duty

1184

U and that, in the case of a failure in the service provider to make available means of allowing a person to identify and correct input elements, a person may rescind any contract made, unless a court orders otherwise on the former’s application.

1185

U Apart from the last provision, the service provider’s failures to perform these duties are not stated as affecting the validity of any contract made, but, before IP completion day, as a “Community infringement” they might attract enforcement measures under [Pt 8 of the Enterprise Act 2002](#).

1186

U On IP completion day,

1187

U the category of “Community infringements” was replaced by “[Schedule 13](#) infringements” and the [Electronic Commerce Regulations 2002](#) regs 6–9 and 11 were included within the substituted [Sch.13 of the 2002 Act](#) for this purpose.

1188

U

Footnotes

1170 [SI 2002/2013](#). On IP completion day (on which generally see above, para.[40-004](#) and Vol.I, paras 1-020 et seq.), the [2002 Regulations](#) were amended: [Electronic Commerce \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/87\)](#) reg.3 (reg.1’s reference to the [2019 Regulations](#) coming into force on “exit day” must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) s.39(1), s.41(4), Sch.5 para.1). The amendments to the [2002 Regulations](#) affected some of the definitions in regs 2, 4–6, 10 and Sch. para.4 but did not affect regs 9, 11, 13 and 15 whose effects are noted in this paragraph. They did not change the definitions in reg.2(1) of “service provider” and “information society services”, but they did change the definition of “established service provider” as noted below.

1171 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”) [2000] O.J. L178/17.

1172 [Electronic Commerce Regulations 2002 \(SI 2002/2013\)](#) reg.2(1) defines “service provider” as “any person providing an information society service” and explains “information society services” by reference to the 2000 Directive art.2(a) (which itself refers to Directive 98/34/EC laying down a procedure for the provision of technical standards and regulations [1998] O.J. L204/37 art.1(2)) and recital 17’s explanation that it covers “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”, though recital 18 further explains, inter alia, that “[i]nformation society services span a wide range of economic activities which take place on-line” and “are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering

on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data". On this see *Criminal Proceedings against Vanderborgh (C-339/15) EU:C:2017:335, 4 May 2017* at paras 37 to 50 (advertising relating to dentistry services by means of a website created by a member of a regulated profession constitutes a commercial communication which is part of an information society service or which constitutes such a service for the purposes of art.8 of the 2000 Directive). After IP completion day (on which see above, para.[40-004](#) and Vol.I, paras [1-020](#) et seq.), the definitions of "service provider" and "information society services" remained intact, but the definition of an "established service provider" was amended: [2002 Regulations reg.2\(1\)](#) as amended by [SI 2019/87 reg.3\(2\)\(b\)](#).

[1173](#) [SI 2002/2013 reg.9](#). [Regulations 6–8](#) impose other requirements on society service providers: to make available general information (such as the name of the provider, geographical address, etc.) in a form which is "easily, directly and permanently accessible"; to ensure the clarity of commercial communications provided; and to ensure that unsolicited commercial communications sent by electronic mail are clearly and unambiguously identifiable as such as soon as it is received. The Trade and Cooperation Agreement 2020 concluded by the UK and EU art.208(1) (b) (formerly art.DIGIT.13(1)(b)) Online consumer trust requires each party to adopt or maintain measures to ensure the effective protection of consumers engaging in electronic commerce transactions, including measures that require suppliers of goods or services to provide consumers engaging in electronic commerce transactions with clear and thorough information. It is submitted that this requirement reflects existing requirements in the [Electronic Commerce \(EC Directive\) Regulations 2002 \(SI 2002/2013\)](#) noted in this paragraph. On the 2020 Agreement more generally, see above, para.[40-004](#) and Vol.I, para.[1-030](#).

[1174](#) On the possible relevance for this purpose of the standard of the "average consumer", see above, paras [40-046](#)—[40-048](#).

[1175](#) [Electronic Commerce Regulations 2002 reg.9\(1\)](#).

[1176](#) On this concept cf. above, para.[40-094](#).

[1177](#) [Electronic Commerce Regulations 2002 reg.9\(3\)](#). This requirement may be enforced by court order: [reg.14](#).

[1178](#) [Electronic Commerce Regulations 2002 reg.9\(2\)](#).

[1179](#) On this concept cf. above, para.[40-094](#).

[1180](#) [Electronic Commerce Regulations 2002 reg.11\(1\) and \(2\)](#).

[1181](#)

- 1182 Electronic Commerce Regulations 2002 reg.9(4) and 11(3).
 Electronic Commerce Regulations 2002 reg.9(1) and (2), and 11(1).
- 1183 i.e. under Electronic Commerce Regulations 2002 regs 6–8, 9(1) and 11(1)(a).
- 1184 Electronic Commerce Regulations 2002 reg.13.
- 1185 Electronic Commerce Regulations 2002 reg.15 referring to the duty in reg.11(1)(b).
- 1186 Enterprise Act 2002 s.210(6) and 212; Sch.13 Pt 1 para.9 (before IP completion day);
 Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003
 (SI 2003/1374) Sch.1 para.1 (2002 Regulations regs 6, 7, 8, 9 and 11 as “specified UK
 laws”). On these enforcement powers see above, paras 40-135—40-141.
- 1187 On which see above, para.40-004 and Vol.I, paras 1-020 et seq.
- 1188 Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI
 2019/203) reg.3(20) and Sch. para.1, inserting new 2002 Act Sch.13 para.11. On this
 change more generally see above, para.40-138.

(a) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 5. - Unfair Commercial Practices and the Consumer's Rights to Redress

(a) - Introduction

Legislative history

- 40-166 In 2008 the UK government enacted the [Consumer Protection from Unfair Trading Regulations \(the “2008 Regulations”\)](#),¹¹⁸⁹ repealing a good deal of the [Trade Descriptions Act 1968](#) and implementing a new scheme for the control of “unfair commercial practices” business-to-consumer as required by the Unfair Commercial Practices Directive 2005 (the “2005 Directive”). When issued, the [2008 Regulations](#) had no impact on “contract law” in the sense that the commission of an unfair commercial practice by a trader which led to a contract with a consumer was not on this ground invalid¹¹⁹⁰; nor did they create any “private rights” of redress for the consumer in respect of such an unfair commercial practice, such as by way of a claim for damages for any loss caused to the consumer as a result. However, in 2014 the UK government issued a further set of regulations to create a new set of “rights to redress” for consumers in respect of *certain* unfair commercial practices by traders by the insertion of a new [Pt 4A into the 2008 Regulations](#).¹¹⁹¹ These rights to redress consist of a “right to unwind” a concluded contract or a payment made by a consumer to a trader,¹¹⁹² a right to a discount¹¹⁹³ and a right to damages.¹¹⁹⁴ As will be explained, the relationship between these new rights to redress and existing rights at common law, in equity and, in particular, under [s.2 of the Misrepresentation Act 1967](#) is not straightforward.¹¹⁹⁵

The structure of this section

40-167

This section will look briefly at the Unfair Commercial Practices Directive, at the general scheme of the [2008 Regulations](#) prohibiting unfair commercial practices and then at the rights to redress for consumers.

Footnotes

- 1189 [SI 2008/1277](#). In the following the “[2008 Regulations](#)” refers to [SI 2008/1277](#) as amended principally by [SI 2014/870](#) in contrast to the “[2008 Regulations](#) (as issued)”, which refers to the [2008 Regulations](#) before their amendment in 2014. On IP completion day (on which see above, para.[40-004](#) and Vol.I, paras 1-020 et seq.), the [2008 Regulations](#) became part of “retained EU law” under [s.2 of the European Union \(Withdrawal\) Act 2018](#) and were subject to minor amendment which will be noted where relevant: [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.6 (the reference in [reg.1\(3\)](#) to the 2018 Regulations coming into force on “exit day” must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020 s.39\(1\), s.41\(4\), Sch.5 para.1](#)).
- 1190 [2008 Regulations reg.29](#) (as issued).
- 1191 [Consumer Protection \(Amendment\) Regulations 2014 \(SI 2014/870\)](#). These Regulations also made certain other amendments to the [2008 Regulations](#), notably, in respect of their definitions: [SI 2014/870 reg.2](#).
- 1192 [2008 Regulations regs 27E–27H](#).
- 1193 [2008 Regulations reg.27I](#).
- 1194 [2008 Regulations reg.27J](#).
- 1195 Below, paras [40-181](#) et seq.

(b) - The Unfair Commercial Practices Directive 2005

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 5. - Unfair Commercial Practices and the Consumer's Rights to Redress

(b) - The Unfair Commercial Practices Directive 2005

General

- 40-168 The Unfair Commercial Practices Directive 2005 requires Member States to put in place a very general framework of control prohibiting unfair business-to-consumer commercial practices.¹¹⁹⁶ Its purposes in doing so combine concerns with the protection of the economic interests of consumers and the prevention of unfair competition in the interests of competitors, with an internal market concern that *national* unfair competition laws should not be allowed to act as a barrier to cross-border trade.¹¹⁹⁷ To achieve the last of these purposes, the 2005 Directive generally requires “full harmonisation”, with the result that, within its scope, Member States *must not prohibit* business-to-consumer commercial practices *unless* they are prohibited as unfair under the controls set out by the 2005 Directive itself.¹¹⁹⁸ On the other hand, within its scope, the purpose of the Directive is to protect consumers and, according to the Court of Justice of the EU, its provisions are “essentially designed with the consumer as the target and victim of unfair commercial practices in mind” and on the assumption that the consumer is “in a weaker position, particularly with regard to the level of information, in that the consumer must be considered to be economically weaker and less experienced in legal matters” than the trader.¹¹⁹⁹

Scope of the 2005 Directive

- 40-169 For present purposes, there are two important aspects of the scope of the Directive. First, it applies to “unfair business-to-consumer commercial practices … before, during and after a commercial

transaction in relation to a product”.¹²⁰⁰ As noted by the Court of Justice of the EU, the Directive gives a “particularly wide definition”¹²⁰¹ to “business-to-consumer commercial practices” for this purpose, as this refers to:

“... any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader directly connected with the promotion, sale or supply of a product to consumers.”¹²⁰²

A “product” is also understood very broadly, as it means “any goods or service including immovable property, rights and obligations”.¹²⁰³ Overall, therefore, a good deal of what traders do in relation to the conclusion and performance of contracts with consumers falls within the scope of the 2005 Directive. On the other hand, secondly, the 2005 Directive provides that it is “without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract”.¹²⁰⁴ As a result, the national, as well as EU,¹²⁰⁵ legal rules of “contract law” are not affected by the 2005 Directive and this means, in particular, that national contract laws are protected from the potential impact of the Directive’s full harmonisation. For this purpose, the reference “in particular” to the rules on the validity, formation or effect of a contract strongly suggest that “contract law” refers to rules governing the relative rights and obligations of parties to a contract.¹²⁰⁶ On the other hand, this also means that Member States are free in principle to give “contract law” significance to some or all of the prohibitions of unfair commercial practices as the Directive understands them.¹²⁰⁷

Relationship with other EU legislation

- 40-170 The 2005 Directive was intended as a “framework directive” with the result that more particular EU provisions on unfair business-to-consumer commercial practices (such as those required by the Unfair Contract Terms Directive¹²⁰⁸ or the Consumer Rights Directive¹²⁰⁹) retain their force within this wider framework: the special rules derogate from the general.¹²¹⁰ According to art.3(4) of the 2005 Directive:

“In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.”

As earlier noted, this provision resolves:

“... irreconcilable conflict between substantive norms, i.e. situations where the same business-to-consumer commercial practice would qualify as ‘unfair’ under one

provision and ‘non-unfair’ ... under another provision. In such cases, the EU special provision shall ‘prevail’.”¹²¹¹

So, UK legislative provisions which implemented other EU directives and thereby created “rules regulating specific aspects of unfair commercial practices” prevail over the national rules which implemented the 2005 Directive (that is, the [2008 Regulations](#)), but only where those UK legislative provisions followed the *requirements* of that other EU directive itself.

A transitional period for “minimum harmonisation” legislation

- ⁴⁰⁻¹⁷¹ On the other hand, art.3(5) of the 2005 Directive protected from the force of its “full harmonisation” national legal prohibitions of business-to-consumer commercial practices which were “more restrictive or prescriptive” than the 2005 Directive and which implemented the requirements of EU “minimum harmonisation” legislation, but only where this was already provided by national law for the protection of consumers at the time of the coming into force of the 2005 Directive and only for a transitional period of six years, ending on 11 June 2013.

¹²¹²

U This means, therefore, that, after this date, national legal provisions which prohibit the use or recommendation for use of unfair terms *beyond* the requirements of minimum harmonisation directives *without* an evaluation of the fairness of that “commercial practice” within the meaning of the 2005 Directive are inconsistent with the 2005 Directive; in particular, national law is not entitled to add to the list of commercial practices provided by Annex 1 of the 2005 Directive which “shall in all circumstances be regarded as unfair”.¹²¹³ As will be seen in relation to the regulation of unfair contract terms under the [Consumer Rights Act 2015](#), the relationship which the 2005 Directive envisages between its own fully harmonised requirements and other more particular, minimum harmonisation directives can cause problems for national implementing measures which go beyond the controls which these directives require.¹²¹⁴

Scheme of control of the 2005 Directive

- ⁴⁰⁻¹⁷² Under the 2005 Directive, there are three main ways in which a commercial practice is to be held unfair. First, there is a general test of an unfair commercial practice where:
- “(a)it is contrary to the requirements of professional diligence, and

(b)it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.”¹²¹⁵

The Directive then defines or explains most of the elements of this general evaluative test.¹²¹⁶ Secondly, the 2005 Directive identifies two commercial practices which “in particular … shall be unfair”: misleading commercial practices (whether constituted by action or omission) and aggressive commercial practices.¹²¹⁷ Thirdly, the 2005 Directive sets out a list of “those commercial practices which shall in all circumstances be regarded as unfair”,¹²¹⁸ without, that is, any “case-by-case” evaluation of the practice under the earlier tests,¹²¹⁹ though the list itself divides these examples between “misleading commercial practices”¹²²⁰ and “aggressive commercial practices”.¹²²¹

Enforcement

⁴⁰⁻¹⁷³ Following its broad declaration that “unfair commercial practices shall be prohibited”,¹²²² the 2005 Directive required Member States to put in place “adequate and effective means” to enforce compliance with its provisions and to lay down penalties for the infringement of national provisions implementing its requirements.¹²²³ Moreover, the 2005 Directive added itself to the list of legislation which attracts the cross-border injunctive relief under the Consumer Injunctions Directive and the Regulation on Consumer Protection Co-operation.¹²²⁴ However, on IP completion day, this system of cross-border enforcement and co-operation no longer includes the United Kingdom.¹²²⁵

Footnotes

¹¹⁹⁶ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ... (Unfair Commercial Practices Directive) [2005] O.J. L149/22 (“2005 Directive”). Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 (“Directive (EU) 2019/2161”) art.3 makes significant amendment to the 2005 Directive, but the 2019 Directive must be implemented by 28 November 2021 (i.e. after IP completion day) and as a result the UK is not required to do so (see above, para.⁴⁰⁻⁰⁰⁴ and Vol.I, para.¹⁻⁰¹⁹), though it is possible that the UK may nevertheless adopt some of the changes required by

the 2019 Directive on their merits. It is also possible that the Trade and Cooperation Agreement concluded by the UK and the EU requires the UK to make changes to the scope of the rights to redress for consumers; see below, para.[40-186](#). The most significant amendments to the 2005 Directive made by the 2019 Directive (by arts 3(5) and (6)) concern redress (new 2005 Directive art.11a and see below, para.[40-185](#)) and penalties (replacing art.13 of the 2005 Directive). The 2019 Directive arts 3(3) and 3(4) amend 2005 Directive art.6 (misleading actions) and art.7 (misleading omissions), and art.3(7) adds further examples of “commercial practices which are in all cases considered unfair” to Annex I to the 2005 Directive. On the 2005 Directive as enacted see in particular the essays in Collins (ed.) *The Forthcoming EC Directive on Unfair Commercial Practices, Contract, Consumer and Competition Law Implications* (2004) and in Weatherill and Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29, New Rules and New Techniques* (2007).

- 1197 Bernitz in Weatherill and Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29, New Rules and New Techniques* (2007), Ch.3 at p.37; Stuyck in Bernitz and Weatherill, Ch.9 at pp.171–172.
- 1198 2005 Directive art.4; *VTB-VAB NV Total Belgium NV (C-261/07 and C-299/07) EU:C:2009:244, [2009] E.C.R. I-2949* at [63]; *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v “Österreich”-Zeitungsvorlag GmbH (C-540/08) EU:C:2010:660, [2010] E.C.R. I-10909* at [27], *Zentral sur Bekämpfung unlauteren Weebewerbs eV v Plus Warenhandelsgessellschaft mbH (C-304/08) EU:C:2010:12, [2010] E.C.R. I-00217* at [41], *Wamo BVBA v JBC NV (C-288/10) EU:C:2011:443, [2011] E.C.R. I-5835* at [33]; *Europamur Alimentación SA v Dirección General de Comercio y Protección del Consumidor de la Comunidad Autónoma de la Región de Murcia (C-295/16) 19 October 2017* at paras 34–35, and 43. There is an important exception to “full harmonisation” in relation to “financial services”: 2005 Directive art.3(9). cf. above, paras [40-026](#)–[40-027](#).
- 1199 *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország Kft (C-388/13) 18 April 2015* at paras 52–53 referring to *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (C-59/12) EU:C:2013:634, 3 October 2013* para.36.
- 1200 2005 Directive art.3(1).
- 1201 *Total Belgium & Galatea (C-261/07 and C-299/07) EU:C:2009:244* at [49].
- 1202 2005 Directive art.2(d). A “commercial practice” is an activity which is “commercial” in nature, i.e. it originates with a “trader” (on which see above, paras [40-052](#)–[40-061](#) and esp. at paras [40-057](#)–[40-058](#)) and constitutes “an act, omission, course of conduct or commercial communication ‘directly connected with the promotion, sale or supply of a product to consumers’”: *RLvS Verlagsgesellschaft mbH v Stuttgarter Wochenblatt GmbH (C-391/12) EU:C:2013:669*, 17 October 2013 para.37; *Komisjaza zashtita na potrebitelite v Kamenova (C-105/17) EU:C:2018:808*, 4 October 2018 at para.42. The CJEU has explained that “although commercial practices are closely linked to a commercial transaction involving a product, they are nevertheless not confused with the product which is the subject of that transaction”: *Openbarr Ministerie v Kirschstein*

(C-393/17) EU:C:2019:563, 4 July 2019 at para.42. A “commercial practice” covers “any measure taken in relation not only to the conclusion of a contract but also to its performance, and in particular the measures taken in order to obtain payment for the product”: *UAB “Gelvora” v Valstybinė vartotoj teisių apsaugos tarnyba (C-357/16) EU:C:2017:573, 20 July 2017* at para.21. The CJEU further held that where the claims assigned to a debt collection agency originated in the supply of a service (the provision of credit at interest), its debt recovery activities may be regarded as a “product” within the meaning of art.2(c) of the 2005 Directive and may constitute an unfair “commercial practice” as the measures which it adopts are liable to influence the consumer’s decision in respect of payment of the product: (*C-357/16*) at paras 21–25. For this purpose, the fact that the existence of the debt was confirmed by a court decision and that that decision was passed for enforcement to a bailiff is without consequence: (*C-357/16*) at para.31. By contrast, in *Openbarr Ministerie v Kirschstein (C-393/17) EU:C:2019:563, 4 July 2019* at paras 45–46, the CJEU held that a national rule (there legislation criminalising the award of degrees of bachelor or master etc. without the required authorisation) which aims to determine the operator who is authorised to provide a service in a commercial transaction without directly regulating the practices which the operator may use to promote or dispose of the sales of that service does not relate to a commercial practice in direct connection with the provision of that service within the meaning of art.2(d) of the 2005 Directive: *Openbarr Ministerie v Kirschstein (C-393/17)* at paras 45–46.

1203

2005 Directive art.2(c). On the CJEU’s interpretation of “product” to include practices in which a debt collection agency engages to recover the debt, see *UAB “Gelvora” v Valstybinė vartotoj teisių apsaugos tarnyba (C-357/16) 20 July 2017* noted in the previous note. cf. the amended definition of “product” to be introduced at the EU level by Directive (EU) 2019/2161 art.3(1)(a) as “any good or service including immovable property, digital service and digital content, as well as rights and obligations” (emphasis added)). On the 2019 Directive, see above, para.[40-168](#) (note).

1204

Directive 2005/29/EC art.3(2), on which see Whittaker in Weatherill and Bernitz (eds), The Regulation of Unfair Commercial Practices under EC Directive 2005/29, New Rules and New Techniques (2007), Ch.8. Art.3(3), (7)–(10) of the 2005 Directive contains further matters in respect of which the Directive is “without prejudice”, for example, “any conditions of establishment or of authorisation regimes, or to the deontological codes of conduct or other specific rules governing regulated professions in order to uphold high standards of integrity on the part of the professional”, on which see *Criminal Proceedings against Vanderborght (C-339/15) EU:C:2017:335, 4 May 2017* at paras 26–30.

1205

2005 Directive recital 9.

1206

Whittaker, in Weatherill and Bernitz (eds), The Regulation of Unfair Commercial Practices under EC Directive 2005/29, New Rules and New Techniques (2007) and cf. above, para.[40-066](#) for a similar understanding of “contract law” for the purposes of the Consumer Rights Directive 2011 art.3(5).

- 1207 It should be noted, however, that Directive (EU) 2019/2161 art.3(5) imposes a new requirement to create rights for redress for consumers in respect of unfair commercial practices: see below, para.[40-185](#). On the 2019 Directive, see above, para.[40-168](#) (note).
- 1208 Directive 93/13/EEC, on which see below, para.[40-225](#).
- 1209 Above, para.[40-063](#).
- 1210 EC Commission, Green Paper on European Union Consumer Protection COM(2001) 531 final, para.3.4 and see Bernitz in Weatherill and Bernitz, *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (2007) 33 at 44. See also Opinion of AG Bot in *Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia (C-487/12)* of 23 January 2014 para.61 referring to provisions on the pricing of air carriage in Regulation (EC) 1008/2008 on common rules for the operation of air services in the Community [2008] O.J. L293/3 art.23 as “lex specialis” in relation to the general rules in the Directive 2005/29/EC and Directive 2011/83/EU. (This point was not referred to by the CJEU in its decision of 18 September 2014.) See also above, para.[40-114](#) (note), discussing, inter alia, *Citroën Commerce GmbH v Zentralvereinigung des Kraftfahrzeuggewerbes zur Aufrechterhaltung lauteren Wettbewerbs eV (ZLW) (C-476/14)* 7 July 2016 at paras 44–46.
- 1211 *Orlando (2011) European Review of Contract Law* 25 at 50–51 (emphases omitted), above, para.[40-114](#).
- 1212 2005 Directive art.3(5); *European Commission v Belgium (C-421/12)* 10 July 2014 at para.73. This permission was subject to a condition that the measures were “essential to ensure that consumers are adequately protected against unfair commercial practices and must be proportionate to the attainment of this objective”. This transitional period was not extended as was foreseen as possible by the 2005 Directive art.3(5), third sentence: EU Commission, First Report on the application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, etc. COM(2013) 139 final, para.2.4 (stating that no such extension should be made). Reflecting their transitional character, Directive (EU) 2019/2161 art.3(2) revoked art.3(5) and (6) of the 2005 Directive and replaced them with provision allowing Member States to adopt “provisions to protect the legitimate interests of consumers with regard to aggressive or misleading marketing or selling practices in the context of unsolicited visits by a trader to a consumer’s home or excursions organised by a trader with the aim or effect of promoting or selling products to consumers”. On the 2019 Directive, see above, para.[40-168](#) (note).
- 1213 2005 Directive art.5(5), recital 17; *Zentral sur Bekämpfung unlauteren Weebewerbs eV v Plus Warenhandelsgesellschaft mbH (C-304/08)* EU:C:2010:12, [2010] E.C.R. I-00217 at [45]; *Wamo BVBA v JBC NV (C-288/10)* EU:C:2011:443, [2011] E.C.R. I-5835 at [37]. Four additional examples of commercial practices unfair in all circumstances are added to the list in Annex I of the 2005 Directive by Directive (EU) 2019/2161 art.3(7), but as the 2019 Directive requires implementation by 28 November 2021 (i.e. after IP completion day), the UK is not required to do so: see

- above, para.[40-168](#) (note) and on IP completion day above, para.[40-004](#) and Vol.I, para.[1-019](#).
- 1214 Below, paras [40-451](#)—[40-454](#).
- 1215 2005 Directive art.5(2)(a) and (b).
- 1216 2005 Directive art.2 (definitions); art.5(3) (explaining the material distortion of the economic behaviour of the average consumer).
- 1217 2005 Directive arts 5(4), 6–8.
- 1218 2005 Directive art.5(5); Annex I.
- 1219 2005 Directive recital 17; *Zentrale sur Bekämpfung unlauteren Weebewerbs eV v Plus Warenhandelsgessellschaft mbH (C-304/08) EU:C:2010:12, [2010] E.C.R. I-00217* at para.45.
- 1220 2005 Directive Annex I points 1–23.
- 1221 2005 Directive Annex I points 24–31.
- 1222 2005 Directive art.5(1).
- 1223 2005 Directive arts 11 and 13. Directive (EU) 2019/2161 art.3(5) and (6) respectively insert a new art.11a on redress for the consumer and replaces art.13 on penalties, but as the 2019 Directive must be implemented by 28 November 2021 (i.e. after IP completion day), the UK is not required to do so: see above, para.[40-004](#) and Vol.I, para.[1-019](#).
- 1224 2005 Directive art.16; Directive 98/27 on injunctions for the protection of consumers' interests [1998] O.J. L166/51 (itself repealed and replaced by Directive 2009/22/EC on injunctions for the protection of consumers' interests [2009] O.J. L110/30). With effect from 25 June 2023 Directive 2009/22/EC will be repealed and replaced by Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC O.J. L409/1 see esp. art.21 and 24. Regulation (EC) 2006/2004 on cooperation between national authorities responsible for the enforcement of the consumer protection law [2004] O.J. L364/1 was repealed and replaced with effect from 17 January 2020 by Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) 2006/2004 O.J. L345/1. On the 2017 Regulation itself, see above, paras [40-136](#) et seq.
- 1225 See above, paras [40-137](#)—[40-138](#).

(c) - The General Scheme of the 2008 Regulations

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 5. - Unfair Commercial Practices and the Consumer's Rights to Redress

(c) - The General Scheme of the 2008 Regulations ¹²²⁶

Faithful implementation of the 2005 Directive

- ⁴⁰⁻¹⁷⁴ When enacted in 2008, the [Consumer Protection from Unfair Trading Regulations](#) followed very faithfully the scope and pattern of the controls of unfair commercial practices required by the 2005 Directive ¹²²⁷ and repealed or amended a number of primary and secondary UK legislative provisions so as to conform to the Directive's general standard of full harmonisation. ¹²²⁸ This faithful implementation was continued when the Regulations were amended in 2014 so as to create the consumer's new rights to redress, although some amendments were also made to the definitions applicable both to the existing regime and to the new provisions. ¹²²⁹ So, [reg.3](#) provides that "unfair commercial practices are prohibited" ¹²³⁰ and provides a general test according to which:

"A commercial practice is unfair if—

- (a)it contravenes the requirements of professional diligence; and
- (b)it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product." ¹²³¹

[Regulation 3](#) also provides that:

[Regulation 3](#)

“A commercial practice is unfair if—

- (a) it is a misleading action under the provisions of regulation 5;
- (b) it is a misleading omission under the provisions of regulation 6;
- (c) it is aggressive under the provisions of regulation 7; or
- (d) it is listed in Schedule 1.”

In this way, the Regulations reflect exactly the ways in which a commercial practice is to be held unfair under the 2005 Directive.

[1232](#)



“Commercial practice”

40-175 Under the [2008 Regulations](#):

“‘... commercial practice’ means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product.” [1233](#)

This definition followed closely the 2005 Directive [1234](#) with the qualification that it concerns behaviour “by a trader, which is directly connected with the promotion, sale or supply of a product *to or from* consumers”. [1235](#) If or to the extent to which the 2005 Directive does not itself cover commercial practices consumer *to* a trader, [1236](#) to this extent the [2008 Regulations](#) extended their prohibitions beyond the scope of the Directive. [1237](#) In the case of the consumer’s rights to redress, the [2008 Regulations](#) proscribe the circumstances in which this extension applies. [1238](#)

“Commercial practice” and isolated events

40-176

Can a commercial practice consist of an isolated event, for example, a single false statement inducing a contract or must it form part of a wider scheme? The definition of “commercial practice” could be read as concerned with the nature of the act or omission and not with whether it needs to be repeated, or part of a scheme, in order to amount to a practice and, as has been noted, the Court of Justice of the EU has held that the definition of “commercial practice” in the 2005 Directive is “particularly wide”,¹²³⁹ a width that is linked to the main purposes of the Directive in creating a fully-harmonised system of fair competition as well as consumer protection throughout the EU.¹²⁴⁰ In terms of English authority, while the Crown Court earlier held that a misrepresentation that relates to only one consumer and one contract will not amount to a “practice” within the meaning of the 2008 Regulations,¹²⁴¹ the Court of Appeal held in *R. v X Ltd* the Crown Court’s reasoning in the case to be unconvincing¹²⁴²: a commercial practice can be derived from a single incident, this finding textual support in the reference in the definition to “*any act ... by a trader which is directly connected with the promotion, sale or supply of a product*”¹²⁴³ and in the Court of Justice’s view that the definition of “commercial practice” in the Directive is wide.¹²⁴⁴ On the other hand, the Court of Appeal considered that the question whether a single incident can constitute, or perhaps better, can reflect a commercial practice will depend on the circumstances: “the concept is concerned with systems”¹²⁴⁵ and, while “a single failing (or perhaps more than one failing) to one customer may not be sufficient”, on the facts the jury was entitled to find that there was a failure in the process.¹²⁴⁶ However, this English case-law was later overtaken by the decision of the Court of Justice of the EU in *UPC Magyarország*.¹²⁴⁷ In that case, a provider of cable television services (the trader) had informed a customer (the consumer) that the service for which he had paid finished on a particular date, but by reason of “a simple clerical error” gave the consumer the wrong date. As a result, the consumer terminated the contract after the end of the period already paid for and was charged an amount for the remaining period, even though he had contracted for the provision of a cable service from another provider. The Hungarian National Consumer Protection Authority brought proceedings against the trader on the basis that its provision of erroneous information was a “misleading commercial practice”, but the trader argued that an “isolated administrative error relating to a single client” could not constitute a “commercial practice” within the meaning of the 2005 Directive. In this respect, the Court of Justice referred to its earlier case-law on the “particularly wide” character of the Directive’s definition of “commercial practice”,¹²⁴⁸ and noted that:

“... the sole criterion referred to in [art.2(d) of the Directive] is that the trader’s practice must be directly connected with the promotion, sale or supply of a product or service to consumers.”¹²⁴⁹

Having held that the provision of misleading information by a trader as part of an after-sales service to a consumer satisfies all the elements of a “misleading action” under the Directive,¹²⁵⁰ the Court of Justice observed that:

“In this regard, it should be stated that the fact that the action of the professional concerned took place on only one occasion and affected only one single consumer is immaterial in this context.

Neither the definitions set out in Articles 2(c) and (d), 3(1) and 6(1) of the Unfair Commercial Practices Directive nor the latter, considered as a whole, contain any indication that the act or omission on the part of the professional must be recurrent or must concern more than one consumer.”

In the light of the need to protect consumers which underlies that directive, those provisions cannot be interpreted as imposing conditions of that kind where they do not even set out such conditions explicitly.¹²⁵¹ Moreover, according to the Court of Justice, the contrary view would have “serious disadvantages”.¹²⁵² First, a requirement of frequency of acts or number of consumers affected without any threshold to determine whether an act or omission would come within the scope of the Directive would threaten its compatibility with the principle of legal certainty; and, secondly, it would be extremely difficult for the consumer to establish that other individuals had been harmed by that same trader.¹²⁵³ On the other hand, the frequency of the unfair commercial practice complained would be relevant to any sanction attached to that practice by national law in fulfilment of its duty to impose penalties which are “effective, proportionate and dissuasive”.¹²⁵⁴ In conclusion, it is submitted that the decision of the Court of Justice in *UPC Magyarország* made clear that an isolated act or omission by a trader may constitute an unfair commercial practice within the meaning of the 2005 Directive and this view should be followed by English courts rather than the approach of the Court of Appeal in *R. v X Ltd.*¹²⁵⁵

Other definitions

40-177

U The 2008 Regulations followed the 2005 Directive in defining a number of the important elements of their controls.¹²⁵⁶ So, “*product*” refers to goods, a service, digital content, immoveable property, and rights or obligations”.¹²⁵⁷ And:

“... ‘professional diligence’ means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either—

- (a) honest market practice in the trader’s field of activity, or

(b)the general principle of good faith in the trader's field of activity.”¹²⁵⁸

However, as earlier noted, the definitions of “consumer” and “trader” were refined on the amendment of the [2008 Regulations](#) in 2014, so that:

“... ‘consumer’ means an individual acting for purposes that are wholly or mainly outside that individual’s business.”

“... ‘trader’ means a person acting for purposes relating to that person’s business, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf.”¹²⁵⁹

And trader “includes a person acting in the name of or on behalf of a trader” except for the purposes of Pt 4A’s rights of civil redress.¹²⁶⁰ Finally, the [2008 Regulations](#) define “transactional decision” for their *general* purposes as:

“... any decision taken by a consumer, whether it is to act or to refrain from acting, concerning—

(a)whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product; or

(b)whether, how and on what terms to exercise a contractual right in relation to a product.”

¹²⁶¹



As will be seen, however, this definition does not apply for the purposes of the consumers’ rights to redress.¹²⁶²

“Average consumer”

40-178

As noted above,¹²⁶³ the idea of the “average consumer” was drawn by the 2005 Directive from the case-law of the European Court of Justice and is explained quite elaborately in its text and recitals.¹²⁶⁴ The [2008 Regulations](#) followed the Directive and thereby adopt a variable objective approach. The starting point is that:

“In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.”¹²⁶⁵

However, where a commercial practice is “directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group”¹²⁶⁶ and:

“In determining the effect of a commercial practice on the average consumer—

(a)where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and

(b)where the practice is likely to materially distort the economic behaviour only of that group,

a reference to the average consumer shall be read as referring to the average member of that group.”¹²⁶⁷

This final provision is stated as being without prejudice to “the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally”.¹²⁶⁸ Although this is not set out in the [2008 Regulations](#), recital 18 of the 2005 Directive explains that it:

“... takes as a benchmark the average consumer, who is reasonably well-informed and reasonably observant and circumspect, *taking into account social, cultural and linguistic factors*”,¹²⁶⁹

adding that:

“... [t]he average consumer test is not a statistical test. National courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case.”¹²⁷⁰

In [Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd](#)
¹²⁷¹

U the High Court considered the significance of the average consumer test in the context of the practices of a provider of care homes in relation to the “administration fee” which it charged to its residents. In this respect, while the [2008 Regulations](#)

1272

U refer to a commercial practice being “directed to a particular group of consumers”, it did not consider that it was

“limited to the situation where a particular commercial practice is targeted at a particular demographic group or consumers with specific *a priori* characteristics (such as age or gender). Rather, it is also relevant where, by virtue of the type of product or service in issue, a commercial practice will necessarily only affect a specific group of consumers.”

1273



As a result, in the case before her, the starting-point for “average consumer” was “consumers who are making decisions about the admission of a prospective resident to a care home”

1274

U and in the context, “the average consumer is a family member or other representative of the prospective care home resident”.

1275

U Having weighed the evidence as their characteristics, the High Court concluded that such an average consumer “is able to make a rational and carefully-considered decision as to the selection of a care home for the prospective resident” and is “able to understand the information that they are given as to the pricing structure of a care home, and to weigh that objectively in the balance alongside other factors in reaching their decision”.

1276

U The High Court then applied this understanding of average consumer in holding that the care home provider had not committed a misleading action or omission, nor any aggressive commercial practice.

1277



Criminal offences

40-179

U Part 3 of the 2008 Regulations creates a series of criminal offences in traders where they knowingly or recklessly engage in a commercial practice which fails the general test of unfairness,¹²⁷⁸ where the practice constitutes a misleading action,¹²⁷⁹ a misleading omission¹²⁸⁰ or an aggressive commercial practice,¹²⁸¹ or where it consists of a commercial practice prohibited

in all circumstances.¹²⁸² These crimes may, on summary conviction, lead to a fine not exceeding the statutory maximum, or, on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both.

¹²⁸³

U In principle, a person convicted of an offence under the Regulations may be ordered to pay compensation to the victim (the consumer),¹²⁸⁴ but this power has been interpreted as requiring evidence of loss and has in general been little used.¹²⁸⁵ The **2008 Regulations** make further provision incidental to the creation of these offences,¹²⁸⁶ including for a defence of due diligence.¹²⁸⁷

Enforcement by authorities

40-180

U Apart from these criminal offences, the **2008 Regulations** are buttressed by two systems of enforcement of their prohibition of unfair commercial practices.

¹²⁸⁸

U First, Pt 4 of the **Regulations** sets out a special scheme of enforcement, under which every weights and measures authority has a duty to enforce the regulations, and the CMA has a power to do so,¹²⁸⁹ in both cases taking into account the desirability of encouraging control of unfair commercial practices by such established means as it considers appropriate in all the circumstances.¹²⁹⁰ These enforcement authorities have the power to make test purchases and powers of entry and investigation.¹²⁹¹ Secondly, the **2008 Regulations** amended the **Enterprise Act 2002** so as to include the 2005 Directive in the list of directives and regulations which gave rise to a “Community infringement” and also to designate the **2008 Regulations** as the specified UK law so as to apply Pt 8 of the **2002 Act** for their purposes.¹²⁹² As earlier explained, on IP completion day¹²⁹³ “Community infringements” were replaced by “Schedule 13 infringements” and the **2008 Regulations** were included within the substituted Sch.13 of the **2002 Act** for this purpose.¹²⁹⁴ As a result, where an infringement of the prohibition against unfair commercial practices by a trader harms the collective interest of consumers,¹²⁹⁵ an “enforcer” can apply to the court for an enforcement order, subject to the conditions set out earlier.¹²⁹⁶ The **2002 Act** also provides that, where an enforcer has brought an application for an enforcement order under Pt 8 of that Act in respect of a Sch.13 infringement involving the contravention of the **2008 Regulations**, the court has a power to require the relevant person to provide evidence as to the accuracy of any factual claim made as part of a commercial practice by that person.¹²⁹⁷ Where the trader fails to do so or fails to do so adequately, “the court may consider that the factual claim is inaccurate”.¹²⁹⁸

Footnotes

- 1226 The 2008 Regulations reg.27A(5)(b) and Sch.1 paras 8 and 23 were subject to minor amendment on IP completion day (on which see above, para.40-004 and Vol.I, paras 1-020 et seq.) by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.6 (the reference in reg.1(3) to reg.6's coming into force on "exit day" must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 ss.39(1), 41(4) and Sch.5 para.1). These changes are noted where relevant in the notes to the following paragraphs. The 2018 Regulations reg.11 made transitional provision to the effect that "[n]othing in ... regulation 6(2) [which amended the 2008 Regulations reg.27A(5)(b)] applies to a contract entered into before IP completion day" (as amended by the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1347) reg.4(8)).
- 1227 2008 Regulations regs 3–7. The main definitional provisions are contained in reg.2. On the amendment of the 2005 Directive by Directive (EU) 2019/2161 art.3, see above, para.40-168 (note).
- 1228 2008 Regulations reg.30(1); Schs 2 and 4.
- 1229 See below, para.40-177. The most important amendment was the redefinition of "consumer" so as to extend the protection of the 2008 Regulations to "individuals acting for purposes that are wholly or mainly outside that individual's business": 2008 Regulations reg.2(1) "consumer". cf. above, paras 40-036—40-045.
- 1230 2008 Regulations reg.3(1).
- 1231 2008 Regulations reg.3(3). On this general test see *Deroo-Blanquart v Sony Europe Ltd (C-310/15) EU:C:2016:633, 7 September 2016*, referring to art.5 of the 2005 Directive. 2005 Directive art.5. The 2005 Directive art.5(4)(a) treats misleading actions and misleading omissions as examples of a single category of misleading commercial practices. Sch.1 of the 2008 Regulations lists 31 "commercial practices which are in all circumstances considered unfair". For the interpretation of examples of these prohibited practices by the CJEU see "*4finance*" UAB v Valstybinė vartotojų teisių (C-515/12) EU:C:2014:211, 3 April 2014; *Loterie Nationale-National Loterij NV van publiek recht v Adriaensen, De Kesel and The Right Frequency VZW* (C-667/15) EU:C:2016:958, 15 December 2016 (concerning 2005 Directive Annex I point 14 implemented by 2008 Regulations Sch.1 para.14 concerning pyramid promotional schemes); *Peek & Cloppenburg KG v Peek & Cloppenburg KG* (C-371/20) EU:C:2021:674, 2 September 2021 (concerning 2005 Directive Annex I point 11 concerning advertisements in the form of editorial content paid for by the trader ("advertorial") implemented by 2008 Regulations Sch.1 para.11); *Autorità Garante della Concorrenza e del Mercato v Wind Tre SpA and Vodafone Italia SpA (Joined Cases C-54/17 and C-55/77) EU:C:2018:710*, 13 September 2018 and *Stichting Waternet v MG* (C-922/19) EU:C:2021:91, 3

- February 2021 (concerning 2005 Directive Annex I point 26 concerning inertia selling implemented by [2008 Regulations Sch.1 para.26](#)).
- 1233 [2008 Regulations reg.2\(1\)](#) “commercial practice” and cf. above, para.[40-169](#) on the CJEU’s interpretation of this notion.
- 1234 The definition of “commercial practice” in [reg.2\(1\)](#) combined the definition of “business-to-consumer commercial practices” in art.2(d) of the 2005 Directive, with art.3(1)’s definition of the scope of the Directive, with the clarification that there is no need for a commercial transaction to have been made. In *Warwickshire CC v Halfords Autocentres Ltd [2018] EWHC 3007 (Admin), [2019] 1 W.L.R. 3597* at [35]–[41] it was held that the requirement that an act, omission etc. be “directed connected with the promotion, sale or supply of a product to consumers” does not mean that a trader’s action triggered by a test-purchase made by a trading standards officer could not be a “commercial practice” even though the *actual* transaction was not made with a “consumer” for the purposes of a prosecution of that trader under [reg.9](#) for a “misleading action” within the meaning of [reg.5](#).
- 1235 [2008 Regulations reg.2\(1\)](#) (emphasis added).
- 1236 On which see above, para.[40-049](#).
- 1237 It is submitted that this extension of the scheme of the 2005 Directive was therefore compatible with its general requirement of “full harmonisation” as, on the narrower view of the scope of the 2005 Directive taken by the European Commission, consumer-to-business commercial practices fall outside the 2005 Directive’s scope and therefore beyond the force of this requirement: cf. above, para.[40-024](#). On such an extension beyond the scope of a “full harmonisation” directive, see above, para.[40-026](#).
- 1238 [2008 Regulations reg.27A\(2\)\(b\)](#), below, para.[40-188](#).
- 1239 *VTB-VAB NV Total Belgium NV (C-261/07 and C-299/07) EU:C:2009:244, [2009] E.C.R. I-2949* at para.49; *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v “Österreich”-Zeitungsverlag GmbH (C-540/08) EU:C:2010:660, [2010] E.C.R. I-10909* at para.17; *Zentrale sur Bekämpfung unlauteren Weebewerbs eV v Plus Warenhandelsgessellschaft mbH (C-304/08) EU:C:2010:12, [2010] E.C.R. I-00217* at para.36; *Wamo BVBA v JBC NV (C-288/10) EU:C:2011:443, [2011] E.C.R. I-5835* at para.33; *Pereničová v SOS finance, spol. sro (C-453/10) EU:C:2012:144*, at para.38.
- 1240 Above, para.[40-168](#).
- 1241 *R. (on the application of Tower Hamlets LBC) v Steele [2012] C.T.L.C. 109*.
- 1242 *R. v X Ltd [2013] EWCA Crim 818, [2014] 1 W.L.R. 591* at [24].
- 1243 [2013] *EWCA Crim 818* at [22] (emphasis added by Court of Appeal).
- 1244 [2013] *EWCA Crim 818* at [26] referring to *Zentrale sur Bekämpfung unlauteren Weebewerbs eV v Plus Warenhandelsgessellschaft mbH (C-304/08) EU:C:2010:12, [2010] E.C.R. I-00217* at para.36.
- 1245 [2013] *EWCA Crim 818* at [23].
- 1246 [2013] *EWCA Crim 818* at [33].
- 1247 *Nemzeti Fogyasztóvédelmi Hatóság v UPC Magyarország (C-388/13) 16 April 2015 (“UPC Magyarország (C-388/13)”), cf. Pereničová v SOS finance, spol. sro (C-453/10) EU:C:2012:144* at para.41, where the CJEU held that “commercial practice” included

the indication in an individual credit agreement of an APR lower than the real rate which therefore constitutes false information as to the total cost of the credit and hence the price”, without requiring explicitly that this false indication formed part of a wider practice on the part of the creditor.

- 1248 *UPC Magyarország (C-388/13)* para.34.
- 1249 *UPC Magyarország (C-388/13)* para.35.
- 1250 2005 Directive art.2(c), 3(1) and 6(1); recital 13; *UPC Magyarország (C-388/13)* paras 36–40.
- 1251 *UPC Magyarország (C-388/13)* paras 41–43 citing, as regards the final point, *CHS Tour Services GmbH v Team4 Travel GmbH (C-435/11), 19 September 2013*.
- 1252 *UPC Magyarország (C-388/13)* para.44.
- 1253 *UPC Magyarország (C-388/13)* paras 45 and 46. The reference to the *consumer* establishing that other individuals have been harmed looks inappropriate in the context of the 2005 Directive, which does not seek to establish any *rights* for consumers against the trader, but is concerned rather to prohibit certain categories of actions and omissions of traders: see above, para.40–166. This is confirmed by the nature of the national proceedings in *UPC Magyarország (C-388/13)*, which were brought by the Hungarian National Authority for Consumer Protection at the request of the individual consumer affected by the trader’s “practice” and resulted in the imposition of a fine on the trader. Indeed, this aspect of the 2005 Directive was later emphasised in the CJEU’s judgment (at para.56).
- 1254 2005 Directive arts 11 and 13; *UPC Magyarország (C-388/13)* at para.57; *Köck v Schutzverband gegen unlauteren Wettbewerb (C-206/11) 17 January 2013* para.44. The CJEU also held that the unintentional nature of the trader’s actions, whether or not it has caused the consumer any harm and whether the consumer could have obtained correct information elsewhere, are not relevant to the question whether the trader has committed a misleading commercial practice, though the first two of these would be relevant to the question of an appropriate penalty: *UPC Magyarország (C-388/13)* at paras 47–54, 58.
- 1255 [2013] EWCA Crim 818, above. In *Warwickshire CC v Halfords Autocentres Ltd [2018] EWHC 3007 (Admin)*, it was accepted that the 2005 Directive (and therefore the 2008 Regulations) covers both isolated acts and repeated behaviour, referring both to *UPC Magyarország (C-388/13)* and *R. v X. Ltd [2013] EWCA Crim 818* at [22] (quoted above) where Lewison LJ accepted that a commercial practice can be derived from a single incident. On the power of the Supreme Court and certain appellate courts to depart from decisions of the CJEU in their interpretation of UK legislation derived from EU law, see Vol.I, para.1-028.
- 1256 The definitions are contained in 2005 Directive art.2.
- 1257 2008 Regulations reg.2(1) “product”, which also makes special provision for this purpose for cases where a trader demands payment from a consumer in full or partial settlement of C’s liabilities, where the “product” is to be treated as that full or partial settlement: 2008 Regulations reg.2(1A) and (1B). As will be explained, there are restrictions on the definition of “product” for the purposes of the consumer’s rights to

- civil redress: 2008 Regulations regs 27C and 27D, below, para.40-187. The definition of “product” in the 2005 Directive is found in art.2(b) (though it will be amended by Directive 2019/2161 art.3(1)(a) as noted above, para.40-168 (note)).
- 1258 2008 Regulations reg.2(1) “professional diligence”; 2005 Directive art.2(h).
- 1259 2008 Regulations reg.2(1) “consumer” and “trader” and see above, paras 40-032 et seq. and 40-052 et seq.
- 1260 2008 Regulations reg.2(1) “trader”.
- 1261 2008 Regulations reg.2(1) “transactional decision”; 2005 Directive art.2(k). On the notion of “transactional decision” and the causal effect of a trader’s unfair commercial practice on such a decision see *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd [2021] EWHC 2088 (Ch)* at [138]–[167], applying *Trento Sviluppo srl and Centrale Adriatica Soc coop arl v Autorità Garante della Concorrenza e del Mercato (C-281/12) EU:C:2013:859*, 19 December 2013 at paras 36 and 38 and *Carrefour Hypermarchés SAS v ITM Alimentaire International SASU (C-562/15) EU:C:2017:95*, 8 February 2017 at paras 33 and 35.
- 1262 2008 Regulations reg.27B(2), below, para.40-194.
- 1263 Above, paras 40-046—40-047.
- 1264 2005 Directive recitals 18 and 19; art.5(2)(b), 5(3).
- 1265 2008 Regulations reg.2(2).
- 1266 2008 Regulations reg.2(4).
- 1267 2008 Regulations reg.2(5).
- 1268 2008 Regulations reg.2(6).
- 1269 Emphasis added. See also *Konsumentombudsmannen v Ving Sverige AB (C-122/10) 12 May 2011* paras 21–22; *Criminal Proceedings against Canal Digital Denmark A/S (C-611/14) EU:C:2016:800*, 26 October 2016 at para.39.
- 1270 And see *Criminal Proceedings against Canal Digital Denmark A/S (C-611/14)* at para.39. See also *R. (on the application of Cityfibre Ltd) v Advertising Standards Authority [2019] EWHC 950 (Admin)*, esp. at [101]–[114]; *Stichting Waternet v MG (C-922/19) EU:C:2021:91*, 3 February 2021 at paras 57–62 (in the context of consent of the consumer and inertia selling under the 2005 Directive, Annex 1 para.29; the CJEU decided after IP completion day, on the significance of which see above, para.40-004 and Vol.I, para.1-028).
- 1271 *[2021] EWHC 2088 (Ch)* at [65]–[78].
- 1272 2008 Regulations reg.2(4).
- 1273 *[2021] EWHC 2088 (Ch)* at [65], per Bacon J.
- 1274 *[2021] EWHC 2088 (Ch)* at [66].
- 1275 *[2021] EWHC 2088 (Ch)* at [73].

- 1276 [2021] EWHC 2088 (Ch) at [78].
- 1277 [2021] EWHC 2088 (Ch) at [121] and [127]–[129] (misleading actions or omissions on which see below, para.40-192 (note)) and [130]–[136] (aggressive commercial practice, on which see below, para.40-199).
- 1278 2008 Regulations reg.8 (subject to the conditions there specified).
- 1279 2008 Regulations reg.9 referring to reg.5, but excluding the case foreseen by reg.5(3)(b). See *Warwickshire CC v Halfords Autocentres Ltd* [2018] EWHC 3007 (Admin), [2019] 1 W.L.R. 3597 on prosecutions after a test-purchase by a trading standards officer, above, para.40-175 (note).
- 1280 2008 Regulations reg.10 referring to reg.6.
- 1281 2008 Regulations reg.11 referring to reg.7.
- 1282 2008 Regulations reg.12 referring to Sch.1, but excluding for these purposes the commercial practices foreseen by Sch.1 paras 11 (“advertorial”) and 28 (including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them).
- 1283 2008 Regulations reg.13. Until 12 March 2015 the maximum fine available on summary conviction was £5,000 (level 5 on the standard scale), but on that date this was changed to an unlimited fine by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.85. An example of sentencing may be found in *R. v Malik* [2020] EWCA Crim 957, [2021] 1 Crim.App. R. (S.) 7, esp. at [42]–[46], where the defendant misled consumers as regards the service to be provided for airport car parking; his sentence of 14 months immediate imprisonment was upheld as his activities were the “sustained, greedy, misleading of customers with a view to substantial financial gain”. cf. *R. v Robinson* [2021] EWCA Crim 1995 where the defendant builder’s sentence of 12 months imprisonment for aggressive and misleading commercial practices was suspended on appeal.
- 1284 Sentencing Act 2020 ss.133–135 (in force 1 December 2020 and replacing earlier powers in the Powers of Criminal Courts (Sentencing) Act 2000 s.130).
- 1285 Law Commission, Scottish Law Commission, Consumer Redress for Misleading and Aggressive Practices (2012) Law Com No.332; Scot Law Com No.226, Cm 8323 para.2.44, 2.46 (in relation to the earlier power in the Powers of Criminal Courts (Sentencing) Act 2000 s.130).
- 1286 2008 Regulations reg.14 (time limit for prosecution); reg.15 (offences committed by bodies of persons); reg.16 (offence due to the default of another person); reg.17 (due diligence defence); reg.18 (innocent publication of advertisement defence).
- 1287 2008 Regulations reg.17.
- 1288 Directive (EU) 2019/2161 art.3(6) replaces the 2005 Directive’s brief art.13 on penalties with a more elaborate set of requirements, but as the 2019 Directive has to be implemented by 28 November 2021 (i.e. after IP completion day), the UK will not

be required to do so: see above, para.[40-004](#) and Vol.I, para.[1-019](#). On the other hand, in 2018 the then UK government announced its intention of introducing legislation to give civil courts the power to impose financial penalties for breaches of consumer law of up to 10 per cent of a firm's worldwide turnover which would in fact broadly reflect a requirement in art.13(3) of the 2005 Directive as so amended: Department of Business, Energy & Industrial Strategy, Modernising Markets, Consumer Green Paper (April 2018), para.165 and see also Secretary of State for Business, Energy and Industrial Strategy, Reforming competition and consumer policy, CP 656 (20 April 2022), Ch.3, above, para.[40-139](#) (note).

1289 [2008 Regulations reg.19\(1\) and \(1A\)](#). In Northern Ireland, this duty is owed by Department of Enterprise, Trade and Investment in Northern Ireland. The duty to enforce does not extend to the consumer's rights to redress in [Pt 4A of the Regulations: reg.19\(1\)](#).

1290 [2008 Regulations reg.19\(4\)](#).

1291 These powers were earlier contained in the [2008 Regulations](#) regs 20–25, but as from 1 October 2015 ([SI 2015/1630 art.3\(h\)](#)) these provisions were revoked and replaced by more general provision in the [Consumer Rights Act 2015](#) s.77, Sch.5 (as amended) para.10 of which refers to the enforcement of the [2008 Regulations](#) reg.19(1) and (1A): [Consumer Rights Act 2015 \(Commencement No.3, Transitional Provisions, Savings and Consequential Amendments\) Order 2015](#) ([SI 2015/1630](#)) art.5, Sch.2 para.115 subject to transitional provisions set out in art.8).

1292 [2008 Regulations reg.26](#); [Enterprise Act 2002](#) Sch.13 para.9C; [Enterprise Act 2002 \(Part 8 Community Infringements Specified UK Laws\) Order 2003](#) ([SI 2003/1374](#)) Sch.1 para.1 as inserted by [2008 Regulations](#) Sch.2 Pt 2 para.100.

1293 On which see above, para.[40-004](#) and Vol.I, paras 1-020 et seq.

1294 [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) ([SI 2019/203](#)) (“[SI 2019/203](#)”) reg.3(20) and Sch. para.1, inserting new [2002 Act](#) Sch.13 para.19 (reg.1's reference to the [2019 Regulations](#) coming into force on “exit day” must be read as referring to “IP completion day”: [European Union \(Withdrawal Agreement\) Act 2020](#) s.39(1), s.41(4), Sch.5 para.1). On the change from “Community infringements” to “Schedule 13 infringements” more generally, see above, paras 40-137—40-138.

1295 [Enterprise Act 2002](#) ss.211(1)(c), 212(1). See above, paras 40-136—40-137.

1296 [Enterprise Act 2002](#) ss.214–218 (as amended) and see above, paras 40-136—40-141.

1297 [Enterprise Act 2002](#) s.218A(1) and (2) as inserted by [2008 Regulations](#) reg.27 and amended by the [Consumer Protection \(Enforcement\) \(Amendment etc.\) Regulations 2020](#) ([SI 2020/484](#)) reg.2(7) and by SI 2019/203 reg.3. “Relevant person” is defined by s.218A(2A).

1298 [Enterprise Act 2002](#) s.218A(3) as inserted by [2008 Regulations](#) reg.27.

(i) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 5. - Unfair Commercial Practices and the Consumer's Rights to Redress

(d) - The Rights to Civil Redress for Consumers

(i) - Introduction

The Law Commissions' recommendations

- 40-181 The rights to redress for consumers introduced by amendment of the [2008 Regulations](#) by the [2014 Regulations](#) resulted from recommendations of the Law Commissions in their report Consumer Redress for Misleading and Aggressive Practices (the “Law Commissions’ Report”).¹²⁹⁹ The Law Commissions considered that there were considerable social problems not being addressed properly by existing law, expressing a particular concern with the extent to which vulnerable persons, such as the elderly or the disabled, were being targeted by “scams” or pressured into buying goods or services.¹³⁰⁰ The Law Commissions identified two main deficiencies in the existing law. First, in the case of misleading actions by traders, the law governing remedies for misrepresentation is “fragmented, complex and unclear”,¹³⁰¹ with particular uncertainty as to the relationship between rescission and damages¹³⁰² and difficulties for consumers in the valuation of their loss.¹³⁰³ Secondly, in the case of aggressive commercial practices, the law governing remedies for duress, undue influence and (especially) unconscionable conduct is unclear and restrictive, being “not readily accessible to non-lawyers”¹³⁰⁴ and leaving important gaps in protection for the victim of “scams”, there being in particular no clear right to damages to victims of duress.¹³⁰⁵ The Law Commissions’ purpose in making their recommendations was therefore to “simplify the consumer remedies against misleading practices and to improve protection against aggressive practices”.¹³⁰⁶ However, contrary to the views of consumer groups and the Office of Fair Trading,¹³⁰⁷ the Law Commissions recommended that the new rights be “targeted” in the sense that they should not arise in respect of all unfair commercial practices prohibited by the [2008](#)

Regulations. In particular, the new rights should apply only in the case of misleading actions and aggressive practices: as a result, a misleading *omission* and a commercial practice found unfair under the general test in the [2008 Regulations](#) should not give rise to the new rights to redress¹³⁰⁸; and a commercial practice listed as unfair in all circumstances should not do so unless it would be likely to cause the average consumer to enter into a contract or make a payment which they would not otherwise have done.¹³⁰⁹ As this further indicates, the new rights should not arise merely as a result of a misleading or aggressive practice, as they should be subject to a condition that they contributed to the conclusion of a contract or the making of a payment.¹³¹⁰ These restrictions were seen by the Law Commissions as needed as wider availability could generate “unpredictable” costs on traders”.¹³¹¹ In terms of the new remedies for consumers arising from misleading or aggressive practices, the Law Commissions recommended a two-tiered approach: the first tier would provide the consumer with a short-lived right to unwind the contract or payment, with full refund of any payments made; and, where the goods or services have been fully consumed, where there has been delay or where the consumer chooses to keep the contract, a right to a discount based on “pre-set bands” of percentages of the price of the contract; the second tier would provide a right to damages recoverable only on proof of loss or harm by the consumer.¹³¹²

The structure of the new law

40-182 Rather than introducing primary legislation, as foreseen by the Law Commissions,¹³¹³ the new rights for consumers were introduced by amendment of the [2008 Regulations](#) by the [2014 Regulations](#).¹³¹⁴ Despite a principal purpose of the new law being to introduce a new simple regime for consumers, the new law is itself complex and bears a complex relationship with the general law of misrepresentation, duress and undue influence. Nevertheless, the fundamental distinction made by the [2008 Regulations](#) (as so amended) is between general conditions for the availability of the new rights to redress¹³¹⁵ and particular conditions, attributes and consequences of the three different rights to redress: the right to unwind; the right to a discount; and the right to damages.¹³¹⁶ In order to enjoy a right to redress, a consumer must establish that both sets of conditions are satisfied.¹³¹⁷ The [2008 Regulations](#) (as so amended) then make consequential provision for the procedural expression of the new rights to redress and on the relationship of the new rights to existing law.¹³¹⁸ This section will follow this broad structure.

No duty on court to raise issue of consumer's rights to redress

40-183 The Court of Justice of the EU has recognised that national courts may have a duty to raise of their own motion the existence of a right for consumers in national law which reflects EU legislation

for the protection of consumers.¹³¹⁹ While the rights to redress in Pt 4A of the 2008 Regulations are tied to the commission by a trader of certain unfair commercial practices whose prohibition reflected the Unfair Commercial Practices Directive 2005 (whose purpose was, *inter alia*, to protect consumers), that Directive as enacted did not provide for any rights for consumers such as are contained in Pt 4A.¹³²⁰ As a result, the Pt 4A rights to redress did not count as rights in EU law and did not, therefore, attract the case-law of the Court of Justice which may impose duties in national courts to raise the rights of consumers of their own motion.

Temporal application of the new law

- 40-184 The provisions of the 2014 Regulations amending the 2008 Regulations and creating the new rights to redress came into force on October 1, 2014 “and apply in relation to contracts entered into, or payments made, on or after that date”.¹³²¹

Rights to civil redress in EU law

- 40-185 As was earlier noted, the 2005 Directive prohibited unfair commercial practices but it did not require Member States to create rights to civil redress for the consumers (or others) affected by them.¹³²² However, this position changed at the EU level on the coming into force of Directive (EU) 2019/2161 for the better enforcement and modernisation of Union consumer protection rules,¹³²³ which requires the introduction of civil redress for consumers harmed by unfair commercial practices; this redress must include “compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract” and it is further provided that these “remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law”.¹³²⁴ Member States nevertheless retain a considerable discretion as to the availability and nature of these remedies as the new provision states that “Member States may determine the conditions for the application and effects of those remedies” and they “may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances”.¹³²⁵ However, the 2019 Directive must be implemented by Member States by 28 November 2021 (i.e. after IP completion day¹³²⁶) and as a result the UK is not required to implement its requirements.¹³²⁷

Possible impact of the Trade and Cooperation Agreement 2020

- 40-186

The Trade and Cooperation Agreement concluded by the UK and the EU¹³²⁸ contains a title on digital trade which includes provision requiring the Parties to:

“... adopt or maintain measures to ensure the effective protection of consumers engaging in electronic commerce transactions including but not limited to measures that:

- (a)proscribe fraudulent and deceptive commercial practices;
- (b)require suppliers of goods and services to act in good faith and abide by fair commercial practices, including through the prohibition of charging consumers for unsolicited goods and services; [...]
- (d)grant consumers access to redress for breaches of their rights, including a right to remedies if goods or services are paid for and are not delivered or provided as agreed.”

¹³²⁹



In the context, para.(d) could be interpreted as requiring the parties to the Agreement to adopt measures so as to grant consumers access to rights to redress in respect of unfair commercial practices, as earlier mentioned in (a) and (b), and if this were the case, then the [European Union \(Future Relationship\) Act 2020 s.29](#) would apply and so require that “[e]xisting domestic law has effect ... with such modifications as are required for the purposes of implementing” this provision of the TCA, which is not otherwise implemented into UK law, if only in respect of electronic commerce transactions.¹³³⁰ If so, the rights to redress would appear to apply to *all* unfair commercial practices rather than just to misleading actions and aggressive commercial practices (which is the case under [Pt 4A of the 2008 Regulations](#)), but only as regards electronic commerce transactions.

Footnotes

- 1299 Law Com No.332; Scot Law Com No.226 (2012); Cm 8323. See also Department for Business Innovation & Skills, Misleading and Aggressive Practices—A New Private Right for Consumers, Government response to consultation on the draft regulations (April 2014) p.3 noting that the Government had in their draft regulations accepted almost all the Commissions’ recommendations.
- 1300 Law Commissions’ Report (2012) SS.3 and 21, paras 1.13, 1.15, 3.50, 3.55, 4.22 and 8.58. An example of such a case is *R. v XLtd [2013] EWCA Crim 818, [2014] 1 W.L.R. 591*.
- 1301 Law Commissions’ Report (2012) S.12, p.x.

- 1302 In particular, under Misrepresentation Act 1967 s.2(2), on which see Vol.I, paras 9-112—9-119.
- 1303 Law Commissions' Report (2012), para.4.15.
- 1304 Law Commissions' Report (2012) S.16, p.x.
- 1305 Law Commissions' Report (2012), paras 3.49 et seq. On this law see Vol.I, Ch.10 and especially para.10-071.
- 1306 Law Commissions' Report (2012), para.1.4.
- 1307 Law Commissions' Report (2012), para.1.37.
- 1308 The general test was seen as “so uncertain as to be intrinsically unsuited to form the basis of private law rights”: Law Commissions' Report (2012), para.2.15.
- 1309 Law Commissions' Report (2012), paras 4.46 and 5.5.
- 1310 Law Commissions' Report (2012), para.5.6.
- 1311 Law Commissions' Report (2012), para.4.42 and see paras 4.57–4.63.
- 1312 Law Commissions' Report (2012), paras 8.24 et seq.
- 1313 Law Commissions' Report (2012), para.5.16.
- 1314 Consumer Protection (Amendment) Regulations 2014 (SI 2014/870). On the consumer's rights to redress under the 2008 Regulations, see *Bant and Paterson (2018) 80 M.L.R. 895*.
- 1315 2008 Regulations regs 27A–27D.
- 1316 2008 Regulations regs 27E–27J.
- 1317 2008 Regulations reg.27A(1).
- 1318 2008 Regulations regs 27K–27L.
- 1319 Above, paras 40-020—40-022.
- 1320 Above, paras 40-168—40-169.
- 1321 SI 2014/870 reg.1(3). The 2014 Regulations reg.9's provisions making minor amendments to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) came into force on 13 June 2014 immediately before the latter Regulations themselves: 2014 Regulations reg.1(2). For the 2013 Regulations generally, see above, paras 40-064 et seq.
- 1322 Above, para.40-169.
- 1323 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 (“Directive (EU) 2019/2161”) on which more generally see above, para.40-168 (note).
- 1324 Directive (EU) 2019/2161 art.3(5) (inserting a new art.11a in the 2005 Directive).
- 1325 2005 Directive art.11a(1) as inserted by Directive (EU) 2019/2161 art.3(5).
- 1326 This is set at 31 December 2020: above, para.40-004 and see generally Vol.I, paras 1-020 et seq.
- 1327 See Vol.I, para.1-019.
- 1328 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (24 December 2020) and see above, para.40-004 and Vol.I, para.1-030.

- 1329 Article 208 (formerly art.DIGIT.13(1)(a) and (b)) online consumer trust.
- 1330 *Whittaker (2021) 137 L.Q.R. 477 at 498–501*, and see on the implementation of the Trade and Cooperation Agreement 2020 by the [European Union \(Future Relationship\) Act 2020](#), Vol.I, para.[1-030](#).

(ii) - General Conditions for the Availability of the Rights to Redress

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 5. - Unfair Commercial Practices and the Consumer's Rights to Redress

(d) - The Rights to Civil Redress for Consumers

(ii) - General Conditions for the Availability of the Rights to Redress

Introduction

40-187 In very broad terms, Pt 4A of the 2008 Regulations requires that the consumer must establish that a misleading action or aggressive commercial practice by a trader was a significant factor in the consumer's decision to enter a contract or make a payment to the trader in respect of a product supplied. This broad picture is expressed by subjecting the general availability of the consumer's rights to redress to three conditions: (i) the existence of a contract between the trader and the consumer or a payment made by the consumer to the trader; (ii) the commission of a misleading action or aggressive commercial practice by the trader or by a "producer" of goods or digital content¹³³¹; and (iii) that the prohibited practice is a significant factor in the consumer's decision to enter the contract or make the payment.¹³³² As will be seen, the first two of these conditions are the subject of considerable nuance.¹³³³ Moreover, following the recommendations of the Law Commissions,¹³³⁴ the 2008 Regulations qualify the general definition of "product"¹³³⁵ for the purposes of the Pt 4A rights by excluding from it immovable property apart from an assured tenancy or a contract of lease for the supply of holiday accommodation¹³³⁶ and services provided in the course of carrying on a "regulated activity" within the meaning of the Financial Services and Markets Act 2000 other than where the service consists of the provision of credit for a transaction between the borrower and the lender or for a transaction between the borrower and a person other than the lender.¹³³⁷

First condition: contract or payment

- 40-188 As has been seen, the prohibition of unfair commercial practices in the [2008 Regulations](#) applies where these practices materially distort or are likely materially to distort the economic behaviour of the average consumer with regard to the “product”, understood very broadly.¹³³⁸ There is no requirement that the trader concludes a contract with a consumer or otherwise actually causes the consumer to take some other “transactional decision” with or for the benefit of the trader. This very broad approach reflects the general concern of the [2008 Regulations](#) (reflecting the 2005 Directive) with the prevention of unfair commercial practices, rather than with “contract law”.¹³³⁹ However, following the recommendations of the Law Commissions, the [2008 Regulations](#) take here a much more restrictive approach, requiring that one of three types of transaction must have taken place between the trader and the consumer for a right to redress to be available. First, where:

“(a)the consumer enters into a contract with a trader for the sale or supply of a product by the trader (a ‘business to consumer contract’).”¹³⁴⁰

This is the broadest category of situation, applying to all contracts for the sale or supply by a trader to a consumer of a *product*, defined very broadly as “goods, a service, digital content, immoveable property, and rights or obligations”,¹³⁴¹ though with the restrictions on immoveable property and the exclusion of financial services as earlier explained.¹³⁴²

“(b)the consumer enters into a contract with a trader for the sale of goods to the trader (a ‘consumer to business contract’).”¹³⁴³

This situation applies to the converse situation of a “consumer to business contract”, but its ambit is much more restricted than the first situation, as it concerns only sales of goods to the trader (such as the sale by a consumer of a second-hand car or jewellery) and, furthermore, is subject to a further restriction in that it does not apply where the trader supplies or agrees to supply a *product* to the consumer as well as agreeing to pay the consumer.¹³⁴⁴ Where a consumer enters a contract of part-exchange with a trader, for example, of a second-hand car, it is submitted that such a contract would fall within (a) as “a contract with a trader for the sale or supply of a product by the trader”, even though it also involves the supply of goods by the consumer.

“(c)the consumer makes a payment to a trader for the supply of a product (a ‘consumer payment’).”¹³⁴⁵

The Law Commissions identified a real social problem in the extent to which unscrupulous traders and others harass consumers into paying debts, whether these are real or invented.¹³⁴⁶ In their view, debt collection following a consumer contract clearly falls within the scope of

the [2008 Regulations](#)' prohibitions, but the position as regards other circumstances (such as wheel-clamping charges, demands in respect of parking charges, requests for compensation for alleged copyright infringements and "civil recovery" against shoplifters) is less clear.¹³⁴⁷ The third situation described at (c) is restricted to payments to a trader for the supply of a product¹³⁴⁸ and therefore restricts the application of the rights to redress for consumers (notably, "unwinding the payment" and damages for any deception ("misleading statement") or harassment ("aggressive practice") to this situation.¹³⁴⁹ For these purposes, however, it should be noted that the Regulations specifically provide that:

"(1A)A trader ('T') who demands payment from a consumer ('C') in full or partial settlement of C's liabilities or purported liabilities to T is to be treated for the purposes of these Regulations as offering to supply a product to C.

(1B)In such a case the product that T offers to supply comprises the full or partial settlement of those liabilities or purported liabilities."¹³⁵⁰

Second condition: "prohibited practice"

40-189 Here, the [2008 Regulations](#) require either that the "trader engages in a prohibited practice in relation to the product" or that, in the case of contracts of sale of goods or the supply of digital content, the "producer" does so in certain circumstances.¹³⁵¹ For both purposes, the Regulations restrict "prohibited practice" to "misleading actions" under [reg.5](#) and "aggressive commercial practices" under [reg.7](#) and, following the Law Commissions' recommendations, therefore do not extend the availability of consumer rights to redress to misleading omissions under [reg.6](#)¹³⁵² nor to commercial practices qualifying as unfair under the general test.¹³⁵³ In the case of commercial practices designated by the Regulations in general as unfair in all circumstances,¹³⁵⁴ the rights to redress are available only if the commercial practice in question satisfies the test for misleading action or aggressive practice. This means in particular that they must cause or be likely to cause the average consumer to take a transactional decision he would not have taken otherwise.¹³⁵⁵

Misleading actions

40-190 Under [reg.5](#), a commercial practice may constitute a "misleading action" either under a very general test of its containing false or deceptive information¹³⁵⁶ or in relation to two special cases.¹³⁵⁷

False or deceptive information

- 40-191 This is the most important category. Regulation 5(2) provides that a commercial practice  constitutes a “misleading action”:

“(a)if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct

1358

; and

(b)it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.”

The lists of matters referred to in reg.5(4) are:

Regulation 5

- “(a) the existence or nature of the product;
- (b) the main characteristics of the product (as defined in paragraph 5);
- (c) the extent of the trader’s commitments;
- (d) the motives for the commercial practice;
- (e) the nature of the sales process;
- (f) any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product;
- (g) the price or the manner in which the price is calculated;
- (h) the existence of a specific price advantage;
- (i) the need for a service, part, replacement or repair;
- (j) the nature, attributes and rights of the trader (as defined in paragraph 6);

(k) the consumer's rights or the risks he may face.”

The Regulations then provide details as to what is included in the “main characteristics of the product”,¹³⁵⁹ and what are the “nature, attributes and rights” as far as concern the trader,¹³⁶⁰ and the “consumer’s rights” for these purposes.¹³⁶¹

- 40-192 In *Canal Digital Denmark A/S*¹³⁶² the Court of Justice of the EU considered whether art.6(1) of the 2005 Directive governing misleading actions (which was implemented in UK law by [reg.5\(2\) of the 2008 Regulations](#)) applies to a case where a trader provides television packages by subscription either on a monthly or on a six-monthly charge, but has particularly highlighted the monthly charge in its marketing, while the six-monthly charge is omitted entirely or presented only in a less conspicuous way.¹³⁶³ Having noted the significance of the “average consumer” to whom the practice is addressed,¹³⁶⁴ the Court of Justice held that in determining whether commercial practices of this sort “deceive or are likely to deceive the average consumer in relation to the price” the national court must:

“... determine, having regard to all the relevant circumstances, whether the commercial communication concerned has the effect of suggesting to the average consumer an attractive price which, ultimately, is proven to be misleading.”¹³⁶⁵

For this purpose:

“... consideration may be given, where relevant, to the fact that offers for TV channels are characterised by a wide variety of proposals and combinations that are generally highly structured, both in terms of cost and content, resulting in a significant asymmetry of information that is likely to confuse consumers.”¹³⁶⁶

On the other hand, the Court of Justice noted that, unlike art.7’s provisions governing misleading *omissions*, art.6(1) “contains no reference to limitations of space or time related to the communication medium used”, so that:

“... time constraints that may apply to certain communication media, such as television commercials, cannot be taken into account when assessing whether a commercial practice is misleading under art.6(1).”¹³⁶⁷

However, where the price of a “product” is divided into several components, one of which is emphasised in the marketing, while the other is omitted or presented less prominently, the average consumer may be led to a mistaken perception of the overall offer, particularly in that he is being offered a particularly advantageous price.

1368

U This guidance on the proper approach to the interpretation and application of art.6(1) of the 2005 Directive makes clear that the *omission* of some information regarding an aspect of the “product” (there, its price) may form part of a misleading action rather than constituting only a misleading omission, thereby taking a broad interpretation of “misleading action” for this purpose, a position of particular significance for the purposes of the consumer’s rights to redress in UK law, as these are available for misleading actions but not misleading omissions.¹³⁶⁹ The Court of Justice also identified an important difference between the two categories of misleading commercial practices (actions and omissions) as a matter of EU law, in that, where:

“... the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted”

whereas no such allowance for the medium used is to be made as regards a misleading action.¹³⁷⁰ On the other hand, art.7(4) of the Directive makes special provision regarding certain categories of information (including as to price) in “invitations to purchase” whose omission “shall be regarded as material”, whereas art.6 makes no similar provision regarding invitations to purchase for the purposes of misleading actions.¹³⁷¹ Overall, therefore, the Court of Justice accepted that a particular commercial practice may constitute at the same time a misleading action *and* a misleading omission, subject to the particular conditions and taking account of the particular considerations set out by arts 6 and 7 of the 2005 Directive respectively.

The special cases

40-193 Reflecting the 2005 Directive,¹³⁷² reg.5(3) identifies two special cases of a commercial practice constituting a “misleading action”, viz where:

“(a)it concerns any marketing of a product (including comparative advertising) which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor; or

(b)it concerns any failure by a trader to comply with a commitment contained in a code of conduct¹³⁷³ which the trader has undertaken to comply with, if—

- (i)the trader indicates in a commercial practice that he is bound by that code of conduct, and
- (ii)the commitment is firm and capable of being verified and is not aspirational,
and it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise, taking account of its factual context and of all its features and circumstances.”¹³⁷⁴

Definitions: “transactional decision”

- 40-194 Both as regards the general test and the special cases, the general definitions of the Regulations apply (including as to “consumer”¹³⁷⁵ and “average consumer”¹³⁷⁶), with the exception of “transactional decision” which is defined specially for the purposes of the availability of the rights to redress as:

“... 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 a payment to a trader for the supply of a product.”¹³⁷⁷

This redefinition for the purposes of the rights to redress is necessary in order to link the definitions of misleading actions and aggressive commercial practices to the circumstances governed by the first condition of the availability of these rights¹³⁷⁸; the definition of “transactional decision” provided generally for the prohibition of unfair commercial practices by the Regulations (which followed the Directive¹³⁷⁹) is much wider

¹³⁸⁰

U and reflects their application to practices “before, during and after a commercial transaction (if any) in relation to a product”.¹³⁸¹

Comparison with the law of misrepresentation

- 40-195 Overall, the types of behaviour covered by “misleading action” as defined by reg.5 cover very many, though not all, the behaviour which may be the subject of a claim for misrepresentation under the general law. Under the general law, an actionable misrepresentation requires a

false statement of fact or law and, in principle, this excludes false statements of opinion or future fact.¹³⁸² This means that some pre-contractual statements by a trader may count as a misrepresentation even though they do not constitute a “misleading action” within the meaning of the **2008 Regulations** (as not falling within the matters enumerated by reg.5(4) or the special cases).¹³⁸³ Conversely, some statements of intention may count as a misleading action under the **2008 Regulations**, for example, a “failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with”¹³⁸⁴ though they would not count as an actionable misrepresentation under the general law if at the time the contract was made the trader intended to comply with the code of conduct. Finally, if (contrary to the position adopted above) an isolated misrepresentation by a trader or its employee that was not part of a scheme or within the employee’s actual authority¹³⁸⁵ does not constitute a “commercial practice”,¹³⁸⁶ it would not fall within “prohibited practice” and could not give rise to the new rights to redress. This result would be the unforeseen consequence¹³⁸⁷ of using a legislative scheme designed for the prohibition of trader behaviour enforceable through administrative measures, court orders or penalties,¹³⁸⁸ not requiring the conclusion of any transaction,¹³⁸⁹ and specifically inapplicable to “contract law”¹³⁹⁰ as the basis of civil redress for individual consumers in respect of the particular contracts which they make with traders. Certainly, if “commercial practice” cannot extend (or cannot extend in the circumstances) to an isolated case of misrepresentation, then even in consumer cases the general law of misrepresentation will remain of importance.¹³⁹¹

Misleading omissions

40-196 Regulation 6 of the **2008 Regulations**¹³⁹² specifically includes an “misleading omission” as an example of the unfair commercial practices which they prohibit, explaining that this includes situations where:

- “(a)the commercial practice omits material information,
- (b)the commercial practice hides material information,
- (c)the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or
- (d)the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,
- (e)and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.”¹³⁹³

“Material information” is defined as referring to:

Regulation 6

(a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and

(b) any information requirement which applies in relation to a commercial communication as a result of an EU obligation.”

1394

So, in the case of the second category, a trader’s failure to provide the information required of traders in respect of distance contracts, off-premises contracts, on-premises contracts or timeshare contracts,¹³⁹⁵ would constitute a misleading omission, subject to it having the designated effect or likely effect on the average consumer’s decision-making.¹³⁹⁶ However, following the recommendation of the Law Commissions, the 2014 amendments to the [2008 Regulations](#) do not include “misleading omissions” as defined by [reg.6](#) as a “prohibited practice” for the purposes of the consumer’s right to redress.¹³⁹⁷ The effect of this is clear in relation to a “pure omission”, so that, notably, a failure in a trader to provide the pre-contractual information required by UK legislation which implemented EU law will not in itself give rise to rights to redress in consumers,¹³⁹⁸ nor will a failure to provide information “which the average consumer needs, according to the context, to take an informed transactional decision”.¹³⁹⁹ However, the position is less clear in the case of a trader providing information in either of these categories, but doing so inaccurately or incompletely. At first sight, such commercial behaviour by a trader could fall within [reg.6\(1\)\(c\)](#)’s reference to the provision of “material information in a manner which is unclear, unintelligible, ambiguous or untimely” and therefore *outside* the scope of availability of the rights to redress. On the other hand, the definition of “misleading action” in [reg.5](#) is very broad, in that it includes both false information and information whose “overall presentation in any way deceives or is likely to deceive the average consumer”.¹⁴⁰⁰ It is submitted that “half-truths” and other statements which, while true, are misleading would be caught by [reg.5](#) and therefore attract the possibility of rights to redress for consumers¹⁴⁰¹ and is, therefore, broadly similar to the position under the general law of misrepresentation where such true but misleading statements can be actionable.¹⁴⁰² Such a broad approach to misleading action was taken by the Law Commissions,¹⁴⁰³ which gave as examples a case where a consumer buys a lawnmower, which works satisfactorily but the consumer is not aware that the mower requires an unusual and hard-to-obtain fuel, and the case where a travel agent sells a package holiday in an exotic foreign destination to a consumer, but fails to tell the consumer that there has recently been an outbreak of cholera at the destination.¹⁴⁰⁴ In the case of the first example, if a trader sold the mower as petrol-driven or a “motor-mower”, it seems correct that the overall presentation is misleading, but in the second example, to include a failure to provide information as to the cholera as a “misleading action” would obliterate the distinction between positive statements and non-

disclosure. On the other hand, after the Law Commission's recommendations and the resulting amendments to the [2008 Regulations](#) were made in 2014, the Court of Justice of the EU in *Canal Digital Denmark A/S*¹⁴⁰⁵ provided guidance on the interpretation and application of arts 6 and 7 of the 2005 Directive on misleading actions and misleading omissions respectively, making clear, first, that the provision of incomplete information may constitute a misleading action, and that, secondly, the same commercial practice may constitute both a misleading action and a misleading omission, subject in either case to its satisfying the particular conditions and taking into account the particular factors which are required by the 2005 Directive. As a result, merely because a commercial practice appears to fall within one of the examples of a misleading omission (in the earlier example, “material information in a manner which is unclear, unintelligible, ambiguous or untimely”) does not prevent it from also counting as a misleading action (notably, as information whose “overall presentation in any way deceives or is likely to deceive the average consumer”).

Aggressive commercial practice

40-197 Regulation 7(1) provides:



Regulation 7

- “(1) A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances—
- (a) it significantly impairs or is likely significantly to impair the average consumer’s freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and
 - (b) it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.”

“Consumer”, “average consumer”, “product” and “transactional decision” are defined in the same way as they are for the purposes of the rights to redress for consumers in respect of misleading actions.¹⁴⁰⁶ Regulation 7(2) then explains that:

Regulation 7

- “(2) In determining whether a commercial practice uses harassment, coercion or undue influence account shall be taken of—
- (a) its timing, location, nature or persistence;

- (b)** the use of threatening or abusive language or behaviour;
- (c)** the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product;
- (d)** any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; and
- (e)** any threat to take any action which cannot legally be taken."

For these purposes, "coercion" includes the use of physical force¹⁴⁰⁷ and "undue influence" means:

"... exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision."¹⁴⁰⁸

The Court of Justice of the EU has explained that:

"... undue influence is not necessarily impermissible influence but influence which, without prejudice to its lawfulness, actively entails, through the application of a certain degree of pressure, the forced conditioning of the consumer's will."

¹⁴⁰⁹



For the Court of Justice, therefore, both the particular concept of undue influence and the concept of aggressive commercial practice more generally are concerned with the freedom of choice of the consumer.¹⁴¹⁰ While this was seen by the Court as related to the importance to the consumer of information relating to the contract (as the reference to an "informed decision" in the definition of undue influence suggests), it acknowledged that the mere fact that the consumer has not had access to information sufficient to guarantee his free choice does not, in itself, constitute an aggressive commercial practice.¹⁴¹¹ Therefore, where a trader concludes or amends contracts for the supply of telecommunication services by delivering its standard-form contract by courier with the courier waiting for the consumer's decision without the latter having time to study it in advance or at the time, this does not constitute an aggressive commercial practice in the absence of "additional

practices” whose effect is to put pressure on the consumer and so significantly impair his freedom of choice.¹⁴¹² Such “additional practices” could consist of “the courier insisting on the need to sign the contract” as “such an attitude is liable to make that consumer feel uncomfortable and thus to confuse his thinking in relation to the transactional decision to be taken”, as would be the case where he is told that a later conclusion of the contract would be possible only on less favourable conditions or on the payment of contractual penalties.¹⁴¹³

Examples; comparison with general law

- 40-198 As the Law Commissions pointed out, the list of practices unfair in all circumstances illustrates the sort of practices which could fall within the category of aggressive practices: creating the impression that the consumer cannot leave the premises until a contract is formed, conducting personal visits to the consumer’s home and ignoring the consumer’s legitimate request to leave or not to return, and making persistent and unwanted solicitations by telephone, fax, email or other remote media except in circumstances and to the extent justified to enforce a contractual obligation.¹⁴¹⁴ The Law Commissions recommended that the definition of an aggressive practice for the purposes of the consumer’s rights to redress should track the definition in reg.7 with some modifications so as, in particular, to avoid reference to “undue influence” which would cause confusion with the doctrine of undue influence under the general law, to define “harassment” as “unreasonable behaviour which is likely to cause alarm, distress or serious annoyance and inconvenience” and to make clear that no “course of conduct” is required for there to be harassment for this purpose.¹⁴¹⁵ These recommendations were not, however, reflected in the law as made, which simply adopted the definition of “aggressive commercial practice” in the Regulations generally without change as the basis of the consumer’s new rights, except in relation to the definition of “transactional decision”.¹⁴¹⁶ This has the advantage of relative simplicity, but it does allow the confusion which the Law Commissions foresaw between “undue influence” for the purposes of the new rights for consumers and “undue influence” under the general law, the main difference being that the latter typically involves the abuse of a special relationship of trust between the parties,¹⁴¹⁷ which is unlikely to be the case in the context of consumer contracts. Moreover, the idea of “undue influence” in the Regulations (following the 2005 Directive) is much broader and less technical than undue influence under the general law, though the significance of vulnerable groups of consumers (notably, by reason of “age, physical or mental infirmity or credulity”¹⁴¹⁸) for the purposes of “average consumer” may sometimes have a similar resonance to some of the traditional concerns of the general law of undue influence or, indeed, equitable relief against unconscionable bargains.¹⁴¹⁹ Indeed, the Regulations’ reference to “the exploitation of a position of power”¹⁴²⁰ without limiting it to a relationship of trust and confidence suggests that the exploitation of a consumer’s urgent need for the product may amount to an aggressive practice. The contrast between the definition of “aggressive practices” and the facts which would attract the common law doctrine of duress is also marked, as the latter typically involves an illegitimate

threat to the person, goods or economic interests of the party to the contract.¹⁴²¹ On the other hand, if (contrary to the view adopted above) “aggressive practice” requires a course of conduct in a trader and cannot apply merely to an isolated example of pressure being exerted on an individual consumer, then the general law of duress, undue influence and unconscionable bargains would retain their significance even in the context of consumer contracts and some cases seen by the Law Commissions as requiring a remedy would be left without one.¹⁴²²

“Exploitation of specific misfortune”

- 40-199** The decision of the Court of Justice of the EU in *IM v STING Reality sro* provides an example of the relevance of exploitation by a trader of the consumer’s specific misfortune.¹⁴²³ There, the consumer was an elderly person with a serious disability and with limited means, the latter being insufficient to repay loans which he had taken out. The consumer had voluntarily put his home up for auction to pay his debts, but the trader (which lent money) approached him and concluded with him a series of contracts which the consumer thought consisted of a refinancing of his loan with security, but which in fact involved the sale of the property.¹⁴²⁴ While the Court acknowledged that it was for the national court to assess whether on the facts the trader had committed an aggressive commercial practice within the meaning of the national legislation implementing the 2005 Directive, it noted the relevance for this purpose of:

“... the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgement, of which the trader is aware, to influence the consumer’s decision with regard to the product.”¹⁴²⁵

In the circumstances, the Court considered that the consumer was clearly vulnerable, though it remained for the national court to determine to what extent the trader knew of the particular situation and deliberately took advantage of it to influence the consumer’s decision.¹⁴²⁶ On the other hand, in *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd* the High Court held that the commercial practices of a provider of residential care in relation to the consumers (and their representatives) who were considering residing in their care homes were not aggressive within the meaning of the 2008 Regulations.

¹⁴²⁷

- U** The CMA contended that the provider’s practice of disclosing sufficient information about an “administration fee” only once a consumer had become seriously interested in proceeding towards admission and therefore “emotionally committed to the admission of their relative to the care home in question” was an aggressive commercial practice on the basis that it “exploited a position

of power over the consumer, exerted pressure on the consumer and impaired their freedom of conduct”.

[1428](#)

U Bacon J “unhesitatingly” rejected this contention: the provider’s practice was to inform consumers on their first visit to a care home, and its statement to the CMA that its staff may mention the fee only when the consumer was “seriously interested” was merely intended to convey that staff may not have provided pricing information to consumers who were obviously not going to consider their home any further.

[1429](#)

U

“There was no basis on which that can be described as the exploitation of a position of power over the consumer, or in any other way aggressive. Rather, it was logical and reasonable that fees would be discussed with the representatives of prospective residents once they had visited the home and had indicated that they remained interested and wanted to know more about the process of admission to the home.”

[1430](#)

U

Moreover, those consumers interested in residential care were not “emotionally committed” at a first visit; on average they visited three times and looked at other care homes, and it was not therefore plausible that “an average consumer would have been committed to such a degree that their freedom of conduct was impaired by the time they received information about the administration fee”,

[1431](#)

U

even though individual consumers “may have been unsatisfied with the timing of or circumstances in which they became aware of the charge, and may have felt under pressure at that point”.

[1432](#)

U

Moreover, while the CMA had submitted generally that the relatives or other representatives of a prospective resident were in a vulnerable position when they visited a care home, and that the administration fee took advantage of that vulnerability, Bacon J found that, while the process of admission to a care home was “a difficult and often stressful experience for the resident and their representatives”, “the evidence did not support the CMA’s claims that average consumers’ abilities to make rational and considered decisions was compromised in those circumstances”.

[1433](#)

U

Prohibited practice by a “producer”

- 40-200 In the preceding discussion of the second condition for the availability of the consumer’s rights to redress, the prohibited practice has been engaged in by the trader with whom the consumer has made a contract or to whom the trader has made a payment. However, reg.27A(4)(b) provides that the second condition for the availability of their rights may equally be satisfied in certain cases where it is the producer of goods or digital content which so engages, being:

- “(b)in a case where a consumer enters into a business to consumer contract for goods or digital content—
 - (i)a producer engages in a prohibited practice in relation to the goods or digital content, and
 - (ii)when the contract is entered into, the trader is aware of the commercial practice that constitutes the prohibited practice or could reasonably be expected to be aware of it.”

The Regulations then define “producer” to include a manufacturer, UK importer¹⁴³⁴ or a person who presents themselves as a producer.¹⁴³⁵

- 40-201 The 2008 Regulations generally do not distinguish between different categories of trader which engage in unfair commercial practices: retailers, wholesalers, producers or agents may all fall under their prohibitions and, therefore, the preventive measures or criminal offences which they set out.¹⁴³⁶ By contrast, the rights to civil redress under Pt 4A of the Regulations require that the trader has made a contract with the consumer, or that the consumer has made a payment to the trader, thereby focussing the consumer’s civil rights against the retailer of goods or services and reflecting the importance of the consumer’s right to unwind the transaction so made.¹⁴³⁷ This focus was supported by the Law Commissions, which recommended against allowing consumers to claim directly against producers and perpetrators of unfair practices other than retailers.¹⁴³⁸ The 2014 Regulations as enacted retain this focus but go further and provide that the trader who supplies goods or digital content may be liable to the consumer’s rights to redress where it is their producer, rather than the trader/supplier itself, which has engaged in a prohibited practice (i.e. misleading action or aggressive practice), subject to the condition that, at the time of the contract, “the trader is aware of the commercial practice that constitutes the prohibited practice or could reasonably be expected to be aware of it”.¹⁴³⁹ This liability in a retailer of goods or digital content for these types of unfair commercial practices in the producer therefore parallels closely the retailer’s contractual liability for lack of satisfactory quality of the goods or digital content supplied even in circumstances where this failure is caused by their own supplier or their manufacturer. For under the Consumer Rights Act 2015 the question whether goods or digital content supplied

under a contract are of satisfactory quality may take into account any public statement made in advertising or labelling about the specific characteristics of the goods or digital content by the producer or trader (or their representatives), but this will not be the case, *inter alia*, where the trader shows that he was not aware, and could not reasonably have been aware, of the statement.¹⁴⁴⁰ In this way, the law governing the consumer's rights to redress for misleading statements reflects closely the law governing the consumer's rights in respect of the satisfactory quality of the goods under the contract.

Third condition: “A significant factor in the consumer’s decision”

- 40-202 The third condition for the availability of the consumer's rights to redress is that “the prohibited practice is a significant factor in the consumer's decision to enter into the contract or make the payment”.¹⁴⁴¹ As earlier explained, the Regulations' definition of “prohibited practice” for the purposes of the consumer's rights to redress requires that the misleading action or aggressive practice causes or is likely to cause the average consumer to enter into a contract with a trader or to make a payment to a trader for the supply of a product.¹⁴⁴² However, in addition, the third condition of the availability of the consumer's rights to redress is that the prohibited practice in question is a significant factor in that consumer's decision to enter the contract or make the payment. The Law Commissions rejected the adoption of a test of “but for” causation between the prohibited practice and the consumer's decision, on the basis that it would be unrealistic to expect consumers to prove that without the commercial practice they would not have entered the contract at all: “often there will be no way of telling why a consumer acted in that particular way following an aggressive or misleading practice”.¹⁴⁴³ On the other hand, “putting no weight on causation would be inconsistent with the compensatory aim of private rights”.¹⁴⁴⁴ The “significant factor” test was seen as a compromise position.¹⁴⁴⁵ The Law Commissions concluded that:

“In practice, this means that consumers will need to provide some evidence that they saw or heard the misleading statement, or experienced the aggressive practice before making the decision to buy or pay and that they were influenced by it. Thereafter, it will be enough if the misleading or aggressive practice is sufficiently serious to cause a reasonably well informed, observant and circumspect consumer to enter into the contract or to make a payment.”¹⁴⁴⁶

Comparison with the general law of misrepresentation, duress and undue influence

- 40-203

Although the Law Commissions thought otherwise,¹⁴⁴⁷ the “significant factor” test to determine the causal connection required between the consumer’s decision to enter the contract differs from the rules governing misrepresentation, duress and undue influence under the general law. In the case of misrepresentation, the test of “inducement” is that it is sufficient for the claimant to show that the misrepresentation was *one* of the inducing causes of the misrepresentee’s decision to enter the contract¹⁴⁴⁸: what is required is that the misrepresentee would not have entered the contract or would not have entered the contract *on the same terms* but for the misrepresentation.¹⁴⁴⁹ However, an exception to this general pattern is found in the rules governing rescission for fraud, where it is sufficient if there is evidence to show that the misrepresentee was materially influenced by the misrepresentation merely in the sense that it had some impact on his thinking: it is no defence for the misrepresentor to show that the misrepresentee would still have made the contract.¹⁴⁵⁰ The courts have applied this special rule for fraud to cases of duress to the person and to cases of actual undue influence,¹⁴⁵¹ but the better view is that the causal requirement for duress of goods and economic duress is that the victim must show that the duress was a “significant cause” of the victim’s entering the contract, in the sense that, but for the threat, he would not have entered the contract or would not have entered it on the same terms.¹⁴⁵² Given that the Law Commissions foresaw that the “significant factor” test retains *some* causal role for the prohibited practice in the consumer’s decision to enter the contract or to make the payment, it is submitted that the courts are likely to seek to apply their general approach in their interpretation of “significant factor” for the purposes of the consumer’s rights to redress under the Regulations with the result that the third condition would be satisfied where the consumer could establish that, but for the prohibited practice, he or she would not have entered the contract or made the payment, or would not have done so on the same terms. However, if the courts wished instead to take a more generous view, they could treat the prohibited practices as more akin to fraud, duress of the person and actual undue influence, with the result that, the trader could not escape liability under the rights to redress merely by establishing that the consumer would anyway have entered the contract or made the payment or would have done so on the same terms. This more generous view may be appropriate as a matter of policy as regards aggressive practices which involve intentional behaviour on the part of the trader (“harassment, coercion or undue influence”¹⁴⁵³), but may well be less so for misleading actions, which may be committed by a trader purely innocently.¹⁴⁵⁴

Footnotes

- 1331 Defined as “data which are produced or supplied in digital form”: 2008 Regulations reg.2(1) “digital content”.
- 1332 2008 Regulations reg.27A(2), (4) and (6).
- 1333 Below, paras 40-188—40-201.
- 1334 Law Commissions Report (2012), paras 6.93–6.118. Their main reasons were that land transactions apart from residential leases are subject to a well-established and understood law of conveyancing, and consumers have access to redress schemes; in the

case of financial services, there are already sophisticated mechanisms in place to protect consumers and the remedies they recommend may be unsuited to the considerable amounts of money which these services may involve. On the other hand, consumer credit agreements and debt collection should be included within the new scheme as they are often inextricably linked to the supply of goods and services and cause many problems.

1335 The general definition is found in [2008 Regulations reg.2\(1\)](#) “product”, above, para.[40-177](#).

1336 [2008 Regulations reg.27C](#) provides that “product” does not include “immoveable property other than a relevant lease”, defining the latter in relation to England and Wales as an assured tenancy within the meaning of [Pt I of the Housing Act 1988](#) or a lease under which accommodation is let as holiday accommodation, but then excluding leases granted by a private registered provider of social housing as defined by [s.80\(3\)\(a\) of the Housing and Regeneration Act 2008](#) or by a registered social landlord as understood by [Pt I of the Housing Act 1996](#), leases of a dwelling-house or part of a dwelling-house granted on payment of a premium calculated by reference to a percentage of the value of the dwelling-house or part of or the cost of providing it or under which the lessee (or the lessee’s representatives) will or may be entitled to a sum calculated by reference, directly or indirectly, to the value of the dwelling-house or part and leases granted to a person as a result of the exercise by a local housing authority within the meaning of the [Housing Act 1996](#) of its functions under [Pt VII](#) (homelessness) of that Act: [2008 Regulations reg.27D\(1\)–\(3\)](#).

1337 [2008 Regulations reg.27D\(1\)](#) excludes generally from the definition of “product” a service provided in the course of carrying on a “regulated activity” within the meaning of [s.22 of the Financial Services and Markets Act 2000](#) (as illustrated by the list in [Sch.2 of that Act](#)), but then [reg.27D\(2\)](#) specifically saves from this exclusion “restricted-use credit agreements” as defined by the [Financial Services and Markets Act 2000 \(Regulated Activities\) Order 2001 \(Order 2001/544\)](#) art.[60L\(1\)](#) “restricted-use credit agreements” para.(a) or (b) (but *not* (c)), i.e. a credit agreement “to finance a transaction between the borrower and the lender, whether forming part of that agreement or not” or “to finance a transaction between the borrower and a person (‘the supplier’) other than the lender”: cf. below, paras [41-027—41-028](#) on these two categories of “restricted-use credit agreement” and their significance under the [Consumer Credit Act 1974 s.11\(1\)](#). This saving provision is itself subject to an exception in the cases of agreements under which the obligation of the borrower to repay is secured by a legal or equitable mortgage on land (other than timeshare accommodation), “mortgage” including a charge for these purposes and “timeshare accommodation” meaning overnight accommodation which is the subject of a timeshare contract within the meaning of the [Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 \(SI 2010/2960\)](#) reg.7: [2008 Regulations reg.27D\(3\)](#) and [\(4\)](#). Finally, it is expressly provided that Pt 4A of the [2008 Regulations](#) (and therefore the consumer’s rights to redress) may apply to the supply of a product even though that supply may constitute an activity within [art.39F](#) (debt-

- collecting) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001: 2008 Regulations reg.27D(5).
- 1338 Above, para.40-177.
- 1339 Above, para.40-169.
- 1340 2008 Regulations reg.27A(2)(a).
- 1341 2008 Regulations reg.2(6), above, para.40-177.
- 1342 2008 Regulations regs 27D and 27E, above, para.40-187.
- 1343 2008 Regulations reg.27A(2)(b).
- 1344 2008 Regulations reg.27A(3).
- 1345 2008 Regulations reg.27A(2)(c).
- 1346 Law Commissions' Report (2012), para.4.34.
- 1347 Law Commissions' Report (2012), para.4.35 and see further Ch.11, Unfair Payment Collection.
- 1348 On the definition of "product" for these purposes, see above, para.40-187.
- 1349 Below, paras 40-207 and 40-211.
- 1350 2008 Regulations reg.2(1A) and 2(1B), which were inserted by SI 2014/870 reg.2(9). This clarification of the position of the nature of a "product" in relation to consumer payments followed the recommendation of the Law Commissions in Law Commissions' Report (2012) paras 9.45-9.59.
- 1351 2008 Regulations reg.27A(4), and see below, paras 40-200—40-201.
- 1352 And see below, para.40-196.
- 1353 2008 Regulations reg.27B. See above, para.40-174 (on the general test) and para.40-181 (for the Law Commissions' views). See also on a possible extension of the range of the rights to redress under the Trade and Cooperation Agreement 2020, above, para.40-186.
- 1354 2008 Regulations reg.3(4)(d); Sch.1, above, para.40-181 and cf. para.40-172.
- 1355 2008 Regulations regs 5(2)(b), 5(3) and 7(1)(b). Moreover, "transactional decision" is defined specially for these purposes: reg.27B(2), below, para.40-194.
- 1356 2008 Regulations reg.5(2) and see below, para.40-191.
- 1357 2008 Regulations reg.5(3) and see below, para.40-193.
- 1358 The requirement that the misleading action "deceives or is likely to deceive the average consumer" does not mean that a misleading action inherently requires dishonesty on the part of the trader as the requirement "concerns the *deceptive nature* of that practice vis-à-vis that average consumer": *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd [2019] EWHC 2828 (Ch)* at [29] (per Ms Kelyn Bacon QC, as she then was). As no allegation of dishonesty was in issue, the CMA's enforcement proceedings under Pt 8 of the Enterprise Act 2002 did not for this reason have to be brought under CPR Pt 7, though this would be necessary where they involve "a substantial dispute of fact". See also *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd [2021] EWHC 2088 (Ch)* noted above at para.40-178 and below at paras 40-192 (note), 40-199 and 40-350.
- 1359 2008 Regulations reg.5(5).
- 1360 2008 Regulations reg.5(6).

- 1361 2008 Regulations reg.5(7).
- 1362 *Criminal Proceedings against Canal Digital Denmark A/S (C-611/14) EU:C:2016:800, 26 October 2016 (“Canal Digital Denmark A/S (C-611/14)”).*
- 1363 *Canal Digital Denmark A/S (C-611/14)* at para.36.
- 1364 See above, paras 40-191 and 40-178.
- 1365 *Canal Digital Denmark A/S (C-611/14)* at para.40.
- 1366 *Canal Digital Denmark A/S (C-611/14)* at para.41.
- 1367 *Canal Digital Denmark A/S (C-611/14)* at para.42.
- 1368 *Canal Digital Denmark A/S (C-611/14)* at paras 43–44. The CJEU also explained that “the price is, in principle, a determining factor in the mind of the average consumer, when he has to make a transactional decision” (para.46), this being relevant to the requirement in art.6(1) that the relevant commercial practice must cause or be likely to cause the average consumer “to take a transactional decision that he would not have taken otherwise” (and see 2008 Regulations reg.5(2)(b), though note that in the Regulations “transactional decision” is defined specially for the purposes of the consumers rights to redress under Pt 4A: 2008 Regulations reg.27B(2) and see below, para.40-194). For an example of the HC applying the approach of the CJEU in *Canal Digital Denmark A/S see Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd [2021] EWHC 2088 (Ch)* at [118]–[128], though the HC found that a care home provider’s pre-contractual information on pricing was not misleading even though it omitted a particular charge as it made clear that the information was “purely illustrative” and that the cost for individual residents would depend on their individual care needs pre-assessment.
- 1369 Above, para.40-189 and see below, para.40-196.
- 1370 *Canal Digital Denmark A/S (C-611/14)* at paras 42 and 58–63.
- 1371 *Canal Digital Denmark A/S (C-611/14)* at paras 52–58.
- 1372 2005 Directive art.6(2). Directive 2019/2161 art.3(3) amends art.6(2) of the 2005 Directive so as to add a further special case, i.e. where a commercial practice involves “any marketing of a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors”. However, as the 2019 Directive requires implementation by 28 November 2021 (i.e. after IP completion day), the UK is not in principle required to implement the change: on Directive 2019/2161 see above, para.40-168 (note).
- 1373 A “code of conduct” is defined by the 2008 Regulations reg.2 as: “an agreement or set of rules (which is not imposed by legal or administrative requirements), which defines the behaviour of traders who undertake to be bound by it in relation to one or more commercial practices or business sectors”.
- 1374 2008 Regulations reg.5(3).
- 1375 Above, para.40-177.
- 1376 Above, para.40-178.
- 1377 2008 Regulations reg.27B(2).

- 1378 2008 Regulations reg.27A(2) and (3), above, para.40-188.
- 1379 2005 Directive art.2(k).
- 1380 2008 Regulations reg.2(1) “transactional decision” above, para.40-177.
- 1381 2008 Regulations reg.2(1) “commercial practice” above, para.40-175.
- 1382 Vol.I, paras 9-008 et seq.
- 1383 Above, paras 40-190—40-193.
- 1384 2008 Regulations reg.5(3)(b).
- 1385 i.e. the employee did not have express, implied or “usual” authority: see Vol.I, paras 21-046 et seq.
- 1386 cf. the discussion above, para.40-176 as to the question whether a “commercial practice” may be found in relation to an isolated transaction.
- 1387 The Law Commissions’ Report appears to assume that “commercial practice” can apply to an isolated transaction: paras 2.10 and 2.11.
- 1388 2005 Directive arts 5(1); 11–13.
- 1389 The definition of “commercial practice” refers to “before, during or after a commercial transaction (if any)”: *R. v XLtd [2013] EWCA Crim 818* at [23]; 2005 Directive recital 13.
- 1390 2005 Directive art.3(2), above para.40-169.
- 1391 This law will not be excluded: see below, para.40-220.
- 1392 Regulation 6 implemented art.7 of the 2005 Directive which is amended significantly by Directive 2019/2161 art.3(4), but as the 2019 Directive requires implementation by 28 November 2021 (i.e. after IP completion day, on which see above, para.40-004 and Vol.I, para.1-019), the UK is not in principle required to implement these changes: on Directive 2019/2161 see above, para.40-168 (note).
- 1393 2008 Regulations reg.6(1).
- 1394 2008 Regulations reg.6(3) and see *Carrefour Hypermarchés SAS v ITM Alimentaire International SASU (C-562/15) EU:C:2017:95, 8 February 2017*. Further provision is made for information to be supplied where a commercial practice is an invitation to purchase: 2008 Regulations reg.6(4). On “invitation to purchase” see 2005 Directive art.2(i) and *Konsumentombudsmannen v Ving Sverige AB (C-122/10) 12 May 2011* paras 27–33 and esp. at para.28 (“an invitation to purchase is a specific form of advertising to which is attached a stricter obligation to provide information”), where it was held that the list of information deemed material by art.7(4) (implemented by reg.6(4) of the 2008 Regulations) is an exhaustive one: (*C-122/10*) at paras 68–72.
- 1395 On which see above, paras 40-101, 40-106 and 40-159.
- 1396 On the significance of reg.6’s requirements as to misleading omissions generally see *OFT v Purely Creative [2011] EWHC 106 (Ch), [2011] E.C.C. 20* at [73]–[74]; *Secretary of State for Business, Innovation and Skills v PLT Antimarketing Ltd [2015] EWCA Civ 76, [2015] C.T.L.C. 8* at [30]–[31]; *Deroo-Blanquart v Sony Europe Ltd (C-310/15), 7 September 2016* especially at paras 48–49 (“material information” refers to “key items of information which the consumer needs to make an informed transactional decision”, assessed in all the circumstances).

- 1397 Above, paras [40-181](#) and [40-189](#). cf. however, the discussion as to the possible impact of the Trade and Cooperation Agreement 2020 above, para.[40-186](#).
- 1398 A failure to supply information required by EU legislation in itself constitutes “material information” whose omission falls within [reg.6: reg.6\(3\)\(b\)](#). The reference to “an EU obligation” was not amended by the secondary legislation amending the [2008 Regulations](#) on IP completion day, i.e. [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.6.
- 1399 [2008 Regulations](#) reg.6(3)(a).
- 1400 [2008 Regulations](#) reg.5(2)(a), above, para.[40-191](#).
- 1401 [2008 Regulations](#) reg.27B(1)(a), above, para.[40-189](#).
- 1402 See Vol.I, para.[9-024](#).
- 1403 Report paras 7.22–7.23 arguing that “deceives” in [reg.5\(2\)\(a\)](#) should be understood in the context to mean “mislead” rather than deliberately mislead.
- 1404 Report paras 7.26–7.28. The examples had been provided by H. Collins, [A Private Right of Redress for Unfair Commercial Practices: A Report for Consumer Focus](#) (April 2009) who referred to them as examples of misleading omissions.
- 1405 *Criminal Proceedings against Canal Digital Denmark A/S (C-611/14) EU:C:2016:800, 26 October 2016* and see above, para.[40-192](#).
- 1406 [2008 Regulations](#) reg.2(1) “consumer”; [reg.2\(2\)–\(6\)](#) “average consumer”; [reg.27B\(2\)](#) “transactional decision”: see above, paras [40-177](#), [40-178](#) and [40-194](#) respectively. Regulation 2(1) defines “product” generally (see above, para.[40-177](#)), but this definition is then qualified by [regs 27C–27D](#) for the purposes of the rights to redress provided by Pt 4A as explained below, para.[40-187](#).
- 1407 [2008 Regulations](#) reg.7(3)(a).
- 1408 [2008 Regulations](#) reg.7(3)(b).
- 1409 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Orange Polska SA (C-628/17) EU:C:2019:480*, 12 June 2019 at para.33. See also *Stichting WaterNet v MG (C-922/19) EU:C:2021:91, 3 February 2021* at paras 55–63 in the context of the prohibition of inertia selling under the 2005 Directive Annex 1 para.29, seen as an example of an aggressive commercial practice; *StWL Städtische Werke Lauf a.d. Pegnitz (C-102/20) EU:C:2021:954*, 25 November 2021 at paras 64–75 (on the aggressive commercial practice unfair in all circumstances in 2005 Directive Annex I point 26 “Making persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation”). On the significance of this decision and this opinion being made after IP completion day, see above, para.[40-004](#) and Vol.I, para.[1-029](#).
- 1410 *Prezes Urzędu Ochrony Konkurencji I Konsumentów v Orange Polska SA (C-628/17) EU:C:2019:480*, 12 June 2019 at paras 33–34. On “aggressive commercial practices” and the CJEU’s earlier case-law see Caronna (2018) 43 E.L.Rev. 880.
- 1411 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Orange Polska SA (C-628/17) EU:C:2019:480*, 12 June 2019 at para.43.

- 1412 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Orange Polska SA (C-628/17)*
EU:C:2019:480, 12 June 2019 at paras 44–45.
- 1413 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Orange Polska SA (C-628/17)*
EU:C:2019:480, 12 June 2019 at paras 47–48.
- 1414 2008 Regulations Sch.1 paras 24, 25 and 26. For examples of “aggressive commercial practices” see *R. v Waters [2016] EWCA Crim 1112, [2017] E.C.C. 5* (high-pressured sale of furniture to elderly person); *R v Jackson [2017] EWCA Crim 78* (pressurising elderly and vulnerable person to agree to pay for work trader said he had carried out).
- 1415 Law Commissions’ Report (2012), paras 7.67–7.82.
- 1416 2008 Regulations reg.27B(1)(b), (2) above, para.40-194.
- 1417 Law Commissions’ Report (2012), para.7.66 and see Vol.I, paras 10-072 et seq. where the complexities of the general law are explained.
- 1418 2008 Regulations reg.2(5)(a), above, para.40-178.
- 1419 Vol.I, paras 10-161 et seq.
- 1420 2008 Regulations reg.7(3)(b).
- 1421 Vol.I, Ch.10 especially paras 10-013—10-015.
- 1422 Above, paras 40-175—40-176.
- 1423 *IM v STING Reality sro (C-853/19)* EU:C:2020:522, Order of the Court, 2 July 2020 (available in French) (“*IM v STING Reality sro (C-853/19)*”).
- 1424 *IM v STING Reality sro (C-853/19)* at paras 21–25.
- 1425 2005 Directive art.9(c), implemented by the 2008 Regulations reg.7(2)(c).
- 1426 *IM v STING Reality sro (C-853/19)* at paras 48–50, observing that it would be relevant for this purpose if the national court found that the trader had concluded the contract of sale so as to avoid national controls on real security for consumer credit.
- 1427 *[2021] EWHC 2088 (Ch)* at [130]–[137]. On the HC’s decision in relation to alleged misleading actions or omissions see above, para.40-192 (note), and on the significance of the residents’ representatives see above, para.40-178 in relation to the definition of average consumer. The CMA also alleged that a term in the contracts between the provider and the residents which imposed payment of an “administration fee” was unfair, on which see below, para.40-150.
- 1428 *[2021] EWHC 2088 (Ch)* at [115], [130] and [131] respectively.
- 1429 *[2021] EWHC 2088 (Ch)* at [132].
- 1430 *[2021] EWHC 2088 (Ch)* at [133].
- 1431 *[2021] EWHC 2088 (Ch)* at [134].
- 1432 *[2021] EWHC 2088 (Ch)* at [135].
- 1433 *[2021] EWHC 2088 (Ch)* at [136].

- 1434 On IP completion day (on which see above, para.[40-004](#) and Vol.I paras [1-020](#) et seq.), [reg.27A\(5\)\(b\)](#) was amended so as to refer to an importer into the UK rather than into the EEA: [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.6(2) (the reference in [reg.1\(3\)](#) to [reg.8](#)'s coming into force on “exit day” must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) ss.[39\(1\)](#), [41\(4\)](#) and Sch.5 para.[1](#)) and see above, para.[40-174](#) (note to title).
- 1435 [2008 Regulations](#) [reg.27A\(5\)](#). This definition was modelled on the one provided by Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/12 art.2(2)(d), which was implemented in UK law by the [Consumer Rights Act 2015](#) ss.[9\(5\)](#), [59\(1\)](#) “producer”, on which see below, para.[40-499](#).
- 1436 Law Commissions’ Report (2012), para.6.64.
- 1437 Above, para.[40-181](#). Law Commissions’ Report (2012), para.6.65.
- 1438 Law Commissions’ Report (2012), paras 6.73–6.75.
- 1439 [2008 Regulations](#) [reg.27A\(4\)\(b\)\(ii\)](#).
- 1440 [Consumer Rights Act 2015](#) s.[9\(5\)](#), [\(6\)](#) and [\(7\)\(a\)](#) (goods); [s.34\(5\)](#), [\(6\)](#) and [\(7\)\(a\)](#) (digital content): see below, paras [40-499](#) and [40-550](#) respectively.
- 1441 [2008 Regulations](#) [reg.27A\(6\)](#). See also Bant and Paterson (2017) *80 M.L.R. 895 at 902 et seq.*
- 1442 [2008 Regulations](#) [reg.27B](#) and see above, paras [40-191](#)—[40-194](#) and [40-197](#). The Law Commissions Report 2014 para.7.85 referred to this element as an objective test, seeing it as similar to the “materiality” test of the general law of misrepresentation, on which see Vol.I, para.[9-048](#).
- 1443 Law Commissions Report 2014 paras 7.107–7.108.
- 1444 Law Commissions Report 2014 para.7.108.
- 1445 Law Commissions Report 2014 para.7.114.
- 1446 Law Commissions Report 2014 para.7.115.
- 1447 Law Commissions Report 2014 para.7.109 stating that the “significant factor” test “is in line with existing law, particularly in Scotland”, but referring to a discussion in their earlier Joint Consultation Paper Consumer Redress for Misleading and Aggressive Practices (2011) Consultation Paper No.199, Discussion Paper No.149 paras 8.7–8.8 which describes incompletely the position in English law (describing the “but for” test as requiring the entering of a contract and not also including the entering of a contract on different terms), and which observes that “[i]n Scotland there has been little discussion of misrepresentation and causation”.
- 1448 Vol.I, para.[9-045](#).
- 1449 Vol.I, paras [9-045](#)—[9-046](#).
- 1450 Vol.I, para.[9-047](#) relying on *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459, 483.
- 1451 Vol.I, para.[9-047](#), 10-031, *Barton v Armstrong* [1976] A.C. 104 (duress to the person); para.[10-099](#), *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555, [2003] 1 P. & C.R. 12 at [86] (actual undue influence). Cases of presumed undue influence are treated differently, as where it is presumed that one party had influence over the other and that a transaction between them was one “not readily explicable by the relationship”

between them, it will be presumed (or inferred) that the transaction was the result of an abuse of an influence unless the presumption is rebutted: Vol.I, para.[10-103](#).

1452 Vol.I paras [10-032—10-034](#).

1453 [2008 Regulations reg.7\(1\)\(a\)](#).

1454 [2008 Regulations reg.5\(2\) and \(3\)](#).

(iii) - The Three Rights to Redress

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 5. - Unfair Commercial Practices and the Consumer's Rights to Redress

(d) - The Rights to Civil Redress for Consumers

(iii) - The Three Rights to Redress

Overview of the consumer's rights

- 40-204 A consumer who enters a contract with, or makes a relevant payment to, a trader as the result of a “prohibited practice”¹⁴⁵⁵ may have a “right to redress”¹⁴⁵⁶ in the form of one or more remedies (termed “rights” by the 2008 Regulations): to “unwind” the contract or payment¹⁴⁵⁷ or, in the case of business to consumer contracts, to obtain a discount,¹⁴⁵⁸ and in either case to claim damages.¹⁴⁵⁹ According to the Law Commissions, the overall strategy of the new rights was “to approximate the outcomes under the current law, but in a simplified way”.¹⁴⁶⁰ The consumer may enforce a right to redress by a claim in civil proceedings.¹⁴⁶¹ The claim will be subject to the Limitation Act 1980 as if it were an action founded on a simple contract.¹⁴⁶²

The right to unwind the contract: business to consumer contracts

- 40-205 If a consumer has entered a “business to consumer” contract¹⁴⁶³ and the three conditions of the general availability of the consumer's rights to redress¹⁴⁶⁴ are fulfilled, the consumer will have a right to “unwind” the contract provided that (i) the consumer indicates to the trader that he or she rejects the product within a limited period,¹⁴⁶⁵ (ii) that the “product” remains “capable of rejection”¹⁴⁶⁶ and (iii) the consumer has not already exercised the right to discount for the same

contract and prohibited practice.¹⁴⁶⁷ The period is 90 days from the later of the day on which the contract was made or, in effect, on which the consumer first received delivery or performance.¹⁴⁶⁸ The product is incapable of rejection only if (as the case may be) the goods have been fully consumed, services have been fully performed,¹⁴⁶⁹ digital content was available to the consumer for a fixed period that has expired,¹⁴⁷⁰ the lease has expired or the right conferred on the consumer has been fully exercised.¹⁴⁷¹ If the consumer has a right to unwind (which, as stated above, requires that the consumer has notified the trader that he or she rejects the product), the contract comes to an end and the consumer and the trader are released from their obligations under it¹⁴⁷²; the trader must give the consumer a refund¹⁴⁷³; and, if the contract was for the sale or supply of goods, the consumer must make the goods available for the trader to collect.¹⁴⁷⁴ Where the consumer has paid money under the contract, in principle the amount paid must be refunded without any deduction for use,¹⁴⁷⁵ though this is qualified by detailed provisions governing cases in which the consumer has transferred something other than money¹⁴⁷⁶ and also where the contract was for the sale or supply of goods on a regular basis.¹⁴⁷⁷ This general position is to be compared with the effects of cancellation by a consumer of an off-premises or distance contract, as cancellation also brings to an end the obligations of the parties to the contract, but generates an obligation in the trader to reimburse all payments received from the consumer other than payments for delivery (subject to a possible qualification for diminution in value through their handling) and in principle also an obligation in the consumer to return any goods supplied.¹⁴⁷⁸

The right to unwind the contract: consumer to business contracts

- 40-206** If the consumer has entered a contract under which the consumer is to sell goods to the trader,¹⁴⁷⁹ the consumer has the right to treat the contract as at an end,¹⁴⁸⁰ so that the parties are released from their obligations under it. There is no time limit, except as applies under the general limitation period.¹⁴⁸¹ If the consumer exercises the right to unwind, he or she will have a right to the return of the goods transferred if they can be returned in the condition they were in when sold by the consumer, and must refund any payment made by the trader. If the goods cannot be returned in the same condition, the consumer has the right to be paid the amount (if any) by which the market price of the goods when the trader paid for them exceeds what the trader paid for them.¹⁴⁸²

Unwinding payments

- 40-207** Where the three general conditions for the availability of a right to redress are satisfied,¹⁴⁸³ a consumer who has made a payment in full or partial settlement of the consumer's liabilities or

purported liabilities to the trader for a product as a result of a prohibited practice, may recover that payment to the extent that the consumer was not required (i.e. legally liable) to make it.¹⁴⁸⁴ In other words, the right to unwind a payment applies only if the payment made was not due: the consumer cannot, for example, recover a payment that was due on the ground that the consumer would not have made the payment at that time but for a misleading action or aggressive practice on the part of the trader.¹⁴⁸⁵

The right to a discount

- 40-208** In the case of a business to consumer contract, if the consumer has not exercised the right to unwind the contract,¹⁴⁸⁶ the consumer has a right to a discount.¹⁴⁸⁷ If the consumer has made one or more payments to the trader, the consumer may recover a relevant percentage; if payments are still to be made, they may be reduced accordingly. For these purposes, for most contracts, the **2008 Regulations** provide “pre-set bands”¹⁴⁸⁸; the relevant percentages are as follows:

- “(a)if the prohibited practice is more than minor, it is 25%,
- (b)if the prohibited practice is significant, it is 50%,
- (c)if the prohibited practice is serious, it is 75%, and
- (d)if the prohibited practice is very serious, it is 100%.”¹⁴⁸⁹

It is clear, therefore, that where the prohibited practice is minor or less than minor, no discount is available.¹⁴⁹⁰ The seriousness of the prohibited practice is to be assessed by reference to:

- “(a)the behaviour of the person who engaged in the practice,
- (b)the impact of the practice on the consumer, and
- (c)the time that has elapsed since the prohibited practice took place.”¹⁴⁹¹

The Law Commissions accepted that pre-set bands for discounts could operate unfairly in purchases where there is clear evidence of the difference between what the product was worth and what the consumer paid for it, for example, in a £10,000 purchase where the trader can show that the loss to the consumer was 10 per cent, the court may be faced with a harsh choice if it were only able to award a discount of 25 per cent or nothing.¹⁴⁹² The **2008 Regulations** reflect this concern by providing an exception to their application for cases where the amount payable under the contract is more than £5,000 and there is clear evidence that the market price of the product is lower than the contract price: here, the relevant percentage is “the percentage difference between the market price of the product and the amount payable for it under the contract” rather than one of

the pre-set bands.¹⁴⁹³ The wording of this provision is ambiguous, but it is submitted that it refers to the percentage by which the contract price exceeds the market price (which on the facts of the example given above would be 11.11 per cent), rather than the percentage by which the market price is lower than the contract price (which on the same facts would be 10 per cent), since if the second percentage were intended, the amount of the discount would be the difference between the contract price and the market price, and it would have been simpler to say so. This replacement of the pre-set bands by this special test means that where traders sell or supply high-value products their behaviour (and therefore any penal element) cannot be taken into account¹⁴⁹⁴; nor can the time that has elapsed since the prohibited practice took place or the “impact of the practice on the consumer” to the extent to which this is not already reflected in the special percentage discount applicable.

Nature of the right to a discount

- 40-209 The most obvious purpose of the discount is to provide a simple mechanism to compensate the consumer who has been misled or pressured into buying a product that is worth less than the consumer had agreed to pay, but who cannot (or chooses not to) unwind the contract.¹⁴⁹⁵ However, it is clear that these discounts are not just a form of price reduction,¹⁴⁹⁶ since (except where the price is over £5,000) there is no reference to the actual value of the product. Although the Law Commissions’ original intention was that “the consumer would receive compensation in the form of a discount on the price … the new [legislation] should use broad bands of detriment”,¹⁴⁹⁷ the Regulations refer to “the seriousness of the prohibited *practice*” (emphases supplied), not the seriousness of the loss to the consumer. The “impact on the consumer” is just a factor to be taken into account together with the behaviour of the person (trader or producer¹⁴⁹⁸) and the time that has elapsed since the prohibited practice took place, and is not the measure to be used, while the nature of the trader’s behaviour would not normally be relevant to calculation of damages. Nor is the discount a form of “aggravated” damages (seeking to compensate the consumer for the additional hurt caused by the trader’s practices¹⁴⁹⁹), as this is a head under which the consumer may recover damages.¹⁵⁰⁰ The right to a discount seems therefore to be partly aimed at compensation for loss of value and partly a form of civil penalty.¹⁵⁰¹ If this is so, then its practical implication could be that its award should not affect any further amount that a consumer may be able to recover on some other basis, such as damages for fraud or for breach of contract, as Pt 4A prevents double recovery only of “compensation”.¹⁵⁰²

The right to damages in respect of contracts made as a result of a prohibited practice

- 40-210 The [2008 Regulations](#) provide the consumer who has entered a contract as the result of a prohibited practice by the trader with a right to damages, whether or not the consumer unwinds the contract or claims a discount.

[1503](#)

U Where the prohibited practice is a misleading action, this right to damages has a particularly uncomfortable relationship with wider bases of recovery under the law of misrepresentation, both at common law and under the [Misrepresentation Act 1967](#).¹⁵⁰⁴ By contrast, where the prohibited practice consists of an aggressive commercial practice, as the Law Commissions intended, the Regulations create a right to damages which does not clearly otherwise exist under the general law.¹⁵⁰⁵

The right to damages in respect of payments made as a result of a prohibited practice

- 40-211 The right to damages provided by the [2008 Regulations](#) is not confined to consumers who have entered a contract with a trader as the result of a prohibited practice; it extends to consumers who have made a payment to the trader in respect of a “product” as the result of a prohibited practice.¹⁵⁰⁶ As earlier noted, the Regulations adopt an extensive view of “product” for this purpose, providing that:

“(1A)A trader (‘T’) who demands payment from a consumer (‘C’) in full or partial settlement of C’s liabilities or purported liabilities to T is to be treated for the purposes of these Regulations as offering to supply a product to C.

(1B)In such a case the product that T offers to supply comprises the full or partial settlement of those liabilities or purported liabilities.”¹⁵⁰⁷

Unlike the right to unwind,¹⁵⁰⁸ the right to damages exists not only as regards payments that were not in fact due but also payment of sums that were due. There will seldom be a viable claim for financial loss in such cases,¹⁵⁰⁹ but it is not hard to imagine cases in which the consumer should be compensated for distress caused by an aggressive practice, which consists of “harassment, coercion or undue influence”.¹⁵¹⁰

Non-financial losses

- 40-212 The Regulations provide that the consumer may claim damages for “alarm, distress or physical inconvenience or discomfort”¹⁵¹¹ that would not have occurred if the prohibited practice had not taken place.¹⁵¹² This provision seems particularly likely to be relevant to cases where the prohibited practice was an aggressive commercial practice, but applies equally where it was a misleading action.

Measure of recovery for financial loss

- 40-213 A consumer who has entered a contract or made a payment as the result of a prohibited practice by the trader may recover damages for financial loss incurred which he would not have incurred if the prohibited practice had not taken place.¹⁵¹³ In this respect, the Regulations specify that this right to damages:

“... does not include the right to be paid damages in respect of the difference between the market price of a product and the amount payable for it under a contract.”¹⁵¹⁴

This formula imposes an ambiguous restriction. In cases where the prohibited practice has resulted in a contract,¹⁵¹⁵ it could mean that the consumer cannot recover damages representing a good bargain, i.e. representing the difference between the price paid for goods or services and their *higher* market value (oddly referred to as “market price”) (the first hypothesis), as was apparently intended by the Law Commissions.¹⁵¹⁶ Such a restriction would accord with the established position as regards the measure of damages for fraud, negligent misstatement at common law, and under s.2(1) of the Misrepresentation Act 1967, often expressed in terms of allowing a misrepresentee to recover a “tort measure” rather than a “contract measure”.¹⁵¹⁷ On the other hand, the formula could mean that the consumer cannot recover damages to compensate him for a bad bargain, i.e. representing the difference between the price paid for goods or services and their *lower* market value (the second hypothesis). Or, of course, it could be thought to refer equally to both hypotheses. In the case of the second hypothesis, it may be unusual for a consumer to need to rely on a claim for damages in order to recover for loss caused by a bad bargain in this way. Where the consumer can exercise the right to unwind the contract under the Regulations or the right to rescind at common law (which remains available in principle in parallel to the rights to redress¹⁵¹⁸), then he will be able to recover any price paid and so throw the bad bargain back onto the trader (even though the consumer also has to return any goods transferred).¹⁵¹⁹ And if neither the right to unwind nor the right to rescind are, or are any longer, available to the consumer,

then he may still have a right to a discount under the Regulations,¹⁵²⁰ although, except where the price payable was more than £5,000, the amount of such a discount is not determined by reference to the difference between the market value (again, referred to as the “price”) and the amount payable under the contract, but rather to the “seriousness” of the prohibited practice, as earlier explained.¹⁵²¹ Nevertheless, there could be cases in which a consumer could not recover in respect of his bad bargain, either by way of recovery of the price or a discount and would therefore wish to do so by way of damages. An interpretation of the **2008 Regulations** which would preclude such a recovery by way of a right to damages under **Pt 4A** would not matter were it not for the fact that where a consumer has a right to redress under the Regulations, he does not have a right to damages under **s.2(1) of the 1967 Act**, as will later be explained.¹⁵²² The latter unattractive result could be avoided if the restricting formula in the Regulations quoted earlier in this paragraph were interpreted to refer only to the first hypothesis so as to preclude recovery in respect of loss of any good bargain, on the basis that this is the likely intention of the legislator given that it appears to have been the view of the Law Commissions and also accords with the position under the general law of misrepresentation to which this legislative right to damages is clearly related.

Reasonably foreseeable losses

- 40-214 In the case both of financial and non-financial losses, the Regulations restrict the damages recoverable by a consumer to the “loss that was reasonably foreseeable at the time of the prohibited practice”.¹⁵²³ In this respect, the criterion of reasonable foreseeability reflects the position under the general law of remoteness in the tort of negligence and for breach of contract,¹⁵²⁴ rather than the special rule of directness applicable to damages in the tort of deceit and applied by the Court of Appeal to liability under **s.2(1) of the Misrepresentation Act 1967** (though this has been the object of criticism).¹⁵²⁵ On the other hand, the Regulations require that it is the *loss* that was reasonably foreseeable, rather than (as under the general law governing the tort of negligence and breach of contract) the *type* or *kind* of loss. The form of words in the Regulations is therefore apparently more restrictive than the general law, as a type of loss may be reasonably foreseeable even where the particular loss suffered by the consumer was not so foreseeable at the time of the prohibited practice.

Defence of due diligence

- 40-215 The trader’s liability to damages under the Regulations is subject to what amounts to a defence of due diligence on the part of the trader and which was intended to reflect the position under **s.2(1) of the Misrepresentation Act 1967**, though using the language of the criminal law defence in the Regulations.¹⁵²⁶ Thus under **reg.27J**:

Regulation 27j

“(5)A consumer does not have the right to damages if the trader proves that—

(a)the occurrence of the prohibited practice in question was due to—

(i)a mistake,

(ii)reliance on information supplied to the trader by another person,

(iii)the act or default of a person other than the trader,

(iv)an accident, or

(v)another cause beyond the trader’s control, and

(b)the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice.”

Again, though, it should be borne in mind that damages are available under the Regulations not merely in respect of misleading actions (which may well be innocent in the sense of both honest and careful so as to attract this defence) and in respect of “aggressive commercial practices”. Although the definition of “aggressive commercial practice” is broad enough to apply to non-intentional or even non-negligent conduct on the part of the trader, most cases of “harassment or coercion” as opposed to “undue influence” may well be thought as unlikely to attract the application of this due diligence defence.

General relationship of “rights to redress” and claims under the wider law

40-216 Regulation 27L provides that:



Regulation 27l

“(1)Nothing in [Part 4A] affects the ability of a consumer to make a claim under a rule of law or equity, or under an enactment, in respect of conduct constituting a prohibited practice.”

However, reg.27L adds that the consumer may not

“(2)(a)make a claim to be compensated under a rule of law or equity, or under an enactment, in respect of such conduct if the consumer has been compensated under this Part in respect of the conduct, or

(b)make a claim to be compensated under this Part in respect of such conduct if the consumer has been compensated under a rule of law or equity, or under an enactment, in respect of the conduct.”¹⁵²⁷

There is no definition of “compensation” for this purpose, and the question arises whether it is wider than merely money awards solely aimed at the indemnisation of the loss or harm caused to the consumer. It is submitted that “compensation” is wider than “damages” (which are normally based on loss¹⁵²⁸) and, in particular, should be interpreted so as to cover “compensation orders” made by criminal courts, even though the courts take into account factors other than the harm caused to the victim.¹⁵²⁹ However, here there is an apparent contrast of approach between the 2008 Regulations and the statutes which have empowered criminal courts to award compensation orders. Regulation 27L(2) appears to provide that where a consumer has been compensated under an enactment (including therefore the statutes providing for compensation orders in respect of a criminal offence), then they “*may not ... make a claim* to be compensated under this Part in respect of such conduct”.¹⁵³⁰ By contrast, under the Sentencing Act 2020 s.144 (which replaced earlier provision in the Powers of the Criminal Courts Act 2000¹⁵³¹) where a person has been awarded a compensation order in respect of loss or damage and later claims damages in a civil court in respect of that loss or damage,

“(2)The damages in the civil proceedings must be assessed without regard to the order.

(3)But the claimant may recover only an amount equal to the aggregate of—

(a)any amount by which the damages assessed exceed the compensation, and

(b)a sum equal to any portion of the compensation which the person fails to recover (‘unrecovered compensation’).¹⁵³²

Whereas the 2008 Regulations appear to *prevent* a claim for damages after compensation has been awarded, the 2020 Act appears instead to allow the claimant to recover the amount by which damages exceed the compensation. It is submitted that the solution to this apparent conflict is to interpret reg.27L(2) as referring only to cases to the extent to which the claimant has already received compensation for the relevant loss or damage caused by the trader’s conduct, that is to say, in order to prevent double recovery in respect of the same loss or other harm. Finally, taking a broad approach to the interpretation of compensation for the purposes of reg.27L raises the question of the nature of an award of a discount under the Regulations for these purposes. As has been explained, although a discount may take into account the consumer’s losses, its foundation in the “seriousness” of the trader’s (or producer’s) conduct indicates that it is not based purely on

loss. If, however, compensation for the purposes of reg.27L were taken to be broader than merely compensation for loss, then any award of a discount under the Regulations (despite its possibly penal aspect) would also count as “compensation” so as to affect any claim by the consumer for damages, whether under the Regulations themselves or under the general law.

Rescission for misrepresentation, duress or undue influence

- 40-217 Regulation 27L(1) quoted in the preceding paragraph therefore means that, subject to their own conditions, a consumer may have a right to rescind the contract for misrepresentation,¹⁵³³ duress, undue influence or unconscionability,¹⁵³⁴ whether or not he also has a right to redress under the Regulations. There may be occasions when the consumer will want to rely on this remedy, rather than on the right to unwind the contract under the 2008 Regulations.¹⁵³⁵

Damages for fraud

- 40-218 Regulation 27L(1) also means that, subject to its own conditions, a consumer may have a right to damages in the tort of deceit for fraud, whether or not he also has a right to redress under the Regulations. Where a consumer can establish fraud, the remedy at common law may have advantages over the damages remedy provided by the Regulations in respect of misleading actions, in particular as the test of remoteness in the tort of deceit is one of directness, whereas the test of remoteness under the Regulations is reasonable foreseeability of the consumer’s loss.¹⁵³⁶ Any claim made or to be made must be read subject to the provision in reg.27L(2) interpreted above as being against double recovery.¹⁵³⁷

Remedies for breach of contract

- 40-219 In the case of a misleading action, if it can be shown that the trader’s statement amounted to an element of the description of the product,¹⁵³⁸ or (because it was information that the trader was required to give under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013¹⁵³⁹) it was “included as a term of the contract”,¹⁵⁴⁰ or if it amounted to an express term of the contract,¹⁵⁴¹ and that the statement was false, the consumer may have the right to terminate the contract and will have a right to damages, though the damages must not include compensation awarded under Pt 4A of the 2008 Regulations.¹⁵⁴² It may be difficult to determine whether, or to what extent, a consumer who has been awarded a discount has been

compensated in respect of the difference between the value the product would have had if it had complied with the contract and its actual value.¹⁵⁴³

Misrepresentation Act 1967 s.2 disapplied

- 40-220 There is, however, an important qualification on the general permission in reg.27L(1) allowing consumers to make a claim on a legal basis other than the Regulations in respect of conduct constituting a prohibited practice.¹⁵⁴⁴ On the creation of the consumer's rights to redress in 2014, the **Misrepresentation Act 1967** was amended so that a consumer who has a right to redress under Pt 4A of the 2008 Regulations in respect of the conduct constituting misrepresentation does not have a right to damages under s.2 of the Act.¹⁵⁴⁵ Section 2(4) of the 1967 Act therefore provides that s.2:

“... does not entitle a person to be paid damages in respect of a misrepresentation if the person has a right to redress under Part 4A of the [2008 Regulations] in respect of the conduct constituting the misrepresentation.”

The thinking behind this disapplication was that leaving two possible grounds for consumer claims would lead to greater complexity in litigation.¹⁵⁴⁶ Nevertheless, s.2(4) is a very strange provision. In the case of the right to damages under s.2(1) of the 1967 Act, s.2(4)'s effect is not merely to prevent consumers from claiming damages under s.2 of the 1967 Act where they have a right to *damages* under the 2008 Regulations, but in all cases where they have a right to *redress*, that is, including a right to unwind the contract or to a discount as well as damages. This would not matter if it were not for the fact that a consumer could have a right to unwind the contract or to a discount but no *practical* right to damages under the 2008 Regulations, notably, where his loss was not reasonably foreseeable by the trader at the time of engaging in the prohibited practice.¹⁵⁴⁷

In this situation, the consumer would almost certainly have a right to a discount¹⁵⁴⁸ (the right to unwind may have expired¹⁵⁴⁹) and therefore the effect of the rule in s.2(4) would be that he could not rely on s.2(1) in order to recover damages under the more generous (if criticised) rule of remoteness there applicable.¹⁵⁵⁰ Moreover, apart from different rules of remoteness of damage, other differences between claims under s.2(1) and claims for damages under the 2008 Regulations may make them more or less attractive to a consumer depending on context. So, while the right to damages under the Regulations may compensate the consumer's “alarm, distress or physical inconvenience or discomfort”, these heads of loss are less clearly recoverable under s.2(1)¹⁵⁵¹; on the other hand, while the limitation periods for rights to redress and claims under s.2(1) are both six years, the time of accrual may differ.¹⁵⁵² And while contributory negligence may be a defence to a claim under s.2(1),¹⁵⁵³ it is less clear that such a defence would apply to a claim for damages under Pt 4A.¹⁵⁵⁴ Certainly, the drawing of an exclusive line between claims under s.2 and the consumer's right to redress under the 2008 Regulations places considerable stress on the

scope of availability of the new rights, which, as has been seen, is complex. In particular, where the contract does not concern a “product” as redefined for the purposes of Pt 4A,¹⁵⁵⁵ the consumer may claim only under s.2 and not under the 2008 Regulations.

The consumer’s rights to redress and s.2(2) of the 1967 Act

- 40-221 Moreover, the relationship between a consumer’s right to redress and the application of s.2(2) of the 1967 Act which provides a power in a court to award damages in lieu of rescission is not clear.¹⁵⁵⁶ Section 2(4) of the 1967 Act provides that:

“... this section does not entitle a person to be paid damages in respect of a misrepresentation if the person has a right to redress ... in respect of the conduct constituting the misrepresentation” (emphasis added).

This could be thought to rule out the possibility of an award of damages under s.2(2) as well as damages under s.2(1), but it is submitted that s.2(4) should not be so interpreted, as the unattractive consequence of such an interpretation would be that where a consumer has a right to redress under the Regulations, then the court would lose its power to refuse rescission (for example, in respect of an insignificant and purely innocent misrepresentation), as the court would not be in a position to “declare the contract subsisting *and award damages* in lieu of rescission” as provided by s.2(2).¹⁵⁵⁷ This consequence would be avoided if s.2(2) were interpreted as not “entitling” the misrepresentee/consumer to damages given that the award of damages is subject to the discretion of the court, as this would then mean that the disapplication in s.2(4) would not affect s.2(2) at all.

Waiver or contractual exclusion of rights to redress

- 40-222 Can the consumer’s rights to redress be lost by “waiver” (including, for example, affirmation of the contract so as to lose the right to unwind) or by contractual agreement, whether in the original consumer contract between the parties or subsequently? Under the general law of misrepresentation contract terms which exclude liability for misrepresentation are subject to a test of reasonableness,¹⁵⁵⁸ and in the case of consumer contracts, are subject to the general test of unfairness in the Consumer Rights Act 2015,¹⁵⁵⁹ but the 2008 Regulations are silent on the issue whether a trader can exclude liability under the rights to redress, as is the 2005 Directive—in the latter case, unsurprisingly given that the Directive puts aside “contract law” from its scope.¹⁵⁶⁰ However, the 2008 Regulations provide that:

“Except as provided by Part 4A, an agreement shall not be void or unenforceable by reason only of a breach of these Regulations.”¹⁵⁶¹

This provision reflects the earlier (and still residual) position that the **2008 Regulations** (following the 2005 Directive) do not affect “contract law”, while excepting the situations where Pt 4A does affect contracts, notably, by the grant of rights to unwind the contract, a discount and damages.¹⁵⁶² What this means is that the commission of an unfair commercial practice within the meaning of the **2008 Regulations** does not itself affect the enforceability of any agreement made between a consumer or a trader except as provided by Pt 4A: it leaves open, therefore, the unenforceability of a contract term or contractual agreement which seeks to exclude or modify the effect of the rights to redress under Pt 4A. In the absence of express provision in the **2008 Regulations**, it is submitted that such a *contract term* in the original consumer contract would fall under the general test of unfairness of terms in consumer contracts.¹⁵⁶³ On the other hand, where a consumer concluded a contract with a trader whose “main subject matter” was to settle or otherwise exclude the consumer’s right to redress under the **2008 Regulations**, this contract may not fall to be tested for its fairness as it could come within the special exclusion for terms that specify the main subject matter of the contract, subject to the proviso that the terms are transparent and prominent.¹⁵⁶⁴ Such an agreement (if contractual) or a payment could themselves give rise to a right to redress under Pt 4A, subject to the general conditions for their availability and any particular conditions applicable to the particular right to redress in question.¹⁵⁶⁵ More generally, however, the legislative controls on unfair terms in consumer contracts would not affect any non-contractual waiver under the general law by the consumer of his or her rights under Pt 4A of the **Regulations**,¹⁵⁶⁶ but the absence of provision in Pt 4A for waiver or affirmation as an exception to the availability of these rights argues against their applying and this position would further the purpose of the new consumer rights which are designed to be simpler and clearer than the general law.¹⁵⁶⁷ In particular, in the case of the consumer’s right to unwind, the **Regulations** provide that the consumer enjoys this right only for a very short period (90 days) and further provides that, if the consumer has exercised the right to a discount, the consumer no longer enjoys the right to unwind. This structure argues that, within the 90-day period and unless the consumer has opted for a discount, he should not lose his right to unwind by action which would constitute affirmation under the general law.

Footnotes

1455 Above, paras 40-189—40-203.

1456 **2008 Regulations** reg.27A(1).

1457 **2008 Regulations** regs 27E—27H; below, paras 40-205—40-207.

1458 **2008 Regulations** reg.27I; below, paras 40-208—40-209.

1459 **2008 Regulations** reg.27J; below, paras 40-210—40-215.

1460 Law Commissions Report (2012), para.8.19.

- 1461 2008 Regulations reg.27K.
- 1462 2008 Regulations reg.27K(5).
- 1463 i.e. one under which the trader is to supply a product to the consumer: see above, para.[40-188](#).
- 1464 See above, paras [40-188](#)—[40-203](#).
- 1465 2008 Regulations reg.27E(1)(a). The drafting of the 2008 Regulations is curious: rather than conferring a right to unwind that the consumer may exercise and that will expire if the consumer does not exercise it within a limited period, the consumer will have a right only if he or she exercises it within the period. If the consumer has the right and exercises it, the contract comes to an end: [2008 Regulations reg.27E\(1\)\(a\)](#) and [27F\(1\)](#).
- 1466 2008 Regulations reg.27E(1)(b).
- 1467 2008 Regulations reg.27E(10).
- 1468 See [2008 Regulations reg.27E\(3\)–\(7\)](#). cf. the 30 day period for the consumer’s “short-term right to reject” goods under the [Consumer Rights Act 2015 s.20](#) and [22](#), below, para.[40-518](#).
- 1469 Law Commissions Report (2012), para.8.77 considered that a consumer who abandons services mid-performance (e.g. a consumer who is misled about a theatre performance and who leaves before the final curtain call) should have a right to a full refund. However, the reason for excluding the right to unwind (with consequential refund) under the Regulations where services have been fully performed is far from clear, given that the prohibited practice may have resulted in the consumer contracting for services that were of no value to him or her even though fully completed, while in other cases a consumer may derive a considerable benefit from services that have only been performed in part yet be entitled to a refund of the whole price. Note, however, that in some circumstances the consumer may obtain a 100 per cent discount of the price (below, para.[40-208](#)) as foreseen by Law Commissions Report (2012), para.8.78.
- 1470 Note that the [2008 Regulations](#) clearly contemplate the consumer being entitled to reject digital content, whereas under the [Consumer Rights Act 2015 Ch.3](#), a consumer who has been supplied digital content that does not conform to the statutory requirements has no right to reject, the drafters having taken the view that there cannot be a right to reject when there is nothing to give back: see [Consumer Rights Act 2015 ss.42](#) especially at [42\(7\)](#), below, para.[40-565](#). It is not clear how digital content that is supplied on a tangible medium is to be treated under the [2008 Regulations](#), as goods or as digital content. It seems better to view them as goods, so that the consumer must make the tangible medium available for collection by the trader, but if the digital content was to be available to the consumer for only a limited period to regard the goods as “fully consumed” when that period expires, so that the consumer will lose the right to unwind just as with other types of digital content. This distinction would accord with the treatment of digital content under the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134\)](#) (above, paras [40-064](#) et seq.). The [2013 Regulations](#) provide that a consumer who has concluded an off-premises or distance contract for the supply of digital content not on a tangible medium with a right of cancellation, but then qualify this where the trader begins performance

- with the express consent of the consumer and with an acknowledgement that the right to cancel will be lost: [2013 Regulations reg.36\(1\)](#) and [\(2\)](#), above, para.[40-118](#).
- 1471 [2008 Regulations reg.27E\(8\)–\(9\)](#).
- 1472 [2008 Regulations reg.27F\(1\)\(a\)](#). It is not clear whether this would affect obligations that are normally intended to survive termination or avoidance of the contract, such as obligations of confidentiality.
- 1473 [2008 Regulations reg.27F\(1\)\(b\)](#); see further below.
- 1474 [2008 Regulations reg.27F\(1\)\(c\)](#). Under other legislation the term “contract for the supply of goods” includes contracts for work and materials, which will result in the goods being incorporated into other goods (as when parts are used to repair a car) or land (as in a building contract) (e.g. under the [Supply of Goods and Services Act 1982 s.1](#)); under the [Consumer Rights Act 2015](#), the contract will be regarded as a mixed contract, partly for the supply of goods and partly for services, see [ss.1\(3\)–\(5\)](#) below, paras [40-486](#) and [40-490](#). The [2008 Regulations](#) also refer to a “mixed contract”, i.e. “a contract relating to a product which consists of any two or more of goods, a service, digital content, immoveable property or rights”, but only for the purposes of setting the “relevant day” for the start of the 90-day period for the right to unwind: [reg.27E\(5\)](#) and [\(6\)](#). If the goods cannot readily be detached (cf. [Borden \(UK\) Ltd v Scottish Timber Products Ltd \[1979\] 3 W.L.R. 672, CA; Hendy Lennox \(Industrial Engines\) Ltd v Grahame Puttick \[1984\] 2 All E.R. 152 \(QBD\)](#)), it can be said that they will have ceased to have an independent existence and therefore should be treated as “fully consumed” within [reg.27E\(8\)\(a\)](#), with the result that the consumer has no right to redress.
- 1475 [2008 Regulations reg.27F\(3\)](#). Law Commissions Report (2012), paras 8.83–8.96 (rejecting an analogy with the then applicable position under [Sale of Goods Act 1979 s.48C\(3\)](#)). This provision is reflected in the “final right to reject” in the [Consumer Rights Act 2015 s.24\(8\)–24\(10\)](#), below, para.[40-522](#).
- 1476 [2008 Regulations reg.27F\(4\)–\(6\)](#).
- 1477 [2008 Regulations reg.27F\(7\)–\(10\)](#).
- 1478 [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134\) regs 33–38](#) above, paras [40-126](#)—[40-129](#).
- 1479 [2008 Regulations reg.27A\(3\)](#) has the effect that contracts under which “the trader supplies or agrees to supply a product to the consumer as well as paying or agreeing to pay the consumer” (such as part-exchange contracts) are not “consumer to business” contracts; they may instead count as “business to consumer” contracts: above, para.[40-188](#). There are special provisions for “unwinding” contracts under which the consumer has transferred something other than money: see [2008 Regulations reg.27F\(4\)–\(5\)](#).
- 1480 The phrase “treat the contract as at an end” seems to be used here in a different sense from its use in the [Consumer Rights Act 2015](#). Under the Act, it is assumed that a consumer may enjoy “a right to treat the contract as at an end” for breach of an express term and for this purpose “treating a contract as at an end means treating it as repudiated”: [Consumer Rights Act 2015 s.19\(11\)\(e\)](#) and [19\(13\)](#) (goods contracts);

s.54(7)(f) (services contracts), that is, what is often called termination for breach of contract, which is coupled with a right to damages for breach of contract. The 2015 Act s.20(4) also sees its special consumer rights to reject goods as involving the treating of the contract as at an end and may be accompanied with damages: 2015 Act ss.19(3), (4), (10) and (11)(a): see below, paras 40-515—40-526 and (on the general law) Vol.I, paras 27-001 et seq. It cannot be intended that a consumer who unwinds a consumer to business contract entered into as the result of a prohibited practice by a trader should recover damages for breach of contract; the consumer's right to damages is governed by reg.27J, see below, paras 40-210—40-215.

1481 2008 Regulations 27K(5), applying the general six-year period applicable to actions founded on simple contract under s.6 of the Limitation Act 1980. It seems unlikely that the consumer will lose this right by inaction unless it is possible to infer an agreement (for good consideration) to abandon the right, or possibly a promissory estoppel which prevents the consumer from enforcing the right (see Vol.I, paras 6-093 et seq.), but see below, para.40-222 on the question whether these general exclusions of a claim by a consumer apply in the context of Pt 4A rights.

1482 2008 Regulations reg.27G(6).

1483 Above, paras 40-188—40-203.

1484 2008 Regulations reg.27H. The Law Commissions Report (2012), para.8.102 acknowledged that a payment made as a result of misleading actions or threats could be recovered under the general law of unjust enrichment, but this law was seen by consumer groups as “complex and difficult” and so the new law should make this recovery “more accessible”. On the general law see Vol.I, paras 32-037 et seq. (mistake) and 32-104 et seq. (compulsion).

1485 Nor is there any right to a discount in relation to consumer payments, below, para.40-208. On the other hand, this restriction limits the right to unwind the payment rather than the consumer's right to redress more generally, so that the consumer who pays a sum that is due may have a right to damages under reg.27J: see below, para.40-211.

1486 The drafting in reg.27I(1)(b) seems inconsistent with earlier provisions. In the case of a business to consumer contract, the consumer does not have a right to unwind at all unless the consumer notifies the trader within the stated period, etc. If the consumer has this right, unwinding then seems to follow automatically. (See above, para.40-205.) But the intention behind the words “if the consumer has not exercised the right to unwind” seems clear enough.

1487 2008 Regulations reg.27I(1). The fact that the consumer has not exercised the right to unwind in respect of the contract assumes that the consumer had such a right but did not exercise it. This means that a consumer who has made a payment which was *due* cannot enjoy a right of discount under reg.27I as he or she does not enjoy a right to unwind the contract under reg.27H in these circumstances: above, para.40-207. It should be noted that there is no right to a discount where a consumer has made a “consumer payment” as the terms of reg.27I(1) provide that “[a] consumer has the right to a discount *in respect of a business to consumer contract* [emphasis added]”.

- 1488 Law Commissions Report (2012), paras 8.125–8.135.
- 1489 [2008 Regulations reg.27I\(4\)](#).
- 1490 cf. Law Commissions Report (2012), para.8.137 setting a lowest band of “0 per cent if [the prohibited practice is] negligible”.
- 1491 [2008 Regulations reg.27I\(5\)](#).
- 1492 Law Commissions Report (2012), para.8.133.
- 1493 [2008 Regulations reg.27I\(6\) and \(7\)](#).
- 1494 See below, para.[40-209](#).
- 1495 Note that damages recoverable under the [2008 Regulations reg.27J](#) may not include “the difference between the market price of a product and the amount payable for it under a contract”: [reg.27J\(3\)](#), see below, para.[40-213](#).
- 1496 See below, paras [40-521](#), [40-563](#) and [40-586](#) for price reduction in the context of failures in conformity of goods, digital content and services under the [Consumer Rights Act 2015](#).
- 1497 Consumer Redress for Misrepresentation and Aggressive Practices: a Joint Consultation Paper (LCCP 199/SLCDP 149, 2011), paras 14.49–14.50. The Report does not explicitly depart from the emphasis on detriment, though it states that the level of discount should depend on: “(1) the impact of the commercial practice on the value of the product; (2) the trader’s behaviour; and (3) the amount of time that has passed...” (para.8.136). The same factors are listed in [reg.27I\(5\)](#), but the behaviour of the person who engaged in the practice is listed first.
- 1498 Above, para.[40-200](#).
- 1499 See Vol.I, para.[29-068](#). Law Commission Report, Aggravated, Exemplary and Restitutionary Damages Law Com. No.247 (1997), Pt II.
- 1500 See below, para.[40-212](#).
- 1501 cf. Law Commission Report, Aggravated, Exemplary and Restitutionary Damages Law Com. No.247 (1997), para.5.25.
- 1502 [2008 Regulations reg.27L\(2\)\(b\)](#) and see below, para.[40-216](#).
- 1503 [2008 Regulations reg.27A\(1\)](#); [reg.27J](#). A striking example of a claim for damages under [Pt 4 of the 2008 Regulations](#) may be found in the claims brought under a Group Litigation Order by some 117,000 claimants all of whom are owners or ex-owners of Volkswagen, Audi, Seat or Skoda cars with a common engine, the defendants being manufacturers, dealers or finance companies. One of the bases of claims of a proportion of the (then) claimants was for damages under the relevant part of the 2008 Regulations: see *Crossley v Volkswagen Aktiengesellschaft [2019] EWHC 698 (QB)* at [19] (a case management conference hearing). For other aspects of this litigation see *Crossley v Volkswagen Aktiengesellschaft [2021] EWHC 3444 (QB)*, below, para.[40-499A](#) (note).
- 1504 Below, paras [40-213](#) and [40-214](#).
- 1505 Law Commissions’ Report (2012), paras 3.49 et seq., above, para.[40-181](#). On this law see Vol.I, [Ch.10](#) and especially para.[10-071](#).
- 1506 On the need for a right to damages in respect of “consumer payments” made as a result of a misleading action or aggressive commercial practice, see Law Commission Report

- (2012) paras 9.77–9.90, which identified as a particular problem cases involving claims for parking charges, copyright infringements, wheel-clamping and civil recovery.
- 1507 [2008 Regulations reg.2\(1A\)](#) and [2\(1B\)](#) which were inserted by [SI 2014/870 reg.2\(9\)](#); see the Law Commissions' Report (2012) paras 9.45–9.59.
- 1508 There is no right to unwind if the payment was in fact due: [2008 Regulations reg.27H](#) and see above, para.[40-207](#). There is no right to a discount in respect of a consumer payment: [2008 Regulations reg.27I\(1\)](#) and above, para.[40-207](#) (note).
- 1509 In the case of a payment made in respect of a debt already due there is unlikely to be financial loss, unless, possibly, where in order to pay the trader the consumer resorts to an (even more) expensive form of credit such a pay-day loan. In the case of a payment of a sum that was not due, the normal remedy would be to unwind any settlement agreement under which the payment was made. In addition, the exclusion of damages for the difference between the market price of a product and the amount payable for it under a contract ([reg.27J\(3\)](#)), read with the definition of "product" in cases of payment ([reg.2\(1A\)](#) and [\(1B\)](#)), seems to preclude an award under [reg.27J](#) for financial loss caused by paying sums that were not due.
- 1510 [2008 Regulations reg.7](#), above, para.[40-197](#) and see below, para.[40-212](#).
- 1511 [reg.27J\(1\)\(b\)](#).
- 1512 See [reg.27J\(1\)\(a\)](#) and [\(b\)](#).
- 1513 [2008 Regulations, reg.27J\(1\)\(a\)](#). The form of words "which he would not have incurred if the prohibited practice had not taken place" suggests a "but/for" test of causation applicable to claims for damages, even though the causal test applicable to the availability of the rights to redress in general is the test of "significant factor" (see [2008 Regulations reg.27A\(6\)](#), above, para.[40-210](#)). *Bant and Paterson* (2018) 80 M.L.R. 895 at 920–921 argue that the requirement in [reg.27J\(1\)](#) should be interpreted as reflecting a concern that the consumer claimant is left "no better off" by reason of the award that he would have been had the prohibited practice not taken place.
- 1514 [2008 Regulations reg.27J\(1\)\(a\)](#) and [\(3\)](#). This provision appears to have no practical application to cases of damages in respect of consumer payments, where the demand for payment is seen as itself the offering to supply a "product", the latter being "the full or partial settlement of [the consumer's] liabilities or purported liabilities": [2008 Regulations reg.2\(1A\)](#) and [\(1B\)](#), above, paras [40-188](#) and [40-211](#).
- 1515 As earlier noted (above, para.[40-211](#) (noted)), the exclusion of damages for the difference between the market price of a product and the amount payable for it under a contract ([reg.27J\(3\)](#)), read with the definition of "product" in cases of payment ([reg.2\(1A\)](#) and [\(1B\)](#)), seems to preclude an award under [reg.27J](#) for loss caused by paying sums that were not due.
- 1516 The Law Commissions described the loss which should be recoverable as "consequential economic loss", giving the example of a consumer "who is sold a new bed in an aggressive way and then throws away the old bed to make room for it": Report (2012), para.8.145. The relevant measure of damages under [Pt 4A](#) therefore follows the "reliance measures" rather than the "expectation measure" of damages: Report (2012), para.8.3–8.15.

- 1517 See *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B.158; *Royal Trust Ltd v Rogerson* [1991] 2 Q.B. 297 and Vol.I, paras 9-063, 9-086, 9-106.
- 1518 Below, para.40-217.
- 1519 Above, para.40-205.
- 1520 Above, para.40-208.
- 1521 Above, para.40-208.
- 1522 Misrepresentation Act 1967 s.2(4), below, para.40-220.
- 1523 reg.27J(4).
- 1524 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound No.1)* [1961] A.C. 388, see Vol.I, paras 3-057 and 9-106 (tort of negligence). On the rules of remoteness for breach of contract see Vol.I, paras 29-124 et seq.
- 1525 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B.158; *Royal Trust Ltd v Rogerson* [1991] 2 Q.B. 297 and Vol.I, paras 9-063 et seq., and 9-085.
- 1526 Law Commissions Report (2012) 8.165–8.173; 2008 Regulations reg.17(1), above, para.40-179.
- 1527 reg.27L(2).
- 1528 A possible exception could be punitive damages, but these are not awarded in claims for breach of contract, though they may exceptionally be awarded for claims in tort: Vol.I, para.29-067.
- 1529 Sentencing Act 2020 s.135(2) and (3), which provides that the amount of compensation in a compensation order “must be the amount that the court considers appropriate, having regard to any evidence and any representations that are made by or on behalf of the offender or the prosecution” and “must have regard to the offender’s means, so far as they appear or are known to the court” replacing (on 20 December 2020) earlier equivalent provision in the Powers of Criminal Courts (Sentencing) Act 2000 s.130(4) and (11). It was held in relation to earlier powers to make compensation orders that, while the making of an order “is not part of the sentence of the court strictly speaking”, there is an “important relationship between the sentence of the court and the desirability or otherwise of making one”: *R. v Brogan* [1975] 1 All E.R. 879, 881, 880 per Scarman J.
- 1530 Emphasis added.
- 1531 Powers of the Criminal Courts Act 2000 s.134(2) (repealed and replaced by the Sentencing Act 2020).
- 1532 The Law Commissions foresaw that the consumer’s right to unwind or to a discount could form part of such a compensation order, but the Regulations as made did not so provide: Law Commissions’ Report (2012), paras 5.19–5.20. 2008 Regulations reg.27K(1) provides that “[a] consumer with a right to redress under this Part may bring a claim in civil proceedings to enforce that right”.
- 1533 On the right to rescission generally see Vol.I, paras 9-120 et seq.
- 1534 On which see Vol.I, paras 10-068 et seq., 10-132.
- 1535 Above, paras 40-198 and 40-203.
- 1536 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 Q.B.158 and see Vol.I, para.9-064; 2008 Regulations reg.27J(4), above, para.40-214.

- 1537 See above, para.[40-216](#).
- 1538 e.g. [Consumer Rights Act 2015 s.11](#) (formerly [Sale of Goods Act 1979 s.13](#)).
- 1539 [SI 2013/3134](#).
- 1540 [SI 2013/3134](#) regs 9(3), 10(5) and 13(6); [Consumer Rights Act 2015 s.11\(4\)](#) and [12\(2\)](#) (goods contracts); ss.36(3) and [37\(2\)](#) (digital content contracts) and [50\(3\)](#) (services contracts): see above, para.[40-108](#) and below, paras [40-501](#)—[40-502](#), [40-552](#)—[40-553](#) and [40-579](#) respectively.
- 1541 See Vol.I, para.[15-002](#).
- 1542 [reg.27L\(2\)\(a\)](#), above, para.[40-216](#).
- 1543 See above, para.[40-209](#).
- 1544 Above, para.[40-216](#).
- 1545 [SI 2014/870 reg.5](#) inserting [Misrepresentation Act 1967 s.2\(4\)](#). It is provided that this disapplication does not affect claims under the [Consumer Credit Act 1974 s.75\(1\)](#) against a creditor under a debtor-creditor-supplier agreement: [1967 Act s.2\(5\)](#) (as inserted). See below, paras [41-030](#)—[41-031](#).
- 1546 Law Commissions Report (2012), paras 7.133–7.134.
- 1547 [2008 Regulations reg.27J\(4\)](#), above, para.[40-214](#). In theory, the consumer “has” a right to damages as specified by [reg.27J\(1\)](#) where a prohibited practice has caused him financial loss or the other types of harm there listed, but the effect of the later provisions of [reg.27J](#) may have the effect that the particular harm may not be recovered under the [2008 Regulations](#).
- 1548 The exception would be where the prohibited practice is not sufficiently serious to qualify as “minor” in the first band of [reg.27I\(4\)\(a\)](#), above, para.[40-208](#).
- 1549 Above, para.[40-205](#).
- 1550 On this rule see Vol.I, para.[9-087](#).
- 1551 They are recoverable in the tort of deceit (Vol.I, para.[9-077](#)) and the fiction of fraud in the [Misrepresentation Act 1967 s.2\(1\)](#) (Vol.I, para.[9-087](#)) suggests that they should therefore equally be recoverable in this context.
- 1552 [2008 Regulations reg.27K\(5\)](#) provides that the period is “as if it were an action founded on simple contract”, thereby attracting a six-year period from the time of accrual of the cause of action, which is normally the breach of contract: Vol.I, para.[31-032](#). Accrual of the cause of action in tort for the purposes of [s.2 Misrepresentation Act](#) is often the date when the contract is entered into, but may be a later date: Vol.I, para.[31-034](#).
- 1553 *Gran Gelato Ltd v Richcliff (Group) Ltd [1992] Ch. 560*, Vol.I, para.[9-091](#).
- 1554 The question would turn on whether the trader’s liability to damages under the Regulations qualifies as “fault” as being an “act or omission which gives rise to a liability in tort” within the meaning of [s.1\(1\)](#) and [s.4 of the Law Reform \(Contributory Negligence\) Act 1945](#). At no point do the [2008 Regulations](#) classify the trader’s liability under [reg.27J](#) as tortious, and the limitation period designated is the period applicable to claims under a simple contract ([reg.27K\(5\)](#)); on the other hand the consumer’s rights to damages under [reg.27J](#) arises from the commission of a “prohibited practice” rather than from any breach of contract.
- 1555 Above, para.[40-187](#).

- 1556 Vol.I, paras 9-112 et seq.
- 1557 Emphasis added.
- 1558 Misrepresentation Act 1967 s.3 on which see Vol.I, paras 9-153—9-166.
- 1559 This is noted by the Misrepresentation Act 1967 s.3(2) (as inserted by the 2015 Act) in disapplying s.3(1)'s own controls from the terms of consumer contracts. On the controls in Pt 2 of the 2015 Act, see below, paras 40-235 and 40-243 et seq.
- 1560 2005 Directive art.3(2), above, para.40-169. cf. Consumer Rights Directive 2011 art.25 which provides that “consumers may not waive the rights conferred on them by the national measures transposing” the Directive, above, para.40-069.
- 1561 2008 Regulations reg.29.
- 1562 Above, paras 40-181 et seq.
- 1563 Consumer Rights Act 2015 s.62(4) and (5), below, paras 40-243 et seq.
- 1564 Consumer Rights Act 2015 s.64, below, paras 40-351 et seq. See in particular *XZ v Ibercaja Banco SA (C-452/18) EU:C:2020:536, 9 July 2020* below, para.40-369.
- 1565 So, for example, a right to unwind a payment made would not exist in the case of payments which were owed under such a settlement contract, but a right to damages could do so: above, paras 40-207 and 40-211.
- 1566 Such a non-contractual waiver by the consumer would not appear to fall within the definition of “consumer notice” under Pt 2 of the 2015 Act: see ss.61(4), (6)—(8) and 62(2), (6) and (7) and below, paras 40-258—40-259.
- 1567 Above, para.40-181.

(a) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(a) - Introduction

The general position

- 40-223 English law has long taken the view that the principles of freedom of contract and the binding force of contracts in general rule out review of the fairness of either the contract as a whole or of particular terms of the contract.¹⁵⁶⁸ As regards the fairness of particular contract terms, this general position at common law can be seen most explicitly in its approach to the validity of exemption clauses: for once agreed by the parties to a contract, they are effective to exclude liability either in contract or in tort,¹⁵⁶⁹ even extending to liability for causing death and personal injuries by negligence.¹⁵⁷⁰ The courts have tempered this position by the development of demanding tests for the incorporation of terms, especially exemption clauses,¹⁵⁷¹ restrictive approaches to the interpretation of standard terms contra proferentem,¹⁵⁷² and the recognition of exceptions (for example, as regards the exclusion of remedies for personal fraud¹⁵⁷³ and penalty clauses¹⁵⁷⁴), but these rules remain relatively restrained exceptions to the general position.

Legislative control of the fairness of contract terms

- 40-224 By contrast, the impact of legislation on the fairness of contract terms has been very considerable and particularly so in the case of consumer contracts. Sometimes this control has been effected by the creation of rights or obligations on the parties to particular types of contracts which are not susceptible of contrary exclusion by agreement, notably as regards contracts of consumer credit,¹⁵⁷⁵ tenancy¹⁵⁷⁶ and employment.¹⁵⁷⁷ Other than this regulation of particular types of contract, before 1995 the most important restriction on the effectiveness of contract terms was the

Unfair Contract Terms Act 1977, which subjected exemption and limitation clauses (and certain related clauses) both as regards persons “dealing as consumer”¹⁵⁷⁸ and commercial parties to considerable restrictions.¹⁵⁷⁹ While this Act also imposed a requirement of reasonableness on the effectiveness of indemnity clauses in consumer contracts,¹⁵⁸⁰ until the UK implemented the Unfair Terms in Consumer Contracts Directive 1993 (the “1993 Directive”),¹⁵⁸¹ English law contained no system of control on the basis of fairness applicable to all or most other types of contract term.

The Unfair Terms in Consumer Contracts Directive 1993

- 40-225 On 5 April 1993 the EC Council enacted a directive on Unfair Terms in Consumer Contracts (“the Directive”).¹⁵⁸² It was made under art.95 of the EC Treaty (now art.114 TFEU), which empowered the European legislator to issue directives for the approximation of provisions laid down by laws, regulations or administrative action which have as their object the establishment and functioning of the common market, making particular mention of proposals in the field of consumer protection which must “take as a base a high level of protection”.¹⁵⁸³ The preamble to the Directive makes clear that its purposes were: (i) to reduce distortions in competition between sellers of goods¹⁵⁸⁴ and suppliers of services caused by differences in rules governing terms in consumer contracts; (ii) to create effective uniform legal protection for consumers from the imposition of unfair contract terms,¹⁵⁸⁵ especially (but not exclusively) where this concerns transactions with suppliers in Member States other than their own¹⁵⁸⁶; and (iii) to enhance the awareness of consumers as to the rules of law which govern consumer contracts in Member States other than their own, for otherwise they may be deterred from entering direct transactions with suppliers in other Member States.¹⁵⁸⁷ The Directive requires only minimum requirements for the control of fairness and transparency of terms in consumer contracts, it being expressly acknowledged that Member States are free to retain or to introduce systems of control which are more protective of consumers.¹⁵⁸⁸ This means, inter alia, that decisions of courts of other Member States concerning the interpretation of their legislation implementing the Directive have to be treated with considerable care, as their interpretation may be of national legislation which (lawfully) goes further than the Directive requires.¹⁵⁸⁹ The 1993 Directive requires Member States to put in place two types of control. First, very broadly, it requires that terms in all types of consumer contracts that have not been “individually negotiated” are binding on consumers only if they are “fair”,¹⁵⁹⁰ with the important exception of terms which define the main subject matter of the contract and as regards the price/quality ratio, provided that they are plain and intelligible (the “core exemption”)¹⁵⁹¹; it also requires more generally that written terms be plain and intelligible.¹⁵⁹² Secondly, the 1993 Directive requires Member States to put in place adequate and effective means to prevent the continued use of unfair terms in consumer contracts.¹⁵⁹³ As regards the latter, the Directive was amended in 2019 by the insertion of new provision governing penalties for the infringement of

national provisions implementing it,¹⁵⁹⁴ but as the amending Directive must be implemented by 28 November 2021,¹⁵⁹⁵ i.e. after IP completion day, the UK is not bound to do so.¹⁵⁹⁶

Earlier UK legislation implementing the 1993 Directive

- 40-226 The 1993 Directive was first implemented into UK law by the [Unfair Terms in Consumer Contracts Regulations 1994](#),¹⁵⁹⁷ but these regulations were revoked and replaced by the [Unfair Terms in Consumer Contracts Regulations 1999](#) ("the 1999 Regulations").¹⁵⁹⁸ The main differences between the two sets of regulations were that the [1999 Regulations](#) followed even more closely the terms of the Directive's provisions¹⁵⁹⁹ and they made provision to enable a number of "qualifying bodies" to apply to the courts for injunctive relief against the use or recommendation for use of unfair terms, whereas under the [1994 Regulations](#) this could be done only by the Director General of Fair Trading.¹⁶⁰⁰ Implementation of the 1993 Directive in this way left unaffected the controls on contract terms in the [Unfair Contract Terms Act 1977](#), some of whose provisions governed consumer contracts as understood by the Regulations.¹⁶⁰¹ However, in 2015 the [1999 Regulations](#) were themselves revoked and the 1993 Directive re-implemented by the [Consumer Rights Act 2015](#).¹⁶⁰²

Summary of controls in the 1999 Regulations¹⁶⁰³

- 40-227 The [1999 Regulations](#) subjected a very wide range of types of the terms in consumer contracts to two requirements: (i) that terms which had not been "individually negotiated" should be "fair"; and (ii) that when in writing they should be written in "plain, intelligible language" (the latter being referred to as a requirement of "transparency").¹⁶⁰⁴ There were two levels of effect in respect of any failure to fulfil these requirements. At the level of the relationship between the parties to a contract, a term which failed the requirement of fairness was not binding on the consumer, while a term which failed the requirement of transparency and was ambiguous was to be interpreted in the way which was most favourable to the consumer and might be subjected to the test of fairness even if it related to the contract's price or main subject matter.¹⁶⁰⁵ At a more general level, the [1999 Regulations](#) empowered the Office of Fair Trading (OFT) (and latterly the Competition and Markets Authority (CMA)¹⁶⁰⁶) and a number of other bodies to bring proceedings for an injunction to prevent a person using a term which they considered to be unfair or unclear.¹⁶⁰⁷ The OFT published guidance on its approach to its powers under the Regulations and on why it considered that certain kinds of standard terms used in contracts with consumers have the potential for unfairness under the Regulations, some of which was general and some of which specific to certain market sectors and, on taking over the OFT's enforcement powers, the CMA adopted this

guidance.¹⁶⁰⁸ These publications provided useful guidance as to the application of the test of unfairness, but the OFT's views were not always followed by the courts.¹⁶⁰⁹

Earlier Law Commission reform proposals

40-228 The existence of two overlapping legislative regimes governing unfair contract terms in the [1999 Regulations](#) and the [Unfair Contract Terms Act 1977](#) attracted considerable criticism and in 2005 the English and Scottish Law Commissions published a joint report recommending major legislative reform.¹⁶¹⁰ Their proposals included the creation of a unified legislative regime for the control of unfair terms in consumer contracts, putting together the controls provided by the [1977 Act](#) and the [1999 Regulations](#); preserving the protection given by the [1977 Act](#) in business contracts; and extending existing protection against unfair contract terms for consumers to small businesses. Meanwhile at the European level, the European Commission proposed changes to the 1993 Directive, placing it in a wider proposal for a Consumer Rights Directive which would have seen the provisions on unfair terms in consumer contracts in the 1993 Directive (with amendments) change from requiring minimum harmonisation to the “full harmonisation” of national laws.¹⁶¹¹ However, the Consumer Rights Directive as enacted in 2011 required no change to the substance of the existing regime of control under the 1993 Directive,¹⁶¹² although one of its provisions may be useful in interpreting aspects of the 1993 Directive.¹⁶¹³ This left the way open for the UK legislator to reform the national controls on unfair terms without waiting for new legislation at the EU level.

Consumer Rights Act 2015

40-229 The [Consumer Rights Act 2015](#)¹⁶¹⁴ (“the [2015 Act](#)” or “the [Act](#)”) reflects the view of the Law Commissions and the UK government that UK consumer law (and especially consumer contract law) was unnecessarily complex, at times inconsistent (especially in relation to the two sets of legislative provisions governing unfair contract terms¹⁶¹⁵) and scattered in an unhelpful way across a series of legislative enactments, some primary legislation and some secondary, some implementing EU legislation and some purely domestic.¹⁶¹⁶ However, the [2015 Act](#) did not follow the Law Commissions’ earlier strategy of placing the controls on unfair contract terms in a single Act and, to a considerable extent, a single framework,¹⁶¹⁷ but instead divided the control of unfair terms sharply between terms found in consumer contracts (regulated by the [2015 Act](#), principally in Pt 2) and terms (principally exemption clauses¹⁶¹⁸) in other contracts (regulated by the [Unfair Contract Terms Act 1977](#)). Moreover, the [2015 Act](#) was also concerned to provide new, dedicated rules for consumer rights in respect of goods, digital content and services ([Pt 1 of the Act](#)), and as a result deleted provisions specifically governing consumer contracts from other more general

legislation, notably, the [Sale of Goods Act 1979](#), and disapplied many other of the provisions of those Acts as regards “consumer contracts”.¹⁶¹⁹

Overview of the 2015 Act

- 40-230 In order to give effect to the policies pursued by the Act, Pt 1 first defines a new, consistent terminology to be used to describe the “consumer” and the “trader”¹⁶²⁰ and then sets out the principal substantive rights to be enjoyed by consumers under each of a series of types of contract: “contracts to supply goods” or “goods contracts” (which are “sales contracts”, contracts for the hire of goods, hire-purchase agreements and “contracts for the transfer of goods”) (Ch.2)¹⁶²¹; “contracts to supply digital content” or “digital content contracts” (Ch.3)¹⁶²²; and “contracts to supply a service” or “services contracts” (Ch.4).¹⁶²³ So, for example, Ch.2 governing contracts to supply goods provides for the inclusion of terms in these contracts that the goods are of satisfactory quality, fit for any particular purpose made known to the trader by the consumer, and are as described, these terms being modelled closely on the well-known statutory implied terms found, *inter alia*, in the [Sale of Goods Act 1979](#) and the [Supply of Goods and Services Act 1982](#).¹⁶²⁴ Chapters 2 to 4 of the Act are discussed in detail later in this chapter.¹⁶²⁵ The following paragraphs refer to the Explanatory Notes accompanying the [Consumer Rights Act 2015](#).¹⁶²⁶
- 40-231 Part 2 of the Act contains provisions which sought to re-implement the Unfair Terms in Consumer Contracts Directive 1993 in the UK, replacing (and revoking) the [Unfair Terms in Consumer Contracts Regulations 1999](#)¹⁶²⁷ and, in doing so, made limited but significant changes to the ambit of the controls on unfair terms in consumer contracts.
- 40-232 Part 3 of the Act makes “miscellaneous and general” provision on various matters, of which its clauses governing enforcement powers of regulatory authorities are most significant for present purposes, their details being contained in Sch.5 (investigatory powers) and Sch.7 (which provides, *inter alia*, for “enhanced consumer measures” under Pt 8 of the Enterprise Act 2002).¹⁶²⁸ Both these changes affect the law governing the control on unfair terms in consumer contracts, as will appear in the following paragraphs.

The strategies of the 2015 Act in relation to contract terms

- 40-233 Four principal strategies were adopted by the Act in relation to the control of unfair terms in consumer contracts.¹⁶²⁹

- 40-234 First, as earlier noted, implementation of the Directive on unfair terms in consumer contracts of 1993, earlier effected by the [Unfair Terms in Consumer Contracts Regulations 1999](#), was effected by the Act, principally by Pt 2. In general, and following the pattern set by the [1999 Regulations](#), these provisions follow closely the language of the 1993 Directive, but the Act extends its protection, notably as regards the category of persons protected by the requirements of fairness and of plain, intelligible language by broadening the definition of “consumer”,¹⁶³⁰ by including individually negotiated terms under the test of unfairness,¹⁶³¹ and by imposing an additional requirement for the application of the exclusion from the test of unfairness of terms relating to the main subject matter of the contract or the price/quality ratio allowed by art.4(2) of the 1993 Directive, in response to its interpretation by the Supreme Court in *Abbey National Plc v Office of Fair Trading*.¹⁶³² Moreover three further examples are included in the “indicative list” of terms which may be unfair,¹⁶³³ and all these terms are thereby specifically prevented from falling under the exclusion of terms relating to the main subject matter, etc. provided by s.64 of the Act.¹⁶³⁴
- 40-235 Secondly, the [Unfair Contract Terms Act 1977](#) was amended so as no longer to apply to terms in “consumer contracts” or “consumer notices” as defined by the [2015 Act](#): instead, the [1977 Act](#) applies only to other notices and to terms in other contracts, i.e. those between traders and those between traders and non-consumers (such as employees) and between persons neither of whom is a trader.¹⁶³⁵ First, a number of provisions in the 1977 Act expressly governed contracts between a person seeking to exclude or limit their “business liability” as against a person “dealing as consumer”: these provisions themselves and references to contracts within this category were deleted, as was the definition of “dealing as consumer” for this purpose.¹⁶³⁶ Secondly, s.2 of the [1977 Act](#) which controls contract terms or notices seeking to exclude or limit “business liability” for negligence in respect of death or personal injury or other loss or damage was amended so as no longer to apply to terms in consumer contracts or to “consumer notices”,¹⁶³⁷ defining “consumer notice” for this purpose as:

“... a notice to the extent that it relates to rights or obligations as between a trader and a consumer, or purports to exclude or restrict a trader’s liability to a consumer.”¹⁶³⁸

Similarly, s.3 of the [Misrepresentation Act 1967](#) was amended so as not to apply to “a term in a consumer contract within the meaning of Pt 2 of the [Consumer Rights Act 2015](#)”.¹⁶³⁹ Here, though, it should be noted that, while this strategy had the effect of placing most (though not all) of the law governing the validity of terms in consumer contracts within the [Consumer Rights Act](#),¹⁶⁴⁰ it also had the effect of making the application of the legislation (the [Unfair Contract Terms Act 1977](#) or the [Misrepresentation Act 1967](#) s.3 on the one hand, the [Consumer Rights Act](#) on the other) turn on the distinction between a person who contracts as a “consumer” with a “trader”

within the meanings of the [2015 Act](#) and where that person contracts other than as “consumer”. As will be seen, the definition of “consumer” provided by the Act is fact-sensitive and, therefore, in some cases the legislation applicable will be difficult to determine. ¹⁶⁴¹

- 40-236 Thirdly, [Pt 1 of the Act](#) provides very widely that a term in the types of contract to which it applies (i.e. “contracts to supply goods”, “contracts to supply digital content”, and “contracts to supply a service”) ¹⁶⁴² is not binding on the consumer to the extent that it would exclude or restrict the trader’s liability arising under a number of the substantive provisions which it sets out ¹⁶⁴³ (such as in respect of breach of the terms as to description, quality or fitness for purpose, etc. of goods inserted into contracts to supply goods ¹⁶⁴⁴ or under rules on delivery of goods or the passing of risk ¹⁶⁴⁵). These provisions will be discussed in the context of the liabilities to which they relate. ¹⁶⁴⁶
- 40-237 Fourthly, the Act extended the enforcement measures (injunctions against and undertakings by traders) which it puts in place for the control of unfair terms in [Pt 2 of the Act](#) (and detailed in Sch.3) to contract terms rendered not binding on consumers under [Pt 1 of the Act](#), as well as to “consumer notices” also rendered not binding on consumers under [Pt 2 of the Act](#). ¹⁶⁴⁷
- 40-238 It will be seen, therefore, that the [Consumer Rights Act 2015](#) sought to extend the framework governing the terms of consumer contracts well known from the 1999 Regulations (and reflecting closely the 1993 Directive) so as to cover “consumer notices”, and the framework of the enforcement measures provided for unfair terms in consumer contracts by the [1999 Regulations](#) so as to cover a range of invalid exclusions of liability in traders to consumers. By contrast, the [2015 Act](#) subsumed the control of the exclusion of liability for misrepresentation of traders to consumers (formerly specially governed by the [Misrepresentation Act 1967 s.3](#)) under the general scheme of control of unfair terms and unfair notices which it provides.

Minimum harmonisation, full harmonisation and the 2015 Act

- 40-239 As earlier noted, the 1993 Directive itself requires only “minimum harmonisation” and as a result the UK was entitled to enact measures within the scope of the Directive which were more protective of consumers. ¹⁶⁴⁸ This means, for example, that the apparently narrower scope to the “core exemption” from the test of unfairness contained in [s.64 of the 2015 Act](#) was compatible with the 1993 Directive and therefore EU law. ¹⁶⁴⁹ Moreover, the apparent extension of the scope of the controls of the Directive by the [2015 Act](#) by its wider definition of “consumer” and its inclusion of controls on “consumer notices” (and not merely the terms of consumer contracts as referred to by

the Directive) are compatible with the Directive to the extent that they fall outside its scope.¹⁶⁵⁰ More difficult, however, is the question of the extension of the enforcement measures foreseen by the 1993 Directive to cases outside its scope as this may fall foul of the “full harmonisation” required by the Unfair Commercial Practices Directive 2005. This is discussed later.¹⁶⁵¹

Relevant case-law for the interpretation of “retained EU law”

- 40-240 While the UK was a Member State of the EU, UK courts were under a duty to interpret the provisions of the [2015 Act](#) seeking to implement the 1993 Directive “as far as possible” in a way so as to give proper effect to the UK’s obligations under the Directive as interpreted by the Court of Justice of the EU¹⁶⁵² and, as noted in Vol.I, Ch.1 of the present work, during the transition period until IP completion day (31 December 2020), the status of case-law of the Court of Justice for the interpretation of UK implementing legislation remained the same.¹⁶⁵³ However, on IP completion day, the body of domestic case-law relating to the [1994](#) and [1999 Regulations](#), as well as to the relevant provisions of the [2015 Act](#) which implemented the 1993 Directive, became part of “retained domestic case-law” and the body of decisions made and principles laid down by the European Court in relation to the 1993 Directive where they are relevant to provisions in the Act forming part of “retained EU law” form part of “retained EU case-law”.¹⁶⁵⁴ In principle, UK courts and tribunals remain bound by this body of retained EU case-law for this purpose, though the Supreme Court and listed appellate courts may depart from it.¹⁶⁵⁵ While therefore in principle UK courts will remain bound by EU case-law on the 1993 Directive decided before IP completion day, and under a duty of conforming interpretation as regards “retained EU law”¹⁶⁵⁶ (which includes the UK implementation of the 1993 Directive in the [2015 Act](#)),¹⁶⁵⁷ certain UK courts (including the Supreme Court and the Court of Appeal) have the power to decide not to follow the case-law of the Court of Justice.¹⁶⁵⁸ On the other hand, decisions made and principles laid down by the European Court *after* IP completion day are not binding on UK courts, though they may have regard to them.¹⁶⁵⁹

Temporal application of the 2015 Act’s provisions on unfair terms

- 40-241 The [2015 Act](#) received Royal Assent on 26 March 2015; its substantive provisions governing unfair contract terms contained in Pts 1 and 2 were brought into force on October 1, 2015¹⁶⁶⁰ so as generally to apply to contracts made on or after 1 October 2015.¹⁶⁶¹ Thus contracts made before 1 October 2015, and notices that might apply to events that occurred before that date, continue to be governed by the pre-Act law, i.e. the [Unfair Terms in Consumer Contract Regulations 1999](#) and,

so far as it affects consumers, the [Unfair Contract Terms Act 1977](#).¹⁶⁶² On IP completion day, the provisions in the [2015 Act](#) which implemented EU directives (including for present purposes the 1993 Directive) formed part of “retained EU law” by [s.2 of the European Union \(Withdrawal\) Act 2018](#) and were subject to some limited amendment by regulation made under [s.8 of the same Act](#) which will be noted where relevant in the following paragraphs.

¹⁶⁶³

 These changes apply to contracts made on or after IP completion day, it being provided that nothing in the relevant amending provision applies to a contract entered into before that date.¹⁶⁶⁴

The structure of this section

40-242 After the present introduction ((a)), this section will discuss in turn the following issues: (b) the scope of the controls in [Pt 2 of the 2015 Act](#), including the key definitions of “consumer” and “trader” and the categories of contract and contract term to which it applies¹⁶⁶⁵; (c) the central requirement of fairness applicable to contract terms and the effects of a finding that a contract terms is unfair¹⁶⁶⁶; (d) the requirement of fairness of consumer notices and the effect of a finding that such a notice is unfair¹⁶⁶⁷; (e) contract terms and consumer notices not binding on the consumer in all circumstances¹⁶⁶⁸; (f) the requirement of transparency for contract terms and consumer notices¹⁶⁶⁹; (g) certain types of terms of “secondary contracts”¹⁶⁷⁰; (h) prevention of avoidance of the controls in [Pt 2 of the 2015 Act](#) by choice of law¹⁶⁷¹; and finally (i) the enforcement of the protections which [Pt 2 of the Act](#) sets out.¹⁶⁷² The [2015 Act](#)’s provisions preventing the exclusion of the trader’s liabilities arising under contracts for the supply of goods, digital content and services will be considered later in this chapter in the context of the provisions setting out the liabilities themselves.¹⁶⁷³

Footnotes

- 1568 See Vol.I, paras [2-003](#) et seq. See notably, the rule that consideration need not be adequate: Vol.I, paras [6-015—6-016](#).
- 1569 [Nicholson v Willan \(1804\) 5 East 507](#).
- 1570 This is clear a fortiori from the effectiveness of non-contractual notices to this effect: e.g. [White v Blackmore \[1972\] 3 All E.R. 158](#).
- 1571 Vol.I, paras 15-005 et seq. and see especially [Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd \[1989\] 1 Q.B. 433](#).
- 1572 Vol.I, para.17-012.
- 1573 Vol.I, para.9-153.

- 1574 Vol.I, paras 29-203 et seq.
- 1575 See [Consumer Credit Act 1974](#), and para.[41-101](#).
- 1576 e.g. [Landlord and Tenant Act 1985 s.8](#) (applicable since 20 March 2019 only to Wales); [s.9A\(4\)](#) (applicable to England from 20 March 2019) (terms as to fitness for human habitation to be “implied, notwithstanding any stipulation to the contrary”).
- 1577 See paras [42-225](#) et seq.
- 1578 The protections were provided for persons “dealing as consumer”: [Unfair Contract Terms Act 1977 ss.3-7, 12](#), Vol.I paras [17-072—17-073](#).
- 1579 See Vol.I, paras [17-076](#) et seq.
- 1580 [Unfair Contract Terms Act 1977 s.4](#) and see Vol.I, para.[17-071](#).
- 1581 Directive 93/13/EEC on unfair terms in consumer contracts [1993] O.J. L95/21 (“1993 Directive”) and see below, para.[40-225](#).
- 1582 Directive 93/13 on unfair terms in consumer contracts [1993] O.J. L95/21 (“1993 Directive”). The 1993 Directive art.10(1) provides that the national provisions implementing the Directive “shall be applicable to all contracts concluded after 31 December 1994” and therefore do not apply to contracts concluded before that date: [SC Raiffeisen Bank SA v JB \(C-698/18 and C-699/18\) EU:C:2020:537](#), para.42. For discussion of the Directive or the [Unfair Terms in Consumer Contracts Regulations](#), see [Dean \(1993\) 56 M.L.R. 581](#); [Collins \(1994\) 14 O.J.L.S. 229](#); [Macdonald \(1994\) J.B.L. 441](#); [Hondius \(1994\) 7 Journal of Contract Law 34](#); [Willett \(1994\) Con. L.J. 114](#); Beale in Beatson and Friedmann (eds), [Good Faith and Fault in Contract Law \(1995\)](#), Ch.9; [Bright and Bright \(1995\) 111 L.Q.R. 655](#); [Weatherill \(1995\) 3 European Review of Private Law 307](#), especially 316 et seq. cf. Joerges at 175; Collins at 353; de Moor at 257; Weatherill, E.C. [Consumer Law and Policy \(2005\)](#), pp.115 et seq.; Howells and Wilhelmsson, E.C. [Consumer Law \(1997\)](#), pp.88 et seq.; [Macdonald \[1999\] C.L.J. 413](#); [Whittaker \(2000\) 116 L.Q.R. 95](#); [Bright \(2000\) 20 L.S. 331](#); [Whittaker \(2004\) ZEuP 75](#); [Whittaker \(2010\) 73 M.L.R. 106](#). The EU Commission has issued a notice, Guidance on the Interpretation and Application of Council Directive 93/13/EEC of 5 April 1993 on Unfair Contract Terms in Consumer Contracts (22 July 2019) C(2019) 5325 final (“Commission guidance C(2019) 5325 final”) which seeks to summarise the case-law of the CJEU on the directive.
- 1583 EC Treaty art.95(3) (now art.114(3) TFEU).
- 1584 But see discussion, below, paras [40-249](#) et seq.
- 1585 Directive 1993 recital 9.
- 1586 This is clear from recital 2’s use of the phrase “notably, when [sellers or suppliers] sell or supply in other Member States [emphasis added]” and in recital 7 (“both at home and throughout the internal market”). See also [Sziber v ERSTE Bank Hungary Zrt \(C-483/16\) EU:C:2018:367](#) paras 56–59.
- 1587 Directive 1993 recital 5.
- 1588 Directive 1993 art.8 and see [Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios \(Ausbanc\) \(C-484/08\) EU:C:2010:309, \[2010\] 3 C.M.L.R. 43](#) (in relation to art.4(2) of the Directive, on which see below, para.[40-023](#)), [Pereničová v SOS finance, spol. sro \(C-453/10\)](#)

- EU:C:2012:144, [2012] 2 C.M.L.R. 28* paras 34–36 (in relation to art.6(1) in fine of the Directive). The Proposal for a Directive on Consumer Rights of 8 October 2008 COM(2008) 614/3 final art.4 (full harmonisation) sought to change this position as regards the 1993 Directive, but the relevant provisions (arts 30–39 of the Proposal) were not present in the Directive as enacted: Directive 2011/83/EU on consumer rights [2011] O.J. L304/64.
- 1589 e.g. the decision of the French Cour de Cassation in Civ.(1) 15 March 2005, Bulletin Civil I No.135 which held that the French legislation protecting consommateurs ou non-professionnels against unfair contract terms could apply for the protection of a corporation as included within the term non-professionnel as long as it acted outside its business, even though both the Directive itself and the ECJ make clear that “consumer” refers only to human persons: 1993 Directive art.2(b) and above, paras 40-032—40-033.
- 1590 1993 Directive arts 3, 4(1) and 6, below, paras 40-273 et seq.
- 1591 1993 Directive art.4(2), on which see below, paras 40-351 et seq. Terms which reflect legislation are also excluded from the scope of the Directive as a whole: 1993 Directive art.1(2), below, paras 40-264—40-272.
- 1592 1993 Directive art.5 and see below, paras 40-428 et seq. and 40-430—40-434.
- 1593 1993 Directive art.7.
- 1594 Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 (“Directive (EU) 2019/2161”) art.1 inserting new art.8b into the 1993 Directive.
- 1595 Directive (EU) 2019/2161 art.7(1).
- 1596 On IP completion day see above, para.40-004 and Vol.I, para.1-019.
- 1597 SI 1994/3159. The 1994 Regulations came into force on 1 July 1995 but were revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083). The 1994 Regulations applied to contracts made on or after 1 July 1995 (though the 1993 Directive art.10(1) required national implementing measures to govern contracts concluded after 31 December 1994) and the 1999 Regulations apply to contracts made on or after 1 October 1999, and before the coming into force of the provisions governing unfair contract terms in the Consumer Rights Act 2015 on 1 October 2015, as explained below, paras 40-229 and 40-241.
- 1598 SI 1999/2083.
- 1599 This may be seen in certain definitional provisions of the 1999 Regulations, in their implementation of art.1(2) of the Directive and in their lack of an exclusion of certain types of contract which appears in the preamble to the Directive, but not in its text see 31st edn (2012) of the present work, Vol.I, paras 17-017, 17-023 and 17-038. This chapter from the 33rd edition is also available as a PDF to online subscribers of this edition on Westlaw.
- 1600 See below, para.40-441.
- 1601 This is most obviously the case as regards contracts where one party “deals as consumer” (Unfair Contract Terms Act 1977 ss.3–7, 12) but is also the case as regards

- the controls on liability for negligence under the [1977 Act](#) s.2: on which see Vol.I, paras [17-071](#)—[17-073](#) and on the present scope of the controls in the [1977 Act](#) see Vol.I, paras [17-075](#) et seq.
- 1602 See below, paras [40-229](#) et seq.
- 1603 For a discussion of the old law under the [1999 Regulations](#) see Ch.38 of the 33rd edition at paras 38-220 et seq. This chapter from the 33rd edition, Vol.II is also available as a PDF to online subscribers of the present edition on Westlaw.
- 1604 [1999 Regulations](#) regs [5](#) (unfair terms) and [7](#) (written contracts).
- 1605 [1999 Regulations](#) reg.[7\(2\)](#) and [6\(2\)](#) respectively.
- 1606 As from 1 April 2014, the OFT was abolished and its functions under the [1999 Regulations](#) taken over by the CMA: [Enterprise and Regulatory Reform Act 2013 \(Competition\) \(Consequential, Transitional and Saving Provisions\) \(No.2\) Order 2014 \(SI 2014/549\)](#) Sch.1 para.26; [Public Bodies \(The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions\) Order 2013 \(SI 2013/783\)](#) art.10. See further below, paras [40-441](#) et seq.
- 1607 [1999 Regulations](#) reg.12 (as amended), and see below, paras [40-441](#) et seq.
- 1608 See notably, OFT, Unfair Contract Terms Guidance (2008) OFT311 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284426/oft311.pdf [Accessed 1 September 2021]. These guidance notes replaced regular “unfair contract terms bulletins”, to which reference is on occasion still made as they provided more context for the examples which they set out. The CMA’s position on this earlier guidance is set out in CMA, Consumer Protection: Guidance on the CMA’s Approach to Use of its Consumer Powers CMA 7 (March 2014) at p.58. The CMA has subsequently published guidance setting out its understanding of the Consumer Rights Act 2015: Unfair Contract Terms Guidance, Guidance on the Unfair Contract Terms Provisions in the Consumer Rights Act, (July 2015) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf [Accessed 1 September 2021]. This guidance is particularly useful in relation to particular types of contract term on the “indicative list” in Sch.2 of the 2015 Act: see further below, paras [40-316](#) et seq.
- 1609 *Director General of Fair Trading v First National Bank Plc* [2001] UKHL 52, [2002] 1 A.C. 481 and see below, para.40-354. See also *OFT v Abbey National Plc* [2009] UKSC 6, [2010] 1 A.C. 696 below, paras [40-355](#)—[40-356](#) and cf. *Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch), [2011] E.C.C. 32.
- 1610 Law Commission, Scottish Law Commission, Unfair Terms in Contracts (Law Com. No.292, Scot Law Com. No.199, 2005).
- 1611 Proposal for a Directive on Consumer Rights of 8 October 2008 COM(2008) 614/3 final whose arts 30–39 concerned unfair contract terms; the principle of “full harmonisation” was set by art.4. On the significance of “full harmonisation” see above, paras [40-026](#)—[40-027](#).
- 1612 Directive 2011/83/EU on consumer rights [2011] O.J. L304/64. Its main requirements concern information and cancellation rights in off-premises and distance contracts (on

which see above, para.[40-063](#)), which were implemented in UK law by the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134\)](#), on which see above, paras [40-064](#) et seq. Other provisions in the 2011 Directive were implemented by the [Consumer Rights Act 2015 ss.28 and 29](#) (on which see below, paras [40-529](#) and [40-530](#)) and the [Consumer Rights \(Payment Surcharges\) Regulations 2012 \(SI 2012/3110\)](#): below, paras [40-555](#) et seq. The provisions on unfair contract terms in consumer contracts in the Proposal for a Directive on Consumer Rights appeared in a somewhat modified form in the Commission's Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final, Annex, arts 79–85 CESL, but this proposal was withdrawn by the EU Commission in December 2014: Vol.I, para.[1-015](#).

[1613](#) See above, para.[40-036](#).

[1614](#) The [Consumer Rights Act 2015](#) was accompanied by a set of Explanatory Notes prepared by the Department for Business, Innovation and Skills ("Explanatory Notes 2015"). See also Conway, [Consumer Rights Act, Briefing Paper](#) (House of Commons Library, SN 6588, 1 October 2015).

[1615](#) [Unfair Contract Terms Act 1977](#); [Unfair Terms in Consumer Contracts Regulations 1999](#).

[1616](#) Explanatory Notes 2015, paras 5–9. Law Commission, Scottish Law Commission, Unfair Terms in Consumer Contracts (2005) Law Com No.292, Scot Law Com No.199 ("Law Com. Unfair Terms (2005)"; Law Commission, Scottish Law Commission, Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills (March 2013) ("Law Com. Advice (2013)"); BIS, Enhancing Consumer Confidence by Clarifying Consumer Law (July 2012) ("BIS, Clarifying Consumer Law"). See also BIS, Enhancing Consumer Confidence through Effective Enforcement, Consultation on consolidating and modernising consumer law enforcement powers (March 2012).

[1617](#) Above, para.[40-228](#).

[1618](#) [Unfair Contract Terms Act 1977](#) as amended by the [2015 Act](#) applies only to exemption clauses and other clauses falling within [s.3\(2\)\(b\)](#) of the [1977 Act](#): see Vol.I, paras [17-069](#) et seq. and esp. at paras [17-079](#)—[17-081](#).

[1619](#) See generally below, paras [40-460](#) et seq.

[1620](#) [2015 Act s.2\(2\)–\(7\)](#) "trader" and "consumer", on which see below, paras [40-247](#) and [40-244](#)—[40-246](#) respectively. The [2015 Act s.2\(1\)](#) restricts these definitions to Pt 1, but [s.76\(2\)](#) adopts them for the purposes of interpretation in Pt 2.

[1621](#) [2015 Act s.3](#). While the Act's provisions refer throughout Ch.2 to contracts to supply goods, the following paragraphs will use the shorter (equivalent) terminology used by the Act of "goods contracts".

[1622](#) [2015 Act s.33](#).

[1623](#) [2015 Act s.48](#), which does not, however, define "service contract".

[1624](#) [2015 Act ss.9–11](#) and see [Sale of Goods Act 1979 ss.13–14](#); [Supply of Goods and Services Act 1982 ss.3, 4, 8 and 9](#).

[1625](#) See below, paras [40-460](#), [40-463](#) and [40-467](#) et seq.

- 1626 These were prepared by the Department of Business, Innovation and Skills (“Explanatory Notes 2015”).
- 1627 [2015 Act s.75; Sch.4 para.34.](#)
- 1628 See above, para.[40-141](#) and below, para.[40-442](#). [2015 Act Pt 3](#) also sets out various new rules, including for private actions in competition law ([s.81](#)); a new duty of letting agents to publicise fees ([ss.83–88](#)); and concerning “secondary ticketing” ([ss.90–95](#)).
- 1629 The CMA has published guidance on the unfair contract terms provisions in the [2015 Act](#): Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf [Accessed 1 September 2021].
- 1630 [2015 Act s.2\(3\) and \(4\)](#) as applied to Pt 2 by [s.76\(2\)](#), below, para.[40-244](#).
- 1631 [2015 Act s.62](#) below, para.[40-262](#).
- 1632 [\[2009\] UKSC 6, \[2010\] 1 A.C. 696](#), on which see below, paras [40-355](#)—[40-356](#) and [40-379](#) et seq.
- 1633 [2015 Act Sch.2 Pt 1](#) paras [5, 12](#) and [14](#) and see below, para.[40-316](#) et seq.
- 1634 [2015 Act s.64\(6\)](#) and see below, para.[40-379](#).
- 1635 Law Com. Advice (2013) S. 44 (noting that the [1977 Act](#) may also apply to “employment contracts”).
- 1636 [2015 Act s.75; Sch.4 para.5](#) (amending [1977 Act s.3](#) “liability arising in contract”); [para.6](#) (deleting [1977 Act s.4](#) “unreasonable indemnity clauses”); [para.7](#) (deleting [1977 Act s.5](#) “guarantees” of consumer goods”); [para.8](#) (amending [1977 Act s.6](#) “sale and hire purchase”); [para.9](#) (amending [1977 Act s.7](#) “Miscellaneous contracts under which goods pass”); [para.10](#) (deleting [1977 Act s.9](#) “effect of breach”) and [para.11](#) (deleting [1977 Act s.12](#) “dealing as consumer”): see Vol.I, paras [17-071](#)—[17-073](#). As regards “consumers”, under the [2015 Act](#) these terms are either governed by particular provisions (e.g. liability of seller to consumer in goods contracts by [s.31](#), on which see below para.[40-535](#)) or are subject to the general test of unfairness provided by [s.62](#), on which see below, paras [40-273](#) et seq.
- 1637 [2015 Act s.75; Sch.4 para.4](#) (amending [1977 Act s.2](#) “negligence liability”). The terms of consumer contracts and consumer notices are subject to control under [ss.62](#) and [65 of the 2015 Act](#): see below, paras [40-274](#) and [40-423](#). On the [1977 Act s.2](#) itself see Vol.I, paras [17-085](#)—[17-087](#).
- 1638 [2015 Act s.61\(4\)](#) and see below, paras [40-258](#)—[40-259](#).
- 1639 [2015 Act s.75; Sch.4 para.1](#). These terms are controlled under the [2015 Act](#) by the general test of unfairness provided by [s.62](#), on which see below, paras [40-273](#) et seq. The details of the changes to the [1977 Act](#) and [s.3 of the Misrepresentation Act 1967](#) are discussed in the 33rd edition of the present work, Vol.I, para.[7-149](#) and paras [15-062](#) et seq. These chapters from the 33rd edition, Vol.I are also available as PDFs to online subscribers of the present edition on Westlaw.
- 1640 It does not include all the law, either at common law (such as the rule rendering ineffective an attempted exclusion of liability for personal fraud: see Vol.I, para.[9-153](#))

- or in legislation creating rules governing consumer contracts whose effect cannot be excluded or restricted (or only subject to conditions) (e.g. the [Package Travel and Linked Travel Arrangements Regulations 2018](#) (SI 2018/634) reg.30 (benefiting “travelers”) (on which see above, para.[40-156](#)) or the [Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010](#) (SI 2010/2960) reg.19 (on which see above, para.[40-162](#)). Moreover, provisions in other legislation make the rules (or some of the rules) which they set out incapable of exclusion by contract: e.g. [Consumer Protection Act 1987](#) s.7 (no exclusion of product liability imposed by Pt 1 of that Act).
- 1641 See below, para.[40-244](#).
- 1642 [2015 Act Chs 2, 3 and 4](#).
- 1643 [2015 Act](#) s.31 (contracts to supply goods); s.[47](#) (contracts to supply digital content); s.[57](#) (contracts to supply services).
- 1644 [2015 Act](#) ss.9–17.
- 1645 [2015 Act](#) ss.28–29.
- 1646 Below, paras [40-467](#) et seq. For discussion of the controls of exemption clauses contained in [Pt 1 of the 2015 Act](#), see below paras [40-535](#), [40-568](#) and [40-589](#)–[40-590](#). As there set out, there are qualifications on this broad picture in the case of contracts for the hire of goods ([s.31\(5\)–\(6\)](#), below, para.[40-535](#)) and contracts for services ([s.57 of the Act](#), below, para.[40-590](#)).
- 1647 [2015 Act](#) s.[70](#); Sch.[3](#) and see below, paras [40-441](#) et seq. In addition, acts or omissions in respect of any provision in [Pts 1 and 2 of the 2015 Act](#) were specified as possible “domestic infringements” for the purposes of [s.211 of the Enterprise Act 2002 \(Enterprise Act 2002 \(Part 8 Domestic Infringements\) Order 2015](#) (SI 2015/1727) art.2); and the relevant provisions of the [2015 Act](#) are included as giving rise to possible “[Schedule 13](#) infringements” for the purposes of [s.212 of the 2002 Act](#) by being included in the substituted [Sch.13 of the 2002 Act](#) for this purpose: [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (SI 2019/203) reg.3(20) and Sch. para.1 inserting new [2002 Act](#) Sch.13 para.27 (replacing on IP completion day earlier provision governing “Community infringements”). On these changes more generally see above, paras [40-137](#)–[40-138](#) and below, para.[40-050](#).
- 1648 1993 Directive art.8, and see above, para.[40-023](#).
- 1649 On [s.64](#), see below, paras [40-376](#)–[40-389](#).
- 1650 On the definition of “consumer” see below, paras [40-244](#)–[40-246](#); on the extension to “consumer notices” see below, para.[40-258](#).
- 1651 Below, paras [40-451](#)–[40-454](#).
- 1652 See Vol.I, para.[1-017](#).
- 1653 See Vol.I, paras [1-018](#)–[1-019](#) and also above, para.[40-004](#). On the effect of the UK leaving the EU more generally, see Vol.I, paras [1-016](#) et seq.
- 1654 See Vol.I, para.[1-028](#).
- 1655 [European Union \(Withdrawal\) Act 2018](#) s.6 (as amended by the [European Union \(Withdrawal Agreement\) Act 2020](#) s.26(1)(a)); [European Union \(Withdrawal\) Act 2018 \(Relevant Court\) \(Retained EU Case Law\) Regulations 2020](#) (SI 2020/1525) and see above, para.[40-004](#) and Vol.I, para.[1-028](#).

- 1656 It is submitted that the principle of conforming interpretation itself constitutes a “retained EU general principle” for the purposes of the European Union (Withdrawal) Act 2018 s.6(3) and (7): see Vol.I, para.1-028 (note).
- 1657 European Union (Withdrawal) Act 2018 s.2 (as amended by the European Union (Withdrawal Agreement) Act 2020 s.25(1) and (2)) and see Vol.I, para.1-023.
- 1658 European Union Withdrawal Act 2018 s.6(4) and (5) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1)); European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525) and see Vol.I, para.1-028.
- 1659 European Union Withdrawal Act 2018 s.6(1)(b) and (2) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1)(a)) and see above, para.40-004 and Vol.I, para.1-029.
- 1660 The Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) art.3(a)–(c). (There is an exception as regards Pt 1 Ch.4’s provisions governing services contracts which did not apply to “consumer transport services” (as defined by the Order) until 1 October 2016: 2015 Order arts 4 and 6(2) as amended by the Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) (Amendment) Order 2016 (SI 2016/484) art.2.) But see further below, para.40-465.
- 1661 The Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) art.6(1) provides that the provisions of Pts 1 and 2 brought into force on 1 October 2015 do *not* apply to any contract entered into before 1 October 2015 which would, apart from its provisions, be covered by Pts 1 or 2 nor to any notice provided or communicated before 1 October 2015 which would constitute a “consumer notice” and so be covered by Pt 2 of the Act. art.6(3) of the 2015 Order therefore preserves the effect of the amendments to the law required by the Sale and Supply of Goods to Consumers Regulations 2002 (see below, para.40-462) in relation to any contract entered before 1 October 2015 despite the revocation of those Regulations by the Act; and art.6(4) preserves the effect of the Unfair Terms in Consumer Contracts Regulations 1999 (on which see above, para.40-227) in relation to “any contract or notice relating to any contract” entered into before 1 October 2015 which is provided or communicated before 1 October 2015 and which would otherwise be covered by Pts 1 or 2 of the Act, despite the revocation of those Regulations by the 2015 Act. Similarly, those provisions brought into force on 1 October 2016 in Pt 1 of the 2015 Act in relation to any “contract to supply a consumer transport service” do not apply to contracts entered before that date and the provisions in the Unfair Contract Terms Act 1977 therefore still apply to those contracts until that date: SI 2015/1630 arts 4 and 6(2) (as amended by SI 2016/484 art.2(3)). On the temporal application of the enforcement provisions of the 2015 Act, see below, para.40-443.
- 1662 On the position under the 1999 Regulations see the 33rd edition of the present work, Vol.II at paras 38-220—38-364; on the position under the 1977 Act before its

amendment by the [2015 Act](#), see the 33rd edition of the present work, Vol.I at paras [15-062](#) et seq. These chapters from the 33rd edition are also available as a PDF to online subscribers of this edition on Westlaw.

1663 The amendments to the [2015 Act](#) were made by the [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.3 (reg.1's reference to the [2018 Regulations](#) coming into force on "exit day" must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) s.39(1), s.41(4), Sch.5 para.1). On IP completion day see above, para.[40-004](#) and Vol.I, paras [1-020](#) et seq. The resulting changes will be noted where relevant in the following paragraphs: see [2015 Act](#) s.32 (below, para.[40-537](#)), s.59 (below, para.[40-499](#)), s.73 (below, para.[40-265](#)) and s.74 (below, para.[40-439](#)) The [2015 Act](#) Sch.5 (Investigatory Powers, etc.) (below, para.[40-442](#)) was amended on IP completion day by the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/203\)](#) reg.4 (reg.1's reference to the [2019 Regulations](#) coming into force on "exit day" must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) s.39(1), s.41(4), Sch.5 para.1). The [Consumer Rights Act 2015 \(Enforcement\) \(Amendment\) Order 2019 \(SI 2019/1074\)](#) arts 2 and 3 (in force 23 July 2019) made minor amendments to Schs 3 and 5 of the [2015 Act](#). Sch.5 was subject to further amendment, inter alia, by the [Market Surveillance \(Northern Ireland\) Regulations \(SI 2021/858\)](#) reg.9, the [Medical Devices \(Northern Ireland Protocol\) Regulations \(SI 2021/905\)](#) reg.27, both of which were consequential on the Northern Ireland Protocol to the Withdrawal Agreement between the UK and the EU 2020: cf. Vol.I, para.[1-021](#) (note).

1664 [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.11 (reg.1's reference to the [2018 Regulations](#) coming into force on "exit day" must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) s.39(1)).

1665 Below, paras [40-243](#)—[40-272](#).

1666 Below, paras [40-273](#)—[40-417](#).

1667 Below, paras [40-418](#)—[40-421](#).

1668 Below, paras [40-422](#)—[40-427](#).

1669 Below, paras [40-428](#)—[40-434](#).

1670 Below, paras [40-435](#)—[40-438](#).

1671 Below, para.[40-439](#).

1672 Below, paras [40-440](#)—[40-454](#).

1673 Below, paras [40-535](#)—[40-536](#), [40-568](#) and [40-589](#)—[40-591](#).

(i) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(b) - The Scope of the Controls on Contract Terms and Notices in Pt 2 of the 2015 Act

(i) - Introduction

- 40-243 Very broadly, **Pt 2 of the Consumer Rights Act 2015** imposes requirements as to the fairness and transparency of the terms of consumer contracts (implementing the 1993 Directive but going beyond both the Directive and its earlier implementation in UK law by the **Unfair Terms in Consumer Contracts Regulations 1999**).¹⁶⁷⁴ Secondly, **Pt 2** imposes a requirement of fairness modelled on the requirement for contract terms to “consumer notices” (therefore generally replacing **s.2 of the Unfair Contract Terms Act 1977** in relation to a trader’s liability to consumers¹⁶⁷⁵) and it also extends the requirement of transparency to consumer notices.¹⁶⁷⁶ This section will consider the general scope of the controls on contract terms and notices, looking in turn at the concepts of “consumer” and “trader”,¹⁶⁷⁷ “consumer contract”,¹⁶⁷⁸ and “consumer notice”.¹⁶⁷⁹ It will then discuss the types of contract terms and notices falling within the controls in **Pt 2** and, in particular the exclusion of terms and notices to the extent that they reflects “mandatory statutory or regulatory provisions” or “the provisions or principles of an international convention to which the United Kingdom is a party”.¹⁶⁸⁰

Footnotes

¹⁶⁷⁴ See above, para.40-227 and below, paras 40-272 et seq. and 40-428 et seq.

¹⁶⁷⁵ Above, para.40-418 and below, para.40-423.

¹⁶⁷⁶ Below, para.40-430. **Pt 2** also extends its controls to certain terms of “secondary contracts”, whether or not the latter count as “consumer contracts”: see below, paras

- 40-435—40-438) and makes special provision for the avoidance of the protection which it puts in place for consumers by choice of law (below, para.40-439).
- 1677 Below, paras 40-244—40-246, 40-247.
- 1678 Below, paras 40-248—40-257.
- 1679 Below, paras 40-258—40-259.
- 1680 2015 Act s.73 and see below, paras 40-260—40-272.

(ii) - “Consumer” and “Trader”

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(b) - The Scope of the Controls on Contract Terms and Notices in Pt 2 of the 2015 Act

(ii) - “Consumer” and “Trader”

“Consumer”

- 40-244 Under **Pt 2 of the 2015 Act** *consumer* means “... an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession”.¹⁶⁸¹ This definition reflected the substance of the definition of “consumer” in the 1993 Directive, and, therefore, the earlier **1999 Regulations**, with the significant exception of the reference to the individual’s purposes being *mainly* outside that individual’s trade, etc.¹⁶⁸² As a matter of policy, this refinement was recommended by the Law Commissions in response “to a concern that many consumers occasionally use products such as mobile phones or home computers for work purposes”¹⁶⁸³; and the new wording followed the UK’s implementation of the Consumer Rights Directive 2011¹⁶⁸⁴ and reflects a wider UK legislative strategy in defining “consumer” for contract law purposes.¹⁶⁸⁵ If or to the extent to which the redefinition extended the scope of protection of the 1993 Directive,¹⁶⁸⁶ it is submitted that it was compatible with EU law.¹⁶⁸⁷ On the other hand, the **2015 Act** restricts “consumers” to “individuals” and therefore rules out the possibility of a company relying on its provisions even if it can be said to act “for purposes which are outside [its] business”. This followed the substance of the earlier position under the 1993 Directive and the **1999 Regulations** (which both restricted their controls to “natural persons”¹⁶⁸⁸), but the **2015 Act** also deleted the protections provided for persons “dealing as consumer” contained in the **Unfair Contract Terms Act 1977**.¹⁶⁸⁹ This deletion meant principally that persons who would have fallen within that category but outside the new definition of “consumer”, such as a company concluding a contract which is neither an integral part of its business nor, if only incidental to it, of a type which

it regularly concludes,¹⁶⁹⁰ were no longer protected on this basis.¹⁶⁹¹ Finally, while the definition of "consumer" in the [2015 Act](#) does not exclude an individual who is in fact acting wholly or mainly outside his trade but who holds himself out as acting in the course of a trade (as did the [1977 Act](#)'s definition of "dealing as consumer"¹⁶⁹²), the case-law of the Court of Justice in this situation suggests that such a person should not be allowed to take advantage of the protection provided for consumers as the trader would legitimately consider that he was acting for business purposes.¹⁶⁹³

"Consumers" as agents for non-consumers

- 40-245 Where an individual (A) contracts for goods or services acting outside his trade, business or profession from a person (B) who does act within the course of the latter's business, but A acts in doing so as agent for a third person (C) who acts in the course of his business, then the contract thereby formed between B (the supplier) and C (the principal)¹⁶⁹⁴ does not count as a consumer contract and so falls outside the controls in [Pt 2 of the 2015 Act](#). However, where in such circumstances A also undertakes personal liabilities under the contract which he makes on behalf of the principal,¹⁶⁹⁵ then the contract may qualify as a consumer contract and so fall within [Pt 2](#) for this purpose. So, it was held in relation to the [1999 Regulations](#) that where after a fire an owner of a house (A) entered a contract for its reinstatement with a builder (B) as agent for his insurer (C) (which had exercised its contractual right to repair the property rather than pay an indemnity) but under which he (A) also undertook personal liabilities in respect of payment for the building work, then the terms of the contract could be assessed for their fairness under those Regulations.¹⁶⁹⁶

Burden of proof as to "consumer"

- 40-246 Following the pattern set by the [Unfair Contract Terms Act 1977](#) (rather than the position under the [1999 Regulations](#)), the [2015 Act](#) provides expressly that a trader claiming that an individual was *not* acting for purposes wholly or mainly outside the individual's trade, etc. must prove it.¹⁶⁹⁷

"Trader"

- 40-247 Under [Pt 2 of the Act](#) *trader* means:

"… a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf."¹⁶⁹⁸

"Business" is then defined to include "the activities of any government department or local or public authority".¹⁶⁹⁹ Taken together these definitions follow the definition of "trader" in the Consumer Rights Directive 2011¹⁷⁰⁰ but also reflect the definition of "seller or supplier" in the 1993 Directive.¹⁷⁰¹ One consequential advantage of using "trader" over the terminology of "seller or supplier" used by the 1999 Regulations¹⁷⁰² is that it avoids the implication that contracts by which consumers supply goods or services *to* traders are necessarily excluded from the controls on unfair contract terms.¹⁷⁰³ As has been earlier explained,¹⁷⁰⁴ in *BKK Mobil Oil*¹⁷⁰⁵ the Court of Justice held that the concept of "trader" and "business" (which are identical) for the purposes of the Unfair Commercial Practices Directive 2005 are broadly defined and must include public bodies even if they conclude contracts in the course of pursuing a task in the public interest¹⁷⁰⁶; the significance of these terms:

"... must be determined in relation to the related but diametrically opposed concept of 'consumer', which refers to any individual not engaged in commercial or trade activities."¹⁷⁰⁷

And in *Šiba v Devénas* the Court of Justice followed this case-law in relation to "seller or supplier" under the 1993 Directive, holding therefore that the public or private nature of the specific task which forms the subject matter of the contract cannot determine that Directive's application.¹⁷⁰⁸ This view also precludes any requirement that the "seller or supplier" acts with a view to profit as public bodies providing services to citizens/consumers will often not do so.¹⁷⁰⁹ On the other hand, in *Kamenova* the Court considered that both an intention to make a profit and the regularity or the frequency of their activity may be relevant (among a number of other factors) to a court's decision as to whether a person acted "for purposes relating to his trade, business or profession".¹⁷¹⁰

Footnotes

1681 2015 Act s.2(3) as applied to Pt 2 by s.76(2).

1682 1993 Directive art.2(b).

1683 Law Com. Advice (2013), para.7.100; cf. BIS, Clarifying Consumer Law, paras 4.25–4.31.

1684 Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 art.2(1), recital 17.

1685 See above, paras 40-043—40-044.

1686 This depends on the proper interpretation under the EU case-law, on which see above, paras 40-035—40-037.

1687 Above, para.40-045.

- 1688 1993 Directive art.2(b) (on which see *Cape Snc v Idealservice Srl (C-541/99 and C-542/99) EU:C:2001:625, [2001] E.C.R. I-09049* (where the company contracted in a way “which [was] wholly unconnected with and remote from its normal trade and business”)) and above, para.40-043; *1999 Regulations reg.3(1)* “consumer”.
- 1689 *2015 Act s.75, Sch.4 paras 5–11* and see Vol.I, paras 17-072—17-073. However, the *Arbitration Act 1996 ss.89–91* (as amended by the *2015 Act Sch.4 paras 31–33*) extended the application of Pt 2 of the *2015 Act* in relation to a term which constitutes an arbitration agreement on which see (on the earlier law regarding the 1999 Regulations) *Heifer International Inc v Christiansen [2007] EWHC 3015 (TCC), [2008] All E.R. (D) 120 (Jan)* and below, para.40-324.
- 1690 *R. & B. Customs Brokers Co Ltd v United Dominions Trust Ltd [1988] 1 W.L.R. 321*, on which see Vol.I, para.17-072.
- 1691 Such a person may still be protected on other grounds, notably, on the ground that it is acting on the other party’s “written standard terms of business” under the *Unfair Contract Terms Act 1977 s.3* (exemption clauses and related clauses), on which see Vol.I, paras 17-088—17-096. The Law Commissions considered that the deletion of the category of persons “dealing as consumer” “carries with it only a negligible loss of protection” and would avoid “a very complicated piece of legislation carrying little benefit for businesses”: Law Com. Advice (2013), para.7.115.
- 1692 *Unfair Contract Terms Act 1977 s.12(1)(a); 2015 Act s.2(3)*.
- 1693 cf. above, para.40-035; *Gruber v Bay Wa AG (C-464/01) EU:C:2005:32, [2005] E.C.R. I-439* at para.54 (in the context of the special consumer jurisdiction in the Brussels Convention).
- 1694 See Vol.I, para.21-057.
- 1695 See Vol.I, para.21-093.
- 1696 *Domsalla v Dyason [2007] EWHC 1174 (TCC), [2007] B.L.R. 348* at [92].
- 1697 *2015 Act s.2(4)* as applied to Pt 2 by s.76(3). The position as regards persons “dealing as consumer” was found in *Unfair Contract Terms Act 1977 s.12(3)* (which, together with the rest of s.12) was deleted by the *2015 Act* (s.75; Sch.4 para.11). No burden of proof as to “consumer” was set by the *1999 Regulations reg.3(1)*, following in this respect the 1993 Directive art.2(b): above, paras 40-050—40-051.
- 1698 *2015 Act s.2(2)* applied to Pt 2 by s.76(2).
- 1699 *2015 Act s.2(7)* applied to Pt 2 by s.76(2).
- 1700 Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 art.2(2); Explanatory Notes 2015, para.34.
- 1701 1993 Directive art.2(c) and see above, para.40-053. One difference between the two definitions is that the *2015 Act* refers expressly to a trader acting either “personally or through another person acting in the trader’s name or on the trader’s behalf”, but it is submitted that such a situation should also be read into the definition in 1993 Directive art.2(c). A “person” is sufficiently broad to include both a “natural” and “legal” person as specified by art.2(c).
- 1702 *1999 Regulations reg.3(1)* “seller or supplier”.
- 1703 cf. above, para.40-053 and below, para.40-249.

- 1704 See generally, above, paras 40-054 et seq.
- 1705 *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (C-59/12) EU:C:2013:634, 3 October 2013 (“BKK Mobil Oil (C-59/12)”),* above para.40-055.
- 1706 *BKK Mobil Oil (C-59/12)* at paras 32–33, above para.40-055.
- 1707 *BKK Mobil Oil (C-59/12)* para.33.
- 1708 *Šiba v Devénas (C-537/13)* para.28.
- 1709 *Karel de Grote-Hogeschool Katholieke Hogeschool Antwerpen VZW v Kuijpers (C-147/16)* 17 May 2018 at para.51.
- 1710 *Komisjaza zashtita na potrebeitelite v Kamenova (C-105/17) EU:C:2018:80, 4 October 2018* above, para.40-058 (in the context of the Unfair Commercial Practices Directive and the Consumer Rights Directive).

(iii) - "Consumer Contracts"

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(b) - The Scope of the Controls on Contract Terms and Notices in Pt 2 of the 2015 Act

(iii) - "Consumer Contracts"

Introduction

- 40-248 As earlier noted, [Pt 2 of the 2015 Act](#) defines its scope by reference to "consumer contracts" and "consumer notices".¹⁷¹¹ As regards the former, [s.61](#) provides that [Pt 2](#) applies to "a contract between a trader and a consumer" which is referred to as a "consumer contract" and, it is specified, "does not include a contract of employment or apprenticeship".¹⁷¹² [Part 2 of the Act](#) then makes provision governing the terms of "consumer contracts," which, notably, require them to be fair and, where they are not, renders them "not binding on the consumer".¹⁷¹³ [Part 2](#) also imposes a requirement of transparency for the terms of consumer contracts¹⁷¹⁴ and makes particular provision for particular types of contract term.¹⁷¹⁵

All types of consumer contracts

- 40-249 The question arises, therefore, as to the range of types of consumer contracts to which [Pt 2](#) applies. In this respect, the [1999 Regulations](#) (following the English version of the 1993 Directive) provided that they applied in relation to "unfair terms in contracts concluded between a seller or supplier and a consumer",¹⁷¹⁶ but they defined "seller or supplier" without reference to the types of contracts involved.¹⁷¹⁷ Moreover, the terminology of sale and supply is not used at the same points in the Directive in a number of its other language versions, which instead use words translatable as

"trader" (such as the French, professionnel or the German Gewerbetreibender) instead of "seller and supplier" and recital 10 of the Directive explains that its rules "should apply to *all* contracts concluded between sellers or suppliers and consumers".¹⁷¹⁸ The general view of commentators has therefore long been that the 1993 Directive applies to all types of consumer contracts defined by reference only to the status of their parties: the "seller and supplier" and the "consumer"¹⁷¹⁹ and this was put beyond doubt by the Court of Justice in *Brusse v Jahani BV*,¹⁷²⁰ *Šiba v Devénas*,¹⁷²¹ and *Tarcău*.¹⁷²² In *Brusse v Jahani BV* the Court of Justice considered a question on the proper interpretation of the definition of "seller or supplier" in the context of Dutch law, given that, like the English version, the Dutch version of the Directive uses "seller" to describe the business party to the contract.¹⁷²³ Having reviewed the various language versions of the Directive, the Court noted that, whatever the terminology used in the different versions, they all defined the business party in the same way and that therefore:

"… beyond the term used to designate the other party to the contract with the consumer, the legislature's intention was not to restrict the scope of the directive solely to contracts concluded between a seller and a consumer."¹⁷²⁴

Noting the reference in recital 10 to "all contracts" concluded between sellers and suppliers and consumers,¹⁷²⁵ the Court concluded that:

"… it is therefore by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession that the directive defines the contracts to which it applies."¹⁷²⁶

This view of the scope of the Directive reflects the purpose of the Directive in the protection of consumers as "weaker parties" as regards both their bargaining power and their level of knowledge.¹⁷²⁷ As a result, the Court held that a contract of residential tenancy concluded between a landlord acting for purposes relating to his trade, business or profession and a tenant acting for purposes which do not relate to his trade, business or profession fell within the scope of the Directive.¹⁷²⁸ In *Šiba v Devénas*,¹⁷²⁹ the Court of Justice followed its earlier view in *Brusse* and therefore held that contracts for the supply of legal services fell within the scope of the Directive, even though the lawyer supplying those services exercised a "liberal profession" (which is distinguished from a business in the laws of some Member States).¹⁷³⁰ And in *Tarcău v Banca Comercială Intesa Sanpaolo România SA*, the Court of Justice followed this earlier case-law and therefore held that the 1993 Directive could apply to a contract of guarantee undertaken by a natural person acting other than in the course of business under which he or she guaranteed the obligations of a debtor company to a commercial lender.¹⁷³¹ According to the Court of Justice:

"… [t]he purpose of the contract is … subject to the exceptions listed in the recital 10 of the Directive …, irrelevant in determining the scope of the directive."¹⁷³²

As a result, the Directive (and therefore also Pt 2 of the 2015 Act) do not restrict the categories of contract to which they apply in the sense of the types of subject matter with which they are concerned; the contracts to which they apply are defined exclusively by reference to the status of the two parties: "seller and supplier" and "consumer".¹⁷³³ On the other hand, in *Šiba v Devēnas* the Court held that the nature of the subject matter of the contract would be relevant to the assessment of the fairness of its terms.¹⁷³⁴

Contracts of supply by "consumers" to "suppliers"

- 40-250 The 2015 Act did not itself take a position on the question whether an individual acting other than in the course of a business who *supplies* goods or services to a trader may count as a "consumer" for the purposes of Pt 2's provisions and so the answer to this question must follow the proper interpretation of the 1993 Directive on this issue.¹⁷³⁵ In this respect, the English version of arts 1 and 2 of the Directive, which describes the business party to the contract as the "seller or supplier" may be thought to support an understanding of a consumer as "recipient".¹⁷³⁶ And in general, as has been seen, the European Court has taken a restrictive interpretation of the notion of "consumer" even in the context of consumer protection legislation.¹⁷³⁷ On the other hand, as earlier noted, other language versions of arts 1 and 2 of the 1993 Directive do not assume a sale or supply *by the business*, instead using terms to describe the non-consumer party to the contract translatable as "trader".¹⁷³⁸ Moreover, the justification for the protection of consumers against unfair terms accepted by the Court of Justice of the EU is that "consumers" are weaker than traders in their bargaining power and level of knowledge and that this leads to their agreeing to terms whose content they cannot influence¹⁷³⁹ and this justification applies with equal force to "consumers" who supply as to those who receive. The view that the 1993 Directive can apply to contracts under which "consumers" supply persons acting in the course of business was confirmed explicitly by the Court of Justice of the EU in its decision in *Tarcău v Banca Comercială Intesa Sanpaolo România SA*.¹⁷⁴⁰ In that case, the national court had considered that the 1993 Directive applied only to contracts for the supply of goods or services to consumers, but the Court of Justice held that the Directive applies to "all contracts" between consumers and sellers or suppliers.¹⁷⁴¹ Given that the directive defines the scope of the contracts to which it applies by reference to the capacity of its contracting parties, that is, "according to whether or not they are acting for purposes relating to their trade, business or profession,"¹⁷⁴² a contract under which a natural person agrees to secure the contractual obligations owed by a commercial company to a banking institution under a credit agreement will fall within the scope of the directive if the national court finds that that natural person (as "consumer") "acted for private purposes" rather than that he:

"... acted for purposes relating to his trade, business or profession or because of functional links he has with that company, such as a directorship or non-negligible shareholding."¹⁷⁴³

Referring to the decision in *Tarcău*, the English Court of Appeal was prepared to assume, without deciding, that the 1993 Directive (and therefore the [1999 Regulations](#)) applied to a case where an individual guarantees the debt of a company, as long as that individual is not connected with the company and has been acting outside his business, trade or profession.¹⁷⁴⁴

Employment contracts

- 40-251 As has been seen, the [2015 Act](#) states explicitly that its definition of the scope of Pt 2 so as to apply to *a contract between a trader and a consumer* "does not include a contract of employment or apprenticeship,"¹⁷⁴⁵ but the position governing employment contracts is not quite as simple as this suggests. Recital 10 of the 1993 Directive notes that "as a result" of its application to "all contracts concluded between sellers or suppliers and consumers", it does *not* apply to:

"... contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies and partnership agreements".

It will be seen that almost all the types of contracts listed would clearly not fall within the category of "consumer contracts" since they do not qualify in terms of the character of their parties (not being "sellers or suppliers" and "consumers"), but this position may not always be the case as regards the parties to employment contracts. In general, an employer is normally a person acting for the purposes of its trade or profession and an employee is *not* acting outside the purposes of his trade or profession in relation to the employment so as to be able to qualify as a "consumer", but sometimes an employer and employee conclude contracts as part of that relationship which do appear to qualify as "consumer contracts". In this respect, in *Pouvin and Dijoux v Électricité de France (EDF)* the Court of Justice of the EU held that where an employee concludes a contract, *other than the employment contract*, with his employer, this does not prevent the employee counting as a "consumer" and his employer counting as a "seller or supplier" within the meaning of the 1993 Directive.¹⁷⁴⁶ As a result, a contract of loan by an employer to its employee for the purpose of the purchase of a property for the employee's private purposes can be a "consumer contract" even where the loan contract is one reserved for certain groups of consumers (there, principally members of staff)¹⁷⁴⁷ and even though the main activity of the employer is not the provision of finance but (as there) the supplying of energy as the:

"... employer has technical information and expertise, and human and material resources that a natural person, namely the other party to the contract, is not deemed to have."¹⁷⁴⁸

However, the Court of Justice also recognised the existence of "the exclusion of employment contracts from the scope of [the 1993 Directive]", holding that such a loan contract is not excluded on this basis as it "does not regulate an employment relationship or employment conditions" and, consequently, cannot be classified as an "employment contract".¹⁷⁴⁹ This assumes that contracts of employment or contracts which otherwise regulate an employment relationship or employment conditions do fall within the exclusion and therefore cannot themselves be a "consumer contract" within the meaning of the 1993 Directive. As a result, for example, where a private individual (the employer) acting outside their trade or profession concludes a contract of employment with a person (the employee) who is acting in the course of their trade or profession, (e.g. a private individual employing a nanny for his children), this contract would not be a "consumer contract" within the meaning of the 1993 Directive, even though otherwise such an employer could be seen as a "consumer" and the employee the "seller or supplier" of those services. It is submitted that the definition of the scope of Pt 2 of the 2015 Act in s.61(1)–(3) as applying to "consumer contracts" but excluding contracts of employment can be interpreted so as to give effect to the set of distinctions adopted by the Court of Justice in *Pouvin and Dijoux*, so that while a contract of employment or of apprenticeship (both of which are "contracts of employment or contracts which otherwise regulate an employment relationship or employment conditions") are excluded from the scope of Pt 2, this is not true of other types of contracts between employers and employees even though they are restricted to employees.

Further examples of "consumer contracts"

- 40-252 The Directive's Annex setting out an indicative list of terms which may be unfair (appearing in Sch.2 of the 2015 Act) assumes that it applies to non-physical property, including transactions in transferable securities, financial instruments and to the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency.¹⁷⁵⁰ This being so, contracts of assignment or of the licensing of contractual or other rights (for example, a right to use digital content) are also included within the ambit of the controls in Pt 2 of the Act. The Court of Justice has held that the 1993 Directive applies to contracts of settlement by which a trader and consumer agree to waive rights or claims they may have arising under an earlier contract for the supply of goods or services.¹⁷⁵¹ And English courts have held or assumed that the 1994 or the 1999 Regulations (which implemented the 1993 Directive before Pt 2 of the 2015 Act¹⁷⁵²) applied to a wide variety of types of consumer contract, notably, contracts of residential tenancy,¹⁷⁵³ contracts for the supply of a newly-built house,¹⁷⁵⁴ contracts for the provision of financial services,¹⁷⁵⁵

contracts of membership of a gymnasium,¹⁷⁵⁶ and the contract under which a person enjoys free parking for a limited period.¹⁷⁵⁷

An autonomous interpretation of “contract”?

- 40-253 So far in this discussion it has been assumed that the transaction which falls within the ambit of Pt 2 of the 2015 Act qualifies as a “contract” within the meaning of this notion in English law. However, the question arises whether the concept of “contract” should be understood in this way or whether instead it attracts an autonomous, European interpretation.¹⁷⁵⁸ In this respect, as will be seen below, the case-law of the Court of Justice as it existed on IP completion day is not clear on this issue.¹⁷⁵⁹

European case-law

- 40-254 A key context for this discussion is whether, or the extent to which, the controls in the 1993 Directive apply to an agreement which is concluded in a national regulatory framework, whether or not this framework forms part of national public law. In this respect, the European Commission has drawn attention to its statement in the Council’s minutes in connection with the adoption of the common position concerning art.2 of the 1993 Directive on the notion of the contract which “points out that the notion of contract also includes transactions involving supplies of goods or services in a regulatory framework”.¹⁷⁶⁰ Moreover, in *Schulz & Egbringhoff*,¹⁷⁶¹ in the context of the exclusion from the 1993 Directive of contract terms required by legislation,¹⁷⁶² Advocate General Wahl distinguished between cases where electricity or gas was supplied under contracts by suppliers under a legal “universal service obligation” some of whose terms were set by legislation, which he referred to as “contracts, which are governed by national legislation, [which] do not fall within the sphere of freedom of contract”¹⁷⁶³ and those made in the absence of such an obligation under “special contracts” which are “concluded on the basis of freedom of contract”.¹⁷⁶⁴ This approach therefore distinguishes between two categories of *contract*, those which are closely regulated by law (both as regards an obligation to conclude the contract in the supply and some of its terms) and those not so regulated, and thereby assumes that the fact of such regulation does not preclude the transaction from being classed as a contract for the purposes of the 1993 Directive.¹⁷⁶⁵ On the other hand, where terms of a consumer contract are required by law in this way in principle they fall within the exclusion from the scope of the 1993 Directive as being terms which reflect “mandatory statutory or regulatory provisions” unless a Member State has not included this exclusion in its implementing legislation.¹⁷⁶⁶ In the case of the UK, this exclusion from the scope of the 1993 Directive was included in s.73 of the 2015 Act.¹⁷⁶⁷

Kanyeба

40-255 In 2019 in *Kanyeба*¹⁷⁶⁸ the question arose before the Court of Justice as to whether the concept of “contract” should be understood autonomously for the purposes of the 1993 Directive in a national context where the exclusion contained in art.1(2) of the Directive had not been implemented.¹⁷⁶⁹ There, three people (the “consumers”¹⁷⁷⁰) had travelled on Belgian trains without buying a ticket and had, moreover, refused to “regularise” their position by buying tickets onboard when asked to or by paying further sums (which increased over time) when invited to, all as provided by the national conditions governing carriage by rail. When these accumulated sums were claimed by the railway company from the travellers, the latter argued that they were payable under a contract and that the “terms” on which they were based were therefore open to challenge on the ground of their unfairness under national legislation implementing the 1993 Directive; the railway company countered that the travellers were not carried under a contract at all and that the sums with which they were charged arose from the regulations governing rail transport.¹⁷⁷¹ It was not clear as a matter of (Belgian) national law whether the legal basis of the national conditions of carriage was contractual or regulatory nor whether or not the relationship between the traveller without a valid ticket was contractual.¹⁷⁷² In this context, Advocate General Pitruzzella advised the Court that the EU regulation on rail passengers’ rights and obligations (which governed “contracts of transport”¹⁷⁷³) and the 1993 Directive merely presuppose the existence of a contract between traveller and carrier; they do not determine:

“... when a legal relationship may be classified as a contract of carriage or the time at which a contract of carriage can be deemed to be concluded”,

and this means that “it is entirely within the discretion of the Member States to classify the nature of the legal relationship which is created” in the situations in question.¹⁷⁷⁴ However, the Court of Justice disagreed. It held, first, that according to the wording of the EU regulation on rail passengers’ rights and obligations “the word ‘contract’ is generally understood to designate an agreement by consensus intended to produce legal effects”¹⁷⁷⁵ and that

“... by allowing free access to its train and, on the other hand, by boarding that train with an intention to travel, both the rail undertaking and the passenger demonstrate their agreement to enter into a contractual relationship”.¹⁷⁷⁶

Moreover, the legal context and objectives of the EU Regulation (and its relationship to the COTIF¹⁷⁷⁷) show that a person travelling without a ticket does so under a “contract of transport” since, in particular, otherwise the carrier could not rely on the national conditions of transport against such travellers and the latter could be deprived of their rights under the EU Regulation.¹⁷⁷⁸

On the other hand, in the Court's view, this position is without prejudice to the validity of the contract or to the consequences of its non-performance in this situation, which are not governed by the EU Regulation and therefore belong to national law.¹⁷⁷⁹ Given this decision on the EU Regulation, the Court of Justice considered it unnecessary to decide whether the Directive on unfair terms in consumer contracts applies to the relationship governing such a traveller, but it did consider the question whether art.6 of the Directive (which renders unfair contract terms not binding on the consumer) prevented a national court from modifying the amount stipulated by a penalty clause in a consumer contract¹⁷⁸⁰ on the express premise that the term did not fall outside the scope of the Directive owing to the exclusion in art.1(2) (i.e. as reflecting legislative provisions)¹⁷⁸¹: this strongly suggests that the Court assumed that the relationship between the parties fell more generally within the scope of the Directive as a "consumer contract". While, therefore, the Court of Justice did not decide explicitly that the Directive requires an autonomous interpretation to be taken to the concept of "contract" for its purposes, it did not follow its Advocate General's view that it did not.

Concept of "contract" under the 2015 Act

- 40-256 At the time of writing, there is no decision of an English court which has determined whether the concept of contract should be interpreted simply according to English law or instead by reference to an autonomous European interpretation, as it generally been assumed or agreed that a "contract" between the parties is established.¹⁷⁸² Given the equivocal nature of the decision of the Court of Justice in *Kanyeба* just noted, it is submitted that there is no "decision" made by that Court before IP completion day which determines the issue, but it is further submitted that it would be open to a UK court to hold that the "principles laid down" by the Court of Justice before IP completion day on the recognition of autonomous interpretations governing concepts in EU directives (and specifically in the 1993 Directive) in principle bind it or at least should frame its own decision-making in relation to the "retained EU law" in Pt 2 of the 2015 Act.¹⁷⁸³ In this respect, as has been seen, the Court of Justice has ruled before IP completion day that the notions of "consumer" and "trader" in the 1993 Directive as well as the notion of "consumer contract" must all have autonomous interpretations.¹⁷⁸⁴ More generally, the interpretative approach of the Court of Justice takes into account whether a national or an autonomous interpretation of a concept is likely to be more effective in enabling the Directive to achieve its purposes,¹⁷⁸⁵ balancing this against the difficulty of constructing a European conception of the concept (here "contract") for the purposes of a directive.¹⁷⁸⁶ As regards the latter, it is to be noted that the Court of Justice has long taken an autonomous view of "matters relating to contract" for the purposes of European instruments on international jurisdiction.¹⁷⁸⁷ And as regards the purposes of the 1993 Directive, both reduction in distortions in competition and the protection of consumers would be enhanced by an autonomous view of "contract" for the purposes of the Directive, for such a view would clearly enhance the harmonising purpose of the Directive and thereby make more effective its

policy of consumer protection within the EU. On the other hand, given the equivocal state of the European case-law, the difficulty of a UK court constructing an autonomous view of contract for the purposes of the 1993 Directive (and therefore the [2015 Act](#))¹⁷⁸⁸ and the lack of significance for the UK of the specifically European concerns about the reduction of distortions in competition in the European market suggest that a UK court could instead decline to identify and apply an autonomous European concept of “contract” and instead simply apply the English law conception of that concept. Certainly, the Supreme Court or one of the appellate courts listed for this purpose could so decide even if they considered that by doing so they departed from European case-law made after IP completion day.¹⁷⁸⁹

Consumer contract contained in a deed

- [40-257](#) Finally, it is submitted that the notion of “consumer contract” for the purposes of [Pt 2 of the 2015 Act](#) should include agreements between a trader and a consumer contained in a deed and binding for that reason even in the absence of consideration (as is generally required for a “simple contract” at common law).¹⁷⁹⁰ An example could be found in the case of an agreement by a consumer with a bank (the trader) to guarantee an existing debt of a family member payable to that bank, where the bank does not promise to forbear to sue on the debt.¹⁷⁹¹ The inclusion of agreements of this kind within “consumer contract” would further the policy of protection of the [2015 Act](#).¹⁷⁹²

Footnotes

- [1711](#) Above, para.[40-243](#). The key provisions are contained in the [2015 Act s.61](#). It is to be noted that there is no exclusion from the scope of this control for “international supply contracts” as there was (and is) under [s.26 of the Unfair Contract Terms Act 1977](#) on which see below, para.[46-125](#) which (before the [2015 Act](#)) applied also to claims by persons “dealing as consumer”.
- [1712](#) [2015 Act s.61\(1\), \(3\) and \(2\)](#) respectively.
- [1713](#) [2015 Act s.62\(1\)](#) and see below, paras [40-405](#) et seq.
- [1714](#) Below, paras [40-428—40-434](#).
- [1715](#) [2015 Act ss.65 and 66](#) on which see below, para.[40-423](#).
- [1716](#) [1999 Regulations reg.4\(1\)](#); 1993 Directive art.1. The [1994 Regulations reg.3\(1\)](#) and Sch.1 paras (a)–(d) were expressed as not applying to contracts relating to employment, contracts relating to succession rights, any contract relating to rights under family law and any contract relating to the incorporation and organisation of companies or partnerships. This reflected 1993 Directive recital 10, as noted below in this paragraph.
- [1717](#) [1999 Regulations reg.3\(1\)](#), “seller or supplier”.

- 1718 (Emphasis added): “que ces règles doivent s’appliquer à tout contrat conclu entre un professionnel et un consommateur”. Similar formulations are found in the Italian, Spanish and German versions of the Directive; 1993 Directive art.2.
- 1719 On the 1993 Directive see *Tenreiro* (1993) 7 *Contrats-Concurrence-Consommation* 1; *Trochu* (1993) *D.S. Chron* 315, 317; Weatherill, EU Consumer Law and Policy (2005) p.117; Calais-Auloy and Steinmetz, *Droit de la consommation*, 7th edn (2006), para.179 (although referring to the French legislation implementing the Directive). The arguments in favour of this position have been rehearsed in successive editions of the present work since the 27th edition, 1994 (see Vol.I, Ch.15).
- 1720 *C-488/11 EU:C:2013:341, 30 May 2013.*
- 1721 *C-537/13 EU:C:2015:14, 15 January 2015 [2015] Bus. L.R. 81* (“*Šiba v Devénas (C-537/13)*”). See also *Karel de Grote-Hogeschool Katholieke Hogeschool Antwerpen VZW v Kuijpers* (C-147/16) 17 May 2018 at paras 53–54; *Pouvin and Dijoux v Électricité de France (EDF)* (C-590/17) *EU:C:2019:232, 21 March 2019* at para.19.
- 1722 *Tarcău v Banca Comercială Intesa Sanpaolo România SA* (C-74/15) *Order of CJEU* 19 November 2015 (“*Tarcău (C-74/15)*”).
- 1723 *C-488/11 EU:C:2013:341*, paras 25–27 (“*verkoper*”).
- 1724 *Brusse v Jahani BV* (C-488/11) *EU:C:2013:341* (“*Brusse (C-488/11)*”), para.28.
- 1725 1993 Directive recital 10 notes that, “as a result” of its application to “all contracts concluded between sellers or suppliers and consumers”, it does *not* apply to “contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organization of companies and partnership agreements”. Generally, these exclusions (which were reflected in the text of the 1994 Regulations reg.3(1), Sch.1) are straightforward given that the parties to these types of contract would not qualify as “seller or supplier” and “consumer” within the meaning of the 1993 Directive, but the position of contracts relating to employment is less straightforward, on which see below, para.40–251.
- 1726 *Brusse (C-488/11)* para.30.
- 1727 *Brusse (C-488/11)* para.31.
- 1728 *Brusse (C-488/11)* para.34.
- 1729 *Šiba v Devénas (C-537/13) 15 January 2015.*
- 1730 *Šiba v Devénas (C-537/13)* at paras 17, 20–24.
- 1731 *Tarcău v Banca Comercială Intesa Sanpaolo România SA* C-74/15 *Order of CJEU* 19 November 2015 (“*Tarcău (C-74/15)*”) (an “order” is made by the CJEU where it considers that the question for a preliminary ruling admits of no reasonable doubt). See similarly *Bucura v SC Bancpost SA* (C-348/14) *EU:C:2015:447, 9 July 2015* (available in French) paras 35–38 (1993 Directive may apply where the alleged “consumer” contracted as “co-debtor” to a person concluding a contract of consumer credit); *Dumitraș v BRD Groupe Société Générale* (C-534/15) *Order of the CJEU of 14 September 2016* (contract of guarantee by individual in context of group of companies); *Bachman v FAER IFN SA* (C-535/16) (*Order of the Court of 27 April 2017*, available in French) (contract of novation under which individual undertook obligations arising under earlier commercial contract of loan). See also

- Air Berlin Plc & Co Luftverkehrs KG v Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbracherzentrale Bundesverband eV* (C-290/16) 6 July 2017 at para.44, holding that the 1993 Directive is a “general directive for consumer protection, intended to apply to all sectors of economic activity” and therefore national legislation implementing the 1993 Directive could apply to the contracts of air transport falling within the scope of Regulation (EC) 1008/2008 of the European Parliament and of the Council on common rules for the operation of air services in the Community in the absence of express provision in that Regulation to the contrary (which there is not); *Ryanair DAC v DelayFix* (C-519/19) EU:C:2020:933, 18 November 2020 at para.52.
- 1732 *Tarcău* (C-74/15) at para.22. On the status of these “exceptions” see note above in this paragraph in relation to the 1993 Directive recital 10.
- 1733 See below, paras 40-224—40-247 on the definitions of these terms.
- 1734 1993 Directive art.4(1); *C-537/13* at paras 33–35 and see below, para.40-295.
- 1735 Above, para.40-049. cf. the position under the **Unfair Contract Terms Act 1977**, in relation to which it was stated that “a person can “deal as consumer” in disposing of goods, no less than in acquiring goods or services”: Peel (ed.), Treitel on The Law of Contract, 14th edn (2015), para.7-054. The controls on contract terms in **Pt 1 of the 2015 Act** are restricted to the protection of consumers who *receive* goods, digital content or services, as the contracts to which that Part relates are all expressed in terms of the supply of goods, digital content or services by traders to consumers: **2015 Act s.1(3)**. See above, para.40-049 and below, para.40-467.
- 1736 cf. the change of phrasing used in defining consumer contracts under the Rome Convention of 19 June 1980 on the law applicable to contractual obligations and its successor in Rome I Regulation (Regulation (EC) 593/2008 on the law applicable to contractual obligations). Under art.5(1) Rome Convention a consumer contract is defined as “[a] contract the object of which is the supply of goods or services to a person (‘the consumer’) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object”, whereas under art.6(1) Rome I the special provisions governing consumer contracts apply to “a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional)”.
- 1737 Above, para.40-034.
- 1738 cf. above, para.40-249.
- 1739 Above, para.40-034.
- 1740 *C-74/15 Order of CJEU* 19 November 2015 (“*Tarcău* (C-74/15)”).
- 1741 *Tarcău* (C-74/15) at para.22 and see above, para.40-249.
- 1742 *Tarcău* (C-74/15) at para.23.
- 1743 *Tarcău* (C-74/15) at para.29. For the earlier English decisions on this point in relation to the **1999 Regulations** see *Barclays Bank Plc v Kufner* [2008] EWHC 2319 (Comm), [2009] 1 All E.R. (Comm) 1 at [28]–[29] Field J. (guarantor acting for purposes of trade or business); *Royal Bank of Scotland v Chandra* [2010] EWHC 105 (Ch), [2010] 1 Lloyd’s Rep. 677 at [102] (affirmed [2011] EWCA Civ 192, [2011] Bus. L.R. D149

- on other grounds) (principal debtor not consumer); *United Trust Bank Ltd v Dohil [2011] EWHC 3302 (QB)* at [73] (guarantor acting for purposes of trade or business) not following *The Governor and Co of the Bank of Scotland v Singh Unreported 17 June 2005, QBD Mercantile Ct, Manchester*, at [85]–[90]; *Manches LLP v Freer [2006] EWHC 991 (QB)*; *Williamson v Governor of the Bank of Scotland [2006] EWHC 1289 (Ch)* at [42]–[46]. On this see below, paras 47-161—47-163.
- 1744 *Harvey v Dunbar Assets Plc [2017] EWCA Civ. 60, [2017] Bus. L.R. 784* at [68]–[72]. On the facts it was very difficult for the individual guarantor to maintain that he had no connection with the company nor was acting in the course of business in making the guarantee and so the CA refused permission to amend the grounds of appeal so as to include the challenge to the guarantee under the 1999 Regulations.
- 1745 2015 Act s.61(1) and (2), above, para.40-248.
- 1746 *Pouvin and Dijoux v Électricité de France (EDF) (C-590/17) EU:C:2019:232, 21 March 2019 ("Pouvin and Dijoux (C-590/17)")* at paras 29–43.
- 1747 *Pouvin and Dijoux (C-590/17)* at paras 18 and 30.
- 1748 *Pouvin and Dijoux (C-590/17)* at para.40.
- 1749 *Pouvin and Dijoux (C-590/17)* at para.32.
- 1750 2015 Act Sch.2 Pt 2 paras 21, 22 and 24 (which *disapply* some of the examples of terms in Pt 1 of Sch.2 in these cases), but which therefore assume that, in principle, these contracts fall within the scope of the controls on the fairness of contract terms in s.62. On the role of this Schedule more generally, see below, paras 40-316 et seq.
- 1751 *XZ v Ibercaja Banco SA (C-452/18) EU:C:2020:536* para.59 and see below, paras 40-369, 40-374 and 40-407.
- 1752 Above, para.40-226.
- 1753 *London Borough of Newham v Khatun [2004] EWCA Civ 55, [2005] Q.B. 37* and see *Peabody Trust Governors v Reeve [2008] EWHC 1432 (Ch)* at [30], [2009] L. & T.R. 6; *Shaftsbury House (Developments) Ltd v Lee [2010] EWHC 1484 (Ch)* at [54], *Rochdale BC v Dixon [2011] EWCA Civ 1173, [2012] H.L.R. 6*.
- 1754 *Zealander v Laing Homes Ltd (2000) 2 T.C.L.R. 724*. The CJEU has assumed that the 1993 Directive applies to contracts for the purchase of immovable property by a consumer from a builder: *Constructora Principado SA v Menéndez Álvarez (C-226/12) EU:C:2014:10, 16 January 2014*.
- 1755 *Director General of Fair Trading v First National Bank [2001] UKHL 52, [2002] 1 A.C. 481* (below, para.40-354); *Abbey National Plc v Office of Fair Trading [2009] UKSC 6, [2010] 1 A.C. 696* (the "Bank Charges" case) (below, paras 40-355—40-356). The 1993 Directive recital 19 assumes that contracts of insurance may fall within its scope. As will be seen, contracts of loan to a consumer secured by mortgage on residential property have formed a significant part of the CJEU's case-law: below, para.40-281.
- 1756 *Office of Fair Trading v Ashbourne Management Services Ltd [2011] EWHC 1237 (Ch), [2011] E.C.C. 31*.
- 1757 *ParkingEye Ltd v Beavis [2015] UKSC 67, [2016] A.C. 1172*, below, paras 40-287—40-289.

- 1758 On “autonomous” interpretations generally, above, para.40-016. For this issue in relation to the 1993 Directive and development of the consequences noted in the following discussion, see *Whittaker (2000) 116 L.Q.R. 95*. cf. the position under the Consumer Rights Directive 2011 art.3(5) which would apparently allocate the question of what constitutes a “contract” for its purposes to national general contract laws and *Stichting Waternet v MG (C-922/19) EU:C:2021:91, 3 February 2021*, above, paras 40-066—40-068, 40-073.
- 1759 See below, paras 40-254—40-255 esp. in relation to *Nationale Maatschappij der Belgische Spoorwegen (NMBS) v Kanyeба, Njs. Dedroog (C-349 to C-351/18) EU:C:2019:936, 7 November 2019*.
- 1760 European Commission, Report on Directive 93/13/EEC on Unfair Terms in Consumer Contracts, COM(2000) final, p.15. In its guidance on the proper interpretation of the 1993 Directive, the European Commission did not explicitly take a view on this general question, but it did note that some decisions of the CJEU have accepted the application of the directive where the consumer has not provided *monetary consideration* for goods or services, as in the case of guarantees for a loan taken out by another party: Commission guidance C(2019) 5325 final, pp.9–10, e.g. *Tarcău (C-74/15)*, above, para.40-249.
- 1761 AG Opinion, *Schulz v Technische Werke Schüssental GmbH und Co KG, Egbringhoff v Stadwerke Ahaus GmbH (C-359 and C-400/11) 8 May 2014*. The CJEU’s decision of 23 October 2014 did not reflect on the differences between the two categories of contract.
- 1762 1993 Directive art.1(2), below, paras 40-265—40-272.
- 1763 AG Opinion, *C-359 and C-400/11* at para.34.
- 1764 AG Opinion, *C-359 and C-400/11* at para.38 (as in the earlier decision of the CJEU in *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV (C-92/11) EU:C:2013:180, 21 March 2013*, below, para.40-266).
- 1765 For the AG, therefore, the terms of the contracts before the Court (which did not reflect freedom of contract) fell within the special provisions on the transparency of contract terms in the relevant Energy Directives and not the 1993 Directive: *C-359 and C-400/11* at para.47.
- 1766 1993 Directive art.1(2). The omission of the exclusion is permitted by its requirement of “minimum harmonisation” under art.8 of the Directive.
- 1767 Below, paras 40-265—40-272.
- 1768 *Nationale Maatschappij der Belgische Spoorwegen (NMBS) v Kanyeба, Njs. Dedroog (C-349 to C-351/18), (“Kanyeба (C-349 to C-351/18)”), Opinion of AG Pitruzzella, 11 June 2019; judgment of the CJEU, 7 November 2019*.
- 1769 Opinion of AG Pitruzzella, para.57.
- 1770 *Kanyeба (C-349 to C-351/18)*, CJEU, para.22.
- 1771 It was noted that Belgian law’s implementation of the 1993 Directive did not include the exclusion of terms reflecting mandatory statutory or regulatory provisions provided by art.1(2): *Kanyeба (C-349 to C-351/18)* AG Opinion, para.57. This meant that, if the legal relationship between the traveller and the carrier were held to be contractual,

- its "terms" would fall to be assessed for their fairness even if required by regulations governing rail transport.
- 1772 *Kanyeба (C-349 to C-351/18)*, CJEU, para.23.
- 1773 Regulation (EC) 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [2007] O.J. L315/14.
- 1774 *Kanyeба (C-349 to C-351/18)*, Opinion of 11 June 2019, paras 38–40 and see also at paras 41, 49–50.
- 1775 *Kanyeба (C-349 to C-351/18)*, CJEU, para.36. cf. *Kh v Sparkasse Sudholstein (C-639/18)* EU:C:2020:206 at paras 45–51 AG Sharpston advising (in the context of art.2(a) of Directive 2002/65 concerning the distance marketing of consumer financial services [2002] O.J. L271/16) that "a key element for a 'contract' to exist within the meaning of Article 2(a) is that there should be an agreement between the parties, that is to say a meeting of minds" (para.51). The decision of the CJEU of 18 June 2020 did not express a view on this issue, though it did not accept its AG's advice on the question whether the amending agreement was a "contract concerning financial services": see above, para.[40-143](#) (note).
- 1776 *Kanyeба (C-349 to C-351/18)*, CJEU, para.37.
- 1777 EU Regulation Annex I setting out Appendix A of the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 and in particular art.9; on COTIF generally see above, paras [38-100](#) et seq.
- 1778 *Kanyeба (C-349 to C-351/18)*, CJEU, paras 37–53.
- 1779 *Kanyeба (C-349 to C-351/18)*, CJEU, para.52.
- 1780 *Kanyeба (C-349 to C-351/18)*, CJEU, paras 55 et seq.
- 1781 The CJEU did so on the basis that the question whether a clause actually fell within art.1(2) was a question for the national court in the light of its own guidance on the proper interpretation of that provision (on which see below, para.[40-266](#)), but, as its AG had noted, the national law of the referring court (Belgian law) had not included the exclusion in art.1(2) in its national implementing legislation: Opinion of AG Pitruzzella para.57.
- 1782 cf. *Roundlistic Ltd v Jones [2016] UKUT 325 (LC)* at [100], where it was held that a lease of residential premises granted by a landlord to its tenant was a contract concluded between those parties, despite the fact that it was concluded within the context of the obligation on the landlord to grant a new lease pursuant to the *Leasehold Reform, Housing and Urban Development Act 1993*: this issue was not appealed and the CA assumed that such a lease was a "contract" for the purposes of the *1999 Regulations: [2018] EWCA Civ 2284, [2019] H.L.R. 17*, though it was further held that these terms of the new lease were excluded from the scope of the 1999 Regulations on the basis that they reflected "mandatory statutory provisions" within the meaning of *reg.4(2)* (whose equivalent provision is *s.72 of the 2015 Act*), on which see below, para.[40-270](#).
- 1783 On the position of the principles laid down and decisions made by the European Court before and after IP completion day generally see above, para.[40-004](#) and Vol.I, paras [1-027—1-029](#).

- 1784 See above, paras 40-034, 40-055 and 40-249 respectively and the cases there cited. On the notion of autonomous interpretations more generally see above, para.40-016. In *KH v Sparkasse Sudholstein* (C-639/18) EU:C:2020:206, 18 June 2020 at paras 45–51, AG Sharpston advised the CJEU that the notion of a “contract concerning financial services” in art.2(a) of Directive 2002/65 concerning the distance marketing of consumer financial services [2002] O.J. L271/16 should be given an autonomous interpretation and that for this purpose “a key element for a ‘contract’ to exist within the meaning of Article 2(a) is that there should be an agreement between the parties, that is to say a meeting of minds” (para.51) (the decision of the CJEU of 18 June 2020 did not express a view on this issue, though it did not accept its AG’s advice on the question whether the amending agreement was a “contract concerning financial services”): see above, para.40-143 (note).
- 1785 cf. the approach of AG Sir Gordon Slynn in *Arcado SPRL v Haviland SA* EU:C:1988:127, (9/87) [1988] E.C.R. 1539 at 1548.
- 1786 *Industrie Tessili Italiana Como v Dunlop AG* (12/76) EU:C:1976:133, [1976] E.C.R. 1473 at para.14.
- 1787 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters 1968 art.5(1), whose equivalent provision is provided by Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels Ibis Regulation”): *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* (34/82) EU:C:1983:87, [1983] E.C.R. 987 and *Jakob Handt & Co GmbH v Traitements Mécano-chimiques des Surfaces SA* (26/91) EU:C:1992:268, [1992] E.C.R. I-3967. However, care is needed in using this case-law by analogy, since the ECJ adopted a very wide approach to “matters relating to contract” for these purposes see, e.g. *Engler v Janus Versand GmbH* (C-27/02) EU:C:2005:33, [2005] E.C.R. I-00481 at para.51 (the sending of a prize notification by a trader which was not followed by the ordering of any goods by the consumer to whom it was addressed fell within art.5(1) as a “matter relating to contract” as based on a “legal obligation freely consented to by one person towards the other and on which the claimant’s action is based”, even though no contract had been concluded for the purposes of art.13 of the Convention).
- 1788 If an autonomous view of contract were adopted by the CJEU then it is likely that it would do so on the basis of an agreement between the parties or an agreement intended to have legal effects and, therefore, without any requirement such as the common law requirement of consideration: *Whittaker* (2000) 116 L.Q.R. 95. See, notably, the definition of “contract” for the purposes of the amended proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM(2017) 637 final art.2(g) to the effect that “‘contract’ means an agreement intended to give rise to obligations or other legal effects”, thereby adopting the definition in the proposed Common European Sales Law art.2 in Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final (proposal withdrawn by the Commission in December 2014, on which see above,

Vol.I paras 1-015 and 1-039). In this respect, recital 17 to the Amended Proposal for a Directive claimed that its definition reflects “the common traditions of all Member States”. However, this definition of “contract” did not appear in the directive as finally adopted which instead provides that it does not affect national general contract law governing the formation and validity of contracts: Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, etc. [2019] O.J. L136/28 recital 18 and art.3(6). See also *Kh v Sparkasse Sudholstein (C-639/18) EU:C:2020:206* at paras 45–51 of the Opinion of AG Sharpston on the notion of “contract” in the context of art.2(a) of Directive 2002/65 concerning the distance marketing of consumer financial services noted above in this paragraph.

1789 On the possibility of these courts departing from EU case-law see the above, para.40-004 and Vol.I, para.1-029.

1790 See Vol.I, paras 1-033, 1-080 and 6-001.

1791 As has been seen, in principle a contract of guarantee by a consumer to a trader may constitute a “consumer contract”: above, para.40-250. On the requirement of consideration in contracts of guarantee see below paras 47-022—47-023.

1792 Moreover, this would find support if an autonomous view of “contract” based on “agreement” were taken for the purposes of Pt 2 of the 2015 Act: cf. note above, para.40-256.

(iv) - "Consumer Notices"

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(b) - The Scope of the Controls on Contract Terms and Notices in Pt 2 of the 2015 Act

(iv) - "Consumer Notices"

Inclusion of "consumer notices" under the controls in Pt 2

- 40-258 Unlike the [1999 Regulations](#) and at least apparently the 1993 Directive itself (which on its face governs only contract terms ¹⁷⁹³), [Pt 2 of the 2015 Act](#) subjects "consumer notices" to a test of fairness and a requirement of transparency modelled on the tests which it sets out to govern contract terms ¹⁷⁹⁴ and it also extends the special rule of interpretation for terms which could have different meanings to "consumer notices". ¹⁷⁹⁵ In addition, the Act's special rules governing the exclusion or limitation of liability for negligence apply equally to contract terms and consumer notices. ¹⁷⁹⁶ In part, these changes reflect the need to protect consumers under the [2015 Act](#) as much as they were protected under [s.2 of the Unfair Contract Terms Act](#) (which applies to the exclusion of liability for negligence by "notice" as well as by contract term ¹⁷⁹⁷), but it will be seen that the new provisions go further in several respects. ¹⁷⁹⁸ Moreover, in the Act the dedicated scheme for the enforcement of the requirements of fairness and transparency of contract terms applies equally to the requirements governing consumer notices. ¹⁷⁹⁹ On the other hand, not all of the provisions in [Pt 2](#) govern consumer notices as well as contract terms. Sometimes they do not do so because their content is simply inapposite to consumer notices (as in the case of the provision which governs the effect of a term not being binding on the contract as a whole ¹⁸⁰⁰), but this is not the case as regards the provision imposing a duty on courts to consider the fairness of contract terms which could (but does not) apply also to consumer notices. ¹⁸⁰¹ This could reflect the origins of this special rule in case-law of the Court of Justice governing the 1993 Directive which, as earlier noted, applies only to contract terms. ¹⁸⁰²

The purposes of consumer notices

40-259 Section 61(4) of the Act provides that Pt 2 of the Act applies to a notice (a “consumer notice”¹⁸⁰³) to the extent that it:

- “(a)relates to rights or obligations as between a trader and a consumer, or
- (b)purports to exclude or restrict a trader’s liability to a consumer.”

The second part of this definition specifically includes what may be seen as the most obvious example of a “consumer notice”, that is, a disclaimer of liability such as a notice on premises whose purpose is to exclude the occupier’s liability for injury or loss¹⁸⁰⁴ or a disclaimer of liability by a surveyor to a person who has bought a building and taken out a loan to finance it in reliance on a survey of the building.¹⁸⁰⁵ However, its first part makes clear that the definition of “consumer notice” is wider and could therefore include notices which seek in other ways to reduce the rights or increase the obligations of a consumer towards the trader. In this respect, the CMA gives an example:

“Among the kinds of transaction to which the consumer notice provisions of the Act may be of particular significance are those involving digital content. Software and other digital products are sold to consumers subject to End User Licence Agreements (EULAs). For legal purposes, the terms of EULAs may not in all cases be clearly part of the contract with the consumer. The effect of the Act is to establish that, even if they are not, they are still assessable for fairness and transparency, as consumer notices.”¹⁸⁰⁶

The potentially wider scope of application of “consumer notice” fits with the test of unfairness of consumer notices which is that:

“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.”¹⁸⁰⁷

For the purposes of the definition of “consumer notice” set out above, the Act states that it does not matter:

“... whether the notice is expressed to apply to a consumer, as long as it is reasonable to assume it is intended to be seen or heard by a consumer.”¹⁸⁰⁸

A *notice* itself is defined to include “an announcement, whether or not in writing, and any other communication or purported communication”.¹⁸⁰⁹ On the other hand, in keeping with the Act’s definition of “consumer contract”, the Act excludes from the definition of “consumer notice” “a notice relating to rights, obligations or liabilities as between an employer and an employee”.¹⁸¹⁰

Footnotes

- 1793 As earlier noted, the 1993 Directive is concerned overtly with “unfair terms” in consumer contracts: above, para.[40-225](#). However, the question was earlier raised whether the concept of “contract” in the 1993 Directive and/or in the [2015 Act Pt 2](#) should bear an autonomous European interpretation and it was suggested that, if this were the case, “contract” would be based simply on the agreement of the parties and, therefore, without any requirement such as the English law doctrine of consideration: above, paras [40-256](#). The effect of non-contractual notices to exclude liability of an occupier of premises if sufficiently drawn to the claimant’s (licensee’s) attention is well established at common law, and based on the acceptance of the risk by entering the premises subject to this condition: *Ashdown v Samuel William & Sons Ltd [1957] 1 Q.B. 409*. This legal position was confirmed by the [Occupiers’ Liability Act 1957 s.2](#), though then controlled by the [Unfair Contract Terms Act 1977 s.2](#) (as originally enacted and as still applicable outside the context of “consumer notices”). While the exclusion of liability by notice is not to be equated with the defence of *volenti non fit injuria*, it could nonetheless be said to rest on an implied non-contractual agreement between the visitor and the occupier of the premises who seeks to rely on the exclusion notice. Following this line of reasoning, notices disclaiming liability (which are seen as non-contractual by English law generally) could be seen as “contract terms” under a European concept of contract as agreement. This would in turn mean that the [2015 Act](#)’s provisions which subject “consumer notices” to the controls set out by the 1993 Directive would not in principle go beyond that Directive’s requirements.
- 1794 [2015 Act s.62\(1\), \(3\)–\(5\)](#) (unfair contract terms); [s.62\(2\), \(3\), \(6\)](#) and [\(7\)](#) (unfair consumer notices); [s.69](#) (transparency of contract terms and notices). On the [1999 Regulations](#), see above, paras [40-227](#).
- 1795 [2015 Act s.69](#) below, para.[40-434](#).
- 1796 [2015 Act ss.65 and 66](#).
- 1797 See Vol.I, paras [17-078](#) and [17-085](#).
- 1798 See below, paras [40-418](#)—[40-421](#) and [40-430](#)—[40-434](#).
- 1799 [2015 Act s.70](#) and [Sch.3](#) and see below, para.[40-442](#). Confusingly, [s.70](#) is headed “Enforcement of the law on unfair contract terms” but [Sch.3](#) itself is headed “Enforcement of the law on unfair contract terms and notices” and [para.1\(d\) of Sch.3](#) states that the schedule applies to “a consumer notice”.
- 1800 [2015 Act s.67](#) and see below, para.[40-409](#). This is also the case as regards the provision governing the application of rules to secondary contracts in [s.72](#) (below, paras

- 40-435—40-438) and the special provision governing choice of law in s.74 (below, para.40-439).
- 1801 2015 Act s.71 and see below, paras 40-394—40-395.
- 1802 On this case-law see above, paras 40-020—40-021 and below, para.40-390.
- 1803 2015 Act s.61(7).
- 1804 A trader cannot exclude its liability for death or personal injuries caused by negligence by either a contract term or a consumer notice (2015 Act s.65), and any term or consumer notice purporting to exclude or restrict its other liability (including for other loss or damage caused by negligence) will not be binding on the consumer unless it is fair (s.62(2), (6) and (7): see below, para.40-423.
- 1805 As in *Smith v Eric S. Bush (A Firm) [1990] 1 A.C. 831*, where the HL considered the effect of the Unfair Contract Terms Act 1977 s.2(2). As the claimant in that case would, it is submitted, now count as a “consumer” and the disclaimer of liability as a “consumer notice” within the meaning of the 2015 Act, the control on the disclaimer by the surveyor would be governed by s.62(2), (5) and (6) since their coming into force.
- 1806 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), para.1.22. On the application of the requirement of transparency to consumer notices see below, para.40-430.
- 1807 2015 Act s.61(6).
- 1808 2015 Act s.61(6).
- 1809 2015 Act s.61(8).
- 1810 2015 Act s.61(5) and cf. 2015 Act s.61(2), above, paras 40-248 and 40-251.

(aa) - Broad Scope of Controls on Contract Terms and Notices

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(b) - The Scope of the Controls on Contract Terms and Notices in Pt 2 of the 2015 Act

(v) - Contract Terms and Notices within and outside Pt 2 of the Act

(aa) - Broad Scope of Controls on Contract Terms and Notices

Variety of types of contract terms and notices

- 40-260 Unlike the [Unfair Contract Terms Act 1977](#) (whose controls principally affect exemption clauses)¹⁸¹¹ the range of contract terms and, in principle, notices falling within the scope of the general controls on fairness and transparency in [Pt 2 of the 2015 Act](#) is very broad. In the case of the requirement of fairness, [s.62\(1\)](#) therefore provides in relation to contract terms simply that

“An unfair term of a consumer contract is not binding on the consumer”.

And [s.68\(1\)](#) provides that

“A trader must ensure that a written term of a consumer contract ... is transparent”.

This breadth of approach reflects the starting-point of the 1993 Directive, whose opening article provides that its purpose is:

“... to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.”¹⁸¹²

As will be seen, this means that a wide variety of types of contract terms have been seen by the Court of Justice as falling to be assessed for their fairness under the 1993 Directive and/or by English courts under the UK legislation implementing it. This variety can be appreciated very easily from the examples in **Sch.2 of the Act** which sets out an “indicative” but expressly “non-exhaustive list” of terms which may be regarded as unfair for the purposes of **Pt 2.**¹⁸¹³ These include exemption clauses, penalty clauses and different types of variation clause, cancellation and termination clauses.¹⁸¹⁴ As earlier noted, while the most likely example of consumer notices falling to be assessed for their fairness will be disclaimers of liability, there is no restriction of the type of notice in this way.¹⁸¹⁵

“Contract terms”

- 40-261 In *Kiss v Kiss* Advocate General Hogan advised the Court of Justice that contract “term” for the purposes of the 1993 Directive:

“... must be understood in a substantial and not in a formal sense, i.e. referring to a specific right or obligation laid down in a contract and not to a particular paragraph of the contract. As a result a clause may contain several terms and a term may take the form of several clauses.”¹⁸¹⁶

The particular context of Advocate General Hogan’s comments was the proper approach to the “core exemption” in art.4(2) of the Directive,¹⁸¹⁷ but they could also be relevant to a court’s approach to the stipulation in art.6 of the Directive that “unfair terms” are not binding on the consumer.¹⁸¹⁸ The implications of this view will be discussed in these contexts.¹⁸¹⁹

“Individually negotiated terms”

- 40-262 Following the 1993 Directive itself,¹⁸²⁰ the **Unfair Terms in Consumer Contracts Regulations 1999** did not include within the scope of the test of unfairness contract terms which had been “individually negotiated”,¹⁸²¹ though they did include them (at least formally) within the scope of the requirement of plain intelligible writing although it is restricted to *written* terms.¹⁸²² This restriction in the 1993 Directive reflects a view strongly urged at the time of its making that the inclusion within its scope of controls on the fairness of “individually negotiated terms” of consumer contracts would represent “a drastic restriction of the autonomy of the individual”.¹⁸²³

The 1993 Directive (and, following it, the [1999 Regulations](#)) helped to reduce the impact of the exclusion of individually negotiated terms on the practical protection for consumers by requiring that:

“A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

...

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.^{[1824](#)}

Moreover, in the UK context, there was clearly a considerable practical similarity between this exclusion from the test of fairness of terms of consumer contracts in the [1999 Regulations](#) and the restriction of the requirement of reasonableness to “written standard terms of business” found in [s.3 of the Unfair Contract Terms Act 1977](#).^{[1825](#)} However, in their advice prior to the [2015 Act](#) the Law Commissions considered it desirable in the interest of simplicity that all the controls on unfair terms should have the same scope^{[1826](#)} and they also considered that the inclusion of individually negotiated terms within the scope of the test of fairness would have little practical effect, as it is rare for consumers to negotiate about any term except the price or main subject matter (which are subject to special treatment under the Act^{[1827](#)}) and a term which has been genuinely individually negotiated is very likely to be fair.^{[1828](#)} The [2015 Act](#) reflected this view and therefore its control on fairness includes terms which were individually negotiated as much as those which were not under its test of unfairness.^{[1829](#)}

Distinct conditions for different requirements

- 40-263 There are, nevertheless, a number of qualifications on the very broad starting point as regards the range of terms governed by [Pt 2 of the 2015 Act](#). First, the two main requirements governing contract terms imposed by [Pt 2 of the Act](#) still differ in another respect as regards the terms which they govern since the requirement of transparency by which terms or notices must be in “plain and intelligible language” and legible applies only to *written* terms of a contract and consumer notices *in writing*,^{[1830](#)} whereas the requirement of fairness applies to contract terms or consumer notices whether they are written or oral.^{[1831](#)} Secondly, the requirement of fairness possesses a special exclusion (known widely as the “core exemption”) which excludes contract terms which define the main subject matter of the contract as long as they are transparent and prominent.^{[1832](#)} Thirdly, the [2015 Act](#) (reflecting to a considerable extent parallel provision in the [Unfair Contract Terms Act 1977](#)) makes special provision for the control of contract terms or notices excluding or

restricting liability for negligence causing death or personal injuries.¹⁸³³ These qualifications on the general starting point will be considered with the treatment of the requirements themselves.

Footnotes

- 1811 See Vol.I, paras 17-069 and 17-076.
- 1812 1993 Directive art.1(1).
- 1813 2015 Act s.63(1) and Sch.2.
- 1814 See below, paras 40-316 et seq.
- 1815 Above, para.40-259.
- 1816 *Kiss v Kiss (C-621/17) EU:C:2019:411* Opinion of 15 May 2019 n.17. (These points were not discussed by the CJEU in its decision of 3 October 2019; EU:C:2019:820.)
- 1817 Implemented in UK law (with some amendment) by the 2015 Act s.64 and see below, paras 40-351 et seq.
- 1818 Implemented in UK law by the 2015 Act s.62(1), on which see below, paras 40-405 et seq.
- 1819 Below, paras 40-365 (note) and 40-409 (note).
- 1820 1993 Directive art.3.
- 1821 1999 Regulations reg.5(1); 1993 Directive art.3; *Engilbertsson v Íslandsbanki hf (E-25/13) (EFTA Court)* 28 August 2014 at paras 125–126; *OTP Bank Nyrt v Ilyés and Kiss (C-51/17) EU:C:2018:750, 20 September 2018* at paras 46–49 (contract terms later amended by legislation are not “individually negotiated”).
- 1822 1993 Directive art.5; 1999 Regulations reg.7 and see now the 2015 Act s.68, below, paras 40-428 et seq.
- 1823 *Brandner and Ulmer (1991)* 29 C.M.L.R. 647 at 652; Howells and Wilhelmsson, E.C. Consumer Law (1997), p.91.
- 1824 1993 Directive art.3(2), formerly implemented in the 1999 Regulations reg.5(2) and (4).
- 1825 On which cf. Vol.I, paras 17-088—17-089. This requirement in s.3(1) of the 1977 Act was originally an alternative to the case where the party “deals as consumer”, but the 2015 Act has deleted this alternative condition: Vol.I, paras 17-072—17-073. For case-law on the exclusion of individually negotiated terms under the earlier law see *Bryen & Langley Ltd v Boston [2005] EWCA Civ 973, [2005] All E.R. (D) 507 (Jul) on appeal from [2004] EWHC 2450 (TCC), 98 Con. L.R. 82; UK Housing Alliance Ltd v Francis [2010] EWCA Civ 117, [2010] Bus. L.R. 1034; Khurana v Webster Construction Ltd [2015] EWHC 758 (TCC)* at [52] and *XZ v Ibercaja Banco SA (C-452/18) EU:C:2020:536, 9 July 2020*, paras 33–35. On this earlier law see the 33rd edition of the present work, Vol.II, paras 38-242—38-245. This chapter from the 33rd edition is also available as a PDF to online subscribers of this edition on Westlaw.
- 1826 Law Com. Advice (2013), paras 7.64–7.65.
- 1827 2015 Act s.64 and see below, paras 40-351 et seq.
- 1828 Law Com. Advice (2013), paras 7.64–7.65.

- 1829 2015 Act s.62(1), (4) and (5).
- 1830 2015 Act s.68, following for contract terms in this respect the 1993 Directive art.5 and recital 11: below, paras 40-428 et seq.
- 1831 Below, paras 40-273 et seq.
- 1832 2015 Act s.64, and see below, paras 40-351 et seq.
- 1833 2015 Act s.65 and 66, on which see below, para.40-423. In addition, s.63(6) and (7) makes special provision regarding contract terms affecting the burden of proof with respect to compliance by a distance supplier or an intermediary with an obligation under any enactment or rule implementing Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, on which see below, para.40-425.

(bb) - Terms or Notices Reflecting “Mandatory Statutory or Regulatory Provisions” or International Conventions

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(b) - The Scope of the Controls on Contract Terms and Notices in Pt 2 of the 2015 Act

(v) - Contract Terms and Notices within and outside Pt 2 of the Act

(bb) - Terms or Notices Reflecting “Mandatory Statutory or Regulatory Provisions” or International Conventions

Exclusion of category of terms from the scope of Pt 2

40-264 There is, however, an exclusion of a particular category of contract terms and notices from the scope of [Pt 2 of the 2015 Act](#), as the Act adopted the exclusion from the scope of the controls set out by art.1(2) of the 1993 Directive and formerly implemented by the [1999 Regulations](#).¹⁸³⁴ Article 1(2) of the 1993 Directive states that:

“The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.”

For this purpose recitals 13 and 14 of the Directive explain that:

“Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions ...; whereas in that respect

the wording ‘mandatory statutory or regulatory provisions’ in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established;

Whereas Member States must however ensure that unfair terms are not included, particularly because this Directive also applies to trades, businesses or professions of a public nature.”

Recital 13 therefore makes clear that the adjective “mandatory” does not restrict the category of legal rules which impose terms on the parties to a contract to those whose effect is incapable of exclusion by agreement, rules which are, therefore, “mandatory” in the normal sense, i.e. belonging to *ius cogens*.¹⁸³⁵ Instead, “mandatory” also includes rules which simply apply by law in the absence of any express contractual provision, but which *may* be the subject of contrary contractual exclusion, i.e. rules belonging to *ius dispositivum*.¹⁸³⁶ This is therefore a potentially wide category of exclusion of terms from the ambit of the controls in Pt 2 of the 2015 Act, and one of particular importance in the provision of public services, where some or even many of the terms are set by legislation. This is certainly the context of the application of the exclusion found in art.1(2) of the Directive in other European national laws where the practice is more widespread of the setting of standard terms for certain services by administrative decree.¹⁸³⁷

2015 Act s.73

40-265

-  The 2015 Act excludes from the application of Pt 2 contract terms which reflect “mandatory statutory or regulatory provisions” or the provisions or principles of an international convention to which the UK is a party, but it also extends this exclusion to “consumer notices” of the same character. Section 73 of the Act therefore provides that Pt 2:

“... does not apply to a term of a contract, or to a notice, to the extent that it reflects—

- (a)mandatory statutory or regulatory provisions, or
- (b)the provisions or principles of an international convention to which the United Kingdom is a party.”

¹⁸³⁸

Section 73(1)(b) as enacted referred to “the provisions or principles of an international convention to which the United Kingdom *or the EU* is a party” (emphasis added), but on IP completion day,

1839

U the words “or the EU” were deleted.

1840

U The [2015 Act](#) explains that in [s.73\(1\)](#) “‘mandatory statutory or regulatory provisions’ includes rules which, according to law, apply between the parties on the basis that no other arrangements have been established”.

1841

U The interpretation of the exclusion in art.1(2) of the 1993 Directive which is reflected in [s.73 of the Act](#) (formerly implemented in the 1999 Regulations) has been the subject of a considerable body of case-law which will be noted in the following paragraphs.

1842

U

Case-law of the CJEU [1843](#)

40-266 In [RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV](#), the Court of Justice of the EU clarified the interpretation of the exclusion of terms provided by art.1(2) of the 1993 Directive.

U

1844

U In that case, the German law governing the supply of natural gas to consumers distinguished between supplies by gas suppliers under “standard tariff contracts”, where the supplier was under a legal obligation to conclude contracts with consumers, and “special contracts”, where they were not. German legislation set the general terms and conditions of supply of the standard tariff contracts, but did not do so for the special contracts. However, the wording of the standard conditions of the *special* contracts concluded by the supplier in the main proceedings corresponded to those required for the tariff contracts by the legislation, and in this sense, they “reflected” those legal provisions. The issue before the Court was whether the contract terms in the special contracts of supply of natural gas to consumers fell under the controls of unfairness in the German legislation implementing the 1993 Directive or whether they fell instead within the exclusion in that legislation foreseen by art.1(2) of that Directive. Referring to recital 13 of the Directive, the Court of Justice considered that this exclusion is justified by the fact that “it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts”.

1845

U and held that this reasoning does not apply to the situation where a consumer contract merely reproduces a rule of national law applicable to *another* category of contracts to which the national legislation in question does not apply:

“... [a]n intention of the parties to extend the application of those rules to a different contract cannot be equated to the establishment by the national legislature of a balance between all the rights and obligations of the parties to the contract.”

1846



The Court of Justice concluded, therefore, that the Directive applies to terms such as those in the “special contracts” of supply of gas to consumers before it.

1847

U The Court therefore held that art.1(2) does not apply to contract terms in a legislative scheme where the scheme does not apply to the contract in question,

1848

U but it assumed that the exclusion found in art.1(2) *does* apply to terms in a contract which copy out legislative or other legal rules which would otherwise apply to that contract, even where those legislative rules do not themselves *require* to be so expressed in the contract, as art.1(2)

“... extends to terms which reflect provisions of national law that apply between the parties to the contract independently of their choice or those that apply by default in the absence of other arrangements established by the parties.”

1849



In *Kušionová*

1850

U the Court of Justice followed its earlier approach to art.1(2) in *RWE Vertrieb AG*, noting that this exclusion should be interpreted strictly

1851

U and that it is for the national court to determine whether a particular contract term falls within this test.

1852

U On the other hand, the Court of Justice in *RWE Vertrieb AG* did not consider directly the question whether art.1(2)’s exclusion applies to contract terms which are not directly determined by national legislation but which are approved or otherwise regulated under a legislative scheme

or to contract terms which are varied under a lawful exercise of a statutory power in the seller or supplier.

¹⁸⁵³

U A significant example of the former would be where the terms of supply of a public service are drawn up by the (commercial) supplier of that service, but then subjected either to a requirement of approval by an administrative body or to a structure of review by a “watchdog” institution.

¹⁸⁵⁴

U If this approval or review were undertaken under “legislative or regulatory provisions” the latter could be said to “determine indirectly” the content of the contracts, as foreseen by recital 13 of the Directive. On the other hand, the Court of Justice could instead distinguish between those provisions which *determine* and those which *provide for approval* of the terms on which services are provided, only the former being within the terms of art.1(2). This distinction could be supported by the clearly restrictive approach of the Court of Justice to the exclusion in art.1(2) in *RWE Vertrieb AG*, following its general approach to exclusions from schemes for the protection of consumers

¹⁸⁵⁵

U and also to the expressions of this restrictive approach in recent case-law of the Court of Justice in the context of consumer credit.

¹⁸⁵⁶

U

Optional terms and mandatory content

40-267 However, in *Engilbertsson* the EFTA Court took a more extensive view of the exclusion in art.1(2) of the 1993 Directive despite its formal recognition “that derogations from EEA consumer protection law must be interpreted strictly”. ¹⁸⁵⁷ In that case, which considered a reference from an Icelandic court, a consumer contract for a mortgage loan contained an indexation clause to govern repayments by the consumer. Under national law such a clause was not mandatory, but, if used, the parties were “bound to a substantial extent by the scheme set out in regulatory and statutory provisions of national law”. ¹⁸⁵⁸ In these circumstances, the EFTA Court held that the exclusion in art.1(2) of the 1993 Directive applies to a term in a consumer contract “whose inclusion in the category of contract is optional but whose substance is mandatory”, as the inequality of bargaining power between the parties does not influence the content of the terms to the detriment of the consumer. ¹⁸⁵⁹ As a result, the national court must assess “whether and to what extent the regulatory scheme is exhaustive and that the seller or supplier therefore has no right to unilaterally set out certain aspects in terms and conditions at a contractual level”. ¹⁸⁶⁰ However, the EFTA Court recognised that, where a national court found that certain aspects of the subject-matter of a term were set by national legal provisions and so excluded from the scope of the Directive, the

trader must nevertheless make the consumer aware of the content of those provisions so that the consumer can “foresee, on the basis of clear, intelligible criteria, the alterations that may occur to the principal of the loan”.¹⁸⁶¹

“Legislative provisions” and common law rules

- 40-268 Article 1(2) of the 1993 Directive refers to “contractual terms which reflect mandatory *statutory or regulatory* provisions” and this suggests that it is not concerned with contract terms which reflect the position *at common law*.¹⁸⁶² As has been seen, however, the Court of Justice has assumed that art.1(2) applies to terms in a contract which copy out legislative rules which would otherwise apply to that contract, even where those legislative rules do not themselves *require* to be so expressed in the contract.¹⁸⁶³ If this is indeed the case, then it is submitted that art.1(2) should equally apply so as to exclude contract terms which mirror the otherwise applicable legal rule whether its source is found in statute or the common law, for art.1(2)’s reference to “legislative” as opposed to “legal” provisions¹⁸⁶⁴ (the latter of which could equally refer to the common law as to legislation) can be explained by the fact that the vast majority of the national laws of Member States at the time of the enactment of the directive set out their legal rules governing contracts in legislation rather than by way of common law. Moreover, the reason for the exclusion as set out in recital 13 and noted in *RWE Vertrieb AG* that “it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts”,¹⁸⁶⁵ could be said to apply equally to regulation by the common law.

Statutory power in party to vary term

- 40-269 The question also arises whether art.1(2) of the Directive (and therefore [s.73 of the 2015 Act](#)) applies to a term inserted into a contract by exercise of a power enjoyed by a party to the contract under statute, or to a term in a contract varied by a party in the same circumstances. In *Rochdale BC v Dixon* the Court of Appeal considered whether a term in a public sector secure periodic tenancy which had been varied by the lawful exercise of the public authority’s statutory power under [ss.102 and 103 of the Housing Act 1985](#) was unfair within the meaning of the [1999 Regulations](#).¹⁸⁶⁶ If valid, the term in question as so varied enabled the local authority landlord to collect the tenant’s water charges from the water company and, therefore, to subject the tenant to the risk of eviction on non-payment of these charges. The Court of Appeal held that such a term was not unfair for a number of reasons, including that any exercise of the statutory power was taken by the democratically elected councillors of the local authority and possessed its own consultation procedure.¹⁸⁶⁷ While the point was not before the Court of Appeal, it could be argued that a term varied under a lawful exercise of a statutory power should be seen as falling within the exclusion

in art.1(2) of the Directive as a term which reflects a legislative provision, but it is submitted that the case-law of the Court of Justice of the EU earlier noted¹⁸⁶⁸ suggests the contrary: art.1(2) is to be strictly construed¹⁸⁶⁹ and such a variation by the “seller or supplier” would not fall squarely within the justification for the exclusion, that is, that:

“... it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts.”¹⁸⁷⁰

Statutory obligation to grant contract on same terms

- 40-270 In *Jones v Roundlistic Ltd*,¹⁸⁷¹ a new lease had been granted to a tenant by her landlord under its obligation imposed by the **Leasehold Reform, Housing and Urban Development Act 1993**.¹⁸⁷² The Upper Tribunal (Lands Chamber) noted that the terms upon which the landlord was obliged to grant the new lease were provided by the **1993 Act** and that, while there was scope for some alterations in the terms, the Act’s starting-point was that the new lease was to be on the same terms as the existing lease subject to certain limited modifications.¹⁸⁷³ In these circumstances, the Upper Tribunal concluded that the **1999 Regulations** did not apply to the terms of the new lease on the basis that they fell within the exclusion in reg.4(2) as “mandatory statutory provisions”.¹⁸⁷⁴ The 33rd edition of this work as first published¹⁸⁷⁵ criticised this decision on the basis that it extended the scope of application of reg.4(2) beyond the likely interpretation by the Court of Justice of the EU of art.1(2) of the 1993 Directive which reg.4(2) implemented¹⁸⁷⁶: art.1(2) is to be strictly construed¹⁸⁷⁷ and there is a difference between contract terms required by legislation itself (where “it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts”¹⁸⁷⁸) and contract terms which reflect an earlier contract between the parties whose content has not been the object of any legislative consideration or imposition. And, on appeal, a majority of the Court of Appeal disagreed with the view of the Upper Tribunal on this issue, holding that on a natural reading reg.4(2) covers only cases where the content of terms is prescribed by legislation and that, decisively, the policy underlying art.1(2) of the 1993 Directive reflects the fact that the “legislator/regulator must be taken to have given proper weight to consumer protection when prescribing a term to be included in the contract”.¹⁸⁷⁹ This policy would clearly not apply where, as here, the legislation said nothing about the substance of the terms to be incorporated into the new lease, the court expressly approving the view taken by the 33rd edition.¹⁸⁸⁰

Terms or notices which reflect the provisions or principles of international conventions

- 40-271 Section 73 of the 2015 Act also provides that Pt 2 does not apply to a term of a contract, or to a notice:

“... to the extent that it reflects ... the provisions or principles of an international convention to which the United Kingdom is a party.”¹⁸⁸¹

As earlier noted,¹⁸⁸² as enacted s.73 referred to “the provisions or principles of an international convention to which the United Kingdom *or the EU* is a party” (emphasis added), reflecting in this respect the second part of the exclusion set out in art.1(2) of the 1993 Directive. However, on IP completion day,¹⁸⁸³ the words “or the EU” were deleted by way of the remedying of a “deficiency” of the legislation arising from the withdrawal of the United Kingdom from the EU.¹⁸⁸⁴ As the 1993 Directive makes clear, this part of the exclusion in art.1(2) is particularly concerned to exclude terms in conventions “in the transport area”,¹⁸⁸⁵ notably the Warsaw Convention on international carriage by air.¹⁸⁸⁶ It should be noted that the exception in s.73(1) applies to contract terms or notices which reflect UK legislation which uses the *principles* as well as provisions of international conventions to which the UK is a party, such as in the area of domestic carriage of goods.¹⁸⁸⁷

No application to implied terms

- 40-272 In *Baybut v Eccle Riggs Country Park Ltd* the High Court noted that the 1999 Regulations (which formerly implemented art.1(2) of the 1993 Directive) are not expressly limited to express contract terms,¹⁸⁸⁸ but it nevertheless considered that they do not apply to implied terms of any type: not to terms implied by statute, as these fall within the exclusion of terms which reflect “mandatory statutory or regulatory provisions” or the “provisions of international conventions”¹⁸⁸⁹; nor to terms implied at common law, whether in law or “to make contracts work by filling a technical lacuna in the contract” on the basis that it is difficult to see how these terms (which are implied only where they are reasonable¹⁸⁹⁰) could ever be found unfair within the meaning of the Regulations.¹⁸⁹¹ The court also noted that all the examples given in the “indicative list” of terms which may be regarded as unfair in Schedule 2 to the 1999 Regulations are express terms,¹⁸⁹² to which it may be added that the exclusion by the 1999 Regulations¹⁸⁹³ from the requirement of fairness of individually negotiated terms makes little sense except in the context of express terms.¹⁸⁹⁴ Finally, while the English version of the 1993 Directive is no more explicit on the

question of implied term than its UK implementing legislation (whether formerly by the [1999 Regulations](#) or by [Pt 2 of the 2015 Act](#)), some of its other language versions use words to refer to the subject-matter of its controls which are more appropriate to describe what an English lawyer would see as an express term: so the French version of art.1(1) of the Directive refers to its application to “*clauses abusives*”; the German version to “*mißbräuchliche Klauseln*”. Overall, the better view is indeed that [Pt 2 of the 2015 Act](#) has no application to implied terms as understood by English law. ^{[1895](#)}

Footnotes

- 1834 [2015 Act s.73](#) and cf. [1999 Regulations reg.4\(2\)](#). As will be explained, the Act includes both contract terms and consumer notices within the exclusion: below, para.[40-265](#). On IP completion day when the departure of the UK from the EU came into full effect, [s.73](#) was amended as noted below, para.[40-265](#).
- 1835 This also rules out any association with the meaning found in private international law: see, e.g. Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6 art.9.
- 1836 This is made clear by French jurists for whom the distinction between *ius cogens* (*loi impérative*) and *ius dispositivum* (*loi supplétive*) is traditional: see notably Ghestin and Marchessaux-Van Melle JCP 1995 I.3854 at No.6. As will be seen, however, art.1(2) has been held *not* to apply to terms which reflect the wording of legislation but where the legislation does not apply to the category of contract in question: *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* (C-92/11) EU:C:2013:180, 31 March 2013, below, para.[40-266](#).
- 1837 e.g. the standard terms on which passengers travel by train on the French national carrier, *SNCF*, on which see Whittaker in Freedland and Auby (eds), *The Public Law/ Private Law Divide* (2006), pp.243, 249 et seq.
- 1838 [2015 Act s.73\(1\)](#) and see *Longley v PPB Entertainment Ltd* [2022] EWHC 977 (QB) at [102.1] noted below, para.[40-266](#) (note).
- 1839 On which see generally above, para.[40-004](#) and Vol.I, paras 1-016 et seq.
- 1840 **Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326 reg.3(4))** ([reg.1\(3\)](#))’s reference to [reg.3\(4\)](#)’s coming into force on “exit day” must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020 s.39\(1\), s.41\(4\), Sch.5 para.1](#)). This change does not apply to a contract entered into before IP completion day: [SI 2018/1326 reg.11](#). See below, para.[40-271](#).
- 1841 [2015 Act s.73\(2\)](#); 1993 Directive recital 13.
- 1842

- 1843 See below, paras [40-266—40-270](#).
 It should be noted that the significance of case-law of the CJEU for English courts changed on IP completion day: above, para.40-004 and Vol.I, paras [1-027—1-029](#).
- 1844 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV (C-92/11)* [EU:C:2013:180, 31 March 2013 \(“RWE Vertrieb AG \(C-92/11\)”\).](#) See further on the case-law of the CJEU: Commission guidance C(2019) 5325 final, pp.11–13.
- 1845 *RWE Vertrieb AG (C-92/11)* at para.29. As the CJEU has further explained, the purpose of the exclusion in art.1(2) of the Directive is therefore to preserve the balance struck by the national legislature: *Woonhaven Antwerpen BV CVBA v Berkani and Hajji (C-446/17)* [EU:C:2017:954](#), Order of CJEU of 7 December 2017 at paras 25–26 (available in French) where it was held that the exclusion does not apply to mandatory provisions governing judicial powers of assessment of the unfair character of a contract term: at para.27. See further *Banco Santander v Demba, Cortés v Banco de Sabadell SA (C-96/16 and C-94/17)* [EU:C:2018:643, 7 August 2018](#) at paras 43–45; *Profi Credit Polska SA z siedziba w Bielsku- Bialej v QJ (C-84/19, C-222/19 and C-252/19)* [EU:C:2020:259, 3 September 2020](#) at para.63 (contract term imposing a charge on the consumer which conforms to a legislative maximum does not fall within art.1(2)). On the other hand, the CJEU has held that the exclusion in art.1(2) can apply to contract terms reflecting mandatory provisions of national law inserted by the legislature *after* the conclusion of the contract: *OTP Bank Nyrt v Ilyés and Kiss (C-51/17)* [EU:C:2018:750, 20 September 2018](#) at para.70. This remains the case even where the later national legislation which inserts the terms gives the consumer a choice whether or not to accept this change: *AH v Zagrebačka banka d.d. (C-567/20)* [EU:C:2022:352, 5 May 2022](#).
- 1846 *RWE Vertrieb AG (C-92/11)* at para.29.
- 1847 *RWE Vertrieb AG (C-92/11)* at para.38.
- 1848 cf. *Peabody Trust Governors v Reeve [2008] EWHC 1432 (Ch), [2009] L. & T.R. 6* at [40]–[62], where it was said that a variation clause which successfully incorporated the power of variation provided by [s.103 of the Housing Act 1985](#) in a tenancy contract to which that provision did *not* apply would be unfair within the meaning of the [1999 Regulations](#).
- 1849 *RWE Vertrieb AG (C-92/11)* para.26; *Kušionová v SMART Capital a.s. (C-34/13), 10 September 2014* para.79; *Andriciuc v Banca Românească (C-186/16), 20 September 2017* at paras 27–31; *NG, OH v SC Banca Transilvania SA (C-81/19)* [EU:C:2020:532, 9 July 2020](#) at para.25; *DP, SG v Trapeza Peiraios AE (243/20)* [EU:C:2021:1045, 21 December 2021](#) at paras 29–40.
- 1850

- 1851 *Kušionová v SMART Capital a.s. (C-34/13), 10 September 2014.*
Kušionová v SMART Capital a.s. (C-34/13) para.77.
- 1852 See also *NG, OH v SC Banca Transilvania SA (C-81/19) EU:C:2020:532, 9 July 2020* at paras 24 and 28.
- 1853 cf. *Unfair Contract Terms Act 1977 s.29(2)* contract term to be taken as satisfying the requirement of reasonableness “if it is incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority acting in the exercise of any statutory jurisdiction or function and is not a term in a contract to which the competent authority is itself a party”: Vol.I, para.17-129.
- 1854 cf. *Longley v PPB Entertainment Ltd [2022] EWHC 977 (QB)* at [102.1] where it was held (obiter) that a term of a contract under which a consumer placed a bet by telephone did not fall within *s.73(1)(a) of the 2015 Act*, as the provisions within the gambling statutory code of practice which formed part of the gambling operator’s licence identified matters which licensees must set out within their rules and “[did] not mandate the form which such rules must take or, hence, exclude the form selected from *s.62*” of the 2015 Act.
- 1855 *easyCar (UK) Ltd v Office of Fair Trading (C-336/03) EU:C:2005:150* at para.21; *Kásler v OTP Jelzálogbank Zrt (C-26/13) EU:C:2014:282, 30 April 2014* at para.42 (on which see below, para.40-358). cf. *Aqua Med sp.z o.o. v Skora (C-266/18) EU:C:2019:28*, 3 April 2019 at paras 35–37 (contract term which gave jurisdiction “to the court which has jurisdiction under the relevant provisions” does not fall within art.1(2) as it “does not, strictly speaking, reflect a specific national provision, since the national provisions … provide for a set of rules governing the arrangements for determining jurisdiction, and the seller or supplier can choose whichever is the most favourable to him”).
- 1856 A term of a contract of consumer credit to purchase a residence which fixes a variable interest rate by reference to one of the official reference indices provided by national legislation for this purpose does not fall within the exclusion in art.1(2) as the legislation in question did not require the index to be used, but merely fixed the conditions for its use by credit institutions: *Gómez del Moral Guasch v Bankia SA (C-125/18) EU:C:2020:138, 3 March 2020* at para.37. Moreover, where national legislation fixes a maximum for the cost of credit apart from interest, a term in a contract of consumer credit which provides a method for the calculation of this cost without taking into account the costs actually incurred does not itself “reflect” that legislation so as to be excluded from the scope of control of the 1993 Directive under art.1(2): such national legislation does not determine the rights and obligations of the contracting parties, but merely restricts their freedom to fix the cost of credit apart from interest, and therefore

- leaves it open to a national court to assess the fairness of their doing so in the contract even if this is below the legislative maximum: *Mikrokasa SA w Gdyni v XO* (C-779/18) 26 March 2020. EU:C:2020:236 at paras 56–57; *Profi Credit Polska SA v QJ* (C-84/19, C-222/19 and C-252/19) EU:C:2020:631, 3 September 2020 at paras 59–63.
- 1857 *Engilbertsson v Íslandsbanki hf* (E-25/13) 28 August 2014 (“*Engilbertsson (E-25/13)*”) at para.77. The EFTA Court decided under the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice art.34. Under art.3(2) of the same Agreement, the EFTA Court “shall pay due account to the principles laid down by the relevant rulings by the Court of Justice of the European Communities given after the date of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the Treaty establishing the European Economic Community … in so far as they are identical in substance to the provisions of the EEA Agreement or to the provisions of Protocols 1 to 4 and the provisions of the acts corresponding to those listed in Annexes I and II to the present Agreement”.
- 1858 *Engilbertsson (E-25/13)* at para.74.
- 1859 *Engilbertsson (E-25/13)* at para.75.
- 1860 *Engilbertsson (E-25/13)* at para.78.
- 1861 *Engilbertsson (E-25/13)* at paras 78, 142–143, citing the CJEU’s case-law on variation clauses under the 1993 Directive in *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (C-472/10) EU:C:2012:242, 26 April 2012 paras 24, 26, 28–29 on which see below, para.40-340.
- 1862 Emphasis added. This question does not arise if art.1(2) of the 1993 Directive is restricted to terms which are determined by the law, as the common law does not require any *express terms* to be included in consumer contracts. For the position as regards *implied terms*, see below, para.40-272.
- 1863 Above, para.40-266.
- 1864 For this purpose, no reliance can be made on the reference in recital 13 to “rules which, according to the law” as other language versions make clear that here “the law” translates legislation rather than “law” (for example, it appears in French as la loi rather than le droit).
- 1865 *RWE Vertrieb AG* (C-92/11) at para.29.
- 1866 [2011] EWCA Civ 1173, [2012] H.L.R. 6.
- 1867 [2011] EWCA Civ 1173 at [68] (Rix LJ with whom Rimer and Elias LJJ agreed).
- 1868 Above, para.40-266.
- 1869 *Kušionová v SMART Capital a.s.* (C-34/13) 10 September 2014 para.77 and see above, para.40-266 (note).
- 1870 *RWE Vertrieb AG* (C-92/11) at para.29, above, para.40-266.
- 1871 [2016] UKUT 325 (LC); [2018] EWCA Civ 2284, [2019] 1 W.L.R. 4461.
- 1872 i.e. ss.43, 56 and 57.
- 1873 [2016] UKUT 325 (LC) at [101].
- 1874 [2016] UKUT 325 (LC) at [101] (reg.4(2) of the 1999 Regulations formerly implemented art.1(2) of the 1993 Directive). It had been held that the new lease was a

- “contract” for the purposes of the 1999 Regulations despite its compulsory elements: see above, para.[38-230](#).
- 1875 33rd edn, Vol.II, para.38-238.
- 1876 See notably *RWE Vertrieb AG (C-92/11)*, above, para.[40-266](#).
- 1877 *Kušionová v SMART Capital a.s. (C-34/13) 10 September 2014* para.77.
- 1878 *RWE Vertrieb AG (C-92/11)* at para.29. See also the explanation of the exclusion in art.1(2) in recital 13 of the 1993 Directive that “the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms”.
- 1879 *[2018] EWCA Civ 2284, [2019] H.L.R. 17* at [40] per Underhill LJ (with whom Singh LJ agreed at [50], Sir Andrew McFarlane P dissenting at [33]–[34]). However, the CA (Underhill and Singh LJJ) affirmed the decision below on the basis that the contract term in question was not unfair: even if it caused a significant imbalance in the rights and obligations of the consumer, this was not “contrary to good faith”: *[2018] EWCA Civ 2284* at [48] and below, para.[40-289](#) (note).
- 1880 *[2018] EWCA Civ 2284* at [40] and [41] per Underhill LJ.
- 1881 2015 Act s.73(1) (as amended) and cf. 1999 Regulations reg.4(2)(b).
- 1882 Above, para.[40-265](#).
- 1883 On which see generally above, para.[40-004](#) and Vol.I, paras 1-020 et seq.
- 1884 Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.3(4) (reg.1(3)’s reference to reg.3(4)’s coming into force on “exit day” must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4), Sch.5 para.1). The 2018 Regulations were made under a power contained in s.8(1) of the European Union (Withdrawal) Act 2018, on which see Vol.I, para.[1-021](#). The change to s.73 of the 2015 Act does not apply to a contract entered into before IP completion day: SI 2018/1326 reg.11.
- 1885 1993 Directive art.1(2).
- 1886 See above, paras [37-002](#) et seq.
- 1887 See above, paras [37-095](#)—[37-097](#). On the other hand, a term of a contract which is governed by an international convention but which does not reflect the provisions of that convention remains subject to the controls in the 1993 Directive: cf. *Air Berlin Plc & Co Luftverkehrs KG v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbracherzentrale Bundesverband eV (C-290/16) 6 July 2017* at paras 44–45 (emphasising the applicability of the 1993 Directive to international contracts of carriage of passengers by air, though not addressing this point).
- 1888 *Unreported 2 November 2006 (Ch D)* at [20], referring to 1999 Regulations regs 4, 5 and 6(2).
- 1889 *Unreported 2 November 2006 (Ch D)* at [22].
- 1890 See Vol.I, para.[16-012](#).
- 1891 *Unreported 2 November 2006, Ch D* at [22].
- 1892 *Unreported 2 November 2006, Ch D* at [23] and see below paras [40-317](#) et seq. For the indicative list of terms in the 2015 Act see Sch.2 and below, paras [40-316](#) et seq. It is submitted that the approach taken by the court in *Baybut v Eccle Riggs Country*

Park Ltd would apply also to the statutory terms which Pt 1 of the Consumer Rights Act 2015 “treats as included” in the contracts to which it applies: see, e.g. in relation to “goods contracts” below, paras 40-494 et seq.

1893 1999 Regulations reg.5; 1993 Directive art.3 (although it should be noted that this exclusion does not apply to the requirement of fairness of terms in s.62 of the 2015 Act).

1894 *Unreported 2 November 2006, Ch D* at [23].

1895 This view was endorsed in relation to the 1999 Regulations by Andrew Smith J in *OFT v Abbey National Plc* [2008] EWHC 875 (Comm), [2008] 2 All E.R. (Comm) 625 at [102] (decision upheld by Court of Appeal, which itself was overturned by SC on other grounds in [2009] UKSC 6, [2010] 1 A.C. 696, below, paras 40-355—40-356).

(aa) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(i) - The Composite Test of Unfairness

(aa) - Introduction

Legislative background

- 40-273 It has been noted that the [2015 Act](#) makes two general requirements of contract terms, that they be fair and that, if in writing, they be transparent (that is to say, expressed in plain and intelligible language and legible).¹⁸⁹⁶ In this section, the first of these requirements will be examined. In this respect, it is important to note that the test of unfairness of contract terms in the Act implemented exactly the test required by the 1993 Directive with the exception that the test in the Act (unlike the test in the [1999 Regulations](#)) is not restricted to terms which have not been “individually negotiated”.¹⁸⁹⁷ In general, therefore, the case-law of the Court of Justice interpreting and giving guidance on the application of the test under the 1993 Directive and the case-law of English courts on the [1999 Regulations](#) is directly relevant to the test in the [2015 Act](#),¹⁸⁹⁸ with the arguable exception of one aspect of the interpretation by the courts of the significance of the “requirement of good faith”.¹⁸⁹⁹ Moreover, as will be seen, the [2015 Act](#) deliberately changed the formulation of the qualification on the application of the test of unfairness known widely as the “core exemption” from the wording provided by the 1993 Directive and implemented faithfully by the [1999 Regulations](#).¹⁹⁰⁰

Test of unfairness in the 1993 Directive

40-274 Article 3(1) of the Directive states that:

“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

Article 4(1) then explains that:

“Without prejudice to Article 7,¹⁹⁰¹ the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.”

Moreover, the Directive provides in its Annex “an indicative and non-exhaustive list of the terms which may be regarded as unfair”.¹⁹⁰²

European case-law on the fairness test

40-275 In *Océano Grupo Editorial SA v Murciano Quintero* the European Court itself ruled that a domestic jurisdiction clause in a consumer contract was unfair within the meaning of the 1993 Directive with the result that the Spanish court applying for a preliminary ruling and seized of a claim by the business against the consumer was entitled to deny jurisdiction on the ground of the unfairness of this term.¹⁹⁰³ However, when in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter*¹⁹⁰⁴ the Court of Justice was asked directly by a national court to decide whether a clause in the consumer contract before it was unfair within the meaning of the 1993 Directive, it refused to do so, noting that:

“... in referring to concepts of good faith and significant imbalance between the rights and obligations of the parties, Art.3 of the [1993] Directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated.”¹⁹⁰⁵

Given the range of factors which the Directive requires to be taken into account in assessing the fairness of a contract term:

“... the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law.”¹⁹⁰⁶

So, while the Court of Justice:

“... may interpret general criteria used by the Community legislation in order to define the concept of unfair terms ... it should not rule on the application of these general criteria to a particular term, which must be considered in the light of the particular circumstances of the case in question.”¹⁹⁰⁷

As a result, following the general principle that it is for national courts to apply EU law to the facts before them,¹⁹⁰⁸ it is generally for a national court to decide whether a contract term satisfies the requirements for it to be regarded as unfair within the meaning of art.3(1) of the Directive.¹⁹⁰⁹ This starting point has been reaffirmed by the Court of Justice in subsequent cases, but, starting with *Invitel*,¹⁹¹⁰ the Court has proved very willing to give guidance to the national court of referral as to the “indications which [that court] may or must apply when examining a contractual term” under the test of fairness in the Directive¹⁹¹¹ and, in doing so, has sometimes drawn factors from the illustrative list of terms which may be unfair in the Annex to the Directive.¹⁹¹² The Court of Justice has also explained the significance of the reference to good faith.¹⁹¹³ As has been explained, after IP completion day, in principle this body of retained EU case-law is binding on UK courts, subject to the possibility for the Supreme Court and listed appellate courts to depart from it.¹⁹¹⁴

The test of unfairness in the 2015 Act

40-276 Subject to the qualification already made concerning the lack of individual negotiation of the terms to which it applies,¹⁹¹⁵ the formulation of the general test of unfairness of terms in consumer contracts in the **2015 Act** is all but identical to the test required by the 1993 Directive and enacted by the **1999 Regulations**, as s.62(4) provides that:

“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.”¹⁹¹⁶

Also following the earlier legislative patterns, though rewritten in more elegant English, s.62(5) of the Act provides that:

“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.”

There are two changes of wording here which may be significant. The first is the reference to “the subject matter of the contract” rather than the “nature of the goods or services for which the contract was concluded” (as in the 1993 Directive and the 1999 Regulations¹⁹¹⁷), but it is submitted that this change makes no substantive difference,¹⁹¹⁸ though it has the advantage of avoiding the risk of appearing to restrict the test of fairness to the context of contracts relating to goods and services rather than, notably, digital content.¹⁹¹⁹ Secondly, the test in the 2015 Act refers to “all the circumstances existing when the term was agreed” rather than (as in the 1993 Directive and the 1999 Regulations) “the time of conclusion of the contract”.¹⁹²⁰ This difference will be considered below.¹⁹²¹ However, following both the 1993 Directive and the 1999 Regulations,¹⁹²² Sch.2 of the 2015 Act includes a list of terms in consumer contracts that “may be regarded as unfair” for the purposes of the controls in Pt 2.¹⁹²³ Taken together, these provisions provide the framework for a sophisticated and composite test of unfairness, its combination of different concepts and considerations being clearly aimed at reducing the degree of uncertainty and discretion which is given to a court in requiring it to judge the fairness of a term. The test can be broken down into two principal elements: the basic test of unfairness (including the significance of the requirement of good faith and the range of considerations relevant to its application); and the significance and contents of the “indicative” or “grey list” of terms found in Sch.2 of the 2015 Act, to which may be added other illustrations of potentially unfair terms.¹⁹²⁴

Footnotes

1896 See above, para.40-260.

1897 1993 Directive art.3(1); 2015 Act s.62(4) and see above, para.40-262.

1898 This statement is subject to the changed status of decisions made and principles laid down by the European Court before and after IP completion day, as explained above, para.40-004 and Vol.I paras 1-037—1-039.

1899 See below, para.40-289, referring to the judgment of the CJEU in *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (C-415/11) EU:C:2013:164, 14 March 2013* as applied by the SC in *ParkingEye Ltd v Beavis [2015] UKSC 67, [2015] 3 W.L.R. 1373*.

- 1900 1993 Directive art.4(2); 1999 Regulations reg.6(2) and 2015 Act s.64 and see below, paras 40-351 et seq., esp. at para.40-379.
- 1901 1993 Directive art.7 concerns its preventive measures: see further, below, paras 40-441 et seq.
- 1902 1993 Directive art.3(3). This is implemented by the 2015 Act s.63 and Sch.2 on which see below, paras 40-316 et seq.
- 1903 *C-240/98 to C-244/98 EU:C:2000:346, [2000] E.C.R. I-4941* and see below, para.40-390.
- 1904 *C-237/02 EU:C:2004:209, [2004] 2 C.M.L.R. 13.*
- 1905 *[2004] 2 C.M.L.R. 13* at [19]–[21].
- 1906 *[2004] 2 C.M.L.R. 13* at [21]; e.g. *Director General of Fair Trading Plc v First National Bank Plc* [2001] UKHL 52, *[2002] 1 A.C. 481*, below, para.40-284.
- 1907 *[2004] 2 C.M.L.R. 13* at [22] distinguishing (at [23]) its earlier decision in *Océano Grupo Editorial SA v Murciano Quintero* EU:C:2000:346, *[2000] E.C.R. I-4941* on the basis that the clause there satisfied all the criteria necessary for it to be judged unfair without consideration of all the circumstances in which the contract was concluded or the advantages and disadvantages which the term would have under the applicable national law. On the general division of functions between the CJEU and national courts, see above, para.40-018.
- 1908 Above, para.40-018.
- 1909 *[2004] 2 C.M.L.R. 13* at [25]. See also *Mostaza Claro v Centro Móvil Milenium SL* (*C-168/05*) EU:C:2006:675, *[2006] E.C.R. I-10421* at [22]–[23].
- 1910 *Nemzeti Fogyasztővédelmi Hatóság v Invitel Távközlési Zrt* (*C-472/10*) EU:C:2012:242, 26 April 2012 paras 21–22, below, para.40-340; *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (*C-415/11*) 14 March 2013 at paras 66–67, below, para.40-281; *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* (*C-92/11*) EU:C:2013:180, 21 March 2013 at paras 48–54, below, para.40-341; *Constructora Principado SA v Menéndez Álvarez* (*C-226/12*) EU:C:2014:10, 16 January 2014 at paras 20–25, below, para.40-282; *Sebestyén v Kővári* (*C-342/13*) EU:C:2014:1857, 3 April 2014 at paras 25–35; *Verein für Konsumenteninformation v Amazon EU Sàrl* (*C-191/15*) EU:C:2016:612, 28 July 2016 at paras 65–71, below, para.40-348; *Andriciuc v Românească* (*C-186/16*) 20 September 2017 at para.58.
- 1911 *Constructora Principado SA v Menéndez Álvarez* (*C-226/12*) EU:C:2014:10, 16 January 2014 at para.20.
- 1912 *Nemzeti Fogyasztővédelmi Hatóság v Invitel Távközlési Zrt* (*C-472/10*) EU:C:2012:242, 26 April 2012 at paras 24–28, and see below, para.40-340.
- 1913 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (*C-415/11*) 14 March 2013; *Constructora Principado SA v Menéndez Álvarez* (*C-226/12*) EU:C:2014:10, 16 January 2014, above, paras 40-281—40-282.
- 1914 European Union (Withdrawal) Act 2018 s.6 and above, para.40-004 and Vol.I, paras 1-037—1-039.
- 1915 Above, para.40-273.
- 1916 cf. 1993 Directive art.3(1); 1999 Regulations reg.5(1).

- 1917 1993 Directive art.4(1); [1999 Regulations reg.6\(1\)](#).
- 1918 cf. the French version of the 1993 Directive art.3(1) which refers to “*la nature des biens ou services qui font l’objet du contrat*”, which may be translated as “the nature of the goods or services which form the subject matter of the contract”.
- 1919 See above, paras [40-248](#) et seq. on the range of “consumer contracts” included within the scope of the requirement of fairness in [Pt 2 of the 2015 Act](#).
- 1920 1993 Directive art.4(1); [1999 Regulations reg.4\(2\)](#).
- 1921 Below, para.[40-296](#).
- 1922 1993 Directive art.3(3) and Annex; [1999 Regulations reg.5\(5\)](#) and [Sch.2](#).
- 1923 [2015 Act s.63\(1\)–\(5\)](#), and see below, paras [40-316](#) et seq.
- 1924 See below, paras [40-317](#) et seq.

(bb) - The Basic Test of Unfairness

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(i) - The Composite Test of Unfairness

(bb) - The Basic Test of Unfairness

The basic test

40-277 The basic test of unfairness of a term is that:

“..., 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.”¹⁹²⁵

When introduced by the Directive, the significance of this test gave rise to considerable comment,¹⁹²⁶ and for some its use of the notion of good faith required the introduction into English law of a new and somewhat alien concept. In this respect, it is helpful to bear in mind the origins of the reference to good faith, this flowing from its use in the German legislation which significantly influenced the Directive.¹⁹²⁷ In turn, this German legislation can be seen as the legislative recognition of existing judicial controls on unfair contract terms, this law-making being justified by the Civil Code’s general provision requiring good faith of parties to contracts¹⁹²⁸: “good faith” in this context can be seen as little more than a convenient legal pigeon-hole in which to have placed within the structure of the Civil Code judicial developments which took into account a range of considerations deemed appropriate to the control in hand.¹⁹²⁹ For this reason, it could be thought that the reference to “good faith” in the Directive is no more than a bow in the direction of these origins. Indeed, such a very limited significance to the phrase “contrary to the requirement of good faith” has been adopted by some French writers¹⁹³⁰ and this was reflected in its omission

from France's implementing legislation.¹⁹³¹ For a French lawyer it is unnecessary for two reasons: first, because the French Civil Code already makes a general requirement of the performance of contracts in good faith¹⁹³² (an argument of no significance for English law), but, secondly, because a business supplier could not be considered to remain in good faith if he were to seek to enjoy the disproportionate advantages set out in the contract concluded with the consumer.¹⁹³³ From this perspective, the requirement that the term "causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer" is sufficient in itself.¹⁹³⁴

"Significant imbalance" and the role of good faith

- 40-278 However, this French view of good faith misunderstands the particular function of the requirement of good faith in the scheme of the Directive. According to this scheme, the first and basic element of the requirement of fairness is that the term "causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". However, not all contract terms which cause such a significant imbalance are to be held unfair. Recital 16 of the Directive explains, therefore, the special role of the requirement of good faith.

"Whereas the assessment, according to the general criteria chosen, of the unfair character of the terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be *supplemented by a means of making an overall evaluation of the different interests involved; whereas this constitutes the requirement of good faith;* whereas, in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account."¹⁹³⁵

- 40-279 So, according to recital 16, the role of the requirement as to good faith is to ensure that the test of "significant imbalance" ("the general criteria chosen") is not applied in any sense mechanically, but rather the court should in making its assessment of a contract term look to "an overall evaluation of the interests involved". It is interesting, for this purpose, that while some of the factors which the recital mentions as being significant to this evaluation are familiar to English lawyers from the assessment of "reasonableness" under the *Unfair Contract Terms Act 1977*¹⁹³⁶ and may indeed be thought to represent an attempt to interpret good faith particularly for the benefit of common lawyers, the recital gives as a first and particular context for this supplementary requirement of good faith as "sale or supply activities of a public nature providing collective services which take

account of solidarity among users".¹⁹³⁷ This inclusion shows that the function of the requirement of good faith is to ensure that *all* possible relevant considerations may be taken into account in making the overall assessment of the fairness of a term, even where these considerations relate to the public interest and therefore not necessarily to the position of either of the parties to the contract.¹⁹³⁸ Furthermore, two of the other circumstances mentioned by the recital as possible elements in this "overall evaluation" illustrate circumstances in which a "significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer" may be justified and therefore fair, where:

"… the consumer had an inducement to agree to the term [or] … the goods or services were sold or supplied to the special order of the consumer."

Another element draws attention to the significance of the relative bargaining power of the parties (which will normally rest with the seller or supplier but which may exceptionally rest with the consumer). The final circumstance re-emphasises the inclusive nature of the requirement of good faith, stating that this may be satisfied:

"… by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account."

This is clearly related to the requirement in art.4(1) of the Directive that in assessing the fairness of a term, a court should consider "all the circumstances attending the conclusion of the contract".

- 40-280 What all this means, therefore, is that the Directive does require an autonomous interpretation of the concept of good faith, but not one drawn from the significances or uses to which the concept (or related concepts) have been put in the laws of the Member States generally.¹⁹³⁹ The concept of good faith is autonomous in the sense that it is specifically European (rather than being left to the interpretation of national law or national courts), but it is also autonomous in the sense that it is particular to the context of the control of unfair contract terms. This can be seen in the case-law of the Court of Justice in *Aziz*¹⁹⁴⁰ and *Menéndez Álvarez*.¹⁹⁴¹

Aziz and Menéndez Álvarez

- 40-281 In *Aziz* the Court of Justice explained the test of "significant imbalance" and the proper approach to the condition that this imbalance must arise "contrary to the requirement of good faith" in a reference from a Spanish court asking for guidance as to whether three terms in a contract of loan secured by a mortgage of residential property to be repaid over 33 years were unfair within the meaning of the Directive.¹⁹⁴² First, as the Court had previously explained, "the system of

protection introduced by the directive is based on the idea that the consumer is in a weaker position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge” and the Directive’s provision that unfair terms are not binding on the consumer “aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them”.¹⁹⁴³ The Court then held that:

“... in order to ascertain whether a term causes a ‘significant imbalance’ in the parties’ rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.”¹⁹⁴⁴

The Court continued:

“With regard to the question of the circumstances in which such an imbalance arises ‘contrary to the requirement of good faith’, having regard to the sixteenth recital in the preamble to the directive ... the national court must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations.”¹⁹⁴⁵

The Court of Justice therefore required national courts to make a hypothetical judgment as to what the *seller or supplier* could *reasonably assume* as to the agreement of the consumer, an approach which links the judicial control of the fairness of contract terms to the condition that the terms in question were not “individually negotiated”,¹⁹⁴⁶ seeing the court’s control as a substitute for the consumer’s own decision-making. For this purpose, Advocate General Kokott, to whose Opinion the Court had referred with approval, added that:

“In this connection, it is important inter alia whether such contractual terms are common, that is to say they are used regularly in legal relations in similar contracts, or are surprising, whether there is an objective reason for the term and whether, despite the shift in the contractual balance in favour of the user of the term in relation to the substance of the term in question, the consumer is not left without protection.”¹⁹⁴⁷

The Court of Justice, by way of “guidance” to the national court, then explained the proper question for it to consider in relation to an acceleration clause in a contract of loan under which the lender would have been entitled to call in the totality of the loan on expiry of the 33 years where the

consumer borrower failed to pay any of the principal or the interest on the loan.¹⁹⁴⁸ Where a borrower under a long-term loan defaulted over a “limited specific period”, the national court should:

“... assess in particular ... whether the right of the [lender] to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the context of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the relevant applicable rules and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.”¹⁹⁴⁹

So, while the Court did indeed refer to the position under the national law applicable in the absence of the relevant term, it first took a view as to the proper position in respect of the operation of such a clause, that is, that the obligation is “of essential importance” and/or the consumer’s non-compliance “is sufficiently serious”. Here, therefore, the Court of Justice requires the national court to compare the position under the contract term and the position which *should* be the case given what it considers to be these proper considerations. The Court of Justice, following its Advocate General’s advice, also found the “indicative list” in the Annex to the Directive (and found in the 2015 Act Sch.2) particularly helpful in setting out the considerations the national court should take into account.¹⁹⁵⁰

- 40-282 Similarly, in *Menéndez Álvarez*¹⁹⁵¹ the Court of Justice held that in general the notion of “significant imbalance” in the test of unfairness of contract terms in the 1993 Directive “cannot be limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract and the costs charted to the consumer” under the term which is challenged, and instead must extend to consideration of a comparison between the parties’ rights and obligations under that term and under the national law rules which would apply in the absence of any such agreement.¹⁹⁵² According to the Court:

“... a significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules.”

¹⁹⁵³

As a result, the national court should assess the fairness of a contract term which imposed on a consumer purchaser of residential property from a builder the liability to pay national capital gains tax which would otherwise lie on the builder as vendor of the property which had benefited from the increase in the value of the property, taking account, in particular, the information which the consumer purchaser had received about this before the contract was made.¹⁹⁵⁴ For these purposes, the Court of Justice further held that the fact that the contract term in question stated that:

“... the consumer’s assumption of responsibility for payment of the capital gains tax [had] been taken into account in determining the sale price does not itself constitute proof of consideration [i.e. something in return] which the consumer would have benefited from”,

although it assumed that proof of an *actual* reduction in price would be relevant to the fairness of the term.¹⁹⁵⁵

- 40-283 Finally, in *Profi Credit Polska SA v QJ* the Court of Justice considered whether a contract term which had not been individually negotiated in a consumer credit agreement and which imposed on the consumer “non-interest credit costs” (including costs of the lender’s business activity) below the maximum set by national law could be considered unfair.¹⁹⁵⁶ In the view of the Court, in the context the national court’s assessment of the significant imbalance created by these non-interest terms:

“cannot be limited to a quantitative economic assessment based on a comparison between the total value of the transaction which was the subject of the contract and the costs charged to the consumer under that term”

because:

“... a significant imbalance can result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules.”¹⁹⁵⁷

This could be the case in the context even though the non-interest credit cost to the consumer is set below the upper limit set by national law:

“... if the services provided in return were not reasonably covered by the services provided in connection with the conclusion or management of the credit agreement, or if the amounts charged to the consumer in respect of the costs of granting and managing the loan are clearly disproportionate in relation to the amount of the loan.”¹⁹⁵⁸

As regards the requirement that this imbalance be “contrary to the requirement of good faith”, this should be assessed by reference to what:

“... the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in contract negotiations,”¹⁹⁵⁹

thereby following the hypothetical test first adopted in *Aziz*.¹⁹⁶⁰

For this purpose, the Court emphasised that:

“... taking into account the requirement of transparency ..., it cannot be considered that the seller or supplier could reasonably expect, when dealing with the consumer in a transparent manner, that the consumer would agree to such a term in contract negotiations.”¹⁹⁶¹

Here, therefore, the Court linked the lack of transparency of the term of the contract whose fairness was challenged directly with its approach to the requirement of good faith.

Fairness and good faith in First National Bank Plc

40-284 In *Director General of Fair Trading v First National Bank Plc*¹⁹⁶² decided some 10 years before the judgments of the Court of Justice in *Aziz*¹⁹⁶³ and *Menéndez Álvarez*,¹⁹⁶⁴ the House of Lords discussed the requirement of good faith and the test of unfairness more generally for the purposes of the Directive as then implemented by the 1994 Regulations.¹⁹⁶⁵ As to good faith, Lord Bingham of Cornhill observed:

“The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer’s

necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in *Schedule 2 to the [1994] Regulations*.¹⁹⁶⁶ Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield¹⁹⁶⁷ was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice. *Regulation 4(1)* lays down a composite test, covering both the making and the substance of the contract, and must be applied bearing clearly in mind the objective which the Regulations are designed to promote.”¹⁹⁶⁸

Clearly, then, Lord Bingham saw good faith as an extremely inclusive concept, potentially comprising elements of both procedural and substantive fairness.¹⁹⁶⁹ However, with the greatest respect, the idea of a business “taking advantage” of the consumer (even if unconsciously) is potentially restrictive, having overtones of bad faith which is clearly unnecessary¹⁹⁷⁰ and is not reflected in the later case-law of the Court of Justice in *Aziz*¹⁹⁷¹ and *Menéndez Álvarez*.¹⁹⁷²

West v Ian Finlay & Associates

40-285 In *West v Ian Finlay & Associates*,¹⁹⁷³ the Court of Appeal took a rather different approach to the requirement of “significant imbalance in the parties’ rights and obligations arising under the contract” than the Court of Justice in *Aziz* and *Menéndez Álvarez*, neither of which were discussed even though they preceded the Court of Appeal’s decision.¹⁹⁷⁴ *West* concerned, *inter alia*, the fairness of a “net contribution clause” in a contract of appointment between a house-owner and the defendant architectural firm for the alteration and renovation of their house. The Court of Appeal held that, as a matter of construction, the effect of the clause was to limit the defendant’s loss or damage to the amount that it was reasonable for it to pay having regard to “the contractual responsibilities of other consultants, contractors and specialists appointed by [the claimants]”.¹⁹⁷⁵ Its practical effect was to place on the claimants the risk of the insolvency of the contractors engaged to undertake the work done on the houses, a risk which had transpired; the clause also meant that the claimant would have to bring proceedings against any defaulting contractor who may be jointly and severally liable with the defendant, and to await the outcome of any contribution proceedings before obtaining full satisfaction.¹⁹⁷⁶ Having set out the test of the unfairness of contract terms in the *1999 Regulations* and having referred to examples of exclusions of liability in the “indicative list” contained in its Sch.2,¹⁹⁷⁷ the Court of Appeal relied on passages from the speeches in the House of Lords in the *First National Bank* case on the test of unfairness,¹⁹⁷⁸ and concluded that “in evaluating the application of regulation 5(1) of the UTCC Regulations, it is necessary to consider significant imbalance and good faith separately as well as together in making the ultimate overall assessment”.¹⁹⁷⁹ The Court of Appeal then noted a range of considerations which it thought relevant on the facts to this assessment, including the fact that the clause would

make the claimants bear the insolvency risk of contractors which they had chosen, that the clause is “by no means unusual” in the context, that other terms of the contract stipulated that the defendant did not warrant the solvency of others, and that the claimants should hold the contractors which they appointed responsible for the performance of their services.¹⁹⁸⁰ The Court of Appeal then turned to the requirement of good faith which it saw, following dicta in the *First National Bank* case, as requiring that the defendants should not take advantage of the claimants nor set any “a concealed trap or pitfall”.¹⁹⁸¹ Nor were the claimants in a weak bargaining position, given their financial experience.¹⁹⁸² On the other hand, although the clause was presented in an open way, it did not draw the reader’s attention to the fact that it was shifting the insolvency risk of the other contractors from the defendant to the claimants, and nor did the defendant itself, despite RIBA guidelines to this effect.¹⁹⁸³ Overall, balancing out all these elements, the Court concluded, therefore, that the requirement of good faith had been satisfied on the facts.¹⁹⁸⁴ Moreover, while the clause plainly caused an imbalance in the parties’ rights and obligations, the Court of Appeal did not consider this “so weighted” in favour of the defendants as to cause a *significant* imbalance given:

“(a) The prevalence of the usage of the [clause] in standard RIBA forms, (b) the fact that the clause would be regarded as not unusual in a commercial contract, and (c) the fact that it was the [claimants] who in this case would be taking the final decision on the future choice of main contractor, very likely being alive (bearing in mind [one of the claimant’s] banking background) to the fact that that contractor’s financial stability was a matter of importance.”¹⁹⁸⁵

The Court of Appeal therefore held the clause was not unfair under the *1999 Regulations*, principally on the ground that there was no failure to fulfil the requirement of good faith, though secondarily on the ground that it did not cause a significant imbalance in the parties’ rights and obligations to the detriment of the consumer.

- 40-286 Many of the elements which the Court of Appeal took into account in coming to its overall evaluation of the term were properly relevant given the guidance given both by the Directive itself and by the Court of Justice *Aziz* and *Menéndez Álvarez*, although, with respect, the fact that the net contribution clause was not unusual in a *commercial* contract should not have been considered relevant.¹⁹⁸⁶ Moreover, the Court of Appeal’s emphasis on the need to evaluate the *significance* of the imbalance in the rights and obligations of the parties is consistent with the guidance in *Menéndez Álvarez*, as the Court of Justice there accepted that:

“[a] significant imbalance can result solely from a *sufficiently serious* impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions.”¹⁹⁸⁷

On the other hand, while the Court of Appeal accepted that the requirement of good faith required the evaluation of “all possible relevant considerations … in making the overall assessment of the fairness of a term”,¹⁹⁸⁸ it did not “assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations” as required by the Court of Justice in *Aziz*, although its reference to the common usage of the clause could be thought of as a relevant to such a hypothetical assessment.¹⁹⁸⁹

ParkingEye Ltd v Beavis¹⁹⁹⁰

40-287 In *ParkingEye Ltd*, the Supreme Court considered the guidance of the Court of Justice on the test of unfairness in the 1993 Directive in *Aziz*¹⁹⁹¹ in deciding how the test of unfairness in the **1999 Regulations** would apply to a term in a contract under which a consumer could park for free in a car park for up to two hours, but would incur a charge of £85 for overstaying this permitted period or for breaking other rules set by the management company of the car park, such as parking only within marked bays.¹⁹⁹² A notice to this effect in “large, prominent and legible” print was displayed on signs at the entrance of the car park and around it.¹⁹⁹³ A user of the car park (the “consumer”) overstayed the two-hour limit by nearly an hour and the management company sought to recover the charge from him. The Supreme Court considered that the contract was a licence to park cars on the terms posted at its entrance, that the charge was not a charge for the right to park or even to overstay at the car park, but arose only on certain breaches of the contract by the user.¹⁹⁹⁴ The car park was operated in this way as its owner was concerned to ensure that motorists should park for free to attract customers for the retailers to which it had leased other parts of its site, but that these customers should not overstay their parking period so as to increase the potential number of customers. The purposes of the charge were therefore to manage the efficient use of parking spaces in the interests of the owner, the retailers and other would-be customers and to provide an income stream for the car park’s managers to meet its costs and make a profit.¹⁹⁹⁵ In considering the fairness of the term imposing the charge under the **1999 Regulations**, the Supreme Court followed the guidance of the Court of Justice of the EU in *Aziz*,¹⁹⁹⁶ which it saw as the “leading case on the topic” provided by that court.¹⁹⁹⁷ It noted Advocate General Kokott’s advice in *Aziz*, which was followed by the Court of Justice, that the requirement that the “significant imbalance” in the contracting parties’ rights and obligations to the detriment of the consumer should be contrary to good faith allows account to be taken of the legitimate interests of the parties to organise their own legal relationship even in a way which derogates from national legal rules otherwise applicable.¹⁹⁹⁸ In this respect, the Supreme Court noted the formula used by the Court of Justice to assess good faith by reference to the hypothetical test of whether the seller or supplier “could reasonably assume that the consumer would have agreed to such a term in

individual negotiations” and the views of Advocate General Kokott on the relevant circumstances for this purpose, such as whether or not the term would be surprising.¹⁹⁹⁹

- 40-288 A majority of the Supreme Court held that the contract term on which the £85 charge was based was fair within the meaning of the Regulations. While the term did create an imbalance in the parties’ rights and obligations to the detriment of the consumer, both the management company and the owners of the car park had a legitimate interest in imposing a liability on consumers in excess of any damages recoverable in inducing them to observe the two-hour time limit: indeed “charging overstayers £85 underpinned the business model which enabled members of the public to park free of charge for two hours” and was:

“... fundamental to the contractual relationship created by [consumers’] acceptance of the terms of the notice, whose whole object was the efficient management of the car park.”²⁰⁰⁰

In the view of the majority, the hypothetical test in *Aziz* was objective:

“... the question is not whether [the defendant consumer] himself would in fact have agreed to the term imposing the £85 charge in a negotiation, but whether a reasonable motorist in his position would have done so. In [its] view, a reasonable motorist would have agreed.”²⁰⁰¹

Motorists generally and the defendant in particular *did* accept the term and while this would not usually have much weight as regards standard terms, the term in question “could not have been briefer, simpler or more prominently proclaimed”.²⁰⁰² Moreover, objectively, they had every reason to accept the terms, as they were allowed to park free for two hours in return for the risk of the £85 charge if they overstayed.²⁰⁰³ The terms were beneficial to motorists themselves as they freed up parking spaces, as well as being beneficial to the management company, the site owner and the retailers and the level of the charge was not exorbitant: the terms were therefore “objectively reasonable”.²⁰⁰⁴ In this respect, Lord Mance’s view was more nuanced, considering that the Court of Justice of the EU in *Aziz* could not be taken to have identified the hypothetical test as conclusive, but rather as relevant to the assessment of fairness of a term, given that the Directive requires a court to take into account all circumstances for this purpose.²⁰⁰⁵ Lord Mance found the argument that the management company could not reasonably have assumed that customers in the defendant’s position would have agreed to the scheme in individual contractual negotiation “less easy to address”, as such a customer, if asked, would have been satisfied with the proposal of two hours of free parking, but would probably have asked for “some form of gradated payment in the event of overstaying”.²⁰⁰⁶ Nevertheless, Lord Mance concluded that the term was not unfair within the meaning of the Regulations, as a term of this sort is simple and familiar and clear notice was given; there is no significant imbalance in the parties’ rights and obligations given that the

consumer is given a valuable privilege (the free parking) in return for a promise to pay a sum in the event of overstaying; and, finally, the charge is not disproportionately high.²⁰⁰⁷ By contrast, Lord Toulson dissented on this issue. In his view, the term on which the charge was based did create a significant imbalance in the parties' rights and obligations to the detriment of the consumer as the charge far exceeded any amount which was otherwise likely to be recoverable as damages.²⁰⁰⁸ Moreover, he considered that the hypothetical test which *Aziz* used to explain the requirement of good faith is "significantly more favourable to the consumer" than is the general common law governing penalty clauses, as its starting point is the special protection of consumers rather than that parties should be kept to their bargains.²⁰⁰⁹ In his view, no assumption can fairly be made that a consumer would have agreed to the term in individual negotiations and the burden of proof is on the trader to establish that he would have done as it makes no allowance for circumstances, allows period of grace and provides no room for adjustment.²⁰¹⁰ He therefore concluded that the term was unfair.²⁰¹¹

Comments

40-289



The Supreme Court in *ParkingEye Ltd* took care to follow and apply the guidance of the Court of Justice of the EU on the interpretation and application of the test of unfairness in the 1993 Directive and, in particular, the requirement of good faith,²⁰¹² and it did so with particular emphasis on the fact that the terms in question were transparent,²⁰¹³ later seen as relevant to good faith by the Court of Justice in *Profi Credit Polska SA v QJ*.

2014

U However, while the hypothetical test used by the Court of Justice in *Aziz* to explain the significance of the requirement of good faith was expressed in general terms, it is submitted that it should not be taken as the touchstone of that requirement. Instead, Lord Mance's interpretation of the hypothetical test as *relevant* to the assessment of good faith but not conclusive of it is to be preferred, not least as recital 16 of the Directive itself explains the significance of good faith by reference to a series of other matters and without reference to the hypothetical test.²⁰¹⁵ Moreover, the hypothetical test is itself open to criticism on the basis that it requires a court to take a view as to the assumptions of a reasonable trader in the position of the actual trader (what he would have assumed) and of a reasonable consumer in the position of the actual consumer (what he would have decided). Such fictitious tests tend to shift the focus of the court away from the level of the substantive imbalance caused to the consumer by the term in issue and the wider interests of the parties and others with which the test of unfairness should be concerned. Furthermore, the hypothetical test assumes that the fundamental problem with the terms of consumer contracts is that they are not individually negotiated and that on this ground the consumer's freedom of contract is undermined, rather than that consumers are to be protected because they are "weaker parties"

as regards both their bargaining power and their level of knowledge. Lord Mance's restrictive interpretation of the Court of Justice's approach to the requirement of good faith also avoids the difficulty otherwise found in relation to the new law under the *Consumer Rights Act 2015* whose controls on unfair contract terms are *not* restricted to terms which are not individually negotiated, as it would make little sense to apply the hypothetical test to a term which had in fact been individually negotiated.²⁰¹⁶ Where a term was individually negotiated, explaining the requirement of good faith by reference to a hypothetical test of what the trader could objectively have assumed the (reasonable) consumer would have agreed in individual negotiations would make little sense, given that, *ex hypothesi*, the consumer had in fact agreed to the term in question.²⁰¹⁷ It is submitted that this difficulty disappears if the hypothetical test is treated as *relevant* to the assessment of good faith, as Lord Mance suggested, rather than as being conclusive of it,²⁰¹⁸ as this allows a court to interpret the requirement of good faith in the context of an individually negotiated term on other and broader grounds, as is indeed suggested by recital 16 of the 1993 Directive itself.²⁰¹⁹ This is apparently the view taken by the CMA, which has advised that the “requirement of good faith ... allows for proper account to be taken of the significance of any real negotiation that has actually taken place”, but considers that:

“... any contention that a particular consumer has actually influenced the substance of a term has to be tested against a detailed consideration of the circumstances existing at the time the contract was concluded. In [the CMA’s] view, individual consumers rarely in practice have the required knowledge and bargaining power to ensure that contractual negotiations involving them are effectively conducted on equal terms.”²⁰²⁰

Finally, in terms of the application of the hypothetical test and the test of unfairness more widely on the facts of *ParkingEye Ltd*, with respect, the view of the majority of the Supreme Court that the terms in *ParkingEye Ltd* were not unfair as a matter of consumer law coupled with its reformulation of the common law governing penalty clauses²⁰²¹ gives rise to concern that traders can effectively impose on consumers the payment of sums for breaches of contract even where the level of the sums is unrelated to any loss actually suffered by those traders.²⁰²²

Footnotes

- ¹⁹²⁵ *2015 Act s.62(4); 1993 Directive art.3(1)* and see above, para.[40-276](#) for the full provisions.
- ¹⁹²⁶ *Collins (1994) 14 O.J.L.S. 229*; Beale in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law* (1995), Ch.9 pp.242 et seq.; *Weatherill (1995) 3 European Review of Private Law* 307; Howells and Wilhelmsson, *E.C. Consumer Law* (1997), p.88, pp.96 et seq.; Bright in Burrows and Peel, *Contract Terms* (2007), Ch.9.

- 1927 i.e. Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (“Standard Contract Terms Act”) of 1976, translated in part by Dannemann in Markesinis, Lorenz and Dannemann, at pp.908 et seq. (The German Standard Contracts Act 1976 itself was abrogated and replaced by a revised BGB para.307(1).) The first draft of the Directive was much closer to the German legislation, applying to commercial as well as to consumer contracts. Apart from the German law, the laws of some other Member States law had used the notion of good faith in their control of unfair contract terms, for example, Spanish law: Paisant, Recueil Dalloz Sirey, 1995 Chronique p.99, p.100.
- 1928 BGB para.242 and see Zimmermann, The New German Law of Obligations (2005), pp.173–178.
- 1929 Zimmermann and Whittaker, Good Faith in European Contract Law (2000), Ch.1. It is noteworthy that the German Standard Terms Act of 1976 did not attempt to explain the requirement of good faith by reference to the already elaborate case-law based on para.242 BGB, but instead listed the clauses which are either necessarily void or are void if they fail a test of “reasonableness”: see Standard Contract Terms Act 1976 paras 9–11.
- 1930 See Larroumet, Droit Civil, Les obligations Le contrat, 5th edn (2003), Tome 3, p.422; Paisant, Recueil Dalloz Sirey, 1995 Chronique p.99.
- 1931 Loi 95/96 of 1 February 1995, now art.L.132-1 al. 1 Code de la consommation (as amended). Again, this reflects French legislative and judicial tradition which preferred to use the notion of the abuse of rights (hence, “*clauses abusives*”) rather than the (admittedly closely related) notion of good faith.
- 1932 In the case of the Code civil as first enacted in 1804, good faith was expressed only as applying to the performance of contracts (art.1134 al. 3 C.civ.), but after reform to French contract law in 2016, art.1104 requires that contracts are “negotiated, formed and performed in good faith”.
- 1933 Paisant Recueil Dalloz Sirey, 1995 Chronique p.99 at p.100.
- 1934 cf. *Tóth v ERSTE Bank Hungary Zrt (C-34/18)* (Opinion of 29 March 2019) paras 55–62 esp. at para.58 where AG Hogan took the view (which he accepted was not reflected in the case-law of the CJEU) that the phrase “contrary to the requirement of good faith” is not distinct from the overall criterion of “significant imbalance”, but is instead “essentially descriptive of the state of affairs” where there is a significant imbalance (a point not addressed by the CJEU in its decision of 19 September 2019). See similarly *Kiss v Kiss (C-621/17)* Opinion of AG Hogan of 15 May 2019 at para.66, although the CJEU in its *decision of 19 October 2019* paras 49 and 50 did not follow its AG’s view. While noting AG Hogan’s view, the EU Commission has preferred to see the reference to good faith and the test of significant imbalance as “closely linked”: Commission guidance C(2019) 5325 final, p.32.
- 1935 Emphasis added.
- 1936 **Unfair Contract Terms Act 1977 s.11(1)** and **Sch.2** and see Vol.I, para.17-101. The elements specified by recital 16 were included in **Sch.2 of the 1994 Regulations**, expressly to be taken account of in the assessment of good faith. However, their

- omission from the text of the [1999 Regulations](#) and from, the [2015 Act](#) makes no substantive change as their presence in the preamble to the Directive requires them to be taken into account in the interpretation of its text and, therefore, the text of the Act.
- 1937 This reference to taking account of “solidarity among users” has little resonance for English lawyers, but it may allude to the idea found, for example, in French administrative law which requires that those who use a public service must have equal access to it and be equally treated by it: Bell, Boyron and Whittaker, *Principles of French Law*, 2nd edn (2008), pp.170–171. This degree of inclusiveness in the evaluation of the fairness of contract terms would also allow a court to take into account their effect on the “Convention rights” of third parties as well as of the parties themselves under the [Human Rights Act](#) (cf. Vol.I, para.[3-134](#); *Whittaker (2001)* 21 *O.J.L.S.* 193, 213. This suggestion finds some support from reference to “fundamental rights” and, more recently, the Charter of Fundamental Rights of the EU in the context of the 1993 Directive: see Opinion AG Tizziano in *Mostaza Claro v Centro Móvil Milenium SL (C-168/05)* *EU:C:2006:675*, [2007] 1 *C.M.L.R.* 222 at [59] quoting *Krombach v Bamberski (C-7/98)* *EU:C:2000:164*, [2000] *E.C.R. I-0193* (relevance of “fundamental rights” to fairness of arbitration clause); *Sánchez Morcillo v Banco Bilbao Vizcaya Argentaria SA (C-169/14)* *EU:C:2014:2099*, 17 July 2014 especially at para.50 (relevance of Charter of Rights art.47 to national procedural law on the consumer’s right of appeal and the effectiveness of the consumer’s protection under 1993 Directive art.7). However, as explained earlier, after IP completion day the Charter of Rights does not form part of “retained EU law” though special consequential provision is also made: [European Union \(Withdrawal\) Act 2018 s.5\(4\)](#) and [\(5\)](#), on which see Vol.I, para.[1-021](#) (note).
- 1938 The words “the function of the requirement of good faith … fairness of a term” in the text in the 31st edition 2012) of the present work at para.[15-074](#) were quoted with approval by the Court of Appeal in *West v Ian Finlay & Associates [2014] EWCA Civ 316*, [2014] *B.L.R.* 324 at [45].
- 1939 On the difficulties of identifying a practical meaning of “good faith” and its linguistic equivalents across European laws see Zimmermann and Whittaker, *Good Faith in European Contract Law* (2000), p.690 and see above, Vol.I, paras [2-034](#)—[2-035](#).
- 1940 *Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa EU:C:2013:164*, 14 March 2013 (“*Aziz (C-415/11)*”).
- 1941 *Constructora Principado SA v Menéndez Álvarez (C-226/12)* *EU:C:2014:10*, 16 January 2014 (“*Menéndez Álvarez (C-226/12)*”).
- 1942 *Aziz (C-415/11)*.
- 1943 *Aziz (C-415/11)* at paras 44–45, referring to *Banco Español de Crédito, SA v Calderón Camino (C-618/10)* *EU:C:2012:349*, 14 June 2012 at paras 39–40.
- 1944 *Aziz (C-415/11)* at para.68. cf. *Kiss v Kiss (C-621/17)* *EU:C:2019:820* (French version used) at para.55 where the contract terms provided for charges on the consumer which were recognised by national law with the result that the CJEU doubted whether they put the consumer in a less favourable position than national law itself.

- 1945 *Aziz (C-415/11)* at para.69. The approach in *Aziz* was followed closely in the order of the CJEU in *Sebestyén v Kovári (C-342/13)* EU:C:2014:1857, 3 April 2014 at paras 27–28; *Kiss v Kiss (C-621/17)* EU:C:2019:820 at para.50.
- 1946 1993 Directive art.3, especially 3(2), above, paras 40-225 and 40-262.
- 1947 *Aziz (C-415/11)* Opinion of AG Kokott, at para.75.
- 1948 See also below, para.40-331 (default interest clause).
- 1949 *Aziz (C-415/11)* at para.73.
- 1950 *Aziz (C-415/11)* at para.74 and see below, paras 40-316 et seq.
- 1951 *Constructora Principado SA v Menéndez Álvarez (C-226/12)* EU:C:2014:10, 16 January 2014.
- 1952 *Menéndez Álvarez (C-226/12)* at paras 21–22.
- 1953 *Menéndez Álvarez (C-226/12)* at para.23. See similarly *Kiss v Kiss (C-621/17)* EU:C:2019:820, 3 October 2019 at para.51; *M.P. and B.P. v prowadzący działalność za pośrednictwem 'A.' SA (C-212/20)* EU:C:2021:934, 18 November 2021 at para.66.
- 1954 *Menéndez Álvarez (C-226/12)* at paras 26–27.
- 1955 *Menéndez Álvarez (C-226/12)* at para.29.
- 1956 *Profi Credit Polska SA v QJ (C-84/19 C-222/19 and C-252/19)* EU:C:2020:631, 3 September 2020 (“*Profi Credit Polska SA v QJ (C-84/19, C-222/19 and C-252/19)*”) at paras 89–97. See similarly *BNP Paribas Personal Finance SA v VE (C-609/19)* EU:C:2021:469, 10 June 2021 at paras 61–71 in the context of the terms of a loan agreement denominated in a foreign currency which “seem to place on the consumer, in so far as the seller or supplier has failed to comply with the requirement of transparency with regard to that consumer, a risk which is disproportionate in relation to the services provided and to the amount of the loan received, since the effect of applying those terms is that the consumer must ultimately bear the cost of changes in the exchange rate”.
- 1957 *Profi Credit Polska SA v QJ (C-84/19, C-222/19 and C-252/19)* at para.92 referring to *Kiss v Kiss (C-621/17)* EU:C:2019:820, 3 October 2019 at para.51.
- 1958 *Profi Credit Polska SA v QJ (C-84/19, C-222/19 and C-252/19)* at para.95.
- 1959 *Profi Credit Polska SA v QJ (C-84/19, C-222/19 and C-252/19)* at para.93.
- 1960 Above, para.40-281.
- 1961 *Profi Credit Polska SA v QJ (C-84/19, C-222/19 and C-252/19)* at para.96.
- 1962 [2001] UKHL 52, [2002] 1 A.C. 481; Macdonald (2002) 65 M.L.R. 763; Dean (2002) 65 M.L.R. 773; Whittaker (2004) ZEuP 75.
- 1963 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (C-415/11)* EU:C:2013:164, 14 March 2013 (“*Aziz (C-415/11)*”), above, para.40-281.
- 1964 *Menéndez Álvarez (C-226/12)*, above, para.40-282.
- 1965 Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) which were revoked and replaced by the 1999 Regulations as noted, above, para.40-226.
- 1966 The 1994 Regulations Sch.2 listed the elements found in recital 16 of the 1993 Directive.
- 1967 See *Carter v Boehm (1766)* 3 Burr. 1905, 1910, quoted Vol.I, para.2-036.

- 1968 [2001] *UKHL* 52 at [17], with whom Lord Steyn (at [39]), Hope of Craighead (at [40]), Millett (at [53]) and Rodger of Earlsferry (at [62]) agreed.
- 1969 Beale in Beatson and Friedman (eds), *Good Faith and Fault in Contract Law* (1995), Ch.9, p.245.
- 1970 cf. *Macdonald* (2002) 65 *M.L.R.* 763 at p.769.
- 1971 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (*C-415/11*) *EU:C:2013:164*, 14 March 2013 ("Aziz (*C-415/11*)" above, para.40-281).
- 1972 *Constructora Principado SA v Menéndez Álvarez* (*C-226/12*) *EU:C:2014:10*, 16 January 2014 ("Menéndez Álvarez (*C-226/12*)" above, para.40-282).
- 1973 [2014] *EWCA Civ* 316, [2014] *B.L.R.* 324. Vos LJ delivered a judgment to which all members of the Court of Appeal contributed.
- 1974 *Aziz* (*C-415/11*); *Menéndez Álvarez* (*C-226/12*), on which see above paras 40-281—40-282. *West v Ian Finlay & Associates* was heard on appeal on 25 February 2014 and judgment was handed down by the Court of Appeal on 27 March 2014.
- 1975 [2014] *EWCA Civ* 316 at [30]. There was, therefore, no room for the application of the required interpretation of *ambiguous* contract terms in favour of the consumer set out in 1999 Regulations reg.7(2): [2014] *EWCA Civ* 316 at [32] and see below, para.40-428.
- 1976 [2014] *EWCA Civ* 316 at [49].
- 1977 cf. 2015 Act s.62(4) and Sch.2, above, paras 40-316 et seq.
- 1978 *Director General of Fair Trading v First National Bank Plc* [2001] *UKHL* 52, [2002] 1 *A.C.* 481 especially at [17], [24], [54] and [56], on which see above, para.40-284.
- 1979 [2014] *EWCA Civ* 316 at [46].
- 1980 [2014] *EWCA Civ* 316 at [51], [52] and [53] respectively.
- 1981 [2014] *EWCA Civ* 316 at [55] and [57].
- 1982 [2014] *EWCA Civ* 316 at [56] and [59].
- 1983 [2014] *EWCA Civ* 316 at [57]–[58].
- 1984 [2014] *EWCA Civ* 316 at [58] and [59].
- 1985 [2014] *EWCA Civ* 316 at [59].
- 1986 On this guidance, see above, paras 40-281—40-282. It is surprising that the Court of Appeal found this relevant as it had earlier noted that, while a commercial party commissioning building work would protect its interests by insurance or the taking of a performance bond from the main contract, in the consumer context "it is common practice for the architect to protect his position by insurance, but uncommon for a consumer client to obtain insolvency insurance protection or a performance bond from a contractor": [2014] *EWCA Civ* 316 at [52].
- 1987 *Menéndez Álvarez* (*C-226/12*) at [23] (emphasis added).
- 1988 [2014] *EWCA Civ* 316 at [45] quoting the 31st edition of the present work, Vol.I, para.15-074; and [57]–[58].
- 1989 *C-415/11* at [69] and see above, para.40-281.
- 1990 [2015] *UKSC* 67, [2015] 3 *W.L.R.* 1373.
- 1991 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (*C-415/11*) *EU:C:2013:164*, 14 March 2013 discussed above, para.40-281.
- 1992 [2015] *UKSC* 67 at [90] and [123].

- 1993 [2015] UKSC 67 at [91].
- 1994 [2015] UKSC 67 at [94].
- 1995 [2015] UKSC 67 at [97]–[98].
- 1996 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (C-415/11)*.
- 1997 [2015] UKSC 67 at [105] (Lord Neuberger of Abbotbury, Lord Sumption and Lord Carnwath) (with whom Lord Hodge (at [289]) and Lord Clarke of Stone-cum-Ebony (at [291]) agreed on these points); [204] and [208] (Lord Mance); Lord Toulson agreed on the importance of the *Aziz* decision (at [306]–[308]), but dissented on its significance on the facts of *ParkingEye Ltd*: see below, para.40-288. The SC also held that the term imposing the charge was not a penalty clause at common law as the management company had a legitimate interest in imposing these charges which could not be satisfied by damages even though the amount did not represent any loss caused to them by the breaches by the user and, secondly, the sum was *not* out of all proportion to its interest or the owner's interests: [2015] UKSC 67 at [99]–[101] (Lord Neuberger, Lord Sumption and Lord Carnwath); [197]–[199] (Lord Mance); Lord Toulson did not express a decided view on this issue: at [316]. *ParkingEye Ltd v Beavis* was joined with *Cavendish Square Holding BV v Makdessi* which concerned the common law regarding contractual penalty clauses in a commercial context, on which see Vol.I, paras 29-203 et seq.
- 1998 [2015] UKSC 67 at [106], referring to AG Kokott's Opinion at paras 73 and 87. Recital 16 of the 1993 Directive itself explains the requirement of good faith as allowing "an overall evaluation of the different interests involved" as noted above, para.40-278.
- 1999 [2015] UKSC 67 at [106]; AG Kokott's Opinion in *Aziz (C-415/11)* at para.75 quoted above, para.40-281.
- 2000 [2015] UKSC 67 at [106] (Lord Neuberger, Lord Sumption and Lord Carnwath, with whom Lord Hodge (at [289]) and Lord Clarke (at [291]) agreed on this point).
- 2001 [2015] UKSC 67 at [108] (referring for this purpose to AG Kokott's Opinion in *Aziz* at para.75, though her reference was to "an objective reason for the term" rather than specifically an objective approach to the hypothetical test).
- 2002 [2015] UKSC 67 at [108].
- 2003 [2015] UKSC 67 at [109].
- 2004 [2015] UKSC 67 at [109]. See also at [111]–[113] rejecting further arguments as to the unfairness of the term.
- 2005 [2015] UKSC 67 at [208], having noted (at [202]–[203]), the 1999 Regulations reg.6(1) and the 1993 Directive recital 16 to this effect. cf. the summary of the approach in *Aziz* by the EU Commission that the CJEU "finds it *particularly relevant* to consider whether the seller or supplier could reasonably assume that the consumer would have agreed to the term in individual negotiations": Commission guidance C(2019) 5325 final p.32 (emphasis added).
- 2006 [2015] UKSC 67 at [209].
- 2007 [2015] UKSC 67 at [212], adopting the conclusions of Judge Maloney QC at trial.
- 2008 [2015] UKSC 67 at [307].
- 2009 [2015] UKSC 67 at [308].

- 2010 [2015] UKSC 67 at [309]–[310].
- 2011 [2015] UKSC 67 at [314].
- 2012 It should be noted that the significance of case-law of the CJEU for English courts changes on IP completion day: above, para.40-004 and Vol.I, paras 1-027—1-029.
- 2013 The relevant terms “could not have been briefer, simpler or more prominently proclaimed”: [2015] UKSC 67 at [108], and see above, para.40-288.
- 2014 *C-84/19, C-222/19 and C-252/19, EU:C:2020:631, 3 September 2020*, above, para.40-283. In *Roundlistic v Jones [2018] EWCA Civ 2284, [2019] 1 W.L.R. 4461* at [47]–[49], [50], the Court of Appeal applied the approach to the test of unfairness and, in particular, the requirement of good faith taken by the CJEU in *Aziz* and adopted by the SC in *ParkingEye Ltd*. The CA therefore approved the decision below holding that a term of a new lease granted pursuant to the landlord’s obligation under the **Leasehold Reform, Housing and Urban Development Act 1993**, and therefore replicating a term in an earlier lease not subject to the **1999 Regulations**, was not “contrary to the requirement of good faith”. While it was arguable that the fact that the terms were replicated itself militated against a finding of unfairness, for the CA the important point was that “the processes of the **1993 Act** gave the lessee the opportunity not only to seek to renegotiate any terms which had become unfair as a result of developments since they were first agreed but to have the question whether such a term should be included determined by a tribunal”; moreover, both parties benefited from legal advice. In these circumstances, the lessor/trader was entitled reasonably to assume that the lessee/consumer would have agreed to such a term in individual contract negotiations: [2018] EWCA Civ 2284 at [48] per Underhill LJ (with whom Singh LJ agreed). See also *Ang v Reliantco Investments Ltd [2020] EWHC 3242 (Comm)* at [89], noted, below, para.40-334 and *Longley v PPB Entertainment Ltd [2022] EWHC 977 (QB)* at [102.9]–[103], noted below, para.40-293 (note). By contrast, in *R. (Ex p. Donegan) v Financial Services Compensation Scheme Ltd [2021] EWHC 760 (Admin)* at [132]–[146] the HC held that contract terms in bonds expressing that they were not transferable were held unfair within the meaning of **s.62 of the 2015 Act**: this “locking the purchasers into the Bonds was itself an imbalance, not least where [the trader selling the Bonds] reserved the right to make early repayment” (at [134]) and, as regards the requirement of good faith, the HC could see “no clear reason why any purchasers would have agreed to the non-transfer provisions in individual negotiations. Those provisions were of no value to the purchasers. Their only apparent purpose would have been to relieve [the trader] of regulatory obligations”: at [134]–[136] and [140], per Bourne J, who saw this result as supported by the lack of transparency of the relevant provisions: at [137].
- 2015 Above, para.40-278.
- 2016 **2015 Act s.62(1), (4) and (5)**, above, para.40-262.
- 2017 cf. the discussion of the hypothetical test in *Aziz in ParkingEye Ltd v Beavis [2015] UKSC 67, [2015] 3 W.L.R. 1373*, above, paras 40-287—40-289.
- 2018 This view was taken by Lord Mance in *ParkingEye Ltd v Beavis [2015] UKSC 67* at [208], above, para.40-288.

- 2019 Above, paras [40-278—40-279](#).
- 2020 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), para.2.30.
- 2021 See Vol.I, paras [29-203](#) et seq.
- 2022 The Salisbury County Court has held that the decision of the SC in *ParkingEye* concerned the fairness of the term imposing a parking charge and therefore did not concern a term which allowed the trader to impose a debt recovery charge: *Britannia Parking Group Ltd v Semark-Jullian [2020] E.C.C. 25* at [36]. In the particular context of parking, Parliament has enacted the [Parking \(Code of Practice\) Act 2019](#) (operative provisions not in force at the time of writing). The Act requires the Secretary of State to prepare a code of practice about the operation and management of private parking facilities, which would contain guidance that promotes good practice in their operation and management and about appeals about parking charges: [Parking \(Code of Practice\) Act 2019 s.1](#). The Act does not directly affect the binding character of contract terms providing for parking charges as [s.5\(1\)](#) provides that “[a] failure on the part of any person to act in accordance with any provision of the parking code does not of itself make that person liable to any legal proceedings...”, but the operator of a parking facility which breaches the code may be precluded from obtaining the details of a car owner from the DVLA and so prevented from enforcing a parking charge; [s.5\(2\)](#). Moreover, the parking code will be admissible in any legal proceedings ([s.5\(5\)](#)) and could be seen as relevant to the fairness of any term of a consumer parking contract.

(cc) - Particular Elements within the Test of Unfairness

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(i) - The Composite Test of Unfairness

(cc) - Particular Elements within the Test of Unfairness

40-290

U It has been seen that the basic test of unfairness on which courts must review the terms of consumer contracts comprises a number of elements. For this purpose the starting point is the criterion of “significant imbalance”, but this is then qualified by the need to ensure the evaluation of all interests involved (under the requirement of good faith).²⁰²³ The [2015 Act](#) (following in this respect the 1993 Directive) then specifies a number of factors to be taken into account in determining the issue of fairness (the nature of the goods or services, all the circumstances attending the conclusion of the contract and all the other terms of the contract or of another contract on which it is dependent) and finally provides a list of illustrative terms which *may* be unfair.²⁰²⁴ The following paragraphs will look at these elements in turn by reference to the case-law, domestic and European.²⁰²⁵ In doing so, reference will on occasion be made to the views expressed in the published guidance of the main enforcement authorities of the UK legislation implementing the 1993 Directive, these being successively the Director General of Fair Trading, the Office of Fair Trading (OFT)²⁰²⁶ and, from 2014, the Competition and Markets Authority (CMA). The CMA has issued general guidance on the test of unfairness under the [2015 Act](#)²⁰²⁷ and more specific guidance of the application of the test in particular commercial sectors.²⁰²⁸ It was said in relation to the OFT guidance that, while a court was “in no sense bound by the guidance provided by the Office of Fair Trading”, it can provide “helpful commonsense indications of what is likely to be considered to be fair”.²⁰²⁹ In this respect, the courts have sometimes accepted claims by the OFT or the CMA that a term or terms in a consumer contract is unfair, but they have not always done so.²⁰³⁰

U

“A significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”

- 40-291 As earlier noted,²⁰³¹ this phrase encapsulates the key idea of the notion of unfairness for the purpose of [2015 Act](#), requiring that the *term* creates an imbalance in the parties’ legal rights and obligations and that this imbalance pass a threshold of significance. Two aspects of this definition have become clear from the case-law or as a result of the enforcement authorities’ work in policing terms in consumer contracts.

Potential for unfairness

- 40-292 The Court of Justice has held that the assessment of the fairness of a contract term must be made by reference to the time of the conclusion of the contract,²⁰³² but in doing so it added that the court should take into account all the circumstances which could have been known at that time and which could affect the future performance of the contract:

“... since a contractual term may give rise to an imbalance between the parties which only manifests itself during the performance of the contract.”²⁰³³

This temporal focus of the assessment also makes clear that a contract term will be judged according to its *potential* unfairness: if a term could give rise to a “significant imbalance in the parties’ rights”, etc. (given the particular and concrete factors to be outlined below), then it is no answer for a trader wishing to rely on it to say that on the facts it does not do so nor that it was never intended to be relied on so as to do so.²⁰³⁴ So, for example, if a price variation clause gives a supplier an unlimited discretion to vary the price (a term which can for this purpose be assumed to be potentially unfair given its lack of limitation or justification²⁰³⁵), then it would not be binding on the consumer with the result that even a moderate variation of the price (itself not in the context apparently unfair) would not be effective against the consumer: the unfairness of the term makes it “not binding” on the consumer.²⁰³⁶ As Advocate General Szpunar has observed, “reasonable conduct in a context where a contractual term is unfair does not render the term fair”.²⁰³⁷

The significance of imbalance

40-292A First, the test of unfairness is not based on whether overall the contract was a bad bargain for the consumer, but rather on whether the particular contract term caused a significant imbalance in the rights and obligations of the parties to the detriment of the consumer. As has been seen,
[2038](#)

U in this respect according to the Court of Justice of the EU, determining whether there is a significant imbalance between the parties to a consumer contract cannot be:

“limited to a quantitative economic evaluation based on a comparison between the total value of the transaction which is the subject of the contract, on the one hand, and the costs charged to the consumer under that clause, on the other. A significant imbalance may result solely from a sufficiently serious impairment of the legal situation in which the consumer, as a party to the contract in question, is placed by reason of the relevant national provisions, whether this be in the form of a restriction of the rights which, in accordance with those provisions, he enjoys under the contract, or a constraint on the exercise of those rights, or the imposition on him of an additional obligation not envisaged by the national rules.”

[2039](#)



40-293 Secondly, the OFT attached very considerable significance to the notion of balance, so that a term which may look, *prima facie*, severely prejudicial to the rights of a consumer may yet be considered fair if it is counterbalanced by a corresponding term which could act to the consumer’s advantage. Various examples of this thinking are given in the OFT’s reports, such as a seller’s right to increase prices being coupled with a realistic right in the consumer to get out of the contract without penalty.
[2040](#) As the CMA has observed:

“A consumer contract may be considered balanced if both parties enjoy rights of equal extent and value in reality, particularly taking into account the nature of the goods, services or digital content provided under the contract. The CMA considers that significant imbalance cannot be avoided just by ensuring a merely mechanical or formal equivalence in rights and obligations. For instance, the fact that the same financial sanction is imposed on both the consumer and the trader for cancelling the contract is unlikely to be acceptable, where (as is often the case) the trader has no interest in

cancelling. In these circumstances, the sanction on the trader does not ‘balance’ fairly the imposition of the same sanction on the consumer for cancelling.”²⁰⁴¹

This way of thinking can be supported by reference to of the examples in the “indicative list” of terms which may be unfair in **Sch.2 of the Act**, for example:

“A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract.”²⁰⁴²

And:

“A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract.”²⁰⁴³



An example of the importance of imbalance for the determination of the fairness of a term may be found in *Spreadex Ltd v Cochrane*.²⁰⁴⁴ There a consumer had agreed to use a trader’s online platform for the making of spread bets with the trader, a spread betting bookmaker. On the premise (which the court rejected) that this agreement was in principle contractually binding,²⁰⁴⁵ a term of the contract under which the consumers were deemed to have authorised all trading under their account number was held unfair within the meaning of the **1999 Regulations**: under the agreement for use of the online platform, the bookmaker assumed no obligations and the customer was granted no rights, whereas under this term, the consumer would be liable for any trade on the account not made or authorised by him. “The result is … and most clearly, a significant imbalance in the parties’ rights and obligations”.

²⁰⁴⁶

U Finally, the relevant imbalance is between the parties’ *rights and obligations* and so, in the CMA’s view, “should not be understood as being restricted to cases in which a purely financial burden or cost is imposed on the consumer”, giving as an example:

“… a term which purports to allow the trader to pass on information it holds on the consumer more widely than is permitted under the **Data Protection Act 1998**.”²⁰⁴⁷

In this situation “[t]here may be no financial cost, but the intention is to take away the consumer’s legal rights”.²⁰⁴⁸

Factors in fairness

- 40-294 While in principle the requirement of fairness in Pt 2 of the 2015 Act is concerned with the unfairness of contract terms, rather than with the fairness of the parties’ behaviour more generally, certain aspects of their mutual behaviour may be relevant in the assessment of fairness. For, as has been seen,²⁰⁴⁹ the 2015 Act requires that:

“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.”²⁰⁵⁰

While formally this provision requires certain factors to be taken into account (raising the possibility of arguing that only these should be), it is submitted that, quite apart from the inherent openness of the concept of fairness itself, other considerations may be taken into account in assessing fairness by way of application of the requirement of good faith which forms an element within the assessment of fairness.²⁰⁵¹

“The nature of the subject matter of the contract”

- 40-295 In certain types of case, the nature of the subject matter of the contract (formerly expressed as the nature of the goods or services²⁰⁵²) could argue for the fairness of a term which in other contexts would clearly be unfair. So, for example, in *Bryen & Langley Ltd v Boston*²⁰⁵³ it was considered material to the issue of fairness of a term that the transaction before the court was not of a “normal ‘consumer’ type, like buying a television set”, but, for the individual or individuals concerned, a major project such as the costly construction of a building which would be undertaken only with the benefit of appropriate professional advice. A second example may be found in the context of clauses allowing the forfeiture of a purchaser’s deposit in contracts of sale of land. Here, at first sight the loss of ten per cent of the purchase price if the purchaser withdraws from the contract suggests that such a clause is unfair, but it may not be given the need of the seller to cover transaction costs and also to be indemnified for likely loss of profit on the transaction. Indeed, a term allowing a person (the alleged consumer) who had agreed to participate in a world voyage

by clipper to cancel the contract at a charge of 75 per cent of the price was held to be fair as not disproportionate in the context since that person's commitment to the venture was important.²⁰⁵⁴ A further example may be found in *A v B*, where the Court of Justice saw the fact that a contract of tenancy related to social housing was relevant to the fairness of penalty clauses for breach of its prohibition of sub-letting and of the tenant's obligation personally to reside in the property:

“... since the lease relates to social housing, it is clear that that prohibition and that obligation are of a special nature, which forms part of the very essence of the contractual relationship.”²⁰⁵⁵

Furthermore, it may be under the heading of the relevance of the nature of the subject-matter of the contract that a court could properly consider the impact of (good) industry practice in relation to the type of contract in question in assessing a term's fairness. For example, *Higgins & Co Lawyers Ltd v Evans* concerned a clause in a conditional fee agreement which provided that the contract came to an end automatically on the death of the claimant for personal injuries, and that, where the solicitors chose not to continue the proceedings on behalf of the estate, the latter would be liable for their “basic charges”.²⁰⁵⁶ The High Court held that the clause was fair, *inter alia*, because it was clear and transparent and expressed in simple language, was common to many conditional fee agreements (and indeed reflected the relevant Law Society's model Conditions) and serves a “fair and transparent purpose” in that the “calculus of risk in a personal injury action fundamentally changes when a claimant dies”.²⁰⁵⁷ By contrast, in *Chevalier-Firescu v Ashfords LLP* the Central London County Court held that a term in a contract between a firm of solicitors and its client which imposed on the latter the costs of litigation to recover unpaid fees on an indemnity basis was unfair: this “unusual and abnormal” clause had the effect of imposing indemnity costs instead of costs on the standard basis or, for small claims (as was the case on the facts), *no legal costs*.²⁰⁵⁸ The clause therefore “significantly penalized the client” and, given the relationship between the solicitors (which held themselves out as experts in employment law) and the client (whose case involved employment rather than commercial matters), the solicitors should have drawn the clause specifically to the client's attention, as was apparently required by the Solicitors Regulatory Authority.²⁰⁵⁹

“All the circumstances existing when the term was agreed”

- 40-296 Section 62(5) of the 2015 Act provides that “whether a term is fair is to be determined ... by reference to all the circumstances existing when the term was agreed”. In two respects, this form of words differs from that found in the 1993 Directive itself and its former implementation in the UK in the 1999 Regulations.²⁰⁶⁰ First, the 2015 Act refers to “all the circumstances *existing* when ...” and this could suggest that these circumstances are restricted to ones independent of the actions of the trader or the consumer, whereas the 1993 Directive and the 1999 Regulations

reference to “circumstances *attending the conclusion*” of the contract does not have such a possible connotation.²⁰⁶¹ It is submitted, though, that the wording in the **2015 Act** should not be given this restrictive significance in the light of the wider formulation in the 1993 Directive, if need be by reference to the (retained) principle of conforming interpretation of UK law which implemented a EU directive.²⁰⁶² Secondly, the formulations in the 1993 Directive and the **1999 Regulations** both require assessment to be by reference “at the time of the conclusion of the contract, to all the circumstances *attending the conclusion of the contract*”.²⁰⁶³ In this respect, it is submitted that the formulation in the **2015 Act** (which instead refers to “all the circumstances existing *when the term was agreed*”) certainly includes all the circumstances attending the conclusion of the contract where a term was agreed as part of that contract, but it could also include a situation in which the relevant *term* was agreed at a later stage than the conclusion of the contract itself where, for example, a particular aspect of the contract was left for agreement of the contracting parties later or resulted from the variation of the original consumer contract by the trader under a valid variation clause.²⁰⁶⁴ Even putting aside this particular type of case, questions nevertheless arise as to the way in which this timeframe should be applied to the requirement of fairness of contract terms, not least owing to the importance of the future *potential* for unfairness for the assessment of terms according to the composite test.²⁰⁶⁵ For this purpose, a distinction needs to be drawn between the assessment of a term as between the parties to a consumer contract (termed an “assessment *in concreto*” by the European Court) and assessment of a term in the context of preventive measures (termed an “assessment *in abstracto*” by the European Court).²⁰⁶⁶

The timeframe for the assessment of fairness of a term as between the parties

40-297

U As between the parties to a consumer contract, the court assesses the fairness of the terms included in the particular contract concluded between them and, as earlier explained, the basic test of unfairness focuses on the (purported) effect of the term on the relative rights and obligations of the parties to such a contract.²⁰⁶⁷ In doing so, the assessment is “concrete” in the sense that it should take into account the particular circumstances of the making of the individual contract: were any terms not easily comprehensible actually explained to the consumer? Did the business bring any pressure to bear on the consumer? More broadly, did the business “deal fairly and equitably with the other party”?²⁰⁶⁸ The facts relevant to these questions would often *precede* the point at which the contract itself is concluded and for this reason it is perhaps surprising that the 1993 Directive refers to “the time of *conclusion* of the contract”.²⁰⁶⁹ However, it is submitted that the purpose of setting “the time of conclusion of the contract” (and similarly “when the term was agreed” as set by the **2015 Act**) as the relevant point of reference is not to exclude prior circumstances but rather to exclude circumstances or facts which occur *after* the conclusion of the contract (or agreement of the term): in principle the Directive and the test in the **2015 Act** are concerned with

the fairness of contract terms, not with the fairness of the behaviour of traders nor with the effect of supervening circumstances affecting the position of the consumer taking place in the course of performance or on non-performance of the contract.²⁰⁷⁰ In *Andriciuc*²⁰⁷¹ the Court of Justice explained the timeframe for assessment of fairness under the 1993 Directive. In that case consumer/borrowers brought proceedings against the bank/lender in which they challenged the fairness of a term requiring repayment of the loans in a foreign currency where the loans were issued in that same currency on the ground that the term put all the risk of devaluation of the currency of their income on them as consumers without so informing them.²⁰⁷² One issue before the Court was whether the significant imbalance in the parties' rights and obligations under the contract has to be evaluated "strictly by reference to the time when the contract was concluded" or whether:

"… that imbalance [may] also extend to the case where, during the performance of the contract, … performance by the consumer has become excessively burdensome in comparison with the time when the contract was concluded because of significant variations in the exchange rate."²⁰⁷³

In this respect, the Court held that the assessment must be made by reference to the time of the conclusion of the contract

²⁰⁷⁴

U :

"… taking into account of all the circumstances which could have been known to the seller or supplier at that time, and which were of such a nature that they could affect the future performance of the contract, since a contractual term may give rise to an imbalance between the parties which only manifests itself during the performance of the contract."²⁰⁷⁵

In this way, while the assessment must be made as at the time of the conclusion of the contract, the test of unfairness does have a forward-looking aspect, for, as earlier explained, a contract term must be assessed according to its potential for unfairness in the future.²⁰⁷⁶ On the other hand, the Court of Justice has held (after IP completion day²⁰⁷⁷) that while the assessment of the fairness of a term:

"… may take account of the performance of the contract, it cannot, under any circumstances, depend on the occurrence of events subsequent to the conclusion of the contract that are beyond the control of the parties."²⁰⁷⁸

The timeframe for the assessment of fairness of a term in enforcement proceedings

- 40-298 However, the timeframe for the assessment of terms in enforcement proceedings brought by the CMA or by other “regulators” under s.70(1) and Sch.3 of the 2015 Act (which implemented a requirement in the 1993 Directive) will normally differ from the timeframe set for assessment in concreto.²⁰⁷⁹ For this purpose, the 1993 Directive provides that:

“Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.”²⁰⁸⁰

It adds that this shall include action before courts or administrative bodies:

“... for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms”²⁰⁸¹

and it makes clear that action can be taken against trade associations to the same end.²⁰⁸² The European Court has described the assessment of contract terms for these purposes as “in abstracto”²⁰⁸³ and this refers to the characteristic of these enforcement proceedings that they do not concern the terms of an individual contract, but rather the terms applicable to contracts of a particular type or types made by a particular business, several businesses or merely recommended for use by a trade association. This “abstract” character means that *individual* circumstances of the conclusion of a contract cannot be taken into account by a court in its assessment of the fairness of the terms which are challenged as these circumstances will differ from case to case. Instead, a court should take into account the general and likely circumstances surrounding the making of contracts in the area concerned and this suggests that in enforcement proceedings the timeframe for the assessment of the terms of contracts is a present and future one, the court looking at the fairness of the terms of the contract (under the basic test) as at the date of the proceedings taking into account the *likely future* circumstances of the actual conclusion of contracts under the terms in question.²⁰⁸⁴ In the CMA’s view, therefore, in the case of the assessment of fairness in enforcement proceedings:

“... the enforcer should apply the requirement [of assessment by reference to the time when the term was agreed] as best it can, by reference to a correctly defined hypothetical consumer for that case. In order for the provision to work effectively in such cases,

account needs to be taken of “the effects of contemplated or typical relationships between the contracting parties.”²⁰⁸⁵

“A particularly wide definition”

- 40-299 In *Pereničovà* the Court of Justice of the EU observed that art.4(1) of the 1993 Directive (which s.62(5) of the 2015 Act implemented):

“... gives a particularly wide definition of the criteria for making such an assessment, by expressly including ‘all the circumstances’ attending the conclusion of the contract in question”.²⁰⁸⁶

For example, in *Financial Services Authority v Asset L.I. Inc (t/a Asset Land Investment Inc)* terms seeking to restrict the seller’s liability in contracts for the sale of land under a collective investment scheme were held unfair given, inter alia, the “telesales pitch” by the sellers.²⁰⁸⁷ In relation to the types of circumstances that could be relevant under the formulation, two possible factors will be mentioned here.

Trader putting pressure on or misleading the consumer

- 40-300 First, the fact that a trader has put pressure on a consumer to conclude the contract or to do so in haste and without time to think about its significance would point strongly against the fairness of any term which prejudices the consumer, even if this pressure did not amount to either duress or undue influence within the meaning of the general law

2088

 or an unfair commercial practice within the meaning of the Consumer Protection from Unfair Trading Regulations 2008.

2089

 In particular, the CMA has expressed the view that this aspect of the test of unfairness allows the Act:

“... to offer special protection to vulnerable consumers. It allows the Act to operate so as particularly to protect those whose circumstances make them vulnerable to exploitation

or pressure at the time they actually sign or otherwise agree to a contract. This may include, for example, cases where a contract is signed in the presence of a representative of the trader in the consumer's home.”

2090



For this purpose, it is submitted that as between the parties to a contract (as contrasted with in enforcement proceedings), the actual vulnerability of the consumer (especially if known or reasonably foreseeable by the trader) would be relevant for this purpose rather than assessing the trader's behaviour by reference to what fairness and good faith require in relation to the “average consumer”.

2091

U Similarly, the fact that a trader has misled the consumer as to the meaning or significance of the term would be relevant as a “circumstance existing when the term was agreed” whether or not the trader's doing so would constitute a misrepresentation under the general law

2092

U or a “misleading action” or “misleading omission” under the [2008 Regulations](#).

2093



The reality of the consumer's opportunity to understand the term

40-301

U Secondly, in the normal case of the contract using the trader's standard terms, the degree of genuine opportunity for the consumer to read, understand, consider and decide upon the terms of a contract is also an important factor in their overall fairness.²⁰⁹⁴ This may be supported by reference to Sch. 2's inclusion in the “indicative list” of:

“... a term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.”²⁰⁹⁵

In this respect, a term which irrevocably binds a consumer to the contract is typically to be found in any contract which does not provide for a consumer to withdraw from the contract and so, absent such a provision, the terms of any contract which the consumer did not have a real opportunity of being acquainted are vulnerable to a charge of unfairness. This aspect of the requirement of fairness

is clearly related to the requirement of plain intelligible language in art.5 of the 1993 Directive, in relation to which recital 20 explains that “the consumer should actually be given an opportunity to examine all the terms”.²⁰⁹⁶ Positively, therefore, a seller or supplier whose explanatory pre-contractual brochure²⁰⁹⁷ makes clear the otherwise surprising terms on which he deals or whose staff follow a practice of advising their customers of the terms in a clear and intelligible manner may be more likely to succeed in arguing that the terms in question are fair. This links in with the common law’s traditional concern with notice of terms,²⁰⁹⁸ but it goes further in that a “real opportunity” is referred to and it may be thought that the more theoretical the opportunity, the more likely a term is to be held to be unfair.²⁰⁹⁹ In this respect, the CMA has advised that:

“One way of ensuring a fuller opportunity to examine is if a ‘cooling-off period’ (including a cancellation right) is provided, but it should not be assumed that a cooling-off period can cure a lack of transparency, whether it arises from gratuitous lack of clarity of language or more fundamental problems inherent in the nature of the contract provisions.”²¹⁰⁰

As earlier noted, this aspect of the test of fairness is related to the requirement in [s.68 of the Act](#) that the contract terms themselves be “transparent”, that is expressed in plain and intelligible language and legible²¹⁰¹ and it is therefore submitted that a lack of plainness or intelligibility is *relevant* to the assessment of a term under the Act’s requirement of fairness. So, for example, a term which provided that:

“Should any other disagreement arise in connection with or out of this contract the matters in dispute shall be referred in accordance with the [Arbitration Act 1950](#) or any statutory modification or re-enactment therefore for the time being in force”,

has been held insufficient to set out clearly its intended nature and effect as an arbitration clause in the circumstances, this being a factor in the court’s holding the clause unfair within the meaning of the [1999 Regulations](#).²¹⁰² And the Court of Justice has emphasised the importance of the quality of pre-contractual information relating to contract terms for the assessment of their fairness, relating this to the requirement of plain intelligible language in art.5 of the 1993 Directive
2103

U which was implemented by [ss.68 and 69 of the 2015 Act](#).²¹⁰⁴ So, where, for example, the fact that the amount of a tax imposed by law on a vendor of property was made payable by a consumer purchaser of residential property by a term of the contract of sale was unknown at the date on which the contract was concluded and was “to be determined only ex post by the relevant [tax] authority”, would argue for the unfairness of that term, for “if that is the case, this could lead to uncertainty on the part of the consumer as to the extent of the commitment undertaken”.²¹⁰⁵ On the other hand, the fact that a term is plain and intelligible does not rule out a finding that it is unfair.²¹⁰⁶ For this purpose, it is submitted that while generally the Court of Justice adopts the variable objective

standard of the “average consumer” to the requirement of transparency itself,²¹⁰⁷ where a business knows (or can reasonably foresee) that a *particular* consumer with whom it deals has a lesser likely understanding of its contract terms, then this should be relevant to the assessment of the fairness of the terms, notably, as a result of the requirement of good faith.²¹⁰⁸

Lack of plainness or intelligibility sufficient?

- 40-302 What is more open to contention is whether a lack of plainness or intelligibility (often referred to as transparency) can render a term unfair within the meaning of s.62 of the 2015 Act without more.
U 2109

U The key hurdle to its doing so is the first element of the composite test of unfairness, viz that the term must cause “a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”.

2110

U Clearly, a case can be imagined where a term (while not transparent) does not attempt to create such an imbalance (notably, where any imbalance is to the *benefit* of the consumer) and so would not be rendered unfair by s.62 of the Act; but in this situation it is difficult to see why the consumer would wish to argue that such a term was “not binding” on him (though a body entrusted with a policing role in relation to unfair contract terms may nevertheless wish to intervene).

2111

U However, where a contract term either seeks to bind a consumer to a particular duty or seeks to create rights which do not benefit him (notably, as compared to his existing rights or the rights of the seller or supplier under the contract more widely), a court could find that such an “imbalance” in the rights and obligations of the parties was “significant” merely on the ground that the consumer was not able to appreciate its extent: as the Director General of Fair Trading observed:

“... it would clearly be difficult to maintain that unintelligible or ambiguous terms were *not* unfair if they had some potential for detriment to the consumer.”

2112



The final step in this direction (noted without comment by the European Commission) is that courts in some Member States have held that a failure in the requirement of transparency itself constitutes “unfairness” within the meaning of the 1993 Directive.

2113

U However, such an equating of the two requirements contained in the Directive does not accord with the way in which they are set out in the Directive as distinct both in their content and even more in their effects.

2114

U Indeed, if a mere failure in transparency would lead without more to a failure in fairness this would render the distinctive treatment of the requirement of transparency entirely otiose. For this reason, the Law Commissions' view that "non-transparent terms" are not automatically unfair, though the lack of transparency is an important factor in the evaluation of their fairness

2115

U is to be supported.

2116

U As Advocate General Hogan has recently put it, art.5 of the Directive (which contains the requirement of plain intelligible language) "does not constitute an alternative test of unfairness".

2117

U This way of thinking is supported by the way in which the Court of Justice has expressed the relevance of transparency under art.5 to fairness under art.3, stating that:

"the transparent nature of a contractual term, as required under Article 5 of Directive 93/13, is *one of the elements* to be taken into account in the assessment of whether that term is unfair, which is for the national court to carry out pursuant to Article 3(1) of that directive. In that context, it is for that court to assess, having regard to all the circumstances of the case, first, the possible failure to observe the requirement of good faith and, second, the possible existence of a significant imbalance to the detriment of the consumer within the meaning of that provision."

2118

U

Negotiation of term

- 40-303 It has been noted that, unlike the 1993 Directive and its former implementation in UK law in the **1999 Regulations**, the requirement of fairness of contract terms in the **2015 Act** applies whether or not the term in question were "individually negotiated".²¹¹⁹ In recommending this change, the Law Commissions considered it would have little practical effect, as it is rare for consumers to negotiate about any term except the price or main subject matter (which are subject to special treatment under the Act²¹²⁰) and that a term which has been genuinely individually negotiated is very likely

to be fair.²¹²¹ It is submitted, though, that where a term or terms have been subject to discussion or negotiation by the trader and the consumer, then the *degree* of such discussion or negotiation would be relevant to their fairness or otherwise even if the terms would not have counted as “individually negotiated” within the meaning of the former law.²¹²² Clearly, the degree of negotiation of a term forms part of the circumstances in which it was agreed as specified by s.62(5)(b),²¹²³ but it is related to the relevance of their transparency, as both individual negotiation and transparency are fundamentally concerned with the extent to which the consumer had a genuine opportunity to understand and therefore consent to the terms in question.²¹²⁴ Moreover, in *Bryen & Langley Ltd v Boston* the question arose as to how, if at all, the 1999 Regulations affected standard terms (here, terms of one of the JCT standard building contracts) *put forward by a consumer* (or rather by his professional advisers) and incorporated into a consumer contract.²¹²⁵ In the Court of Appeal Rimer J noted that the consumer before him had had:

“... the opportunity to influence the terms on which the contractors were being invited to tender, even though he may not have taken it up”

and held that in these circumstances any term of the standard contract would not fail the requirement of fairness, as it would not cause a significant imbalance in the rights and obligations of the parties to the detriment of the consumer *contrary to the requirement of good faith.*²¹²⁶

“All of the other terms of the contract”

- 40-304 The 2015 Act requires courts to take into account the other terms of the contract before them in assessing the unfairness of a term.²¹²⁷ It is to be noticed that *all* the terms should be looked at, including terms which may fall within the “core exemption” as relating to the contract’s main subject matter or price/quality ratio.²¹²⁸ In the view of the Director General of Fair Trading, an example of “another term” of a contract which may argue for the fairness of a term which by itself looks unfair may be found in a term which provides the consumer with a cooling-off period during which he may decide to cancel the contract without penalty.²¹²⁹

“All of the other terms ... of any other contract on which it depends”

- 40-305 It would seem from the general formulation of this phrase that there is no requirement that the other contract on which the consumer contract is dependent must itself be a consumer contract within the meaning of Pt 2 of the 2015 Act (though in the vast majority of situations it will be) nor even that the other contract be between the same parties as the one whose term is to be assessed.²¹³⁰ A

situation in the consumer context in which two contracts are related may be found in the context of the financing of a consumer sale. Here, it would seem that whatever controls already exist on the fairness of the terms of either the sale or the financing contract,²¹³¹ the terms of the one may go to the fairness of the terms of the other. For example, the fairness of the terms of purchase of a house could be assessed taking into account the terms of a loan contract secured on the house taken out by a consumer purchaser/mortgagor. However, this example shows the difficulties that would arise in this respect, where the mortgagee is not also the seller, for it may be thought unfair for a mortgagee to be prejudiced by the terms of the sale of which it may know nothing and have even less control. This may lead a court to imply into the phrase “another contract” a requirement that this contract be between the parties to the consumer contract whose terms are to be assessed.

The test of unfairness applied in the First National Bank Plc case

40-306 In *Director General of Fair Trading v First National Bank Plc*²¹³² the Director General of Fair Trading challenged the fairness of a term under the *Unfair Terms in Consumer Contracts Regulations 1994*²¹³³ (which first implemented the 1993 Directive in UK law²¹³⁴) in a contract of consumer credit the effect of which (if valid) would be that where the bank obtains judgment against a borrower, interest would be payable at the contractual rate on the outstanding principal plus accrued interest unpaid at the date of judgment until the judgment is discharged by payment. The Court of Appeal held that the term was unfair as the borrower’s attention is not specifically drawn to the point of payment of interest at the contractual rate beyond judgment in instalments by the bank at or before the conclusion of the contract—nor indeed at any later stage.²¹³⁵ In its view, the existence of the court’s powers by statute to order payment by instalments and to modify the contractual rate of interest as a result does not prevent the term from operating unfairly “in a majority of cases where instalment orders are made without the consideration by the courts of those provisions”.²¹³⁶ The bank has the stronger bargaining position and the clause comes as an “unfair surprise”. However, the House of Lords unanimously reversed this decision and held that the term was fair within the meaning of the *1994 Regulations*. So, for Lord Bingham of Cornhill:

“The essential bargain is that the bank will make funds available to the borrower which the borrower will repay, over a period, with interest. Neither party could suppose that the bank would willingly forgo any part of its principal or interest. If the bank thought that outcome at all likely, it would not lend. If there were any room for doubt about the borrower’s obligation to repay the principal in full with interest, that obligation is very clearly and unambiguously expressed in the conditions of contract. There is nothing unbalanced or detrimental to the consumer in that obligation; the absence of such a term would unbalance the contract to the detriment of the lender.”²¹³⁷

The unfairness of the situation in which consumer borrowers relied on the terms of judgments made against them for payment of their debt to lenders and were later surprised by a demand for payment of *contractual* interest under a term such as the one in issue was caused by the absence of procedural safeguards provided for a consumer on default by the applicable primary and secondary legislation rather than by the contract term itself.²¹³⁸

Other factors in the assessment of good faith or fairness

- 40-307 Other factors have been suggested as relevant to determining whether the requirement of good faith is satisfied, though most could equally well be thought of simply as going to the issue of fairness in general.

Price/quality ratio

- 40-308 A notable example is found in the preamble to the Directive which allows the “price/quality” ratio of the contract to be taken into account in assessing a term *other than* one which itself describes the main subject matter of the contract or the quality/price ratio of the goods or services supplied.²¹³⁹ The relevance of the price/quality ratio to the fairness of incidental terms may be seen to be reflected in recital 16’s reference to the consumer’s receipt of an inducement as an element within the application of the requirement of good faith.

EU recommendations

- 40-309 It has been suggested that EU recommendations in the field of consumer protection may be referred to by a court in assessing the fairness of a term²¹⁴⁰ and this suggestion was recently given support by the Court of Justice’s reference to an EU recommendation for the purposes of determining whether a contract term has satisfied the requirement of plain intelligible language.²¹⁴¹ However, it may be that UK courts will give little weight to EU recommendations as to unfair contract terms made after the UK has left the EU, even though it would remain open for them to do so.

Consumer benefiting from advice, well-informed or experienced

- 40-310

Where a consumer's professional agent put forward a standard set of terms which were held to have been incorporated into the contract, and thereby "imposed these terms" on the supplier of a service, the Court of Appeal regarded:

"... the suggestion that there was any lack of good faith or fair dealing by [the supplier] with regard to the ultimate incorporation of these terms into the contract as repugnant to common sense ... It was not for [the suppliers] to take the matter up with [the consumer] and ensure that he knew what he was doing: they knew that he had the benefit of the services of a professional ... to advise him on the effects of the terms."²¹⁴²

In this way, even if a particular term of the standard contract (here, an arbitration clause) were found to cause a "significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer" as envisaged by [s.62\(4\) of the 2015 Act](#), this would not be "contrary to the requirement of good faith", with the result that the contract term would not be unfair within the meaning of the Act. Similarly, where it is shown that the consumers were independently wealthy, experienced in business and legally advised, that the negotiation of the contract was conducted aggressively on their behalf, that significant changes were procured to the trader's usual terms and that the terms challenged were expressed fully, clearly and legibly, and given appropriate prominence "with no concealed pitfalls", a court may conclude that the requirement of good faith is satisfied and so the terms are not unfair under [Pt 2 of the 2015 Act](#).²¹⁴³ Even in the absence of legal advice, the financial experience of the consumer may be relevant to the application of the test of unfairness in the circumstances, as it makes it more likely that he or she will understand the significance of the term.²¹⁴⁴ But the mere fact that a consumer benefits from legal advice in relation to a term does not necessarily tip the balance in favour of their fairness. So, for example, in *Harrison v Shepherd Homes Ltd*²¹⁴⁵ (decided in relation to the [1999 Regulations](#)) consumer purchasers, concluding a standard contract of purchase with builders, were legally advised, but while this "opportunity for them to be advised [had] to be weighed in the overall assessment of good faith", in fact they were "not alerted to any problems with the terms" and so this did not detract sufficiently from other circumstances so as to establish the "fair and open dealing" which the Regulations require.²¹⁴⁶

Particularly vulnerable consumers

- 40-311 It has been seen that the Court of Justice has developed the notion of the "average consumer" for a number of legal purposes and that the Unfair Commercial Practices Directive 2005 gave it a prominent role for the purposes of its general scheme of regulatory control of commercial practices business-to-consumer, so to ensure, inter alia, the protection of consumers who are vulnerable "because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee".²¹⁴⁷ And while not mentioned in the 1993 Directive, the

Court of Justice has used the standard of the “average consumer” as the proper standpoint for the assessment of the requirement of plain intelligible language under that Directive.²¹⁴⁸ It is submitted that the taking advantage by a business of the vulnerability of a consumer understood in the sense earlier noted would clearly be relevant to the issue of the business’s failing to have “dealt fairly and equitably with the consumer” and therefore the requirement of good faith,²¹⁴⁹ even though the consumer possessed the requisite legal capacity to conclude the contract in question under the law governing minors’ contracts or the law governing lack of mental capacity.²¹⁵⁰

The language type of the contract

- 40-312 In general, a domestic consumer contract governed by English law is normally to be expressed in the English language and where reference is made to the “intelligibility” of the language used this normally refers to the style of language rather than to its type. However, it should not be universally assumed that English should be the only language in which such a contract should be expressed: for if a seller or supplier contracts with consumers whose first language is known or can reasonably be foreseen by it to be other than English, then it may be “contrary to the requirement of good faith” for the business to rely entirely on terms set out in English.²¹⁵¹ And where, for example, a contract for the provision of financial services was made with consumers who were Greek and non-resident in the UK, the court considered that the term under consideration “called for *translation* and careful explanation”.²¹⁵² A similar approach could also be taken in the case of a cross-border contract concluded via the internet and on terms set out on the trader’s website.²¹⁵³

“Fairness” under Pt 2 of the 2015 Act and “reasonableness” under the Unfair Contract Terms Act 1977²¹⁵⁴

- 40-313 It has been noted that some of the considerations to be taken into account by a court in assessing the fairness of a term for the purposes of Pt 2 of the 2015 Act (in particular in relation to the requirement of good faith) are the same or very similar to those to be taken into account in assessing the “reasonableness” of a term under the Unfair Contract Terms Act 1977.²¹⁵⁵ Moreover, while the specific factors which are to be taken into account may differ somewhat, the “definitions” of the two concepts are both very inclusive, allowing a court to take into account whatever factors it thinks right in judging whether a term should be enforced, as long as these relate to the term (as opposed to post-contractual dealings between the parties).²¹⁵⁶ There is, therefore, a profound similarity in the two tests in that they both require a court to decide whether a particular contract term *should* be enforceable according to a range of considerations, some of which relate to the contract itself and some of which relate to the relative positions of the parties to the contract or the circumstances in which the contract was made. All this does not mean, however, that the two tests

have the same significance, but their differences do not stem from use of the language, on the one hand, of “reasonableness” and, on the other, of “fairness” and “good faith”. Instead, they flow from the differences in ambit of the two pieces of legislation, in particular as regards their respective scopes of application and the types of term to be assessed. In this respect, first, the test of fairness in [Pt 2 of the 2015 Act](#) applies to *all* consumer contracts defined by reference to their parties (trader and consumer),²¹⁵⁷ whereas the [1977 Act](#) (after its amendment by the [2015 Act](#)) applies to contracts *other than* consumer contracts within the meaning of Pt 2²¹⁵⁸ and generally to contracts made between two traders.²¹⁵⁹ Clearly, the approach of the courts to the fairness of contract terms in the contexts of consumer and non-consumer contracting is likely to be very different. Secondly, the [1977 Act](#) applies to exemption clauses and certain related terms,²¹⁶⁰ whereas the requirement of fairness in [Pt 2 of the 2015 Act](#) affects any type of contract term as long as it is “ancillary”.²¹⁶¹ The considerations which are appropriate in judging the “fairness” of terms other than exemption clauses are likely to differ considerably from those which are appropriate to that context. There are indeed existing parallels for this in wider English law: so, for example, the factors which are to be taken into account by a court in judging the “reasonableness” of a term of a contract which is in restraint of trade are not the same as those in judging the “reasonableness” of an exemption clause: the terminology of reasonableness is shared but the impact of this requirement differs according to the type of term in question, and the factors in determining reasonableness differ according to the reasons for which the term is viewed with suspicion (whether excluding a person’s claim which would otherwise exist or unduly fettering a person’s freedom).²¹⁶² In a similar way, the practical application of the requirement of fairness for the purposes of [Pt 2 of the 2015 Act](#) and the test of reasonableness under the [1977 Act](#) are likely to differ so as to reflect the different nature of the contracting parties and according to the context of the particular type of contract term in issue.²¹⁶³

Footnotes

- 2023 Above, paras [40-277—40-289](#).
- 2024 See below, paras [40-316 et seq.](#)
- 2025 On the continuing but changed significance of the case-law of the Court of Justice of the EU see above, para. [40-004](#) and Vol.I, paras [1-027—1-029](#).
- 2026 Notably, OFT, Unfair contract terms (2008) OFT311 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284426/oft311.pdf [Accessed 1 September 2021]. Further guidance was made available as regards particular market sectors. It is to be noted that the way in which the test of unfairness will apply in disputes between the parties to a contract will differ in certain respects from the way in which it is to be applied in preventative proceedings (on which, see below, para. [40-444](#)), but these are not significant for present purposes.
- 2027 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015).

- 2028 e.g. CMA, Guidance for Lettings Professionals on Consumer Protection Law; Helping you Comply with your Obligations (13 June 2014, CMA31).
- 2029 *Peabody Trust Governors v Reeve [2008] EWHC 1432 (Ch), [2009] L. & T.R. 6* at [54], per G. Moss QC, referring to OFT, Guidance on Unfair Terms in Tenancy Agreements (November 2001).
- 2030 See *Office of Fair Trading v Foxtons Ltd [2009] EWHC 1681 (Ch), [2009] 29 E.G. 98 (C.S.)* at [91]–[95], [101] and [103]–[106] (decided under the 1999 Regulations) (certain terms in a contract between an estate and its tenants held unfair); *Office of Fair Trading v Ashbourne Management Services Ltd [2011] EWHC 1237 (Ch), [2011] E.C.C. 32* at [162]–[174] (certain terms in contract between gymnasium and its members held unfair) (and see below, para.40-329) and cf. *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd [2021] EWHC 2088 (Ch)* (term in a contract for the provision of residential care held not unfair) on which see below, para.40-350.
- 2031 Above, paras 40-281 et seq.
- 2032 1993 Directive art.4(1). This was implemented by s.62(5(b)), referring to “all the circumstances existing when the term was agreed”; and see further below, para.40-297.
- 2033 *Andriciuc v Banca Românească (C-186/16) 20 September 2017* para.54 referring to *Bucura v SC Bancpost SA (C-348/14) EU:C:2015:447, 9 July 2015* para.48; *GT v JS (C-38/17) EU:C:2019:461*, 5 June 2019 at paras 40–41.
- 2034 See the explicit reference to the potential unfairness of a term by the CJEU in *Banco Primus SA v Gutiérrez García (C-421/14) 26 January 2017* at para.67; *Ryanair DAC v DelayFix (C-519/19) EU:C:2020:933, 18 November 2020* at para.61. See also the views expressed by the CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.2.19: “[t]o be unfair an imbalance must be practically significant, but a finding of unfairness does not require proof that a term has already caused actual harm. The fairness assessment is concerned with rights and duties, and therefore its focus is on potential not actual outcomes”. See also *Financial Services Authority v Asset L.I. Inc (t/a Asset Land Investment Inc) [2013] EWHC 178 (Ch), [2013] 2 B.C.L.C. 480* at [135]; [2014] EWCA Civ 435, [2015] 1 All E.R. 1 at [99]; cf. *Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] Q.B. 600* (in relation to the reasonableness test under the Unfair Contract Terms Act 1977 s.11).
- 2035 And see 2015 Act Sch.2 Pt 1 para.11, below, paras 40-338—40-341.
- 2036 In *Banco Bilbao Vizcaya Argentaria SA v Quintano Ujeta (C-602/13) EU:C:2015:397 Order of 11 June 2015* paras 47–50 (available only in French) an acceleration clause in a contract of consumer credit secured on the consumer’s residence created a right in the lender to call in the principal and interest immediately on non-payment of interest even though the default position in national law subjected this right to three months of lateness. The national court held the acceleration clause unfair on this ground and the CJEU held that the fact that the trader had chosen to wait for three months to call in the principal and interest did not affect the fact that the effect of unfairness is to render the clause “not binding” on the consumer. (On the inability of the trader to rely on the

- default position in national law in these circumstances, see below, para.40-411). See also *Radlinger v Finway a.s. (C-377/14) 21 April 2016* at para.95 (potential cumulative effect of all penalty clauses on consumer as the basis for assessment of fairness).
- 2037 *Banco Primus SA v Gutiérrez García (C-421/14) AG Opinion 2 February 2016* para.85.
 (The judgment of the CJEU of 26 January 2017 did not refer to this issue.)
- 2038 Above, para.40-282, quoting *Constructora Principado SA v Menéndez Álvarez (C-226/12) EU:C:2014:10*, 16 January 2014 at para.23.
- 2039 *Kiss v Kiss (C-621/17) EU:C:2019:820*, 3 October 2019 at para.51; *M.P. and B.P. v prowadzący działalność za pośrednictwem 'A.' SA (C-212/20) EU:C:2021:934*, 18 November 2021 at para.66.
- 2040 OFT, Unfair Contract Terms, Bulletin No.1 (May 1996), para.1.5, p.6.
- 2041 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.2.13, cross-referring to para.5.13.4.
- 2042 2015 Act Sch.2 Pt 1 para.4.
- 2043 2015 Act Sch.2 Pt 1 para.5.
- 2044 [2012] EWHC 1290 (Comm), [2012] Info. T.L.R. 1.
- 2045 [2012] EWHC 1290 (Comm) at [14]–[16] (absence of consideration) and see below, para.40-326 (note). cf. *Roundlistic Ltd v Jones [2016] UKUT 325 (LC)* at [103] where the Upper Tribunal (Lands Chamber) had held that the fact that the terms of a new long lease (subject to the 1999 Regulations) granted on the same terms as a lease for which it was substituted (which had 80 years remaining and which was not subject to the 1999 Regulations) meant that a term of the new lease could not be said to “cause” a significant imbalance in the rights and obligations of the contracting parties: “[i]f there was a significant imbalance it already existed”. However, the CA disagreed on the basis that it was the term of the *new* lease which was the subject of the litigation and therefore the claim of unfairness: *Jones v Roundlistic Ltd [2018] EWCA Civ 2284, [2019] 1 W.L.R. 4461* at [35], [42] and [50]. See also *Abbott v RCI Europe [2016] EWHC 2602 (Ch)* at [45]–[47] (term of a contract under which consumers “deposited” their own timeshare rights with a company so as to enable them to exchange those rights for access to other properties held fair as creating no significant imbalance given the fetters imposed by law on the company’s exercise of its discretion under the term and the power in the consumers to cancel the contract without penalty).
- 2046 [2012] EWHC 1290 (Comm) at [17], per David Donaldson QC referring also to other factors to the same end, notably the inadequate manner in which the potential customer’s agreement was sought: at [21]. cf. *Longley v PPB Entertainment Ltd [2022] EWHC 977 (QB)* at [102.4]–[103], where a term in a contract governing online and telephone gambling which allowed the trader to recover awards made as a result of human error was held to be fair: the term was “transparent,” did not create any significant imbalance in the rights and obligations of the parties to the detriment of the consumer as it applied only in limited, defined circumstances, and was not contrary to

- the requirement of good faith viewed in terms of fair dealing, taking into account the trader's legitimate interest in correcting erroneous bets and assessed by reference to what the trader could reasonably assume a relevant consumer would have agreed and what such a reasonable consumer would have agreed.
- 2047 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.2.14.
- 2048 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.2.14 and see *Profi Credit Polska SA v QJ (C-84/19, C-222/19 and C-252/19) EU:C:2020:631, 3 September 2020* above, para.40-283.
- 2049 See above, para.40-276.
- 2050 2015 Act s.62(5) which implemented art.4(1) of the 1993 Directive and see similarly 1999 Regulations reg.6(1).
- 2051 See above, paras 40-278 et seq.
- 2052 1999 Regulations reg.6(1) and see above, para.40-276 on this difference in wording.
- 2053 [2004] EWHC 2450 (TCC), 98 Con. L.R. 82 at [45]; [2005] EWCA Civ 973, [2005] All E.R. (D) 507 (Jul) (appeal allowed on other grounds).
- 2054 *Boyde v Clipper Ventures Plc* 2013 S.C.L.R. 313, 2013 G.W.D. 12-243.
- 2055 *A v B (C-738/19) EU:C:2020:687, 10 September 2020* at para.33 and see below, para.40-331.
- 2056 [2019] EWHC 2809 (QB), [2020] 1 W.L.R. 141 at [101]–[103] (decided under the 2015 Act s.62).
- 2057 [2019] EWHC 2809 (QB) at [101], per Saini J.
- 2058 Unreported 29 January 2021 (Central London County Court) at [12]–[13].
- 2059 Unreported 29 January 2021 (Central London County Court) at [14]–[18], esp. at [15].
- 2060 1993 Directive art.4(1); 1999 Regulations reg.6(1).
- 2061 Emphases added.
- 2062 On which see above, paras 40-004 and 40-015.
- 2063 1993 Directive art.4(1); 1999 Regulations reg.6(1).
- 2064 In *OFT v Abbey National Plc (Bank Charges)* [2008] EWHC 875 (Comm) at [442], the HC noted that the meaning or application of the expression “the conclusion of the contract” may give rise to particular difficulty where “new” terms are introduced into the relationship between parties to a contract concluded earlier by exercise of a unilateral power of variation or consensual variation. While the decision of the HC was upheld by the Court of Appeal, the latter’s decision was reversed by the SC on other grounds: [2009] UKSC 6, [2010] 1 A.C. 696, above, paras 40-355—40-356. It is submitted that it would be a matter of construction whether any subsequent agreement between the trader and the consumer added or varied terms of the original contract between them (where the criterion of the “time when the term was agreed” would be apposite) or whether such a subsequent agreement instead constituted a distinct (and later) consumer contract (where the criterion of the “time when the contract was concluded” would lead to the same result as the “term when the term was agreed”):

- on the line between variation and substituted contract see Vol.I, paras 25-030, 25-033 and 25-036.
- 2065 Above, para.40-292.
- 2066 *Commission v Spain (C-70/03) EU:C:2004:505, [2004] E.C.R. I-0799* at para.16.
- 2067 Above, para.40-277.
- 2068 Above, paras 40-277 et seq.
- 2069 1993 Directive art.4(1) (emphasis added).
- 2070 cf. Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] O.J. L149/22 which “applies to unfair business-to-consumer commercial practices, before, during or after a commercial transaction relating to goods or service”: see above, para.40-175 and *Pereničová v SOSfinance, spol. sro (C-453/10) EU:C:2012:144*, para.39, above, para.40-314.
- 2071 *Andriciuc v Banca Românească (C-186/16) 20 September 2017 (“Andriciuc (C-186/16)”)*.
- 2072 Above, para.40-292.
- 2073 *Andriciuc (C-186/16)* at para.17.
- 2074 *Andriciuc (C-186/16)* at para.54 referring to 1993 Directive art.4(1) and *Bucura v SC Bancpost SA (C-348/14) EU:C:2015:447, 9 July 2015* para.48 and cf. above, para.40-292. See also *XZ v Ibercaja Banco SA (C-452/18) EU:C:2020:536, 9 July 2020* at para.48; *M.P. and B.P. v prowadzący działalność za pośrednictwem ‘A.’ SA (C-212/20) EU:C:2021:934*, 18 November 2021 at para.52 (in relation to information available to the trader at the time of conclusion of the contract).
- 2075 *Andriciuc (C-186/16)* para.54.
- 2076 Above, para.40-292.
- 2077 The decision therefore may be taken into account by a UK court: see above, para.40-004 and Vol.I para.1-029.
- 2078 *Dexia Nederland BV v XXX (Joined Cases C-229/19 and C-289/19) EU:C:2021:68, 27 January 2021* at para.54 and see further at paras 55–61.
- 2079 Below, paras 40-441 et seq.
- 2080 1993 Directive art.7(1).
- 2081 1993 Directive art.7(2).
- 2082 1993 Directive art.7(3).
- 2083 *Commission v Spain (C-70/03) EU:C:2004:505, [2004] E.C.R. I-0799* at para.16.
- 2084 And see below, para.40-444.
- 2085 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), para.2.34 referring to *Office of Fair Trading v Foxtons Ltd [2009] EWCA Civ 288, [2010] 1 W.L.R. 663* at [47] (commenting on the 1993 Directive art.4(1)) (see below, para.40-445) and quoting Lord Stein in *Director General of Fair Trading v First National Bank Plc [2001] UKHL 52, [2002] 1 A.C. 481* at [33] (in relation to the 1994 Regulations reg.4(2)) on which see above, para.40-284.

- 2086 *Pereničová v SOS finance, spol. sro* (C-453/10) EU:C:2012:144, [2012] 2 C.M.L.R. 28 at para.42. The CJEU has therefore held that national legislation cannot apply a restricted legal standard for the assessment of a contract term, such as a restriction on the rate of default interest to three times the interest otherwise owed under the contract: *Ibercaja Banco SAU v Cortés González* (C-613/15) 17 March 2016 at para.33.
- 2087 [2013] EWHC 178 (Ch), [2013] 2 B.C.L.C. 480 at [134]–[137]. On appeal, the Court of Appeal considered that the issue of the unfairness of the terms was unnecessary for the issues before the court, but it would have agreed with the court below: [2014] EWCA Civ 435, [2015] 1 All E.R. 1 at [96]–[99].
- 2088 See Vol.I, Ch.10.
- 2089 cf. above, paras 40-168 et seq.
- 2090 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015), para.2.35. The last example given by the CMA is redolent of the special protection given to consumers in respect of “off-premises contracts” provided by the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* (SI 2013/3134), on which see above, paras 40-084—40-088 (definition of “off-premises contracts”); paras 40-100 and 40-107 et seq. (information requirements and their consequences); and paras 40-115 et seq. (right of cancellation). However, as there explained, the protections put in place for the consumer concern the supply of information and a short-lived right of cancellation, whereas a term of a contract found “unfair” within the meaning of *s.62 of the 2015 Act* is “not binding on the consumer”: on the significance of the latter, see below, paras 40-405 et seq.
- 2091 On average consumer, see generally above, para.40-046. cf. however, *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd* [2021] EWHC 2088 (Ch) where in enforcement proceedings brought by the CMA the HC rejected the CMA’s claim that the defendant’s conduct was an aggressive commercial practice and that a term in a contract which resulted from this conduct was unfair, in part by reference to the position of the average consumer: see above, para.40-199 and below, para.40-350.
- 2092 See Vol.I, Ch.9.
- 2093 cf. above, paras 40-168 et seq. and esp. at paras 40-090—40-093. On the other hand, in the CMA’s view, the question whether a consumer was misled is “an issue separate from that of contractual fairness. For the purposes of unfair contract terms legislation, the essential question is whether an unfair imbalance exists in rights and obligations under the contract—for example whether the term has the potential to exclude liability for statements made by the business. Where consumers have been the victim of

- misrepresentation, or of other unfair, misleading or aggressive practices, remedies may be more directly available under the law of misrepresentation or under the [2008 Regulations]”: CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015), para.2.37.
- 2094 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015), para.2.34.
- 2095 2015 Act Sch.2 para.10. See further *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV (C-92/11) EU:C:2013:180, 21 March 2013* paras 43–44 referring to 1993 Directive art.5 and recital 20, and emphasising the importance of the provision of pre-contractual information for the fairness of a variation clause, below, para.40-341.
- 2096 See *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt (C-472/10) EU:C:2012:242, 26 April 2012* at paras 26–28, referring to the requirement of “plain, intelligible writing” in art.5 of the Directive in relation to the assessment of the fairness of contract term, on which see below, paras 40-428 et seq.
- 2097 OFT, Unfair Contract Terms, Bulletin No.2 (September 1996), para.2.22, p.12 (though considering this to be particularly a matter for the good faith of the trader). cf. the reference in *Andriciuc v Banca Românească (C-186/16) 20 September 2017* at paras 46–47 to an the trader’s “promotional material” for the purposes of the requirement of plain intelligible language, above, para.40-371.
- 2098 See Vol.I, paras 15-005 et seq.
- 2099 By contrast, the common law approach distinguishes between the general law of notice, where the unusual or onerous nature of a contract term is relevant to the degree of notice required (*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] Q.B. 433*) and the rule governing signed documents, where it is not: *L'Estrange v F Graucob [1934] 2 K.B. 394*. See Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), paras 6-004—6-006 and see Vol.I, paras 15-005 and 15-007.
- 2100 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015), para.2.57 (in the context of a discussion principally concerned with the requirement of transparency).
- 2101 2015 Act s.68 and see below, paras 40-428—40-434.
- 2102 *Mylcrist Builders Ltd v Buck [2008] EWHC 2172 (TCC), [2009] 2 All E.R. (Comm) 259* at [56]. See also *R (ex p. Donegan) v Financial Services Compensation Scheme Ltd [2021] EWHC 760 (Admin)* at [136]–[139], linking a failure in transparency to the requirement of good faith; *Green v Petfre (Gibraltar) Ltd (t/a Betfred) [2021] EWHC 842 (QB)* at [176]–[181] (where clauses had also been held inapplicable on their construction and not incorporated into the contract).
- 2103 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt (C-472/10) EU:C:2012:242, [26]–[28]*, below, para.40-340; *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV (C-92/11) EU:C:2013:180, 21 March 2013* at para.44, below, para.40-341; *Constructora Principado SA v Menéndez Álvarez (C-226/12) EU:C:2014:10, 16 January 2014* at para.26; *Kiss v Kiss (C-621/17)*

EU:C:2019:820, 3 October 2019 (French version used) at para.49; *BNP Paribas Personal Finance SA v VE (C-609/19)* 10 June 2021 at para.62; *M.P. and B.P. v prowadzący działalność za pośrednictwem 'A.' SA (C-212/20)* EU:C:2021:934, 18 November 2021 at para.58. In his Opinion in *Kiss v Kiss* of 15 May 2019, para.60 AG Hogan had advised the CJEU that “[i]t is only when, as interpreted by reference to the special interpretative rule contained in Art.5 [that is, interpretation most in favour of the consumer], the contractual term still creates an imbalance to the detriment of the consumer that it might be considered as unfair”; this specific point was not addressed by the CJEU itself).

2104 Below, paras [40-428—40-434](#). Art.5 of the Directive has two aspects: first, a requirement of “plain, intelligible language” for written terms (implemented in [s.68 of the Act](#)) and, secondly, a special rule of interpretation where “where there is doubt about the meaning of a term” (implemented in [s.69 of the Act](#)).

2105 *Menéndez Álvarez (C-226/12)* at para.27.

2106 *Sebestyén v Kovári (C-342/13)* EU:C:2014:1857, 3 April 2014 at para.34.

2107 Above, paras [40-046](#) and below paras [40-370—40-372](#), [40-382—40-383](#) (in relation to the proviso to the core exclusion in art.4(2) of the 1993 Directive) and para.[40-429](#) (in relation to the requirement of transparency itself in art.5 of the 1999 Directive).

2108 Above, paras [40-278](#) et seq.

2109 cf. Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), Principles, Definitions and Model Rules of European Private Law, Interim Outline edn (2008), Draft Common Frame of Reference art.II.-9:402(2) which provides that “[i]n a contract between a business and a consumer a term which has been supplied by the business in breach of the duty of transparency ... may on that ground alone be considered unfair”. No similar provision was contained in the Proposal for a Regulation for a Common European Sales Law COM(2011) 635 final, Annex I, arts 79–83 CESL.

2110 [2015 Act s.62\(4\)](#) (formerly implemented by the [1999 Regulations reg.5\(1\)](#)), above, para.[40-277](#) and see Bright in Burrows and Peel, Contract Terms (2007), p.172 at 184–186.

2111 On this see below, paras [40-441](#) et seq.

2112 OFT, Unfair Contract Terms, Bulletin No.2 (September 1996), p.8.

2113 EC Commission, Report on the Implementation of Directive 93/13/EEC on unfair terms in consumer contracts COM(2000) 248 final, p.18.

2114 1993 Directive arts 3 and 6(1) (unfair terms) and 5 (transparency) and see below, paras [40-405—40-417](#) and [40-433—40-434](#) in relation to their effects. These differences have also been noted by the HC in relation to the [2015 Act](#) (the test of fairness in

s.62(4) and the requirement for transparency in s.68), the court concluding that a lack of transparency may be relevant to the assessment of the fairness of a term but would not necessarily render the term unfair: *Longley v PPB Entertainment Ltd [2022] EWHC 977 (QB)* at [102.2.]–[102.3].

2115 Law Com., Scottish Law Com., Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills (March 2013), para.S.34; para.6.60.

2116 See also Commission guidance C(2019) 5325 final pp.37–39. cf. *Verein für Konsumenteninformation v Amazon EU Sàrl (C-191/15) 28 July 2016* at para.68 where, as will be seen below, para.40-348, the CJEU came close to saying that an express choice of law clause in a consumer contract *will* be unfair if the trader does not explain that its effect is limited by the restrictions imposed by art.6(2) of the Rome I Regulation on the law applicable to contractual obligations, on the basis that this means that the term fails the requirement of plain intelligible language.

2117 *Tóth v ERSTE Bank Hungary Zrt (C-34/18)* (Opinion of 29 March 2019) para.86 (a point not discussed by the CJEU in its decision of 19 September 2019); *Kiss v Kiss (C-621/17)* Opinion of AG Hogan of 15 May 2019, para.60 (the point not being discussed as such by the CJEU in its *judgment of 3 October 2019*); *Profi Credit Polska SA z siedzibą w Bielsku- Bialej v QJ (C-84/19, C-222/19 and C-252/19)* Opinion of AG Hogan of 2 April 2020, para.112 (a point not discussed by the CJEU in its decision of 3 September 2020).

2118 *Kiss v Kiss (C-621/17) EU:C:2019:820*, 3 October 2019 at para.49 (emphasis added), and see *BNP Paribas Personal Finance SA v VE (C-609/19)* 10 June 2021 at para.62; *M.P. and B.P. v prowadzący działalność za pośrednictwem 'A.' SA (C-212/20) EU:C:2021:934*, 18 November 2021 at paras 58 and 65, where the CJEU specifically required the national court to consider not merely any failure in transparency but also whether the contract term caused a significant imbalance in the parties' rights and obligations.

2119 Above, para.40-262.

2120 2015 Act s.64, below, paras 40-351 et seq. esp. at 40-379.

2121 Law Com. Advice (2013), paras 7.64–7.65.

2122 1999 Regulations reg.5 which (following the 1993 Directive art.3) set a high barrier for terms to count as “individually negotiated”: above, para.40-262.

2123 Above, paras 40-296 et seq.

2124 See above, para.40-301.

2125 [2005] EWCA Civ 973, [2005] All E.R. (D) 507 (Jul) on appeal from [2004] EWHC 2450 (TCC), 98 Con. L.R. 82.

2126 [2005] EWCA Civ 973 at [46] and cf. [2004] EWHC 2450 (TCC) at [43] (Judge Richard Seymour QC). Rimer J considered it arguable that the terms had therefore not been “individually negotiated” but did not express a view on this as it had not been argued.

- 2127 2015 Act s.62(5)(b).
- 2128 1993 Directive recital 19. On the “core exclusion” see below, paras 40-351 et seq.
- 2129 OFT, Unfair Contract Terms, Bulletin No.2 (September 1996), p.12.
- 2130 cf. *Domsalla v Dyason [2007] EWHC 1174 (TCC)* at [77] (wide range of contracts related to the consumer contract in question considered as part of “all the circumstances”).
- 2131 Notably, under the Consumer Credit Act 1974 on which see below, Ch.41.
- 2132 [2001] UKHL 52, [2002] 1 A.C. 481; Whittaker (2004) ZEuP 75 and see above, para.40-284 in relation to the requirement of good faith.
- 2133 SI 1994/3159.
- 2134 Above, para.40-226.
- 2135 [2000] Q.B. 672, 688.
- 2136 [2000] Q.B. 672, per Peter Gibson LJ. The powers are contained in Consumer Credit Act 1974 ss.129, 136.
- 2137 [2001] UKHL 52 at [20]. Lords Steyn, Hope of Craighead, Millett and Rodger of Earlsferry agreed.
- 2138 [2001] UKHL 52 at [23], [61], [66].
- 2139 1993 Directive recital 19.
- 2140 Howells and Wilhelmsson E.C. Consumer Law (1997) at p.103.
- 2141 *Andriciuc v Banca Românească (C-186/16) 20 September 2017* para.49, below, para.40-368.
- 2142 *Bryen & Langley Ltd v Boston [2005] EWCA Civ 973, [2005] All E.R. (D) 507 (Jul)* at [46], per Rimer J (with whom Clarke ([56]) and Pill LJJ [56] agreed) (decided under the 1999 Regulations). This decision has been treated as holding generally that the arbitration provisions in the JCT Minor Works Contract “even if proffered by the contractor in circumstances which would make it procedurally unfair for the contractor to rely on them vis-à-vis a consumer, do not cause a significant imbalance in the parties’ rights and obligations”: *Domsalla v Dyason [2007] EWHC 1174 (TCC)* at [92], per HH Judge Thornton QC.
- 2143 *Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 (Comm)* at [372]–[380] (in relation to the 1999 Regulations).
- 2144 *West v Ian Finlay & Associates [2014] EWCA Civ 316, [2014] B.L.R. 324* at [60] (in relation to the 1999 Regulations) and see above para.40-285.
- 2145 [2011] EWHC 1811 (TCC), (2011) 27 Const. L.J. 709.
- 2146 [2011] EWHC 1811 (TCC), at [113], per Ramsey J (and similarly at [116] and [119]).
- 2147 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices art.5(3) and see above, para.40-178.
- 2148 1993 Directive arts 4(2), 5; *Kásler v OTP Jelzálogbank Zrt (C-26/13) EU:C:2014:282, 30 April 2014* para.74, above, paras 40-370—40-372 and below, para.40-429.
- 2149 Above, paras 40-278 et seq.
- 2150 See Vol.I, paras 11-005 et seq. and 11-075 et seq. respectively.
- 2151 See further Whittaker, Cambridge Yearbook of European Studies (2006), Vol.8, Ch.10; Loos (2017) EuCML 54. Legislation sometimes makes requirements as to the language

of pre-contractual information and the contract itself, as in the case of timeshare and related contracts where the required information and the contract must be provided in English and may, in addition, be provided in another language: [Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010](#) (SI 2010/2960) regs 12(6) and 17(2) (as substituted on IP completion day by the [Timeshare, Holiday Products, Resale and Exchange Contracts \(Amendment etc.\) \(EU Exit\) Regulations 2018](#) (SI 2018/1397) reg.2(3) and (4)), on which see above, paras 40-159—40-160. cf. [Consumer Rights Act 2015](#) s.30(4) (guarantees to consumers in relation to goods offered within the UK must be in English), below, para.40-531.

- 2152 *Standard Bank London Ltd v Apostolakis (No.2)* [2001] *Lloyd's Rep. Bank* 240, 250 (emphasis added).
- 2153 On which see Whittaker, Cambridge Yearbook of European Studies (2006), Vol.8, Ch.10, *passim*.
- 2154 On the [1977 Act](#) generally see Vol.I, paras 17-069 et seq.
- 2155 See above, para.40-279 and on the test of reasonableness in the [1977 Act](#) see Vol.I, paras 17-099 et seq.
- 2156 This is made clear by the reference in the [2015 Act](#) s.62(5)(b) to “all the circumstances existing when the term was agreed”: and see above, paras 40-276 and 40-296—40-297.
- 2157 [2015 Act](#) s.61 and see above, paras 40-248—40-257.
- 2158 [Unfair Contract Terms Act 1977](#) ss.2(4), 3(3), 6(5) and 7(4A); “consumer contract” is defined by s.14 by reference to s.61 of the [2015 Act](#). The [2015 Act](#) also deleted the provisions in the [1977 Act](#) referring to persons “dealing as consumer”: above, para.40-235 and see Vol.I, paras 17-072—17-073.
- 2159 This is the case as a result of the restriction of ss.2–7 to “business liability” combined with the disapplication of the terms of “consumer contracts” from the same provisions. The exception to this position is found in relation to s.6(4) of the [1977 Act](#), which applies to the liabilities arising under any contract of sale of goods or hire-purchase agreement referred to in that section whether or not they are “business liabilities” under s.1(3). This is significant in relation to the implied terms as to title, etc., whose exclusion or restriction is rendered ineffective by s.6(1), but this result applies without reference to the test of reasonableness in s.11.
- 2160 [1977 Act](#) s.2, 6 and 7 apply only to the exclusion or restriction of liability as defined by s.13; s.3 applies to such exclusion or restriction and also (s.3(2)(b)) to contract terms under which a person claims “to be entitled—(i) to render a contractual performance substantially different from that which was reasonably expected of him, or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all”. See Vol.I, paras 17-079—17-082 and 17-090—17-095.
- 2161 i.e. not falling within the first limb of the “core exclusion” in the [2015 Act](#) s.64(1)(a): see below, paras 40-351 et seq. especially at para.40-359. It is to be noted that this exclusion does not apply where the relevant term is not transparent and prominent: [2015 Act](#) s.64(2) and see below, paras 40-370—40-374 and 40-379—40-387. There is a further qualification to the scope of control as regards mandatory contract terms: [2015 Act](#) s.73, above, paras 40-264—40-271.

2162 cf. Vol.I, para.[17-099](#) et seq. and paras 18-139 et seq.

2163 There is, though, a particular difference between the two controls in relation to burden of proof discussed below, paras [40-397](#) et seq.

(dd) - Unfair Terms and Unfair Commercial Practices

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(i) - The Composite Test of Unfairness

(dd) - Unfair Terms and Unfair Commercial Practices

Distinct but related tests of unfairness

40-314 In *Pereničová* the Court of Justice of the EU considered the relationship between a finding of an “unfair commercial practice” within the meaning of the Unfair Commercial Practices Directive 2005²¹⁶⁴ and a finding of the unfairness of a contract term within the meaning of the 1993 Directive.²¹⁶⁵ The particular significance of this relationship before the Court was that, under the 2005 Directive, a finding of an “unfair commercial practice” has no impact on the validity of any contract or contract term to which the unfair practice relates,²¹⁶⁶ whereas under the 1993 Directive, an unfair contract term is not binding on the consumer and may invalidate the contract as a whole.²¹⁶⁷ The Court noted that the definition of an “unfair commercial practice” is “particularly wide”²¹⁶⁸ and:

“... applies to unfair business-to-consumer commercial practices, before, during or after a commercial transaction relating to goods or service.”²¹⁶⁹

The 2005 Directive provides a general test for the unfairness of a commercial practice,²¹⁷⁰ which is supplemented by three particular examples of unfair commercial practices,²¹⁷¹ including “misleading actions”,²¹⁷² and a blacklist of practices which “shall in all circumstances be regarded as unfair”.²¹⁷³ In *Pereničová* a consumer credit agreement had misstated the APR, as the lender

had not included within its calculation some charges relating to the loan.²¹⁷⁴ In the view of the Court of Justice this would constitute a “misleading commercial practice” within the meaning of the 2005 Directive if the national court were to find that it “causes or is likely to cause the average consumer to take a transaction decision that he would not have taken otherwise”,²¹⁷⁵ but the referring court wished to know whether such a finding would mean that the APR term in question would also be unfair under the 1993 Directive. For this purpose, the Court of Justice observed that art.4(1) of the 1993 Directive:

“... gives a particularly wide definition of the criteria for making such an assessment, by expressly including ‘all the circumstances’ attending the conclusion of the contract in question ... In those circumstances, ... a finding that a commercial practice is unfair is one element among others on which the competent court may base its assessment of the unfairness of contractual terms under Article 4(1) of Directive 93/13. That element, however, is not such as to establish, automatically and on its own, that the contested terms are unfair. It is for the referring court to decide on the application of the general criteria set out in Articles 3 and 4 of Directive 93/13 to a specific term, which must be considered in the circumstances of the particular case.”²¹⁷⁶

In the result, “a finding that a commercial practice is unfair has no direct effect on whether the contract is valid” under the 1993 Directive.²¹⁷⁷

Use of unfair term as an unfair commercial practice

- 40-315 On the other hand, although the question was not directly before the Court of Justice in *Pereničová*, Advocate General Trstenjak in her opinion in *Pereničová* observed that:

“... it is conceivable that the unfairness of a commercial practice consists in the very use in consumer contracts of unfair terms within the meaning of Directive 93/13. [citation] The trader’s use of such terms is likely to be seen as a misleading act, since false information is provided or the consumer is unclear as to the actual scale of the contractual rights and obligations, especially with regard to rights and obligations arising from the clauses which are unfair and so invalid for the consumer.”²¹⁷⁸

This strongly suggests that the use or recommendation for use by a trader of contract terms with consumers may constitute a business-to-consumer “commercial practice” for the purposes of the *Consumer Protection from Unfair Trading Regulations 2008* (which implemented in the UK the Unfair Commercial Practices Directive 2005²¹⁷⁹) and it has been so decided by the High Court.²¹⁸⁰ In the view of the CMA:

“... the [2008 Regulations] prohibit commercial practices which fail to meet a standard defined particularly by reference to honest market practice, where there is likely to be an appreciable impact on consumers’ ability to make an informed decision. Using, recommending or enforcing a contract term that is unfair under the [2015] Act, and therefore unenforceable, is inherently likely to be considered an unfair practice under the [2008 Regulations], and subject to enforcement action, having regard to this standard.”²¹⁸¹

Footnotes

- 2164 Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market [2005] O.J. L149/22 (“2005 Directive”), implemented in UK law by the *Consumer Protection from Unfair Trading Regulations 2008* (SI 2008/1277). On the 2005 Directive and these implementing regulations, see above, paras 40-166—40-222.
- 2165 *Pereničová v SOS finance, spol. sro (C-453/10) EU:C:2012:144, [2012] 2 C.M.L.R. 28.*
- 2166 Directive 2005/29 art.3(2) and see above, para.40-168. This was also the position in UK law when the 2005 Directive was first implemented in UK law by the *Consumer Protection from Unfair Trading Regulations 2008* (SI 2008/1277), but changed by the *Consumer Protection (Amendment) Regulations 2014* (SI 2014/870) inserting, notably, new Pt 4A Consumers’ Rights to Redress in the 2008 Regulations. On these amendments see above, paras 40-181—40-222.
- 2167 1993 Directive art.6(1) on which see below, paras 40-405 et seq.
- 2168 *Plus Warenhandelsgesellschaft (C-304/08) EU:C:2010:12, [2010] E.C.R. I-217* at para.36; *Mediaprint Zeitungs- und Zeitschriftenverlag (C-540/08) EU:C:2010:660, [2011] 1 C.M.L.R. 48* at para.17.
- 2169 *Pereničová v SOS finance, spol. sro (C-453/10) EU:C:2012:144 (“Pereničová (C-453/10)”)* para.39.
- 2170 2005 Directive art.5(1).
- 2171 2005 Directive art.5(4).
- 2172 2005 Directive art.6.
- 2173 2005 Directive art.5(5), Annex I.
- 2174 *Pereničová (C-453/10)* para.22.
- 2175 *Pereničová (C-453/10)* para.41, following art.5(2)(b) as explained by art.2(b) and 2(k) of the 2005 Directive.
- 2176 *Pereničová (C-453/10)* paras 42–44.
- 2177 *Pereničová (C-453/10)* para.46 and see *Bankia SA v Merino (C-109/17) 19 September 2018* at paras 48–50. In *Bankia SA* esp. at paras 33–34 and para.49 the CJEU held that a national court has no duty to raise the existence of an unfair commercial practice of its own motion even where it is allegedly related to the existence of an unfair term in a consumer contract, though it may do so.

- 2178 *Pereničová (C-453/10) AG* Opinion of 29 November 2011 at para.90.
- 2179 It would appear that the question whether such a “commercial practice” may consist of an isolated event would not or would only rarely arise in the context of use or recommendation for use of unfair contract terms which have not been individually negotiated, as such a use would normally rest on a continuing practice of the business using standard terms in their dealings with consumers on more than one isolated occasion: cf. above, para.[40-176](#).
- 2180 *OFT v Ashbourne Management Services Ltd [2011] EWHC 1237 (Ch), [2011] E.C.C. 31*, especially at [227] and [240].
- 2181 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.6.24.

(ii) - The “Indicative List” of Terms

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(ii) - The “Indicative List” of Terms

The “indicative list of terms”

40-316 Following the 1993 Directive and the 1999 Regulations,²¹⁸² the 2015 Act includes a list of terms in consumer contracts that “may be regarded as unfair” for the purposes of the controls in Pt 2, the scope of these examples being qualified in a similar way as was found in the 1999 Regulations.²¹⁸³ The vast majority of the 20 examples included in the list in the Act are substantively identical to the 17 found in the earlier instruments, differing only in minor points of drafting and in the replacement of “seller or supplier” with “trader”,²¹⁸⁴ but there are three additional examples.²¹⁸⁵ The Act makes provision for amendment of the “indicative list” (and its qualifications) by the Secretary of State by order made by statutory instrument.²¹⁸⁶

The significance of the list

40-317 Following the significance of the list in the Annex to the 1993 Directive, Pt 1 of Sch.2 of the 2015 Act contains “an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair” for the purposes of Pt 2 of the Act.²¹⁸⁷ This list has sometimes been termed a “grey list”,²¹⁸⁸ for the terms which it contains are not necessarily to be held unfair (a “black list”),²¹⁸⁹ but this terminology may be misleading as inclusion within the list does not formally give rise to any presumption that a term will be unfair.²¹⁹⁰ On the other hand, the Court of Justice has emphasised the list’s importance, observing that:

“If the content of the annex [to the Directive] does not suffice in itself to establish automatically the unfair nature of a contested term, it is nevertheless an essential element on which the competent court may base its assessment as to the unfair nature of that term.”²¹⁹¹

Given its merely illustrative nature, it may appear odd that the second part of Sch.2 purports to restrict the scope of particular examples of terms found in the first part, but this reinforces the importance which was attached by the drafters of the Directive to the illustrative list and therefore the need to make exceptions to its examples.²¹⁹² Moreover, as will be explained, the appearance of a contract term on the indicative list has a second significance, for where it does so it falls outside the “core exemption” set by art.4(2) of the Directive and provided by s.64 of the 2015 Act.²¹⁹³ For this reason it is helpful that the indicative list in Pt 1 Sch.2 notes where the examples which it includes have exceptions in Pt 2 of the Schedule and, as appropriate, where their apparent subject matter is dealt with elsewhere in the 2015 Act.

- 40-318 The list in Pt 1 of Sch.2 of the 2015 Act includes a wide variety of terms and these not merely illustrate the application of the requirement of fairness, but also the range of types of terms which are subject to the Act’s controls (in particular in contrast to the limited ambit of the Unfair Contract Terms Act 1977).²¹⁹⁴ It is clear that a particular contract term may fall within more than one of the examples in the list.²¹⁹⁵ In the following paragraphs, these terms will be noted and briefly discussed, the examples retaining the number which they bear in Pt 1 of the Schedule. In this respect, reference will be made where appropriate to the guidance given on their interpretation and application by the CMA.²¹⁹⁶

Exclusion or limitation clauses

- 40-319 Three of the examples in the “indicative list” in Sch.2 Pt 1 involve the exclusion or restriction of liability in the trader or of the consumer’s rights:

“1A term which has the object or effect of excluding or limiting the trader’s liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader.²¹⁹⁷ This does not include a term which is of no effect by virtue of section 65 (exclusion for negligence liability).

2A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any

of the contractual obligations, including the option of offsetting a debt owed to the trader against any claim which the consumer may have against the trader.²¹⁹⁸

...

20A term which has the object or effect of excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, in particular by

- (a)requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions,
- (b)unduly restricting the evidence available to the consumer, or
- (c)imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract.”²¹⁹⁹

Trader liability for death or personal injury

- 40-320 A first point to note is that para.1 disapplies itself from terms within the scope of [s.65 of the Act](#), the latter applying to most cases of trader liability to consumers for death and personal injury caused by negligence and rendering them of no effect without any assessment of their fairness.²²⁰⁰ However, this special treatment leaves aside cases of the exclusion or restriction of trader liability in respect of liabilities for death or personal injury caused by negligence in circumstances falling outside the scope of [s.65](#)²²⁰¹ and also cases of strict liabilities in the trader for death or personal injuries to consumers, for example, where arising under the [Animals Act 1971 s.2](#).²²⁰²

Exclusion clauses more generally

- 40-321 Apart from these special cases, the examples listed in [paras 1, 2 and 20 of Pt 1 of Sch.2](#) quoted above,²²⁰³ make clear that exclusions of trader liability or of consumers’ rights will be seen as potentially unfair under [Pt 2 of the 2015 Act](#). As the CMA has expressed it:

“Rights and duties under a contract cannot be considered evenly balanced unless both parties are equally bound by their obligations under the contract and the general law. Any term that undermines the value of such obligations by preventing or hindering the consumer from seeking redress from a trader who has not complied with them is open to challenge as unfair under [Part 2 of the Act](#).²²⁰⁴

There are a number of examples of such an unfair exclusion in the case-law as well as illustrations in the CMA’s Guidance.²²⁰⁵ In this respect, the test of unfairness in Pt 2 of the Act is not, of course, restricted to a technical definition of exemption clause as is the case with the majority of the controls in the [Unfair Contract Terms Act 1977](#),²²⁰⁶ and therefore a term is likely to be unfair “whatever its form” and “particularly if it makes it more difficult for consumers to enforce their rights against the trader” as in the case of:

“... terms which ‘deem’ things to be the case, or get consumers to declare that they are satisfied with what they have received—whether they really are or not—with the aim of ensuring that no liability arises in the first place.”²²⁰⁷

An example of a term which requires a declaration may be found in the case of a contract for the provision of medical services under which the consumer/patient declares that he knows medical facts which could only be known with any certainty by experts.²²⁰⁸ Moreover, the High Court found (in circumstances described as unusual) a “withholding notice clause” in the JCT Minor Works standard contract by which the consumer/employer’s right of set-off can be exercised only if the appropriate notice has been served in time to the building contractor to be unfair within the meaning of the [1999 Regulations](#).²²⁰⁹

Clauses preventing set-off by the consumer

- 40-322 The CMA interprets the impact of the requirement of fairness on clauses which limit the consumer’s right to offset a debt broadly. So, in its view:

“There is unlikely to be an objection to terms which fairly reflect the consumer’s normal legal obligation to pay promptly and in full what is properly owing—that is, the full price, on satisfactory completion of the contract. But terms may be unfair if they say, or clearly imply, that the consumer must in all cases complete his or her payment of the whole contract price, without any deduction, as soon as the business chooses to regard its side of the bargain as finished. They are likely to be seen as excluding the right of setoff even if they do not actually mention that right.”²²¹⁰

In the CMA’s view, the exclusion of a consumer’s right to set-off is likely to be particularly harmful (and therefore to be unfair) where the consumer does not have the short-term right to reject the goods under the [2015 Act](#) so as to be able to return them and recover a full refund if they are unsatisfactory.²²¹¹ Also likely to be unfair are terms under which the trader can impose a sanction on the consumer (without first going to court) if the consumer does not pay the whole contract price when it is demanded.²²¹²

“Hindering the consumer’s right to take legal action”

40-323 In *Aziz*²²¹³ the Court of Justice of the EU saw para.1(q) of the Annex to the Directive (which was implemented in UK law by Sch.2 Pt 1 para.20)²²¹⁴ as relevant to the fairness of a term under which a lender under a long-term contract of loan secured by a mortgage of residential premises was able unilaterally to determine the amount of debt unpaid, this having considerable procedural advantages under the national procedural law applicable. In these circumstances, the national court

“... must in particular assess whether and, if appropriate, to what extent, the term in question derogates from the rules applicable in the absence of agreement between the parties, so as to make it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of the defence.”²²¹⁵

U On the other hand, the High Court has held that a term in the standard contract between an airline and its passengers which required the latter to submit any claims for compensation for delay or cancellation of their flights under the Denied Boarding Regulation²²¹⁶ directly to the airline and to allow it 28 days to respond directly to them rather than via a third party (such as a solicitor or a claims management firm) was not unfair within the meaning of the 1993 Directive.²²¹⁷ The contract made clear that the airline was willing to deal with a third party engaged by a customer, but only if the customer had first attempted to deal directly with them and had either received no response within 28 days or had been unsuccessful. In these circumstances, the contract term requiring claims to be directed to the airline did not cause a significant imbalance in the parties’ rights and obligations, as it set out a “straightforward procedure for initiating a flight disruption claim against [the airline] that is reasonable in scope”, and the passenger was not “excluded or hindered” in a material sense from her right to take legal action or exercise any other legal remedy to which she was entitled under the Denied Boarding Regulation.

²²¹⁸

U

Arbitration and adjudication clauses

40-324 Paragraph 20 of Sch.2 quoted above,

U

2219

U refers to a term which requires a “consumer to take disputes exclusively to arbitration not covered by legal provisions”.

2220

U This may refer to arbitration or adjudication clauses which give no option to the consumer. In this respect, it is specifically provided by the [Arbitration Act 1996](#) that an arbitration agreement

2221

U is deemed necessarily unfair where it relates to a claim for a “modest amount” set at the time of writing at £5,000.

2222

U However, even where a claim for more than this amount is subject under a consumer contract to arbitration or adjudication the relevant term may be held unfair.

2223

U In this respect, the CMA has expressed the view that:

“If an arbitration clause is to be used with consumers, it must be free from the element of compulsion, and in the view of the CMA this is necessary to meet the requirement of fairness even if it relates to claims higher than the £5,000 threshold sum in the 1996 Act. When entering contracts, ordinary consumers are most unlikely to consider detailed legal issues connected with the possibility of a dispute arising unless they have the benefit of legal advice on this issue. The consequences of the inclusion of such a clause are thus liable to surprise them unfairly if such a dispute does arise.

2224

U

So, for example, in [Zealander v Laing Homes Ltd](#)

2225

U the claimant had contracted to buy a new house and certain other items from the defendant, this house being covered in part by the National House Builders Council “Build Mark” Agreement, which contained a compulsory arbitration clause. The Technology and Construction Court refused to stay his claim for damages in respect of defects in the house, holding that the clause was unfair within the meaning of the [1994 Regulations](#) (which first implemented the 1993 Directive in UK law

2226

U) in that it created a “significant imbalance” between the parties since the claimant, who had been in a position of disparity with the defendant builder, would have to take separate proceedings for the matters covered by the “Build Mark” Agreement and those falling outside it, which would put the claimant at a financial disadvantage. Similarly, in [Picardi v Cuniberti](#),

2227

U the same court held unfair a clause in a contract between two consumers and their architect under which either party could refer any dispute or difference to adjudication, the adjudicator to be appointed by the parties or, absent their agreement, nominated by the architect's own professional body. Applying the approach of Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank Plc*,

2228

U the court held that:

“... a procedure which the consumer is required to follow, and which will cause irrecoverable expenditure in either prosecuting or defending it, is something which may hinder the consumer's right to take legal action. The fact that the consumer was deliberately excluded by Parliament from the statutory regime of the [Housing Grants Construction Regeneration Act 1996] reinforces this view.”

2229

U

On the other hand, in *Westminster Building Co Ltd v Beckingham*

2230

U a private individual (the “consumer”) who had commissioned a firm of builders to renovate his property under a contract falling outside the **Housing Grants, Regeneration and Construction Act 1996** was held bound by an adjudication clause which it contained since this clause was not unfair in the circumstances: its terms were couched in plain and intelligible language and had been decided upon by the consumer's professional agents, chartered surveyors, who could have given him competent and objective advice as to its existence and effect.

2231

U Moreover, in *Du Plessis v Fontgarry Leisure Parks Ltd*

2232

U the Court of Appeal held that a term of a contract between the owner of a holiday caravan park and the owner of a caravan in respect of use of a designated pitch for 10 years under which any dispute about an increase in pitch fee under a term of the contract could be referred to arbitration only with the support of 51 per cent or more of the park's caravan owners was not unfair under the **1999 Regulations**, the Court seeing the

“... good sense of permitting arbitration only if it was requested by a substantial body of caravan owners. Pitch fees had to be set consistently for the whole park. It would not be practicable to administer the leisure park if pitch fees were negotiated or determined on an individual basis.”

2233

U

Choice of jurisdiction clauses²²³⁴

- 40-325 In *Océano Grupo Editorial SA v Murciano Quintero* the European Court of Justice held that a choice of local jurisdiction clause in a consumer contract which purported to give jurisdiction to the court where the business supplier was established even though the consumers were domiciled in another part of Spain was unfair within the meaning of art.3 of the Unfair Terms in Consumer Contracts Directive 1993, the European Court seeing this type of term as falling within the category set out in sub-para.(q) of para.1 of the Annex to that Directive.²²³⁵ While this aspect of the European Court’s decision has less direct significance for English law,²²³⁶ in *Standard Bank London Ltd v Apostolakis (No.2)* its impact was extended by analogy to an international jurisdiction clause.²²³⁷ In that case, the defendants were two wealthy individuals resident in Greece who had entered foreign exchange contracts with a bank in Athens and who had commenced proceedings on the contracts in Athens. The claimant bank failed in its proceedings in England for an injunction to restrain the defendants from continuing their proceedings in Greece. Steel J expressed the view that, whether or not the case fell within art.13 of the Brussels Convention so as to give the Greek courts exclusive jurisdiction,²²³⁸ the term which gave exclusive jurisdiction to the English courts was unfair within the meaning of the *1999 Regulations* given the cost and inconvenience of requiring the defendants to defend an action in England, the contrast with this requirement and the claimant’s reservation to itself of a right to sue the defendants in England or in any country where they had assets or were amenable to suit and the fact that the defendants had been faced with “potentially confusing sets of jurisdiction clauses calling for translation and careful explanation”, neither of which had taken place.²²³⁹ However, the decision in *Apostolakis (No.2)* was distinguished in *Chopra v Bank of Singapore Ltd* on the basis that the clause in the latter case conferred only non-exclusive jurisdiction, the contract was in a language (English) known to the consumers and was “fairly simple and straightforward”; there was, moreover, no evidence that if they had known about the clause they would not have entered the contract.²²⁴⁰ The fact that international jurisdiction clauses in a consumer contract may fall within the scope of the Unfair Terms in Consumer Contracts Directive 1993 has recently been recognised explicitly by the Court of Justice of the EU.²²⁴¹

“Potestative conditions”

- 40-326

“3.A term which has the object or effect of making an agreement binding on the consumer in a case where the provision of services by the trader is subject to a condition whose realisation depends on the trader’s will alone.”²²⁴²

It may be thought that in English law a term as described in para.3 of Sch.2 Pt 1 may render the contract as a whole void for uncertainty or lack of consideration, in that it appears to give the trader an effective choice whether or not to do anything under the contract,²²⁴³ a term which in the Romanist terminology is known as a “potestative condition”.²²⁴⁴ The term’s presence in the indicative list may be explained by the fact that the result of invalidity of the contract is not uniformly shared throughout the Member States.²²⁴⁵ On the other hand, in the view of the CMA such a term in a consumer contract is clearly open to objection as potentially unfair.²²⁴⁶ Moreover, the type of term foreseen by para.3 may be thought to be analogous to some forms of termination clause under which the trader can terminate the contract on the ground of an alleged minor breach by the consumer, with the effect that trader’s future obligations come to an end and any payments made by the consumer are in principle irrecoverable.²²⁴⁷ This type of clause will be discussed below.²²⁴⁸

Unbalanced forfeiture clauses

40-327

“4.A term which has the object or effect of permitting the trader to retain sums paid by the consumer where the consumer decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the trader where the trader is the party cancelling the contract.”²²⁴⁹

The terms described in para.4 of the “indicative list” in Pt 1 of Sch.2 of the 2015 Act include terms under which either a part-payment or deposit paid by a consumer may be forfeited and are the object of considerable criticism by the CMA on the basis that a term which “makes any substantial prepayment entirely non-refundable, whatever the circumstances, potentially allows the trader to make an unjustified windfall gain”.²²⁵⁰ In this respect, important factors in the fairness of such a term are the proportion between the sum to be forfeited and any loss to be suffered by the trader by the consumer’s cancellation²²⁵¹ and, as para.4 mentions, the existence of any counter-balancing provision in the contract for the benefit of the consumer, although in the view of the CMA:

“whether or not such a provision is fair depends on a number of factors, and in particular on whether it confers any real benefit on the consumer, comparable to that enjoyed by the trader”.²²⁵²

In *SC Topaz Development SRL v Juncu*²²⁵³ the Court of Justice considered para.(d) of the Annex to the 1993 Directive (implemented in UK law by para.4 quoted above²²⁵⁴) in the context of a term in a contract to sell a building by a trader to a consumer which allowed the trader unilaterally to terminate the contract for delay in payment of any sum owing for longer than five working days, to keep any monies already paid by the consumer and to recover a penalty of 30 per cent of the contract price without prejudice to any damages. In the Court’s view, such a term appears to fall within para.(d)²²⁵⁵ as it allows the seller not to perform the contract and to retain sums paid and a penalty without allowing the consumer to terminate for the trader’s non-performance with an equivalent level of compensation for the consumer.²²⁵⁶

Disproportionate sums payable by the consumer: introduction

- 40-328 The 1993 Directive (followed by the [1999 Regulations](#)) included as an example contained in the indicative list:

“... terms which have the object or effect of ... requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation” ,

which is recognisable to an English lawyer as a form of penalty clause, that is in respect of sums payable on breach by the consumer.²²⁵⁷ While the [2015 Act](#) included this example in its own list at [para.6 of Sch.2 Pt 1](#), it added a further example in para.5 of terms which impose disproportionate sums on the consumer for the situation where this is not (or not necessarily) payable on the ground of breach by the consumer but arise “where the consumer decides not to conclude or perform the contract” and impose such a sum either as “compensation or for services which have not been supplied”. These examples are clearly related even though they remain distinct.

Where the consumer decides not to conclude or perform the contract

- 40-329

“5.A term which has the object or effect of 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.”

The CMA identifies two distinct terms falling within para.5.²²⁵⁸ First, it concerns disproportionate termination fees on cancellation of the contract by the consumer, whether cancellation takes effect

by way of a right to cancel under the contract (for example, early cancellation under a contract for the supply of services or digital content) or in breach of contract. In the CMA’s view:

“A term requiring a payment for exercising a contractual right to cancel the contract early is likely to be open to challenge as excessive … if it does not appropriately reflect: any savings for the business associated with no longer having to provide the goods, service or digital content; any ability of the business to mitigate (reduce) its loss, for instance by finding another customer; and any benefit to the business of receiving a payment earlier than it would otherwise have done.”²²⁵⁹

Secondly, para.5 includes terms which “effectively lock consumers into paying for services” and create fixed or “tie-in” minimum contract periods,²²⁶⁰ where the contract provides for no right of cancellation or allows it only on payment of a charge equivalent to all or substantially all of the payments.²²⁶¹ In the CMA’s view, such a term in a contract for services:

“… will be under suspicion of unfairness if the consumer who chooses to stop receiving the service is always required to pay in full or nearly in full, regardless of whether allowance could be made for savings or gains available as a result of the contracts’ early termination”.²²⁶²

For example, in *Office of Fair Trading v Ashbourne Management Services Ltd*,²²⁶³ a series of standard form consumer contracts for gym club membership for 6, 12 and 24 months contained terms by which in most circumstances the consumers were locked into paying for these periods.²²⁶⁴ The High Court held that these terms were unfair given, in particular, the average consumer’s tendency to overestimate how often they will use the gym membership and that unforeseen circumstances may make continued use of its facilities impractical or unaffordable,²²⁶⁵ that the termination charge is often considerably more than any discount enjoyed by the consumer for the longer minimum period of membership,²²⁶⁶ and that the gyms are rarely so oversubscribed that they cannot take on new members.²²⁶⁷

Penalty clauses

40-330

“6.A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation.”

As earlier noted, the example in para.6 of Pt 1 of Sch.2 of the 2015 Act is also contained in the indicative list provided by the 1993 Directive and was formerly implemented by the 1999

Regulations²²⁶⁸ and, as a result, it has been the subject of discussion both by the Court of Justice of the EU and by English courts.²²⁶⁹ This type of term bears a considerable similarity to the common law understanding of a “penalty clause”, since the disproportionately high nature of a sum to be paid on breach argues in favour of it being a penalty.²²⁷⁰ Clearly, though, clauses whose object or effect is to impose a disproportionately high sum on failure in performance by the consumer will be subject to the test of fairness under **Pt 2 of the 2015 Act**, whether or not they count as penalties in the common law sense.²²⁷¹ So, for example, it has been held that a clause which requires a consumer to pay interest at 8 per cent over the Bank of England current base rate on sums due to the business under the contract 30 days after the issue of an account is unfair within the meaning of the **Unfair Terms in Consumer Contracts Regulations 1999**, even though it constituted a genuine pre-estimate of damage likely to be suffered by the claimant in the event of non-payment and therefore not a penalty clause under the then accepted approach at common law,²²⁷² this decision on the unfairness of the term resting principally on the grounds that the term was unusual and not balanced by a similar term governing unpaid monies such as damages which may fall due to the consumer.²²⁷³ In *Office of Fair Trading v Ashbourne Management Services Ltd*,²²⁷⁴ a standard form consumer contract for gym club membership of a year’s duration with monthly payments by the consumer contained an express term allowing the business to terminate on the ground of the consumer’s breach where the term was not a technical condition and the breach did not require to be repudiatory. Where the term further provided that the consumer was liable for all sums which *would have fallen due* if the contract had not been terminated early on the ground of breach, it was held to be both a penalty at common law and unfair within the meaning of the **1999 Regulations**.²²⁷⁵ By contrast, in another standard form contract for gym membership before the court, a plain and intelligible term allowed termination only for repudiatory breach, and its requirement for accelerated payment of sums which would have fallen due (subject to a discount for this acceleration) was held to be neither a penalty at common law nor unfair within the meaning of the **1999 Regulations**.²²⁷⁶

A “disproportionately high sum”

- 40-331 The question whether the sum to be paid by the consumer is disproportionately high depends on the nature of the contract and on the context more generally. So, a term allowing a person (the alleged consumer) who had agreed to participate in a world voyage by clipper to cancel the contract at a charge of 75 per cent of the price was held to be fair as not disproportionate in the context since that person’s commitment to the venture was important.²²⁷⁷ In *Aziz*²²⁷⁸ the Court of Justice of the EU considered the proper approach to a term in a long-term contract of loan secured by a mortgage of residential premises which set an annual default interest of 18.75 per cent automatically to sums not paid when due without the need for notice to the debtor. In these circumstances, the European Court advised that the national court must assess the national legal rules which would otherwise apply and compare the rate of default interest (if any) set by law and set by the contract term “in

order to determine whether [the latter] is appropriate for securing the attainment of the objectives pursued by it in the Member State concerned and does not go beyond what is necessary to achieve them”.²²⁷⁹ In *ParkingEye Ltd v Beavis*²²⁸⁰ the Supreme Court held that a term in a contract under which a consumer parked for free in a car park for up to two hours, but who incurred a charge of £85 for overstaying this permitted period was not unfair even though this amount did not reflect the potential loss caused by its breach to the managers of the car park,²²⁸¹ as the amount was not disproportionate to the legitimate interest of the managers of the car park, its owners and its other users in the efficient management of the car park.²²⁸²

The wider context of the penalty clause

- 40-332 Finally, in *A v B*²²⁸³ the Court of Justice considered the criteria to be used for the assessment of the fairness of a term imposing the payment of sums on breach of various obligations of the consumer in the context of a contract of tenancy of a social housing dwelling with a monthly rent of €648.96. The contract in issue contained a number of penalty clauses (so-termed by the Court of Justice), including on breach by the consumer tenant (B) of a prohibition of sub-letting (€5,000 without prejudice to the right of the landlord (A) to full compensation for its damage suffered) and a “residual” penalty clause for breaches of the contract where no other penalty clause applied.²²⁸⁴ The tenant left occupation of the property and sub-let it to C at a higher rent than the one B paid to A. A therefore sued B for the penalty of €5,000 plus restitution of B’s profit (the difference between the two rents), the latter being available under a provision in the national civil code.²²⁸⁵ The national court held that B was in breach both of its obligation to occupy the dwelling and the prohibition on subletting, but referred to the Court of Justice the relevance of the other penalty clauses in the contract which had not been invoked by A in the proceedings. In this respect, while the Court acknowledged that where more than one term in a consumer contract requires the consumer to pay sums in compensation for failure to perform the same obligation, the national court should assess the cumulative effect of all such terms in assessing their disproportionate effect, whether or not the trader actually insists on their enforcement,²²⁸⁶ but this was not the case where the trader invoked and could invoke only a single penalty clause for the breaches committed by the consumer and where therefore there could be no cumulative penalties payable for a single breach, even though the contract contained further penalty clauses.²²⁸⁷ However, the Court of Justice required the national court to consider the fairness of the penalty clauses in the context of the other terms of the contract (reflecting in particular “the degree of interaction between the term at issue and other terms having regard, inter alia, to their respective scope”²²⁸⁸), and more generally to all the circumstances of the case,²²⁸⁹ and in particular to have regard to “the nature of the obligation in the context of the contractual relationship at issue, inter alia, whether that obligation is of essential importance”.²²⁹⁰ In this respect:

“... since the lease relates to social housing, it is clear that that prohibition and that obligation [to reside personally in the rented dwelling] are of a special nature, which forms part of the very essence of the contractual relationship.”²²⁹¹

The Court of Justice further held that A’s claim for restitution of profits arose out of a national legislative provision and not under a term of a contract and so fell outside the scope of the controls of the 1993 Directive, although it could be relevant to the fairness of the penalty clause if the national court found that the law also imposed a penalty for breach of the obligation.²²⁹²

Cancellation clauses

40-333

“7.A term which has the object or effect of authorising the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the trader to retain the sums paid for services not yet supplied by the trader where it is the trader who dissolves the contract.”

This example in the indicative list reflects one earlier contained in the [1999 Regulations](#) implementing the 1993 Directive.²²⁹³ It could be argued that an executory contract which contains a term permitting either party to “dissolve”²²⁹⁴ it without any prejudicial consequence (such as the payment of expenses or the loss of a deposit) is itself void for lack of consideration, for consideration is illusory where it is alleged to consist of a promise the terms of which leave performance entirely to the discretion of the promisor (unless something else of value in the eyes of the law is required instead).²²⁹⁵ However, this is clearly not the assumption of the [2015 Act](#) (nor indeed of the [Unfair Contract Terms Act 1977](#)²²⁹⁶), which is that such clauses are, in principle, valid. Moreover, from the point of view of consumer protection, it does not help a consumer to say that a clause which allows a trader to cancel without prejudicial consequence renders the contract as a whole void, for this releases the trader just the same, whereas a holding that the clause is unfair means merely that the *clause* does not bind the consumer, thereby leaving the *contract* binding for both.²²⁹⁷ Conversely, however, a term which allows a trader to retain a deposit when the consumer cancels the contract may well be held fair. So, for example, a clause requiring the parents of a pupil accepted at an independent school to give a term’s written notice when cancelling their acceptance of a place, failing which a term’s fees would be payable, was held fair within the meaning of the [1999 Regulations](#).²²⁹⁸ In the view of the CMA the factors relevant to the fairness of a cancellation clause include whether the trader’s rights on cancellation are excessive or whether they undermine the consumer’s own rights to cancel; whether the trader can cancel at will, for vaguely defined reasons, on the ground of the consumer’s breach of contract however trivial or, conversely, whether the trader can cancel only where performance is impossible or impractical, or on the ground of the

consumer’s serious misconduct.²²⁹⁹ And as regards the second aspect of the example in para.7, the CMA considers that:

“... cancellation clauses which allow the trader to cancel without acknowledging any right on the part of consumers to a refund of prepayments can be particularly open to abuse.”²³⁰⁰

Termination for breach

- 40-334 An important type of term which may be seen as vulnerable to a finding of unfairness (and which has been seen by the CMA as falling within the examples in para.7 of the “indicative list”²³⁰¹) is one which allows the trader to terminate the contract on a minor breach by the consumer, whether this stems from a very slight breach of a significant term or the breach of a very minor term of the contract (notably, where the contract classes the terms in question as “conditions” as opposed to warranties).²³⁰² Moreover, a contract term which sets the consequences of termination of the contract by the trader may be held unfair. For example, in *Ang v Reliantco Investments Ltd* a dispute arose between a trader which offered investments in financial products and services through a web-based trading platform and a consumer who opened an account for this purpose.²³⁰³ The High Court found that the consumer was in breach of terms of the contract under which the account had been opened by permitting her husband to use the account and it held that, under this contract, these breaches entitled the trader to terminate the consumer’s account.²³⁰⁴ However, a further question was whether these breaches entitled the trader to “annul or cancel” the consumer’s open trading position on the ground of these breaches, rather than “closing” the open position and allowing the consumer to realise the gains made. In this respect, on the assumption that as a matter of their construction certain terms of the contract so allowed (which they did not²³⁰⁵), the High Court held that the terms were unfair and not binding on the consumer under s.62 of the Consumer Rights Act 2015, as they would permit the trader

“... for what might be trivial breaches, to deprive the consumer of what might be very significant gains showing on her open trading position”

and, in considering the requirement of good faith, the trader could not reasonably have assumed that the consumer would have agreed to the terms in individual negotiations.²³⁰⁶

Terms relating to notice in contracts of indeterminate duration

40-335

“8.A term which has the object or effect of enabling the trader to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so. This is subject to paragraphs 21 (financial services) and 24 (sale of securities, foreign currency etc).”

Terms in a contract of indefinite duration which allow one or other party to terminate it are, in principle, valid in English law, as may be seen from the law governing contracts of employment and partnerships.²³⁰⁷ Paragraph 8 of Pt 1 of Sch.2 describes a term which seeks to provide for the termination of a contract of indefinite duration without reasonable notice (a concept familiar to the common law) unless there are serious grounds for doing so.²³⁰⁸ The OFT applied this example to a contract for the provision of estate agency services which allowed the agency to cancel the contract at any time, preferring its replacement with a term which allowed termination only on 14 days’ notice.²³⁰⁹ As para.8 notes, however, paras 21 and 24 of Pt 2 of Sch.2 of the 2015 Act exclude from its scope a range of terms in contracts for the supply of financial services, transactions in transferable securities, etc.²³¹⁰ This does not mean, however, that the terms covered by this exclusion cannot be found to be unfair, as may be the case, for example, where a term is drafted in such a way that it could in practice be used by the trader arbitrarily to suit its own interests.²³¹¹

“Automatic extension clauses”

40-336



“9.A term which has the object or effect of automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express a desire not to extend the contract is unreasonably early.”

²³¹²



In the CMA’s view, a term which fixes the duration of a contract is one of the most important to consumers and so:

“If a term can be used—relying on a consumer’s inertia or insufficient information—to extend the contract period beyond what the consumer would normally expect, it is liable to be considered unfair.”²³¹³

Relevant for this purpose is whether the term renews a contract automatically, and, if so, whether it informs the consumer properly about this and the effects of renewal; whether the contract as renewed contains reasonable provision for cancellation by the consumer; and whether the notice period for cancellation is over-long.²³¹⁴ Thus, for example, a term in a contract for the provision of a vehicle declamping service which stipulated that the annual contract was to be renewed unless the consumer gave notice not less than four weeks before its expiry was considered potentially unfair by the OFT (it being coupled with a clause requiring the payment of a very high percentage of the annual fee if the period for notice was not observed).²³¹⁵

Binding terms and the relevance of notice

40-337

“10. A term which has the object or effect of irrevocably binding the consumer to terms with which the consumer has had no real opportunity of becoming acquainted before the conclusion of the contract.”²³¹⁶

As has already been noted, this example of a possible unfair term has very important implications.²³¹⁷ For the vast majority of consumer contracts written standard terms contain a term which binds the consumer irrevocably to the contract, although some rely simply on a requirement of a consumer’s signature. Where a contract does contain such a term, then para.10 suggests that *this term* may be unfair in the absence of a real opportunity of knowing about *other terms* of the contract and if it is, *this term* (and therefore the contract as a whole) will not be binding on the consumer.²³¹⁸ In this way, the 2015 Act allows a court to make more onerous requirements of notice than has been the case at common law.²³¹⁹ In the CMA’s view:

“Any provision or notice which seeks to bind the consumer to accept or comply with terms which are ‘hidden’—or, in legal jargon, ‘incorporated’ solely ‘by reference’—is liable to challenge. This issue commonly arises in the context of online transactions—for example, where a condition of receiving digital content is the acceptance of terms and conditions through a tick box against a provision which has the purported effect of binding the consumer to ‘terms’ of the agreement in circumstances where the consumer has no reasonable prospect of reading and understanding them.”²³²⁰

Relevant factors for this purpose include the appropriateness of the chance for the consumer to become acquainted with the terms, the extent to which the consumer is properly informed about the terms and, especially where terms are long and/or unavoidably complex, the provision of a “cooling-off” period during which the consumer may cancel the contract without financial sanction.²³²¹

Variation clauses and related clauses

40-338

“11. A term which has the object or effect of enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract. This is subject to paragraphs 22 (financial services), 23 (contracts which last indefinitely) and 24 (sale of securities, foreign currency etc).

12. A term which has the object or effect of permitting the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it. This is subject to paragraph 23 (contracts which last indefinitely).

13. A term which has the object or effect of enabling the trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or services to be provided.

14. A term which has the object or effect of 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).

15. A term which has the object or effect of permitting a trader to increase the price of goods, digital content or services without giving the consumer the right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded.”²³²²

These five examples of terms which may be unfair are related, each providing a trader with a unilateral power either to determine the characteristics of the subject matter of the contract or the price after the consumer is bound, or to vary an aspect of the contract (its terms, its subject matter or its price) to the possible prejudice of the consumer.²³²³ In this way, the trader can allow itself to provide goods, digital content or services to the consumer in a way other than the consumer expected on making the contract. As is noted by the Act in the indicative list itself as quoted above, the scope of the examples provided by para.11 (variation of terms), 12 (trader determination of the characteristics of the subject matter) and 14 (determination of price after consumer bound) is limited by the [2015 Act](#) in various ways regarding certain terms in contracts for the provision of financial services, transactions in transferable securities, etc.²³²⁴ This suggests that such a term is not likely to be seen as unfair, but this will depend on the circumstances. As regards the variation of terms generally, the CMA considers that:

“A right for one party to alter the terms of the contract after it has been agreed, regardless of the consent of the other party, is under strong suspicion of unfairness ... A contract can be considered balanced only if both parties are bound by their obligations as agreed.”²³²⁵

On the other hand, a term is more likely to be found fair if it has a narrow effect, for example, allowing variations to reflect changes in the law or where it can be exercised only in circumstances, by a method and for reasons which are clearly stated in the contract.²³²⁶ Also relevant for this purpose are whether the variation clause is in the exclusive interest of the trader, its transparency more generally, and the vulnerability of the consumer, in particular whether they can realistically escape the impact of the changes by cancelling the contract.²³²⁷ For example, in *Peabody Trust Governors v Reeve*,²³²⁸ a term in a standard contract of tenancy used by a registered social landlord which purported to reserve to itself:

“... almost carte blanche in the field of variations, apart from the areas of rent and statutory protection, so as to provide in effect that the terms of the tenancy agreement will be whatever the [landlord] says they are to be from time to time”

was held unfair: the tenant’s right to walk away from the contract in such a context is illusory as he has no real choice.²³²⁹ In the case of terms under which the trader has a power to determine or vary the subject of the contract, the factors seen by the CMA as relevant to their fairness include their clarity; whether the variation is minor (for example, involving minor technical adjustments or changes required by law or necessity); if the variation is more significant, then the provision of a genuine right in the consumer to cancel; setting out valid, clear reasons for any variation to be made and how these will affect the consumer; and the provision of notice to the consumer of any variation to be made.²³³⁰ Moreover, it should be noted that, quite apart from these controls on the fairness of variation clauses in Pt 2 of the 2015 Act, as will be seen, Pt 1 of the Act provides that certain categories of information provided by the trader about goods or digital content are to be treated as included as a term of the relevant contract, and that:

“... any change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader”;

similar provision is made in respect of information provided by the trader in respect of a services contract.²³³¹ Finally, in the case of terms which allow the trader to determine or to vary the price payable, as CMA robustly expresses it, “[a]ny purely discretionary right to set or vary a price after the consumer has become bound to pay is obviously objectionable”.²³³² The factors seen by the CMA as relevant to the fairness of price variation clauses include how clearly they set out the circumstances in which the variation may be made so that the consumer can foresee the possible changes; whether the level or limits of price increases are specified; whether the possible changes are linked to a published price index; and whether, on variation, the consumer has a genuine right to escape the effects of the contract.²³³³ As will be seen, these factors reflect in particular the decisions of the Court of Justice of the EU in *Invitel*²³³⁴ and *RWE Vertrieb AG*²³³⁵ discussed in the following paragraphs.

Du Plessis v Fontgary Leisure Parks Ltd

40-339 In *Du Plessis v Fontgary Leisure Parks Ltd* the Court of Appeal considered the fairness under the **Unfair Terms in Consumer Contracts Regulations 1999** of a term in a licence agreement between the owner of a holiday caravan and the owner of a holiday caravan park (from which the caravan was purchased) in respect of use of a designated pitch for 10 years for a period of just over 10 months each year.²³³⁶ Under the contract, the caravan owner paid an annual pitch fee reviewable every year under a procedure complying with an industry-wide code of practice, this procedure including a possibility of referring the proposed fee increase to a special arbitrator if 51 per cent or more of the caravan owners on the site objected to it. Under the relevant term, any review of the pitch fee by the park owner was to be made having regard to five specified criteria (including changes to the costs of living and sums spent on the facilities) or to “any other relevant factor”. A year after the conclusion of the contract, the park owner sought to introduce a grading of pitches so as to charge different fees according to their size and location and it notified all caravan owners (including the claimant) of this intention. The increases were not sent to arbitration as the claimant did not have the support of more than 51 per cent of the caravan owners to do so. After grading, the claimant’s pitch fell into the highest grade and her fee chargeable increased from £1,895 to £2,160 and, on her refusal to pay the increase, her contract was terminated and she sold her caravan at a loss. Before the Court of Appeal, the claimant argued that the term of the contract under which the park owner had purported to increase her pitch fee did not as a matter of construction allow increases on the ground of site grading and that, if it did, it was unfair and not binding on her under the **1999 Regulations**. The Court held, first, that the increases caused by the introduction of grading fell within the words “any other relevant factor” in the relevant term as a matter of construction, there being no room for application of reg.7(2)’s contra proferentem rule as this phrase was not ambiguous.²³³⁷ Secondly, the Court held that this aspect of the relevant term was not unfair under the Regulations as it did not create an imbalance in the parties’ rights and obligations to the detriment of the claimant consumer: it formed part of a carefully balanced review procedure, any increase could be challenged by the courts even in the absence of arbitration, and the relevant term did not fall within any of the paragraphs in the Schedule to the Regulations on which the claimant relied²³³⁸: the claimant had a proper opportunity to become acquainted with the terms of the licence agreement before she entered into it; the relevant contract did not enable the defendant to alter the terms of the licence agreement unilaterally without a valid reason which was specified in the contract, nor did it alter the characteristics of the service which it provided; and the licence agreement gave the claimant the right to terminate if she found the pitch fee to be unacceptable.²³³⁹ Moreover:

“... the method by which the pitch fee would be varied was ‘explicitly described’, as required by paragraph 2(d) of Schedule 2 to the 1999 Regulations.”²³⁴⁰

Invitel case

- 40-340 Subsequently, in *Invitel*²³⁴¹ the Court of Justice of the EU set out the criteria to be taken into account by a national court in considering a term in a contract for the supply of telephone services which imposed a fee in respect of payment of invoices by “money order” (or postal order) without specifying the method of the calculation of these fees. The Court of Justice treated such a term as being one which allowed the service provider to amend the fees charged for the service, as it meant that “the consumer pay[s] fees which had not initially been agreed between the parties”.²³⁴² Having considered the examples in the “indicative list” of terms in the Annex to the Directive, paras 1(j), 1(l) and 2(b) and (d),²³⁴³ the Court held that:

“... in assessing the unfair nature of a term such as that at issue in the main proceedings, the question whether the reasons for, or the method of, the variation of the fees connected with the service provided were specified and whether the consumer had the right to terminate the contract is particularly relevant.”²³⁴⁴

The actual opportunity of the consumer to examine the terms and their consequences and the service provider’s obligation under art.5 of the Directive to draft the terms in plain intelligible language were also relevant.²³⁴⁵ Overall,

“... the possibility for the consumer to foresee, on the basis of clear, intelligible criteria, the amendments, by a seller or supplier, of the [general business conditions] with regard to the fees connected to the service to be provided is of fundamental importance.”²³⁴⁶

Where certain aspects of the method of amendment of fees are required by “mandatory statutory or regulatory provisions” within the meaning of art.1(2) of the Directive,²³⁴⁷ or where those provisions provide a right for the consumer to terminate the contract, then the consumer must be informed of these provisions.²³⁴⁸ Although the Court of Justice’s guidance in *Invitel* was given in the context of a different type of consumer contract and a different type of variation clause,²³⁴⁹ it is submitted that, had the Court of Appeal in *Du Plessis v Fontgary Leisure Parks Ltd*²³⁵⁰ had the benefit of the guidance given by the Court of Justice in *Invitel*,²³⁵¹ it might have reached a different conclusion on the fairness of the tariff review clause before it in that case. For, while the circumstances taken into account by the Court of Appeal would still have argued in favour of the fairness of the term,²³⁵² it could have been argued that the term which provided for an increase in the fee payable by the caravan owner (the consumer) having regard to “any other

relevant factor” (even though it described the method of variation explicitly) did not allow the caravan owner “*to foresee*, on the basis of clear, intelligible criteria, the amendments” of the fees, a possibility which the Court of Justice in *Invitel* considered to be of “fundamental importance”. ²³⁵³

RWE Vertrieb AG

- 40-341 In *RWE Vertrieb AG*²³⁵⁴ the Court of Justice followed its earlier approach in *Invitel*²³⁵⁵ in the context of a standard term in a contract for the supply of gas to consumers which allowed the supplier unilaterally to vary the gas supply price without indicating the grounds, conditions or scope of such a variation.²³⁵⁶ While accepting that the decision as to the fairness of such a term is for the national court to decide, the Court of Justice emphasised the importance for this purpose of the information provided to the consumer *before* the contract was made, for

“... [i]t is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier.”²³⁵⁷

In the context of assessing a price variation clause, the national court must consider whether the seller or supplier set out in a transparent fashion the reason for and method of the variation of the charges for the service to be provided, so that the consumer can foresee the alterations that may be made and, secondly, whether the consumer has the right to terminate the contract if the charges are in fact altered.²³⁵⁸ While the Annex to the Directive at several points acknowledges that in contracts of indeterminate length the supplier has a legitimate interest in being able to alter the charge for the service,²³⁵⁹ a lack of information for the consumer before contract:

“... cannot, in principle, be compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges and of their right to terminate the contract if they do not wish to accept the variation.”²³⁶⁰

In this way, the strict requirements as to the provision of information for consumers and the acceptance of the possibility of a right in the seller unilaterally to vary the terms of the contract “correspond to a balancing of the interests of the two parties”.²³⁶¹ Finally, it is also “of fundamental importance ... that the right of termination given to the consumer is not purely formal but can actually be exercised” and, for this purpose, various circumstances should be taken into account, including whether or not the market concerned is competitive.²³⁶² As the Court of Justice later summarised, standard terms which allow the trader to make a unilateral adjustment of the terms “must meet the requirements of good faith, balance and transparency laid down” by the 1993 Directive.²³⁶³

Terms giving trader rights of determination

40-342

“16.A term which has the object or effect of giving the trader the right to determine whether the goods, digital content or services supplied are in conformity with the contract, or giving the trader the exclusive right to interpret any term of the contract.”²³⁶⁴

There are two distinct types of term identified here which may be unfair.²³⁶⁵ First, terms which allow the trader to decide whether or not the subject matter of the contract (goods, digital content or services) are in conformity with the contract and, therefore, whether or not the trader is itself in breach of contract, for example, where a person appointed by the trader to repair goods is empowered to decide whether the problem requiring repair is the responsibility of the trader or caused by the consumer’s own action.²³⁶⁶ This type of term is objectionable as traders “can unfairly refuse to acknowledge that they have broken [their own contractual obligations] and deny redress to the consumer” in a similar way to exemption clauses.²³⁶⁷ An example of the second type of term may be found in a clause which provides that:

“Any dispute or difference which may arise in regard to the interpretation of the Rules shall be determined by the Management, whose decision shall be final.”²³⁶⁸

According to the CMA, such a term is objectionable as it puts the trader “effectively in a position to alter the way [the contract] works so as to suit themselves” in a way which is similar to a clause allowing it to vary the terms.²³⁶⁹ A term which allows the consumer to refer any decision on the interpretation of the contract to an independent expert or arbitrator may be a factor in its fairness, though terms requiring compulsory arbitration involving sums of less than £5,000 are always unfair and those involving more may be unfair.²³⁷⁰

“Entire agreement clauses”

40-343

“17.A term which has the object or effect of limiting the trader’s obligation to respect commitments undertaken by the trader’s agents or making the trader’s commitments subject to compliance with a particular formality.”²³⁷¹

The first part of this paragraph describes an important group of contract terms, often termed “entire agreement clauses”. These clauses are of various kinds, but in general their aim is to ensure that

a court concludes that it was the intention of the parties that a written document contains all the terms of the contract, for in the absence of such a finding a court can look at the oral as well as the written agreement of the parties²³⁷² and/or that it does not contain any promises made orally by the trader or its agents. Here, the CMA is clear as to the unfairness of such terms:

“Good faith demands that each party to a contract is bound by his or her promises and by any other statements which help secure the other party’s agreement. If a contract excludes liability for words that do not appear in it, there is scope for consumers to be misled with impunity. ... These objections apply equally to other types of wording which have the same effect.”²³⁷³

For example, the CMA considered unfair the following term:

“The placing of an order with the company will be deemed to bind the customer to the following terms and conditions and no oral representation shall bind the company. Any variation or alteration in the following terms and conditions shall only be binding upon the company if made in writing and signed by a director of the company.”²³⁷⁴

- 40-344 As will be seen in this illustration, sometimes an entire agreement clause will seek to avoid liability in a seller or supplier by unreasonably restricting or purporting to restrict the authority of its agent.²³⁷⁵ So, it has been held that where in the context of a particular type of contract (such as for the supply of replacement doors and windows) there is a very clear risk of statements being made by agents which do not conform to the contract’s written terms, this risk is:

“... sufficiently great to make it unfair and contrary to the requirement of good faith for a supplier of such products to make use of a term which restricts liability for such statements”,

e.g. by requiring any representation or promise made before or at the time of conclusion of the contract to be added to the contract and signed by both parties.²³⁷⁶ On the other hand, in *Shaftsbury House (Developments) Ltd v Lee*²³⁷⁷ an entire agreement clause excluding liability for any representations or statements not included in the written agreement in a contract of sale by a developer of an apartment “off plan” was held not unfair within the meaning of the **Unfair Terms in Consumer Contracts Regulations 1999**, although on the facts this decision was hypothetical given that the court had found no actionable misrepresentations in the circumstances. By contrast, in *Djurberg (t/a Hampton Riviera) v Small*, the High Court held an entire agreement clause in a contract for the sale of a luxury house-boat was unfair given the bargaining position of the contracting parties and their dealings.²³⁷⁸ Finally, it should be noted that **Pt 1 of the 2015 Act** gives contractual force to statements made by a trader to a consumer in relation to goods contracts,

digital content contracts and services contracts, and rules generally that where this is the case, liability for breach of these statutory terms cannot be excluded or restricted by contract without any assessment of the fairness of that exclusion or restriction.²³⁷⁹

“Unequal opt out clauses”

40-345

“18.A term which has the object or effect of obliging the consumer to fulfil all of the consumer’s obligations where the trader does not perform the trader’s obligations.”²³⁸⁰

An example of such a term may be found in a contract for the provision of airtime by a mobile telephone service which allowed its provider “from time to time without notice to suspend the Network service”, but further provided that:

“Notwithstanding any suspension of the Network service … the Customer shall remain liable for all charges due throughout the period of suspension unless [the supplier] at its sole discretion determines otherwise.”²³⁸¹

Not surprisingly, given its width, the OFT considered that this particular example of an “unequal opt out clause” was potentially unfair, and negotiated its replacement with a clause which advised the consumer to arrange insurance to cover any monthly charges and provided for a refund by the provider of the service if the consumer is unable to use the services in certain circumstances for a continuous period of three days.²³⁸² Another possible way in which a term could be fair may be for the contract period to be extended without additional cost and thereby ensure that the consumer receives all the services and benefits contracted for.²³⁸³

Assignment by the trader

40-346

“19.A term which has the object or effect of allowing the trader to transfer the trader’s rights and obligations under the contract, where this may reduce the guarantees for the consumer, without the consumer’s agreement.”²³⁸⁴

According to the CMA:

“If a business changes hands, then rights and obligations under any contracts with consumers are likely to transfer with it. As a result the consumers affected may find

themselves dealing with someone else if their contract was a continuing one (like an insurance contract) or, if it was for a single transaction, where any problem arises with the goods, services or digital content that were supplied to them under that transaction.”²³⁸⁵

The example in para.19 refers to terms which allow the trader to transfer the trader’s *rights and obligations*. As a matter of general law the trader can assign only its rights under the contract, but, as the CMA notes, in practice, parties often behave as though the burden of the contract can also be assigned, and that where this is the case such a course of dealing can be classed as a novation or an assignment of the benefit of the contract coupled with the subcontracting of the obligations to the new business; in its view, clauses which allow such a transfer also fall within the example in para.19.²³⁸⁷ The example in para.19 illustrates how a clause allowing such a transfer may be fair, that is, where it subjects the transfer to the consumer’s agreement.²³⁸⁸ Finally, it should be noted that the 2015 Act put in place special controls on the resale (assignment) of tickets for a recreational, sporting or cultural event in the United Kingdom (secondary ticketing).²³⁸⁹

Assignment by the consumer

⁴⁰⁻³⁴⁷ While a term described in para.19 of Pt 1 of Sch.2 of the 2015 Act (quoted above²³⁹⁰) does not concern assignment of rights by the consumer, a trader’s assignment clause is particularly likely to be unfair if the contract prevents the consumer from transferring his own rights under the contract, given the reference in the general test of unfairness to the need for rights to be balanced.²³⁹¹ And the CMA has intervened so as to prevent certain consumer contracts from preventing the assignment by the consumer of his rights under the contract more generally.²³⁹² In its view:

“Guarantees, while they remain current, can add substantial value to the main subject matter of the contract. If consumers cannot sell something still under guarantee with the benefit of that guarantee, they are effectively deprived of part of what they may reasonably feel they have paid for.”²³⁹³

On the other hand, the CMA accepts that traders have a legitimate interest in ensuring that they are not subject to baseless claims under guarantees and so there is unlikely to be objection to terms which require purchasers (or “assignees”) of goods, if they wish to rely on the guarantee, to establish that the guarantee was properly assigned, as long as any procedural requirements are reasonable.²³⁹⁴ In a different context, “non-transferable ticketing” in air-travel contracts was the subject of criticism by the OFT.²³⁹⁵

Choice of law clauses

- 40-348 In *Verein fur Konsumenteninformation v Amazon EU Sarl*, the Court of Justice of the EU considered the relationship between the fairness under the Unfair Terms in Consumer Contracts Directive 1993 of a standard choice of law clause in a consumer contract and the rules governing choice of applicable law in the Rome I Regulation²³⁹⁶ in the context of a term of an online trader’s standard contract which designated the law of Luxembourg (which was the place of the trader’s “seat”) as “applicable to the exclusion of the United Nations Convention on the international sale of goods”.²³⁹⁷ The Court noted that arts 3(1) and 6(1) of the Rome I Regulation recognise that in principle the parties to a consumer contract may choose the law applicable to it, but that art.6(2) adds that, subject to certain conditions, any such choice of law does not “have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement” under the law of his habitual residence²³⁹⁸ and this may include national law rules implementing the 1993 Directive even where they ensure a higher level of protection for the consumer than the Directive requires.²³⁹⁹ The Court of Justice therefore considered the proper approach to a national court’s consideration of the fairness of such a express choice of law under the 1993 Directive, its proper starting point being the position under the Rome I Regulation, and that therefore:

“... a pre-formulated term on the choice of the applicable law designating the law of the Member State in which the seller or supplier is established is unfair only in so far as it displays certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties.”²⁴⁰⁰

For this purpose, the unfairness of a such a term may result from its failure to conform to the requirement of plain and intelligible language by the trader in failing to inform the consumer that the effects of such a term are qualified by the mandatory statutory provisions of the consumer’s place of residence provided for his protection.²⁴⁰¹ If the national court finds that the trader has failed to do so and “so leads the consumer into error by giving him the impression that only the law of [the Member State chosen] applies to the contract”, then the choice of law clause would itself be an unfair term.²⁴⁰²

Other potentially unfair terms

- 40-349



The successive guidance of the OFT and the CMA contains a number of types of terms found in consumer contracts which are seen as likely to be considered to be unfair.²⁴⁰³ These include terms which allow the supplier to impose unfair financial burdens, such as a right to demand payment of unspecified amounts by way of security deposit,²⁴⁰⁴ terms which put on the consumer the onus to judge technical matters in which the supplier is expert but in which the consumer is not (for example, placing on a consumer the determination whether a driveway was ready for resurfacing with tarmacadam)²⁴⁰⁵; terms which transfer risks to the consumer where the risk is within the trader’s control, where it is one which the consumer cannot be expected to know about or where the trader can insure against it more cheaply,²⁴⁰⁶ terms where the apparent supplier of the service states in small print that he acts only as agent for another person (for example, in the provision of a holiday cottage)²⁴⁰⁷; and “unfair enforcement clauses”, for example, a term which grants to a seller of goods a right to enter the consumer’s home and repossess the goods in certain circumstances without recourse to the court.²⁴⁰⁸ The CMA has taken action to stop online gambling firms using unfair contract terms under which the firms could confiscate money from players’ accounts on the ground that they had not logged in for a certain amount of time.²⁴⁰⁹ And the CMA has advised on the fairness of terms used by the sellers of tickets for events which restrict their resale.²⁴¹⁰

U Finally, the CMA has advised generally on the unfairness of terms in consumer contracts in the context of the Covid-19 epidemic, taking the view in particular that contract terms which allow a trader to keep a consumer’s money (including deposits and payments in advance) on the frustration of the contract are likely to be unfair.²⁴¹¹

40-350

U Apart from these examples, the Law Commission has suggested that contract terms in sets of terms and conditions agreed when purchasing goods (particularly online) which delay the formation of the contract until dispatch of the goods may be unfair as they “potentially create an imbalance between retailer and consumer, as the consumer is obliged to pay money to the retailer without the retailer being under a contractual obligation to deliver the goods”.²⁴¹² Such a term therefore causes the risk of detriment to consumers in that the transfer of ownership rules do not apply causing the risk that on the insolvency of the trader they may not recover either the goods or payments made,²⁴¹³ the trader’s obligation to deliver within 30 days under s.28 of the 2015 Act does not apply as this obligation arises on “the day on which the contract is entered into”,²⁴¹⁴ and they may lose their rights under s.75 of the Consumer Credit Act 1974.²⁴¹⁵ Other types of clauses which may be thought to be potentially unfair are those which restrict a consumer’s legal or equitable rights, such as in relation to discharge of a guarantee on variation of the contract or negligence in relation to the security.²⁴¹⁶ Moreover, it has been held that a contract term which provides that the consumer must indemnify the business in respect of its legal or other costs in any action or proceedings and pay it a reasonable sum in respect of time spent in connection with such an action or proceedings was unfair, even though the court saw the force of the argument

that such a term could protect the business against unfair treatment by the customer who could use the business’s unrecoverable costs to negotiate a discount on the unpaid contract price: the term remained unbalanced by any similar provision for the benefit of the consumer.²⁴¹⁷ Terms under which an estate agent charged commission on the renewal of a lease by the tenant and on the sale of the property to the tenant have been held unfair, although the court was careful to state that its decision did not mean that all renewal commission clauses were unfair since the clauses in question were capable of operating onerously and not enough had been done to draw them to the attention of the consumer.²⁴¹⁸ On the other hand, it has been held that a term in a sale and leaseback contract under which the tenant/consumer loses the right to the final part of the purchase price (constituting a third of the total figure) on termination of the lease by the landlord under the tenancy agreement (where this final part would otherwise have been payable on expiry of ten years or the giving up of the tenancy by the tenant) was not unfair within the meaning of the **Unfair Terms in Consumer Contract Regulations 1999** on the ground that the term did not create a significant imbalance in the rights and obligation of the parties to the detriment of the consumer and was not contrary to the requirement of good faith.²⁴¹⁹ According to Longmore LJ, while it is possible to conceive of circumstances where such a term might create such an imbalance:

“... especially if the original contract price was below the market price and the rental market (or perhaps the sale market) was buoyant at the time of the possession ... the matter has to be judged at the time when the contract is made and it would be equally possible to envisage a stagnant market in which the landlord would find it difficult to re-let the property or even re-sell it. In those circumstances the retention of what is less than one third of the price does not cause any imbalance let alone a significant one”.²⁴²⁰

And it has been held that a term in a loan agreement under which the lender was entitled to recover the legal and other costs of enforcing its terms and recovering the money did not cause any significant imbalance in the parties’ rights and obligations to the detriment of the consumer and was not unfair.²⁴²¹ A term in a contract between a provider of care homes and their residents which imposed payment of an “administration fee” on concluding the contract was held not unfair given that the provider “had provided material and distinct pre-admission services to prospective residents and their families or representatives and there was no reason of principle why [the provider] should not have made a separate charge for the significant costs of those services”; as a result, the term did not cause a significant imbalance in the parties’ rights and obligations under the contract.²⁴²²

U Finally, it has been held that a claimant who had contracted for the provision of a family burial plot in an area of a cemetery providing for Muslim burials on the express basis (in the face of the Covid-19 pandemic) that there would be two-tier burials until further notice and that the upper tier would not be reserved for the family of the deceased in the lower tier, had no arguable case that this term was unfair within the meaning of the s.62 of the 2015 Act.²⁴²³

Footnotes

- 2182 1993 Directive art.3(3) and Annex; [1999 Regulations reg.5\(5\)](#) and [Sch.2](#).
- 2183 [s.63\(1\)](#); [Sch.2 Pts 1](#) and [2](#) respectively. The 2015 Act s.64(6) provides that terms listed in [Sch.2 Pt 1](#) cannot fall within the exclusion provided by [s.64](#), but [s.63\(2\)](#) clarifies that a term listed in [Sch.2 Pt 2](#) (which is thereby excluded from the scope of the examples in the indicative list in [Sch.2 Pt 1](#)) may nevertheless be assessed for fairness unless it is excluded from the scope of the test of fairness either as a term reflecting “mandatory statutory or regulatory provisions”, etc. under [s.73](#) (on which see above, paras [40-264](#)—[40-271](#)) or as a term specifying the main subject matter of the contract, etc. under the “core exclusion” in [s.64](#) (on which see below, paras [40-351](#) et seq.).
- 2184 [2015 Act Sch.2 Pt 1](#); [1999 Regulations Sch.2](#).
- 2185 [2015 Act Sch.2 Pt 1](#) paras 5, 12 and 14, on which see below, paras [40-329](#) and [40-338](#).
- 2186 [2015 Act s.63\(3\)–\(5\)](#).
- 2187 [2015 Act s.63\(2\)](#) and cf. [1999 Regulations reg.5\(5\)](#), [Sch.2 para.1](#); 1993 Directive art.3(3) and Annex.
- 2188 *Matei v SC Volksbank România SA (C-143/13) EU:C:2015:127, 26 February 2015* para.60.
- 2189 See, e.g. *Britannia Parking Group Ltd v Semark-Jullian [2020] E.C.C. 25* (Salisbury County Ct) at [37] holding that the unfairness of a contract term “cannot be determined simply on the basis that the term ‘fits’ the examples given” in the indicative list. Under the 1993 Directive, a Member State may declare the terms on the list (or other terms) to be unfair in all circumstances as the Directive requires only minimum harmonisation: 1993 Directive art.8 and see *Tóth v ERSTE Bank Hungary Zrt (C-34/18) EU:C:2019:764* para.47. On “minimum harmonization” see above, paras [40-023](#) and [40-225](#).
- 2190 cf. the position under the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final, Annex I art.84 CESL (a list of “contract terms which are always unfair”) and art.85 CESL (a list of “contract terms which are presumed to be unfair”). On the proposal, see Vol.I, para.1-015.
- 2191 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt (C-472/10) EU:C:2012:242, 26 April 2012* para.26, and see below para.[40-340](#); *Sebestyén v Kovári (C-342/13) EU:C:2014:1857, 3 April 2014* at para.32; *Tóth v ERSTE Bank Hungary Zrt (C-34/18) EU:C:2019:764* at para.45.
- 2192 The exceptions made by [Pt 2 of Sch.2](#) of the 2015 Act were foreseen by the 1993 Directive Annex para.2 (and see also [1999 Regulations Sch.2 para.2](#)). However, [s.63\(2\)](#) makes clear that a term listed in [Pt 2 of Sch.2](#) may be assessed for fairness under [s.62](#) unless [s.64](#) (the core exclusion) or [s.73](#) (mandatory terms) applies to it. The ECJ has held that national legislation implementing the 1993 Directive need not itself include the list in the Directive’s Annex. However: “Inasmuch as [it] is

of indicative and illustrative value, it constitutes a source of information both for the national authorities responsible for applying the implementing measures and for individuals affected by those measures”, and so its “form and method of implementation [must] offer a sufficient guarantee that the public can obtain knowledge of it”. The Court held that the European Commission had failed to show that this requirement was not satisfied where (in Sweden) the Annex had been included in the travaux préparatoires of the implementing legislation and where these constitute an important aid to legislative interpretation: *Commission v Sweden (C-478/99) EU:C:2002:281, [2002] E.C.R. I-04147.*

- 2193 2015 Act s.64(6) which refers to the terms listed in Sch.2 Pt 1 and therefore not to the terms excluded from it by Sch.2 Pt 2; see below, paras 40-361 and 40-379.
- 2194 Above, para.40-260.
- 2195 See *SC Topaz Development SRL v Juncu (C-211/17) EU:C:2019:906 Order of 24 October 2019*, where a combined termination and penalty clause in a contract of sale of a building was seen as falling within three of the examples of terms in the 1993 Directive’s indicative list in its Annex (paras 1(d), (e) and (f)), on which see below, para.40-327.
- 2196 Unfair Contract Terms Guidance, Guidance on the Unfair Contract Terms Provisions in the Consumer Rights Act, (July 2015) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf [Accessed 1 September 2021].
- 2197 cf. 1993 Directive Annex para.1(a); 1999 Regulations Sch.2 para.1(a).
- 2198 cf. 1993 Directive Annex para.1(b); 1999 Regulations Sch.2 para.1(b).
- 2199 cf. 1993 Directive Annex para.1(q); 1999 Regulations Sch.2 para.1(q).
- 2200 See below, para.40-423 which notes the definition of the scope of the controls in s.65 by s.66.
- 2201 2015 Act s.66 and see below, para.40-423.
- 2202 See below para.40-423.
- 2203 Above, para.40-319.
- 2204 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015), para.5.2.2.
- 2205 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.2.1–5.11.6.
- 2206 1977 Act s.13 defines the “varieties of exemption clause” which it controls; the exception to this pattern of control is found in s.3(2)(b) of the 1977 Act: see Vol.I, paras 17-079 and 17-090.
- 2207 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.2.6. See also CMA, Consumer Law Compliance Review: Cloud Storage, Findings Report (27 May 2016), paras 5.59–5.66 available at <https://assets.publishing.service.gov.uk/media/57472953e5274a03750000d/cloud-storage-findings-report.pdf> [Accessed 1

- September 2021] (on exclusions or limitations of liability in contract for the provision of “cloud computing” services).
- 2208 OFT, Unfair Contract Terms Guidance OFT311, Annex A, p.8.
- 2209 *Domsalla v Dyason [2007] EWHC 1174 (TCC)*, at [94]–[97]. cf. *West v Ian Finlay and Associates [2014] EWCA Civ 316, [2014] B.L.R. 324* (“net contribution clause” whose effect was to limit the liability of an architect to its own reasonable responsibility for the loss or damage suffered by its employer not unfair in the circumstances): see above, para.[40-285](#).
- 2210 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015), para.5.8.3.
- 2211 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.8.4. On the right to reject the goods see [2015 Act s.20](#) and below, paras [40-515](#)–[40-519](#) and [40-521](#)–[40-522](#).
- 2212 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.8.6–5.8.7.
- 2213 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (C-415/11) 14 March 2013*. Formerly implemented in UK law by the [1999 Regulations Sch.2 para.1\(q\)](#).
- 2214 *Aziz (C-415/11)* at para.75. The CJEU has also seen Annex para.1(q) as relevant to the fairness of a term of a contract under which the consumer waives his or her rights against the trader arising under an earlier contract between them: *XZ v Ibercaja Banco SA (C-452/18) EU:C:2020:536* at para.77 and see above, para.[40-374](#).
- 2215 Regulation (EC) 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or of long delays in flights, on which see above, paras [37-054](#) et seq.
- 2216 *Bott & Co Solicitors v Ryanair DAC [2018] EWHC 534 (Ch), [2018] 3 Costs L.O. 375. [2018] EWHC 534 (Ch)* at [134]–[139]. It was further held that the term was not inconsistent with Regulation (EC) 261/2004 art.15’s prohibition of the exclusion or waiver of an airline’s obligations to passengers: *[2018] EWHC 534 (Ch)* at [130]–[131]. The CA upheld the latter decision as well as the decision refusing the solicitor an equitable lien in respect of sums for its fees over compensation awarded directly by the airline to passengers, but found it unnecessary to decide further issues (apparently including the issue of the fairness of the term within the meaning of the 1993 Directive): *[2019] EWCA Civ 143, [2019] 1 W.L.R. 3375* at [71]–[75]. However, the SC reversed the CA’s decision on the issue of equitable lien: *[2022] UKSC 8, [2022] 2 W.L.R. 634*.
- 2217 See above, para.[40-319](#).
- 2218 On the timing of a challenge to the validity of an arbitration clause on the grounds of its unfairness, see *Mostaza Claro v Centro Móvil Milenium SL (C-168/05) EU:C:2006:675, [2006] E.C.R. I-10421; Asturcom Telecommunicaciones SL v Rodriguez Nogueira (C-40/08) EU:C:2009:615, [2009] E.C.R. I-9579* below, paras [40-390](#) and [40-393](#) (note).

- 2221 An *arbitration agreement* means “an agreement to submit to arbitration present or future disputes or differences (whether or not contractual)”: [Arbitration Act 1996 s.89\(1\)](#) (as amended by the [2015 Act Sch.4 para.31](#)).
- 2222 The [Arbitration Act 1996](#) extends the application of [Pt 2 of the 2015 Act](#) in relation to a term which constitutes an arbitration agreement and provides that [Pt 2](#) “applies where the consumer is a legal person as it applies where the consumer is an individual”: [s.89–91](#) (as amended by the [2015 Act Sch.4 paras 31–33](#)); these sections apply whatever the law applicable to the arbitration agreement: [1996 Act s.89\(3\)](#); [Soleymani v Nifty Gateway LLC \[2022\] EWHC 773 \(Comm\)](#) at [96]–[98], holding that they applied also regardless of the place of the arbitration. See also [Unfair Arbitration Agreements \(Specified Amount\) Order 1999 \(SI 1999/2167\)](#) (in force 1 January 2000). Under Directive 2013/11/EU on alternative dispute resolution for consumer disputes [2013] O.J. L165/63 (the “ADR Directive”) art.10 Member States must ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity (as defined by art.4(1)(h)) is not binding on the consumer if it was concluded before the dispute has materialised and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute and that in ADR procedures which aim at resolving the dispute by imposing a solution the solution imposed may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. This requirement was implemented in UK law by the [Alternative Dispute Resolution for Consumer Disputes \(Competent Authorities and Information\) Regulations 2015 \(SI 2015/542\)](#) reg.14B (as inserted by [SI 2015/1392 reg.2\(8\)](#)) but amended on IP completion day so as to apply only to “domestic disputes” rather than also to “cross-border disputes”: [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.9(10) (the reference in [2018 Regulations reg.1\(3\)](#) to their coming into force on “exit day” must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020 s.39\(1\), s.41\(4\) and Sch.5 para.1](#)). See further on the ADR Directive and the [2015 Regulations](#) above, para.[40–164](#).
- 2223 cf. [Mostaza Claro v Centro Móvil Milenium SL \(C-168/05\) EU:C:2006:675, \[2006\] E.C.R. I-10421](#) where a Spanish court considered unfair an arbitration clause in a consumer mobile telephone contract which referred all disputes to arbitration and gave the consumer a period of 10 days in which to refuse arbitration or, if she did not, to file submissions and present evidence in her defence. While the ECJ reaffirmed that the question whether a term is unfair within the meaning of the 1993 Directive is for national courts (above, para.[40–275](#)), AG Tizziano noted (at paras [32]–[37] and [49] of his Opinion) that this clause “severely limited” the consumer’s fundamental right to a fair hearing. cf. [Soleymani v Nifty Gateway LLC \[2022\] EWHC 773 \(Comm\)](#) at [55]–[61], where it was held that a consumer resident in England could not apply to the HC for a declaration that an arbitration clause in a contract concluded with a New

- York company after an online auction was unfair under s.62 of the 2015 Act as the HC lacked jurisdiction under the Civil Jurisdiction and Judgments Act 1982 ss.15A–15E as it fell within the arbitration exception found in art.1(2)(d) of the Brussels Ibis Regulation, whose scope defined the ambit of the 1982 Act provisions.
- 2224 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.29.3.
- 2225 *(2003) 19 Const. L.J. 350*. See also *Mylcrist Builders Ltd v Buck [2008] EWHC 2172 (TCC), [2009] 2 All E.R. (Comm) 259* at [54]–[60], the court taking into account, inter alia, the low level of the sums involved relative to the costs of arbitration, the clause’s lack of transparency as to its effect, and the lack of involvement of the consumer’s professional advisers in drafting the contract.
- 2226 Above, para.40-226.
- 2227 *[2002] EWHC 2923*. This decision was strictly obiter given that the court held that the term was not incorporated into the contract at common law.
- 2228 *[2001] UKHL 52, [2002] 1 A.C. 481*, above, para.40-284.
- 2229 *[2002] EWHC 2923* at [131]. The court also noted that the guidance of the RIBA whose standard form the architect had used, clearly required its members individually to negotiate such an adjudication clause.
- 2230 *[2004] EWHC 138 (TCC)* at [31]. See similarly *Lovell Projects Ltd v Legg (TCC) [2003] B.L.R. 452*. cf. *Bryen & Langley Ltd v Boston [2005] EWCA Civ 973, [2005] All E.R. (D) 507 (Jul)* (arbitration clause in JCT standard contract held binding where the consumer imposed it on the supplier); *Heifer International Inc v Christiansen [2007] EWHC 3015 (TCC), [2008] All E.R. (D) 120 (Jan)* (Danish arbitration clause fair as inserted by consumer’s own lawyers: the 1999 Regulations were “not intended to protect clients from their own legal advisers”: at [299], per HH Judge Toulmin QC).
- 2231 See similarly *Khurana v Webster Construction Ltd [2015] EWHC 758 (TCC)* at [53].
- 2232 *[2012] EWCA Civ 409* and see also below, para.40-339.
- 2233 *[2012] EWCA Civ 409* at [57], per Jackson LJ (with whom Lloyd and Ward LJJ agreed).
- 2234 cf. the position as regards choice of law clauses discussed below, para.40-348.
- 2235 *Océano Grupo Editorial SA v Murciano Quintero (C-240/98 to C-244/98 EU:C:2000:346, [2000] E.C.R. I-4941*, especially at [22] and see below, para.40-390.
- 2236 In the CMA’s view, a contract term requiring resort to the courts of England and Wales despite the fact that the contract is being used in another part of the UK having its

- own laws and courts would be unfair as the consumer should not be forced to travel long distances and use unfamiliar procedures to defend or bring proceedings: Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.29.7.
- 2237 [\[2001\] Lloyd's Rep. Bank 240](#).
- 2238 This was the main ground of the decision: [Apostolakis \(No.2\) \[2001\] Lloyd's Rep. Bank 240](#) at [40]. The equivalent provision of art.13 of the Brussels Convention is found in Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (“the Brussels Ibis Regulation”) and see especially arts 17–19.
- 2239 [\[2001\] Lloyd's Rep. Bank 240, 250](#). It had previously been held that these contracts were “consumer contracts” for the purposes of the [1999 Regulations: Standard Bank London Ltd v Apostolakis \(No.1\) \[2000\] I.L. Pr. 766](#) and see above, para.40-039.
- 2240 [\[2015\] EWHC 1549 \(Ch\)](#) at [139]–[140]. See also [Weco Project ApS v Loro Piana \[2020\] EWHC 2150 \(Comm\)](#) at [108]–[110], where the HC held that a choice of international jurisdiction clause was not unfair within the meaning of [s.62 of the 2015 Act](#) and therefore that it did not need to consider, in particular, the argument that this control did not apply as it was incompatible with the scheme of the Brussels Ibis Regulation.
- 2241 [Ryanair DAC v DelayFix \(C-519/19\) EU:C:2020:933, 18 November 2020](#) at paras 58–59. The CJEU held that the proper approach under art.25 of Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Ibis Regulation) was for the court seized of a claim to consider the validity of such a choice of jurisdiction under the law of the Member State whose jurisdiction was designated by the clause, that law being interpreted so as to conform to the requirements of the 1993 Directive: [Ryanair DAC v DelayFix \(C-519/19\)](#) at paras 49–51.
- 2242 cf. 1993 Directive Annex para.1(c); [1999 Regulations Sch.2 para.1\(c\)](#).
- 2243 [de Moor \(1995\) 3 European Review of Private Law](#) 257, 269 and cf. below, para.40-333. cf. [Spreadex Ltd v Cochrane \[2012\] EWHC 1290 \(Comm\), \[2012\] Info. T.L.R. 1](#) at [14]–[16] where it was held that an agreement under which a consumer had access to an online interactive platform for the making of “spread bets” in commodities was not contractually binding for lack of consideration since on its terms the spread betting bookmaker made no commitment as to the provision of the online service, the holding of the consumer’s account or the acceptance of any bet made.
- 2244 Thomas, Textbook of Roman Law (1976), p.237.
- 2245 For example, while such a term may lead to the annulment of a contract in French law (being termed a *condition potestative*, see art.1174 C. civ. (as enacted) and Nicholas, The French Law of Contract, 2nd edn (1991), pp.159 et seq.), it would not necessarily do so in German law (cf. German Standard Contract Terms Act 1976 para.10(3), replaced from 2000 by BGB para.308(3)).
- 2246 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.12.1.

- 2247 See Vol.I, paras 27-081 and 27-084.
- 2248 Below, para.40-334.
- 2249 cf. 1993 Directive Annex para.1(d); [1999 Regulations Sch.2 para.1\(d\)](#).
- 2250 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.13.1.
- 2251 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.13.3.
- 2252 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.13.4.
- 2253 (*C-211/17*) [EU:C:2019:906](#), Order of 24 October 2019 (available in French).
- 2254 i.e. [2015 Act Sch.2 Pt 1 para.4](#).
- 2255 1993 Directive Annex para.1(d).
- 2256 *C-211/17*, Order of 24 October 2019 paras 55–57. The term also fell within the Annex para.1(e) (penalty clauses, on which see below, paras 40-328—40-332) and para.1(f) (cancellation clauses) on which see below, para.40-333.
- 2257 1993 Directive Annex 1, para.1(e); similarly [1999 Regulations Sch.2 para.1\(e\)](#).
- 2258 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.15.1–5.14.7.
- 2259 Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.15.3.
- 2260 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.15.3.
- 2261 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.15.4.
- 2262 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.15.5.
- 2263 [\[2011\] EWHC 1237 \(Ch\)](#), [\[2011\] E.C.C. 32](#) at [162]–[174]. See further on this case below, para.40-330.
- 2264 [\[2011\] E.C.C. 32](#) at [164].
- 2265 [\[2011\] E.C.C. 32](#) at [164].
- 2266 [\[2011\] E.C.C. 32](#) at [168].
- 2267 [\[2011\] E.C.C. 32](#) at [169].
- 2268 1993 Directive Annex 1, para.1(e) (“terms which have the object or effect of ... requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation”); similarly [1999 Regulations Sch.2 para.1\(e\)](#).
- 2269 And see CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.14.1–5.14.10.
- 2270 See [Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis \[2015\] UKSC 67](#), [\[2015\] 3 W.L.R. 1373](#), discussed Vol.I, paras 29-203 et seq. The decision of the SC in *ParkingEye Ltd* is noted below, para.40-331 and also above, paras 40-287—40-289. cf. Vol.I, paras 29-203 et seq. In *Kindlance v Murphy Unreported 12 December 1997, NI Ch D* an “interest acceleration clause” in a contract of mortgage was held unfair within the meaning of the [1994 Regulations](#). For an example of the upholding as fair

- of a clause requiring a consumer to pay a sum on his own termination of the contract, see *Gosling v Burrard-Lucas [1999] 1 C.L. 197*. For a further decision on allegedly penalty-like terms in financial services contracts see *Evans v Cherry Tree Finance Ltd Unreported 13 April 2007, Ch D* (early redemption clause with six-month deferment unfair in the circumstances).
- 2272 *Munkenbeck & Marshall v Harold [2005] EWHC 356 (TCC), [2005] All E.R. (D) 227*. The common law position was recast by the SC in *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis [2015] UKSC 67, [2015] 3 W.L.R. 1373*, discussed in Vol.I, paras 29-203 et seq.
- 2273 [2005] EWHC 356 (TCC) at [12] and [15].
- 2274 [2011] EWHC 1237 (Ch), [2011] E.C.C. 32.
- 2275 [2011] EWHC 1237 (Ch) at [188]–[190] referring to *Financings Ltd v Baldock [1963] 2 Q.B. 104*. See similarly SC *Topaz Development SRL v Juncu (C-211/17) EU:C:2019:906 Order of 24 October 2019* (available in French), para.59 and above, para.40-327.
- 2276 [2011] EWHC 1237 (Ch) at [207] referring to *Lombard North Central Plc v Butterworth [1987] Q.B. 527*.
- 2277 *Boyde v Clipper Ventures Plc 2013 S.C.L.R. 313; 2013 G.W.D. 12-243* (Sheriff Court of Edinburgh, decided under the 1999 Regulations).
- 2278 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (C-415/11) 14 March 2013*.
- 2279 *Aziz (C-415/11)* at para.74. Where such a term is held unfair and not binding on the consumer, the court must not instead apply the national rules otherwise applicable: below, para.40-411 discussing *Banco Bilbao Vizcaya Argentaria SA v Quintano Ujeta (C-602/13) EU:C:2015:397 Order of 11 June 2015*.
- 2280 [2015] UKSC 67, [2015] 3 W.L.R. 1373 on which see above, paras 40-287—40-289.
- 2281 [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [97] (concession by the car park's managers). See above, para.40-288.
- 2283 *A v B (C-738/19) EU:C:2020:687, 10 September 2020* (“*A v B (C-738/19)*”).
- 2284 *A v B (C-738/19)* at para.11.
- 2285 Art.6:104 of the Civil Code of the Netherlands.
- 2286 *Radlinger v Finway a.s. (C-377/14) EU:C:2016:283, 21 April 2016* at paras 92–95.
- 2287 *A v B (C-738/19)* at paras 26–30.
- 2288 *A v B (C-738/19)* at para.39.
- 2289 *A v B (C-738/19)* at para.31.
- 2290 *A v B (C-738/19)* at para.32.
- 2291 *A v B (C-738/19)* at para.33.
- 2292 *A v B (C-738/19)* at paras 34–38.
- 2293 1999 Regulations Sch.2 para.1(f); 1993 Directive Annex para1.(f).
- 2294 The CJEU has held, however, that Annex para.1(f) of the 1993 Directive (implemented by Sch.2 Pt 1 para.7 of the 2015 Act) can apply to a clause allowing the trader to terminate for a (minor) contractual non-performance by the consumer, and this suggests a different understanding of the word “dissolve” as it appears to include termination for breach rather than referring merely to termination at the choice of the trader without

- such a ground: see *SC Topaz Development SRL v Juncu* (C-211/17) EU:C:2019:906 Order of 24 October 2019 (available in French), paras 60–61 and above, para.40-327. cf. *Higgins & Co Lawyers Ltd v Evans* [2019] EWHC 2809 (QB), [2020] 1 W.L.R. 2809 at [101] where it was held that the example in Sch.2 Pt 1 para.7 of the 2015 Act was not relevant to a contract term whose effect was to terminate the contract automatically on the death of one of its parties.
- 2295 See above, para.40-326.
- 2296 s.3(2)(b)(ii) and see Vol.I, para.17-090.
- 2297 And see 2015 Act ss.62(1) and 67 on which see below, paras 40-405 et seq.
- 2298 *Broadwater Manor School v Davis* [1999] C.L.Y. 1801 Worthing County Court.
- 2299 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.16.1–5.16.8.
- 2300 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.17.1 and see further paras 5.17.2–5.17.3.
- 2301 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.16.3 and see above, para.40-333.
- 2302 See Vol.I, paras 27-013 et seq. and Whittaker in Burrows and Peel, Contract Terms (2007), 255, 262–263. See also *SC Topaz Development SRL v Juncu* (C-211/17) EU:C:2019:906 Order of 24 October 2019 (available in French), paras 60–61 referring to the 1993 Directive Annex para.1(f), above, para.40-333 (note).
- 2303 [2020] EWHC 3242 (Comm).
- 2304 [2020] EWHC 3242 (Comm) at [85]–[86].
- 2305 [2020] EWHC 3242 (Comm) at [88].
- 2306 [2020] EWHC 3242 (Comm) at [89] per Butcher J. While not cited by the HC, this interpretation of the significance of the requirement of good faith applies the approach taken by the CJEU in *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (C-415/11) EU:C:2013:164, 14 March 2013 at para.69 (on which see above, para.40-281) and followed by the SC in *ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [105]–[108] (on which see above, paras 40-287—40-288).
- 2307 See below, paras 42-166 et seq. as regards employment and the Partnership Act 1890 s.26(1) as regards partnerships.
- 2308 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.18.1–5.18.4.
- 2309 OFT, Unfair Contract Terms Guidance (2008) OFT311 above, para.40-227 (note), para.7 and Annex I, p.71.
- 2310 Pt 2 of Sch.2 of 2015 Act para.21 states that: “Paragraph 8 (cancellation without reasonable notice) does not include a term by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, if the supplier is required to inform the consumer of the cancellation immediately”; para.24 states that: “Paragraph 8 (cancellation without reasonable notice), 11 (variation of contract without valid reason), 14 (determination of price after consumer bound) and 15 (increase in price) do not apply to—(a) transactions in transferable securities, financial instruments and other products or services where

- the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control, and (b) contracts for the purchase or sale of foreign currency, traveller’s cheques or international money orders denominated in foreign currency”.
- 2311 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.18.4.
- 2312 [2015 Act Sch.2 Pt 1 para.9](#); 1993 Directive Annex para.1(h); formerly [1999 Regulations Sch.2 para.1\(h\)](#). The government has announced the intention to introduce legislation to protect consumers from “subscription traps”, including where contracts “have the potential to lock-in consumers indefinitely (by virtue of an automatic renewal provision that repeatedly extends the contract period), when the roll-over period [is] lengthy (for example 1 year) and where unclear information buried in lengthy terms and conditions obstructs a consumer making an informed decision”: Secretary of State for Business, Energy and Industrial Strategy, Reforming competition and consumer policy, CP 656 (20 April 2022) Ch.2.
- 2313 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.19.1.
- 2314 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.19.2–5.19.6.
- 2315 OFT, Unfair Contract Terms, No.2 (September 1996), p.18. See also CMA, Consumer Law Compliance Review: Cloud Storage, Findings Report (27 May 2016), paras 5.50–5.58 (on terms which automatically renew fixed-term contracts for the provision of “cloud computing” services), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/526447/cloud-storage-findings-report.pdf [Accessed 1 September 2021].
- 2316 [2015 Act Sch.2 Pt 1 para.10](#); 1993 Directive Annex para.1(i); formerly [1999 Regulations Sch.2 para.1\(i\)](#).
- 2317 See above, para.[40-301](#).
- 2318 See below, para.[40-405](#) et seq.
- 2319 See above, Vol.I, paras [15-005](#) et seq.
- 2320 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.20.2.
- 2321 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.20.3–5.20.6.
- 2322 [2015 Act Sch.2 Pt 1 paras 11–15](#). The equivalents of the terms in paras 11, 13 and 15 are found in the 1993 Directive Annex para.1(j)–(l); formerly implemented by the [1999 Regulations Sch.2 para.1\(j\)–\(l\)](#); the terms in paras 12 and 14 were added by the [2015 Act](#), though they are closely related to terms already included in the indicative list.
- 2323 The CMA has expressed concern as to the fairness of contract terms under which the provider of “cloud computer” services reserves to itself broad powers of unilateral variation of the terms of the contract or the characteristics of the services: see CMA,

- Consumer Law Compliance Review: Cloud Storage, Findings Report (27 May 2016), above, para.[40-321](#) (note), paras 5.24–5.38.
- 2324 [2015 Act Sch.2 Pt 2 paras 22–25](#) state: “22 Paragraph 11 (variation of contract without valid reason) does not include a term by which a supplier of financial services reserves the right to alter the rate of interest payable by or due to the consumer, or the amount of other charges for financial services without notice where there is a valid reason, if—(a) the supplier is required to inform the consumer of the alteration at the earliest opportunity, and (b) the consumer is free to dissolve the contract immediately. 23 Paragraphs 11 (variation of contract without valid reason), 12 (determination of characteristics of goods etc. after consumer bound) and 14 (determination of price after consumer bound) do not include a term under which a trader reserves the right to alter unilaterally the conditions of a contract of indeterminate duration if—(a) the trader is required to inform the consumer with reasonable notice, and (b) the consumer is free to dissolve the contract”. “24 Paragraph 8 (cancellation without reasonable notice), 11 (variation of contract without valid reason), 14 (determination of price after consumer bound) and 15 (increase in price) do not apply to—(a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control, and (b) contracts for the purchase or sale of foreign currency, traveller’s cheques or international money orders denominated in foreign currency. 25 Paragraphs 14 (determination of price after consumer bound) and 15 (increase in price) do not include a term which is a price-indexation clause (where otherwise lawful), if the method by which prices vary is explicitly described”.
- 2325 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.21.1.
- 2326 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.21.5 and 5.21.6.
- 2327 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.21.2.
- 2328 [\[2008\] EWHC 1432 \(Ch\), \[2009\] L. & T.R. 6.](#)
- 2329 [\[2008\] EWHC 1432 \(Ch\)](#) at [56]–[57], per G. Moss QC.
- 2330 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.22.4–5.22.13.
- 2331 [2015 Act ss.11\(4\)–\(5\) and 12\(2\)–\(3\)](#) (goods contracts); [ss.36\(3\)–\(4\)](#) and [37\(2\)–\(3\)](#) (digital content contracts) and [s.50\(2\)](#) and [\(3\)](#) (services contracts). On these provisions see below, paras [40-108](#), [40-501](#)–[40-502](#), [40-552](#)–[40-553](#) and [40-579](#) respectively. In addition to the general controls on variation clauses put in place by the [2015 Act](#) and discussed in the text, the [Package Travel and Linked Travel Arrangements Regulations 2018 \(SI 2018/634\)](#) reg.6 above, para.[40-152](#) (replacing the [Package Travel, Package Holidays and Package Tours Regulations 1992 \(SI 1992/3288\)](#) regs 12 and 13, above, para.[40-146](#)) makes special provision for the variation of the package travel contracts to which they apply.

- 2332 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.23.2.
- 2333 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.23.3–5.23.7.
- 2334 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (C-472/10) EU:C:2012:242, 26 April 2012 (“*Invitel* (C-472/10)”).
- 2335 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* (C-92/11) EU:C:2013:180, 21 March 2013 (“*RWE Vertrieb AG* (C-92/11)”).
- 2336 [2012] EWCA Civ 409 (2 April 2012).
- 2337 [2012] EWCA Civ 409 at [37]–[42] and cf. now CRA 2015 s.69 and below, paras 40–428—40–434.
- 2338 i.e. 1999 Regulations Sch.2 paras 1(i), (j), (k) and (l), whose equivalents in Sch.2 of the 2015 Act are found in Pt 1 paras 11–14.
- 2339 [2012] EWCA Civ 409 at [51].
- 2340 [2012] EWCA Civ 409 at [51], per Jackson LJ (with whom Lloyd and Ward LJJ agreed), though the reference to Sch.2 para.2(d) was only indirectly apposite as it provides that ‘[p]aragraph 1(l) is without hindrance to price indexation clauses, where lawful, provided that the method by which prices vary is explicitly described’. See further the comment, below, para.40–340.
- 2341 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (C-472/10) EU:C:2012:242, 26 April 2012 (“*Invitel* (C-472/10)”).
- 2342 *Invitel* (C-472/10) at para.17.
- 2343 cf. 2015 Act Sch.2 Pt 1 paras 11 and 15; Pt 2 paras 22, 23 and 25, quoted above, para.40–338.
- 2344 *Invitel* (C-472/10) at para.26.
- 2345 *Invitel* (C-472/10) at para.27.
- 2346 *Invitel* (C-472/10) at para.28.
- 2347 art.1(2) was implemented in UK law by the 2015 Act s.73 (though with amendments on IP completion day); see above, para.40–265.
- 2348 *Invitel* (C-472/10) at para.28. See also *Engilbertsson v Íslandsbanki hf* (E-25/13) 28 August 2014 at paras 77, 142–143 and above, para.40–267.
- 2349 In *Du Plessis* [2012] EWCA Civ 409 (2 April 2012), above, para.40–339, the relevant term allowed the trader to vary the fee payable on various grounds according to a prescribed process; in *Invitel* (C-472/10), the relevant term allowed the trader to impose a fee in respect of payments made by money order without specifying the method of calculation of the fee or its amount.
- 2350 [2012] EWCA Civ 409 (2 April 2012), above, para.40–339.
- 2351 *Invitel* (C-472/10).
- 2352 [2012] EWCA Civ 409 at [47]–[52], above, para.40–339.
- 2353 *Invitel* (C-472/10) para.28 (emphasis added).
- 2354 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* (C-92/11) EU:C:2013:180, 21 March 2013 (“*RWE Vertrieb AG* (C-92/11)”).
- 2355 *Invitel* (C-472/10), above, para.40–340.

- 2356 For the CJEU’s decision on the possible application of art.1(2) of the 1993 Directive to the term in question, see above, para.[40-266](#).
- 2357 *RWE Vertrieb AG (C-92/11)* at para.44. This importance was emphasised as regards the particular category of contract by the legislative duties with respect to transparency regarding contract terms and conditions imposed on the suppliers of gas by Directive 2003/55 of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC [2003] O.J. L176/57 art.3(3). The CJEU referred to the “requirements of good faith, balance and transparency” laid down by the 1993 and 2003 directives: *RWE Vertrieb AG (C-92/11)* at para.47.
- 2358 *RWE Vertrieb AG (C-92/11)* at paras 48–49, citing *Invitel (C-472/10)* at paras 24, 26 and 28.
- 2359 *RWE Vertrieb AG (C-92/11)* at para.40 referring to the 1993 Directive Annex, point 1(j), point 2(b) and also Directive 98/30/EC (above) art.3(3), Annex A, points (a) and (b).
- 2360 *RWE Vertrieb AG (C-92/11)* at para.51.
- 2361 *RWE Vertrieb AG (C-92/11)* at para.53.
- 2362 *RWE Vertrieb AG (C-92/11)* at para.43.
- 2363 *DenizBank AG v Verein fur Konsumenteninformation (C-287/19)* EU:C:2020:897, 11 November 2020 at para.65.
- 2364 *2015 Act Sch.2 Pt 1 para.16* and cf. 1993 Directive Annex Pt 1(m) formerly implemented by *1999 Regulations Sch.2 para.1(m)*.
- 2365 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.24.1.
- 2366 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.24.3 and 5.24.4 advising that a term which allows the trader to determine whether the consumer is in breach is open to similar objections.
- 2367 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.24.2.
- 2368 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) Annex A, A65.
- 2369 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.24.5 and cf. above, para.[40-338](#) et seq.
- 2370 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.24.5. and 5.24.6 and see above, para.[40-324](#).
- 2371 *2015 Act Sch.2 Pt 1 para.17* and cf. 1993 Directive Annex Pt 1(n) formerly implemented by *1999 Regulations Sch.2 para.1(n)*.
- 2372 See Vol.I, para.[15-031](#) in the context of the “parol evidence rule”.
- 2373 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.25.1 and 5.25.2, and see earlier OFT, Unfair Contract Terms Guidance (2008) OFT311, para.14 to the same effect. The CMA gives as an example of such a term being held unfair *The Financial Services Authority v Asset LI Inc (trading as Asset Land Investment Inc) [2013] EWHC 178 (Ch), [2013]*

- 2 B.C.L.C. 480**, where it was held (at [133]–[138]) that a “no representations by seller” clause in contracts for the sale of land under a collective investment scheme was unfair given, inter alia, the “telesales pitch” by the sellers: see also [\[2014\] EWCA Civ 435](#), [\[2015\] 1 All E.R. 1](#) at [98]–[99] (where the CA agreed, though held it unnecessary for the HC’s or its own decision).
- 2374 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) Annex A at A66. After the CMA’s action, the term was replaced with: “To protect your own interests please read the conditions carefully before signing them … If you are uncertain as to your rights under them or you want any explanation about them please write or telephone to our customer queries department, at the address and telephone number set out above”.
- 2375 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.25.2. Such a clause attempts to denude the agents of their apparent or ostensible authority: cf. above, Vol.I, paras [21-063](#) et seq.
- 2376 *Office of Fair Trading v MB Designs (Scotland) Ltd* [\[2005\] S.L.T. 691](#) at [46], per Lord Drummond Young (OH of the Ct of Sess., in the context of granting an interim order under [Pt 8 of the Enterprise Act 2002](#), on which see para.[40-450](#)).
- 2377 [\[2010\] EWHC 1484 \(Ch\)](#) at [64]. See similarly *Harrison v Shepherd Ltd* [\[2011\] EWHC 1811 \(TCC\)](#) at [118]–[120]; affirmed on other grounds [\[2012\] EWCA Civ 904](#).
- 2378 *Unreported 1 September 2017, Ch D* at [124] discussing together unfairness under the 1999 Regulations and unreasonableness under [s.3 of the Misrepresentation Act 1967](#) and [s.11 of the Unfair Contract Terms Act 1977](#).
- 2379 2015 Act ss.11, 12 and [31\(1\)\(c\)](#) and [\(d\)](#), below, paras [40-501](#)–[40-502](#) and [40-535](#); ss.36, 37 and [47\(1\)\(c\)](#) and [\(d\)](#), below, paras [40-552](#)–[40-553](#) and [40-568](#); [s.50](#) and [57\(2\)](#) and [\(3\)](#) (which makes an exception to the general rule for terms which *restrict* the trader’s liability under [s.50](#) to a sum more than the price paid, which are nevertheless to be assessed for their fairness under the general test in [Pt 2 of the Act](#)), see below, paras [40-577](#)–[40-579](#) and [40-589](#)–[40-591](#).
- 2380 2015 Act Sch.2 Pt 1 para.18 and cf. 1993 Directive Annex para.1(o) formerly implemented by [1999 Regulations Sch.2 para.1\(o\)](#).
- 2381 OFT, Unfair Contract Terms, Bulletin No.3 (March 1997), p.77 and see generally CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.27.1–5.27.5.
- 2382 OFT, Unfair Contracts Terms, Bulletin No.3, p.77. See also CMA, Consumer law compliance review: cloud storage, Findings report (27 May 2016) (above, para.[40-321](#) (note)), paras 5.39–5.49.
- 2383 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.27.4.
- 2384 2015 Act Sch.2 Pt 1 para.19 and cf. 1993 Directive Annex para.1(p) formerly implemented by the [1999 Regulations Sch.2 para.1\(p\)](#).
- 2385 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.28.1.
- 2386 On assignment generally see Vol.I [Ch.22](#).

- 2387 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.28.1 n.116. On novation, see Vol.I, paras 22-089 et seq.
- 2388 And see CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.28.1–5.28.4.
- 2389 2015 Act Pt 3 Ch.5.
- 2390 Above, para.40-346.
- 2391 See above, paras 40-276—40-282. As has been seen, a person travelling under a package travel contract may transfer the benefit of that contract, subject to certain conditions: see the [Package Travel and Linked Travel Arrangements Regulations 2018](#) reg.9, replacing the [Package Travel, Package Holidays and Package Tours Regulations 1992](#) reg.10 (transfer of bookings); above, paras 40-152 and 40-146 respectively.
- 2392 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) Annex A Group 18(d) at A81–A82.
- 2393 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.33.2. On the enforceability of guarantees under the [CRA 2015 s.30](#); see below, para.40-531.
- 2394 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) para.5.33.3.
- 2395 OFT, Unfair Contract Terms, Bulletin (July 1999), para.1.8.
- 2396 *Verein fur Konsumenteninformation v Amazon EU Sàrl (C-191/15) EU:C:2016:612, 28 July 2016* (“Amazon EU Sàrl (C-191/15)”), on which see Ruhl (2018) 55 *CML Rev.* 201. See similarly *Verein fur Konsumenteninformation v TVP Treuhand- und Verwaltungsgesellschaft fur Publikumsfonds mbH & Co KG (C-272/18) EU:C:2019:827, 3 October 2019* at paras 58–60.
Amazon EU Sàrl (C-191/15) 28 July 2016.
- 2397 Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6. On the retained EU law Rome I Regulation generally see Vol.I, paras 33-018 et seq. and esp. at para.33-024.
- 2398 *Amazon EU Sàrl (C-191/15)* at para.59 (noting art.8 of the Directive).
- 2399 *Amazon EU Sàrl (C-191/15)* at para.67.
- 2400 *Amazon EU Sàrl (C-191/15)* at paras 69–70. In *Verein fur Konsumenteninformation v TVP Treuhand- und Verwaltungsgesellschaft fur Publikumsfonds mbH & Co KG (C-272/18) EU:C:2019:827, 3 October 2019* at paras 58 and 59, the CJEU held that this approach is “not limited to a specific form for the conclusion of contracts, namely, inter alia, by electronic means, and are of a general nature”.
- 2401 *Amazon EU Sàrl (C-191/15)* at para.71.
- 2402 OFT, Unfair contract terms guidance (2008) OFT311 para.18; CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) Pt 5A and Annex A, Group 18 at A76 et seq. As well as the examples noted in the text, see also clauses preventing assignment by the consumer, above, para.40-347; terms providing for “consumer declarations”, “have read and understood” declarations, exclusions and reservations of special rights to the trader (e.g. as regards use of personal

- data) and discretion in the trader as to its own obligations: CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.34–5.36.
- 2404 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.30.1–5.30.6.
- 2405 OFT, Unfair Contract Terms, Bulletin No.3 (March 1997), p.24.
- 2406 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.31.1 and further 5.31.2–5.31.8.
- 2407 OFT, Unfair Contract Terms, Bulletin No.3, p.28.
- 2408 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act (July 2015) paras 5.32.1–5.32.6.
- 2409 CMA Press Release (29 August 2018) (action taken under [Consumer Rights Act 2015 Pt 2](#)): see <https://www.gov.uk/government/news/online-gambling-firms-remove-restrictions-on-cash-withdrawals> [Accessed 1 September 2021].
- 2410 CMA, An open letter to event organisers (17 January 2019) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771521/Open_letter_to_event_organisers.pdf and see [R. v Hunter \[2021\] EWCA Crim 1785, \[2022\] 1 Cr. App. R. 13](#) at [161]–[168] where this was discussed in the context of an appeal from conviction of two “ticket-touts” for fraudulent trading under [s.993 of the Companies Act 2006](#).
- 2411 CMA, Statement on Coronavirus (Covid-19), Consumer Contracts, Cancellation and Refunds (updated 28 August 2020).
- 2412 Law Commission, Consumer sales contracts: transfer of ownership (HC 1365, Law Com No 398) (22 April 2021) at para.5.70 and see further paras 5.69–5.78.
- 2413 Transfer of ownership takes effect according to the rules provided by the [Sale of Goods Act 1979 ss.16–19, 20A–20B](#): below, para.[40-475](#) (on the application of the [1979 Act](#) to a consumer goods contract) and below, paras [46-130—46-188](#) on the rules themselves. [2015 Act s.28\(3\)](#) and see below, para.[40-529](#).
- 2414 Below, paras [41-307—41-309](#).
- 2415 Such a term would not come within [Sch.2 Pt 1 para.2 of the 2015 Act](#) (on which see above, para.[40-319](#)) as it would not relate to a right in respect of the other party’s inadequate *performance* and see further below, paras [47-162—47-165](#).
- 2416 [Munkenbeck & Marshall v Harold \[2005\] EWHC 356 \(TCC\), \[2005\] All E.R. \(D\) 227](#) at [12]–[15] (decided under the [1999 Regulations](#)).
- 2417 [Office of Fair Trading v Foxtons Ltd \[2009\] EWHC 1681 \(Ch\), \[2009\] 29 E.G. 98 \(C.S.\)](#) at [91]–[95], [101], [103]–[106] (decided under the [1999 Regulations](#)). The decision on unfairness of the renewal commission clauses was taken after the court had held that they did not fall within the exclusion of [reg.6\(2\) of the 1999 Regulations](#) on the ground that they were not “plain and intelligible” (at [70], [74]), even if they formed part of the “core bargain”: see below, para.[40-385](#) (note) on this exclusion more generally see below, paras [40-351 et seq.](#)

- 2419 *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117, [2010] Bus. L.R. 1034, especially at [27]–[29]. cf. *Solitaire Property Management Co Ltd v Holden* [2012] UKUT 86 (LC) at [34] (term under which landlord holds funds supplied by tenant in case of “temporary deficiency” in moneys available to meet service charge expenses found fair).
- 2420 [2010] EWCA Civ 117 at [27].
- 2421 *Shaw v Nine Regions Ltd* [2009] EWHC 3553 (QB). See also *Higgins & Co Lawyers Ltd v Evans* [2019] EWHC 2809 (QB), [2020] 1 W.L.R. 2809 at [101] (clause in a conditional fee agreement terminating the contract on the death of the claimant and imposing a liability to pay “basic charges” in the latter’s estate held fair), on which see above, para.40-295.
- 2422 *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd* [2021] EWHC 2088 (Ch) at [103] per Bacon J, concluding at [111]. The defendant did not pursue its pleaded argument that the term fell within the “core exclusion” in s.64 of the 2015 Act: [2021] EWHC 2088 (Ch) at [58].
- 2423 *Meghjee v BW Foundation* [2020] EWHC 2970 (QB) at [28].

End of Document

© 2022 SWEET & MAXWELL

(aa) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(iii) - The “Core Exemption”

(aa) - Introduction

A control of unfair terms rather than unfair contracts

40-351 A very important qualification on the application of the test of the unfairness of contract terms provided by the EU Directive on unfair terms in consumer contracts 1993 is found in art.4(2), following the Directive's explanation of how the unfairness of a contract term should be assessed²⁴²⁴ and this qualification was retained by s.64 of the 2015 Act though in an amended form and with an apparently new proviso.²⁴²⁵ The significance of s.64 can be understood only in the light of its background in the Directive, in the case law of the Court of Justice as well as of the House of Lords and the Supreme Court.²⁴²⁶ Article 4(2) of the Directive provides that:

“Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.”

This provision reflects the focus of concern of the Directive on unfair *terms*, rather than on unfair *contracts* and so rules out (in principle) from its ambit any review of contracts on the basis that they represent a bad bargain for the consumer: to this extent, the exclusion contained in art.4(2) reflects the general principle of freedom of contract.²⁴²⁷ This understanding is reflected in the proviso to the exclusion, which is that any relevant term must be “in plain intelligible language”

as where it is not consumers are not in a position to exercise their autonomy. However, both the interpretation and application of art.4(2) have caused considerable difficulty, this stemming in part from the awkwardness of the drafting of the Directive, which does not make clear whether it seeks to exclude a category of terms from the test of fairness or whether instead it seeks to exclude certain types of issue from the evaluation of the fairness of terms.²⁴²⁸ The Directive itself recognises the potential difficulty in applying the exclusion found in art.4(2) and attempts to explain how it may apply in the context of one particular example, contracts of insurance.²⁴²⁹

40-352 Article 4(2) was first implemented in UK law in a very faithful way²⁴³⁰ and this was continued on its implementation by the [Unfair Terms in Consumer Contracts Regulations 1999 reg.6\(2\)](#) of which provided that:

“In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate—

- (a)to the definition of the main subject matter of the contract, or
- (b)to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.”

While this exclusion—often termed the “core exemption” or “core exclusion” in UK discussions—has been considered and applied by the House of Lords in *DGFT v First National Bank Plc*²⁴³¹ and the Supreme Court in *Abbey National Plc v Office of Fair Trading*,²⁴³² later decisions of the Court of Justice of the EU, notably in *Kásler*²⁴³³ and *Matei*,²⁴³⁴ clarified the proper interpretation of art.4(2) of the Directive and provided guidance to national courts on the application of national legislation which implements it in a way which differs from the Supreme Court’s views in *Abbey National Plc*.²⁴³⁵ Moreover, after the decision in *Abbey National Plc* the Law Commission expressed concern at the legal uncertainty which remained as to the application of the exclusion and made recommendations for change.²⁴³⁶ As a result, the [Consumer Rights Act 2015 s.64](#) reformulated the exclusion in a way which is apparently more protective of consumers than the exclusion in [reg.6\(2\) of the 1999 Regulations](#) as interpreted by the Supreme Court, in particular by requiring any relevant contract term to be “prominent” (that is, “brought to the consumer’s attention in such a way that an average consumer would be aware of the term”) as well as “transparent” (that is, “in plain and intelligible language and (in the case of a written term) ... legible”).²⁴³⁷ However, as will be explained, later decisions of the Court of Justice (made before IP completion day and therefore in principle binding on UK courts²⁴³⁸) have interpreted art.4(2) of the 1993 Directive (and in particular its requirement of transparency) in a way which may be even more demanding and, therefore, more protective of consumers than the wording of [s.64](#) suggests.²⁴³⁹

40-353

The following paragraphs will therefore start by looking at the UK case-law on the earlier implementation of art.4(2) of the Directive in the [1994](#) and the [1999 Regulations](#); it will then discuss the case-law of the Court of Justice; and finally it will consider s.64 of the [2015 Act](#) itself in the light of these two bodies of case-law.

Footnotes

- 2424 1993 Directive art.4(1) which was implemented by the [2015 Act](#) s.62([5](#)) and see above, para.[40-276](#).
- 2425 Below, paras [40-379](#)—[40-389](#).
- 2426 For this case law see below, paras [40-354](#)—[40-356](#) (English courts) and [40-357](#)—[40-375](#) (CJEU).
- 2427 This view was pressed strongly at the time of the travaux préparatoires of the 1993 Directive in relation to the EC Commission's Proposal for a Council Directive on unfair terms in consumer contracts COM(90) 322 final, which did not restrict the control of unfair contract terms in this way: see, notably, *Brandner and Ulmer* (1991) 28 C.M.L.R. 645 especially at 655–657; Niglia, *The Transformation of Contract in Europe* (2003) pp.119–145.
- 2428 The *position* of art.4(2) of the Directive suggests that it excludes certain types of issue from the evaluation of the fairness of terms, as does the first part of its text (“*assessment* of the unfair nature of the terms *shall relate neither* to the definition of the subject matter”) and it may be thought unusual for a particular term itself to “relate … to the adequacy of the price or remuneration, *as against* the goods or services supplied in exchange”. On the other hand, the last phrase of art.4(2) suggests the exclusion of a category of term (“in so far as *these terms* are in plain intelligible language”) and this is supported by recital 19, according to which “*assessment shall not be made of terms which describe* the main subject matter of the contract nor the quality/price ratio of the goods or services supplied” continuing that “the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of *other terms*”. As will be seen, the CJEU has held that the way in which the exclusion in art.4(2) applies differs according to its two limbs; see below, paras [40-358](#)—[40-360](#).
- 2429 1993 Directive recital 19 states that “… it follows [from the exclusion in art.4(2)] *inter alia*, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer”. There is no equivalent explanatory provision in either the [1994](#) or the [1999 Regulations](#) nor in the [2015 Act](#). cf. *Bankers Insurance Co Ltd v South* [2003] EWHC 380, [2003] P.I.Q.R. P28 at [21] (exclusion in travel insurance agreed as defining “main subject matter of the contract”) and see below, para.[40-367](#), discussing *Van Hove v CNP Assurances SA* (C-96/14) EU:C:2015:262, 23 April 2015.
- 2430 Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) reg.3(2).

- 2431 [2001] *UKHL* 52, [2002] 1 A.C. 481, below, para.40-354.
- 2432 [2008] *EWHC* 875 (Comm), [2009] *EWCA Civ* 116, [2009] 2 *W.L.R.* 1286, [2009] *UKSC* 6, [2010] 1 A.C. 696; *Whittaker* (2010) 73 *M.L.R.* 106 and see below, paras 40-355—40-356.
- 2433 *Kásler v OTP Jelzálogbank Zrt* (C-26/13) *EU:C:2014:282*, 30 April 2014, paras 40-357 et seq.
- 2434 *Matei v SC Volksbank România SA* (C-143/13) *EU:C:2015:127*, 26 February 2015.
- 2435 See below, paras 40-366 and 40-375.
- 2436 Law Commission, Scottish Law Commission, Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills (March 2013) (“Law Com. Advice (2013)”) at S14 and see below, para.40-376.
- 2437 2015 Act s.64(2)–(5) and see below, paras 40-379—40-387.
- 2438 Above, para.40-004 and Vol.I, para.1-028 which explain the circumstances in which the Supreme Court and certain listed appellate courts (including the Court of Appeal) may depart from “retained EU case-law” and see below, para.40-387 in relation to the interpretation of s.64 of the 2015 Act.
- 2439 Below, paras 40-382 and 40-385.

(bb) - UK Case Law before the 2015 Act

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(iii) - The “Core Exemption”

(bb) - UK Case Law before the 2015 Act

The First National Bank Plc decision

40-354 In *Director General of Fair Trading v First National Bank Plc*²⁴⁴⁰ the House of Lords took a restrictive approach to the interpretation of the exclusion from the test of fairness in the **1994 Regulations** which had implemented art.4(2) of the 1993 Directive.²⁴⁴¹ There, a contract of consumer credit contained a term by which:

“... interest on the amount which becomes payable [on default] shall be charged in accordance [with rates stipulated by the contract] ... until payment after as well as before any judgment (such obligation to be independent of and not to merge with the judgment).”

The effect of this agreement (if valid) would be that where the bank obtains judgment against a borrower, interest would be payable at the contractual rate on the outstanding principal plus accrued interest unpaid at the date of judgment until the judgment is discharged by payment. It would prevent the independent obligation to pay interest to merge in the judgment, the provision for interest at the contractual rate continuing to apply after judgment. The bank argued that this contract term did not fall to be assessed for fairness under the Regulations because it concerned the adequacy of the bank’s remuneration as against the services supplied, namely the loan of money.²⁴⁴² The House of Lords disagreed. In the view of Lord Bingham of Cornhill:

“The object of the Regulations and the Directive is to protect consumers against the inclusion of unfair and prejudicial terms in standard-form contracts into which they enter, and that object would plainly be frustrated if reg.3(2)(b) were so broadly interpreted as to cover any terms other than those falling squarely within it. In my opinion the term, as part of a provision prescribing the consequences of default, plainly does not fall within it. It does not concern the adequacy of the interest earned by the bank as its remuneration but is designed to ensure that the bank’s entitlement to interest does not come to an end on the entry of judgment.”²⁴⁴³

In this respect, the fact that the contract term before them was a “default provision” clearly weighed with the House.²⁴⁴⁴ Having said this, though, in applying the test of fairness to this contract term, for the House of Lords the fact that it related to the payment of interest which was part of the “essential bargain” between the parties argued in favour of its fairness.²⁴⁴⁵ In the result, the House of Lords held that the term in question did *not* fall within the exclusion found in art.4(2) of the Directive, but nevertheless “carries into effect what the parties themselves would regard as the essence of the transaction” and was held valid.²⁴⁴⁶

OFT v Abbey National Plc

40-355 In *OFT v Abbey National Plc*,²⁴⁴⁷ the question arose as to whether the OFT was entitled to consider the unfairness under the 1999 Regulations of certain terms of contracts between banks and their current account consumer customers under which the banks imposed charges when the customer requested or instructed the bank to make a payment for which they did not hold the necessary funds in the account and which was not covered by an arranged facility (the “relevant terms”). As regards the nature of the exclusion, at first instance, Andrew Smith J expressed the view that reg.6(2)(b) of the 1999 Regulations excludes an assessment relating to the adequacy of the price from a term to which it applies²⁴⁴⁸; and, on appeal, the banks adopted this position with the result that the question to be determined by the Supreme Court was whether, in assessing the fairness of the terms, the OFT was entitled to take into account “the adequacy of the price or remuneration, as against the goods or services supplied in exchange”, on the ground that:

“... [a]ny assessment based on matters *not* relating to the appropriateness in amount of the price or remuneration is *not* excluded by regulation 6(2)(b).”²⁴⁴⁹

The Supreme Court therefore considered whether the relevant terms provided for the “price or remuneration in exchange for the services” supplied by the bank so as to fall within this exclusion. For this purpose, it held, first, that the banks provided a “package of services” to their customers, which:

“... include the collection and payment of cheques, other money transmission services, facilities for cash distribution ... and the provision of statements in printed or electronic form.”²⁴⁵⁰

Secondly, the Supreme Court held that the payments for which the terms provided constituted part of the “price or remuneration” in exchange for this package of services so as to attract the application of the exclusion, rejecting the Court of Appeal’s view that in deciding whether a term provided for the “price or remuneration” a court should adopt the point of view of the typical consumer and consider whether the relevant terms provided for the “essential bargain” between the parties.²⁴⁵¹ According to the Supreme Court, the Court of Appeal’s reference to the view of the typical consumer was not supported by the travaux préparatoires of the 1993 Directive, whose concern with the protection of the parties’ consent was amply reflected in its distinct exclusion from review of terms which are “individually negotiated” and by the proviso to the exclusion found in art.4(2) that the terms in question be in plain and intelligible language.²⁴⁵² Instead, “the identification of the price or remuneration ... is a matter of objective interpretation by the court”.²⁴⁵³

- 40-356 Applying this view of reg.6(2)(b), the Supreme Court agreed that the bank charges in issue before it constituted part of the price or remuneration for the package of services provided by the banks. According to Lord Walker JSC (with whom Baroness Hale JSC and Lord Neuberger of Abbotbury MR agreed):

“... [t]hey are an important part of the banks’ charging structure, amounting to over 30 per cent of their revenue stream from all personal current account customers. The facts that the charges are contingent, and that the majority of customers do not incur them, are irrelevant.”²⁴⁵⁴

With respect, this comes close to saying that the fact that the banks made a good deal of money out of the charges generated by the relevant terms means that they provided for part of the price or remuneration for the package of services, so adopting the position of the supplier of the goods or services, rather than an objective view. Lord Mance JSC (with whom Baroness Hale JSC and Lord Neuberger MR also agreed) took a somewhat different approach:

“... viewing the matter at the level of the banking contracts, the comparison is between, on the one hand, the package of services offered by the banks (some or all of which may or may not be used by any particular customer) and, on the other, the customer’s commitment to pay *such charges as may arise from whatever facilities he does use*. At this level, the banks’ case is that price or remuneration is or includes the customer’s

potential liability for charges, rather than the payments which he or she has actually to make if and when such charges are incurred.”²⁴⁵⁵

Lord Mance therefore viewed the OFT’s challenge to the proportionality of the relevant charges to the cost of providing particular services (as opposed to the overall package of services) as beside the point²⁴⁵⁶:

“... [i]f the agreement to incur the relevant charges is part of an overall package contract, its vulnerability to challenge and, if permissible, any assessment of its fairness under the Directive and the Regulations must ... depend upon an analysis of such agreement as part of the package contract.”²⁴⁵⁷

He held, in conclusion, that:

“... the concepts of ‘price or remuneration’ must ... be capable in principle of covering, under a banking contract, an agreement to make a payment in a particular event.”²⁴⁵⁸

So, while Lord Mance JSC accepted that some terms providing for the payment of money did not fall within reg.6(2)(b) even though they could not be said to be “default terms”,²⁴⁵⁹ the relevant charges clearly did so fall. The Supreme Court further held that, even if the Court of Appeal had been right in requiring reg.6(2)(b) to be applied from the point of view of the typical consumer so as to focus on what was or was not “ancillary” to the main bargain, the relevant terms would still fall within its exclusion. For this purpose, Lord Walker JSC could not see how “charges amounting to 30 per cent of the revenue stream were ‘not part of the core or essential bargain’”.²⁴⁶⁰ Lord Mance JSC agreed:

“... [t]he uneconomic nature of the relevant charges from the customers’ viewpoint constitutes the importance of the charges from the banks’ viewpoint, and the plain intelligible language of the banking contracts made evident that there must be a considerable element of cross-subsidy in respect of customers where they remained in credit.”²⁴⁶¹

This view enabled the Supreme Court to hold that, quite apart from the doctrine of acte clair (on which the Supreme Court was divided²⁴⁶²) it did not need to refer the question of the proper interpretation of art.4(2) of the Directive to the Court of Justice of the EU since the *application* of reg.6(2) was a matter for itself as a national court.²⁴⁶³

Footnotes

- 2440 [2001] UKHL 52, [2002] 1 A.C. 481 and see *Whittaker* (2004) ZEuP 75. On the interpretation and application of the test of fairness itself see above, paras 40-284 and 40-306.
- 2441 Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) reg.3(2)(b). The 1994 Regulations were revoked and replaced by the refer to the Unfair Terms in Consumer Contracts Regulations 1999 (which were themselves revoked and replaced by the 2015 Act): above, para.40-226.
- 2442 [2001] UKHL 52 at [10].
- 2443 [2001] UKHL 52 at [12]. See similarly [2001] UKHL 52 at [34] (Lord Steyn). References to reg.3(2)(b) refer to the earlier Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159).
- 2444 [2001] UKHL 52 at [11]-[12], [34], [43].
- 2445 [2001] UKHL 52 at [20] and see above, para.40-306.
- 2446 [2001] UKHL 52 at [56], per Lord Millett and see above, para.40-306.
- 2447 [2008] EWHC 875 (Comm), [2009] EWCA Civ 116, [2009] 2 W.L.R. 1286, [2009] UKSC 6, [2010] 1 A.C. 696; *Whittaker* (2011) 74 M.L.R. 106.
- 2448 [2008] EWHC 875 at [423]-[424]. cf. above, para.40-351 (note).
- 2449 [2009] UKSC 6 at [95], per Lord Mance JSC; similarly, at [57]-[60], per Lord Phillips JSC. While Lord Walker of Gestingthorpe JSC was “inclined to agree” that for the purposes of the appeal the dispute as to the nature of the exclusion was a distraction, he also saw that “in the long run it may become an issue of great practical importance”: [2009] UKSC 6 at [29] and see at [61] (Lord Phillips PSC).
- 2450 [2009] UKSC 6 at [40], per Lord Walker JSC and cf. at [80] and [81] (where this view is apparently taken by Lord Phillips PSC), and at [98] (Lord Mance JSC).
- 2451 [2009] EWCA Civ 116 at [91]-[92].
- 2452 [2009] UKSC 6 at [45] (Lord Walker JSC); similarly at [78] (Lord Phillips PSC), [108], [112] and [115] (Lord Mance JSC). In relation to this particular issue, *OFT v Foxtons Ltd* [2009] EWHC 1681 (Ch), [2009] 29 E.G. 98 (C.S.) (which was decided on the basis of the CA’s decision in *OFT v Abbey National Plc*) was overtaken by the decision of the SC in the latter case.
- 2453 [2009] UKSC 6 at [113] per Lord Mance JSC.
- 2454 [2009] UKSC 6 at [47] and see at [88] (Lord Phillips PSC).
- 2455 [2009] UKSC 6 at [98] (emphasis added).
- 2456 [2009] UKSC 6 at [99].
- 2457 [2009] UKSC 6 at [100].
- 2458 [2009] UKSC 6 at [104].
- 2459 [2009] UKSC 6 at [101].
- 2460 [2009] UKSC 6 at [47].

2461 [2009] UKSC 6 at [117].

2462 Lord Walker JSC ([2009] UKSC 6 at [49]), Lord Mance JSC ([2009] UKSC 6 at 115) and Baroness Hale JSC ([2009] UKSC 6 at [91]) considered that the doctrine of acte clair would have applied; Lord Phillips PSC ([2009] UKSC 6 at [91]) and Lord Neuberger of Abbotbury MR ([2009] UKSC 6 at [120]) would have held that it did not.
2463 [2009] UKSC 6 at [50] (Lord Walker JSC), [117] (Lord Mance JSC) and at [120] (Lord Neuberger of Abbotbury MR).

(cc) - European Case-law

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(iii) - The “Core Exemption”

(cc) - European Case-law

European case-law

- 40-357 There had been no consideration of the exclusion in art.4(2) of the 1993 Directive by the Court of Justice of the EU before the decision of the Supreme Court in *OFT v Abbey National Plc*, but after the latter decision the Court of Justice has considered the exclusion contained in art.4(2) of the 1993 Directive in a considerable number of cases of which the most important are *Kásler*, *Matei*, *Van Hove*, *Andriciuc* and *XZ v Ibercaja Banco SA*.²⁴⁶⁴ This European case-law has taken a different view of the interpretation of art.4(2) from that adopted by the Supreme Court in *OFT v Abbey National Plc* and provides significant guidance on its application. It should be noted, however, that the significance of case-law of the Court of Justice for English courts changed on IP completion day; in particular the Supreme Court and listed appellate courts (including the Court of Appeal) may depart from case-law of the Court of Justice made before IP completion day.²⁴⁶⁵

Kásler and Matei

- 40-358 These cases both concerned terms of contracts of consumer credit, the details of which will be noted later,²⁴⁶⁶ its ruling in *Kásler* being followed closely by *Matei*. The Court of Justice held that the exclusion in art.4(2) of the Directive must be strictly interpreted as it provides an exception to the test of unfairness²⁴⁶⁷ and that its terms require an “autonomous and uniform

interpretation throughout the European Union” taking into account its context and the purpose of the legislation.²⁴⁶⁸ Moreover, while it is for national courts alone to rule on the classification of a term in a contract (as falling within or outside these terms), the Court of Justice can “elicit [from art.4(2)] the criteria that the national court may or must apply when examining a contractual term”.²⁴⁶⁹ The Court further held that art.4(2) distinguished clearly between two categories of contract term, which are concerned respectively with terms that concern the main subject matter of the contract and terms relating to the “adequacy of the price and remuneration on [the] one hand, as against the services or goods supplied, on the other”.²⁴⁷⁰

The “main subject matter of the contract”

- 40-359 First, where a term concerns the “main subject matter of the contract” the Court of Justice considered that it should not be examined as to its unfairness at all. According to the Court:

“... contractual terms falling within the notion of the ‘main subject-matter of the contract’ ... must be understood as being those that lay down the essential obligations of the contract and, as such, characterise it. By contrast, terms ancillary to those that define the very essence of the contractual relationship cannot fall within the notion of the ‘main subject-matter of the contract’ within the meaning of Article 4(2).”²⁴⁷¹

For this purpose, the fact that a term has been individually negotiated cannot constitute a relevant criterion given that, if the term was so negotiated, it would fall outside the scope of the Directive.²⁴⁷² The Court in *Kásler* then explained that in identifying the terms covered by the first limb of art.4(2) national courts should have regard to a wide range of circumstances (in the context, “the nature, general scheme and the stipulations of the loan agreement, and its legal and factual context”), but in doing so it did not echo the language used by Advocate General Wahl, who had advised that:

“... the [national] court must decide in each individual case the essential obligation(s) which must *objectively* be regarded as essential in the general scheme of the contract,”

asking itself whether a term “contributes objectively, in one way or another, to the *legal or commercial definition of the essential characteristics of the contract*”.²⁴⁷³ In this way, the Court of Justice required courts to take a broad contextual approach to the identification of the main subject matter of the contract, rather than the more abstract approach based on the legal definition of the contract which its Advocate General advocated.

The “adequacy of the price or remuneration as against the services or goods supplied in exchange”

- 40-360 Secondly, the second limb of art.4(2) of the Directive covers terms relating to “the adequacy of the price and remuneration on [the] one hand, as against the services or goods supplied, on the other”²⁴⁷⁴ and so the starting point for the application of this exclusion is also the identification of a contract term which has this characteristic. However, in the view of the Court of Justice:

“... it is clear from the wording of Article 4(2) of Directive 93/13 that the second category of terms that cannot be examined as regards unfairness is limited in scope, for that exclusion concerns only the adequacy of the price or remuneration as against the services or goods supplied in exchange.”²⁴⁷⁵

The explanation for this exclusion is that “no legal scale or criterion exists that can provide a framework for, and guide, such a review”.²⁴⁷⁶ So, where a term describes “the quality/price ratio of the goods or services supplied” then it is excluded from the review of unfairness only as regards this issue. As a result of this restricted significance of the second limb of the exclusion:

“Terms relating to the consideration²⁴⁷⁷ due by the consumer to the lender or having an impact on the actual price to be paid to the latter by the consumer thus do not, in principle, fall within the second category of terms, except as regards the question whether the amount of consideration or the price as stipulated in the contract are adequate as compared with the service provided in exchange by the lender.”²⁴⁷⁸

The significance of the “indicative list”

- 40-361 Thirdly, according to the Court of Justice of the EU, a term falling within one of the examples in the “indicative list” of terms in the Annex to the Directive will not fall within the exclusion contained in art.4(2) of the Directive, since, given the purpose of this list is to “serve as a ‘grey list’ of terms which may be regarded as unfair”, such an inclusion would:

“... to a large extent be deprived of its effectiveness if they were excluded from the outset from an assessment of their unfairness pursuant to Article 4(2).”²⁴⁷⁹

Guidance on the application of the exclusion

- 40-362 In *Kásler* a contract of consumer credit denominated in a foreign currency set the exchange rate for repayment of the loan by the consumer at the creditor bank's "selling rate" by one term, whereas another term set the exchange rate for payment of the original sums lent by the bank to the consumer at the bank's "buying rate". The loan was denominated in the foreign currency (there, Swiss francs) to ensure stability of the repayment advanced and did not make available any foreign currency to the consumer borrower. In these circumstances, and applying its interpretation of art.4(2) of the Directive,²⁴⁸⁰ the Court of Justice held that it was for the national referring court:

"… to determine, having regard to the nature, general scheme and the stipulations of the loan agreement, and its legal and factual context, whether the term setting the exchange rate for the monthly repayment instalments constitutes an essential element of the debtor's obligations, consisting in the repayment of the amount made available by the lender."²⁴⁸¹

However, the Court of Justice held that the second limb of the exclusion in art.4(2) *could not* apply to the term before the national referring court:

"… such a term, in so far as it contains a pecuniary obligation for the consumer to pay, in repayment instalments of the loan, the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency, *cannot be considered as 'remuneration'*, the adequacy of which as consideration for a service supplied by the lender cannot be subject of an examination as regards unfairness under Article 4(2)."²⁴⁸²

This was the case on the basis that this difference could not constitute something in return ("consideration") for any foreign exchange service supplied by the lender in this respect.²⁴⁸³

Comparisons with *OFT v Abbey National Plc*

- 40-363 These views of the Court of Justice therefore differ from those expressed by the Supreme Court in *OFT v Abbey National Plc*²⁴⁸⁴ in two ways. First, the Court of Justice considered that contract terms relating to the calculation of moneys payable by the consumer should be considered in relation to each limb of the exclusion in art.4(2) (so, for example, a price term *may* define the very essence of the contractual relationship so as to fall within the "main subject matter of the contract"),

whereas the Supreme Court in *OFT v Abbey National Plc* assumed that the relevant terms setting bank charges would fall only under the second limb of the exclusion.²⁴⁸⁵ It may be added that it would be difficult to argue that the relevant terms in *OFT v Abbey National Plc* constituted an “essential element” of the bank customer’s contract as understood by the Court of Justice, especially given that their contingent nature meant that they would not apply to all customers. Secondly, the Supreme Court in *OFT v Abbey National Plc* considered whether the sums arising under the relevant terms constituted part of the price or remuneration for “the package of services provided by the banks”,²⁴⁸⁶ whereas the Court of Justice in *Kásler* held that the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency, could not be considered as “remuneration” as there was nothing done by the creditor in exchange *for this difference*, thereby rejecting an approach which would have instead looked at the difference as forming part of the remuneration for the package of financial services provided by the creditor. So, for the Court of Justice, the exclusion in the second limb of art.4(2) applies only where there is something specifically in return for the “price or remuneration” provided by the term in question.

Further guidance on the application of the exclusion in *Matei*

- 40-364 In *Matei* the Court of Justice offered guidance to a Romanian court on the application of legislation implementing art.4(2) of the Directive to two terms in a contract of consumer credit: a term under which the consumer debtor could be required to pay the creditor a “risk charge” calculated on the basis of the balance of the loan and payable monthly throughout its duration, and a term authorising the creditor to alter the rate of interest “in the event of significant changes on the financial markets” (the variation clause).²⁴⁸⁷ As regards the variation clause, the Court of Justice saw four reasons why such a clause should fall outside the scope of the exclusion in art.4(2): first, the Court so held in the earlier case of *Invitel* in relation to a similar term²⁴⁸⁸; secondly, such a clause is included in the first paragraph of the Annex to the Directive as a term which may be considered unfair unless it satisfies certain conditions set by its second paragraph and this inclusion would be deprived of its effectiveness if it were excluded from the outset from the test of unfairness by way of art.4(2)²⁴⁸⁹; thirdly, the term looks “ancillary” as it contains an adjustment mechanism for the interest rate which is set by a term which is likely to be part of the main subject matter of the contract²⁴⁹⁰; and, fourthly, the second limb of the exclusion did not appear to be in issue before the national court, as the latter was concerned rather with:

“... the conditions and criteria enabling the lender to make that alteration, in particular on the ground of alleging ‘significant changes in the money market’ and so was not concerned with the limited issue of any alleged inadequacy of the level of the altered interest rate as against any consideration that may have been supplied in exchange for the alteration.”²⁴⁹¹

So, the view of the Court of Justice was very clearly that the interest variation term fell outside the scope of art.4(2), though it was careful to add that this view was “subject to verification by the referring court”.²⁴⁹²

- 40-365 In the case of the terms providing for a “risk charge” to be applied by the lender, according to the Court of Justice “several elements suggest that they do not fall within the exclusion laid down by Article 4(2)”.²⁴⁹³ As regards the first limb of the exclusion, in deciding whether the terms defined the “very essence of the contractual relationship” or are instead “ancillary”, the national court must take into account:

“... the essential aim pursued by the ‘risk charge’ which consists in ensuring repayment of the loan. That clearly constitutes an essential obligation on the part of the consumer in exchange for making available the amount of the loan.”²⁴⁹⁴

For this purpose, the Court considered that:

“... taking account of the objective of protecting consumers which must guide the interpretation of the provisions of [the 1993 Directive] ... the mere fact that the ‘risk charge’ may be regarded as representing a relatively important part of the APR and, therefore, the income received by the lender from the credit agreements concerned is in principle irrelevant for the purposes of determining whether the terms providing for that charge define the ‘main subject-matter’ of the contract.”²⁴⁹⁵

In deciding whether the term providing for the “risk charge” fell within the second limb of the exclusion, in the view of the Court of Justice “certain information in the documents submitted to the Court seems rather to indicate that this is not the case”, though it remained for the referring court to decide whether the term does fall within the exclusion.²⁴⁹⁶ The information in question suggests that the dispute below:

“... does not concern the adequacy of the amount of the risk charge as compared with a service provided by the lender (of whatever kind) since it is submitted that the lender does not provide any actual service which could constitute consideration for that charge, so that the question of the adequacy of that charge does not arise.”²⁴⁹⁷

Instead:

“... the dispute ... essentially covers the grounds justifying the terms in question, and in particular, whether, in so far as they require the consumer to pay commission of a substantial amount which aims to ensure the repayment of the loan, even though it is argued that that risk is already guaranteed by a mortgage and that, in exchange for that

charge, the bank does not provide a real service to the consumer solely in the consumer's interests, those terms must be regarded as unfair, within the meaning of Article 3 of [the 1993 Directive].”²⁴⁹⁸

So, if the national court were to hold that this was the case, the exclusion in the second limb of art.4(2) would not be in issue as the challenge to the term would not concern the adequacy of the remuneration in relation to a service supplied in return by the creditor. In this way, the Court of Justice appears to require a distinct service to be identified to constitute consideration for the “risk charge” (an “actual service which could constitute consideration for that charge”). In the absence of such a counter-part for the charge, the question of its adequacy (and therefore the second limb of the exclusion in art.4(2)) “does not arise”.²⁴⁹⁹

Comparison with *OFT v Abbey National Plc*

- 40-366** Of these elements of guidance in the application of art.4(2) provided by the Court of Justice of the EU in *Matei*, two contrast with the approach taken by the Supreme Court in *OFT v Abbey National Plc*: first, in common with its approach in *Kásler*,²⁵⁰⁰ the application of the second limb of the exclusion the Court requires a distinct service to be identified in exchange for which the “price or remuneration” is to be paid²⁵⁰¹; and, secondly, the Court of Justice specifically ruled it to be “in principle irrelevant” for the application of the first limb that the “risk charge” generated a relatively important part of the income received by the creditor from their contracts with consumers, whereas three members of the Supreme Court in *OFT v Abbey National Plc* saw the fact that the relevant terms imposing bank charges generated an important part of the banks’ revenue stream as relevant to the question whether the charges amounted to part of the “price or remuneration” for the package of services under the second limb.²⁵⁰²

Van Hove

- 40-367** As earlier noted,²⁵⁰³ in the case of contracts of insurance recital 19 of the 1993 Directive sought to explain the exclusion in art.4(2) by stating that:

“... it follows [from the exclusion in art.4(2)] inter alia, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer.”

In *Van Hove v CNP Assurances SA*²⁵⁰⁴ the Court of Justice considered the significance of this in a reference from a French court concerning the application of the core exemption in relation to a consumer contract of insurance. There the consumer had concluded two contracts of loan with a lender and at the same time had concluded with an insurer a contract of insurance which guaranteed cover of all the loan repayments:

“... due from the borrowers to the contracting party in the event of death, permanent and absolute invalidity or 75% of such loan repayments in the event of total incapacity for work.”

A further term stated that the insured:

“... shall be regarded as being in a state of total incapacity for work if, after 90 consecutive days’ interruption of activity following an accident or illness (‘the waiting period’), he finds himself unable to take up any activity, paid or otherwise.”²⁵⁰⁵

After suffering a work-related accident, the consumer was assessed by the national social security authorities as having a permanent partial incapacity at 72 per cent, but the insurer’s doctor advised it that the consumer’s state of health allowed him to carry on appropriate employment on a part-time basis and the insurer therefore refused to cover his loan repayments as he was no longer “unable to take up any activity, paid or otherwise” within the meaning of the contract. The consumer claimed that these terms were unfair, and the French court therefore asked the Court of Justice whether art.4(2) should be interpreted as covering such terms in a contract of insurance. The Court of Justice, following faithfully its early approach to art.4(2) in *Kasler* and *Matei*, held that in deciding whether a term falls within the “main subject-matter of the contract” a national court should consider whether it lays down “the essential obligations of the contract” which “characterise it” or whether it is an ancillary term.²⁵⁰⁶ For this purpose, the Court felt able to draw on its own case-law which held for the purposes of EU provisions on VAT, that:

“... the essentials of an insurance transaction are that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded.”²⁵⁰⁷

Having cited recital 19 of the 1993 Directive, the Court held that the contract term in issue which defines the concept of “total incapacity for work” and other conditions which the consumer must meet to receive cover for the loan may circumscribe the insurer’s risk and “lay down the essential obligations of the insurance contract at issue”, but whether or not it did was for the national court to decide, taking into account the “nature, general scheme and the stipulations of the contract and its legal and factual context”.²⁵⁰⁸ However, the Court of Justice then considered the significance

of the condition for the application of the exclusion in art.4(2) that the term be in “plain, intelligible language” as discussed more generally below.²⁵⁰⁹

Andriciuc

- 40-368 The decision of the Court of Justice in *Andriciuc v Banca Românească* provides a good example of a case where it clearly considered that the contract term in question fell *within* the exclusion provided by art.4(2).²⁵¹⁰ In that case, the consumers, resident in Romania and with incomes in Romanian currency, had contracted loans from a bank under which they had to make monthly repayments in the same foreign currency (Swiss francs) as that in which the contracts had been concluded, with the consequence that the risk in fluctuations as between the Romanian currency and the Swiss franc was borne entirely by the consumers. The consumers sought to challenge the fairness of the terms providing for the loan to be repaid in the same currency in which it was made, but the question arose whether those terms fell within the exclusion in Romanian legislation implementing art.4(2) of the Directive. Having referred to its own case-law in *Kásler, Matei* and *Van Hove*,²⁵¹¹ the Court of Justice concluded that “a number of elements in the documents before the Court” indicate that the relevant terms are covered by the notion of “main subject matter of the contract” within the meaning of the first limb of art.4(2).²⁵¹² The Court observed:

“In that connection, it must be observed that, under a loan agreement, the lender undertakes, in particular, to make available to the borrower a certain sum of money and the latter undertakes, in particular, to repay that sum, usually with interest, on the scheduled payment dates. Therefore, the essential obligations of such a contract relate to a sum of money which must be determined by the stipulated currency in which it is paid and repaid. Thus, as the Advocate General observed..., the fact that a loan must be repaid in a certain currency relates, in principle, not to an ancillary repayment arrangement, but to very nature of the debtor’s obligation, thereby constituting an essential element of a loan agreement.”²⁵¹³

In this respect, the Court of Justice distinguished the situation before it from *Kásler* on the basis that, although the loans there were denominated in foreign currency, they had to be repaid in the national currency according to the selling rate of the exchange applied by the bank, whereas in *Andriciuc* the loans had to be repaid in the same foreign currency as that in which they were issued.²⁵¹⁴ As a result, the Court of Justice was clear that the term setting the repayment in Swiss francs fell within the exclusion of art.4(2), subject to the proviso that it was drafted in plain intelligible language.²⁵¹⁵

Ibercaja Banco SA

- 40-369 In *XZ v Ibercaja Banco SA*²⁵¹⁶ a trader and a consumer had concluded a contract of consumer credit secured by a mortgage with a variable rate of interest (the first contract) and then had concluded a contract (the second contract, termed a “novation agreement”) under which they agreed to amend the lower limit on the variable rate (contained in its “floor clause”) and also to a mutual waiver of any claim arising from the first contract, including therefore in particular any claim by the consumer that the terms of the first contract were unfair and not binding on him.²⁵¹⁷ The Court of Justice was asked by a Spanish court to rule on the validity of the *second* contract under the 1993 Directive. According to Advocate General Saugmandsgaard Øe, the “non-binding” effect of the 1993 Directive on any term in the *first* consumer contract does not in principle render such a second contract invalid,²⁵¹⁸ and the Court of Justice appeared to agree as it instead considered the fairness of the terms of the *second* contract under the Directive,²⁵¹⁹ in particular as regards the provision of information enabling the consumer to understand the legal consequences for themselves.²⁵²⁰ In this case, however, the Court noted that the consumer’s agreement to waive their rights was capable of forming the “main subject-matter of the contract” within the meaning of art.4(2) of the Directive so as to fall outside the requirement of fairness²⁵²¹: as Advocate General Saugmandsgaard Øe had observed, it is “the very essence” of a settlement to contain a clause concerning the waiver of all rights, actions or claims relative to the dispute.²⁵²² However, the Court of Justice focused its own guidance on the proviso to art.4(2) that the terms are in plain intelligible language, a proviso which is explained in the following paragraphs.²⁵²³

The condition that the “terms are in plain intelligible language”

- 40-370 The exclusions from the assessment of unfairness contained in art.4(2) of the Directive (formerly implemented in *reg.6(2) of the 1999 Regulations*²⁵²⁴) are subject to the condition that the relevant terms are expressed in plain and intelligible language and, where they are not, the terms are for this reason subject to the test of unfairness.²⁵²⁵ The Court of Justice has made clear both the importance and the demanding character of this condition.²⁵²⁶ First, in *Pohotovost’ sro v Korčkovská*²⁵²⁷ the Court of Justice held that the omission of the APR (which, together with other “essential terms of the contract”²⁵²⁸ was required by the Consumer Credit Directive of 1987²⁵²⁹) from a term of a contract of consumer credit which concerned the cost of the loan could be seen by a national court as having a decisive impact on the question whether that term was “in plain intelligible language”, and, if it was so held, the term failed the condition for the application of art.4(2) and fell to be assessed for its fairness under art.3 of the Directive.²⁵³⁰ This decision has considerable implications given the breadth of scope of application and the extent of

information requirements imposed by the law (and EU law in particular) in relation to consumer contracts.²⁵³¹ Secondly, in *Kásler* the Court of Justice explained more generally the significance of the condition that the “terms are in plain intelligible language”, holding that it has the same scope as the requirement of plain intelligible writing in art.5 of the 1993 Directive,²⁵³² and that the latter includes a requirement that the consumer should actually be given an opportunity of examining all the terms of the contract.²⁵³³ The Court then noted that it had previously held in the context of art.5 that pre-contractual information on the terms of the contract and the consequences of concluding it is of “fundamental importance for a consumer” as it provides the basis on which “he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier”.²⁵³⁴ For this reason, “the requirement of transparency” of contract terms in the 1993 Directive (including in art.4(2)) cannot be “reduced merely to their being formally and grammatically intelligible”, but must be understood in a broad sense given that the Directive is based on the idea that the consumer is in a position of weakness compared to the trader “in particular as regards his level of knowledge”.²⁵³⁵ As a result, the requirement of transparency requires that the “consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from” the term in question; the reasons for the trader using the term and its relationship with other contractual terms should be clear and intelligible.²⁵³⁶ In the context of the terms before it, which concerned the application of different exchange rates to different aspects of the contract of consumer credit,²⁵³⁷ the national referring court must therefore:

“... determine whether, having regard to all the relevant information, including the promotional material and information provided by the lender in the negotiation of the loan agreement, the *average consumer, who is reasonably well informed and reasonably observant and circumspect*, would not only be aware of the difference, generally observed on the securities market, between the selling rate of exchange and the buying rate of exchange of a foreign currency, but also be able to assess the potentially significant economic consequences for him resulting from the application of the selling rate of exchange for the calculation of the repayments for which he would ultimately be liable and, therefore, the total cost of the sum borrowed.”²⁵³⁸

It will be seen, therefore, that the Court of Justice requires national courts to consider as a condition for the application of the exclusion in art.4(2) not merely whether a term is formally or grammatically clear but also whether (in its context) it allows the average consumer to understand its practical significance for themselves.²⁵³⁹

- 40-371 For this purpose, *Van Hove* provides an example of how very demanding the requirement of transparency can be. There, a contract of insurance contained a term which restricted cover for the consumer to the situation where he suffered from “total incapacity for work” where:

“... after 90 consecutive days’ interruption of activity following an accident or illness ... he finds himself unable to take up any activity, paid or otherwise.”²⁵⁴⁰

The French court had considered that while “plain and precise”, this term is capable of being understood in various ways, including that it does not rule out payment other than where the consumer is not fit to carry on any activity whatsoever²⁵⁴¹ so that it cannot be ruled out that, even though grammatically intelligible, “the scope of that term was not understood by the consumer”.²⁵⁴² The notion of “activity, paid or otherwise” is, in the view of the Court of Justice, “extremely broad and vague”; moreover, the consumer may not necessarily have been aware of the difference between the concept of “total incapacity for work” under the contract and “partial permanent incapacity” within the meaning of French social security law.²⁵⁴³ It was, therefore, for the national court to assess all the information available to the consumer as well as the contract itself, in deciding whether an average consumer would have understood this difference and its potentially significant economic consequences.²⁵⁴⁴ Moreover, the fact that the insurance contract was related to loan contracts could also be relevant as:

“... [t]he consumer cannot be required ... to have the same vigilance regarding the extent of the risks covered by that insurance contract as he would if he had concluded that contract and the loan contracts separately.”²⁵⁴⁵

In this way, the understanding of the average consumer of the significance of a contract term is crucial to the application of the exclusion in art.4(2), though it is relevant to the condition of transparency rather than to the identification of the terms subject to the exclusion.²⁵⁴⁶ A similarly demanding approach was taken in *Andriciuc*, which concerned a term requiring repayment of a loan in a foreign currency where the loan was itself issued in that same currency.²⁵⁴⁷ The Court of Justice noted that, in deciding whether the contract:

“... puts the consumer in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from [the contract]”,²⁵⁴⁸

a national court should refer to all relevant facts, “including the promotional material and information provided by the lender in the negotiation of the loan agreement” with the view to ascertaining whether:

“... all the information likely to have a bearing on the extent of his commitment have [sic] been communicated to the consumer, enabling him to estimate in particular the total cost of his loan.”²⁵⁴⁹

In this respect, the Court of Justice noted the Recommendation of the European Systematic Risk Board on lending in foreign currencies to the effect that financial institutions:

“... must provide borrowers with adequate information to enable them to take well-informed and prudent decisions and should at least encompass the impact on instalments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate.”²⁵⁵⁰

As a result, in the case of such a contract, the consumer/borrower must be clearly informed that he is being exposed to a certain foreign exchange risk which may become difficult to bear if there is a fall in value of the currency in which he receives his income and the lender must set out the possible variations in exchange rate and the risks in taking out a loan in a foreign currency.²⁵⁵¹ In this respect, of particular interest is the Court of Justice’s use of a European recommendation to help determine the content of the information to be supplied by a trader if it is to satisfy the requirement that a term is in plain, intelligible writing.

40-372

U

In *Gómez del Moral Guasch*, the Court of Justice of the EU gave further guidance as to the application of the transparency requirement in the context of a contract of consumer credit with a variable rate of interest.²⁵⁵² There, a term of the contract of consumer credit set the interest rate by reference to one of the official reference indices provided by national legislation for this purpose, though the one selected was both less usual and more costly to the consumer than others so provided.²⁵⁵³ In the view of the Court of Justice, the transparency requirement means that:

“... an average consumer, who is reasonably well-informed and reasonably observant and circumspect, is in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations.”²⁵⁵⁴

While it is for the national court to assess whether this is the case, including by reference to the promotional material and information provided by the lender before contract,²⁵⁵⁵ it should determine whether:

“... all the information likely to have a bearing on the extent of his or her commitment have [sic] been communicated to the consumer, enabling the consumer to estimate in particular the total cost of the loan.”²⁵⁵⁶

However, for this purpose, in the circumstances it was relevant that the essential information relating to the way in which the index rate was determined was “easily accessible to anyone intending to take out a mortgage loan” in the relevant national legislation and was capable of enabling the reasonably observant and circumspect consumer to understand how the index was calculated.²⁵⁵⁷ It was also relevant that credit institutions at the time were required by national law to provide consumers with data relating to the fluctuations of the index rate in question during the preceding two years as well as with its most recent available value and this would give the consumer “an objective indication as to the economic consequences arising from the application of such an index” and provide:

“... a useful point of comparison between the calculation of the variable interest rate based on the [the particular index rate] and other formulas for calculating interest rates.”²⁵⁵⁸

This guidance illustrates how demanding the transparency requirement can be in a context such as consumer credit, but it also illustrates that in assessing whether or not it has been satisfied on the facts a court should consider all the sources of information available to the “average consumer” and not just information provided or to be provided by the trader.²⁵⁵⁹ In this respect, the Court of Justice has held that a declaration by the consumer that he is fully aware of the potential risks of a loan being denominated in a foreign currency is not in itself relevant to the decision whether the trader has fulfilled the requirement of transparency as to those risks.

²⁵⁶⁰



Transparency as regards the trader's services

- 40-373 On the other hand, the Court of Justice has interpreted the requirement of transparency in a less demanding way in the case of the information which the consumer is to receive about the services to be provided by the trader. In *Kiss v Kiss*, a contract of consumer credit included two terms under which a “disbursement commission” (a fixed sum of about €250) and a “management charge” of 2.4 per cent per annum were payable by the consumer in addition to the interest itself in circumstances where it was not clear what services the trader provided in respect of either the commission or the management charge.²⁵⁶¹ The Court of Justice was asked to consider whether this meant that these terms were not “plain and intelligible” within the meaning of arts 4(2) and 5 of the 1993 Directive and, if so, whether they were unfair.²⁵⁶² In the case of the management charge, the Court found that the consumer was in a position to understand “the potentially significant economic consequences for him” of the term as required by the Court’s earlier case-law,²⁵⁶³ but in the case of the commission charge the national court should consider whether the contract set

out transparently the reasons justifying the remuneration corresponding to that charge.²⁵⁶⁴ On the other hand, the Court of Justice held that its case-law did *not* require the lender to specify in the contract the nature of all the services supplied in return for the charges imposed by one or more of the contract terms, though it is important that the nature of the services actually provided can be reasonably understood or deduced from the contract as a whole and that the consumer must be in a position to check that there is no overlap between the different costs or between the services which they remunerate.²⁵⁶⁵

Transparency in settlement contracts

- 40-374 As earlier noted, in *XZ v Ibercaja Banco SA* the Court of Justice held that a clause in a settlement agreement between a bank and a consumer under which the parties waive any rights or claims relating to an earlier consumer credit contract may fall within the first limb of the exclusion contained in art.4(2) of the 1993 Directive (on the basis that the clause relates to the definition of the main subject matter of the settlement contract), but only if it satisfies the requirement of transparency.²⁵⁶⁶ In this respect, the national court considered that the bank had not provided the consumer with sufficient information as to the unfairness of the term in the earlier contract nor of their rights to recover money as “unduly paid” if that term were held unfair and not binding.²⁵⁶⁷ However, in this respect, the Court of Justice noted that the unfairness of a term must be assessed as of the time of the conclusion of the contract:

“... taking account of all the circumstances which could have been known to that seller or supplier at that time, and which were such as to affect the future performance of that contract, since a contractual term may give rise to an imbalance between the parties which manifests itself only during the performance of the contract.”²⁵⁶⁸

In the context, while the unfairness of the term (a “floor clause”) in the consumer credit contract which was the subject of settlement had been established by the national supreme court at the relevant time, that decision had been prospective and it was only later that that Supreme Court had accepted that art.6 of the Directive precluded such a temporal limitation.²⁵⁶⁹ At the time of the conclusion of the second contract, therefore, the unfairness of the floor clause was *foreseeable* by the bank, but it was not certain as it had not been so established between the contracting parties; nor was it apparent that the law as it stood at that time meant that the bank knew that the unfairness of the term would have given the consumer a right to full reimbursement of sums paid.²⁵⁷⁰ The national court should therefore assess “the level of certainty which existed at the time of conclusion of the novation agreement as regards the unfairness of the initial ‘floor’ term” in order to determine what information the requirement of transparency required of the bank in presenting the term under which the consumer waived his or her rights arising from the consumer credit contract.²⁵⁷¹

However, the Court of Justice then ruled that the term in the second contract under which the consumer waived her rights arising from the earlier credit contract:

“... may be regarded as ‘unfair’, particularly where the consumer was not provided with the relevant information enabling him or her to understand the legal consequences for him or her”,

the Court referring to the example in the “indicative list” of terms whose object or effect is “excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy”.²⁵⁷² In this way, a failure in transparency of a term can both disapply the exclusion in art.4(2) and contribute to a finding of its unfairness under the general test in art.3(1).

Burden of proof as to transparency

40-374A In *VB v BNP Paribas Personal Finance SA* the Court of Justice of the EU has held (after IP completion day²⁵⁷³) that the “seller or supplier” must bear the burden of proof as regards the fulfilment of the condition of transparency for the purposes of the exclusion contained in art.4(2) of the 1993 Directive so as to ensure the effectiveness of the consumer’s protection.²⁵⁷⁴ The significance of this decision will be discussed in the context of the requirement of transparency more generally.²⁵⁷⁵

OFT v Abbey National Plc viewed in the light of the European case-law

40-375 In earlier paragraphs, it was explained that the approaches to the interpretation and proper application of the exclusion in art.4(2) of the Directive (as then implemented in UK law by [reg.6\(2\) of the 1999 Regulations](#)) taken by the Supreme Court in *OFT v Abbey National Plc* and by the Court of Justice of the EU in its later case-law differ significantly.²⁵⁷⁶ Under the approach of the Court of Justice, there are three questions for a court considering the possible application of national legislation implementing art.4(2) to terms such as those considered by the Supreme Court in *OFT v Abbey National Plc* (i.e. terms in a contract for a current account which imposed charges on consumer customers when they requested or instructed the bank to make a payment without sufficient funds or credit).²⁵⁷⁷ First, under the first limb of the exclusion, the court should consider whether the terms could be said to “lay down the essential obligations of the contract and, as such, characterise it”.²⁵⁷⁸ It is submitted that it would be most unlikely that a court would so decide, particularly given the contingent nature of the terms in question.²⁵⁷⁹ Secondly, under the second limb of the exclusion, the court should consider whether any payments to be made under the terms constitute the “remuneration” in exchange for a specific service provided by the bank

(rather than as part of the remuneration for a wider package of services). Here, it could be argued that the banks provided a “specific service” to customers when or before the charge was levied by processing their instruction to pay and then paying,²⁵⁸⁰ but it is submitted that Andrew Smith J’s view on this question in *OFT v Abbey National Plc* is correct, that is, that the such charges are not payments *in exchange* for those services, but charges levied because the services are supplied in particular circumstances.²⁵⁸¹ If this view is correct, then the core exclusion would not apply to terms imposing such bank charges, without reference to the third question. Thirdly, even if in principle the terms imposing bank charges were to fall within the exclusion, they would do so only if they passed the requirement of transparency. For this purpose, the Court of Justice requires not merely that the terms are grammatically intelligible, but that the average consumer would be able to evaluate the economic consequences of the term for his own position. The answer to this question would depend not merely on the clarity or even prominence of the drafting of the terms in question but on how any particular term would be viewed by the average consumer given the wider context in which the contract in question was made.²⁵⁸² This discussion does not have a merely historical significance as background to the exclusion now contained in [s.64 of the 2015 Act](#), as, even after IP completion day, the case-law of the Court of Justice then existing remains binding on UK courts, subject to the power in the Supreme Court and certain appellate courts to depart from it.²⁵⁸³ For while the formulation of the exclusion in the UK legislation has changed, as a matter of retained EU law it must not set out an exclusion any *less* protective of consumers than that required by the 1993 Directive as interpreted by retained EU case-law.

Footnotes

2464 See, in particular, *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* (C-484/08) EU:C:2010:309, 3 June 2010 [2010] 3 C.M.L.R. 43; *Pohotovost' sro v Korčkovská* (C-76/10) 16 November 2010 (available only in French); *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (C-472/10) EU:C:2012:242, 26 April 2012 (“*Invitel (C-472/10)*”); *Kásler v OTP Jelzálogbank Zrt* (C-26/13) EU:C:2014:282, 30 April 2014 (“*Kásler (C-26/13)*”); and *Matei v SC Volksbank România SA Matei* (C-143/13) EU:C:2015:127, 26 February 2015 (“*Matei (C-143/13)*”); *Van Hove v CNP Assurances SA Van Hove* (C-96/14) EU:C:2015:262, 26 April 2015 (“*Van Hove (C-96/14)*”); *Bucura v SC Bancpost SA* (C-348/14) EU:C:2015:447, 9 July 2015; *Andriciuc v Banca Românească* (C-186/16) 20 September 2017 (“*Andriciuc (C-186/16)*”); and *XZ v Ibercaja Banco SA* (C-452/18) EU:C:2020:536, 9 July 2020 (“*Ibercaja Banco SA (C-452/18)*”).

2465 See above, para.40-004 and Vol.I, paras 1-027—1-029.

2466 Below, paras 40-362 and 40-364—40-365.

2467 *Kásler (C-26/13)* at para.42; *Matei (C-143/13)* para.49.

2468 *Kásler (C-26/13)* at paras 37–38; *Matei (C-143/13)* para.50.

2469 *Kásler (C-26/13)* at para.45; *Matei (C-143/13)* para.53.

- 2470 *Kásler (C-26/13)* at paras 43–51 and 52–58 respectively; *Matei (C-143/13)* paras 54–55.
- 2471 *Kásler (C-26/13)* at [49]–[50]; similarly *Matei (C-143/13)* para.54; *Kiss v Kiss (C-621/17) EU:C:2019:820, 3 October 2019* (French version used) at para.32; *Profi Credit Polska SA v QJ (C-84/19, C-222/19 and C-252/19) EU:C:2020:631, 3 September 2020* at para.67. Successive editions of the present work explained art.4(2) on the basis that it draws a distinction between the term or terms which express the substance of the bargain and “incidental” (if important) terms which surround them, a formulation quoted with apparent approval by Lord Bingham of Cornhill in *Director General of Fair Trading v First National Bank Plc [2001] UKHL 52* at [12]: see 31st edn, Vol.I, para.17-060.
- 2472 *Kásler (C-26/13)* at [47]–[48], referring to 1993 Directive art.3(1).
- 2473 *Kásler (C-26/13) AG Wahl, Opinion of 12 February 2014* at [49] (original emphasis) and [53] (emphasis added).
- 2474 *Kásler (C-26/13)* at para.52; *Matei (C-143/13)* para.55.
- 2475 *Kásler (C-26/13)* at para.54 and 55; *Matei (C-143/13)* para.55.
- 2476 *Kásler (C-26/13)* at para.54.
- 2477 In the French version of this judgment, “consideration” appears as “*la contrepartie*” and in the German as “*Gegenleistung*”, that is in both cases, something in return.
- 2478 *Matei (C-143/13)* para.56 followed in *Profi Credit Polska SA v QJ (C-84/19, C-222/19 and C-252/19) EU:C:2020:631, 3 September 2020* at para.80.
- 2479 *Matei (C-143/13)* para.60. As will be seen, the 2015 Act s.64(6) made this explicit as this provides that the section providing for the “core exclusion” “does not apply to a term of a contract listed in Part 1 of Schedule 2”, i.e. the indicative list of terms foreseen by para.1 of the Annex to the 1993 Directive: see below, para.40-379.
- 2480 Above, paras 40-358—40-361.
- 2481 *Kásler (C-26/13)* at para.54. The CJEU has stated that contract terms which relate to the foreign exchange risk in a consumer loan define the main subject matter of that agreement, as long as they relate to the actual nature of the debtor’s obligation to repay the amount made available to it by the lender: *Dunai v ERSTE Bank Hungary Zrt (C-118/17) EU:C:2019:207, 14 March 2019* at para.48; *BNP Paribas Personal Finance SA v VE (C-609/19) EU:C:2021:469, 10 June 2021* at paras 33–39.
- 2482 *Kásler (C-26/13)* at para.59 (emphasis added).
- 2483 *Kásler (C-26/13)* at para.58 applied in *BNP Paribas Personal Finance SA v VE (C-609/19) EU:C:2019:207, 10 June 2021* at para.32.
- 2484 [2009] UKSC 6, above, paras 40-355—40-356.
- 2485 i.e. 1999 Regulations reg.6(2)(b).
- 2486 [2009] UKSC 6 at [40], per Lord Walker JSC and cf. at [80] and [81] (where this view is apparently taken by Lord Phillips PSC), and at [98] (Lord Mance JSC), above, para.40-355.
- 2487 *Matei (C-143/13)* paras 26–27.

- 2488 *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt* (*C-472/10*)
EU:C:2012:242, 26 April 2012 at para.23; *Matei* (*C-143/13*) para.58 and see above,
para.40-340.
- 2489 *Matei* (*C-143/13*) paras 59–61 referring to 1993 Directive Annex paras 1(j) and 2(b).
- 2490 *Matei* (*C-143/13*) para.62.
- 2491 *Matei* (*C-143/13*) para.63.
- 2492 *Matei* (*C-143/13*) para.63.
- 2493 *Matei* (*C-143/13*) para.64.
- 2494 *Matei* (*C-143/13*) para.67.
- 2495 *Matei* (*C-143/13*) para.68.
- 2496 *Matei* (*C-143/13*) para.69.
- 2497 *Matei* (*C-143/13*) para.70 referring by analogy to *Kásler* (*C-26/13*) at para.58, above,
para.40-362.
- 2498 *Matei* (*C-143/13*) para.71.
- 2499 *Matei* (*C-143/13*) para.70 and see similarly *BNP Paribas Personal Finance SA v VE* (*C-609/19*) EU:C:2021:470, 10 June 2021 at para.32. cf. the very different interpretation given to *Matei* by AG Hogan in *Kiss v Kiss* (*C-621/17*) EU:C:2019:411 *Opinion of 15 May 2019* at paras 35–38. There, a contract of consumer credit included two terms under which a “disbursement commission” (a fixed sum of about €250) and a “management charge” of 2.4 per cent per annum were payable by the consumer borrower. Even though the contract did not specify the services for which this charge was made, AG Hogan advised that the term providing for the management charge could fall within the second limb of art.4(2) of the 1993 Directive on the basis that the charge formed “one element of the price to be paid” in return for the loan: “a single service may give rise to several price clauses” without taking the clauses outside the exclusion, and “a clause may contain several terms and a term may take the form of several clauses”: *C-143/13* at para.50. However, he further advised that the terms were not in “plain intelligible writing”: *C-143/13* at para.44, and see below, paras 40-370 et seq. (The CJEU in its decision of 3 October 2019 EU:C:2019:820 did not address the issue of the application of the second limb, but focussed instead on the nature and significance of the requirement of transparency.) In *Profi Credit Polska SA z siedziba w Bielsku- Bialej v QJ* (*C-84/19, C-222/19 and C-252/19*) EU:C:2020:259, AG Hogan in his *Opinion of 2 April 2020*, paras 49–60 took a similar view of art.4(2) as he had in *Kiss v Kiss*, but this view was not followed by the CJEU in its judgment of 3 September 2020 EU:C:2020:631 at paras 81 and 86 as it stated that the application of the second limb of the exception in art.4(2) of the Directive did not apply to the contract terms in question as they did not specify the services to which the charges which they imposed referred; the terms were also likely to have failed the requirement of transparency.
- 2500 *Kásler* (*C-26/13*) at para.59, above, para.40-363.
- 2501 cf. [2009] *UKSC* 6 at [40], per Lord Walker and cf. at [80] and [81] (where this view is apparently taken by Lord Phillips) and at [98] (Lord Mance), above, para.40-355.
- 2502 [2009] *UKSC* 6 at [47] (Lord Walker, with whom Baroness Hale and Lord Neuberger agreed), above, para.40-356.

- 2503 Above, para.40-351.
- 2504 *C-96/14 EU:C:2015:262, 23 April 2015 (“Van Hove (C-96/14)”).*
- 2505 *Van Hove (C-96/14)* paras 11–12.
- 2506 *Van Hove (C-96/14)* paras 31, 33 referring to *Kásler (C-26/13)* para.50; *Matei (C-143/13)* para.54 above, para.40-359.
- 2507 *Van Hove (C-96/14)* para.34 referring to *Card Protection Plan (CCP) Ltd v Commissioners of Customs & Excise (C-349/96) EU:C:1999:93, [1999] E.C.R. I-973 para.17; Skandia (C-240/99) EU:C:2001:140, [2001] E.C.R. I-01951 para.37; and Commission v Greece (C-13/06) EU:C:2006:765, [2006] E.C.R. I-11563 para.10.*
- 2508 *Van Hove (C-96/14)* paras 36–37, following *Kásler* at paras 50 and 51, above, para.40-359.
- 2509 Below, paras 40-370 et seq.
- 2510 *Andriciuc v Banca Românească (C-186/16) EU:C:2017:703, 20 September 2017 (“Andriciuc (C-186/16)”).*
- 2511 Above, paras 40-358—40-367.
- 2512 *Andriciuc (C-186/16)* at paras 27–31.
- 2513 *Andriciuc (C-186/16)* at para.38 referring to the Opinion of AG Wahl, paras 46 et seq. See also *CY v Caixabank SA (C-224/19, C-259/19) EU:C:2020:578, 16 July 2020* at paras 62–64.
- 2514 *Andriciuc (C-186/16)* at para.40.
- 2515 *Andriciuc (C-186/16)* at para.41. On its decision on the proviso, see below, para.40-371.
- 2516 *C-452/18*, Opinion of AG Saugmandsgaard Øe of 20 January 2020 (available in French) (“C-452/18, AG Opinion”); decision of the CJEU (*C-452/18) EU:C:2020:536, 9 July 2020* (“Ibercaja Banco SA (C-452/18)”).
- 2517 As noted below, para.40-374, national case-law had found *some* floor clauses unfair under national legislation implementing the 1993 Directive.
- 2518 *C-452/18, AG Opinion* paras 34 and 35. See below, para.40-407 where the conditions for this position are noted.
- 2519 *Ibercaja Banco SA (C-452/18)* paras 59–61.
- 2520 *Ibercaja Banco SA (C-452/18)* at para.77.
- 2521 *Ibercaja Banco SA (C-452/18)* at para.68.
- 2522 *C-452/18, AG Opinion* para.73 applying the approach to the first limb of art.4(2) adopted by the CJEU in *Kásler v OTP Jelzálogbank Zrt (C-26/13) EU:C:2014:282* paras 49 and 50, above, para.40-359.
- 2523 See, in particular, below, para.40-374 in relation to *Ibercaja Banco SA* itself.
- 2524 cf. below paras 40-379—40-380 in relation to the differently worded condition in s.64 of the 2015 Act.
- 2525 For examples in the English courts on the 1999 Regulations, see *Bankers Insurance Co Ltd v South [2003] P.I.Q.R. P.28* at [24] (exclusion in travel insurance held “plain and intelligible”); *Financial Services Authority v Asset L.I. Inc (t/a Asset Land Investment Inc) [2013] EWHC 178 (Ch), [2013] 2 B.C.L.C. 480* at [132] (terms in contracts for the sale of land under a collective investment scheme which described services undertaken by seller held not to be in “plain, intelligible” language and so reviewable for unfairness

even if they otherwise fell within the exclusion in reg.6(2) of the 1999 Regulations). On appeal, the Court of Appeal considered that the issue of the unfairness of the terms was unnecessary for the issues before the court, but it would have agreed with the court below: *[2014] EWCA Civ 435*, *[2015] 1 All E.R. 1* at [96]–[99]).

2526 See also Commission guidance C(2019) 5325 final pp.26–31.

2527 (*C-76/10* EU:C:2010:685, *Order of the Court of 16 November 2010* (available only in French).

2528 Directive 87/102 on consumer credit [1987] O.J. L42/48 art.4(3).

2529 Directive 87/102 on consumer credit [1987] O.J. L42/48 art.4(2)(a).

2530 *C-76/10* para.72, citing *Caja de Madrid (C-484/08)* para.32 and see similarly *EPS KSI Slovensko sro v Danko (C-448/17)* EU:C:2018:745, 20 September 2018 (credit agreement's use of a mathematical formula for the calculation of the APR without the information necessary to make that calculation is equivalent to a simple failure to provide the APR). The CJEU in *Pohotovost' sro* further held that the national court could find that the term was unfair as a result of the omission of the APR: *C-76/10* at para.73.

2531 See above, paras 40-062 et seq., especially in respect of on-premises contracts, off-premises contracts and distance contracts in retained EU law.

2532 *Kásler (C-26/13)* at para.69. On art.5 (implemented by the 2015 Act ss.68 and 69) see below paras 40-428—40-429.

2533 *Kásler (C-26/13)* at para.67 referring to 1993 Directive recital 12 and see above, para.40-301 in the context of the application of the test of fairness.

2534 *Kásler (C-26/13)* at para.70 referring to *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV (C-92/11)* EU:C:2013:180, 21 March 2013 at para.44, below, para.40-429.

2535 *Kásler (C-26/13)* at paras 71–72.

2536 *Kásler (C-26/13)* at para.75.

2537 Above, para.40-362.

2538 *Kásler (C-26/13)* at para.74 (emphasis added).

2539 The CJEU has held that the plainness and intelligibility of a term must be assessed “by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract, even though some of those terms have been declared or presumed to be unfair and annulled at a later time by the national legislature”: *OTP Bank Nyrt v Ilyés and Kiss (C-51/17)* EU:C:2018:750, 20 September 2018 at paras 79–80, drawing on the terms of art.4(1) of the 1993 Directive which itself refers to the assessment of the unfairness of a contract term. On the wider significance of the “average consumer” in EU law see above, paras 40-046—40-048. The CJEU has held that the requirement of transparency must be assessed by the court in its context and that this is incompatible with national case-law which holds that a particular contract term in itself satisfies this requirement: *CY v Caixabank SA (C-224/19 and C-259/19)* EU:C:2020:578 at para.69.

2540 *Van Hove v CNP Assurances SA (C-96/14)* EU:C:2015:262, 23 April 2015, on which see above, para.40-367.

- 2541 *Van Hove (C-96/14)* para.42.
- 2542 *Van Hove (C-96/14)* para.43.
- 2543 *Van Hove (C-96/14)* paras 45–46.
- 2544 *Van Hove (C-96/14)* para.47.
- 2545 *Van Hove (C-96/14)* para.48. As will be seen, the *Consumer Rights Act 2015* follows this approach in its provision implementing art.4(2) of the Directive by expressly referring to the “average consumer” for the purpose of its condition that the term be prominent as well as transparent: see *2015 Act s.64(2)–(5)* below, paras 40-376—40-389 and esp. at para.40-483.
- 2546 cf. the approach of the Court of Appeal in *OFT v Abbey National Plc* (reversed by the SC in the same case) which adopted the viewpoint of an average consumer to distinguish between those contract terms which set the “price or remuneration” and other terms, as suggested by earlier editions of the present work: [2009] EWCA Civ 116, [2009] 2 W.L.R. 1286 at [72] referring to the present work (30th edn, 2008) Vol.I para.17-058, reversed [2009] UKSC 6, [2010] 1 A.C. 696 at [113]. On the decision of the SC, see above, paras 40-355—40-356.
- 2547 *Andriciuc v Banca Românească (C-186/16)* 20 September 2017 (“*Andriciuc (C-186/16)*”) above, para.40-368. See similarly *OTP Bank Nyrt v Ilyes and Kiss (C-51/17)* EU:C:2018:750, 20 September 2018 at paras 71–78; *GT v JS (C-38/17)* EU:C:2019:461, 5 June 2019 at paras 33–36.
- 2548 *Andriciuc (C-186/16)* at para.45.
- 2549 *Andriciuc (C-186/16)* at paras 46–47.
- 2550 *Andriciuc (C-186/16)* at para.49 referring to Recommendation ESRB/2011/1 of 21 September 2011 on lending in foreign currencies, [2011] O.J. C342/1, Recommendation A—Risk awareness of borrowers, para.1 [2011] O.J. C342/1.
- 2551 *Andriciuc (C-186/16)* at para.50.
- 2552 *Gómez del Moral Guasch v Bankia SA (C-125/18)* EU:C:2020:138, 3 March 2020 at para.37 (“*Gómez del Moral Guasch v Bankia SA (C-125/18)*”). See also *BNP Paribas Personal Finance SA v VE (C-609/19)* EU:C:2021:469, 10 June 2021 at paras 41–57 in the context of information required relating to the exchange risk in a consumer loan denominated in a foreign currency.
- 2553 The rate in question was the average rate of mortgage loans granted by the Spanish savings banks (“IRPH” of Spanish savings banks) whereas 90 per cent of mortgage loans taken out in Spain instead referred to the Euro Interbank Offered Rate (“the Euribor index”): *Gómez del Moral Guasch v Bankia SA (C-125/18)* at para.22.
- 2554 *Gómez del Moral Guasch v Bankia SA (C-125/18)* at para.51.
- 2555 *Gómez del Moral Guasch v Bankia SA (C-125/18)* at para.52.
- 2556 *Gómez del Moral Guasch v Bankia SA (C-125/18)* at para.52 (emphasis added).
- 2557 *Gómez del Moral Guasch v Bankia SA (C-125/18)* at para.53.
- 2558 *Gómez del Moral Guasch v Bankia SA (C-125/18)* at para.54.
- 2559 See also *XZ v Ibercaja Banco SA (C-452/18)* EU:C:2020:536 at paras 44–56, where the CJEU followed its approach in *Gómez del Moral Guasch v Bankia SA* but accepted (at para.52) that where a bank lends money on a variable interest rate with a “floor

clause”, it “cannot … be required to provide precise information regarding the financial consequences of variations in the interest rate during the course of the contract, since those variations depend on unforeseeable future events that are outwith the seller or supplier’s control”.

2560 *EP v ERSTE Bank Hungary Zrt (C-670/20) EU:C:2021:1002*, Order of 6 December 2021 at para.32.

2561 (*C-621/17*) *EU:C:2019:820*, 3 October 2019 (French version used) (“*Kiss v Kiss (C-621/17)*”).

2562 The CJEU did not think it necessary to consider the issue discussed by AG Hogan (Opinion at paras 35–38) as to whether the lack of a service in return for a particular sum payable under the contract affected whether the second limb of the exclusion in art.4(2) applied: see above, para.[40-365](#) (note).

2563 *Kásler (C-26/13)* para.75, above, para.[40-370](#); *Van Hove (C-96/14)* para.47; *Andriciuc (C-186/16)* paras 45–47, above, para.[40-371](#).

2564 *Kiss v Kiss (C-621/17)* at para.40 following *Matei (C-143/13)* at para.77 and followed by *Profi Credit Polska SA v QJ (C-84/19, C-222/19 and C-252/19) EU:C:2020:631*, 3 September 2020 at paras 74–78.

2565 *Kiss v Kiss (C-621/17)* para.40; *Profi Credit Polska SA v QJ (C-84/19, C-222/19 and C-252/19) EU:C:2020:631*, 3 September 2020 at para.75.

2566 *XZ v Ibercaja Banco SA (C-452/18) EU:C:2020:536* 9 July 2020 (“*Ibercaja Banco SA (C-452/18)*”) at para.68, on which see above, para.[40-369](#). The CJEU held that consumers could not waive their rights to challenge the fairness of the terms in any future dispute: *Ibercaja Banco SA (C-452/18)* paras 75–77 and see below para.[40-407](#).

2567 *Ibercaja Banco SA (C-452/18)* para.69.

2568 *Ibercaja Banco SA (C-452/18)* para.70.

2569 *Ibercaja Banco SA (C-452/18)* para.71.

2570 *Ibercaja Banco SA (C-452/18)* paras 72 and 73.

2571 *Ibercaja Banco SA (C-452/18)* para.74.

2572 *Ibercaja Banco SA (C-452/18)* para.75 (first indent), On the example in para.1(q) (implemented by *2015 Act Sch.2 Pt 1 para.20* see above, para.[40-319](#)).

2573 This date means that UK courts are not bound in principle by the decision but may have regard to it: see above, para.[40-004](#) and Vol.I, para.[1-029](#).

2574 *VB v BNP Paribas Personal Finance SA (C-776/19 to C-782/19) EU:C:2021:470*, 20 June 2021 at paras 79–89, above, para.14–164 (note).

2575 Below, para.[40-432A](#).

2576 See above, paras [40-363](#) and [40-366](#).

2577 See above, paras [40-358](#)—[40-361](#).

2578 *Kásler (C-26/13)* at para.49 and see above, para.[40-359](#).

2579 cf. above, para.[40-355](#).

2580 cf. the Court of Appeal in *OFT v Abbey National Plc [2009] EWCA Civ 116, [2009] 2 W.L.R. 1286* at [17] referring to the discussion of Andrew Smith J *[2008] EWHC 875*

(*Comm*), [2008] 2 All E.R. (*Comm*) 625 at [373] et seq. and especially at [402]–[413]. The Court of Appeal did not require to decide this issue: at [113].

2581 *OFT v Abbey National Plc* [2008] EWHC 875 (*Comm*), [2008] 2 All E.R. (*Comm*) 625 at [406]. It is true that Andrew Smith J referred to the understanding of the typical consumer for this purpose (and this does not form part of the approach of the CJEU at this stage of its analysis), but Andrew Smith J considered that it rested equally on the substance and reality of the matter. The Supreme Court did not take a view on this issue as it held that payments made under the terms formed part of the remuneration for a package of services: [2009] UKSC 6, [2010] 1 A.C. 696 especially at [42], [47], [81], [89], [100]–[104], and [104], above, para.40-355.

2582 cf. above, paras 40-370—40-383.

2583 Above, para.40-004 and Vol.I, paras 1-037—1-039.

(dd) - The “Core Exemption” Reformulated by the 2015 Act

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(iii) - The “Core Exemption”

(dd) - The “Core Exemption” Reformulated by the 2015 Act

The Law Commissions’ Advice

40-376 The view taken by the Supreme Court in *Abbey National Plc v Office of Fair Trading*²⁵⁸⁴ to the core exemption in reg.6(2) of the 1999 Regulations was criticised as too broad and insufficiently protective of consumers²⁵⁸⁵ and led the Department for Business, Innovation and Skills (BIS) to ask the Law Commissions to advise it on the issue as part of a wider updated advice on the creation of a single harmonised regime to replace the Unfair Contract Terms Act and the 1999 Regulations.²⁵⁸⁶ The Law Commissions’ advice to BIS had the advantage of guidance by the Court of Justice on the significance of art.4(2) of the 1993 Directive, notably in *Caja de Madrid* and *Pohotovost'*,²⁵⁸⁷ but not in the important later decisions in *Kásler*, *Matei* and *Van Hove*.²⁵⁸⁸ They advised that the UK’s implementation of the exclusion contained in art.4(2) of the 1993 Directive should be reformed as the:

“... current law is unacceptably uncertain. It requires significant legal expertise to navigate, and even then the outcome is unpredictable. Both consumers and traders may suffer from this uncertainty.”²⁵⁸⁹

The Law Commissions considered that the first limb of the exemption in art.4(2) (concerning the main subject matter of the contract) excludes from the test of unfairness a category of contract terms, whereas the second part (referring to “the adequacy of the price and remuneration, on

the one hand, as against the services or goods supplied in exchange, on the other”) instead excludes the amount of the price as against the services or goods supplied in exchange from the assessment of the fairness of a term.²⁵⁹⁰ As regards the second limb, they interpreted the Supreme Court’s decision in *Abbey National Plc v Office of Fair Trading*²⁵⁹¹ as rejecting a distinction between the main price and ancillary price or charges for the purposes of identifying “price and remuneration” under art.4(2),²⁵⁹² and stated that “[p]rice is therefore intended to be a broad concept which includes ancillary and contingent charges”.²⁵⁹³ They considered that the “price” should be understood as “money consideration” following the definition in the *Sale of Goods Act 1979*.²⁵⁹⁴ While they considered that the reference to “remuneration” in art.4(2) of the Directive was unlikely to refer to consideration furnished other than in money (such as terms requiring consumers to grant traders intellectual property rights), if it did, as a matter of policy they recommended that the exclusion should not cover this situation.²⁵⁹⁵

- 40-377 The purpose of the Law Commissions’ recommendations was to clarify the exemption allowed by art.4(2) and to discourage traders from using “hidden price terms” which undermine the competitiveness of the market by offering low headline prices and then adding hidden extras, which both “causes detriment to consumers and disadvantages honest traders who are upfront about their charges”.²⁵⁹⁶ Rather than proposing that the exemption should not apply to payments which are “incidental or ancillary to the main purpose of the contract” as they had previously suggested, the Law Commissions therefore recommended that:

“... price or main subject matter terms should be exempt from review only if they are transparent and prominent. Both approaches distinguish between the terms which consumers take into account in their decision to buy the product and those which become lost in small print. The emphasis on prominence, however, offers a practical way of distinguishing between a headline price and other charges. It also emphasises that whether a term is exempt is within the control of the trader.”²⁵⁹⁷

- 40-378 For this purpose, the Law Commissions recommended that future legislation should make clear that a requirement of transparency of terms required that they should be “plain and intelligible”, legible and readily available to the consumer,²⁵⁹⁸ considering that this did not “gold-plate” the Directive (i.e. did not go beyond its requirements).²⁵⁹⁹ Moreover, the Law Commissions recommended that the legislation should add a new condition that a term must also be “prominent” to fall within the exemption,²⁶⁰⁰ meaning by this that:

“... it is presented during the sales process in such a way that a reasonable consumer would be aware of the term even if they did not read the full contractual document.”²⁶⁰¹

For this purpose, the EU standard of the “average consumer” (that is, “a reasonably well informed, observant and circumspect” consumer) should be adopted.²⁶⁰² The Law Commissions considered that there is “considerable overlap between the concepts of transparency and prominence”, but that while transparent terms will not always be prominent, prominent terms will usually be available and legible, but may not necessarily be in plain and intelligible language.²⁶⁰³ Moreover, the additional requirement of “prominence” would apply only as a condition for the application of the exclusion drawn from art.4(2) and would not affect the general requirement of transparency of terms.²⁶⁰⁴ While not saying so explicitly, the Law Commissions apparently saw the imposition of this condition additional to the one required by art.4(2) of the 1993 Directive as permissible given the “minimum harmonisation” which it requires.²⁶⁰⁵

Consumer Rights Act 2015 s.64

40-379 Section 64 of the Act is entitled “Exclusion from assessment of fairness” and s.64(1) provides:

Section 64

“A term of a consumer contract may not be assessed for fairness … 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.”

²⁶⁰⁶

Section 64 further provides that this excludes a term from an assessment only if it is “transparent and prominent”.²⁶⁰⁷ For this purpose:

“(3)A term is transparent … if it is expressed in plain and intelligible language and (in the case of a written term) is legible.²⁶⁰⁸

(4)A term is prominent … 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.”

Relationship to Law Commissions’ recommendations and European case-law

- 40-380 It will be seen that s.64 reflects most but not all of the recommendations of the Law Commissions; and also reflects to a considerable extent the case-law of the Court of Justice of the EU.²⁶⁰⁹

The nature of the two limbs of the exclusion

- 40-381 First, s.64 reflects the view of the Law Commissions²⁶¹⁰ that the nature of the two limbs of art.4(2) of the 1993 Directive differs: the first limb excludes from assessment for its fairness “a term ... to the extent that it specifies the main subject matter of the contract”²⁶¹¹; whereas the second limb excludes a term from assessment for its fairness:

“... to the extent that 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.”²⁶¹²

This view finds clear support in the judgments of the Court of Justice in *Kásler* and *Matei*.²⁶¹³ In *R (ex p. Donegan) v Financial Services Compensation Scheme Ltd* the High Court applied the explanation in *Kásler* to the first limb of the exclusion in s.64 of the Act, holding that a non-transfer term in a bond did not lay down “the essential obligations of the contract and, as such characterise it” as opposed to being “ancillary to those that define the very essence of the contractual relationship”²⁶¹⁴ since:

“... transferability is clearly a secondary aspect of the contract in question. The essential obligations were payment of the subscription, accrual of interest and repayment upon maturity.”²⁶¹⁵

The condition of transparency

- 40-382 Secondly, s.64(3) explains the condition that a term be transparent in order to come within the exclusion as concerning both its expression in plain and intelligible language and, in the case of written terms, legibility. It will be noted that, unlike art.4(2) of the Directive, s.64(3) therefore

specifies that transparency requires that written terms must be legible as well as “plain and intelligible”, but, on the other hand, and contrary to the recommendation of the Law Commissions, s.64 does not also require that the term be “readily available”.²⁶¹⁶ It is submitted, however, that neither this inclusion nor this omission make any substantive difference given the very broad interpretation given to the requirement of transparency by the Court of Justice of the EU. As has been seen, the Court of Justice in *Kásler* held that the condition of transparency in art.4(2) and the requirement of transparency in art.5 are the same and that, for the purposes of art.5, recital 20 states that “the consumer should actually be given an opportunity of examining all the terms of the contract”.²⁶¹⁷ As a result, a UK court would have to give effect to this aspect of the condition of the transparency of terms under art.4(2) in its interpretation of s.64(3) even though this element is not specified.²⁶¹⁸ Moreover, the Court of Justice in *Kásler* went much further, holding that the requirement of transparency does not merely require that the term is “formally and grammatically intelligible”,²⁶¹⁹ but also that the “consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from” the term in question: the trader’s reasons for using the term and its relationship with other contractual terms should be clear and intelligible.²⁶²⁰ This clearly includes legibility in the case of written terms. Finally, the Court of Justice set as the standard for evaluation of the transparency of contract terms “the average consumer, who is reasonably well informed and reasonably observant and circumspect”.²⁶²¹ Given this European case-law, it is submitted that it does not matter that s.64 refers to the standard of the “average consumer” (defined as “a consumer who is reasonably well-informed, observant and circumspect”) only for the purposes of the requirement of prominence²⁶²² rather than also for the requirement of transparency, as the standard is relevant to the latter as a matter of its proper interpretation under this case-law.²⁶²³

The “average consumer”: a variable objective standard

40-383

- U In this respect, it is helpful to recall the treatment of the “average consumer” for the purposes of the Unfair Commercial Practices Directive 2005, which makes clear that the test of the “average consumer” is not necessarily uniform, but that (while remaining objective) may vary according to context.²⁶²⁴ For this purpose, the 2005 Directive distinguishes between: (i) the average consumer; (ii) the average member of the group where a commercial practice is directed to a particular group of consumers; and (iii) the average member of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.²⁶²⁵ It is submitted that similar distinctions could helpfully be drawn for the purposes of the transparency of contract terms under the 1993 Directive and, therefore, also under s.64 of the 2015 Act, especially as regards the extent to which consumers could be expected to read, understand and appreciate the practical significance for their own position of the terms of the contract, for

while a court would generally be justified in assessing these questions bearing in mind an “average consumer” (neither very sophisticated and careful nor, conversely, of under average intelligence or careless), where a trader has targeted its goods or services (and therefore its contract terms) towards a particular group of consumers, then this standard should be varied so as to take this into account.

²⁶²⁶

U It is submitted, moreover, that in the context of contract terms, this standard could be varied in either direction. So, if a business targets particularly vulnerable consumers (for example, offering loans to low-income or poor-credit would-be borrowers), then the “average consumer” should be to an extent lowered; but if a business targets its sophisticated financial products towards high-income individuals (who may be independently advised), then the “average consumer” should be to this extent raised. And, as the General Court has observed in the context of EU legislation on trade marks, “the average consumer’s level of attention is likely to vary according to the category of goods or services in question”. ²⁶²⁷ In this way, the “average consumer” is an objective standard variable according to its context.

The new condition of prominence

- 40-384 Thirdly, s.64(4) imposes a further condition of “prominence” for a contract term to fall within the exclusion from the requirement of fairness as recommended by the Law Commissions ²⁶²⁸ and it explains this condition in terms of it being “brought to the consumer’s attention in such a way that an average consumer would be aware of the term”. The *Explanatory Notes* to the Act provide as an example of this condition that terms governing the price or subject matter are “in the small print”. ²⁶²⁹ The Law Commissions apparently assumed that this additional condition would go beyond the condition of “plain intelligible language” or transparency set by art.4(2) of the Directive, ²⁶³⁰ but this assumption is open to doubt given the very broad interpretation of the condition of transparency in *Kásler, Matei, Van Hove* and *Andriciuc*, for in those cases, as earlier noted, the Court of Justice required the national court to consider not merely whether a relevant term had been “brought to the consumer’s attention in such a way that an average consumer would be aware of the term”, ²⁶³¹ but that the average consumer “is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from that term”. ²⁶³² Indeed, the additional condition of “prominence” set by the *2015 Act* may not go far enough to give proper effect to the interpretation of the Court of Justice without the aid of the principle of conforming interpretation by national courts of legislation implementing EU law. ²⁶³³ On the other hand, if and to the extent to which the Act’s condition of “prominence” does indeed go further than the 1993 Directive (as interpreted) in the interests of providing greater protection for consumers than it requires, then the Act’s compatibility with EU law is covered by the Directive’s “minimum harmonisation” clause as regards its “contract law effects”, though it may not be so covered as to its provision of enforcement measures. ²⁶³⁴ Finally, it will be noted that, unlike its definition of transparency itself, the definition of prominence refers explicitly to the standard of

the average consumer, thereby adopting the standard found in the case-law of the Court of Justice in the context of transparency of contract terms and more widely in EU law.²⁶³⁵ In its guidance on the interpretation of the requirement of prominence, the CMA has emphasised the need for practical and effective prominence, this depending on “consideration of all the circumstances at the conclusion of the contract, the nature of the term and its relationship to other terms” and having regard in particular to information provided to the consumer before contract and other relevant aspects of the sales process, the nature of the relevant term and its relationship to other terms of the contract or other contracts and “what will have been the consumer’s reasonable expectations when deciding whether to enter the contract”.²⁶³⁶

“Price and remuneration” and “price”

- 40-385 Fourthly, the strategy of the [2015 Act](#) in dealing with the problem of “hidden price terms” by requiring that they must be “prominent” rested on the Law Commission’s broad interpretation of the expression “price and remuneration” found in art.4(2) of the Directive so as to cover all terms which impose money obligations on consumers including terms imposing ancillary charges.²⁶³⁷ However, the Law Commissions recommended that only “price” (understood in the sense of “money consideration” as found in the [Sale of Goods Act 1979](#)²⁶³⁸) should be included, as they did “not think that the reference to “remuneration” adds anything and ... could cause confusion” as it could be read as including non-monetary obligations (such as terms requiring consumers to grant traders intellectual property rights) which should not be included as a matter of policy.²⁶³⁹ This view is reflected directly in [s.64\(1\)\(b\) of the 2015 Act](#) which excludes from the assessment of the term “the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied” under the contract, although (contrary to the recommendation of the Law Commissions) the Act does not define “price” for this purpose. However, it is submitted that an interpretation of [s.64\(1\)\(b\) of the Act](#) so as to include within “price” all “money consideration” (as understood broadly by the Supreme Court in [Abbey National Plc](#)²⁶⁴⁰ and followed by the Law Commissions) may be broader in its effect than the interpretation given to the second limb of the exclusion in art.4(2) of the Directive by the Court of Justice. In [Kásler](#), the Court of Justice considered whether a term in a contract of consumer credit denominated in a foreign currency which set the exchange rate for repayment by the consumer of the loan at the creditor bank’s “selling rate” could be assessed for its unfairness, where another term set the exchange rate for repayment of the original sums lent by the bank to the consumer at the bank’s “buying rate”.²⁶⁴¹ It held that the second limb of the exclusion in art.4(2) *could not apply* to the repayment term, as such a term:

“... in so far as it contains a pecuniary obligation for the consumer to pay, in repayment instalments of the loan, the difference between the selling rate of exchange and the buying rate of exchange of the foreign currency, *cannot be considered as*

‘remuneration’, the adequacy of which as consideration for a service supplied by the lender cannot be subject of an examination as regards unfairness under Article 4(2)”,

of the Directive,²⁶⁴² apparently on the basis that this difference did not constitute something in return (“consideration”) for any foreign exchange service supplied by the lender.²⁶⁴³ As earlier explained, the Court of Justice therefore saw the second limb of the exclusion in art.4(2) as ruling out comparison of the sum payable under a contract term (there, the repayment term) as against any services provided *for such a sum*, thereby implicitly rejecting the Supreme Court’s approach which looked globally at the sums payable (or contingently payable) under the term as against the package of services provided by the trader in respect (in part) of those sums.²⁶⁴⁴ Moreover, this contrast between the approach of the Court of Justice and the Supreme Court in *OFT v Abbey National Plc* was made clearer by the Court of Justice’s judgment in *Matei*, where it again required the identification of a distinct service in exchange for which the “price or remuneration” is to be paid.²⁶⁴⁵

- 40-386 In this respect, in *Casehub Ltd v Wolf Cola Ltd* (decided before IP completion day) the High Court rejected the invitation of the claimant (to whom consumers had assigned their claims²⁶⁴⁶) that it should not follow the Supreme Court’s decision in *Abbey National Plc* in relation to the exclusion in s.64 of the 2015 Act on the basis that it was inconsistent with the later decisions of the CJEU in *Kásler* and *Matei*, on the grounds that it was bound by the Supreme Court’s decision and that it was “far from clear that the CJEU cases … have the effect for which [the claimant] contends”.²⁶⁴⁷ In *Casehub*, the consumers (and other customers) had contracted with the defendant for the internet storage of data by way of “cloud computing”. Under their contracts, the defendant charged its customers a £20 monthly subscription fee for a fixed term of 12 months; if a customer terminated its agreement within the minimum term, a cancellation fee was payable calculated as a lump sum equivalent to the total remaining monthly charges less a 10 per cent discount said to reflect the fact that the customer was paying early. Due to system problems, a number of the defendant’s customers did not receive their log-in information to access the service and they therefore terminated their contracts within the first month, being then charged a £196 cancellation fee. The claimant contended that the cancellation fee provisions in the consumer contracts were unlawful as unfair under s.62 of the 2015 Act and that therefore the consumers were not liable to pay the fees and could recover fees already paid. However, the High Court rejected this claim, holding that the cancellation fees provisions in the contracts came within the exclusion provided by s.64 of the Act. The assessment of the fairness of these terms would involve “the assessment … of the appropriateness of the price payable under the contract” under s.64(1)(b), since, while the cancellation fee does not comprise the price payable under the contract, it was a monetary obligation on the customer which formed part of that price in accordance with the approach of the Supreme Court in *Abbey National Plc* to contracts providing for a package of ways of charging for a package of services.²⁶⁴⁸ With respect, however, it is doubtful whether the High Court’s approach to the authority of the Supreme Court’s decision was correct given

the requirement in [s.3\(1\) of the European Communities Act 1972](#) (which was in force at the time) that questions of the meaning of EU law (here, art.4(2) of the 1993 Directive) must be determined in accordance with “the principles laid down by and any relevant decision of the European Court” and given that the High Court did not explain how the European case-law did not have the effect contended for in relation to the Supreme Court’s decision. Moreover, to include within the exclusion in [s.64\(1\)\(b\)](#) a term under which a fee is charged on “cancellation” of the contract by the consumer did not take into account the presence in [Sch.2 Pt 1 of the 2015 Act](#) (which lists terms which may be regarded as unfair) of:

“... [a] term which has the object or effect of 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.”²⁶⁴⁹

It is more than arguable that the cancellation fee term in the cloud computing contract in *Casehub* fell within this example of a term in that it required the consumers to pay “a disproportionately high sum in compensation or for services which [were] not supplied”; and under [s.64\(6\) of the Act](#) (following case-law of the Court of Justice), [s.64](#) “does not apply to a term of a contract listed in Part 1 of Schedule 2”.²⁶⁵⁰

The position after IP completion day

- 40-387 After IP completion day, [s.64](#) (and the other provisions of the [2015 Act](#) which implemented EU directives) forms part of retained EU law.²⁶⁵¹ Given the contrast of approach between the broad interpretation of “price” in [s.64\(1\)\(b\)](#) taken by the Law Commissions and the Supreme Court and the narrower approach taken by the Court of Justice of the EU to art.4(2) of the 1993 Directive, it is submitted that English courts should give effect to the interpretation and guidance of the Court of Justice of the EU (which forms part of retained EU case-law) following the retained general principle of conforming interpretation as applicable to retained EU law which implemented EU directives,²⁶⁵² though an English court may consider this not “possible” given the wording of [s.64\(1\)\(b\)](#), its background in the Law Commissions’ earlier Advice and the decision of the Supreme Court in *OFT v Abbey National Plc.*²⁶⁵³ Moreover, either the Supreme Court or the Court of Appeal could instead decide to depart from this body of retained EU case-law and follow the views of the Supreme Court and the Law Commission.²⁶⁵⁴

The significance of terms being included in Pt 1 of the “indicative list”

- 40-388

Finally, s.64(6) of the 2015 Act provides that s.64 does not apply to a term in the list of “indicative terms” provided by Pt 1 of Sch.2.²⁶⁵⁵ This therefore provides a particularly important significance to the terms included within this indicative list, but also on the exclusions to their scope provided by Pt 2 of the same schedule.²⁶⁵⁶ For example, in *R (ex p. Donegan) v Financial Services Compensation Scheme Ltd* the fact that a term in a bond providing that it was not transferable fell within two examples in the indicative list in Pt 1 of Sch.2 supported the conclusion that the exemption in s.64 did not apply to it.²⁶⁵⁷ The disapplication is straightforward as regards the examples of terms contained in the list in Pt 1 of Sch.2 of the Act which are also contained in the Annex to the 1993 Directive, as these terms are specified by art.3(3) of the 1993 Directive as ones “which may be regarded as unfair” and have therefore been held by the Court of Justice of the EU to fall outside the exclusion contained in art.4(2).²⁶⁵⁸ However, the disapplication of the exclusion in s.64 provided by s.64(6) may well have gone further than the requirements of the Directive as regards terms added by the Act to this list.²⁶⁵⁹

Core exemption inapplicable to “consumer notices”

- 40-389 As the CMA notes, s.64 (which implemented art.4(2) of the 1993 Directive) applies only to contract terms and does not apply to the requirement of unfairness governing “consumer notices” in the 2015 Act.²⁶⁶⁰ This reflects the purpose and content of the exemption in the 1993 Directive, which is limited to contract terms and concerned to ensure that the Directive’s controls do not interfere with freedom of contract.²⁶⁶¹

Footnotes

2584 [2009] UKSC 6, [2010] 1 A.C. 696.

2585 e.g. *Whittaker* (2010) 73 M.L.R. 106.

2586 Law Commission, Scottish Law Commission, Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills (March 2013) (“Law Com. Advice (2013)”).

2587 *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)* (C-484/08) EU:C:2010:309, [2010] E.C.R. I-04785; *Pohotovost’ sro v Korčkovská* (C-76/10) EU:C:2010:685.

2588 *Kásler v OTP Jelzálogbank Zrt* (C-26/13) EU:C:2014:282, 30 April 2014 (“Kásler (C-26/13)”), and *Matei v SC Volksbank România SA* (C-143/13) EU:C:2015:127, 26 February 2015 (“Matei (C-143/13)”), *Van Hove v CNP Assurances SA* (C-96/14) EU:C:2015:262, 23 April 2015 (“Van Hove (C-96/14)”), above, paras 40-358—40-383.

2589 Law Com. Advice (2013) S. 14.

- 2590 Law Com. Advice (2013), paras 3.100–3.102.
- 2591 [\[2009\] UKSC 6, \[2010\] 1 A.C. 696](#) especially at [41], [78] and [113].
- 2592 Law Com. Advice (2013), paras 3.13 and 4.61. It is submitted, though, that while the SC rejected the approach of the Court of Appeal below, its own approach is more complex than the Law Commissions’ interpretation allows, as some of its members acknowledged that *some* charges fell outside the scope of art.4(2), notably, those charges which fall within examples of terms within the “indicative list”: see [\[2009\] UKSC 6](#) at [43], [101] referring to [1999 Regulations Sch.2](#) paras 1(d), (e), (f) and (l).
- 2593 Law Com. Advice (2013), para.4.61.
- 2594 Law Com. Advice (2013), para.4.63 referring to [Sale of Goods Act 1979 s.2\(1\)](#). The Law Commissions considered that terms providing for “early termination charges” should attract distinct treatment and therefore recommended that they should be added to the new legislation’s “indicative list of terms” (foreseen by the 1993 Directive art.3(3)), whose members would be excluded explicitly from the benefit of the exclusion: Law Com. Advice (2013), paras 4.61 and 5.82. For implementation of this recommendation see [2015 Act Sch.2 Pt 1 para.5](#), above, para.[40-329](#).
- 2595 Law Com. Advice (2013), paras 4.63–4.64.
- 2596 Law Com. Advice (2013), para.2.39.
- 2597 Law Com. Advice (2013) S. 18 and see further Pts 2 and 3 of the Advice.
- 2598 Law Com. Advice (2013), paras 4.25–4.26.
- 2599 Law Com. Advice (2013), para.4.17 referring in particular to the significance of recital 20 which explains that “the consumer should actually be given an opportunity to examine all the terms”.
- 2600 Law Com. Advice (2013), paras 4.27–4.48.
- 2601 Law Com. Advice (2013), para.4.27.
- 2602 Law Com. Advice (2013), paras 4.41–4.45.
- 2603 Law Com. Advice (2013), para.4.47.
- 2604 Law Com. Advice (2013), para.4.48.
- 2605 Law Com. Advice (2013), para.3.99. This position is implicit given the Law Commissions’ contrasting treatment of the requirement of transparency, which they saw as implementing art.4(2) as properly understood: Law Com. Advice (2013), para.4.17.
- 2606 [2015 Act s.64\(1\)](#). The reference to “goods, digital content or services” may look restrictive (not applying, e.g. to contracts for the sale of land or insurance contracts), but it is clear that, in principle, the exclusion may apply to any type of “consumer contract” to which [Pt 2 of the 2015 Act](#) (following the 1993 Directive) applies: cf. above, paras [40-249](#)—[40-252](#).
- 2607 [2015 Act s.64\(2\)](#).
- 2608 This definition of “transparency” is expressed as applying for the purposes of [Pt 2 of the Act](#) and therefore applies equally to the general requirement of transparency of terms in consumer contracts in [s.68\(1\)](#), below, paras [40-430](#) et seq.
- 2609 For the CMA’s views on the “core exemption” see CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015) paras 3.1 et seq.

- 2610 Above, para.[40-376](#).
- 2611 [2015 Act s.64\(1\)\(a\)](#).
- 2612 [2015 Act s.64\(1\)\(b\)](#).
- 2613 *Kásler (C-26/13)* at paras 43, 49–51 and 52–55; *Matei (C-143/13)* at para.70 and see above, paras [40-359](#)—[40-360](#).
- 2614 *Kásler (C-26/13)* at paras 49–51.
- 2615 [\[2021\] EWHC 760 \(Admin\)](#) at [143] per Bourne J. For the context of this decision see below, paras [40-414](#)—[40-416](#). See also *Green v Petfre (Gibraltar) Ltd (t/a Betfred)* [\[2021\] EWHC 842 \(QB\)](#) at [182] (exclusion clauses in on-line betting contract which purported to deal with “a contingency: namely with the risk that there is an undetectable flaw in the design or realisation of the Game that shortens the odds in the player’s favour” held not to concern the main subject matter of the contract within the meaning of [s.64 of the 2015 Act](#)).
- 2616 cf. above, para.[40-378](#).
- 2617 *Kásler (C-26/13)* at paras 66–68 and above, paras [40-370](#), [40-371](#) which discusses the later case-law of the CJEU in *Matei (C-143/13)*, *Van Hove (C-96/14)* and *Gómez del Moral Guasch v Bankia SA (C-125/18)* which confirms its earlier approach in *Kásler*. In the view of AG Wahl, the requirement of plain intelligible language “implies that *the consumer acquires actual knowledge* of all the terms”: *Andriciuc v Banca Românească (C-186/16) EU:C:2017:703 (“Andriciuc (C-186/16)”), AG Opinion of 26 April 2016* at para.62. This point was not specifically addressed in the judgment of the CJEU of 20 September 2017.
- 2618 This remains the case after IP completion day given that the relevant case-law of the CJEU forms part of “retained EU case-law” and that the principle of conforming interpretation is a “retained general principle of EU law” within the meaning of [s.6 of the European Union \(Withdrawal\) Act 2018](#) (as amended), on which see above, para.[40-004](#) and Vol.I, para.[1-028](#).
- 2619 *Kásler (C-26/13)* at para.71.
- 2620 *Kásler (C-26/13)* at para.75 and see also *Andriciuc (C-186/16)* at paras 45–50, above, para.[40-371](#).
- 2621 *Kásler (C-26/13)* at para.74; *Andriciuc (C-186/16)* at para.47.
- 2622 [2015 Act s.64\(4\)](#) and [\(5\)](#).
- 2623 In *R. (ex p. Donegan) v Financial Services Compensation Scheme Ltd [2021] EWHC 760 (Admin)* at [137] (Bourne J) the HC considered it arguable that the condition of transparency in [s.64 of the 2015 Act](#) had not been satisfied: while non-transfer terms in bonds sold to consumers and their lack of regulatory protection including the exclusion from the FSCS compensation scheme were “prominent and clearly stated”, the terms were not “transparent” as there was “no reference to, let alone any explanation of, the fact that it was the non-transferability of the Bonds which caused the lack of regulatory protection, or the apparent fact that the purpose of the former was to achieve the latter”. See further above, paras [40-414](#)—[40-416](#).
- 2624 Above, paras [40-046](#)—[40-047](#) and [40-178](#).
- 2625 These distinctions are drawn from 2005 Directive art.5(2) and 5(3), above, para.[40-178](#).

- 2626 cf. the identification of the “average consumer” in the context of the commercial practices of a provider of residential care and its relevance for the assessment of the fairness of a term providing for an “administration fee” in *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd [2021] EWHC 2088 (Ch)* at [65]–[78] (average consumer) and at [99], [105] and [106] (its relevance to fairness), on which see above, paras 40-178 and 40-350 respectively.
- 2627 *Tifosi Optics Inc v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (T-531/12) EU:T:2014:855* para.36; *Mundipharma v Office for Harmonisation in the Internal Market (Trade Marks and Designs) OHIM-Altana Pharma (RESPICUR) (T-256/04) EU:T:2007:46*, [2007] E.C.R.II-449 at para.42.
- 2628 Above, para.40-376.
- 2629 Explanatory Notes 2014 paras 307–308. See also the guidance in CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), paras 3.20–3.32.
- 2630 Above, para.40-378.
- 2631 2015 Act s.64(4).
- 2632 *Kásler (C-26/13)* at para.75; *Matei (C-143/13)* at para.74; *Van Hove (C-96/14)* at para.41; *Andriciuc (C-186/16)* at para.45.
- 2633 On the continuing relevance of this principle after IP completion day, see above, paras 40-004 and 40-015. cf. the Package Travel Directive 2015 (Directive (EU) 2015/2302 on package travel and linked travel arrangements, on which see above, para.40-152) which requires a set of information, changes to information provided and the alteration of terms of the contract to be communicated to the traveller in a “prominent” as well as a “clear and comprehensible” manner: arts 5(3), 6(1), 7(4) and 19(2). However, rather than suggesting that “prominence” is a distinct requirement, it is submitted that this coupling of an explicit requirement of prominence with the long-established requirement that information, etc. be “clear and intelligible” is likely to encourage the CJEU to see prominence as already inherent in the “clear and intelligible” requirement made in other EU consumer protection directives, including the 1993 Directive.
- 2634 On minimum harmonisation and the 1993 Directive see above, paras 40-023 and 40-225; on the particular issues arising in relation to enforcement measures see below, paras 40-451—40-454.
- 2635 On the case-law of the CJEU in the context of the condition of transparency in art.4(2) of the 1993 Directive, see above, paras 40-370—40-374 and 40-383; on “average consumer” in other contexts see above, paras 40-046—40-047 and 40-178.
- 2636 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015) paras 3.13–3.14.
- 2637 Law Com. Advice (2013), para.4.61, above, para.40-376. The Law Commissions saw their view as reflecting the position of the SC in *OFT v Abbey National Plc*, see above, para.40-376 (which criticises this interpretation). This position does not mean, however, that the exclusion covers all terms governing prices, as some (e.g. price variation clauses) are clearly covered by the test of fairness as they are contained in the indicative

list in Annex para.(l) of the 1993 Directive: [2009] UKSC 6 at [43] and [101]. Annex para.(l) was later implemented as 2015 Act Sch.2 Pt 1 para.15 on which see above, para.40-338.

2638 s.2(1) referring to “a money consideration, called the price”.

2639 Law Com. Advice (2013), paras 4.63–4.65.

2640 Above, para.40-376.

2641 See above, note to paras 40-358—40-362.

2642 *Kásler (C-26/13)* at para.59 (emphasis added).

2643 *Kásler (C-26/13)* at para.58.

2644 Above, paras 40-355—40-356, 40-363.

2645 *Matei (C-143/13)* at para.70 and see above, paras 40-365—40-366 where, however, the very different interpretation given to *Matei* by AG Hogan in *Kiss v Kiss (C-621/17) EU:C:2019:411 Opinion of 15 May 2019* at paras 35–38 is also noted. The CMA adopts a similar approach here, giving as an example the pre-Act case of *Office of Fair Trading v Foxtons Ltd [2009] EWHC 1681 (Ch), [2009] 3 E.G.L.R. 133* at [103]–[103] where the core exemption (then provided by reg.6(2) of the 1999 Regulations) was found not to apply to a term in a letting agreement entered by a consumer landlord which required payment of sales commission to the letting agent if the landlord sold the property to the tenant, but where no selling service was offered or provided (the court noting without explanation that no question of the core exemption applied to the relevant term): CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015) paras 3.13–3.14.

2646 The HC held that these assignments of the consumers’ restitutionary claims against the defendant were valid and not unenforceable on the ground of maintenance and champerty: [2017] EWHC 1169 (Ch), [2017] 5 Costs L.R. 835 at [25]–[31].

2647 [2017] EWHC 1169 (Ch) (decided 22 May 2017), [2017] 5 Costs L.R. 835 at [53]–[54].

2648 [2017] EWHC 1169 (Ch) at [49]–[56] referring in particular to [2009] UKSC 6 at [42] (Lord Walker JSC) and [78] (Lord Phillips PSC), on which see above, paras 40-355—40-356.

2649 2015 Act Sch.2 Pt 1 para.5.

2650 Above, para.40-379.

2651 On “retained EU law” and IP completion day generally see above, para.40-004 and Vol.I, paras 1-020 et seq. On the position of the 2015 Act, see above, para.40-240; s.64 was not amended on IP completion day.

2652 On the continuing relevance after IP completion day of the principle of conforming interpretation in respect of retained EU law, see above, para.40-004 and Vol.I, para.1-028.

2653 On the principle of “conforming interpretation” and its limits, see above, para.40-015.

2654 European Union (Withdrawal) Act 2018 s.6 and see above, para.40-004 and Vol.I, para.1-028.

2655 2015 Act s.64(6); Sch.2 Pt 1, above, para.40-316.

2656 On the indicative list and its qualifications in Sch.2 of the 2015 Act, see above, paras 40-316 et seq.

- 2657 [2021] EWHC 760 (Admin) at [145] referring earlier (at [128]–[129] to the examples in Sch.2 Pt 1 paras 2 and 20, on which see above, para.40-319 et seq. On the context of this decision see below, paras 40-414—40-416.
- 2658 *Matei v SC Volksbank România SA Matei (C-143/13) EU:C:2015:127, 26 February 2015* at paras 59–61 and see above, para.40-361.
- 2659 This applies to the terms listed in the 2015 Act Sch.2 Pt 1 paras 5, 12 and 14, on which see above, paras 40-316 (generally), 40-329 (para.5) and 40-328 (paras 12 and 14). On the compatibility of such an extension with retained EU law see above, para.40-239 and below, paras 40-451—40-454.
- 2660 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), para.3.2, On the requirement of fairness governing consumer notices see the 2015 Act s.62(2), and 62(6) and (7), and below, paras 40-418—40-421.
- 2661 Above, para.40-351.

(aa) - Duty of Court in Relation to the Issue of Fairness

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(iv) - Procedural Issues and Burden of Proof

(aa) - Duty of Court in Relation to the Issue of Fairness

Background in European case-law

40-390 In *Océano Grupo Editorial SA v Murciano Quintero*,²⁶⁶² which concerned proceedings brought by suppliers against consumers, the European Court of Justice held that, at least where a term in a consumer contract was clearly unfair within the meaning of the Directive, the national court is entitled to raise the issue of fairness of its own initiative, this being necessary to ensure that the consumer enjoys effective protection in view of the real risk that he is unaware of his rights or encounters difficulties in enforcing them²⁶⁶³ and in *Mostaza Claro v Centro Móvil Milenium SL*²⁶⁶⁴ the Court of Justice went further, holding that national courts have a duty to intervene of their own initiative in order to ensure that the protection promised by the Directive is effectively ensured for consumers. According to the Court:

“The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify ... the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.”²⁶⁶⁵

In *Pannon GSM Zrt v Erzsébet Sustikné Györfi*²⁶⁶⁶ the Court of Justice confirmed that a national court bears an *obligation* to examine of its own motion the issue of the possible fairness of a contract term within the meaning of the Directive, but it restricted this obligation to the

situation “where it has available to it the legal and factual elements necessary for that task”.²⁶⁶⁷ This qualification, whose language echoes the formulation used by the Court in *Freiburger Kommunalbauern*²⁶⁶⁸ to describe the role of national courts in assessing the fairness of terms under art.3 of the Directive, recognises that in some situations a national court will not be in a position to come to a view as to the fairness of a term in the circumstances, possibly in part owing to the absence of consumer’s own representations or evidence adduced for this purpose. Moreover, the Court of Justice added that:

“In carrying out that obligation, the national court is not … required under the Directive to exclude the possibility that the term in question may be applicable, if the consumer, after having been informed of it by that court, does not intend to assert its unfair or non-binding status.”²⁶⁶⁹

So, a national court’s obligation to assess the fairness of a contract term does not mean that it should refuse to apply the term where the consumer wishes it to do so, a position which fits entirely with art.6(1)’s provision that an unfair term will “not be binding on the consumer”.²⁶⁷⁰ Indeed, where a national court, having raised the issue of its own motion, considers that a term in a consumer contract in proceedings before it is unfair within the meaning of the Directive, it must as a general rule inform the parties to the dispute of that fact and invite them to set out their views on the matter by way of application of the principle of *audi alteram partem* found in art.47 of the Charter of Fundamental Rights of the European Union.²⁶⁷¹

“National procedural autonomy” and its limits

- 40-391 In *VB Pénzügyi Lizing Zrt v Schneider* the Court of Justice of the EU was asked whether a national court’s duty to address the fairness of a term in a consumer contract meant that it is obliged to undertake, of its own motion, an examination with a view to establishing the factual and legal elements necessary for this purpose.²⁶⁷² In the view of AG Trstenjak, EU law does not so require as:

“… [t]he powers of the national court are determined rather by national procedural law … [I]n the laws of the Member States, civil law is characterised by the principle that it is for the parties to take the initiative, under which the parties are responsible for submitting all relevant facts on which the court must then base its decision.”²⁶⁷³

For the Court of Justice the positive action to be taken by a national court to further the consumer’s protection had two stages.

“In the exercise of the functions incumbent upon it under the provisions of the Directive, the national court must ascertain whether a contractual term which is the subject of the dispute before it falls within the scope of that Directive. If it does, that court must assess that term, if necessary, of its own motion, in the light of the requirements of consumer protection laid down by that Directive.”²⁶⁷⁴

However, the Court of Justice did not consider it necessary to address the wider implications of the question addressed to it and, in particular, whether a national court has a power or a duty to examine facts *not* available to it on the face of the documents put before it by the business.²⁶⁷⁵

40-392 In *Lintner v UniCredit Bank Hungary Zrt*

U 2676

U the Court of Justice clarified its position on the duties of national courts in relation to the assessment of the fairness of the terms of a consumer contract. In that case a consumer complained of the unfairness of a clause in a consumer credit contract under which the lender reserved to itself a power to vary the terms of the contract, but the national court was uncertain as to whether its duty to consider the fairness of the terms of the contract extended to *all* the contract’s terms or only the one in dispute. In this respect, the Court of Justice held, first, that, where a national court has available to it the legal and factual elements it needs, the duty to consider the fairness of a contract term of its own motion extends to “those contractual terms which are connected to the subject matter of the dispute” as defined by the parties in their pleadings even if they are not challenged by the consumer’s claim, but it does not extend to *all* the terms of the contract.

2677

U Moreover, secondly, in cases where from “the elements of law and fact in the file” before it, a national court has serious doubts as to the unfair nature of particular terms which are related to the subject matter of the dispute but which are *not* invoked by the consumer but the court is not able to make “definitive assessments in that regard” then it must:

“... take, if necessary of its own motion, investigative measures in order to complete that case file, by asking the parties, in observance of the principle of audi alteram partem, to provide it with the clarifications or documents necessary for that purpose.”

2678

U

40-393

U

Behind this case-law of the Court of Justice is an implicit recognition of the principle that national courts “know the law” (this principle being known widely on continental Europe under the Latin tag “iura novit curia”) and specifically that they therefore are on notice as to the ambit of the protection required by the 1993 Directive so as to enable them—and indeed to require them—to intervene of their own initiative; it also assumes a more interventionist role for the court in the gathering of evidence than is traditional in English law.

²⁶⁷⁹

U On the other hand, the laws of civil procedure differ very considerably between Member States in terms of the relative roles of the courts and the parties to litigation in the identification of the facts on the basis of which they claim and their characterisation in legal terms, and this realisation forms one reason for the Court’s acceptance of what is sometimes termed the “principle of the procedural autonomy of the Member States”.

²⁶⁸⁰

U However, while this principle provides the starting point for the Court of Justice, it then subjects the national rules in question to the double test of the principle of effectiveness and the principle of equivalence.

²⁶⁸¹

U There is abundant case-law in the Court of Justice on the tension between the principle of procedural autonomy and the principles of effectiveness and equivalence in the context of the national laws of Member States.

²⁶⁸²

U

Section 71 of the 2015 Act

40-394 The [2015 Act](#) sought to give explicit effect to the case-law of the Court of Justice of the EU as regards the duty of national courts to consider the fairness of a term in a consumer contract within the scope of the controls set out by the 1993 Directive.²⁶⁸³ This followed the recommendation of the Law Commissions, which considered that such a statement would be helpful to bring this obligation to the attention of the courts and, especially, the lower courts.²⁶⁸⁴ [Section 71 of the Act](#) therefore provides that:

Section 71

“(1) Subsection (2) applies to proceedings before a court which relate to a term of a consumer contract.

(2) The court must 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.

(3) But subsection (2) does not apply unless the court considers that it has before it sufficient legal and factual material to enable it to consider the fairness of the term.”

The qualification on the ambit of the duty made by s.71(3) reflects closely the qualification put on the national court’s duty by the Court of Justice of the EU in *Pannon*²⁶⁸⁵ but, as has been seen, the case-law of the Court of Justice developed after *Pannon* and in *Lintner* it required a national court which doubted the fairness of a term in a consumer contract but did not have the legal and factual materials to determine the issue, to:

“... take, if necessary of its own motion, investigative measures in order to complete that case file, by asking the parties, in observance of the principle of audi alteram partem, to provide it with the clarifications or documents necessary for that purpose.”²⁶⁸⁶

As a matter of retained EU law, in principle a UK court would be under a duty to interpret s.71 if possible so as to conform to this interpretation of the law,²⁶⁸⁷ but it may be doubted whether the clear words of s.71 can be so interpreted; moreover, after IP completion day the Supreme Court and listed appellate courts have the power to depart from this (retained) EU case-law.²⁶⁸⁸ Such a decision could be appropriate on the basis that the interpretation of the extent of courts’ duties adopted in *Lintner* is incompatible with the clear words of the 2015 Act and with fundamental principles of English civil procedure according to which it is for the parties to adduce evidence of facts rather than for the court to require them to do so.

“Proceedings before a court relate to a term of a consumer contract”

40-395

Section 71(1) of the 2015 Act restricts the court’s duty to consider the fairness of a term to the situation where “proceedings before a court *relate to* a term of a consumer contract”²⁶⁸⁹ and this, together with the wording of s.71(2), suggests that the duty to consider the fairness of a contract term arises only where the proceedings before the court *relate to the term which is to be considered for its fairness*.²⁶⁹⁰ While similar wording has sometimes been used by the Court of Justice of the EU,²⁶⁹¹ it is submitted that such an interpretation of s.71 would risk imposing on English courts a more limited duty than is foreseen by recent (retained) case-law of the Court of Justice. For,

under that case-law, a national court before which proceedings are brought relating to a consumer contract is under a duty to assess of its own motion “those contractual terms which are connected to the subject matter of the dispute” as defined by the parties in their pleadings even if those terms are *not* challenged by the consumer’s claim.

²⁶⁹²

U Again, it would be a question whether, following the (retained) principle of conforming interpretation, a UK court could interpret [s.71](#) so as to conform to this case-law of the Court of Justice. ²⁶⁹³

No duty in court in relation to terms not binding without assessment of fairness

40-396 It should be noted that, on its terms (which are restricted to a court considering the *fairness* of a term) and reflecting the case-law of the Court of Justice (which also concerns the assessment of the fairness of terms under the 1993 Directive), the duty in a court under [s.71](#) appears not to apply to cases where the controls on a term of a consumer contract would lead to its ineffectiveness *without* any assessment of its fairness. Paradoxically, therefore, a court would appear not to be under a duty to consider and hold ineffective a contract term excluding liability for death and personal injury caused by negligence “barred” by [s.65](#) ²⁶⁹⁴ nor contract terms which are ineffective to exclude or restrict liability for breach of the statutory terms in [Pt 1 of the 2015 Act](#) without any consideration of their fairness. ²⁶⁹⁵

Effect of court failing to raise issue of fairness effectively

40-396A In *MA v Ibercaja Banco SA*, consumers had concluded a loan for the purchase of a property secured by a mortgage.

²⁶⁹⁶

U On non-payment of the instalments, the lender had brought successful proceedings in a Spanish court to enforce the mortgage, the court considering at an initial stage in these proceedings that the terms on which interest was calculated were fair; the court’s decision enforcing the mortgage (which did not refer to its decision on the fairness of the terms nor its grounds) acquired the force of res judicata and the property was sold to a third party. However, when the lender sought to recover unpaid interest against the consumers, they claimed that the clauses on which interest was calculated were unfair. The Court of Justice of the EU held that the Spanish court was not

entitled to apply its normal rules governing res judicata to the earlier decision of the first court as the consumers had not been put in a position “to assess, with full knowledge of the facts, whether it was necessary to bring proceedings against that decision”

2697

U and, as a result, the consumers were entitled to raise the issue of fairness.

2698

U But the 1993 Directive did not prevent the application of national legal rules which prevented the assessment of the unfairness of the terms of a mortgage contract after the enforcement proceedings had ended and ownership in the property transferred to a third party as such an assessment would “lead to the annulment of the acts transferring ownership and call into question the legal certainty of the transfer of ownership already made to a third party”.

2699

U In these circumstances, though, the effectiveness of arts 6 and 7 of the 1993 Directive does require that the consumer must be able to rely on the unfairness of the terms of the mortgage loan agreement in order to be able to exercise effectively and in full his or her rights under that directive and “*with a view to obtaining compensation, under that directive, for the financial damage caused by the application of those terms*”.

2700

U This decision therefore raises the possibility of a court awarding damages to a consumer against a trader for the financial consequences of the application of an unfair contract term where an earlier court had failed effectively to raise the issue of their fairness as required by [s.71 of the 2015 Act](#), but it should be noted that the observations of the Court of Justice in [*MA v Ibercaja Banco SA*](#) were made in very particular circumstances and its decision was made after IP completion day and is therefore not binding on a UK court.

2701

U

Footnotes

- 2662 *C-240/98 to C-244/98 EU:C:2000:346, [2000] E.C.R. I-4941.*
- 2663 *EU:C:2000:346, [2000] E.C.R. I-4941* at [26].
- 2664 *C-168/05 EU:C:2006:675, [2006] E.C.R. I-10421.*
- 2665 *C-168/05 EU:C:2006:675*, at [38] (emphasis added).
- 2666 *C-243/08 EU:C:2009:350, [2009] E.C.R. I-4713.*
- 2667 *C-243/08* at [32] and see *Bucura v SC Bancpost SA (C-348/14) EU:C:2015:447, 9 July 2015* para.44.
- 2668 *Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter (C-237/02 EU:C:2004:209, [2004] 2 C.M.L.R. 13* at [21] and [22] and see above, para.40-275.

- 2669 *C-243/08 EU:C:2009:350*, at [33] and see similarly at [35]. See also *Lintner v UniCredit Bank Hungary Zrt (C-511/17) EU:C:2020:188*, para.33.
- 2670 1993 Directive art.6(1), below, para.40-405.
- 2671 *Banif Plus Bank Zrt v Csipai (C-472/11) EU:C:2013:88; [2013] W.L.R. (D) 76* at [29]; *Brusse v Jahani BV (C-488/11) EU:C:2013:341, 30 May 2013* at para.52; *Lintner v UniCredit Bank Hungary Zrt (C-511/17) EU:C:2020:188*, para.43.
- 2672 *C-137/08 EU:C:2010:659* at para.45 (although the national court's question had earlier (para.25) been expressed in permissive rather than mandatory terms). On the CJEU's case-law in this area see also Commission guidance C(2019) 5325 final pp.50 et seq.
- 2673 AG Trstenjak's Opinion paras 107–116, especially at para.110 (original emphasis) and 115.
- 2674 *C-137/08 EU:C:2010:659* at para.49. See similarly *Karel de Grote-Hogeschool Katholieke Hogeschool Antwerpen VZW v Kuijpers (C-147/16)* of 17 May 2018 at para.30. It is for a national court to ascertain whether the terms which are the subject of the dispute pending before it fall within the exclusion of "terms which reflect mandatory statutory or regulatory provisions" so as to fall outside the scope of the Directive: *Brusse v Jahani BV (C-488/11) EU:C:2013:341, 30 May 2013*, at para.33 referring to 1993 Directive art.1(2) and see above, paras 40-264—40-272.
- 2675 cf. AG Trstenjak's interpretation of *Pénzügyi* in *Banco Español de Crédito, SA v Calderón Camino (C-618/10) EU:C:2012:349 (Opinion of 14 February 2012)* para.32, considering that the Court there "imposed on the national court an obligation under EU law to investigate in order to establish the necessary facts and law ... In the absence of precise indications from the Court, it could be assumed that regard should be had to the procedural law of each individual Member State" in determining how precisely this was to be done. For the decision of the CJEU, see above in this paragraph.
C-511/17, EU:C:2020:188, 11 March 2020 ("Lintner (C-511/17)").
- 2677 *Lintner (C-511/17)* at para.34, followed by the CJEU in *Profi Credit Bulgaria EOOD v T.I.T. (C-170/21) EU:C:2022:518*, 30 June 2022 at para.32. Where national legislation permits a lender stipulating in the contract of consumer credit that the borrower should issue a blank promissory note for the purpose of securing the debt and the lender/ payee later completes the note and claims the sums under it, the national court must consider whether both the terms of the promisor note agreement and the underlying term requiring it in the credit contract are fair within the meaning of the 1993 Directive: *Profi Credit Polska SA v Włostowska (C-419/18 and C-483/18) EU:C:2019:930, 7 November 2019* at para.60.
- 2678 *Lintner (C-511/17)* at para.37. The CJEU further noted that where this was the case the national court must give the parties an opportunity to "set out their views" and to give the consumer the opportunity not to assert the unfair or non-binding status of the term: paras 42–43.
- 2679

- Whittaker* (2001) 117 *L.Q.R.* 215; Whittaker in Leczykiewicz and Weatherill (eds), *The Involvement of EU Law in Private Relationships* (2013) Ch.6. See also above, para.40-021 discussing *Faber v Autobedrijf Hazet Ochten BV* (C-497/13) *EU:C:2015:357, 4 June 2015*.
- 2680 *Cofidis SA v Fredout* (C-473/00) *EU:C:2002:705* at para.28; *Asturcom Telecomunicaciones SL v Rodriguez Nogueira* (C-40/08) *EU:C:2009:615, [2009] E.C.R. I-9579* at para.38.
- 2681 See generally Craig and de Búrca, *EU Law, Text, Cases and Materials*, 6th edn (2020), pp.273 et seq.
- 2682 *Asturcom Telecommunicaciones SL v Rodriguez Nogueira* (C-40/08) *EU:C:2009:615, [2009] E.C.R. I-9579* (whether court must consider fairness of arbitration clause in the context of arbitral enforcement proceeding). See also *Banco Español de Crédito, SA v Calderón Camino* (C-618/10) *EU:C:2012:349, 14 June 2012* at paras 45, 49–57 (whether, under a national order for payment procedure, a national court must consider the fairness of the terms of a consumer contract on which the basis of which payment is claimed) and similarly *Finanmadrid EFC SA v Albán Zambrano* (C-49/14) *EU:C:2016:98, 18 February 2016*; *Profi Credit Polska SA w Bielsku Bialej v Wawrzosek* (C-176/17) *EU:C:2018:711* (national order for payment procedure based on promissory note) and *Bondora* (C-453/18) *EU:C:2019:921 AG Sharpston of 31 October 2019* (duty to raise issue of fairness of term applies to the European order for payment procedure under Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] O.J. L399/1; *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (C-415/11) *EU:C:2013:164, 14 March 2013* at paras 50, 59–64; *Sánchez Morcillo v Banco Bilbao Vizcaya Argentaria SA* (C-169/14) *EU:C:2014:2099, 17 July 2014*; *Banco Santander SA v Sánchez López* (C-598/15) *EU:C:2017:945, 7 December 2017* (all three concerning Spanish procedures for the enforcement of mortgages); *Jőrös v Aegon Magyarország Hitel Zrt* (C-397/11) *EU:C:2013:340, 30 May 2013* at paras 29–38 and *Brusse v Jahani BV* (C-488/11) *EU:C:2013:341, 30 May 2013* paras 42–46 (both concerning national rules and the role of appellate courts in circumstances where the unfairness of term had not been raised at first instance); *Baczó v Raiffeisen Bank Zrt* (C-567/13) *EU:C:2015:88, 12 February 2015* (national rules governing competent national court to hear consumer claims); *Faber v Autobedrijf Hazet Ochten BV* (C-497/13) *EU:C:2015:357, 4 June 2015* (on which see above, para.40-021); *ERSTE Bank Hungary Zrt v Sugár* (C-32/14) *EU:C:2015:637, 1 October 2015* (effectiveness of the protection of consumers in context of national law governing notaries); *BBVA SA v Peñalva López* (C-8/14) *EU:C:2015:731, 29 October 2015* (time-limit for relying on unfairness of terms specified by transitional legislation); *Radlinger v Finway a.s.* (C-377/14) *EU:C:2016:283, 21 April 2016* at paras 51–59 (court's duty applies to insolvency proceedings). See also *L v Unicaja Banco SA* (C-869/19) *EU:C:2022:397,*

- 17 May 2022; *I.O. v Impuls Leasing România* (C-725/19) EU:C:2022:396, 17 May 2022; *SPV Project 1503 v Y.B.* (C-693/19 and C-831/19) EU:C:2022:395, 17 May 2022; and *EL, TP v Caixabank* (C-385/20) EU:C:2022:278, 7 April 2022 (award of costs to successful consumer).
- 2683 See, notably, *Mostaza Claro v Centro Móvil Milenium SL* (C-168/05) EU:C:2006:675, [2006] E.C.R. I-10421; *Pannon GSM Zrt v Erzsébet Sustikné Györfi* (C-243/08) EU:C:2009:350, [2009] E.C.R. I-4713 and on this case-law and its progeny, above, paras 40-020—40-022, 40-390—40-393.
- 2684 Law Com. Advice (2013), para.7.90.
- 2685 *Pannon GSM Zrt v Erzsébet Sustikné Györfi* (C-243/08) EU:C:2009:350, [2009] E.C.R. I-4713 at [32], above, para.40-390. For an example of a UK court considering that it did *not* have sufficient material for this purpose see *Allner v Peters & May Group Ltd* [2019] EWHC 3258 (Comm) at [29].
- 2686 *Lintner v UniCredit Bank Hungary Zrt* (C-511/17) EU:C:2020:188 at para.37 and see above, paras 40-021 and 40-392.
- 2687 This follows from the retention after IP completion day of “retained general principles of EU law” which generally means those laid down by the CJEU before that day and which include the principle of conforming interpretation: see above, paras 40-004 and 40-015 and Vol.I, para.1-028.
- 2688 European Union Withdrawal Act 2018 s.6(4) and (5) (as amended), and see above, para.40-004 and Vol.I, para.1-028 (which notes the criteria for such a departure from retained EU case law).
- 2689 2015 Act s.71(1) (emphasis added).
- 2690 cf. the observation in the Explanatory Notes to the 2015 Act para.341 in relation to s.71 that “the courts would only have to look at the term or terms in question, not the entire contract; this reflects the principle in *VB Pénzügyi v Schneider Case C-137/08* in 2010”. Notably, *VB Pénzügyi Lizing Zrt v Schneider* (C-137/08) EU:C:2010:659, [2010] E.C.R. I-847 at para.49 referring to the duty of the court to decide whether “a contractual term *which is the subject of the dispute* before it falls within the scope of the Directive” (emphasis added).
- 2692 *Lintner v UniCredit Bank Hungary Zrt* (C-511/17) EU:C:2020:188 at para.34, above, para.40-392. In *R. v Hunter* [2021] EWCA Crim 1785, [2022] 1 Cr. App. R. 13 the CA held that where the issue of the fairness of terms in a consumer contract arose in the context of the appeal from conviction for fraudulent trading under s.993 of the Companies Act 2006 brought against two “ticket-touts” who bought tickets from the organisers of events or primary ticket sellers and resold them to consumers, the duty in s.71 of the 2015 Act (which involves mixed questions of fact and law) was for the judge not for the jury: [2021] EWCA Crim 1785 at [145]–[146]. The CA held that the judge had been correct to hold that there was no “systematic unfairness” in the terms of the consumer contracts between the organisers of events and consumers which imposed restrictions on resale of the tickets: [2021] EWCA Crim 1785 at [161]–[168].

- 2693 The same qualification applies as to the status after IP completion day of retained case
law of CJEU as is noted in para.[40-394](#): and see Vol.I, para.[1-028](#).
- 2694 See below, para.[40-423](#).
- 2695 See below, paras [40-535](#) (goods contracts); [40-568](#) (digital content contracts); and
[40-589—40-591](#) (services contracts).
- 2696 (*C-600/19*) *EU:C:2022:394*, 17 May 2022.
- 2697 (*C-600/19*) at paras 49–50.
- 2698 (*C-600/19*) at para.56.
- 2699 (*C-600/19*) at para.57.
- 2700 (*C-600/19*) at paras 58 and 59 (emphasis added).
- 2701 On the significance of this, see above, para.[40-004](#) and Vol.I, para.[1-029](#).

(bb) - Burden of Proof as to Fairness of a Term

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(iv) - Procedural Issues and Burden of Proof

(bb) - Burden of Proof as to Fairness of a Term

Legislative background

- 40-397 In English law, the decision of an issue such as the reasonableness of a contract term is a matter requiring the allocation of a burden of proof.²⁷⁰² This was reflected in [s.11\(5\) of the Unfair Contract Terms Act 1977](#) which provides that “[i]t is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does”, thereby reversing the normal burden of proof in civil cases according to which burdens of proof rest on a person claiming something to establish it.²⁷⁰³ However, the 1993 Directive does not provide a rule for the burden of proof as to the issue of the fairness of a term, in contrast to the position as to the “individual negotiation” of a term where the burden is placed on the seller or supplier to show that a term is individually negotiated,²⁷⁰⁴ and this legislative silence was followed by [1999 Regulations](#) and by [Pt 2 of the 2015 Act](#).

A national or an autonomous rule of burden of proof

- 40-398 As a matter of EU law, the question therefore arises as to whether the Court of Justice would hold that the issue of burden of proof is to be determined by EU law (an autonomous rule) or whether it would be left to the national laws of Member States. It is submitted that the case-law of the Court of Justice earlier noted which holds that it is the duty of national courts to address the question of the

fairness of a term in a consumer contract of their own initiative²⁷⁰⁵ is incompatible with a simple imposition of the burden of proof on consumers as to the issue of fairness in the normal common law sense, since it assumes that there is no need for the consumer to allege, let alone to establish, its unfairness. Moreover, the European Court's view that the role of national courts in this respect is a matter for EU law (rather than for national law by way of the principle of subsidiarity or under the principle of the procedural autonomy of Member States) suggests that the Court would also see the issue of burden of proof as to unfairness as one on which an autonomous view should be taken, subject to any extension of the protection for consumers which the 1993 Directive allows to Member States.²⁷⁰⁶ In this respect, the general rule in the national laws of Member States is that it is for a person to establish what he alleges,²⁷⁰⁷ but to this it could be countered that the effectiveness of the protection of consumers requires that the burden of proof should lie on the seller or supplier, as it does in the [Unfair Contract Terms Act 1977](#)²⁷⁰⁸ and as it does under the 1993 Directive as to the "individual negotiation" of terms.²⁷⁰⁹

"Neutral" assessment of fairness

- 40-399 However, it is submitted that the Court of Justice would be more likely to hold that the issue of the fairness of a contract term is not itself an issue proper for the imposition of a burden of proof on either party to the contract, but rather for a neutral judicial assessment.²⁷¹⁰ This is apparently the position of the European Commission, which has expressed the view that:

"... strictly speaking there is no problem concerning the burden of proof, because the unfair nature of a clause is not a matter of facts to be substantiated by the parties concerned, but a matter of law which the court must independently decide upon according to the rules of law (jura novit curia).²⁷¹¹ Unfairness is therefore very much a matter of law, but potentially may depend on elements of fact which the court may not know and this becomes for burden of proof for one or the other side which may want the clause to be declared unfair or not unfair as the case may be."²⁷¹²

This position may be supported at a textual level by noting the contrast between the Directive's provision of a rule governing the burden of proof as to the "individual negotiation" of a term²⁷¹³ (a predominantly factual issue) and the issue of unfairness (an issue for judicial assessment). If this way of thinking were followed by the Court of Justice, then a court of a Member State would have to decide the issue of the fairness of a contract term (whether this issue were raised by the consumer or by the court of its own initiative) on the basis of the facts brought to its attention by the parties.²⁷¹⁴ These facts themselves (for example, as to the circumstances in which the contract was concluded²⁷¹⁵) would remain subject to burdens of proof following the normal rules of the national laws of the Member States (and thereby preserving to this extent the general principle

of the procedural autonomy of Member States).²⁷¹⁶ This position appears to have led the Law Commissions to recommend that no provision should be made as to the burden of proof as to the fairness of a term in the new legislation, beyond the statement as to the duty of courts to raise the issue of fairness of their own motion,²⁷¹⁷ since:

“... [t]o put the burden of proof on the consumer, even if it was just to prove a *prima facie* case, may not fit with the requirements of the EU law.”²⁷¹⁸

The position under the 2015 Act

- 40-400 Overall, it is submitted that the better view is that the issue of fairness of terms under the [2015 Act](#) is not itself one appropriate to the allocation of a burden of proof, but instead for a “neutral assessment” of the term, although any facts on which the trader or consumer relies for this purpose would be subject to the normal rules of burden of proof so that, in general, it would be for either trader or consumer to establish the facts on which they rely. Given this position as regards contract terms, it is submitted that the same approach should be taken to the fairness of “consumer notices” which are subjected by the [2015 Act](#) to a very similar test of fairness as it requires for contract terms,²⁷¹⁹ even though this is not apparently required by the 1993 Directive.²⁷²⁰ Of course, if, after IP completion day,²⁷²¹ the Court of Justice were to rule on the issue of burden of proof as to unfair contract terms under the 1993 Directive, a UK court could have regard to this decision, though it would not be obliged to do so and would not be bound by it.²⁷²²

Burden of proof in enforcement proceedings

- 40-401 Finally, it is submitted that the approach according to which the issue of the fairness of a contract term or notice under the [2015 Act](#) is also in principle a matter for neutral assessment by the court, rather than being itself the object of a burden of proof is equally suitable to enforcement proceedings brought by the CMA or by one of the regulators under [s.70\(1\)](#) and [Sch.3 of the 2015 Act](#).²⁷²³ One practical difference between the two types of way in which the issue of unfairness arises is that as between contracting parties there is likely to be more discussion as to the particular circumstances surrounding the making of the contract (these circumstances being subject to burden of proof), whereas enforcement proceedings are relatively more “abstract”²⁷²⁴ and by their nature less likely to require the consideration of particular facts which need to be established.

²⁷²⁵



Footnotes

- 2702 cf. the position at common law governing the reasonableness of a covenant in restraint of trade which is considered an issue attracting a burden of proof, it being for the person seeking to rely on the covenant to show its reasonableness: above, Vol.I, para.[18-142](#).
- 2703 See above, Vol.I, para.[15-100](#).
- 2704 1993 Directive art.3(2) para.3 and see above, para.[40-262](#). It is also noteworthy that the [2015 Act](#) followed the [Unfair Contract Terms Act 1977 s.12\(3\)](#) (deleted by the [2015 Act](#)) as regards persons “dealing as consumer” in setting a rule governing the burden of proof as to a person qualifying as a “consumer”, [s.2\(4\) of the 2015 Act](#) (applied to Pt 2 by [s.76\(3\)](#)) providing that “[a] trader claiming that an individual was not acting for purposes wholly or mainly outside the individual’s trade, business, craft or profession must prove it”. On this, see above, para.[40-246](#).
- 2705 See above, paras [40-390—40-393](#).
- 2706 1993 Directive art.8 and see above, para.[40-225](#).
- 2707 “Actori incumbit probatio”. See, for example, French law: Ghustin and Goubeaux, Droit Civil, Introduction Générale, 3rd edn (1990), p.536; and German law: Stadler in Ebke and Finkin (eds), Introduction to German Law (1996), Ch.13, pp.357, 367.
- 2708 [s.11\(5\)](#).
- 2709 1993 Directive art.3(2); [1999 Regulations reg.5\(4\)](#), above, para.[40-262](#). As earlier noted, the [2015 Act](#) did not retain the exclusion from the requirement of fairness contract terms which have been individually negotiated: above, para.[40-262](#).
- 2710 cf. the approach of English law to the issue of reasonableness in unfair dismissal. For while an employer bears the burden of proof of showing that dismissal took place for reasons which were “potentially fair”, once this has been shown, the tribunal assesses whether or not the employer “acted reasonably or unreasonably” as a “neutral issue”, although the parties may adduce facts or arguments in support of their positions: [Boys and Girls Welfare Society v McDonald \[1996\] I.R.L.R. 129, 132](#).
- 2711 i.e. “The court knows the law” and sometimes found as *curia novit legem*. The idea behind this maxim is that while in civil cases it is for the parties to bring the facts to the court, it is for the courts to apply the law to those facts, even in the absence of any legal submissions by the parties: see above, para.[40-393](#).
- 2712 Proceedings of the Conference, “The Unfair Terms Directive: 5 years On” (July 1999), The Implementation of Directive 93/13 into the National Legal Systems, Final Report to Workshop 3, “The definition of ‘unfairness’”, pp.141–142, available at http://ec.europa.eu/consumers/archive/cons_int/safe_shop/unf_cont_terms/event29_en.htm [Accessed 1 September 2021].
- 2713 1993 Directive art.3(2) para.3.

- 2714 cf. however, *VB v BNP Paribas Personal Finance SA* (C-776/19 to C-782/19) EU:C:2021:470, 10 June 2021 at [79]–[89] where the CJEU held (after IP completion day) that the “seller or supplier” has the burden of proof in showing that a term is “transparent” for the purposes of the proviso to the exclusion from the test of fairness in art.4(2) of the Directive: see below, paras 40-374A and 40-432A. If the CJEU were to rule on the issue of burden of proof as to the fairness of contract terms under the 1993 Directive, a UK court could have regard to such a decision, but it would not be bound by it as being made after IP completion day: see above, para.40-004 and Vol.I paras 1-027—1-029 noting the changed status of decisions of the CJEU made before and after IP completion day.
- 2715 See above, para.40-296.
- 2716 On this principle and its qualifications see above, paras 40-391—40-393. cf., however, two proposals for EU legislation (later withdrawn) which included a set of terms which required proof of unfairness and another set which were presumed to be unfair: the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final, Annex I, arts 83–85 CESL (withdrawn by the Commission in December 2014), itself following the scheme of the earlier Proposal for a Directive on Consumer Rights of 8 October 2008 COM(2008) 614/3 final, whose principal provisions on unfair terms (arts 30–39) did not appear in the Directive as enacted in 2011: Directive 2011/83/EU on consumer rights [2011] O.J. L304/64.
- 2717 Above, para.40-394.
- 2718 Law Com. Advice (2013), para.7.91.
- 2719 2015 Act s.62 and see below, para.40-418.
- 2720 Above, para.40-258 (note).
- 2721 On which see above, para.40-004 and Vol.I, paras 1-020 et seq.
- 2722 European Union (Withdrawal) Act 2018 s.6(1)(a) and (2) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1)(a)) and see Vol.I, para.1-029.
- 2723 See below, paras 40-441 et seq.; cf. *Director General of Fair Trading v First National Bank Plc* [2000] 1 W.L.R. 98, 112 (in relation to preventive measures under the 1994 Regulations) where it was noted that counsel for the DGFT conceded that it was for him to show that the term used by the defendant bank was unfair.
- 2724 In *Commission v Spain* (C-70/03) EU:C:2004:505, [2004] E.C.R. I-0799 at para.16 the ECJ distinguished between proceedings between parties to a consumer contract (“assessment in concreto”) and “actions for cessation which involve persons or organisations representative of the collective interest of consumers” (under art.7 of the 1993 Directive) (“assessment in abstracto”): cf. above, paras 40-296—40-298.
- 2725 Even here, however, facts may be relevant: e.g. a particular contract term may be more intelligible (and therefore more likely to be fair) if the business which uses it explains its significance either by a brochure or the practice of its agents. See, e.g. *Competition and Markets Authority v Care UK Health and Social Care Holdings Ltd* [2021] EWHC 2088 (Ch) at [85]–[111], the HC concluding that the claim of the CMA that the relevant term was unfair failed on the facts: cf. above, para.40-350. See more generally on the

different nature of the assessment of the fairness of terms in enforcement proceedings above, paras 40-296—40-298.

End of Document

© 2022 SWEET & MAXWELL

(cc) - Other Procedural Issues

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(iv) - Procedural Issues and Burden of Proof

(cc) - Other Procedural Issues

Judicial discretion and domestic appeals

- 40-402 In the context of the [Unfair Contract Terms Act 1977](#), it has been said that while a decision on the reasonableness of a contract term is not merely an exercise of judicial discretion (and so in practice all but immune to appeal)²⁷²⁶ there “will sometimes be room for a legitimate difference of judicial opinion”,²⁷²⁷ this indicating a judicial desire to discourage appeals on the issue of reasonableness.²⁷²⁸ While the test of unfairness for the purposes of [Pt 2 of the 2015 Act](#) has a number of features in common with the test of reasonableness under the [1977 Act](#),²⁷²⁹ the composite character of the former requires courts to take into account a number of elements, each of which may require “interpretation” and not merely application. And English appellate courts have not appeared unwilling to reverse first instance decisions on the fairness of a term in a consumer contract where they disagreed with their application of the test.²⁷³⁰

Group Litigation Orders

- 40-403 In [Tew v Bank of Scotland](#)²⁷³¹ a number of claimants sought to establish the unfairness of terms within the meaning of the [Unfair Terms in Consumer Contracts Regulations 1994](#) (which first implemented the 1993 Directive in the UK²⁷³²) in a particular category of mortgage (“shared

appreciation mortgages") made with them by certain lenders, including the defendants to the proceedings. The question before Mann J was whether the court should make a Group Litigation Order (GLO) in relation to these claims. Under [CPR rr.19.10 to 19.15](#) such an order is available so as "to provide for the case management of claims which give rise to common or related issues of fact or law". Mann J held that while some issues arising from claims by a number of consumers that the terms of their contracts of a particular type were unfair within the meaning of the [1994 Regulations](#) could be the object of a GLO (such as whether or not the relevant terms fell within the exclusion in [reg.3\(2\)](#) (which implemented art.4(2) of the 1993 Directive) ²⁷³³), the determination of the fairness of the terms could not.

"On the face of the legislation, the facts of individual cases are capable of affecting the assessment of fairness, and they cannot be disregarded as such."²⁷³⁴

The learned judge added that:

"This is not a case where one of necessity has to hypothesise a typical consumer, as one does in a regulatory challenge.²⁷³⁵ There are real consumers, with real transactions, who are complaining that the transactions are unfair to them. It is in their particular contexts that the unfairness falls to be assessed, and it is not a sensible exercise to divide that exercise up in the way suggested",²⁷³⁶

so as to construct "common issues". In the particular context of the case before him, Mann J instead gave directions for the trial of lead cases in order to get the fairness issue decided.²⁷³⁷

Collective actions and stays of proceedings

40-404

- U Under the [Civil Procedure Rules](#), the courts possess a power to stay the whole or part of any proceedings or judgment either generally or until a specified date or event.²⁷³⁸ This power was used to stay the many thousands of proceedings relating to "bank charges" which had been brought by consumers against their banks until the general legal issues relating to the contract terms on the basis of which these charges were imposed were resolved by the courts in proceedings between the OFT against eight major banks for a declaration as to the ambit of the "core exemption" allowed by art.4(2) of the 1993 Directive.²⁷³⁹ However, in *Sales Sinués and Drame Ba*²⁷⁴⁰ the Court of Justice of the EU considered the lawfulness of the staying of individual actions brought by consumers pending the outcome of "collective proceedings" on a preliminary reference from a Spanish court. There, individual proceedings had been brought by consumers for the annulment of a particular category of allegedly unfair terms ("interest rate floor clauses") in their contracts of consumer

credit with banks, and the latter had asked the courts seized of these proceedings to stay them under a national provision allowing the staying of proceedings with the same subject matter pending the outcome of “collective proceedings” brought by a consumers’ association under national legislation implementing art.7 of the 1993 Directive. Under Spanish law, the individual consumers could join the collective proceedings, but only subject to various constraints not imposed in respect of the individual proceedings. The Court of Justice explained the different purposes and legal effects of individual actions by consumers and collective actions under art.7, and that the principle of procedural autonomy allows national laws to establish the rules applicable to those collective actions subject to the principles of equivalence and effectiveness.²⁷⁴¹ As regards the latter, the Court held that it was clear from the national court’s reference that the national legal provision under which the consumers’ individual actions may be stayed would lead to those consumers no longer being able individually to assert the rights which the 1993 Directive recognises other than by joining the collective proceedings.²⁷⁴² This:

“... is liable to undermine the effectiveness of the protection intended by that directive, in view of the differences in the purpose and nature of the consumer-protection mechanisms given specific expression by those actions.”²⁷⁴³

For if the consumer joins the collective proceedings, national civil procedure rules would prevent the court which heard them from considering the circumstances relating to the individual consumer contract, the individual consumer would be dependent on the period set for the collective proceedings without consideration of his particular circumstances and he would be subject to further procedural constraints: these rules therefore do not constitute an adequate or effective means of bringing the continued use of unfair terms to an end contrary to art.7²⁷⁴⁴; and as regards the consumer’s individual proceedings which would be stayed:

“... the need to ensure consistency between judicial decisions cannot justify such a lack of effectiveness since ... the difference in nature between judicial control exercised in the context of a collective action and that exercised in the context of an individual action should, in principle, prevent the risk of incompatible judicial decisions.”²⁷⁴⁵

Moreover, the “need to avoid overburdening the courts” cannot justify the effective exercise of a consumer’s own individual (“subjective”) rights.²⁷⁴⁶ While the decision in *Sales Sinués and Drame Ba* has no direct application in the English context, it does emphasise that, as a matter of retained EU law (including for this purpose the EU case-law in *Sales Sinués and Drame Ba*) in principle any power under the English Civil Procedure Rules to stay consumers’ individual proceedings must not be exercised in a way which undermines the practical exercise of their own individual rights under the UK legislation which implemented the 1993 Directive.²⁷⁴⁷

Footnotes

- 2726 See, e.g. the approach of the courts to the exercise of judicial discretion in relation to the award of a “just sum” under the [Law Reform \(Frustrated Contracts\) Act 1943 s.1\(3\)](#): Vol.I, para.[26-120](#).
- 2727 [George Mitchell \(Chesterhall\) Ltd v Finney Lock Seeds Ltd \[1983\] 2 A.C. 803, 816](#), per Lord Bridge.
- 2728 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.9-075 and see Vol.I, para.[17-105](#).
- 2729 Above, para.[40-313](#).
- 2730 e.g. [Director General of Fair Trading v First National Bank Plc \[2001\] UKHL 52, \[2002\] 1 A.C. 481 reversing the Court of Appeal \[2000\] Q.B. 672](#) which itself had reversed the HC; [Bryen & Langley Ltd v Boston \[2005\] EWCA Civ 973, \[2005\] All E.R. \(D\) 507 \(Jul\).](#)
[\[2010\] EWHC 203 \(Ch\).](#)
- 2732 Above, para.[40-226](#).
- 2733 [\[2010\] EWHC 203 \(Ch\) at \[36\]–\[37\]](#).
- 2734 [\[2010\] EWHC 203 \(Ch\) at \[25\]](#), per Mann J.
- 2735 See now in particular [2015 Act s.70](#) and [Sch.3](#) and see below, paras 40-441 et seq.
- 2736 [\[2010\] EWHC 203 \(Ch\) at \[27\]](#), per Mann J.
- 2737 [\[2010\] EWHC 203 \(Ch\) at \[37\]](#).
- 2738 CPR r.3.1(2)(f).
- 2739 [Office of Fair Trading v Abbey National Plc \[2009\] UKSC 6, \[2010\] 1 A.C. 696](#) at [17] and [61]. For general discussion of this case, see above, paras [40-355](#)—[40-356](#) and [40-375](#).
- 2740 [Sales Sinués v Caixabank SA, Drame Ba v Catalunja Caixa SA \(Joined Cases C-381/14 and C-385/14\) EU:C:2016:909, 14 April 2016 \(“Sales Sinués \(Joined Cases C-381/14 and C-385/14\)”\).](#)
- 2741 [Sales Sinués \(Joined Cases C-381/14 and C-385/14\) at paras 30–32](#).
- 2742 [Sales Sinués \(Joined Cases C-381/14 and C-385/14\) at para.35](#).
- 2743 [Sales Sinués \(Joined Cases C-381/14 and C-385/14\) para.36](#).
- 2744 [Sales Sinués \(Joined Cases C-381/14 and C-385/14\) at paras 37–39](#).
- 2745 [Sales Sinués \(Joined Cases C-381/14 and C-385/14\) at para.41](#).
- 2746 [Sales Sinués \(Joined Cases C-381/14 and C-385/14\) at para.42](#). The judgment of the Court of Justice is expressed in terms of the precluding of a national provision which *requires* the national court *automatically* to suspend the consumer’s individual action without considering its effect on the protection of the consumer and without that consumer being able to dissociate himself from the collective proceedings, even though (as AG Szpunar made clear at paras 29, 45 and 74) the national provision itself appears to provide a discretion rather than to impose a duty. This is apparently explained by

the existence of uncertainty at the national level as to the proper force of the provision in question.

2747 On retained EU law, the position of retained EU case-law after IP completion day, see above, para.[40-004](#) and Vol.I, para.[1-028](#).

(v) - The Effects of a Finding That a Term is Unfair

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(c) - The Requirement of Fairness of Contract Terms

(v) - The Effects of a Finding That a Term is Unfair

“Not binding on the consumer”

40-405 Article 6(1) of the 1993 Directive provides that:

Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

2748

The wording of [reg.8 of the 1999 Regulations](#) followed this formulation closely, except that understandably it omitted any reference to national law. The substance of the treatment of the effect of unfairness on a contract term in the [2015 Act](#) is the same, but the form and wording differs. [Section 62\(1\) of the 2015](#) opens the key section which also defines when contract terms or notices are unfair, by stating simply that “[a]n unfair term of a consumer contract is not binding on the consumer”,²⁷⁴⁹ but [s.62\(3\)](#) adds that “[t]his does not prevent the consumer from relying on the term or notice if the consumer chooses to do so”.²⁷⁵⁰ [Section 67](#) later provides that:

“Where a term of a consumer contract is not binding on the consumer as a result of [Part 2 of the Act], the contract continues, so far as practicable, to have effect in every other respect.”

In addition to these effects of unfairness between the contracting parties, as will be seen, use by a trader of an unfair term in a consumer contract may attract the special enforcement measures of the law of unfair terms provided by Sch.3 of the Act²⁷⁵¹ or the making of an “enforcement order” under Pt 8 of the Enterprise Act 2002 where it harms the collective interests of consumers,²⁷⁵² and it may constitute an “unfair commercial practice” so as to attract the criminal sanctions provided by the Consumer Protection from Unfair Trading Regulations 2008.²⁷⁵³

“Not binding on the consumer” and consumer choice

- 40-406 The idea of an unfair contract term being “not binding” on a consumer was deliberately adopted by the European legislator as a “neutral” way of expressing the effect of a finding of “unfairness”, making clear the practical effect which it sought to achieve without adopting any one of the various terminologies or techniques used by national laws in similar circumstances (such as holding the term invalid, a nullity, void or “deemed not to have been written”).²⁷⁵⁴ Moreover, as s.62(3) of the 2015 Act reflects, art.6(1)’s reference to an unfair term being “not binding on the consumer” means that a consumer may choose that the term in question *should* apply. So, for example, the European Court has held that where a national court holds unfair a term which determines internal territorial jurisdiction, it may nevertheless apply that term and take jurisdiction “if the consumer opposes [its] non-application”.²⁷⁵⁵ Apart from this situation, where a national court has found a term to be unfair of its own motion, the European Court has held that it must not apply it.²⁷⁵⁶ As a result, a court must be able to establish all the consequences of the finding of the unfairness of a term without waiting for the consumer, who has been fully informed of his rights, to submit a statement requesting that the term be declared invalid.²⁷⁵⁷

The “non-binding” character of unfair terms and “waiver” agreements

- 40-407 In *XZ v Ibercaja Banco SA*²⁷⁵⁸ the question arose as to the validity of a contract (called a “novation agreement”) concluded between parties to an earlier contract of consumer credit under which the parties amended a term in the credit contract setting the lower limit of the variable interest rate (a “floor clause”), confirmed that that contract was valid and waived any rights or claims relating to it. Subsequently, the consumer contested the fairness of the floor clause in the credit contract and claimed, *inter alia*, that the second contract was a nullity as a result of that clause being “not binding on the consumer” under art.6(1) of the 1993 Directive. In this respect, the Court of Justice of the EU held, first, that while art.6(1) renders an unfair contract term not binding on the consumer, the consumer’s “right to effective consumer protection includes the option to waive the exercise of

one's rights”²⁷⁵⁹ as long as the consumer's agreement was “free and informed”.²⁷⁶⁰ In the view of the Court, the position of settlement agreements was analogous, with the result that:

“... a consumer may waive the right to rely on the unfairness of a contractual term in the context of a novation agreement, whereby the consumer waives the effects that would result from that term being declared to be unfair, provided that that waiver is the result of free and informed consent.”²⁷⁶¹

In this way, art.6(1) does not itself render not binding a later settlement agreement under which the consumer waives his right or claims under an earlier consumer contract, but it will do so where that waiver was not “free and informed”.²⁷⁶² Moreover, the terms of such a consumer contract may in principle themselves be assessed for their fairness,²⁷⁶³ in particular as regards information enabling him or her to understand the legal consequences for him or her.²⁷⁶⁴ On the other hand, the Court of Justice added that:

“... a consumer may not legitimately waive, *for the future*, the legal protection and the rights that he or she derives from Directive 93/13. By definition, he or she cannot appreciate the consequences of agreeing to such a term as regards disputes which may arise in the future.”²⁷⁶⁵

This stems from the mandatory nature of art.6(1) of the Directive.²⁷⁶⁶

Examples of the “non-bindingness” of unfair terms

- 40-408 In the vast majority of cases which concern the unfairness of “incidental terms” not binding under [s.62 of the 2015 Act](#) the effect of a finding of unfairness is straightforward and unproblematic. So, for example, a consumer is not affected by any purported exercise of any power granted by the term (such as a variation of the price or subject matter of the contract by the seller or supplier); not prejudiced by any allocation of risk indicated by the term (such as contained in an exemption clause); nor is the consumer obliged to conform to a procedure stipulated by the term (such as in the case of an arbitration clause or choice of jurisdiction clause). By contrast, in principle, the trader remains bound by the term, even if it is unlikely that a consumer would wish to hold him to it (given that *ex hypothesi* the term purports to cause a significant imbalance in his rights or obligations to his detriment). However, in some cases, as will be seen, the “non-bindingness” of a contract term may sometimes lead to the failure of the contract itself²⁷⁶⁷ and, in other cases, the effect of “non-bindingness” of a term must be complemented by the non-application of any national law rules which would (in the absence of that term) otherwise apply.²⁷⁶⁸

“The contract continues, so far as practicable, to have effect in every other respect”

- 40-409 The words in the title of this paragraph (drawn from s.67 of the 2015 Act) implemented the second part of art.6(1) of the 1993 Directive, which states that:

“... the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.”

The Court of Justice of the EU has held that the purpose of the 1993 Directive:

“... consists in restoring the balance between the parties while in principle preserving the validity of the contract as a whole, not in abolishing all contracts containing unfair terms ... As regards the criteria for assessing whether a contract can indeed continue to exist without the unfair terms, it must be noted that both the wording of article 6(1) ... and the requirements concerning the legal certainty of economic activities plead in favour of an objective approach in interpreting that provision, so that ... the situation of one of the parties to the contract, in this case the consumer, cannot be regarded as the decisive criterion determining the fate of the contract.”²⁷⁶⁹

As a result, according to the Court of Justice, under the Directive itself, a national court cannot base its decision as to the continued existence of the contract solely on a possible advantage for the consumer of its annulment,²⁷⁷⁰ although it may do so if national law so provides owing to the minimum nature of the harmonisation required by art.8 of the Directive.²⁷⁷¹ By contrast, the Court of Justice has held that a national provision which empowers a national court to *replace* unfair terms with a modified (and fair) term is not compatible with art.6(1) of the Directive.²⁷⁷² On the other hand, as art.6(1) expressly provides, “the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms”.²⁷⁷³ As a result, where a term in a contract of consumer credit fixing default interest has been held unfair and so not binding on the consumer, the Court of Justice has held that the national court may nevertheless impose interest under another term of the contract imposing “ordinary interest” not itself held unfair and so still binding on the consumer.²⁷⁷⁴

- 40-410 Moreover, a national court is not precluded “in accordance with the principles of the law of contract, from deleting an unfair term and substituting for it a supplementary provision of national

law” (i.e. a national legal rule applicable to the issue governed by the term in the absence of other or contrary agreement

2775

U) where this would enable “real balance between the rights and obligations of the parties to be restored” and where otherwise the invalidity of the unfair term would require the court to annul the contract in its entirety with disadvantageous consequences to the consumer.

2776

U A key example could be found in the case of a term relating to the main subject matter of the contract which fails the condition set by art.4(2) that it must be “plain and intelligible” and which is found to be unfair and so not binding on the consumer

2777

U; if a supplementary rule allows a court to govern the issue of the main subject matter, then reliance on it could rescue the contract from overall invalidity.

2778

U For example, where the unfairness (and therefore invalidity) of a term setting a variable interest rate in a contract of consumer credit by reference to a particular index would otherwise lead to the nullity of contract as a whole, the Court of Justice considered that a national court could replace that invalid term by setting the interest rate by reference to another legislative index applicable in the absence of agreement: this was justified in the interests of the consumer as annulment of the whole contract would be likely to lead to the immediate repayment of the capital by the consumer.

2779

U A possible example drawn from English law may be found in the position as regards the price in a contract for the sale of goods. If a term setting the price of the goods falls outside the core exemption in [s.64 of the 2015](#)

2780

U and is found to be unfair and not binding on the consumer, it could be argued that the court could substitute a “reasonable price” for the price fixed under that contract term by way of application of [s.8 of the Sale of Goods Act 1979](#), for in this situation the price could be said not to have been “fixed by the contract”, left by the contract to be fixed in a manner agreed by the contract or have been determined by the course of dealing between the parties as foreseen by that section.

2781

U On the other hand, it could be countered that, where a contract term fixing the price has been found unfair and “not binding” on the consumer, it nevertheless cannot be said that there is no price “fixed by the contract” so as to allow the application of [s.8\(3\)](#).

2782

U

No application of national “supplementary rules” more generally

- 40-411 As has been noted above, the Court of Justice of the EU allows a national court of a Member State to apply a national supplementary rule (that is, one applicable in the absence of other or contrary agreement²⁷⁸³) to govern an issue regulated by a contract term found unfair and therefore not binding on the consumer, where otherwise the contract would fail to the prejudice of the consumer, subject to the condition that such an application would enable a “real balance between the rights and obligations of the parties to be restored”.²⁷⁸⁴ However, the Court of Justice has emphasised that this acceptance of the application of national rules in substitution for a contract term held unfair is limited to these particular circumstances.²⁷⁸⁵ In *Banco Bilbao Vizcaya Argentaria SA* the strictness of this position for the trader was confirmed by the Court in considering whether a Spanish court could apply its general rules governing interest on late payments of debts provided by the Spanish Civil Code for the situation where no contract term setting a rate of interest has been fixed instead of an express term in a consumer contract of loan setting default interest found unfair under national legislation implementing the 1993 Directive.²⁷⁸⁶ In its Order,²⁷⁸⁷ the Court held that the effect of art.6(1) of the Directive is that:

“... national courts are bound solely to exclude the application of the unfair contract term so that it produces no binding effects on the consumer, without their being empowered to revise its content. Indeed, the contract must in principle subsist without any modification other than the suppression of the unfair contract terms to the extent to which such a survival of the contract is legally possible under the rules of national law.”²⁷⁸⁸

As a result, where a court declares a penalty clause in a consumer contract to be unfair, art.6(1) “cannot be interpreted as allowing the national court ... to reduce the amount of the penalty imposed on the consumer instead of excluding entirely the application of the clause”²⁷⁸⁹; such a power of revision would “contribute to the elimination of the deterrent effect exercised on traders by the pure and simple non-application of such unfair contract terms as regards consumers”, to the extent to which traders would be tempted to use them knowing that, if they were later invalidated, they could still look to the court to protect the interest with which the term was concerned.²⁷⁹⁰ Moreover, in the case of a penalty clause such as the default interest clause before it, its annulment would not have any negative consequences for the consumer as the amounts which he or she would have to pay would necessarily be less.²⁷⁹¹ This decision, if followed by English courts,²⁷⁹² would have some potentially radical consequences in the context of English law. First, in the particular context of *Banco Bilbao Vizcaya Argentaria SA*, where a term in a consumer contract imposing a contractual rate of interest for late payment of any sum owed by the consumer is held

unfair and not binding on the consumer under [Pt 2 of the 2015 Act](#), a court could not award the trader actual interest losses caused by this late payment even if pleaded and proved as is generally possible at common law,²⁷⁹³ nor, apparently, could a court exercise a statutory discretion to impose interest in respect of any such late payment.²⁷⁹⁴ Secondly, the approach of the Court of Justice to “supplementary provisions of national law” is not restricted to the context of late payments of sums of money, and has been applied, for example, to a penalty stipulated for travel by rail in the absence of a ticket.²⁷⁹⁵ For example, where a term in a consumer contract imposes on the consumer liability to pay a sum of money on breach of contract is held unfair and not binding on the consumer under [Pt 2 of the 2015 Act](#),²⁷⁹⁶ the trader would *not* be entitled to recover damages for any loss actually caused by the consumer’s breach under the general common law, as here the common law rules on damages must be viewed as “supplementary rules” which would substitute for the (unfair) term in the consumer contract. Such an effect of a finding of unfairness of a contract term under the [2015 Act](#) contrasts strikingly with the effect of a finding that a term is a penalty clause at common law, as such a finding does not prevent the injured party from recovering damages at common law against the party in breach in respect of proven and legally recoverable losses.²⁷⁹⁷ It is difficult to foresee, however, how far the approach of the Court of Justice in *Bilbao Vizcaya Argentaria SA* should be taken. For example, if a term in a consumer contract providing a power of termination in the trader for breach of contract by the consumer in certain circumstances were found unfair under [Pt 2 of the 2015 Act](#), it could be argued that such a finding prevents the trader from relying on the general common law of repudiatory breach so as to terminate the contract in respect of the circumstances foreseen by the term in question. Certainly, such a result would have a strong deterrent effect on traders including unfair termination clauses, and thus contribute to the effectiveness of the protection of consumers. However, even if this were the case, it is submitted that such a result should not prevent the trader from terminating the contract on the grounds of breach by the consumer on grounds not foreseen by the unfair contract term, whether under a fair (and therefore binding) express term or at common law.²⁷⁹⁸ Finally, the degree of uncertainty as to the limits of the approach of the Court of Justice in *Bilbao Vizcaya Argentaria SA* were increased by its decision in [CY v Caixabank SA](#).²⁷⁹⁹ In this case the Court of Justice held, *inter alia*, that where a contract term which places all the costs of setting up and discharging a mortgage executed in relation to a loan on the consumer is held unfair, a national court *may* still allow these costs (or part of these costs) to rest with the consumer if national law would anyway so provide.²⁸⁰⁰ In so deciding, the Court did not refer to its earlier case-law discussed in the previous paragraphs starting with *Kásler* which has rejected the application of national supplementary law instead of an unfair contract term except where this would enable a “real balance between the rights and obligations of the parties to be restored” and where otherwise the invalidity of the unfair term would require the court to annul the contract in its entirety with disadvantageous consequences to the consumer.²⁸⁰¹ Nor did it address the concern of this earlier case-law that allowing a trader to rely on national legal provisions against a consumer instead of a term held unfair would undermine the deterrent effect of the Directive. In these circumstances, the lasting status of the decision must remain in doubt. Moreover, these aspects of the effect of the non-binding effect of a term held unfair under [Pt 2 of the 2015 Act](#) may well be appropriate for reconsideration by the Supreme

Court or the Court of Appeal given their power to depart from this body of retained EU case-law after IP completion day.²⁸⁰²

Restitution of money paid by the consumer

- 40-412** Neither Pt 2 of the 2015 Act nor the 1993 Directive which it implemented make express provision regarding any possible restitutionary consequences of a finding that a term is “not binding” on the consumer on the ground of its unfairness. In this respect, art.6(1) of the Directive refers to an unfair term not binding the consumer “as provided for under their national law” and this neutrality as between the conceptual mechanisms of “non-bindingness” (such as invalidity or nullity) could suggest that other possible consequential effects of “non-bindingness” (notably, as to the availability of restitution and its incidents) are similarly a matter for national law. However, in *Gutiérrez Naranjo* the Court of Justice of the EU made clear that the restitutionary consequences of non-bindingness are, in principle, a matter for EU law.

²⁸⁰³

U The background to this judgment was that in 2013 the Spanish Supreme Court had held terms in consumer loan contracts providing that the variable interest rate would not go below a certain threshold (“floor clauses”) were not transparent and were unfair under Spanish legislation implementing the 1993 Directive, but the same court later held that while the effect of this unfairness was to render the terms invalid, this did not affect claims for restitution in respect of which a judgment with the force of res judicata had been given nor claims in respect of monies paid under the clauses *after* the date of its judgment on unfairness, the latter on the basis of “considerations of legal certainty, good faith and risk of serious economic difficulties”.²⁸⁰⁴ Advocate General Mengozzi had advised the Court of Justice that this limitation on the temporal effect of its judgment was a matter for Spanish law subject to the principles of equivalence and effectiveness, the latter of which was not infringed as the national court was entitled (exceptionally) to balance the purposes of the 1993 Directive (including its deterrent effect) and “the macroeconomic challenges to the already weakened banking system of a Member State”.²⁸⁰⁵ However, the Court of Justice disagreed. Taking into account, in particular, that art.6(1) of the 1993 Directive is a:

“... mandatory provision that is intended to replace the formal balance established by the contract between the rights and obligations of the parties with an effective balance that re-establishes equality between them”,²⁸⁰⁶

art.6(1):

“... must be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. Therefore, the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed.

It follows that the obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory [sic] effect in respect of those same amounts.”²⁸⁰⁷

The Court of Justice therefore considered that while the reference to national law in art.6(1) means that Member States may define:

“... the detailed rules under which the unfairness of a contractual clause is established and the actual legal effects of that finding are produced”,

the consumer must be allowed “a right of restitution of advantages wrongly obtained”.²⁸⁰⁸ While exceptions to this position may be made in respect of claims subject to res judicata and while reasonable time-limits may be imposed for the bringing of proceedings, the Court ruled that only itself is entitled to decide upon temporal limitations to be placed on its own interpretations of a rule of EU law.²⁸⁰⁹ By contrast, the Spanish Supreme Court’s restriction of claims by consumers to payments made before its own decision on the unfairness of the relevant terms was tantamount to depriving the consumers affected of their rights to obtain repayment in full of the amounts overpaid.²⁸¹⁰ The national court therefore had failed to provide the adequate and effective means of preventing the continued use of the relevant unfair terms as required by art.7(1) of the 1993 Directive.²⁸¹¹

- 40-413** The particular issues presented to the Court of Justice in *Gutiérrez Naranjo* are not directly relevant to the interpretation and application of Pt 2 of the 2015 Act by English courts. However, *Gutiérrez Naranjo* makes clear that EU law requires in principle that a consumer who has paid money under a contract term found unfair has a right to recovery of that money, as in the case of penalty clause, an unfair price variation clause or an unintelligible²⁸¹² and unfair clause setting the price itself. However, the exact legal nature of this recovery and its incidents (for example, as regards any limitation period applicable or possibly even any defence of change of position by the seller or supplier or contributory fault in the consumer²⁸¹³) could still be thought to be a matter for national law, as being “detailed rules” governing the effect of the non-bindingness of the term in question, subject to the qualification that the practical effect of the nature and incidents of the recovery must not prejudice the effectiveness of the consumer’s protection.

2814

U Given this position in the EU case-law on IP completion day (and therefore as a matter of *retained* EU law), it is submitted that it would be open to an English court to hold that the nature and incidents of the consumer's restitutive recovery are a matter for general English law, without recourse to the power of the Supreme Court or the listed appellate courts to depart from EU case-law.²⁸¹⁵ In terms of the classification of such a claim as a matter of the English law of restitution, it could be thought that recovery of money paid by a consumer could be placed on the ground of the failure of basis on which it had been paid (traditionally called failure of consideration)²⁸¹⁶ or possibly on the ground of a mistake of law.²⁸¹⁷

Terms “not binding” on consumer and third parties

40-414 Where a contract term does not bind a consumer as being unfair under Pt 2 of the 2015 Act, this may in certain circumstances have legal consequences for third parties to the contract.²⁸¹⁸ For example, if a term in a consumer contract which stipulates that the rights under it may not be transferred (e.g. a non-transferable air ticket²⁸¹⁹) is found unfair within the meaning of Pt 2, then if these rights would otherwise be transferable²⁸²⁰ the consumer would be entitled to assign them to a third party and the third party would receive valid assigned rights under the contract. This follows from the general position that where rights under a contract may otherwise be assigned, an invalid assignment will prevent the transfer of rights to the third party²⁸²¹; conversely, a contractual prohibition on assignment invalid as between the contracting parties will not prevent transfer of such rights to a third party.²⁸²² On the other hand, the non-binding character of a prohibition on assignment may not always have this kind of effect on the third party's position. In *R (ex p. Donegan) v Financial Services Compensation Scheme Ltd*²⁸²³ the question arose as to the possible effect of the “non-binding” character of a term providing for the non-transferable character of bonds created by the consumer contract (the “Bond Instrument”). Bourne J held that, even if the relevant contract terms were unfair (which he held that they were²⁸²⁴) and therefore not binding on the consumer under the 2015 Act, this would not render the bonds transferable so as to constitute “transferable securities” and so fall within the scope of the Financial Services Compensation Scheme for two reasons.²⁸²⁵ First,

“... each of the Bonds would remain a bond constituted by a Bond Instrument which states that it cannot be transferred, although the effect of section 62 [of the 2015 Act] would be that that term could not be enforced against any of the Claimants [consumers]. The security, as distinct from the contract by which each Claimant acquired it, would retain its original characteristics.”²⁸²⁶

The learned judge supported this by the fact that the [2015 Act](#) recognises that the consumer can choose to rely on an unfair contract term ²⁸²⁷ and “this indicates that the term in question remains capable of having legal effects even if it cannot be enforced against a consumer”. ²⁸²⁸ The original consumer purchaser could therefore sell the bond (if a buyer could be found) but:

“... the survival of the non-transfer characteristic in the instrument itself would ... be inconsistent with the existence of any genuine ‘capital market’ on which the Bonds could be truly negotiable”²⁸²⁹

so as to be “transferable securities” for the relevant statutory purposes.²⁸³⁰ Secondly, the consumers’ claim did not merely seek the disapplication of:

“... an unfair non-transfer provision so that they are free to transfer the Bonds. Instead, they are asking the Court in effect to turn unregulated securities into regulated securities.”²⁸³¹

This would go beyond the court’s powers under [s.62 of the 2015 Act](#), was not justified by the case-law of the Court of Justice (which sees the court’s role as to restore the balance to the transaction between the parties), its true purpose being “to give the Claimants a regulatory remedy outside the contractual transaction”,²⁸³² and “to permit the Court to change the regulatory status of the Bonds in this way would offend against legal certainty”.²⁸³³

- 40-415 Even where a third party does enjoy a right or rights of a consumer by way of valid assignment or grant, can that third party enjoy the protections put in place for the consumer even though not himself a consumer? For example, let us take the case of a landlord (the “trader”) who grants a long lease to a tenant (the “consumer”), the contract of tenancy constituting a “consumer contract” for the purposes of [Pt 2 of the 2015 Act](#).²⁸³⁴ If the tenant sells the lease to a third party, the question could arise as to whether that third party can claim the benefit of the controls of [Pt 2 of the 2015 Act](#) on the fairness of its terms, even though not party to the original contract and, in some situations, even though not himself a “consumer”.²⁸³⁵ It could be argued that the protections which the 1993 Directive (and therefore [Pt 2 of the 2015 Act](#)) provide are personal to the consumer party to the contract with the trader and therefore cannot be enjoyed by a third party. However, it is submitted that in principle where under the contract of transfer the third party enjoys the contractual rights of the consumer, he should also be able to claim the benefit of the protections which [Pt 2 of the 2015 Act](#) provides and which his own transferor enjoyed and would have continued to enjoy: the purpose of the requirement of fairness under the [2015 Act](#) is to “re-balance” the parties’ rights and obligations under the consumer contract and it is these “rebalanced” rights which the third party acquires.²⁸³⁶ This approach may be supported by case-law of the Court of Justice of the EU in the context of the assignment of rights and claims arising under a consumer contract by the consumer

to a trader for the purposes of the enforcement of those rights. In this situation, the Court of Justice has held in the context of the Consumer Credit Directive 2008²⁸³⁷ that:

“... the scope of that directive is not dependent on the identity of the parties to the dispute, but on the capacity of the parties to the credit agreement,”²⁸³⁸

and the Court has taken the same approach to the application of the 1993 Directive, allowing the benefit of controls on the fairness of terms and therefore the non-binding character of a jurisdiction clause in a consumer contract of air transport to affect the claim by a claims recovery company to whom the consumer’s rights had been assigned.²⁸³⁹

- 40-416 There may be other implications for third parties of the non-binding character of a term in a consumer contract. For example, in the context of contingency fee agreements, if a litigant (the consumer) were not bound by a term of a contingency fee agreement setting his advocate’s success fee (on the basis that the term was both not “plain and intelligible” and unfair²⁸⁴⁰), then no costs order could be made by a court against a losing defendant (third party to the agreement) in respect of this fee since the court’s statutory power to do so is restricted to “fees payable under a conditional fee agreement (including one which provides for a success fee)”: if the term is not binding against the consumer, then the success fee would not be payable under the agreement.²⁸⁴¹

Other consequences of unfairness of contract term

- 40-417 Apart from the above consequences as between the parties to a consumer contract, the use, proposal for use or recommendation for use by a trader of an unfair term in a consumer contract may attract enforcement measures in the CMA and other regulators under dedicated provisions in Sch.3 of the 2015 Act. These and other enforcement powers will be discussed below.²⁸⁴²

Footnotes

- 2748 See also Commission guidance C(2019) 5325 final pp.41–50 summarising the case-law of the CJEU.
- 2749 2015 Act s.62(1). For discussion of the effect of a finding of unfairness in a “secondary contract” under s.72 of the Act see below, paras 40-435—40-438.
- 2750 2015 Act s.62(2). This follows the CJEU’s ruling that where a court raises the issue of fairness of a term of its own motion and finds it unfair, then it must not apply it unless “the consumer, after having been informed of it, does not intend to assert its

- unfair or non-binding status”: *Pannon GSM Zrt v Erzsébet Sustikné Györfi* (C-243/08) EU:C:2009:350, para.33, above, para.40-390.
- 2751 2015 Act s.70, which refers also to the provision of investigatory powers available to the CMA and other regulators for these purpose which are set out in Sch.5 and see below, paras 40-441—40-446.
- 2752 See below, para.40-450.
- 2753 See below, paras 40-447—40-449.
- 2754 *Tenreiro* (1995) *European Review of Private Law* 273, 280 *et seq.*
- 2755 *Pannon GSM Zrt v Erzsébet Sustikné Györfi* (C-243/08) EU:C:2009:350, [2009] E.C.R. I-4713 at [35].
- 2756 *Pannon GSM* (C-243/08) EU:C:2009:350, [2009] E.C.R. I-4713 at para.35; *Jőrös v Aegon Magyarország Hitel Zrt* (C-397/11) EU:C:2013:340, 30 May 2013 at para.41.
- 2757 *Jőrös v Aegon Magyarország Hitel Zrt* (C-397/11) EU:C:2013:340, 30 May 2013 at para.42. See also the duty of courts to consider the fairness of contract terms in s.71 of the 2015 Act, above, paras 40-394—40-395.
- 2758 *XZ v Ibercaja Banco SA* (C-452/18) EU:C:2020:536, 9 July 2020 (“*Ibercaja Banco SA* (C-452/18)”), followed by the CJEU in *I.W. and R.W. v Bank BPH SA* (C-19/20) EU:C:2021:341, 29 April 2021 at paras 46–49.
- 2759 *Ibercaja Banco SA* (C-452/18) at para.25 citing *Sales Sinués v Caixabank SA, Drame Ba v Catalunya Caixa SA* (*Joined Cases* C-381/14 and C-385/14) EU:C:2016:909 para.25. See also *Pannon GSM Zrt v Erzsébet Sustikné Györfi* (C-243/08) EU:C:2009:350, [2009] E.C.R. I-4713, above, paras 40-390 and 40-405—40-406.
- 2760 *Ibercaja Banco SA* (C-452/18) at paras 25 and 27 referring to *Banif Plus Bank Zrt v Csipai* (C-472/11) EU:C:2013:88; [2013] W.L.R. (D) 76 at para.35. In this respect, AG Saugmandsgaard Øe Opinion of 20 January 2020 (available in French), para.54 appeared to assume that the “free” character of the consumer’s consent is to be determined by national contract law rules (e.g. in English law the law of duress or undue influence), a question not addressed by the CJEU.
- 2761 *Ibercaja Banco SA* (C-452/18) at para.28. In *I.W. and R.W. v Bank BPH SA* (C-19/20) EU:C:2021:341, 29 April 2021 at paras 91–99 the CJEU stated that it was “settled case-law that it is for the national court, which has found a term to be unfair and must draw the legal conclusions therefrom, to comply with the requirements of effective judicial protection of an individual’s rights under EU law, as guaranteed by Article 47 of the Charter [of Fundamental Rights of the European Union]”, which include the “principle of audi alteram partem” (at para.92, referring to *Banif Plus Bank Zrt v Csipai* (C-472/11) EU:C:2013:88, [2013] W.L.R. (D) 76 at para.29). It is, therefore, “for the national court to indicate to the parties, in the context of national procedural rules and in the light of the principle of equity in civil proceedings, objectively and exhaustively the legal consequences which the removal of the unfair term may entail, irrespective of whether or not they are represented by a professional representative”, this being “all the more important where non-application of the unfair term is liable to lead to the invalidation of the contract in its entirety, potentially exposing the consumer to claims for restitution” (at paras 97 and 98 respectively).

- 2762 *Ibercaja Banco SA (C-452/18)* at para.30.
- 2763 *Ibercaja Banco SA (C-452/18)* at para.59.
- 2764 *Ibercaja Banco SA (C-452/18)* at para.77 (summarising earlier paragraphs). On the possibility of such a term falling within the exclusion in art.4(2) of the Directive see above, para.40-374.
- 2765 *Ibercaja Banco SA (C-452/18)* at para.75 (emphasis added).
- 2766 *Ibercaja Banco SA (C-452/18)* at para.76.
- 2767 Below, paras 40-409—40-410.
- 2768 Below, para.40-411.
- 2769 *Pereničová v SOS finance, spol. sro (C-453/10)* EU:C:2012:144, [2012] 2 C.M.L.R. 28 (“*Pereničová (C-453/10)*”) paras 31–32; *Jőrös v Aegon Magyarország Hitel Zrt (C-397/11)* EU:C:2013:340, 30 May 2013 at paras 44–48; applied by the CJEU in *I.W. and R.W. v Bank BPH SA (C-19/20)* EU:C:2021:341, 29 April 2021 at paras 56–57.
- 2770 *Pereničová (C-453/10)* para.33. The question whether a contract can continue to exist without the unfair term is to be determined as a matter of national contract law, subject to the requirement (noted in the text) that the situation of one of the parties to the contract cannot be regarded as the decisive criterion: *Dziubak v Raiffeisen Bank International AG (C-260/18)* EU:C:2019:819 at para.40.
- 2771 *Pereničová (C-453/10)* at paras 34–35.
- 2772 *Banco Español de Crédito, SA v Calderón Camino (C-618/10)* EU:C:2012:349, 14 June 2012, paras 69–73. See also *Brusse v Jahani BV (C-488/11)* EU:C:2013:341, 30 May 2013 at paras 54–60; *Kásler v OTP Jelzálogbank Zrt (C-26/13)* EU:C:2014:282, 30 April 2014 (“*Kásler (C-26/13)*”) at paras 76–79; *Unicaja Banco, SA v Hidalgo Rueda (C-482/13, C-484/13, C-485/12 and C-487/13)* EU:C:2015:21, 21 January 2015 at paras 28–32; *Abanca Corporación Bancaria SA v Salamanca Santos, Bankia SA v Rodríguez Ramírez (C-70/17 and C-179/17)* EU:C:2019:250, 26 March 2019 at paras 54–55; *Gómez del Moral Guasch v Bankia SA (C-125/18)* EU:C:2020:138, 3 March 2020 at para.59; *I.W. and R.W. v Bank BPH SA (C-19/20)* EU:C:2021:341, 29 April 2021 at paras 68–69.
- 2773 The decision of the Salisbury County Ct in *Britannia Parking Group Ltd v Semark-Jullian [2020] E.C.C. 25* provides an example of the application of the rule in s.67 of the Consumer Rights Act 2015 (implementing this aspect of art.6 of the 1993 Directive). There, a parking contract imposed a “penalty charge” where a person parked without paying the normal charge and also a further charge representing “contractual costs” involved in the recovery of this debt. The Court held that, even if the term imposing the debt recovery charge were unfair, the court below should have considered whether the remainder of the contract (including the term imposing the penalty charge) continued to have effect: *[2020] E.C.C. 25* at [38].
- 2774 *Banco Santander v Demba, Cortés v Banco de Sabadell SA (C-96/16 and C-94/17)* EU:C:2018:643, 7 August 2018 at paras 73–79 where it was explained that this result also follows where “the default interest rate is fixed in the form of an increase in the ordinary interest rate by a certain number of percentage points. In the latter case, as the unfair term consists in that increase, Directive 93/13 requires solely that

that increase be annulled”: at para.77. In this way, the CJEU appeared implicitly to accept the “blue-pencilling” of a single contract term, in effect deleting its unfair element or elements while retaining its other, not unfair elements. cf. however, *Abanca Corporación Bancaria SA v Salamanca Santos, Bankia SA v Rodríguez Ramírez (C-70/17 and C-179/17) EU:C:2019:250*, 26 March 2019 at para.55 where the CJEU held that the deletion of part of a contract term (so as to remove its unfair character) would constitute a revision of the term by altering its substance and was not permitted and see further Commission guidance C(2019) 5325 final pp.44–46. AG Hogan has expressed the view that “the notion of ‘term’ used by the 1993 Directive must be understood in a substantial and not in a formal sense for the purposes of art.4(2) (*Kiss v Kiss (C-621/17) Opinion of AG Hogan of 15 May 2019*, para.50 (issue not addressed by the CJEU in its decision of 3 October 2019) and see above, para.[40-260](#)) and this approach to the identification of a “term” would be important if such a term were then to be held “not binding” in its entirety. In this respect, though, in *I.W. and R.W. v Bank BPH SA (C-19/20) EU:C:2021:341*, 29 April 2021 at paras 70–80 the CJEU recognised “the power of a national court, by way of exception, to remove the unfair element of a term in a contract binding a seller or supplier” (para.75) where the deterrent objective pursued by the 1993 Directive is ensured by national legislative provisions governing the use of that term and where such removal would not amount to revising the content of that term by altering its substance, though stating that this is possible only if the element of the relevant term in the consumer contract consists of a contractual obligation distinct from the other contractual terms, “capable of being the subject of an individual examination of its unfairness, that the national court could remove it”(para 71)). Note, however, that *I.W. and R.W. v Bank BPH SA* was decided after IP completion day and is therefore not binding on UK courts, though they may have regard to it: above, para.[40-004](#) and Vol.I, para.[1-029](#).

2775

In English law, in principle such a supplementary rule may be fixed by statute (as in the case of rules governing contracts of sale of goods under the *Sale of Goods Act 1979*) or at common law, whether expressed in terms of a general legal position (such as the law governing termination for repudiatory breach) or by way of implied term. However, the CJEU has cast indirect doubt on whether recourse could be had to the common law for this purpose as it has ruled out reference to “national [legislative] provisions of a general nature which provide that the effects expressed in a legal transaction are to be supplemented, *inter alia*, by the effects arising from the principle of equity or from established customs” on the basis that these provisions have not been subject to “a specific assessment by the legislature with a view to establishing that balance” between the rights and obligations of the parties: *Dziubak v Raiffeisen Bank International AG (C-260/18) EU:C:2019:819*, 3 October 2019 at paras 59–62. While it could be argued that in a common law system the proper balance of the parties’ rights and obligations can be fixed equally properly and specifically by the common law as by the legislature (so addressing one point of the CJEU’s concern), it remains true that this balance is not fixed by the legislature.

2776 *Kásler v OTP Jelzálogbank Zrt* (C-26/13) EU:C:2014:282, 30 April 2014 ("Kásler (C-26/13)") at paras 82–84; *Unicaja Banco, SA v Hidalgo Rueda* (C-482/13, C-484/13, C-485/12 and C-487/13) EU:C:2015:21, 21 January 2015 at para.33; *Abanca Corporación Bancaria SA v Salamanca Santos, Bankia SA v Rodríguez Ramírez* (C-70/17 and C-179/17) EU:C:2019:250, 26 March 2019 at paras 56–64. See also Commission guidance C(2019) 5325 final pp.46–49. The unfavourable consequences to the consumer of annulment should be assessed in relation to the circumstances existing or foreseeable at the time when the dispute arose, rather than when the contract was concluded and the consumer may object to being protected by the upholding of the contract in this way: *Dziubak v Raiffeisen Bank International AG* (C-260/18) EU:C:2019:819 at paras 50 and 55. Where the contract cannot be upheld by replacing the unfair contract term, a national court is not entitled instead to uphold the original unfair term itself unless the consumer gives his "free and informed consent" to this effect: ibid. at paras 63–68. On the other hand, in *Banca B. SA v A.A.A.* (C-269/19) EU:C:2020:954, 25 November 2020 at para.41 the CJEU held that where a court had found a term of a consumer credit agreement which sets a variable interest rate unfair, that therefore the contract could not continue without this term, and that there was no national legal provision which could fill the gap and so allow the contract to continue: "the national court must, while taking into account all of its national law, take all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result from the annulment of the loan agreement in question, notably the fact that the seller or supplier could immediately claim the debt from the consumer". In this respect, "nothing precludes the national court from, inter alia, inviting the parties to negotiate with the aim of establishing the method for calculating the interest rate, provided that it sets out the framework for those negotiations and that those negotiations seek to establish an effective balance between the rights and obligations of the parties to the contract taking into account in particular the objective of consumer protection": *Banca B. SA v A.A.A.* (C-269/19) at para.42. Similarly in *Lombard Pénzügyi és Lízing Zrt v PN* (C-472/20) EU:C:2022:242, 31 March 2022 paras 56–60 (French version used) the CJEU accepted that where a term defining the main subject matter of the contract (there, terms setting the exchange rate in a contract denominated in a foreign currency) was unfair and that therefore in principle the contract could not subsist, and where there are no relevant national supplementary provisions by way of substitute provision, if the national court considers that a declaration of the invalidity of the contract as a whole would have particularly harmful consequences for the consumer (notably, allowing the lender to demand repayment of the capital), it may make an order which puts the consumer in a position as though the *contract term* rather than the *contract* did not exist, apparently by way of permitted greater protection for the consumer than the 1993 Directive requires. In the particular circumstances, this allowed the national court to order that the contract be denominated in the national currency instead of the foreign currency, to designate the interest rate

applicable and to order the lender to reimburse any sums which were not payable as a result of these changes.
2777 See above, paras 40-370 and 40-371.

2778 *Kásler* (*C-26/13*) at paras 81–83. This possible effect of the non-binding nature of a term which defines the main subject-matter of the contract was recognised by the CJEU in *Dunai v ERSTE Bank Hungary Zrt* (*C-118/17 EU:C:2019:207*, 14 March 2019 at para.52, noting that the question whether it is legally possible for the contract as a whole to survive is a matter for the national court. However, the CJEU held that the Directive does not preclude national legislation which substitutes a legislative term for an unfair term (there a term setting differential exchange rates determined by a lender as in *Kásler* itself) and prevents the national court from holding that the contract as a whole cannot continue to exist without that unfair term, as long as this allows the consumer to be put in the legal and factual situation which he would have been in the absence of that unfair term in particular by granting the consumer a right to restitution of advantages wrongly obtained, but this legislation cannot prevent the court from finding another term unfair, including where that term determines the main subject matter of the contract as long as it is not in plain, intelligible language (in the case itself, terms governing the exchange rate risk not covered by the statutory provisions and therefore by the exclusion in art.1(2) of the Directive), and from drawing the proper legal effects of that finding on the validity of the contract, including that the contract itself cannot continue in existence without that unfair term taking into account that continuing the contract would be contrary to the interests of the consumer: (*C-118/17*) at paras 43–56. See similarly *JZ v OTP Jelzálogbank Zrt* (*C-932/19 EU:C:2021:673*, 2 September 2021).

2779 *Gómez del Moral Guasch v Bankia SA* (*C-125/18 EU:C:2020:138*, 3 March 2020 at paras 60–67.

2780 On which see above, paras 40-351 et seq.

2781 *Sale of Goods Act 1979* s.8(1) and (2) (which still applies to consumer contracts after the *2015 Act*: below, para.40-475) on which see below, paras 46-051—46-052.

2782 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.7-126. cf. Bridge, The Sale of Goods, 4th edn (2019), para.9.41 who notes (without referring to *s.8(3) of the 1979 Act*) that in these circumstances the absence of a power in the court to rewrite the contract means that the contract cannot continue and so must be unwound. Similar issues would arise in relation to price terms found unfair and not binding in contracts for the provision of services in relation to the *Supply of Goods and Services Act 1982* s.15.

2783 The French expression used is “une disposition de droit national à caractère supplétif”. This invokes the classic civil law distinction between legal provisions applying subject

- to other or contrary agreement (les lois supplétives de volonté or ius dispositivum) and legal provisions applying irrespective of the parties' agreement (les lois impératives or ius cogens).
- 2784 *Kásler v OTP Jelzálogbank Zrt* (C-26/13) EU:C:2014:282, 30 April 2014 at paras 82–84; *Unicaja Banco SA v Hidalgo Rueda* (C-482/13, C-484/13, C-485/12 and C-487/13) EU:C:2015:21, 21 January 2015 (“*Unicaja Banco SA* (C-482/13, etc.)”) at para.33; *Dexia Nederland BV v XXX (Joined Cases C-229/19 and C-289/19)* EU:C:2021:68, 27 January 2021 at para.54 and see further at paras 61–67.
- 2785 *Unicaja Banco SA* (C-482/13, etc.) at para.33.
- 2786 *Banco Bilbao Vizcaya Argentaria SA v Quintano Ujeta* (C-602/13) EU:C:2015:397, Order of 11 June 2015 (available only in French) (“*Bilbao Vizcaya Argentaria SA* (C-602/13)”). The CJEU followed this ruling closely in very similar circumstances in *Banco Grupo Cajatres SA v Manjón Pinilla* (C-90/14) EU:C:2015:465, 8 July 2015 at paras 33–38.
- 2787 The fact that the CJEU decided in the form of an Order rather than a judgment reflects its view that its response to the national court's question could clearly be deduced from its existing case-law: *Bilbao Vizcaya Argentaria SA* (C-602/13), para.29 referring to art.99 of the Court's own rules of procedure.
- 2788 *Bilbao Vizcaya Argentaria SA* (C-602/13) at para.33. The translations from the French text of the CJEU's Order here and in the remainder of this paragraph are the editor's.
- 2789 *Bilbao Vizcaya Argentaria SA* (C-602/13) at para.34.
- 2790 *Bilbao Vizcaya Argentaria SA* (C-602/13) at para.36.
- 2791 *Bilbao Vizcaya Argentaria SA* (C-602/13) at para.39. The CJEU accepted that this lack of negative effect would be “subject to verification by the referring court”. cf. the position as regards the application of an interest rate set by another term of the contract instead of by the (unfair) term setting a default interest rate: *Banco Santander SA v Demba, Cortés v Banco de Sabadell SA* (C-96/16 and C-94/17) EU:C:2018:643 at paras 74–77, above, para.40-409 (note). cf. also Commission guidance C(2019) 5325 final p.49.
- 2792 On the position of “retained EU case-law” after IP completion day and on the possibility for the Supreme Court and certain appellate courts to depart from that case-law see above, para.40-004 and Vol.I, para.1-028.
- 2793 cf. Vol.I paras 29-287—29-289 explaining the general common law position.
- 2794 See Vol.I, paras 29-295—29-300, referring notably to the Senior Courts Act 1981 s.35A.
- 2795 *Nationale Maatschappij der Belgische Spoorwegen (NMBS) v Kanyeba, Njis. Dedroog* (C-349 to C-351/18) EU:C:2019:936, 7 November 2019 paras 65–74 (where the CJEU left open the possibility of the traveller being liable under national *extra-contractual* liability rules). On the question whether such a person travels under a “consumer contract” see above, para.40-255.
- 2796 Such a contract term is foreseen as one which “may be regarded as unfair” by s.63(1) of the 2015 Act; Sch.2 Pt 1 para.6, see above, paras 40-328—40-332. An example may

- be found in *Munkenbeck & Marshall v Harold* [2005] EWHC 356 (TCC), [2005] All E.R. (D) 227, above, para.40-330.
- 2797 McGregor on Damages, 21st edn (2020), paras 16-028—16-029; and see *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [9].
- 2798 cf. *Higgins & Co Lawyers Ltd v Evans* [2019] EWHC 2809 (QB), [2020] 1 W.L.R. 2809 at [101] at point (vi) where a term in a conditional fee agreement automatically terminating the contract on the death of the claimant for personal injuries and imposing payment on the latter's estate of the solicitor's "basic charges" (which would have to be reasonable by way of application of the *Solicitors Act 1974* s.70) was *not* unfair in part on the ground that, if the clause were unfair and non-binding, the rest of the contract would remain in force and the estate would therefore come under an obligation to pay reasonable fees.
- 2799 (*C-224/19, C-259/19*) EU:C:2020:578, 16 July 2020.
- 2800 (*C-224/19, C-259/19*) at paras 54 and 55.
- 2801 *Kásler v OTP Jelzálogbank Zrt* (*C-26/13*) EU:C:2014:282 at paras 82–84 and see above, paras 40-409—40-410 for further references.
- 2802 Above, para.40-004 and Vol.I, para.1-028.
- 2803 *Gutiérrez Naranjo v Cajasur Banco SAU, Palacios Martinez v Banco Bilbao Vizcaya Argentaria SA (BBVA), Banco Popular Español, SA v Irles López (Joined Cases C-154/15, C-307/15 and C-308/15)* EU:C:2016:980, 21 December 2016 ("Gutiérrez Naranjo (Joined Cases C-154/15, C-307/15 and C-308/15)") followed by *I.W. and R.W. v Bank BPH SA* (*C-19/20*) EU:C:2021:341, 29 April 2021 at para.84. See also *MA v Ibercaja Banco SA* (*C-600/19*) EU:C:2022:394, 17 May 2022 at paras 58 and 59, where the CJEU set out particular circumstances where arts 6 and 7 of the 1993 Directive require a national court to award compensation to a consumer for financial damage caused by the earlier judicial application of unfair terms: see above, para.40-396A.
- 2804 Opinion of AG Mengozzi, *Gutiérrez Naranjo (Joined Cases C-154/15, C-307/15 and C-308/15)* at para.21 and see also the decision of CJEU in *Gutiérrez Naranjo* at paras 18–26.
- 2805 Opinion, *Gutiérrez Naranjo (Joined Cases C-154/15, C-307/15 and C-308/15)* at para.72.
- 2806 *Gutiérrez Naranjo (Joined Cases C-154/15, C-307/15 and C-308/15)* at para.55.
- 2807 *Gutiérrez Naranjo (Joined Cases C-154/15, C-307/15 and C-308/15)* at paras 61–62.
- 2808 *Gutiérrez Naranjo (Joined Cases C-154/15, C-307/15 and C-308/15)* at paras 64–66.
- 2809 *Gutiérrez Naranjo (Joined Cases C-154/15, C-307/15 and C-308/15)* at paras 67–71.
- 2810 *Gutiérrez Naranjo (Joined Cases C-154/15, C-307/15 and C-308/15)* at para.72.
- 2811 *Gutiérrez Naranjo (Joined Cases C-154/15, C-307/15 and C-308/15)* at para.73. On the other hand, where a contract term which places all the costs of setting up and discharging a mortgage executed in relation to a loan on the consumer is held unfair, a national court *may* still allow these costs (or part of these costs) to rest with the

- consumer if national law would anyway so provide: *CY v Caixabank SA (C-224/19, C-259/19) EU:C:2020:578* of 16 July 2020 at para.55.
- 2812 This further requirement stems from the proviso to the “core exclusion” from the test of unfairness: see above, paras 40-370—40-371.
- 2813 According to the EU Commission, Commission guidance C(2019) 5325 final p.50, “only provisions related to legal certainty, in particular res judicata and reasonably limitation periods, may limit such restitutive effect”, referring to *Gutiérrez Naranjo (Joined Cases C-154/15, C-307/15 and C-308/15)* at paras 67–69.
- 2814 *Gutiérrez Naranjo (Joined Cases C-154/15, C-307/15 and C-308/15)* at paras 66 and 69. The approach to art.6(1) in *Gutiérrez Naranjo* was followed by the CJEU in *Profi Credit Bulgaria EOOD v T.I.T. (C-170/21) EU:C:2022:518*, 30 June 2022 (French version used). There, it was held that where a contract of loan to a consumer survives a finding that one of its terms is unfair and so not binding on the consumer, the lender may recover monies owed under the contract other than under that term as long as this does not require any variation of the contract. In this respect, art.6(1) requires the national court to draw all the consequences which flow under national law from the unfairness of the particular term and, where a consumer is not present before the court, art.6(1) permits a court to deduct from its award under the contract any sums already paid under the unfair term by way of set-off. However, such a court is not under an obligation to set-off those sums in this way and national legislation which does not permit it to do so is not inconsistent with EU law as long as it satisfies the principles of equivalence and effectiveness: (C-170/21) at paras 30 and 34–49. On limitation of actions see *SC Raiffeisen Bank SA v JB (C-698/18 and C-699/18) EU:C:2020:537, 9 July 2020* at paras 63–67, 75–76 (a limitation period of three years for claims of restitution of sums paid under an unfair contract term is in principle “reasonable” and so consistent with the principle of effectiveness, but not where the period starts to run from the time of completed performance of the contract as it is likely to have expired before the consumer is aware of the possible unfairness of the contract’s terms; the principle of equivalence has also to be observed); similarly, *CY v Caixabank SA (C-224/19 C-259/19) EU:C:2020:578, 16 July 2020* at paras 85–92; *VB v BNP Paribas Personal Finance SA (C-776/19 to C-782/19) EU:C:2021:470, 10 June 2021* at paras 39–48. In *VB v BNP Paribas Personal Finance SA* it was also held that any limitation period for claims by a consumer for a declaration that a term was unfair would be contrary to the principle of effectiveness: ibid. at para.38. In *L.H. v Profi Credit Slovakia sro (C-485/19) EU:C:2021:313, 22 April 2021* at paras 51–66 the CJEU considered a national limitation period of three years governing a consumer’s claim for restitution of sums paid under an unfair contract term which started on the day on which the trader’s unjustified enrichment occurred and which applied even though the consumer was not in a position to assess whether a term is unfair or had not been made aware of the unfairness of the term. It held that such a limitation period would be contrary to the principle of effectiveness, apparently particularly in the case of a long-term consumer credit agreement, where the relevant enrichment may occur during its performance so

as to make it excessively difficult for the consumer to exercise the rights conferred by the 1993 Directive. cf. *Cofidis CA v Fredout* (C-473/00) EU:C:2002:705, [2002] E.C.R. I-10875 (national limitation period held unable to prevent court intervening as regards the fairness of a contract term) and *Hamilton v Volksbank Filder eG* (C-412/06) EU:C:2008:215, [2008] E.C.R. I-2383 especially AG Maduro's Opinion at para.24 ("The existence of a general principle of limitation should therefore be recognised, while leaving the Member States the necessary discretion to implement it in their respective legal systems").

2815 On retained EU law, retained EU case-law and the power of the SC and appellate courts in this respect, see above, para.40-004 and Vol.I, paras 1-027—1-028.

2816 See Vol.I, paras 32-063 et seq.

2817 *Chesterton Global Ltd v Finney* Unreported 30 April 2010, Lambeth County Ct; *Re Welcome Financial Services Ltd* [2015] EWHC 815 (Ch) at [106] and see generally on this ground of recovery Vol.I, paras 32-037—32-062.

2818 See also the provision in s.72 of the 2015 as regards the control of certain terms of "secondary contracts": below, paras 40-435—40-438. cf. the position as regards the effects of the unenforceability of contracts against minors on third parties: Vol.I, para.11-052.

2819 cf. above, para.40-347. cf. also the treatment of contract terms in contracts of sale of tickets for recreational, sporting and cultural events in the UK which provide for the cancellation of the ticket or blacklisting of the buyer on resale of the ticket by the "secondary ticketing" provisions in the Consumer Rights Act 2015 s.91(2), (3), (7) and (8) (in force on 26 May 2015: 2015 Act s.100(4) and see the Consumer Rights Act 2015 (Consequential Amendments) Order 2015 (SI 2015/1726) arts 2–4; Sch. paras 2–5).

2820 So, for example, the rights in question are not too personal for this purpose: see Vol.I, paras 22-056—22-057.

2821 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85 esp. at 106 and 108 and see Vol.I para.22-044.

2822 It would also appear to follow that if the third party had incited the consumer to assign his rights under the contract knowing of the non-assignment clause, then that third party would nonetheless not be guilty of the tort of inducing breach of contract as the contract would not have been broken: cf. *Proform Sports Management Ltd v Proactive Sports Management Ltd* [2006] EWHC 2903 (Ch), [2007] Bus. L.R. 93 at [33] in the context of a contract unenforceable against a minor. On the need for breach of contract (and not mere interference with contract) for this tort see *OGB Ltd v Allan*, *Douglas v Hello! Ltd*, *Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 A.C. 1 at [34] et seq. where the tort was described as being an "accessory" liability to breach of contract.

2823 [2021] EWHC 760 (Admin).

2824 [2021] EWHC 760 (Admin) at [132]—[146].

2825 The full discussion appears at [2021] EWHC 760 (Admin) at [110]—[126].

2826 [2021] EWHC 760 (Admin) at [120].

2827 2015 Act s.62(3).

2828 [2021] EWHC 760 (Admin) at [121].

- 2829 [2021] EWHC 760 (Admin) at [122].
2830 i.e. art.4.1(44) of MiFID 2: see at [33].
2831 [2021] EWHC 760 (Admin) at [123].
2832 [2021] EWHC 760 (Admin) at [124].
2833 [2021] EWHC 760 (Admin) at [124]–[125].
2834 *London Borough of Newham v Khatun* [2004] EWCA Civ 55, [2005] Q.B. 37 and see above, para.40-249.
2835 cf. the position in *Roundlistic Ltd v Jones* [2018] EWCA Civ 2284, [2019] 1 W.L.R. 4461 where, however, these points were not raised: on this case, see above, paras 40-256 (note) and 40-293 (note). See also *Casehub Ltd v Wolf Cola Ltd* [2017] EWHC 1169 (Ch), [2017] 5 Costs L.R. 835 at [25]–[31] (assignment by consumers of their restitutionary claims under the 1999 Regulations to claimant company held valid) and see further above, para.40-386.
2836 On the idea that the purpose of the requirement of fairness is to re-balance the parties' rights, see *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (C-415/11) EU:C:2013:164, 14 March 2013 at paras 44–45, on which see, para.40-281.
2837 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] O.J. L133/66 on which see below, para.41-011.
2838 *Lexitor sp. z o.o. v Spółdzielcza Kasa Oszczędnościowo - Kredytowa im. Franciszka Stefczyka* (C-383/18) EU:C:2019:702, 11 September 2019 at para.20.
2839 *Ryanair DAC v DelayFix* (C-519/19) EU:C:2020:933, 18 November 2020 at paras 53–54. The CJEU also held that the jurisdiction clause in the consumer contract (in principle binding on the contracting parties under art.25 of Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the Brussels Ibis Regulation)) would not bind the consumer's assignee nor the original trader as “in principle, a jurisdiction clause incorporated in a contract may produce effects only in the relations between the parties who have given their agreement to the conclusion of that contract” and neither party had consented to such a clause in relation to any dispute arising between them, though the CJEU recognised an exception to this position where the assignee was successor to all the consumer's rights and obligation under the national substantive law applicable: *Ryanair DAC v DelayFix* at paras 42–47. See above, paras 40-370 and 40-371, but cf. above, paras 40-409—40-410.
2841 *Courts and Legal Services Act 1990* s.58A(6) (emphasis added) and see CPR Pt 44.3A, Practice Direction about Costs supplementing Pts 43–47 CPR para.9.1.
2842 See below, paras 40-441 et seq.

(i) - The Test of Unfairness

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(d) - The Requirement of Fairness of Consumer Notices

(i) - The Test of Unfairness

Test modelled on the test governing contract terms

40-418 As was earlier explained, the [2015 Act](#) defines a “consumer notice” as:

“... a notice to the extent that it relates to rights or obligations as between a trader and a consumer, or purports to exclude or restrict a trader’s liability to a consumer”²⁸⁴³

and it provides that “an unfair consumer notice is not binding on the consumer”.²⁸⁴⁴ In this respect, the [2015 Act](#) provides that:

“A [consumer] 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.”²⁸⁴⁵

This assessment must be made 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 and to the terms of any contract on which it depends.”²⁸⁴⁶

It will readily be seen that this test of unfairness of consumer notices is modelled closely on the test applied to contract terms set out by the [2015 Act](#) which implemented the 1993 Directive,²⁸⁴⁷ rather than on the requirement of fairness as regards notices in [s.11\(3\) of the 1977 Act](#) which is:

“... that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.”²⁸⁴⁸

This contrast is particularly striking since the substantive control of “notices” in the [2015 Act](#)²⁸⁴⁹ was not (at least explicitly) required by the 1993 Directive (which governs contract terms), but reflects rather the well-known provisions in the [Unfair Contract Terms Act 1977](#) providing for the ineffectiveness of the exclusion of business liability for death and personal injury caused by negligence and (relevant for these purposes) the ineffectiveness of the exclusion of business liability for “other loss or damage” caused by negligence unless it satisfies the requirement of reasonableness.²⁸⁵⁰

- 40-419 The approach of the [2015 Act](#) to the control of “consumer notices” is two-fold: first, as will be seen, it bars the exclusion or restriction of liability for death or personal injuries resulting from negligence by notice, subject to certain exclusions.²⁸⁵¹ Secondly, the Act subjects the exclusion by notice of *all other liabilities* in traders to consumers to the new test of unfairness which has just been set out: this therefore applies to exclusions of liability for personal injuries or death caused by negligence in the cases excluded from the special bar,²⁸⁵² exclusions of liability for personal injuries or death other than caused by negligence and to exclusions of liability for other loss or damage. As regards the last situation, an example may be found in a notice of disclaimer of liability by a surveyor engaged by a building society purporting to exclude the surveyor’s liability (in tort) to the (consumer) purchaser of the residence bought by the consumer with the help of a loan by the building society as seen in *Smith v Eric S. Bush*²⁸⁵³ which would now fall to be assessed for its fairness under the [2015 Act](#)²⁸⁵⁴ rather than under [s.2\(2\) of the 1977 Act](#). However, the [2015 Act](#) goes further than the [1977 Act](#), as it subjects “consumer notices” in general to the test of fairness and this therefore includes non-contractual exclusions or limitations of liability by a trader for death or personal injury or for other loss or damage where caused other than by negligence.²⁸⁵⁵ This therefore includes notices seeking to exclude strict liabilities for death or personal injuries.²⁸⁵⁶ This would also allow the control of “end user licence agreements” (which commonly accompany contracts for software and other digital products and which not only include terms about how far the consumer may copy the information, but also restrictions of a range of liabilities including for defamation or breach of privacy)²⁸⁵⁷ and “browse wrap licences” (which many internet sites use and which state that by downloading material the consumer will be taken to have agreed to the owner’s terms and conditions, even where there is no box or icon to tick).²⁸⁵⁸ Furthermore, a consumer notice could purport to restrict, for example, the consumer’s rights or

a trader's obligations under data protection laws rather than excluding or restricting the trader's *liability*. Such "consumer notices" would also fall under the test of unfairness in [s.62 of the 2015 Act](#).

Footnotes

- 2843 [2015 Act s.61\(4\)](#) and on the definition of "consumer notice" see [s.76\(1\)](#) and above, paras [40-258—40-259](#).
- 2844 [2015 Act s.62\(2\)](#).
- 2845 [2015 Act s.62\(6\)](#).
- 2846 [2015 Act s.62\(7\)](#).
- 2847 [2015 Act s.62\(4\)](#) and [\(5\)](#); 1993 Directive arts 3(1) and 4(1) and see above, paras [40-273 et seq.](#)
- 2848 See Vol.I, para.[17-100](#).
- 2849 But see the argument at para.[40-258](#) (note) that the control of non-contractual notices as understood at common law could be required were an autonomous interpretation of "contract" adopted for the purposes of the 1993 Directive.
- 2850 [Unfair Contract Terms Act 1977 s.2](#) on which see Vol.I, para.[17-085](#). The [1977 Act s.5](#) "consumer guarantees" also applied to "notices", but [s.5](#) was deleted by the [Consumer Rights Act s.75](#); Sch.4 para.[7](#) following the recommendation of the Law Commissions which saw it as unnecessary: [Unfair Terms in Contracts \(2005\)](#), para.3.48.
- 2851 [2015 Act ss.65 and 66](#) on which see below, para.[40-423](#).
- 2852 [2015 Act s.66\(4\)](#) excludes from the bar in [s.65](#) terms or notices excluding or limiting the liability of an occupier of premises to a person who obtains access for recreational purposes, subject to certain conditions. However, this exclusion does not apply to the controls of the fairness of contract terms and consumer notices in [s.62 of the 2015 Act](#) (on which see above, para.[40-276](#) and in this paragraph), as noted by Clerk and Lindsell on Torts, 22nd edn (2017), paras 12-52—12-53.
- 2853 Joined with the decision in *Harris v Wyre Forest DC [1990] 1 A.C. 831*.
- 2854 [2015 Act s.62\(6\)](#) and [\(7\)](#).
- 2855 This follows the recommendation of the Law Commission, Scottish Law Commission, Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills (March 2013) ("Law Com. Advice (2013)"), para.7.26.
- 2856 Many statutory strict liabilities for death or personal injuries possess their own rules preventing their exclusion or restriction by agreement or notice: e.g. statutory liability for defective products under [Pt 1 of the Consumer Protection Act 1987 \(s.7\)](#) or liability for breach of safety regulations made under [s.11 of the 1987 Act \(s.41\(1\) and \(4\)\)](#). However, an example of a strict liability causing death or personal injury which does not possess such a special control on exclusions of liability may be found in the [Animals Act 1971 s.2](#): liability under [s.2\(1\)](#) (liability for animals belonging to a dangerous species) is clearly strict and liability under [s.2\(2\)](#) (liability for animals belonging to a non-

dangerous species subject to certain conditions) is apparently strict though this has been criticised: Jones (ed.) Clerk & Lindsell on Torts, 23rd edn (2020) paras 20-03—20-04. A “consumer notice” seeking to exclude or restrict liability for animals (including arising under the 1971 Act s.2) would therefore fall under the general test of fairness in s.62 of the 2015 Act.

2857 Law Com. Advice (2013), paras 7.18–7.19, 7.26.

2858 Law Com. Advice (2013), paras 7.20–7.21.

(ii) - The Effect of a Finding that a Consumer Notice is Unfair

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(d) - The Requirement of Fairness of Consumer Notices

(ii) - The Effect of a Finding that a Consumer Notice is Unfair

“Not binding on the consumer”

- 40-420 The [Consumer Rights Act 2015](#) provides that “an unfair consumer notice is not binding on the consumer”.²⁸⁵⁹ In the typical case of a consumer notice which purports to exclude or restrict the trader’s liability, the non-binding character of the notice will mean that the exclusion or restriction has no effect so that the trader’s liability arises as it would do in the absence of such a notice. Where, the consumer notice relates to the consumer’s rights or the trader’s obligations as between them rather than the trader’s liability, then the fact that the notice is not binding on the consumer would mean that the consumer’s rights or, as the case may be, the trader’s obligations would remain as they would have been absent the notice. An example of the latter could be found in a case where a consumer notice purports to restrict the consumer’s data protection rights or rights to copy information provided by the trader which would exist under the wider law.²⁸⁶⁰ If such a notice were unfair, then it would not affect the consumer’s rights or the trader’s obligation.

Enforcement measures

- 40-421 The [2015 Act](#) extends the scheme of enforcement measures required for the prevention of unfair contract terms by the 1993 Directive to “consumer notices”.²⁸⁶¹ Moreover, the enforcement powers in other schemes of consumer protection may also apply to the enforcement of the law

in the 2015 Act governing consumer notices. These schemes of enforcement will be discussed below.²⁸⁶²

Footnotes

2859 2015 Act s.62(2).

2860 cf. above, para.40-419.

2861 The heading of the 2015 Act s.70 confusingly refers only to the “enforcement of the law of unfair contract terms”, but s.70(1) itself refers to the conferral of functions on the CMA and other regulators in relation to the enforcement of Pt 2 and, therefore, the law governing “consumer notices” as well as governing terms in consumer contracts. This is confirmed explicitly by Sch.3 (entitled “Enforcement of the law on unfair contract terms and notices” and which sets out the enforcement powers), para.1(d) of which provides that the Schedule applies to “a consumer notice”.

2862 Below, paras 40-440—40-454.

(i) - Four Special Categories

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(e) - Contract Terms and Notices Not Binding on the Consumer in All Circumstances

(i) - Four Special Categories

- 40-422 Under the [Consumer Rights Act 2015](#), there are four categories of situation where terms in consumer contracts or “consumer notices” are made not binding on the consumer without any evaluation of their fairness as is provided for contract terms and consumer notices generally.

End of Document

© 2022 SWEET & MAXWELL

(ii) - Terms or Notices Excluding or Restricting Liability for Death or Personal Injury Resulting from Negligence

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(e) - Contract Terms and Notices Not Binding on the Consumer in All Circumstances

(ii) - Terms or Notices Excluding or Restricting Liability for Death or Personal Injury Resulting from Negligence

40-423 Section 65(1) of the 2015 Act provides that:

“... [a] trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence.”

This reproduces for the consumer context the controls on the exclusion or restriction of these liabilities long-established by s.2(1) of the Unfair Contract Terms Act 1977,²⁸⁶³ which the 2015 Act disapplied from that context.²⁸⁶⁴ For this purpose, s.65 reproduces the definitions of “personal injury” and, with minor changes, “negligence” provided by the 1977 Act.²⁸⁶⁵ Again following the 1977 Act, the 2015 Act excludes from the scope of these special controls²⁸⁶⁶ any contract in so far as it is a contract of insurance, including a contract to pay an annuity on human life and any contract so far as it relates to the creation or transfer of an interest in land²⁸⁶⁷; and it provides that s.65 does not affect the validity of any discharge or indemnity given by a person in consideration of the receipt by that person of compensation in settlement of any claim the person has²⁸⁶⁸ and does not apply to the liability of an occupier of premises to a person who obtains access to the premises for recreational purposes if the person suffers loss or damage because of the state of premises and allowing the person access for those purposes is not within the purposes of the occupier’s trade, business, craft or profession.²⁸⁶⁹ It is to be noted that these exclusions from the effect of s.65 leave applicable the general controls on terms or notices on the basis of their fairness and transparency.²⁸⁷⁰ So, for example, where liability for death or personal injury is imposed by the

law on a trader other than on the ground of negligence, any purported exclusion or restriction of that liability by the trader will not be subject to the special rule contained in [s.65 of the Act](#), but will be subject to the test of fairness in [s.62](#).²⁸⁷¹

Footnotes

- 2863 On which see Vol.I, paras [17-085—17-087](#).
- 2864 [Unfair Contract Terms Act 1977 s.2\(4\)](#).
- 2865 [2015 Act s.65\(3\) and \(4\)](#) respectively; [Unfair Contract Terms Act 1977 s.1\(1\)](#) (“negligence”); [s.14](#) (“personal injury”). [2015 Act ss.65\(2\)](#) (on relationship to voluntary acceptance of risk) and [65\(5\)](#) (immortal whether breach inadvertent or intentional or liability direct or vicarious) make similar provision as is found in the [1977 Act](#), ss.2(3) and [1\(4\)](#) respectively.
- 2866 The [2015 Act](#) does not disapply from the scope of controls in [s.65](#) the exclusion or restriction of an employer’s liability to their employees as is found in [Sch.1 para.4 of the 1977 Act](#) (which provides that [s.2\(1\)](#) and [\(2\)](#) “do not extend to a contract of employment, except in favour of the employee”) because, as earlier noted, the controls in [Pt 2 of the 2015](#) generally do not apply to contracts of employment nor to notices relating to rights, obligations or liabilities as between an employer and an employee: [2015 Act s.61\(2\)](#) and [61\(5\)](#) on which see above, para.[40-251](#) and [40-259](#) respectively.
- 2867 [2015 Act ss.65\(6\)](#) and [66\(1\)](#) and cf. [Unfair Contract Terms Act 1977 s.1\(2\)](#); [Sch.1 para.1\(a\)](#) and [\(b\)](#).
- 2868 [2015 Act ss.65\(6\)](#) and [66\(2\)](#) and cf. [Unfair Contract Terms Act 1977 s.1\(2\)](#); [Sch.1 para.5](#) (which is restricted to cases of compensation for pneumoconiosis).
- 2869 [2015 Act ss.65\(6\)](#) and [66\(4\)](#) and cf. [Unfair Contract Terms Act 1977 s.1\(3\)\(b\)](#) (which refers to “recreational or educational purposes”).
- 2870 [2015 Act ss.62, 68](#) and [69](#).
- 2871 Jones (ed.) Clerk & Lindsell on Torts, 23rd edn (2020) para.3-141 and see above, para.[40-419](#).

(iii) - Contract Terms Seeking to Exclude Pt 1 Liabilities

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(e) - Contract Terms and Notices Not Binding on the Consumer in All Circumstances

(iii) - Contract Terms Seeking to Exclude Pt 1 Liabilities

- 40-424 The [Consumer Rights Act 2015 Pt 1](#) imposes on traders a series of liabilities in the three categories of contracts to which it applies: contracts by traders to supply goods, digital content or services to consumers.²⁸⁷² Part 1 of the Act also provides in general that the liabilities arising under its provisions in this way cannot be excluded or restricted by a term of the relevant contract.²⁸⁷³ So, for example, a term of a consumer contract of sale of goods cannot exclude liability arising from breach of the term that the quality of the goods is satisfactory or that the goods are reasonably fit for any purpose made known by the consumer to the trader before the contract is made,²⁸⁷⁴ thereby reflecting and, as regards consumer contracts, replacing the controls in [s.6 of the 1977 Act](#).²⁸⁷⁵ Also following the [1977 Act](#), this control on the exclusion of liability extends to a series of terms of similar function.²⁸⁷⁶ The rendering of contract terms ineffective in this way by Pt 1 of the 2015 Act generally takes effect without the need for any judicial assessment of their fairness under the general test of unfairness under Pt 2 of the Act.²⁸⁷⁷ None of these controls in Pt 1 of the Act are required by the 1993 Directive, although some are required by the Consumer Sales Directive 1999,²⁸⁷⁸ and, to a much lesser extent, the Consumer Rights Directive 2011.²⁸⁷⁹ To the extent to which these controls on contract terms were not so required, their effect on the binding nature of the term between the contracting parties was clearly permitted by EU law under the “minimum harmonisation” clause in the 1993 Directive, but the position was more difficult as regards the availability of enforcement measures linked to these controls as a result of the “full harmonisation” required by the Unfair Commercial Practices Directive 2005.²⁸⁸⁰

Footnotes

- 2872 2015 Act Pt 1, Chs 2, 3 and 4 respectively, and see below, paras 40-467 et seq.
- 2873 2015 Act s.31 (contracts to supply goods), s.47 (contracts to supply digital content) and s.57 (contracts to supply services) and see below, paras 40-535, 40-568 and 40-589—40-591 (which note the qualifications on this general position).
- 2874 2015 Act ss.9 and 10; s.31(1)(a) and (b).
- 2875 Unfair Contract Terms Act 1977 s.6(2) (which the 2015 Act s.75, Sch.4 para.8(3) deleted).
- 2876 e.g. 2015 Act s.31(2) reflecting the definition in the Unfair Contract Terms Act 1977 s.13.
- 2877 For the details see 2015 Act ss.31, 47 and 57 below, paras 40-535, 40-568 and 40-589—40-591 respectively (which explain the qualifications on this general position).
- 2878 Art.7(1) and see below, para.40-461.
- 2879 Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/12 art.7(1). The Consumer Rights Directive 2011 (whose provisions are “imperative” under art.25) is relevant to the trader’s liability under s.11(4) and s.12 (below, paras 40-501—40-502); s.36(3) and s.37 (below, paras 40-552—40-553) and s.50(3) (below, para.40-577). The 2011 Directive is also relevant to ss.28 and 29 of the Act: below, paras 40-529—40-530.
- 2880 See below, paras 40-451—40-454.

(iv) - Contract Terms and Burden of Proof under the Distance Marketing of Financial Services Directive

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(e) - Contract Terms and Notices Not Binding on the Consumer in All Circumstances

(iv) - Contract Terms and Burden of Proof under the Distance Marketing of Financial Services Directive

- 40-425 The [Consumer Rights Act 2015](#) provides specially so as to deem unfair a term of a consumer contract which:

“... has the effect that the consumer bears the burden of proof with respect to compliance by a distance supplier or an intermediary with an obligation under any enactment or rule implementing”

the Distance Marketing of Financial Services Directive 2002.

2881

- U The consequences of such deemed unfairness follow the consequences of a term assessed as unfair as earlier explained.

2882



Footnotes

- 2881 **2015 Act s.63(6)** and **(7)**; Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16; **2015 Act s.63(6)** and **(7)** (which provides definitions for this purpose). This provision reflects the **1999 Regulations reg.5(6)** and **(7)** as inserted by the **Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) reg.24(3)**. On the latter (which implemented the 2002 Directive in the UK) see generally above, para.**40-143**.
- 2882 Above, paras **40-420** et seq. where it is noted (para.**40-143** (note)) that the Financial Services and Markets Bill 2022 provides for the revocation of the **Financial Services (Distance Marketing) Regulations 2004**.

(v) - Consumer Arbitration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(e) - Contract Terms and Notices Not Binding on the Consumer in All Circumstances

(v) - Consumer Arbitration

- 40-426 The [Consumer Rights Act 2015](#) retained the special rule in the [Arbitration Act 1996](#) according to which a term in a consumer contract which constitutes an arbitration agreement is deemed unfair so far as it relates to a pecuniary claim in a modest amount (i.e. less than £5,000 at the time of writing).²⁸⁸³ Arbitration agreements in consumer contracts which relate to claims for larger sums may be assessed for their fairness under the general rule in [s.62 of the Act](#).²⁸⁸⁴

Footnotes

- 2883 Arbitration Act 1996 ss.89–91 as amended by [2015 Act s.75](#), Sch.4 paras 30–32, referring to Pt 2 of the Act for these purposes. The special rule in the [Arbitration Act 1996 s.90](#) extending the definition of a “consumer” so as to include a legal person is also retained. The amount is specified by the [Unfair Arbitration Agreements \(Specified Amount\) Order 1999 \(SI 1999/2167\)](#). cf. above, para.40-324.
- 2884 Above, para.40-324. For this latter purpose, the definition of “consumer” follows the general scheme as provided by the [2015 Act s.2\(2\)](#) and [s.76\(2\)](#) on which see above, para.40-244.

(vi) - Non-Bindingness and its Consequences

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(e) - Contract Terms and Notices Not Binding on the Consumer in All Circumstances

(vi) - Non-Bindingness and its Consequences

- 40-427 In each of these four categories of case, the contract term or (as the case may be) notice is not binding on the consumer, but the wider consequences of the non-bindingness of a term as between the contracting parties differ as between them. As regards the two cases where a contract term is deemed unfair (arbitration agreements and terms governing burden of proof in distance contracts for the supply of financial services), the provisions of Pt 2 which govern the effects of the non-bindingness of a contract term apply so that the consumer is able to rely on the clause and as regards its possible effect on the wider contract.²⁸⁸⁵ In the case of the exclusion of liability for negligence, the 2015 Act provides simply that “[a] trader *cannot* by a term of a consumer contract ... exclude or restrict liability for death or personal injury resulting from negligence”,²⁸⁸⁶ not thereby deeming a contract term seeking to do so “unfair” and so “not binding” within the meaning of Pt 2 so as to attract its wider effects. It is submitted, though, that this is unlikely to cause any practical problems as a consumer has no reason to *rely* on such a clause and the ineffectiveness of such an exemption clause would not have the effect of rendering the continuation of the wider contract impracticable.²⁸⁸⁷ Similarly, while Pt 1 makes no special provision for any wider effects of the non-bindingness of contract terms seeking to exclude Pt 1 liabilities, such an effect is most unlikely to have any effect on the wider contract.²⁸⁸⁸ On the other hand, the 2015 Act applies the special enforcement regime for unfair terms which it provides in Sch.3 to all four of these categories of ineffective contract term.²⁸⁸⁹

Footnotes

- 2885 2015 Act s.62(1) (as applied by [Arbitration Act 1996 s.91\(1\)](#) as amended) (arbitration agreements); s.62(1) (as applied by [s.63\(6\)](#) (distance contracts). For these consequences see ss.62(3) and [67 of the Act](#), above, paras 40-405 et seq.
- 2886 2015 Act s.65(1) (emphasis added).
- 2887 cf. 2015 Act ss.62(3) and [67](#). There is an argument that [s.67](#) could apply to terms ineffective under [s.65](#) as the text of the former refers to terms “not binding on the consumer” which does properly describe the effect of [s.65](#) even though it does not use this terminology.
- 2888 2015 Act ss.31, 47 and [57](#) (Pt 1 liabilities); [s.67](#).
- 2889 2015 Act ss.31(7), 47(5) and [57\(7\)](#) (Pt 1 liabilities); [s.70\(1\)](#) (terms deemed unfair under ss.63(6) and by the [Arbitration Act 1996 s.91](#)). While the heading of [s.70](#) refers to the “enforcement of the law on unfair contract terms” (emphasis added), the text of [s.70](#) refers “to the enforcement of this Part” and this clearly includes the enforcement of the rule contained in [s.65](#): and cf. Explanatory Notes 2015, paras 333–334. On this enforcement regime more generally, see below, paras 40-441 et seq.

(f) - The Requirement of Transparency for Contract Terms and Consumer Notices

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(f) - The Requirement of Transparency for Contract Terms and Consumer Notices

Transparency of contract terms in the 1993 Directive

- 40-428 The 1993 Directive itself does not refer to the “transparency” of contract terms, but instead art.5 provides that:

“In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2).”

However, the Court of Justice has referred to art.5 as imposing a requirement of transparency²⁸⁹⁰ and this is reflected in the terminology used by the [2015 Act](#).²⁸⁹¹ In the 1993 Directive, the transparency of contract terms is expressly significant in two ways: first, there is the general requirement in art.5 (set out above) and, secondly, the plain and intelligible character of a contract term is a condition for the application of the “core exemption” from the requirement of fairness in art.4(2).²⁸⁹² As has earlier been seen in relation to the latter, the Court of Justice sees these two requirements as having the same scope and so case-law on one may properly be referred to in relation to the other.²⁸⁹³ It has also been seen that the Court of Justice has seen the transparency or otherwise of contract terms as relevant to their fairness under art.3 of the Directive, though a lack of transparency will not in itself render a term unfair.²⁸⁹⁴ In relation to the requirement in art.5, it will be seen that it has two elements: the first sentence requires written terms to be “drafted

in plain, intelligible language” and the second and third sentences set a rule of interpretation for terms with doubtful meanings applicable between the contracting parties.

Broad approach to the requirement of transparency by the CJEU ²⁸⁹⁵

- ⁴⁰⁻⁴²⁹ The Court of Justice of the EU has held that the requirement that contract terms are in plain, intelligible language in art.5 of the 1993 Directive “cannot be … reduced merely to their being formally and grammatically intelligible”. ²⁸⁹⁶ First, in *RWE Vertrieb AG* ²⁸⁹⁷ the Court linked the requirement of plain, intelligible language in art.5 of the Directive to recital 20’s explanation that “the consumer must actually be given an opportunity to examine all the terms of the contract”. ²⁸⁹⁸ It then added that:

“Information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier.” ²⁸⁹⁹

Later, in *Kásler* the Court held that the requirement meant that a court must determine whether, having regard to all the information provided by the business, including any promotional material or information provided in advance of the conclusion of the contract, “the average consumer, who is reasonably well informed and reasonably observant and circumspect” ²⁹⁰⁰ would understand not merely the grammatical sense of the words used by the contract term in question but also its practical consequences for him in his or her own context.

²⁹⁰¹

- U** This very demanding and substantive (as opposed to merely formal) approach to the requirement of plain intelligible language clearly has very close links with the Court of Justice’s approach to the requirement of *fairness* for the purposes of art.3 of the Directive as seen, notably, in *Invitel*. ²⁹⁰²

Transparency of contract terms and notices in the 2015 Act

- ⁴⁰⁻⁴³⁰ The *2015 Act* implemented the general requirement of transparency and the rule of interpretation of doubtful terms required by art.5 of the Directive, ²⁹⁰³ but it extended the relevant provisions so as

to include consumer notices as well as contract terms,²⁹⁰⁴ as it also did as regards the requirement of fairness.²⁹⁰⁵ In addition, as has been seen, the [2015 Act](#) implemented the condition for the application of the “core exemption” in [s.64](#) that contract terms be transparent, but added what was seen as a further condition that the terms be prominent.²⁹⁰⁶ English courts have also seen the transparency of contract terms as relevant to their fairness under the composite test.²⁹⁰⁷ As regards the independent requirement of transparency as was required by the first sentence of art.5 of the 1993 Directive, [s.68\(1\) of the 2015 Act](#) headed “Requirement for transparency” provides that:

“A trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent.”

This requirement applies to contract terms whether or not individually negotiated or contained in standard terms.²⁹⁰⁸ In relation to contract terms, it is provided (in the context of the “core exemption” but applying for the purposes of Pt 2 generally) that:

“... [a] term is transparent ... if it is expressed in plain and intelligible language and (in the case of a written term) is legible.”

²⁹⁰⁹



Section 68(2) provides specially that “[a] consumer notice is transparent ... if it is expressed in plain and intelligible language and it is legible”. [Section 69 of the 2015 Act](#) then provides separately for the special rule of interpretation in the second part of art.5.²⁹¹⁰

The significance of transparency

- ⁴⁰⁻⁴³¹ As first sight, the requirement of “plain and intelligible language” appears to focus on the form of drafting of the terms or notices, rather than either their intended legal effect or their accessibility, but, as has been seen in relation to the case-law of the Court of Justice, it goes much further. A starting point is that a term which uses a vague word may not be “plain and intelligible” even though it is not so vague as to render the term void for legal uncertainty.

²⁹¹¹

- In this respect:

“Any lawyer worth his salt can usually contrive possible alternative meanings of contractual words, and the fact that this can be done does not of itself make any given

language insufficiently plain and intelligible. For that to result the alternative wording, or uncertain effect, must be one of substance or significance, and not merely of legal contrivance.”

2912



As regards the intelligibility of contract terms, and just at the level of their drafting, the OFT in its role as enforcer of this requirement indicated what it viewed as the virtues towards which the drafter of a consumer contract should strive and which its own work was aimed at promoting.

2913

U Its starting point was that the contracts should normally be comprehensible by the consumer without recourse to legal advice.

2914

U As a result, the contract should avoid legal jargon (such as, for example, “representation”, “warranty”, “consequential damages”, “force majeure”) and references to a consumer’s “statutory rights”; it should express itself in direct and ordinary language, notably by using the first and second person rather than by naming and defining the parties to the contract; and it should minimise the number of cross-references. Headings in the contract may be helpful, and the size of the print should be large enough to be legible without difficulty,

2915

U a requirement now made explicitly by the Act’s definition of transparency for written terms as including legibility.

2916

U The CMA has continued this approach in relation to the drafting of contract terms and notices,

2917

U adopting the view of the Court of Justice noted earlier according to which the court must determine whether, having regard to all the information provided by the business, including any promotional material or information provided in advance of the conclusion of the contract, “the average consumer, who is reasonably well informed and reasonably observant and circumspect”

2918

U would understand not merely the grammatical sense of the words used by the contract term in question but also its practical consequences for him in his or her own context.

2919

U For this purpose, the degree and quality of the notice given to the consumer of the terms and any information which may cast light on them is relevant.

2920

U Moreover, in the view of the CMA:

“Where complex and technical issues have to be covered, particular care should be taken. It should not be assumed, for instance, that the consumer understands the detail of how a particular transaction or market operates. Sufficient information should be given (for example, in accompanying literature) to ensure that the consumer understands both the words used and the practical implications of any unavoidably difficult terms and their relationship with his or her other rights and obligations.”

[2921](#)



Relevance of the “average consumer”

- 40-432 Although neither the [2015 Act](#) nor the [1999 Regulations](#) before it refer to the standard of the “average consumer” for the purposes of the requirement of transparency (unlike the requirement of prominence used in the context of the “core exemption” [2922](#)), English courts and the CMA have accepted that the “plain and intelligible” character of a contract term is to be assessed from the standpoint of the typical (or average) consumer. [2923](#)

Burden of proof as to transparency

- 40-432A As earlier noted, in *VB v BNP Paribas Personal Finance SA* the Court of Justice of the EU held (after IP completion day) that the “seller or supplier” must bear the burden of proof as regards the fulfilment of the condition of transparency for the purposes of the exclusion contained in art.4(2) of the 1993 Directive so as to ensure the effectiveness of the consumer’s protection. [2924](#) Given that the Court of Justice has held (before IP completion day [2925](#)) that the requirement of transparency in art.4(2) and in art.5 of the Directive have the same scope [2926](#) and given that this is reflected in the terms of the 2015 Act ([s.64\(3\)](#) of which defines “transparency” for the purposes of [Pt 2 of the Act](#) and therefore including both [s.64](#) and [s.68](#)), it could be argued that it is also for the trader to establish that it has fulfilled the requirement of transparency for the purposes of [s.68\(1\)](#). This position would accord with the reasons given by the Court of Justice in *VB v BNP Paribas Personal Finance SA* for its allocation of the burden of proof on the trader which were that the Directive’s purpose was to “rebalance the asymmetry” between the trader and the consumer who is weaker “as regards both bargaining power and level of knowledge” [2927](#) and that it avoids imposing on the consumer a burden of proof as to a “negative fact”, that is, that the trader did not provide them with all the information necessary to satisfy the requirement of transparency. [2928](#) Against

this position, however, it should be noted, first, that *VB v BNP Paribas Personal Finance SA* was decided after IP completion day and that therefore no UK court is bound by it, though it may have regard to it.²⁹²⁹ And, secondly, there is a difference in the roles of the requirement of transparency in the two contexts: in art.4(2) of the Directive (and s.64 of the Act) transparency of the term is a condition for the application of an exclusion from the test of fairness which restricts the protection for consumers which that test provides and for that reason the exclusion is to be interpreted strictly, whereas s.68 imposes a direct requirement of transparency for written terms primarily enforceable against traders by means of the dedicated scheme put in place by the Act.²⁹³⁰ Under this scheme, a “regulator” may apply to a court for an injunction against a person if it thinks that the person is using a term or notice where it breaches the requirement of transparency²⁹³¹: in this situation, it is submitted that the normal position would be for the burden of proof to fall on the regulator to establish breach of the requirement in question and this should equally apply to the requirement in s.68 of the 2015 Act.²⁹³²

Effects of a failure in transparency

- 40-433 Subject to what will be said about the special rule of interpretation, neither the 2015 Act (nor the 1993 Directive) set out explicitly and in general terms the consequences of a failure to conform to the requirement of transparency as between the contracting parties. As has been seen, though, in the case of both contract terms and notices, such a failure is relevant to the assessment of the fairness of the term or notice under the Act²⁹³³ and, in the case of contract terms, would prevent the application of the “core exemption” to the term or terms affected.²⁹³⁴ Moreover, the 2015 Act (following the 1993 Directive as regards contract terms²⁹³⁵) applies its dedicated enforcement provisions to failures of the requirement of transparency as well as the failure of the requirement of fairness.²⁹³⁶

The special rule of interpretation

- 40-434 However, s.69(1) of the 2015 Act (which implemented the requirement in the second sentence of art.5 of the 1999 Directive as regards contract terms but extended it to consumer notices) provides that:

“If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.”

First, it should be noted that while a failure in plain, intelligible language (under s.68(1)) may well lead to a term having different meanings (its ambiguity) for the purposes of s.69(1), this may not be the case: “[a] term might be obscure and difficult to understand at all, but bear only one meaning for anyone who manages to fathom it”.

2937

U In terms of the rule of interpretation in s.69(1), at first sight this does not seem to add much to the traditional general position at common law which has long recognised a rule of construction that an ambiguous written instrument shall be construed against the person who made it (*contra proferentem*), but recent cases indicate that, under the general law, construction *contra proferentem* will be used by courts only where recourse to the context of the contract (its “matrix of fact”) has been exhausted,

2938

U whereas the requirement in the 1993 Directive (and s.69(1) of the Act) is expressed as a legal rule applicable to cases where a term in a consumer contract could have different meanings and, moreover, requires the *most favourable* meaning to be given to the term or notice. In *CC Construction Ltd v Mincione* HH Judge Eyre QC considered the significance of the rule in s.69(1) in the context of a contract between a builder and a consumer in an amended JCT standard form,

2939

U observing that s.69(1) “does not come into play simply because it is possible to argue for differing interpretations at the start of the exercise of interpreting a contractual term” and that “there must be genuine ambiguity after the normal process of analysing the language used in its context to determine the intention of the parties has been undertaken”, following the position adopted at first instance by two earlier decisions.

2940

U However, while s.69(1) (and art.5 second sentence of the 1993 Directive) themselves make clear that its rule will apply only where a term could have different meanings, with respect it remains less clear that the decision as to the clarity or ambiguity of a term should first be determined by the normal rules of construction. The special rule as to the meaning of a term in art.5 of the Directive follows immediately its first sentence requiring plain, intelligible language (as implemented by s.68(1) of the 2015 Act). As has been seen, this rule requires a consumer to be put “in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from” the term in question, and to be made aware of the reasons for the trader using the term and its relationship with other contractual terms should be clear and intelligible.

2941

U For this purpose, the transparency of contract terms must be assessed from the perspective of the “the average consumer, who is reasonably well informed and reasonably observant and circumspect”.

2942

U The textual juxtaposition of the rule of transparency and the special rule of interpretation in art.5 of the Directive might suggest that the issue of the ambiguity of a contract term for the purposes of the rule of interpretation should also be assessed from the point of view of the “average consumer” rather than by reference to the ordinary (national) rules of construction. In a contract such as the JCT standard contract before the court in *Mincione*, these normal rules could well require reference to all the other terms of the complex contract and possibly even decisions of the courts authoritatively determining the meaning of particular standard clauses,

2943

U and they would exclude the parties’ pre-contractual negotiations,

2944

U including what was said by the trader to the consumer about the matter with which the contract term in question deals. Adopting instead the perspective of the average consumer in the position of the consumer contracting party to determine the question of ambiguity would, it is submitted, better promote the protection of consumers as being weaker and less well-informed than traders.

2945

U By contrast, requiring a consumer to establish that a contract term is ambiguous according to the normal rules of construction would mean that the special rule of interpretation contained in s.69(1) would not apply to cases where the average consumer would not have understood the significance of the term for his or her own position given its ambiguity from his or her own perspective. In this way, there is an important relationship between the requirement for transparency and the special rule of interpretation, even though they are distinct.

40-434A In this respect, and also following the 1993 Directive,

2946

U s.69(2) provides that the special rule of interpretation in s.69(1) does not apply to the construction of a term or a notice in proceedings on an application for an injunction under the enforcement provisions in Sch.3 of the Act. According to the Court of Justice of the EU, the distinction drawn here between actions involving an individual consumer and preventive measures brought by persons or organisations representative of the collective interest of consumers (which underlies the distinction in s.69)

“may be accounted for by the different aims pursued by those actions. In the former case, the courts or competent bodies are required to make an assessment *in concreto* of the unfair character of a term contained in a contract which has already been concluded, while in the latter case it is their task to assess *in abstracto* the unfair character of a term which may be incorporated into contracts which have not yet been concluded. In the former case, an interpretation favourable to the individual consumer concerned benefits him or her immediately. By contrast, in the latter case, in order to obtain, by way of

prevention, the most favourable result for consumers as a whole, it is not necessary, where there is doubt, to interpret the term in a manner favourable to them. Accordingly, an objective interpretation makes it possible to prohibit more frequently the use of an unintelligible or ambiguous term, which results in wider consumer protection.”

2947



The contrast drawn by the Court of Justice therefore gives a degree of support to a different approach being taken in determining the threshold requirement of ambiguity under s.69(1) as between proceedings between consumers and traders (which should take proper account of the need to protect the individual consumer) and preventive measures where “an objective interpretation” should be taken *also* in the interests of the protection of consumers. As regards the latter, as the CMA has observed, “the purpose of the ‘most favourable interpretation’ rule is to protect individual consumers in private disputes” so that:

“[i]f a term’s ambiguity could cause detriment to consumers it may be challenged by a ‘regulator’ as unfair even if one of its possible meanings is fair.”

2948



Footnotes

- 2890 An explicit reference to a requirement of “transparency” by the CJEU in relation to art.5 of the 1993 Directive may be seen in *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV (C-92/11) EU:C:2013:180, 21 March 2013* at para.40, where the CJEU picks up the terminology used by art.3(3) of Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC ([2003] O.J. L176/57), which refers to “transparency regarding general contractual terms and conditions”. The terminology was used in the sole context of the 1993 Directive by *Kásler v OTP Jelzálogbank Zrt (C-26/13) EU:C:2014:282, 30 April 2014 (“Kásler (C-26/13)”)* at para.70.
- 2891 2015 Act ss.64(2) and (3) and 68, on which see above, para.40-376 and below, para.40-430 respectively.
- 2892 On this exemption generally, see above, paras 40-351 et seq.
- 2893 *Kásler (C-26/13)* at para.69, above, para.40-370.
- 2894 Above, paras 40-301—40-302.

- 2895 It should be noted that the significance of case-law of the CJEU for English courts changed on IP completion day as explained generally above, para.40-004 and Vol.I, paras 1-027—1-028.
- 2896 *Kásler (C-26/13)* at para.71.
- 2897 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV (C-92/11)* EU:C:2013:180, 21 March 2013 (“*RWE Vertrieb AG (C-92/11)*”) above para.40-341; *Verein für Konsumenteninformation v Amazon EU Sàrl (C-191/15)* EU:C:2016:612, 28 July 2016 at paras 67–71 and above, para.40-348.
- 2898 *RWE Vertrieb AG (C-92/11)* at para.43.
- 2899 *RWE Vertrieb AG (C-92/11)* at para.44. In *Verein für Konsumenteninformation v Amazon EU Sàrl (C-191/15)* EU:C:2016:612, 28 July 2016 above, para.40-348, the CJEU identified the unfairness of a choice of foreign law clause in its failure to conform to the requirement of plain and intelligible language by the trader in failing to inform the consumer that the effects of such a term are qualified by the mandatory statutory provisions of the consumer’s place of residence provided for his protection. However, in *Tóth v ERSTE Bank Hungary Zrt (C-34/18)* EU:C:2019:764 at paras 68–69, the CJEU refused to see this case-law as justifying the existence of a duty in a trader to alert consumers to relevant national general procedural provisions governing burden of proof nor to their interpretation by the courts as this would go further than could reasonably be expected of the trader under the requirement of transparency; and later in *Profi Credit Polska SA z siedziba w Bielsku- Bialej v QJ (C-84/19, C-222/19 and C-252/19)* EU:C:2020:259 Opinion of 2 April 2020 at para.96, AG Hogan argued (in the context of a consumer credit contract) that a failure in a trader to specify the tasks it must perform or the costs which it must bear to provide the service should not be seen as a lack of “plain, intelligible language” within the meaning of art.4(2). In his view, “[i]t is only if the financial consequences of the contract, considered as a whole or as to the subject matter of the contract, are not clear from the contract, in particular due to the existence of an excessive number of price clauses, that such clauses can be considered as not fulfilling that condition”. The CJEU in its judgment (*EU:C:2020:631*) of 3 September 2020 at para.75 took a rather more demanding view of the requirement of transparency holding that while “the seller or supplier is not obliged to specify the nature of each service provided in return for the costs imposed on the consumer under the terms of the contract, … it is important that the nature of the services actually provided can be reasonably understood or inferred from the contract considered as a whole. In addition, the consumer must be able to ascertain that there is no overlap between those various costs or the services for which those costs are paid”.
- 2900 On the significance generally of the “average consumer” see above, paras 40-046—40-047.
- 2901 *Kásler (C-26/13)* at paras 71–75 especially at 74 and see paras 40-370, 40-371 et seq. on the interpretation and application of the proviso of transparency of the terms otherwise falling within the “core exemption” in *s.64 of the 2015 Act* which reflects art.4(2) of the 1993 Directive. The national court must assess whether or not the trader has complied

- with the requirement of transparency in the light of the information available to it on the date when the contract with the consumer was concluded: *M.P. and B.P. v prowadzący działalność za pośrednictwem ‘A.’ SA* (C-212/20) EU:C:2021:934, 18 November 2021, referring to earlier case law.
- 2902 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (C-472/10) EU:C:2012:242, 26 April 2012 on which see above, para.[40-340](#).
- 2903 Its earlier implementation (restricted to contract terms) was contained in the 1999 Regulations reg.7.
- 2904 2015 Act ss.[68](#) and [69](#) on the latter of which see below, para.[40-434](#).
- 2905 2015 Act s.[62\(2\)](#), [\(6\)](#) and [\(7\)](#) and see above, para.[40-418](#).
- 2906 2015 Act s.[64\(2\)](#), [\(4\)](#) and [\(5\)](#), above, paras [40-382](#) and [40-384](#).
- 2907 Above, para.[40-301](#).
- 2908 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), para.2.43. On the requirement of fairness see above, para.[40-262](#). However, unlike the requirement of fairness, the requirement of transparency in the 1993 Directive applies to all written terms, whether or not they are “individually negotiated”: cf. arts 3(1) and 5.
- 2909 2015 Act s.[64\(3\)](#) and see [s.76\(1\)](#) “transparent”.
- 2910 Below, para.[40-434](#).
- 2911 *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), [2009] 29 E.G. 98 (C.S.), (2009) 106(30) L.S.G. 14 [60]–[75] especially at [62]; *Office of Fair Trading v Ashbourne Management Services Ltd* [2011] EWHC 1237 (Ch), [2011] E.C.C. 31 at [155]; *Allproperty Claims Ltd v Tang* [2015] EWHC 2198 (QB) at [45].
- 2912 *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch) at [73], per Mann J (in the context of the proviso concerning “plain intelligible language” in [reg.6\(2\)](#) of the 1999 Regulations).
- 2913 OFT, Unfair Contract Terms Guidance (2008) OFT311, above, para.[40-227](#) (note), paras 19.1 et seq.
- 2914 OFT, Unfair Contract Terms Guidance (2008) OFT311, above, para.[40-227](#) (note), para.19.3.
- 2915 OFT, Unfair Contract Terms Guidance (2008) OFT311, above, para.[40-227](#) (note), para.19.4–19.8. It is submitted that the requirement of “plain, intelligible writing” does not affect the language type in which it is to be drawn up, but that this type may be relevant to the test of unfairness: see Whittaker, Cambridge Yearbook of European Studies (2006), Vol.8, Ch.10, above para.[40-312](#).
- 2916 2015 Act s.[64\(3\)](#).

- 2917 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), paras 2.52–2.62.
- 2918 On the significance of the “average consumer” generally see above, paras 40-046—40-047.
- 2919 *Kásler (C-26/13)* at paras 71–75 especially at para.74 and see paras 40-370 et seq. on the interpretation and application of the proviso of transparency of the terms otherwise falling within the exclusion in s.64 of the 2015 Act (reflecting art.4(2) of the 1993 Directive). See CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), esp. at paras 2.44–2.46.
- 2920 See 1993 Directive recital 20 explaining art.5: “Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms ...” and cf. above, para.40-201 in relation to the assessment of fairness.
- 2921 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), para.2.47.
- 2922 2015 Act s.64(4)above, paras 40-482—40-483.
- 2923 *Office of Fair Trading v Ashbourne Management Services Ltd [2011] EWHC 1237 (Ch), [2011] E.C.C. 31* at [128], [155], [158], [159]; *Allproperty Claims Ltd v Tang [2015] EWHC 2198 (QB)* at [75]; CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), paras 2.63–2.64, noting however (at para.2.65) that “the concept of the average consumer is directly relevant to the assessment of fairness for the purposes of enforcement action,” as instead it should take into account “the effects of the contemplated or typical relationships between the contracting parties”. On the CMA’s approach in this context, see above, para.40-298.
- 2924 *VB v BNP Paribas Personal Finance SA (C-776/19 to C-782/19) EU:C:2021:470*, 10 June 2021 at paras 79–89, above, para.40-374A.
- 2925 The significance of which is that in principle UK courts are bound by it: above, para.40-004 and Vol.I, para.1-028.
- 2926 *Kásler v OTP Jelzálogbank Zrt (C-26/13)* 30 April 2014 at para.69, above, para.40-370.
- 2927 *VB v BNP Paribas Personal Finance SA (C-776/19 to C-782/19)* at para.82.
- 2928 *VB v BNP Paribas Personal Finance SA (C-776/19 to C-782/19)* at para.85.
- 2929 European Union (Withdrawal) Act 2018 s.6(1)(a) and (2) and see above, para.40-004 and Vol.I, para.1-029.
- 2930 2015 Act s.70 and Sch.3 and see below, paras 40-441 et seq.
- 2931 2015 Act Sch.3 para.3(1) and (5).

- 2932 cf. however, the position as to the burden of proof as to the requirement of fairness which is equally enforceable under the [2015 Act Sch.3](#): above, para.40-401.
- 2933 Above, paras [40-301—40-302](#).
- 2934 Above, paras [40-379](#) and [40-382](#).
- 2935 1993 Directive art.7, read in conjunction with the limited disapplication as regards the rule of interpretation in the second sentence of art.5, indicates that it requires the preventive measures in the former to failures in the transparency requirement in the first sentence of art.5.
- 2936 [2015 Act s.70](#) and [Sch.3 para.1](#) on which see below, paras [40-441 et seq.](#)
- 2937 *Office of Fair Trading v Abbey National Plc (Bank Charges) [2008] EWHC 875 (Comm)* at [87], per Andrew Smith J (in relation to the 1999 Regulations reg.7(1) and (2)). The decision of the HC was not upheld on other grounds by the SC in *Abbey National Plc v Office of Fair Trading [2009] UKSC 6, [2010] 1 A.C. 696*, on which see above, paras [40-355—40-356](#).
- 2938 cf. Vol.I, para.[17-012](#).
- 2939 [\[2021\] EWHC 2502 \(TCC\), 198 Con. L.R. 183](#).
- 2940 [\[2021\] EWHC 2502 \(TCC\)](#) at [63] following HH Judge Keyser QC in *AJ Building and Plastering Ltd v Turner [2013] EWHC 484 (QB), [2013] Lloyd's Rep. I.R. 629* esp. at [47] and [53]–[54] (which rejected counsel's argument that, subject only to the relevance of background knowledge, the normal rules of construction do not apply to the special rule of interpretation for consumer contracts) itself followed by HH Judge Stephen Davies in *Khurana v Webster Construction Ltd [2015] EWHC 758 (TCC), [2016] 1 All E.R. (Comm) 466* at [55]–[56].
- 2941 *Kásler v OTP Jelzálogbank Zrt (C-26/13) EU:C:2014:282*, 30 April 2014 at para.75.
- 2942 *Kásler (C-26/13)* at para.74. On the requirement for transparency see above, paras [40-370](#) (in the context of the exclusion in [s.64 of the 2015 Act](#)) and [40-428—40-432](#) (in the context of [s.68 of that Act](#)).
- 2943 See above, para.[39-020](#).
- 2944 See Vol.I, para.[15-059](#).
- 2945 On this see above, para.[40-034](#). The argument in the text finds some support from a recent decision of the CJEU where it held that where a contract term appeared ambiguous (with the parties understanding it differently), a national court must not apply its ordinary rules of interpretation of contracts based on the common intention of the contracting parties so as to “remedy” the term’s lack of transparency, as this

would undermine the non-binding effect of unfairness under art.6 of the 1993 Directive, treating this as a power in the court to revise the term so as to make it fair: at paras 67–75 and 79. However, with respect, the wider significance of the CJEU's observations is not completely clear given that the national court's own decisions appeared to be contradictory, holding the relevant clause to be unfair and yet suggesting that this could be corrected by interpretation.

2946 1993 Directive art.5, third sentence.

2947 *Commission v Spain (C-70/03) EU:C:2004:505, [2004] E.C.R. I-0799* at para.16.

2948 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), para.2.50.

(g) - Certain Types of Term of “Secondary Contracts”

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(g) - Certain Types of Term of “Secondary Contracts”

Extending the controls of Pt 2 to certain types of term in “secondary contracts”

- 40-435 Section 72 of the Consumer Rights Act 2015 Act applies the rules of Pt 2 to “a term of a contract (“the secondary contract”)” that “reduces the rights or remedies or increases the obligations of a person under another contract (“the main contract”)”,²⁹⁴⁹ “that would apply to the term if it were in the main contract”.²⁹⁵⁰ For these purposes, it does not matter “whether the parties to the secondary contract are the same as the parties to the main contract” or “whether the secondary contract is a consumer contract”.²⁹⁵¹ On the other hand, these rules do not apply “if the secondary contract is a settlement of a claim arising under the main contract”.²⁹⁵² This provision had no counterpart in the 1999 Regulations (nor the 1993 Directive), but is related to s.10 of the Unfair Contract Terms Act 1977, which provides that:

“A person is not bound by any contract term prejudicing or taking away rights of his which arise under, or in connection with the performance of, another contract, so far as those rights extend to the enforcement of another’s liability which [Part I of the Act] prevents that other from excluding or restricting.”

The purpose of this anti-avoidance provision has been said to prevent a person (A) from enforcing against another person (B) a clause in a contract between them (the “secondary contract”) which provides that B is not to sue a third person (C) under a contract between B and C and which would have been ineffective under the 1977 Act if it had been contained in the contract between B and C (the “main contract”).²⁹⁵³ It therefore applies, for example, to the case where a term in a direct contract between a manufacturer of goods and a person purports to affect the rights

of that person as buyer under the **Sale of Goods Act 1979** against the retailer from whom he purchases the goods²⁹⁵⁴ or to the case where a supplier (B) contracts to supply a customer (C) with a product under a contract (the main contract) containing no exemption clause, but the customer (C) also enters a servicing contract with A (the secondary contract) under which C is precluded from exercising his rights against B under the main contract.²⁹⁵⁵ While the scope of **s.10** has been described as “enigmatic”,²⁹⁵⁶ it has been held not to apply to the compromise or waiver of an existing contractual claim such as the release by a person of rights which have accrued to him as the result of the breach of another contract to which he is party²⁹⁵⁷ nor to the case where the parties to the main contract and the secondary contract are the same.²⁹⁵⁸

- 40-436** It will be seen that while **s.72 of the 2015 Act** has considerable similarities with **s.10 of the 1977 Act**, it also has significant differences.²⁹⁵⁹ First, **s.72** would apply to the situation where a person (A), *whether or not a trader* for these purposes, concludes a contract (the “secondary contract”, A/B) with another person, B, *whether or not B is a “consumer”* for these purposes, which includes a term which reduces B’s rights or remedies or increases his obligations towards a third person (C) where C is a “trader” and B is a “consumer” within the meaning of the Act so that this main contract (B/C) qualifies as a “consumer contract”. In this situation, the term of the secondary contract is subject to the provisions of **Pt 2 of the Act** (including those governing the fairness and transparency of contract terms²⁹⁶⁰) as they would apply if it were in the main contract.²⁹⁶¹ Secondly, unlike the **1977 Act** as it has been interpreted, **s.72 of the 2015 Act** would also apply to the situation where a person, A (a “trader” for these purposes), and B (a “consumer” for these purposes), conclude a “consumer contract” (the “main contract”) and also conclude a further contract (the “secondary contract”) which contains a term that reduces B’s rights or remedies against or increases his obligations towards A under the main contract, whether or not A qualifies as “trader” or B as “consumer” for the purposes of this secondary contract and whether or not that contract otherwise fails to qualify as a “consumer contract”.²⁹⁶² In this situation, equally, the terms of the secondary contract are subject to the rules of **Pt 2 of the Act** governing, notably, its fairness and transparency. While the examples of exclusion or limitation clauses in the “indicative list” provided by **Sch.2 of the 2015 Act** would not apply directly for this purpose (given that they are concerned with the exclusion or limitation of liability in a trader to a consumer under a consumer contract),²⁹⁶³ they could nevertheless provide useful guidance mutatis mutandis. Thirdly, as has been noted, following the interpretation taken of the scope of **s.10 of the 1977 Act**, **s.72(4)** expressly provides that it shall not apply to a settlement of a claim arising under the main contract.²⁹⁶⁴

The effect of unfairness on terms in “secondary contracts”

40-437

Unlike the position under [s.10 of the Unfair Contract Terms Act 1977](#) (which provides that a person is not bound by a term falling under it ²⁹⁶⁵), the controls imposed by [s.72 of the 2015 Act](#) on the terms of secondary contracts are those provided by [Pt 2 of that Act](#) according to the provisions in question which provide, notably, that unfair terms in a consumer contract are not binding on the consumer. ²⁹⁶⁶ Following but also adapting this general rule for the present context, where a term in a secondary contract is found unfair by way of application of [s.72](#), it is apparently not binding on the person whose rights or remedies are reduced or obligations increased, even though there is no provision in the [2015 Act](#) to this explicit effect. ²⁹⁶⁷

- 40-438 While, as earlier noted, the provisions governing “secondary contracts” find no direct counterpart in the 1993 Directive, to the extent to which they govern terms in “consumer contracts” they clearly come within its scope, but to the extent to which they govern terms other than in “consumer contracts” within the meaning of the 1993 Directive they fall outside its scope and therefore in principle within the general competence of national law. ²⁹⁶⁸ In either situation, it is submitted that any extension beyond the 1993 Directive having effect on the contract term (being part of “contract law”) itself was compatible with EU law. ²⁹⁶⁹ On the other hand, the controls on the terms of secondary contracts in [s.72](#) may form the object of enforcement measures provided by [Sch.3 of the Act](#). ²⁹⁷⁰ To the extent to which the availability of these enforcement powers go beyond the 1993 Directive and also fall within the scope of the Unfair Commercial Practices Directive 2005, they may fall foul of the “full harmonisation” which the latter Directive requires. ²⁹⁷¹

Footnotes

2949 [2015 Act s.72\(1\).](#)

2950 [2015 Act s.72\(2\).](#)

2951 [2015 Act s.72\(3\).](#)

2952 [2015 Act s.72\(4\).](#)

2953 Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.7-076. This lack of enforceability could result either directly from a provision of the Act (e.g. [s.2\(1\)](#), [s.6\(2\)](#)) or from a finding of “unreasonableness” of such a term (e.g. [s.2\(2\)](#) or [s.6\(3\)](#) as assessed under [s.11](#)).

2954 See Vol.I, para.[17-131](#).

2955 *Tudor Grange Holdings Ltd v Citibank N.A.* [1992] Ch. 53 at [66].

2956 Vol.I, para.[17-131](#).

2957 *Tudor Grange Holdings Ltd v Citibank N.A.* [1992] Ch. 53; Vol.I, para.[17-131](#).

2958 *Tudor Grange Holdings Ltd v Citibank N.A.* [1992] Ch. 53 at [66]; Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), paras 7-076—7-077.

2959 The Law Commissions had earlier recommended that its proposed unified legislation on unfair terms should contain provision, applicable to all the types of contract governed

- by it, subjecting terms in secondary contracts to the same controls as if they appeared in the main contract, but that genuine agreements to settle existing disputes should be exempted: Law Commissions, Unfair Terms (2005), paras 3.141–3.142.
- 2960 In this respect, [s.72\(2\)](#) refers generally to the term of the secondary contract being subject to “the provisions of this Part” and this would include not merely the general requirements of fairness and transparency in [ss.62](#) and [68](#), but also, e.g. the special controls in [s.65 of the Act](#) (on which see above, para.[40-423](#)).
- 2961 Unlike the controls on the terms of secondary contracts imposed by the [Unfair Contract Terms Act 1977 s.10](#) (which apply to the “prejudicing or taking away” of rights which [Pt 1 of that Act](#) prevents) the controls imposed by [s.72 of the 2015 Act](#) on the terms of the secondary contract are those provided by [Pt 2 of the Act](#) (i.e. principally the test of unfairness, the requirement of transparency and the special controls on liability for negligence in [s.65](#)) and they do not, therefore, extend to the controls imposed by [Pt 1 of the Act](#) on contract terms which seek to exclude or limit liabilities or rules provided for consumer contracts and provided by [s.31](#) (exclusion of liability: goods contracts), [s.47](#) (exclusion of liability: digital content contracts), and [s.57](#) (exclusion of liability: services contracts).
- 2962 Notably, if the secondary contract is a contract of employment which is excluded from the definition of “consumer contract” by the [2015 Act s.61\(2\)](#), above, paras [40-248](#) and [40-251](#).
- 2963 [2015 Act Sch.2 Pt 1](#) paras 1 and 2.
- 2964 *Tudor Grange Holdings Ltd v Citibank N.A. [1992] Ch. 53* at 66–67.
- 2965 Above, para.[40-435](#).
- 2966 [2015 Act s.62\(1\)](#), above, para.[40-405](#).
- 2967 [2015 Act s.72\(2\)](#) provides merely that “the term is subject to the provisions of this Part that would apply to the term if it were in the main contract”. In the case of a term in a main contract (which must be a “consumer contract”) the primary effect of a finding of unfairness is that the term is “not binding on the consumer”: [s.62\(1\)](#). However, if this provision were applied as it stands to the case of a term in a secondary contract then it would appear to restrict the effect of the finding of unfairness in that secondary contract to the situation where the person affected is a “consumer” for the purposes of that contract, which appears inconsistent with [s.72\(3\)\(b\)](#) which provides that “it does not matter for the purposes [of [s.72](#)] ... whether the secondary contract is a consumer contract”. It is clearly (if implicitly) the intention of [s.72](#) that a person who acts as a “consumer” in the main contract should not lose the benefit of the rights which he enjoys under that contract by agreement with a third party, even if he acts other than as a consumer for the purposes of that secondary contract.
- 2968 cf. above, paras [40-023](#)—[40-024](#).
- 2969 Above, para.[40-239](#).
- 2970 [2015 Act s.70\(1\)](#) refers to [Sch.3](#) providing functions for regulators “in relation to the enforcement of this Part” i.e. [Pt 2](#).
- 2971 See below, paras [40-451](#)—[40-454](#).

End of Document

© 2022 SWEET & MAXWELL

(h) - Prevention of Avoidance of the Controls in Pt 2 of the 2015 Act by Choice of Law

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(h) - Prevention of Avoidance of the Controls in Pt 2 of the 2015 Act by Choice of Law

Special rule governing choice of law other than of the UK or part of the UK

- 40-439 Section 74 of the Consumer Rights Act 2015 provides that, where a consumer contract has a close connection with the United Kingdom, a choice of law of a country or territory other than the United Kingdom or part of the United Kingdom as the contract's applicable law does not affect the application of Pt 2's provisions governing unfair contract terms.²⁹⁷² As enacted, s.74 had implemented the special rule for choice of law governing consumer contracts required by the 1993 Directive for contracts within its scope²⁹⁷³ and so provided a special rule governing choice of law "of a country or territory other than an EEA State",²⁹⁷⁴ but on IP completion day its scope was changed by regulation made under the European Union (Withdrawal) Act 2018 s.8 so as to apply to choice of law of a country or territory other than the UK.²⁹⁷⁵ The provision therefore forms part of retained EU law and its interpretation follows the interpretation of the 1993 Directive in *retained* EU case-law which it implemented, although subject to this amendment.²⁹⁷⁶ The special provision governing choice of law required by the 1993 Directive²⁹⁷⁷ makes the provisions in Pt 2 of the Act "overriding mandatory provisions" in the sense of art.9 of the retained EU law Rome I Regulation.²⁹⁷⁸ Section 74 of the 2015 Act as enacted made it clear that in all other cases the normal rules in the EU Rome I Regulation would apply. On IP completion day, this cross-reference was changed to refer to the fact that cases where the law applicable has not been chosen are governed generally by the rules contained in the retained EU law Rome I Regulation.²⁹⁷⁹ Article 6(1) of the retained EU law Rome I Regulation provides that, in the absence of agreement

otherwise, the law of the consumer's habitual residence provides the applicable law governing consumer contracts:

... provided that the professional:

- (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
- (b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.²⁹⁸⁰

Furthermore, where these same conditions are satisfied, art.6(2) of the retained EU law Rome I Regulation provides that any agreement in the consumer contract on applicable law may not:

“... have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.”²⁹⁸¹

It is to be noted that, to the extent to which the [2015 Act](#) extended the definition of “consumer contract” beyond the definition taken by the Court of Justice for the purposes of the 1993 Directive,²⁹⁸² the [2015 Act](#) also extended the application of this special rule governing choice of law.²⁹⁸³ The [2015 Act](#) makes no provision equivalent to the exclusion of “international supply contracts” nor the rules governing *English* choice of law clauses as are found in the [Unfair Contract Terms Act](#).²⁹⁸⁴ It should be noted, however, that the Court of Justice of the EU has held that where a consumer contract contains a choice of law clause which designates the law of another Member State, that term may itself be an unfair term within the meaning of the 1993 Directive.²⁹⁸⁵ It would appear that (before or after IP completion day) in principle a term in a consumer contract choosing applicable law could equally constitute an unfair term within the meaning of [Pt 2 of the 2015 Act](#), but it is submitted that after the changes to [s.74 of the Act](#) which protects consumers from choice of law other than of the UK or part of the UK, this is much less likely to be significant.

Footnotes

²⁹⁷² It is to be noted that the restriction of [s.74](#)'s special rule to the application of [Pt 2](#) means that it does not apply so as specially to protect the rules rendering terms not binding on

consumers under [Pt 1 of the Act](#), i.e. those rules governing the exclusion or restriction of liability arising from [Pt 1](#) provisions by [2015 Act ss.31, 47 and 57](#). However, under the retained EU law Rome I Regulation art.6(2), a choice of law by the contracting parties “may not ... have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable” and these provisions in [Pt 1 of the Act](#) which render liability under the statutory terms non-excludable fall within the category “provisions which cannot be derogated by agreement” for this purpose. As a result, as long as art.6 applies, a choice of a law other than English law will not deprive the consumer of their protection. On art.6(2) generally see Vol.I paras [33-151](#) and [33-168](#). See also the similar provision to [s.74 of the Act](#) in [2015 Act s.32](#) in respect of “contracts to supply goods” under [Pt 1 Ch.2 of the Act](#), reflecting the Consumer Sales Directive 1999 art.7(2), below, para.[40-537](#).

- 2973 1993 Directive art.6(2).
- 2974 [2015 Act s.74](#) (as enacted and until 31 December 2020). The earlier provision was contained in the [1999 Regulations reg.9](#).
- 2975 [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.3(5)(a)–(c) (the reference to “exit day” in reg.1(3) to the 2018 Regulations governing their coming into force must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020 s.39\(1\), s.41\(4\), Sch.5 para.1](#)). This change is subject to transitional provision: [SI 2018/1326 reg.11](#).
- 2976 [European Union \(Withdrawal\) Act 2018 s.6\(3\)](#) and see above, para.[40-004](#) and Vol.I, paras [1-027—1-029](#).
- 2977 1993 Directive art.6(2) on which see Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn (2012), Vol.II, paras 33-168—33-173.
- 2978 Rome I Regulation arts 9 and 23 (on which generally see Vol.I, paras [33-024](#) (arts 9 and 23) and [33-293](#) et seq. (art.9)). On IP completion day, the EU Rome I Regulation (Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (“Rome I”) [2008] O.J. L177/6) was retained as part of UK law by [s.3 of the European Union \(Withdrawal\) Act 2018](#) and was amended by the [Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/834\)](#) reg.10 (as itself amended by the [Jurisdiction, Judgments and Applicable Law \(Amendment\) \(EU Exit\) Regulations 2020 \(SI 2020/1574\)](#) reg.6(12) and (13)) (for “exit day” in reg.1 of the 2019 Regulations read “IP completion day”: [EU \(WA\) Act 2020 ss.39\(1\), 41\(4\)](#) and Sch.5 para.1(1)).
- 2979 [2015 Act s.74\(1\)](#) after its amendment on IP completion day cross-references to the retained EU Rome I Regulation, including as applied by the [Law Applicable to Contractual Obligations \(England and Wales and Northern Ireland\) Regulations 2009 \(SI 2009/3064\)](#) reg.5 and the [Law Applicable to Contractual Obligations \(Scotland\) Regulations 2009 \(SI 2009/410\)](#) reg.4, and also to the special transitional rule contained in the Withdrawal Agreement between the UK and the EU of 24 January 2020 art.66.

- 2980 On IP completion day, art.6(4) of the retained EU Rome I Regulation was subject to only technical amendment: [Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/834\)](#) reg.10(6).
- 2981 As noted above in this paragraph, these provisions would include ss.31, 47 and 57 of the 2015 Act.
- 2982 See esp. above, para.[40-424](#) (in relation to the definition of “consumer” in 2015 Act s.2(3) as an individual acting “wholly or mainly outside that individual’s trade”, etc.).
- 2983 s.[74\(1\)](#) *in fine* provides that “this Part [i.e. Pt 2] applies despite that choice”.
- 2984 [Unfair Contract Terms Act](#) ss.[26](#) and [27](#), on which see Vol.I paras [17-127](#) and [17-130](#) respectively. As regards ss.[26](#) and [27\(1\)](#), this reflects the earlier recommendations of the Law Commissions for consumer contracts (made in relation to the Rome Convention on the law applicable to contractual obligations 1980, which preceded the Rome I Regulation): Law Commission and Scottish Law Commission Unfair Terms in Contracts (2005) Pt 7, especially paras 7.6 and 7.9; their recommendations as regards s.[27\(2\)](#) were more nuanced, but are not reflected directly in the 2015 Act, except to the extent to which s.[74](#) applies its rule on choice of law so as to protect the controls on unfair contract terms in Pt 2 of the Act other than those required by the 1993 Directive.
- 2985 *Verein für Konsumenteninformation v Amazon EU Sàrl (C-191/15) EU:C:2016:612, 28 July 2016*, above, para.[40-348](#).

(i) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(i) - The Enforcement of the Controls on Unfair Terms and Notices

(i) - Introduction

Three schemes of enforcement

- 40-440 The controls in the [2015 Act](#) on unfair contract terms and unfair consumer notices are the subject of a dedicated scheme of enforcement provided by the Act itself.²⁹⁸⁶ In addition, the use, proposal for use or recommendation for use of an unfair term or notice may constitute an unfair commercial practice within the meaning of the [Consumer Protection from Unfair Trading Regulations 2008](#)²⁹⁸⁷ or, on the application of an enforcer, may give rise to an enforcement order under [Pt 8 of the Enterprise Act 2002](#).²⁹⁸⁸ The following paragraphs will look at each of these three possible routes to enforcement in turn. The compatibility of extensions of enforcement powers in the 2015 Act with retained EU law will then be considered.²⁹⁸⁹

Footnotes

2986 [2015 Act s.70 ad Sch.3](#) and see below, para.40-441—40-446.

2987 Below, paras 40-447—40-449.

2988 Below, para.40-450.

2989 Below, paras 40-451—40-454.

(ii) - The Dedicated Scheme of Enforcement in the 2015 Act

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(i) - The Enforcement of the Controls on Unfair Terms and Notices

(ii) - The Dedicated Scheme of Enforcement in the 2015 Act

Background in the 1993 Directive and the 1999 Regulations

40-441

U The [Consumer Rights Act 2015](#) put in place a dedicated scheme of control on unfair terms in consumer contracts, which implemented but also went further in its scope than was required by the Unfair Terms in Consumer Contracts Directive 1993. Given this background in the 1993 Directive, on IP completion day, the relevant provisions of the [2015 Act](#) formed part of retained EU law under s.2 of the European Union (Withdrawal) Act 2018²⁹⁹⁰ and some of them were amended.
²⁹⁹¹

U Article 7 of 1993 Directive requires Member States²⁹⁹² to:

“... ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.”

And it further provides that these:

“... means ... shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before the competent administrative bodies for a decision as to whether contractual terms drawn up for general

use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.”

These requirements were first implemented in UK law by the [Unfair Terms in Consumer Contracts Regulations 1994](#)²⁹⁹³ and [1999](#)²⁹⁹⁴ and the resulting preventive measures followed the scope of controls in those two sets of regulations, which themselves reflected very closely the controls in the 1993 Directive itself. Under the [1999 Regulations](#) the CMA (replacing the OFT) and a number of “qualifying bodies” possessed powers to police the fairness of contract terms, including powers to receive and consider complaints and powers to apply to a court for an injunction to stop any person caught by the Regulations’ requirements from using or recommending for use, an unfair contract term drawn up for general use in contracts concluded with consumers.²⁹⁹⁵

Enforcement measures under the 2015 Act

- 40-442 The approach of the [2015 Act](#) to the enforcement of the controls which it requires for unfair terms and notices reflects the earlier law in the [1999 Regulations](#) on contract terms, and clarified that the powers in [Sch.3](#) apply to the most important protections put in place by [Pt 2 of the Act](#)²⁹⁹⁶ including the requirement of fairness²⁹⁹⁷ and transparency,²⁹⁹⁸ but the Act extended its dedicated scheme of enforcement to its controls on “consumer notices”²⁹⁹⁹ and to the controls on exemption clauses in [Pt 1 of the Act](#).³⁰⁰⁰ It also provided that the investigatory powers available for these purposes are the same as for the enforcement of consumer protection legislation more widely, setting these out in [Sch.5 of the Act](#).³⁰⁰¹ Under [Sch.3 of the Act](#), the CMA and other “regulators”³⁰⁰² possess a power to apply for an injunction against a person if it thinks that the person is “using, or proposing or recommending the use of, a term or notice” in the following circumstances³⁰⁰³: where a term or notice purports to exclude or restrict liability imposed by [Pt 1](#) (for example, in respect of the satisfactory quality of goods supplied) or business liability for death or personal injury resulting from negligence³⁰⁰⁴; where a term or notice is unfair within the meaning of [Pt 2](#) “to any extent”³⁰⁰⁵; and where a term or notice fails the requirement of transparency.³⁰⁰⁶ [Schedule 3](#) also provides regulators with powers to consider complaints about a term or notice in the same circumstances,³⁰⁰⁷ and to accept an undertaking from a person against whom it has applied, or thinks it is entitled to apply for an injunction.³⁰⁰⁸ A court may grant an injunction on such conditions, and against such respondents to the proceedings, as it thinks appropriate.³⁰⁰⁹ The powers in regulators are therefore wider in their scope of application than those contained in the [1999 Regulations](#) in three principal ways: first, they apply to those provisions in the [2015 Act](#) which reflect provisions in the [1977 Act](#) and which render terms not binding on consumers without any assessment of their fairness³⁰¹⁰; secondly, they apply to terms assessed as unfair under the general test even where (owing to the extended character of the scope of this test)

they would not have fallen to be assessed under the [1999 Regulations](#) (or the 1993 Directive)³⁰¹¹; and, thirdly, they apply to “consumer notices” in the same way as they apply to contract terms.³⁰¹²

Temporal application of enforcement powers provided by the 2015 Act

- 40-443 As earlier noted, the [Consumer Rights Act 2015](#) revoked the [1999 Regulations](#) and replaced their provisions governing unfair terms and their enforcement with its own new provisions,³⁰¹³ which were brought into force by an Order in 2015 (the “[2015 Order](#)”) on October 1, 2015.³⁰¹⁴ However, the [2015 Order](#) provides that the new provisions so brought into force³⁰¹⁵ do not apply to “any contract entered into before 1st October 2015 which would, apart from these provisions, be covered by [Parts 1 or 2 of the Act](#)” and provides instead that:

“... the [Unfair Terms in Consumer Contracts Regulations 1999](#) continue to have effect in relation to any contract or notice relating to any such a contract despite the revocation of those Regulations by the Act.”³⁰¹⁶

This means that the preventive powers contained in the [1999 Regulations](#), rather than those in the [2015 Act](#), still apply to contracts made before October 1, 2015 despite the general revocation.³⁰¹⁷ In practice, this will concern the use by a trader of a contract made with a consumer or consumers before that date.³⁰¹⁸ This is likely to remain of significance in the case of contracts of continuing significance or duration, including many financial services contracts such as life insurance, or a loan by a building society or bank to finance the purchase of a house.³⁰¹⁹

Application of the fairness test in enforcement proceedings

- 40-444 In [Commission v Spain](#)³⁰²⁰ the European Court distinguished between “actions involving an individual consumer” (typically, where the consumer relies on a term being unfair and not binding on him) and “actions for cessation which involve persons or organisations representative of the collective interest of consumers” (such as the enforcement proceedings brought by a regulator under the [2015 Act](#)) and considered both that the nature of the assessment of terms claimed to be unfair and the time-frame for the assessment will differ as between the two.³⁰²¹ These differences have been discussed earlier,³⁰²² as has the burden of proof as to the fairness and transparency of contract terms or notices in enforcement proceedings.³⁰²³

Nature of relief: injunctions and declarations

- ⁴⁰⁻⁴⁴⁵ In *Office of Fair Trading v Foxtons Ltd*³⁰²⁴ the Court of Appeal considered the ambit, nature and appropriate content of relief to be granted by a court on the success of proceedings under the **1999 Regulations** brought by the OFT.³⁰²⁵ It held, first, that the preventive measures foreseen by art.7 of the 1993 Directive and provided for by **reg.12 of the 1999 Regulations** were intended to cover existing as well as future contracts.³⁰²⁶ Secondly, it held that the decision whether or not to grant an injunction will depend on the circumstances of the case.³⁰²⁷ In this respect, Waller LJ observed that:

“... in a situation where on a general challenge a court has found a term or terms in a set of standard conditions in use in current contracts unfair, it must be a proper exercise of its power to grant an injunction to prevent enforcement of that term or terms in existing contracts.”³⁰²⁸

Arden LJ took a rather more qualified approach, noting that the granting of an injunction in this context must accord with the general principles of Community law and so be both effective and proportionate (so that the interference with the rights of the business by the grant of the injunction is justified by the need to protect the consumer interests).³⁰²⁹ Thirdly:

“... [t]he terms of the injunction (or declaration) can only ultimately be worked out against the background of precisely what the court has found to be unfair.”³⁰³⁰

Fourthly, a court’s decision in relation to preventive proceedings does not bind a subsequent court by way of res judicata in deciding an individual challenge to the fairness of a term by a consumer,³⁰³¹ so that a term not found unfair generally in preventive proceedings may be held unfair in the particular circumstances of the case in relation to an individual consumer.³⁰³² On the other hand:

“... if there is an injunction which extends to existing contracts, the ability of the supplier to initiate or participate in [individual] proceedings will be governed by the terms of that injunction.”³⁰³³

Finally, a finding in preventive proceedings that a term or terms in standard consumer contracts is or are unfair may appropriately be the subject of a declaration by the court, even though this may necessarily have an effect on non-parties to those proceedings.³⁰³⁴ It is submitted that the approach of the Court of Appeal is consistent with the later decision of the Court of Justice of the

EU in *Invitel*.³⁰³⁵ There the Court of Justice held that effective implementation of the “deterrent nature and dissuasive purpose” of the preventive measures under art.7 of the Directive requires that a term in a set of standard terms used by a seller or supplier with a number of consumers which is declared unfair in an action for an injunction brought against that seller or supplier should:

“... not [be] binding on either the consumers who are parties to the actions for an injunction or on those who have concluded with that seller or supplier a contract to which the same [standard terms] apply.”³⁰³⁶

Application to enforcement under the 2015 Act

40-446 It is submitted that the guidance on the scope and exercise of the court’s discretion to award an injunction in preventive proceedings under the **1999 Regulations** provided by the Court of Appeal in *Office of Fair Trading v Foxtons Ltd*³⁰³⁷ and discussed in the preceding paragraph³⁰³⁸ remains valuable for the purposes of the regulators’ powers of enforcement under **Sch.3 of the 2015 Act**. First, these powers apply to:

- “(a)a term of a consumer contract
- (b)a term proposed for use in a consumer contract,
- (c)a term which a third party recommends for use in a consumer contract, or
- (d)a consumer notice.”³⁰³⁹

This is consistent, therefore, with the regulators’ powers applying both to the terms of contracts already made and to terms in proposed or recommended contracts,³⁰⁴⁰ and with the qualification already noted that terms in contracts concluded before the coming into force of the relevant provisions of the **2015 Act** are governed by the enforcement provisions of the **1999 Regulations** rather than of the **2015 Act**.³⁰⁴¹ Secondly, the Court of Appeal’s comments on the proper approach of a court to the granting of an injunction and the terms of any injunction granted³⁰⁴² apply equally to the exercise of the court’s powers to grant an injunction under the **2015 Act**,³⁰⁴³ even as regards Arden LJ’s observations on the significance of the EU general principles of effectiveness and proportionality,³⁰⁴⁴ as these general principles were retained on IP completion day and remain relevant to the interpretation of retained EU law.³⁰⁴⁵ Thirdly, it remains true that a decision as to the unfairness of a term in enforcement proceedings does not bind a court in relation to a later decision as to the same or a similar term in individual proceedings between the contracting parties³⁰⁴⁶: as has earlier been explained, the way in which the test of unfairness applies under the **2015 Act**

differs as between the two types of proceedings, especially as regards the relevance in individual proceedings of the actual circumstances in which the particular contract was concluded.³⁰⁴⁷

Footnotes

- 2990 On the significance of retained EU law see above, para.40-004 and Vol.I, paras 1-020 et seq.
- 2991 s.70 and Sch.3, which concern directly the dedicated scheme of enforcement of unfair contract terms in the Act, were not amended on IP completion day, but Sch.5's provisions on the investigatory powers of "enforcers" applies to "unfair contract terms enforcers" (Sch.5 para.2(d)) and this Schedule was amended on IP completion day: Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.4 (reg.1's reference to the 2019 Regulations coming into force on "exit day" must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4), Sch.5 para.1). Sch.5 was subject to further amendment, inter alia, by the Market Surveillance (Northern Ireland) Regulations (SI 2021/858) reg.9 and the Medical Devices (Northern Ireland Protocol) Regulations (SI 2021/905) reg.27, both of which were consequential on the Northern Ireland Protocol to the Withdrawal Agreement between the UK and the EU 2020: cf. Vol.I, para.1-021 (note).
- 2992 At an EU level, the enforcement measures required by the 1993 Directive are changed by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 art.1 of which inserted a new art.8b into the 1993 Directive requiring Member States to lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to the Directive. However, the UK does not require to implement this Directive as the date set for implementation by Member States is 28 November 2021 and so after IP completion day: see Vol.I, para.1-019.
- 2993 SI 1994/3159.
- 2994 SI 1999/2083.
- 2995 1999 Regulations regs 10–15.
- 2996 2015 Act s.70(1) and see also Sch.3 para.3(3) and (5).
- 2997 2015 Act s.61, above, paras 40-223 et seq.
- 2998 2015 Act s.68, above, para.40-428 et seq.
- 2999 While s.70 is entitled "Enforcement of the law on unfair *contract terms*" (emphasis added), Sch.3 para.1(d) states that the Schedule applies to a consumer notice.
- 3000 s.70(1) of the Act itself provides that Sch.3 "confers functions on the Competition and Markets Authority and other regulators in relation to the enforcement of this Part" (i.e. Pt 2), but Sch.3 para.3(1) and (2) empowers regulators to apply for an injunction in

- respect of a contract term which purports to exclude or restrict liability of the kind mentioned in the [2015 Act](#): see also ss.[31\(7\)](#), [47\(5\)](#), [57\(7\)](#) and [70\(1\)](#).
- 3001 [2015 Act s.70\(2\)](#), applying the investigatory powers in [Sch.5](#) (which replaced the special provisions on investigatory powers in the [1999 Regulations reg.13](#)): see especially [s.77](#) and [Sch.5 paras 2\(d\), 6](#) (“unfair contract terms enforcer”), and [13\(7\)](#) and [\(8\)](#). On the temporal application of these powers, see below, para.[40-443](#) (note), where the qualifications on this general position are noted. On IP completion day (on which see above, para.[40-004](#) and Vol.I, paras [1-020](#) et seq.) [Sch.5](#) was amended so as to replace references to “Community infringement” with “[Schedule 13](#) infringement” and “EU enforcer” with “[Schedule 13](#) enforcer”: [reg.4](#). This harmonised the provisions in the [2015 Act Sch.5](#) with the changes made to the [Enterprise Act 2002 Pt 8](#), on which see above, paras [40-136](#)—[40-138](#) and below, para.[40-442](#).
- 3002 [Sch.3 para.8](#) (as amended) specifies that “regulators” are: the CMA; the Department of Enterprise, Trade and Investment in Northern Ireland; a local weights and measures authority in Great Britain; the Financial Conduct Authority; the Office of Communications; the Information Commissioner; the Gas and Electricity Markets Authority; the Water Services Regulation Authority; the Office of Rail and Road; the Northern Ireland Authority for Utility Regulation; and the Consumers’ Association.
- The [2015 Act](#) replaced the expression “qualifying body” used by the [1999 Regulations](#) and instead refers to all those empowered to enforce its provisions governing unfair contract terms (including the CMA) as “regulators”: [2015 Act Sch.3 para.8\(1\)](#).
- 3003 [2015 Act Sch.3 para.3\(1\)](#).
- 3004 [2015 Act Sch.3 para.3\(2\)](#) referring to ss.[31](#), [47](#), [57](#) and [65\(1\)](#) of the [Act](#) and see above, para.[40-423](#) and below, paras [40-535](#), [40-568](#) and [40-589](#)—[40-591](#).
- 3005 [2015 Act Sch.3 para.3\(3\)](#). This includes both terms or notices assessed as unfair under [s.62](#) and terms deemed to be unfair under [s.63\(6\)](#) or the [Arbitration Act 1996 s.91](#), on which see above, paras [40-273](#) et seq., [40-418](#)—[40-419](#) and [40-426](#).
- 3006 [2015 Act Sch.3 para.3\(5\)](#) and see [s.68](#), above, paras [40-430](#)—[40-434](#). The application of the enforcement measures to this requirement is therefore made explicit by the [Act](#), though it was not under the [1999 Regulations reg.12](#).
- 3007 [2015 Act Sch.3 para.2](#) (reflecting [1999 Regulations reg.10](#)).
- 3008 [2015 Act Sch.3 para.6\(1\)](#).
- 3009 [2015 Act Sch.3 para.5\(1\)](#). This broadly reflects [1999 Regulations reg.12\(3\)](#) and [\(4\)](#).
- 3010 [2015 Act Sch.3 para.3\(2\)](#), above, paras [40-423](#)—[40-424](#), [40-426](#).
- 3011 The scope of the test of unfairness is widened in the following ways: the definition of “consumer” is extended by [s.2\(3\)](#) and [76\(2\)](#), above, para.[40-244](#); contract terms which have been individually negotiated are subjected to the test of unfairness by [s.62](#), above, para.[40-262](#); the “core exemption” from the assessment of the fairness of terms in [s.64](#) is subjected to an additional condition of “prominence”, above, paras [40-379](#)—[40-387](#). The [2015 Act](#) does not expressly apply the [Sch.3](#) enforcement regime to its controls on the effectiveness of certain terms on choice of applicable law as set out in [s.74](#), as the latter is not expressed as rendering such terms unfair or otherwise not binding on consumers so as to fall within one of the categories in [Sch.3 para.3\(2\)](#), [\(3\)](#) or [\(5\)](#) as

- required by para.3(1)(b), but art.6(2) of the 1993 Directive required Member States to “take the necessary measures to ensure that the consumer does not lose the protection granted” by it and so such an effect could possibly be achieved by way of “conforming interpretation” as explained above, para.40-439.
- 3012 2015 Act ss.62(2), (6) and (7), 65 and 68; Sch.3 para.3(3) and (5).
- 3013 Above, para.40-442.
- 3014 The Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) art.3(c), (g) and (h) referring in particular to the provisions in Pt 2 and Schs 3 (enforcement of the law of unfair contract terms and notices) and 5 (investigatory powers, etc.) and Sch.4 para.34 of which revokes the 1999 Regulations.
- 3015 The 2015 Order art.6(1) provides that this applies only to the provisions in paras (a) to (c) and (g) of art.3 and therefore not to the 2015 Act’s provisions on investigatory powers in art.3(h) of the 2015 Order.
- 3016 The Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) arts 3 and 6(1) (a) and 6(4).
- 3017 For detailed consideration of these powers see the 33rd edition of the present work, Vol.II, paras 38-353 et seq. This chapter from the 33rd edition is also available as a PDF to online subscribers of this edition on Westlaw.
- 3018 The statement in the text must itself be qualified as contracts made before the 1999 Regulations came into force on 1 October 1999 (reg.1) but after the Unfair Terms in Consumer Contracts Regulations 1994 came into force on 1 July 1995 (reg.1) remain governed by the latter.
- 3019 See further the explanation by the FCA in this respect at <https://www.fca.org.uk/firms/unfair-contract-terms> [Accessed 1 September 2021].
- 3020 *Commission v Spain (C-70/03) EU:C:2004:505, [2004] E.C.R. I-0799.*
- 3021 *C-70/03 EU:C:2004:505*, at [16].
- 3022 Above, para.40-298.
- 3023 Above, paras 40-401 (requirement of fairness of terms) and 40-432A (requirement of transparency of terms and notices).
- 3024 *[2009] EWCA Civ 288, [2010] 1 W.L.R. 663.*
- 3025 Above, para.40-441.
- 3026 *[2009] EWCA Civ 288* at [43]-[44], [63]-[70] (Waller and Arden LJJ respectively). cf. *[2009] EWCA Civ 288* at [86] (Moore-Bick LJ).
- 3027 *[2009] EWCA Civ 288* at [73] (Arden LJ) and [49] (Waller LJ).
- 3028 *[2009] EWCA Civ 288* at [48].
- 3029 *[2009] EWCA Civ 288* at [73] (Arden LJ) and see [99] (Moore-Bick LJ).
- 3030 *[2009] EWCA Civ 288* at [51] (Waller LJ) and similarly at [73] (Arden LJ).
- 3031 *[2009] EWCA Civ 288* at [71] (Arden LJ).
- 3032 *[2009] EWCA Civ 288* at [46] (Waller LJ).
- 3033 *[2009] EWCA Civ 288* at [71], per Arden LJ. cf. *[2009] EWCA Civ 288* at [86] and [96] Moore-Bick LJ.

- 3034 [2009] EWCA Civ 288 at [71], per Arden LJ. cf. [2009] EWCA Civ 288 at [86] and [96], per Moore-Bick LJ. Subsequently, Mann J held that certain categories of terms in the contracts concluded by the defendant in these earlier proceedings (Foxtons Ltd, an estate agent supplying management services under “letting only service contracts” to non-business (“consumer”) landlords) were unfair within the meaning of the Regulations: [2009] EWHC 1681 (Ch), [2009] 29 E.G. 98 (C.S.). The final order of 23 December 2009 made by Mann J identified these categories of terms, declared them unfair and not binding on the consumers with whom they had already been made and forbade the defendant from using or recommending them for use, save with the prior permission of the OFT and from relying on these same categories of terms appearing in existing contracts with their consumer customers: this order is available at <https://www.gov.uk/cma-cases/foxtons-hidden-fees-in-lettings-agreements-with-consumer-landlords> [Accessed 1 September 2021].
- 3035 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (C-472/10) EU:C:2012:242, 26 April 2012 and cf. above, para.40-340. cf. *Biuro podróży “Partner” Sp. z o.o. Sp. komandytowa w Dąbrowie Górnictwie v Prezes Urzędu Ochrony Konkurencji i Konsumentów* (C-119/15) EU:C:2016:987, 25 December 2016 at para.40 (trader fined for use of terms *equivalent to* a standard condition of business declared unlawful in other proceedings and placed on a national register must have a right to challenge the assessment of unfairness and the penalty as a result of the right to an effective judicial remedy under art.47 of the Charter of Fundamental Rights of the European Union).
- 3036 (C-472/10) EU:C:2012:242, 26 April 2012 at paras 37–38.
- 3037 [2009] EWCA Civ 288, [2010] 1 W.L.R. 663.
- 3038 Above para.40-446.
- 3039 2015 Act Sch.3 para.1.
- 3040 *Office of Fair Trading v Foxtons Ltd* [2009] EWCA Civ 288 at [43]–[44], [63]–[70] (Waller and Arden LJJ respectively). cf. [2009] EWCA Civ 288 at [86] (Moore-Bick LJ).
- 3041 Above, para.40-443, where it is noted that contracts made before the coming into force on 1 October 1999 of the 1999 Regulations but after the coming into force of the Unfair Terms in Consumer Contracts Regulations 1994 on 1 July 1995 remain governed by the latter.
- 3042 [2009] EWCA Civ 288 at [48] and [51] (Waller LJ); at [73] (Arden LJ) and see [99] (Moore-Bick LJ) above, para.40-445.
- 3043 2015 Act Sch.3 para.5(1) and (3).
- 3044 [2009] EWCA Civ 288 at [73].
- 3045 European Union (Withdrawal) Act 2018 s.6(3)(a) and (7) “retained general principles of EU law” and see above, para.40-004 and Vol.I, para.1-028.
- 3046 See [2009] EWCA Civ 288 at [46] and [51] (Waller LJ); [71] and [73] (Arden LJ); cf. [86] and [96] (Moore-Bick LJ) above, para.40-445.
- 3047 Above, paras 40-296—40-298.

End of Document

© 2022 SWEET & MAXWELL

(iii) - Use of Unfair Terms or Notices as an Unfair Commercial Practice

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(i) - The Enforcement of the Controls on Unfair Terms and Notices

(iii) - Use of Unfair Terms or Notices as an Unfair Commercial Practice

Consumer Protection from Unfair Trading Regulations 2008

- 40-447 As has been seen, the [2008 Regulations](#) implemented in UK law the Unfair Commercial Practices Directive 2005³⁰⁴⁸ and, on IP completion day, formed part of retained EU law with minor amendments.³⁰⁴⁹ The Regulations set a very broad standard of commercial behaviour for traders in relation to consumers in a general provision which prohibits practices which contrary to “professional diligence” “materially distort or are likely to materially distort the economic behaviour of the average consumer with regard to the product”,³⁰⁵⁰ (“product” here being defined very broadly to include goods or services, digital content, immoveable property and rights or obligations³⁰⁵¹). This standard is fleshed out by the setting of three main examples of unfair commercial practices (misleading actions, misleading omissions and aggressive commercial practices³⁰⁵²) and is supplemented by a black list of particular commercial practices which “are in all circumstances considered unfair”.³⁰⁵³ “Unfair commercial practices” are prohibited and the [2008 Regulations](#) create a series of offences relating to unfair commercial practices and a number of enforcement powers in public bodies.³⁰⁵⁴ In the result, where, for example, a trader:

“... knowingly or recklessly engages in a commercial practice which contravenes the requirements of professional diligence ... and the practice materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product”,”

then the trader is guilty of a criminal offence and for this purpose:

“... a trader who engages in a commercial practice without regard to whether the practice contravenes the requirements of professional diligence shall be deemed recklessly to engage in the practice, whether or not the trader has reason for believing that the practice might contravene those requirements.”³⁰⁵⁵

In 2014 the [Consumer Protection from Unfair Trading Regulations 2008](#) were amended, inter alia, so as to create rights to (civil) redress in consumers in respect of certain categories of unfair commercial practices, i.e. “misleading actions” and “aggressive commercial practice”.³⁰⁵⁶ The consumer’s right of redress may include a “right to unwind” the contract after rejection of goods or services (where the consumer has a general right to refund), a right to a discount and a right to damages.³⁰⁵⁷

Use or recommendation for use of unfair contract terms as a “unfair commercial practice”

- 40-448 The Court of Justice has noted that “commercial practice” is given a “particularly wide definition” by the 2005 Directive³⁰⁵⁸ which makes clear that such a commercial practice may take place “before, during and after a commercial transaction in relation to a product”.³⁰⁵⁹ This strongly suggests that the use or recommendation for use by a trader of contract terms with consumers may constitute a business-to-consumer “commercial practice” for the purposes of the Unfair Commercial Practices Directive 2005,³⁰⁶⁰ and this has been assumed by the Court of Justice in *Pereničová*³⁰⁶¹ and decided by the UK High Court.³⁰⁶² This gives rise to the possibility that the use in a consumer contract of terms which are not transparent (and so misleading to the consumer) may be held to constitute a misleading action or omission within the meaning of the [2008 Regulations](#).³⁰⁶³ Moreover, while the transparency of contract terms is likely to be particularly relevant to a trader’s being found to have committed an unfair commercial practice, in the view of the CMA:

“... [u]sing, recommending or enforcing a contract term that is unfair under the [2015] Act, and therefore unenforceable, is inherently likely to be considered an unfair practice under the [2008 Regulations], and subject to enforcement action,”

having regard to the standard of “honest market practice” in the general test of unfair commercial practices.³⁰⁶⁴

If the use of unfair terms by a trader in its dealings with consumers is held to constitute an unfair commercial practice, then the enforcement measures and, subject to their own conditions, criminal offences provided for the policing of unfair commercial practices would apply³⁰⁶⁵ in addition to the particular consequences foreseen by [Sch.3 of the 2015 Act](#) itself. Moreover, under [Pt 4A of the 2008 Regulations](#), the commission of a misleading action may attract “rights to redress” in consumers, these including, *inter alia*, a right to unwind a contract where the trader has engaged in an unfair commercial practice in relation to the goods or services, etc. provided under the contract.³⁰⁶⁶ Where such a right to redress exists, a consumer who has concluded a contract containing an unfair contract term may be able to escape the binding force of the contract as a whole by exercising the right to unwind the contract, and not merely the binding force of the particular term in question (which is the normal consequence of a finding that a term is unfair).³⁰⁶⁷ For this purpose, however, it must be recalled that both the scope of protection for consumers and the tests of unfairness of commercial practices (under the [2008 Regulations](#)) and of contract terms (under [Pt 2 of the 2015 Act](#)) are distinct (following the EU directives which they implemented) so that, in particular, the mere finding of an unfair commercial practice will not render any related contract term unfair.³⁰⁶⁸

Footnotes

- 3048 Directive 2005/29/EC concerning unfair business-to-consumer commercial practices [2005] O.J. L149/22 and see above, paras [40-168](#)—[40-173](#).
- 3049 European Union (Withdrawal) Act 2018 s.2; amendments made by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2019 (SI 2018/1326) reg.6 (as noted above, para. [40-174](#) (note)).
- 3050 [Consumer Protection from Unfair Trading Regulations 2008](#) (SI 2008/1277) reg.3(1)—(3). The Regulations came into force on 26 May 2008 and were significantly amended by SI 2014/870. On the [2008 Regulations](#) generally see above, paras [40-174](#) et seq.
- 3051 SI 2008/1277 reg.2(1) “product” (as amended).
- 3052 SI 2008/1277 regs 3(2), 3(4)(a)–(d) and [5–7](#).
- 3053 SI 2008/1277 reg.3(4)(d); Sch.1.
- 3054 SI 2008/1277 Pts 3 and 4 respectively.
- 3055 SI 2008/1277 reg.8 and see above, para. [40-179](#).
- 3056 See generally above, paras [40-181](#) et seq. These amendments came into force on 1 October 2014: [SI 2014/870](#) reg.1(3).
- 3057 SI 2014/870 reg.2 inserting regs 27E–27K into the [2008 Regulations](#).
- 3058 *Total Belgium & Galatea* (C-261/07 and C-299/07) EU:C:2009:244 at para.49.
- 3059 2005 Directive art.3(1).
- 3060 On the possibility of an isolated action constituting an “unfair commercial practice” see above, para. [40-176](#).
- 3061 *Pereničová v SOSfinance, spol. sro* (C-453/10) EU:C:2012:144, paras 37–41 (although the issue before the CJEU was whether the finding of an unfair commercial practice

under the 2005 Directive would in itself render a term unfair and so not binding on the consumer under the 1993 Directive, on above, para.[40-314](#)). AG Trstenjak in her opinion in *Pereničová* 29 November 2011 at para.90, in the course of a wider discussion of the 1993 and 2005 directives, observed that “it is conceivable that the unfairness of a commercial practice consists in the very use in consumer contracts of unfair terms within the meaning of Directive 93/13. The trader’s use of such terms is likely to be seen as a misleading act, since false information is provided or the consumer is unclear as to the actual scale of the contractual rights and obligations, especially with regard to rights and obligations arising from the clauses which are unfair and so invalid for the consumer”.

- 3062 *OFT v Ashbourne Management Services Ltd [2011] EWHC 1237 (Ch), [2011] E.C.C. 31* especially at [227] and [240].
- 3063 On “misleading actions” and “misleading omissions” see above, paras [40-190](#)—[40-193](#) and [40-196](#); on the significance of the requirement of transparency of contract terms and notices, see above, paras [40-428](#) et seq.
- 3064 CMA, Unfair Contract Terms Guidance, Guidance on the Unfair Terms Provisions in the Consumer Rights Act 2015 (CMA37, July 2015), para.6.24. The general test is found in the [2008 Regulations reg.3\(3\)](#) referring to the “requirement of professional diligence” which is itself defined in [reg.2](#) as: “the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either—(a) honest market practice in the trader’s field of activity, or (b) the general principle of good faith in the trader’s field of activity”. See above, para.[40-174](#).
- 3065 Above, paras [40-179](#)—[40-180](#) and [40-449](#). Moreover, where a trader knows that the contract term on the basis of which he claims payment is unenforceable in law and acts dishonestly in doing so, he may be convicted of fraud under the general criminal law: *R. v Whatcott [2019] EWCA Crim 1889, [2020] Crim. L.R. 618*.
- 3066 This possible consequence of the use by a trader of unfair contract terms was clearly compatible with the full harmonisation required by the 2005 Directive art.4 as the 2005 Directive as enacted did not affect national contract law: Directive 2005/29 art.3(2), recital 9 and see above, paras [40-181](#) et seq.
- 3067 [2015 Act s.62\(1\)](#) and [67](#), on which see above, paras [40-405](#) et seq.
- 3068 *Pereničová v SOS finance, spol. sro (C-453/10) EU:C:2012:144*, para.41, above para.[40-314](#).

(iv) - “Enforcement orders” under Pt 8 of the Enterprise Act 2002

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(i) - The Enforcement of the Controls on Unfair Terms and Notices

(iv) - “Enforcement orders” under Pt 8 of the Enterprise Act 2002

Relevant provisions of 2015 Act listed for purposes of Pt 8 enforcement

- 40-450 In addition to the powers provided by Sch.3 of the 2015 Act, the CMA and other persons or bodies may enjoy powers of enforcement under Pt 8 of the Enterprise Act 2002. Under Pt 8 of the 2002 Act a number of bodies, termed “enforcers”, may apply to the court for an “enforcement order” against a person to stop infringing legislation enacted for the benefit of consumers where it harms the collective interest of consumers.³⁰⁶⁹ First, acts or omissions in respect of any provision in Pt 2 of the 2015 Act are specified as possible “domestic infringements” for the purposes of s.211 of the Enterprise Act 2002.³⁰⁷⁰ Secondly, as earlier explained,³⁰⁷¹ the scheme of enforcement of consumer protection legislation contained in Pt 8 of the 2002 Act changed on IP completion day so as, in particular, to replace the category of “Community infringement” in s.212 of the 2002 Act with “Schedule 13 infringement,” the latter being defined as “an act or omission which contravenes a listed enactment and which harms the collective interests of consumers”,³⁰⁷² this list appearing in Sch.13 to the 2002 as substituted. This list includes the relevant provisions of the 2015 Act³⁰⁷³ and the 2008 Regulations in their entirety.³⁰⁷⁴ This means, in particular, that the “enforcers” for the purpose of the 2002 Act may apply for an enforcement order in respect of breaches of provisions of Pt 2 of the 2015 Act, notably breaches of the requirement of fairness or transparency of contract terms or notices, subject to the condition that these breaches harm the collective interests of consumers (and of the other conditions of Pt 8 of the 2002 Act). Furthermore, as earlier noted, the 2015 Act provided for “enhanced consumer measures” which are available to a court to which an application for an enforcement order under Pt 8 of the Enterprise Act has been

made so as to include, for example, measures offering compensation or other redress to consumers who have suffered loss as a result of the conduct which has given rise to the enforcement order. ³⁰⁷⁵

Footnotes

- 3069 On this law generally see above, paras 40-136—40-141.
- 3070 Enterprise Act 2002 s.211(2); Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2015 (SI 2015/1727) art.2.
- 3071 Above, paras 40-137—40-138.
- 3072 Enterprise Act 2002 s.212(1) Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.3(3) and (20) (latter as substituted by Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2020 (SI 2020/1347) reg.3(3)(h)).
- 3073 2002 Act Sch.13 para.27 as substituted by the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.3(20); Sch. para.1(27) referring to ss.2, 3, 5, 9 to 15, 19, 23, 24, 28 to 32, 36(3) and (4), 37, 38, 42, 50, 54, 58, 59, 61 to 64, 67 to 70, 72 to 74 of, and Schedules 2 and 3 and Part 3 of Schedule 5 to the 2015 Act.
- 3074 2002 Act Sch.13 para.1(19) as substituted by the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.3(20); Sch. para.1(19).
- 3075 Consumer Rights Act 2015 s.79, Sch.7 inserting new s.219A in the Enterprise Act 2002. The example is found in s.219A(2)(a): see above, para.40-141.

(v) - Compatibility of Extensions of Enforcement Powers in 2015 Act with Retained EU law?

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(i) - The Enforcement of the Controls on Unfair Terms and Notices

(v) - Compatibility of Extensions of Enforcement Powers in 2015 Act with Retained EU law?

The position in EU law

40-451 It was explained earlier that the scope of the controls on unfair contract terms in the [2015 Act](#) is wider in several respects than was required by the Unfair Terms in Consumer Contracts Directive 1993.³⁰⁷⁶ At first sight, such extensions are compatible with EU law either to the extent to which they fall within the scope of that Directive and, therefore, within its permissive “minimum harmonisation” clause or outside the scope of the 1993 Directive and therefore within the general competence of the UK.³⁰⁷⁷ However, the difficulty arises from the impact of the “full harmonisation” generally required by the Unfair Commercial Practices Directive on national measures (apart from “contract law”) which prohibit business-to-consumer commercial practices within the scope of the 2005 Directive.

The impact of “full harmonisation” under the Unfair Commercial Practices Directive 2005

40-452 Within its scope, the impact of full harmonisation under the 2005 Directive is that Member States must not prohibit a “business-to-consumer commercial practice” falling within its scope

unless it is prohibited under the controls of the Directive itself.³⁰⁷⁸ As earlier noted, the use or recommendation for use of an unfair contract term or terms by a trader with a consumer or consumers may constitute a commercial practice in that trader within the meaning of the Unfair Commercial Practices Directive 2005 and may be held unfair under the [Consumer Protection from Unfair Trading Regulations 2008](#).³⁰⁷⁹ After the expiry of a transitional period for “minimum harmonisation” directives allowed by the 2005 Directive as enacted,³⁰⁸⁰ in principle national legislation which prohibits business-to-consumer commercial practices as understood by the 2005 Directive other than under that Directive’s own scheme is compatible with its requirement of full harmonisation only if its rules are *required* by other EU legislation or if they belong to “contract law”.³⁰⁸¹ This means, therefore, that the 2005 Directive permits the [2015 Act](#)’s extension of the controls on unfair contract terms as between the contracting parties (“contract law”) so as to be more protective of consumers, “contract law” effects referring here principally to its requirement that unfair terms are not binding on consumers and that terms which are ambiguous are interpreted in favour of consumers.³⁰⁸² On the other hand, it is submitted that the measures required by the 1993 Directive of Member States to prevent the use or recommendation for use of unfair terms in consumers contracts³⁰⁸³ do not in this sense belong to “contract law”.

Significance for the Consumer Rights Act 2015

- 40-453 This is significant for the [2015 Act](#) to the extent to which it extends the *enforcement* measures put in place to prohibit contract terms to situations which the 1993 Directive does not require³⁰⁸⁴ and yet which fall within the scope of the 2005 Directive.³⁰⁸⁵ First, these measures are available to prevent the use, proposal for use or recommendation for use by a third party of contract terms which seek to exclude the trader’s liability for breach of certain terms inserted by [Pt 1 of the Act](#) into contracts with consumers (such as to the satisfactory quality of goods supplied or the trader’s right to supply goods³⁰⁸⁶) without any evaluation of the fairness of the terms (under the 1993 Directive) or of the fairness of this commercial practice (under the 2005 Directive).³⁰⁸⁷ Secondly, these enforcement measures are available under the [2015 Act](#) to prevent the use or recommendation for use of contract terms which seek to exclude the trader’s business liability for death or personal injury resulting from negligence, similarly without regard to any evaluation of their fairness.³⁰⁸⁸ Thirdly, as earlier noted, the [2015 Act](#) extends the ambit of the test of unfairness by imposing a condition that terms relating to the subject matter of the contract, etc. are exempted from this test under the core exemption only if they are prominent as well as transparent and these apparent extensions apply for the purposes of the Act’s enforcement measures as well as for the “contract law” effects.³⁰⁸⁹ Finally, the Act extends the scope of enforcement measures to “notices” as well as to “contract terms”, an extension not apparently foreseen by the 1993 Directive.³⁰⁹⁰ All these extensions of enforcement measures concerning the “commercial practices” of the use, etc. of consumer terms or notices without the need for an evaluation under the 2005 Directive appear to

be precluded by that Directive as a result of its full harmonisation.³⁰⁹¹ This casts doubts on the compatibility of the extended enforcement measures as a matter of EU law.

After IP completion day

40-454 However, it is submitted that the position outlined above may have changed on IP completion day (31 December 2020).³⁰⁹² After this date in principle the UK is no longer bound by EU law obligations, including those arising from the fully harmonising nature of the 2005 Directive. On the other hand, on IP completion day both the provisions of the [2015 Act](#) and the [2008 Regulations](#) (which implemented the 2005 Directive) became part of “retained EU law” under the [European Union \(Withdrawal\) Act 2018](#), and the latter also provides that the (retained) principle of supremacy applies:

“... so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before IP completion day”.³⁰⁹³

Moreover, the [2018 Act](#) provides that retained EU law³⁰⁹⁴ is in principle to be interpreted:

“... in accordance with any retained case-law (including retained EU case-law) and any retained general principles of EU law,³⁰⁹⁵ and, having regard (among other things) to the limits, immediately before IP completion day, of EU competences”,³⁰⁹⁶

although the Supreme Court and listed appellate courts may decide to depart from any retained EU case-law.³⁰⁹⁷ While the Court of Justice of the EU has made clear that the 2005 Directive requires full harmonisation within its scope,³⁰⁹⁸ it has not ruled on the specific question of the compatibility with this requirement of national enforcement measures relating to extensions of protections required for consumers by other EU directives (such as the Unfair Contract Terms Directive). It may be that this degree of uncertainty as to the impact of the 2005 Directive (and therefore the position under [2008 Regulations](#)) could allow a UK court to hold that the enforcement measures in the [2015 Act](#) are not incompatible with “retained EU law” even where they go beyond the protections for consumers required by the 1993 Directive, without invoking the judicial power in the [2018 Act](#) to depart from retained EU case-law.

Footnotes

3076 Above, para.[40-234](#).

- 3077 cf. above, paras 40-023—40-024 and 40-225.
- 3078 Above, para.40-168.
- 3079 SI 2008/1277 above, para.40-448.
- 3080 2005 Directive art.3(5) and see above, para.40-171.
- 3081 2005 Directive art.3(2) and (4) and see above, paras 40-168—40-170.
- 3082 1993 Directive arts 5 and 6(1) and see on art.3(2) Whittaker in Weatherill and Bernitz (eds), The Regulation of Unfair Commercial Practices under EC Directive 2005/29, New Rules and New Techniques (2007), Ch.8.
- 3083 1993 Directive art.7, above, paras 40-441 and 40-447.
- 3084 Above, para.40-442. If the 1993 Directive does require these measures, then they fall within 2005 Directive art.3(4), above, para.40-170.
- 3085 On the other hand, extensions of controls on unfair terms which do not fall within the scope of the 2005 Directive (such as those which protect persons other than “consumers” in the EU law sense, on which see above, para.40-244) are not affected by its requirement of “full harmonisation”.
- 3086 2015 Act ss.9, 17, 31(1) (a) and (i).
- 3087 For the details of when the 2015 Act does hold a term not binding on the consumer without any evaluation of its fairness, see 2015 Act ss.31, 47 and 57 and below, paras 40-535, 40-568 and 40-589—40-591 respectively. The application of the Sch.3 powers is provided for by the 2015 Act ss.31(7), 47(5) and 57(7). Sch.3 para.3(2)(a)—(c) then specifically provide that a “regulator” (such as the CMA) may apply for an injunction against a person if it thinks that the person is using, or proposing or recommending the use of, terms purporting to exclude or restrict liability in these situations. The position of terms seeking to exclude or limit the trader’s liability in respect of the quality or fitness for purposes of goods in contracts of sale of goods differs from the general picture described in the text, as here EU law provides that such terms are not binding on consumers without any evaluation of their fairness: Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/12 art.7(1). While the 1999 Directive does not provide for measures to be put in place by Member States to ensure the effectiveness of this consumer protection (in contrast to the position under the 1993 Directive art.7), the 1999 Directive was included in the list of those whose national implementing measures must be supported by injunctions under Directive 98/27 on injunctions for the protection of consumers’ interests [1998] O.J. L166/51, which was repealed and replaced by codified Directive 2009/22/EC on injunctions for the protection of consumers’ interests, [2009] O.J. L110/30. As a result, it may be argued that injunctive relief in respect of such exclusion clauses is protected from the effect of “full harmonisation” under the 2005 Directive as it stems from a Community rule “regulating specific aspects of unfair commercial practices” within the meaning of 2005 Directive art.3(4).
- 3088 2015 Act ss.65 and 70(1); Sch.3 para.3(2)(d). As regards the ineffectiveness to exclude liability in this situation, this is clearly modelled on the Unfair Contract Terms Act 1977 s.2(1), but that Act made no provision for “preventive measures”.
- 3089 2015 Act ss.64(4), 70(1) and Sch.3 and see above, paras 40-379—40-384.

- 3090 [2015 Act s.61\(1\), 70\(1\)](#) and [Sch.3](#), especially para.1(d). cf. though, above para.[40-258](#) (note), where it is argued that the treatment of “consumer notices” by the Act could be seen as reflecting a European interpretation of “contract term” so as to fall within the requirements of the 1993 Directive.
- 3091 There is an argument that Directive 2009/22/EC on injunctions for the protection of consumers’ interests, [2009] O.J. L110/30 recital 4 suggests that the Directive concerns the effectiveness of “national measures transposing the Directives in question, *including protective measures that go beyond the level required by those Directives*, provided that they are compatible with the Treaty and allowed by those Directives” but it is submitted that this is unlikely to avoid the difficulty of the clear “full harmonisation” required by art.4 of the 2005 Directive: for further discussion see the 33rd edition of the present work, Vol.II, para.38-425.
- 3092 On this see above, para.[40-004](#) and Vol.I, paras [1-020](#) et seq.
- 3093 [2018 Act s.5\(1\)](#) and [\(2\)](#) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.25(4)). See Vol.I, para.[1-026](#).
- 3094 [2018 Act s.6\(7\)](#) and see Vol.I, para.[1-021](#).
- 3095 Defined in terms of temporal origin by [s.6\(7\) of the 2018 Act](#) as those which are made or laid down immediately before IP completion day: [s.6\(7\)](#) “retained EU case-law” and “retained general principles of EU law”. See also [2018 Act Sch.1 paras 2 and 3](#).
- 3096 [2018 Act s.6\(3\)](#) (as amended by the European Union (Withdrawal Agreement) Act 2020 s.26(1)(a)).
- 3097 [2018 Act s.6\(4\)\(a\)](#) and see above, para.[40-004](#) and Vol.I, para.[1-028](#) which notes the criteria for doing so.
- 3098 Above, para.[40-168](#).

(j) - Special Rules Governing Consumer Payments

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 6. - The Control of Unfair Contract Terms

(j) - Special Rules Governing Consumer Payments

The Consumer Rights Directive 2011

- 40-455 In addition to information requirements and rights of cancellation,³⁰⁹⁹ the Consumer Rights Directive 2011 provides for “other consumer rights” and these include special rules governing “fees for the use of means of payment”, “communication by telephone” and “additional payments”.³¹⁰⁰ These provisions were implemented in the UK by regulations as the following paragraphs explain. The focus of these rules is to control the imposition of disguised, unforeseen or otherwise unfair payments on consumers incidental to the payment for the goods and services under the contract. To the extent to which these payments are imposed under terms of a contract between the trader and the consumer, they constitute controls of such terms, as any payment imposed other than in accordance with the rules which they set out are required to be ineffective under the 2011 Directive.³¹⁰¹ However, as will be seen, their impact on contracts is more direct than this suggests as they seek to control the *level* of the charges to be imposed by a trader in certain circumstances. Moreover, in the case of payment surcharges, the UK’s implementation of the Second Payment Services Directive 2015³¹⁰² led to the abolition of any charge for use of certain payment instruments except where these are “commercial”.³¹⁰³

Payment surcharges: the controls

- 40-456 The Consumer Rights (Payment Surcharges) Regulations 2012 as made
 ³¹⁰⁴

U implemented art.19 of the Consumer Rights Directive, and [reg.4 of the 2012 Regulations](#) therefore provides that a trader must not charge consumers in respect of the use of a given means of payment fees that exceed the cost borne by the trader for the use of that means (such as an administration, booking or handling fee),

3105

U where the payment is made for the purposes of a sales contract, a service contract or a contract for the supply of water, gas, electricity, district heating or digital content.

3106

U Regulation 4's prohibition does not refer to any particular method of payment (such as a credit or debit card) and therefore applies to any means of payment that a trader decides to accept, including cash, cheques, prepaid cards, charge cards, etc. and this means that any new methods of paying will also be subject to this prohibition as the technology relating to payments develops.

3107

U This law applies to contracts entered into on or after 6 April 2013.

3108

U However, this protection for consumers was supplemented by a wide prohibition on payment surcharges

3109

U on the amendment of the [Consumer Rights \(Payment Surcharges\) Regulations 2012](#) by the [Payment Services Regulations 2017](#),

3110

U implementing a requirement imposed by the Second Payment Services Directive 2015.

3111

U Under the 2015 Directive, a payee, such as a retailer, "shall not request charges for the use of payment instruments"

3112

U where their interchange fees are capped under the Interchange Fees Regulation 2015,

3113

U and this includes the majority of consumer debit and credit cards.

3114

U However, the UK's implementation of this aspect of the 2015 Directive went further than this requirement, as the Directive permits where a Member State considers that this is needed to encourage competition and promote the use of efficient payment instruments.

3115

U As a result, under [reg.6A\(1\) of the 2012 Regulations](#) (as inserted by the [2017 Regulations](#)), "a payee

3116

U must not charge a payer

3117

U any fee in respect of payment by means of a payment instrument” as long as it is not a commercial card or other payment instrument,

3118

U whether or not it is a card-based payment instrument within the meaning of the Interchange Fees Regulation 2015; nor must a payee charge in respect of a payment service (such as a direct debit) in euro.

3119

U As a result (and subject to territorial limitations

3120

U), [reg.6A\(1\)](#) imposes a ban on surcharging applicable to all non-commercial retail payment instruments.

3121

U According to the Explanatory Memorandum to the [2017 Regulations](#),

“... this is intended to level the playing field across all non-commercial retail payment instruments and create a clearer picture for consumers in which they know the full price of the product/service they are purchasing upfront and are confident that there will be no additional charges when they come to pay using a particular payment instrument.”

3122

U

Where [reg.6A\(1\)](#) does not apply owing in particular to the method of payment used (and subject to its own conditions), [reg.4](#) still prohibits traders from charging consumers more than the direct cost borne by them for use of the relevant means of payment.

3123

U Finally, [reg.6A\(2\)](#) imposes the latter type of control in respect of most payments between businesses made with commercial payment instruments.

3124

U

Payment surcharges: enforcement

The 2012 Regulations provide for the enforcement of reg.4 (the prohibition of excessive charges) and reg.6A (prohibition of any charge in respect of certain payment instruments) by local weights and measures authorities, who may take undertakings or apply to the court for an injunction for these purposes.³¹²⁵ Any contract term which requires the payment of a fee charged in contravention of reg.4 or reg.6A is unenforceable to the extent of that contravention and the contract for the purposes of which the payment is made is to be treated as providing for the fee to be repaid to the extent that the charging of the fee contravenes reg.4 or reg.6A.³¹²⁶ In addition, the relevant provisions of the 2012 Regulations are listed in Sch.13 of the Enterprise Act 2002³¹²⁷ and this means that the various powers provided by Pt 8 of the 2002 Act in respect of “Schedule 13 infringements” are available for their enforcement.³¹²⁸

Additional payments

40-458 Regulation 40 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (“2013 Regulations”)³¹²⁹ implemented art.22 of the Consumer Rights Directive and provides that:

- “(1) Under a contract between a trader and a consumer, no payment is payable in addition to the remuneration agreed for the trader’s main obligation unless, before the consumer became bound by the contract, the trader obtained the consumer’s express consent.
- “(2) There is no express consent (if there would otherwise be) for the purposes of this paragraph if consent is inferred from the consumer not changing a default option (such as a pre-ticked box on a website).”

On IP completion day, reg.40 became part of retained EU law without amendment.³¹³⁰ As suggested by reg.40(2)’s example, the principal target of this provision is the use of “pre-ticked” boxes to generate payments for additional services, for example, on websites selling passenger air-transport in relation to charges for bags or insurance. This provision appeared in the Consumer Rights Directive Proposal of 2008 as an element in the “transparency requirements” for contract terms, forming part of the proviso to its treatment of the questions at present governed by art.4(2) of the 1993 Directive.³¹³¹ While art.22 of the Consumer Rights Directive as enacted stands alone, it rests on a similar distinction between contractual payments to be made by consumers which concern the main subject matter of the contract (which in principle fall within the exclusion from the test of fairness in art.4(2) of the 1993 Directive) and payments “in addition to the remuneration agreed” which, under art.22, require the consumer’s express consent.³¹³² Where a trader receives

an additional payment which is not payable under a contract under reg.40, the contract is to be treated as providing for the trader to reimburse the payment to the consumer.³¹³³ More generally, the enforcement measures available in respect of this prohibition in reg.40 follow those available more generally under the 2013 Regulations.³¹³⁴

Helpline charges over basic rate

40-459 Regulation 41 of the 2013 Regulations,³¹³⁵ which implemented art.21 of the Consumer Rights Directive 2011, provides that, where a trader operates a telephone line for the purpose of consumers contacting the trader by telephone in relation to contracts entered into with the trader, a consumer contacting the trader must not be bound to pay more than the basic rate.³¹³⁶ Although “basic rate” is not defined by the Directive nor the Regulations for this purpose, the Court of Justice of the EU has held that it refers to “an ordinary rate for a telephone call at no additional cost for the consumer” i.e. the cost of a call to a standard geographic landline or mobile telephone line and that this means that traders are not allowed to charge consumers premium rates even where they do not make a profit in doing so.³¹³⁷ Any amount paid by the consumer in excess of such a rate is recoverable by them.³¹³⁸ Again, the enforcement measures available in respect of the prohibition in reg.41 follow those available more generally under the 2013 Regulations.³¹³⁹ On IP completion day, reg. 41 became part of retained EU law without amendment.³¹⁴⁰

Footnotes

- 3099** These are implemented in UK law by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) (“2013 Regulations”). For these aspects of the 2013 Regulations requirements, see above, paras 40-063 et seq.
- 3100** Consumer Rights Directive 2011 arts 19, 21 and 22. The scope of these provisions in terms of the contracts to which they apply is set by art.17. On the 2011 Directive generally, see above, paras 40-063 and 40-065—40-071.
- 3101** 2011 Directive art.25 “imperative nature of the Directive”, second sentence: see above, para.40-069.
- 3102** Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market [2015] O.J. L337/35, art.62(3)–(4).
- 3103** Below, para.40-456.
- 3104** SI 2012/3110 (“2012 Regulations”) (and as amended by the 2013 Regulations (SI 2013/3134)). On IP completion day (on which see above, para.40-004 and Vol.I,

- para.1-020) the 2012 Regulations became part of “retained EU law” under s.2 of the European Union (Withdrawal) Act 2018 with relatively minor amendments made by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.7 (reg.1(3)’s reference to reg.7’s coming into force on “exit day” must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4), Sch.5 para.1). Where relevant, these changes will be noted in the notes to the following paragraphs. On retained EU law and its interpretation, see generally above, para.40-004 and Vol.I, paras 1-020 et seq.
- 3105 2012 Regulations reg.4. “Trader” and “consumer” are defined by reg.2 in the new standard UK definitions described above, paras 40-052—40-061 (esp. at 40-060) and 40-031—40-051 (esp. at 40-043) respectively. For explanation of what can properly be charged by a trader as the “cost” for use see DG Justice Guidance Document on 2011 Directive, para.9.3.
- 3106 2012 Regulations reg.5(1). The definitions of these various categories of contract provided by reg.3 of the 2012 Regulations is mirrored by those found in the 2013 Regulations reg.5, on which see above, paras 40-076—40-078. Regulation 5(1) and (2) of the 2012 Regulations exclude from the rule against excessive charges a series of “excluded contracts” as allowed by the 2011 Directive, notably including contracts for financial services contracts, this list following the exclusions in 2013 Regulations reg.6, with the addition of contracts for social services and health services (as explained by reg.5(2)(a) and (b) (the latter of which was amended on IP completion day (on which see above, para.40-004 and Vol.I, paras 1-020 et seq.) by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.7(2) (reg.1(3)’s reference to reg.7’s coming into force on “exit day” must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4), Sch.5 para.1). Regulation 6 of the 2012 Regulations provides a temporary exemption from the prohibition in reg.4 where the trader’s business is an existing micro-business or a new business as explained in their Schedule.
- 3107 Department of Business, Energy & Industrial Strategy, The Consumer Rights (Payment Surcharges) Regulations 2012, Guidance (June 2018), para.8.5.
- 3108 2012 Regulations reg.1(1) and (2). Reg.6 provides for a temporary exemption from the requirements of reg.4 for micro-businesses and new business as defined by the Sch. to the Regulations.
- 3109 2012 Regulations reg.6A. The new rules contained in reg.6A apply to charges made on or after 13 January 2018, except for charges under contracts entered into before 18 July 2017 (the date on which the 2017 Regulations were made): 2012 Regulations reg.1(3) as inserted by the 2017 Regulations Sch.8 (as regards the temporal effect on contracts

- of reg.6A); 2017 Regulations reg.1(6) (in relation to the prohibition on charging in reg.6A).
- 3110 SI 2017/752 (“2017 Regulations”) reg.156; Sch.8 Pt 3 para.12. The 2017 Regulations were amended on IP completion day (on which generally see above, para.40-004 and Vol.I, paras 1-020 et seq.) but these amendments apply only marginally to the provisions discussed here: [Electronic Money, Payment Services and Payment Systems \(Amendment and Transitional Provisions\) \(EU Exit\) Regulations 2018](#) (SI 2018/1201) Sch.2 Pt 2 (reg.1(3)’s reference to these provisions coming into force on “exit day” must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) s.39(1), s.41(4), Sch.5 para.1). On 20 July 2022 the government introduced the Financial Services and Markets Bill 2022, which provides, *inter alia*, for the revocation of the [Payment Services Regulations 2017](#) as part of a wider revocation of retained EU law governing financial services: cl.1 and, specifically, Sch.1 Pt 1. However, cl.1(4) provides generally that “the revocation of any legislation in accordance with [cl.1] does not affect the continued effect of any amendments to other legislation made by that revoked legislation (as those amendments had effect immediately before the revocation)”. As a result, the revocation of the 2017 Regulations would apparently not affect the amendments which they made to the 2012 Regulations.
- 3111 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market [2015] O.J. L337/35 (“2015 Directive”), art.62(3)–(4).
- 3112 The 2015 Directive art.4(14) defines “payment instrument” as “a personalised device(s) and/or set of procedures agreed between the payment service user and the payment service provider and used in order to initiate a payment order” and this has been held to include “the near-field communication (NFC) functionality of a personalised multifunctional bank card, by means of which low-value payments are debited from the associated bank account” (i.e. a contactless payment function): *DenizBank AG v Verein fur Konsumenteninformation* (C-287/19) EU:C:2020:897, 11 November 2020. Art.4(14)’s definition was implemented by the [2017 Regulations](#) reg.2(1) “payment instrument” (this definition applying also for the purposes of the [2012 Regulations](#) by reg.3 of the latter).
- 3113 Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions [2015] O.J. L123/1 (“Interchange Fees Regulation 2015”). On IP completion day (on which generally see above, para.40-004 and Vol.I, paras 1-020 et seq.) the Interchange Fees Regulation 2015 became part of retained EU law under [s.3 of the European Union \(Withdrawal\) Act 2018](#) (as amended) and was amended by the [Interchange Fee \(Amendment\) \(EU Exit\) Regulations 2019](#) (SI 2019/284) (“SI 2019/284”) Pt 3 (reg.1(2)’s reference to the [Regulations](#) coming into force on “exit day” must be read as referring to IP completion

- day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4), Sch.5 para.1). These amendments restrict the scope of the retained Regulation to the UK rather than the EU.
- 3114 Explanatory Memorandum to the 2017 Regulations, para.7.16.
- 3115 2015 Directive art.62(5).
- 3116 A “payee” for the purposes of reg.6A is defined in reg.3 of the 2012 Regulations (as inserted) by reference to reg.2(1) of the 2017 Regulations as “a person who is the intended recipient of funds which have been the subject of a payment transaction”. Unlike reg.4, therefore, reg.6A is not restricted to payments made to traders.
- 3117 Under reg.3 of the 2012 Regulations (as inserted and referring to reg.2(1) of the 2017 Regulations) “... ‘payer’ means—(a) a person who holds a payment account and initiates, or consents to the initiation of, a payment order from that payment account; or (b) where there is no payment account, a person who gives a payment order”.
- 3118 2012 Regulations reg.6A(1)(a)(ii) and (b)(ii). “Commercial card” is defined by art.2(6) of the Interchange Fees Regulation 2015 as “any card-based payment instrument issued to undertakings or public sector entities or self-employed natural persons which is limited in use for business expenses where the payments made with such cards are charged directly to the account of the undertaking or public sector entity or self-employed natural person”.
- 3119 2012 Regulations reg.6A(1)(c). “Payment service” is defined by reg.3 of the 2012 Regulations (as amended) by reference to the 2017 Regulations reg.2(1), which itself refers to a list in its Sch.1 (which was amended on IP completion day (on which generally see above, para.40-004 and Vol.I, paras 1-020 et seq.) by SI 2018/1201 Sch.2 Pt 2 para.69).
- 3120 These are contained in the 2012 Regulations reg.6B. Before IP completion day, they referred to the location in “an EEA State” of the payment service provider of the payer or the payment service provider of the payee, but on that day these references to “an EEA State” were replaced by references to “the United Kingdom”: Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.7(3) (reg.1(3)’s reference to reg.7(3)’s coming into force on “exit day” must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4), Sch.5 para.1). On IP completion day see generally above, para.40-004 and Vol.I, paras 1-020 et seq.
- 3121 Explanatory Memorandum to the 2017 Regulations para.7.16.
- 3122

- 3123 Explanatory Memorandum to the [2017 Regulations](#) para.7.16.
See above, in this paragraph.
- 3124 This is the effect of [reg.6A\(2\)](#)'s use of the very general terms "payer" and "payee" as earlier noted.
- 3125 [2012 Regulations](#) regs 8-9 (amended by the [2017 Regulations](#) only to the extent to reflect the substantive changes inserted by means of [reg.6A of the 2012 Regulations](#)). In Northern Ireland the enforcement authority is the Department of Enterprise, Trade and Investment in Northern Ireland.
- 3126 [2012 Regulations](#) reg.10.
- 3127 On IP completion day, the [2012 Regulations](#) regs 4 and [6A–10](#) were included within the substituted Sch.13 of the 2002 Act at para.24: [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/203\)](#) reg.3(20) and Sch. para.1 ([reg.1](#)'s reference to the Regulations coming into force on "exit day" must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) s.39(1), s.41(4), Sch.5 para.1). On these changes to Pt 8 of the 2002 Act more generally see above, paras [40-137](#)—[40-138](#).
- 3128 See above, paras [40-136](#) and [40-139](#)—[40-141](#).
- 3129 For the contracts included and generally excluded from the scope of the [2013 Regulations](#) see [reg.6](#) above, paras [40-072](#), [40-076](#)—[40-082](#). However, despite the general exclusion of contracts for the provision of financial services under [reg.6\(1\)\(b\)](#), the [2013 Regulations](#) specifically apply [reg.40](#)'s controls where an additional payment is for financial services, unless the trader's main obligation is to supply financial services: [reg.6\(3\)](#) and [40\(3\)](#).
- 3130 [European Union \(Withdrawal\) Act 2018](#) s.2, above, para.[40-004](#) and Vol.I, para.[1-023](#). Other parts of the [2013 Regulations](#) were subject to amendment on IP completion day by the [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.8 and see above, para.[40-064](#) (note).
- 3131 The Proposal for a Directive on Consumer Rights of 8 October 2008, COM(2008) 614/3 final art.32(2).
- 3132 cf. above, paras [40-351](#) et seq. esp. at paras [40-359](#), [40-379](#) and [40-381](#).
- 3133 [2013 Regulations](#) reg.[40\(4\)](#).
- 3134 [2013 Regulations](#) regs [44–46](#) and see above, paras [40-135](#) et seq.
- 3135 [SI 2013/3134](#).
- 3136 This prohibition applies regardless of the type of telephone number by which the consumer customer can contact the trader and therefore applies equally to a speed dial number at a rate higher than the basic rate even if the trader also provides another telephone number at the basic rate and therefore the consumer can be said to have chosen to use the higher rate number: *Starman v Tarbijakaitseamet (C-332/17) EU:C:2018:721, 13 September 2018* at paras 30–33.
- 3137 *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main eV v comtech GmbH (C-568/15) EU:C:2017:154, 2 March 2017* at paras 27–32.

- 3138 2013 Regulations reg.41(2).
- 3139 2013 Regulations regs 44–46 and see above, paras 40-135 et seq.
- 3140 European Union (Withdrawal) Act 2018 s.2, above, para.40-004 and Vol.I, para.1-023.
Other parts of the 2013 Regulations were subject to amendment on IP completion day by the Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.8 and see above, para.40-064 (note).

(a) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(a) - Introduction

Legislative background

- 40-460 Between the enactment of the [Sale of Goods Act 1893](#) and the amendment in 2002 of its successor, the [Sale of Goods Act 1979](#)³¹⁴¹ the legislative frameworks governing contracts for the sale of goods did not themselves apply special rules to govern consumer contracts, that is, broadly speaking, contracts between sellers acting in the course of business and buyers *not* acting in the course of business, though they distinguished between sellers acting or not acting in the course of business.³¹⁴² On the other hand, from 1973 legislation controlling the validity of contract terms seeking to exclude or to limit the seller's liability under the statutory implied terms in [ss.13 to 15 of the Sale of Goods Act 1979](#) did distinguish according to the position of the buyer, first by reference to "consumer sales"³¹⁴³ and then, under the [Unfair Contract Terms Act 1977](#), by reference to a buyer "dealing as consumer".³¹⁴⁴ This pattern was also followed in the case of contracts of hire-purchase³¹⁴⁵ and "miscellaneous contracts under which goods pass",³¹⁴⁶ such as contracts of hire of goods³¹⁴⁷ or for work and materials.³¹⁴⁸

Consumer Sales Directive 1999

- 40-461 However, this established pattern of treatment was changed on implementation of the Consumer Sales Directive of 1999.
 ³¹⁴⁹

U The main purpose of this directive is to require uniform rules governing certain aspects of contracts of sale of goods by sellers acting in the course of a business to consumer buyers
3150

U on the basis of “minimum harmonisation”,
3151

U but its scope extends also to “contracts for the supply of goods to be manufactured and produced”.
3152

U The Directive has three main requirements to be given effect in national laws. First, it requires that “the seller must deliver goods to the consumer which are in conformity with the contract of sale”, and then presumes “conformity” (rebuttably
3153

U) in a series of circumstances similar to those with which the English lawyer is familiar from the statutory implied terms in **ss.13 to 15 of the Sale of Goods Act 1979**, i.e. that the goods comply with their description, are fit for any purpose made known by the consumer to the seller and accepted by him, are “fit for the purposes for which goods of the same type are normally used” and “show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect”,
3154

U as well as generally being in “conformity with the contract of sale”, i.e. any express contract terms.
3155

U However, some aspects of the 1999 Directive’s requirement of conformity were new to English law at the time, notably, the specified relevance to the quality which a consumer can reasonably expect of goods of “public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative”.
3156

U Secondly, the Directive requires a series of rights for consumer buyers in respect of the “contractual non-conformity” of the goods: at a first level, a right to repair or replacement of the goods
3157

U; and, if these remedies are unavailable or fail,
3158

U a right to “an appropriate reduction in the price”
3159

U and a right to “rescission” of the contract as long as the non-conformity of the goods is not minor.

3160

U The Directive also makes incidental provision for these rights of conformity, notably as regards proof of non-conformity

3161

U and the limitation period for the rights which it requires for consumers.

3162

U Thirdly, the Directive requires that “guarantees” by sellers or producers to consumers

3163

U shall be binding.

3164

U Finally, the Directive makes clear the mandatory nature of its requirements, providing that

“any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.”

3165

U

While the 1999 Directive was repealed with effect from 1 January 2022 by the Consumer Sales Directive 2019,

3166

U as earlier explained,

3167

U the new law which it contains governing the law of consumer sales of goods applicable to Member States does not affect the UK and is not, therefore, directly significant for UK law.

3168

U The Consumer Sales Directive 1999 will therefore remain significant for the interpretation of the retained EU law which implemented it in the [2015 Act](#) and will, for convenience, be referred to in this chapter in the present tense.

First implementation of 1999 Directive: amendment of existing legislation

- 40-462 The 1999 Directive was first implemented in the UK by the Sale and [Supply of Goods to Consumers Regulations 2002](#) (“the 2002 Regulations”)³¹⁶⁹ and took effect principally by the amendment of existing UK legislation: the [Sale of Goods Act 1979](#),³¹⁷⁰ the [Supply of Goods and Services Act 1982](#),³¹⁷¹ the [Supply of Goods \(Implied Terms\) Act 1973](#),³¹⁷² and the [Unfair Contract Terms Act 1977](#).³¹⁷³ In particular, the [2002 Regulations](#) inserted a new Pt 5A into the [1979 Act](#) (a new Pt 1B into the [1982 Act](#)) providing a new scheme of remedies based on the Directive for those dealing as consumer. The [2002 Regulations](#) also made provision for “consumer guarantees” as required by the 1999 Directive, which was not inserted into any existing primary legislation.³¹⁷⁴ In implementing the Directive in this way, the English law provisions were extended so as to benefit persons “dealing as consumer” within the meaning of the [Unfair Contract Terms Act 1977](#) and not merely “consumers” as understood by the 1999 Directive.³¹⁷⁵ This law still applies to contracts made before October 1, 2015, when the relevant provisions of the [Consumer Rights Act 2015](#) came into force.³¹⁷⁶

Second implementation of the 1999 Directive

- 40-463 However, the [Consumer Rights Act 2015](#) took a radically different approach to implementation of the Consumer Sales Directive 1999 and introduced wider reform to the substantive rights of consumers against traders in respect of the conformity of goods, digital content or services with the contract. [Part 1 of the 2015 Act](#) identifies three broad categories of consumer contract: “contracts for a trader to supply goods to a consumer” or “goods contracts” ([Ch.2](#))³¹⁷⁷; “contracts for a trader to supply digital content to a consumer” or “digital content contracts” ([Ch.3](#))³¹⁷⁸; and “contracts for a trader to supply a service to a consumer” or “services contracts” ([Ch.4](#))³¹⁷⁹; providing for each category a series of terms which are “treated as included” in the contract, these being broadly equivalent to the traditional implied terms of earlier legislation, as amended and supplemented.³¹⁸⁰ Secondly, in respect of each category of contract, the [2015 Act](#) provides a series of “rights to enforce terms” about their subject matter (goods, digital content or services).³¹⁸¹ [Part 1 of the 2015 Act](#) also gives effect to certain aspects of the Consumer Rights Directive 2011, notably its requirement that information provided by the trader about the goods or services as set out by the Directive is to form part of the contract³¹⁸² and its rules governing delivery of goods and the passing of risk in goods in sales contracts.³¹⁸³ Thirdly, the [2015 Act](#) provides very widely that a term in a contract to which it applies cannot exclude or restrict the trader’s liability arising under its substantive provisions.³¹⁸⁴ In this way, the [2015 Act](#) sought to set out in a single enactment the rules governing the issues arising between the parties to consumer contracts. As will be explained

in more detail below, as a result, the [2015 Act](#) therefore disapplied earlier legislation affecting these categories of contracts so as no longer to apply to them or to apply to them only with qualifications.³¹⁸⁵ On the other hand, in the case of “goods contracts”/contracts of sale of goods, the [2015 Act](#) did not seek to regulate all the issues governed by the [1979 Act](#) and these other provisions remain applicable even though the buyer is a consumer.³¹⁸⁶ Moreover, other consumer protection legislation may apply to the parties to a contract falling within [Pt 1 of the 2015 Act](#), as may the common law itself.³¹⁸⁷

EU directives on distance contracts for the sale of goods and on contracts for the supply of digital content

40-464 In May 2019, the EU enacted new directives governing contracts of sale of goods and contracts for the supply of digital content: the Directive on aspects of the law governing sales of goods

³¹⁸⁸

U repealed the Consumer Sales Directive 1999

³¹⁸⁹

U (which was implemented in UK law by [Ch.2 of Pt 1 of the 2015 Act](#)

³¹⁹⁰

U) and the Directive on certain aspects concerning contracts for the supply of digital content and digital services,

³¹⁹¹

U (which is original to EU law, though its subject-matter overlaps with that of [Ch.3 of Pt 1 of the 2015 Act](#)

³¹⁹²

U). Both Directives require “full harmonisation”

³¹⁹³

U (unlike the earlier Consumer Sales Directive 1999

³¹⁹⁴

U) and had to be implemented by Member States by 1 July 2021 so as to apply from 1 January 2022, the 1999 Directive being repealed on the latter date.

³¹⁹⁵

U This implementation deadline was therefore beyond IP completion day (set as 31 December 2020, when the UK’s leaving the EU comes into full effect) and, as a result, the UK was under no obligation to implement these directives.

3196



Temporal application of Pt 1 of the 2015 Act

- 40-465 As earlier noted, subject to one qualification, the relevant provisions of the [2015 Act](#) were brought into force so as to apply to contracts made on or after October 1, 2015.³¹⁹⁷

Relevant provisions in Pt 1 of 2015 Act as “retained EU law”

- 40-466 On IP completion day those provisions of [Pt 1 of the 2015 Act](#) which implemented EU directives (the Consumer Sales Directive 1999³¹⁹⁸ and the Consumer Rights Directive 2011³¹⁹⁹) became part of “retained EU law” by virtue of the [European Union \(Withdrawal\) Act 2018](#).³²⁰⁰ This has important effects on their interpretation under retained case-law and, in particular, it should be noted that, while in principle decisions of the Court of Justice of the EU on the relevant EU law already made on IP remain binding on UK courts, this is subject to a power in the Supreme Court and listed appellate courts to depart from this “retained EU case-law”.³²⁰¹ Moreover, also on IP completion day, the [2015 Act](#) was amended under a power in [s.8 of the 2018 Act](#), the changes so made³²⁰² affecting only [s.32](#)’s provision for a special rule on choice of law for consumer sales³²⁰³ and [s.59](#)’s definition of “‘producer’ in relation to goods or digital content” which was amended so as to include their “importer into the United Kingdom” rather than their “importer into the European Economic Area”.³²⁰⁴ The amending regulations provide that the changes which it makes to the [2015 Act](#) do not apply to a contract entered into before IP completion day.³²⁰⁵

Footnotes

- 3141 These amendments were effected by the [Sale and Supply of Goods to Consumers Regulations 2002 \(SI 2002/3045\)](#) implementing Directive 1999/44/EEC (“the Consumer Sales Directive 1999”).
- 3142 As regards the latter, [s.12 of the Sale of Goods Act 1979](#) does not require the seller to be contracting in the course of business, whereas [s.14\(2\) and \(3\) of the same Act](#) does so require. This does not mean that the legislature was not concerned with the implications of consumer sales for the drafting of the legislation and the amendments to the wording of the terms as to the quality of goods in [s.14 of the 1979 Act](#) were made in part so as to ensure that it was appropriate to consumer sales as much as to commercial

- sales: in particular, “merchantable quality” became “satisfactory quality”, which was then explained by reference to a series of “aspects of the quality of the goods”: see Law Commission Report Sale and Supply of Goods, Law Com. No.160 (1987) especially § 2.10; [Sale and Supply of Goods Act 1994 s.1](#).
- 3143 [Supply of Goods \(Implied Terms\) Act 1973 s.4](#) creating new [Sale of Goods Act 1893 s.55\(4\) and \(7\)](#) (repealed by [Unfair Contract Terms Act 1977](#)).
- 3144 [Unfair Contract Terms Act 1977 s.6\(2\)\(a\)](#) (in relation to the terms implied by the [Sale of Goods Act 1979 ss.13–15](#)).
- 3145 [Unfair Contract Terms Act 1977 s.6\(2\)\(b\)](#) (in relation to the terms implied by the [Supply of Goods \(Implied Terms\) Act 1973 ss.9–11](#)).
- 3146 [Unfair Contract Terms Act 1977 s.7\(2\)](#) (in relation to terms implied “from the nature of the contract”). For example, in most contracts for the transfer of goods (other than sale of goods or hire-purchase), such as a contract for the supply of work and materials, terms are implied by the [Supply of Goods and Services Act 1982 ss.2–5](#).
- 3147 [Unfair Contract Terms Act 1977 s.7\(2\); Supply of Goods and Services Act 1982 ss.7–10.](#)
- 3148 [Supply of Goods and Services Act 1982 ss.2–5](#) (“contracts for the transfer of goods” not being contracts for the sale of goods or hire-purchase agreements). In the case of contracts for the supply of services, a supplier in the course of business owes a duty to take reasonable care in the supply of the service by a term implied by the [Supply of Goods and Services Act 1982 s.13](#) and any purported exemption of liability for breach of this term is ineffective in respect of claims for death or personal injury and, in respect of other loss or damage, is subject to the test of reasonableness under the [Unfair Contract Terms Act 1977 s.2](#) (negligence liability): neither statutes distinguished for this purpose according to whether the recipient of the services was “dealing as consumer”.
- 3149 Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/12 (“Consumer Sales Directive” or “1999 Directive”).
- 3150 1999 Directive art.1(2)(a) “consumer”; (b) “consumer goods”; and (c) “seller”.
- 3151 1999 Directive art.8.
- 3152 1999 Directive art.1(4) deeming these to be “contracts of sale” for the purposes of the Directive.
- 3153 1999 Directive recital 8.
- 3154 1999 Directive art.2(1), 2(2)(c) and (d). On art.2(2) see *DS v Porsche Inter Auto GmbH & Co KG, Volkswagen AG (C-145/2) EU:C:2022:572*, 14 July 2022, below, para.40-49A.
- 3155 1999 Directive art.2(1), recital 7.

- 3156 1999 Directive art.2(2)(d) and (4).
- 3157 1999 Directive art.3(3). On art.3 see *Quelle AG v Bundersverband des Versbraucherzentralen und Verbraucherverbände (C-404/06) [2008] E.C.R. I-2685* (art.3 does not permit national law to impose liability on consumer buyer for compensation for use of non-conforming goods replaced); *Gebr. Weber GmbH v Wittmer, Putz v Medianess Electronics GmbH (C-65/09 and C-87/09) [2011] 3 C.M.L.R. 27* (on which see below, paras 40-520 (note) and 40-525); *Fülla v Toolport GmbH (C-52/18) EU:C:2019:447* (on which see below, para.40-520 (note)).
- 3158 On the specific requirements in this respect as implemented in UK law, see below, paras 40-520—40-521.
- 3159 1999 Directive art.3(5).
- 3160 1999 Directive art.3(5) and (6). On the restriction to minor non-conformity in the directive (which does not apply to the right to reject under the 2015 Act s.20) see *DS v Porsche Inter Auto GmbH & Co KG, Volkswagen AG (C-145/20) EU:C:2022:572*, 14 July 2022 paras 82–97. On this case more generally see below, para.40-499A.
- 3161 1999 Directive art.5(3).
- 3162 1999 Directive art.5(1) and (2).
- 3163 Defined in 1999 Directive art.1(2)(e).
- 3164 1999 Directive art.6.
- 3165 1999 Directive art.7(1) which notes by way of exception an option in Member States to allow parties to contracts of sale of second-hand goods to agree to a shorter time period for the liability of the seller than that set down in art.5(1) as long as it is not less than one year. This option was not exercised by the UK.
- 3166 Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods [etc.] of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/28 and see art.23. However, art.24(2) of the 2019 Directive provides that its provisions “shall not apply to contracts concluded before 1 January 2022”.
- 3167 Above, para.40-004 and see Vol.I, para.1-019.
- 3168 See below, para.40-464. The fact that the 1999 Directive has been repealed by the EU will, over the course of time, have an indirect significance for the UK law which

- 3169 implemented it (and which became part of “retained EU law”) as national courts cease
 to request the CJEU for guidance as to the proper interpretation of the repealed directive.
 SI 2002/3045.
- 3170 2002 Regulations regs 3–6, amending [Sale of Goods Act 1979](#) ss.14, 20, 32 and [61\(1\)](#)
 and inserting new Pt 5A.
- 3171 2002 Regulations regs 7–12, amending [Supply of Goods and Services Act 1982](#) ss.4,
 9, 11D, 11J and 18 and inserting new Pt 1B.
- 3172 2002 Regulations regs 13 amending [Supply of Goods \(Implied Terms\) Act 1973](#) ss.10
 and 15.
- 3173 2002 Regulations reg.14 amending [Unfair Contract Terms Act 1977](#) s.12 (for English
 law).
- 3174 2002 Regulations reg.15. The definitions in [reg.2](#) apply only to this provision as
 the remainder of the substantive provisions of the [2002 Regulations](#) provide for
 amendments of other legislation (as explained in the text) whose terms fall to be
 interpreted, therefore, by the legislation which these amendments concern.
- 3175 This legislative decision took effect by amendment of the existing legislation whose
 provisions applied for the benefit of those “dealing as consumer” by reference to
 the [1977 Act](#): e.g. [Sale of Goods Act 1979](#) s.48A(1)(a); s.61(5A). As explained in
 the previous note, the definition of “consumer” provided by [2002 Regulations](#) reg.2
 (which followed the definition in the 1999 Directive art.1(2)(a)) did not apply to these
 amendments. On the general approach to the definition of “consumer” in the EU
 consumer protection directives see above, paras [40-032](#) et seq.
- 3176 For discussion of this law see the 33rd edn of the present work, Vol.II, paras 38-439
 —38-464. This chapter from the 33rd edition is also available as a PDF to online
 subscribers of this edition on Westlaw.
- 3177 [Consumer Rights Act 2015](#) s.3(1).
- 3178 [2015 Act](#) s.33(1).
- 3179 [2015 Act](#) s.48(1).
- 3180 i.e. the [Supply of Goods \(Implied Terms Act\) 1973](#), the [Sale of Goods Act 1979](#) and
 the [Supply of Goods and Services Act 1982](#).
- 3181 [2015 Act](#) s.19 (goods contracts); [s.42](#) (digital content contracts); and [s.54](#) (services
 contracts) and see below, paras [40-495](#), [40-561](#) and [40-584](#) respectively.
- 3182 2011 Directive art.6(5), above, para.[40-108](#); [2015 Act](#) ss.11(4)–(6), 12 (goods
 contracts); [s.36\(3\)–\(4\)](#) and [37](#) (digital content contracts); and ss.50(3)–(4) (services
 contracts) and see below, paras [40-501](#)—[40-502](#), [40-552](#)—[40-553](#) and [40-579](#)
 respectively.
- 3183 2011 Directive arts 18 and 20; [2015 Act](#) ss.28–29, below, paras [40-529](#)—[40-530](#).
- 3184 [2015 Act](#) s.31 (goods contracts), [s.47](#) (digital content contracts) and [s.57](#) (services
 contracts) and see below, paras [40-535](#), [40-568](#) and [40-589](#)—[40-591](#) respectively
 (where the qualifications on this are explained).
- 3185 [2015 Act](#) s.60 and Sch.1 and see below, paras [40-474](#)—[40-476](#).
- 3186 Below, para.[40-475](#).
- 3187 Below, paras [40-477](#)—[40-478](#).

- 3188 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, etc. [2019] O.J. L136/28 (“Directive (EU) 2019/771”).
- 3189 Directive (EU) 2019/771 art.23.
- 3190 On this law see below, paras [40-487](#) et seq.
- 3191 Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 [2019] O.J. L136/1 (“Directive (EU) 2019/770”). On this directive see Sein and Spindler (2019) 15 E.R.C.L. 257.
- 3192 On this law, see below, paras [40-544](#) et seq.
- 3193 Directive (EU) 2019/771 art.4; Directive (EU) 2019/770 art.4 and see above, para.[40-026](#).
- 3194 1999 Directive art.8 and see above, para.[40-461](#).
- 3195 Directive (EU) 2019/771 (sale of goods) arts 23 and 24, it being provided (art.24(2)) that the provisions of the 2019 Directive “shall not apply to *contracts concluded before 1 January 2022*” (emphasis added). Directive (EU) 2019/770 (supply of digital content) art.24, it being provided (art.24(2)) that its provisions “shall apply to *the supply of digital content or digital services which occurs from 1 January 2022 with the exception of Articles 19 [which concerns the modification of digital content] and 20 [which concerns the trader’s right to redress]* of this Directive which shall only apply to *contracts concluded from that date*” (emphasis added).
- 3196 See above, para.[40-004](#) and Vol.I, para.[1-019](#).
- 3197 The Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) (the “2015 Order”) arts 3(a)–(c). The exception is found in relation Pt 1 Ch.4 whose provisions governing services contracts did not apply to certain “consumer transport services” (certain rail passenger services, carriage by air, and sea and inland waterway transport, all as specially defined by the [2015 Order art.2](#)) until 1 October 2016: [2015 Order arts 4 and 6\(2\)](#) as amended by the Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) (Amendment) Order 2016 (SI 2016/484) art.2. The main reason for this delay in the bringing into force of the 2015 Act in this area was a concern that the Act’s provisions (especially [s.57](#)’s controls on the exclusion or restriction of liability in the carrier) would risk complexity and duplication with sectoral transport schemes: Department of Transport, Applying the Consumer Rights Act 2015 to the rail, aviation and maritime

sectors, Response to Consultation, Moving Britain Ahead (July 2016). Although the Department of Transport (para.2.4) had earlier announced that the exemption from the application of [s.57\(3\) of the 2015 Act](#) (governing *restrictions* on liability) would continue to apply to passenger services operated by EU licensed rail passenger operators until 1 October 2017 (see *draft Consumer Rights (Rail Passenger Service Exemption, Enforcement and Amendments) Order 2016* (laid before Parliament, 7 July 2016)). On 6 September 2016 it was announced that the [2015 Act](#) would apply in full to all passenger transport services, including mainline rail passenger services as from 1 October 2016: <https://www.gov.uk/government/publications/consumer-rights-act-application-to-transport-services> [Accessed 1 September 2021]. See above, para.[40-241](#).

3198 Above, paras [40-461](#) and [40-463](#).

3199 Above, para.[40-463](#).

3200 s.2 (as amended by the [European Union \(Withdrawal Agreement\) Act 2020](#) s.25(1) and on “retained EU law” generally, see above, para.[40-004](#) and Vol.I, paras [1-020](#) et seq. See further above, para.[40-004](#) and Vol.I, paras [1-027—1-028](#).

3201 3202 [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.3(3) (reg.1(3)’s reference to reg.3’s coming into force on “exit day” must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) s.[39\(1\)](#), [s.41\(4\)](#), Sch.5 para.1).

3203 Below, para.[40-537](#).

3204 Below, para.[40-499](#).

3205 3206 [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.11 (as amended by the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(SI 2020/1347\)](#) reg.4(8)).

(i) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(b) - The Law Recast by the 2015 Act: “Goods Contracts”, “Digital Content Contracts” and “Services Contracts”

(i) - Introduction

- 40-467 As noted earlier, Pt 1 of the 2015 Act³²⁰⁶ identifies three broad categories of consumer contract: “contracts for a trader to supply goods to a consumer” or “goods contracts” (Ch.2)³²⁰⁷; “contracts for a trader to supply digital content to a consumer” or “digital content contracts” (Ch.3)³²⁰⁸; and “contracts for a trader to supply a service to a consumer” or “services contracts” (Ch.4).³²⁰⁹

Terms “treated as included”

- 40-468 First, for each broad category, the 2015 Act provides a series of terms which are “treated as included” in the contract, these being broadly equivalent to the traditional implied terms of earlier legislation, as amended and supplemented.³²¹⁰ In this respect, in the case of “goods contracts”, the Act sought to implement the Law Commissions’ recommendations in its report Consumer Remedies for Faulty Goods.³²¹¹ Within “goods contracts”, further distinctions between different contracts are made, for example, for the purposes of the term that the trader has the right to supply the goods where a distinction is drawn between contracts for the hire of goods and other goods contracts.³²¹²

“Rights to enforce terms”

- 40-469

Secondly, in respect of each category of contract, the [2015 Act](#) provides a series of “rights to enforce terms” about their subject matter (goods, digital content or services).³²¹³ In the case of “goods contracts” and “digital content contracts”, these rights are modelled broadly on the rights in respect of contractual non-conformity of goods provided by the 1999 Directive and earlier implemented by Pt 5A in the [Sale of Goods Act 1979](#),³²¹⁴ but there are a series of adjustments and differences.³²¹⁵

Other aims

- 40-470 U** Thirdly, [Pt 1 of the 2015 Act](#) also gives effect to certain aspects of the Consumer Rights Directive 2011, notably its requirement that information provided by the trader about the goods or services as set out by the Directive is to form part of the contract³²¹⁶ and its rules governing delivery of goods and the passing of risk in goods in sales contracts.³²¹⁷ Moreover, as will be seen, the provisions of the [2015 Act](#) governing “digital content contracts” are original in the sense that they found no direct equivalent in EU legislation nor earlier UK legislation, though some of the provisions themselves have echoes of both.³²¹⁸ The [2015 Act](#)’s provisions on “services contracts”³²¹⁹ are based principally on earlier provisions in the [Supply of Goods and Services Act 1982](#), supplemented by the creation of new rights to “repeat performance” and to price reduction.³²²⁰

Trader liabilities not subject to exclusion

- 40-471** Fourthly, in general [Pt 1 of the 2015 Act](#) provides that a term in a contract to which it applies cannot exclude or restrict the trader’s liability arising under its substantive provisions, though this strict position is qualified in the case of contracts of hire and in relation to contracts for services.³²²¹

Disapplication of general legislation

- 40-472** Fifthly, the corollary of the [2015 Act](#)’s enactment of special and separate provision for consumer contracts in certain respects is that it amended other, earlier legislation affecting these categories of contracts so as no longer to apply to them or to apply to them only with qualifications.³²²²

Law outside the 2015 Act still applicable

- 40-473 On the other hand, this does *not* mean that all the law governing consumer contracts for the supply of goods, digital content or services is found in the [2015 Act](#), as the following paragraphs will explain.

Issues regulated by the 2015 Act and no longer regulated by the Sale of Goods Act

- 40-474 As will be seen, special provision is made in the [2015 Act](#)³²²³ for the issues formerly (and still generally) governed by the [1979 Act](#)'s provisions on statutory implied terms as to title, sale by description, quality or fitness for purpose and sale by sample³²²⁴ and, as a result, the [2015 Act](#) disapplied these provisions in the [1979 Act](#) so as no longer apply to "goods contracts" within the meaning of [Pt 1 of the 2015 Act](#).³²²⁵ So, for example, [s.14 of the Sale of Goods Act 1979](#) was amended so as to remove earlier insertions governing buyers "dealing as consumer"³²²⁶ and to provide that:

"This section does not apply to a contract to which [Chapter 2 of Part 1 of the Consumer Rights Act 2015](#) applies (but see the provision made about such contracts in [sections 9, 10 and 18 of that Act](#))."³²²⁷

Similarly, the [2015 Act](#) makes special provision for "goods contracts" regarding delivery of goods generally,³²²⁸ delivery of the wrong quantity,³²²⁹ instalment deliveries,³²³⁰ and the passing of risk³²³¹ and, as a result, it disapplied the relevant provisions governing delivery and the passing of risk applicable to contracts of sale of goods generally.³²³² The [2015 Act](#) provides a new scheme of remedies for the consumer under "goods contracts" and therefore, apart from deleting [Pt 5A of the 1979 Act](#),³²³³ it disapplied other provisions in the [1979 Act](#) which were otherwise inconsistent with this new scheme.³²³⁴

Issues still regulated by the Sale of Goods Act 1979

- 40-475 This means, however, that the [2015 Act](#) left unaffected a number of provisions of the [1979 Act](#), which are therefore potentially applicable to the contracts to which [Ch.2 of Pt 1 of the 2015 Act](#)

applies.³²³⁵ This applies to provisions in the **1979 Act** governing capacity to buy and sell,³²³⁶ how contracts of sale of goods are made,³²³⁷ existing or future goods,³²³⁸ perished goods,³²³⁹ goods perishing before sale but after agreement to sell,³²⁴⁰ ascertainment of price,³²⁴¹ agreement to sell at a valuation,³²⁴² stipulations about time,³²⁴³ when property passes (though the **2015 Act** refers instead to “ownership” rather than “property”),³²⁴⁴ sales by a person other than the owner,³²⁴⁵ duties of sellers and buyers in general,³²⁴⁶ payment and delivery as concurrent conditions,³²⁴⁷ delivery (other than about the timing for delivery³²⁴⁸), the buyer’s liability for not taking delivery of goods,³²⁴⁹ the unpaid seller’s lien,³²⁵⁰ the seller’s action for the price,³²⁵¹ damages for non-acceptance against the buyer³²⁵² and auction sales.³²⁵³ While this is quite a catalogue, it will be seen that many of the issues still governed by the **1979 Act** are unlikely to arise between the parties to a consumer contract, the main exception being the seller/trader’s rights in respect of the price and in respect of the consumer buyer’s non-acceptance.

Supply of Goods (Implied Terms) Act 1973 and the Supply of Goods and Services Act 1982

- 40-476 The effect of the **2015 Act** is that a consumer contract falling under Pt 1 of the **2015 Act** is no longer governed by the provisions of the **Supply of Goods (Implied Terms) Act 1973** (hire-purchase agreements) or of the **Supply of Goods and Services Act 1982** (contracts for the transfer of property in goods, contracts for the hire of goods and contracts for services).³²⁵⁴ Unlike the **Sale of Goods Act 1979**, there are no provisions in the **1973** or **1982 Acts** which still apply both to consumer contracts and to contracts generally, reflecting the generally narrower scope of the regulation of the categories of contract to which they apply.

Common law and equity

- 40-477 Part 1 of the **2015 Act** itself recognises that its rights to enforce the terms of the contracts may be supplemented by “other remedies” at common law or in equity, which, depending on the category of contract in question, may include specific performance, damages, “relying on the breach against a claim by the trader for the price”, “treating the contract as an end” or recover of money paid on the basis of a failure of consideration.³²⁵⁵ Moreover, even though not flagged up by the Act in this way, the common law may apply so as to provide other rights for the consumer. This is the case, for example, as regards the law of misrepresentation,³²⁵⁶ the law of undue influence or duress.³²⁵⁷

Other legislation

- 40-478 Apart from the rules in Pt 2 of the 2015 Act governing unfair terms in consumer contracts generally,³²⁵⁸ other consumer protection legislation may also apply to the three broad categories of contract governed by Pt 1 of the 2015 Act, notably, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013³²⁵⁹ and the Consumer Protection from Unfair Trading Regulations 2008.³²⁶⁰

Interpretation of 2015 Act Pt 1

- 40-479 Many concepts used by the 2015 Act are defined by it.³²⁶¹ For example, the 2015 Act provides that contracts to supply goods are treated as including a term that “the trader must have the right to sell or transfer the goods at the time when ownership of the goods is to be transferred”,³²⁶² and defines “ownership” for this purpose,³²⁶³ though it then refers its reader to the 1979 Act “for the time when ownership of goods is transferred” in relation to contracts of sale.³²⁶⁴ Other concepts used by the 2015 Act are left undefined by it. It is submitted that the proper interpretation of these concepts depends on whether the provision in which they appear reflects EU legislation. Where it does (even in cases where the Act goes beyond what that legislation requires), then its interpretation may require an autonomous European interpretation and reference to any relevant retained domestic or EU case-law.³²⁶⁵ Moreover, where the 2015 Act uses a concept drawn from an EU directive though extended beyond the latter’s scope (as, for example, in the case of the consumer’s rights in respect of non-conforming digital content³²⁶⁶), then consistency of interpretation of the Act would argue for the adoption of the European interpretation in these extended situations. Where, on the other hand, the concept does not reflect EU legislation or has not received and would not receive such an autonomous interpretation, then its interpretation would be subject to the normal rules governing the interpretation of UK statutes. In the case of concepts known to the common law or previously (or more generally) used by domestic statutes, in principle reference should be made to their interpretation under this wider English law. However, where a particular concept is used both in provisions which reflect EU law and in other provisions which do not do so but reflect domestic legislation, difficulty may arise. So, for example, “possession” is used by the Act in its definition of “hire of goods” (which does not reflect EU law),³²⁶⁷ but it is also used in the Act’s provisions governing the passing of risk³²⁶⁸ and, by reference, on the delivery of goods,³²⁶⁹ both of which reflect provisions in the Consumer Rights Directive 2011.³²⁷⁰

New terminology used by the Act

- 40-480 The declared purpose of the Act was to make the law governing consumer rights more accessible to consumers, or at least to their advisers.³²⁷¹ As a result, some of the familiar terminology of the common law and of earlier legislation was abandoned and replaced by new terminology which was intended to be more easily comprehended. The most prominent example of this is the replacement of the terminology of “implied term” or “implied condition” familiar both from the common law and from statute since the [Sale of Goods Act 1893](#) with provisions that provide that a contract “is to be treated as including a term”, for example, that the quality of goods is satisfactory.³²⁷² It is not clear that such a statutory deeming provision is any more accessible to non-lawyers than the traditional terminology, but in the following paragraphs these terms will be referred to as “statutory terms”. On the other hand, use of “condition” by the [2015 Act](#) is more complex. The [2015 Act](#) abandons the technical sense (used both by the [1979 Act](#) and the common law) of a condition as a type of term the slightest breach of which will in principle give rise in the injured party to a right to terminate the contract (“treat the contract as repudiated”),³²⁷³ but it recognises that a contract to supply goods may be conditional as well as absolute,³²⁷⁴ and then refers specially to a “conditional sales contract” as one where the trader retains ownership in the goods until certain conditions are met (typically payment).³²⁷⁵ Moreover, the terminology used by the Act to describe the effects, for example, of failures of conformity in goods, is not uniform.³²⁷⁶ The [2015 Act](#) places the new statutory terms under a heading “What statutory *rights* are there under a goods contract?”³²⁷⁷ and under a later heading asks “What *remedies* are there if statutory rights under a goods contract are not met?”³²⁷⁸ However, [s.19](#) (which follows this second heading and sets out the general framework for the consumer’s rights) refers to the consumer’s “rights to enforce terms about goods”,³²⁷⁹ for example, the “right to reject”,³²⁸⁰ except when referring to “other remedies” available to the consumer, such as damages and specific performance, which arise under the general law.³²⁸¹ On the other hand, later provisions setting out the details of the consumers’ “rights to enforce” do sometimes refer instead to the consumer’s “remedy”.³²⁸² This apparent inconsistency is not helpful. Moreover, at times the terminology adopted by the [2015 Act](#) to define a technical distinction (with normative significance) may not be readily apparent without a close familiarity with its provisions. This is the case notably as regards the distinction between a “contract to supply goods” and “contracts for the transfer of goods” (the former being used to describe the broad category of contracts to which [Ch.2](#) applies and which consists of “sales contracts”, contracts for the hire of goods, hire purchase agreements and contracts for the transfer of goods³²⁸³ and the latter being a residual category of contract under which the trader transfers or agrees to transfer ownership of goods to the consumer, which is neither a sales contract nor a hire-purchase agreement).³²⁸⁴

Legislative style of the 2015 Act

40-481 The general legislative style is to expound the law in relatively short sentences and to make frequent cross-reference within the text of the provisions to other sections of the Act itself or, on occasion, to other legislation. A prominent example is that each section of the Act which inserts a statutory term ends with a provision referring the reader to the relevant provision within the Act which provides for the consumer's rights against the trader in respect of breach of the term.³²⁸⁵ Conversely, s.31's provision rendering ineffective a contract term which seeks to exclude the trader's liability arising under the provisions of Pt 1, lists the relevant sections for this purpose.³²⁸⁶

Footnotes

- 3206 On IP completion day (on which see generally, above, para.40-004 and Vol.I, paras 1-020 et seq.), Pt 1 of the 2015 Act was amended as noted above, para.40-466.
- 3207 Consumer Rights Act 2015 s.3(1).
- 3208 2015 Act s.33(1).
- 3209 2015 Act s.48(1).
- 3210 i.e. the Supply of Goods (Implied Terms Act) 1973, the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982.
- 3211 Law Com No.317, Scot Law Com No.216, Cm 7725 (2008).
- 3212 2015 Act s.17 below, paras 40-509—40-511.
- 3213 2015 Act s.19 (goods contracts); s.42 (digital content contracts); and s.54 (services contracts) and see below, paras 40-495, 40-548 and 40-574 respectively.
- 3214 1982 Act Pt 1B.
- 3215 See below, paras 40-514 et seq. and 40-561 et seq.
- 3216 2011 Directive art.6(5), above, para.40-108; 2015 Act ss.11(4)–(6), 12 (goods contracts); s.36(3)–(4) and 37 (digital content contracts); and ss.50(3)–(4) (services contracts): see below, paras 40-501—40-502, 40-552—40-553 and 40-579 respectively.
- 3217 2011 Directive arts 18 and 20; 2015 Act ss.28–29, below paras 40-529—40-530.
- 3218 See below, paras 40-549—40-554, 40-559 and 40-561—40-566. However, see Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] O.J. L136/1 on which see above, para.40-464.
- 3219 2015 Act Pt 1 Ch.4.
- 3220 On the provisions based on the 1982 Act see 2015 Act ss 49, 52 and 53 on which see below, paras 40-575, 40-579 and 40-581. On the new rights see ss.54–56 and below, paras 40-584 et seq.

- 3221 2015 Act s.31 (goods contracts), s.47 (digital content contracts) and s.57 (services contracts) and see below, paras 40-535, 40-568 and 40-589—40-591 respectively.
- 3222 2015 Act s.60 and Sch.1 and see below, paras 40-474—40-476.
- 3223 2015 Act ss.9–18, below, paras 40-494 et seq.
- 3224 1979 Act ss.11–15.
- 3225 2015 Act s.60; Sch.1, paras 8, 10–14.
- 3226 2015 Act s.60 and Sch.1 para.13(2) deleting s.14(2D) to (2F) of the 1979 Act.
- 3227 2015 Act s.60 and Sch.1 para.13(3).
- 3228 2015 Act s.28, below, para.40-529.
- 3229 2015 Act s.25, below, para.40-527.
- 3230 2015 Act s.26, below, para.40-528.
- 3231 2015 Act s.29, below, para.40-530.
- 3232 1979 Act ss.20, 29(3), 30–33; 35–36; 2015 Act s.60, Sch.1 paras 17–22. The 2015 Act s.60, Sch.1 para.23 provides that s.34 of the 1979 Act’s provisions on the buyer’s right of examining the goods do not affect the operation of s.22 of the 2015 Act (time limit for short-term right to reject), on which see below, para.40-518.
- 3233 Pt 5A had formerly implemented the Consumer Sales Directive 1999, above, para.40-462.
- 3234 2015 Act s.60, Sch.1 paras 24–30 and 32 disapplying 1979 Act s.35 (acceptance), s.35A (right of partial rejection), and s.36 (buyer not bound to return rejected goods), s.51 (damages for non-delivery), s.52 (specific performance), s.53 (remedy for breach of warranty), s.54 (interest) and referring the reader to the relevant provisions of the 2015 Act. The 2015 Act s.60, Sch.1 also made other minor amendments to the 1979 Act consequential on its enactment of Pt 1.
- 3235 For these purposes, it must first be noted that while Ch.2 of Pt 1 of the 2015 Act applies to “goods contracts” as it defines them (2015 Act ss.3 and 5, below, paras 40-488—40-490), the 1979 Act applies to “contracts of sale of goods” as it defines them: 1979 Act ss.1–2.
- 3236 1979 Act s.3, on which see Vol.I, paras 11-013—11-015 and below para.46-033.
- 3237 1979 Act s.4, though parallel provision is made for all the contracts to which Pt 1 of the 2015 Act applies: 2015 Act s.1(2).
- 3238 1979 Act s.5 on which see below, para.46-038.
- 3239 1979 Act s.6 on which see below, paras 46-045—46-046.
- 3240 1979 Act s.7 on which see below, paras 46-047—46-050.
- 3241 1979 Act s.8 on which see below, paras 46-051—46-052.
- 3242 1979 Act s.9 on which see below, para.46-053.
- 3243 1979 Act s.10 on which see below, para.46-128.
- 3244 2015 Act s.4; 1979 Act ss.16–19, 20A–20B, below, paras 46-130—46-188. As noted below, para.40-479 (note) the Law Commission has made recommendations on the amendment of the 2015 Act so as to provide dedicated rules on the transfer of ownership for consumer sales: see Law Commission, Consumer sales contracts: transfer of ownership (HC 1365, Law Com No 398) (22 April 2021). See also Law Commission, Consumer sales contracts: transfer of ownership: a consultation paper (Consultation

- Paper No.246 (2020); Consumer Prepayments on Retailer Insolvency Law Com. No.368 (2016).
- 3245 1979 Act ss.21–26, below, paras 46-193—46-235.
- 3246 1979 Act s.27 on which see below, para.46-236.
- 3247 1979 Act s.28 on which see below, para.46-237.
- 3248 1979 Act s.29. The 2015 Act disapplied s.29(3) as regards Pt 1 consumer contracts.
- 3249 1979 Act s.37 on which see below, para.46-292.
- 3250 1979 Act ss.41–48 on which see below, paras 46-316 et seq.
- 3251 1979 Act s.49 on which see below, paras 46-361 et seq.
- 3252 1979 Act s.50 on which see below, paras 46-370 et seq.
- 3253 1979 Act s.57.
- 3254 In the case of the 1973 Act, the disapplication of the provisions applicable to hire-purchase agreements was effected by 2015 Act s.60, Sch.1 paras 1–7 (which do so by substituting “relevant hire-purchase agreement” for “hire-purchase agreement” in the 1973 Act and then defining a relevant hire-purchase agreement as one which “is not a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies”, as well as making consequential amendments to the 1973 Act. In the case of the 1982 Act, some provisions formerly applicable only to consumers were deleted (notably, Pt 1B), the scope set out in ss.1, 6 and 12 was amended so as not to apply to contracts to which Ch.2 of Pt 1 of the 2015 Act applies, these not being “relevant” contracts of the types governed by the Act; other consequential amendments were also made: 2015 Act s.60, Sch.1, paras 37–44, 50–52.
- 3255 2015 Act s.19(9)–(13) below, para.40-526; s.42(6)–(7) (digital content) below, para.40-566; and s.54(6)–(7) (services contracts) below, para.40-588.
- 3256 See Vol.I, Ch.9. However, s.2(1) of the Misrepresentation Act 1967 does not apply where the misrepresentee has a right of consumer redress under the Consumer Protection from Unfair Trading Regulations 2008: see above, para.40-220.
- 3257 See Vol.I, Ch.10.
- 3258 Above, paras 40-223 et seq.
- 3259 SI 2013/3134: see above, paras 40-063 et seq.
- 3260 SI 2008/1277 (as amended): see above, paras 40-166 et seq.
- 3261 See notably, 2015 Act ss.2, 3–8, 33, 48 and 59.
- 3262 2015 Act s.17 provides exceptions for contracts for the hire of goods (s.17(1)(a)) and where circumstances show or imply that the trader intended to transfer only a more limited title (s.17(1) and (4)–(7)).
- 3263 2015 Act s.4(1) “the general property in goods, not merely a special property”.
- 3264 2015 Act s.4(2) referring to 1979 Act ss.16–20B. The Law Commission has made recommendations for the amendment of the 2015 Act so as to provide dedicated rules on the transfer of ownership for consumer sales, in particular so as to protect consumers who have paid in advance for goods and the seller then becomes insolvent: Law Commission, Consumer sales contracts: transfer of ownership (HC 1365, Law Com. No.398) (22 April 2021) and see also Law Com. Consultation Paper No.246, Consumer sales contracts: transfer of ownership: a consultation paper (27 July 2020) and the Law

- Commission's earlier report: Consumer Prepayments on Retailer Insolvency (2016) Law Com. No.368.
- 3265 Above, para.[40-016](#). See also above, para.[40-004](#) and Vol.I, paras [1-027](#)—[1-029](#) on the changing significance of European case-law for English courts on IP completion day.
- 3266 The [2015 Act](#) created rights in respect of non-conformity of digital content modelled on those found in the Consumer Sales Directive 1999: see below, paras [40-561](#)—[40-563](#).
- 3267 [2015 Act s.6](#).
- 3268 [2015 Act s.29](#) referring to "physical possession".
- 3269 [2015 Act s.28](#); "delivery" is defined by [s.59\(1\)](#) as the "voluntary transfer of possession from one person to another".
- 3270 2011 Directive arts 18 and 20 (both referring to "physical possession"). See further, below, paras [40-529](#)—[40-530](#).
- 3271 BIS, Enhancing Consumer Confidence by Clarifying Consumer Law (July 2012), paras 2.1–2.3.
- 3272 [2015 Act s.9\(1\)](#).
- 3273 On this usage, see [1979 Act s.11\(3\)](#) and more generally Vol.I, paras [27-013](#) et seq. The [2015 Act](#) instead provides its own remedies which bring the contract to an end: e.g. below, paras [40-515](#), [40-515](#) and [40-521](#) ("goods contracts").
- 3274 [2015 Act s.3\(5\)\(c\)](#).
- 3275 [2015 Act s.5\(3\)](#).
- 3276 *Whittaker* (2017) [133 L.Q.R.](#) 47 at 57–59.
- 3277 Heading prefacing s.9 of the [2015 Act](#) (emphasis added).
- 3278 Heading prefacing s.19 of the [2015 Act](#) (emphasis added).
- 3279 [2015 Act s.19](#) title.
- 3280 [2015 Act s.20](#).
- 3281 [2015 Act s.19\(9\)–\(11\)](#).
- 3282 [2015 Act s.23\(4\)](#) and [\(5\)](#).
- 3283 [2015 Act s.3\(1\)](#) and [\(2\)](#).
- 3284 [2015 Act s.8](#).
- 3285 e.g. as regards "goods contracts", [ss.9\(9\)](#), [10\(6\)](#), [12\(5\)](#), [13\(3\)](#), [14\(3\)](#), [15\(2\)](#) referring to s.19.
- 3286 [2015 Act s.31\(1\)](#) and see below, para.[40-535](#).

(ii) - General Definitions

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(b) - The Law Recast by the 2015 Act: “Goods Contracts”, “Digital Content Contracts” and “Services Contracts”

(ii) - General Definitions

Scope of application of Pt 1 of the 2015 Act

- 40-482 Part 1 of the 2015 Act applies only to three broad categories of consumer contract: “contracts for a trader to supply goods to a consumer” or “goods contracts” (Ch.2)³²⁸⁷; “contracts for a trader to supply digital content to a consumer” or “digital content contracts” (Ch.3)³²⁸⁸; and “contracts for a trader to supply a service to a consumer” or “services contracts” (Ch.4).³²⁸⁹ The particular elements of these contracts will be explained in turn below,³²⁹⁰ but certain “key definitions” are of more general application.

“Consumer”

- 40-483 For the purposes of Pt 1 of the 2015 Act:

“‘Consumer’ means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.”³²⁹¹

This reflects the new standard UK definition of “consumer” and reflects the EU definition of “consumer”, with the gloss that it includes as “consumer” a person who acts *mainly* outside his

trade, etc.³²⁹² Following similar provision in the [Unfair Contract Terms Act 1977](#), the 2015 Act provides that:

“A trader claiming that an individual was not acting for purposes wholly or mainly outside the individual’s trade, business, craft or profession must prove it.”³²⁹³

“Trader”

40-484 The [2015 Act](#) provides that:

“‘Trader’ means a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf.”³²⁹⁴

And “... ‘business’ includes the activities of any government department or local or public authority”.³²⁹⁵ This definition of the other party to a consumer contract has become standard in modern UK legislation governing consumer contracts and follows closely the position in EU law, as explained earlier.³²⁹⁶

Contracts business-to-consumer

40-485 It has earlier been seen that EU legislation (and therefore UK legislation which reflects it exactly without extension) may not make clear whether it applies so as to protect persons dealing other than in a course of business where they *supply* goods or services as opposed to where they *receive* goods or services.³²⁹⁷ However, [Pt 1 of the 2015 Act](#) makes clear that its provisions apply only to contracts under which a trader supplies goods, digital content or services *to* consumers.³²⁹⁸ This makes substantive sense as it seeks to create rights in buyers or customers (the consumer) and it also reflects the position under the EU legislation which some of the Act’s provisions implemented.³²⁹⁹

Mixed contracts

40-486 [Chapters 2 to 4 of Pt 1 of the 2015 Act](#) make provision for “goods contracts”, “digital content contracts” and “services contracts” respectively, but it is specifically provided that each chapter

applies even if the contract also covers something covered by another chapter, so that a “mixed contract” may be governed by two or all three of the chapters.³³⁰⁰ For example, a trader may agree to provide the consumer with a computer (“goods”) including software (“digital content”) together with after-sales advice (a “service”). Under the Act, the contract would be a “mixed contract” and, therefore, the relevant chapters in Pt 1 would apply notably to any non-conformity of the goods, digital content or service with the contract. Moreover, in two cases the Act makes special provision for particular mixed contracts: where a contract for the supply of goods includes their installation and where a contract for the supply of goods includes digital content.³³⁰¹ On the other hand, as will be seen, within the broad category of “goods contracts”, sharp distinctions are drawn between contracts for the hire of goods and hire-purchase agreements,³³⁰² hire-purchase agreements and conditional sales agreements,³³⁰³ and a “contract for transfer of goods” is defined as a residual category of contracts for the transfer of ownership of goods which is not a sales contract nor a hire-purchase agreement.³³⁰⁴

Footnotes

- 3287 Consumer Rights Act 2015 s.3(1).
- 3288 2015 Act s.33(1).
- 3289 2015 Act s.48(1).
- 3290 Below, paras 40-487 et seq., 40-544 et seq. and 40-571 et seq. respectively.
- 3291 2015 Act s.2(3).
- 3292 For discussion of the significance of “consumer” see above, paras 40-032 et seq. and paras 40-244 and 40-247. The 2015 Act s.2(5) and (6) makes a specific exclusion from this definition of “consumer” in relation to “sales contracts” as explained below, para.40-489.
- 3293 2015 Act s.2(4) cf. Unfair Contract Terms Act 1977 s.12(3) in relation to a person “dealing as consumer”, itself deleted by the 2015 Act: see Vol.I, para 17-072—17-073.
- 3294 2015 Act s.2(2).
- 3295 2015 Act s.2(7).
- 3296 Above, paras 40-052 et seq. and 40-247.
- 3297 Above, para.40-049.
- 3298 2015 Act ss.1(1), 3(1), 33(1) and 48(1).
- 3299 i.e. 1999 Directive especially art.2(2)(c) defining the business party as “seller”, arts 2 and 3 imposing duties on the seller and rights in the consumer against the seller; Consumer Rights Directive 2011 arts 18 and 20 (which both make clear that they apply where the trader sells goods to the consumer).
- 3300 2015 Act s.1(4)—(5); s.3(7).
- 3301 2015 Act s.1(6), referring to ss.15 and 16, below, paras 40-505—40-506.
- 3302 2015 Act s.6(2), below, para.40-491.
- 3303 2015 Act s.7(4), below, para.40-492.

3304 2015 Act s.8, below, para.40-493.

End of Document

© 2022 SWEET & MAXWELL

(i) - The Four Types of “Goods Contracts”

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(c) - “Goods Contracts”

(i) - The Four Types of “Goods Contracts”

Introduction

40-487 The [2015 Act](#) provides that there are four types of “goods contracts” to which [Ch.2 of Pt 1](#) applies: a “sales contract”, a “contract for the hire of goods”, a “hire-purchase agreement” and a “contract for transfer of goods”. ³³⁰⁵ These may include contracts entered into between one part owner and another, contracts for the transfer of an undivided share in goods and contracts that are absolute and contracts that are conditional. ³³⁰⁶ These contracts are referred to by the Act either as contracts to supply goods or “goods contracts”. ³³⁰⁷

“Sales contracts”

40-488 The [2015 Act](#) provides that:



Arrangement of Act

“A contract is a sales contract if under it—

(a) the trader transfers or agrees to transfer ownership of goods to the consumer, and

(b) the consumer pays or agrees to pay the price.”

3308



Apart from the substitution of “ownership of goods” for “the property in goods”, this definition follows closely the definition of “contract of sale of goods” in the [1979 Act](#),³³⁰⁹ and this substitution makes no substantive difference given that the [2015 Act](#) defines “ownership” as “the general property in goods, not merely a special property”.³³¹⁰

“Goods”

40-489 “Goods” are defined by the [2015 Act](#) as:

“... any tangible moveable items, but that includes water, gas and electricity if and only if they are put up for supply in a limited volume or set quantity.”³³¹¹

This reflects the wording of the definition of “consumer goods” in the 1999 Directive, rather than “goods” in the [1979 Act](#).³³¹² Moreover, reflecting an option for Member States under the 1999 Directive,³³¹³ the [2015 Act](#) generally excludes from the application of Ch.2’s provisions *sales* contracts where the goods are “second hand goods sold at public auction, and ... individuals have the opportunity of attending the sale in person”, though it does so by deeming the buyer not to be a “consumer” in these circumstances,³³¹⁴ but the [2015 Act](#) does not make this exclusion in relation to those of its provisions which implement the Consumer Rights Directive 2011, as that Directive does not allow for such an exclusion.³³¹⁵

Contract for work and materials as “sales contract”

40-490 The [2015 Act](#) also includes within “sales contracts” certain contracts which might be treated by English law as being contracts for work and materials,³³¹⁶ thereby implementing the 1999 Directive.³³¹⁷ Section 5(2) of the [2015 Act](#) provides that:

Section 5

“A contract is a sales contract (whether or not it would be one under subsection (1)) if under the contract—

- (a) goods are to be manufactured or produced and the trader agrees to supply them to the consumer,
- (b) on being supplied, the goods will be owned by the consumer, and
- (c) the consumer pays or agrees to pay the price.”

So, for example, a contract under which a tailor produces a made-to-measure suit for a consumer is a sales contract.³³¹⁸ Similarly, the [2015 Act](#) specifically provides that for the purposes of Pt 1: a “conditional sales contract” means:

“... a sales contract under which—

- (a)the price for the goods or part of it is payable by instalments, and
- (b)the trader retains ownership of the goods until the conditions specified in the contract (for the payment of instalments or otherwise) are met; and it makes no difference whether or not the consumer possesses the goods.”³³¹⁹

In keeping with the position under the general law,³³²⁰ the [2015 Act](#) provides that a contract cannot be a hire-purchase agreement if it is a conditional sales contract,³³²¹ but the [2015 Act](#) also contains provisions which apply specifically to conditional sales contracts for the purposes of the consumer’s “right to reject”.³³²²

“Contracts for the hire of goods”

40-491 [Section 6\(1\) of the 2015 Act](#) provides that:

“A contract is for the hire of goods³³²³ if under it the trader gives or agrees to give the consumer possession of the goods with the right to use them, subject to the terms of the contract, for a period determined in accordance with the contract.”

This definition rewrites the definition provided for contracts generally by the [Supply of Goods and Services Act 1982](#), replacing its reference to a person bailing or agreeing to bail goods to another by way of hire,³³²⁴ with the phrase giving “the consumer possession of the goods with the right to use them”. As earlier noted, a contract for the hire of goods is not a hire-purchase agreement.³³²⁵

“Hire-purchase agreements”

40-492 The [2015 Act](#) provides that a contract is a hire-purchase agreement if “under the contract goods are hired³³²⁶ by the trader in return for periodical payments by the consumer” and if under the contract “ownership of the goods³³²⁷ will transfer to the consumer if the terms of the contract are complied with and:

- “(a)the consumer exercises an option to buy the goods,
- (b)any party to the contract does an act specified in it, or
- (c)an event specified in the contract occurs.”³³²⁸

It is provided that a contract is not a hire-purchase agreement if it is a conditional sales contract.³³²⁹ These provisions substantively follow the definition in the [Supply of Goods \(Implied Terms\) Act 1973](#), with the substitution of “ownership” for “property” and “hired” for “bailed”.³³³⁰

“Contracts for transfer of goods”

40-493 The [2015 Act](#) provides that:

“A contract to supply goods is a contract for transfer of goods³³³¹ if under it the trader transfers or agrees to transfer ownership³³³² of the goods to the consumer and—

- (a)the consumer provides or agrees to provide consideration otherwise than by paying a price, or
- (b)the contract is, for any other reason, not a sales contract or a hire-purchase agreement.”³³³³

As earlier explained, “contracts for transfer of goods” is therefore the residual category of “goods contracts”.³³³⁴ An example can be found where a trader supplies goods to a consumer in return for the supply by the consumer of other goods and money (as in the part-exchange of a second-hand car).³³³⁵ Another example may be found in a contract under which a trader agrees to repair the consumer’s property using materials or spare parts which the trader supplies.³³³⁶

Footnotes

- 3305 [2015 Act s.3\(2\)](#). Ch.2 does not apply to a contract for a trader to supply coins or notes to a consumer for use as currency; a contract for goods to be sold by way of execution or otherwise by authority of law; a contract intended to operate as a mortgage, pledge, charge or other security; or a contract made by deed and for which the only consideration is the presumed consideration imported by the deed: [s.3\(3\)](#). Particular provisions of the Act may apply or may apply differently according to the different types of “goods contracts” which *are* included: [s.3\(6\)](#) and, e.g. [s.17](#) (trader to have right to supply the goods, etc.) on which see below, paras [40-509](#)—[40-512](#).
- 3306 [2015 Act s.3\(5\)](#). cf. [1979 Act s.2\(2\)–\(3\)](#), above, para. [40-480](#).
- 3307 [2015 Act s.3\(4\)](#); heading preceding s.3.
- 3308 [2015 Act s.5\(1\)](#). cf. *Software Incubator Ltd v Computer Associates UK Ltd (C-410/19 EU:C:2021:742*, 16 September 2021 at paras 32–51, where the CJEU held that a contract for the supply of computer software together with a perpetual licence in return for payment of a fee *does* fall within the autonomous EU interpretation of “sale of goods” for the purposes of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] O.J. L382/17 (on which see generally Vol.I, paras [21-020](#) et seq.) whether it was supplied by electronic means or on a tangible medium, on which see above, para. [40-075](#) (note).
- 3309 [1979 Act s.2\(1\)](#) below, paras [46-020](#) et seq.
- 3310 [2015 Act s.4\(1\)](#) and cf. [1979 Act s.61\(1\)](#) defining “property” as “general property in goods, and not merely a special property”, on which see below, para. [46-013](#). In the *PST Energy 7 Shipping LLC v OW Bunker Malta (The Res Cogitans) [2016] UKSC 23, [2016] 2 W.L.R. 1193* the SC held (in a commercial context) that a contract providing for possession of goods to be given, coupled with a legal entitlement to use or consume them before the property in them is transferred upon payment is not a contract of sale of goods within the meaning of the [Sale of Goods Act 1979](#) (see below, para. [46-020](#) (note)). On the significance of this decision for the definition of “sales contract” for the purposes of the [2015 Act](#), see Benjamin’s Sale of Goods, 11th edn (2020), paras 14-068—14-071.
- 3311 [2015 Act s.2\(8\)](#). cf. the definition of “goods” under the [1979 Act s.61\(1\)](#) as “all personal chattels other than things in action and money” with further explanations, on which see below, para. [46-013](#).
- 3312 1999 Directive art.1(2)(b), though this provision also excludes from its definition of “consumer goods” “goods sold by way of execution or otherwise by authority of law”. cf. above, para. [40-059](#), which discusses *Wathelet v Garage Bietheres & Fils SPRL (C-149/15) EU:C:2016:840, [2017] 1 W.L.R. 865* on when a trader who acts on behalf

- of a private individual is to be treated as a “seller” of goods under the Consumer Sales Directive 1999.
- 3313 1999 Directive art.1(3).
- 3314 [2015 Act s.2\(5\)](#). This restriction does not apply to the other types of “goods contracts” governed by [Ch.2](#), but these other types of contract would not normally be the subject of public auction.
- 3315 See [2015 Act s.2\(6\)](#) referring to [s.11\(4\)](#) and [\(5\)](#) and [12](#) (both of which concern the information requirements under the 2011 Directive), [s.28](#) (delivery) and [s.29](#) (passing of risk) and “the other provisions of [Chapter 2](#) as they apply in relation to those sections”. The 2011 Directive makes special requirements as regards the information to be provided by the trader (art.6(3)) at “public auctions” (which it defines by art.2(13)), and excludes contracts so made from the rights of cancellation which a consumer may otherwise enjoy under the Directive: art.16(k). On these rights of cancellation see above, paras [40-115](#) et seq. See further on auction sales and the [2015 Act](#) Benjamin’s Sale of Goods, 11th edn (2020), para.14-062.
- 3316 cf. below, para.[46-026](#) on the position under the [Sale of Goods Act 1979](#).
- 3317 1999 Directive art.1(4) on which see *Schottelius v Seifert (C-247/16) EU:C:2017:638*, 7 September 2017 where the CJEU confirmed that the 1999 Directive does not apply to contracts for the provision of work and materials other than the two types of such contract which it specifically includes. Thus art.1(4) deems “contracts for the supply of consumer goods to be manufactured or produced” to be “contracts of sale” and art.2(5) provides that “[a]ny lack of conformity resulting from incorrect installation of the consumer goods shall be deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale of the goods and the goods were installed by the seller or under his responsibility”. On the latter, see below, para.[40-505](#) concerning [s.15 of the 2015 Act](#).
- 3318 Explanatory Notes 2015 para.58.
- 3319 [2015 Act s.5\(3\)](#).
- 3320 Below, para.[46-028](#).
- 3321 [2015 Act s.7\(4\)](#).
- 3322 [2015 Act ss.20\(14\), 22\(3\)\(a\)](#) and [24\(11\)](#) on which see below, paras [40-516](#), [40-518](#) and [40-522](#).
- 3323 See [2015 s.2\(8\)](#) and above, para.[40-489](#) for the definition of “goods”.
- 3324 [1982 Act s.6\(1\)](#).
- 3325 [2015 Act s.6\(2\)](#).
- 3326 “Hired” is to be read in accordance with [s.6\(1\): 2015 Act s.7\(2\)](#).
- 3327 On “ownership of the goods” see [2015 Act s.4\(1\)](#) and above, para.[40-479](#).
- 3328 [2015 Act s.7\(1\)-\(3\)](#).
- 3329 [2015 Act s.7\(4\)](#) and see [s.5\(3\)](#) for “conditional sales contract”, above, para.[40-490](#).
- 3330 Supply of Goods (Implied Terms) Act 1973 s.15(1) “hire-purchase agreement”. See also the definition of “hire-purchase agreement” under the [Consumer Credit Act 1974 s.189\(1\)](#), above, paras [41-310](#) et seq. and especially paras [41-314](#) and [41-360](#) (effect of the [Consumer Credit Act 1974](#)).

- 3331 On the definition of “goods” see [2015 Act s.2\(8\)](#) and above para.[40-489](#).
- 3332 On the definition of “ownership” see [2015 Act s.4\(1\)](#) and above para.[40-479](#).
- 3333 [2015 Act s.8](#).
- 3334 Above, para.[40-480](#).
- 3335 Explanatory Notes 2015 para.58.
- 3336 In *Wood v TUI Travel Plc (t/a First Choice) [2017] EWCA Civ 11, [2017] 1 Lloyd's Rep. 322* esp. at [27] it was held that in the case of a contract for a holiday for consumers under which a hotel is to provide food and drink, in the absence of express agreement to the contrary, the property in the meal transfers to them when it is served, whether or not that meal is accompanied with a service. As a result, such a contract is a “contract for the transfer of property in goods” under [s.4 of the Supply of Goods of Services Act 1982](#). (The decision related to a contract made before the coming into force of the [2015 Act](#) on 1 October 2015.)

(ii) - The Statutory Terms and “Goods Conforming to a Contract”

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(c) - “Goods Contracts”

(ii) - The Statutory Terms and “Goods Conforming to a Contract”

Introduction

- 40-494 The following paragraphs will set out the terms which the [2015 Act](#) provides are to be treated as included in the contracts to which [Ch.2 of Pt 1](#) applies (the “statutory terms”),³³³⁷ as well its provisions governing “conformity of the goods”,³³³⁸ but before doing so it is helpful to note that breach of the statutory terms which these provisions insert into contracts and the non-conformity of the goods to the contract do not relate to the Act’s scheme of rights to enforce terms about contracts in an entirely straightforward way.³³³⁹

The relationship between the statutory terms, non-conformity of the goods and the consumer’s remedies

- 40-495 At common law and under the [Supply of Goods \(Implied Terms\) Act 1973](#), the [Sale of Goods Act 1979](#) and the [Supply of Goods and Services Act 1982](#) (before the latter two were amended by the [Sale and Supply of Goods to Consumers Regulations 2002](#)³³⁴⁰), the customer’s remedies in respect of the goods or services rests on his or her establishing breach of that contract, whether that breach relates to an express or to an implied term, though for the purposes of the availability of rejection of goods and “treating the contract as repudiated” the [1979 Act](#) uses the distinction between conditions (where rejection is available) and warranties (where it is not).³³⁴¹ To this

relatively simple framework, the [2002 Regulations](#) added a supplementary set of rights for those dealing as consumer, which, following the Consumer Sales Directive 1999, rested on establishing that the goods do not conform to the contract,³³⁴² conformity being defined as referring to the situation where there was breach of an express term of the contract or to one of the statutory implied terms as to the goods’ description, quality or fitness for purpose³³⁴³: in effect, therefore, the consumer’s remedies still required proof of breach of contract. However, here the [2015 Act](#) is more complicated, though it does not adopt the apparently opaque, traditional distinction between conditions and warranties. The position under the [2015 Act](#) is best understood by starting with [s.19](#)’s overview of the consumer’s rights to enforce terms about contracts. [Section 19](#) begins by defining what is meant by reference to “goods conforming to a contract” for its own purposes and for the purposes of later provisions governing particular consumer remedies,³³⁴⁴ being references to:

- “(a)the goods conforming to the terms described in [sections 9, 10, 11, 13](#) and [14](#),
- (b)the goods not failing to conform to the contract under section [15](#) or [16](#), and
- (c)the goods conforming to requirements that are stated in the contract.”³³⁴⁵

At first sight, this looks very inclusive, but there are two omissions from this catalogue: first, breach of the term inserted by [s.12 of the Act](#), which gives contractual force to information required to be and actually supplied by the trader to the consumer under the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#) other than information concerning the main characteristics of the goods³³⁴⁶; and secondly, breach of the terms inserted by [s.17 of the Act](#), which concern the trader’s right to supply the goods, etc.³³⁴⁷; each of these omitted cases are provided with their own special remedial consequences.³³⁴⁸ [Section 19\(3\)](#) then provides more generally that goods that do not conform to the contract because of the breach of the statutory terms earlier listed³³⁴⁹ or under [s.16](#) (goods not conforming to contract if digital content does not conform) give rise to the short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject,³³⁵⁰ but [s.19\(3\)](#) does not apply to non-conformity under [s.15](#) (installation as part of conformity of the goods) nor to breach of requirements stated in the contract, both of which are stated as giving rise to the right to repair or replacement and the right to a price reduction or the final right to reject, but not, therefore, to the short-term right to reject.³³⁵¹ Moreover, this position has three further nuances. First, the pattern of remedies for breach of the statutory terms or non-conformity just set out³³⁵² is subject to [s.25](#)’s provisions on delivery by the trader of the wrong quantity of goods.³³⁵³ Secondly, the consumer’s short-term right to reject and the consumer’s right to reject in respect of breach of a term as to the trader’s right to supply are subject to [s.26](#)’s provisions on instalment deliveries.³³⁵⁴ And, thirdly, as [s.19\(8\)](#) explains, [s.28](#) makes special provision about remedies for the consumer for breach of a term about the time for delivery of goods in sales contracts; these remedies do not rest on “non-conformity” of the goods to the contract and fall outside the remedial scheme foreseen by [s.19](#).³³⁵⁵

- 40-496 To a considerable extent this pattern results from substantive differences between the statutory terms which the Act inserts and from the resulting appropriateness of some but not all the remedies which the Act foresees for consumers, but the complexity of the statutory provisions is unattractive in legislation aimed at simplification in the interests of accessibility of the law to consumers and their advisers. The following paragraphs will, therefore, refer to the relevant remedies arising for breach of the particular statutory terms or non-conformity of the goods with the contract individually, leaving until later detailed discussion of the remedies themselves and their relationship with “other remedies”.³³⁵⁶

Presumption of non-conformity on delivery

- 40-497 Following the requirement of art.5(3) of the 1999 Directive as regards the contracts of sale (including sale and installation) to which it applies,³³⁵⁷ s.19(14) provides that:

“... goods which do not conform to the contract at any time within the period of six months beginning with the day on which the goods were delivered to the consumer must be taken not to have conformed to it on that day.”

This rule does not apply if it is established that the goods did conform to the contract on that day or if its application is incompatible with the nature of the goods or with how they fail to conform to the contract.³³⁵⁸ According to the Court of Justice of the EU in *Faber v Autobedrijf Hazet Ochten BV*,³³⁵⁹ in order to benefit from the presumption, a consumer must first establish that a “lack of conformity” exists (though he or she need not establish its cause or that its origin is attributable to the seller³³⁶⁰) and, secondly, that this lack of conformity became “physically apparent” within six months of delivery of the goods.³³⁶¹ Having done so, the consumer need not establish that the lack of conformity existed at the time of delivery, the short period of six months allowing an assumption that it already existed “in embryonic form” on delivery.³³⁶² On the other hand, the seller may provide evidence that the lack of conformity did not exist on delivery, by establishing that its “cause or origin ... is to be found in an act or omission which took place after that delivery”.³³⁶³ But if the seller fails to do so, the consumer buyer can rely on the rights derived from the 1999 Directive.³³⁶⁴

- 40-498 The 2015 Act extends the benefit of this rebuttable presumption of non-conformity to all “goods contracts”,³³⁶⁵ and not merely to contracts of sale of goods and for the supply of goods to be manufactured or produced (“sales contracts” under the 2015 Act s.5³³⁶⁶) as required by the 1999

Directive.³³⁶⁷ However, the presumption of non-conformity in s.19 of the 2015 Act applies only for the purposes of the consumer's right to repair or replacement and right to a price reduction or final right to reject and not, therefore, for the purposes of the consumer's short-term right to reject.³³⁶⁸ Moreover, the presumption applies only in respect of breaches of the statutory terms governing the quality, fitness for particular purpose and description of goods, goods matching a sample or model,³³⁶⁹ for non-conformity arising from inadequate installation of the goods,³³⁷⁰ arising from digital content that does not conform,³³⁷¹ or because of a breach of requirements that are stated in the contract.³³⁷² The presumption does not, therefore, apply to breach of the terms relating to the trader's right to supply.³³⁷³

Goods to be of satisfactory quality

40-499 The 2015 Act divides the famous provision in s.14 of the Sale of Goods Act 1979 and equivalent provisions in the Supply of Goods (Implied Terms) Act 1973 and Supply of Goods and Services Act 1982,³³⁷⁴

U into two parts: s.9(1) inserts into all “goods contracts”³³⁷⁵

U a statutory term that the goods are of satisfactory quality, whereas s.10 inserts a statutory term that the goods are fit for any particular purpose made known to the trader.³³⁷⁶

U The content of s.9 follows closely the wording of s.14(2) of the 1979 Act as formerly amended by the 2002 Regulations, s.9(2)–(7) providing that:

Section 9

“(2) The quality of goods is satisfactory if they meet the standard that a reasonable person would consider satisfactory, taking account of—

(a) any description of the goods,

(b) the price or other consideration for the goods (if relevant), and

(c) all the other relevant circumstances (see subsection (5)).

(3) The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods—

- (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.

(4) The term mentioned in subsection (1) does not cover anything which makes the quality of the goods unsatisfactory—

- (a)** which is 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,

[3377](#)

 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.

(5) The relevant circumstances mentioned in subsection (2)(c) include any public statement about the specific characteristics of the goods made by the trader, the producer or any representative of the trader or the producer.

[3378](#)



(6) That includes, in particular, any public statement made in advertising or labelling.

(7) But a public statement is not a relevant circumstance for the purposes of subsection (2)(c) if the trader shows that—

- (a)** when the contract was made, the trader was not, and could not reasonably have been, aware of the statement,

- (b) before the contract was made, the statement had been publicly withdrawn or, to the extent that it contained anything which was incorrect or misleading, it had been publicly corrected, or
- (c) the consumer’s decision to contract for the goods could not have been influenced by the statement.”

Section 9 further provides that a term about the quality of the goods may be treated as included in a goods contract as a matter of custom.

3379

U It is submitted that earlier case-law on the significance of the implied term in s.14(2) of the 1979 Act will remain helpful for the interpretation of s.9 of the 2015 Act,

3380

U though the latter’s consumer context will need to be borne in mind,

3381

U as will the fact that s.9 implemented the requirements of art.2 of the Consumer Sales Directive 1999 regarding the conformity of the goods with the contract.

3382

U Under s.19 of the 2015 Act, goods which do not conform to the term described in s.9 are not “conforming goods” and may attract (subject to their own conditions) the short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject,

3383

U as well as any “other remedies” available under the general law.

3384

U The 2015 Act provides that contract terms which seek to exclude or restrict liability in the trader arising under s.9 are not binding on the consumer.

3385

U

Conformity of the goods and regulatory requirements

40-499A

U

Section 9 of the 2015 Act reflects the Consumer Sales Directive 1999 art.2(2) which sets out the circumstances in which goods are (rebuttably) presumed to be in conformity with the contract including, in particular, where the goods “show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods ...”.

³³⁸⁶

U In *DS v Porsche Inter Auto GmbH & Co KG, Volkswagen AG* the Court of Justice of the EU considered this provision in the context of diesel motor vehicles sold to consumers which were fitted with software which reduced the effectiveness of emission control systems and which therefore constituted a “defeat device” prohibited by an EU Regulation concerned with the approval of vehicle types with respect to their emissions (the “Emissions Regulation”

³³⁸⁷

U).

³³⁸⁸

U In the view of the Court of Justice, when acquiring a vehicle model of a type that has been approved and is, therefore, accompanied by a “certificate of conformity” provided by its manufacturer certifying that it belongs to a type which “complied with all regulatory acts at the time of its production”,

³³⁸⁹

U a consumer can reasonably expect that the Emissions Regulation and, in particular, its prohibition of “defeat devices”, has been complied with in respect of that vehicle, even in the absence of specific contractual clauses.

³³⁹⁰

U As a result, a vehicle which does not comply with this regulatory prohibition does not “show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods” within the meaning of the 1999 Directive, even though the vehicle had been EC type-approved allowing it to be driven on the road.

³³⁹¹

U

Goods to be fit for particular purpose

40-500 Section 10 of the 2015 Act inserts a statutory term into all “goods contracts”³³⁹² based on s.14(3) of the 1979 Act and equivalent provisions in the 1973 and 1982 Acts,³³⁹³

“... 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”³³⁹⁴

“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.”³³⁹⁵

However, this term is not to be “treated as included” if “the circumstances show that the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the trader”.³³⁹⁶ Section 10 further provides that a term about the fitness of the goods for a particular purpose may be treated as included in a goods contract as a matter of custom.³³⁹⁷ Under s.19 of the Act, goods which do not conform to the term described in s.10 are not “conforming goods” and may attract (subject to their own conditions) the short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject,³³⁹⁸ as well as any “other remedies” available under the general law.³³⁹⁹ The 2015 Act provides that contract terms which seek to exclude or restrict liability in the trader arising under s.10 are not binding on the consumer.³⁴⁰⁰

Goods to be as described

40-501



Section 11(1)–(3) of the 2015 Act follow closely the earlier legislative provision for implied term in the 1979 Act for sale by description (and the equivalent provisions in the 1973 Act and the 1982 Act),³⁴⁰¹ providing that contracts to supply goods³⁴⁰² by description³⁴⁰³

“are to be treated as including a term that the goods will match the description”.³⁴⁰⁴ However, the 2015 Act made important new provision for this purpose by way of implementation of the Consumer Rights Directive 2011³⁴⁰⁵ and all but replacing its earlier implementation by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the “2013 Regulations”)³⁴⁰⁶ to the effect that:

“(4) Any information that is provided by the trader about the goods and is information mentioned in paragraph (a) of Schedule 1 or 2 to [the 2013 Regulations] (main characteristics of goods) is to be treated as included as a term of the contract.

(5)A change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.”³⁴⁰⁷

The inclusion of this information in [s.11 of the 2015 Act](#) has the effect of attracting a broader range of remedies under the Act than is provided for breach of the terms derived from information supplied by the trader inserted by [s.12 of the 2015 Act](#), which will be considered in the following paragraph, since breach of the statutory terms inserted by [s.11](#) leads to the goods not “conforming” within the meaning of [s.19\(1\) of the Act](#) and thereby makes available (subject to their own conditions) the short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject,³⁴⁰⁸ as well as any “other remedies” available under the general law.³⁴⁰⁹ This is not the case as regards “other information” within the meaning of [s.12 of the 2015 Act](#). The [2015 Act](#) provides that contract terms which seek to exclude or restrict liability in the trader arising under [s.11](#) are not binding on the consumer.³⁴¹⁰

Other pre-contract information included in contract

⁴⁰⁻⁵⁰² [Section 12 of the 2015 Act](#) applies to all goods contracts³⁴¹¹ and provides that where a trader was required to provide information under the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#),³⁴¹² any of that information that was provided by the trader other than the information concerning the main characteristics of the contract³⁴¹³ “is to be treated as included as a term of the contract”.³⁴¹⁴ [Section 12\(3\)](#) provides that a change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.³⁴¹⁵ As will be seen, the [2015 Act](#) therefore distinguishes between information concerning the main characteristics of the contract (which becomes a statutory term under [s.11](#)) and other information (which becomes a statutory term under [s.12](#)). The significance of this treatment lies in the differences in remedies available for breach of the terms in the two sections. As has been seen, breach of a statutory term inserted by [s.11](#) makes available (subject to their own conditions) the short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject,³⁴¹⁶ as well as any “other remedies” available under the general law.³⁴¹⁷ However, breach of any statutory term inserted by [s.12](#) does not render the goods “non-conforming” within the meaning of [s.19](#).³⁴¹⁸ Instead, [s.19\(5\)](#) provides that:

“If the trader is in breach of a term that [section 12](#) requires to be treated as included in the 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.”

This is clearly a very much more restricted remedy than the set of remedies available in respect of breach of the terms treated as included more generally³⁴¹⁹ as it is restricted to “the amount of any costs incurred by the consumer as a result of the breach”. The Explanatory Notes to the **2015 Act** state that this remedy could be supplemented by a claim for damages under the general law where the consumer has incurred costs or losses above this amount,³⁴²⁰ but if this is right, it is difficult to see what practical role the restriction in s.19(5) is intended to play.³⁴²¹ The **2015 Act** provides that contract terms which seek to exclude or restrict liability in the trader arising under s.12 are not binding on the consumer.³⁴²²

Goods to match sample

40-503 Section 13 of the **2015 Act** applies to a “contract to supply goods by reference to a sample of the goods that is seen or examined by the consumer before the contract is made”,³⁴²³ and provides that such a contract is to be treated as including a term that:

- “(a)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, and
- (b)the goods will be free from any defect that makes their quality unsatisfactory and that would not be apparent on a reasonable examination of the sample.”³⁴²⁴

This statutory term differs from the term implied by s.15 of the **1979 Act** (and the equivalent provisions in the **1973** and **1982 Acts**³⁴²⁵), in that, instead of referring to “the bulk” corresponding with the sample in quality,³⁴²⁶ it instead provides more simply (and more appropriately for the consumer context) 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 was made.³⁴²⁷ Under s.19 of the **Act**, goods which do not conform to the term described in s.13 are not “conforming goods” and may attract (subject to their own conditions) the short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject,³⁴²⁸ as well as any “other remedies” available under the general law.³⁴²⁹ The **2015 Act** provides that contract terms which seek to exclude or restrict liability in the trader arising under s.13 are not binding on the consumer.³⁴³⁰

Goods to match a model seen or examined

- 40-504 Section 14 of the 2015 Act makes new provision governing contracts to supply goods³⁴³¹ “by reference to a model of the goods that is seen or examined by the consumer before entering into the contract”,³⁴³² providing that such a contract is to be treated as including:

“... a term that the goods will match the model except 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.”³⁴³³

No definition is given by the Act of “model” for this purpose, but the accompanying Explanatory Notes give as an example a case of a consumer viewing a television on the floor of a shop but receiving a boxed television from the stockroom; if the television received does not match the model seen, its seller would be liable for breach of the statutory term in s.14.³⁴³⁴ Under s.19 of the Act, goods which do not conform to the term described in s.14 are not “conforming goods” and may attract (subject to their own conditions) the short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject,³⁴³⁵ as well as any “other remedies” available under the general law.³⁴³⁶ The 2015 Act provides that contract terms which seek to exclude or restrict liability in the trader arising under s.14 are not binding on the consumer.³⁴³⁷

Installation as part of conformity of the goods

- 40-505 Section 15 of the 2015 Act makes special provision for this purpose, stating that:

Section 71

“... goods do not conform to a contract to supply goods if—

- (a) installation of the goods forms part of the contract,
- (b) the goods are installed by the trader or under the trader’s responsibility, and
- (c) the goods are installed incorrectly.”

³⁴³⁸

This reflects a requirement to the same effect in the 1999 Directive.³⁴³⁹ If the installation is carried out in the circumstances foreseen by s.15, the trader must see that the goods are installed correctly: a strict obligation, rather than an obligation to take reasonable care and skill.³⁴⁴⁰ Under s.19 of the Act, goods which do not conform to the contract under s.15 are not “conforming goods” within the meaning of that section,³⁴⁴¹ but attract their own set of remedies (subject to their own conditions): the right to repair or replacement and the right to a price reduction or the final right to reject,³⁴⁴² as well as any “other remedies” available under the general law.³⁴⁴³ This means that where goods do not conform to the contract owing to their incorrect installation, the consumer does not have the short-term right to reject.³⁴⁴⁴ The 2015 Act provides that contract terms which seek to exclude or restrict liability in the trader arising under s.15 are not binding on the consumer.³⁴⁴⁵

Goods not conforming to contract if digital content does not conform

- 40-506 Part 1 of the 2015 Act defines “digital content” as “data which are produced and supplied in digital form”³⁴⁴⁶ and distinguishes generally between “contracts for a trader to supply digital content to a consumer” (which are regulated specially by Pt 1 Ch.3³⁴⁴⁷) and contracts where the digital content is included within goods, which may be regulated by Pt 1 Ch.2 of the Act.³⁴⁴⁸ This appears from s.16(1) of the Act which provides that:

Section 16

“Goods (whether or not they conform otherwise to a contract to supply goods) do not conform to it if—

- (a) the goods are an item that includes digital content, and
- (b) the digital content does not conform to the contract to supply that content (for which see section 42(1)).”

As a result, where digital content is included within goods (for example, a disk) and the digital content does not conform to the contract,³⁴⁴⁹ then the goods themselves will not conform to the contract. Under s.19 of the Act, this means that the consumer may enjoy (subject to their own conditions) the short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject,³⁴⁵⁰ as well as any “other remedies” available under the general law.³⁴⁵¹ This range of remedies includes the short-term and final right to reject which are not available under Ch.3 in respect of digital content supplied other than where included in goods.³⁴⁵²

The [2015 Act](#) provides that contract terms which seek to exclude or restrict liability in the trader arising under [s.16](#) are not binding on the consumer.³⁴⁵³

No other terms about quality or fitness except express terms

- 40-507 As earlier noted, the [2015 Act](#) abandoned the traditional terminology of implied term in favour of a statutory formula according to which a relevant term is “treated as included” in the contract.³⁴⁵⁴ However, the Act still finds it necessary to state that the statutory terms so included are not to be supplemented by other terms about quality or fitness, mirroring the earlier statutory formula as to implied terms.³⁴⁵⁵ The result is [s.18\(1\)](#) according to which:

“Except as provided by [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, unless the term is expressly included in the contract.”³⁴⁵⁶

There are two points to be noted here. First, [s.18\(1\)](#) refers to only *some* of the statutory terms contained in [Pt 1 Ch.2 of the Act](#): it refers to the terms concerning satisfactory quality, fitness for purpose, goods matching a sample, and goods not conforming to contract if digital content does not conform to the contract,³⁴⁵⁷ but it does not refer to the statutory term as to goods being as described, relating to pre-contractual information other than relating to the main characteristics of the goods, to goods matching a model seen or examined, nor to the trader’s right to supply the goods, etc.³⁴⁵⁸ As regards the terms which appear in the general legislation (such as the [1979 Act](#)) as implied terms, this follows the earlier legislative pattern³⁴⁵⁹ and the exclusions more generally continue to make substantive sense. Secondly, however, [s.18\(1\)](#) refers to a term that is “expressly included in the contract” as to the quality or fitness for any particular purpose of the goods. Again, it must be right for the new statutory terms to be capable of being supplemented by express terms, but it is unfortunate that the key provision in [s.19](#) governing the consumer’s rights to enforce terms about goods does not refer to express terms about the goods, their quality or fitness for purpose, but instead refers to “the goods conforming to requirements that are stated in the contract”.³⁴⁶⁰ It is submitted, however, that the latter expression is wide enough to include express terms as to the quality or fitness for any particular purpose of the goods within the meaning of [s.18\(1\)](#), as well as to any other stipulation (“requirement”) as to the goods (such as their place of manufacture or their colour). The significance of this is that breach of a “requirement stated in the contract” gives rise only to a limited set of remedies, notably *not* including the short-term right to reject, as noted in the following paragraph.

Rights for consumer in respect of goods failing to conform to requirements stated in the contract

- 40-508 **Section 19(4) of the 2015 Act** provides that where goods do not conform to the contract because there is a breach of a requirement stated in the contract,³⁴⁶¹ the consumer has the right to repair or replacement and the right to a price reduction or the final right to reject,³⁴⁶² but not therefore the short-lived right to reject.³⁴⁶³ The consumer may also enjoy the “other remedies” available under the general law³⁴⁶⁴ and, exceptionally, in the case of a breach of an express term³⁴⁶⁵ these “other remedies” include the right to treat the contract as at an end (i.e. to terminate the contract).³⁴⁶⁶ Under the general law, the consumer will have a right to terminate if the breach of the express term has the effect of substantially depriving the consumer of the whole benefit of what the consumer was contracting for or if the express term “goes to the root of the contract” and thus amounts to a condition.³⁴⁶⁷

Trader to have right to supply the goods, etc.

- 40-509 **Section 17** provides statutory terms governing the trader’s right to supply the goods, reflecting here the diversity of types of contract included under the broad category of “goods contracts”. So, s.17 distinguishes between a “contract for the hire of goods” and other goods contracts, i.e. sales contracts, hire-purchase contracts and contracts for the transfer of goods,³⁴⁶⁸ and then provides for cases where the parties to the contract intend that it should transfer a more limited title.³⁴⁶⁹

Contracts for the hire of goods

- 40-510 **Section 17(1) of the 2015 Act** provides that a contract for the hire of goods is to be treated as including a term that:

“... at the beginning of the period of hire the trader must have the right to transfer possession of the goods by way of hire for that period.”³⁴⁷⁰

Section 17(3) provides a further statutory term:

“... that the consumer will enjoy quiet possession of the goods for the period of the hire except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed or known to the consumer before entering into the contract.”

These terms reflect closely the position under the [1982 Act](#), except that they do not use the language of bailment.³⁴⁷¹ Again following the [1982 Act s.17](#) provides that it does not affect the right of the trader to repossess the goods where the contract provides or is to be treated as providing for this.³⁴⁷² The [2015 Act](#) makes special provision governing contract terms which seek to exclude or restrict liability in the trader arising under [s.17](#) in respect of contracts for the hire of goods.³⁴⁷³

Other “goods contracts”

- 40-511 In the case of other goods contracts, i.e. sales contracts, hire-purchase contracts and contracts for the transfer of goods,³⁴⁷⁴ [s.17\(1\)](#) provides that the contract is to be treated as including a term:

“... that the trader must have the right to sell or transfer the goods at the time when ownership of the goods is to be transferred.”³⁴⁷⁵

[Section 17\(2\)](#) provides for a further term to be treated as included that:

Section 17

(a) the goods are free from any charge or encumbrance not disclosed or known to the consumer before entering into the contract,

(b) the goods will remain free from any such charge or encumbrance until ownership of them is to be transferred, and

(b) the consumer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.”

These statutory terms follow closely the terms implied generally by the [1979 Act](#) (and equivalent terms implied by the [1973](#) and [1982 Acts](#)).³⁴⁷⁶ The [2015 Act](#) provides that terms in these goods contracts which seek to exclude or restrict liability in the trader arising under [s.17](#) are not binding on the consumer.³⁴⁷⁷

Contracts where the parties intend that a more limited title should be transferred

- 40-512 As regards all types of “goods contracts”,³⁴⁷⁸ s.17 provides special treatment:

Section 17

“... if the contract shows, or the circumstances when they enter into the contract imply, that the trader and the consumer intend the trader to transfer only—

- (a) whatever title the trader has, even if it is limited, or
- (b) whatever title a third person has, even if it is limited.”

³⁴⁷⁹

Where this is the case, the contract is to be treated as including a term that all charges or encumbrances known to the trader and not known to the consumer were disclosed to the consumer before entering into the contract and a term that the consumer’s quiet possession of the goods will not be disturbed by the trader, and will not be disturbed by a person claiming through or under the trader, unless that person is claiming under a charge or encumbrance that was disclosed or known to the consumer before entering into the contract.³⁴⁸⁰ Where the parties intend that the trader should transfer only whatever title a third person has, even if it is limited, then the contract is also to be treated as including a term that the consumer’s quiet possession of the goods will not be disturbed by the third person, and will not be disturbed by a person claiming through or under the third person, unless the claim is under a charge or encumbrance that was disclosed or known to the consumer before entering into the contract.³⁴⁸¹ These provisions mirror (with some rewording) earlier provisions in the 1979 Act and the equivalent provisions in the 1973 and 1982 Acts.³⁴⁸²

Rights arising from breach of terms in s.17

- 40-513 As earlier noted, s.19 of the 2015 Act does not deem goods supplied in breach of the terms included by s.17 to render the goods “non-conforming” for its purposes.³⁴⁸³ Instead, s.19(6) provides that breach of the term included by s.17(1) on the trader’s right to supply gives rise to a right in the consumer to reject the goods,³⁴⁸⁴ which may include a right of partial rejection.³⁴⁸⁵ Breach of such a term or of the terms treated as included by the remainder of s.17³⁴⁸⁶ may give rise to “other

remedies” under the general law (notably, damages), though these remedies do not include a right to reject the goods and terminate the contract.³⁴⁸⁷ The 2015 Act provides in principle that contract terms which seek to exclude or restrict liability in the trader arising under s.17 are not binding on the consumer, but makes special provision in respect of contracts of hire.³⁴⁸⁸

Footnotes

- 3337 2015 Act ss.9–14, 17–18.
- 3338 2015 Act ss.15 and 16, below, paras 40-505—40-506.
- 3339 See below, paras 40-514 et seq. on the scheme of remedies itself.
- 3340 SI 2002/3045 above, para.40-462.
- 3341 1979 Act s.11 see below, para.46-056.
- 3342 e.g. 1979 Act s.48A(1)(b); 1999 Directive art.2 above, para.40-461. The person dealing as consumer had the benefit of a presumption of non-conformity: 1979 Act s.48A(3). Both these provisions of the 1979 Act (which were contained in Pt 5A of that Act) were deleted by the 2015 Act: above, para.40-474.
- 3343 e.g. 1979 Act s.48F (before its deletion by the 2015 Act). This special scheme therefore did not apply in respect of breach by the seller, etc. of the implied condition as to title or right to possession in the 1973 Act s.8, the 1979 s.12 or the 1982 Act ss.2 and 7.
- 3344 2015 Act s.19(1) referring to ss.22–24 of the same Act.
- 3345 2015 Act s.19(1)(a)–(c).
- 3346 On which see above, paras 40-063 et seq. and esp. at 40-108 and below, para.40-502. The special remedial consequence of breach of this statutory term is set by s.19(5) of the 2015 Act. Information provided by the trader concerning the main characteristics of the goods as required by the 2013 Regulations is inserted as a term of the contract under s.11 of the 2015 Act, which is included within the general scheme of s.19(1): below, para.40-501.
- 3347 The special remedial consequence of breach of this term is set by s.19(6) of the 2015 Act: below, paras 40-509—40-513. Confusingly, while s.19(1) does not include goods conforming to the terms in s.17 as “conforming goods” for its own purposes or for the purposes of ss.22–24, s.21(12) specifically includes goods conforming to the terms in s.17 as goods conforming to the contract for the purposes of s.21 which concerns the partial rejection of goods by the consumer. Moreover, s.19(2) provides that for the purposes of ss.19, and 22 to 24, a failure to conform as defined by subs.(1)(a) to (c) is not a failure to conform to the contract if it has its origin in materials supplied by the consumer. Finally, it is not entirely clear whether s.19’s reference to “the goods conforming to requirements that are stated in the contract” refers merely to a subset of express terms as ordinarily understood by English law, especially given that s.18(1) refers to the possibility of such an express term using this traditional expression: on which see below, para.40-507.

- 3348 The special remedial consequence of breach of these statutory terms are set by the [2015 Act](#) by s.[19\(5\)](#) and [19\(6\)](#) respectively: below, paras [40-502](#) and [40-513](#).
- 3349 i.e. inserted by [2015 Act ss.9, 10, 11, 13 and 14](#) (again omitting reference to [s.12](#)).
- 3350 [2015 Act s.19\(3\)](#), referring to ss.[20, 22–24](#) of the same Act.
- 3351 [2015 Act s.19\(4\)](#) referring to ss.[20, 23–24](#) of the same Act.
- 3352 i.e. under [s.19\(3\)–\(6\)](#) of the 2015 Act.
- 3353 [2015 Act s.19\(7\)](#) referring to s.[19\(3\) to \(6\)](#): below, para.[40-527](#).
- 3354 [2015 Act s.19\(7\)](#) referring to s.[19\(3\)\(a\)](#) and [\(6\)](#) respectively: below, para.[40-528](#).
- 3355 Below, para.[40-529](#).
- 3356 Below, paras [40-514](#) et seq.
- 3357 1999 Directive art.[5\(3\)](#).
- 3358 [2015 Act s.19\(15\)](#).
- 3359 [C-497/13 EU:C:2015:357, 4 June 2015 \(“Faber \(C-497/13\)”\).](#)
- 3360 *Faber (C-497/13)* at para.70.
- 3361 *Faber (C-497/13)* at para.71.
- 3362 *Faber (C-497/13)* at para.72 quoting European Commission, Explanatory Memorandum to the proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees, COM(95) 520 final, p.12.
- 3363 *Faber (C-497/13)* at para.73.
- 3364 *Faber (C-497/13)* at para.74.
- 3365 As defined by [s.3\(1\)](#), above, paras [40-487](#)—[40-493](#), following the general scheme of Ch.2 of Pt 1 as reflected in [s.19](#).
- 3366 [2015 Act s.5](#) on which see above, paras [40-488](#)—[40-489](#).
- 3367 1999 Directive art.[1\(1\)](#) and [\(4\)](#).
- 3368 [2015 Act s.19\(14\)](#) referring to [s.19\(3\)\(b\)](#) and [\(c\)](#) and [\(4\)](#) (and so not including [s.19\(3\)\(a\)](#))’s provision on the short-term right to reject.
- 3369 [2015 Act s.19\(14\)](#) referring to [s.19\(3\)\(b\)](#) and [\(c\)](#) and [\(4\)](#), which themselves refer to ss.[9, 10, 11, 13, and 14](#).
- 3370 [2015 Act s.19\(14\)](#) referring to [19\(4\)](#) which itself refers to [s.15](#).
- 3371 [2015 Act s.19\(14\)](#) referring to [19\(3\)](#) which itself refers to [s.16](#).
- 3372 [2015 Act s.19\(14\)](#) referring to [s.19\(4\)](#) which itself refers to breach of requirements that are stated in the contract.
- 3373 [2015 Act s.19\(14\)](#) refers to [s.19\(3\)\(b\)](#) and [\(c\)](#) and [\(4\)](#), none of which relate to breach of the terms in [s.17](#). Breaches of the terms included by [s.12](#) are also omitted, but they do not give rise to the rights mentioned by [s.19\(3\)](#) and [\(4\)](#): [s.19\(5\)](#).
- 3374 i.e. [1973 Act s.10](#) and the [1982 Act s.4](#) and [9](#).
- 3375 On which see above, paras [40-487](#)—[40-493](#).
- 3376 Below, para.[40-500](#).
- 3377

art.2(3) of the 1999 Directive (which was implemented by the words in the text) provides that “[t]here shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity ...”. In *DS v Porsche Inter Auto GmbH & Co KG, Volkswagen AG* (C-145/20) AG Rantos referred to the consumer’s awareness under art.2(3) as being “objective in nature” and advised that the condition could not apply to a consumer’s hypothetical readiness to acquire the goods in question if he had been aware of the lack of conformity, which was “subjective”: Opinion of AG Rantos, 23 September 2021, paras 157–158. The CJEU agreed that art.2(3) did not apply to the case before it as it was not disputed that, at the time of the sale of the goods in question, the consumer was not aware of the alleged lack of conformity and could not have reasonably been aware of it: (*C-145/20 EU:C:2022:572*, 14 July 2022 at paras 83 and 84. On this case more generally, see below, para.[40-499A](#).

[3378](#) [2015 Act s.59\(1\)](#) defines “producer in relation to goods or digital content” as the manufacturer, the importer into the United Kingdom, or any person who purports to be a producer by placing the person’s name, trade mark or other distinctive sign on the goods or using it in connection with the digital content”, a definition deriving from the 1999 Directive art.1(2)(d) but amended on IP completion day (on which see above, para.[40-004](#) and Vol.I, paras [1-020](#) et seq.), so as to substitute the “United Kingdom” for the “European Economic Area” in this definition: [Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\)](#) reg.3(3) (reg.1(3)’s reference to reg.3’s coming into force on “exit day” must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020](#) s.39(1), Sch.5 para.1). The [2018 Regulations](#) reg.11 provides that “nothing in regulation 3 [which amends the [2015 Act](#)] … applies to a contract entered into before exit day”.

[3379](#) [2015 Act s.9\(8\)](#). cf. below, para.[46-094](#).

[3380](#) On which see below, paras [46-095](#) et seq.

[3381](#) For an example of the application of [s.9 of the 2015 Act](#), see *Pendragon v Coom Unreported 22 March 2021* (Cardiff CC) (puppy sold as a pet which suffered from health defect was not of satisfactory quality).

[3382](#) See, in particular, below, para.[40-499A](#). On the 1999 Directive generally, see above, para.[40-461](#).

[3383](#) [2015 Act s.19\(1\)\(a\)](#) and [s.19\(3\)](#) referring to [ss.20](#) and [22](#) (short-term right to reject, on which see below, paras [40-515](#)–[40-519](#)); [s.23](#) (right to repair or replacement, on which see below, para.[40-520](#)) and [s.24](#) (the right to a price reduction or the final right to reject, on which see below, paras [40-521](#)–[40-522](#)).

[3384](#)

- 3385 2015 Act s.19(9), as explained and restricted by s.19(10)–(13), below, para.40-526.
 2015 Act s.31(1)(a) and see below, para.40-535.
- 3386 1999 Directive art.2(2)(d). For the terms of s.9 of the 2015 Act see above, para.40-499.
- 3387 Regulation (EC) 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information [2007] O.J. L171/1 esp. arts 3(10) and 5(2).
- 3388 *DS v Porsche Inter Auto GmbH & Co KG, Volkswagen AG (C-145/20) EU:C:2022:572*, 14 July 2022. The case was joined in the AG’s opinion of 23 September 2021 with *GSMB Invest GmbH & Co KG v Auto Krainer Gesellschaft mbH (C-128/20)* and *IR v Volkswagen AG (C-134/20)*, but these cases did not raise the questions of interpretation of the 1999 Directive noted in the text. The CJEU gave separate judgments in respect of these two other cases: (*C-128/20*) EU:C:2022:570 and (*C-134/20*) EU:C:2022:571, both of 14 July 2022.
- 3389 See Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) [2007] O.J. L263/1 arts 3(36) and 18(1).
- 3390 *DS v Porsche Inter Auto GmbH & Co KG, Volkswagen AG (C-145/20)* at para.54.
- 3391 *DS v Porsche Inter Auto GmbH & Co KG, Volkswagen AG (C-145/20)* at paras 55–56. AG Rantos had also advised (Opinion of 23 September 2021 at para.147) that “in the absence of an accurate certificate of conformity, the vehicle concerned does not comply ‘with the description given by the seller’, within the meaning of Article 2(2) (a) of [the 1999 directive]. Similarly, that vehicle is not ‘fit for any particular purpose for which the consumer requires [it]’ and is not ‘fit for the purposes for which goods of the same type are normally used’, within the meaning of Article 2(2)(b) and (c) of that directive”. The CJEU did not comment on these other possible aspects of non-conformity which had not been raised by the preliminary reference. The CJEU also held (at paras 82–97) that the non-conformity of the goods which it had identified was not “minor” within the meaning of the restriction on the availability of “rescission” for non-conformity of the goods in art.3(5) of the 1999 Directive, but this point is not relevant to the 2015 Act where rejection of the goods by the consumer by which the latter treats the contract as at an end (s.20(4) of the 2015 Act) is not conditional on the contractual non-conformity of the goods being not minor, this constituting an enhanced protection for consumers as permitted by art.8(1) of the 1999 Directive. In *Crossley v Volkswagen Aktiengesellschaft [2021] EWHC 3444 (QB)* the HC (deciding after the AG’s opinion

but before the CJEU’s judgment noted in the text) refused to grant summary judgment for the benefit of group litigation claimants against car dealers from which they had bought vehicles fitted with defeat devices on the basis that it was clear that the dealers were in breach of the implied term as to satisfactory quality in [s.14 of the Sale of Goods Act 1979](#) (which was applicable at the relevant time). In this respect, the claimants had argued that the vehicles’ certificates of conformity were invalid due to the vehicles’ non-compliance with the Emissions Regulation, that therefore a person driving such a vehicle would be committing a criminal offence under the [Road Traffic Act 1988 s.42\(b\)](#) and would be at risk of being “de-registered” by the relevant vehicle licensing authority: [\[2021\] EWHC 3444 \(QB\)](#) at [141]. However, the HC held that the fact that a certificate of conformity is inaccurate does not mean that it is “necessarily invalid in the sense of being void” as the claimants contended ([\[2021\] EWHC 3444 \(QB\)](#) at [185] and [203]) and that it was not clear that any criminal offences would be committed by use of a vehicle with a defeat device ([\[2021\] EWHC 3444 \(QB\)](#) at [219], [229]–[230], and [247]–[248]). Moreover, even if a criminal offence would be committed, there remained a number of issues as regards the application of the test of satisfactory quality for this purpose which made it unsuitable for summary judgment: [\[2021\] EWHC 3444 \(QB\)](#) at [260] and [263]–[266]. The group litigation was later settled: *The Times*, 25 May 2022.

3392 On which see above, paras [40-487](#)–[40-493](#).

3393 i.e. [1973 Act s.10](#) and the [1982 Act s.4](#) and [9](#).

3394 [2015 Act s.10\(1\)](#). [Section 10\(2\)](#) (qualified by [s.10\(4\)](#)) provides that the statutory term also applies to a contract to supply goods if “(a) the goods were previously sold by a credit-broker to the trader, (b) in the case of a sales contract or contract for transfer of goods, the consideration or part of it is a sum payable by instalments, and (c) before the contract is made, the consumer makes known to the credit-broker (expressly or by implication) any particular purpose for which the consumer is contracting for the goods” and see the definitions of “credit-broker” and “credit-brokerage” in [s.59\(1\) of the 2015 Act](#). As explained below in relation to the equivalent provision in the [1979 Act s.14](#), thus intends to include instalment credit transactions where the supplier of the goods, e.g. a retailer, sells the goods to a finance company which then sells them to the buyer on credit terms, the effect of the provision being to make the actual seller subject to the statutory term: see below, para.[46-106](#).

3395 [2015 Act s.10\(3\)](#).

3396 [2015 Act s.10\(4\)](#).

3397 [2015 Act s.10\(5\)](#). cf. below, para.[46-094](#).

3398 [2015 Act s.19\(1\)\(a\)](#) and [s.19\(3\)](#) referring to ss.[20](#) and [21](#) (short-term right to reject, on which see below, paras [40-515](#)–[40-519](#)); [s.23](#) (right to repair or replacement, on which see below, para.[40-520](#)) and [s.24](#) (the right to a price reduction or the final right to reject, on which see below, paras [40-521](#)–[40-522](#)).

3399 [2015 Act s.19\(9\)](#), as explained and restricted by [s.19\(10\)–\(13\)](#), below, para.[40-526](#).

3400 [2015 Act s.31\(1\)\(b\)](#) and see below, para.[40-535](#).

3401 [1973 Act s.9; 1979 Act s.13; 1982 Act s.3](#) and [8](#).

3402 i.e. all “goods contracts”, on which see above, paras [40-487](#)–[40-493](#).

- 3403 s.11 retains the technical expression the supply of goods “by description” for the purposes of the statutory term which it treats as included in goods contracts. As explained below in relation to [s.13 of the 1979 Act](#), sale by description may be used in relation to two situations: where the buyer contracts in reliance on the description of the goods in contracts without having seen them and, secondly, where the buyer has seen the goods, but the stated characteristics of the goods are still intended to form part of the description by which they are sold: below, paras [44-086—44-087](#). This means that not all descriptions used by a seller in relation to goods will be relevant to “sale by description” under [s.13 of the 1979 Act](#). The use of “by description” by [s.11\(1\)–\(3\) of the 2015 Act](#) suggests that the interpretation given to [s.13 of the 1979 Act](#) is equally applicable to [s.11](#), but [s.11\(1\) of the Act](#) implemented the Consumer Sales Directive 1999 art.2(2)(a), which provides simply that “[c]onsumer goods are presumed to be in conformity with the contract if they: (a) comply with the description given by the seller ...” and this form of words suggests that *any* description of the goods by the seller would be relevant for this purpose. It would be a question, though, given the use of the technical expression of supply “by description” whether the words of [s.11\(1\)](#) could be given the meaning suggested by art.2(2)(a) of the Directive by way of the (retained EU law) principle of conforming interpretation. cf. [s.36 of the 2015 Act](#) which sets out a statutory term that digital content will match any description without using the terminology of contracting “by description”: below, para.[40-552](#).
- 3404 [2015 Act s.11\(1\). Section 11\(2\)–\(3\)](#) provide that “if the supply is by sample as well as by description, it is not sufficient that the bulk of the goods matches the sample if the goods do not also match the description” and “a supply of goods is not prevented from being a supply by description just because (a) the goods are exposed for supply, and (b) they are selected by the consumer”: for discussion of the equivalent provisions in the [1979 Act s.13](#) see below, paras [46-088—46-092](#).
- 3405 On the amendment of the Consumer Rights Directive 2011 by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 ... as regards the better enforcement and modernisation of Union consumer protection rules [2019] O.J. L328/7 art.4, see above, para.[40-063](#) (note).
- 3406 [SI 2013/3134](#). The 2011 Directive art.6(1)(a) and (5) (as regards off-premises and distance contracts). The 2011 Directive does not require that information provided by the trader in respect of other contracts (governed by art.4 and termed “on-premises contracts” by the [2013 Regulations](#)) should “form an integral part” of the contract, but the [2013 Regulations reg.9\(3\)](#) (and see above, para.[40-108](#)) and the [2015 Act](#) (as is explained in the text) do so require. After their amendment, the relevant provisions of the [2013 Regulations](#) apply only to contracts for the supply of digital content *other than* for a price paid by the consumer, i.e. those digital content contracts not falling within the definition of the contracts governed by the [2015 Act Pt 1 Ch.3](#): see below, paras [40-545—40-546](#). It is to be noted, though that the scope of the [2013 Regulations](#) is restricted in a number of important ways: see above, paras [40-079—40-080, 40-099](#).

- 3407 2015 Act s.11(4)–(5). In contrast to the general position, for the purposes of s.11(4)–(5), goods contracts include contracts where the goods are second-hand goods and are sold at public auction: 2015 Act s.11(6) referring to s.2(5) and (6) on which see above, para.40-489.
- 3408 2015 Act s.19(3) and see below, paras 40-515—40-519, 40-520 and 40-521—40-522.
- 3409 2015 Act s.19(9), as explained and restricted by s.19(10)–(13), below, para.40-526.
- 3410 2015 Act s.31(1)(c) and see below, para.40-535.
- 3411 On which see above, paras 40-487—40-493.
- 3412 SI 2013/3134 reg.9 (on-premises contracts), reg.10 (off-premises contracts) and reg.13 (distance contracts). As earlier noted, while the 2011 Directive art.6(1)(a) and (5) requires information provided before the conclusion of off-premises and distance contracts to form part of the contract, it does not make the same requirement as regards information provided by the trader in respect of other contracts (governed by art.5 and termed “on-premises contracts” by the 2013 Regulations) but the 2013 Regulations reg.9 (and see above, para.40-108) and the 2015 Act (as is explained in the text) do so require.
- 3413 Any information which concerns the main characteristics of the goods is to be treated as a term of the contract under 2015 Act s.11(4), as noted above, para.40-501.
- 3414 2015 Act s.12(1) and (2). See the similar provision in relation to contracts “for the supply of digital content other than for a price paid by the consumer” in 2013 Regulations reg.9(3) (on-premises contracts), reg.10(5) (off-premises contracts), and reg.13(6) (distance contracts) (as regards the latter two reflecting the 2011 Directive art.6(5)).
- 3415 See the similar provision in relation to contracts “for the supply of digital content other than for a price paid by the consumer” in 2013 Regulations reg.9(3) (on-premises contracts), reg.10(5) (off-premises contracts) and reg.13(6) (distance contracts) (all as amended by SI 2015/1629 regs 4–6 on the bringing into force of the 2015 Act) and, as regards the latter two, reflecting the 2011 Directive art.6(5)).
- 3416 2015 Act s.19(3).
- 3417 2015 Act s.19(9), as explained and restricted by s.19(10)–(13), below, para.40-526.
- 3418 This follows from the terms of s.19(1)(a) and s.19(3) which do not include s.12 in their lists of relevant terms.
- 3419 i.e. under 2015 Act ss.9–11, 13 and 14 and in respect of non-conformity under s.16.
- 3420 2015 Act s.19(9)(a), (10) and (11)(a); Explanatory Notes 2015 para.89. A consumer could not, however, rely on the general law so as to terminate the contract for breach of any terms inserted by s.12: 2015 Act s.19(12)–(13). The Explanatory Notes 2015 para.89 explain in relation to the recovery of costs that where there is other consideration given instead of a price, the cap on the recoverable costs would be the value of that consideration.
- 3421 On the other hand, if the Explanatory Notes are wrong and the consumer’s claim for compensation for breach (including by way of damages) is restricted as s.19(5) suggests, there would be a question whether the Act properly implemented the Consumer Rights Directive 2011 art.6(5), on which see above, para.40-108.

- 3422 2015 Act s.31(1)(d) and see below, para.[40-535](#).
- 3423 2015 Act s.13(1). On “contracts to supply goods” generally, see above, paras [40-487](#)—[40-493](#). The formulation of the type of contract to which s.13 applies follows the wording of the [1973 Act](#) s.11 and the [1982 Act](#) ss.5 and 10 (contracting “by reference to a sample”) rather than the [1979 Act](#) s.15 (“where there is an express or implied term” to the effect the contract for sale is by sample, on which see below, para.[46-113](#)), but it is submitted that there is no substantive difference in this respect.
- 3424 2015 Act s.13(2).
- 3425 1973 Act s.11; [1982 Act](#) ss.5 and 10.
- 3426 1979 Act s.15(2)(a) and see below, para.[46-114](#). See similarly [1973 Act](#) s.11(1)(a) and (b); [1982 Act](#) ss.5(2)(a) and (b) and 10(2)(a) and (b).
- 3427 2015 Act s.13(2)(a).
- 3428 2015 Act s.19(1)(a) and s.19(3) referring to ss.20 and 22 (short-term right to reject, on which see below, paras [40-515](#)—[40-519](#)); s.23 (right to repair or replacement, on which see below, para.[40-520](#)) and s.24 (the right to a price reduction or the final right to reject, on which see below, paras [40-521](#)—[40-522](#)).
- 3429 2015 Act s.19(9), as explained and restricted by s.19(10)–(13), below, para.[40-526](#).
- 3430 2015 Act s.31(1)(e) and see below, para.[40-535](#).
- 3431 On which see above, para.[40-487](#).
- 3432 2015 Act s.14(1).
- 3433 2015 Act s.14(2).
- 3434 Explanatory Notes 2015 para.77.
- 3435 2015 Act s.19(1)(a) and s.19(3) referring to ss.20 and 22 (short-term right to reject, on which see below, paras [40-515](#)—[40-519](#)); s.23 (right to repair or replacement, on which see below, para.[40-520](#)) and s.24 (the right to a price reduction or the final right to reject, on which see below, paras [40-521](#)—[40-522](#)).
- 3436 2015 Act s.19(9), as explained and restricted by s.19(10)–(13), below, para.[40-526](#).
- 3437 2015 Act s.31(1)(f) and see below, para.[40-535](#).
- 3438 2015 Act s.15(1).
- 3439 1999 Directive art.2(5). Art.2(5) of the Directive also provides that any lack of conformity from incorrect installation is to be deemed equivalent to lack of conformity of the goods where the product is intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions. Under the [2015 Act](#), this result follows from the application of ss.9–11 as the goods accompanied by inadequate installation instructions would not themselves be of satisfactory quality, etc. (on which see above, paras [40-500](#)—[40-501](#)) rather than requiring any dedicated provision.
- 3440 cf. [1982 Act](#) s.13 and [2015 Act](#) s.49 on which see below, para.[40-575](#).
- 3441 2015 Act s.19(1)(b).
- 3442 2015 Act s.19(4) referring to s.23 (right to repair or replacement, on which see below, para.[40-520](#)) and ss.20 and 24 (the right to a price reduction or the final right to reject, on which see below, paras [40-521](#)—[40-522](#)).
- 3443 2015 Act s.19(9)(b), as explained and restricted by s.19(10)–(13), below, para.[40-526](#).

- 3444 This right is explained by [2015 Act s.22](#). This restricted range of remedies in respect of incorrect installation is compatible with the 1999 Directive, which does not require a remedy such as the short-term right to reject.
- 3445 [2015 Act s.31\(1\)\(g\)](#) and see below, para.[40-535](#).
- 3446 [2015 Act s.2\(9\)](#).
- 3447 Below, paras [40-539](#) et seq. The [2015 Act s.33\(4\)](#) further specifies that “[a] trader does not supply digital content to a consumer for the purposes of this Part merely because the trader supplies a service by which digital content reaches the consumer”.
- 3448 cf. [s.42\(3\)](#) which refers to [s.16](#) as applying “if an item including digital content is supplied”.
- 3449 For this purpose [s.42\(1\) of the 2015 Act](#) provides that digital content does not conform to the contract where it does not conform to the statutory terms imposed by [s.34](#) (satisfactory quality), [s.35](#) (fitness for particular purpose) and [s.36](#) (description), on which see below, paras [40-550](#), [40-551](#) and [40-552](#) respectively.
- 3450 [2015 Act s.19\(1\)\(b\)](#) and [s.19\(3\)](#) referring to [ss.20](#) and [22](#) (short-term right to reject, on which see below, paras [40-515](#)—[40-519](#)); [s.23](#) (right to repair or replacement, on which see below, para.[40-520](#)) and [s.24](#) (the right to a price reduction or the final right to reject, on which see below, paras [40-521](#)—[40-522](#)).
- 3451 [2015 Act s.19\(9\)\(b\)](#), as explained and restricted by [s.19\(10\)–\(13\)](#), below, para.[40-526](#).
- 3452 On which see [2015 Act s.42\(2\)](#) and see below, para.[40-565](#).
- 3453 [2015 Act s.31\(1\)\(h\)](#) and see below, para.[40-535](#).
- 3454 Above, para.[40-480](#).
- 3455 e.g. [1979 Act s.14\(1\)](#).
- 3456 [2015 Act s.18\(2\)](#) notes that [s.18\(1\)](#) is subject to provision made by any enactment (whenever passed or made); “enactment” is defined by [s.59\(1\)](#).
- 3457 Above, paras [40-499](#), [40-500](#), [40-503](#) and [40-506](#) respectively.
- 3458 [2015 Act ss.11, 12, 14](#) and [17](#) respectively.
- 3459 e.g. [1979 Act s.12](#) (implied terms about title, etc.) and [s.13](#) (sale by description).
- 3460 [2015 Act s.19\(1\)\(c\)](#) defining “goods conforming to a contract” for the purposes of [ss.19, 22 to 24](#); [s.19\(4\)](#).
- 3461 On which see above, para.[40-507](#).
- 3462 [2015 Act ss.20, 23](#) and [24](#) on which see below, paras [40-515](#)—[40-517](#), [40-519](#) and [40-520](#)—[40-522](#).
- 3463 [2015 Act s.22](#) below, para.[40-518](#).
- 3464 [2015 Act s.19\(9\)\(c\)](#) below, para.[40-526](#).
- 3465 See above, para.[40-507](#).
- 3466 [2015 Act s.19\(10\)–\(13\)](#) and esp. [\(11\)\(e\)](#) and see below, para.[40-526](#).
- 3467 See Vol.I, paras [27-009](#) et seq.
- 3468 On these categories, see above, paras [40-488](#)—[40-493](#).
- 3469 [2015 Act s.17\(4\)–\(7\)](#).
- 3470 [2015 Act s.17\(1\)\(a\)](#).
- 3471 [1982 Act s.7\(1\)](#) and [\(2\)](#).
- 3472 [2015 Act s.17\(8\)](#) reflecting the [1982 Act s.7\(3\)](#).

- 3473 [2015 Act s.31\(5\)](#) and [\(6\)](#) and see below, para.[40-535](#).
- 3474 On these categories, see above, paras [40-488](#)—[40-490](#), [40-492](#)—[40-493](#).
- 3475 [2015 Act s.17\(1\)\(b\)](#). “Ownership” is defined by [s.4\(1\)](#), as noted at para.[40-479](#) (note).
- 3476 [1979 Act s.12\(1\)](#) and [\(2\)](#); [1973 Act s.8\(1\)](#); [1982 Act s.2\(1\)](#) and [\(2\)](#). For discussion of s.12 of the [1979 Act](#) see below, paras [46-075](#) et seq.
- 3477 [2015 Act s.31\(1\)\(i\)](#) and see below, para.[40-535](#). The position as regards hire of goods is governed by [s.31\(5\)](#) and [\(6\)](#) as explained below, para.[40-535](#).
- 3478 On which see [2015 Act s.3\(2\)](#), above, paras [40-487](#)—[40-493](#).
- 3479 [2015 Act s.17\(4\)](#).
- 3480 [2015 Act s.17\(5\)](#) and [\(6\)](#).
- 3481 [2015 Act s.17\(7\)](#) referring to [s.17\(4\)\(b\)](#).
- 3482 [1979 Act s.12\(3\)–\(5\)](#); [1973 Act s.8\(2\)](#) and [1982 Act s.2\(3\)–\(5\)](#). For discussion of these aspects of the [1979 Act](#) see below, para.[46-084](#). Section 17 of the [2015 Act](#) does not affect the protection for private purchasers of motor vehicles under the [Hire-Purchase Act 1964 s.27](#) (which concerns purchases from a seller who has vehicle under hire-purchase agreement or conditional sale agreement and does not yet own the vehicle) and the private purchaser in good faith and without notice of those agreements and deems the transfer of the vehicle to take effect as if the seller’s title had been vested: Explanatory Notes 2015 para.83.
- 3483 This follows from the terms of [s.19\(1\)](#): see above, para.[40-495](#). There is an exception as regards the partial rejection of non-conforming goods under [s.21](#): [2015 Act s.21\(12\)](#). This is also the case as regards the application of the broad scheme of consumer remedies in [s.19\(3\) of the 2015 Act](#).
- 3484 [2015 Act s.19\(6\)](#), referring to [s.20](#). Section 20(3) provides that the right to reject under [s.19\(6\)](#) is not limited by ss.[22](#) and [24](#) which has the effects in particular that the right to reject on this ground is not constrained by the time-limits set by [s.22](#) nor is any refund affected by any deduction for use under [s.24](#).
- 3485 [2015 Act s.21](#), [s.12](#) of which specifically includes within goods conforming to the terms in [s.17](#) to goods conforming to the contract for its own purposes. On [s.20](#) and [22](#) generally, see below, paras [40-515](#)—[40-517](#).
- 3486 i.e. [2015 Act s.17\(2\)](#) (above, para.[40-511](#)), [s.17\(3\)](#) (above, para.[40-510](#)) and [s.17\(5\)–\(7\)](#) (above, para.[40-512](#)).
- 3487 [2015 Act s.19\(9\)\(a\)](#) (which refers generally to breach of a term that [Ch.2](#) requires to be treated as included in the contract), (10)–(13). On these general remedies, see below, para.[40-526](#).
- 3488 [2015 Act s.31\(1\)\(i\)](#), [\(5\)](#) and [\(6\)](#) and see below, para.[40-535](#).

(iii) - The Scheme of Remedies for the Consumer

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(c) - “Goods Contracts”

(iii) - The Scheme of Remedies for the Consumer

Introduction

- 40-514 As earlier noted, the [2015 Act](#) makes elaborate provision as regards the different circumstances which give rise to the remedies (often termed “rights” by the Act) which the Act provides for the consumer. This availability has been noted in respect of each of the statutory terms, special provisions as to the non-conformity of the goods and breach of requirements stated in the contract.³⁴⁸⁹ The following paragraphs will therefore consider the new remedies themselves, termed “rights to enforce terms about goods”. These include the short-term right to reject; the right to repair or replacement, and the right to a price reduction or the final right to reject. The relationship between these special rights and other remedies under the general law will be explained.³⁴⁹⁰

The right to reject: general provisions

- 40-515 Section [20 of the 2015 Act](#) makes general provision concerning the two rights to reject, which is then supplemented by more particular treatment of the circumstances in which a consumer may reject some but not all of the goods,³⁴⁹¹ and special provisions governing the time limit for the short-term right to reject and the final right to reject.³⁴⁹² Each of the short-term right to reject and the final right to reject entitles the consumer to “reject the goods and treat the contract as at an end”, subject to special rules governing severable contracts.³⁴⁹³ The right to reject is exercised

“if the consumer indicates to the trader that the consumer is rejecting the goods and treating the contract as at an end” whether by way of something said or done as long as it is in a way which is clear enough to be understood by the trader.³⁴⁹⁴ This formulation adopts a terminology of the consumer *treating* the contract as at an end, rather than, for example, terminating or rescinding the contract³⁴⁹⁵ and it assimilates this to rejection of the goods.³⁴⁹⁶ Of more practical significance are the general provisions governing the effects of rejection. Here, the **2015 Act** provides that in principle the trader has a duty to give the consumer a refund and the consumer has a duty to return or 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.³⁴⁹⁷

Trader’s duty to refund

- 40-516 On rejection of the goods by the consumer, the trader has a duty to refund any money paid under the contract.³⁴⁹⁸ In the case of a contract for the hire of goods, the consumer’s entitlement to a refund extends only to anything paid for a period of hire that the consumer does not get because the contract is treated as at an end³⁴⁹⁹ and a similar rule applies to hire-purchase agreements and conditional sales contracts, even though the payments so made may exceed the value of having the goods.³⁵⁰⁰ The trader must give any refund without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund and using the same means of payment as the consumer used, unless the consumer expressly agrees otherwise³⁵⁰¹; the trader must not impose any fee on the consumer in respect of the refund.³⁵⁰² Where a consumer is not entitled to receive a refund (whether as a result of not having paid any money or otherwise³⁵⁰³), he or she may be entitled to claim damages.³⁵⁰⁴

Partial rejection of goods

- 40-517 The **2015 Act** makes detailed provision modelled on the general pattern in s.20 outlined above so as to allow a consumer to reject some but not all of the goods, where the goods so rejected do not conform to the contract.³⁵⁰⁵

Time limit for short-term right to reject

- 40-518 The consumer’s right to repair or replacement and right to a price reduction or final right to reject reflect closely the scheme of rights for consumers required by the 1999 Directive (and first brought

into English law by the [2002 Regulations](#)),³⁵⁰⁶ but these rights are not always more attractive to consumers than the classic right to reject goods for breach of condition under the [1979 Act](#), though this classic right may be lost by “acceptance” of the goods, which may take place by lapse of time.³⁵⁰⁷ It was for this reason that implementation of the 1999 Directive by the [2002 Regulations](#) did not in principle preclude consumers from relying on this classic right unless they had required the trader to repair or replace the goods.³⁵⁰⁸ The strategy of the [2015 Act](#) was instead to provide a special “short-term right to reject” for consumers instead of the classic right³⁵⁰⁹ but in addition to the Directive’s four-fold scheme of rights. The circumstances in which this right to reject arises and the manner and consequences of its exercise are determined under the general provisions contained in [s.20 of the Act](#),³⁵¹⁰ but [s.22](#) makes particular provision as to its short-lived character. [Section 22\(1\)](#) provides that:

“A consumer who has the short-term right to reject loses it if the time limit for exercising it passes without the consumer exercising it, unless the trader and the consumer agree that it may be exercised later.”³⁵¹¹

In principle, the time-limit for exercising the short-term right to reject is the end of 30 days beginning with the first day after ownership or (in the case of a contract for the hire of goods, a hire-purchase agreement or a conditional sales contract³⁵¹²) possession of the goods has been transferred to the consumer and the goods have been delivered.³⁵¹³ However, where the consumer requests or agrees to the repair or replacement of goods, the period set by the time limit stops running from the date of that request or agreement until the date that the consumer receives the goods in response to them.³⁵¹⁴ And where goods supplied by the trader in response to such a request or agreement do not conform to the contract, the consumer has a further seven days after receipt of those goods or, if longer, any unexpired time set under the original time limit extended by the time between his request or agreement and receipt of those goods.³⁵¹⁵

Affirmation, waiver or estoppel

- 40-519 As earlier noted, the [2015 Act](#) does not contain provision for loss of the consumer’s right to reject of a kind found governing “acceptance” of goods in [s.35 of the Sale of Goods Act 1979](#).³⁵¹⁶ Under [s.35](#), there are three ways by which the buyer may lose the right to reject: when the buyer (a) “intimates to the seller that he has accepted” the goods; (b) commits an act inconsistent with ownership of the seller; or (c) on the lapse of a reasonable time. As regards (c), it is clear that the [2015 Act](#) contains its own scheme for loss of the consumer’s two rights to reject the goods by lapse of time, these differing as between the short-term right to reject and the final right to reject.³⁵¹⁷ Moreover, it seems clear that the omission of any reference to the loss of the consumer’s right to reject goods by committing an act inconsistent with ownership was also a deliberate choice on

the part of the legislature,³⁵¹⁸ although some cases of acts inconsistent by the consumer (such as cutting cloth bought to make clothes or even altering clothes³⁵¹⁹) may mean that the “goods” no longer exist and so may prevent the consumer from recovering a refund of the price or other consideration on the basis that he cannot make available the goods transferred.³⁵²⁰ On the other hand, the position as regards the case of “intimation” to the trader by the consumer that he waives the right to reject the goods (and affirms the contract) is less clear.³⁵²¹ There is no provision in the **2015 Act** (nor in the 1999 Directive) which states that the consumer loses the right to reject the goods on communication of a clear choice to keep them despite their non-conformity and this omission from such a detailed statutory scheme governing the two rights to reject could indicate that such a choice would not affect the consumer’s right to reject. On the other hand, against this it could be argued that a clear statement by the consumer to the trader that he wishes to keep the goods despite their non-conformity could take effect by way of affirmation, waiver or promissory estoppel under the general common law³⁵²² and that if the **2015 Act** had intended these general doctrines not to apply it should have said so.³⁵²³

Right to repair or replacement

- 40-520 These rights reflect the first level of remedies required by the 1999 Directive.³⁵²⁴ They reflect the idea, widespread in modern civil law, that a creditor of an obligation should be able to obtain the cure of a defective performance from the debtor; they are rights to *corrective* performance by the trader, rather than rights simply to performance of the trader’s original (primary) obligation arising under the contract.³⁵²⁵ Section 23 provides that where the consumer requires the trader to repair or replace the goods,³⁵²⁶ the trader must do so “within a reasonable time and without significant inconvenience to the consumer” and must bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).³⁵²⁷ However, s.23(3) and (4) provide that:

Section 23

“(3) The consumer cannot require the trader to repair or replace the goods if that remedy (the repair or the replacement)—

(a) is impossible, or

(b) is disproportionate compared to the other of those remedies.

(4) Either of those remedies is disproportionate compared to the other if it imposes costs on the trader which, compared to those imposed by the other, 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.”

For this purpose, a reasonable time or significant inconvenience is to be determined taking account of the nature of the goods and the purpose for which the goods were acquired.³⁵²⁸ This generally follows the position under the [2002 Regulations](#) which formerly implemented the 1999 Directive by amendment of the [1979 Act](#), except that under [s.23 of the 2015 Act](#) the seller cannot refuse to repair or replace the goods on the ground that this would be disproportionate in comparison with an appropriate price reduction or rescission.³⁵²⁹ Also in keeping with the position adopted by the UK legislature under the [2002 Regulations](#) (though not foreseen by the 1999 Directive),³⁵³⁰ a consumer who requires or agrees to the repair of goods or, as the case may be, the replacement of the goods cannot require the trader to provide the other of those two remedies nor exercise the short-term right to reject, without giving the trader a reasonable time to repair or, as the case may be, replace them, unless giving the trader that time would cause significant inconvenience to the consumer.³⁵³¹ For this purpose, the Act clarifies that “... ‘repair’ in relation to goods that do not conform to a contract, means making them conform”.³⁵³²

Right to price reduction or final right to reject

40-521 These rights reflect the second level of remedies required by the 1999 Directive.³⁵³³ Under the right to a price reduction, the consumer may require the trader to reduce or extinguish³⁵³⁴ the price³⁵³⁵ which the consumer is required to pay under the contract, and/or to receive a refund from the trader for anything already paid by the consumer above the reduced amount.³⁵³⁶ In this respect, neither the 1999 Directive nor the [2015 Act](#) explain the precise purpose of a price reduction (beyond referring to reduction by an “appropriate amount”³⁵³⁷), but it would seem that (following its origins in the civil law³⁵³⁸) in general the reduction should reflect the difference in value between what was received by the consumer compared to what he should have received if the goods had conformed to the contract.³⁵³⁹ [Section 24\(5\) of the Act](#) further provides, however, that:

Section 24

“A consumer who has the right to a price reduction and the final right to reject may only exercise one (not both), and may only do so in one of these situations—

- (a) after one repair or one replacement, the goods do not conform to the contract;
- (b) because of section 23(3) the consumer can require neither repair nor replacement of the goods; or
- (c) the consumer has required the trader to repair or replace the goods, but the trader is in breach of the requirement of section 23(2)(a) to do so within a reasonable time and without significant inconvenience to the consumer.”

3540

For the purposes of subs.(5)(a) there has been a repair or replacement if the consumer has requested or agreed to repair or replacement of the goods (whether in relation to one fault or more than one), and the trader has delivered goods to the consumer, or made goods available ³⁵⁴¹ to the consumer, in response to the request or agreement. ³⁵⁴²

Final right to reject and deduction for use

40-522 Unlike the short-lived right to reject (where no deduction for use can be made by the trader), if the consumer exercises the final right to reject, in principle any refund to the consumer may be reduced by a deduction for use, taking into account of the use the consumer has had of the goods in the period since they were delivered. ³⁵⁴³ However, the trader may make no deduction to take account of use in any period when the consumer had the goods only because the trader failed to collect them at an agreed time or if the final right to reject is exercised in the first six months after the goods were delivered and ownership or (depending on the nature of the contract) possession was transferred to the consumer. ³⁵⁴⁴

Time-limits in the scheme of the 1999 Directive and limitation of actions

40-523 Article 5(1) of the Consumer Sales Directive 1999 provides that:

“The seller shall be held liable under Article 3 where the lack of conformity becomes apparent within two years as from delivery of the goods. If, under national legislation, the rights laid down in Article 3(2) are subject to a limitation period, that period shall not expire within a period of two years from the time of delivery.”

In *Ferenschild*³⁵⁴⁵ the Court of Justice of the EU held that art.5(1) distinguishes between two types of time-limits: the first governing the period of *liability* of the seller where non-conformity of the goods becomes apparent and which is set in principle as two years from the time of delivery of the goods³⁵⁴⁶; the second governing the:

“... period of time during which the consumer can actually exercise the rights that arose in the period of liability of the seller, with regard to the latter.”³⁵⁴⁷

Under the 1999 Directive, Member States may choose whether or not to impose a time-limit of the second type³⁵⁴⁸ and the UK in its implementation (whether by earlier amendment of the **1979 Act** by the **2002 Regulations**³⁵⁴⁹ or by the **2015 Act**) chose not to do so. As regards the period of liability of the seller, again following the former position under the amended **1979 Act**, the **2015 Act** did not retain the relatively short period for liability in the seller foreseen by art.5 of the Directive and therefore instead generally allows consumers to bring their claims under the **2015 Act** within the general limitation period of six years provided by the **Limitation Act 1980**.³⁵⁵⁰ While an exception to this pattern is found in the case of the “short-term right to reject” which has a time-limit of 30 days,³⁵⁵¹ this is compatible with the 1999 Directive as the short-term right to reject is not required by the Directive but is additional to (and therefore more protective than) the Directive’s own scheme of consumer rights, as permitted by its minimum harmonisation character.³⁵⁵²

Discretion as to appropriate remedy

- 40-524 The **2015 Act s.58** provides that in any proceedings in which one of the special remedies provided for consumers by Ch.2³⁵⁵³ is sought, the court enjoys two additional powers.³⁵⁵⁴ First, on the application of the consumer, the court may make an order requiring specific performance by the trader of any obligation imposed on the trader in respect of repair or replacement of the goods.³⁵⁵⁵ For this purpose, an order of specific performance would not seek to enforce the primary obligations of the contract, whether based on an express, implied or statutory term; instead, specific performance would seek to enforce the trader’s secondary obligation (arising on breach of the obligations arising on breach of the relevant statutory term) to repair or replace the goods, and thereby protect the consumer’s right to *corrective* performance.³⁵⁵⁶ Secondly, where a consumer claims the right to repair or replacement or the right to a price reduction or the final right to reject (termed the “relevant remedies” by **s.58**), but the court decides that the provisions governing these rights “have the effect that exercise of another of these rights is appropriate”, “the court may proceed as if the consumer had exercised that other right”.³⁵⁵⁷ The court may make an order under

s.58 unconditionally or on such terms and conditions as to damages, payment of the price and otherwise as it thinks just.³⁵⁵⁸ Finally, on their terms, the court's powers under s.58 do not extend to the “other remedies” for consumers as this is understood by the Act and as explained below.³⁵⁵⁹

The court's discretions in relation to sales contracts

- 40-525 In the case of contracts for the *sale* of goods (“sales contracts”), the consumer’s right to repair or replacement of goods in the *2015 Act* reflects requirements of the Consumer Sales Directive 1999 and therefore until IP completion day when the UK’s departure from the EU came into full effect,³⁵⁶⁰ the provisions of the Act relating to this right had to be interpreted with this in mind and in the light of the principle of effectiveness, here, of the consumer’s protection in accordance with the principle of conforming interpretation.³⁵⁶¹ For this purpose, in *Weber and Putz* the Court of Justice of the EU assumed that the consumer’s specific rights (i.e. repair or replacement) under the Directive were enforceable in kind against the seller, holding that national law must not allow replacement to be refused by a trader on the ground of disproportionality with regard to the value of the goods as conforming and the significance of the non-conformity, even though in the circumstances this meant that the trader had to bear the costs of the removal of goods installed by the consumer and the reinstallation of the replacement goods.³⁵⁶² This suggested that an English court should not refuse specific performance in support of the consumer’s right to repair or replacement of goods sold on the ground that damages would be an adequate remedy, as this would replace the consumer’s “European rights” with damages and so render them ineffective; it also suggested that the court should not take into account other traditional elements governing the availability of specific performance stemming from its equitable nature on the basis that the Directive itself provides only two circumstances (impossibility and disproportionality compared to the other specific remedy) where the trader is entitled to refuse to repair or replace.³⁵⁶³ Finally, following the decision in *Weber and Putz* itself, in the case of “sales contracts”, the court’s powers to substitute another “appropriate right” under s.58 appear as incompatible with the 1999 Directive in that it allows a court to refuse a right to repair or replacement in circumstances other than those which are foreseen by art.3 of the Directive. On IP completion day, the provisions of the *2015 Act* which implemented the Consumer Sales Directive became part of “retained EU law”,³⁵⁶⁴ the decision of the Court of Justice in *Weber and Putz* (which was decided before IP completion day) became part of “retained EU case-law” and the principle of conforming interpretation and the principle of effectiveness became “retained general principles of EU law”: this means that, in principle, UK courts (except the Supreme Court and listed appellate courts) are bound by this case-law in their interpretation of s.58.³⁵⁶⁵ However, the EU law principle of conforming interpretation does not require national courts to interpret their legislation where this is not possible given the words used (that is, interpretation “*contra legem*”)³⁵⁶⁶ and it could be that a UK court would hold that the explicit terms of s.58 as to the substitution of remedy are not susceptible to interpretation so as to conform to the interpretation of the nature of the consumer’s rights under art.3 of the

1999 Directive. In this situation, the court could then hold that it should “disapply” s.58 by way of application of the (retained EU) principle of supremacy.³⁵⁶⁷ Alternatively, the Supreme Court or the Court of Appeal could decide to depart from the case-law of the Court of Justice in *Weber and Putz* to the extent necessary to retain the discretions as they are set out by s.58.

Other remedies for the consumer

- 40-526 The 2015 Act acknowledges that, in principle, its provision of special rights for consumers under Ch.2 does not prevent them seeking other remedies in respect of breach of the terms that it treats as included in the contract, on the special grounds on which goods do not conform to the contract under ss.15 and 16, or for breach of a requirement stated in the contract.³⁵⁶⁸ In respect of all three of these sets of cases, and depending on the circumstances, these other remedies may include damages, seeking specific performance or relying on the breach against a claim by the trader for the price³⁵⁶⁹; the conditions and characteristics of these remedies are found in the law applicable to contracts generally.³⁵⁷⁰ A consumer may exercise a right to treat the contract as at an end (which the Act explains as meaning “treating it as repudiated”³⁵⁷¹ and which is often termed rescission or termination for breach of contract) under the general law only for breach of an express term³⁵⁷²; a consumer may treat the contract as at end on the ground of breach of Ch.2’s statutory terms or on the special grounds of the conformity of the goods in ss.15 and 16 only under the rights to reject which the Act itself creates.³⁵⁷³ The Act provides that a consumer may exercise a remedy other than the remedies which itself creates (though not so as to recover twice for the same loss), instead of such a special remedy, or where no such special remedy is provided.³⁵⁷⁴ Moreover, the 2015 Act does not prevent a consumer from claiming a remedy on grounds other than breach of the statutory terms or special grounds of non-conformity. So, for example, a consumer who has suffered personal injury or damage to property caused by a defect in a product (the goods) may be able to recover damages in tort under the statutory product liability provisions contained in Pt 1 of the Consumer Protection Act 1987.³⁵⁷⁵

Delivery of wrong quantity

- 40-527 The 2015 Act s.25 makes provision for the case where the trader delivers under a “goods contract”³⁵⁷⁶ a quantity of goods to the consumer less than or more than the trader contracted to supply, in a way which is very closely based on the law provided for contracts of sale of goods under s.30 of the 1979 Act.³⁵⁷⁷ Section 25 provides that where the trader delivers to the consumer a quantity of goods less than the trader contracted to supply, the consumer may reject them, but if the consumer accepts them, the consumer must pay for them at the contract rate.³⁵⁷⁸ Conversely,

where the trader delivers to the consumer a quantity of goods larger than the trader contracted to supply, the consumer may accept the goods included in the contract and reject the rest, or may reject all of the goods; but if the consumer accepts all of the goods delivered, the consumer must pay for them at the contract rate.³⁵⁷⁹ Where a consumer is entitled to reject goods under s.25, then any further entitlement to treat the contract as at an end depends on the terms of the contract and the circumstances of the case.³⁵⁸⁰ Section 25 of the 2015 Act does not restrict the consumer's right of rejection where the shortfall or the excess is so slight that it would be unreasonable to do so, as did s.30 of the 1979 Act where the buyer did not deal as consumer before its amendment by the 2015 Act.³⁵⁸¹ While at common law the right to reject is subject to the principle de minimis non curat lex so that a trifling departure from the exact quantity stipulated does not entitle the buyer to reject the goods,³⁵⁸² it is submitted that this restriction should not be read into s.25 of the 2015 Act as to do so could (if marginally) undermine the clarity of approach desirable in the context of consumer contracts. On the other hand, following s.30 of the 1979 Act,³⁵⁸³ s.25 of the 2015 Act provides that it is subject to any usage of trade, special agreement, or course of dealing between the parties.³⁵⁸⁴ While s.25 is not protected from exclusion or restriction by s.31 of the 2015 Act,³⁵⁸⁵ it is submitted that a contract term which seeks to vary or exclude the rules in s.25 would fall under the requirements for transparency and fairness in Pt 2 of the 2015 Act and, subject to the conditions which that Part sets out, may not be binding on the consumer on the ground of its unfairness.³⁵⁸⁶

Instalment deliveries

- 40-528 The 2015 Act s.26 provides for instalment deliveries under “goods contracts”³⁵⁸⁷ in very similar terms as s.31 of the 1979 Act, with modifications so as to fit these rules into the framework which the 2015 Act provides for consumers.³⁵⁸⁸ As a result, s.26 provides that, under a goods contract, the consumer is not bound to accept delivery of the goods by instalments, unless that has been agreed between the consumer and the trader.³⁵⁸⁹ Where, however, the contract provides for the goods to be delivered by stated instalments, which are to be separately paid for³⁵⁹⁰:

“If the trader makes defective deliveries³⁵⁹¹ in respect of one or more instalments, the consumer, apart from any entitlement to claim damages, may be (but is not necessarily) entitled—

- (a)to exercise the short-term right to reject or the right to reject under section 19(6)³⁵⁹² (as applicable) in respect of the whole contract, or
- (b)to reject the goods in an instalment.”³⁵⁹³

The consumer's entitlement to exercise the rights in (a) or (b) depend on the terms of the contract and the circumstances of the case.³⁵⁹⁴ While s.26 of the 2015 Act is not itself protected from

contrary exclusion or restriction by s.31 of the Act, the trader's liabilities which give rise to the consumer's short-term right to reject³⁵⁹⁵ or to the right to reject provided by s.19(6)³⁵⁹⁶ to which s.31 refers are so protected.³⁵⁹⁷ Finally, s.26(6) provides that:

Section 26

"If the consumer neglects or refuses to take delivery of or pay for one or more instalments, the trader may—

(a) be entitled to treat the whole contract as at an end, or

(b) if it is a severable breach, have a claim for damages but not a right to treat the whole contract as at an end."

The trader's entitlement to exercise the rights in (a) or (b) depends on the terms of the contract and the circumstances of the case.³⁵⁹⁸

Footnotes

3489 The key provisions are in s.19 of the 2015 Act. For the particular terms, etc. and their relationship to the remedies provided see above, paras 40-499—40-513.

3490 Below, para.40-526.

3491 2015 Act s.21.

3492 2015 Act ss.20(1) and (2), 22 and 24.

3493 2015 Act s.20(4) referring to ss.(20) and (21). In summary, s.20(20) provides that where the contract is a severable contract and the contract is a goods contract other than sale, the provisions concerning defective delivery in instalments in s.26(3) do not apply to the final right to reject; s.20(21) adds that, depending on the terms of the contract and the circumstances of the case, the consumer is entitled to reject the goods to which a severable obligation relates or exercise a right to reject in respect of the whole contract. cf. 1979 Act s.11(4), below, para.46-069.

3494 2015 Act s.20(5) and (6).

3495 See Vol.I, paras 27-001—27-005 and Peel (ed.), Treitel on The Law of Contract, 15th edn (2020), para.18-001 discussing the varied terminology used for this purpose by the common law and preferring "termination for breach".

3496 cf. below, para.46-066.

3497 2015 Act s.20(7). 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: 2015 Act s.20(8).

- 3498 2015 Act s.20(10) and (18). Special provision is made where the consumer transferred something other than money under the contract, where the consumer is entitled to receive back the same amount of that thing, unless no substitute can be provided, in which case the consumer is entitled to receive back the thing transferred in its original state: s.20(11)–(12). If the thing cannot be given back in its original state, then the consumer is not entitled to receive a refund, but may be entitled to claim damages: 2015 Act s.20(18)(b) and (19).
- 3499 2015 Act s.20(13). This rule applies also to things transferred by the consumer other than money. The 2015 Act s.20(18)(c) provides that to the extent that anything the consumer transferred cannot be divided so as to give back only the amount, or part of the amount, then the consumer has no entitlement to receive a refund. In this situation, the consumer may be entitled to claim damages: 2015 Act s.20(19).
- 3500 2015 Act s.20(14) referring to the return only of the part of the price paid. On the definition of these contracts see 2015 Act s.7 and 5(3) respectively, above, paras 40-492 and 40-480 respectively.
- 3501 2015 Act s.20(15) and (16). cf. similar provisions applicable to the consumer's right of reimbursement under the 2013 Regulations reg.34(4)–(6), above, para.40-126.
- 3502 2015 Act s.20(17). cf. similar provisions applicable to the consumer's right of reimbursement under the 2013 Regulations reg.34(7), above, para.40-126.
- 3503 2015 Act s.20(18) especially (b) and (c) noted above in this paragraph.
- 3504 2015 Act s.20(19), below, para.40-526.
- 3505 2015 Act s.21. For this purpose “non-conformity” includes goods which do not conform to the statutory term in s.17 of the Act as to the trader's right to supply, etc.: 2015 Act s.21(12).
- 3506 Above, paras 40-461 and 40-462.
- 3507 1979 Act s.35 on which see below, paras 40-519 and 46-305—46-316.
- 3508 1979 Act s.48D. Under the general law, a buyer is not deemed to have accepted the goods merely because he or she requests their repair: Sale of Goods Act 1979 s.35(6) and below, para.46-286.
- 3509 This is made clear by s.19(12) and (13)'s provisions governing termination for breach: see below, para.40-526 (“other remedies” for the consumer).
- 3510 The short-term right to reject may also arise in respect of partial rejection of goods under s.21 of the Act.
- 3511 2015 Act s.22(2) provides that an agreement under which the short-term right to reject would be lost before the time limit passes is not binding on the consumer.
- 3512 On these contracts see above, paras 40-491, 40-492 and 40-480 respectively.
- 3513 2015 Act s.22(3), which adds the further condition for the case where the contract requires the trader to install the goods or take other action to enable the consumer to use them, that the trader has notified the consumer that the action has been taken. Section 22(4) further provides that where any of the goods are of a kind that can reasonably be expected to perish after a shorter period, the time limit for exercise of the right in respect of those goods is the end of that shorter period.
- 3514 2015 Act s.22(6) and (8) effecting this by setting and defining a “waiting period”.

- 3515 [2015 Act s.22\(7\) and \(8\).](#)
- 3516 Above, para.[40-518](#) and on [s.35](#) see further below, para.[46-279](#).
- 3517 Above, para.[40-518](#) and below, paras [40-522—40-523](#) respectively.
- 3518 See Law Commission, Scottish Law Commission, Consumer Remedies for Faulty Goods Law Com No.317, Scot Law Com No.216, Cm 7725 (2008) para.3.82.
- 3519 See Law Commission, Scottish Law Commission, Consumer Remedies for Faulty Goods Law Com No.317, Scot Law Com No.216, Cm 7725 (2008) para.3.75 and also the Law Commission Consultation Paper No.188 and the Scottish Law Commission Discussion Paper No.139, Consumer Remedies for Faulty Goods, Joint Consultation Paper at para.8.56.
- 3520 On the duty of the consumer to make available the goods on rejection see [2015 Act s.20\(7\)\(b\)](#), above, para.[40-515](#).
- 3521 It is submitted that the 1999 Directive's provision in art.7(1) that "any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer" refers to agreements or waiver in the contract and, in any event, before the consumer's right to non-conformity has arisen, and therefore has no bearing on the question whether any subsequent waiver by the consumer buyer should affect his rights in respect of non-conformity. Moreover, recital 15 of the 1999 Directive provides that "the detailed arrangements whereby rescission of the contract is effected may be laid down in national law" and the question whether a consumer may effectively waive his right to rescission would fall naturally within such "detailed arrangements". Finally, the CJEU has recognised the importance of the finality of what it called "waiver agreements" between a trader and a consumer in the context of settlement agreements in respect of a prior consumer contract one or more of whose terms may be unfair and therefore not finding under the law governing unfair contract terms: *XZ v Ibercaja Banco SA (C-452/18) EU:C:2020:536, 9 July 2020* and see above, para.[40-407](#).
- 3522 On which see generally Vol.I, paras [27-056—27-062](#) and, in the context of sale of goods, Benjamin's Sale of Goods, 11th edn (2020), paras 12-036–12-039.
- 3523 See Gibbs <http://gibbslawandlife.blogspot.com/2018/03/repair-and-replacement-under-consumer.html> [Accessed 1 September 2021] who appears to rest the survival of affirmation as regards the right to reject under [Ch.2](#) of the [2015 Act](#) in part on the fact that [s.11\(2\) of the 1979 Act](#) was not amended by the [2015 Act](#). [s.11\(2\)](#) provides that "where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated". It is submitted, however, that this provision has no application to the position of consumer buyers under the [2015 Act](#) in relation to the statutory terms which the Act sets out as these are *not* designated as conditions or warranties but are instead subject to their own special scheme of remedies. Moreover, [s.11\(4\) of the 1979 Act](#) (which provides for the loss of the right to reject the goods where they have been accepted as noted below, para.[46-068](#)) does not apply to the consumer contracts falling within [Pt 1 Ch.2](#).

of the 2015 Act: 1979 Act s.11(4A) as inserted by the 2015 Act Sch.1 para.10. In *Van Gordon v Volkswagen Financial Services (UK) Ltd (t/a Audi Finance) Unreported 30 April 2019 (Nottingham CC)* the defendant trader argued that the consumer had lost his final right to reject the goods (a car) arising under s.24 of the 2015 Act by affirmation by continuing to use it after discovery of the defect and by continuing to make payments for it under a hire-purchase agreement (though he had also continued to purport to reject the goods). The court assumed that affirmation would be a defence to a claim for rejection under the Act, but held that it had not been made out on the facts in the absence of any “clear and unequivocal” communication of acceptance as required by *Tele2 International Card Co v Post Office Ltd [2009] EWCA Civ 9* at [53] (which accepted that this communication could be by “words or conduct” and itself referred to *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The “Kanchenjunga”) [1990] 1 Lloyd’s Rep. 391* at 398 (Lord Goff of Chieveley)).

3524 1999 Directive art.3(3)–(4) on which see *Quelle AG v Bundersverband des Versbraucherzentralen und Verbraucherverbände (C-404/06) [2008] E.C.R. I-2685* and *Gebr Weber GmbH v Wittmer, Putz v Medianess Electronics GmbH (C-65/09 and C-87/09) [2011] 3 C.M.L.R. 27* at [50]–[62] (the requirement that the repair or replacement should be “free of charge” extends to the cost of removing goods not in conformity and installation where this is necessary for the goods replacement). In *Fülla v Toolport GmbH (C-52/18) EU:C:2019:447, 23 May 2019* paras 32 and 33 the CJEU interpreted art.3 as requiring that “any repair or replacement must be made free of charge, within a reasonable time and without significant inconvenience to the consumer” and this meant that “the place where goods not in conformity are to be made available to the seller to be repaired or replaced must be appropriate for ensuring that they are brought into conformity in compliance with that triple requirement”. In the case of a distance contract, this place depends on the specific circumstances of each individual case, taking into account the nature of the goods and the purpose for which the consumer required them: paras 40–45. However, where the goods need to be transported to the seller’s place of business, the seller does not have to pay the cost of such transport in advance unless the burden of doing so would deter the consumer from asserting his rights: at para.56.

3525 *Whittaker (2017) 133 L.Q.R. 47* at 61–63.

3526 2015 Act s.23(1) refers back to s.19(3) and (4) as to the circumstances in which the consumer has the right to repair or replacement, as set out above, para.40–495.

3527 2015 Act s.23(2).

3528 2015 Act s.23(5).

3529 cf. 1979 Act s.48B(3)(c) (as inserted by 2002 Regulations, on which see above, para.40–462).

3530 1999 Directive art.3(2) and (3) and see above, para.40–461; 1979 Act s.48C(1)(b) and (2) (as inserted by the 2002 Regulations).

3531 2015 Act s.23(6) and (7).

- 3532 2015 Act s.23(8). For an example of the impossibility of both repair and replacement see *Pendragon v Coom* Unreported 22 March 2021 (Cardiff CC) at [72] (puppy which suffered from health defect could be neither “repaired” nor replaced).
- 3533 1999 Directive art.3(5)–(6).
- 3534 This is the effect of s.24(2)’s provision that: “[t]he amount of the reduction may, where appropriate, be the full amount of the price or whatever the consumer is required to transfer”. From the fact that the Act does not allow a right of rejection in respect of digital content (see below, para.40-565), it would appear that the drafters of the Act took the view that there can be no right to reject where the consumer has nothing physical to hand back. Where the consumer is in this position as regards a “goods contract”, a consumer could recover a 100 per cent reduction in price. In *Pendragon v Coom* Unreported 22 March 2021 (Cardiff CC), the court below had awarded the recovery by the consumer of the full price by way of price reduction (£1,000) of a puppy sold with a health defect, an award not challenged on appeal).
- 3535 “Price reduction” may also apply to anything else the consumer is required to transfer under the contract: s.24(1) and (2). However, where this is the case, the right to a price reduction does not apply where what the consumer is (before the reduction) required to transfer under the contract (whether or not already transferred) cannot be divided up so as to enable the trader to receive or retain only the reduced amount, or if anything transferred which cannot be the subject of substitution cannot be given back in its original state: s.24(4) referring to s.20(12) in this respect.
- 3536 2015 Act s.24(1). Section 24(3) provides that s.20(10)–(17) applies to the consumer’s right to receive a refund as outlined above, para.40-516.
- 3537 1999 Directive art.3(2) and (5) (“appropriate reduction”); 2015 Act s.24(1)(a) (reduction by an “appropriate amount”).
- 3538 In Roman law, the actio quanti minoris in sale reflected, e.g. in art.1644 of the French Code civil. cf. the “right to a discount” under the 2008 Regulations, above, paras 40-208—40-209.
- 3539 cf. Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) prepared by the Study Group for a European Civil Code and the Research Group on EC Private Law (Acquis Group) (2010) art.III.-3:601 Right to reduce price. See also Directive (EU) 2019/771 (which is to repeal and replace the Consumer Sales Directive 1999, above, para.40-464), art.15 of which provides that “[t]he reduction of price shall be proportionate to the decrease in the value of the goods which were received by the consumer compared to the value the goods would have if they were in conformity”. See further below, para.40-586 in relation to 2015 Act s.56 (price reduction in relation to services contracts).
- 3540 On these requirements see above, para.40-520. In *Fülla v Toolport GmbH* (C-52/18) EU:C:2019:447, 23 May 2019 at para.66 the CJEU held that in the case of a distance contract, the obligation on the seller to repair or replace the goods within a reasonable time is not satisfied “if the seller does not take any appropriate steps ... to inspect the goods not in conformity, including the obligation to inform the consumer, within a reasonable time, of the place where the goods not in conformity are to be made

- available to him to be brought into conformity". The County Court at Nottingham has held that a requirement made by a consumer to repair a car by the car dealer can satisfy the condition set by s.24(5), even though the car was sold by the dealer's associated finance house (the "trader" for this purpose), as long as the dealer acted on behalf of the finance house in relation to handling defects in the cars sold: *Van Gordon v Volkswagen Financial Services (UK) Ltd (t/a Audi Finance) Unreported 30 April 2019* County Court at Nottingham esp. at [28]–[34].
- 3541 For these purposes goods that the trader arranges to repair at the consumer's premises are made available when the trader indicates that the repairs are finished: *2015 Act s.24(7)*.
- 3542 *2015 Act s.24(6)*.
- 3543 *2015 Act s.24(8)*. For the general provisions governing the right to reject see *2015 Act s.20*, above, paras 40-515—40-517. For an example of the exercise of the final right to reject see *Van Gordon v Volkswagen Financial Services (UK) Ltd (t/a Audi Finance) Unreported 30 April 2019* esp. at [28]–[34].
- 3544 *2015 Act s.24(9)* and *(10)* and *(11)*, *(c)* of which adds a further condition in respect of goods where the contract required the trader to install the goods or take other action to enable the consumer to use them, that the trader has notified the consumer that the action has been taken. The *2015 Act s.24(10)* makes an exception to the rule preventing any deduction being made where the consumer exercised the final right to reject within six months for the case of motor vehicles or goods of a description to be specified by order of the Secretary of State as set out by *s.24(10)*, *(12)–(15)*.
- 3545 *Ferenschild v JPC Motor SA (C-133/16) EU:C:2017:541, 13 July 2017 ("Ferenschield (C-133/16)")*.
- 3546 *Ferenschild (C-133/16)* at paras 33–34.
- 3547 *Ferenschild (C-133/16)* at para.35.
- 3548 *Ferenschild (C-133/16)* at para.36.
- 3549 Above, para.40-462.
- 3550 Limitation Act 1980 s.5 (six years from accrual of the cause of action). The general rule in contract is that the cause of action accrues when the breach takes place rather than when any damage may have been suffered: see Vol.I, paras 31-032 et seq. While art.5(1) of the 1999 Directive requires liability in the seller for two years from the date of delivery, it is submitted that breach will not precede delivery in this context. The UK equally chose not to exercise the option provided by art.7(2) of the 1999 Directive which allows Member States to provide that in the case of second-hand goods, the seller and the consumer buyer may agree contract terms which have a time period of liability shorter than the two years set by art.5(1) first sentence as long as it is not less than one year.
- 3551 *2015 Act s.22* and above, para.40-518 (which explain the starting-points for this period).
- 3552 1999 Directive arts 3 and 8(2) and cf. *Ferenschild (C-133/16)* at para.48.
- 3553 *2015 Act s.58(1)*, referring to *s.19(3)* and *(4)* and therefore to the legal grounds of the consumer's rights in respect of the statutory terms as to quality, fitness for purpose, etc.

under the special rules governing conformity of the goods or for breach of requirements that are stated in the contract as there provided: above, para.40-495. The powers of the court in s.58 therefore do not extend to proceedings brought in respect of the costs incurred by the consumer under s.19(5) in relation to breach of the statutory terms under s.12, nor to the right of rejection foreseen by s.19(6) as regards breach of the statutory term as to the trader's right to supply under s.17. Moreover, while the remedies for consumers foreseen by s.19(3) and (4) are the short-term right to reject, the right to repair or replacement and the right to a price reduction or the final right to reject, s.58's provisions affect only the latter 4 of these remedies. Section 58 makes similar provision in respect of the special rights which Chs 3 and 4 of Pt 1 of the Act create in respect of digital contents contracts and services contracts, on which see below, paras 40-564 and 40-587 respectively.

3554 These powers in the court were earlier provided by the *Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045)* reg.5 which inserted s.48E into the *Sale of Goods Act 1979* on the first implementation of the Consumer Sales Directive 1999, even though they were not foreseen by that Directive.

3555 2015 Act s.58(2) referring to s.23 of the Act, above, para.40-520.

3556 *Whittaker (2017) 133 L.Q.R. 47 at 61–63* and see above, para.40-520.

3557 2015 Act s.58(4) and (5). The “relevant remedies” are defined by s.58(8)(a), referring to ss.23 and 24. For this purpose, if the consumer has claimed to exercise the final right to reject, the court may order that any reimbursement to the consumer is reduced by a deduction for use, to take account of the use the consumer has had of the goods in the period since they were delivered to the extent provided by s.24(9) and (10): 2015 Act s.58(5) and (6).

3558 2015 Act s.58(7).

3559 Below, para.40-526.

3560 On this see above, para.40-004 and Vol.I, paras 1-020 et seq.

3561 See *Whittaker (2017) 133 L.Q.R. 47 at 63–66*. On the Consumer Sales Directive 1999 generally, see above, para.40-461. On “sales contracts” see above, paras 40-488—40-490.

3562 *Gebr Weber GmbH v Wittmer, Putz v Medianess Electronics GmbH (C-65/09 and C-87/09) EU:C:2011:396, [2011] 3 C.M.L.R. 27* at paras 63–78.

3563 1999 Directive art.3(3), reflected in 2015 Act s.23(3)–(4) and see above, para.40-520.

3564 European Union (Withdrawal) Act 2018 s.2 above, para.40-004 and Vol.I, para.1-023.

3565 European Union (Withdrawal) Act 2018 s.6(3)–(5D) (as amended by the European Union (Withdrawal Agreement) Act 2020 and see Vol.I, para.1-028).

3566 *Association de médiation sociale v Union locale des syndicats CGT (C-176/12) EU:C:2014:2* at para.39; *Kásler v OTP Jelzálogbank Zrt (C-26/13) EU:C:2014:282* at para.65 and see above, para.40-015.

3567 European Union (Withdrawal) Act 2018 s.5(2) (as amended by the European Union (Withdrawal Agreement) Act 2020) and see Vol.I, paras 1-026 and 1-028.

3568 2015 Act s.19(9).

3569 2015 Act s.19(11) (a), (b) and (d) respectively.

- 3570 See in relation to damages and specific performance Vol.I, Chs 29 and 30 respectively. Note that the 2015 Act disapplies the 1979 Act ss.51 (damages for non-delivery), 52 (specific performance), 53 (remedy for breach of warranty) and 54 (interest) from contracts to which Ch.2 of Pt 1 applies: 2015 Act s.60, Sch.1 paras 28–30 and 32 as noted above, para.40-474 (note). On the other hand, as regards contracts of sale of goods, the question whether a consumer buyer may rely on the trader's breach in resisting the seller's claim for the price remains governed by the 1979 Act ss.27, 28 and 49 (none of which the 2015 Act amends): on which see below, paras 46-236—46-237 and 46-361 et seq. In *Pendragon v Coom* Unreported 22 March 2021 (Cardiff CC) the court below had awarded both a full reduction in price in respect of a puppy sold as a pet which suffered from a health defect and also the considerable cost of veterinary expenses incurred by the consumer buyer. In these circumstances, the County Court held (at [78]) that the consumer could not recover expenses by way of damages at common law after the time when she could have mitigated her loss by rejecting the puppy in exercise of the statutory right in s.23, above, para.40-520.
- 3571 2015 Act s.19(13).
- 3572 2015 Act s.19(11)(e). cf. above, paras 40-507—40-508 on the relationship between breach of an express term and breach of a requirement stated in the contract.
- 3573 2015 Act s.19(12) referring to s.19(3), (4) and (6), on these rights see above, paras 40-515—40-518 and 40-521—40-522.
- 3574 2015 Act s.19(10).
- 3575 This 1987 Act implemented Directive 1985/374/EEC concerning liability for defective products, [1985] O.J. L210/29. For discussion of the requirements of the 1987 Act see below, paras 46-457 et seq. and Clerk and Lindsell on Torts, 23nd edn (2020), paras 10-45 et seq.
- 3576 2015 Act s.3(1) and (2), above, paras 40-487—40-493.
- 3577 On which see below, paras 46-257—46-262.
- 3578 2015 Act s.25(1). There is no EU legislative background to this provision.
- 3579 2015 Act s.25(2) and (3).
- 3580 2015 Act s.25(4). Section 25(5) and (6) provide for the manner of rejection in a similar manner to s.20(5) and (6) above, para.40-515, with the distinction that the consumer may not necessarily also indicate that the contract is at an end. Section 25(8) provides that it is subject to any usage of trade, special agreement, or course of dealing between the parties. A consumer may also claim damages in respect of delivery of the wrong quantity: s.25(7).
- 3581 1979 Act s.30(2A)–(2D) below, para.46-261. The 2015 Act s.60, Sch.1 para.19 deleted the restriction in s.30(2A) to buyers other than dealing as consumer and disapplies s.30 where Ch.2 of Pt 1 of the 2015 Act applies: s.30(6).
- 3582 Below, para.46-261 with authorities there cited.
- 3583 1979 Act s.30(5).
- 3584 2015 Act s.25(8).
- 3585 On which see below, para.40-535.

- 3586 See especially [2015 Act ss.62](#) and [68](#) and above, paras [40-273](#) et seq. (fairness) and [40-428](#) et seq. (transparency). It is to be noted that, unlike the [Unfair Terms in Consumer Contracts Regulations 1999 \(SI 1999/2083\)](#), the controls on fairness in Pt 2 of the [2015 Act](#) extend to terms that have been individually negotiated: above, para.[40-262](#).
- 3587 On which see [2015 Act s.3\(1\)](#) and [\(2\)](#), above, paras [40-487](#)—[40-493](#).
- 3588 On the [1979 Act](#) s.31 see below, paras [46-263](#)—[46-269](#). The [2015 Act](#) s.60, Sch.1 para.20 disappplies s.31 where Ch.2 of Pt 1 of the [2015 Act](#) applies: [1979 Act s.31\(3\)](#).
- 3589 [2015 Act s.26\(1\)](#).
- 3590 [2015 Act s.26\(2\)](#).
- 3591 For this purpose, “making defective deliveries” does not include failing to make a delivery in accordance with s.28: [2015 Act s.26\(5\)](#). On s.28 see below, para.[40-529](#).
- 3592 On which see above, para.[40-495](#) (setting out the situations in which this right is available) and paras [40-515](#)—[40-518](#) and [40-521](#)—[40-522](#) (setting out the nature and effects of exercise of these rights).
- 3593 [2015 Act s.26\(3\)](#).
- 3594 [2015 Act s.26\(4\)](#).
- 3595 This is provided by [s.19\(3\) of the Act](#).
- 3596 Above, para.[40-513](#) (trader’s right to supply, etc.).
- 3597 [2015 Act s.31\(1\)](#) below, para.[40-535](#).
- 3598 [2015 Act s.26\(7\)](#).

(iv) - Other Rules About Goods Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(c) - “Goods Contracts”

(iv) - Other Rules About Goods Contracts

Delivery of goods in sales contracts

40-529 Section 28 of the 2015 Act makes special provision concerning the delivery of goods in “sales contracts”,³⁵⁹⁹ which implemented the Consumer Rights Directive 2011 art.18³⁶⁰⁰ and replacing its earlier implementation by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.³⁶⁰¹ On IP completion day, therefore, s.28 became part of “retained EU law”.³⁶⁰² Section 28 provides that:

“... unless the trader and the consumer have agreed otherwise, the contract is to be treated as including a term that the trader must deliver³⁶⁰³ the goods to the consumer.”³⁶⁰⁴

Moreover,

“... unless there is an agreed time or period [for the delivery of the goods³⁶⁰⁵], the contract is to be treated as including a term that the trader must deliver the goods—

(a)without undue delay, and

(b)in any event, not more than 30 days after the day on which the contract is entered into.”³⁶⁰⁶

Where the trader has an obligation to deliver the goods at the time the contract is entered into, that time counts as the “agreed” time for these purposes.³⁶⁰⁷ Where the trader does not deliver the goods in accordance with these rules, s.28 provides that the consumer may treat the contract as at an end if:

- “(a)the trader has refused to deliver the goods,³⁶⁰⁸
- (b)delivery of the goods at the agreed time or within the agreed period is essential taking into account all the relevant circumstances at the time the contract was entered into, or
- (c)the consumer told the trader before the contract was entered into that delivery in accordance with subsection (3), or at the agreed time or within the agreed period, was essential.”³⁶⁰⁹

The Act’s Explanatory Notes expect that in most cases where a consumer purchases goods expecting to receive them immediately, that immediate delivery will be essential in all the circumstances,³⁶¹⁰ and adds that examples of goods for which delivery within the initial period might be taken to be essential would include a wedding dress or a birthday cake.³⁶¹¹ Where the trader does not deliver the goods in accordance with the above rules in any other circumstances, the consumer may specify a period that is appropriate in the circumstances and require the trader to deliver the goods before the end of that period³⁶¹² and if the trader fails to do so, may treat the contract as at an end.³⁶¹³ Where the consumer exercises a right to treat the contract as at an end under s.28, the trader must without undue delay reimburse all payments made under the contract.³⁶¹⁴ On the other hand, where the consumer has such a right but does not exercise it, s.28 provides that the consumer may cancel the order for any of the goods or reject goods that have been delivered, whereupon “the trader must without undue delay reimburse all payments made under the contract in respect of any goods for which the consumer cancels the order or which the consumer rejects”.³⁶¹⁵ Apart from making special provision in this respect where any of the goods form a commercial unit,³⁶¹⁶ s.28 does not explain what is meant by “cancellation” for this purpose, a term which is not otherwise used by Pt 1 of the 2015 Act.³⁶¹⁷ The “right to reject the goods” may refer to the special short-term right to reject or final right to reject (as the case may be) as foreseen by the 2015 Act itself.³⁶¹⁸ If this is the case, then the effect of these provisions appears to be that it allows the consumer not to pay (or to recover payments made) for goods rejected, which amounts to a form of partial termination. This remedy is not foreseen by art.18 of the 2011 Directive, which, apart from termination of the contract for which it provides, could be thought to allow national law only to provide additional *remedies*,³⁶¹⁹ rather than providing additional circumstances in which termination of a different kind may be effected; if this were so, then this aspect of s.28 would be problematic since art.18 of the 2011 Directive requires “full harmonisation”.³⁶²⁰ Certainly, s.28 of the 2015 Act (following explicitly art.18 of the Directive) adds that it does not prevent the consumer seeking other remedies where it is open to the consumer to do so.³⁶²¹ Finally, the rules on delivery in s.29 of the 1979 Act apply to delivery under “sales

contracts” where they count as contracts for the sale of goods within the meaning of the **1979 Act**,³⁶²² except as regards s.29(3)’s provision that where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.³⁶²³ For this purpose, however, it should be noted that delivery under **s.29 of the 1979 Act** includes (where appropriate) making the goods available for the buyer to collect,³⁶²⁴ whereas under **s.28 of the 2015 Act** delivery seems to refer to the trader actually handing over the goods to the consumer.³⁶²⁵ The **2015 Act** provides that contract terms which seek to exclude or restrict liability in the trader arising under **s.28** are not binding on the consumer.³⁶²⁶

Passing of risk

- 40-530 **Section 29 of the 2015 Act** makes special provision for the passing of risk in goods under “sales contracts” and the Act therefore disappplies the general provisions governing the passing of risk in **s.20 of the 1979 Act** as regards contracts to which **s.29 of the 2015 Act** applies.³⁶²⁷ Under **s.29**, a sales contract is to be treated as including a term to the effect that the goods³⁶²⁸ remain at the trader’s risk until they come into the physical possession of the consumer or a person identified by the consumer to take possession of the goods, unless the goods are delivered to a carrier who is commissioned by the consumer to deliver the goods other than a carrier the trader named as an option for the consumer: in the second situation, the goods are at the consumer’s risk on and after delivery to the carrier.³⁶²⁹ The main difference between this set of rules and the general rules retained for **s.20 of the 1979 Act** is that in the latter there is a presumption that the risk passes with the passing of property in the goods, rather than on their delivery.³⁶³⁰ The **2015 Act** provides that contract terms which seek to exclude or restrict liability in the trader arising under **s.29** are not binding on the consumer.³⁶³¹

Goods under guarantee

- 40-531 **Section 30 of the 2015 Act** implemented art.6 of the Consumer Sales Directive 1999,

 3632 thereby replacing its earlier implementation by the **Sale and Supply of Goods to Consumers Regulations 2002**
 3633
 and while the drafting differs between the two, the substance remains the same. Accordingly, s.30 applies where there is a contract to supply goods,

3634

U and there is a guarantee in relation to the goods. A “guarantee” for these purposes is:

“... an undertaking to the consumer given without extra charge by a person acting in the course of the person’s business (the “guarantor”

3635

U) that, if the goods do not meet the specifications set out in the guarantee statement or in any associated advertising—

(a) the consumer will be reimbursed for the price paid for the goods, or

(b) the goods will be repaired, replaced or handled in any way.”

3636

U

The Act provides that the guarantee “takes effect, at the time the goods are delivered, as a contractual obligation owed by the guarantor” under the conditions set out in the guarantee statement and in any associated advertising.

3637

U The guarantor must ensure that the guarantee sets out in plain and intelligible language

3638

U the contents of the guarantee and the essential particulars for making claims under the guarantee and that it states that the consumer has statutory rights in relation to the goods and that those rights are not affected by the guarantee.

3639

U Section 30 makes further detailed provision as to the contents and availability to the consumer of the guarantee.

3640

U

Exclusion or limitation of liability by a “guarantee”

40-532 As earlier noted, s.30(3) provides that a “guarantee” “takes effect as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and in any associated advertising” and s.30(4) adds that the guarantor must ensure that the guarantee “states that the consumer has statutory rights in relation to the goods and that those rights are not affected by the guarantee”. This reflects the Act’s perception of the legitimate function of

guarantees as being undertakings by traders as to consumer rights to reimbursement of the price, or repair or replacement of the goods not available (or not necessarily available) otherwise to the consumer.³⁶⁴¹ Clearly, any attempted exclusion of the liabilities imposed on a guarantor in his capacity as the trader who sells or supplies goods to the consumer by Ch.2 of Pt 1 of the Act would fall foul of the controls which the Act provides as regards those liabilities.³⁶⁴² On the other hand, where the guarantee of goods is made by a trader other than such a seller or supplier (for example, their manufacturer) but seeks to exclude or limit the liability of the seller/supplier of the goods (also a trader), it is submitted that s.72 of the Act could come into play so as to control these attempted restrictions in the guarantee, a “secondary contract” for this purpose.³⁶⁴³ In this respect, as has been seen, s.72 provides that a term in such a secondary contract which attempts to reduce the rights of the consumer buyer in the main contract (of sale or supply) would be subject to the general test of fairness in Pt 2 of the 2015 Act, rather than subject to the controls on the liabilities imposed on the trader/supplier provided by Pt 1 of the 2015 Act.³⁶⁴⁴ The position of limitations of liability in respect of the “contractual obligations” imposed by the Act in respect of the undertakings given by a trader in the guarantee which do *not* purport to affect the seller/supplier’s liabilities in Pt 1 Ch.2 of the Act is more difficult, as, for example, an undertaking by the seller or the manufacturer to repair the goods without the restrictions on that “right to repair” set out by the 2015 Act,³⁶⁴⁵ but subject to a limitation on the cost of such a replacement. The reference in s.30 to the guarantee taking effect “under the conditions set out in the guarantee” suggests that such a restriction should be given effect without any assessment of its fairness, but it could be argued that such a restriction is a term of the “guarantee contract” recognised by s.30 and is, therefore, subject to the general controls on the fairness of terms in Pt 2 of the 2015 Act.³⁶⁴⁶

Enforcement of the duties on guarantors and other traders by s.30

- 40-533 The duties on guarantors and other traders imposed by s.30 may be enforced by injunction on the application of the CMA or a local weights and measures authority.³⁶⁴⁷ Moreover, their breach may attract the enforcement measures put in place for “domestic infringements”³⁶⁴⁸ or “Schedule 13 infringements” which harm the collective interests of consumers under Pt 8 of the Enterprise Act 2002 as explained earlier.³⁶⁴⁹

Extended warranties on electrical goods

- 40-534 It can also be conveniently noted here that the 2015 Act left unaffected existing provision as regards “extended warranties” in the Supply of Extended Warranties on Domestic Electrical Goods Order 2005,³⁶⁵⁰ which imposes an obligation on suppliers of electrical goods,³⁶⁵¹ who also supply or offer to supply extended warranties for those goods, to provide certain information for consumers

before the sale of an extended warranty and gives consumers rights of cancellation and termination in relation to such warranties.³⁶⁵²

Footnotes

- 3599 For the definition of this category of contract for this purpose, see [2015 Act s.5](#), above, paras [40-488—40-490](#). However, the [2015 Act](#)'s general exclusion of sales of second-hand goods sold at public auction does not apply for the purposes of [s.28](#), following the definition of "goods" in art.2(3) of the Consumer Rights Directive: [2015 Act s.2\(5\)](#) and [\(6\)\(a\)](#); [s.28\(14\)](#).
- 3600 2011 Directive art.18. On the 2011 Directive more generally, see above, paras [40-063 et seq.](#)
- 3601 [SI 2013/3134 reg.42](#) (revoked by [SI 2015/1629 reg.8](#)).
- 3602 [European Union \(Withdrawal\) Act 2018 s.2](#) (as amended by the [European Union \(Withdrawal\) Agreement Act 2020](#) and see above, para.[40-004](#) and Vol.I, para.[1-023](#).
- 3603 "Delivery" means "voluntary transfer of possession from one person to another": [2015 Act s.59\(1\)](#). This is the same definition as is contained in [s.61\(1\) of the 1979 Act](#). While the significance of "delivery" varies under the general law in the [1979 Act](#), it is normally sufficient for the seller to make the goods available to the buyer and it may take place by constructive means and without any transfer of the actual physical custody of the goods: below, para.[46-241](#); Benjamin's Sale of Goods, 11th edn (2020), para.8-002. It is submitted, however, that the meaning of "delivery" in [s.28 of the 2015 Act](#) should follow its meaning in art.18 of the Consumer Rights Directive which it implemented, and the latter requires that the trader "shall deliver the goods by transferring the physical possession or control of the goods", which suggests more than merely making the goods available for collection by the buyer. This is confirmed by the explanation in recital 55 of "delivery" in art.20 of the Directive in relation to the passing of risk that "a consumer should be considered to have acquired the physical possession of the goods when he has received them". Article 20 of the 2011 Directive was implemented by [s.29 of the 2015 Act](#), on which see below, para.[40-530](#).
- 3604 [2015 Act s.28\(2\)](#).
- 3605 [2015 Act s.28\(4\)\(a\)](#).
- 3606 [2015 Act s.28\(3\)](#). Although [s.28](#) implemented art.18 of the 2011 Directive, the time of the conclusion of the contract must be determined in accordance with the general rules of English contract law as set out by Vol.I [Ch.4](#): 2011 Directive art.3(5) as explained above, paras [40-066—40-068](#).
- 3607 [2015 Act s.28\(4\)\(b\)](#).
- 3608 [s.28\(6\)\(a\)](#) (following the 2011 Directive art.18(2) (second paragraph)) does not distinguish between the trader's refusal to deliver the goods before or after the due time for performance and, therefore, could apply in circumstances which the common law

- would see as anticipatory breach consisting of renunciation of the contract (on which see Vol.I, paras 27-048—27-049, 27-072).
- 3609 2015 Act s.28(5) and (6).
- 3610 Explanatory Notes 2015 para.152.
- 3611 Explanatory Notes 2015 para.153.
- 3612 2015 Act s.28(7).
- 3613 2015 Act s.28(5) and (7)–(8).
- 3614 2015 Act s.28(9) referring to subss.(6) and (8).
- 3615 2015 Act s.28(10).
- 3616 If any of the goods form a commercial unit, the consumer cannot reject or cancel the order for some of those goods without also rejecting or cancelling the order for the rest of them. A unit is a “commercial unit” if division of the unit would materially impair the value of the goods or the character of the unit: 2015 Act s.28(11) and (12).
- 3617 “Cancellation” is referred to in relation to secondary ticketing in s.91 of the 2015 Act; and is included in some of the examples of contract terms which may be unfair for the purposes of Pt 2 of the Act: s.63, Sch.2 Pt 1 paras 4 and 15.
- 3618 Above, paras 40-515—40-518, 40-521—40-522.
- 3619 2011 Directive art.18(4).
- 3620 2011 Directive art.4, above, para.40-065. A possible way out of this problem would be to hold that “cancelling the order” refers to a right to cancel an off-premises contract or distance contract under the 2013 Regulations (in which the content of s.28 was earlier contained), but the context of the provision in s.28 does not suggest that this is so: see SI 2013/3134 reg.42(10)–(11) and above, paras 40-115 et seq. For the position as regards the principle of supremacy and the principle of conforming interpretation after IP completion day see Vol.I, paras 1-026 and 1-028.
- 3621 2015 Act s.28(13). Such a remedy could include a claim for damages for breach of contract under the general law: 2011 Directive recital 53.
- 3622 On the differences between these two categories see above, paras 40-488—40-490. For discussion of s.29 of the 1979 Act see below, paras 46-241 et seq.
- 3623 s.29(3) is disapplied to contracts to which Ch.2 of Pt 1 of the 2015 Act applies: 2015 Act s.60, Sch.1 para.18, inserting new subs.(3A) in s.29 of the 1979 Act.
- 3624 Below, para.46-244.
- 3625 See, in particular, s.28(2) of the 2015 Act and see above, para.40-529 (note).
- 3626 2015 Act s.31(1)(j) and see below, para.40-535. On the other hand, s.28(1) and (2) are both subject to any agreement between the parties that, respectively, the goods do not have to be delivered to the consumer or have to be delivered in a period agreed between them. Moreover, s.28 does not itself prevent the operation of terms notified to the consumer which provide for the contract to be *formed* only on dispatch of the goods, though such a term may be unfair and not binding on the consumer within the meaning of Pt 2 of the 2015 Act: above, para.40-430.
- 3627 2015 Act s.60; Sch.1 para.17 (thereby replacing s.20(4) of the 1979 Act which applied to buyers dealing as consumer). The 2015 Act s.29 implemented the Consumer Rights Directive 2011 art.20 and replaced its earlier implementation by the 2013 Regulations

- reg.43 (which was itself revoked by the [Consumer Contracts \(Amendment\) Regulations 2015 \(SI 2015/1629\)](#) reg.8 as regards contracts entered into on or after 1 October 2015). 2015 Act s.29 therefore became part of “retained EU law” under [s.2](#) of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020) on IP completion day: see further on this above, para.[40-004](#) and Vol.I, para.[1-023](#).
- 3628 The [2015 Act](#)’s general exclusion of sales of second-hand goods sold at public auction does not apply for the purposes of [s.29](#), following the definition of “goods” in art.2(3) of the Consumer Rights Directive: [2015 Act s.2\(5\)](#) and [\(6\)\(a\)](#); [s.29\(6\)](#).
- 3629 [2015 Act s.29\(1\)–\(4\)](#). Section 29(5) notes that this final rule does not affect any liability of the carrier to the consumer in respect of the goods. On “delivery” see above, para.[40-529](#) (note).
- 3630 See [1979 Act s.20\(1\)](#) and below, paras [46-189](#) et seq.
- 3631 [2015 Act s.31\(1\)\(k\)](#) and see below, para.[40-535](#).
- 3632 The 1999 Directive was repealed and replaced by Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, etc. [2019] O.J. L136/28 on which see above, paras [40-461](#) and [40-464](#).
- 3633 SI 2002/3045 reg.15, above, para.[40-462](#).
- 3634 [2015 Act s.30\(1\)](#) and see [2015 Act s.3\(1\)](#) and [\(2\)](#), above, para.[40-487](#).
- 3635 There is no definition of “guarantor” in the [2015 Act](#) except the designation in [s.30\(2\)](#), with the result that any person who gives a guarantee as is described there (whether the trader party to the goods contract, the producer of the goods or any other person) can be a “guarantor” subject to the condition that they act in the course of their business. On the definition of “business” for this purpose see [2015 Act s.2\(7\)](#) and above, para.[40-484](#) as explained by paras [40-054](#)—[40-058](#).
- 3636 [2015 Act s.30\(2\)](#).
- 3637 [2015 Act s.30\(3\)](#). This would mean that any failure in respect of the undertakings in the guarantee would give rise to the normal remedies for breach of contract (and notably damages) provided under the general law: on damages see Vol.I, [Ch.29](#).
- 3638 As the [2015 Act s.30](#) implemented art.6 of the 1999 Directive, it is submitted that the interpretation of this requirement should follow the approach taken by the CJEU for the purposes of the Unfair Terms in Consumer Contracts Directive 1993 arts 4(2) and 5, as explained above, paras [40-370](#), [40-371](#) and [40-429](#).
- 3639

- 2015 Act s.30(4).** Where the goods are offered within the territory of the United Kingdom, the guarantee must be written in English: [2015 Act s.30\(4\)\(c\)](#). In *absoluts -bikes and more- GmbH & Co KG v the-trading-company GmbH* (C-179/21) EU:C:2022:353, 5 May 2022 (“*Victorinox* case”) at paras 57 and 58 the CJEU explained that art.6(2) of the 1999 Directive (which [s.30\(4\)](#) and [\(5\) of the 2015 Act](#) implemented) specifies the information which must be included in commercial guarantees, whereas arts 5 and 6 of the Consumer Rights Directive 2011 (which were implemented by the [2013 Regulations](#) [regs 9, 10, and 13, Schs 1\(h\) and 2\(q\)](#)) imposes requirements on traders to provide consumers with pre-contractual information on the existence and conditions of commercial guarantees, but not their whole contents). On this requirement in the [2013 Regulations](#) see above, para.[40-101](#) (note).
- 3640 These contents must include the name and address of the guarantor and the duration and territorial scope of the guarantee. The guarantor and any other person who offers to supply to consumers the goods which are the subject of the guarantee must, on request by the consumer, make the guarantee available to the consumer within a reasonable time, in writing and in a form accessible to the consumer: [2015 Act s.30\(5\)–\(7\)](#).
- 3641 See also 1999 Directive recital 21 (“[w]hereas, for certain categories of goods, it is current practice for sellers and producers to offer guarantees on goods against any defect which becomes apparent within a certain period; whereas this practice can stimulate competition”).
- 3642 [2015 Act s.31](#) and see below, para.[40-535](#).
- 3643 See above, paras [40-435](#)—[40-438](#).
- 3644 [2015 Act s.72\(2\)](#).
- 3645 [2015 Act s.23](#) and see above, para.[40-520](#).
- 3646 On these general controls see above, paras [40-243](#) et seq.
- 3647 [2015 Act s.30\(8\)–\(10\)](#).
- 3648 Enterprise Act 2002 s.211 (on which see above, paras [40-137](#) and [40-138](#)); Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2015 (SI 2015/1727) art.2.
- 3649 Enterprise Act 2002 s.212. On IP completion day (on which see above, para.[40-004](#) and Vol.I, paras [1-020](#) et seq.), “[Schedule 13](#) infringements” replaced “Community infringements” and [s.30 of the 2015 Act](#) was included within the substituted Sch.13 of the 2002 Act for this purpose: [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2019](#) (SI 2019/203) reg.3(20) and Sch. para.1 inserting new 2002 Act Sch.13 para.27. On this change more generally see above, paras [40-137](#)—[40-138](#).
- 3650 SI 2005/37. The Order was made by the (then) Director General of Fair Trading under ss.[47\(1\), 49\(1\) and 50\(1\) of the Fair Trading Act 1973](#) in response to the report by the Competition Commission, A Report on the Supply of Extended Warranties on Domestic Electrical Goods within the UK (Cm 6089) (2003).
- 3651 Defined in [SI 2005/37](#) art.1(3).
- 3652 These are provided by [art.8 of SI 2005/37](#), though these rights do not apply ([art.2](#)) where the provisions governing off-premises or distance contracts governed by the Consumer Rights Directive 2011. On the provisions of UK law implementing this Directive see the

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) above, paras 40-064 et seq.

End of Document

© 2022 SWEET & MAXWELL

(v) - Exclusion of Liability, Choice of Law and Enforcement

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(c) - “Goods Contracts”

(v) - Exclusion of Liability, Choice of Law and Enforcement

Exclusion of liability arising under Pt 1 Ch.2 of the 2015 Act

40-535 As earlier explained, the [2015 Act](#) repealed or disapplied provisions in the [Unfair Contract Terms Act 1977](#) governing the contracts to which [Ch.2](#) applies, and instead makes its own provision controlling the exclusion of liabilities arising under its provisions, ³⁶⁵³ though this follows the pattern of the relevant provisions in the [1977 Act](#) to a considerable extent. As a result, [s.31 of the 2015 Act](#) provides generally that a term of a goods contract ³⁶⁵⁴ is not binding on the consumer to the extent that it would exclude or restrict the trader’s liability under the statutory terms which it treats as included, ³⁶⁵⁵ in respect of its special provisions governing non-conformity of the goods, ³⁶⁵⁶ and governing delivery of goods and the passing of risk. ³⁶⁵⁷ [Section 31](#) then explains what is meant by the exclusion or limitation of liability in terms which closely follow [s.13 of the Unfair Contract Terms Act 1977](#), providing that the exclusion or restriction of liability:

“... also means that 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 ...,
- (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 exclude or restrict rules of evidence or procedure.

(3)The reference in subsection (1) to excluding or restricting a liability also includes preventing an obligation or duty arising or limiting its extent.”³⁶⁵⁸

Section 31 makes special provision in respect of the control of express terms in contracts for the hire of goods which seek to exclude or restrict liability in the trader in respect of the statutory term governing the trader’s right to supply the goods, subjecting such a term to the test of unfairness under Pt 2 of the 2015 Act.³⁶⁵⁹ On the other hand, s.31 does not control the effectiveness of contract terms seeking to exclude or restrict the trader’s liabilities arising under s.25 (delivery of wrong quantity) or s.26 (instalment deliveries), both of which refer (for different purposes) to the agreement of the parties in relation to the application of their own provisions.³⁶⁶⁰ In this respect, it is submitted that for these purposes exclusion or limitation clauses could fall within the general controls on terms in consumer contracts provided by Pt 2 of the 2015 Act, notably, by reference to the requirement of fairness and the requirement for transparency.³⁶⁶¹

Enforcement of provisions on exclusion of trader’s liabilities

- 40-536 As earlier explained in relation to the 2015 Act’s treatment of unfair contract terms more generally, the Act applies the enforcement measures provided for the control of unfair contract terms under Pt 2 (which implemented the 1993 Directive³⁶⁶²) to its controls of exclusion clauses in Pt 1 of the Act as here reflected in s.31.³⁶⁶³ These enforcement measures have been discussed earlier,³⁶⁶⁴ as have the technical difficulties of compatibility of their extension in this way as a matter of EU law.³⁶⁶⁵

Special rule governing choice of law

- 40-537 As required by the Consumer Sales Directive 1999 as regards those contracts of sale of goods falling within its scope (though as amended on IP completion day),³⁶⁶⁶ s.32 made special provision for choice of law for “sales contracts”.³⁶⁶⁷ Accordingly, s.32 provides that where the law of a country or territory other than the United Kingdom or any part of the United Kingdom is chosen by the parties to be applicable to a sales contract, but the sales contract has a close connection with the United Kingdom, Ch.2 applies despite that choice.³⁶⁶⁸ In this way, s.32 makes very similar provision as is found in s.74 of the 2015 Act for the purposes of Pt 2’s controls on unfair terms, in the latter case implementing the Unfair Terms in Consumer Contract Directive’s own special provision on choice of law (though as also amended on IP completion day).³⁶⁶⁹ However, reflecting the fact that some of the provisions in Ch.2 implemented the Consumer Rights Directive 2011 rather than the Consumer Sales Directive 1999, and that the 2011 Directive makes no special provision for choice of law, s.32 excludes from its special provision those sections of Ch.2 which

implemented the 2011 Directive.³⁶⁷⁰ For the cases where these exclusions apply or where the law applicable has not been chosen, s.32 refers generally to the retained EU law Rome I Regulation on the law applicable to contractual obligations which applies instead.³⁶⁷¹

Enforcement of Pt 1 more generally

- 40-538 As earlier explained, enforcement authorities enjoy considerable powers under Pt 8 of the Enterprise Act 2002 to enforce designated UK legislation which protects consumers.³⁶⁷² In this respect, acts or omissions in respect of any provision in Pt 1 of the 2015 Act are specified as possible “domestic infringements” for the purposes of s.211 of the Enterprise Act 2002.³⁶⁷³ Moreover, since many (though not all) of the provisions of Ch.2 of the 2015 Act reflect requirements of the Consumer Sales Directive 1999 or the Consumer Rights Directive 2011, these provisions have been designated as the possible basis of “Schedule 13 infringements” for the purposes of s.212 of the 2002 Act.³⁶⁷⁴

Footnotes

- 3653 See above, para.40-235. On the general strategy of the 2015 Act in relation to the control of unfair contract terms, see above, paras 40-233—40-238.
- 3654 2015 Act s.3(1) and (2), above, paras 40-487—40-493.
- 3655 i.e. 2015 Act s.9 (goods to be of satisfactory quality), s.10 (goods to be fit for particular purpose), s.11 (goods to be as described), s.12 (other pre-contract information included in contract); s.13 (goods to match a sample); s.14 (goods to match a model seen or examined) and s.17 (trader to have right to supply the goods, etc.): 2015 Act s.31(1)(a)—(f), (i). On these provisions see above, paras 40-499—40-504 and 40-509—40-513.
- 3656 i.e. 2015 Act s.15 (installation as part of conformity of the goods with the contract) and s.16 (goods not conforming to contract if digital content does not conform): 2015 Act s.31(1)(g) and (h). On these provisions see above, paras 40-505—40-506 respectively.
- 3657 2015 Act ss.28 and 29 respectively: 2015 Act s.31(1)(j) and (k), on which see above, paras 40-529 and 40-530 respectively.
- 3658 2015 Act s.31(2) and (3). Section 31(4) (following the 1977 Act s.13(2)) provides that an agreement in writing to submit present or future differences to arbitration is not to be regarded as excluding or restricting any liability for its purposes, but it should be noted that an arbitration clause in a consumer contract may be “unfair” and therefore not binding on a consumer under s.62 of the Act, and that the Arbitration Act 1996 provides that a term which constitutes an arbitration agreement is deemed to be unfair if the claim is for less than an amount currently £5,000: see above, para.40-426. For

- discussion of [s.13 of the 1977 Act](#), see Vol.I, para.17-079, much of which is relevant to the interpretation of these provisions.
- 3659 [2015 Act s.31\(5\)–\(6\)](#) referring to liability under [s.17](#) (on which see above, para.40-510). For the test of unfairness under [Pt 2 of the Act](#) see [s.62](#) and above, paras 40-273 et seq. It is not clear what particular effect is intended by this reference to [Pt 2 of the Act](#) which would in any event apply to a term seeking to exclude liability under [s.17](#), whether or not that term was individually negotiated.
- 3660 [2015 Act s.25\(4\) and \(8\)](#) (above, para.40-527); [s.26\(2\) and \(4\) and \(7\)](#) above, para.40-528.
- 3661 [2015 Act ss.62 and 68](#) above, paras 40-273 et seq. and 40-428—40-434 respectively.
- 3662 1993 Directive art.7.
- 3663 [2015 Act s.31\(7\)](#) referring to [Sch.3](#).
- 3664 Above, paras 40-441—40-446.
- 3665 The difficulty arises from the fact that the controls on exclusion clauses governing liability under [s.31 of the 2015 Act](#) go beyond the scope of the controls required by the Consumer Sales Directive 1999 (whose controls on the exclusion of liability in art.7(1) apply only to contracts for the sale of goods within its definition in art.1) and, where this is the case, beyond the intensity of the controls required by Unfair Terms in Consumer Contracts Directive 1993 (in that they invalidate such clauses in all circumstances rather than subjecting them to the test of unfairness) and that enforcement measures in respect of the “commercial practice” of use of such exemption clauses could therefore fall foul of the “full harmonisation” of the Unfair Commercial Practices Directive 2005. For an explanation of this difficulty see above, paras 40-451—40-454. The difficulty does not exist as regards the controls on the exclusion of liability under [ss.11\(4\) and \(5\), 12, 28 and 29 of the 2015 Act](#) which are required by the Consumer Rights Directive 2011 art.25.
- 3666 1999 Directive art.7(2). The relevant provisions of the 1999 Directive apply to contracts for the sale of goods and deem contracts for the supply of consumer goods to be manufactured and produced to be included in this category for this purpose: art.1(2) (b) “consumer goods”, (c) “seller” and art.1(4)) above, paras 40-488—40-490. On the amendments on IP completion day, see the note below in this paragraph.
- 3667 Defined by [s.5 of the 2015 Act](#).
- 3668 [2015 Act s.32\(1\)](#). On IP completion day (on which see above, para.40-004 and Vol.I, paras 1-020 et seq.), the reference to “the United Kingdom or any part of the United Kingdom” replaced a reference to “an EEA State” in [s.32\(1\)\(a\): Consumer Protection \(Amendment etc.\) \(EU Exit\) Regulations 2018 \(SI 2018/1326\) reg.3\(5\)\(b\)](#) (the reference in [reg.1\(3\)](#) to [reg.3](#)’s coming into force on “exit day” must be read as referring to IP completion day: [European Union \(Withdrawal Agreement\) Act 2020 s.39\(1\), s.41\(4\), Sch.5 para.1](#)). Transitional provision is made by the 2018 Regulations [reg.11](#) (as amended by the [Consumer Protection \(Enforcement\) \(Amendment etc.\) \(EU Exit\) Regulations 2020 \(SI 2020/1347\) reg.4\(8\)](#)).
- 3669 1993 Directive art.6(2). For discussion of [s.74 of the Act](#), art.6(2) of the 1993 Directive and their relationship to the general provisions governing applicable law in the retained

- EU law Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I Regulation”) see above, para.[40-439](#).
- 3670 [2015 Act s.32\(2\)](#). The relevant provisions are [2015 Act ss.11\(4\)](#) and [\(5\)](#) and [12](#) (which implemented the 2011 Directive’s provisions governing information requirements, on which see above, paras [40-108](#), [40-501—40-502](#)); [s.28](#) (delivery, on which see above, para.[40-529](#)); [s.29](#) (passing of risk, on which see above, para.[40-530](#)) and [s.31\(1\)\(d\)](#), [\(j\)](#) and [\(k\)](#) (which concern the exclusion of liability under [ss.12](#), [28](#) and [29](#), on which see above, para.[40-535](#)). On the 2011 Directive and its amendment at the EU level, see above, para.[40-063](#).
- 3671 [2015 Act s.32\(3\)](#) (with qualifications there noted). On the retained EU law Regulation (EC) 593/2008 on the law applicable to contractual obligations (“Rome I Regulation”) generally see Vol.I, paras [33-019](#) et seq.
- 3672 Above, paras [40-136—40-141](#).
- 3673 Enterprise Act 2002 s.211(2); Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2015 (SI 2015/1727) art.2.
- 3674 Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.3(20) and Sch. para.1 inserting new 2002 Act Sch.13 para.27 (reg.1’s reference to the [2019 Regulations](#) coming into force on “exit day” must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), [s.41\(4\)](#), Sch.5 para.1). The provisions in Pt 1 of the [2015 Act](#) there listed are: [ss.2, 3, 5, 9—15, 19, 23, 24, 28—32, 36\(3\)](#) and [\(4\)](#), [37, 38, 42, 50, 54, 58](#) and [59](#). This took effect on IP completion day when “[Schedule 13](#) infringements” replaced “Community infringements”: on this change more generally see above, para.[40-138](#).

(d) - Digital Content Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(d) - Digital Content Contracts

Introduction

40-539

U Chapter 3 of Pt 1 of the 2015 Act makes original provision governing important aspects of “digital content contracts”, which it defines for these purposes.

3675

U Under earlier law, it was by no means clear whether a person who “buys” digital content does so under a contract of sale of goods, a contract for services or something else.

3676

U As a result, consumers who purchase digital content were unclear as to what rights they might have, how they should seek to enforce those rights against the trader and whether these rights were subject to exclusion by agreement. The 2015 Act sought therefore to create a “new category of digital content in consumer law with a bespoke set of rights and remedies appropriate to the unique nature of digital content”.

3677

U In doing so, however, the 2015 Act drew on earlier legislation in a number of important ways, adapting earlier provisions to suit the new context as well as supplementing them so as to provide for the distinctive features of the modern supply of digital content to consumers. On the other hand, the main provisions of Ch.3 did not implement the requirements of EU directives and therefore do not form part of “retained EU law”.

3678



- 40-540 First, the **2015 Act** adopts the definition of “digital content” used by the **Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013**, that is “data which are produced and supplied in digital form”,³⁶⁷⁹ which was itself drawn from the Consumer Rights Directive 2011.³⁶⁸⁰ As has been seen, the **2013 Regulations** impose important information requirements on traders in relation to the consumer contracts to which they apply and these include contracts under which digital content is supplied, also creating rights of cancellation in respect of “off-premises contracts” and distance contracts.³⁶⁸¹ On the other hand, the legislative treatment of contracts under which digital content is supplied under the **2013 Regulations** and the **2015 Act** differs, as will be explained³⁶⁸² and the **2015 Act** defines specially the *types* of contract for the supply of digital content to which it applies.³⁶⁸³
- 40-541 Secondly, the **2015 Act** adopts the scheme of statutory terms governing satisfactory quality, fitness for purpose, description and pre-contract information which it uses for “goods contracts” and familiar from earlier legislation in order to create rights for consumers in respect of these matters in relation to digital content contracts.³⁶⁸⁴ In doing so, the Act makes only those changes which are necessary given the change in subject matter of the contracts between the two contexts.³⁶⁸⁵ On the other hand, the Act’s provisions on the trader’s right to supply the digital content to the consumer differ significantly from its provisions governing “goods contracts”.³⁶⁸⁶ Moreover, the Act makes original provision to regulate the situation where a consumer has concluded a contract to supply digital content and the consumer’s access to the content on a device requires transmission to the device, or where, after the trader has supplied the digital content, the consumer is to have access to a “processing facility” under arrangements made by the trader.³⁶⁸⁷ The Act also provides specially for the case where digital content is supplied under a contract subject to the right of the trader or a third party to modify that content.³⁶⁸⁸
- 40-542 Thirdly, the **2015 Act** adopts three of the special remedies for consumers provided by **Pt 1 Ch.2 of the Act** in respect of “goods contracts” for use by consumers in respect of digital content contracts: the right to repair or replacement and price reduction.³⁶⁸⁹ On the other hand, while the Act makes clear that a consumer may claim a refund in respect of breaches by the trader of the statutory terms, and that this refund may be in full,³⁶⁹⁰ the Act does not provide for any right in the consumer to reject the digital content or to treat the digital content contract as at an end, similar to the right to reject provided by **Pt 1 Ch.2 of the Act** for consumers in relation to goods.³⁶⁹¹ The Act provides the consumer with new remedies of repair or compensation in respect of digital content which causes damage to a device or to other digital content.³⁶⁹²

40-543

Finally, the [2015 Act](#) makes similar provision as is made in [Pt 1 Ch.2](#) so as to render terms which seek to exclude or restrict the trader's liability for breach of the statutory terms not binding on the consumer.^{[3693](#)} It also applies the enforcement regime provided by [Pt 2 of the Act](#) for the control of unfair terms generally to the particular context of its controls on exclusion and limitation clauses.^{[3694](#)}

Footnotes

- 3675 cf. the Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] O.J. L136/1 on which see above, para.[40-464](#).
- 3676 Explanatory Notes 2015 para.169 referring to Bradgate, "Consumer rights in digital products: A research report prepared for the UK Department for Business, Innovation and Skills", Institute for Commercial Law Studies, Sheffield and BIS, available at: <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1125-consumer-rights-in-digital-products>. cf. *Software Incubator Ltd v Computer Associates UK Ltd (C-410/19) EU:C:2021:742*, 16 September 2021 at paras 32–51 where the CJEU held that a contract for the supply of computer software together with a perpetual licence in return for payment of a fee falls within the autonomous EU interpretation of "sale of goods" for the purposes of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents [1986] O.J. L382/17 (on which see generally below, paras [21-020](#) et seq.) whether it was supplied by electronic means or on a tangible medium, on which see above, para.[40-075](#) (note).
- 3677 Explanatory Notes 2015, para.172.
- 3678 The exceptions are ss.[36\(3\)](#), [\(4\)](#) and [37](#), which implemented a requirement as to the contractual status of information supplied by the trader by the Consumer Rights Directive 2011; see below, paras [40-552](#)—[40-553](#). On the significance of "retained EU law", see above, para.[40-004](#) and Vol.I, paras [1-020](#) et seq. Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] O.J. L136/1 does concern consumer contracts for the supply of digital content and digital services, but the UK was not required to implement this directive as it was to be implemented in the laws of Member States by 1 July 2021 and therefore after the departure of the UK from the EU has taken its full effect: see above, para.[40-004](#) and Vol.I, para.[1-019](#). For an assessment of the treatment of digital content contracts by the [2015 Act](#) in the light of this EU Directive see *Giliker (2021) J.B.L. 143*.

- 3679 [SI 2013/3134 reg.5](#) “digital content”; [2015 Act s.2\(9\)](#).
- 3680 Consumer Rights Directive 2011 art.2(11). The definition in the 2011 Directive will remain the same on the amendment of that Directive by Directive 2019/2161 art.4(1)(e), cross-referring to the definition in Directive (EU) 2019/770 art.2(2). On these directives see above, para.[40-063](#) (note) and para.[40-464](#) respectively.
- 3681 Above, paras [40-063](#) et seq.
- 3682 Below, para.[40-547](#).
- 3683 [2015 Act s.33](#), below, paras [40-544](#)—[40-546](#).
- 3684 [2015 Act ss.34–38](#) (digital content contracts) reflecting [ss.9–12 of the Act](#) (goods contracts), on which see above, paras [40-499](#)—[40-502](#). The provisions in the 2015 governing goods contracts implemented requirements of the Consumer Sales Directive 1999 as regards the “consumer sales” within its scope, but the contracts governed by [Ch.3 of the 2015 Act](#) did not fall within the scope of that Directive and therefore did not implement EU *requirements*, even where they reflect the pattern adopted by [Ch.2 the Act](#) (which did implement that Directive) in relation to goods contracts: see, e.g. the relevance of public statements by the producer of digital content in relation to its satisfactory quality under [s.34\(5\)–\(7\)](#) (on which see below, para.[40-550](#)) and cf. [s.9\(5\)–\(7\) of the Act](#) as regards “goods” contracts which implemented art.2(2)(d) of the 1999 Directive (above, para.[40-499](#)) and the remedies of repair or replacement and price reduction under [ss.43](#) and [44](#) (on which see below, paras [40-562](#) and [40-563](#)) and cf. [ss.23 and 24 of the Act](#) as regards “goods contracts which implemented art.3 of the 1999 Directive (on which see below, paras [40-520](#) and [40-521](#)).
- 3685 Below, paras [40-548](#) et seq.
- 3686 [2015 Act s.41](#) (digital content contracts), on which see below, paras [40-559](#)—[40-560](#) and cf. [s.17](#) discussed above, paras [40-509](#)—[40-513](#).
- 3687 [2015 Act s.39](#) below, paras [40-555](#)—[40-557](#).
- 3688 [2015 Act s.40](#), below, para.[40-558](#).
- 3689 [2015 Act ss.42–44](#), below, paras [40-561](#) et seq.
- 3690 [2015 Act s.44\(1\)](#) and [\(2\)](#) (which treats the refund as a consequence of the application of price reduction). [Section 45](#) provides a direct right to a refund of (in principle) “all money paid by the consumer for the digital content” where the trader is in breach of the statutory term as to the right to supply in [s.41\(1\)](#): [2015 Act ss.42\(5\)](#) and [45](#).
- 3691 On these remedies and how they relate to “other remedies” available under the general law, see below, paras [40-561](#) et seq. On the remedies under goods contracts, see above, paras [40-514](#) et seq.
- 3692 [2015 Act s.46](#) below, para.[40-567](#).
- 3693 [2015 Act s.47](#), below, para.[40-568](#).
- 3694 [2015 Act s.47\(5\)](#), below, para.[40-570](#).

(i) - "Digital Content Contracts"

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(d) - Digital Content Contracts

(i) - "Digital Content Contracts"

"Digital content"

- 40-544 As earlier noted, the [2015 Act](#) defines "digital content" as "data which are produced and supplied in digital form".³⁶⁹⁵ The Explanatory Notes to the Act explain that this includes software, music, computer games and applications (or "apps")³⁶⁹⁶ and that:

"... [i]n the case of digital content which is supplied under contract from a trader to a consumer, and largely or wholly stored and processed remotely, such as software supplied via cloud computing, some digital content will always be transmitted to the consumer's device so that they can interact with the digital content product that they have contracted for."³⁶⁹⁷

Digital content so transmitted may fall within the scope of [Ch.3](#) as long as it is supplied pursuant to a contract to which it applies, as set out below.

The contracts covered by Pt 1 Ch.3 of the 2015 Act

- 40-545 [Chapter 3](#) provides that its provisions apply to contracts under which digital content is supplied of two distinct types.³⁶⁹⁸ First, [s.33\(1\)](#) provides that it applies to:

"... a contract for a trader to supply digital content to a consumer, if it is supplied or to be supplied for a price paid by the consumer."³⁶⁹⁹

And secondly, according to s.33(2) Ch.3 also applies to:

"... a contract for a trader to supply digital content to a consumer, if—

(a)it is supplied free with goods or services or other digital content for which the consumer pays a price, and

(b)it is not generally available to consumers unless they have paid a price for it or for goods or services or other digital content."

This second example is the less obvious, but reflects the fact that digital content is frequently supplied as part of a wider arrangement, for example, when software is given away with a paid-for magazine in circumstances where it is not generally available to consumers for free.³⁷⁰⁰ For this purpose, s.33(3) explains that the references in these earlier definitions to:

"... the consumer paying a price include references to the consumer using, by way of payment, any facility for which money has been paid."³⁷⁰¹

The idea of something being paid for with "a facility for which money has been paid" was new and the Act's Explanatory Notes provide as examples

"... a token, virtual currency, or gift voucher, that was originally purchased with money (e.g. a magic sword bought within a computer game that was paid for within the game using "jewels" but those jewels were originally purchased with money)."³⁷⁰²

As a result, any contract which falls within one or other of the definitions in s.33(1) or s.33(2) will be governed by Ch.3 and both are equally termed a "contract to supply digital content" by the Act³⁷⁰³ or simply "digital content contract", the latter of which will be the term used in the following paragraphs.

40-546 On the other hand, Ch.3 of the 2015 Act does not apply to contracts for the supply of digital content other than for a price paid by the consumer, such as where the consumer provides information to the trader in return for the supply of digital content. This is reflected in the amendments made to the 2013 Regulations in consequence of the enactment of the 2015 Act. Formerly, the 2013 Regulations had themselves implemented the requirement in the Consumer Rights Directive 2011³⁷⁰⁴ that information provided by the trader to the consumer as required by the Regulations

was treated as a term of the contract and cannot be changed effectively unless this has been expressly agreed between them: these provisions applied to all the contracts covered by the Regulations, i.e. for the supply of goods, digital content or services.³⁷⁰⁵ However, after the [2015 Act](#), as in the case of goods and services,³⁷⁰⁶ pre-contract information provided by a trader in relation to a digital content contract is made a term of the contract by the Act itself,³⁷⁰⁷ but only in relation to those “digital content contracts” to which [Ch.3](#) applies. As a result, the provisions in the [2013 Regulations](#) providing for the contractual status of pre-contract information supplied, etc. were amended so as to apply only to those contracts omitted from the scope of [Ch.3](#), i.e. contracts “for the supply of digital content other than for a price paid by the consumer”.³⁷⁰⁸ However, while this means that information supplied in respect of digital content contracts other than for a price paid by the consumer are made terms of the contract, the [2013 Regulations](#) do not specify the remedial consequences of breach of those terms, unlike the [2015 Act](#) which distinguishes for this purpose between certain important categories of information (such as its main characteristics) and other types of pre-contractual information.³⁷⁰⁹

“Digital content contracts” and other contracts in Pt 1 of the Act

- [40-547](#) The treatment of digital content contracts by [s.33 of the Act](#) has two main consequences. First, as suggested by the [2015 Act](#)’s general provisions governing “mixed contracts”,³⁷¹⁰ a digital content contract within the meaning of [Ch.3](#) may also be a “goods contract” within the meaning of [Ch.2](#), that is, where both goods and digital content are supplied under the contract or where goods are supplied under the contract and digital content is supplied for free under the particular circumstances set out in [s.33\(2\)](#). Indeed, as earlier explained, [s.16 of the Act](#) makes particular provision for the case where goods do not conform to the contract if the goods consist of an item that includes digital content and the digital content does not conform to the contract.³⁷¹¹ This regulatory overlap differs from the pattern under the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#), which distinguish between sales contracts (which are defined as relating to tangible moveable items, which may include digital content, as in the case of a CD) and “contracts for the supply of digital content not on a tangible medium” (which do not require payment of a “price” by the consumer), and then regulates them distinctly.³⁷¹² Secondly, a contract for a trader to supply a service to a consumer or “services contract” governed by [Pt 1 Ch.4 of the 2015 Act](#) may also constitute a “digital content contract” and so fall within [Pt 1 Ch.3](#), but [s.33\(4\)](#) provides that:

“... [a] trader does not supply digital content to a consumer for the purposes of this Part merely because the trader supplies a service by which digital content reaches the consumer.”

This clarification of the significance of the Act's definition of "digital content contract" reflects the view of the EU Commission taken for the purposes of the Consumer Rights Directive 2011 that where a trader's main obligation is not to provide digital content but rather to provide a service (for example, allowing the creation, processing, sorting or sharing of data that is produced by a consumer) the contract is not for the supply of digital content even though some digital content reaches the consumer, though it may be a contract for the supply of a service.³⁷¹³ A particular significance of this provision is discussed below.³⁷¹⁴

Footnotes

- 3695 [2015 Act s.2\(9\).](#)
- 3696 Explanatory Notes 2015 para.166. cf. the illustrations of "digital content" provided by the Consumer Rights Directive 2011 recital 19, quoted above, para.[40-078](#).
- 3697 Explanatory Notes 2015 para.166.
- 3698 [2015 Act s.33\(8\)](#) provides, however, that [s.33](#) does not limit the application of [s.46](#)'s provisions providing a remedy for damage to a device or to other digital content caused by digital content, except as regards its limitation in [s.33\(4\)](#), on which see below, para.[40-556](#) (note). The [2015 Act s.33\(5\)–\(6\), \(9\)–\(10\)](#) provides the Secretary of State with powers by order to apply to other contracts for a trader to supply digital content to a consumer subject to certain conditions.
- 3699 [2015 Act s.33\(1\).](#)
- 3700 Explanatory Notes 2015 para.174.
- 3701 [2015 Act s.33\(3\).](#)
- 3702 Explanatory Notes 2015 para.174.
- 3703 [2015 Act s.33\(7\).](#)
- 3704 Art.6(5) (although this effect was not required by the 2011 Directive as regards "on-premises contracts") and see above, paras [40-078](#) and [40-108](#).
- 3705 [2013 Regulations regs 9\(3\) and \(4\); 10\(5\) and \(6\); and 13\(6\) and \(7\)](#) (until their amendment in 2015) (although this effect is not required by the 2011 Directive as regards "on-premises contracts").
- 3706 [2015 Act ss.11\(4\) and \(5\) \(goods\); 50\(3\) and \(4\) \(services\).](#)
- 3707 [2015 Act ss.36\(3\) and \(4\); s.37](#), below, paras [40-552](#)—[40-553](#).
- 3708 [2013 Regulations regs 9\(3\), 10\(5\) and 13\(6\)](#) as inserted by the [Consumer Contracts \(Amendment\) Regulations 2015 \(SI 2015/1629\) reg.4](#).
- 3709 [2015 Act s.36\(3\) and 37](#), below, paras [40-552](#)—[40-553](#).
- 3710 [2015 Act s.1\(4\)–\(6\)](#), above, para.[40-486](#).
- 3711 Above, para.[40-506](#). This overlap is also noted by the [2015 Act s.42\(3\)](#) for the case where "an item including the digital content is supplied".
- 3712 [2013 Regulations reg.5](#) "sales contract" and "goods", above, para.[40-078](#).

- 3713 EU Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2011/83/EU (etc.) COM(2017) 259 final, para.5 and see above, para.[40-078](#).
- 3714 Below, para.[40-556](#) (note).

(ii) - The Statutory Terms

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(d) - Digital Content Contracts

(ii) - The Statutory Terms

The relationship between the statutory terms, non-conformity of the digital content and the consumer's remedies

- 40-548 Following in very broad terms the pattern set by Ch.2 for “goods contracts”,³⁷¹⁵ s.42 of the 2015 Act sets out the relationship between the statutory terms “treated as included” in digital content contracts, the consumer’s rights to enforce terms about digital content and any “other remedies” which the consumer may enjoy. In doing so, it draws a three-fold distinction. First, s.42 provides that for these purposes³⁷¹⁶ “digital content conforming to a contract” refers to the content’s conforming to the statutory terms governing its quality, fitness for a particular purpose and description³⁷¹⁷ and where it does not conform to the contract in this sense, the consumer has a right to repair or replacement and the right to a price reduction.³⁷¹⁸ Secondly, s.42 provides that where pre-contractual information other than as to the digital content’s main characteristics, functionality or compatibility forms the basis of a statutory term of the contract,³⁷¹⁹ breach of this term creates a right in the consumer to recover from the trader the amount of any costs incurred as a result of the breach, up to the amount of the price paid for the digital content or for any facility used by the consumer.³⁷²⁰ This reflects a similarly limited remedy created for information provided by the trader under goods contracts other than where it relates to the main characteristics of the goods.³⁷²¹ Thirdly, s.42 provides that where the trader is in breach of the statutory term relating to the trader’s right to supply the digital content, the consumer has a special right to a refund which in principle extends to all money paid.³⁷²² It is to be noted that this three-fold scheme does not provide for the case of “requirements that are stated in the contract” as Ch.2 does in the case of “goods contracts”³⁷²³ nor for the case where the contract contains an express term about the quality

or its fitness for any particular purpose even though such an express term is specifically foreseen by the Act.³⁷²⁴ As regards the latter, it is submitted that the remedial and other consequences of breach of such an express term would be governed by the general law and this could lead to a claim for damages and, subject to its general conditions, a claim by the consumer to treat the contract as at an end under the law of termination for breach of contract.³⁷²⁵ In this respect, while the Act provides expressly for the relationship between the special remedies for the consumer which s.42 recognises and other remedies which the consumer may enjoy under the general law (and excludes from these other remedies the consumer's treating the contract as at an end³⁷²⁶), the latter concerns only other remedies which the consumer may enjoy as a result of breach of the statutory terms in the Act³⁷²⁷ and not, therefore, any express term.

Presumption of non-conformity

- 40-549 The 2015 Act s.42 adopts the presumption of non-conformity on delivery which the Act earlier uses in relation to “goods contracts” and which is drawn from the Consumer Sales Directive 1999³⁷²⁸ and so provides that:

“... digital content which does not conform to the contract at any time within the period of six months beginning with the day on which it was supplied must be taken not to have conformed to the contract when it was supplied,”³⁷²⁹

This does not apply if it is established that the digital content did conform to the contract when it was supplied or if its application is incompatible with the nature of the digital content or with how it fails to conform to the contract.³⁷³⁰

Digital content to be of satisfactory quality

- 40-550 The 2015 Act s.34 makes almost identical provision as to the satisfactory quality of digital content supplied under a “digital content contract”³⁷³¹ as s.9 of the Act makes in relation to the satisfactory quality of goods supplied under a “goods contract”,³⁷³² itself being familiar from earlier statutory provisions, notably governing sale of goods.³⁷³³ Section 34 provides that:

Section 34

“(1) Every contract to supply digital content is to be treated as including a term that the quality of the digital content is satisfactory.

(2) The quality of digital content is satisfactory if it meets the standard that a reasonable person would consider satisfactory, taking account of—

- (a)** any description of the digital content,
- (b)** the price mentioned in section 33(1) or (2)(b) (if relevant), and
- (c)** all the other relevant circumstances (see subsection (5)).

(3) The quality of digital content includes its state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of digital content—

- (a)** fitness for all the purposes for which digital content of that kind is usually supplied;
- (b)** freedom from minor defects;
- (c)** safety;
- (d)** durability.

(4) The term mentioned in subsection (1) does not cover anything which makes the quality of the digital content unsatisfactory—

- (a)** which is specifically drawn to the consumer's attention before the contract is made,
- (b)** where the consumer examines the digital content before the contract is made, which that examination ought to reveal, or
- (c)** where the consumer examines a trial version before the contract is made, which would have been apparent on a reasonable examination of the trial version.

(5) The relevant circumstances mentioned in subsection (2)(c) include any public statement about the specific characteristics of the digital content made by the trader, the producer or any representative of the trader or the producer.³⁷³⁴

(6) That includes, in particular, any public statement made in advertising or labelling.

(7) But a public statement is not a relevant circumstance for the purposes of subsection (2)(c) if the trader shows that—

(a) when the contract was made, the trader was not, and could not reasonably have been, aware of the statement,

(b) before the contract was made, the statement had been publicly withdrawn or, to the extent that it contained anything which was incorrect or misleading, it had been publicly corrected, or

(c) the consumer's decision to contract for the digital content could not have been influenced by the statement.

(8) In a contract to supply digital content a term about the quality of the digital content may be treated as included as a matter of custom.”

Apart from replacement of the references to “goods” with references to “digital content”, [s.34](#) omits [s.9](#)'s reference to “appearance and finish”³⁷³⁵ as a possible aspect of the quality of digital content (for obvious reasons). Secondly, [s.34\(4\)\(c\)](#) replaces [s.9](#)'s provision for the case of a contract to supply goods by sample (to the effect that the statutory term does not cover anything which would have been apparent on a reasonable examination of the sample³⁷³⁶), with provision for the case where the consumer examines a “trial version” before the contract is made, to the effect that the statutory term does not cover anything which would have been apparent on a reasonable examination of the trial version. It is to be noted that [s.34\(5\)–\(7\)](#) also makes public statements relevant to the standard that a reasonable person would consider satisfactory in [s.9\(5\)–\(7\)](#) which reflects a requirement of the Consumer Sales Directive, even though the Directive itself does not apply to digital content contracts.³⁷³⁷ In terms of the significance of “satisfactory quality” in the context of digital content contracts, according to the Act's Explanatory Notes:

“... a reasonable person's expectations as to quality are likely to vary according to the nature of the content and some aspects of quality set out in subsection (3) may not be relevant in particular cases. So for example a reasonable person might expect a simple music file to be free from minor defects so that a track which failed to play to the end would not be of satisfactory quality. However, it is the norm to encounter some bugs in a complex game or piece of software on release so a reasonable person might not expect that type of digital content to be free from minor defects. Consequently the application of the quality aspect ‘freedom from minor defects’ to digital content will depend on reasonable expectations as to quality.”³⁷³⁸

Under [s.42 of the Act](#) breach of the statutory term in [s.34](#) gives rise in the consumer to the right to repair or replacement and the right to a price reduction, and may also give rise to other remedies under the general law.³⁷³⁹

Digital content to be fit for particular purpose

40-551 Section 35 of the 2015 Act makes identical provision for digital content contracts³⁷⁴⁰ as s.10 makes for goods contracts,³⁷⁴¹ subject only to the replacement of the latter's references to "goods" with "digital content". As a result, where the consumer makes known to the trader (expressly or by implication) any particular purpose for which the consumer is contracting for the digital content,³⁷⁴²

"... the contract is to be treated as including a term that the digital content is reasonably fit for that purpose, whether or not that is a purpose for which digital content of that kind is usually supplied."³⁷⁴³

It is provided that this term is not to be included if the circumstances show that the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the trader.³⁷⁴⁴ A contract to supply digital content may be treated as making provision about the fitness of the digital content for a particular purpose as a matter of custom.³⁷⁴⁵ Under s.42 of the Act breach of a statutory term inserted by s.35 will give rise in the consumer to the right to repair or replacement and the right to a price reduction, and may also give rise to other remedies under the general law.³⁷⁴⁶

Digital content to be as described

40-552 Section 36 of the 2015 Act provides that:

Section 36

"(1) Every contract to supply digital content is to be treated as including a term that the digital content will match any description of it given by the trader to the consumer.

(2) Where the consumer examines a trial version before the contract is made, it is not sufficient that the digital content matches (or is better than) the trial version if the digital content does not also match any description of it given by the trader to the consumer."

It will be noted that s.36 does not use the technical expression of contracting “*by description*” used by s.11’s provision governing the statutory term as to the description of goods, which itself reflects the general position under the 1979 Act.³⁷⁴⁷ Instead, s.36 stipulates that “any description” of the digital content will form the basis of the statutory term which it inserts in the contract. Moreover, s.36(2) adapts the parallel provision in s.11(2) of the 2015 Act so as to fit the more inclusive general approach to descriptions taken by s.36(1) and also to replace references to “sample” with references to “trial version”, following the precedent set by the Act in relation to the statutory term as to the satisfactory quality of digital content in s.34.³⁷⁴⁸ Section 36 also follows the approach earlier set by the Act in relation to goods contracts, by providing that information within some of the categories required to be provided by the trader under the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013*³⁷⁴⁹ and actually supplied by the trader to the consumer is to be included as a term of the contract.³⁷⁵⁰ The categories in question are: “the main characteristics of the … digital content, to the extent appropriate to the medium of communication and to the … digital content”; “where applicable, the functionality,³⁷⁵¹ including applicable technical protection measures, of digital content”; and “where applicable, any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of”.³⁷⁵² This implemented the Consumer Rights Directive’s requirement that information supplied by the trader as it requires should form an integral part of the consumer contract³⁷⁵³; equally, a change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.³⁷⁵⁴ More generally, according to the Act’s Explanatory Notes:

“The policy intention is that matching the description should mean that the digital content should at least do what it is described as doing. It is not intended that “matches the description” should mean that the digital content must be exactly the same in every aspect. This section would not, for example prevent the digital content going beyond the description, as long as it also continues to match the description. This is particularly relevant for updates that may enhance features or add new features. As clarified in section 40, as long as the digital content continued to match the original product description and conform to the pre-contractual information provided by the trader, improved or additional features would not breach this right.”³⁷⁵⁵

Under s.42 of the Act breach of a statutory term inserted by s.36 gives rise in the consumer to the right to repair or replacement and the right to a price reduction, and may also give rise to other remedies under the general law.³⁷⁵⁶

Other pre-contract information included in contract

Section 37 of the 2015 Act makes similar provision for digital content contracts as does s.12 for goods contracts,³⁷⁵⁷ and provides that where the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013³⁷⁵⁸ required the trader to provide to the consumer before the contract became binding information other than about the main characteristics, functionality or compatibility of the digital content (which are dealt with by s.36³⁷⁵⁹), any information that was provided by the trader is to be treated as included as a term of the digital content contract.³⁷⁶⁰ The categories of information to which s.37 therefore applies are set out above in relation to the 2013 Regulations themselves.³⁷⁶¹ Section 37 provides that a change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader.³⁷⁶² However, breach of the statutory terms foreseen by s.37 of the Act does not give rise to the three rights more widely provided by Ch.3 for consumers, as s.42(4) instead provides that in these circumstances 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 for the digital content or for any facility³⁷⁶³ ... used by the consumer.”³⁷⁶⁴

A consumer may, however, enjoy other remedies (notably, damages) in respect of breach of the statutory term in s.37, with the exception of a right to treat the contract as at an end.³⁷⁶⁵

No other requirement to treat term about quality or fitness as included

40-554 Section 38(1) provides that a contract to supply digital content is not to be treated as including any term about the quality of the digital content or its fitness for any particular purpose except as the Act itself provides,³⁷⁶⁶ unless the term is expressly included in the contract.³⁷⁶⁷ Where such an express term is concluded, its breach may give rise to remedies for breach provided by the general law, apparently even as regards a right to treat the contract as at an end for major breach of contract.³⁷⁶⁸ This marks an apparent contrast with the general position under the 2015 Act, which does not allow a consumer to treat a digital content contract as at an end by reason of breach of the statutory terms which it treats as included in the contract.³⁷⁶⁹

Supply by transmission and facilities for continued transmission

40-555

Section 39 of the 2015 Act makes original provision relating to supply by transmission of the digital content under a digital content contract,³⁷⁷⁰ creating, inter alia, a special statutory term regarding a processing facility to which the consumer is granted access.

Time of supply by transmission

- 40-556 First, s.39 provides a special rule as to the time of supply of digital content where it takes place by transmission rather than by supply on a tangible medium, such as a disk. Transmission of this kind could take place, for example, where digital content is bought or used via the internet or through a satellite transmission under an arrangement with an internet service provider or mobile network operator,³⁷⁷¹ and where digital content is supplied in this way, it will usually travel through one or more intermediaries before it reaches the consumer's device.³⁷⁷² According to the Act's Explanatory Notes:

“Some of these intermediaries, for example an Internet Service Provider (“ISP”), have been chosen by and are within the contractual control of the consumer. Other intermediaries, however, will be within the contractual control of the trader, or under arrangements initiated by the trader. For example, a supplier of streamed movies (the trader) may contract with a content delivery network who will deliver the data from the trader’s server to the ISPs who will then deliver the content to the consumer.”³⁷⁷³

For these purposes, s.39 provides that where the consumer's access to the content on a device requires its transmission to the device under arrangements initiated by the trader,³⁷⁷⁴ the digital content is taken as supplied either when the content reaches the device (for example, directly to a consumer's satellite dish³⁷⁷⁵), or, if earlier, when the content reaches another trader chosen by the consumer to supply (such as an internet service provider³⁷⁷⁶) under a contract with the consumer, a service by which digital content reaches the device.³⁷⁷⁷ The result of these intricate provisions is that where the digital content fails to meet the quality standards set by the statutory terms because of a problem for which the trader (T) or an intermediary in the contractual control of the trader is responsible, then the trader will be liable.³⁷⁷⁸ On the other hand, where the digital content fails to meet these quality standards because of a problem with the consumer's device or with the delivery service supplied by an independent trader with whom the consumer has contracted (such as an ISP or mobile network provider), the trader (T) would not be liable “since that trader (T) cannot be at fault in any way for the problem and has no way of rectifying it”.³⁷⁷⁹

Facilities for continued transmission

- 40-557 Secondly, where there is a contract to supply digital content and “after the trader (T) has supplied the digital content, the consumer is to have access under the contract to a processing facility under arrangements made by T”,³⁷⁸⁰ under s.39(5) of the Act:

“... [t]he contract is to be treated as including a term that the processing facility (with any feature that the facility is to include under the contract) must be available to the consumer for a reasonable time, unless a time is specified in the contract.”³⁷⁸¹

For these purposes:

“A processing facility is a facility by which T or another trader will receive digital content from the consumer and transmit digital content to the consumer (whether or not other features are to be included under the contract).”³⁷⁸²

As a result, according to the Act’s Explanatory Notes, these provisions:

“... apply to digital content where use of the content in line with the contract requires some digital content to be transferred via the internet between the consumer’s device and a server (processing facility) operated by or within the contractual control of T. Examples of this type of digital content would be massively multiplayer online games (“MMOs”) and software accessed on the Cloud such as a music streaming facility.”³⁷⁸³

In these circumstances, s.39(5)’s statutory term means that the consumer should be able to use their digital content in the way described for a reasonable time, unless an express term provides a different time.³⁷⁸⁴ Finally, the sections of the Act which insert statutory terms in the contract governing the quality, fitness for a particular purpose and description of digital content are applied to all digital content transmitted to the consumer on each occasion under the facility, while it is provided under the contract, as they apply to the digital content first supplied.³⁷⁸⁵ Breach of these statutory terms as well as the special statutory term as to access for the consumer to a processing facility foreseen by s.39(5) may give rise to the right to repair or replacement or the right to a price reduction, or other remedies under the general law, except a right to treat the contract as at an end.³⁷⁸⁶

Quality, fitness and description of content supplied subject to modification

40-558 According to the Act's Explanatory Notes, [s.40 of the 2015 Act](#):

“... reflects a unique issue for digital content in that manufacturers and traders are technically able to change or update digital content after the initial provision of the digital content. This may be set out in the terms and conditions of the licence. In the majority of cases, this is to the benefit of consumers and often includes important updates to the digital content. Requiring consent for every update would create problems for business, both due to the logistics of contacting every consumer and getting their consent and the problems that would arise when some consumers do not accept updates, thus resulting in many different versions of software in circulation and unnecessary disputes with consumers when digital content stops working due to lack of updates.”³⁷⁸⁷

Section 40 therefore allows a contract to provide that a trader or a third party (such as the digital content manufacturer) may update digital content, as long as the contract stated that such updates would be supplied and as long as the term by which it does so is not unfair within the meaning of [Pt 2 of the 2015 Act](#).³⁷⁸⁸ Accordingly, [s.40\(1\)](#) first provides that, where under a contract a trader supplies digital content to a consumer subject to the right of the trader or a third party to modify the digital content, the Act's provisions inserting statutory terms as to satisfactory quality, fitness for a particular purpose and description of the digital content “apply in relation to the digital content as modified as they apply in relation to the digital content as supplied under the contract”.³⁷⁸⁹ However, as regards any description of the digital content, this

“... does not prevent the trader from improving the features of, or adding new features to, the digital content, as long as—

- (a)the digital content continues to match the description of it given by the trader to the consumer, and
- (b)the digital content continues to conform to the information provided by the trader as mentioned in [subsection \(3\) of section 36](#), subject to any change to that information that has been agreed in accordance with [subsection \(4\) of that section](#).³⁷⁹⁰

The references to [s.36\(3\)](#) and [\(4\)](#) here concern the information as to the main characteristics, functionality and compatibility of the digital content which is required to be provided and is in fact provided by the trader under the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#).³⁷⁹¹ For these purposes, the presumption of non-conformity applicable

to the rights arising from breach of the statutory terms governing the quality, fitness for particular purpose and description of digital content generally does not apply to cases governed by s.40 and so as regards these cases the consumer must establish the failures of the digital content as provided for by s.40.³⁷⁹² Finally, a claim on the grounds that digital content does not conform to a statutory term concerning satisfactory quality, fitness for particular purpose or description as applied by s.40(1) to digital content which has later been modified “is to be treated as arising at the time when the digital content was supplied under the contract and not the time when it is modified”.³⁷⁹³ This therefore means that any claim for breach must be brought within six years of the date when the digital content was first supplied, rather than at the date when the modification took place.³⁷⁹⁴

Trader's right to supply digital content

40-559 Section 41 of the 2015 Act provides for a new statutory term to be included in contracts to supply digital content that the trader has the right to supply the digital content, mirroring the terms provided for goods contracts, but reflecting the fact that under many digital content contracts the trader does not agree to transfer to the consumer any property rights (such as intellectual property rights to the digital content).³⁷⁹⁵ Section 41(1) therefore provides that:

Section 41

“Every contract to supply digital content is to be treated as including a term—

- (a) in relation to any digital content which is supplied under the contract and which the consumer has paid for, that the trader has the right to supply that content to the consumer;
- (b) in relation to any digital content which the trader agrees to supply under the contract and which the consumer has paid for, that the trader will have the right to supply it to the consumer at the time when it is to be supplied.”

³⁷⁹⁶

While, as has been explained, in Ch.3 generally “contract to supply digital content” includes not merely contracts where the content is supplied for a price paid by the consumer, but also where it is supplied free with goods, services or other digital content for which the consumer does pay a price and where it is not generally available without payment of a price,³⁷⁹⁷ s.41(1) subjects the insertion of the statutory terms as to the trader's right to supply to the condition that the digital content was paid for by the consumer. Where s.41(1) applies, the statutory term as to the trader's right to supply concerns both digital content supplied under the contract itself and to digital content which the trader *agrees* to supply under the contract, for example, by way of later modification.

Special refund remedy for breach

40-560 As earlier noted, breach of the statutory term that the trader has the right to supply digital content provided by [s.41\(1\) of the 2015 Act](#) gives rise to a special right in the consumer to a refund provided by [s.45](#).³⁷⁹⁸ This right reflects the idea that digital content cannot be returned and, therefore, the consumer should not have a right of rejection.³⁷⁹⁹ Under [s.45](#), this special right “gives the consumer the right to receive a refund from the trader of all money paid by the consumer for the digital content”,³⁸⁰⁰ unless “the breach giving the consumer the right to a refund affects only some of the digital content supplied under the contract” in which case, “the right to a refund does not extend to any part of the price attributable to digital content that is not affected by the breach”.³⁸⁰¹ In keeping with other provisions in the [2015 Act](#) governing refunds,³⁸⁰² [s.45](#) provides that a refund must be given without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund; it must be given using the same means of payment as the consumer used to pay for the digital content, unless the consumer expressly agrees otherwise; and the trader must not impose any fee on the consumer in respect of the refund.³⁸⁰³

Footnotes

- 3715 [2015 Act s.19](#), above, para.40-495.
- 3716 Technically, [s.42\(1\)](#) makes this definition both for the purposes of [s.42](#) and of [s.43](#) (which concerns the right to repair or replacement): below, para.40-562.
- 3717 [2015 Act s.42\(1\)](#) referring to [ss.34, 35 and 36 of the Act](#), below, paras 40-550, 40-551 and 40-552 respectively.
- 3718 [2015 Act s.42\(2\)](#) referring to [ss.43 and 44](#) on which see below, paras 40-562 and 40-563 respectively.
- 3719 Under [2015 Act s.37](#), below, para.40-553. Where information is provided in relation to the digital content’s main characteristics, functionality or compatibility, it becomes a term of the contract under [s.36](#) whose breach renders the content non-conforming within the meaning of [s.42\(1\)](#), with the remedial consequences provided by [s.42\(2\)](#): below, para.40-552.
- 3720 [2015 Act s.42\(4\)](#) which provides that “facility” is to be understood in the sense in which it is used by [s.33\(3\)](#) (on which see above, para.40-545).
- 3721 [2015 Act ss.12 and 19\(5\)](#), above, para.40-502.
- 3722 [2015 Act ss.41, 42\(5\) and 45](#) on which see below, paras 40-559—40-560.
- 3723 [2015 Act s.19\(1\)\(c\) and 19\(4\)](#), above, paras 40-495 and 40-508.
- 3724 [2015 Act s.38\(1\)](#).

- 3725 On which see Vol.I, Ch.27 (termination for breach) and Ch.29 (damages).
- 3726 2015 Act s.42(8).
- 3727 2015 Act s.42(6) and (8) referring to breach of terms to which s.42(2), (4) or (5) apply.
- 3728 2015 Act s.19(14) and (15) above, paras 40-497—40-498; Consumer Sales Directive 1999 art.5(3).
- 3729 2015 Act s.42(9), which specifies that its provision is for the purposes of s.42(2). As earlier noted, s.42(1) defines non-conformity of the digital content for this purpose as referring to where it is supplied other than in conformity with the statutory terms as to quality, fitness for particular purpose and description set by ss.34, 35 and 36 of the Act: above, para.40-548.
- 3730 2015 Act s.42(10).
- 3731 On this category see 2015 Act s.33(1), (2) and (7) and above, paras 40-544—40-545.
- On the 1979 Act s.14, see below, paras 46-095 et seq.
- 3732 2015 Act s.9, above, para.40-499.
- 3733 1979 Act s.14(2).
- 3734 2015 Act s.59(1) (as amended) defines “producer in relation to goods or digital content” as the manufacturer, the importer into the United Kingdom, or any person who purports to be a producer by placing the person’s name, trade mark or other distinctive sign on the goods or using it in connection with the digital content”, a definition deriving from the 1999 Directive art.1(2)(d) but amended on IP completion day (on which see above, para.40-004 and Vol.I, paras 1-020 et seq.), so as to substitute the “United Kingdom” for the “European Economic Area” in this definition: Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018 (SI 2018/1326) reg.3(3) (reg.1(3)’s reference to reg.3’s coming into force on “exit day” must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4), Sch.5 para.1).
- 3735 2015 Act s.9(3)(b).
- 3736 2015 Act s.9(4)(c).
- 3737 1999 Directive art.1(2)(b) “consumer goods”. The provision governing public statements is found in art.2(2)(d) and (4). On these provisions see above, para.40-499. On IP completion day, there was no retained EU case-law on these provisions in the Directive though a UK court could take account of any later case-law of the CJEU in taking its view on the interpretation of s.9(5)—(7), in order to achieve a consistent interpretation in the Act, s.34(5)—(7). On the changing significance of case-law of the CJEU see above, para.40-004 and Vol.I, paras 1-027—1-029.
- 3738 Explanatory Notes 2015 para.179.
- 3739 2015 Act s.42(1) and (2) on the operation of which, see above, para.40-548. On the consumer’s rights and remedies see below, paras 40-561 et seq.
- 3740 See the special definition of this category by s.33, above, paras 40-544—40-546.
- 3741 See above, para.40-500. cf. Sale of Goods Act 1979 s.14(3), below, paras 46-105 et seq.
- 3742 2015 Act s.35(1).
- 3743 2015 Act s.35(3). Section 35(2) and (4) provide for the application of subs.(3) in the case of sale by a credit-broker to a trader and the consumer makes the particular

- purpose known to the credit-broker. “Credit-broker” and “credit-brokerage” are defined by s.59(1) of the Act.
- 3744 2015 Act s.35(4).
- 3745 2015 Act s.35(5).
- 3746 2015 Act s.42(1) and (2) on the operation of which, see above, para.40-548. On the consumer’s rights and remedies see below, paras 40-561 et seq.
- 3747 2015 Act s.11 (above, para.40-501). On the 1979 Act s.13, see below, paras 46-086—46-087.
- 3748 2015 Act s.34(4)(c), above, para.40-550.
- 3749 SI 2013/3134 especially regs 9, 10 and 13 referring to Schs 1 and 2 of the Regulations: see above, paras 40-063 et seq. and esp. para.40-108.
- 3750 2015 Act s.36(3)—(4). As earlier noted, similar provision is made for contracts for the supply of digital content other than for a price paid by the consumer (which fall outside the definition of “digital content contract” in s.33, above, paras 40-545—40-547) in the 2013 Regulations themselves: reg.9(3), 10(5) and 13(6).
- 3751 2013 Regulations reg.5 provides that “functionality” in relation to digital content includes region coding, restrictions incorporated for the purposes of digital rights management, and other technical restrictions”.
- 3752 2013 Regulations Sch.1 paras (a), (j) and (k) (on-premises contracts); Sch.2 paras (a), (v) and (w) (off-premises contracts and distance contracts): for the full lists of information in these Schedules see above, paras 40-106 and 40-101 respectively.
- 3753 2011 Directive art.6(5) (though that requirement is applicable only to off-premises contracts and distance contracts): above, para.40-108 and cf. above para.40-501 in relation to goods contracts in s.11 of the Act and below, para.40-579 in relation to services contracts in s.50 of the Act.
- 3754 2015 Act s.36(4); 2011 Directive art.6(5) (as regards off-premises contracts and distance contracts): above, para.40-108.
- 3755 Explanatory Notes 2015 para.185. On 2015 Act s.40, see below, para.40-558.
- 3756 2015 Act s.42(1) and (2) on the operation of which, see above, para.40-548. On the consumer’s rights and remedies see below, paras 40-561 et seq.
- 3757 Above, para.40-502.
- 3758 SI 2013/3134 regs 9, 10 and 13 on which see above, paras 40-064 et seq. and especially 40-099—40-106. It is to be noted, though, that the scope of the 2013 Regulations is restricted in a number of important respects: see above, paras 40-079—40-081, 40-099.
- 3759 Above, para.40-552. The information relevant to s.37 is set out by 2013 Regulations Sch.1 paras (b)–(i) (on-premises contracts); Sch.2 paras (b)–(u) and (x) (off-premises contracts and distance contracts): for the full lists of information in these Schedules see above, paras 40-106 and 40-101 respectively. As earlier noted, similar provision is made for contracts for the supply of digital content other than for a price paid by the consumer (which fall outside the definition of “digital content contract” in s.33, above, para.40-108) in the 2013 Regulations themselves: reg.9(3), 10(5) and 13(6): above, para.40-546.

- 3760 2015 Act s.37(1)–(3), which thereby implemented the 2011 Directive art.6(5) (though art.6(5) itself applies only to off-premises contracts and distance contracts): and see above, para.40-108.
- 3761 2013 Regulations Schs 1 and 2, above, paras 40-106 and 40-101.
- 3762 2015 Act s.37(3).
- 3763 “Facility” is not defined by the 2015 Act but it is used by s.33(3), on which see above, para.40-545.
- 3764 cf. 2015 Act s.19(5) making similar provision as regards “goods contracts”, above, para.40-502. For the general scheme of the 2015 Act in relation to the availability of consumer remedies in respect of digital content, see above, para.40-548.
- 3765 2015 Act s.42(6)–(8), below, para.40-566.
- 3766 i.e. under 2015 Act ss.34 and 35, above, paras 40-550 and 40-551 respectively.
- 3767 2015 Act s.38(2) provides that the rule in s.38(1) is subject to provision made by any other enactment, whenever passed or made. cf. 2015 Act s.18 above, para.40-507 for the equivalent provision in relation to goods contracts.
- 3768 For this right under the general law see Vol.I, Ch.27.
- 3769 This follows from the fact that 2015 Act s.42(6)–(8) (which provides for and restricts “other remedies” for the consumer) does not apply to breaches of express terms, but is instead restricted to breaches of the statutory terms foreseen by ss.34, 35, 36, 37 and 41(1) of the Act.
- 3770 On the definition of this category of contracts see 2015 Act s.33, above, paras 40-544–40-548.
- 3771 Explanatory Notes 2015 para.191.
- 3772 Explanatory Notes 2015 para.192.
- 3773 Explanatory Notes 2015 para.192.
- 3774 While this is specially provided for the purposes of Ch.3, this definitional provision applies only in the circumstances set out by s.39(1) of the 2015 Act: s.39(2).
- 3775 Explanatory Notes 2015 para.193.
- 3776 Explanatory Notes 2015 para.193.
- 3777 2015 Act s.39(2). A trader which is in the contractual control of the consumer and which only provides a service by which the digital content reaches the consumer is not providing digital content for the purposes of Ch.3: 2015 Act s.33(4), though may be subject to provision in Ch.4 governing the provision of services: Explanatory Notes 2015 para.193.
- 3778 Explanatory Notes 2015 para.194.
- 3779 Explanatory Notes 2015 para.194 and see further Krebs (2017) J.B.L. 376.
- 3780 2015 Act s.39(3).
- 3781 2015 Act s.39(5).
- 3782 2015 Act s.39(4).
- 3783 Explanatory Notes para.195.
- 3784 Explanatory Notes para.195.
- 3785 2015 Act s.39(6) referring to ss.34, 35 and 36, on which see above, paras 40-550, 40-551 and 40-552 respectively.

- 3786 2015 Act s.39(7) and s.42(1), (6)–(8) and see below, paras 40-561 et seq.
- 3787 Explanatory Notes 2015 para.196.
- 3788 i.e. 2015 Act s.62 on which see above, paras 40-223 et seq.
- 3789 2015 Act s.40(1) referring to ss.34, 35 and 36 on which see above, paras 40-550, 40-551 and 40-552 respectively.
- 3790 2015 Act s.40(2).
- 3791 SI 2013/3134 regs 9, 10 and 13 and see above, paras 40-063 et seq., especially 40-099—40-106 (for the information requirements) and above, para.40-552 (on s.36 of the 2015 Act).
- 3792 This follows from the restricted terms of s.42’s provisions governing the presumption of non-conformity. So, s.42(9) applies the presumption only for the purposes of s.42(2), which refers to the consumer’s rights arising from “non-conformity” as defined by s.42(2), i.e. where the digital content does not conform to the statutory terms in ss.34, 35 and 36. On the presumption of non-conformity, see above, para.40-549.
- 3793 2015 Act s.40(3).
- 3794 This follows from s.5 of the Limitation Act 1980’s provision that the action under a simple contract “shall not be brought after the expiration of six years from the date on which the cause of action accrued”, on which see Vol.I, para.31-002 and paras 31-031 et seq.
- 3795 Explanatory Notes 2015 paras 199–200.
- 3796 2015 Act s.41(1).
- 3797 For the definition of this category see 2015 Act s.33, above, paras 40-544—40-546.
- 3798 2015 Act s.42(5), above, para.40-548. cf. below, para.40-563 for the more general situation where a consumer may be able to obtain a partial or even full refund by way of price reduction under s.44 of the Act.
- 3799 See below, para.40-565.
- 3800 2015 Act s.45(1).
- 3801 2015 Act s.45(2).
- 3802 Notably, s.20(15)–(17) (refund under goods contracts), above, para.40-516. Similarly, s.44(4)–(6) (refund as a result of price reduction in relation to digital content contract), below, para.40-563.
- 3803 2015 Act s.45(3)–(5).

(iii) - The Scheme of Remedies for the Consumer

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(d) - Digital Content Contracts

(iii) - The Scheme of Remedies for the Consumer

Special rights for the consumer

- 40-561 It has been seen that the Act provides the consumer with a special right to a refund by s.45 of the 2015 Act for breach of the statutory term as to the trader's right to supply the digital content³⁸⁰⁴ and a very limited right to recover the amount of any costs incurred in respect of breach of the statutory term as to information contained in s.37 of the Act.³⁸⁰⁵ More generally, s.42 provides that, where the trader has committed a breach of a statutory term as to the satisfactory quality, fitness for a particular purpose or description of the digital content as provided by ss.33, 34 and 36 of the Act, the consumer has a right of repair or replacement (under s.43) and a right to a price reduction (under s.44).³⁸⁰⁶ The Act acknowledges that the consumer may also enjoy a remedy for breach of one of these statutory terms under the general law.³⁸⁰⁷

First level of remedies: right to repair or replacement

- 40-562 Much of s.43's provision for the right to repair or replacement of digital content under digital content contracts follows word for word s.23's provision for the right to repair or replacement of goods under goods contracts,³⁸⁰⁸ with the exception that "digital content" is substituted for "goods".³⁸⁰⁹ Under goods contracts, these rights to corrective performance in the consumer implemented in UK law the Consumer Sales Directive 1999,³⁸¹¹ and while the Directive's requirements do not extend to contracts for the supply of digital content other than where supplied

as part of a “tangible movable item”,³⁸¹² an English court is likely to interpret the provisions of s.43 which use the same words as s.23 in a harmonious way, and in principle the latter must “wherever possible” be interpreted so as to conform the Directive’s requirements.³⁸¹³ Section 43(2)–(4) of the 2015 Act provide that:

Section 43

“(2) If the consumer requires the trader to repair or replace the digital content, 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).

“(3) The consumer cannot require the trader to repair or replace the digital content if that remedy (the repair or the replacement)—

(a) is impossible, or

(b) is disproportionate compared to the other of those remedies.

“(4) Either of those remedies is disproportionate compared to the other if it imposes costs on the trader which, compared to those imposed by the other, are unreasonable, taking into account—

(a) the value which the digital content would have if it 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.”

However, in certain respects s.43 amends the scheme foreshadowed by s.23, and the differences in the contexts of s.23 and s.43 may also require differences in interpretation. So, s.43(5) provides that:

Section 43

“(5) Any question as to what is a reasonable time or significant inconvenience is to be determined taking account of—

- (a) the nature of the digital content, and
- (b) the purpose for which the digital content was obtained or accessed.”

This differs from the parallel provision governing goods contracts,³⁸¹⁴ in that it refers to the purpose for which the digital contained was “obtained or accessed” rather than, under s.23(5) “for which the goods were acquired”. This reflects the fact that Ch.3’s statutory terms governing the quality, etc. of digital content may apply not merely to digital content acquired under the contract to supply digital content, but also to digital content which is later supplied or accessed.³⁸¹⁵ Moreover, s.43’s provisions require the consumer to give the trader time to perform repairs or, as the case may be, to replace the digital content (unless giving the trader that time would cause significant inconvenience to the consumer) and so relate only to these two rights, unlike s.23’s equivalent provisions which relate also to the consumer’s short-term right to reject the goods: this follows from the absence of any provision for the consumer to reject digital content, either under a short-term or a final right of rejection.³⁸¹⁶ However, unlike the position applicable to “goods contracts”, where the consumer has the right to a reduction in price if the goods do not conform to the contract after one repair or replacement by the trader,³⁸¹⁷ the consumer will not necessarily have the right to a reduction of price after requiring repair or replacement of digital content under s.43 even though the digital content still does not conform to the contract, but will do so only if the consumer has required the trader to repair or replace the digital content and the trader has not done so within a reasonable time and without significant inconvenience to the consumer.³⁸¹⁸ This difference reflects the fact that it is the nature of some forms of digital content (such as games) that they may contain a few “bugs” on release, which may require multiple fixing by the trader.³⁸¹⁹

Second level of remedy: right to price reduction

40-563 Section 44 of the 2015 Act provides for a right to price reduction for a consumer in respect of digital content which has failed to conform to the statutory terms as to quality, etc. which the Act itself provides.³⁸²⁰ While to an extent this remedy reflects the pattern established by the Act for consumers in relation to “goods contracts” which implemented the Consumer Sales Directive 1999,³⁸²¹ s.44 does not couple the right to price reduction with any right to reject the digital content or to terminate the contract. Under s.44(1)–(3):

Section 44

“(1) The right to a price reduction is the right to require the trader to reduce the price to the consumer by an appropriate amount (including the right to receive a refund for anything already paid above the reduced amount).

(2) The amount of the reduction may, where appropriate, be the full amount of the price.

(3) A consumer who has that right may only exercise it in one of these situations—

(a) because of section 43(3)(a) the consumer can require neither repair nor replacement of the digital content, or

(b) the consumer has required the trader to repair or replace the digital content, but the trader is in breach of the requirement of section 43(2)(a) to do so within a reasonable time and without significant inconvenience to the consumer.”

Thus, in common with the position as regards the consumer’s right to a price reduction or final right to reject in respect of goods,³⁸²² the consumer’s right to a price reduction in respect of digital content applies only at a second level, where the first level remedies of repair or replacement are either not available or the trader has failed to perform them within a reasonable time and without significant inconvenience to the consumer, though the details of the circumstances differ.³⁸²³ On the other hand, where a consumer has a right to a price reduction, is entitled to exercise it and does exercise it, in common with other provisions in the Act, any refund must be given without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund, using the same means of payment as the consumer used to pay for the digital content, unless the consumer expressly agrees otherwise, and the trader must not impose any fee on the consumer in respect of the refund.³⁸²⁴

Discretion as to appropriate remedy

40-564 **Section 58 of the 2015 Act** provides that in any proceedings in which one of the three special remedies provided for consumers by Ch.3³⁸²⁵ is sought, the court enjoys two additional powers. First, on the application of the consumer, the court may make an order requiring specific performance by the trader of any obligation imposed on the trader in respect of repair or replacement of the digital content.³⁸²⁶ Secondly, where a consumer claims the right to repair or replacement or the right to a price reduction (termed the “relevant remedies” by s.58), but the court decides that the provisions governing these rights “have the effect that exercise of another of these rights is appropriate”, “the court may proceed as if the consumer had exercised that other right”.³⁸²⁷ The court may make an order under s.58 unconditionally or on such terms and

conditions as to damages, payment of the price and otherwise as it thinks just.³⁸²⁸ These powers do not extend to the “other remedies” for consumers as this is understood by the Act and as explained in a later paragraph.³⁸²⁹

No right to reject digital content for breach of the statutory terms

- 40-565 Before publication of the Consumer Rights Bill, the Government consulted on the question whether future legislation should include within the new rights for consumers in respect of failures of quality, etc. in digital content a right to reject the digital content (with full refund) modelled on what became the short-term right to reject goods.³⁸³⁰ The Government considered that the “unique nature of digital content means that this is not a straightforward decision”, as

“... the concept of returning goods does not easily transfer to digital content since copies could be retained and any attempt to return the digital content to the trader could in fact result in another copy of digital content.”³⁸³¹

As enacted, the [2015 Act](#) made no provision for a right to reject digital content with a full refund, though, as has been seen, its provisions governing price reduction may in an appropriate case lead to a full refund.³⁸³² On the other hand, as earlier noted, in principle the [2015 Act](#) does not prevent a consumer from treating the contract as at an end under the general law on the ground of breach of an *express* term as to the quality, etc. of the goods, and while this would lead to a refund of money paid by the consumer only if the consumer established a total failure of consideration, the consumer would be entitled to damages for non-performance of the contract as a whole, any value the consumer has retained being deducted.³⁸³³ Of more practical importance, perhaps, may be the consumer’s admittedly very short-lived right to cancel a contract under which digital content is supplied under the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013](#), not least because this right is not subject to establishing that the digital content was in any sense faulty.³⁸³⁴

Other remedies in respect of breach of the statutory terms

- 40-566 The [2015 Act](#) acknowledges that, in principle, its provision of special rights for consumers under Pt 1 Ch.3 does not prevent them seeking other remedies in respect of breach of the statutory terms as to satisfactory quality, fitness for particular purpose, description, information supplied and the trader’s right to supply.³⁸³⁵ In this respect, and depending on the circumstances, these other remedies may include damages, seeking to recover money paid where the consideration for payment of the money has failed, and seeking specific performance or relying on the breach against

a claim by the trader for the price³⁸³⁶; the conditions and characteristics of these remedies are found in the law applicable to contracts generally.³⁸³⁷ However, the Act does not allow a consumer faced with breach of one of the statutory terms to treat the contract as at an end even if the general law would otherwise so allow,³⁸³⁸ following its general refusal to provide a right of rejection of digital content to which such a right to treat the contract as at an end would be connected.³⁸³⁹

Footnotes

- 3804 Above, para.40-560.
- 3805 Above, para.40-553.
- 3806 2015 Act s.42(1)–(2), above, para.40-548. On these rights see below, paras 40-562 and 40-563 respectively.
- 3807 2015 Act s.42(6)–(8), below, para.40-566.
- 3808 On which see above, para.40-520.
- 3809 This is true of s.43(1)–(4).
- 3810 Above, para.40-520; *Whittaker* (2017) 133 L.Q.R. 47 at 61–63.
- 3811 1999 Directive art.3(2) and (3), above, para.40-461.
- 3812 1999 Directive art.1(2)(b) “consumer goods”.
- 3813 Above, para.40-015, though note both the continuing significance of the retained EU general principle of conforming interpretation and the changing role of EU case-law on IP completion day: above, para.40-004 and Vol.I, paras 1-027—1-029.
- 3814 Above, para.40-520.
- 3815 See above, para.40-557 in relation to s.39 of the 2015 Act.
- 3816 2015 Act s.43(6) and (7), below, para.40-565.
- 3817 2015 Act s.24(5)(a), above, para.40-521.
- 3818 2015 Act s.44(3)(b), below, para.40-563.
- 3819 Explanatory Notes 2015 para.204.
- 3820 2015 Act s.42(1) and (2).
- 3821 2015 Act s.24; 1999 Directive art.3(5), above, paras 40-461, 40-521—40-522.
- 3822 2015 Act s.24(5), above, para.40-521.
- 3823 The legislative expression here is odd, as s.44(3) does not say that the consumer has a right to a price reduction in these circumstances, but rather that the consumer may only exercise such a right in these circumstances.
- 3824 2015 Act s.44(4)–(6).
- 3825 2015 Act s.58(1), referring to s.42(2): the right to repair or replacement (under s.43) and the right to a price reduction (under s.44) (which are the “relevant remedies” under s.58(8)(b)). On the effect of s.58 in relation to “goods contracts” see above, paras 40-524 and 40-525.
- 3826 2015 Act s.58(2) referring to s.43 of the Act, above, para.40-562.
- 3827 2015 Act s.58(3) and (4).
- 3828 2015 Act s.58(7).

- 3829 Below, para.[40-566](#).
- 3830 BIS, Enhancing Consumer Confidence by Clarifying Consumer Law (July 2012) (“BIS, Clarifying Consumer Law”), paras 7.137 et seq. which summarise the arguments for and against.
- 3831 BIS, Clarifying Consumer Law, para.7.138.
- 3832 [2015 Act s.44\(2\)](#), above, para.[40-563](#).
- 3833 See Vol.I, Ch.27 and especially para.[27-081](#) and see also paras [32-063—32-073](#) (referring to “failure of basis”). The *possibility* of such a right of termination of the contract is allowed by the fact that the provisions in [s.42\(6\)–\(8\)](#) governing “other remedies” and preventing the consumer from treating the contract as at an end are restricted to breach of the statutory terms in [ss.34–37](#) and [41\(1\)](#) of the [2015 Act](#). The approach of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] O.J. L136/1 (on which see above, para.[40-464](#)) differs here, as arts 14(6), 15–17 provide for the circumstances in which a consumer may terminate a contract for the supply of digital content or a digital service and also for the consequences of such a termination.
- 3834 [SI 2013/3134](#) and see above, paras [40-064](#) et seq. and [40-115](#) et seq.
- 3835 [2015 Act s.42\(6\)](#) referring to [s.42\(2\)](#), [\(4\)](#) and [\(5\)](#).
- 3836 [2015 Act s.42\(7\)\(a\), \(b\), \(c\)](#) and [\(e\)](#) respectively.
- 3837 See Vol.I, Ch.29 (damages), Ch.30 (specific performance and injunction) and paras [24-026—24-036](#) on the question whether a party to a contract may rely on the other party’s breach in resisting the latter’s claim for the price. In the case of recover of money paid, the general condition at common law is that the injured party (the consumer) has to establish a total failure of consideration (or basis) and this would apparently always be impossible in the context of the supply of digital content since it requires that the contract is discharged, which [s.42\(8\)](#) forbids: for discussion of the requirement generally see Vol.I, paras [32-063](#) et seq.
- 3838 [2015 Act s.42\(8\)](#).
- 3839 See above, para.[40-565](#).

(iv) - Compensation for Damage to Device

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(d) - Digital Content Contracts

(iv) - Compensation for Damage to Device

Consumer Rights Act 2015 s.46

40-567 Under [s.46 of the 2015 Act](#), where a trader supplies digital content to a consumer under a contract and the digital content causes damage to a device or to other digital content which belongs to the consumer and “the damage is of a kind that would not have occurred if the trader had exercised reasonable care and skill”, the consumer may require the trader either to repair the damage or compensate the consumer for the damage with an appropriate payment.³⁸⁴⁰ For this purpose, any repair by the trader must be done within a reasonable time and without significant inconvenience to the consumer, and at the trader’s cost.³⁸⁴¹ The consumer may bring civil proceedings to enforce any right under [s.46](#) and such a claim is treated as an action founded on simple contract for the purposes of limitation of actions.³⁸⁴² According to the Act’s Explanatory Notes, the intention behind [s.46](#) is “to engage the principles behind a negligence claim but limit the type of loss that can be claimed”,³⁸⁴³ so as to create a remedy for the case, for example, where a consumer downloads software that contains a virus which causes loss or damage to the consumer’s device or to other digital content.³⁸⁴⁴ For this purpose, however, it is by no means clear that a claim in the tort of negligence would exist, for no duty of care has been recognised by the courts in this context and in the case of damage to other digital content, it would be a nice question whether this would constitute damage to property or pure economic loss.³⁸⁴⁵ The remedies under [s.46](#) supplements any remedy which the consumer may enjoy where a consumer can establish that a breach of a statutory term (either in a goods contract in which digital content is supplied or in a digital content contract) has caused the damage.³⁸⁴⁶ [Section 46](#) is an innovative provision in a number of ways. First, while the consumer’s remedies require proof of a causal link between the digital content

supplied by a trader under a contract and damage to the consumer’s “property” (whether this is a device or digital content), they do not require proof that this damage was caused by the negligence of the trader supplying it; instead, the consumer’s remedies arise where “the damage is of a kind that would not have occurred if the trader had exercised reasonable care and skill”, which appears to be at most a statutory expression of *res ipsa loquitur* as to the trader’s negligence. Secondly, the consumer’s remedies pick up the Act’s more general recourse to a right of repair, though here the trader may be required to repair something (whether a device or digital content) which it did not itself supply under the contract. However, the trader is permitted to opt to pay compensation instead of repairing. Thirdly, while the Explanatory Notes to s.46 compare the position under a “negligence claim”, the consumer’s remedies under s.46 arise only where digital content is supplied by a trader to a consumer under a contract, and the consumer’s claim is subjected to the general *contractual* period of limitation.³⁸⁴⁷

Footnotes

- 3840 2015 Act s.46(1)–(2). The compensation payment must be made without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to the payment; and the trader must not impose any fee on the consumer in respect of the payment: s.46(5) and (6).
- 3841 2015 Act s.46(3), subs.(b) of which specifies that these necessary costs include in particular the cost of any labour, materials or postage. Section 46(4) provides that: “any question as to what is a reasonable time or significant inconvenience is to be determined taking account of (a) the nature of the device or digital content that is damaged, and (b) the purpose for which it is used by the consumer”.
- 3842 2015 Act s.46(8) and see especially Limitation Act 1980 s.5 and Vol.I, paras 31-031 et seq.
- 3843 Explanatory Notes 2015 para.219.
- 3844 Explanatory Notes 2015 para.219.
- 3845 On the case-law surrounding recovery of pure economic loss in the tort of negligence see Clerk and Lindsell on Torts, 23rd edn (2020), paras 1-44 and 7-103 et seq. There would also be difficulties facing a consumer claiming that “digital content” supplied would itself constitute a “defective product” for the purposes of the statutory product liability in Pt 1 of the Consumer Protection Act 1987 as it is by no means clear that a “product” for this purpose includes non-physical property apart from electricity: see 1987 Act s.1(1), Clerk and Lindsell on Torts, paras 10-50—10-52, *Whittaker* (1989) 105 L.Q.R. 125 and cf. *VI v KRONE - Verlag Gesellschaft mbH & Co KG* (C-65/20) EU:C:2021:471, 10 June 2021 esp. at para.36 (physical newspaper not a “defective product” by reason of inaccurate health advice which it contained).
- 3846 The relevant provisions of the 2015 Act are found in ss.9–11, 16 (goods contracts) and ss.34–36 (digital content contracts). Liability in damages under the general law for

breach of the statutory terms inserted by these provisions is foreseen by [s.19\(9\)–\(10\)](#),
and [\(11\)\(a\)](#) (goods contracts) and [s.42\(6\)](#) and [\(7\)\(a\)](#) (digital content contracts).
3847 2015 Act s.46(8).

(v) - Exclusion of Liability and Enforcement

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(d) - Digital Content Contracts

(v) - Exclusion of Liability and Enforcement

Exclusion of liability

40-568 Section 47 provides an almost identical pattern of control of any attempted exclusion or restriction of liability as the Act earlier makes as regards the exclusion of the trader's liabilities under goods contracts, rendering such terms "not binding on the consumer to the extent that [the term] would exclude or restrict the trader's liability" arising under the provisions which insert statutory terms relating to the satisfactory quality, fitness for particular purpose, description, other pre-contractual information and trader's right to supply.³⁸⁴⁸ Section 47 makes identical provision for this purpose as the Act earlier makes as regards goods contracts in relation to the meaning of excluding or restricting liability which is modelled on s.13 of the Unfair Contract Terms Act 1977.³⁸⁴⁹ The exception to this pattern is that a trader's liabilities arising under s.46 in relation to damage to a device or other digital content caused by digital content may be excluded or restricted to the extent that it would satisfy the controls on unfair terms in consumer contracts generally in Pt 2 of the 2015 Act.³⁸⁵⁰

Choice of law

40-569 Unlike the position in relation to "goods contracts" in Pt 1 Ch.2
 3851

U and the controls on unfair terms in Pt 2 of the 2015 Act,
3852

U Ch.3 of the Act makes no special provision as regards the effect of choice of law on the protections for consumers which it sets out. This reflects the fact that, unlike these earlier provisions,

3853

U Ch.3's provisions were not required by EU legislation which itself sets out a special rule on the effect of choice of law. This means that the effect of any choice of law falls to be governed under the general private international law rules applicable and, in particular, the retained EU law Rome I Regulation on the law applicable to contractual obligations.

3854

U

Enforcement

40-570 **Section 47(5) of the 2015 Act** provides that a regulator may enforce s.47's provisions rendering terms seeking to exclude the trader's liability not binding on a consumer under the scheme of enforcement which the Act provides generally for the control of unfair contract terms.³⁸⁵⁵ This scheme has been described earlier, as have the difficulties of its use in relation to commercial practices which consist of the use or recommendation for use of terms in ways which do not reflect EU legislative requirements.³⁸⁵⁶ In the case of digital content contracts, as has earlier been noted, Ch.3 of the 2015 Act did not generally implement any EU legislation (though some of its provisions are modelled on the Consumer Sales Directive beyond the latter's scope³⁸⁵⁷), with the exception of certain provisions implementing the Consumer Rights Directive 2011.³⁸⁵⁸ As a result, the relevant provisions in Ch.3 of Pt 1 of the 2015 Act which implemented the 2011 Directive have been listed by Sch.13 of the Enterprise Act 2002 as capable of giving rise to a "Schedule 13 infringement" within the meaning of Pt 8 of the 2002 Act.³⁸⁵⁹ In addition, acts or omissions in respect of any provision in Pt 1 of the 2015 Act were specified as able to give rise to a "domestic infringement" for the purposes of s.211 of the 2002 Act.³⁸⁶⁰

Footnotes

3848 2015 Act s.47(1) referring to ss.34–37 and 41 of the Act. In one respect, the controls differ, as s.47 renders terms seeking to exclude the trader's liability in respect of breach of s.41 (trader's right to supply digital content) not binding on the consumer in all circumstances, whereas the controls in s.31 on the exclusion of the trader's liability

- in respect of breach of [s.17](#) (trader's right to supply the goods, etc.) under a contract of hire is subject to a test of fairness: [2015 Act s.31\(5\)–\(6\)](#). On the controls on the exclusion of the trader's liabilities under "goods contracts" see [2015 Act s.31](#) and above, para.[40-535](#).
- 3849 [2015 Act s.47\(2\)–\(4\)](#), cf. [2015 Act s.31\(2\)–\(4\)](#) as explained above, para.[40-535](#).
- 3850 [2015 Act s.47\(6\)](#) and see [2015 Act s.62](#) and above, paras [40-273](#) et seq.
- 3851 [2015 Act s.32](#) (which implemented the Consumer Sales Directive 1999 art.7(2)), above, para.[40-537](#).
- 3852 [2015 Act s.74](#) (which implemented the Unfair Terms in Consumer Contracts Directive 1993 art.6(2)) above, para.[40-439](#).
- 3853 See above, para.[40-537](#) (notes).
- 3854 Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I") [2008] O.J. L177/6 was retained on IP completion day by s.3 of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020 s.25(2)(a)) and was amended by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/834) reg.10 (as itself amended by the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020 (SI 2020/1574) reg.6(12) and (13)) on which generally see Vol.I, paras [33-019](#) et seq.
- 3855 [2015 Act Sch.3](#).
- 3856 See above, paras [40-440](#)—[40-454](#).
- 3857 Above, paras [40-550](#) (statutory term as to satisfactory quality) and paras [40-562](#)—[40-563](#) (special remedies for consumer).
- 3858 2011 Directive art.6(5) in relation to [s.36\(3\)–\(4\)](#) and [s.37](#) and the consequential remedies for breach specified by [s.42](#), as explained above, paras [40-552](#) and [40-553](#). As earlier noted in para.[40-424](#) (note), the 2011 Directive art.25 renders all its provisions "imperative" and so incapable of exclusion by agreement in all circumstances.
- 3859 Enterprise Act 2002 s.212 and Sch.13 para.27 (as inserted by the Consumer Protection (Enforcement) (Amendment. etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.3(20) and Sch. para.1)) lists ss.[36\(3\)](#) and [\(4\)](#), [37](#), [38](#) and [42](#) of the 2015 Act for this purpose and thereby followed the former position provided for "Community infringements" under the Enterprise Act 2002 (Part 8 EU Infringements) Order 2014 (SI 2014/2908) art.4; Sch. (as amended by the Enterprise Act 2002 (Part 8 Community Infringements and Specified UK Laws) (Amendment) Order 2015 (SI 2015/1628) art.3(2)). While ss.[36\(3\)](#) and [\(4\)](#), [37](#) and [42](#) can be seen to have implemented art.6(5) of the Consumer Rights Directive 2011, it is not clear why [s.38](#) (no other requirement to treat term about quality or fitness as included) was listed, nor why [s.47](#) (which provides for the control of the exclusion or restriction of liability) was *not* listed given the Directive art.25's

statement that all its provisions are “imperative”. This law governing “[Schedule 13](#) infringements” replaced earlier provisions governing “Community infringements” as explained more generally above, paras [40-136—40-137](#).

3860 [Enterprise Act 2002 s.211\(2\); Enterprise Act 2002 \(Part 8 Domestic Infringements\) Order 2015 \(SI 2015/1727\) art.2](#) on which see above, paras [40-136—40-137](#).

(i) - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(e) - Services Contracts

(i) - Introduction

Background

- 40-571 The general motivations for the inclusion of provisions in Pt 1 of the Consumer Rights Act 2015 governing “services contracts”³⁸⁶¹ reflects long-standing concerns in the Law Commission and in government that English law’s treatment of these contracts in the context of consumer-contracting was piecemeal and incomplete. The main provisions applicable were those governing “contracts for the supply of a service” put in place by the Supply of Goods and Services Act 1982 (the “1982 Act”) applicable irrespective of the status of the contracting parties. To a considerable extent, the new provisions in Pt 1 Ch.4 of the 2015 Act which apply to contracts “for a trader to supply a service to a consumer” or “services contracts”, reflect the earlier provisions in the 1982 Act (with some change of wording), but Ch.4 makes new provision for the contractual status of information supplied by the trader to the consumer (whether or not it was required to be supplied under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (“2013 Regulations”)),³⁸⁶² for new special remedies for the consumer if the trader breaches the statutory terms which it creates (being the “right to repeat performance” and the right to a price reduction)³⁸⁶³ and dedicated and original controls on the exclusion by agreement of liability in the trader.³⁸⁶⁴

No statutory definition of “services contracts”

- 40-572

Ch.4 of the 2015 Act applies to “a contract for a trader to supply a service to a consumer” which it terms a “contract to supply a service”³⁸⁶⁵ or (in its headings) “services contracts”, the last name being used in the following paragraphs. Apart from the fact that this makes clear that **Ch.4** does not apply to contracts for services to be supplied by a consumer to a trader,³⁸⁶⁶ the only further clarification given is that the Act states that this “does not include a contract of employment or apprenticeship”.³⁸⁶⁷ In these respects, **Ch.4** follows the precedent set by the **1982 Act**,³⁸⁶⁸ and, as a result, the understanding of the contracts to be governed by **Ch.4**’s provisions will fall to be decided, at least in part, by reference to the traditional distinction between contracts for services and contracts of employment (sometimes called contract *of* service).³⁸⁶⁹ This leaves a very wide range of contracts within the scope of **Ch.4**’s provisions.³⁸⁷⁰ In particular, the government clearly assumed that “contracts for services” included contracts of transport, as it delayed the coming into force of **Ch.4** in relation to certain categories of “consumer transport services”.³⁸⁷¹ Moreover, it must be recalled that the **2015 Act** specifically provides that each of **Chs 2 to 4** can apply even if the contract covers something covered by another chapter of **Pt 1**.³⁸⁷² The **2015 Act** amended the **1982 Act** so that the contracts to which **Ch.4** applies are no longer governed by the relevant provisions of the **1982 Act**.³⁸⁷³

Limited EU legislative background

- 40-573 In general, the provisions of **Ch.4 of Pt 1 of the 2015 Act** did not implement EU legislation, but an exception to this position is found in relation to **s.50**, which provides that information required to be supplied by the trader to the consumer under the **2013 Regulations** is to be treated as a term of the contract: this implemented a particular aspect of the Consumer Rights Directive 2011.³⁸⁷⁴

Footnotes

- 3861 The **2015 Act**’s substantive provisions on “services contracts” generally came into force on 1 October 2015, but an exception was made as regards certain categories of “consumer transport service” which came into force on 1 October 2016 as noted above, para.40-465 and below para.40-572 (note).
- 3862 **2015 Act s.50**, below, paras 40-576—40-580. On the **2013 Regulations** generally, see above, paras 40-064 et seq.
- 3863 **2015 Act s.54–56**, below, paras 40-585—40-586.
- 3864 **2015 Act s.57**, below, paras 40-589—40-591.
- 3865 **2015 Act s.48(4)**.
- 3866 The definitions of “consumer” and “trader” in **s.2(2)–(7)** of the **2015 Act** apply. On these see above, paras 40-244 and 40-247 respectively.

- 3867 2015 Act s.48(2). In addition since 2017 as regards England, Scotland and Wales s.48(3A) has provided that Ch.4 does not apply to anything that is governed by Regulation (EU) 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) 2006/2004.
- 3868 1982 Act s.12(1) and (2).
- 3869 See below, paras 42-003, 42-005, 42-010 et seq.
- 3870 In common with the 1982 Act s.12(4)–(5), s.48(5)–(8) of the 2015 Act empowers the Secretary of State to provide by Order that a provision within Ch.4 does not apply in relation to a service of a description specified in the order.
- 3871 The Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630) arts 4 and 6(2) as amended by the Consumer Rights Act 2015 (Commencement No.3, Transitional Provisions, Savings and Consequential Amendments) (Amendment) Order 2016 (SI 2016/484) art.2, and see above, para.40-465.
- 3872 2015 Act s.1(4)–(5) referring to these as “mixed contracts”: above, para.40-486. The 2015 Act therefore omits provision similar to s.12(3) of the 1982 Act which includes within the definition of contract for the supply of a service a contract whether or not goods are also to be transferred or bailed by way of hire under the contract.
- 3873 2015 Act s.60, Sch.1 paras 37–38 and 51 amending, notably, s.12 of the 1982 Act.
- 3874 2011 Directive art.6(5) on which see above para.40-108 and on s.50(2) and (3) of the 2015 Act see below, para.40-579. See also on the exclusion or restriction of liability in these cases below, para.40-590 (note).

(ii) - The Statutory Terms

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(e) - Services Contracts

(ii) - The Statutory Terms

The relationship between the statutory terms, non-conformity of the service to the contract and the consumer's remedies

- 40-574 Following the legislative pattern set by Pt 1's provision governing goods and digital content, ³⁸⁷⁵ the 2015 Act makes special provision as to how breach of the statutory terms which it inserts into contracts for a trader to supply services to a consumer relates to the scheme of remedies for the consumer which it sets out. For this purpose, s.54(2) of the Act defines "a service conforming to a contract"³⁸⁷⁶ as a reference to:

- "(a)the service being performed in accordance with section 49, or
- (b)the service conforming to a term that section 50 requires to be treated as included in the contract and that relates to the performance of the service."³⁸⁷⁷

As will be seen, s.49 inserts into the contract a statutory term that the service is to be performed with reasonable care and skill, ³⁸⁷⁸ and s.50 makes original provision according to which "anything that is said or written to the consumer" by the trader "about the trader or about the service" may (subject to the conditions there specified) become a term of the contract and any information provided by the trader as required by the 2013 Regulations will become a term of the contract. ³⁸⁷⁹ In this respect, s.54(2)(b)'s definition of "a service conforming to a contract" is therefore restricted: it does not include breaches of all the terms treated as included by s.50, but is limited to those where the term (and therefore the information) "relates to the performance of the service". Where the service does not conform to the contract in the special sense just outlined, the consumer has a

“right to require repeat performance” and the right to a price reduction, subject to the conditions and qualifications on the availability on these rights which are later set out.³⁸⁸⁰ On the other hand, where the trader is in breach of a statutory term required by s.50 which does *not* relate to the service or is in breach of the statutory term requiring the trader to perform within a reasonable time inserted by s.52, then, the consumer has a special right only to a price reduction.³⁸⁸¹ In keeping with its approach to the remedies available to the consumer under Chs 2 and 3 in relation to goods contracts and digital content contracts,³⁸⁸² s.54 of the Act also provides that it does not prevent a consumer seeking “other remedies” under the general law for a breach of the statutory terms imposing duties on the trader under Ch.4, though, unlike the earlier provisions, it includes within these other remedies a right to treat the contract as at an end.³⁸⁸³

Service to be performed with reasonable care and skill

40-575 Reflecting both the common law of implied term and s.13 of the 1982 Act, s.49(1) provides that:

“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.”

Given that no special explanation is provided for what is meant by “reasonable care” for these purposes, recourse should be made to earlier case-law on this notion in the context of the 1982 Act and more generally at common law.³⁸⁸⁴ Similarly, the consumer bears the burden of proof of establishing that the trader failed to exercise reasonable care in the performance of the service. Breach of this statutory term may give rise to a right in the consumer to repeat performance or a price reduction,³⁸⁸⁵ as well as the possibility of a remedy for breach of contract under the general law.³⁸⁸⁶

Information about the trader or service to be binding

40-576 Section 50 of the 2015 Act makes new, significant and quite complex provision rendering “anything that is said or written to the consumer” and certain categories of information supplied by the trader to the consumer binding on the trader by the creation of new statutory terms of the contract. For this purpose, s.50 distinguishes two situations.

Anything “said or written” by the trader irrespective of a duty to do so

40-577 First, s.50(1) provides that:

Section 50

“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, if—

- (a) it is taken into account by the consumer when deciding to enter into the contract, or
- (b) it is taken into account by the consumer when making any decision about the service after entering into the contract.”

So, “anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service” will constitute a term of the contract, subject to the two conditions set by (a) or (b) and a qualification set by s.50(2).³⁸⁸⁷ Section 50(1) is therefore restricted to things “said or written” “about the trader or the service”; the second of these is obvious, but an example of the first may be found in a commitment made by a trader to paying its workers a “living wage”.³⁸⁸⁸ When compared to the general position under the law of misrepresentation, “anything that is said or written” is very inclusive as it is not restricted to information (which may imply something factual) and could, therefore, include what the common law would treat as a representation of opinion or future fact³⁸⁸⁹; on the other hand, at common law a misrepresentation of fact can take place by conduct,³⁸⁹⁰ whereas conduct itself could not be said to constitute “anything that is *said or written*”, though, it is submitted, conduct accompanying things said or written could contribute to their interpretation. As regards the two conditions, the condition in (a) is straightforward as it provides a particular form of causal link between “what is said or written” by the trader and the consumer’s decision to enter into the contract. This is familiar from the law of misrepresentation, where an actionable misrepresentation must induce the contract.³⁸⁹¹ However, the alternative condition in (b) was new and makes relevant anything said or written which relates to the trader or the service if it is to be taken into account by the consumer “when making any decision about the service *after* entering into the contract”.³⁸⁹² The latter condition could be satisfied where what is said or written to the consumer relates to the choices which he or she will enjoy in the course of performance of the contract. For example, where a consumer concludes a contract for the provision of a wedding reception, the contract may leave open details of the arrangements to be settled at a later date. Anything said or written by the trader after the conclusion of the contract in relation

to those arrangements could fall within s.50(1)(b) and so become a term of the original contract after it was made.

- 40-578 As noted earlier, the impact of s.50(1) is qualified and this is effected by s.50(2), according to which:

Section 50

“Anything taken into account by the consumer as mentioned in subsection (1)(a) or (b) is subject to—

(a) anything that qualified it and was said or written to the consumer by the trader on the same occasion, and

(b) any change to it that has been expressly agreed between the consumer and the trader (before entering into the contract or later).”

The impact of s.50(1) may be qualified therefore either by what the trader says or writes at the time (“on the same occasion”³⁸⁹³) or by any change agreed between the consumer, whether before entering the contract or at some later date.³⁸⁹⁴ Despite these qualifications, it will be seen that the 2015 Act gives contractual force to pre-contractual statements in a range of situations where it would not be clearly the case under the general law of “warranty”.³⁸⁹⁵

Information supplied as required by 2013 Regulations

- 40-579 The second situation foreseen by s.50 is provided by s.50(3), which provides that, without prejudice to s.50(1),³⁸⁹⁶ information which the trader provided to the consumer as required by the Consumer Contracts (Information Cancellation and Additional Charges) Regulations 2013 is to be treated as a term of the contract.³⁸⁹⁷ Following the pattern set by statutory terms which the 2015 Act provides for “goods contracts” and “digital content contracts”,³⁸⁹⁸ s.50(4) requires that change to any of the information mentioned in s.54(3), “made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader”.

Remedies for breach

- 40-580

Where a trader breaches a statutory term treated as included in the contract under s.50(1) or (3), the consumer's special remedies differ according to whether the term (and therefore what was said or written or the information provided) related to the service (in which case they may consist of the right to repeat performance or price reduction)³⁸⁹⁹ or to the trader, when it may consist only of price reduction,³⁹⁰⁰ though in both cases the consumer may equally enjoy a remedy for breach of contract under the general law.³⁹⁰¹

Service to be performed within a reasonable time

- 40-581 Section 52 of the 2015 Act makes very similar provision as does s.14 of the 1982 Act for contracts for services more generally, setting a statutory term "that the trader must perform the service in a reasonable time",³⁹⁰² where

"(a)the contract does not expressly fix the time for the service to be performed, and does not say how it is to be fixed, and
(b)information that is to be treated under section 50 as included in the contract does not fix the time either."³⁹⁰³

This condition differs substantively from s.14 only in that it refers for this purpose to information which has been incorporated into the contract under s.50. As earlier noted, breach by the trader of a statutory term inserted by s.52 gives rise to a right to a price reduction and may give rise to other remedies for breach of contract under the general law.³⁹⁰⁴

Reasonable price to be paid for a service

- 40-582 Section 51 of the 2015 Act provides that, where the consumer has not paid a price or other consideration for the service, and where the contract does not expressly fix a price or other consideration, and does not say how it is to be fixed, and "anything that is to be treated under section 50 as included in the contract does not fix a price or other consideration either", then "the contract is to be treated as including a term that the consumer must pay a reasonable price for the service, and no more".³⁹⁰⁵

While s.51 reflects closely s.15 of the 1982 Act, it is unusual in the 2015 Act in that it may lead to the imposition of an obligation on the consumer to the trader, but it was required so as to allow the neat separation of the 2015 Act (applicable to consumer contracts) and the 1982 Act (applicable to other contracts); and the final three words "and no more" allow s.51 to make some claim as being useful for the protection of consumers. The 2015 Act makes no provision for breach by the

consumer of any term inserted into the contract by s.51 and this is therefore left to the general law, notably the trader's action for the price.³⁹⁰⁶

Express terms; relation of statutory terms to other law on contract terms

40-583 The 2015 Act provides that the special remedies which it provides for the consumer "do not affect any rights that the contract provides for, if those are not inconsistent".³⁹⁰⁷ So, for example, a clause in a contract may provide the consumer with a power of termination of the contract, whether for breach by the trader or on some other ground. At common law, such an express clause takes effect on its terms as properly construed and, given that the Act makes no provision of this sort in its scheme of rights for the consumer, a right in the consumer under such an express clause would not be inconsistent with the consumer's special remedies. As will be seen, the Act makes further provision as to the possible exclusion or limitation of the special rights which it creates for consumers in relation to services.³⁹⁰⁸ Secondly, the 2015 Act provides that nothing in Ch.4 "affects any enactment or rule of law that imposes a stricter duty on the trader"³⁹⁰⁹ and is also:

"... subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description."³⁹¹⁰

These provisions all follow closely similar provisions in the 1982 Act.³⁹¹¹

Footnotes

- 3875 2015 Act s.19 (goods contracts) and s.42 (digital content contracts), above, paras 40-495 and 40-548 respectively.
- 3876 This definition is stated as being for the purposes of the relevant provisions, i.e. ss.54 and 55 of the Act.
- 3877 2015 Act s.54(2).
- 3878 Below, para.40-575.
- 3879 2015 Act s.50(1)–(3), below, paras 40-576—40-580.
- 3880 2015 Act ss.54(3), 55 and 56 and see below, paras 40-584—40-587.
- 3881 2015 Act ss.54(4) and (5), 56 and see below, para.40-586.
- 3882 2015 Act s.19(9)–(13) and s.42(6)–(8) on which see above, paras 40-526 and 40-566 respectively.
- 3883 2015 Act s.54(6)–(7). The restriction to statutory terms imposing duties on the trader follows from the restriction in s.54(6) to breach of terms to which subs.(3)–(5) apply

- and these provisions do not apply to s.51's statutory term as to reasonable price to be paid by the consumer: on s.51 see below, para.40-582.
3884 cf. Vol.I, para.16-046.
- 3885 2015 Ac s.54(2)–(3) as explained above, para.40-574. The remedies of repeat performance and price reduction are explained below, paras 40-585—40-587.
- 3886 2015 Act s.54(6) and (7), below, para.40-588.
- 3887 Below, para.40-578.
- 3888 Explanatory Notes 2015 para.249.
- 3889 cf. Vol.I, paras 9-008 et seq.
- 3890 See Vol.I, paras 9-022—9-023.
- 3891 See Vol.I, paras 9-041—9-043.
- 3892 2015 Act s.50(1)(b) (emphasis added).
- 3893 It would seem for this reason that neither a later qualification even if made before the contract was concluded nor a qualification contained in an express term of the contract itself if made other than “on the same occasion” would fall within s.50(2)’s provision: cf. for this purpose the facts of *Allner v Peters & May Group Ltd [2019] EWHC 3258 (Comm)* where (allegedly) a statement was made in writing before contract that a yacht would be delivered before a certain date and the contract contained an express term making clear that no commitment was made to delivery dates: see below, para.40-590. In principle, such a term in a consumer contract which effected such a change could itself be an unfair term and so not binding on the consumer under s.62 of the 2015 Act, on which see above, paras 40-273 et seq. For an example of the claimed application of s.50(1), see *Allner v Peters & May Group Ltd [2019] EWHC 3258 (Comm)* and below, para.40-590.
- 3894
- 3895 See Vol.I paras 9-004, 15-002—15-019.
- 3896 Above, para.40-577.
- 3897 2015 Act s.54(3); 2013 Regulations regs 9, 10 and 13 on which see generally above, paras 40-064 et seq. and (for the information requirements themselves), paras 40-101 and 40-106, implementing (in particular) the Consumer Rights Directive 2011 art.6(5) (as explained above, para.40-108). It is to be noted, though, that the scope of the 2013 Regulations is restricted in a number of important respects: see above, paras 40-079—40-081, 40-099. On the exclusion or restriction of liability for breach of a term so treated as included in the contract, see below, para.40-590.
- 3898 2015 Act s.11(5) and 12(3) (goods contracts), above, paras 40-501 and 40-502; ss.36(4) and 37(3) (digital content contracts), above, paras 40-552 and 40-553.
- 3899 2015 Act s.54(2)–(3) above, para.40-574.
- 3900 2015 Act s.54(4) above, para.40-574.
- 3901 2015 Act s.54(6)–(7), below, para.40-588.
- 3902 2015 Act s.50(2). “What is reasonable time is a question of fact”: 2015 Act 52(3).
- 3903 2015 Act s.52(1).
- 3904 2015 Act s.54(5)–(6), above, para.40-574. On the right to a price reduction, see below, para.40-586.

- 3905 2015 Act s.51(1) and (2). “What is a reasonable price is a question of fact”: 2015 Act s.51(3).
- 3906 See Vol.I, paras 30-002 et seq. (though ex hypothesi, the trader’s claim for enforcement of the statutory term inserted by s.51 would not be for an *agreed* sum).
- 3907 2015 Act s.54(1).
- 3908 2015 Act s.57, below, paras 40-590—40-091.
- 3909 e.g. *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners [1975] 1 W.L.R. 1095*, above, para.39-205.
- 3910 2015 Act s.53. An example may be found in the case of contracts for services governed by the carriage of air conventions (notably, the Warsaw Convention and the Montreal Convention, on which see above, paras 37-002 et seq.) which, in the view of the UK government, remain the exclusive basis of liability on the routes to which they apply even after the 2015 Act applies to them: Department of Transport, Applying the Consumer Rights Act 2015 to the rail, aviation and maritime sectors, Response to Consultation, Moving Britain Ahead (July 2016), para.2.8.
- 3911 1982 Act s.16(2)–(4).

(iii) - The Scheme of Remedies for the Consumer

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(e) - Services Contracts

(iii) - The Scheme of Remedies for the Consumer

Introduction

- 40-584 In the case of services contracts, the range of special remedies is reduced to two: a right to repeat performance and a right to price reduction. Where the consumer has *both* these rights in the sense that the breach of the statutory term in question gives rise to them both under s.54(3),³⁹¹² then the Act places them at two levels: the right to repeat performance first, the right to price reduction second. However, in cases where the consumer has only the special remedy of price reduction (i.e. where the trader is in breach of a s.50 term that does not relate to the service or in breach of the term to perform within a reasonable time³⁹¹³), then, of course, there is no hierarchy of remedies: the consumer is restricted to, but also can immediately rely on, the right to price reduction. In a very broad sense, these special remedies reflect the right to repair or replacement and the right to price reduction in Ch.2 of the Act as regards goods contracts, which implemented requirements in the Consumer Sales Directive 1999,³⁹¹⁴ but the remedies in Ch.4 of the Act did not implement any EU law requirement.³⁹¹⁵

A right to repeat performance

- 40-585 This was an original and, at first sight, a rather startling remedy. As earlier noted,³⁹¹⁶ it reflects in broad terms the right to repair or replacement provided by the 2015 Act for consumers under goods contracts and digital content contracts³⁹¹⁷ in that it seeks to ensure that consumers receive the

performance which they pay for reflecting their right to corrective performance.³⁹¹⁸ Accordingly, s.55(1)–(4) provides that:

Section 55

“(1) The right to require repeat performance is a right to require the trader to perform the service again, to the extent necessary to complete its performance in conformity with the contract.

(2) If the consumer requires such repeat performance, the trader—

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

(3) The consumer cannot require repeat performance if completing performance of the service in conformity with the contract is impossible.

(4) Any question as to what is a reasonable time or significant inconvenience is to be determined taking account of—

- (a) the nature of the service, and
- (b) the purpose for which the service was to be performed.”

Where a consumer has this right,³⁹¹⁹ the only restriction on its availability is therefore that “the consumer cannot require repeat performance if completing performance of the service in conformity with the contract is *impossible*”:³⁹²⁰ there is no restriction on its availability on the basis of “disproportionality” of the type which is found in relation to the right to repair or replacement of goods and of digital content, where either one of the rights (to repair or, as the case may be, to replacement) is disproportionate *compared to the other*.³⁹²¹ Under s.55, impossibility could relate not merely to physical impossibility but also to impossibility in the sense that a *repeat* performance would be impossible, as in the case where performance of the services is time specific.³⁹²² Nevertheless, this is a very different position from the general law governing the availability of specific performance of a contract for the provision of services,³⁹²³ though as will be explained, the consumer’s right to require repeat performance will not necessarily lead to an order of specific performance of the (repeat performance) of the service by the trader.³⁹²⁴ As earlier noted, the right to repeat performance is placed at a first level of the consumer’s special remedies in the sense that, where a consumer “has” both remedies, the right to a price reduction arises only where the right to repeat performance is unavailable or has failed in two specified senses.³⁹²⁵ The

right to repeat performance may be illustrated by reference to the facts of the well-known decision of the House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth*, where a landowner (apparently qualifying as a “consumer” within the meaning of the 2015 Act though before its coming into force) commissioned the building of a swimming pool of a stipulated depth, and when it failed to conform to the stipulation, claimed the cost of reinstatement by way of damages for breach of contract.³⁹²⁶ This claim failed, on the basis that this cost was disproportionate to the advantage to be gained by the landowner from reinstatement. If such a contract were to qualify as a contract for services within the meaning of Ch.4 of the 2015 Act; the contractual stipulation as to the depth of the pool would then count as something “said or written” to the consumer under s.50(1) and, given that it would relate to performance of the service so as to fall within s.54(2)(b), would therefore give rise to the right to repeat performance under s.54(3)(a). What is much less clear is whether a court would wish to order specific performance in support of the consumer’s claim to repeat performance in circumstances such as these.³⁹²⁷

A right to price reduction

40-586 According to s.56(1) of the Act:

Section 56

“(1) The right to a price reduction is the right to require the trader to reduce the price to the consumer by an appropriate amount (including the right to receive a refund for anything already paid above the reduced amount).

(2) The amount of the reduction may, where appropriate, be the full amount of the price.”

For these purposes, s.56 makes similar provision as to the payment of any refund without undue delay, by the same means of payment, and without the imposition of a fee as Pt 1 provides more widely for refunds.³⁹²⁸ The Explanatory Notes to the Act suggest that a reduction in the price by an appropriate amount will normally mean that the price is reduced by the difference in value between the service the consumer paid for and the value of the service as provided and that this will take into account the benefit which the consumer has derived from the service.³⁹²⁹ However, they acknowledge that there may be some cases where the trader’s breach has not reduced the value of the service to the consumer:

“This could occur, for example, where the trader has not complied with information they gave about themselves.³⁹³⁰ For example, if the trader tells the consumer that they will pay their workers the living wage and this is important to the consumer and a reason

why they decided to go with this particular trader, arguably this does not affect the value of the service but the consumer would still have the right to request a reduction of an “appropriate amount” to account for the breach.”³⁹³¹

As earlier explained, the right to a price reduction is either available by itself (as in the cases where the trader has broken a term inserted by s.50 which does not relate to performance of the service or the statutory term to perform within a reasonable time³⁹³²) or coupled with a right to repeat performance. Where it is available by itself, the consumer can exercise it freely as foreseen by s.56(1) and (2). However, where the consumer “has” both the remedies in the sense of s.54(2)–(3) of the Act (which makes these two remedies available to a consumer where the trader breaches the statutory term of reasonable care or a term that s.50 treats as included which relates to performance of the service), then the Act sets the right to repeat performance at a first level and allows the right to price reduction only at a second level.³⁹³³ This is effected by s.56(3) of the 2015 Act, according to which:

“A consumer who has [the right to a price reduction] and the right to require repeat performance³⁹³⁴ is only entitled to a price reduction in one of these situations—

- (a)because of section 55(3) the consumer cannot require repeat performance; or
- (b)the consumer has required repeat performance, but the trader is in breach of the requirement of section 55(2)(a) to do it within a reasonable time and without significant inconvenience to the consumer.”

This is drafted in an odd way, as it provides that where a consumer *has* a right to a price reduction, he or she “is only entitled” to it in one of these two situations. Be that as it may, the effect of this provision is that in the circumstances where the Act provides the consumer with *both* these rights, he or she must in principle require the right to repeat performance first and proceed to price reduction only if the first right is impossible or if the trader has failed to repeat performance within a reasonable time and without significant inconvenience to the consumer. This means, in effect, that, in principle, under the special scheme of remedies, the consumer must first require the trader to re-perform the service and thereby give the trader another chance to perform in conformity with the contract and another chance to earn (or keep) the price. There may, however, be a way by which a consumer who wishes to require price reduction could do so without first requiring repeat performance, notably, where the consumer has lost confidence in the trader. If “impossibility of performance” by the trader, were held to include the situation where the trader cannot perform without co-operation by the consumer,³⁹³⁵ then, on a literal reading of s.55(3), the consumer could not require repeat performance and this in turn could then be said to trigger the availability of the right to price reduction.³⁹³⁶ However, such a reading is unnatural, as it would be odd to hold that the consumer does not have a *right* to repeat performance (and so can enjoy a right to price reduction) owing to a decision which the consumer has himself or herself made (the decision not to co-operate with the trader’s further performance). Either way, the special scheme of rights for

the consumer in ss.54 to 56 of the Act does not affect the availability of a remedy for breach of contract under the general law and, particularly in the case of a serious breach where the consumer has lost confidence in the trader, any right in the consumer to terminate the contract for breach and/or claim damages may seem more attractive.

Discretion as to appropriate remedy

- 40-587 Section 58 of the 2015 Act provides that in any proceedings in which one of the two special remedies provided for consumers by Ch.4³⁹³⁷ is sought, the court enjoys two additional powers. First, on the application of the consumer, the court may make an order requiring specific performance by the trader of any obligation imposed on the trader in respect of repeat performance.³⁹³⁸ Secondly, where a consumer claims the right to repeat performance or the right to a price reduction (termed the “relevant remedies” by s.58), but the court decides that the provisions governing these rights “have the effect that exercise of another of these rights is appropriate”, “the court may proceed as if the consumer had exercised that other right”.³⁹³⁹ The court may make an order under s.58 unconditionally or on such terms and conditions as to damages, payment of the price and otherwise as it thinks just.³⁹⁴⁰ It should be noted that, on their terms, the court’s powers under s.58 do not extend to the consumer’s “other remedies” as this is understood by the Act and as explained below.³⁹⁴¹ Neither the right to repeat performance nor the right to price reduction in relation to services contracts implemented any requirement of EU law,³⁹⁴² and so there is no problem of compatibility with retained EU law in relation to the potentially restrictive effect of a court’s exercise of its discretions in s.58 in relation to Ch.4.³⁹⁴³ However, if a court were simply to apply the restrictive approach of the general law as to the availability of specific performance in relation to the right to repeat performance (albeit in relation to the performance of primary obligations rather than obligations to correct a non-conforming performance), this could well undermine the policy of consumer protection envisaged by the Act. On the other hand, to return to the example suggested by *Ruxley Electronics Construction Ltd v Forsyth*,³⁹⁴⁴ a court may well be reluctant to order a builder to rebuild a swimming pool in conformity with the contract under threat of contempt of court, particularly where s.58 allows it instead to order a price reduction. A possible way of reconciling the need to maintain the genuine character of the consumer’s right to repeat performance and the proper concerns of a court in this sort of case with awarding specific performance, may be found in the court’s power to award damages in lieu of specific performance provided by s.50 of the Senior Courts Act 1981 (which reflects earlier provision in s.2 of the Chancery Amendment Act 1858, commonly known as Lord Cairns’ Act).³⁹⁴⁵ For if a court were to refuse to award specific performance in support of a consumer’s claim for repeat performance under the 2015 Act, it could instead award damages under s.50 of the Senior Courts Act in lieu of specific performance of the trader’s *obligation to repeat performance* and so allow the consumer to obtain the cost of reinstatement of the swimming pool. As the Supreme Court has explained in relation to damages in lieu of an injunction, damages awarded under Lord Cairns’ Act

may not necessarily be measured in the same way as damages recoverable at common law³⁹⁴⁶: damages in substitution for specific performance “are a monetary substitute for what is lost by the withholding of the relief”.³⁹⁴⁷ As a result, the measure of damages in lieu of specific performance of a trader’s obligation to repeat performance should reflect the particular nature of the obligation whose enforcement has been sought, i.e. the trader’s secondary obligation to *repeat* performance, rather than the trader’s primary obligation to build a (conforming) swimming pool. This would allow a consumer to gain damages to cover the cost of reinstatement even though under the general law an injured party could not do so on the ground that this would be disproportionate. On the other hand, in this same sort of situation a court could instead prefer to exercise the second of its discretions in s.58 of the 2015 Act³⁹⁴⁸ and award price reduction instead of repeat performance (and therefore also instead of damages in lieu of repeat performance under the Senior Courts Act). In a case such as *Ruxley Electronics Construction Ltd v Forsyth*, even where the claimant is a consumer, a reduction in the price rather than an award of damages based on the cost of reinstatement may strike the proper balance of the interest of the consumer and the trader.

“Other remedies”

- 40-588 The 2015 Act does not prevent the consumer seeking other remedies for a breach of a statutory term imposing a duty on the trader as earlier set out, “in addition to one of the special remedies which it provides for the consumer “but not so as to recover twice for the same loss”.³⁹⁴⁹ These remedies include a consumer claiming damages, seeking to recover money paid where the consideration for payment of the money has failed; seeking specific performance; relying on the breach against a claim by the trader under the contract; and exercising a right to treat the contract as at an end.³⁹⁵⁰

Footnotes

- 3912 As earlier seen, under s.54(3), the consumer has a right both to require repeat performance and the right to a price reduction where the service does not conform to the contract in the special sense set by s.54(2) (which refers to breach of the term relating to reasonable care in s.49 and breach of a term in s.50 and the term relates to the performance of the service): see above, para.40-574.
- 3913 2015 Act s.54(4) and (5), above, para.40-574.
- 3914 1999 Directive art.3; see above, paras 40-461, 40-520 and 40-521.
- 3915 The 1999 Directive applies generally to sales of “consumer goods” but it also makes special provision for installation of goods where required by the contract to be relevant to their “non-conformity”: art.2(5), which was implemented by 2015 Act s.15 on which see above, para.40-505.
- 3916 Above, para.40-584.

- 3917 Above, paras 40-520 and 40-562.
- 3918 Above, para.40-520; *Whittaker* (2017) 133 L.Q.R. 47 at 61–63. The sections in Ch.2 which provide for the right to repair or replacement implemented a requirement in the Consumer Sales Directive 1999 art.3 (on which see above, paras 40-461, 40-520 and 40-521).
- 3919 In the sense that it is in principle available under 2015 Act s.54(2)–(3).
- 3920 2015 Act s.55(3) (emphasis added).
- 3921 2015 Act s.23(3)(b) above, para.40-520; s.43(3)(b) above, para.40-562.
- 3922 Explanatory Notes 2015 para.263.
- 3923 See Vol.I, paras 30-015 et seq.
- 3924 2015 Act s.58(1)–(3), below, para.40-587.
- 3925 See below, para.40-586.
- 3926 [1996] A.C. 344 on which see Vol.I, para.29-044.
- 3927 See 2015 Act s.58(2), below, para.40-587; *Whittaker* (2017) 133 L.Q.R. 47 at 65–66.
- 3928 2015 Act s.56(4)–(6). cf. 2015 Act s.20(15)–(17) (goods contracts), above, para.40-516.
- 3929 Explanatory Notes 2015 para.266. cf. above, para.40-521 in relation to price reduction in respect of “goods contracts”.
- 3930 This would fall under s.50(1) of the 2015 Act.
- 3931 Explanatory Notes 2015 para.267.
- 3932 2015 Act s.54(4)–(5) referring to s.50 and s.52 respectively, above, para.40-574.
- 3933 cf. the position as regards “goods contracts” under ss.23 and 24 of the Act, above, paras 40-520—40-521.
- 3934 The circumstances in which these rights are “had” by a consumer are set by s.54(2)–(3), above, para.40-574.
- 3935 cf. by analogy, the rules governing an injured party’s right to affirm a contract, perform and sue for the price under the general law: this right is subject to a condition that performance by the injured party does not require co-operation by the party in breach: see Vol.I, para.29-123.
- 3936 2015 Act s.56(3)((a)).
- 3937 2015 Act s.58(1), referring to s.54(3): the right to repeat performance (under s.55) and the right to a price reduction (under s.56) (which are the “relevant remedies” under s.58(8)(c)). These powers do not extend to the “other remedies” for consumers as this is understood by the Act and as explained below, para.40-588.
- 3938 2015 Act s.58(2) referring to s.55 of the Act, above, para.40-585.
- 3939 2015 Act s.58(3) and (4).
- 3940 2015 Act s.58(7).
- 3941 Below, para.40-588.
- 3942 Above, para.40-584.
- 3943 cf. above, para.40-525 in relation to the right to repair or replacement in “sales contracts”.
- 3944 [1996] A.C. 344 on which see Vol.I, para.29-044 and cf. above, para.40-585.

- 3945 2015 Act s.58(1) specifically preserves “any other power [the court] has” as well as the powers which s.58 provides. For this suggestion see *Whittaker* (2017) 133 L.Q.R. 47 at 66.
- 3946 *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2018] 2 W.L.R. 1353 at [47] explaining that the remark of Lord Wilberforce in *Johnson v Agnew* [1980] A.C. 367, 400, [1979] 1 All E.R. 883 which appears to suggest the contrary should be treated with care. cf. Vol.I, paras 30-101 and 30-104.
- 3947 *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20 at [95] per Lord Reed (with whom Lady Hale, Lord Wilson and Lord Carnwath agreed).
- 3948 2015 Act s.58(3) and (4).
- 3949 2015 Act s.54(6).
- 3950 2015 Act s.54(7) and see Vol.I, paras 24-026—24-036 (whether a party to a contract may rely on the other party’s breach in resisting the latter’s claim for the price); Ch.27 (termination for breach); Ch.29 (damages), Ch.30 (specific performance and injunction); and paras 32-063 et seq. (recovery of money of paid on a total failure of consideration (or basis)).

(iv) - Exclusion of Liability

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(e) - Services Contracts

(iv) - Exclusion of Liability

Introduction: before the 2015 Act

- 40-589 At common law, in principle a person who contracts to perform a service for another person may limit or exclude their liability in respect of any defective performance, following the general principle of freedom of contract.³⁹⁵¹ By contrast, under the statutory scheme in the [Unfair Contract Terms Act 1977](#) before its amendment by the [2015 Act](#), where a person acting in the course of a business seeks by contract to exclude or limit their liability for negligence, such an exemption clause is ineffective as regards the trader's liability for death and personal injury and effective as regards other losses only to the extent that the clause satisfies the "reasonableness test".³⁹⁵² These controls therefore apply where a trader seeks to exclude its liability for breach of the implied term in the [1982 Act](#) that it must perform a service with reasonable care and skill.³⁹⁵³ Beyond this case, any exemption of liability by a trader providing a service might have fallen foul of the controls put in place for contractual liability generally by the [1977 Act](#),³⁹⁵⁴ or under the [Unfair Terms in Consumer Contracts Regulations 1999](#).³⁹⁵⁵

Exclusion of liability for breach of the statutory terms

- 40-590 However, [s.57 of the 2015 Act](#) makes special provision to control the exclusion or limitation of the trader's liabilities to the consumer in respect of breach of the statutory terms which it provides for the consumer in respect of services and, for this purpose, makes a series of distinctions between

the grounds on which the consumer's remedies arise and also as between the exclusion and the limitation of the trader's liability. So, first, s.57(1) provides:

“A term of a contract to supply services is not binding on the consumer to the extent that it would exclude the trader's liability arising under section 49 (service to be performed with reasonable care and skill).”³⁹⁵⁶

Here, it will be seen, an *exclusion* of liability (whether arising under the special remedies provided by the Act or the general law) is rendered totally ineffective. Secondly, and similarly, according to s.57(2) “a term of a contract to supply services is not binding on the consumer to the extent that it would exclude the trader's liability arising under section 50 (information about trader or service to be binding)”, though this is subject to s.50(2)'s own provision allowing the trader to qualify what it says or writes to the consumer or change it where expressly agreed with the consumer.³⁹⁵⁷ Again, this control applies only to *exclusions* of liability (whether arising under the special remedies which the Act provides in this case or under the general law³⁹⁵⁸). Thirdly, however, s.57(3) makes more general provision as regards a contract term under which the trader purports to *restrict* its liability arising from breach of the statutory terms as to performance with reasonable care, information supplied by the trader, and performance within a reasonable time³⁹⁵⁹: these are not binding on the consumer if the term “would prevent the consumer in an appropriate case from recovering the price paid or the value of any other consideration”.³⁹⁶⁰ The effect of this rather convoluted provision is therefore to render ineffective as regards these liabilities a clause which *restricts* the trader's liability (a limitation clause) unless the limitation is set at a level above the contract price. However, as s.57(3) itself acknowledges, this does not necessarily mean that a limitation clause which does allow the consumer to recover against the trader up to the level of the contract price will be effective, as it may still be not binding on the consumer under the general controls on unfair contract terms in Pt 2 of the 2015 Act.³⁹⁶¹

- 40-591 An illustration of the relationship between breach of the statutory term in s.50(1) and the controls on the exclusion of liability in s.57 may be found in *Allner v Peters & May Group Ltd.*³⁹⁶² There (on the facts as alleged) the defendant had contracted to arrange for the transport of the claimant's yacht from Genoa to the Caribbean, and the defendant had stated prior to the conclusion of the contract that the yacht would definitely arrive in time for Christmas. The contract contained express provision which made clear that delivery dates were not ones to which the defendant was committing itself and requiring any claim to be brought within nine months for claims.³⁹⁶³ The yacht did not arrive in time and the claimant relied on s.50(1) of the 2015 Act on the basis that the defendant's pre-contractual comments bound them and overrode the defendant's terms and conditions, including the clause imposing the nine month time-limit for claims.³⁹⁶⁴ The claimant further relied on the controls on the exclusion of liability under s.57 of the Act, arguing that the clause sought to “exclude liability” arising from breach of the term in s.50(1).³⁹⁶⁵ The High Court

concluded that there was a triable issue arising, in particular, from the claimant's argument as to the effect of s.57 on the defendant's time-limit clause.³⁹⁶⁶

Footnotes

- 3951 See Vol.I, paras 2-003 et seq., but see also Ch.17, paras 17-001—17-022.
- 3952 1977 Act s.1(3) (defining “business liability); s.2 (controlling the exclusion of liability for negligence); s.11 (the reasonableness test): see Vol.I, paras 17-085—17-086.
- 3953 Supply of Goods and Services Act 1982 s.13.
- 3954 1977 Act s.3: see Vol.I, paras 17-088—17-095 (which describe the current law) and 17-072 (which notes the earlier position under s.3).
- 3955 See above, paras 40-276—40-277.
- 3956 On this statutory term, see above, para.40-575.
- 3957 Above, paras 40-577—40-578.
- 3958 Above, paras 40-585—40-588.
- 3959 s.57(3) refers to the restriction of liability arising under ss.49 and 50 and, where they apply, ss.51 and 52. The inclusion of s.51 is odd as this provides for the setting of a reasonable price to be paid by *the consumer* and therefore it cannot give rise to any liability in the trader.
- 3960 2015 Act s.57(3).
- 3961 2015 Act s.57(3) and on these general controls see especially 2015 Act s.62 and above, paras 40-243 et seq. especially at paras 40-273 et seq. There is a particular difficulty in the case of a term limiting liability at a level *above* the price paid by the consumer in respect of breach of a term included in the contract under s.50(3) of the Act as regards information supplied as required by the 2013 Regulations (above, para.40-579), as the controls contained in s.57 of the Act appear to permit such a term subject only to assessment of its fairness under the general test in Pt 2 of the Act, whereas s.50(3) implements art.6(5) of the Consumer Rights Directive 2011, art.25 of which generally requires its provisions to be “imperative”, so that such a term should not be binding on the consumer without such an assessment: see above, paras 40-069 and 40-108. It may be difficult to argue, however, that after IP completion day the (retained) principle of conforming interpretation can be used so as to require the ineffectiveness of any restriction of liability for breach of the statutory term in s.50(3), given the explicit character of the provision in s.57(3) as this could be seen as interpretation “*contra legem*”: cf. above, para.40-525.
- 3962 [2019] EWHC 3258 (Comm).
- 3963 [2019] EWHC 3258 (Comm) at [12] and [16].
- 3964 [2019] EWHC 3258 (Comm) at [12]–[13].
- 3965 [2019] EWHC 3258 (Comm) at [34].
- 3966 [2019] EWHC 3258 (Comm) at [38]–[47]. For this purpose, the parties and the court proceeded on the basis that the relevant controls were to be found in s.57(3) of the 2015

[Act](#), although, with respect, given that the claimant based his case on breach of the term in [s.50\(1\) of the Act](#), the relevant control was to be found in [s.57\(2\) of the Act](#). On these provisions, see above in the text of this paragraph.

End of Document

© 2022 SWEET & MAXWELL

(v) - Enforcement

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 40 - Consumer Contracts

Section 7. - Contracts for the Supply of Goods, Digital Content or Services

(e) - Services Contracts

(v) - Enforcement

Enforcement of provisions on exclusion of trader's liabilities

- 40-592 As earlier explained in relation to the 2015 Act's treatment of unfair contract terms more generally, the Act applies the enforcement measures provided for the control of unfair contract terms under Pt 2 (and derived from the 1993 Directive³⁹⁶⁷) to its controls of contract terms in Pt 1 Ch.4 of the Act.³⁹⁶⁸ Secondly, the provisions in Ch.4 of Pt 1 of the 2015 Act which implemented the Consumer Rights Directive 2011 have been listed by Sch.13 of the Enterprise Act 2002 as capable of giving rise to a “Schedule 13 infringement” within the meaning of Pt 8 of the 2002 Act.³⁹⁶⁹ In addition, acts or omissions in respect of any provision in Pt 1 of the 2015 Act were specified as able to give rise to a “domestic infringement” for the purposes of s.211 of the 2002 Act.³⁹⁷⁰

Footnotes

3967 1993 Directive art.7.

3968 2015 Act s.57(7) referring to Sch.3. See above, para.40-442.

3969 Enterprise Act 2002 s.212 and Sch.13 para.27 (as inserted by the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203) reg.3(20) and Sch. para.1) lists ss.50 and 54 of the 2015 Act for this purpose and thereby followed the former position provided for “Community infringements” under the Enterprise Act 2002 (Part 8 EU Infringements) Order 2014 (SI 2014/2908) art.4, Sch. (as amended by the Enterprise Act 2002 (Part 8 Community Infringements and

Specified UK Laws) (Amendment) Order 2015 (SI 2015/1628) art.3(2)). While ss.50 and 54 can be seen to have implemented art.6(5) of the 2011 Directive, it is not clear why s.57 (which provides for the control of the exclusion or restriction of liability) was *not* listed given the Directive art.25's statement that all that Directive's provisions are "imperative" (though see above, para.40-590 on the status of this provision). The law governing "Schedule 13 infringements" replaced the earlier provision governing "Community infringements", as explained more generally above, paras 40-137—40-138.

3970 Enterprise Act 2002 s.211(2); Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2015 (SI 2015/1727) art.2, on which see above, paras 40-137—40-138.

Section 1. - The Regulation of Consumer Credit

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

Eva Lomnicka

In general

- 41-001 Laws regulating the lending of money have been in operation in the United Kingdom for a considerable period of time. But, historically, the statutory control of money-lending (“lender credit”) was treated quite distinctly from the control applied to the extension of credit to a purchaser of goods who was allowed to pay for them by instalments (“vendor credit”). As a result, the statutory regulation of credit transactions was at one time determined solely by the legal form in which the transaction was cast, irrespective of its economic function. And certain types of credit transaction, which could not easily be allocated to either of these self-contained categories, escaped any form of control. The [Consumer Credit Act 1974](#) broke down these barriers in order to ensure that, wherever protection is required for the consumer, that protection is in principle available whatever the form of credit transaction adopted.²

Changes since 1974

- 41-002 As will be noted below, the [Consumer Credit Act 1974](#) has been amended significantly since coming into force.³ The most far-reaching amendments were those in the [Financial Services Act 2012](#) (and orders made thereunder), which overhauled the regulatory architecture for financial services regulation generally by extensively amending the [Financial Services and Markets Act 2000 \(FSMA 2000\)](#) so as to create, *inter alia*, a new financial market regulator: the Financial Conduct Authority (FCA), in part replacing the Financial Services Authority. In anticipation of the abolition of the existing consumer credit regulator, the Office of Fair Trading (OFT), on 1 April

2014,⁴ the [Financial Services Act 2012](#) also enabled the Treasury by Order⁵ to transfer consumer credit regulation to the FCA. This was achieved by enabling any activity requiring a consumer credit licence under the [1974 Act](#) to become a “regulated activity” under the [FSMA 2000](#).⁶ Hence, essentially, since 1 April 2014 regulatory powers over consumer credit (and hire) activity, in particular authorisation (in place of licensing), supervision and enforcement, are exercised by the FCA under the [FSMA 2000](#). Moreover, consumer credit advertisements (and quotations) are regulated under the [FSMA 2000](#) “financial promotion” regime.

⁷

U In addition, some provisions of the [1974 Act](#) that imposed obligations on credit and hire providers⁸ have been repealed and replaced by “rules” in a new “Module” of the FCA Handbook: “CONC”. However, much of the [1974 Act](#) still remains in force (with the FCA replacing the OFT as the main regulator and the Treasury replacing the Secretary of State). In particular, the formality and information requirements (both at the time of contracting and thereafter) are still imposed by the [1974 Act](#) (and the regulations already made thereunder), although they are now enforced by the FCA using the (more extensive) powers conferred by the [FSMA 2000](#).⁹

The Mortgage Credit Directive

41-003 Until the Mortgage Credit Directive (MCD)

U ¹⁰

U was implemented, there were two statutory regimes for the regulation of land mortgages, both eventually administered by the Financial Conduct Authority¹¹: one under the [Consumer Credit Act 1974](#) (for, essentially, certain second charge mortgages) and one under [FSMA 2000](#) (for, essentially, first legal charge residential mortgages). The need to implement the MCD provided the opportunity for aligning the two regimes. Hence, essentially, all residential mortgages are now within the [FSMA 2000](#) regime and consequently are exempted from the [Consumer Credit Act 1974](#) regime.¹² Moreover, there is a separate “lighter-touch” regulatory regime for certain consumer “buy-to-let” mortgages.¹³

The future of consumer credit regulation

41-004 A five-year review of consumer credit regulation was undertaken by the FCA in 2019.

U ¹⁴

U Building on that review,

15

U the Treasury has announced its intention

16

U to undertake a wholesale reform of the consumer credit regulatory regime consistent with its new Financial Services Future Regulatory Framework (the “FRF”).

17

U This (given Brexit) envisages giving more regulatory power to regulators such as the FCA, under the umbrella of a revised FSMA 2000. However, those parts of the [1974 Act](#) that are to be retained and that cannot be replicated in the FCA rulebook CONC (for example, those imposing sanctions, the unfair relationship

18

U and the connected lender liability

19

U provisions) will necessarily have to be enacted in primary legislation. Moreover, the consumer credit sector will be affected by the “bonfire of EU regulation” to be effected under the Financial Services and Markets Act (presently Bill) 2022.

20

U

Scope of Consumer Credit Act 1974

41-005 The [Consumer Credit Act 1974](#) gave effect to the recommendations of the Crowther Committee on Consumer Credit²¹ for the regulation of the supply to individuals (including sole traders, small partnerships and unincorporated associations) of credit throughout the United Kingdom.²² It provided for the licensing of those who carried on the business of granting consumer credit²³ and of ancillary credit activities.²⁴ The Act repealed²⁵ and replaced the previous statutes that regulated the supply of credit or the advertisement of credit such as the [Pawnbrokers Acts 1872 to 1960](#),²⁶ the [Moneylenders Acts 1900 to 1927](#),²⁷ the [Hire-Purchase Act 1965](#),²⁸ and the [Advertisements \(Hire-Purchase\) Act 1967](#).²⁹ It replaced these enactments with a single statute, far more uniform in its application, although with necessary concessions to differing forms of credit business.

Many types of credit business that were previously subject to no control became regulated by the Act.³⁰ Further, the licensing system established by the Act extended, not merely to those engaged in the granting of consumer credit, but also to those engaged in businesses ancillary thereto.³¹

Consumer hire agreements

- 41-006 The [1974 Act](#) also regulates consumer hire agreements if the hirer is an individual (including a sole trader, small partnership or unincorporated association). ³² A licence was required for a consumer hire business ³³ and various businesses ancillary thereto. ³⁴

Extension of the 1974 Act

- 41-007 Certain provisions of the [1974 Act](#), in particular those that deal with unfair relationships, ³⁵ apply to all credit agreements where the debtor is an individual even if the agreement is otherwise “exempt”. ³⁶

Regulations, orders, etc.

- 41-008 The [1974 Act](#) was merely a blueprint for the system of regulation that it established. It was supplemented by a considerable amount of subordinate legislation ³⁷ made by the Secretary of State, ³⁸ which was (and in so far as still in force, is) both detailed and complex.

Contracting-out

- 41-009 Contracting-out of the protections conferred by the [1974 Act](#) is prohibited. ³⁹

Consumer Credit Act 2006

- 41-010 Since the enactment of the [Consumer Credit Act 1974](#), the consumer credit market changed dramatically both in relation to the increased amount of credit provided and in relation to the range of credit facilities offered to consumers. After a review of the Act, ⁴⁰ its regime was amended in two stages. First, a number of Regulations (in particular, the Advertisements, ⁴¹ the Agreements ⁴² and the Early Settlement ⁴³ Regulations) were replaced or amended extensively. Secondly, the

Consumer Credit Act 2006 introduced a number of changes to the **1974 Act** itself. In particular, the scope of the **1974 Act** was generally widened⁴⁴ by removing the financial limit in general, although the financial limit of £25,000 was retained if the agreement was for the debtor's or hirer's purely *business* purposes.⁴⁵ Changes were made to the licensing system and the powers of the OFT were increased to enable it to impose "requirements" and "civil penalties" on licensees.⁴⁶ The provisions allowing the court to reopen "extortionate credit bargains" were replaced by the wider "unfair relationship" provisions.⁴⁷ Moreover, the provisions rendering agreements that breached certain formal requirements "irredeemably unenforceable"⁴⁸ were repealed.

Consumer Credit Directive

41-011 The implementation of the Consumer Credit Directive 2008 ("CCD"),

49

U resulted in yet more significant changes to the **1974 Act** and the regulations made thereunder.

50

U To a large extent those changes were not extended to agreements outside the scope of the Directive, namely: (a) hire agreements, (b) agreements secured on land,

51

U (c) pawn agreements, (d) credit agreements for business purposes, and (e) agreements providing for credit in excess of the Directive's financial ceiling (£60,260).

52

U Hence there are now two regulatory regimes in some circumstances: the old regime applying to such "non-Directive" regulated agreements and a new "Directive" regime applying to regulated credit agreements within the scope of the Directive. However, some of the "Directive" protections have been extended to "non-Directive" agreements either in order to maintain a coherent regime (so they apply to hire-purchase as well as to conditional sale agreements, and to a large extent to pawn agreements) or because they are regarded as appropriate protections in any event.

53

U Moreover, when it comes to the formal requirements for regulated credit agreements,

54

U creditors who would otherwise be outside the new "Directive" regime may generally "opt into" it. These CCD-derived provisions are listed as due for revocation in the Financial Services and Markets Bill 2022.

55



Banks and investment firms authorised in other EEA states

- 41-012 Before Brexit, the implementation of the EU's Banking Directive⁵⁶ and Markets in Financial Instruments Directive⁵⁷ was effected by legislative provisions contained in or made under the **Financial Services and Markets Act 2000**.⁵⁸ The philosophy underlying the Directives is that of "home state control", i.e. the authorisation and regulation of the institutions concerned are matters for the home state, with the host state having only a limited regulatory role. As a result of these provisions, the control exercisable by virtue of the **Consumer Credit Act 1974** and the **Financial Services and Markets Act 2000** was reduced in the case of (broadly) an institution established in an EEA state ("home state") other than the United Kingdom that was authorised to carry on the relevant activity by its home state regulator.⁵⁹ Such a firm was entitled to establish a branch or provide services in another EEA state (the entitlement is sometimes referred to as "the single market passport") in accordance with the EU Treaty as applied in the EEA and subject to the conditions of the relevant single market directive.⁶⁰ If it sought to exercise its passport rights in the United Kingdom it qualified for authorisation by satisfying certain formal conditions.⁶¹ However, as a result of Brexit, this "single market passport" regime is no longer applicable in relation to the United Kingdom.⁶²

The Standards of Lending Practice

- 41-013 These "Standards",⁶³ which set the benchmark of good lending practices, are issued by the Lending Standards Board and replace the old "Lending Code" (which itself replaced, in part, the provisions of the old Banking Code⁶⁴). Like the Code, they are voluntary "soft law" in the sense that lending institutions agree to be bound by them in their dealings with both personal and (small) business customers but the Standards do not, as such, give rise to legal rights or obligations.⁶⁵ The scope and content of the Standards differ from those of the statutory consumer credit regulatory regime but there is a considerable degree of overlap. In some respects the protection is more extensive than that of the statutory regime and in other respects it is less extensive. But nothing in the Code can detract from the statutory regulatory system or diminish the protection afforded to debtors and hirers, or their sureties, contained in that regime.⁶⁶

Other EU Directives

- 41-014 Other EU Directives have had an impact on the statutory regulatory regime, in particular, the
U Electronic Commerce Directive 2000,

[67](#)

U the Distance Marketing of Consumer Financial Services Directive 2002,
[68](#)

U the Unfair Commercial Practices Directive 2005,
[69](#)

U the Revised Payment Services Directive 2015 (“PSD2”)
[70](#)

U and the Consumer Rights Directive 2011.
[71](#)

U The Mortgage Credit Directive 2014
[72](#)

U resulted in further significant changes to the statutory regime, in particular the transfer of second charge residential mortgage regulation to the **Financial Services and Markets Act 2000** regime. English law, as altered by the implementation of these directives, is not expected to be substantially amended as a result of Brexit, at least in the very near future,
[73](#)

U although the government has announced that it will review all UK law that is derived from the EU.
[74](#)

U

Footnotes

- 1 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).

- 2 See the wide definition of “credit” for the purposes of the regime, considered below, para.[41-019](#).
- 3 Most of the Act came into force on 19 May 1985; see [SI 1983/1551](#) and [SI 1989/1128](#).
- 4 By the [Enterprise and Regulatory Reform Act 2013](#) s.26(3).
- 5 The two main Orders were: (i) the [Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) \(No.2\) Order 2013](#) ([SI 2013/1881](#)) and (ii) the [Financial Services Act 2012 \(Consumer Credit\) Order 2013](#) ([SI 2013/1882](#)).
- 6 See [FSMA 2000](#) s.22 and the previous footnote. [SI 2013/1881](#) made considerable amendments to the [Financial Services and Markets Act 2000 \(Regulated Activities\) Order 2001](#) ([SI 2001/544](#)), the so-called “RAO” (made under the [FSMA 2000](#) s.22), which now contains the definitions of (a) those “credit-related” regulated activities that are now regulated under the [FSMA 2000](#) and (b) exempt agreements (see below, paras [41-039](#) et seq.). See especially the [FSMA 2000](#) s.21 and the [Financial Promotion Order 2005](#) ([SI 2005/1529](#)), as amended, esp. by [SI 2013/1881](#). And note the proposed amendments to the financial promotion regime in the Financial Services and Markets Bill 2022 cl.20 and Sch.5.
- 7 e.g. [CCA 1974](#) ss.[51](#), [51A–51B](#), [55A](#), [55B](#), [74A–74B](#), [81](#), [82A](#), [160A](#).
- 8 But see para.[41-004](#), below, for possible changes to these “retained provisions”.
- 9 Directive 2014/17/EU implemented on 21 March 2016. See Implementation of the EU Mortgage Credit Directive (HMT, 5 September 2014); Implementing the Mortgage Credit Directive and the new regime for second charge mortgages (FCA CP14/20); Implementation of the EU Mortgage Credit Directive: summary of Proposals (HMT, 26 January 2015) and Implementing the Mortgage Credit Directive and the new regime for second charge mortgages: feedback to CP14/20 and final rules (FCA PS15/9). The EU is revising the MCD but the MCD is listed in the Financial Services and Markets Bill 2022 Sch.1 Pt.3 so that any provision made under it is due for revocation.
- 10 Since the transfer of consumer credit regulation from the OFT to the FCA: see above, para.[41-002](#).
- 11 Credit agreements within the MCD art.3(1)(b)—for the acquisition or retention of interests in land or buildings—are also taken out of the [CCA 1974](#) regime: see [SI 2015/910](#) art.3 and Sch.1 para.2(2), amending [CCA 1974](#) s.8(3).
- 12 See below, para.[41-535](#).
- 13 See the FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (presented to Parliament March 2019). For previous documents, see Call for Input: Review of Retained Provisions of the Consumer Credit Act, February 2016 and The Interim Report, August 2018.
- 14 And the more recent FCA Woolard Review, A review of change and innovation in the unsecured credit market: Report to the FCA Board (February 2021).
- 15 On 16 June 2022. A “high level” consultation paper is expected by the end of 2022.

- ①17 See, most recently, HMT's Financial Services Future Regulatory Framework Review: Proposals for Reform: Response to the consultation (July 2022) and the Financial Services and Markets Bill 2022 implementing it.
- ①18 CCA 1974 ss.140A–140C; see below, paras 41-213 et seq.
- ①19 CCA 1974 ss.75 and 75A; see below, paras 41-307–41-309.
- ①20 See especially the list of retained EU law and UK EU-derived provisions to be revoked, listed in Sch.1 to the Bill. It includes (see Pt 2) UK legislation implementing the Directives mentioned in this chapter.
- 21 Cmnd.4596 (1971).
- 22 Initially, the Act only regulated credit below £5,000. The limit was raised from £5,000 to £15,000 from 20 May 1985, by SI 1983/1878 and to £25,000 from 1 May 1998, by SI 1998/996. As noted below, para.41-010, the Consumer Credit Act 2006 abolished that limit except for the purposes of the exemption of agreements made for the debtor's business purpose (previously CCA 1974 s.16B, see now RAO art.60C(3)–(7), below, para.41-047). However, agreements providing for credit in excess of £60,260 are outside the scope of the Consumer Credit Directive (see below, para.41-011) and hence are not covered by many provisions implementing that Directive (especially: CCA 1974 ss.55C, 66A, 75A and 77B); they may also fall within the “high net worth” exemption (previously in CCA 1974 s.16A, see now RAO art.60H, below, para.41-046), which is not available to agreements within the scope of the Directive.
- 23 See below, para.41-063. Licensing under the CCA 1974 has been replaced by authorisation under the FSMA 2000: see below, paras 41-063 et seq.
- 24 See below, paras 41-234 et seq.
- 25 CCA 1974 s.192(3)(b), (4) Sch.5; SI 1977/325 (c.11); SI 1977/802 (c.30); SI 1979/1685 (c.42); SI 1980/50 (c.3); SI 1981/280 (c.6); SI 1983/1551.
- 26 The progressive repeal of these Acts was effected by SI 1977/325 (c.11); SI 1980/50 (c.3); SI 1983/1551.
- 27 See Meston on Moneylenders, 5th edn. The progressive repeal of these Acts was effected by SI 1977/325 (c.11); SI 1977/802 (c.30); SI 1979/1685 (c.42); SI 1980/50 (c.3); SI 1981/280; and SI 1983/1551.
- 28 SI 1983/1551. See Chitty on Contracts, 23rd edn, Ch.7; Goode, Hire-Purchase Law and Practice, 2nd edn; Guest, The Law of Hire-Purchase (1966).
- 29 The repeal of the whole of this Act was effected by SI 1980/50 (c.3).
- 30 e.g. bank lending, credit cards, check trading, some land mortgages, mail order business.
- 31 See below, paras 41-234 et seq.
- 32 See below, paras 41-036 et seq. As was the case with credit agreements (see above, para.41-005), initially the Act only regulated *hire* agreements below £5,000. The limit was raised from £5,000 to £15,000 from 20 May 1985, by SI 1983/1878 and to £25,000 from 1 May 1998, by SI 1998/996. As also noted below, para.41-010, the Consumer Credit

Act 2006 abolished that limit except for the purposes of the exemption for agreements made for the hirer's business purpose (previously CCA 1974 s.16B, see now RAO art.60O, below, para.41-047). The Consumer Credit Directive (see below, para.41-011) and hence the provisions enacted to implement it do not apply to hire agreements.

33 See below, para.41-063. Licensing under the CCA 1974 has been replaced by authorisation under the FSMA 2000: see below, para.41-065.

34 See below, para.41-234.

35 CCA 1974 ss.140A–140C, see below, paras 41-213 et seq.

36 Unless it is exempt under RAO art.60C(2) (previously CCA 1974 s.16(6C)) (see s.140A(5)). For exempt agreements, see below, paras 41-039 et seq.

37 See SI 1975/2123, 2124; SIs 1976/191, 837, 1002; SIs 1977/325, 328, 329, 330, 331, 802, 2163; SIs 1979/661, 667, 1685; SIs 1980/51, 59; SIs 1981/280, 614; SIs 1983/1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1878; SIs 1984/435, 436, 1046, 1107, 1108, 1109, 1600; SIs 1985/621, 666, 705, 1192; SI 1988/2047; SIs 1989/591, 596, 869, 1125, 1126, 1128, 1841, 2237; SIs 1991/817, 1393, 1949, 2844; SIs 1993/346, 2922; SI 1994/2420; SIs 1995/1250, 2914; SIs 1996/1445, 3081; SI 1997/211; SIs 1998/996, 997, 998, 1203, 1944; SIs 1999/1956, 2725, 3177; SIs 2000/290, 291, 1797; SIs 2004/1481, 1482, 1483, 1484, 2619, 3236, 3237; SI 2006/1273; SIs 2007/827, 1167, 1168; SIs 2008/645, 668, 1751; SIs 2010/139, 1011, 1012 (revoked), 1013, 1014, 1970; SI 2011/11; SI 2012/1745; SI 2012/2798.

38 Since the transfer of consumer credit regulation to the FCA (see above, para.41-002), the Treasury has become the responsible government department for making subordinate legislation under the CCA 1974.

39 CCA 1974 s.173(1), (2). But see s.173(3) (later consent) and *Hunter v Lex Vehicle Finance Ltd [2005] EWHC 233*.

40 See the White Paper Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century, 2003, Cm.6040. For a comment on the proposals, see *Lomnicka [2004] J.B.L. 64*.

41 See below, para.41-069.

42 See below, paras 41-082 et seq.

43 See below, paras 41-158 et seq.

44 But the definition of "individual" in s.189(1) was narrowed so as only to include partnerships of two or three (non-corporate) persons. Hence (see below, para.41-016) agreements with larger partnerships were taken out of regulation.

45 See the exemption in RAO art.60C(3)–(7) (credit) and RAO art.60O (hire) (previously CCA 1974 s.16B), below, para.41-047, for "business" agreements above that amount.

46 These provisions were eventually replaced by those in FSMA 2000; see below, para.41-065.

47 CCA 1974 ss.140A–140C, see below, paras 41-213 et seq.

48 viz CCA 1974 s.127(3)–(5). The term "irredeemably unenforceable" was coined by Lord Hoffmann in *Dimond v Lovell [2002] A.C. 384*. See below, paras 41-094 and 41-201.

49 Directive 2008/48/EC, [2008] O.J. L133/66, replacing Consumer Credit Directive (87/102).

See also Directive 2011/90/EU of 14 November 2011 amending the APR assumptions in Pt II of Annex I to the 2008 Directive, implemented on 1 January 2013 by the Consumer

[Credit \(Total Charge for Credit\) \(Amendment\) Regulations 2012 \(SI 2012/1745\)](#): see below, para.[41-061](#). There is a proposal for a new EU Directive on consumer credits repealing and replacing the Consumer Credit Directive (COM/2021/347 final).

⑤0 The Directive was implemented by a series of statutory instruments: (a) [Consumer Credit \(EU\) Regulations 2010 \(SI 2010/1010](#), as amended by [SI 2010/1969](#) and [SI 2010/1011](#)) (the main implementing regulations, amending, inter alia, the [1974 Act](#)); (b) [Consumer Credit \(Total Charge for Credit\) Regulations 2010 \(SI 2010/1011](#), as amended by [SI 2011/11](#) and since revoked by [SI 2013/1881 art.21\(gg\)](#)) (see below, para.[41-061](#)); (c) [Consumer Credit \(Advertisements\) Regulations 2010 \(SI 2010/1012](#) replaced by [SI 2010/1970](#) and since revoked by [SI 2013/1881 art.21\(hh\)](#)) (see below, para.[41-069](#)); (d) [Consumer Credit \(Disclosure of Information\) Regulations 2010 \(SI 2010/1013](#), as amended by [SI 2010/1969](#) and [SI 2011/11](#)) (see below, para.[41-078](#)); (e) [Consumer Credit \(Agreements\) Regulations 2010 \(SI 2010/1014](#), as amended by [SI 2010/1969](#)) (see below, paras [41-082](#) and [41-084](#)).

⑤1 But see now the Mortgage Credit Directive (above, para.[41-003](#)) which required the imposition of regulation on (essentially) all residential mortgages.

⑤2 But when the Mortgage Credit Directive (see above, para.[41-003](#)) was implemented on 21 March 2016, the Consumer Credit Directive was extended to apply to unsecured loans above this financial limit to renovate residential property and hence the [Consumer Credit Act 1974](#) was amended accordingly in relation to so-called “residential renovation agreements” (as defined in [CCA 1974 s.189\(1\)](#) to refer to the Directive definition): see amendments to the [1974 Act](#) made by [SI 2015/910 art.3](#) and Sch.1 para.[2\(3\)–\(9\)](#).

⑤3 e.g. the FCA Handbook CONC 4.2 and 4.3 (previously [CCA 1974 s.55A](#)), CONC 5 and 6.2 (previously [CCA 1974 s.55B](#)) and [CCA 1974 s.66A](#) are applicable to regulated “business” credit agreements; FCA Handbook CONC 5 and 6.2 (previously [CCA 1974 s.55B](#)) and the financial promotion restrictions in CONC 3 are applicable to credit above £60,260 (see below, para.[41-069](#)).

⑤4 See below, paras [41-082](#) et seq.

⑤5 See s.1 and Sch.1 Pt 3 and above para.[41-004](#).

56 Directive 2013/36/EU (and related texts), so-called “CRR/CRD IV”, replacing Directive 2006/48, replacing Directive 2000/12, which in turn replaced the Second Banking Coordination Directive 89/646.

57 “MiFID” (Directive 2004/39), replacing the Investment Services Directive (ISD), Directive 93/22, was itself replaced by “MiFID II” (Directive 2014/65/EU) and “MiFIR” (Regulation EU No.600/2014) in January 2017.

58 FSMA 2000 ss.[31\(1\)\(b\)](#), [37](#) and Sch.[3](#), as amended.

59 FSMA 2000 Sch.[3](#) Pt I para.[5](#).

60 FSMA 2000 Sch.[3](#) Pt I para.[7](#).

- 61 Such as informing the Financial Conduct Authority (FCA) of its intentions and being informed of the rules that applied to the conduct of its activities in the UK: (the now repealed) FSMA 2000 Sch.3 Pt I paras 12–15. In particular, such a firm that qualified for authorisation was ordinarily exempted from the need to apply for FCA authorisation: (the now repealed) FSMA 2000 Sch.3 Pt I para.15(3).
- 62 And see the [Consumer Credit \(Amendment\) \(EU Exit\) Regulations 2018 \(SI 2018/1038\)](#) (whereby in, inter alia, ss.98A and 157, on “IP completion day” (31 December 2020 at 11.00pm), the term “a retained EU obligation” was substituted for “an EU obligation”), and the [Financial Services and Markets Act 2000 \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/632\)](#) (miscellaneous amendments, noted where relevant).
- 63 They can be downloaded from <https://www.lendingstandardsboard.org.uk/> [Accessed 1 September 2021].
- 64 The other parts of the old Banking Code are replaced by the BCOBS Module of the FCA Handbook.
- 65 But the Banking Code was relevant to the extent of the common law duty owed by a bank subscribing to the Code; see [Thomas v Triodos Bank NV \[2017\] EWHC 314 \(QB\)](#).
- 66 See [CCA 1974 s.173](#), above, para.41-009.
- ⑥67 Directive 2000/31, implemented, as far as consumer credit is concerned, primarily by the [Consumer Credit Act 1974 \(Electronic Communications\) Order 2004 \(SI 2004/3236\)](#) made under the [Electronic Communications Act 2000](#).
- ⑥68 Directive 2002/65, implemented by the [Financial Services \(Distance Marketing\) Regulations 2004 \(SI 2004/2095\)](#), see below, para.41-126.
- ⑥69 Directive 2005/29, implemented by the [Consumer Protection from Unfair Trading Regulations 2008 \(SI 2008/1277\)](#), as amended by the [Consumer Protection \(Amendment\) Regulations 2014 \(SI 2014/870\)](#) in relation to contracts entered into on or after 1 October 2014. See, generally, above, paras 40-166 et seq.
- ⑥70 Replacing the old Payment Services Directive 2007, Directive 2007/64/EC. PSD2 has been implemented, as far as consumer credit is concerned, primarily by the [Payment Services Regulations 2017 \(SI 2017/752\)](#). Overlap with the [1974 Act](#) is, to some extent, avoided: see, in particular [regs 41 and 64](#). See further, paras 36-225 and 41-514 et seq.
- ⑥71 Directive 2011/83/EU. The Government implemented that part of the Directive that amended previous Directives conferring cancellation rights in certain sales on consumers, by the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134\)](#), an order under the [European Communities Act 1972](#). See further below, para.41-125. See now the [Consumer Rights Act 2015](#) (for contracts made on or after 1 October 2015) which updates and clarifies the law on goods and services and unfair contract terms, considered further above in paras 40-223 et seq.
- ⑥72

See above, para.41-003.

⑤73 See above, Vol.I, paras 1-021 et seq. But see (i) the [Consumer Credit \(Amendment\) \(EU Exit\) Regulations 2018 \(SI 2018/1038\)](#) (whereby in, inter alia, CCA 1974 ss.98A and 157, on “IP completion day” (31 December 2020 at 11.00pm), the term “a retained EU obligation” was substituted for “an EU obligation”), and (ii) the [Financial Services and Markets Act 2000 \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/632\)](#) (miscellaneous amendments, noted where relevant). However, any revision of the “retained” [1974 Act](#) provisions (see above, para. 41-004) will, of course, be unconstrained by any EU provisions. But these instruments are listed in the Financial Services and Markets Bill 2022 Sch.1 as due for revocation under that Bill (see next note).

⑤74 And see the list in the Financial Services and Markets Bill 2022 Sch.1 of retained EU financial services laws and UK EU-derived law due for revocation under that Bill.

(a) - Terminology

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(a) - Terminology

New concepts

- 41-015 The draftsman of the [Consumer Credit Act 1974](#) found it impossible to set up a system of wide-ranging control without devising new concepts, and consequently introduced, in [Pt II of the Act \(ss.8 to 20\)](#) and elsewhere, an entirely new and complex terminology. An understanding of this terminology is essential to an understanding of the regulatory regime. Examples illustrating the use of this terminology are provided in [Pt II of Sch.2 to the 1974 Act](#).⁷⁵ On the transfer of consumer credit regulation to the FCA,⁷⁶ that terminology has been adopted (with minor changes⁷⁷) in legislative provisions made under the [FSMA 2000](#), in particular the [RAO](#).⁷⁸

“[Consumer] credit agreement”

- 41-016 The [1974 Act](#) defines a “consumer credit agreement” as an agreement⁷⁹ between an individual (“the debtor”) and any other person (“the creditor”) by which the creditor provides⁸⁰ the debtor with credit⁸¹ of any amount.⁸² The expression “individual” is stated to include a partnership consisting of two or three persons not all of whom are bodies corporate and any other unincorporated body not consisting entirely of bodies corporate.⁸³ Hence an agreement for the provision of credit where the debtor is a body corporate will not be a “consumer credit agreement”.⁸⁴ But if the debtor is an unincorporated body, such as a society or club, or is a sole trader or partnership of three or fewer persons, there can be a “consumer credit agreement” notwithstanding that the debtor carries on a business and that the credit is advanced for business purposes.⁸⁵ The definition of “credit agreement” (omitting the term “consumer”) in the [RAO](#)

is almost identical, with the use of the terms “borrower” and “lender” instead of “debtor” and “creditor”.⁸⁶ Therefore the application of the regulatory regime is generally determined by the status of the debtor/borrower and not by the purpose of the advance, subject to two qualifications in relation to “business” credit.⁸⁷ First, as noted below,⁸⁸ “business” agreements for over £25,000 are exempt from regulation. Second, as a result of the implementation of the Consumer Credit Directive⁸⁹ (which does not apply to “business” credit) the regulatory regime is less onerous in a number of respects in relation to regulated “business” credit agreements, although creditors may choose to opt into the “Directive” formal requirements for regulated credit agreements.⁹⁰

“Regulated” consumer credit agreement

- 41-017 Since the transfer of consumer credit regulation to the FCA,⁹¹ the definition of “regulated” credit agreement is now in the [Financial Services and Markets Act 2000 \(Regulated Activities\) Order 2001](#),⁹² the so-called “RAO”. A consumer credit agreement is a regulated agreement within the meaning of the [1974 Act](#)⁹³ and for the purposes of [RAO](#)⁹⁴ if it is not an “exempt agreement”, as also defined in the [RAO](#).⁹⁵ An agreement that would not otherwise be a “regulated” agreement but is stated to be “regulated” and is documented as such, is not treated as a “regulated” agreement for the purposes of the regulatory regime.⁹⁶

“Debtor”/“borrower” and “creditor”/“lender”

- 41-018 The expressions “debtor” and “creditor” are used in the [1974 Act](#) to refer respectively to the individual receiving credit and the person providing credit under a consumer credit agreement, or the person⁹⁷ to whom his rights and duties under the agreement have passed by assignment⁹⁸ or operation of law, and in relation to a prospective consumer credit agreement includes the prospective debtor or creditor.⁹⁹ The definitions of “borrower” and “lender” in the [RAO](#) are almost identical.¹⁰⁰ There is no requirement that the creditor/lender carries on a consumer credit, or any, business.¹⁰¹

“Credit”

- 41-019



The expression “credit” is not defined in the [1974 Act](#) or the [RAO](#),¹⁰² but is stated in both instruments to include “a cash loan, and any form of financial accommodation”.¹⁰³ These words embrace all types of loan (e.g. moneylenders’ loans, bank and building society loans, overdrafts, pawnbrokers’ loans, advances on mortgage, etc.), the sale of goods on instalment credit terms (e.g. credit sales, conditional sales, budget accounts, option accounts, subscription accounts, etc.), the supply of services on credit, check trading, credit cards and charge cards¹⁰⁴ and debit cards.¹⁰⁵ In fact, any agreement for, say, the supply of goods or services where “credit” is extended (in the sense of the grant of a contractual right to defer the payment of a debt, whether the payment is to be made in one amount or by instalments)

¹⁰⁶

U will be a consumer credit agreement if the debtor is an individual. In many commercial agreements, payment is to be made in arrear; such agreements can therefore be consumer credit agreements (if the debtor is not a body corporate or large partnership), although they may be “exempt agreements”¹⁰⁷ and hence will not necessarily be regulated agreements. The Court of Appeal has held that arrangements for the instalment payment of a settlement sum, scheduled to a Tomlin Order, may constitute “credit” if they contractually reschedule a debt that is owing.¹⁰⁸

Hire agreements

- 41-020 The words “any other form of financial accommodation” do not cover hire agreements (e.g. rental or leasing agreements) as hire agreements are contained within a separate category for which special statutory provision is made.¹⁰⁹ But, the hiring of goods to an individual under a hire-purchase agreement is deemed to be the provision of fixed-sum credit.¹¹⁰

“Credit exceeding £25,000”

- 41-021 Although the [Consumer Credit Act 2006](#) removed the financial limit so that agreements providing credit of any amount may now be regulated agreements,¹¹¹ the limit has been retained for the purposes of the exemption for credit advanced for purely *business* purposes.¹¹² Hence, in that context, it is still necessary to decide if “credit exceeding £25,000”¹¹³ is provided. These words are relatively easy to apply where the agreement is one for the provision of fixed-sum credit¹¹⁴: the amount of the credit will be the amount agreed to be lent (whether this is to be drawn down in a lump sum or by instalments). In the case of a credit sale or conditional sale agreement, or a hire-purchase agreement,¹¹⁵ relating to goods, the amount of the credit will be the balance financed, i.e.

the cash price less the deposit (if any). But in the case of running-account credit,¹¹⁶ the application of the £25,000 limit is by no means simple.¹¹⁷

The Consumer Credit Directive: “credit exceeding £60,260”

41-022 The Consumer Credit Directive¹¹⁸ does not generally apply to agreements providing credit in excess of €100,000 and hence, in general, agreements providing credit in excess of that amount (which was converted to £60,260 for the purposes of implementing the Directive in the United Kingdom) are not affected by the provisions that are derived from the Directive.¹¹⁹ However, the duty to assess creditworthiness¹²⁰ as well as credit promotion regulation¹²¹ apply regardless of the credit amount. Moreover, although creditors offering credit in excess of £60,260¹²² *prima facie* remain subject to the “old” regime as regards formal agreement requirements,¹²³ they may “opt into” the new “Directive” regime.¹²⁴

“Charge for credit”

41-023 For the purposes of the [1974 Act](#), an item entering into the total charge for credit¹²⁵ (e.g. interest, credit charges or other time/price differential charges, and certain other fees or charges) is not to be treated as credit even though time is allowed for its payment.¹²⁶

“Running-account credit”

41-024 This expression is defined, for the purposes of the [1974 Act](#) and the [RAO](#), as a facility under a (consumer) credit agreement¹²⁷ whereby the debtor/borrower or another “is enabled to receive from time to time” from the creditor/lender or a third party:

“... cash, goods or services to an amount or value such that, taking into account payments made by or to the credit of the debtor/borrower, the credit limit (if any) is not at any time exceeded.”¹²⁸

Examples of running-account credit are bank overdrafts, shop budget accounts, credit cards and charge cards, debit cards, and option accounts.¹²⁹

“Credit limit”

- 41-025 In relation to running-account credit, “credit limit” is defined to mean, as respects any period, the maximum debit balance which, under the credit agreement, is allowed to stand on the account during that period.¹³⁰ But any term of the agreement allowing that maximum to be exceeded merely temporarily is to be disregarded.¹³¹

For the purpose of deciding whether or not running-account credit gives rise to an exempt “business” credit agreement,¹³² the transaction will be within the £25,000 limit (and hence not exempt) if the credit limit does not exceed £25,000.¹³³ However, there is an anti-avoidance provision in [s.10\(3\)\(b\) of the 1974 Act](#) and in the [RAO](#) which sets out three situations where running-account credit is deemed not to exceed £25,000, whether or not there is a credit limit, and if there is, notwithstanding that it exceeds £25,000. The first situation is where the debtor is not enabled to draw at any one time an amount that, so far as it represents credit, exceeds £25,000.¹³⁴ The second situation is where the agreement provides that, if the debit balance rises above a given amount (not exceeding £25,000), the rate of the total charge for credit increases or any other condition favouring the creditor or his associate comes into operation.¹³⁵ The third situation is where, at the time the agreement is made it is probable, having regard to the terms of the agreement and any other relevant considerations, that the debit balance will not at any time rise above £25,000.¹³⁶ A creditor cannot therefore avoid the operation of the regulatory regime in relation to business credit, for example, by agreeing to provide running-account credit up to £30,000, when it is probable from the outset that the debtor will not require more than £25,000.¹³⁷

“Fixed-sum credit”

- 41-026 This is any facility, other than running-account credit, under a [consumer] credit agreement¹³⁸ whereby the debtor/borrower is enabled to receive credit (whether in one amount or by instalments).¹³⁹ That which is not running-account credit is therefore fixed-sum credit. Examples of fixed-sum credit are moneylenders’ loans, bank and building society loans, pawnbrokers’ loans, hire-purchase,¹⁴⁰ credit sale and conditional sale agreements, and check trading.¹⁴¹

“Restricted-use credit”

- 41-027

A restricted-use credit agreement is defined both in the [1974 Act](#)¹⁴² and the [RAO](#).¹⁴³ There are three categories of restricted-use credit agreement. The first (category (a)) is a credit agreement¹⁴⁴ to finance a transaction between the debtor/borrower and the creditor/lender, whether forming part of that agreement or not.¹⁴⁵ Examples of this category of agreement are hire-purchase,¹⁴⁶ credit sale and conditional sale agreements (whether the credit is provided by the supplier himself, or by a financier under the “direct collection” method of business where the goods are sold by the supplier to the financier and then let or sold by the financier to the debtor), and mail order credit and shop budget and option accounts. The second (category (b)) is a credit agreement¹⁴⁷ to finance a transaction between the debtor/borrower and a person (the “supplier”) other than the creditor/lender.¹⁴⁸ Examples of this category of agreement are loans for the purchase of land, loans where the loan is paid directly to a dealer (other than the creditor) who supplies goods or services to the debtor/borrower, check trading agreements, and credit card agreements (insofar as the card is used to obtain goods or services and not money).¹⁴⁹ The third (category (c)) is a credit agreement¹⁵⁰ to refinance any existing indebtedness of the debtor’s/borrower’s whether to the creditor/lender or another person.¹⁵¹

- 41-028 An agreement is not a restricted-use credit agreement if the credit is in fact provided in such a way as to leave the debtor/borrower free to use it as he chooses, even though certain uses would contravene that or any other agreement.¹⁵² Thus, for example, if a moneylenders’ or bank loan is advanced to a debtor for a particular purpose which is stipulated in the agreement,¹⁵³ but in fact is paid over to the debtor so that he could (albeit in breach of the agreement) use it in whatever manner he wished, the agreement is not a restricted-use credit agreement.¹⁵⁴ Nor is an agreement a restricted-use credit agreement unless it contains an express or implied term that the credit is to be used for a particular purpose¹⁵⁵ even though there are mechanisms in place to ensure that he will not receive the credit unless it is so used.¹⁵⁶

“Unrestricted-use credit”

- 41-029 An unrestricted-use credit agreement is a credit agreement¹⁵⁷ that is not a restricted-use credit agreement.¹⁵⁸ Hence, in order to discover if an agreement is for “unrestricted-use” credit, it is necessary first to consider if it is for “restricted-use” credit.¹⁵⁹ If it is not, then the agreement is necessarily an “unrestricted-use” credit agreement. Examples of unrestricted-use credit agreements are pawnbrokers’ loans, bank overdrafts, bank cash cards, and (usually) bank and building society personal loans, and credit cards (insofar as the card is used to obtain money and not goods or services).¹⁶⁰

“Debtor-creditor-supplier agreement”/“borrower-lender-supplier agreement”

- 41-030 One of the most important types of agreement classified in the [1974 Act](#) and [RAO](#) is a “debtor-creditor-supplier agreement” (for the purposes of the [1974 Act](#)) and “borrower-lender-supplier agreement” (for the purposes of the [RAO](#)).¹⁶¹ The definitions of these two terms in the [1974 Act](#) and [RAO](#) are almost identical, the different wording (debtor/borrower, creditor/lender) reflecting the different terminology in the two regulatory regimes. Such an agreement is defined as a credit agreement falling into one of three categories:
- 41-031 The first category is a category 12(a) restricted-use credit agreement, that is, one to finance a transaction between the debtor/borrower and the creditor/lender, whether forming part of that agreement or not.¹⁶² It is important to realise that, despite the fact that the expression “debtor-creditor-supplier agreement”/“borrower-lender-supplier agreement” might suggest three parties (as in the usual tripartite arrangement between debtor, financier and dealer), within this category also fall agreements where only two parties are involved, as where a dealer carries his own instalment credit or a shop or mail order house allows the debtor/borrower credit for the purchase of the creditor/lender’s own goods or services.¹⁶³
- 41-032 The second category is a category 12(b) restricted-use credit agreement, that is, one to finance a transaction¹⁶⁴ between the debtor/borrower and a person (the “supplier”) other than the creditor/lender,¹⁶⁵ provided that it is made by the creditor/lender under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier.¹⁶⁶ The definitions of “pre-existing arrangements” and “future arrangements”¹⁶⁷ are complex.¹⁶⁸ But typical examples of pre-existing arrangements between a creditor/lender and the supplier are those that exist between a financier and its dealers by whom loan business is channelled to the financier, between a credit card issuer and recognised suppliers (of goods or services) who have agreed to accept the card¹⁶⁹ and between a check trading company and the suppliers who have agreed to honour its checks.¹⁷⁰ The expression “in contemplation of future arrangements” is more difficult to construe and reference must be made to its precise wording.¹⁷¹ But the mere fact that the credit agreement is entered into in the knowledge or subject to a term that the creditor/lender will pay the amount of the loan direct to the supplier does not necessarily involve a debtor-creditor-supplier or borrower-lender-supplier agreement if the creditor/lender holds himself out as willing to make, in specified circumstances, payments of that kind to suppliers generally.¹⁷²

41-033

The third category is a category 12(c) unrestricted-use credit agreement, that is, one made by the creditor/lender under pre-existing arrangements between himself and a person (the “supplier”) other than the debtor/borrower in the knowledge that the credit is to be used to finance a transaction between the debtor/borrower and the supplier.¹⁷³ If, for example, as the result of an arrangement previously made between a financier and a dealer, a customer is directed by the dealer to the financier and obtains a loan, then, notwithstanding that the loan is at the free disposition of the debtor/borrower,¹⁷⁴ there will be a debtor-creditor-supplier or borrower-lender-supplier agreement if the financier knows that the loan will be used to purchase goods or services from the dealer.¹⁷⁵

“Debtor-creditor agreement”/“borrower-lender agreement”

41-034 Important incidents are also attached to the classification of a credit agreement as a “debtor-creditor” or “borrower-lender” agreement.¹⁷⁶ Again¹⁷⁷ the former term is used in the **1974 Act** and the latter in the RAO but the definitions of these two terms in both instruments are almost identical. It is the intention of the two regimes that any credit agreement that is not a debtor-creditor-supplier/borrower-lender-supplier agreement, is a debtor-creditor/borrower-lender agreement. The three categories of this type of agreement are:

- (i)a category 12(b) restricted-use credit agreement¹⁷⁸ which is *not* made by the creditor/lender under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier¹⁷⁹; or
- (ii)a category 12(c) restricted-use credit agreement,¹⁸⁰ that is, to re-finance any existing indebtedness of the debtor’s/borrower’s, whether to the creditor/lender or another person¹⁸¹; or
- (iii)an unrestricted-use credit agreement that is not made by the creditor/lender under pre-existing arrangements between himself and a person (the “supplier”) other than the debtor/borrower in the knowledge that the credit is to be used to finance a transaction between the debtor/borrower and the supplier.¹⁸²

Examples of debtor-creditor/borrower-lender agreements are moneylending agreements and bank loans (where the money is at the free disposition of the borrower), overdrafts, pawnbrokers’ loans, credit cards (insofar as the card is used to obtain money and not goods or services), and many cash card agreements.¹⁸³

“Credit-token agreement”

41-035

A credit-token agreement is a regulated agreement for the provision of credit¹⁸⁴ in connection with the use of a credit-token.¹⁸⁵ Section 14(1) of the 1974 Act¹⁸⁶ defines a credit-token to mean a card, check, voucher, coupon, stamp, form, booklet or other document or thing given to an individual¹⁸⁷ by a person carrying on a consumer credit business,¹⁸⁸ who undertakes—(a) that on the production of it (whether or not some other action is also required) he will supply cash, goods and services (or any of them) on credit; or (b) that where, on production of it to a third party (whether or not any other action is also required), the third party supplies cash, goods and services (or any of them), he will pay the third party for them (whether or not deducting any discount or commission), in return for payment to him by the individual.¹⁸⁹ Examples of credit-tokens are two-party and three-party (or four-party¹⁹⁰) credit cards,¹⁹¹ checks issued by check trading companies by which the holder is enabled to purchase goods from approved suppliers,¹⁹² certain debit cards,¹⁹³ and (in certain instances)¹⁹⁴ cash cards by which cash can be obtained from an automatic machine.¹⁹⁵ Less obvious documents may also be included, for example “preferred customer” letters issued by a creditor to a debtor upon the successful conclusion of a credit agreement which entitles the debtor, on production of it, to obtain further credit. And in *Elliot v Director General of Fair Trading*¹⁹⁶ a Divisional Court held that the need, inter alia, to enter into a credit agreement before the credit was extended was “some other action” (within section 14(1)(a)) and did not prevent the document—a card with the size, shape and appearance of an ordinary credit card—from being a credit-token.¹⁹⁷ But a document is not a credit-token if it does not have to be produced in order to obtain cash, goods or services. It is further submitted that cheque forms issued by a bank, and cheques and drafts drawn on a bank, are not credit-tokens in that the undertaking of the bank (vis-à-vis its customer) is not to “supply cash”, but to pay the instrument. Moreover, it seems clear that electronic purses insofar as they merely store “e-cash” are not “credit-tokens”.¹⁹⁸

“Consumer hire agreement”¹⁹⁹

- 41-036 A “consumer hire agreement” is defined in the 1974 Act²⁰⁰ and the RAO²⁰¹ to mean an agreement made by a person (“the owner”) with an individual²⁰² (the “hirer”) for the bailment²⁰³ of goods to the hirer, being an agreement which—(a) is not a hire-purchase agreement²⁰⁴; and (b) is capable of subsisting for more than three months.²⁰⁵ The original version of the definition in the 1974 Act imposed a financial limit²⁰⁶ but this has been removed except in relation to “business” hire.²⁰⁷ The 1974 Act and RAO thus embrace, not only domestic rental agreements, but also, by reason of the fact that the word “individual”²⁰⁸ includes sole traders and small partnerships, and any unincorporated body of persons,²⁰⁹ equipment leases and contract-hire agreements even though made for the business purposes of the hirer.²¹⁰ However, as noted below,²¹¹ “business” hire for over £25,000 is exempt from regulation. The application of the 1974 Act and RAO is therefore (apart from this “business” exemption) determined by the status of the hirer and not by the purpose

of the advance. As the Consumer Credit Directive²¹² does not apply to hire agreements, such agreements are not affected by those provisions of the [1974 Act](#) introduced in implementation of that Directive. Nor is there any possibility of owners “opting into” the “Directive” regime.

“Regulated” consumer hire agreement

- 41-037 Since the transfer of consumer credit (and hire) regulation to the FCA,²¹³ the definition of “regulated” consumer hire agreement is now in the [RAO](#).²¹⁴ A consumer hire agreement is a regulated consumer hire agreement within the meaning of the [1974 Act](#)²¹⁵ and for the purposes of [RAO](#)²¹⁶ if it is not an “exempt agreement” as also defined in the [RAO](#).²¹⁷

“Owner” and “hirer”

- 41-038 The expressions “owner” and “hirer” are used in the [1974 Act](#) to refer respectively to a person who bails goods and the individual to whom goods are bailed under a consumer hire agreement, or the person²¹⁸ to whom his rights and duties under the agreement have passed by assignment or by operation of law, and in relation to a prospective consumer hire agreement includes the prospective bailor or hirer.²¹⁹ The definition of “owner” in the [RAO](#) is almost identical.²²⁰ There is no requirement that the owner carries on a consumer hire, or any, business.²²¹

“Exempt agreements”: general

- 41-039 Certain credit and consumer hire agreements are designated “exempt agreements” by the [RAO](#).²²² As such they are excluded from being “regulated agreements”.²²³ With two exceptions,²²⁴ the fact that a credit agreement is an exempt agreement does not prevent the application to it of the “unfair relationship” provisions in [ss.140A to 140C](#).²²⁵ Exempt agreements fall into a number of categories, which will now be considered.

Exempt land mortgages

- 41-040 There are essentially three main types of exempt agreements where the credit is secured on land.²²⁶ The first²²⁷ is a credit agreement that is a “regulated mortgage contract” (or “regulated

home purchase plan”), both as defined in the RAO.²²⁸ The effect of this exemption is to remove from the control of the 1974 Act²²⁹ the majority of land mortgages (as well as “regulated home purchase plans”) where the borrower is an individual, the loan is secured by a mortgage on land²³⁰ and at least 40 per cent²³¹ of that land is used as a dwelling house by the borrower or their family. The reason for this exemption from the Consumer Credit Act 1974 regime is that such agreements are regulated under the Financial Services and Markets Act 2000. Secondly,²³² certain types of credit agreements²³³ secured by a land mortgage²³⁴ where the lender is either a local authority or a lender specified by the FCA in its rules and falling within various categories,²³⁵ also constitute exempt agreements. The list of institutions that may be so “specified” (and hence whose land mortgages of a specified description may be “exempt agreements”) includes banks, building societies, insurers, friendly societies, organisations of employers or workers, charities and land improvement companies.²³⁶ The third main type of exempt land mortgage²³⁷ is a consumer credit agreement secured by a land mortgage of a dwelling where the lender is a housing authority.²³⁸

“Investment mortgages” exemption

- 41-041 The removal of the financial limit²³⁹ in the Consumer Credit Act 1974 potentially brought those land mortgages above that limit (that were not otherwise exempt²⁴⁰) within regulation. This unintended consequence in relation to certain “investment” (especially “buy-to-let”) mortgages was obviated by the introduction of an exemption²⁴¹ for credit agreements secured by a land mortgage where less than 40 per cent of the land is used, or intended to be used, as the borrower’s²⁴² dwelling.²⁴³ However, lending for consumer “buy-to-let” agreements is regulated under a special regime.²⁴⁴

Exempt credit agreements: number of payments

- 41-042 Certain “borrower-lender-supplier”

- U** ²⁴⁵ agreements may gain exemption if the number of payments²⁴⁶
- U** ²⁴⁷ to be made by the borrower does not exceed a certain number.
- U** The most important exemptions are such agreements (i) for “fixed-sum credit”

248

U where the number of payments does not exceed 12 if those payments are required to be made within a period not exceeding 12 months beginning with the date of the agreement

249

U and (ii) for “running-account credit”

250

U where the whole amount outstanding is payable in one instalment per period. As a result of the implementation of the Consumer Credit Directive,

251

U further conditions were added. For both the fixed-sum and the running-account exemption, there is now the further condition that the credit must either be secured on land or be provided without interest or any other charge (or in the case of running-account credit, with “no or insignificant charges”).

252

U Moreover, the running-account exemption only applies if the period does not exceed three months. The fixed-sum exemption was initially introduced primarily in order to exempt short-term invoice deferral. However, it has been relied on in other contexts, for example it is used by certain non-financial firms that offer interest free credit, for example dentists use it for repayment plans and sports clubs for membership fees. More recently it has been used by “Buy-Now Pay-Later” (“BNPL”)

253

U providers, mainly financing digital retail sales, and this has prompted a reappraisal of this exemption which is likely to result in BNPL being brought into regulation.

254

U There is a special exemption for borrower-lender-supplier agreements financing the purchase of land if the number of payments is not more than four (irrespective of the period over which they are payable) and the credit is either secured on land or provided without interest or other charges.

255

U

Exempt credit agreements: low-cost of credit

41-043 Certain “borrower-lender” agreements ²⁵⁶ may gain exemption if the rate of total charge for credit is below certain thresholds. ²⁵⁷ Essentially there are three categories of such “low cost credit”

agreements.²⁵⁸ The first category applies to credit union loans²⁵⁹ and the other two categories apply to credit agreements offered to a particular class and not offered to the public generally.²⁶⁰

Exempt credit agreements: other categories

- 41-044 There are two further categories of exempt credit agreements. The first is credit agreements made in connection with trade in goods or services with a connection with a country outside the United Kingdom.²⁶¹ The second is credit agreements by banks or investment firms for the purpose of allowing the borrower to carry out a transaction relating to financial instruments (for example, in the context of settlement mismatches or margin-trading).²⁶²

Exempt consumer hire agreements

- 41-045 There is one special²⁶³ category of exempt consumer hire agreement: where the owner is a body corporate authorised by or under any enactment to supply electricity, gas or water and the subject of the agreement is a meter or metering equipment.²⁶⁴

High net worth (HNW) “opt-out” exemption

- 41-046 There is an exemption for certain credit and consumer hire agreements made with “high net worth” (HNW) borrowers or hirers.

²⁶⁵

 Four conditions need to be satisfied: (a) the borrower or hirer must be an “individual”
²⁶⁶

 ; (b) the agreement itself must include a prescribed signed “declaration”
²⁶⁷

 that the borrower or hirer agrees to forgo the “protection and remedies” applicable to regulated agreements
²⁶⁸

 ; (c) a “statement of high net worth”,
²⁶⁹

U must have been made

270

U in relation to the borrower or hirer; and (d) this statement of high net worth must have been made during the year ending with the date of the agreement. However, as this exemption was incompatible with the Consumer Credit Directive,

271

U it was originally only available for agreements outside the scope of the Directive: credit agreements secured on land,

272

U agreements where credit in excess of £60,260 is provided

273

U and hire agreements. For the time being, this essentially

274

U remains the position although it is likely to be reviewed in due course.

“Business purpose” exemption

41-047 Although the **Consumer Credit Act 2006** generally removed the financial limit (of £25,000 at the time the **2006 Act** was passed),²⁷⁵ that limit has been retained for “business purpose” credit or hire agreements.²⁷⁶ Hence those credit and consumer hire agreements entered into “wholly or predominantly” for the borrower’s or hirer’s “business purposes” where the credit provided or hire payments to be made exceed £25,000²⁷⁷ are exempt agreements.²⁷⁸ As it may not always be obvious whether the agreement is entered into “wholly or predominantly” for “business” purposes, there is a rebuttable presumption that arises where the agreement includes a declaration by the borrower or hirer to that effect.²⁷⁹ However, the presumption does not apply if, at the time the agreement was made, the lender or owner²⁸⁰ “knows or has reasonable cause to suspect” that the declaration is not true.²⁸¹ If the presumption does not apply, the question of whether the agreement is “wholly or predominantly” for “business” purposes will need to be established in the usual way and, as it will be the lender or owner who will be seeking to invoke the exemption, the onus will then be on them to establish the business purpose on the part of the borrower or hirer.

“Business purpose”: Consumer Credit Directive

41-048

The Consumer Credit Directive²⁸² does not apply to “business” lending. Nevertheless, a number of provisions resulting from the implementation of the Directive have been extended to regulated “business” credit agreements, in particular, the duty to provide pre-contractual explanations,²⁸³ the duty to assess creditworthiness²⁸⁴ and the 14-day right of withdrawal in s.66A of the 1974 Act.²⁸⁵ Moreover, although creditors providing regulated business credit *prima facie* remain subject to the “old” regime as regards formal agreement requirements,²⁸⁶ they may instead opt into the new “Directive” regime.²⁸⁷

“Small agreement”

- 41-049 Section 17 of the 1974 Act defines “small agreements”. These are subject to “lighter” regulation.²⁸⁸ A small agreement is (a) a regulated consumer credit agreement for credit not exceeding £50,²⁸⁹ other than a hire-purchase²⁹⁰ or conditional sale²⁹¹ agreement; or (b) a regulated consumer hire agreement which does not require the hirer to make payments exceeding £50, provided that (in either case) the agreement is an agreement which is either unsecured²⁹² or secured²⁹³ by a guarantee or indemnity only (whether or not the guarantee is itself secured). In the case of running-account credit,²⁹⁴ the credit limit must not exceed £50.²⁹⁵ Section 17 also contains provisions designed to prevent the splitting up of agreements into two or more agreements below the £50 limit.²⁹⁶ Although the Consumer Credit Directive²⁹⁷ allows Member States to apply a threshold of £160 and to exclude agreements under that amount, on the implementation of the Directive it was decided not to apply that threshold but to maintain the less onerous regulatory regime only for agreements below £50.²⁹⁸

“Non-commercial agreement”

- 41-050 The application of the regulatory regime is, in principle, not limited to situations where creditor/lender or owner carries on the *business* of granting credit or letting goods on hire, although FCA authorisation is only required by those acting “by way of business”.²⁹⁹ A loan by one individual to another will, for example, be a regulated credit agreement as long as it is not exempt.³⁰⁰ Dispensation is, however, granted from certain provisions³⁰¹ of the 1974 Act to “non-commercial agreements”, defined to mean a consumer credit agreement or a consumer hire agreement not made by the creditor or owner in the course of a business³⁰² carried on by him.³⁰³

“Multiple agreement”

41-051 Section 18 of the 1974 Act,³⁰⁴ which is primarily an anti-avoidance provision,³⁰⁵ defines the expression “multiple agreement”. Of all the sections in the Act it is this section which has given rise in practice to the greatest difficulty of interpretation.³⁰⁶ Subsections (1), (2) and (3) appear to envisage four situations. First, where the terms of the agreement are such as to place a *part* of it within one category of agreement mentioned in the Act and another *part* of it within a category not so mentioned (for example, a “save and loan” agreement where the loan part is a consumer credit agreement and the savings part falls outside the Act).³⁰⁷ Secondly, where the terms of the agreement are such as to place a *part* of it within one category of agreement mentioned in the Act, and another *part* of it within a different category of agreement so mentioned.³⁰⁸ Thirdly, where the terms of the agreement are such as to place a *part* of it within two or more categories of agreement mentioned in the Act, the other part or parts falling outside the Act, or within one category, or likewise within two or more categories.³⁰⁹ Fourthly, where the agreement is a “single” or *unitary* agreement, not in parts, and the terms of the agreement are such as to place it within two or more categories of agreement mentioned in the Act.³¹⁰ In all four situations, there is a “multiple agreement”. But where *part* of an agreement falls within the first three situations mentioned above, that part is to be treated for the purposes of the Act as a *separate agreement*, and the Act applies to it accordingly.³¹¹ However, in the fourth situation, the agreement is to be treated as an agreement in each of the categories in question, and the Act applies to it accordingly,³¹² but it is not split into separate agreements.³¹³

“Category of agreement”

41-052 The expression “category of agreement” is not defined in the 1974 Act. However, it would appear to mean a type of agreement that the Act makes special provision for and hence is not limited to the broad categories of agreement created by Pt II³¹⁴ of the Act.³¹⁵ It also seems that the words “two or more categories”³¹⁶ must mean disparate categories.³¹⁷

“Part” of an agreement

41-053 The greatest difficulty that has arisen relates to the interpretation and application of the word “part”.³¹⁸ The problem initially surfaced with respect to credit agreements where the debtor elects to take out payment protection insurance, the amount of the premium being financed by the

creditor under the principal credit agreement.³¹⁹ Suppose, for example, that the principal credit agreement is a hire-purchase or conditional sale agreement,³²⁰ or a debtor-creditor loan.³²¹ Does the inclusion in the agreement of payment protection insurance give rise to “parts”, requiring each part to be treated for the purposes of the Act as a separate agreement? Or is the agreement (though multiple) a unitary agreement, not in parts, so that such separate treatment is not required?³²² Suppose that an agreement contains two elements, each of which falls within a different category of agreement mentioned in the Act. To determine whether this gives rise to “separate agreements”, it is necessary to decide whether these elements constitute “parts”³²⁴ or whether the agreement remains a unitary agreement, not in parts.³²⁵ It is generally agreed that the answer does not depend on whether the parties have literally divided the agreement into parts.³²⁶ But there is a wide spectrum of opinion on the test to be applied.³²⁷ On one view s.18 is essentially an anti-avoidance provision and an agreement will be a unitary multi-category agreements, not in parts, if it is an integrated package which could not be split up without affecting the character of the transaction.³²⁸ On another, more cautious, view, however, the first question to be asked is whether the terms of the agreement treat the two elements differently, e.g. different rates of interest, different terms of repayment, different security. If they do, then the two elements may constitute “parts”. Secondly, even if the elements are not differently so treated, is there a substantial degree of disparity between them, having regard to their subject-matter, their legal nature and the operation of the Act? If so, it would be prudent to assume that the two elements constitute parts. So, for example, a hire-purchase agreement coupled with a loan to finance single premium payment protection insurance would give rise to “parts”, as each element differs in legal nature³²⁹ and for the purposes of the Act.³³⁰ Further problems which have emerged (but to which the same tests might be applied) relate to loans where one element of the loan is unrestricted-use credit, that is at the free disposition of the borrower, and another element is restricted-use credit, re-financing the borrower’s indebtedness to another creditor or creditors³³¹; to exempt agreements,³³² where one element of the loan is advanced for an exempt purpose and another for a purpose which is non-exempt; and to credit card agreements where the card may be used to obtain goods or services (a debtor-creditor-supplier agreement) or cash (usually a debtor-creditor agreement).³³³

Consequences if part is a separate agreement

- 41-054 One of the most important consequences³³⁴ of each part being required to be treated as a separate agreement is that the formal requirements of the *Consumer Credit (Agreements) Regulations 1983*,³³⁵ the *Consumer Credit (Agreements) Regulations 2010*³³⁶ and of the *Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983*,³³⁷ will, unless otherwise provided, apply distinctly to each part.³³⁸ The resulting complexity of documents is likely to confuse, rather than to assist, the debtor or hirer. Few creditors and owners, however, have thought

it necessary, for example, to serve separate enforcement,³³⁹ default³⁴⁰ or termination³⁴¹ notices in respect of each part which falls to be treated as a separate agreement.

Running-account credit

- 41-055 In the case of an agreement for running-account credit,³⁴² a term of the agreement allowing the credit limit to be exceeded merely temporarily is not to be treated as a separate agreement or as providing fixed-sum credit in respect of the excess.³⁴³

“Linked transaction”³⁴⁴

- 41-056 The effect of the regulatory regime is not confined to the regulation of consumer credit or consumer hire agreements alone. It extends to “linked transactions”, or transactions ancillary to the consumer credit or consumer hire agreement.³⁴⁵ The definition of a linked transaction is contained in s.19(1) and (2) of the 1974 Act,³⁴⁶ and the word “transaction” is, of course, wider than “contract” or “agreement”.³⁴⁷ A transaction entered into by the debtor³⁴⁸ or hirer, or a relative³⁴⁹ of his, with any other person (“the other party”), *except one for the provision of security*³⁵⁰ is a linked transaction in relation to an actual or prospective regulated agreement (the “principal agreement”) of which it does not form part if it falls within one of the categories (a), (b) or (c) in s.19(1).
- 41-057 The first category³⁵¹ of transaction (in s.19(1)(a)) is one that is entered into by the debtor or hirer, or a relative of his, in compliance with a term of the principal agreement.³⁵² Therefore if, for example, a regulated hire-purchase or conditional sale agreement relating to a motor vehicle requires the debtor to insure the vehicle during the continuance of the agreement, or if a regulated consumer hire agreement requires the hirer to enter into a contract for the maintenance of the goods during the continuance of the agreement, the contract of insurance and the contract for maintenance (respectively) are “linked transactions”, notwithstanding that the other party to the contract is in no way connected with the creditor and notwithstanding that the debtor is left completely free to choose the source of insurance or maintenance.
- 41-058 The second category of transaction (in s.19(1)(b)) is one where the principal agreement is a debtor-creditor-supplier agreement³⁵³ and the transaction is financed, or to be financed, by the principal agreement. Therefore if, for example, a debtor obtains a loan from a financier to enable him to obtain goods from a dealer, and the loan is advanced by the financier under pre-existing arrangements or in contemplation of future arrangements with the dealer, the contract between the

debtor and the dealer for the purchase of the goods is a linked transaction. Similarly, where the debtor uses a credit card, debit card or check, in order to obtain goods or services from a supplier, the contract for the supply of the goods or services is a linked transaction.

- 41-059 The third category (in s.19(1)(c)) is subdivided into three sub-categories and is so complex that reference should be made to the precise wording of the Act.³⁵⁴ Essentially, this category covers a number of situations where a person (not necessarily the creditor or owner himself) initiates the transaction by suggesting it to the debtor or hirer, or his relative.³⁵⁵ Thus, for example, if a creditor or broker informs the debtor that a valuation or survey must be carried out as a pre-condition for the grant of credit, or suggests to the debtor that it would be advisable to take out a payment protection policy,³⁵⁶ the contract of valuation, survey or insurance will be a linked transaction if the other party to it knew, at the time the transaction was initiated, that the credit agreement had been made or contemplated that it might be made.³⁵⁷

Linked transaction of no effect until principal agreement made

- 41-060 One of the particular incidents of a transaction being a “linked transaction”, if entered into before the making of the principal agreement, is that it has no effect until such time (if any) as the principal agreement is made.³⁵⁸ But regulations have excluded certain linked transactions, namely, contracts of insurance, guarantees of goods and agreements for deposit and current accounts, from the operation of this provision.³⁵⁹

“Total charge for credit” and “APR”

- 41-061 Before the transfer of consumer credit regulation to the FCA,³⁶⁰ s.20(1) of the 1974 Act required the Secretary of State to make regulations containing such provisions as appeared to him appropriate for determining the “true” cost to the debtor of the credit provided or to be provided under an actual or prospective consumer credit agreement (the “total charge for credit” and “annual percentage rate” (APR)).³⁶¹ In consequence of the subsequent implementation of the Consumer Credit Directive³⁶² there were two sets of regulations: the original **Consumer Credit (Total Charge for Credit) Regulations 1980**³⁶³ and (in implementation of the Directive) the **Consumer Credit (Total Charge for Credit) Regulations 2010**.³⁶⁴ The **1980 Regulations** only applied to agreements secured on land (as these were outside the scope of the Directive) unless the creditor had opted into the “Directive” regime.³⁶⁵ They prescribed what items were to be treated as entering into the total charge for credit, how their amount was to be ascertained, and the method of calculating

the APR³⁶⁶ of the total charge for credit. These regulations provided for the inclusion in the total charge for credit not only of the interest on the credit but also certain other charges. In principle, all charges payable under the transaction³⁶⁷ by the debtor or a relative³⁶⁸ of his whether to the creditor or any other person (and thus whether the creditor derived any benefit from them or not) were included,³⁶⁹ although various charges were specifically excluded.³⁷⁰ Further, the regulations contained the formula for the calculation of the APR³⁷¹ and for the making of assumptions in calculating the total charge for credit and the APR where certain relevant factors could not be ascertained.³⁷² The 2010 “Directive” Regulations contained similar provisions prescribing what items were to be treated as entering into the total charge for credit, how their amount was to be ascertained, and the method of calculating APR. These regulations also provided for the inclusion in the total charge for credit not only of the interest on the credit but also certain other specified “costs”.³⁷³ Further, they also contained the formula for the calculation of the APR³⁷⁴ and for the making of assumptions in calculating the total charge for credit and the APR where certain relevant factors could not be ascertained.³⁷⁵ On the transfer of consumer credit regulation to the FCA, the FCA was given the power to make rules defining the “total charge for credit”.³⁷⁶ Hence both sets of the Total Charge for Credit Regulations have been repealed and replicated by two sets of FCA rules.³⁷⁷

Significance of “total charge for credit” and “APR”

- 41-062 The “true” cost of credit is significant in two main respects. First, one of the most important recommendations of the Crowther Committee on Consumer Credit³⁷⁸ was that creditors should be compelled to disclose the “true” cost of credit to persons obtaining or wishing to obtain credit. This approach is also reflected in the Consumer Credit Directive. Accordingly the total charge for credit and the APR must be disclosed when credit is promoted³⁷⁹ and in documents comprising regulated credit agreements.³⁸⁰ Although there is controversy whether the calculation indeed reveals the “true” cost of the credit, the APR, in being calculated in a uniform way for all agreements, does provide a yardstick for comparing the cost of available credit. Second, as noted above, certain low-cost “borrower-lender” agreements may gain exemption if the rate of total charge for credit is below certain thresholds.³⁸¹

Footnotes

¹ See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer

- Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).
- 75 But see s.188(2), (3). Note *Southern Pacific Mortgage Ltd v Heath [2009] EWCA Civ 1135*: Example 16 regarded as erroneous by Lloyd LJ.
- 76 See above, para.41-002.
- 77 For example, the terms “lender” and “borrower” are used (in line with the terminology already used by the FCA Handbook in relation to the regulation of mortgages) rather than “creditor” and “debtor”.
- 78 The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544), as amended. See especially RAO arts 60B(3) and 60L.
- 79 For the Act to apply there must be an “agreement”, and not merely, e.g. an offer or letter of intent or proposal (see Vol.I, Ch.4). There may, however, be difficulty in ascertaining whether there is an agreement for a line of credit or whether the actual credit agreement is made in pursuance of the line of credit or both.
- 80 i.e. agrees to provide: see CCA 1974 Sch.2 Example 21 and *National Westminster Bank Plc v Story [1999] C.C.L.R. 70, CA*.
- 81 See below, para.41-019.
- 82 CCA 1974 s.8(1). Section 8 was amended (i) (from 6 April 2008) by the Consumer Credit Act 2006 ss.2(1) and 5; (ii) (from 31 October 2008) by SI 2008/2826; (iii) (from 1 April 2014) by SI 2013/1881; (iv) (from 28 February 2014) by SI 2014/436 (s.8(1) does not apply to a “green deal plan”, because CCA 1974 s.189B applies instead (see below, para.41-261)); (v) (from 21 March 2016, in implementation of the Mortgage Credit Directive) by SI 2015/910; (vi) (from immediately after the amendment noted in (v) above) by SI 2016/392; (vii) (from 31 December 2020) by SI 2019/632. See the almost identical definition in RAO art.60LB(3). As noted above (para.41-005), originally the Act imposed a financial limit.
- 83 CCA 1974 s.189(1), as amended (from 6 April 2007) by the Consumer Credit Act 2006 s.1. See CCA 1974 Sch.2 Pt II Examples 19, 24. See the almost identical definition of “relevant recipient of credit” in RAO art.60L.
- 84 Except under CCA 1974 s.185(5), as amended by the Consumer Credit Act 2006 s.5(8), where such a body corporate contracts jointly with an individual. See *Bank of Ireland (UK) Plc v McLaughlin [2014] NIQB 104* (corporate debtor not within CCA 1974).
- 85 See CCA 1974 Sch.2 Pt II Examples 7, 15, 19.
- 86 RAO art.60B(3) (for the definition of “relevant recipient of credit”, see RAO art.60L).
- 87 Moreover, the application of the financial promotion provisions in CONC 3 do not apply to prospective *business* debtors: CONC 3.1.6R(1) (as was the case with the now repealed 2004 Advertising Regulations), see below, para.41-069.
- 88 RAO art.60C(3)–(7) (previously CCA 1974 s.16B), below para.41-047.
- 89 See above, para.41-011.
- 90 See below, para.41-082.
- 91 See above, para.41-002.
- 92 SI 2001/544, made under the FSMA 2000 s.22 (as amended in this regard by SI 2013/1881). See RAO art.60B(3) and the next footnote.

- 93 s.8(3), cross-referring to the definition in the **RAO Ch.14A**. But (as a result of the implementation of the Mortgage Credit Directive (see above, para.41-003) on 21 March 2016) there is the further qualification that, for the agreement to be a “regulated credit agreement” for the purposes of the **CCA 1974**, the agreement must *not* be for the acquisition or retention of property rights in land or a building (see amendment to s.8(3) in SI 2015/910 art.3 and Sch.1 para.2(2)). Note, from 31 December 2020, as a result of Brexit, the amendments made to s.8(3) and the addition of s.8(3A) (to remove references to the Directive) by the **Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632) reg.194**.
- 94 RAO art.60B(3), and note the transitional provisions (for agreements made before 1 April 2014).
- 95 In **RAO** arts 60C–60HA, see below, paras 41-039 et seq.
- 96 *NRAM Plc v McAdam & Hartley [2015] EWCA Civ 751, reversing [2014] EWHC 4174 (Comm)*.
- 97 The assignment by an individual debtor of his rights under a consumer credit agreement to a company does not alter the status of the agreement.
- 98 See the FCA Handbook, CONC 6.5 (previously **CCA 1974** s.82A (added in implementation of the Consumer Credit Directive, see above, para.41-011)): in the case of an assignment of a regulated agreement other than one secured on land, the assignee must “arrange for” notice to be given to the debtor if arrangements for servicing the credit change from the debtor’s perspective.
- 99 s.189(1). See *Jones v Link Financial Ltd [2012] EWHC 2402 (QB), [2012] C.C.L.R. 3* (extent of application of **CCA 1974** to legal assignee of creditor).
- 100 RAO art.60L(1).
- 101 But see the many exclusions for “non-commercial agreements”, below para.41-050. A lender who enters into a regulated credit agreement by way of business requires FCA authorisation, see below para.41-064.
- 102 The essence of credit is the contractual right to defer payment of an existing debt, or to incur a debt and contractually defer its payment: *R. v Mitchell [1955] 1 W.L.R. 1125*; *R. v Garlick (1958) 42 Cr. App. R. 141*; *Grant v Watton (Inspector of Taxes) [1999] S.T.C. 330, 345*; *Dimond v Lovell [2000] 1 Q.B. 261; affirmed [2002] 1 A.C. 384*; *CFL Finance Ltd v Laser Trust [2021] EWCA Civ 228*. For the problems which arise, see Guest and Lloyd Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-010; and Goode, Consumer Credit: Law and Practice, Pt C, Ch.24. See also *Santander UK Plc v Harrison [2013] EWHC 199 (QB), [2013] C.C.L.R. 4*: the capitalisation of arrears (by adding them to the outstanding capital balance and increasing the monthly repayments correspondingly) whilst being the provision of “credit” was not the provision of a “cash loan” (for the purposes of SI 2008/831 art.4(1) which uses the term “cash loan”, see below, para.41-148).
- 103 CCA 1974 s.9(1); RAO art.60L (and see art.61(3)(c) in relation to mortgages). See **CCA 1974** Sch.2 Pt II Examples 16, 19, 21. This wide definition of “credit” is also adopted in numerous other statutory provisions, e.g. the **Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) reg.3(1)**; the **Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) reg.2(1)**.

- 104 See [CCA 1974 Sch.2 Pt II Example 16](#).
- 105 But see below, para.[41-492](#).
- 106 See [Storlink UK v Thomas \[1996\] C.L.Y. 1225, Cty Ct; Dimond v Lovell \[2000\] 1 Q.B. 261, affirmed \[2002\] 1 A.C. 384](#). Contrast [Legal and General Assurance Soc v Cooper \[1994\] C.L.Y. 2656, Cty Ct](#) (advance of monies against future commission did not constitute the provision of “credit”); [Tilby v Perfect Pizza Ltd \(2002\) N.L.J. 397, \[2003\] C.C.L.R. 9](#) (ATE insurance premium payable only when risk arose did not involve “credit”); [Nejad v City Index Ltd \[2000\] C.C.L.R. 7](#) (so-called “credit allocation” in betting context not “credit” as indebtedness would not necessarily arise); [McMillan Williams v Range \[2004\] EWCA 294, \[2004\] 1 W.L.R. 1858](#) (no “credit” where unclear at the outset if indebtedness would arise); [Maple Leaf Macro Volatility Master Fund v Rouvroy \[2009\] EWHC 257, \[2009\] C.C.L.R. 9](#) (no “credit” in funding agreement where no certainty that obligations to pay under the agreement would arise); [OFT v Ashbourne Management Services Ltd \[2011\] EWHC 1237 \(Ch\)](#) (monthly payment for gym membership did not give rise to “credit”); [Burrell v Helical \(Bramshott Place\) Ltd \[2015\] EWHC 3727 \(Ch\)](#) (no deferment of any obligation to pay hence no “credit”). Employer Salary Advance Schemes (“ESASs”), being the early payment of accrued wages, also do not involve the provision of credit (and the Woolard Review (A review of change and innovation in the unsecured credit market: Report to the FCA Board, February 2021, para.4.50 et seq.) did not recommend their regulation, although recommending the issue be kept under review, and the FCA is encouraging providers to develop a Code of Practice.
- 107 By virtue of the RAO art.[60F](#) (previously [CCA 1974 s.16\(5\)](#) and the [Exempt Agreements Order \(SI 1989/869\) art.3](#), made thereunder) the following (inter alia) are “exempt agreements” (see below, paras [41-039](#) et seq.): (i) certain “borrower-lender-supplier” agreements (see below, paras [41-030—41-031](#)) for fixed-sum credit (see below, para.[41-026](#)) where the number of payments to be made by the borrower does not exceed 12 (previously four) if those payments are required to be made within a period of 12 months (or less) beginning with the date of the agreement and (ii) certain “borrower-lender-supplier” agreements (see below, paras [41-030—41-031](#)) for running-account credit (see below, para.[41-024](#)) where the number of payments to be made by the borrower in repayment of the whole credit per period of not more than three months does not exceed one. In both cases (as a result of the Consumer Credit Directive (see above, para.[41-011](#))) there must be no charge for the credit. Further, by virtue of the RAO art.[60G](#), certain “borrower-lender” agreements (see below, para.[41-034](#)) at low rates of charge are exempt.
- 108 With the result that the [CCA 1974](#) (if not complied with) may potentially apply to render the agreement unenforceable; see [CFL Finance Ltd v Laser Trust \[2021\] EWCA Civ 228](#), overruling, by implication, [CFL Finance Ltd v Bass \[2019\] EWHC 1839 \(Ch\)](#). But it was held that on the facts, as there was a genuine triable issue, the arrangements did *not* provide “credit” by contractually deferring an existing debt but merely settled a contested claim for one. cf. (distinguished in that case) [Holyoake v Candy \[2017\] EWHC 3397 \(Ch\)](#) (which concerned the settlement of credit agreements and, on the facts, did give rise to “credit”).

- 109 CCA 1974 s.15 and RAO arts 60N–60R, see below, para.41-036 and above, paras 35-085 et seq.; *Moorgate Mercantile Leasing Ltd v Isobel Gell and Ugolini Dispensers (UK) Ltd [1986] 2 C.L. 39*, Cty Ct. But see *Dimond v Lovell [2000] Q.B. 216*; *Burdis v Livsey [2002] EWCA Civ 510, [2003] Q.B. 36* (“credit hire” agreements where hire payments were deferred were also credit agreements); and Guest and Lloyd Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-016.
- 110 CCA 1974 s.9(3) and RAO art.60L(8). See below, para.41-361.
- 111 See above, para.41-010.
- 112 RAO art.60C(3)–(7) (previously CCA 1974 s.16B), below para.41-047.
- 113 For credit otherwise than in sterling, see CCA 1974 s.9(1) and RAO art.60L(9).
- 114 Defined in CCA 1974 s.10(1)(b) and RAO art.60L; below, para.41-026.
- 115 Which is an agreement for “fixed-sum credit”, see CCA 1974 s.9(3) and RAO art.60L(8); see also below, para.41-361.
- 116 Defined in CCA 1974 s.10(1)(a) and RAO art.60L; below, para.41-024.
- 117 See below, para.41-025.
- 118 See above, para.41-011.
- 119 Viz: CCA 1974 ss.55C, 60(5)(c), 61, 66A, 75A, 77B and FCA Handbook, CONC 4.2 and 4.3 (previously CCA 1974 s.55A). Moreover, the “high net worth” exemption in RAO art.60H (previously CCA 1974 s.16A) below, para.41-046, remains applicable to such agreements. But when the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016, that financial threshold ceased to apply to “residential renovation agreements” (as defined in CCA 1974 s.189(1) to mean, essentially, unsecured loans to renovate residential property): see amendments made to the 1974 Act in SI 2015/910 art.3 and Sch.1 paras 2(3)–(9).
- 120 In the FCA Handbook, CONC 5 and 6.2 (previously CCA 1974 s.55B) considered further below, para.41-080.
- 121 In the FCA Handbook, CONC 3 (previously SI 2010/1970) considered further below, para.41-069.
- 122 When the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016, so-called “residential renovation agreements” (as defined in CCA 1974 s.189(1) to mean, essentially, unsecured loans to renovate residential property) above this threshold became subject to the “new” (consumer credit) directive regime: see amendments made by SI 2015/910 art.3 and Sch.1 paras 3, 11, 13, 14. See also the amendments made by (a) SI 2016/392 and (b) (after Brexit, removing the reference to the Directive) SI 2019/632.
- 123 See below, paras 41-082 et seq.
- 124 See below, para.41-082.
- 125 Defined in CCA 1974 ss.20(1), 189(1); below, para.41-061.
- 126 s.9(4) (see the equivalent provision in the RAO art.60L(11); added by SI 2015/853 art.3(5)). See CCA 1974 Sch.2 Pt II Examples 5, 19; and *Huntpast Ltd v Leadbeater [1993] C.C.L.R. 15*; *Humberclyde Finance Ltd v Thompson [1997] C.C.L.R. 23*; *Wilson v First County Trust Ltd [2001] Q.B. 407*; *Wilson v Robertsons (London) Ltd [2005] EWHC 1425*; *Griffiths v Welcome Financial Services Ltd [2007] C.C.L.R. 3*. In respect of a loan of money advanced in part to discharge prior mortgage arrears, see the apparently conflicting decisions (as to

whether these arrears were a “charge for credit”) of the Court of Appeal in *Watchtower Investments Ltd v Payne [2001] EWCA Civ 1159* (followed in *London North Securities Ltd v Meadows [2005] EWCA Civ 956*); and *McGinn v Grangewood Securities Ltd [2002] EWCA Civ 522*. *London North Securities Ltd v Meadows* was distinguished in *Black Horse Ltd v Hanson & Ant [2009] EWCA Civ 73, [2009] C.C.L.R. 6*, where a dealer erroneously added VAT to the price and hence included it when he stated the “amount of the credit” in the agreement. It was held that this VAT amount, although erroneously charged, did form part of the “credit” and was not part of the total charge for credit. See also *Southern Pacific Securities 05–2 Plc v Walker [2010] UKSC 32* (deferred broker’s administration fee and interest thereon within s.9(4) and hence not part of “credit”).

- 127 The CCA 1974 uses the expression “consumer credit agreement” (defined in s.8(1)) and the RAO uses the expression “credit agreement” (defined in RAO art.60B) but both have an almost identical meaning, see above, para.41-016.
- 128 CCA 1974 s.10(1)(a) (as amended (from 6 April 2008) by the Consumer Credit Act 2006 s.5(2)(a)) and RAO art.60L. See also CCA 1974 ss.18, 78, 82, 108, 118, 120 and 185.
- 129 See CCA 1974 Sch.2 Pt II Examples 15, 16, 18 and 23. It is a moot point whether traders’ running accounts or milk, newspaper, etc. accounts are for “running-account credit” or “fixed-sum credit”. The distinction is important, inter alia, in respect of the RAO art.60F (previously the Consumer Credit (Exempt Agreements) Order 1989 (SI 1989/869) art.3(1) (a)). See also *Goshawk Dedicated (No.2) Ltd v Bank of Scotland [2005] EWHC 2906 (Ch), [2006] C.C.L.R. 1*.
- 130 CCA 1974 s.10(2) and RAO art.60L(7). See also CCA 1974 Sch.2 Pt II Examples 6, 7, 19, 22, 23.
- 131 CCA 1974 s.10(2) and RAO art.60L(7). This is to permit, for example, a bank to honour cheques drawn on it in (temporary) excess of an agreed overdraft. See also CCA 1974 ss.18(5), 82(4), Sch.2 Pt II Examples 22, 23.
- 132 Within RAO art.60C(3)–(7) (previously CCA 1974 s.16B), see below, para.41-047.
- 133 CCA 1974 s.10(3)(a), as amended (from 6 April 2008) by the Consumer Credit Act 2006 s.5(2)(b).
- 134 CCA 1974 s.10(3)(b)(i). See the corresponding provision in RAO art.60L(10)(b)(i), added by SI 2015/853 art.3(6). Thus if a bank grants business overdraft facilities to an individual of £60,000 (or even without limit), but stipulates that, say, they shall only be entitled to draw £10,000 in any one month, there will be a regulated credit agreement.
- 135 CCA 1974 s.10(3)(b)(ii). See the corresponding provision in RAO art.60L(10)(b)(ii), added by SI 2015/853 art.3(6). An example would be where the agreement provides for an increase in interest rate, or for provision of security by the debtor, if the debit balance exceeds £10,000.
- 136 CCA 1974 s.10(3)(b)(iii). See the corresponding provision in RAO art.60L(10)(b)(iii), added by SI 2015/853 art.3(6). See also CCA 1974 Sch.2 Pt II Example 7.
- 137 The considerable uncertainty created by this anti-avoidance provision is to some extent mitigated, but by no means wholly removed, by s.171(1) (agreement by the parties that, in their opinion, s.10(3)(b)(iii) does not apply to the agreement).

- 138 The CCA 1974 uses the expression “consumer credit agreement” (defined in s.8(1)) and the RAO uses the expression “credit agreement” (defined in RAO art.60B) but both have an almost identical meaning, see above, para.41-016.
- 139 CCA 1974 s.10(1)(b) (as amended (from 6 April 2008) by the Consumer Credit Act 2006 s.5(2)(a)) and RAO art.60. See also CCA 1974 ss.18, 77, 107, 118, 120, 139. See CCA 1974 s.189C(1)(a): a “green deal consumer credit agreement” (as defined in CCA 1974 s.189B(8)) to mean a green deal plan (as defined in CCA 1974 s.189(1)) that is to be treated as a consumer credit agreement for the purpose of the 1974 Act by virtue of CCA 1974 s.189B(1)) is to be treated as an agreement for fixed-sum credit within s.10(1)(b). For “green deal plans” see below, para.41-261.
- 140 CCA 1974 s.9(3) and RAO art. 60L(8); see below, para.41-361.
- 141 See also CCA 1974 Sch.2 Pt II Examples 9, 10, 17, 23 and note the controversy over traders’, etc. “running accounts” noted above, para.41-025.
- 142 CCA 1974 s.11(1), which also provides that the expression “restricted-use credit” is to be construed in the Act accordingly. See also ss.12, 13, 19(1)(c), 58(2), 69, 71, 72, 74(2).
- 143 RAO art.60L(1), (2).
- 144 The CCA 1974 s.11(1) uses the term “regulated consumer credit agreement” but it is suggested that the RAO definition (in referring to “credit agreement”) is the more logical as whether an agreement is regulated or not will depend on whether it is for restricted use (and hence a borrower-supplier or borrower-lender-supplier agreement: see below, paras 41-030—41-031).
- 145 CCA 1974 s.11(1)(a) and RAO art.60L(1). See *National Westminster Bank Plc v Story [1999] C.C.L.R. 70*, Cty Ct (there must be a contractual commitment “to finance” rather than a mere common purpose, see below, para.41-028). See also *Consolidated Finance Ltd v McCluskey [2012] EWCA Civ 1325* (CCA 1974 s.11(1) inapplicable due to absence of either an express or implied term as to the provision of finance), followed in *Consolidated Finance Ltd v Collins [2013] EWCA Civ 475*.
- 146 CCA 1974 s.9(3) and RAO art.60L(8); below, para.41-361. See also CCA 1974 Sch.2 Pt II Example 10.
- 147 CCA 1974 s.11(1) uses the term “regulated consumer credit agreement” but it is suggested that the RAO definition (in referring to “credit agreement”) is the more logical as whether an agreement is regulated or not will depend on whether it is for restricted use (and hence a borrower-supplier or borrower-lender-supplier agreement: see below, paras 41-030—41-031).
- 148 CCA 1974 s.11(1)(b) and RAO art.60L(1). This category applies even if the identity of the supplier is unknown at the time the agreement is made: CCA 1974 s.11(4) and RAO art.60L(2)(b). See *OFT v Lloyds TSB Bank Plc [2006] EWCA Civ 268*: despite “very extensive” number of outlets where debtor could use card, agreement still “restricted-use”.
- 149 See also CCA 1974 Sch.2 Pt II Examples 12, 14, 16. The word “transaction” is not defined in the Act or RAO and will extend to a transaction in land, accommodation, facilities or choses in action (such as shares) as well as goods or services. See *Sutherland Professional Funding Ltd v Bakewells (A Firm) [2013] EWHC 2685 (QB)*: the “supplier” in relation to loan made to finance litigation was the solicitor who paid various disbursements to others,

- not the individual recipients of the disbursements. See CCA 1974 s.189C(2): where a “green deal consumer credit agreement” (as defined in CCA 1974 s.189B(8) to mean a green deal plan (as defined in CCA 1974 s.189(1)) that is to be treated as a consumer credit agreement for the purpose of this Act by virtue of CCA 1974 s.189B(1)) is a regulated agreement, it is to be treated as a restricted-use agreement within s.11(1)(a). For “green deal plans” see below, para.41-261.
- 150 CCA 1974 s.11(1) uses the term “regulated consumer credit agreement” but it is suggested that the RAO definition (in referring to “credit agreement”) is the more logical as whether an agreement is regulated or not will depend on whether it is for restricted use (and hence a borrower-supplier or borrower-lender-supplier agreement: see below, paras 41-030—41-031).
- 151 CCA 1974 s.11(1)(c) and RAO art.60L(1). See also CCA 1974 Sch.2 Pt II Example 13. See *Consolidated Finance Ltd v Collins [2013] EWCA Civ 475* (on facts, a CCA 1974 s.11(1)(c) not a CCA 1974 s.11(1)(b) case).
- 152 CCA 1974 s.11(3) and RAO art.60L(2)(a). *National Home Loans Corp Plc v Hannah [1997] C.C.L.R. 7*, Cty Ct; *Citibank International v Schlieder, The Times*, 26 March 1999. It has been confirmed that the fact that credit is, in fact, provided in such a way that the debtor is not free to use it as he chooses does not, without more, render it “restricted use” as credit is only “restricted use” if it falls within one of the categories in s.11(1): see *National Westminster Bank Plc v Story [1999] C.C.L.R. 70, CA*.
- 153 If it is a term of a regulated agreement, it must be so stipulated: see CCA 1974 s.61(1)(b), below, para.41-085.
- 154 cf. CCA 1974 Sch.2 Pt II Example 12.
- 155 *National Westminster Bank Plc v Story [1999] C.C.L.R. 70, CA*. See para.41-027, above.
- 156 *National Home Loans Corp Plc v Hannah [1997] C.C.L.R. 7, Cty Ct*.
- 157 CCA 1974 s.11(1) uses the term “regulated consumer credit agreement” but it is suggested that the RAO definition (in referring to “credit agreement”) is the more logical as whether an agreement is regulated or not will depend on whether it is for restricted use (and hence a borrower-supplier or borrower-lender-supplier agreement: see below, paras 41-030—41-031).
- 158 CCA 1974 s.11(2) and RAO art.60L(1). CCA 1974 s.11(2) (but not the RAO provision) adds that the expression “unrestricted-use credit” is to be construed in the Act accordingly.
- 159 See above, para.41-027 and note *OFT v Lloyds TSB Bank Plc [2006] EWCA Civ 268 (affirmed as regards another issue: [2007] UKHL 48)*.
- 160 See also CCA 1974 Sch.2 Pt II Examples 12, 16, 18, 21.
- 161 See, in particular, CCA 1974 ss.19(1), 56, 69–75. Of these provisions, ss.70(3) and 75 are of particular importance and exemption under the RAO arts 60C–60G (see below, paras 41-039 et seq.), especially arts 60F and 60G, may depend on whether the agreement is “borrower-lender-supplier” or “borrower-lender”.
- 162 CCA 1974 s.12(a) and RAO art.60L. See above, para.41-027.
- 163 See *Dimond v Lovell [2002] 1 A.C. 384* (hire agreement where credit given for hire charges is a CCA 1974 s.12(a) agreement as regards the credit element).
- 164 See above, para.41-027.

- 165 See above, para.41-027.
- 166 CCA 1974 s.12(b) and RAO art.60L.
- 167 CCA 1974 s.187 (as amended by Banking Act 1987 s.89, which added a new subs.(3A) excluding arrangements for the electronic transfer of funds from a current account at a bank, e.g. EFTPOS transactions) and RAO art.60L(3)–(5). See below, para.41-492.
- 168 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-188.
- 169 See *OFT v Lloyds TSB Bank Plc [2006] EWCA Civ 268 (affirmed as regards another issue: [2007] UKHL 48)* holding that “arrangements” exist in “four-party” credit card situations (see below, para.41-490) between card issuers and suppliers (even suppliers abroad) through network schemes such as VISA and Mastercard. See also *Bank of Scotland v Truman [2005] EWHC 583, [2005] C.C.L.R. 3*.
- 170 CCA 1974 s.187(1) and RAO art.60L(3). See also CCA 1974 Sch.2 Pt II Example 16, and s.187(4), (5).
- 171 See s.187(2), (4) and RAO art.60L(4), (5).
- 172 CCA 1974 s.187(3) and RAO art.60L(5)(a). See also CCA 1974 Sch.2 Pt II Example 21.
- 173 CCA 1974 s.12(c) and RAO art.60L.
- 174 This is so whether any other use than a transaction between the customer and the dealer would be a breach of the credit agreement (see CCA 1974 s.11(3) and RAO art.60L(2)(a), above, para.41-028, and CCA 1974 Sch.2 Pt II Example 8) or whether the loan is, under the agreement, technically at the free disposition of the borrower.
- 175 But certain similar transactions may be excluded by CCA 1974 s.187(3) and RAO art.60L(5)(a). See CCA 1974 Sch.2 Pt II Example 21 (cheque guarantee cards)—but since June 2011, no longer in use.
- 176 See ss.49(1), 74(1). And exemption may depend on whether the agreement is borrower-lender or borrower-lender-supplier, see above paras 41-030—41-031.
- 177 Compare the case of “debtor-creditor-supplier agreements” and “borrower-lender-supplier agreements”, see above, paras 41-030—41-031.
- 178 See above, para.41-027.
- 179 CCA 1974 s.13(a) and RAO art.60L(1). This excludes agreements within CCA 1974 s.12(b) (and the corresponding agreements within the definition of “borrower-lender-supplier agreement” within art.60L); above, para.41-032.
- 180 See above, para.41-027.
- 181 CCA 1974 s.13(b) and RAO art.60L(1).
- 182 CCA 1974 s.13(c) and RAO art.60L(1). This excludes agreements within CCA 1974 s.12(c) (and the corresponding agreements within the definition of “borrower-lender-supplier agreement” within art.60L); above, para.41-033.
- 183 See also CCA 1974 Sch.2 Pt II Examples 8, 16, 17, 18, 21.
- 184 See CCA 1974 s.9(1) (para.41-019, above) and s.14(3) (considered below).
- 185 CCA 1974 s.14(2). See also CCA 1974 ss.63(4), 64(2), 66, 70(5), 84, 85, 171(4), 170, SI 1983/1553 Sch.2 Pt I para.17 (Sch.2 was replaced by SI 2004/1482); SI 1983/1555, as amended, below, paras 41-498 et seq.
- 186 The definition in the FCA Handbook Glossary is similar.

- 187 Defined in [s.189\(1\)](#), see above, para.[41-016](#).
- 188 Defined in [CCA 1974 s.189\(1\)](#) to mean any business in so far as it comprises or relates to providing credit (or otherwise being a creditor) under regulated consumer credit agreements.
- 189 Where [CCA 1974 s.14\(1\)\(b\)](#) applies, it is arguable that a deemed provision of credit arises under [s.14\(3\)](#): see below, para.[41-492](#). See also [CCA 1974 Sch.2 Pt II Examples 2, 14, 16, 21, 22](#). Alternatively (a preferable view), [s.14\(3\)](#) may merely determine *when* and *by whom* credit is provided.
- 190 *OFT v Lloyds TSB Bank Plc [2006] EWCA Civ 268 (affirmed as regards another issue: [2007] UKHL 48)*.
- 191 See below, para.[41-476](#).
- 192 See below, para.[41-485](#).
- 193 See below, para.[41-481](#) and Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-015: probably only where issued under an agreement for the provision of credit.
- 194 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-015.
- 195 [CCA 1974 s.14\(4\)](#).
- 196 *[1980] 1 W.L.R. 977*.
- 197 It therefore seems that a document that, in law, is an invitation to treat may be a credit-token. The Divisional Court held that “undertakes” in [s.14\(1\)](#) does not require a contractual agreement or the possibility of a contractual agreement.
- 198 See below, para.[41-484](#) and Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-015.
- 199 Provisions of the [CCA 1974](#) and [RAO](#) applicable both to consumer credit and consumer hire agreements are dealt with in the present chapter. For provisions applicable solely to consumer hire agreements, see above, paras [35-085](#) et seq.
- 200 [CCA 1974 s.15\(1\)](#).
- 201 [RAO art.60N\(3\)](#) and note the use of the phrase “individual or relevant recipient of credit [sic]”, which means the same as “individual” in the [CCA 1974 s.189\(1\)](#).
- 202 Defined in [s.189\(1\)](#) (and see previous note), see above, para.[41-016](#).
- 203 Or in Scotland, “the hiring”. It was held in *TRM Copy Centre (UK) Ltd v Lanwell Services Ltd [2009] UKHL 35* that “bailment” must be construed as confined to an agreement for hire (i.e. an agreement by which the bailor transfers or agrees to transfer to the bailee possession of and the right to use the goods in exchange for payment in cash or kind). Any wider construction would create anomalies (see *Palmer and Yates [1979] C.L.J. 180*). And see *Eurocopy (Scotland) Plc v Lothian Health Board 1995 S.L.T. 1356* (photocopier held to be provided under a contract of “hire” in circumstances where there was no charge, provided minimum amount of paper was purchased).
- 204 For the definition of “hire-purchase agreement”, see [CCA 1974 s.189\(1\)](#) and below, para.[41-360](#). Hire-purchase is characterised as fixed-sum *credit* for the purposes of the [CCA 1974](#) and [RAO](#) see below, para.[41-361](#).
- 205 This will exclude, e.g. agreements for hire of plant for a *fixed* term of one month, but not an agreement from month to month of indefinite duration. It was confirmed in *Burdis v Livsey*

- [2002] EWCA Civ 510, [2003] Q.B. 36, CA* that the period referred in CCA 1974 s.15(1)(b) is the period of hire and not the payment (or any other) period.
- 206 CCA 1974 s.15(1)(c), repealed by the Consumer Credit Act 2006 s.2(2). The limit was raised from £5,000 to £15,000 from 20 May 1985, by SI 1983/1878 and to £25,000 from 1 May 1998, by SI 1998/996.
- 207 See RAO art.60O (previously CCA 1974 s.16B), below, para.41-047, which exempts “business” hire agreements where the hirer has to make payments exceeding £25,000.
- 208 Or in the case of the RAO the term “relevant recipient of credit [sic]”, above.
- 209 See above, para.41-016. cf. CCA 1974 s.185(5).
- 210 See CCA 1974 Sch.2 Pt II Examples 20, 24.
- 211 RAO art.60O (previously CCA 1974 s.16B, below), para.41-047. If the agreement provides, for example, for an automatic adjustment of hire rentals in the event of corporation tax or other changes, it is submitted that the amount that the hirer is required to pay, calculated as at the outset of the agreement, is the relevant figure. cf. CCA 1974 Sch.2 Pt II Example 24. Further, VAT should be included in calculating the £25,000 limit as it is a payment required to be made by the hirer by the agreement (being a tax charged on the supply of the goods and thus part of the consideration for the hiring): *Apollo Leasing Ltd v Scott, 1984 S.L.T. 90*; Value Added Tax Act 1994 ss.1, 89. More difficult problems are posed by agreements that, upon the expiration of the hiring, provide for a rebate of rentals based on (for example) the price fetched by the goods on resale, so that in effect the hirer pays less than £25,000. It is submitted that the rebate provision will not render the agreement a consumer hire agreement if the rebate is paid after the hirer has made payments in excess of £25,000. But if the rebate is to be *set-off* against the final (usually large) rental, the possibility that the hirer will not be required to make payments in excess of £25,000 would appear to constitute the agreement a regulated hire agreement.
- 212 See above, para.41-011.
- 213 See above, para.41-002.
- 214 SI 2001/544, made under the FSMA 2000 s.22 (as amended in this regard by SI 2013/1881). See RAO art.60N(3) and the next footnote.
- 215 s.15(2), cross-referring to the definition in the RAO.
- 216 RAO art.60N(3).
- 217 In RAO arts 60O–60Q, see below, paras 41-045 et seq.
- 218 The assignment by an individual hirer of his rights under a consumer hire agreement to a company does not alter the status of the agreement.
- 219 CCA 1974 s.189(1). In the case of a hire-purchase agreement, the parties are respectively the “creditor”/“lender” and “debtor”/“borrower” as hire-purchase is characterised as fixed-sum credit, not hire: see below, para.41-361.
- 220 RAO art.60N(3). Curiously, “hirer” is not defined in the RAO except (see the definition of “consumer hire agreement” (see para.41-036, above)), as being the counterparty to the owner.
- 221 But see “non-commercial” agreements, below, para.41-050. An owner who enters into regulated consumer hire agreements by way of business requires FCA authorisation, see below, para.41-064).

- 222 The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) arts 60C–60H (credit) and arts 60O–60Q (hire), inserted by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 (SI 2013/1881) art.6. These new provisions replace the old CCA 1974 ss.16–16C. The “credit” exemptions were amended significantly when the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016: see amendments in SI 2015/910 art.3 and Sch.1 para.4. See also the amendments (in consequence of Brexit) by the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632) and see below, para.41-535.
- 223 See above, paras 41-017, 41-037. For further discussion, see Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-017; and Goode, Consumer Credit: Law and Practice (looseleaf), Pt C, Ch.26.
- 224 Land mortgages and home purchase plans that are “exempt agreements” under RAO art.60C(2), see below, para.41-040.
- 225 CCA 1974 s.140A(5). On ss.140A–140C, see below, paras 41-213 et seq. These provisions do not apply to *hire* agreements, but see CCA 1974 s.132 (above, para.35-090).
- 226 See also (i) below, para.41-041 and (ii) the exemption for “borrower-lender-supplier” agreements secured on land and financing the purchase of land where the number of payments is four or less in RAO art.60F(4), referred to below in para.41-042.
- 227 RAO art.60C(2). When the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016 this exemption was extended to all (not just first charge) residential mortgages: see amendment to art.60C(2) in SI 2015/910 art.3 and Sch.1 para.4(13) and the amendment to the definition of “regulated mortgage contract” in art.61 by SI 2015/910 art.3 and Sch.1 para.4(21).
- 228 RAO arts 61(3) (as amended by SI 2015/910 art.3 and Sch.1 para.4(21); SI 2019/632) and 63F (added by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No.2) Order 2006 (SI 2006/2383)), respectively. This exemption was previously in CCA 1974 s.16(6C)–(6E), added on 31 October 2004 by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) art.90(2) and amended (to add the reference to “regulated home purchase plan”) on 6 April 2007 by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No.2) Order 2006 (SI 2006/2383) art.25(2). This category now (since the implementation on 21 March 2016 of the Mortgage Credit Directive (see above, para.41-003): see below, para.41-535) covers most residential mortgages.
- 229 As noted above, para.41-039, whilst the “unfair relationship” provisions in CCA 1974 ss.140A–140C generally apply to “exempt agreements”, those provisions do not apply to these two categories of exempt agreements (see s.140A(5)). However CCA 1974 s.126 (as substituted by 2013/1881 art.20(38), as amended by SI 2014/506) applies to preclude enforcement of a land mortgage securing a “regulated mortgage contract” (but not a “home purchase plan”) without a court order: s.126(1)(b).
- 230 In relation to a contract entered into before 31 December 2020, “land” means land in the UK or within the territory of an EEA State but (as a result of Brexit) after that date it means

- land in the UK: see the amendment made by the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632) reg.145(3).
- 231 See *Dickinson v UK Acorn Finance Ltd [2015] EWCA Civ 1194*: “It is agreed that the phrase ‘40% of land’ is a geographical rather than a financial expression.”
- 232 RAO art.60E(1)–(4). This exemption was previously in CCA 1974 s.16(1), (2), as amended. Note that since 21 March 2016 until Brexit this exemption did not apply in so far as it was not permitted by the Mortgage Credit Directive (see above, para.41-003): see the old RAO art.60HA, added by SI 2015/910 art.3 and Sch.1 para.4(19) and amended by SI 2019/632. But the “Brexit” amendment to art.60HA made by the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632) reg.142 results in art.60HA (similarly) qualifying art.60E.
- 233 A “relevant credit agreement relating to the purchase of land” as precisely defined in RAO art.60E(7) (and see art.60E(8)–(10)).
- 234 “legal or equitable mortgage secured on land” as defined in RAO art.60L(1).
- 235 Those specified in RAO art.60E(3). Under the old CCA 1974 provisions, the institutions (and the relevant agreements) were specified by the Exempt Agreements Order 1989 (SI 1989/869) (as extensively amended).
- 236 The list also includes bodies corporate “named or specifically referred to in any public general Act” and bodies corporate “named or specifically referred to in an order” made under “a relevant housing provision” (as defined in RAO art.60E(7)).
- 237 RAO art.60E(5). Note that since 21 March 2016 until Brexit this exemption did not apply in so far as it was not permitted by the Mortgage Credit Directive (see above, para.41-003): see the new RAO art.60HA added by SI 2015/910 art.3 and Sch.1 para.4(19) and amended by SI 2019/632. But the “Brexit” amendment to art.60HA made by the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632) reg.142 results in art.60HA (similarly) qualifying art.60E.
- 238 “Housing authority” is defined in RAO art.60E(7). This exemption was previously in CCA 1974 s.16(6A), (6B) inserted by the Housing and Planning Act 1986 s.22.
- 239 See above, para.41-005.
- 240 See above, especially para.41-040 for the many exemptions available for land mortgages but note the changes to these exemptions on 21 March 2016 when the Mortgage Credit Directive (see above, para.41-003) was implemented.
- 241 RAO art.60D (previously CCA 1974 s.16C, added on 1 October 2008 by the Legislative Reform (Consumer Credit) Order 2008 (SI 2008/2826), as amended by the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632); see the transitional provisions (ensuring that the financial limit was not removed for these agreements until the exemption came into force) in SI 2008/831 art.3(1) and Sch.2). As is the case in all other exempted land mortgages (except for those exempted by RAO art.60C(2)), the “unfair relationship” provisions in ss.140A–140C (see below, paras 41-213 et seq.) apply. And CCA 1974 s.126 also applies to art.60D mortgages: CCA 1974 s.126(2).
- 242 Or “related person of the borrower” (as defined in art.60D(3)(b)). For the position of credit provided to trustees, see art.60D(2)(b).

- 243 There is no requirement that the debtor actually rent out the land. When the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016, this exemption ceased to apply to credit agreements within art.3(1)(b) of that Directive i.e. those for the acquisition or retention of interests in land or buildings: see amendment to art.60D in SI 2015/910 art.3 and Sch.1 para.4(14). But such mortgages are in any event not within the CCA 1974 regime: see CCA 1974 s.8(3) as amended by SI 2015/910 art.3 and Sch.1 para.2(2).
- 244 See above, para.41-003 and below, para.41-535.
- ②245 See above, paras 41-030—41-031, not “borrower-lender” agreements, see above, para.41-034. But this exemption does not apply to (a) agreements financing the purchase of land (but note the special exemption for certain such agreements in art.60F(4), noted below); (b) conditional sale or hire-purchase agreements or (c) agreements secured by a pledge: RAO art.60F(2)(e), (3)(e) referring to (7).
- ②246 “Payment” is defined in RAO art.60F(8) (as amended by SI 2015/853 art.3(5)) as a payment comprising or including either the repayment of capital or the payment of interest or any other charge which forms part of the total charge for credit (as to which, see above, para.41-061).
- ②247 RAO art.60F (as amended by SI 2015/352 and 2015/853). It essentially re-enacts, *but with some changes*, (the now revoked) Consumer Credit (Exempt Agreements) Order 1989 (SI 1989/869) art.3, made under (the now repealed) CCA 1974 s.16(5)(a). Art.3 was substantially amended as a result of the implementation of the Consumer Credit Directive (see above, para.41-011).
- ②248 See above, para.41-026.
- ②249 See (on the old provision, where the number of payments had to be four or less, see above) *Zoan v Rouamba [2001] 1 W.L.R. 1509; Ketley v Gilbert [2001] 1 W.L.R. 986; O'Hagan v Wright [2001] NICA 26, [2003] C.C.L.R. 6; Clarke v Tull [2002] EWCA Civ 510, [2002] C.C.L.R. 4; Thew v Cole [2003] EWCA Civ 1828, [2004] R.T.R. 410; Stevenson v Dudley Social Services [2006] C.L.Y. 704, Cty Ct; Barons Finance Ltd & Reddy Corp Ltd v Makaju [2013] EWHC 153 (QB), [2013] C.C.L.R. 3; Consolidated Finance Ltd v Collins [2013] EWCA Civ 475.*
- ②250 See above, para.41-024.
- ②251 See above, para.41-011.
- ②252 RAO art.60F(2)(d); art.60F(3)(d). And see the exemption in RAO art.60F(4) noted below.
- ②253 This sector is called the “Deferred Payment Credit” (“DPC”) sector by the FCA in its Perimeter Reports (i) 2020/21, Ch.8 and (ii) 2021/22. HMT refers to it as short-term interest-free credit (“STIFC”).

- ②54 The Woolard Review (A review of change and innovation in the unsecured credit market: Report to the FCA Board, February 2021, para.4.15) recommended that BNPL schemes be brought within CCA regulation and in February 2021 HMT announced that it would take action, by amending the [RAO](#), to do so. See HMT's Regulation of Buy-Now Pay-Later: Response to consultation (June 2022). (Meanwhile, the FCA has relied on the [Consumer Rights Act 2015](#) to induce BNPL providers to change those of their contractual terms that it considered "unfair" to consumers.) The following are likely to remain outside regulation: (i) "invoicing" (certain deferred payment given by suppliers to customers), (ii) trade credit (deferred payment given by suppliers to small businesses), (iii) agreements financing insurance contracts, (iv) charge cards (see below para.[41-480](#)) and (v) employer/employee lending by third parties (given employer provided loans are usually exempt under art.[60F\(2\)](#)).
- ②55 [RAO art.60F\(4\)](#). Note that since 21 March 2016 this exemption does not apply in so far as it is not permitted by the Mortgage Credit Directive (see above, para.[41-003](#)): see new [RAO art.60HA](#), added by [SI 2015/910 art.3](#) and [Sch.1 para.4\(19\)](#) and amended by [SI 2019/632](#). There are also special exemptions for the financing of insurance premium exemptions in [RAO art.60F\(5\)](#) and [\(6\)](#).
- 256 See above, para.[41-034](#), not "borrower-lender-supplier" agreements, see above paras [41-030—41-031](#).
- 257 [RAO art.60G](#). It essentially re-enacts, *but with some changes*, (the now revoked) [Consumer Credit \(Exempt Agreements\) Order 1989 \(SI 1989/869\) art.4](#), made under (the now repealed) CCA 1974 s.16(5)(b). Art.4 was substantially amended as a result of the implementation of the Consumer Credit Directive (above, para.[41-011](#)). Note the amendments made to [art.60G](#) when (i) the Mortgage Credit Directive (see above, para.[41-003](#)) was implemented on 21 March 2016 (to render it compatible with the Directive) by [SI 2015/910 art.3](#) and [Sch.1 para.4\(17\)](#) and (ii) Brexit occurred, by [SI 2019/632 reg.140](#).
- 258 See also the category in 60G(2A) added as a result of the Mortgage Credit Directive.
- 259 [RAO art.60G\(2\)](#). The rate of total charge for credit must not exceed 42.6 per cent. Note the new [art.60G\(2\)\(c\)](#) added when the Mortgage Credit Directive (see above, para.[41-003](#)) was implemented on 21 March 2016 (to render it compatible with the Directive) by [SI 2015/910 art.3](#) and [Sch.1 para.4\(17\)\(a\)\(ii\)](#).
- 260 See (i) [RAO art.60G\(3\)](#) (if interest is the only charge and the interest may not *at any time* be more than the sum of 1 per cent and the highest of the base rates published by the banks listed in [art.60G\(7\)](#) on the date 28 days before the date on which the interest is charged) and (ii) [RAO art.60G\(4\)](#) (if the rate or amount of any item entering into the total charge for credit cannot be *increased* after the date of the agreement and that rate must not exceed 1 per cent above the highest bank rate of the banks listed in [art.60G\(7\)](#) as it stood 28 days before the date of the agreement). Note the amendments to [art.60G\(3\)](#) and [\(4\)](#) made (referring to [\(8\)](#)) when the Mortgage Credit Directive (see above, para.[41-003](#)) was implemented on 21 March 2016 (to render them compatible with the Directive) by [SI 2015/910 art.3](#) and [Sch.1 para.4\(17\)](#).

- 261 RAO art.60C(8), as amended by the [Financial Services and Markets Act 2000 \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/632\)](#). It essentially re-enacts, *but with some changes*, (the now revoked) [Consumer Credit \(Exempt Agreements\) Order 1989 \(SI 1989/869\)](#) art.5, made under (the now repealed) [CCA 1974 s.16\(5\)\(c\)](#). Some ordinary foreign trade transactions would otherwise be caught.
- 262 RAO art.60E(6) (amended, in consequence of Brexit, by the [Financial Services and Markets Act 2000 \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/632\)](#) reg.139). It essentially re-enacts, *but with some changes*, (the now revoked) [Consumer Credit \(Exempt Agreements\) Order 1989 \(SI 1989/869\)](#) art.5A, added in implementation of the Consumer Credit Directive (see above, para.41-011) art.2(2)(h), by [SI 2010/1010 reg.67A](#) (inserted by [SI 2010/1969](#)).
- 263 See also the exemptions (also available for credit agreements) considered below in para.41-046 (HNW exemption) and para.41-047 (business purpose exemption).
- 264 RAO art.60P. It essentially re-enacts, *but with some changes*, (the now revoked) [Consumer Credit \(Exempt Agreements\) Order 1989 \(SI 1989/869\)](#) art.6, made under (the now repealed) [CCA 1974 s.16\(6\)](#).
- ②65 RAO art.60H (credit) (as amended by the [Financial Services and Markets Act 2000 \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/632\)](#) reg.141 and the [Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) \(No. 2\) Order 2022 \(SI 2022/726\)](#) art.2(7), adding new paras (1A)–(1F), noted below) and art.60Q (hire) (previously [CCA 1974 s.16A](#), added by the [Consumer Credit Act 2006 s.3](#)). The exemption mirrors the one for “certified sophisticated investors” in relation to financial promotion under the [Financial Services and Markets Act 2000 \(Financial Promotion\) Order 2005 \(SI 2005/1529\)](#) art.50, which HMT is reviewing (see HMT, Financial promotion exemptions for high net worth individuals and sophisticated investors: A consultation, December 2021).
- ②66 i.e. a natural person and not a partnership or unincorporated association (or corporation, although these cannot make regulated agreements anyway). See above, para.41-016.
- ②67 Complying with the relevant FCA rules (see the FCA Handbook, CONC App 1.4.6) (previously the (now repealed) [Consumer Credit \(Exempt Agreements\) Order 2007 \(SI 2007/1168\)](#) art.3 and Sch.1).
- ②68 Although (see above, para.41-039) the “unfair relationship” provisions in ss.140A–140C (below, paras 41-213 et seq.) apply and the declaration must say so.
- ②69 Again, complying with the relevant FCA rules (see FCA Handbook, CONC App 1.4.6) (previously the (now repealed) [Consumer Credit \(Exempt Agreements\) Order 2007 \(SI 2007/1168\)](#) art.5 and Sch.2).
- ②70 It must be made by a person of a description “specified” by the FCA rules (and hence not by the borrower or hirer themselves) and must state that, in that person’s opinion, the borrower or hirer either has an income or has net assets above a certain (specified by the rules) amount

(presently net annual income after tax of above £150,000) or net assets (which are defined to exclude the primary residence and pension rights) of at least £500,000. A copy of this statement must be provided to the lender or owner before the agreement is made.

②71 See above, para.41-011.

②72 To render it compatible with the Mortgage Credit Directive (see above, para.41-003) art.60H was amended when that Directive was implemented on 21 March 2016: see (i) new RAO art.60HA, added by SI 2015/910 art.3 and Sch.1 para.4(19) but amended to exclude reference to art.60H by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2022 (SI 2022/726) art.2(8) and (ii) amendment made by SI 2015/910 art.3 and Sch.1 para.4(18). See also the “Brexit” amendment in the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632) reg.141.

②73 See RAO art.60H(b) (and Vol.I, para.5-022). But when the Mortgage Credit Directive (“MCD”) (see above, para.41-003) was implemented on 21 March 2016, the credit exceeding £60,260 could not be for the purpose of (a) the renovation of residential property or (b) acquiring or retaining property rights in land or buildings: see amendments to art.60H in SI 2015/910 art.3 and Sch.1 para.4(18). But agreements within (b) are in any event outside the 1974 regime: see amendment to s.8(3) in SI 2015/910 art.3 and Sch.1 para.2(2)). During the Brexit transition period, it was decided to take credit agreements secured on a variety of high-value assets financing the purchase of property rights out of regulation, to restore the position prior to the MCD being transposed (meaning that such agreements entered into by HNW individuals would once again be exempt from regulation): see the Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632). The new art.60H(1A)–(1F) added by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2022 (SI 2022/726) art.2(7) and noted above, follow on from those EU Exit regulations and render such agreements exempt again. However, the individual needs to be “resident” or “present” (as defined) in the UK to ensure that those benefitting from this legislative exemption have contributed to the UK economy.

②74 But see previous two footnotes on the reversal of the position to that pre-MCD.

275 See above, para.41-005.

276 RAO art.60C(3)–(7) (credit) and RAO art.60O (hire) (previously CCA 1974 s.16B, added by the Consumer Credit Act 2006 s.4). As noted above, paras 41-016 and 41-036, in general, “business” credit and hire is within the scope of the regulatory regime. The old CCA 1974 provision was unsuccessfully invoked in *Bassano v Alfred Toft, Peter Biddulph, Peter Biddulph Ltd, Borro Loan Ltd, Borro Loan 2 Ltd [2014] EWHC 377 (QB), [2014] C.C.L.R. 8*. See also, on RAO art.60C(3)–(7), *Newmafruit Farms Ltd v Pither [2016] EWHC 2205 (QB), [2017] C.C.L.R. 8* and *Brooker v Advanced Industrial Technology Corp Ltd [2019] EWHC 3160 (Ch)*. See also the new art.60C(4A)–(4C) added by the Financial Services

- and Markets Act 2000 (Regulated Activities) (Coronavirus) (Amendment) Order 2020 (SI 2020/480), exempting business loans of £25,000 or less under the coronavirus Bounce Back Loan Scheme (“the BBLS”) operated by the British Business Bank Plc.
- 277 For a discussion of how this limit is calculated, see para.[41-021](#) (credit) and [41-036](#) (hire).
- 278 See *Woolsey v Payne [2015] EWHC 968 (Ch)* (meaning of “business purposes” in old [s.16B](#)) and *Credit Capital Corp Ltd v Watson [2021] EWHC 466 (QB)* (example of exemption applying). The exemption also applies to “green deal plans” (see [RAO art.60C\(4\)](#) and for “green deal plans” see below, para.[41-261](#)) but they must be entered “wholly” (not “wholly or predominantly”) for business purposes.
- 279 [RAO art.60C\(5\)](#) and [art.60O\(2\)](#). The declaration must comply with FCA rules (see FCA Handbook, CONC App.1.4.8). Although this is not made explicit (cf. the presumptions in [CCA 1974 s.171\(1\), \(2\)](#)), it seems clear that this presumption can be rebutted by evidence to the contrary adduced by the borrower or hirer.
- 280 Or any person who has acted on his behalf in connection with the entering into of the agreement, for example a broker.
- 281 [RAO art.60C\(6\)](#) and [art.60O\(3\)](#). If there is more than one lender or owner, then it is enough for this to be the case in relation to only one. It seems clear that (if the agreement contains the declaration) the onus is on the borrower or hirer to establish this. See *Wood v Capital Bridging Finance Ltd [2015] EWCA Civ 451* (presumption rebutted).
- 282 See above, para.[41-011](#).
- 283 In the FCA Handbook, CONC 4.2 and 4.3 (previously [CCA 1974 s.55A](#)): see below, para.[41-079](#).
- 284 In the FCA Handbook, CONC 5 and 6.2 (previously [CCA 1974 s.55B](#)): see below, para.[41-080](#).
- 285 See below, para.[41-103](#).
- 286 See below, paras [41-078](#) et seq.
- 287 See below, para.[41-082](#).
- 288 In so far as the FCA Handbook uses the term “small borrower-lender-supplier agreement” (see CONC 2.9.2(2)R), this is defined by the Glossary by reference to [CCA 1974 s.17](#). Pt V of the CCA 1974 (except ss.[55](#), [56](#) and [66A](#)), which relates to the form and content of regulated agreements, does not apply to “small” debtor-creditor-supplier agreements for restricted use: [CCA 1974 s.74\(1\)\(d\)](#) and see subss.(2) and (4). The older [2004 Disclosure Regulations](#) made under [s.55](#) apply (unless the creditor has opted into the “Directive” regime): [SI 2004/1481 reg.2](#), as amended by [SI 2010/1010 reg.75](#) and [SI 2010/1969 reg.24](#), see below, para.[41-078](#). The following sections do not apply to any “small” agreements: [CCA 1974 ss.77A](#) and [78\(7\)](#) (periodic statements), [s.85\(3\)](#) (issue of new credit-tokens), [ss.86B](#) and [86C](#) (notice of sums in arrears), [s.86E](#) (notice of default sums) and [s.130A](#) (interest on judgment debts). Moreover, FCA Handbook, CONC 2.9 (previously [CCA 1974 s.51](#)) prohibiting unsolicited credit-tokens does not apply to “small borrower-lender-supplier agreements”. But [CCA 1974 ss.77B](#) (statement of account on request) and [78A](#) (notification of variation of interest), added in consequence of the implementation of the Consumer Credit Directive (see above, para.[41-011](#)), do apply.

- 289 The limit may be raised under CCA 1974 s.181 and was raised from £30 to £50 by SI 1983/1878. See CCA 1974 Sch.2 Pt II Examples 16, 17, 21, 22.
- 290 Defined in CCA 1974 s.189(1); below, para.41-360.
- 291 Defined in CCA 1974 s.189(1); below, para.41-446.
- 292 See the definition of “security” in CCA 1974 s.189(1); below, para.41-182.
- 293 CCA 1974 s.189(1).
- 294 Defined in CCA 1974 ss.10, 189(1); above, para.41-024.
- 295 CCA 1974 s.17(2) (as amended by the Consumer Credit Act 2006 s.5(3)) and note ss.10(2) and 10(3)(a). See also CCA 1974 Sch.2 Pt II Examples 16, 21, 22.
- 296 s.17(3), (4).
- 297 See above, para.41-011.
- 298 See Consultation on Proposals for Implementing the Consumer Credit Directive, BERR, April 2009, para.1.11.
- 299 See below, para.41-064.
- 300 See above, paras 41-039 et seq.
- 301 Pt V of the Act (except s.56), which relates to the form and content of regulated agreements, and withdrawal from and cancellation of regulated agreements, does not apply to “non-commercial” agreements: s.74(1)(a). The following sections also do not apply to non-commercial agreements: CCA 1974 ss.75(1), 77–79, 80(1), 82, 83, 86B, 86C, 86E 103(1), 107–109, 110(1), 112, 114–122, 123 and 130A.
- 302 i.e. *any* business, as defined in CCA 1974 s.189(1), (2); see also below, para.41-064. There is an identical definition of “non-commercial agreement” in the FCA Handbook Glossary.
- 303 CCA 1974 s.189(1). The CCA 1974 does not make provision in s.171 as to the onus of proof, but it would seem that the burden lies on the person alleging the agreement to be a non-commercial agreement. In *Khodari v Tamimi [2009] EWCA Civ 1109, [2010] C.C.L.R. 3* a series of large loans over six years in a private context by a banker “to foster the relationship with an important client” at gambling clubs were held not to have been made “in the course of business” and hence to be “non-commercial” loans. For another example of a non-commercial agreement, see *Bassano v Alfred Toft, Peter Biddulph, Peter Biddulph Ltd, Borro Loan Ltd, Borro Loan 2 Ltd [2014] EWHC 377 (QB), [2014] C.C.L.R. 8*. See also *Woolsey v Payne [2015] EWHC 968 (Ch)* and *GML International v Harfield [2020] EWHC 909 (QB)*.
- 304 The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see Annex 5, para.39) that s.18 should be retained in legislation, as an FCA rule could not replicate its provisions. However, it is noted that “it could benefit from simplification and clarification, particularly in relation to its scope and effect”. The Review also notes that the impact of s.18 will be reduced in so far as information requirements and other CCA provisions are repealed and replaced by FCA rules in CONC.
- 305 See Auld LJ in *National Westminster Bank Plc v Story [1999] C.C.L.R. 70, CA*. See also the FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above). Annex 5, para.34 thereof notes that the rationale for s.18 is twofold: (a) anti-avoidance: to ensure that the CCA is not avoided by artificially combining distinct agreements in order to exceed the regulatory limit of £25,000 for business lending

- (see above, para.41-047) and (b) to determine how multiple agreements are to be treated (especially documented): the agreement must comply with the statutory requirements for *each* category and not merely those that apply to the predominant category.
- 306 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-019; Goode, Consumer Credit: Law and Practice (looseleaf), Pt C, paras 25.101 et seq. The reform of s.18 was considered in the review that lead to the *Consumer Credit Act 2006* (see the DTI Consultation Document, Tackling loan sharks—and more! (July 2002)) but as the impact of s.18 was diminished both by the repeal of s.127(3)–(4) and the removal of the financial limit, no proposals for reform were forthcoming. The Home Credit Market Investigation Order 2007 (made by the Competition Commission under the *Enterprise Act 2002* ss.161 and 164 and amended in 2011) art.9 is in almost identical terms to s.18. For appellate case-law see *National Westminster Bank Plc v Story* [1999] C.C.L.R. 70 and *Southern Pacific Mortgage Ltd v Heath* [2010] EWCA Civ 1135, [2010] C.C.L.R. 4 (followed by Horner J in *Swift Advances Plc v Scott* [2018] NICH 28). See also: *National Home Loans Corp Plc v Hannah* [1997] C.C.L.R. 7, Cty Ct; *Wilson v First County Trust Ltd (No.1)* [2003] C.C.L.R. 1; *Ocwen v Coxall* [2004] C.C.L.R. 7; *London North Securities Ltd v Meadows* [2005] EWCA Civ 956, [2005] C.C.L.R. 7. For cases where s.18 was held inapplicable, see *Dimond v Lovell* [2002] 1 A.C. 384; *Burdis v Livsey* [2002] EWCA Civ 510, [2003] Q.B. 36; *Goshawk Dedicated (No.2) Ltd v Bank of Scotland* [2005] EWHC 2906 (Ch), [2006] C.C.L.R. 1.
- 307 CCA 1974 s.18(1)(a) and Sch.2 Example 18. But see s.18(6) (exemption for furnished lettings). cf. *National Home Loans Corp Plc v Hannah* [1997] C.C.L.R. 7, Cty Ct.
- 308 CCA 1974 s.18(1)(a) and Sch.2 Example 16 (but Example 16, in suggesting that an agreement could fall within both s.18(1)(a) and 18(1)(b), was regarded as erroneous by Lloyd LJ in *Southern Pacific Mortgage Ltd v Heath* [2009] EWCA Civ 1135).
- 309 CCA 1974 s.18(1)(b).
- 310 CCA 1974 s.18(1)(b). For an example, see *Southern Pacific Mortgage Ltd v Heath* [2010] EWCA Civ 1135, [2010] C.C.L.R. 4: (obiter) credit card agreements and (ratio) the loan agreement in that case, were “single” (or unitary) agreement within s.18(1)(b).
- 311 CCA 1974 s.18(2). Where part of an agreement falls within the third situation, the agreement (i.e. the separate agreement constituted by subs.(2)) is also to be treated as an agreement in each of the categories in question, and the Act applies to it accordingly (s.18(3)). See also s.18(4) (construction and apportionment).
- 312 CCA 1974 s.18(3).
- 313 The opening words of subs.(2) make it clear that the subsection is applicable only where *part* of an agreement falls within subs.(1) and see *Southern Pacific Mortgage Ltd v Heath* [2010] EWCA Civ 1135, [2010] C.C.L.R. 4.
- 314 CCA 1974 ss.10–19.
- 315 And so would include, e.g. “hire-purchase”, “conditional sale” and “credit sale” agreements: see CCA 1974 s.189(1). But see *National Westminster Bank Plc v Story* [1999] C.C.L.R. 70.
- 316 CCA 1974 s.18(1)(b).
- 317 *Southern Pacific Mortgage Ltd v Heath* [2010] EWCA Civ 1135, [2010] C.C.L.R. 4; *National Home Loans Corp Plc v Hannah* [1997] C.C.L.R. 7, Cty Ct.
- 318 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-019.

- 319 Giving rise to a debtor-creditor-supplier agreement (within CCA 1974 s.12(b), see above, para.41-029) for restricted-use (see above, para.41-027) fixed-sum credit (see above, para.41-026).
- 320 Additional difficulties arise in this case because of the wording of CCA 1974 ss.90, 100: see Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at paras 2-019, 2-091, 2-101.
- 321 See above, para.41-034.
- 322 The Agreement Regulations (see below, paras 41-082 et seq.) in fact resolved this particular dilemma by making special provision for such a case: see SI 1983/1553 reg.2(8) and (9) and SI 2010/1014 reg.3(6) and (7).
- 323 CCA 1974 s.18(2).
- 324 The second situation mentioned above, para.41-051.
- 325 CCA 1974 s.18(1)(b). The fourth situation mentioned above, para.41-051.
- 326 CCA 1974 s.18(5) and Sch.2 Examples 16 and 18.
- 327 See, e.g. Goode, Consumer Credit Law and Practice (looseleaf); Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-019.
- 328 Goode, above. In *Southern Pacific Mortgage Ltd v Heath [2010] EWCA Civ 1135, [2010] C.C.L.R. 4* the Court of Appeal essentially approved the “Goode” view, holding that a loan in excess of the (then) financial limit similar to that in *National Home Loans Corp Plc v Hannah [1997] C.C.L.R. 7, Cty Ct*, fell within s.18(1)(b) in that although aspects fell within two categories of agreement, it was not in “parts” and hence was not notionally “split” by virtue of s.18(2). cf. *National Westminster Bank Plc v Story [1999] C.C.L.R. 70*.
- 329 The hire-purchase element is a contract of hire of goods whereas the loan for the insurance is a contract of loan.
- 330 The hire-purchase element is a debtor-creditor-supplier agreement within CCA 1974 s.12(a), whereas the loan for the insurance is a debtor-creditor-supplier agreement within CCA 1974 s.12(b), to which the Act attributes very different incidents, see, e.g. s.75 (below, para.41-307).
- 331 In this case, however, unless there are differing terms, it is submitted that the agreement is a unitary agreement, not in parts, since each element is a contract of loan, and the Act attributes no very different incidents to restricted-use/unrestricted-use credit. But see *National Westminster Bank Plc v Story [1999] C.C.L.R. 70*.
- 332 See above, paras 41-039 et seq.
- 333 See CCA 1974 Sch.2 Example 16. See now *Southern Pacific Mortgage Ltd v Heath [2010] EWCA Civ 1135, [2010] C.C.L.R. 4*: (obiter) credit card agreements (and (ratio)) the loan agreements in that case were a “single” (or unitary) agreement within s.18(1)(b)) and Example 16 was regarded as erroneous in suggesting that an agreement could fall within both s.18(1)(a) and 18(1)(b).
- 334 When the CCA 1974 imposed a general financial limit, a further important consequence was that the separate agreements might have been below the limit (and hence regulated) whereas the “whole” agreement was above it (and hence not regulated). This issue might still arises in relation to a “business” agreement above the limit in the exemption provided for in RAO art.60C(3)-(7) (credit) and RAO art.60O (hire); see above, para.41-047.

- 335 SI 1983/1553, as amended, see below, para.41-083.
- 336 SI 2010/1014, as amended by SI 2010/1969 regs 41–45, see below, para.41-084.
- 337 SI 1983/1557, as amended; see below, para.41-088.
- 338 But see reg.2(8) and (9) (previously reg.2(7A) inserted by SI 1984/1600) of the Consumer Credit (Agreements) Regulations 1983, as amended by SI 2004/1482 reg.4 (alleviation in the case of certain types of payment protection insurance). And see the identical provision in reg.3(6) and (7) of the Consumer Credit (Agreements) Regulations 2010 (SI 2010/1014).
- 339 CCA 1974 s.76; see below, para.41-166.
- 340 CCA 1974 s.87; see below, para.41-168.
- 341 CCA 1974 s.98; see below, para.41-174.
- 342 Defined in CCA 1974 ss.10, 189(1); above, para.41-024.
- 343 CCA 1974 s.18(5). See also CCA 1974 ss.10(2), 82(4). This covers a bank honouring cheques drawn on it in (temporary) excess of an agreed overdraft. See CCA 1974 Sch.2 Pt II Examples 22, 23.
- 344 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-020; and Goode, Consumer Credit: Law and Practice (looseleaf), Pt C, Ch.43.
- 345 See CCA 1974 ss.57(1), 67, 69(1), 70, 72, 95(2), 96, 113(8)–141(1), 142(2), 173, 179. See also CCA 1974 s.140C(4)(b) and note s.140C(5) and (6)(b) (a “linked transaction” is a “related agreement” for the purpose of ss.140A and 140B (the “unfair relationship” provisions, see below, paras 41-213 et seq.)). In *Townson v FCE Bank Plc (t/a Ford Credit) Unreported 23 June 2016, Birmingham Cty Ct* a PPI policy that was a “linked transaction” (within s.19(1)(c), see below, para.41-059) was held to be a “related transaction” in the context of the “unfair relationship” provisions. “Linked transactions” are not to be confused with the Consumer Credit Directive concept of “linked credit agreements” to which s.75A (see below, para.41-309) applies.
- 346 See also CCA 1974 Sch.2 Pt II Example 11. The definition of “attached contract” in the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) reg.12(2) is similar to s.19(1)(a), (1)(b) and (1)(c)(i). The term “linked transaction” is also used in RAO art.60E(7)(c) (definition of “relevant credit agreement relating to the purchase of land”) and is defined (in RAO art.60E(8)) in an almost identical fashion.
- 347 cf. *Greenberg v IRC [1972] A.C. 109* (on s.43(4)(i) of the Finance Act 1960); *Re Duckwari Plc [1999] Ch. 268, CA* (on Companies Act 2006 s.322(3)(b)).
- 348 See CCA 1974 s.189B(3), Sch.2A: in CCA 1974 s.19, references to “debtor” in relation to “green deal plans” (as defined in s.189(1), see below, para.41-261) are to be read as references to the “improver”, as defined in CCA 1974 s.189B(6).
- 349 Defined in CCA 1974 ss.184(1), 189(1).
- 350 See below, para.41-182 (including a contract of guarantee or indemnity), and CCA 1974 Sch.2 Pt II Example 11. An insurance policy that is assigned to the creditor may be a linked transaction since it is the contract of assignment (and not the policy contract itself) that constitutes the “provision of security”.
- 351 See also CCA 1974 Sch.2 Pt II Example 11.

- 352 The wording contemplates that the transaction must be made *after* the principal agreement (in that it can only then be made “in compliance with a term” of that agreement). But see [CCA 1974 s.19\(1\)\(c\)](#), below.
- 353 Above, paras [41-030](#)—[41-031](#). See *Citibank International v Schneider, The Times*, 26 March 1999 (where this condition was not satisfied and hence [s.19\(1\)\(b\)](#) held not to apply) and *Goshawk Dedicated (No.2) Ltd v The Governor and Company of the Bank of Scotland [2005] EWHC 2906 (Ch)* (solicitors’ disbursements were linked transactions within [s.19\(1\)\(b\)](#) in being financed by a debtor-creditor-supplier agreement).
- 354 See also [CCA 1974 s.19\(2\)](#). See also [CCA 1974 Sch.2 Pt II Example 11](#).
- 355 Defined in [CCA 1974 ss.184\(1\), 189\(1\)](#).
- 356 See *Townson v FCE Bank Plc (t/a Ford Credit) Unreported 23 June 2016, Birmingham Cty Ct*: PPI policy within [s.19\(1\)\(c\)](#).
- 357 CCA 1974 ss.19(1)(c)(i), (ii), 19(2)(a), (b), (c). It is to be presumed in any proceedings, unless the contrary is proved, that when a person initiated a transaction (as mentioned above) he knew the principal agreement had been made, or contemplated that it might be made: [CCA 1974 s.171\(2\)](#).
- 358 CCA 1974 s.19(3). See also [CCA 1974 s.57](#) (effect of withdrawal, below, para.[41-099](#)), [CCA 1974 s.69\(1\)\(i\)](#) (effect of cancellation below, para.[41-107](#)), [CCA 1974 s.96](#) (effect of early repayment, below, para.[41-163](#)), [CCA 1974 s.140C\(4\)\(b\)](#) (“related agreement” in “unfair relationship” provisions, below, paras [41-213](#) et seq.).
- 359 CCA 1974 s.19(4); SI 1983/1560 (also applicable in relation to [ss.69](#) and [96](#)—see previous note). The regulations were made by the Secretary of State but since the transfer of consumer credit regulation to the FCA (see above, para.[41-002](#)) the Treasury is now the responsible government department.
- 360 See above, para.[41-002](#).
- 361 See also [CCA 1974 ss.9\(4\), 69, 70, 93, 95, 155](#) and [Sch.2 Pt II Examples 5, 10](#); SI 1983/1553 and [SI 2010/1014](#).
- 362 See above, para.[41-011](#).
- 363 SI 1980/51 (revoking [SI 1977/327](#)), as amended by [SIs 1985/1192, 1989/596, 1999/3177](#) and [SI 2010/1010](#). The Financial Services Authority adopted much of the Regulations in the “MCOB” part of its Handbook, applicable to those land mortgages it regulated (and the FCA now regulates).
- 364 [SI 2010/1011](#), as amended by [SI 2011/11](#).
- 365 See below, para.[41-082](#).
- 366 The original method of calculating the APR was completely changed by the amendment of the [1980 Regulations](#) by [SI 1999/3177](#) in order to implement the first Consumer Credit Directive, Council Directive 87/102 ([1987] O.J. L42/48). A computer program is usually necessary to calculate the APR.
- 367 Defined widely to include not only the credit agreement but also (i) any other transaction entered into in compliance with the credit agreement (i.e. a linked transaction with [CCA 1974 s.19\(1\)\(a\)](#), see above, paras [41-056](#)—[41-057](#)); (ii) any contract for the provision of security relating to the credit agreement; (iii) any credit brokerage contract relating to the

- agreement; and (iv) any contract required to be made or maintained as a condition of making the credit agreement.
- 368 Defined in [CCA 1974 ss.184\(1\), 189\(1\)](#).
- 369 SI 1980/51 reg.4 as amended by [SIs 1989/596](#) and [1999/3177](#). So, in principle, finance charges, commitment fees, brokerage fees (see the amendment made by [SI 1989/596](#)), documentation fees (see *Wilson v First County Trust Ltd (No.1) [2001] Q.B. 407*; *Wilson v Robertsons (London) Ltd [2005] EWHC 1425 (Ch)*), membership fees, surveyors' fees, legal fees and similar charges (see *Griffiths v Welcome Financial Services Ltd [2007] C.C.L.R. 3* (mortgage indemnity fee)) could be included. On the meaning of "charge" where part of the loan must pay off arrears under a previous loan, see *Watchtower Investment Ltd v Payne [2001] EWCA Civ 1159*, which was followed in *London North Securities Ltd v Meadows [2005] EWCA Civ 956*; but distinguished in *McGinn v Grangewood Securities Ltd [2002] EWCA Civ 522*. And see *Ocwen v Hughes [2004] C.C.L.R. 4, Cty Ct* (optional credit insurance premiums).
- 370 SI 1980/51 reg.5 as amended by [SIs 1985/1192, 1989/596](#) and [1999/3177](#). For example, insurance premiums (other than premiums under insurance contracts within [reg.4\(c\)](#)) and see *London North Securities Ltd v Meadows [2005] EWCA Civ 956*, certain maintenance charges, membership fees, default charges, and charges for money transmission services. See *Huntpast Ltd v Leadbeater [1993] C.C.L.R. 15* (insurance premium and legal costs); *Humberclyde Finance Ltd v Thompson [1997] C.C.L.R. 23* (payment waiver premium).
- 371 SI 1980/51 Pt III (as amended by [SI 1999/3177](#)).
- 372 SI 1980/51 Pt IV.
- 373 SI 2010/1011 reg.4 (in different terms to SI 1980/51 regs 4 and 5, noted above).
- 374 SI 2010/1011 reg.5 and Sch.
- 375 SI 2010/1011 reg.6—again in different terms to [SI 1980/51 Pt IV. Reg.6](#) was amended (from 1 January 2013) by [SI 2012/1745](#), implementing Directive 2011/90/EU which amended Pt II of Annex I to Directive 2008/48/EC.
- 376 RAO art.60M. See the definition of "total charge for credit" in [CCA 1974 s.20](#) and [RAO art.60L](#), referring to rules made under [RAO art.60M](#).
- 377 In the CONC Module of the FCA Handbook. See CONC App 1.1 (Total charge for credit rules for certain agreements secured on land replicating the "old" 1980 regulations) and CONC App 1.2 (Total charge for credit rules for other agreements, replicating the "Directive" 2010 regulations).
- 378 Cmnd.4596 (1971) paras 6.5.15–21.
- 379 FCA Handbook, CONC 3; below, para.[41-069](#).
- 380 s.60; below, paras [41-082](#) et seq.
- 381 RAO art.60G, see above, para.[41-043](#).

(b) - Authorisation of Credit and Hire Businesses

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(b) - Authorisation of Credit and Hire Businesses³⁸²

Activities requiring FCA authorisation

- 41-063 From 1 April 2014, the [1974 Act](#) licensing regime (as reformed by the [Consumer Credit Act 2006](#)) was replaced by the authorisation regime under the [Financial Services and Markets Act 2000 \(FSMA 2000\)](#), operated by the Financial Conduct Authority (FCA). The [FSMA 2000](#) imposes a “general prohibition” on anyone undertaking a “regulated activity” in the United Kingdom³⁸³ unless they are either an “authorised” or an “exempt” person.³⁸⁴ The two activities of (i) entering into a “regulated credit agreement”³⁸⁵ as lender and (ii) exercising or having the right to exercise a lender’s rights and duties under a regulated credit agreement, are “specified” under the [Financial Services and Markets Act 2000 \(Regulated Activities\) Order 2001 \(“RAO”\)](#).³⁸⁶ This means that if undertaken “by way of business”,³⁸⁷ they are “regulated activities”³⁸⁸ and hence can only be carried on in the United Kingdom by an authorised or exempt person. Similarly, the two activities of (i) entering into a “regulated consumer hire agreement”³⁸⁹ as owner and (ii) exercising or having the right to exercise an owner’s rights and duties under a regulated consumer hire agreement, are also “specified” under the [RAO](#).³⁹⁰ Hence again, if undertaken “by way of business”³⁹¹ they are “regulated activities”³⁹² and can only be carried on in the United Kingdom by an authorised or exempt person. Authorisation is therefore not required by businesses (a) that provide credit or hire only to companies or partnerships of over three persons³⁹³; and/or (b) that provide credit or hire only under exempt agreements.³⁹⁴ But authorisation is required, for, e.g. bank lending, moneylending, hire-purchase,³⁹⁵ conditional and credit sale, credit card, check trading, pawnbroking, mortgage lending,³⁹⁶ leasing and rental businesses. Shops and stores providing budget or option accounts or other credit facilities require authorisation, as do mail order businesses. Other business activities in relation to credit and hire (most of which are termed

“ancillary credit businesses” under the [1974 Act](#)) also require authorisation and are considered further below.³⁹⁷

“Business”

- 41-064 Only “specified activities” undertaken “by way of business” are “regulated activities” requiring authorisation.³⁹⁸ Whilst sometimes a special meaning is given to the expression “by way of business” in relation to certain regulated activities,³⁹⁹ for credit and hire businesses the expression is left undefined in the [FSMA 2000](#),⁴⁰⁰ although the FCA has provided some guidance in its Handbook, which has been found helpful in the case-law.

⁴⁰¹



Authorisation and regulatory control

- 41-065 Authorisation under the [FSMA 2000](#) brings with it all the regulatory control that the FCA may exercise under that Act over “authorised persons”. Hence, as well as having to satisfy the conditions for obtaining and then maintaining “authorisation”,⁴⁰²

⁴⁰²



authorised persons are subject to the FCA Handbook, which has a special “Module” of rules⁴⁰³

⁴⁰³



and guidance devoted to consumer credit: the CONC Module.⁴⁰⁴

⁴⁰⁴



Authorised persons will also be subject to the new “consumer duty”, to be introduced by the FCA⁴⁰⁵

⁴⁰⁵



with the aim of setting higher and clearer standards of consumer protection in retail financial markets generally and requiring financial services authorised persons to put their customers’ needs first.⁴⁰⁶

⁴⁰⁶



It remains to be seen, when the consumer credit regime is revised,

407

U whether the provisions giving effect to this duty will replace the present more explicit and prescriptive requirements. Moreover, the FCA has power to ban products

408

U and control high-cost short-term lending.

409

U Authorised persons are also subject to high level “Principles for Business”,

410

U such as Principle 6 whereby “a firm must pay due regard to the interests of its customers and treat them fairly” (the so-called “TCF Principle”). Whilst a breach of a “rule” is generally actionable by “private persons” (as defined) suffering loss,

411

U breach of a Principle does not give rise to the same right. However, the offending firm may be disciplined for breach of a Principle and the FCA may require it to pay compensation to parties who have been harmed. The FCA has extensive powers of monitoring “authorised persons”

412

U and a wide variety of disciplinary powers ranging from varying, suspending or withdrawing authorisation

413

U to the imposition of penalties

414

U and requiring remedial action.

415

U The FCA’s disciplinary powers are subject to an appeal to the Upper Tribunal.

416

U However, an authorised person that breaches the FCA rulebook is not subject to any criminal penalty

417

U and their agreements are generally not impeachable on that ground alone.

418

U Finally, the Financial Ombudsman Scheme (“FOS”)

419

U applies to disputes between authorised persons and their customers. FOS makes its determinations on the basis of what is “fair and reasonable” and it takes into account whether the firm has complied with the Principles,

420

 and if it did not do so may order it to pay compensation to the consumer.

421



Trading whilst unauthorised

- 41-066 Undertaking regulated activities in the consumer credit context whilst not an authorised or exempt person and thus breaching the “general prohibition”⁴²² is a criminal offence⁴²³ and special provision was made for the specific funding of teams detecting illegal money lenders (so-called “loan sharks”) in the [Bank of England and Financial Services Act 2016](#).⁴²⁴ Moreover, agreements made by a person in contravention of the general prohibition are unenforceable and voidable by the counterparty, although the FCA has power to order otherwise if satisfied that this is “just and equitable”.⁴²⁵ The undertaking of credit or hire activities by an authorised person otherwise than in accordance with their authorisation (for example, if their authorisation does not extend to undertaking credit or hire activities) is similarly a criminal offence⁴²⁶ and agreements are similarly unenforceable and voidable, subject to the FCA determining otherwise.⁴²⁷

Trading “through” unauthorised persons

- 41-067 Agreements made by an authorised person “through” someone acting in breach of the general prohibition or outside their authorisation are also unenforceable and voidable, subject to the FCA determining otherwise.

428



FCA determinations to enforce agreements

- 41-068 If the FCA dismisses the application to enforce an agreement (“except on technical grounds only”) any security provided in relation to the agreement is avoided.⁴²⁹ There is an appeal to the Upper Tribunal in respect of these FCA determinations.⁴³⁰

Footnotes

- 1 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).
- 382 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), paras 2-022 —2-042; and Goode, Consumer Credit: Law and Practice (looseleaf), Pt C, Ch.27.
- 383 See [FSMA 2000 s.418](#).
- 384 [FSMA 2000 s.19](#). See below, para.[41-066](#): trading whilst unauthorised. For “exempt persons” see [FSMA 2000 s.38](#) (Exemption by Treasury Order) and [s.39](#) (“appointed representatives”).
- 385 See above, para.[41-017](#).
- 386 [SI 2001/544 art.60B](#), as inserted by the [Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) \(No.2\) Order 2013 \(SI 2013/1881\)](#) art.6.
- 387 See below, para.[41-064](#).
- 388 [FSMA 2000 s.22](#).
- 389 See above, para.[41-037](#).
- 390 [SI 2001/544 art.60N](#), as inserted by the [Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) \(No.2\) Order 2013 \(SI 2013/1881\)](#) art.6.
- 391 See below, para.[41-064](#).
- 392 [FSMA 2000 s.22](#).
- 393 As such persons cannot enter into consumer credit and consumer hire agreements (see above, paras [41-016](#) and [41-036](#), respectively) and hence “regulated agreements” (see above, paras [41-017](#) and [41-037](#), respectively).
- 394 For exempt agreements, see above, paras [41-039](#) et seq.
- 395 See [RAO art.60L\(8\)](#) above, para.[41-024](#); below, para.[41-361](#).
- 396 But note the exemptions for land mortgages, see above, para.[41-039](#); below, para.[41-533](#). Residential mortgages within [RAO art.61](#) (so-called “regulated mortgage contracts”) are not “regulated agreements” (see [RAO art.60C\(2\)](#)) and hence not “regulated agreements” for the purpose of the [CCA 1974](#) regime; but they are regulated (as “regulated mortgage contracts”) under the parallel [FSMA 2000](#) regime. See below, para.[41-533](#).
- 397 See below, paras [41-234](#) et seq.
- 398 [FSMA 2000 s.22](#).
- 399 See the [Financial Services and Markets Act 2000 \(Carrying on Regulated Activities by Way of Business\) Order 2001 \(SI 2001/1177\)](#), as amended, made under [FSMA 2000 s.419](#).
- 400 The [CCA 1974](#) definitions of “business” in [s.189](#) (see [s.189\(1\)](#) (the expression “business” in the Act includes profession or trade) and [s.189\(2\)](#) (occasional transactions to be ignored)) have not been repealed and (as confirmed in [Newmafruit Farms Ltd v Pither \[2016\] EWHC](#)

2205 (QB), [2017] C.C.L.R. 8) are technically not relevant to the meaning of the terms in FSMA 2000 s.22. See, on the CCA 1974 definition, *Bassano v Alfred Toft, Peter Biddulph, Peter Biddulph Ltd, Borro Loan Ltd, Borro Loan 2 Ltd [2014] EWHC 377 (QB), [2014] C.C.L.R. 8* (one-off loan).

- ①401 See FCA Handbook, PERG 2 (referred to in the mortgage case *Helden v Strathmore Ltd [2010] EWHC 2012 (Ch), approved in [2011] EWCA Civ 542*). *Helden* was applied in *Jackson v Ayles [2021] EWHC 995 (Ch)*. See also *Campbell v Tyrrell [2022] EWHC 423 (Ch)* (a case on the predecessor, CCA s.16B).
- ①402 See **FSMA 2000 Pt 4A**. Note especially **s.55B** (“threshold conditions”) and also the “control of business transfers” powers in **FSMA 2000 Pt VII**. On “threshold conditions” see *Lewis Alexander Ltd v FCA [2019] UKUT 49 (TCC)*.
- ①403 Breach is generally actionable by “private persons” (as defined) suffering loss: **FSMA 2000 s.138D**, as noted below.
- ①404 For the FCA’s rule-making powers, see **FSMA 2000 Pt 9A**.
- ①405 It will apply to all new and existing products and services that are currently on sale or renewal from 31 July 2023. It will be extended to closed-book products 12 months later.
- ①406 See the FCA’s PS22/9: A new Consumer Duty (July 2022) and its Guidance published simultaneously. The duty will entail a new “Consumer Principle for Business” (requiring firms to “act to deliver good outcomes for retail customers”) and new Handbook rules (“providing greater clarity on [the FCA’s] expectations under the new Principle and helping firms interpret … four [listed] outcomes … helping to drive good outcomes for customers”).
- ①407 See above, para.41-004.
- ①408 **FSMA 2000 s.137D**.
- ①409 **FSMA 2000 s.137C**. See further below, para.41-296.
- ①410 See the “PRIN” Module of the FCA Handbook. See the new Consumer Principle 12 to be introduced under the new “consumer duty” in place of Principles 6 and 7, noted above.
- ①411 **FSMA 2000 s.138D**. See *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm)* (breach of credit assessment duty in CONC 5.2.1 in “pay-day loan” context).
- ①412 See its far-reaching powers to obtain information in **FSMA 2000 Pt XI**.
- ①413

See **FSMA 2000 ss.55J** (variation or cancellation) and **s.206A** (suspension). Note also its power to impose requirements under **ss.55L, 55N, 55O** and prohibitions and restrictions under **FSMA 2000 s.55P**.

- ④14 See **FSMA 2000 s.206**. The FCA may also publicly censure: **FSMA 2000 s.205**.
- ④15 See **FSMA 2000 s.384**. The FCA may apply to court for injunctions (**s.380**) or restitution orders (**s.382**).
- ④16 See **FSMA 2000 s.55Z4** (for powers under **Pt 4A**) and **ss.208(4), 384(6)** (for other sanctions).
- ④17 See **FSMA 2000 s.138E(1)**.
- ④18 See **FSMA 2000 s.138E(2)**—but there is an exception (**s.138E(3)**) for the special high-cost credit rules under **s.137C** and the product intervention rules under **s.137D**.
- ④19 See **FSMA 2000 Pt XVI**.
- ④20 *R. (on the application of British Bankers Association) v Financial Services Authority [2011] EWHC 999 (Admin)*. Its determinations may be at variance with the strict legal position: *R. (on the application of Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service [2008] EWCA Civ 642*.
- ④21 The financial limit of awards is £355,000.
- 422 See above, para.41-063.
- 423 **FSMA 2000 s.23(1)** and see *R. v Gopee [2019] EWCA Crim 601* (appeals against convictions for undertaking an unlawful money lending business). Unlicensed trading was also a criminal offence under (the now repealed) **CCA 1974 ss.39(1), 167** and **Sch.1**. See *R. v Linegar [2009] EWCA Crim 648* (sentencing appeal).
- 424 See the new **Pt X XB** added to **FSMA 2000**, in force 16 July 2016.
- 425 **FSMA 2000 ss.26, 28A**. The position was similar under the **CCA 1974** (see the now repealed **s.40**) but with the OFT having the power to “validate” agreements made by unlicensed traders (see *Smerdon v Ellis [1997] C.L.Y. 960, Cty Ct; Rendle v Hicks [1998] C.L.Y. 2504, Cty Ct; Barons Finance Ltd & Reddy Corp Ltd v Makanju [2013] EWHC 153 (QB), [2013] C.C.L.R. 3*). In other, non “credit-related activities”, an application needs to be made to *the court* to uphold the agreements: **FSMA 2000 s.28**.
- 426 **FSMA 2000 s.23(1A)–(1G)**. To preserve the position under the **CCA 1974** (see above), this is only the position in relation to “credit-related activities” (i.e. those activities that were previously subject to the **CCA** licensing regime). An authorised person who acts outside their authorisation in relation to other regulated activities only faces disciplinary action.
- 427 **FSMA 2000 ss.26A, 28A**.
- ④28

FSMA 2000 ss.27, 28A. See *Chickcombe v FCA [2018] UKUT 258 (TCC)* concerning a Tribunal appeal under FSMA 2000 s.28B(3) in relation to agreements financing timeshare accommodation that had been brokered by an unauthorised broker and considered for enforcement under FSMA 2000 s.28A. See the sequel: *Barclays Partner Finance v FCA [2022] UKUT 151 (TCC)*. This introduces a degree of “self-policing” into the authorisation regime. In other, non “credit-related activities”, an application needs to be made to the *court* to uphold the agreements: s.28.

429 CCA 1974 ss.113(3)(c), 106.

430 FSMA 2000 s.28B. See *Chickcombe v FCA [2018] UKUT 258 (TCC)*.

(c) - Seeking Business

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(c) - Seeking Business⁴³¹

Advertising and quotations

⁴¹⁻⁰⁶⁹ Originally, Pt IV of the 1974 Act dealt with advertising and quotations, but since 1 April 2014, following the transfer of consumer credit regulation from the OFT to the FCA,⁴³² those activities are now regulated under the FSMA 2000 “financial promotion” regime.⁴³³

U In consequence of the implementation of the Consumer Credit Directive⁴³⁴ there are now two sets of regulations made under the (now repealed) provisions of the 1974 Act,⁴³⁵ concerning the form and content of credit⁴³⁶ advertisements: the Consumer Credit (Advertisements) Regulations 2004⁴³⁷ and (in implementation of the Directive) the Consumer Credit (Advertisements) Regulations 2010.⁴³⁸ The FCA rules (in the FCA Handbook, CONC 3) largely replicate the detailed and prescriptive provisions of these two sets of old Advertising Regulations.⁴³⁹ Infringement of these provisions is no longer a criminal offence⁴⁴⁰ but (as well as giving rise to the usual consequences for breach of FCA rules⁴⁴¹) may also breach the Consumer Protection from Unfair Trading Regulations 2008.⁴⁴² Regulations under the 1974 Act⁴⁴³ also prescribed the content of quotations in certain cases⁴⁴⁴ and their provisions have also been largely replicated as “rules” in the FCA Handbook.⁴⁴⁵

Canvassing

- 41-070 It is an offence⁴⁴⁶ to canvass⁴⁴⁷ debtor-creditor⁴⁴⁸ agreements off trade premises,⁴⁴⁹ except in response to a request in writing made on a previous occasion and signed by or on behalf of the person making it.⁴⁵⁰

Circulars to minors

- 41-071 It is also an offence⁴⁵¹ for a person, with a view to financial gain, to send to a minor a document⁴⁵² inviting him to borrow money, obtain goods on credit or hire, obtain services on credit, or apply for information or advice on borrowing money or otherwise obtaining credit, or hiring goods.⁴⁵³

Infringement

- 41-072 Failure to comply with those provisions of Pt IV that remain in force⁴⁵⁴ do not affect the validity or enforceability of any agreement.⁴⁵⁵

Footnotes

1 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).

431 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), paras 2-044 —2-055; and Goode, Consumer Credit: Law and Practice (looseleaf), Pt C, Ch.28.

432 See above, para.41-002.

433 See especially FSMA 2000 s.21 and the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (SI 2005/1529) (the “FPO”). See the amendments to the FPO made by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 (SI 2013/1881) art.17. Hence CCA 1974 ss.43–45, 47, 52 and 53 have been

repealed. Note the proposed amendments to this promotions regime by the Financial Services and Markets Bill 2022 cl.20 and Sch.5.

434 See above, para.41-011.

435 For a case on the breach of the old **CCA 1974** Advertising Regulations in the context of internet advertising, see *Motor Depot Ltd, Philip Wilkinson v Kingston Upon Hull City Council [2012] EWHC 3257 (Admin)*.

436 The **Advertisements Regulations 2004** originally also applied to *hire* advertisements, but hire was removed from the scope of the Regulations by the **Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277)** reg.30(1) and Sch.2 para.108. However, hire is now subject to the FCA promotion rules.

437 **SI 2004/1484** amended by **SI 2004/2619, 2007/827, 2008/1277** (removing hire agreements from regulation), **2010/1010, 2010/1969**. These regulations constituted the third major revision of the **CCA 1974** advertisements regime (the previous two being contained in **SI 1980/54**, as amended and **SI 1989/1125**, as amended).

438 **SI 2010/1970** (replacing **SI 2010/1012**).

439 The (now repealed) **CCA 1974** s.45, which prohibited advertisements where goods, etc. were not sold for cash, is replicated as a “rule” in CONC 3.5.2R and 3.6.3R.

440 As it was under the **CCA 1974** s.167 and Sch.1 (relevant provision repealed by the **Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 (SI 2013/1881)** art.20(64)).

441 See above, para.41-065.

442 **SI 2008/1277**, and hence give rise to a criminal offence or, for contracts made on or after 1 October 2014, civil redress. **CCA 1974** s.46 (which also made it an offence to publish “false or misleading” advertisements) was repealed (from 26 May 2008) by **SI 2008/1277** reg.30(1) and Sch.2 para.18. For case-law on s.46 (which may still be of persuasive relevance to offences under the **2008 Regulations**), see *Home Insulation Ltd v Wadsley [1988] 10 C.L. 48; Metsoja v H Norman Pitt & Co Ltd [1989] Crim. L.R. 560; Rover Group Ltd and Rover Finance Ltd v Sumner [1995] C.C.L.R. 1; Dudley MBC v Colorvision Plc [1997] C.C.L.R. 19*.

443 Under **CCA 1974** s.52, as amended (on 1 October 2004) by **RAO** art.90(4). See **SI 1999/2725** as amended by **SI 2000/1797** and **SI 2001/544**. The first quotations regulations (**SI 1980/55**, as amended) were replaced by **SI 1989/1126**, as amended, and were much wider in scope and were revoked by **SI 1997/211**.

444 In connection with a prospective credit agreement (a) that would or could be secured by a mortgage or charge on the debtor’s home, or (b) under which repayments of credit would be made in a currency other than sterling.

445 See CONC 4.1.

446 **CCA 1974** s.167 and Sch.1.

447 **CCA 1974** ss.48, 189(1).

448 See above, para.41-034.

449 **CCA 1974** s.48.

450 **CCA 1974** s.49. A Determination has been made by the Director General of Fair Trading under s.49(3) (the FCA now being the responsible authority), with respect to the exclusion of

current accounts from [s.49\(1\), \(2\)](#). See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.4-4800. See also [ss.153, 154](#) (below, para.[41-256](#)) and the FCA's guidance on [ss.48](#) and [49](#) in CONC 3.10.3(3)–(7). The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above) states (see Annex 7, para.64) that the FCA was not aware of any instance where the offences in this section had been prosecuted. However, whilst stating (para.7.97) that “the criminal offences in the CCA may no longer be necessary” it also notes (para.7.103) that “there may be arguments in favour of keeping the current offences in respect of canvassing … this merits further consideration”. For additional obligations imposed on such lenders, see the Home Credit Market Investigation Order 2007, as amended in 2011, made by the Competition Commission under the [Enterprise Act 2002 ss.161, 164](#).

451 [CCA 1974 s.167](#) and [Sch.1](#).

452 It would seem that this term would cover emails and SMS texts but not telephone calls.

453 [CCA 1974 s.50](#). cf. *Alliance and Leicester Building Society v Leicestershire CC*, *The Times*, 15 March 1993. The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above) states (see Annex 7, para.69) that the FCA was not aware of any instance where the offences under s.50 had been prosecuted. (However, see *Alliance and Leicester Building Society v Leicestershire CC*, noted above.) Moreover, nor was it “aware of evidence of the deliberate targeting of minors” (para.67). However, whilst stating (para.7.97) that “the criminal offences in the CCA may no longer be necessary” it also notes (para.7.103) that “there may be arguments in favour of keeping the current offences in respect of … circulars to minors … this merits further consideration”. For a (now repealed) exemption from [s.50](#) with respect to student loans, see the [Education \(Student Loans\) Act 1990 Sch.2 para.3\(A\)](#) (as amended).

454 Sections 48–49 (see above, para.[41-070](#)) and [s.50](#) (see above, para.[41-071](#)).

455 [CCA 1974 s.170\(1\)](#). For criminal penalties, see [CCA 1974 ss.49, 50, 167\(1\), \(2\)](#) and [Sch.1](#) (as amended).

(d) - Antecedent Negotiations

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(d) - Antecedent Negotiations⁴⁵⁶

“Antecedent negotiations”

- 41-073 These are defined⁴⁵⁷ by s.56(1)⁴⁵⁸ of the 1974 Act to mean any negotiations with the debtor⁴⁵⁹ or hirer of the following alternative descriptions: first, negotiations conducted by the creditor or owner in relation to any regulated agreement; second, negotiations conducted by a credit-broker⁴⁶⁰ in relation to goods sold or proposed to be sold by the credit-broker to the creditor before forming the subject of a debtor-creditor-supplier agreement falling within s.12(a)⁴⁶¹; third, negotiations conducted by the supplier⁴⁶² in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement falling within s.12(b) or (c).⁴⁶³ It is to be noted that negotiations conducted by a third party other than the creditor or owner (either himself or by his employees or common law agents) in respect of a debtor-creditor⁴⁶⁴ or hire⁴⁶⁵ agreement do not fall within s.56(1).
- 41-074 The first category of antecedent negotiations mentioned above is self-explanatory, and it is clear that it will embrace negotiations conducted by an employee or an agent of the creditor or owner. The second category covers negotiations conducted by, for example, a dealer in relation to goods to be sold by the dealer⁴⁶⁶ to a financier and which are to be the subject of a hire-purchase, conditional sale or credit sale agreement between the financier and the debtor (the usual “tripartite” transaction). It is to be noted that this category relates only to negotiations in relation to *goods* and to the goods sold or proposed to be sold by the dealer to the financier.⁴⁶⁷ The third category refers, for instance, to negotiations conducted by a supplier of goods or services who supplies them for money advanced by a financier to the debtor as a restricted-use loan⁴⁶⁸ under pre-existing arrangements between the financier and the supplier.

- 41-075 The person by whom negotiations are so conducted with the debtor or hirer is referred to as the “negotiator”.⁴⁶⁹
- 41-076 For the purposes of the Act, antecedent negotiations are to be taken to begin when the negotiator and the debtor or hirer first enter into communication (including communication by advertisement⁴⁷⁰), and to include any representations⁴⁷¹ made by the negotiator to the debtor or hirer and any other dealings between them.⁴⁷²

Negotiator as agent

- 41-077 Once antecedent negotiations have been shown to exist, the negotiator, though not in fact the common law agent of the creditor, is deemed to have conducted the negotiations in the capacity of agent of the creditor as well as in his actual capacity.⁴⁷³ Thus the creditor will be liable for express misrepresentations by his deemed agent,⁴⁷⁴ and for any contractual undertakings given by the deemed agent.⁴⁷⁵ This deemed agency and liability for the acts or omissions of the deemed agent cannot be excluded by agreement.⁴⁷⁶

Footnotes

- 1 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).
- 456 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-057.
- 457 See also CCA 1974 Sch.2 Pt II Examples 1, 2, 3, 4.
- 458 The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see Annex 5, para.30) the FCA's view that s.56 should be retained in legislation as FCA rules could not replicate its provisions (especially subs.(2) if the deemed agent is not an authorised person).
- 459 But not with a guarantor of the debtor: *Lombard North Central Plc v Gate [1998] C.C.L.R. 51, Cty Ct*. See CCA 1974 s.189B(3), Sch.2A: in s.56, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), below, para.41-261) are to be read as references to the “improver”/“first bill payer”, as defined in CCA 1974 s.189B(6).
- 460 Defined in CCA 1974 s.189(1); below, para.41-235.

- 461 See above, paras 41-030—41-031.
- 462 Defined in CCA 1974 s.189(1).
- 463 See above, paras 41-032, 41-033.
- 464 See above, para.41-034.
- 465 See above, para.41-036, and *Moorgate Mercantile Leasing Ltd v Isobel Gell and Ugolini Dispensers (UK) Ltd* [1986] 2 C.L. 39, Cty Ct; *Mynshul Asset Finance v Clarke* [1992] C.L.Y 487, Cty Ct; *Williams (JD) & Co v McCauley, Parson and Jones* [1994] C.C.L.R. 78; *Woodchester Leasing Equipment v British Association of Canned and Preserved Foods Importers and Distributors Ltd* [1995] C.C.L.R. 51, CA; *PB Leasing Ltd v Patel and Patel (t/a Plankhouse Stores)* [1995] C.C.L.R. 82, Cty Ct; *Powell v Lloyd's Bowmakers* [1996] S.L.T. 117, [1996] C.C.L.R. 50 Sh Ct. But contrast the following cases where the supplier was found to be, on the facts, the common law agent of the owner: *Woodchester Leasing Equipment v Clayton* [1994] C.C.L.R. 87; and *Lease Management Services Ltd v Purnell Secretarial Services Ltd* [1994] C.C.L.R. 127.
- 466 See *Black Horse Ltd v Langford* [2007] EWHC 907, [2007] C.C.L.R. 5: s.56(1)(b) did not apply to a dealer who (although having the status of a “credit broker”) sold the goods to an intermediary who then sold to the creditor in that the dealer was not the “credit broker” who sold the goods to the creditor. But note (i) the Law Commissions’ Joint Report: Consumer Redress for Misleading and Aggressive Practices (March 2012), Cm.8323, Recommendation 51, recommending that s.56 should be “clarified” to cover dealers acting through intermediaries and (ii) the FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above), para.5.28, which notes the Law Commissions’ recommendation and states that “it is unclear whether the legislation intended to make a distinction depending on whether a dealer sells goods directly to the creditor or via an intermediary”.
- 467 But see *UDT v Whitfield and First National Securities* [1987] C.C.L.R. 60, Cty Ct; and *Forthright Finance Ltd v Ingate* [1997] 4 All E.R. 99, CA (finance house held liable for dealer’s failure to fulfil his undertaking to the debtor to discharge the outstanding balance on a vehicle traded-in by the debtor as part of a transaction to take a new vehicle on hire-purchase). Contrast *Powell v Lloyd's Bowmaker Ltd*, 1996 S.L.T. (Sh Ct) 117. In *Van Gordon v VWFS (UK) Ltd (t/a Audi Finance)* Unreported 30 April 2019, Nottingham Cty Ct, it was held that s.56(4) does not apply to subsequent negotiations concerning the repair of the goods (although, on the facts, the dealer was held to be the agent of the creditor at common law).
- 468 See above, para.41-027; below, para.41-306. See *Scotland v British Credit Trust Ltd* [2014] EWCA Civ 790 (main loan, but not loan for PPI, was “restricted-use”) (and see below).
- 469 CCA 1974 s.56(1). See also CCA 1974 Sch.2 Pt II Examples 1, 2, 3, 4.
- 470 Defined in CCA 1974 s.189(1).
- 471 Defined in CCA 1974 s.189(1). See *Scotland v British Credit Trust Ltd* [2014] EWCA Civ 790 (representations that PPI (not financed by a “restricted-use” agreement) was a condition of the main loan (a restricted-use agreement) were held to have been made in relation to the main loan and hence within s.56(1)(c)) (and see above).
- 472 CCA 1974 s.56(4).

- 473 CCA 1974 s.56(2). See also below, para.41-306. Unlike CCA 1974 s.75(2), below, para.41-307, no express right of indemnity is conferred on the creditor against the negotiator but a right to contribution would arise under Civil Liability (Contribution) Act 1978 (confirmed obiter in *Scotland v British Credit Trust Ltd [2014] EWCA Civ 790*). For the relevance of s.56 in attributing activities of others to the creditor in the context of the “unfair relationship” provisions (below, para.41-225) see *Plevin v Paragon Personal Finance Ltd [2013] EWCA Civ 1658* (point not considered on appeal [2014] UKSC 61) and *Scotland v British Credit Trust Ltd [2014] EWCA Civ 790* (s.56(2) rendered activities of “negotiator” relevant). And see *Van Gordon v VWFS (UK) Ltd (t/a Audi Finance) Unreported 30 April 2019*, Nottingham Cty Ct (dealer not statutory agent (although was agent, on the facts, at common law) in relation to subsequent negotiations about repair of goods) and *Premium Credit Ltd v Primary Care Management Solutions Ltd [2018] EWHC 3083 (Comm)* (had the agreement been regulated and hence s.56(1)(c) applied, designated “agent” of borrower would have been deemed statutory agent of creditor).
- 474 See Vol.I, Ch.9, and below, para.41-306.
- 475 These may in consequence become terms of the regulated agreement: see CCA 1974 s.61(1)(b); below, para.41-085. It is a moot point whether collateral warranties would be so incorporated.
- 476 CCA 1974 s.56(3) (and see, more generally, CCA 1974 s.170(1)).

(e) - The Agreement

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(e) - The Agreement⁴⁷⁷

Pre-contract disclosure⁴⁷⁸

41-078 Regulations may be made under s.55 of the 1974 Act,

 479

 480 requiring specified information to be disclosed in the prescribed manner to the debtor or hirer before a regulated agreement is made (so-called pre-contract information “PCI”).

481

 482 In *Madison CF UK (t/a 118118 Money) v Various Defendants*,

483

 484 Hildyard J. opined that “the purpose … is to enable customers to compare credit offerings across different providers by the provision of information in a standard format”. Failure to comply with the PCI regulations made under s.55 renders the agreement enforceable against the debtor or hirer on an order of the court only.

485

 486 In consequence of the implementation of the Consumer Credit Directive

487

 488 there are now two sets of “Disclosure” regulations in relation to regulated credit (but not hire) agreements: the *Consumer Credit (Disclosure of Information) Regulations 2004*

489

U and (in implementation of the Directive) the [Consumer Credit \(Disclosure of Information\) Regulations 2010](#).

485

U The [2004 Regulations](#) now only apply to agreements outside the scope of the Directive, unless the creditor is able to and has opted into the “Directive” regime.

486

U Hence the [2004 Regulations](#) (as well as still applying to regulated hire agreements) only apply to: (a) credit agreements secured on land (except to those to which [s.58](#),

487

U applies); (b) agreements for credit in excess of £60,260

488

U; (c) “business” credit agreements; and (d) “small” debtor-creditor-supplier agreements for restricted use.

489

U The 2010 “Directive” Regulations essentially apply to other regulated credit agreements. They require the pre-contract information to be provided in the exact format set out in the Standard European Consumer Credit Information (SECCI) sheet at Annex 1 of the Directive, reproduced in [Sch.1 to the 2010 Regulations](#).

490

U Although the requirements in the two sets of regulation are similar, there are some significant differences.

491

U

Pre-contract explanations

- 41-079 In consequence of the implementation of the Consumer Credit Directive,⁴⁹² a new duty to provide an “adequate explanation” of certain features of the agreement before it is made is imposed on lenders by rules made by the FCA⁴⁹³ in relation to those regulated credit agreements within the scope of the Directive. Hence the obligation does not apply to agreements for credit in excess of £60,260 or agreements secured on land.⁴⁹⁴ However, although “business” credit is not within the scope of the Directive, the duty has been extended to regulated agreements for “business” credit.⁴⁹⁵ As the duty is imposed by FCA rules, the usual sanctions for breach of such rules apply.⁴⁹⁶ However, the agreement is not, without more, unenforceable.⁴⁹⁷

Assessment of creditworthiness

- 41-080 Also in consequence of the implementation of the Consumer Credit Directive⁴⁹⁸ a new duty to assess the creditworthiness of the borrower before extending credit⁴⁹⁹ is imposed on lenders by rules made by the FCA⁵⁰⁰ in relation to those regulated credit agreements within the scope of the Directive. Hence the obligation does not apply to agreements secured on land or to pawn agreements.⁵⁰¹ However, although agreements for credit in excess of £60,260 and “business” credit agreements are not within the scope of the Directive, the duty has been extended to such agreements.⁵⁰² As the duty is imposed by FCA rules, the usual sanctions for breach of such rules apply.⁵⁰³ However, the agreement is not, without more, unenforceable.⁵⁰⁴

Copy of draft agreement

- 41-081 In consequence of the implementation of the Consumer Credit Directive,⁵⁰⁵ a new duty to give the debtor, on request and “without delay”, a copy of the prospective agreement (or such of its terms as have at that time been reduced to writing) before a regulated credit agreement is made, is imposed on the creditor by s.55C of the 1974 Act.⁵⁰⁶ The obligation does not arise if at the time of the request the creditor is unwilling to proceed with the agreement. Moreover, the obligation does not arise⁵⁰⁷ in relation to regulated credit agreements that are outside the scope of the Directive, namely: (a) agreements secured on land, (b) pawn agreements, (c) agreements where credit in excess of £60,260 is provided,⁵⁰⁸ and (d) “business” credit. Breach of the duty gives rise to a breach of statutory duty action and the normal disciplinary sanctions are available to the FCA.⁵⁰⁹ However, failure to provide the copy does not, without more, render the agreement unenforceable.⁵¹⁰

Form and content of agreement: general

- 41-082  Section 60(1) of the 1974 Act requires the Treasury⁵¹¹ to make regulations as to the form and content of documents embodying regulated agreements.⁵¹² In consequence of the implementation of the Consumer Credit Directive⁵¹³ there are now two sets of regulations made under this section in relation to regulated credit agreements: the Consumer Credit (Agreements) Regulations 1983⁵¹⁴ and (in implementation of the Directive) the Consumer Credit (Agreements) Regulations 2010.

515

U The 1983 Regulations now only apply to regulated credit⁵¹⁶ agreements outside the scope of the Directive, unless the creditor is permitted to and has opted into the “Directive” regime.⁵¹⁷ Hence, the 1983 Regulations (as well as still applying to regulated hire agreements) apply to: (a) credit agreements secured on land, (b) agreements for credit in excess of £60,260,⁵¹⁸ and (c) “business” credit agreements.⁵¹⁹ The 2010 “Directive” Regulations apply to other regulated credit agreements. There are significant differences between the requirements of the two sets of regulations as to content, format (the 1983 Regulations prescribe various “sub-headings” and preclude interspersion of information) and forms of wording.⁵²⁰

Form and content of agreement: the 1983 Agreements Regulations

41-083 These regulations⁵²¹ require documents embodying regulated agreements:

- (i) clearly to inform the debtor or hirer that the agreement is regulated by the Consumer Credit Act 1974;
- (ii) to set out, in a specified order and under specified headings, certain information as to the terms of the agreement, of which the most important items have to be set out together as a whole and not interspersed with other information (a requirement colloquially known as “the holy ground”);
- (iii) to contain certain prominent notices advising the debtor or hirer of the protections and remedies available to him under the regime;
- (iv) to contain a box with prescribed wording for the signature of the debtor or hirer to the agreement; and
- (v) in the case of consumer credit agreements, to state the annual percentage rate of charge for credit (APR).⁵²²

Since these requirements may differ according to the type of agreement entered into, the regulations are of considerable length and complexity.⁵²³ However, on an application made by a person carrying on a consumer credit or consumer hire business, if it appears to the FCA impracticable for the applicant to comply with any requirement of the regulations in a particular case, it may by notice to the applicant direct that the requirement be waived or varied in relation to such agreements, and subject to such conditions (if any) as it may specify.⁵²⁴ But it can only give such a notice if it is satisfied that to do so would not prejudice the interests of debtors or hirers⁵²⁵ and few dispensations have in consequence been granted.⁵²⁶

Form and content of agreement: the 2010 Agreements Regulations

41-084 These regulations

U 527

U impose similar, but by no means identical, requirements to those imposed by the 1983 Regulations as to the form and content of the regulated credit agreements to which they apply. In particular, the 2010 Regulations are generally less prescriptive as to the manner in which the requisite information⁵²⁸ needs to be given: it need only be “presented in a clear and concise manner”.⁵²⁹ As the requirements in these regulations (being imposed in implementation of the Consumer Credit Directive) are mandatory, the provision noted above that enables the FCA to relax the requirements in the 1983 Regulations⁵³⁰ is only available in respect of the 2010 Regulations in so far as they apply (by way of opt-in) to non-Directive agreements.⁵³¹

Signing of agreement⁵³²

41-085 A regulated agreement is not properly executed⁵³³ unless it satisfies the requirements set out in s.61(1) of the 1974 Act.⁵³⁴ First, a document in the prescribed form itself⁵³⁵ containing all the prescribed terms⁵³⁶ and conforming to regulations under s.60(1)⁵³⁷ must be signed in the prescribed manner⁵³⁸ both by the debtor or hirer⁵³⁹ and by or on behalf of the creditor or owner.⁵⁴⁰ Secondly, the document must embody⁵⁴¹ *all the terms of the agreement*,⁵⁴² other than implied terms.⁵⁴³ Thirdly, the document must, when presented or sent to the debtor or hirer for signature, be in such a state that all its terms are readily legible.⁵⁴⁴ In addition, where the agreement is one to which s.58(1) of the 1974 Act applies (land mortgage),⁵⁴⁵ it is not properly executed⁵⁴⁶ unless certain further requirements are satisfied.⁵⁴⁷

Supply of copies: general

41-086 Sections 61A to 63 of the 1974 Act contain provisions relating to the supply of copies.⁵⁴⁸ They use the terms “unexecuted” and “executed” agreement. The latter term is defined⁵⁴⁹ to mean the document, signed by both parties, embodying the terms of a regulated agreement, whilst the former term apparently refers to such a document not yet signed by both parties.⁵⁵⁰

Supply of copies: two regimes:

- 41-087 In consequence of the implementation of the Consumer Credit Directive⁵⁵¹ there are now two “copy” regimes in relation to regulated credit agreements: the “old” regime under ss.62 and 63 and the “Directive regime” under s.61A.⁵⁵² The “old” ss.62–63 regime (as well as continuing to apply to regulated hire agreements⁵⁵³) now only applies to so-called “excluded agreements”, that is (essentially) credit agreements outside the scope of the Directive, unless the creditor is permitted to and has chosen to opt into the “Directive” regime. Those “excluded agreements” are: (a) credit agreements secured on land,⁵⁵⁴ (b) agreements for credit in excess of £60,260⁵⁵⁵ and (c) “business” credit agreements.⁵⁵⁶ Moreover, ss.62 and 63 continue to apply to “cancellable agreements” within s.67.⁵⁵⁷ The “Directive” regime under s.61A applies to all other regulated credit agreements.

Supply of copies: meaning of “copy”

- 41-088 The *Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983*⁵⁵⁸ make provision as to the form and content of the copies to be supplied, and in particular require the copy to be a “true copy”⁵⁵⁹ and to be easily legible.⁵⁶⁰ The meaning of “true copy” was considered at length in *Carey v HSBC Bank Plc*⁵⁶¹ where it was held that a “true copy” of an executed agreement could be “a reconstituted version of the executed agreement which may be from sources other than the actual signed agreement itself”.⁵⁶²

Supply of copies: failure to comply

- 41-089 A regulated agreement is not properly executed if the “copy” requirements are not observed, with the result that it is enforceable on an order of court only.⁵⁶³

Supply of copies: “old” ss.62–63 regime⁵⁶⁴

- 41-090 If the unexecuted agreement is *presented personally* to the debtor or hirer for his signature, and on the occasion when he signs it the creditor or owner signs or has already signed the agreement, then

a copy of the executed agreement must there and then be delivered to him, but no further copy is required.⁵⁶⁵ If the unexecuted agreement is *sent* to the debtor or hirer for his signature, a copy of it must be sent to him at the same time.⁵⁶⁶ But no further copy is required if the unexecuted agreement becomes an executed agreement on the debtor or hirer's signature, i.e. because the creditor or owner has already signed it before it is sent.⁵⁶⁷

- 41-091 On the other hand, if the unexecuted agreement is *presented personally* to the debtor or hirer for his signature, but on the occasion when he signs it the creditor or owner does not sign and has not already signed the agreement, then (a) a copy of the unexecuted agreement must there and then be delivered to him⁵⁶⁸; and (b) a further copy of the executed agreement must be given to him within seven days⁵⁶⁹ of its being made.⁵⁷⁰ Likewise, if the unexecuted agreement is *sent* to the debtor or hirer for his signature, a copy of it must be sent to him at the same time,⁵⁷¹ and, if the creditor or owner has not already signed it before it was sent, a further copy of the executed agreement must be given to the debtor or hirer within seven days⁵⁷² of its being made.⁵⁷³ If the agreement is a cancellable agreement, the second copy must be sent by post.⁵⁷⁴ The copy of the unexecuted or executed agreement must also be accompanied by a copy of "any other document referred to in it".⁵⁷⁵ This comprehends not only, e.g. any security referred to in the agreement, but also any document other than a document excepted by regulation.⁵⁷⁶

Notice of cancellation rights

- 41-092 In the case of a cancellable agreement, i.e. a regulated agreement which, by virtue of s.67 of the 1974 Act,⁵⁷⁷ may be cancelled by the debtor or hirer,⁵⁷⁸ s.64 of the Act provides⁵⁷⁹ that a notice in the prescribed form indicating the right of the debtor or hirer to cancel the agreement must be included in every copy given to the debtor or hirer under ss.62 or 63.⁵⁸⁰ Various forms of notice (differing according to the nature of the agreement) have been prescribed by the Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983.⁵⁸¹ These notices indicate how and when the right to cancel the agreement is exercisable, and the name and address of a person to whom notice of cancellation may be given.⁵⁸² In those instances where only one copy is required,⁵⁸³ a notice of cancellation rights must be sent⁵⁸⁴ separately to the debtor or hirer within the seven days⁵⁸⁵ following the making of the agreement.⁵⁸⁶

Supply of copies: "Directive" s.61A regime⁵⁸⁷

- 41-093

In contrast to the “old” regime, the Consumer Credit Directive merely (as well as requiring pre-contract information⁵⁸⁸) requires a debtor to receive a copy of the final agreement. Hence, for regulated credit agreements within the scope of the Directive,⁵⁸⁹ s.61A⁵⁹⁰ requires the creditor to give the debtor a copy of the executed agreement (and any other document referred to in it) unless the debtor already has a copy of the unexecuted agreement and this is in identical terms to the executed agreement. In the latter case, the creditor must inform the debtor in writing that: (a) the agreement has been made, (b) the executed agreement is in identical terms to the copy, and (c) the debtor has 14 days to ask for a copy which must be given “without delay”. Separate provision is made for overdrafts.⁵⁹¹

Failure to comply

- 41-094 In the event of non-compliance with ss.60 to 64⁵⁹² of the 1974 Act, the agreement is “not properly executed”.⁵⁹³ The consequence of improper execution is that the agreement is enforceable against the debtor or hirer on an order of the court only.⁵⁹⁴ A retaking of goods or land to which a regulated agreement relates is an enforcement of the agreement.⁵⁹⁵ Further, any security⁵⁹⁶ provided in relation to the agreement is enforceable (so far as provided in relation to the agreement) where such an order has been made in relation to the agreement, but not otherwise,⁵⁹⁷ and if the court dismisses an application for such an order (except on technical grounds only), the security is rendered invalid.⁵⁹⁸ No wider restitutionary remedy is available at common law against the debtor or hirer on the basis of unjust enrichment.⁵⁹⁹
- 41-095 A wide discretion is, however, given to the court as to whether, and, if so, on what terms it will make an enforcement order in situations of infringement.⁶⁰⁰ The 1974 Act originally provided that, in three cases, the court was precluded from making an enforcement order at all.⁶⁰¹ However, the Consumer Credit Act 2006⁶⁰² repealed the relevant provisions and hence no agreement made after the repeal was brought into force is now “irredeemably unenforceable”.⁶⁰³ Those three cases (which are still relevant to old agreements⁶⁰⁴) were as follows. First,⁶⁰⁵ the court could not enforce the agreement unless a document containing all the *prescribed* terms of the agreement,⁶⁰⁶ was signed by the debtor or hirer.⁶⁰⁷ Secondly, the court could not enforce a “cancellable”⁶⁰⁸ agreement if a provision of s.62 or 63 was not complied with,⁶⁰⁹ and the creditor or owner did not give a copy of the executed agreement, and of any other document referred to in it, to the debtor or hirer before the commencement of the proceedings in which the order is sought.⁶¹⁰ Thirdly, the court could not enforce a “cancellable”⁶¹¹ agreement if s.64(1) (notice of cancellation rights)⁶¹² was not complied with.⁶¹³ In *Wilson v First County Trust Ltd (No.2)*,⁶¹⁴ the Court of Appeal made a declaration pursuant to s.4(2) of the Human Rights Act 1998 that the absolute bar on

enforcement imposed in the first case mentioned above was contrary to the European Convention on Human Rights.⁶¹⁵ This decision was reversed by the House of Lords sub. nom. *Wilson v Secretary of State for Trade and Industry*,⁶¹⁶ although the court queried whether this result would be reached in the absence of the (then £25,000) financial limit. To avoid further challenges once the financial limit was generally removed by the *Consumer Credit Act 2006*,⁶¹⁷ that Act repealed these “irredeemably unenforceable” provisions in their entirety.

Footnotes

- 1 See Guest and Lloyd, *Encyclopedia of Consumer Credit Law* (1975, looseleaf); Goode, *Consumer Credit: Law and Practice* (looseleaf); Goode, *Consumer Credit Law* (1989); Harding, *Consumer Credit and Consumer Hire* (1995); Philpott et al, *The Law of Consumer Credit and Hire* (2009) Rosenthal, *Consumer Credit Law and Practice—A Guide*, 5th edn (2018).
- ⁴⁷⁷ See Guest and Lloyd, *Encyclopedia of Consumer Credit Law* (1975, looseleaf), paras 2-056, 2-061—2-066; and Goode, *Consumer Credit: Law and Practice* (looseleaf), Pt C, Ch.30.
- ⁴⁷⁸ The *Payment Services Regulations 2017 (SI 2017/752)* regs 43 and 48 impose additional information requirements prior to the making of “payment services contracts” (or certain payments thereunder), a term that covers *certain* credit agreements (see generally, above, paras 36-225 et seq.), but note the modification for agreements that are *CCA 1974*-regulated agreements in reg.41(3).
- ⁴⁷⁹ s.55 does not apply to the types of agreement listed in *CCA 1974* s.74(1)(a) (non-commercial agreement, see above, para.41-050), in s.74(1)(b) (“authorised business overdraft agreements”) and in s.82(4) (variation). And note the further exclusions, in relation to each set of regulations mentioned in the text.
- ⁴⁸⁰ See *CCA 1974* s.189B(3), Sch.2A: in s.55, references to “debtor” in relation to “green deal plans” (as defined in *CCA 1974* s.189(1), see below, para.41-261) are to be read as references to the “improver”, as defined in *CCA 1974* s.189B(6). Note also *CCA 1974* s.55C (copy of draft credit agreement available on request), below, para.41-081.
- ⁴⁸¹ [2018] EWHC 2786 (Ch), [7].
- ⁴⁸² *CCA 1974* s.55(2), as substituted by *SI 2010/1010* reg.16. This only applies to the *2004 Regulations* (see text) as only these are made under s.55. The *2010 Regulations* (see text) are made under the *European Communities Act 1972*.
- ⁴⁸³ See above, para.41-011.
- ⁴⁸⁴ *SI 2004/1481*.

- ④85 SI 2010/1013, as amended by SI 2010/1969 regs 31–40 and SI 2011/11 reg.8. These regulations are listed in the Financial Services and Markets Bill 2022 Sch.1 Pt 2 as due for revocation as EU-derived law.
- ④86 See SI 2004/1483 reg.2, as amended by SI 2010/1010 reg.75 and SI 2010/1969 reg.24. Opt-in is not possible for hire agreements. The Regulations also exclude (a) agreements within CCA 1974 s.58 (as an “advance copy” is provided under that section, see below, para.41-539) and (b) “distance contracts”, as defined in the Financial Services (Distance Marketing) Regulations 2004 SI 2004/2095 (as (usually, if the contract is made with a “consumer”) those regulations will apply, see below, para.41-126).
- ④87 See previous note, above and (for s.58) below, para.41-539.
- ④88 When the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016, they now also apply to so-called “residential renovation agreements” (as defined in CCA 1974 s.189(1) to mean, essentially, unsecured loans to renovate residential property) above this threshold: see amendments made by SI 2015/910 art.3 and Sch.1 paras 11, 13.
- ④89 See above, para.41-049.
- ④90 But, after Brexit, the document is no longer designated a “SECCI” in the UK but just a document with pre-contract credit information (a so-called “PCI” document): see the amendment to SI 2010/1013 Sch.1 made by the Consumer Credit (Amendment) (EU Exit) Regulations 2018 (SI 2018/1038) reg.3(2). Note also that the 2010 Regulations are listed in the Financial Services and Markets Bill 2022 Sch.1 Pt 2 as due for revocation as EU-derived law.
- ④91 e.g. the 2004 Regulations do not prescribe any particular format or the order of presentation of the information or the form of wording. In the 2010 Regulations there is a “lighter” disclosure regime for arranged overdrafts and there are different requirements for distance and telephone contracts. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states at para.6.31 that the obligation to provide information in s.55 could be replaced by a corresponding FCA rule but that breach of such a rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation.
- 492 See above, para.41-011.
- 493 In the FCA Handbook, see CONC 4.2 (general) and CONC 4.3 (P2P agreements) (previously CCA 1974 s.55A, added by SI 2010/1010 reg.3). Much of the OFT’s publication: Irresponsible lending—OFT guidance for creditors (OFT 1107, March 2010; updated February 2011) (ILG), Section 3 of which contained extensive guidance on the OFT’s interpretation of the requirements of the now repealed CCA 1974 s.55A has been incorporated in CONC.

- 494 See CONC 4.2.1(3) and (4). It also does not apply to “non-commercial” agreements, see above, para.[41-050](#) (CONC 4.2.5(7)(a)), most overdraft agreements (CONC 4.2.1(5)) or “small” agreements, see above, para.[41-049](#) (CONC 4.2.5(7)(b)).
- 495 But only “business” credit under £25,000 is “regulated”: see above, para.[41-047](#). The duty has also been modified in relation to pawn agreements (see CONC 4.2.5(6), previously [CCA 1974 s.55A\(7\)](#)).
- 496 See above, para.[41-065](#). Hence breach is actionable under the [FSMA 2000 s.138D](#) and could result in the usual FCA disciplinary sanctions. See also [ss.140A–140C](#) (unfair relationships), below, paras [41-213](#) et seq.
- 497 cf. breach of [CCA 1974 ss.55, 61, 61A, 62, 63, 64](#).
- 498 See above, para.[41-011](#). See *Schyns v Belfius Banque SA (C-58/18)* (on the Consumer Credit Directive’s art.5(6) obligation to explain pre-contractual information and the extent to which it requires a credit assessment of the debtor). See also *OPR-Finance SRO v GK (C-679/18 EU:C:2020:167)* (CJEU case on the appropriate approach to assessing remediation for breach by a creditor of the duty to assess creditworthiness).
- 499 Whether initially or “significantly” increasing credit already available.
- 500 In the FCA Handbook, see CONC 5 (on contracting) and CONC 6.2 (during agreement) (previously [CCA 1974 s.55B](#), added by [SI 2010/1010 reg.5](#)). Again much of the OFT’s publication: Irresponsible lending—OFT guidance for creditors (OFT 1107, March 2010; updated February 2011) (ILG), which contained extensive guidance on the OFT’s interpretation of the requirements of [CCA 1974 s.55B](#) has been incorporated in CONC.
- 501 CONC 5.2.1(4). It also does not apply to “non-commercial” agreements, see above, para.[41-050](#) (CONC 5.2.1(5)(a)), current account overdrawning (CONC 5.2.1(5)(b)) or “small” agreements, see above, para.[41-049](#) (CONC 5.2.1(5)(c)).
- 502 But only “business” credit under £25,000 is “regulated”: see above, para.[41-047](#).
- 503 See above, para.[41-065](#). Hence breach is actionable under the [FSMA 2000 s.138D](#) and could result in the usual FCA disciplinary sanctions. See also [ss.140A–140C](#) (unfair relationships), below, paras [41-213](#) et seq.
- 504 cf. breach of [CCA 1974 ss.55, 61, 61A, 62, 63, 64](#).
- 505 See above, para.[41-011](#). See *JC v Kreissparkasse Saarlouis (C-66/19) EU:C:2020:242* (CJEU case on when the 14-day right of withdrawal period under the CCD (and hence [s.66A](#)) begins to run).
- 506 Added on 1 February 2011 by [SI 2010/1010 reg.6](#) (not repealed and replaced by rules in FCA Handbook, CONC). See [CCA 1974 s.189B\(3\)](#), Sch.2A: in [CCA 1974 s.55C](#), references to “debtor” in relation to “green deal plans” (as defined in [CCA 1974 s.189\(1\)](#), see below, para.[41-261](#)) are to be read as references to the “improver”/“first bill payer”, as defined in [CCA 1974 s.189B\(6\)](#). The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above) states (see para.5.26 and Annex 5, para.13) that [s.55C](#) could be repealed and replaced by an FCA rule imposing a corresponding obligation, without adversely affecting the appropriate degree of consumer protection. The sanction for breach of an FCA rule (private a right of action for damages under [FSMA 2000 s.138D](#)) would be equivalent to the breach of statutory duty action under [s.55C\(3\)](#). However the FCA adds (see para.6.26 and Annex 5, para.14) that repeal and replacement by an FCA

rule, should other related provisions remain in the CCA (for example ss.77–78, 79, below, para.41-128 et seq.), would result in an undue fragmentation of the regime and so such a step should be considered in that wider context.

- 507 CCA 1974 s.55C also does not apply to the types of agreement listed in (i) s.74(1)(a) (“non-commercial” agreements, see above, para.41-050), (ii) s.74(1)(b) (“authorised business overdrafts”), (iii) s.74(1)(d) (“small” agreements, see above, para.41-049). See also s.82(4) (variation).
- 508 When the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016, this exemption ceased to apply to so-called “residential renovation agreements” (as defined in CCA 1974 s.189(1) to mean, essentially, unsecured loans to renovate residential property) above this threshold: see amendment to s.55C in SI 2015/910 art.3 and Sch.1 para.2(3).
- 509 See above, para.41-065. See also ss.140A–140C (unfair relationships), below, paras 41-213 et seq.
- 510 cf. breach of CCA 1974 ss.55, 61, 61A, 62, 63, 64.
- 511 Before the transfer of regulation to the FCA (see above, para.41-002) the Secretary of State made the regulations.
- 512 This provision does not apply to the types of agreement listed in s.74(1) (see below, para.41-104). See also s.82(4) (variation). See CCA 1974 s.189B(3), Sch.2A: in CCA 1974 s.60, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver” (as defined in CCA 1974 s.189B(6)), including an improver who is not an individual.
- 513 See above, para.42-011.
- 514 SI 1983/1553 (brought into force on 19 May 1985) and amended by SI 1984/1600; SI 1985/666; SI 1988/2047; SI 1999/3177; SI 2004/1482; SI 2004/2619; SI 2010/1010. They were completely overhauled by SI 2004/1482 (in force, 31 May 2005).
- 515 SI 2010/1014, as amended by SI 2010/1969 regs 41–45. These regulations are listed in the Financial Services and Markets Bill 2022 Sch.1 Pt 2 as due for revocation as EU-derived law.
- 516 As hire agreements are not within the scope of the Directive, the 1983 Regulations also continue to apply to regulated hire agreements.
- 517 See SI 1983/1553 reg.8(1A), added by SI 2010/1010 reg.53 and amended further by SI 2010/1969 reg.13.
- 518 But when the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016, these regulations ceased to apply to so-called “residential renovation agreements” (as defined in CCA 1974 s.189(1) to mean, essentially, unsecured loans to renovate residential property) above this threshold: see amendment to SI 1983/1553 in SI 2015/910 art.3 and Sch.1 para.3.
- 519 But note that only business credit under £25,000 is “regulated”: see above, para.41-047.
- 520 The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see para.6.31) that the obligation to provide information in s.60 could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction should be

retained in legislation. Moreover the Review states that “there may be merit … in aligning the requirements (subject to the CCD compliance) and providing firms with additional flexibility along the lines of the 2010 regulations” (see para.6.39).

- 521 See above, para.41-082.
- 522 See CCA 1974 s.20; above, para.41-061. An erroneously calculated APR gave rise to criminal liability under the misleading price indications provisions of the (now repealed by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277)) Consumer Protection Act 1987 s.20 in *R. v Kettering Magistrates' Court Ex p. MRB Insurance Brokers Ltd [2000] 2 All E.R. (Comm) 353, QB*. See *Brooks v Northern Rock (Asset Management) Plc Unreported 16 April 2010, Oldham Cty Ct* (on the citation of rates of interest) and *Black Horse Ltd v Speak [2010] EWHC 1866 (QB)*.
- 523 See Guest and Lloyd Encyclopedia of Consumer Credit Law (1975, looseleaf) at paras 3-215 et seq.
- 524 CCA 1974 s.60(3)–(6), amended by Sch.25(6) to the Enterprise Act 2002, SI 2013/1881 and SI 2013/1882. See also CCA 1974 s.183 (variation or revocation of directions made under the CCA 1974). Note also that FSMA 2000 ss.55U(4), (5), (7) and (8) apply to an application made under CCA 1974 s.60(3) as if the application were an application made to the FCA under the FSMA 2000 Pt 4A: see the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014 (SI 2014/366) art.4.
- 525 CCA 1974 s.60(4).
- 526 The FCA stated on 30 March 2015 that this dispensation is available to shared-equity mortgage agreements that provide specified alternative information.
- 527 SI 2010/1014, as amended by SI 2010/1969 regs 41–45. These regulations are listed in the Financial Services and Markets Bill 2022 Sch.1 Pt 2 as due for revocation as EU-derived law.
- 528 Set out in Sch.1 to the regulations.
- 529 SI 2010/1014 reg.3(2).
- 530 CCA 1974 s.60(3)–(6), see above, para.41-082.
- 531 See CCA 1974 s.60(5)—and note the amendment (as a result of the implementation of the Mortgage Credit Directive (see above, para.41-003) on 21 March 2016) in relation to so-called “residential renovation agreements” (as defined in CCA 1974 s.189(1) to mean, essentially, unsecured loans to renovate residential property) in SI 2015/910 art.3 and Sch.1 para.4.
- 532 The Consumer Credit Directive (see above, para.41-011) does not require a signature but is without prejudice to national rules as to the validity of agreements. Hence, the CCA 1974 requirement for a signature has been retained. For a discussion of electronic contracting, see Philpott, “E-Commerce and Consumer Credit” (2001) 3 J.I.F.M. 131; and Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-062. See also *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd [2012] 2 All E.R. (Comm) 978* at 932 (name typed in an email is a signature); *Bassano v Alfred Toft, Peter Biddulph, Peter Biddulph Ltd, Borro Loan Ltd, Borro Loan 2 Ltd [2014] EWHC 377 (QB)*, [2014] C.C.L.R. 8 (clicking “I accept” which generated a PDF document with the debtor’s typed name, fulfilled the “signature” requirement in CCA 1974 s.61(1)). The FCA’s Review of

Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see para.5.23) that s.61 should be retained in legislation. However the Review does consider whether the signature requirement might be modified (see Annex 6, paras 146–162) and notes that the statutory obligation in s.61 could be replaced by a corresponding FCA rule but that breach of such a FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation. See also Annex 6 paras 158–162 containing some discussion of the problems with electronic signatures.

- 533 And hence enforceable on an order of court only, see CCA 1974 s.65 and below, paras 41-094 and 41-095.
- 534 CCA 1974 s.61 does not apply to the agreements specified in CCA 1974 s.74(1) (see para.41-104) and note CCA 1974 s.82(4) (variation).
- 535 And not by reference to another document.
- 536 These prescribed terms are set out in the two sets of *Agreement Regulations* (see above, paras 41-082 et seq.): (i) SI 1983/1553 Sch.6 and (ii) SI 2010/1014 reg.4(1).
- 537 See above, paras 41-082 et seq.
- 538 Prescribed in the two sets of *Agreement Regulations* (see above, paras 41-082 et seq.): (i) SI 1983/1553 (as amended, especially by SI 2004/1482) reg.2(7) and Sch.5 (signature box) and (ii) SI 2010/1014 reg.4(3)–(4).
- 539 Signature of a document in blank will be insufficient (*Eastern Distributions Ltd v Goldring [1957] 2 Q.B. 600*; *Campbell Discount Co Ltd v Gall [1961] 1 Q.B. 431*) as will a signature by only one of two joint debtors (*HFC Bank v Grossbard [2001] C.L.Y. 908*). See also CCA 1974 ss.61(4), 185(3), (6), 189(3).
- 540 CCA 1974 s.61(1)(a). See also CCA 1974 ss.186, 189(3).
- 541 Defined in CCA 1974 s.189(1), (4) (reference to another document). But see *Jerome v Nationwide Building Society Unreported 27 September 2011, Huddersfield Cty Ct*: reference to other document must be accurate (hence loose sheets were not “embodied” in document referring to “attached sheets”).
- 542 As under s.6(2) of the Moneylenders Act 1927, so that if, e.g. money advanced can be applied in one way only, this must be stated: *Hanyet Securities Ltd v Mallett [1968] 1 W.L.R. 1265*. Contrast *Askinex Ltd v Green [1969] 1 Q.B. 272*. Similarly the case-law under the 1927 Act held that any term to the effect that the loan renews another loan ought to be stated: *Lyle v Chappell [1932] 1 K.B. 691*; *Temperance Loan Fund v Rose [1932] 2 K.B. 522*; *Egan v Langham Investments [1938] 1 K.B. 667*; *Re British Games [1938] Ch. 240*; *Allighan v London and Westminster Loan and Discount Ltd [1946] 3 All E.R. 530*. But see *Holiday Credit v Erol [1977] 1 W.L.R. 704*; *Broadwick Financial Services v Spencer [2002] EWCA Civ 35* (non-binding concession need not be stated).
- 543 CCA 1974 s.61(1)(b). For implied terms, see below, paras 41-386 et seq., 41-461, 41-472.
- 544 CCA 1974 s.61(1)(c). See also SI 1983/1553 reg.6(2), as amended by SI 2004/1482 and (to substitute media-neutral wording) by SI 2004/3236.
- 545 See below, para.41-539.
- 546 And hence enforceable on an order of court only, see CCA 1974 s.65 and below, paras 41-094 and 41-095.

- 547 CCA 1974 s.61(2), (3); below, para.41-539.
- 548 The provisions do not apply to the agreements specified in CCA 1974 s.74(1) (see para.41-104). See also CCA 1974 s.82(4) (variation) and CCA 1974 ss.180 (form of copies), 185(1)(a) (plurality of debtors or hirers). See CCA 1974 s.189B(3), Sch.2A: in CCA 1974 ss.61A–63, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver” (as defined in CCA 1974 s.189B(6)).
- 549 In CCA 1974 s.189(1).
- 550 It is defined in CCA 1974 s.189(1) in almost identical terms to those used to define “executed agreement”, but with the omission of any reference to signature.
- 551 See above, para.41-011.
- 552 Added on 1 February 2011 by SI 2010/1010 reg.8. See also CCA 1974 s.61B, added by SI 2010/1010 reg.9: special copy requirements for overdrafts. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see para.6.31) that the obligation in s.61A could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation.
- 553 As hire agreements are not within the scope of the Directive.
- 554 But CCA 1974 ss.62–63 invariably apply to land mortgages to which CCA 1974 s.58 applies, as these cannot opt into the “Directive” regime (see SI 2010/1013 reg.2(2) and (5)).
- 555 When the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016, this exclusion ceased to apply to so-called “residential renovation agreements” (as defined in CCA 1974 s.189(1) to mean, essentially, unsecured loans to renovate residential property) above this threshold: see the new s.61A(6A) inserted by SI 2015/910 art.3 and Sch.1 para.2(5).
- 556 But note that only business credit under £25,000 is “regulated”: see above, para.41-047.
- 557 See below, para.41-103.
- 558 SI 1983/1557, as amended by SI 1983/1558; SI 1984/1108; SI 1988/2047; (most extensively) SI 2004/2619; SI 2004/3236. See also, SI 1985/666 and SI 1989/591, made under (inter alia) CCA 1974 s.180.
- 559 SI 1983/1557 reg.3(1).
- 560 SI 1983/1557 reg.2(1).
- 561 [2009] EWHC 3417 (QB), a case on CCA 1974 s.78 (see below, para.41-132). See also MBNA Europe Bank Ltd v Thorius Unreported 21 September 2009, South Shields Cty Ct DDJ Smart: original agreement terms, not terms in force at time of proceedings, need to be provided.
- 562 [2009] EWHC 3417, at [54].
- 563 CCA 1974 ss.61A(5), 61B(3), 62(3), 63(5), 65; below, paras 41-094 and 41-095. The same consequence follows for breach of CCA 1974 s.64 (see below, para.41-094): s.64(5).
- 564 The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see para.6.31) that the obligations in ss.62 and 63 could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not

- carry the same sanction and hence proposes that the existing sanction should be retained in legislation.
- 565 CCA 1974 s.63(1), (2)(a). But see CCA 1974 s.64 (cancellable agreements), below, para.41-092.
- 566 CCA 1974 s.62(1).
- 567 CCA 1974 s.63(2)(b). But see CCA 1974 s.64 (cancellable agreements), below, para.41-092.
- 568 CCA 1974 s.62(1).
- 569 Except in the case of a credit-token agreement: CCA 1974 s.63(4).
- 570 CCA 1974 s.63(2). So he can check that the terms are the same as those of the document he signed.
- 571 CCA 1974 s.62(2).
- 572 Except in the case of a credit-token agreement: CCA 1974 s.63(4).
- 573 CCA 1974 s.63(2). So he can check that the terms are the same as those of the document he signed.
- 574 CCA 1974 s.63(3).
- 575 CCA 1974 ss.62(1), (2), 63(1), (2).
- 576 See CCA 1974 s.180(1)(b), (3), and (for the relevant regulations) SI 1983/1557 reg.11.
- 577 See below, para.41-103.
- 578 See the definition of “cancellable agreement” in CCA 1974 s.189(1).
- 579 CCA 1974 s.64 does not apply to the agreements excepted under CCA 1974 s.74(1) (see para.41-104) and CCA 1974 s.82(4) (variation). See CCA 1974 s.189B(3), Sch.2A: in s.64, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver” (as defined in CCA 1974 s.189B(6)).
- 580 See above, para.41-086.
- 581 SI 1983/1557, as amended by SI 1983/1558; SI 1984/1108; SI 1988/2047 (and, most extensively) SI 2004/2619; SI 2004/3236. See also SI 1985/666 and SI 1989/591, made under (inter alia) CCA 1974 s.180. See *Goshawk Dedicated (No.2) Ltd v Bank of Scotland [2005] EWHC 2906 (Ch), [2006] C.C.L.R. 1*; followed by *Bank of Scotland v Euclidian (No.1) Ltd [2007] EWHC 1732* (whether the form of notice of cancellation was correctly drafted).
- 582 CCA 1974 s.64(1). See also CCA 1974 s.185(1)(a) (plurality of debtors or hirers).
- 583 See above, para.41-090.
- 584 The wording of CCA 1974 s.63(3) has been changed from “by post” to “by an appropriate method” by SI 2004/3236 art.2(4), to allow for electronic communication.
- 585 Except in the case of a credit-token agreement: CCA 1974 s.64(2).
- 586 CCA 1974 s.64(1)(b), (2); SI 1983/1557 reg.6 (as amended by SI 2004/3236) and Sch. Pt VI (as substituted by SI 2004/2619 and subsequently amended by SI 2004/3236). But power is conferred on the FCA (previously the OFT) to dispense with this requirement in the case of certain mail order credit agreements pursuant to regulations made by the Treasury (previously the Secretary of State): CCA 1974 s.64(4), amended by Sch.25(6) to the Enterprise Act 2002; SI 2013/1882. See also CCA 1974 ss.68(b), 183. Regulations may also provide that the separate notice shall be accompanied by a further copy of the executed

- agreement, and of any other document referred to in it ([CCA 1974 s.64\(3\)](#)). No regulations have been made.
- 587 For the potential impact of the FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above), see para.[41-087](#), above.
- 588 See above, para.[41-078](#).
- 589 See above, para.[41-011](#).
- 590 Added on 1 February 2011 by [SI 2010/1010 reg.8](#).
- 591 [CCA 1974 s.61B](#), added on 1 February 2011 by [SI 2010/1010 reg.9](#). The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above) states (see para.6.31) that the obligation in [s.61B](#) could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation.
- 592 See above, paras [41-082](#)—[41-093](#). Note that [CCA 1974 s.55\(2\)](#) provides for the same consequence for breach of [CCA 1974 s.55](#): see above, para.[41-078](#).
- 593 [CCA 1974 ss.61\(1\), \(2\), 62\(3\), 63\(5\), 64\(5\)](#).
- 594 [CCA 1974 s.65\(1\)](#). See [CCA 1974 s.189B\(3\)](#), Sch.2A: in [CCA 1974 s.65](#), references to "debtor" in relation to "green deal plans" (as defined in [CCA 1974 s.189\(1\)](#), see below, para.[41-261](#)) are to be read as references to the "improver"/"current bill payer"/"previous bill payer" (as defined in [CCA 1974 s.189B\(6\)](#)). For case-law on [s.65](#), see *PB Leasing Ltd v Patel (t/a Plankhouse Stores) [1995] C.C.L.R. 82*, *Cty Ct; Smerdon v Ellis [1997] C.L.Y. 960, Cty Ct*; *Re Dixon-Vincent [1997] C.L.Y. 958, Cty Ct*; *Rendle v Hicks [1998] C.L.Y. 2504, Cty Ct*; *Kemp v Ling [1998] C.L.Y. 2502, Cty Ct*; *Gibbons v Gibbons [1998] C.L.Y. 2500, Cty Ct*; *Rahman v Brassil [1998] C.L.Y. 2503, Cty Ct*; *Barons Finance Ltd & Reddy Corp Ltd v Makanju [2013] EWHC 153 (QB)*, [2013] C.C.L.R. 3 (multiple breaches of Agreements Regulations); *Consolidated Finance Ltd v Collins [2013] EWCA Civ 475*. cf. *Eastern Distributors Ltd v Goldring [1957] 2 Q.B. 600*; *North West Securities v Alexander Breckon Ltd [1981] R.T.R. 518* (enforcement against third parties); *R. v Modupe [1991] Crim. L.R. 531* (debtor or hirer remains under a liability); *Carlyle Finance Ltd v Pallas Industrial Finance Ltd [1991] 1 All E.R. (Comm) 659* (offer accepted although agreement not yet signed by creditor); *Hitchens v General Guarantee Corp Ltd [2001] C.L.Y. 880, CA* (valid hire-purchase agreement for purposes of [Hire-Purchase Act 1964](#)). No sanction is imposed by the [CCA 1974](#) for enforcing an unenforceable agreement without a court order ([CCA 1974 s.170\(1\)](#)), but the creditor or owner may be subject to liability at common law; see Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-066, or to disciplinary action as an FCA authorised person (see above, para.[41-065](#)) or (in the case of credit agreements) the relationship may be determined as "unfair" under [ss.140A–140C](#) (see below, paras [41-213](#) et seq.). *CPR Pt 7*, PD 7B.
- 595 [CCA 1974 s.65\(2\)](#). But see [CCA 1974 s.173\(3\)](#) (consent); *Wotton v Flagg [1997] C.L.Y. 959, Cty Ct*; *Hatfield v Hiscock [1998] C.L.Y. 2501, Cty Ct*. cf. *Rendle v Hicks [1998] C.L.Y. 2504, Cty Ct*; *Kemp v Ling [1998] C.L.Y. 2502, Cty Ct*; *Gibbons v Gibbons [1998] C.L.Y. 2500, Cty Ct*.
- 596 Defined in [CCA 1974 s.189\(1\)](#); see below, para.[41-182](#).

- 597 CCA 1974 s.113(2). See also CCA 1974 s.113(8) (linked transactions) and below, para.41-193.
- 598 CCA 1974 ss.106, 113(3)(c); below, para.41-194. See also CCA 1974 s.113(8).
- 599 *Dimond v Lovell* [2002] 1 A.C. 384, 397–398; *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40, [2003] 3 W.L.R. 568 at [49]–[50].
- 600 CCA 1974 s.127(1); below, para.41-201. For refusals to enforce, see *PB Leasing Ltd v Patel and Patel (t/a Plankhouse Stores)* [1995] C.C.L.R. 82; *Smerdon v Ellis* [1997] C.L.Y. 960; *Re Dixon-Vincent* [1997] C.L.Y. 958; *Rendle v Hicks* [1998] C.L.Y. 2504; *Barons Finance Ltd & Reddy Corp Ltd v Makanju* [2013] EWHC 153 (QB), [2013] C.C.L.R. 3; *Consolidated Finance Ltd v Collins* [2013] EWCA Civ 475. And see below as to the “irredeemably unenforceable” case-law. For enforcement orders made, see *National Guardian Mortgage Corp v Wilkes* [1993] C.C.L.R. 1 (but interest rate reduced); *Rank Xerox v Hepple* [1993] C.C.L.R. 1 (but reduction of amount payable); *Hatfield v Hiscock* [1996] C.C.L.R. 68; *London North Securities Ltd v Meadows* [2005] EWCA Civ 956 (but PPP not payable); *Wilson v Hurstanger Ltd* [2007] EWCA Civ 299 (but some sums not payable). Note *Wells v Devani* [2019] UKSC 4, a case on the Estate Agents Act 1979 s.18(6), which is almost identical in terms to CCA 1974 s.127.
- 601 CCA 1974 s.127(3)–(5).
- 602 Consumer Credit Act 2006 s.15, in force on 6 April 2007 (SI 2007/123).
- 603 A term coined by Lord Hoffmann in *Dimond v Lovell* [2002] 1 A.C. 384.
- 604 Those made on or before 5 April 2007.
- 605 CCA 1974 s.127(3). See also CCA 1974 s.127(5) and s.185(3). For case-law, see *Wilson v First County Trust Ltd (No.1)* [2001] Q.B. 407; *O'Hagan v Wright* [2001] NICA 26, [2003] C.C.L.R. 6; *Dimond v Lovell* [2002] 1 A.C. 384; *McGinn v Grangewood Securities Ltd* [2002] EWCA 522; *Wilson v Robertson (London) Ltd* [2005] EWHC 1425; *London North Securities Ltd v Meadows* [2005] EWCA Civ 956, [2005] C.C.L.R. 7 (distinguished in *Black Horse Ltd v Hanson* [2009] EWCA Civ 73); *Brophy v HFC Bank Ltd* [2011] C.C.L.R. 1; *Napier v HFC Bank Ltd (t/a The GM Card)* [2011] C.C.L.R. 2; *Sternlight v Barclays Bank Plc* [2011] C.C.L.R. 6.
- 606 See above para.41-085. Omission of terms of the agreement other than prescribed terms, did not have this effect: CCA 1974 s.61(1)(b). But see (the now repealed) CCA 1974 s.127(5).
- 607 See above, para.41-085. The signature did not have to be in the manner prescribed by the Agreements Regulations made under CCA 1974 s.61 (see above, para.41-095).
- 608 i.e. a regulated agreement which, by virtue of CCA 1974 s.67, could be cancelled by the debtor or hirer (see below, para.41-103).
- 609 See above, paras 41-090 et seq.
- 610 CCA 1974 s.127(4)(a). See *VL Skuse & Co v Cooper* [1975] 1 W.L.R. 593. For the commencement of proceedings in the county court, see CPR Pt 7 r.2.
- 611 See above.
- 612 See above, para.41-092.
- 613 s.127(4)(b). *Woodchester Leasing Equipment v Clayton* [1994] C.C.L.R. 87, Cty Ct; *Moorgate Services Ltd v Kabir* [1995] C.C.L.R. 74, CA.
- 614 [2001] EWCA Civ 633, [2002] Q.B. 74.

615 art.6 and art.1 of the First Protocol.

616 *[2003] UKHL 40, [2004] 1 A.C. 816.*

617 See above, para.41-005.

End of Document

© 2022 SWEET & MAXWELL

(f) - Withdrawal and Cancellation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(f) - Withdrawal and Cancellation⁶¹⁸

Offer and acceptance

- 41-096 Regulated credit and hire agreements are in principle no exception to the general rule⁶¹⁹ that either party is at liberty to withdraw from the intended transaction until such time as an offer has been accepted,⁶²⁰ and acceptance has been communicated to the offeror.⁶²¹ But, in the case of a prospective regulated agreement, the 1974 Act makes certain modifications to the common law rules in respect of the persons to whom notice of withdrawal may be given and the consequences of withdrawal.⁶²²

Mode of withdrawal

- 41-097 The giving to a party of a written or oral notice which, however expressed, indicates the intention of the other party to withdraw from a prospective regulated agreement operates as a withdrawal from it.⁶²³ There can be little doubt that, as at common law,⁶²⁴ the withdrawal is not normally effective until communicated to the other party, and that a posted withdrawal does not take effect on posting.⁶²⁵

To whom notice may be given

- 41-098

By [s.57\(3\) of the 1974 Act](#), each of the following is deemed to be the agent of the creditor or owner for the purpose of receiving a notice of withdrawal—(a) a credit-broker⁶²⁶ or supplier⁶²⁷ who is the negotiator⁶²⁸ in any antecedent negotiations⁶²⁹; and (b) any person who, in the course of a business⁶³⁰ carried on by him, acts on behalf of the debtor or hirer in any negotiations for the agreement. Thus, a prospective debtor may, for example, in certain circumstances give notice of withdrawal to the dealer who negotiates the transaction⁶³¹ or even to his own broker or solicitor. However, by [s.175](#), where under the [1974 Act](#) a person is deemed to receive a notice as agent of the creditor or owner under a regulated agreement, he is deemed to be under a contractual duty to the creditor or owner to transmit the notice to him forthwith and hence will be liable in contract (to the creditor or owner) if he fails to do so.

Consequences of withdrawal

- 41-099 The withdrawal of a party from a prospective regulated agreement operates to apply [Pt V of the 1974 Act](#) to the agreement, any linked transaction⁶³² and any other thing done in anticipation of the making of the agreement as it would apply if the agreement were made and cancelled under [s.69](#).⁶³³ This is so notwithstanding that the agreement, if made, would not be a “cancellable” agreement.⁶³⁴

Prospective land mortgage

- 41-100 The [1974 Act](#) contains special “pause” provisions providing for an opportunity for withdrawal from a prospective land mortgage,⁶³⁵ in so far as it is a regulated agreement.⁶³⁶

Agreement not to withdraw

- 41-101 At common law, a person may bind himself not to withdraw his offer either absolutely or for a certain time, if his promise to do so is made by deed or if the promisee furnishes consideration for the promise.⁶³⁷ But under [s.59\(1\) of the 1974 Act](#)⁶³⁸ an agreement is void if, and to the extent that, it purports to bind a person to enter as a debtor into a prospective regulated agreement. This provision does not, however, prevent the creditor or owner from being bound to enter into such an agreement.

14-day “right of withdrawal”

- 41-102 In consequence of the implementation of the Consumer Credit Directive,⁶³⁹ a new s.66A⁶⁴⁰ has been added to the 1974 Act. It confers an unconditional 14-day “right of withdrawal” (the Directive’s term for a right to cancel an agreement that has already been made) in relation to regulated credit agreements other than “excluded agreements”. “Excluded agreements” are those for credit exceeding £60,260 (as these are outside the scope of the Directive⁶⁴¹) and those that are also excluded from the definition of “cancellable” agreement within s.67.⁶⁴² Moreover, s.66A does not apply to most overdrafts.⁶⁴³ Although “business” credit is outside the scope of the Directive, the new s.66A “right of withdrawal” has nevertheless been extended to regulated business credit agreements.⁶⁴⁴ In common with all other “Directive” provisions, it has also been extended to hire-purchase agreements. Section 66A sets out both the mode and timing of withdrawal (the debtor must “give oral or written notice” within 14 days from (usually) the date the agreement is made) and its effect (hence, as well as the credit agreement, any “ancillary service” (as defined) contract relating to the agreement, is treated as if it had never been entered into). Agreements that do not have the benefit of the s.66A right of withdrawal (in particular, credit agreements in excess of £60,260⁶⁴⁵ and hire agreements) may be “cancellable” within s.67 of the 1974 Act.⁶⁴⁶

“Cancellable” agreements⁶⁴⁷

- 41-103 For agreements not subject to the s.66A “right of withdrawal”,⁶⁴⁸ s.67 of the 1974 Act sometimes⁶⁴⁹ provides for a “cooling off” period within which a debtor or hirer under a regulated agreement, is entitled to cancel the agreement. The section provides that a regulated⁶⁵⁰ agreement may be cancelled by the debtor or hirer in accordance with Pt V of the Act if the antecedent negotiations⁶⁵¹ included oral representations⁶⁵² made when in the presence of the debtor or hirer by an individual⁶⁵³ acting as, or on behalf of, the negotiator⁶⁵⁴ unless the unexecuted agreement was signed by the debtor or hirer at premises at which any of the following was carrying on any business⁶⁵⁵ (whether on a permanent or temporary basis):

- (i)the creditor or owner⁶⁵⁶;
- (ii)any party to a linked transaction⁶⁵⁷ (other than the debtor or hirer or a relative of his);
- (iii)the negotiator in any antecedent negotiations.⁶⁵⁸

Hence a regulated agreement is not “cancellable” if (broadly) it is signed by the debtor or hirer at trade premises; but it will also not be “cancellable” if, although signed elsewhere, the debtor has

not at some stage prior to the making of the agreement been subject to “face-to-face” persuasion. So, for example, if there is no personal contact at all, as in the case of some types of credit agreement canvassed by “mail shot” or correspondence, or an agreement canvassed by telephone, the agreement is not “cancellable” under the [1974 Act](#). But, on the other hand, the right to cancel is not confined to the door-to-door context. If negotiations are conducted face to face at a dealer’s showroom, and the debtor takes the agreement home for signature, the agreement will be a “cancellable” agreement.

Exceptions

- 41-104 [Section 67](#) itself establishes the following exceptions to its applicability, viz if “the agreement is secured on land, or is a restricted-use ⁶⁵⁹ credit agreement to finance the purchase of land or is an agreement for a bridging loan in connection with the purchase of land”. ⁶⁶⁰ Further exceptions are established by [s.74 of the 1974 Act](#).⁶⁶¹

Cooling-off period

- 41-105 The period within which the debtor or hirer is permitted to serve notice of cancellation—sometimes known as the “cooling-off” period—is set out in [s.68 of the 1974 Act](#). Its starting point is always his signing of the unexecuted agreement. The period generally ends at the end of the fifth day following the day on which he receives the second copy⁶⁶² or, if no second copy is required, the notice under [s.64\(1\)\(b\) of the Act](#).⁶⁶³ Thus if he signs the agreement on the 1st, and the second copy (or notice) is received by him on the 7th,⁶⁶⁴ he has until midnight on the 12th to serve his notice of cancellation.

Notice of cancellation

- 41-106 A notice of cancellation may be served on:
- (i)the creditor or owner⁶⁶⁵; or
 - (ii)the person specified in the notice under [s.64\(1\)](#)⁶⁶⁶; or
 - (iii)a credit-broker⁶⁶⁷ or supplier⁶⁶⁸ who is the negotiator⁶⁶⁹ in antecedent negotiations⁶⁷⁰; or

(iv)any person who, in the course of a business⁶⁷¹ carried on by him acts on behalf of the debtor or hirer in any negotiations for the agreement⁶⁷²; or

(v)a person who is the agent of the creditor or owner.⁶⁷³

It will therefore normally be open to the debtor or hirer to serve the notice on a dealer who negotiated the transaction, and, in certain circumstances, even upon an agent of the debtor or hirer himself.⁶⁷⁴ A notice will be an effective notice of cancellation if, however expressed and whether or not conforming to the notice given under s.64(1),⁶⁷⁵ it indicates the intention of the debtor or hirer to withdraw from the agreement.⁶⁷⁶ A notice of cancellation sent by post to a person is deemed to be served on him at the time of posting whether or not it is actually received by him and an electronic notice⁶⁷⁷ is deemed served when it is transmitted.⁶⁷⁸

Effect of notice

41-107 Service of a notice of cancellation by the debtor or hirer operates, in general, to cancel the agreement and any linked transaction,⁶⁷⁹ and to withdraw any offer by the debtor or hirer, or his relative,⁶⁸⁰ to enter into a linked transaction.⁶⁸¹ Except so far as is otherwise provided by or under the 1974 Act,⁶⁸² an agreement or transaction so cancelled is treated as if it had never been entered into.⁶⁸³ Thus the cancellation of a regulated agreement will also, for example, operate to cancel any collateral contract for maintenance which is a linked transaction.⁶⁸⁴ And if goods are bought from a supplier for cash advanced by a financier as a loan under pre-existing arrangements with the supplier,⁶⁸⁵ the cancellation of the loan agreement will operate automatically to cancel the contract of sale.⁶⁸⁶ Further, on cancellation, any security provided is rendered invalid.⁶⁸⁷

Special cases

41-108 Special provision is, however, made for the case of a debtor-creditor-supplier⁶⁸⁸ agreement for restricted-use⁶⁸⁹ credit financing—(a) the doing of work or supply of goods to meet an emergency, or (b) the supply of goods which, before service of the notice of cancellation, had by the act of the debtor or his relative⁶⁹⁰ become incorporated in any land or thing not comprised in the agreement or any linked transaction.⁶⁹¹ In such a case service of a notice of cancellation operates to cancel only such provisions of the agreement and any linked transaction as relate to the provision of credit, or require the debtor to pay an item in the total charge for credit,⁶⁹² or subject the debtor to any obligation other than to pay for the doing of the work, or the supply of the goods.⁶⁹³ The “credit” obligations of the debtor under the credit agreement or any linked transaction are therefore

released, but he is still liable for the outstanding balance of the cash price of the goods or services. Any security provided is, however, rendered invalid.⁶⁹⁴

Repayment to and release of debtor⁶⁹⁵

- 41-109 On cancellation,⁶⁹⁶ the debtor or hirer is entitled to be repaid any sum paid by him, or his relative,⁶⁹⁷ under or in contemplation of the agreement or transaction,⁶⁹⁸ including any item in the total charge for credit.⁶⁹⁹ That sum is repayable by the person to whom it was originally paid.⁷⁰⁰ But, in the case of a debtor-creditor-supplier agreement falling within s.12(b) of the 1974 Act,⁷⁰¹ the creditor and supplier are under a joint and several liability to repay sums paid by the debtor, or his relative, under the agreement or under a linked transaction falling within s.19(1)(b).⁷⁰² However, subject to any agreement between them, the creditor is entitled to be indemnified by the supplier for loss suffered by the creditor in satisfying that liability, including costs reasonably incurred by him in defending proceedings instituted by the debtor.⁷⁰³
- 41-110 If the total charge for credit⁷⁰⁴ includes an item in respect of a fee or commission charged by a credit-broker,⁷⁰⁵ the amount repayable in respect of that item is the excess of over £5 of the fee or commission⁷⁰⁶; any other sum included in the total charge for credit which is payable or paid by the debtor to a credit-broker is for this purpose treated as if it were such a fee or commission.⁷⁰⁷ A further effect of cancellation⁷⁰⁸ is that any sum, including any item in the total charge for credit,⁷⁰⁹ which but for the cancellation is, or would or might become, payable by the debtor or hirer, or his relative,⁷¹⁰ under the agreement or transaction ceases to be, or does not become, so payable.⁷¹¹ The debtor or hirer is thus released (subject to s.71)⁷¹² from liability to pay the sums—including credit charges—payable by him under the cancelled agreement or any linked transaction.⁷¹³

Repayment to creditor by supplier

- 41-111 On cancellation,⁷¹⁴ in the case of a debtor-creditor-supplier agreement falling within s.12(b) of the 1974 Act,⁷¹⁵ any sum paid on the debtor's behalf by the creditor to the supplier⁷¹⁶ becomes repayable to the creditor.⁷¹⁷

Cancellation: repayment of credit ⁷¹⁸

- 41-112 Money may be advanced to a debtor under a regulated consumer credit agreement in anticipation of the making of the agreement or during the “cooling-off” period, but the debtor may then withdraw from or cancel the agreement. **Section 71 of the 1974 Act** deals with the repayment of the credit by the debtor in such a situation and is clearly designed to discourage the making of loans before the agreement is executed or, in the case of a cancellable agreement, before the expiration of the period allowed for cancellation.
- 41-113 In the first place, on cancellation, ⁷¹⁹ the loan advanced does not become immediately repayable. **Section 71 of the 1974 Act** provides that, notwithstanding the cancellation of a regulated consumer credit agreement, ⁷²⁰ other than a debtor-creditor-supplier ⁷²¹ agreement for restricted-use ⁷²² credit, the agreement is to continue in force so far as it relates to repayment of credit and payment of interest. ⁷²³ It is important to realise, however, that all other covenants by the debtor, e.g. for the provision of security or for insurance, become inoperative, ⁷²⁴ and likewise any guarantee or indemnity given in connection with the loan is of no effect. ⁷²⁵ Secondly, if, following the cancellation of the agreement, the debtor repays the whole or a portion of the credit before the expiry of one month following service of the notice of cancellation (or, in the case of a credit repayable by instalments, before the date on which the first instalment is due), no interest is payable on the amount repaid. ⁷²⁶ Thirdly, if the whole of a credit repayable by instalments is not repaid on or before the date mentioned above, the debtor is not liable to repay any of the credit except on receipt of a request in writing in the prescribed form, ⁷²⁷ signed by or on behalf of the creditor. ⁷²⁸ The request must state “the amounts of the remaining instalments (recalculated by the creditor as nearly as may be in accordance with the agreement and without extending the repayment period), but excluding any sum other than principal and interest”. ⁷²⁹ So, for example, if a cash loan ⁷³⁰ of £1,000 is made which is repayable with interest of £320 by 24 equal monthly instalments of £55 (APR 32.1 per cent), and the borrower cancels the agreement, he might repay part of the loan, say £400, free of interest before the date on which the first instalment fell due. The remaining £600 would be repayable by him only on the request of the creditor and would be repayable, together with interest at the rate specified in the agreement, over that part of the original repayment period then still unexpired. The debtor is not relieved from paying interest on the £600 not repaid in respect of the period before the request is received. The £600 would, therefore, be repayable with interest at APR 32.1 per cent for 24 months (£192), by (say) 23 monthly instalments of £34.43. ⁷³¹ Repayment of credit, and payment of interest, under a cancelled agreement is treated as duly made if it is made to any person on whom, under **s.69**, ⁷³² a notice of cancellation could have been served, other than a person referred to in **s.69(6)(b)**. ⁷³³

Return of goods ⁷³⁴

41-114 Section 72 of the 1974 Act deals with the return of goods on cancellation.⁷³⁵ Where the possession of goods has been acquired by virtue of a cancelled restricted-use⁷³⁶ debtor-creditor-supplier⁷³⁷ agreement, consumer hire agreement⁷³⁸ or linked transaction⁷³⁹ to which the debtor or hirer under a regulated agreement is a party, or by virtue of a cancelled linked transaction⁷⁴⁰ to which a relative⁷⁴¹ of the debtor or hirer under a regulated agreement is a party, the possessor is under a duty⁷⁴² to restore the goods to the person from whom he acquired possession.⁷⁴³ The possessor is, however, not under any duty to deliver the goods except at his own premises,⁷⁴⁴ and then only if he is served with a request in writing so to do.⁷⁴⁵ The possessor is under a duty from the time when he acquired possession to the date of cancellation (“the pre-cancellation period”)⁷⁴⁶ to retain possession of the goods and to take reasonable care of them.⁷⁴⁷ This duty continues after cancellation,⁷⁴⁸ but subject to certain qualifications, viz:

- (i)if no request for delivery of the goods is received by him within 21 days following the cancellation, his duty to take reasonable care of the goods (but not his duty to retain possession of them) ceases at the end of that period; and
- (ii)if he receives a request for delivery of the goods within 21 days following cancellation, but he unreasonably refuses or unreasonably fails to comply with it, his duty to take reasonable care of the goods continues until he does so comply.⁷⁴⁹

41-115 The possessor may deliver the goods, either at his own premises⁷⁵⁰ or elsewhere, to any person on whom, under s.69 of the 1974 Act,⁷⁵¹ a notice of cancellation could have been served (other than a person referred to in s.69(6)(b)),⁷⁵² or he may send the goods at his own expense to such a person.⁷⁵³ Once he has so delivered or sent the goods, his duty to retain the goods or deliver them to any person, and his duty to take care of them,⁷⁵⁴ cease, save that, if he elects to send the goods, he is under a duty to take reasonable care to see that they are received by the person from whom he acquired possession and not damaged in transit.⁷⁵⁵

41-116 Breach of a duty imposed by s.72 of the 1974 Act is actionable as a breach of statutory duty.⁷⁵⁶

Exceptions

41-117

Certain exceptions are created to s.72. The section does not apply to perishable goods,⁷⁵⁷ or to goods which by their nature are consumed by use and which, before cancellation, were so consumed,⁷⁵⁸ or to goods supplied to meet an emergency,⁷⁵⁹ or to goods which, before the cancellation, had become incorporated in any land or thing not comprised in the cancelled agreement or a linked transaction.⁷⁶⁰

Goods given in part-exchange⁷⁶¹

- 41-118 Section 73 of the 1974 Act contains provision for the return of goods given in part-exchange where a regulated agreement is cancelled.⁷⁶² For the purposes of the section goods are given in part-exchange if, in antecedent negotiations,⁷⁶³ the negotiator⁷⁶⁴ agreed to take goods in part-exchange (the “part-exchange goods”) and those goods have been delivered to him.⁷⁶⁵ The negotiator is treated as having agreed to take goods in part-exchange if, in pursuance of the antecedent negotiations, he either purchased or agreed to purchase those goods or accepted or agreed to accept them as part of the consideration for the cancelled agreement.⁷⁶⁶
- 41-119 In principle, on cancellation, the part-exchange goods should be returned to the debtor or hirer in a condition substantially as good as when they were delivered to the negotiator.⁷⁶⁷ If they are not so delivered before the end of the period of 10 days beginning with the date of cancellation, the debtor or hirer is entitled to recover from the negotiator a sum equal to the “part-exchange allowance”, i.e. the sum agreed as the part-exchange allowance in the antecedent negotiations or, if no such agreement was arrived at, such sum as it would have been reasonable to allow in respect of the part-exchange goods if no notice of cancellation had been served.⁷⁶⁸ In the case of a debtor-creditor-supplier agreement within s.12(b) of the 1974 Act,⁷⁶⁹ both the negotiator and the creditor are under a joint and several liability to pay that sum to the debtor⁷⁷⁰; but the creditor is given a right (subject to any agreement between them) to be indemnified by the negotiator in satisfying that liability, including costs reasonably incurred by him in reasonably defending proceedings instituted by the debtor.⁷⁷¹
- 41-120 Where the debtor or hirer recovers from the negotiator or creditor or both of them jointly a sum equal to the part-exchange allowance, then, if the title of the debtor or hirer to the part-exchange goods has not vested in the negotiator, it vests in the negotiator on the recovery of that sum.⁷⁷² Title does not in any circumstances vest in the creditor.

Lien

- 41-121 If, under the terms of a cancelled agreement or transaction, the debtor or hirer, or his relative,⁷⁷³ is in possession of any goods, he is entitled to a lien on them for any sum repayable to him under s.70(1) of the 1974 Act⁷⁷⁴ in respect of that agreement or transaction, or any other linked transaction.⁷⁷⁵ Also, during the period of 10 days beginning with the date of cancellation, if the debtor or hirer is in possession of goods to which the cancelled agreement relates, he has a lien on them for delivery of the part-exchange goods⁷⁷⁶ in a condition substantially as good as when they were delivered to the negotiator,⁷⁷⁷ or a sum equal to the part-exchange allowance,⁷⁷⁸ and, if such a lien continues to the end of that period, a lien thereafter for a sum equal to the part-exchange allowance.⁷⁷⁹

Agency for receiving notice of rescission

- 41-122 The right to withdraw from or cancel the agreement conferred by the 1974 Act in no way inhibits the exercise by the debtor or hirer of any other contractual remedy to which he may be entitled and which has the effect of terminating the agreement. Moreover, by s.102(1) of the Act certain persons are deemed to be the agent of the creditor or owner for the purpose of receiving any notice “rescinding” the agreement, which is served by the debtor or hirer. Those persons are:

- (a)a credit-broker⁷⁸⁰ or supplier⁷⁸¹ who was the negotiator⁷⁸² in antecedent negotiations⁷⁸³ (e.g. the dealer in an ordinary three-cornered instalment credit transaction); and
- (b)any person who, in the course of a business⁷⁸⁴ carried on by him, acted on behalf of the debtor or hirer in any negotiations for the agreement (e.g. the debtor or hirer’s own solicitor or agent).⁷⁸⁵

The word “rescind” is not defined. It does not, however, include service of a notice of cancellation,⁷⁸⁶ or termination of an agreement under s.99⁷⁸⁷ or 101⁷⁸⁸ of the 1974 Act or by the exercise of a right or power in that behalf expressly conferred by the agreement. But it is submitted that “rescind” should not be construed too narrowly so as to comprehend only the equitable remedy of rescission, e.g. for misrepresentation,⁷⁸⁹ but should also extend to rescission consequent upon a repudiatory breach of the agreement by the creditor or owner.⁷⁹⁰

Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

- 41-123 These regulations ⁷⁹¹ confer on a consumer a 14 day right of cancellation (“withdrawal”) from timeshare and other “holiday accommodation” contracts within their scope, ⁷⁹² that have a requisite connection with the UK or another EEA State. ⁷⁹³ On such cancellation both the obligations under the contract and any “ancillary contract” (i.e. a contract for services provided by the trader or by a third party with whom the trader has arrangements) terminates. ⁷⁹⁴ Moreover a “related credit contract” is also automatically terminated at no cost to the consumer. ⁷⁹⁵ A “regulated credit contract” is defined as one that fully or partly covers any payment under the holiday accommodation contract and that is made either with the trader or a third party “on the basis of an arrangement” between them.

Package Travel and Linked Travel Arrangements Regulations 2018 ⁷⁹⁶

- 41-124 These regulations ⁷⁹⁷ confer upon a “traveller” ⁷⁹⁸ under a “package travel contract”, on payment of “an appropriate and justifiable termination fee” a right to terminate the contract at any time before the start of the package. But in the event of “unavoidable and extraordinary circumstances” ⁷⁹⁹ at the place of destination or its immediate vicinity, which significantly affect (a) the performance of the package, or (b) the carriage of passengers to the destination, the traveller may terminate the contract before the start of the package without paying any termination fee and in such a case the traveller is entitled to a full refund of any payments made for the package (but not additional compensation). The definition of “traveller” in the regulations is not in any way linked to the conceptual framework of the [1974 Act](#) and there is no exception in a case where an associated credit agreement is subject to the right of withdrawal under [s.66A of the 1974 Act](#) or is a “cancellable” agreement under [s.67 of the 1974 Act](#).

Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

- 41-125 Part 3 of these regulations ⁸⁰⁰ confers a right to cancel without giving any reason or incurring any costs (unless specified) on “consumers” (as defined) in the case of certain “distance” or “off-premises” contracts (as defined) made by “traders” (as defined). The cancellation period is generally 14 days (from the date of conclusion of the contract or the date of delivery), although if

the trader does not provide the consumer with the requisite information on cancellation rights,⁸⁰¹ the cancellation period may be extended by up to 12 months. The regulations contain provisions adjusting the position of the parties after cancellation,⁸⁰² which are similar to those in ss.70–73 of the 1974 Act.⁸⁰³ The regulations (including the cancellation right) do not apply to a variety of agreements, including credit agreements.⁸⁰⁴ However, a credit agreement may be cancelled if it is a so-called “ancillary contract” in relation to a distance or off-premises contract (the “main contract”) that is cancelled by virtue of the regulations.⁸⁰⁵ An “ancillary contact” is defined as “a contract by which the consumer acquires goods or services related to the main contract”, where those goods or services are provided either by the trader or by a third party (for example a creditor) “on the basis of an arrangement between the third party and the ‘trader’”. “Arrangement” is not defined in the regulations but it is a word of wide import.⁸⁰⁶

Financial Services (Distance Marketing) Regulations 2004

41-126 These Regulations



U extend a right to cancel to certain “distance”⁸⁰⁸ consumer financial services contracts, including credit contracts.⁸⁰⁹ Credit contracts that are already cancellable as “ancillary contracts” under the **Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013**⁸¹⁰ or as timeshare credit agreements under the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010⁸¹¹ are excluded.⁸¹² There is no overlap with s.67 of the 1974 Act⁸¹³ in that this section requires “face-to-face” negotiation whereas the regulations require “distance communication”. However, if the s.66A right of withdrawal applies,⁸¹⁴ then the right of cancellation conferred by these regulations is excluded.⁸¹⁵ The regulations require the right to cancel to be communicated “in good time” prior to the consumer being bound⁸¹⁶ and the “cooling off” period is generally 14 days from the date the contract is concluded. Provision is also made for the cancellation of an “attached contract”, a concept which may include credit contracts.⁸¹⁷

Footnotes

1 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer

- Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).
- 618 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), paras 2-058, 2-068—2-075; and Goode, Consumer Credit: Law and Practice (looseleaf), Pt C, Ch.31. The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, paras 148–149) that the cancellation provisions should be retained in legislation because their repeal would adversely affect the appropriate degree of consumer protection. In particular, although the FCA has rule-making power to make cancellation rules ([FSMA 2000 s.137B\(3\)](#)), such rules could not replicate the full effect of [s.66A](#) (especially, subss.(7)(b) and (11)). However, the view is also expressed that “having two separate regimes for withdrawal [[s.66A](#)] and cancellation [[ss.67–73](#)] could potentially cause confusion … because of the differences in the requirements and obligations under the two regimes”. Hence, the FCA continues: “there is a case to consider aligning the requirements (subject to EU law while it applies)” and this would “provide an opportunity to review the scope and application of the provisions”.
- 619 See Vol.I, [Ch.4](#).
- 620 cf. *Financings Ltd v Stimson [1962] 1 W.L.R. 1184*.
- 621 cf. *Lowe v Lombank Ltd [1960] 1 W.L.R. 196, 206*; *Robophone Facilities Ltd v Blank [1966] 1 W.L.R. 1428*.
- 622 CCA 1974 s.57. See [CCA 1974 s.189B\(3\)](#), Sch.2A: in CCA 1974 s.57, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver”, as defined in CCA 1974 s.189B(6). Section 57 does not apply to the agreements excepted under CCA 1974 s.74(1) (see para.41-104) and under [s.82\(4\)](#) (variation).
- 623 CCA 1974 s.57(2). But see the exceptions listed in CCA 1974 s.74(1) (below, para.41-104) and in [s.82\(4\)](#) (variations).
- 624 See Vol.I, para.4-114.
- 625 *Byrne & Co v Leon Van Tienhoven & Co (1880) 5 C.P.D. 344*. Contrast CCA 1974 s.69(7) (deemed service of notice of cancellation).
- 626 Defined in [CCA 1974 s.189\(1\)](#).
- 627 Defined in [CCA 1974 s.189\(1\)](#).
- 628 Defined in CCA 1974 ss.56(1), 189(1); see above, para.41-075.
- 629 Defined in CCA 1974 ss.56(1), 189(1); see above, paras 41-073 et seq.
- 630 See [CCA 1974 s.189\(1\), \(2\)](#).
- 631 At common law a dealer who negotiates a transaction is not an agent of the creditor for the purpose of fixing the creditor with knowledge that the offer was made subject to an oral stipulation qualifying the debtor’s liability: *Eastern Distributors Ltd v Goldring [1957] 2 Q.B. 600*; *Northgran Finance Ltd v Ashley [1963] 1 Q.B. 476*. But he is the agent of the creditor for the purpose of communicating the withdrawal of the offer: *Financings Ltd v Stimson [1962] 1 W.L.R. 1184*.
- 632 See [CCA 1974 ss.19\(1\), 189\(1\)](#), above, paras 41-056 et seq. But certain linked transactions are excepted by SI 1983/1560 (contracts of insurance, guarantees of goods, and agreements for deposit and current accounts).

- 633 CCA 1974 s.57(1). But this is not so in the case of agreements excepted by CCA 1974 ss.74(1) (see below, para.41-104) and 82(4) (variations). For CCA 1974 s.69, see below, para.41-106. See also CCA 1974 s.113(6); below, para.41-191.
- 634 CCA 1974 s.57(4).
- 635 CCA 1974 s.58(1), considered below at para.41-539. But see the exceptions in CCA 1974 ss.58(2), 74(1) (see below, para.41-104) and 82(4) (variations).
- 636 Note that many land mortgages are “exempt agreements”: see para.33-039.
- 637 See Vol.I, Ch.6.
- 638 But see the exceptions in CCA 1974 ss.74(1) (see below, para.41-104) and 82(4) (variations). Under CCA 1974 s.59(2) and SI 1983/1552, certain types of agreement are excluded from s.59(1), namely, agreements to enter into prospective hire agreements and agreements to enter into prospective restricted-use agreements for fixed-sum credit, in both cases the goods being used for business purposes. See also *Lakin v Exe Haulage Ltd [2006] C.L.Y. 705, Ct Ct*: s.59 inapplicable to exempt agreement. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.23) that s.59 should be retained in legislation as an FCA rule could not replicate its provisions.
- 639 See above, para.41-011. See *JC v Kreissparkasse Saarlouis (C-66/19) EU:C:2020:242* (CJEU case on when the 14-day right of withdrawal period under the CCD (and hence s.66A) begins to run).
- 640 Added on 1 February 2011 by SI 2010/1010 reg.13. See CCA 1974 s.189B(3), Sch.2A: in CCA 1974 s.66A, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver” (as defined in CCA 1974 s.189B(6)).
- 641 When the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016, this exclusion ceased to apply to so-called “residential renovation agreements” (as defined in CCA 1974 s.189(1) to mean, essentially, unsecured loans to renovate residential property) above this threshold: see amendment to s.66A in SI 2015/910 art.3 and Sch.1 para.2(5).
- 642 CCA 1974 s.66A(14). For agreements excluded from the definition of “cancellable” agreement, see below, para.41-104: agreements secured on land and various agreements financing the purchase of land.
- 643 See CCA 1974 s.74(1)(b) (but see s.74(1D)): certain non-business overdrafts. Section 66A also does not apply to “non-commercial” agreements (as to which, see above, para.41-050): s.74(1)(a). See also, in the context of variation (as to which, see below paras 41-148, 41-151), CCA 1974 s.82(4), (6A)–(6B).
- 644 But note that only business credit under £25,000 is “regulated”, see above, para.41-047.
- 645 When the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016, this exclusion ceased to apply to so-called “residential renovation agreements” (as defined in CCA 1974 s.189(1) to mean, essentially, unsecured loans to renovate residential property) above this threshold: see amendment to s.66A in SI 2015/910 art.3 and Sch.1 para.2(5).

- 646 See next paragraph. And the FCA Handbook, CONC 11.2 confers a “right of withdrawal” (essentially a right to cancel) on borrowers under certain “peer-to-peer” (P2P) credit agreements.
- 647 See [CCA 1974 Sch.2 Pt II Example 4](#). The special [s.58](#) “pause” provisions may apply instead in the case of a regulated agreement secured by a land mortgage: see below, para.[41-539](#). For a pre-Directive discussion of the various provisions generally conferring rights of cancellation, see *Hellwege (2004) C.L.J. 712*.
- 648 Viz: regulated credit agreements in excess of £60,260 and regulated hire agreements; see previous paragraph.
- 649 See the exceptions noted below, para.[41-104](#). And note that if cancellation rights are conferred by contract on agreements not satisfying [s.67](#), such agreements do not attract the provisions of the Act applicable to “cancellable agreements”: *Rankine v MBNA Europe Bank Ltd [2007] EWCA Civ 1273* (but see the [Consumer Credit \(Cancellation Notices and Copies of Documents\) Regulations 1983](#) (SI 1983/1557) reg.5(4), added by [SI 1984/1108](#), rendering those *regulations* (only) applicable).
- 650 An exempt agreement (above paras [41-039](#) et seq.) cannot be cancelled under the [CCA 1974](#).
- 651 Defined in [CCA 1974 ss.56\(1\), 189\(1\)](#); above, paras [41-073](#) et seq.
- 652 Defined in [CCA 1974 s.189\(1\)](#). See *Moorgate Services Ltd v Kabir [1995] C.L.Y. 722*.
- 653 Defined in [CCA 1974 s.189\(1\)](#).
- 654 Defined in [CCA 1974 ss.56\(1\), 189\(1\)](#); above, para.[41-075](#).
- 655 Defined in [s.189\(1\), \(2\)](#).
- 656 e.g. a financier where it is the creditor under a hire-purchase, credit sale or conditional sale agreement.
- 657 For linked transactions see [CCA 1974 s.19\(1\)](#); above, paras [41-056](#) et seq. e.g. a dealer selling goods, where a loan is made by a financier on his introduction to purchaser of goods: [s.19\(1\)](#).
- 658 e.g. a dealer: see above, para.[41-074](#). But because of the definition of “antecedent negotiations” and “negotiator” in [CCA 1974 s.56](#), a distinction exists between debtor-creditor-supplier agreements on the one hand and debtor-creditor and consumer hire agreements on the other: see Guest and Lloyd, *Encyclopedia of Consumer Credit Law* (1975, looseleaf) at para.2-068.
- 659 Defined in [CCA 1974 ss.11\(1\), 189\(1\)](#); see above, para.[41-027](#).
- 660 [CCA 1974 s.67\(1\)\(a\)](#). See also [CCA 1974 ss.58\(1\), 61\(2\)](#).
- 661 See [CCA 1974 s.74\(1\)](#): (i) non-commercial agreements (as to which, see above, para.[41-050](#)); (ii) certain overdrafts; (iii) (in accordance with the OFT’s Determination (made on 21 December 1989), see Guest and Lloyd, *Encyclopedia of Consumer Credit Law* (1975, looseleaf) at para.4-4802) a debtor-creditor agreement to finance the making of payments connected with the death of a person as may be prescribed by regulation (see [SI 1983/1554](#)) and (iv) small (see above, para.[41-049](#)) debtor-creditor-supplier agreements (see above, paras [41-030—41-031](#)) for restricted use (see above, para.[41-027](#)). See also, in the context of variation (as to which, see below paras [41-148—41-150, 41-151](#)), [CCA 1974 s.82\(4\), \(6\)](#).
- 662 Of the executed agreement under [CCA 1974 s.63\(2\)](#): see above, para.[41-091](#).
- 663 See above, para.[41-092](#). If, by virtue of regulations made under [s.64\(4\)](#) (see the regulations made: see [SI 1983/1558](#) (certain mail order consumer credit agreements)), [s.64\(1\)\(b\)](#) does

- not apply, the period runs to the end of the 14th day following the day on which he signed the unexecuted agreement.
- 664 The second copy (or notice) must normally be sent by post within the seven days following the making of the agreement: see above, para.[41-092](#).
- 665 [CCA 1974 s.69\(1\)\(a\)](#).
- 666 [CCA 1974 s.69\(1\)\(b\)](#); see above, para.[41-092](#).
- 667 Defined in [CCA 1974 s.189\(1\)](#).
- 668 Defined in [CCA 1974 s.189\(1\)](#).
- 669 Defined in [CCA 1974 ss.56\(1\), 189\(1\)](#).
- 670 [CCA 1974 s.69\(1\)\(c\), \(6\)\(a\)](#). See also [CCA 1974 s.175](#) (contractual duty to the creditor or owner to transmit the notice to him forthwith).
- 671 Defined in [CCA 1974 s.189\(1\), \(2\)](#).
- 672 [CCA 1974 s.69\(1\)\(c\), \(6\)\(b\)](#). See also [CCA 1974 s.175](#) (contractual duty to the creditor or owner to transmit the notice to him forthwith).
- 673 [CCA 1974 s.69\(1\)\(c\)](#).
- 674 And see [CCA 1974 s.175](#) (contractual duty to the creditor or owner to transmit the notice to him forthwith).
- 675 See above, para.[41-092](#).
- 676 [CCA 1974 s.69\(1\)](#).
- 677 In accordance with [CCA 1974 s.176A](#), added by [SI 2004/3236 art.2\(7\)](#).
- 678 [CCA 1974 s.69\(7\)](#), as amended by [SI 2004/3236 art.2\(5\)](#), adding the reference to electronic communications.
- 679 Defined in [CCA 1974 ss.19\(1\), 189\(1\)](#); above, paras [41-056](#) et seq. But see the linked transactions excepted under [CCA 1974 s.69\(5\)](#) by [SI 1983/1560](#) (contracts of insurance, guarantees of goods and agreements for deposit and current accounts); and note *Goshawk Dedicated (No.2) Ltd v Bank of Scotland [2005] EWHC 2906 (Ch), [2006] C.C.L.R. 1; Bank of Scotland v Euclidian (No.1) Ltd [2007] EWHC 1732*.
- 680 Defined in [CCA 1974 ss.184\(1\), 189\(1\)](#).
- 681 [CCA 1974 s.69\(1\)](#). See also [CCA 1974 s.142\(2\)](#). But see above (excepted linked transactions).
- 682 e.g. by [CCA 1974 s.71](#).
- 683 [CCA 1974 s.69\(4\); Colesworthy v Collmain Services Ltd \[1993\] C.C.L.R. 4, Cty Ct](#).
- 684 See above, paras [41-056](#) et seq. But see above (excepted linked transactions).
- 685 [CCA 1974 s.19\(1\)\(b\)](#). This also applies to services.
- 686 But see the dictum of Lord Mance in *OFT v Lloyds TSB Bank Plc [2007] UKHL 48* that [s.69\(1\)](#) is likely only to apply to a “linked transaction which is sufficiently connected with the United Kingdom”, although he declined to opine on the nature of the requisite link. Hence he doubted if a foreign supply transaction (financed by a UK credit card agreement) could be cancelled under [s.69](#).
- 687 [CCA 1974 ss.106, 113\(3\)\(a\)](#); below, para.[41-194](#). See also [CCA 1974 s.113\(8\)](#).
- 688 Defined in [CCA 1974 ss.12, 189\(1\)](#); see above, paras [41-030—41-031](#).
- 689 Defined in [CCA 1974 ss.11\(1\), 189\(1\)](#); see above, para.[41-027](#).

- 690 But not, e.g. by the act of a supplier.
- 691 CCA 1974 s.69(2). But see CCA 1974 ss.69(3), 70(8), 113(3)(a). “Linked transactions” are defined in CCA 1974 ss.19(1), 189(1); see above, paras 41-056 et seq.
- 692 Defined in CCA 1974 ss.20, 189(1); above, para.41-061.
- 693 CCA 1974 s.69(2). But see CCA 1974 ss.69(3), 70(8), 72(9), 113(3)(a). See also CCA 1974 s.142(2).
- 694 CCA 1974 ss.106, 113(3)(a); below, para.41-194. See also CCA 1974 s.113(8).
- 695 See also the comparable provisions in the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095), below, para.41-126 and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134), below, para.41-125. See also (the less elaborate provisions in relation to the CCA 1974 s.66A right of withdrawal in) s.66A(9)–(10), above, para.41-103.
- 696 Or withdrawal: see CCA 1974 s.57(1); above, para.41-099. But see the exceptions in CCA 1974 ss.74 (above, para.41-104) and 82(4) (variations). See also CCA 1974 s.70(5) (credit-tokens).
- 697 Defined in CCA 1974 ss.184(1), 189(1).
- 698 i.e. a linked transaction: see CCA 1974 ss.19(1), 189(1); above, paras 41-056 et seq.
- 699 CCA 1974 s.70(1)(a). For “total charge for credit”, see above, para.41-061.
- 700 CCA 1974 s.70(3). See *Colesworthy v Collmain Services Ltd [1993] C.C.L.R. 4, Cty Ct* (money recoverable from collection/management agents of owner under cancelled consumer hire agreement). Where a financier supplies goods under a hire-purchase or conditional or credit sale agreement, and a deposit is paid by the debtor to the supplier, the deposit is recoverable from the financier at common law (*Branwhite v Worcester Works Finance Ltd [1969] 1 A.C. 552*) even though not paid to the creditor. For lien of debtor, see CCA 1974 s.70(2); below, para.41-121.
- 701 See above, para.41-032.
- 702 CCA 1974 s.70(3). See also above, paras 41-056 et seq. (on s.19(1)). The creditor is entitled, in accordance with rules of court, to have the supplier made a party to any proceedings brought against the creditor to recover these sums: CPR Pt 20.
- 703 CCA 1974 s.70(4).
- 704 Defined in CCA 1974 ss.20, 189(1); above, para.41-061.
- 705 Defined in CCA 1974 s.189(1); see below, para.41-235.
- 706 CCA 1974 s.70(6). The amount was increased from £1 to £3 by SI 1983/1571 and to £5 by SI 1998/997.
- 707 CCA 1974 s.70(7).
- 708 Or withdrawal: see CCA 1974 s.57(1); above, para.41-099. But see the exceptions in CCA 1974 ss.74(1) (above, para.41-104) and 82(4) (variations).
- 709 Defined in CCA 1974 ss.20, 189(1); above, para.41-061.
- 710 Defined in CCA 1974 ss.184(1), 189(1).
- 711 CCA 1974 s.70(1)(b).
- 712 See below, paras 42-112 et seq. See also CCA 1974 s.70(5) (credit-tokens).
- 713 Defined in CCA 1974 ss.19(1), 189(1); above, paras 41-056 et seq.

- 714 Or withdrawal: see [CCA 1974 s.57\(1\)](#); above, para.[41-099](#). But see the exceptions in [CCA 1974 ss.74\(1\)](#) (above, para.[41-104](#)) and [82\(4\)](#) (variations).
- 715 See above, para.[41-032](#).
- 716 Defined in [CCA 1974 s.189\(1\)](#).
- 717 [CCA 1974 s.70\(1\)\(c\)](#).
- 718 See also the comparable provisions in the [Financial Services \(Distance Marketing\) Regulations 2004 \(SI 2004/2095\)](#), below, para.[41-126](#) and the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134\)](#), below, para.[41-125](#). See also [s.66A\(9\)–\(10\)](#).
- 719 Or withdrawal: [CCA 1974](#) see [s.57\(1\)](#); above, para.[41-099](#). But see the exceptions in [CCA 1974 ss.74](#) (above, para.[41-104](#)) and [82\(4\)](#) (variation).
- 720 Defined in [CCA 1974 ss.8, 189\(1\)](#); above, para.[41-017](#).
- 721 Defined in [CCA 1974 ss.12, 189\(1\)](#); above, paras [41-030](#)—[41-031](#).
- 722 Defined in [CCA 1974 ss.11\(1\), 189\(1\)](#); above, para.[41-027](#).
- 723 [CCA 1974 s.71\(1\)](#). But see [CCA 1974 s.113\(5\)](#).
- 724 [CCA 1974 ss.69\(1\), \(4\), 106, 113\(3\)](#).
- 725 [CCA 1974 ss.69\(1\), \(4\), 106, 113\(3\)](#).
- 726 [CCA 1974 s.71\(2\)](#). But there is no relief from interest payable on any amount not so repaid.
- 727 For the prescribed form, see [SI 1983/1559](#), as amended by [SI 2004/3236 art.7](#) (electronic communications).
- 728 [CCA 1974 s.71\(3\)](#). But see [CCA 1974 s.113\(5\)](#).
- 729 [CCA 1974 s.71\(3\)](#).
- 730 Which is for “unrestricted-use”, above, para.[41-029](#).
- 731 For examples of calculations in the case of entire non-repayment or partial repayment, see Guest and Lloyd, [Encyclopedia of Consumer Credit Law](#) (1975, looseleaf) at para.2-072.
- 732 See above, para.[41-106](#). See also [CCA 1974 s.175](#) (duty to remit the notice to the creditor).
- 733 [CCA 1974 s.71\(4\)](#). Section 69(6)(b) refers to “any person who, in the course of a business carried on by him, acts on behalf of the *debtor* ... in any negotiations for the agreement”. See above, para.[41-106](#).
- 734 See the comparable provisions in the [Financial Services \(Distance Marketing\) Regulations 2004 \(SI 2004/2095\)](#), below, para.[41-126](#), and the [Consumer Contracts \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134\)](#), below, para.[41-125](#).
- 735 Or, by virtue of [CCA 1974 s.57](#), on withdrawal: see above, para.[41-099](#). But see the exceptions listed in [CCA 1974 ss.72\(9\), 74](#) (above, para.[41-104](#)), [82\(4\)](#).
- 736 Defined in [CCA 1974 ss.11\(1\), 189\(1\)](#); above, para.[41-027](#).
- 737 Defined in [CCA 1974 ss.12, 189\(1\)](#); above, paras [41-030](#)—[41-031](#).
- 738 Defined in [CCA 1974 ss.15, 189\(1\)](#); above, para.[41-036](#).
- 739 Defined in [CCA 1974 ss.19\(1\), 189\(1\)](#); above, paras [41-056](#) et seq.
- 740 Defined in [CCA 1974 ss.19\(1\), 189\(1\)](#); above, paras [41-056](#) et seq.
- 741 Defined in [CCA 1974 ss.184\(1\), 189\(1\)](#).
- 742 Subject to his right of lien under [CCA 1974 s.70\(2\)](#); below, para.[41-121](#). And see [CCA 1974 s.113\(5\)](#).

- 743 CCA 1974 s.72(1), (2), (4). For the difficulties confronting a financier which finds itself holding depreciated goods, see Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-073.
- 744 See CCA 1974 s.72(10).
- 745 CCA 1974 s.72(5). The request must be signed by or on behalf of the person from whom he acquired possession and it must be served upon him either before or at the time the goods are collected from those premises: ss.72(2), (5).
- 746 CCA 1974 s.72(2)(c).
- 747 CCA 1974 s.72(3).
- 748 CCA 1974 s.72(4).
- 749 CCA 1974 s.72(8). Or until he sends the goods as mentioned in subs.(6).
- 750 See CCA 1974 s.72(10).
- 751 See above, para.41-106.
- 752 CCA 1974 s.72(6)(a). Section 69(6)(b) refers to a person who, in the course of a business carried on by him, acts on behalf of the *debtor or hirer* in any negotiations for the agreement. CCA 1974 s.175, which in terms only imposes a contractual duty on such a person (to the creditor or owner) to transmit a “notice or *payment*” (emphasis added) to the creditor or owner forthwith would seem to be inapplicable to the return of goods.
- 753 CCA 1974 s.72(6)(b).
- 754 CCA 1974 s.72(7).
- 755 CCA 1974 s.72(6), (7).
- 756 CCA 1974 s.72(11).
- 757 CCA 1974 s.72(9)(a).
- 758 CCA 1974 s.72(9)(b).
- 759 CCA 1974 s.72(9)(c). See also CCA 1974 s.69(2); above, para.41-108.
- 760 CCA 1974 s.72(9)(d). “Linked transaction” is defined in CCA 1974 ss.19(1), 189(1); above, paras 41-056 et seq. See also CCA 1974 s.69(2); above, para.41-108.
- 761 See the comparable provisions in the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095), below, para.41-126, and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134), below, para.41-125.
- 762 Or, by virtue of CCA 1974 s.57, on withdrawal: see above, para.41-099. But see the exceptions listed in CCA 1974 ss.74 (above, para.41-104) and 82(4) (variations).
- 763 Defined in CCA 1974 ss.56, 189(1); above, paras 41-073 et seq.
- 764 Defined in CCA 1974 ss.56(1), 189(1).
- 765 CCA 1974 s.73(1).
- 766 CCA 1974 s.73(7)(a).
- 767 CCA 1974 s.73(2).
- 768 CCA 1974 s.73(2), (7)(b).
- 769 See above, para.41-032.
- 770 CCA 1974 s.73(3). The creditor is entitled, in accordance with rules of court to have the negotiator made a party to the proceedings: s.73(8); CPR Pt 20.
- 771 CCA 1974 s.73(4).

- 772 CCA 1974 s.73(6).
- 773 Defined in CCA 1974 ss.184(1), 189(1).
- 774 See above, para.41-109.
- 775 CCA 1974 s.70(2). For linked transaction, see ss.19(1), 189(1); above, paras 41-056 et seq.
- 776 CCA 1974 s.73(1); above, para.41-118.
- 777 Defined in CCA 1974 ss.56(1), 189(1). See above, para.41-094.
- 778 CCA 1974 s.73(6); above, para.41-119.
- 779 CCA 1974 s.73(5).
- 780 Defined in CCA 1974 s.189(1); below, para.41-235.
- 781 Defined in CCA 1974 s.189(1).
- 782 Defined in CCA 1974 ss.56, 189(1); above, para.41-075.
- 783 See above, paras 41-073 et seq.
- 784 Defined in CCA 1974 s.189(1), (2).
- 785 But see CCA 1974 s.175 (duty to transmit the notice to the creditor or owner).
- 786 CCA 1974 s.69(1); above, para.41-107.
- 787 CCA 1974 s.99(1); below, para.41-371.
- 788 CCA 1974 s.101(1); above, para.35-088.
- 789 See Vol.I, Ch.9.
- 790 See Vol.I, Ch.27.
- 791 SI 2010/2960 (implementing the Timeshare etc. Directive 2008/122/EC and repealing the Timeshare Act 1992). See further above, paras 40-157 et seq. See the similar provisions in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134), below, para.41-125, which exclude contracts within the 2010 Regulations from their cancellation provisions.
- 792 See SI 2010/2960 regs 3, 4, 6-10.
- 793 See SI 2010/2960 reg.5.
- 794 See SI 2010/2960 reg.22.
- 795 See SI 2010/2960 reg.23.
- 796 These were amended by the Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018 (SI 2018/1367) as a result of Brexit, in exercise of the powers in the European Union (Withdrawal) Act 2018 s.8(1).
- 797 SI 2018/634 (implementing Council Directive 2015/2302). See above, paras 40-135 et seq. See also Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-068.
- 798 Defined in reg.2 as an “individual who is seeking to conclude a contract or is entitled to travel on the basis of a contract concluded” within the regulations.
- 799 As defined in reg.2, see previous note.
- 800 SI 2013/3134. For a fuller consideration, see above, paras 40-115 et seq. For case-law on the predecessor Cancellation of Contracts made in a Consumer’s Home or Place of Work, etc. Regulations 2008 (SI 2008/1816), see *W v Veolia Environmental Services (UK) Plc [2011] EWHC 2020* (hire contract unenforceable under those regulations as signed at home without the requisite notice); *Salat v Barutis [2013] EWCA Civ 1499* (lack of cancellation

notice in motorcycle hire agreement); *Allproperty Claims v Tang [2015] EWHC 2198* (lack of notification of cancellation right rendered agreement unenforceable) and *RTA (Business Consultants) Ltd v Bracewell [2015] EWHC 630 (QB)* (meaning of “consumer”).

- 801 The requisite information is set out in Sch.2 to the regulations.
- 802 See regs 34–37.
- 803 See above, paras 41-109—41-121.
- 804 See reg.6(1)(b).
- 805 See reg.38.
- 806 See the similar provision in the *Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010*, considered above, para.41-123.
- 807 SI 2004/2095 (implementing Directive 2002/65 (the “DMD”—Distance Marketing Directive, on which see *KH v Sparkasse Sudholstein Case C-639/18 ECLI:EU:C:2020:477, [2020] Bus.L.R. 1581*)). Regs 15 and 22 were amended by the *Consumer Protection from Unfair Trading Regulations 2008* (SI 2008/1277) reg.30(1) and Sch.2 para.110 (to remove the criminal offences). For a fuller consideration, see above, paras 40-143 et seq. The regulations are listed in the Financial Services and Markets Bill 2022 Sch.1 Pt 2 as due for revocation as EU-derived law.
- 808 The definition is similar to that under the *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* (SI 2013/3134), above, para.41-125, which replaced the *Consumer Protection (Distance Selling) Regulations 2000* (SI 2000/2334). However, there is (curiously) no equivalent (either in the 2004 regulations under discussion or in the 2013 Regulations) to the “indicative list” of what constitutes “distance communication” in Sch.1 to the 2000 Regulations.
- 809 But not hire contracts. Reg.2(1) defines “credit” in almost identical terms to CCA 1974 s.9(1), see above, para.41-019.
- 810 See above, para.41-125.
- 811 See above, para.41-123.
- 812 SI 2004/2095 reg.11(1)(e) (substituted by SI 2013/3134), (f) (substituted by SI 2010/2960).
- 813 See above, para.41-103.
- 814 See above, para.41-103.
- 815 SI 2004/2095 reg.11(1)(h), added by SI 2010/1010 reg.89 and substituted by SI 2013/1881 Sch.1 para.26(b).
- 816 SI 2000/2334 reg.7. The right to cancel is exercisable by a “notice of cancellation”, with the formal requirements being more flexible than those under the CCA 1974.
- 817 SI 2000/2334 reg.12.

(g) - Supply of Information

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(g) - Supply of Information⁸¹⁸

Current account “overrunning”: information requirements

- 41-127 In consequence of the implementation of the Consumer Credit Directive⁸¹⁹ there are two new “information” provisions concerning so-called current account “overrunning”, a Directive term that has been re-worded in the UK legislation⁸²⁰ as “overdraw without a pre-arranged overdraft or exceed a pre-arranged over-draft limit”. First,⁸²¹ where this may be permitted by the creditor, the current account agreement must contain certain information as to the interest rate(s) and any other charges levied for such “overrunning”. Moreover, the creditor must also inform the account-holder of this information annually. Second,⁸²² when “significant” overrunning occurs for more than one month (three months if the excess is secured on land), the creditor must inform the account-holder in writing, within that period or thereafter “without delay”, of the rate of interest and any other charges. Overrunning is “significant” if: (a) the account-holder is liable to pay a “charge” for which he would not otherwise be liable, or (b) the overdraft or excess is likely to have an adverse effect on the debtor’s ability to receive further credit, or (c) it “otherwise appears significant, having regard to all the circumstances”. The provisions applying to variations of agreements⁸²³ do not apply to any debtor-creditor agreement arising as a result of overrunning.

Information to debtor under fixed-sum credit agreement on request

- 41-128 Section 77 of the 1974 Act requires⁸²⁴ the creditor under a regulated agreement for fixed-sum credit⁸²⁵ (other than a non-commercial agreement⁸²⁶) to give⁸²⁷ the debtor, on request, a copy of

the executed agreement (if any)⁸²⁸ and of any other document referred to in it,⁸²⁹ together with a statement of the account between them.⁸³⁰ In order to be valid the request must be in writing, and a fee of £1 must be paid.⁸³¹ The statement must be signed by or on behalf of the creditor and must show (according to the information to which it is practicable for him to refer):

- (a)the total sum paid under the agreement by the debtor;
- (b)the total sum which has become payable under the agreement by the debtor but remains unpaid, and the various amounts comprised in that total sum, with the date on which each became due; and
- (c)the total sum which is to become payable under the agreement by the debtor and the various amounts comprised in that total sum, with the date or mode of determining the date, when each becomes due.⁸³²

If the creditor fails to comply within 12 working days⁸³³ after receiving a request, he is not entitled, while the default continues, to enforce the agreement.⁸³⁴

Annual information to debtor under fixed-sum credit agreement

41-129 Section 77A⁸³⁵ of the 1974 Act requires the creditor under a regulated agreement for fixed-sum credit⁸³⁶ (other than a non-commercial agreement⁸³⁷) automatically to give⁸³⁸ the debtor, without charge,⁸³⁹ annual statements of the account between them⁸⁴⁰ in the form and with the contents prescribed.⁸⁴¹ If the creditor fails to comply, he is not entitled to enforce⁸⁴² the agreement during the period of non-compliance and the debtor is not liable to pay any interest or default sums referable to that period.⁸⁴³ It was held in *JP Morgan Chase Bank, National Association v Northern Rock (Asset Management) Plc*⁸⁴⁴ that if a s.77A statement that does not comply with the prescribed requirements is served, it is to be treated as if no statement had been served at all (and hence the commencement of the period of non-compliance needs to be calculated accordingly).

Statement of account to debtor under fixed-sum credit agreement on request

41-130 In consequence of the implementation of the Consumer Credit Directive⁸⁴⁵ where a fixed-sum regulated credit⁸⁴⁶ agreement is of fixed duration and where the credit is repayable in instalments, the new s.77B⁸⁴⁷ requires the creditor, at the request of the debtor, to give a written statement of account with a table showing details of the instalments due.⁸⁴⁸ The statement must be given “as soon as reasonably practicable” and no charge for it can be made.⁸⁴⁹ Breach does not render

the agreement unenforceable but is actionable as a breach of statutory duty.⁸⁵⁰ Moreover, the normal disciplinary sanctions are available to the FCA for non-compliance, which could also render the agreement an “unfair relationship”.⁸⁵¹ As this obligation derives from the Consumer Credit Directive, the obligation does not apply to agreements outside the scope of that Directive, namely: agreements secured on land, pawn agreements, agreements where credit in excess of £60,260⁸⁵² is provided and “business” credit agreements.⁸⁵³

Notices of sums in arrears (NOSIAs): fixed-sum credit agreements

- 41-131 Further information needs to be given to a debtor under a regulated agreement for fixed-sum credit⁸⁵⁴ (other than a non-commercial⁸⁵⁵ or small⁸⁵⁶ agreement)⁸⁵⁷ if they fall into arrears. Section 86B⁸⁵⁸ requires the creditor to give,⁸⁵⁹ in the form and with the contents prescribed,⁸⁶⁰ a “notice of sums in arrears” (a so-called “NOSIA”) within 14 days after the debtor becomes two payments (or four payments if made weekly⁸⁶¹) in arrears⁸⁶² and, unless payment is duly made, to continue sending out such a notice at intervals of not more than six months.⁸⁶³ The notice, which must be free of charge,⁸⁶⁴ must also be accompanied by⁸⁶⁵ the “arrears information sheet” drafted by the FCA⁸⁶⁶ which sets out information as to the legal consequences of falling in arrears and sources of help for debtors. The debtor may make an application to court for a time order after service of the notice but only after giving a counter-notice (a “notice of intent”) with a proposal for payment.⁸⁶⁷ If the creditor fails to comply with the requirement to give a NOSIA then during the period of non-compliance he is not entitled to enforce the agreement.⁸⁶⁸ Moreover, the debtor is not liable to pay any interest that relates to that period or any “default sum” that is incurred or becomes payable during that period.⁸⁶⁹

Information to debtor under running-account credit agreement on request

- 41-132 Section 78⁸⁷⁰ contains similar provisions⁸⁷¹ to those in s.77⁸⁷² (applicable to a fixed-sum credit agreement) in relation to a regulated agreement for running-account credit⁸⁷³ (other than a non-commercial agreement⁸⁷⁴). But here the statement on request must show:

- (a)the state of the account;
- (b)the amount, if any, currently payable under the agreement by the debtor to the creditor; and
- (c)the amounts and dates of payments which, if the debtor does not draw further on the account, will later become payable under the agreement by the debtor to the creditor.⁸⁷⁵

Again, if the creditor fails to comply within 12 working days⁸⁷⁶ after receiving a request, he is not entitled, while the default continues, to enforce the agreement.⁸⁷⁷

Automatic periodic information to debtor under running-account credit agreement

- 41-133 In addition, s.78(4) requires the creditor under a regulated agreement for running-account credit⁸⁷⁸ (other than a non-commercial agreement⁸⁷⁹ or a small agreement),⁸⁸⁰ automatically to give⁸⁸¹ the debtor, without charge,⁸⁸² periodic statements of the account (according to the information to which it is practicable for the creditor to refer) between them in prescribed form.⁸⁸³ Further, where the agreement provides, in relation to specified periods, for the making of payments by the debtor, or the charging against him of interest or any other sum, the statement must show (according to the information to which it is practicable for the creditor to refer) the state of account at the end of each of those periods during which there is any movement in the account.⁸⁸⁴ The terms of s.78(4) differ from those of s.77A (in relation to fixed-sum credit⁸⁸⁵) in referring to statements at “regular intervals of not more than 12 months”⁸⁸⁶ and hence if an interval of less than 12 months is initially chosen by the creditor, then this periodicity must be adhered to. Moreover, there is no explicit sanction for failure to comply with s.78(4).⁸⁸⁷

Notices of sums in arrears (NOSIAs): running-account credit agreements

- 41-134 Further information needs to be given to a debtor under a regulated agreement for running-account credit⁸⁸⁸ (other than a non-commercial⁸⁸⁹ or small⁸⁹⁰ agreement) if they fall in arrears. Section 86C⁸⁹¹ requires the creditor to give,⁸⁹² in the form and with the contents prescribed,⁸⁹³ a “notice of sums in arrears” (a so-called “NOSIA”) after the debtor becomes two payments in arrears.⁸⁹⁴ This notice must be given at a time no later than the next periodic statement under s.78(4)⁸⁹⁵ and may be incorporated in it.⁸⁹⁶ The provisions of s.86C are otherwise similar to those of s.86B. The notice must be free of charge⁸⁹⁷ and accompanied by⁸⁹⁸ the “arrears information sheet” drafted by the FCA.⁸⁹⁹ The debtor may make an application to court for a time order but only after giving a counter-notice (a “notice of intent”) with a proposal for payment.⁹⁰⁰ The creditor is not entitled during the period of non-compliance to enforce the agreement⁹⁰¹ and the debtor is not liable to pay any interest that relates to that period or any “default sum” that is incurred or becomes payable during that period.⁹⁰²

Notice of default sum

- 41-135 A “default sum” is defined ⁹⁰³ as a sum (other than a sum of interest) payable by a debtor or hirer under a regulated agreement “in connection with a breach of the agreement” but not including a sum which is payable earlier than otherwise required as a consequence of breach. Thus charges (but not interest) imposed for late payment are covered but not amounts payable under acceleration clauses. Section 86E⁹⁰⁴ provides that if a “default sum” becomes payable under a regulated agreement (other than a non-commercial ⁹⁰⁵ or small ⁹⁰⁶ agreement) ⁹⁰⁷ the creditor must give ⁹⁰⁸ the debtor notice in the form and with the contents prescribed ⁹⁰⁹ within 35 days ⁹¹⁰ of the sum becoming payable. The notice must be free of charge ⁹¹¹ and may be incorporated in any other notice or statement given under the Act. ⁹¹² If the creditor fails to comply with the requirement to give the notice, then during the period of non-compliance he is not entitled to enforce the agreement. ⁹¹³ As for interest, the section states that the debtor has no liability to pay interest in connection with the default sum in respect of the period “before the 29th day after the day on which the debtor” is given “notice under this section”. Hence the creditor cannot charge interest ⁹¹⁴ on the default sum until 28 days after the debtor receives ⁹¹⁵ the notice. ⁹¹⁶

Default sums: other provisions

- 41-136 As well as requiring a notice to be given when a default sum has been incurred, ⁹¹⁷ the 1974 Act makes other special provision in relation to “default sums”. Only simple (and not compound) interest may be charged “in connection with” default sums. ⁹¹⁸ Moreover, a debtor is not liable to pay any default sums that are incurred or become payable during a period when the creditor has not complied with his statutory obligation to give a “notice of sums in arrears”. ⁹¹⁹

Information to “surety”

- 41-137 The creditor under a regulated agreement for fixed-sum credit ⁹²⁰ or running-account credit, ⁹²¹ and the owner under a regulated consumer hire agreement, ⁹²² in relation to which security ⁹²³ is provided, is required within 12 working days ⁹²⁴ after receiving a request in writing to that effect from a surety and payment of a fee of £1 ⁹²⁵ to give ⁹²⁶ to the surety ⁹²⁷ a statement of the account as between himself and the debtor or hirer in the same terms ⁹²⁸ as the statement to be given to the debtor or hirer. ⁹²⁹ In addition, the creditor or owner is required to give to the surety:

- (i)a copy of the executed agreement (if any) and of any other document referred to in it; and
- (ii)a copy of the security instrument (if any).⁹³⁰

41-138 Failure to comply will preclude him, while the default continues, from enforcing the security, so far as provided in relation to the agreement.⁹³¹ Non-commercial agreements are, however, excepted.⁹³²

Copy of security instrument

41-139 The creditor or owner under a regulated agreement (other than a non-commercial agreement)⁹³³ is required, within 12 working days⁹³⁴ after receiving a request in writing to that effect from the debtor or hirer and payment of a fee of £1,⁹³⁵ to give⁹³⁶ to the debtor or hirer a copy of any security instrument⁹³⁷ executed in relation to the agreement *after* the making of the agreement.⁹³⁸ Failure to comply precludes the creditor or owner, while the default continues, from enforcing the security so far as provided in relation to the agreement.⁹³⁹

Information as to whereabouts of goods

41-140 Where a regulated agreement (other than a non-commercial agreement)⁹⁴⁰ requires the debtor or hirer to keep goods to which the agreement relates in his possession or control, he must, within seven working days after he has received a request in writing to that effect from the creditor or owner, tell the creditor or owner where the goods are.⁹⁴¹ If he fails to comply with the request, and the default continues for 14 days, he commits an offence.⁹⁴²

Information as to settlement figure

41-141 The creditor under a regulated consumer credit agreement⁹⁴³ is required,⁹⁴⁴ within seven working days⁹⁴⁵ after he has received a request⁹⁴⁶ to that effect from the debtor, to give⁹⁴⁷ to the debtor a statement in the prescribed form indicating (according to the information to which it is practicable for him to refer), the amount of the payment required to discharge the debtor's indebtedness under the agreement, together with the prescribed particulars showing how the amount is arrived

at.⁹⁴⁸ If the creditor fails to comply, he is not entitled, while the default continues, to enforce the agreement.⁹⁴⁹

Termination statement

41-142 Section 103⁹⁵⁰ of the 1974 Act confers upon the debtor or hirer under a regulated agreement (other than a non-commercial agreement)⁹⁵¹ the right to obtain, on request, a termination statement confirming that he has discharged his indebtedness and that the agreement is at an end. In order to obtain a termination statement under this section, the debtor or hirer must serve a notice complying with the requirements of s.103(1). The creditor or owner must then, within 12 working days⁹⁵² after receiving the notice, either:

- (i)comply with it (by confirming that the statements contained in the notice are correct); or
- (ii)serve a counter-notice stating either that he disputes the correctness of the notice or that he asserts that the person serving the notice is not indebted to him under the agreement.⁹⁵³

If he disputes the correctness of the notice he must give particulars of the way in which he alleges it to be wrong.⁹⁵⁴ A breach of s.103(1) is actionable as a breach of statutory duty.⁹⁵⁵ A termination statement is required to be given in pursuance of this provision on one occasion only.⁹⁵⁶

Statements binding on creditor or owner

41-143 Section 172 renders certain statements given by the creditor or owner binding on him. The section only applies to statements required to be given, on request,⁹⁵⁷ to the debtor or hirer under ss.77(1), 78(1) and 79(1) of the Act,⁹⁵⁸ the statements required to be given to a surety under ss.107 to 109,⁹⁵⁹ and the statement as to the settlement figure required to be given under s.97(1).⁹⁶⁰ Further, if, in response to a notice requiring a termination statement under s.103,⁹⁶¹ the creditor or owner by notice confirms that the statements contained in the notice served on him are correct, or if he himself serves a counter-notice asserting that the person serving the notice is not indebted to him under the agreement, the notice of confirmation or counter-notice is binding on him.⁹⁶² However, if in proceedings before any court it is sought to rely on any statement or notice given as mentioned above, and the statement or notice is shown to be incorrect, the court may direct such relief (if any) to be given to the creditor or owner as appears to the court to be just.⁹⁶³ No doubt the court will relieve the creditor or owner if the debtor, hirer or surety was aware that a mistake had been made; and, although negligence on the part of the creditor or owner may be a relevant factor, it is submitted that the fact that he was negligent should not preclude relief.⁹⁶⁴ As is the case in relation to estoppel at common law, it would seem that the most important consideration should be

whether the person against whom relief is claimed has so changed his position in reliance on the statement that it would be inequitable to allow the creditor or owner to correct the statement.⁹⁶⁵

Payment Services Regulations 2009 ⁹⁶⁶

- ⁴¹⁻¹⁴⁴ These regulations impose additional information requirements⁹⁶⁷ in relation to credit agreements within their scope. However, many of these obligations are modified in relation to agreements that are “regulated credit agreements” within the [1974 Act](#) and hence subject to the obligations under that Act considered in this section.⁹⁶⁸

Footnotes

- 1 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).
- 818 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), paras 2-078—2-081, 2-087A—2-087E, 2-098, 2-104, 2-108—2-111. See also the Guidance in the FCA Handbook, CONC 13.
- 819 See above, para.[41-011](#).
- 820 The provisions were originally in [CCA 1974 ss.74A and 74B](#) (added by [SI 2010/1010](#) regs 21 and 22, as amended by [SI 2010/1969](#) regs 9 and 10) but on the transfer of consumer credit regulation to the FCA (see above, para.[41-002](#)) ss.74A and 74B were repealed (see [SI 2013/1881 art.20\(27\)](#)) and replaced by corresponding provisions in the FCA Handbook CONC 4.7 and 6.3.3 (old s.74A) and CONC 6.3.3 and 6.3.4 (old s.74B).
- 821 FCA Handbook CONC 4.7 and 6.3.3 (previously [CCA 1974 s.74A](#), see the previous footnote).
- 822 FCA Handbook CONC 6.3.4 (previously [CCA 1974 s.74A](#), see above).
- 823 Viz (i) [CCA 1974 s.82\(1\)](#) (see s.82(1E), see below, para.[41-146](#)) and (ii) (for interest rate variations) [CCA 1974 s.78A](#) (see s.78A(6)(a), see below, para.[41-147](#)).
- 824 [CCA 1974 s.77\(1\)](#), except where relieved under s.77(2), below, or s.77(3) (no sums payable and repeated requests).
- 825 Defined in [CCA 1974 ss.10\(1\)\(b\), 189\(1\)](#); above, para.[41-026](#).
- 826 Defined in [CCA 1974 s.189\(1\)](#); above, para.[41-050](#). See [CCA 1974 s.77\(5\)](#).
- 827 Defined in [CCA 1974 s.189\(1\)](#) (as amended by [SI 2004/3236 art.2\(2\)](#)) to mean “deliver or send by appropriate method”.
- 828 See above, para.[41-086](#). See also [CCA 1974 s.180](#).

- 829 See above, para.41-091.
- 830 See *NRAM Plc v McAdam & Hartley [2015] EWCA Civ 751*, reversing [2014] EWHC 4174 (Comm): (obiter) s.77 does not apply to non-regulated agreements that are documented as regulated agreements. See also CCA 1974 s.189B(3), Sch.2A: in CCA 1974 s.77, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “current bill payer”/“previous bill payer” (as defined in CCA 1974 s.189B(6)). Note s.77A (para.41-129, below) which requires the creditor *automatically* to provide a statement of account annually. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see para.6.31) that the obligation to provide information in s.77 could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation.
- 831 CCA 1974 s.77(1). The amount was raised from 15p to 50p by SI 1983/1571 and to £1 by SI 1998/997. See *Carey v HSBC Bank Plc [2009] EWHC 3417 (QB)* (on the similar CCA 1974 s.78 copy (below, para.41-132) requirement). See also the Guidance in the FCA Handbook CONC 13.
- 832 CCA 1974 s.77(1). But see s.77(2) (modification where creditor possesses insufficient information to comply with (c)). See also CCA 1974 s.172 (statement binding, below, para.41-138), and SI 1983/1557 reg.7. See also CCA 1974 s.86E(3) (if a “default sum” (see CCA 1974 s.187A and below, para.41-135) is payable, the statement may incorporate the notice of default sum required by s.86E) and CCA 1974 s.130A(5) (if post-judgment interest is payable, the statement may incorporate the notice required under s.130A(5)).
- 833 Prescribed by SI 1983/1569.
- 834 CCA 1974 s.77(4)(a). The court presently has no discretion to order enforcement (although this may change as a result of the implementation of the FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above), see para.41-129. See *McGuffick v Royal Bank of Scotland Plc [2009] EWHC 2386, [2010] C.C.L.R. 2*, on the meaning of “enforcement” (does not cover reporting default to credit reference agency) and for confirmation that the creditor’s contractual rights are merely *unenforceable*, not extinguished. Section 77(4)(b) (an offence was committed after one month) was repealed by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.30(1) and Sch.2 para.19.
- 835 Inserted by the Consumer Credit Act 2006 s.6 from 1 October 2008 (see SI 2007/3300 art.3(3)) but applicable to agreements whenever made. New subss.(1A)–(1E) were substituted and amendments to subss.(5) and (7) made on 1 October 2008 by SI 2008/2826. See also the new subs.(9) (inapplicable to unauthorised overdrawing on current account) inserted by SI 2010/1010 reg.23. See CCA 1974 s.189B(3), Sch.2A: in CCA 1974 s.77A, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “current bill payer” (as defined in CCA 1974 s.189B(6)). Note s.77 (para.41-128, above), which enables the debtor to request a statement of the account (together with a copy of the executed agreement etc.). The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004

(note), above) states (see para.6.31) that the obligation to provide information in s.77A could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation. Moreover (see paras 7.91–7.92) it suggests that the court be given power (similar to that in CCA 1974 s.127, see para.41-201, below) “to mitigate the risk of disproportionate outcomes”.

- 836 Defined in CCA 1974 ss.10(1)(b), 189(1); above, para.41-026.
- 837 Defined in CCA 1974 s.189(1); above, para.41-050. See s.77A(8).
- 838 Defined in CCA 1974 s.189(1) (as amended by SI 2004/3236 art.2(2)) to mean “deliver or send by appropriate method”.
- 839 CCA 1974 s.77A(3). cf. statements under CCA 1974 ss.77, 78, 79.
- 840 CCA 1974 s.77A(1), except where relieved under s.77A(4) (no sums payable).
- 841 See SI 2007/1167 regs 3–12 and Sch.1, as amended by SI 2008/1751 and SI 2014/2369. Section 172 (statements binding, below, para.41-143) does *not* apply to s.77A statements. See also CCA 1974 s.86E(3) (if a “default sum” (see s.187A and below, para.41-135) is payable, the statement may incorporate the notice of default sum required by s.86E) and CCA 1974 s.130A(5) (if post-judgment interest is payable, the statement may incorporate the notice required under s.130A(5)).
- 842 See *McGuffick v Royal Bank of Scotland Plc [2009] EWHC 2386 (Comm), [2010] C.C.L.R. 2*, (in relation to the similar CCA 1974 s.77) on the meaning of “enforcement”, noted above, para.41-128.
- 843 CCA 1974 s.77A(5)–(6). “Default sums” (defined in CCA 1974 s.187A, see below, para.41-135) that would have become payable during the period of non-compliance (or would have become payable thereafter in connection with a breach during that period) are irrecoverable.
- 844 [2014] EWHC 291 (Ch), [2014] C.C.L.R. 7.
- 845 See above, para.41-011.
- 846 See above, para.41-026.
- 847 Added on 1 February 2011 by SI 2010/1010 reg.26. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see para.5.24) that s.77B could be repealed and replaced by an FCA rule imposing a corresponding obligation without adversely affecting the appropriate degree of consumer protection. The sanction for breach of an FCA rule (private a right of action for damages under FSMA 2000 s.138D) would be equivalent to the breach of statutory duty action under s.77B(8). However the Review adds (see para.6.26) that repeal and replacement by an FCA rule, should other related provisions remain in the CCA 1974 (for example ss.77–79, below, para.41-128 et seq.), would result in undue fragmentation of the regime and so such a step should be considered in that wider context.
- 848 See CCA 1974 s.77B(3)–(5).
- 849 See CCA 1974 s.77B(7). cf. statements under CCA 1974 ss.77, 78, 79.
- 850 See CCA 1974 s.77B(8). This is in contrast to the “unenforceability” sanction for breach of the other “information” provisions: CCA 1974 ss.77(4)(a), 77A(6)(a), 78(6)(a), 79(3)(a).
- 851 Within s.140A, see below, paras 41-213 et seq.

- 852 When the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016, this exclusion ceased to apply to so-called “residential renovation agreements” (as defined in CCA 1974 s.189(1) to mean, essentially, unsecured loans to renovate residential property) above this threshold: see amendment to s.77B in SI 2015/910 art.3 and Sch.1 para.2(8).
- 853 See CCA 1974 s.77B(9). Note CCA 1974 s.77B(10): in relation to the business exemption, RAO art.60C(3)–(7), above, para.41-047, apply.
- 854 Defined in CCA 1974 ss.10(1)(b), 189(1); above, para.41-026.
- 855 Defined in CCA 1974 s.189(1); above, para.41-050. See CCA 1974 s.86B(12)(b).
- 856 CCA 1974 s.17, above, para.41-049. See CCA 1974 s.86B(12)(b).
- 857 The obligation also arises in relation to regulated hire agreements.
- 858 Added by the Consumer Credit Act 2006 s.9 and coming into force on 1 October 2008 (see SI 2007/3300) but see the transitional provisions in the 2006 Act Sch.3 para.6. Section 86B was amended by SI 2008/2826 and to provide for “green deal plans” (see CCA 1974 s.189B) by the Energy Act 2011 and SI 2014/436. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see para.6.31) that the obligation to provide information in s.86B could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation.
- 859 Defined in CCA 1974 s.189(1) (as amended by SI 2004/3236. Art.2(2)) to mean “deliver or send by appropriate method”.
- 860 CCA 1974 s.86B(8) and see the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 (SI 2007/1167) regs 19–23 and Sch.3, as amended by SI 2008/1751. See also CCA 1974 s.86E(3) (if a “default sum” (see CCA 1974 s.187A and below, para.41-135) is payable, the notice may incorporate the notice of default sum required by s.86E) and CCA 1974 s.130A(5) (if post-judgment interest is payable, the notice may incorporate the notice required under s.130A(5)). Section 172 (statements binding, below, para.41-143) does *not* apply to s.86B notices.
- 861 Or lesser interval, CCA 1974 s.86B(9).
- 862 CCA 1974 s.86B(1), (2)(a).
- 863 CCA 1974 s.86B(2)(b), (4). However a first NOSIA must always be sent, even if the debtor ceases to be in arrears before it is issued: s.86B(3).
- 864 CCA 1974 s.86B(7). cf. statements under CCA 1974 ss.77, 78, 79.
- 865 CCA 1974 s.86B(6).
- 866 CCA 1974 s.86A(1), (2) (added by the Consumer Credit Act 2006 s.8) requires the FCA (previously the OFT) to prepare and publish such a sheet. It is available on the FCA website.
- 867 CCA 1974 s.129(1)(ba), see below, para.41-203.
- 868 CCA 1974 s.86D(1), (3) (added by the Consumer Credit Act 2006 s.11).
- 869 CCA 1974 s.86D(4) (added by the Consumer Credit Act 2006 s.11). For “default sums”, see below, para.41-135.
- 870 It was amended by SI 2006/1508 and to provide for “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) by the Energy Act 2011. See (i) *McGuffick v Royal Bank of Scotland Plc [2009] EWHC 2386 (Comm), [2010] C.C.L.R. 2*, above, para.41-128

- (on the similar provision in CCA 1974 s.77) (ii) *Carey v HSBC Bank Plc [2009] EWHC 3417 (QB)* and *Phoenix Recoveries (UK) Ltd v Kotecha [2011] EWCA Civ 105* (on the copy requirement under CCA 1974 s.78). See also FCA's Guidance in its Handbook CONC 13, replacing (in part) the OFT's Guidance on ss.77, 78 and 79 of the Consumer Credit Act 1974 (OFT 1272 Oct 2010). The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see para.6.31) that the obligation to provide information in s.78 could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation.
- 871 See also SI 1983/1569 (period of 12 working days prescribed for giving of statement on request); SI 1998/997 (fee raised to £1). See also SI 1983/1557, as amended by SI 2004/2619 and SI 2004/3236 (copies).
- 872 See above, para.41-128. But note s.78(1A): Where a request under s.78(1) also amounts to a request under the Payment Services Regulations 2017 (SI 2017/752) reg.49 (information during period of contract, see generally, above, para.36-225), no fee is payable under s.78 (as none is payable under those regulations).
- 873 Defined in CCA 1974 ss.10, 189(1); above, para.41-024.
- 874 Defined in CCA 1974 s.189(1); above, para.41-050. See CCA 1974 s.78(7).
- 875 CCA 1974 s.78(1). But see s.78(2) (modification if creditor possesses insufficient information to comply with (c)) and s.78(3) (exceptions where no sums payable or repeated requests made). See also s.172 (statement binding, below, para.41-143), and SI 1983/1557 reg.7. See also s.86E(3) (if a "default sum" (see s.187A and below, para.41-135) is payable, the statement may incorporate the notice of default sum required by s.86E) and s.130A(5) (if post-judgment interest is payable, the statement may incorporate the notice required under s.130A(5)).
- 876 Prescribed by SI 1983/1569.
- 877 CCA 1974 s.78(6). Originally, if the default continued for one month, an offence was committed (s.78(6)(b)) but this provision was repealed by the Consumer Protection from Unfair Trading Regulations 2008 SI 2008/1277 reg.30(1) and Sch.2 para.20.
- 878 Defined in CCA 1974 ss.10(1)(b), 189(1); above, para.41-024.
- 879 Defined in CCA 1974 s.189(1); above, para.41-050. See CCA 1974 s.78(7).
- 880 Defined in CCA 1974 ss.17, 189(1); above, para.41-049. See CCA 1974 s.78(7).
- 881 Defined in CCA 1974 s.189(1) (as amended by SI 2004/3236 art.2(2)) to mean "deliver or send by appropriate method".
- 882 Although, in contrast to CCA 1974 s.77A(3) (see above, para.41-129) and CCA 1974 s.86B(7) (see above, para.41-131), there is no explicit provision to this effect, it seems that one is likely to be implied.
- 883 See SI 1983/1570. And see s.78(4A) (added by the Consumer Credit Act 2006 s.7) which provides for regulations (see SI 2007/1167, as amended) requiring the statement to include prescribed information about the consequences of failing to make payments or of making minimum payments. Section 172 (statements binding, below, para.41-143) does not apply to periodic statements under s.78(4) but they may be binding at common law (see *United Overseas Bank v Jiwani [1976] 1 W.L.R. 694*). See also s.86E(3) (if a "default sum" (see

- s.187A and below, para.41-135) is payable, the statement may incorporate the notice of default sum required by s.86E) and s.130A(5) (if post-judgment interest is payable, the statement may incorporate the notice required under s.130A(5)).
- 884 s.78(4)(b).
- 885 See above, para.41-129.
- 886 s.78(4)(a). But see s.185(2)–(2D) (as substituted (from 1 October 2008) by the Consumer Credit Act 2006 s.7(3) (joint debtors)).
- 887 However, breach (in common with all breaches of the CCA 1974) is a “domestic infringement” capable of being enforced under the Enterprise Act 2002 Pt 8. Moreover, it could give rise to disciplinary action by the FCA (see above, para.41-065) and possibly render the agreement an “unfair relationship” within CCA 1974 ss.140A–140C, see below, paras 41-213 et seq.
- 888 Defined in CCA 1974 ss.10(1)(a), 189(1); above, para.41-024.
- 889 Defined in CCA 1974 s.189(1); above, para.41-050. See CCA 1974 s.86C(7)(b).
- 890 CCA 1974 s.17, above, para.41-049. See CCA 1974 s.86C(7)(b).
- 891 Added to the CCA 1974 by the Consumer Credit Act 2006 s.10 and coming into force on 1 October 2008 (see SI 2007/3300) but see the transitional provisions in the 2006 Act Sch.3 para.7. Section 86C was amended by SI 2008/2826. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see para.6.31) that the obligation to provide information in s.86C could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation.
- 892 Defined in CCA 1974 s.189(1) (as amended by SI 2004/3236 art.2(2)) to mean “deliver or send by appropriate method”.
- 893 CCA 1974 s.86C(6) and see the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 (SI 2007/1167) regs 24–26 and Sch.3. See also s.86E(3) (if a “default sum” (see s.187A and below, para.41-135) is payable, the notice may incorporate the notice of default sum required by s.86E) and s.130A(5) (if post-judgment interest is payable, the notice may incorporate the notice required under s.130A(5)). Section 172 (statements binding, below, para.41-143) does *not* apply to s.86C notices.
- 894 CCA 1974 s.86C(1), (2). Hence a debtor who repeatedly misses every second payment will not receive a NOSIA.
- 895 See above, para.41-133.
- 896 CCA 1974 s.86C(4).
- 897 CCA 1974 s.86C(5). cf. statements under ss.77, 78, 79.
- 898 CCA 1974 s.86C(3).
- 899 CCA 1974 s.86A(1), (2) (added by the Consumer Credit Act 2006 s.8) requires the FCA to prepare and publish by General Notice such a sheet. It is available on the FCA website.
- 900 CCA 1974 s.129(1)(ba), see below, para.41-203.
- 901 CCA 1974 s.86D(2), (3), added by the Consumer Credit Act 2006 s.11.
- 902 CCA 1974 s.86D(4), added by the Consumer Credit Act 2006 s.11. For “default sums”, see below, para.41-135.

- 903 CCA 1974 s.187A, added by the Consumer Credit Act 2006 s.18.
- 904 Added to the CCA 1974 by the Consumer Credit Act 2006 s.12 and coming into force on 1 October 2008 (see SI 2007/3300) but see the transitional provisions in the 2006 Act Sch.3 para.8 (applicable to agreements whenever made but only to default sums payable after 1 October 2008). See also CCA 1974 s.189B(3), Sch.2A: in s.86E, references to “debtor” in relation to “green deal plans” (as defined in s.189(1), see below, para.41-261) are to be read as references to the “current bill payer”/“previous bill payer” (as defined in s.189B(6)). The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see para.6.31) that the obligation to provide information in s.86E could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation.
- 905 Defined in CCA 1974 s.189(1); above, para.41-050. See CCA 1974 s.86C(7)(b).
- 906 CCA 1974 s.17, above, para.41-049. See CCA 1974 s.86C(7)(b).
- 907 The obligation arises in relation to both regulated credit and regulated hire agreements.
- 908 Defined in CCA 1974 s.189(1) (as amended by SI 2004/3236 art.2(2)) to mean “deliver or send by appropriate method”.
- 909 CCA 1974 s.86E(7)(b) and see the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 (SI 2007/1167) regs 27–32 and Sch.4. See also s.130A(5) (if post-judgment interest is payable, the notice may incorporate the notice required under s.130A(5)). Section 172 (statements binding, below, para.41-143) does *not* apply to s.86E notices.
- 910 The period prescribed by the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 (SI 2007/1167) reg.28.
- 911 CCA 1974 s.86E(6).
- 912 CCA 1974 s.86E(3). For example, information statements under CCA 1974 ss.77, 77A or 78, NOSIAs under s.86B or 86C, default notices under s.87. But other communications (not given “by virtue of another provision of [the 1974] Act”) cannot incorporate the notice which must therefore be given separately.
- 913 CCA 1974 s.86E(5).
- 914 And only simple interest may be charged on default sums: CCA 1974 s.86F(2).
- 915 As “give” is defined as “deliver or send by appropriate method to” and hence connotes receipt.
- 916 There is no explicit provision as regards the charging of interest where a “late” notice is given after the expiry of the prescribed 35 days (cf. CCA 1974 s.86D(4)(a)) and it may be that such a notice is not a “notice under this section” (in that it is outside the prescribed period) and hence the liability to pay interest in relation to the default sum under s.86E(4) can never arise. (See, in relation to annual statements under s.77A (above, para.41-129) that did not comply with the regulations, *JP Morgan Chase Bank, National Association v Northern Rock (Asset Management) Plc [2014] EWHC 291(Ch.)*.) However, the terms of s.86E(5) suggest that a “late” notice is a “notice under this section” and hence interest can be charged 28 days after such a late notice is received.
- 917 See above, para.41-135.

- 918 CCA 1974 s.86F(2). And see s.86E(4), above at para.41-135. See CCA 1974 s.189B(3), Sch.2A: in s.86F, references to “debtor” in relation to “green deal plans” (as defined in s.189(1), see below, para.41-261) are to be read as references to the “current bill payer”/“previous bill payer” (as defined in s.189B(6)). The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.108) that s.86F should be retained in legislation as repeal would adversely affect the appropriate degree of consumer protection. Whilst an FCA rule could impose corresponding obligations, it could not automatically render void or invalid a term providing for compound interest on default sums; a challenge to such a term would require the debtor to take the initiative.
- 919 Under CCA 1974 s.86B (fixed-sum credit and hire), above, para.41-131 or CCA 1974 s.86C (running-account credit), above, para.41-134: see CCA 1974 s.86D(4)(b).
- 920 Defined in CCA 1974 ss.10(1)(b), 189(1); above, para.41-026.
- 921 Defined in CCA 1974 ss.10, 189(1); above, para.41-024.
- 922 Defined in CCA 1974 ss.15, 189(1); above, para.41-036.
- 923 Defined in CCA 1974 s.189(1); see below, para.41-182.
- 924 Prescribed by SI 1983/1569.
- 925 The fee was raised from 15p to 50p by SI 1983/1571 and to £1 by SI 1998/997.
- 926 Defined in CCA 1974 s.189(1) (as amended by SI 2004/3236 art.2(2)) to mean “deliver or send by appropriate method”.
- 927 If a different person from the debtor or hirer: see below, para.41-185.
- 928 See above, paras 41-128—41-133 (CCA 1974 ss.77–78).
- 929 CCA 1974 ss.107–109. See also CCA 1974 s.172 (statements binding, below, para.41-143). See CCA 1974 s.189B(3), Sch.2A: in s.107 references to “debtor” in relation to “green deal plans” (as defined in s.189(1), see below, para.41-261) are to be read as references to the “improver” (as defined in s.189B(6)).
- 930 CCA 1974 ss.107(1)(a), (b), 109(1)(a), (b). See below, para.41-184, for the definition of “security instrument”. See also SI 1983/1557, as amended by SI 2004/2619 and SI 2004/3236.
- 931 CCA 1974 ss.107(4)(a), 108(4)(a), 109(3)(a). Originally, if the default continued for one month, an offence was committed (ss.107(4)(b), 108(4)(b), 109(3)(b)) but these provisions were repealed by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.30(1) and Sch.2 paras 25–27.
- 932 CCA 1974 ss.107(5), 108(5), 109(4). See CCA 1974 s.189(1) (definition); above, para.41-050.
- 933 Defined in CCA 1974 s.189(1); see above, para.41-050. See CCA 1974 s.110(2)(a).
- 934 Prescribed by SI 1983/1569.
- 935 The fee was raised from 15p to 50p by SI 1983/1571 and to £1 by SI 1998/997.
- 936 Defined in CCA 1974 s.189(1) (as amended by SI 2004/3236 art.2(2)) to mean “deliver or send by appropriate method”.
- 937 Defined in CCA 1974 ss.105, 189(1); below, para.41-184.

- 938 CCA 1974 s.110(1) (subject to the exceptions listed in s.110(2)(b), (c)). The Consumer Credit (Agreements) Regulations 1983 SI 1983/1553, as amended (especially by SI 2004/1482) regs 2, 3 and Sch.1 para.21, and Sch.3 para.9, made under ss.60 and 105(9), require any security instrument executed in relation to the agreement *before* the making thereof to be referred to and so “embodied in” the regulated agreement itself, so that the debtor or hirer will be entitled to a copy under CCA 1974 ss.77 to 79. See the less prescriptive requirements of the Consumer Credit (Agreements) Regulations 2010 (SI 2010/1014) reg.3 and Sch.1. See also CCA 1974 ss.180, 181. See CCA 1974 s.189B(3), Sch.2A: in s.110 references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver” (as defined in CCA 1974 s.189B(6)).
- 939 CCA 1974 s.110(3)(a). Originally, if the default continued for one month, an offence was committed (s.110(3)(b)) but this provision was repealed by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.30(1) and Sch.2 para.28.
- 940 Defined in CCA 1974 s.189(1); above, para.41-050.
- 941 s.80(1). See CCA 1974 s.189B(3), Sch.2A: in s.80, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver” (as defined in CCA 1974 s.189B(6)).
- 942 CCA 1974 ss.80(2), 167 and Sch.1. Although many of the criminal offences imposed by the CCA 1974 for breaches of notice requirements were repealed by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.30(1) and Sch.2, this one (which exceptionally imposes criminal liability on the debtor or hirer) has been retained. See the FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) which states (see para.7-97) that the FCA’s general view is that “the criminal offences in the CCA may no longer be necessary”.
- 943 Defined in CCA 1974 ss.8, 189(1); above, para.41-017.
- 944 Subject to CCA 1974 s.97(2) (repeated request).
- 945 Prescribed by SI 1983/1564 and reduced from 12 days by SI 2004/1483 reg.9.
- 946 The request need not (since 1 February 2011) be in writing unless the agreement is secured on land: s.97(2A), added by SI 2010/1010 (and note the transitional and “opt-in” provisions in regs 100–101).
- 947 Defined in CCA 1974 s.189(1) (as amended by SI 2004/3236 art.2(2)) to mean “deliver or send by appropriate method”.
- 948 CCA 1974 s.97(1) (as amended by SI 2010/1010 reg.33). The prescribed form and particulars are set out in the Consumer Credit (Settlement Information) Regulations 1983 (SI 1983/1564, as amended by SI 2004/1483 and SI 2004/3236). The settlement figure has to take account of the contractual or statutory rebate on early settlement: see s.95 (below, para.41-158) and SI 2004/1483, as amended by SI 2004/2619; *Home Insulation v Wadsley [1988] 10 C.L.Y. 419*. See also s.172 (statements binding, below, para.41-143); and *Lombard North Central Plc v Stobart, The Times, 2 March 1990, CA* (estoppel of creditor at common law). See *NRAM Plc v McAdam & Hartley [2015] EWCA Civ 751, reversing [2014] EWHC 4174 (Comm)*: (obiter) s.97 does not apply to non-regulated agreements that are documented as regulated agreements. See also CCA 1974 s.189B(3), Sch.2A: in s.97, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see para.41-261) are

to be read as references to the “improver”/“current bill payer” (as defined in CCA 1974 s.189B(6)). There is a similar obligation under CCA s.97A to provide a settlement figure after part-payment (see especially s.97A(2)(h), below, para.41-160). See the FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) which notes (see para.6.31) that the obligation to provide a settlement statement in s.97 could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation.

- 949 CCA 1974 s.97(3)(a). Section 97(3)(b): (offence was committed after one month) repealed by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.30(1) and Sch.2 para.23.
- 950 See the FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) which notes (see Annex 5, para.180) that s.103 could be replaced by an FCA rule (although s.172(2), para.41-143, below, would no longer apply) without adversely affecting the appropriate degree of consumer protection, especially as the sanction for breach of an FCA rule (action under FSMA 2000 s.138D) is similar to the breach of statutory duty sanction for breach of s.103.
- 951 Defined in CCA 1974 s.189(1); above, para.41-050. See CCA 1974 s.103(4).
- 952 Prescribed by SI 1983/1569.
- 953 CCA 1974 s.103(1). No doubt he would assert that the person serving the notice is not indebted to him under the agreement if he could not trace the agreement or no longer had any record of it. See also CCA 1974 s.172(2) (statements binding, below, para.41-143).
- 954 CCA 1974 s.103(2).
- 955 CCA 1974 s.103(6), added by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.30(1) and Sch.2 para.24(b). Section 103(5) (offence committed after one month): repealed by SI 2008/1277 reg.30(1) and Sch.2 para.24(a).
- 956 CCA 1974 s.103(3). And note that CCA 1974 s.185 (as amended (from 1 October 2008) by the Consumer Credit Act 2006 s.7(3) (copies to joint debtors/hirers)) does not apply as there is no actual or prospective regulated agreement. See CCA 1974 s.189B(3), Sch.2A: in s.103 references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver” (as defined in CCA 1974 s.189B(6)).
- 957 But not the automatic periodic statements required by CCA 1974 s.77A (fixed-sum agreement), see above, para.41-120 or s.78(4) (running-account agreement), see above, para.41-133.
- 958 Above, paras 41-128, 41-132. Note that s.172 does not apply to statements given under CCA 1974 s.77A, 77B or 78(4) nor to notices under s.86B, 86C or 86E.
- 959 Above, para.41-137.
- 960 Above, para.41-141.
- 961 Above, para.41-142.
- 962 s.172(2).
- 963 s.172(3).
- 964 See *Kelly v Solari (1841) 9 M. & W. 54*; Vol.I, para.32-044.

- 965 See, e.g. *Skyring v Greenwood* (1825) 4 B. & C. 281; *Baylis v Bishop of London* [1913] 1 Ch. 127; *Holt v Markham* [1923] 1 K.B. 504; *Larner v LCC* [1949] 2 K.B. 683; *Lloyds Bank Ltd v Brooks* (1950) 6 Legal Decisions Affecting Bankers 161; *United Overseas Bank v Jiwani* [1976] 1 W.L.R. 964; *Avon CC v Howlett* [1983] 1 W.L.R. 605; *Lombard North Central Plc v Stobart, The Times*, 2 March 1990, CA; Vol.I, paras 32-199—32-208.
- 966 SI 2017/752. See generally, above, paras 36-224 et seq.
- 967 See especially: regs 43–47 (“single payment services contracts”), regs 48–54 (“framework contracts”), reg.66 (charges), regs 67–80 (payment).
- 968 See SI 2017/752 reg.41 (disapplying regs 50–51 and modifying Pt 6) and reg.64 (modifying Pt 7).

(h) - Variation of Agreements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(h) - Variation of Agreements⁹⁶⁹

Variation and termination

- 41-145 The parties to a regulated credit or hire agreement are generally ⁹⁷⁰ free to terminate that agreement by mutual consent and to substitute a new agreement therefor. ⁹⁷¹ No particular form is required to effect a termination; but the new agreement must then comply *in all respects* with the provisions of the **1974 Act** and regulations made thereunder applicable to original agreements. ⁹⁷² The parties to a consumer credit or consumer hire agreement are likewise free to vary the agreement by mutual consent. ⁹⁷³ Section 82 ⁹⁷⁴ of the Act, however, contains special provisions relating to the variation of agreements. ⁹⁷⁵ In principle, the question whether an agreement has merely been varied or whether it has been terminated and a new agreement substituted, depends upon the intention of the parties in each particular case. ⁹⁷⁶ But, in view of s.82(2), it seems probable that an agreement which “varies or supplements an earlier agreement” will not be construed as a termination and substitution unless such is manifestly the intention of the parties. ⁹⁷⁷

Unilateral variation under a power in agreement: the general rule⁹⁷⁸

- 41-146 If the creditor or owner varies a regulated agreement under a power contained in the agreement, by virtue of s.82(1) the variation generally does not take effect before notice of it is given to the debtor or hirer in the prescribed ⁹⁷⁹ form. However, largely as a result of the implementation of the Consumer Credit Directive, ⁹⁸⁰ there are some special provisions in relation to the variation of interest rates. ⁹⁸¹ The general rule requires notice to be served before the variation takes effect,

but in certain circumstances notice of a variation in the interest rate (when the special “Directive” provisions do not apply) may be given by public announcement in the press.⁹⁸² A typical example where notice is required is where an owner varies the rentals payable under a leasing agreement, in pursuance of a provision in the agreement entitling him so to do. But a provision in the agreement for the *automatic* adjustment of rentals in the event of tax changes, will not attract the requirement of notice.⁹⁸³ A term in a credit or hire agreement that enables the creditor or owner to alter unilaterally the terms of the agreement or any characteristic of the product or service to be provided may, in certain circumstances, not be binding on the debtor or hirer if successfully challenged under the [Consumer Rights Act 2015 Pt 2](#).⁹⁸⁴

Unilateral variation of interest rate under a power in agreement

41-147 Originally, unilateral variations in interest rate were covered by the general rule in [s.82\(1\)](#).⁹⁸⁵ The implementation of the Consumer Credit Directive⁹⁸⁶ has resulted in the addition of a new [s.78A](#),⁹⁸⁷ which generally imposes more onerous conditions when the interest rate is varied, although [s.82\(1\)](#) continues to apply to agreements secured on land (which are outside the Directive⁹⁸⁸) unless the agreement secured on land is an overdraft and the rate is reduced.⁹⁸⁹ [Section 78A](#) generally requires certain information to be given in writing before a change in interest rate under a regulated credit agreement can take effect. The information (set out in [s.78A\(3\)](#)) comprises: (a) the variation, (b) the new repayment amounts (if changed), and (c) if the number or frequency of payments is to change, the new number or frequency. However, there are some qualifications to this general obligation. First,⁹⁹⁰ the obligation does not arise (and hence the rate may be varied without more) where, essentially, the rate varies according to a publicly available reference rate (with information about the reference rate being available on the creditor’s premises) and the creditor is contractually obliged to inform the debtor in writing periodically of the information set out in [s.78A\(3\)](#). Second,⁹⁹¹ in the case of overdrafts, the obligation only arises if the rate of interest *increases* and it is only an obligation to inform of the variation (and not the other matters in relation to changes in payments). Third,⁹⁹² the obligation does not apply to two categories of agreement (so-called “excluded agreements”): (a) so-called overdraft “overrunning” (a debtor-creditor agreement arising where a current account holder overdraws on the account without a pre-arranged overdraft or exceeds a pre-arranged overdraft limit)⁹⁹³; or (b) agreements secured on land (as these are outside the Directive and governed by [s.82\(1\)](#)).

Mutual variation by subsequent agreement: “modifying agreement”

41-148

Section 82(2) deals with the situation where an agreement (a “modifying agreement”) “varies or supplements” an earlier agreement.⁹⁹⁴ A modifying agreement will arise, for example, where a further advance is made under an existing fixed-sum loan agreement⁹⁹⁵; where additional goods are agreed to be let together with those already let under an existing hire-purchase agreement (an “add-on” agreement); where part of the goods comprised in an existing agreement are released from that agreement, or other goods substituted therefor; where a fixed-term hire agreement is extended by agreement for a further term; and where the security provided in respect of an existing agreement is augmented, changed or released, or where security is now provided for an existing unsecured agreement. The effect of a modifying agreement is:

- (i)to revoke the earlier agreement; and
- (ii)to reproduce the combined effect of the two agreements, so that (*inter alia*) obligations outstanding in relation to the earlier agreement are treated as outstanding instead in relation to the modifying agreement.⁹⁹⁶

However, so that the effect of s.82(2) does not result in overlap between the two regulatory regimes presently applicable to mortgages (the one now operated by the FCA under the [1974 Act](#) and the other by the FCA under the [Financial Services and Markets Act 2000](#)),⁹⁹⁷ it does not apply⁹⁹⁸ if the earlier agreement or the modifying agreement is an FCA-regulated exempt agreement under [RAO art.60C\(2\)](#).⁹⁹⁹ Similarly, s.82(2) does not apply if the earlier agreement or the modifying agreement is an exempt agreement under [RAO art.60D](#).¹⁰⁰⁰ Moreover, when the statutory right to *part* settle a regulated credit agreement was introduced as a result of the Consumer Credit Directive,¹⁰⁰¹ s.82(2) was disapplied to any consequent variations of the agreement.¹⁰⁰²

- 41-149 If the earlier agreement is a regulated agreement, but the modifying agreement is not, then the modifying agreement is treated as a regulated agreement, unless the modifying agreement is for running-account credit¹⁰⁰³ or is an exempt agreement regulated under the [Financial Services and Markets Act 2000](#) or an exempt agreement under [RAO art.60D](#).¹⁰⁰⁴ Thus if the earlier agreement was a loan of £20,000 for a business purposes but that agreement is varied or supplemented by a further advance so that the balance payable is now fixed-sum credit of £30,000, the agreement is still a regulated agreement.¹⁰⁰⁵ If the earlier agreement was not a regulated agreement, but the effect of the variation is such as to make the modifying agreement a regulated agreement, the modifying agreement will be a regulated agreement for the purposes of the Act.¹⁰⁰⁶ For example, if the earlier agreement was for a loan of £26,000 for a business purpose (and so not a regulated credit agreement¹⁰⁰⁷), but the outstanding balance under that agreement has been reduced to £18,000 and there is a further advance of £5,000, so that the balance payable is now £23,000, the modifying agreement (comprising as it does the combined effect of the earlier agreement and the variation) is a regulated agreement. On the other hand, in this example, if the amount of the further advance exceeded £7,000, so that the total balance now payable under the modifying agreement is in excess of £25,000, the modifying agreement is not regulated.¹⁰⁰⁸

- 41-150 A variation may convert one type of agreement mentioned in the [1974 Act](#) into another type of agreement. For example, the taking of a land mortgage as security for a previously unsecured loan agreement will mean that the modifying agreement attracts the “special pause” provisions in [ss.58](#) and [61\(2\)](#) and [\(3\)](#) of the [Act](#)¹⁰⁰⁹ even though the earlier agreement did not do so. And an exempt agreement¹⁰¹⁰ may become a regulated agreement by reason of the fact that the agreement, as varied, no longer falls within the exemption.¹⁰¹¹

Cancellation of modifying agreement

- 41-151 If the earlier agreement is an agreement to which the [s.66A](#) “right of withdrawal”¹⁰¹² applies or is a “cancellable” agreement¹⁰¹³ and the modifying agreement is made within the period allowed for withdrawal from or cancellation of the earlier agreement, then whether or not the modifying agreement is itself subject to the right of withdrawal or is itself a cancellable agreement, it can be withdrawn from or cancelled within that period,¹⁰¹⁴ unless the modifying agreement is an exempt agreement under [RAO art.60C\(2\)](#) or [RAO art.60D](#).¹⁰¹⁵ Otherwise the modifying agreement cannot be withdrawn from or cancelled.¹⁰¹⁶

Mere indulgence

- 41-152 It would appear that the word “varies” should be construed in its technical and legal sense, that is to say, an alteration, as a matter of contract, of contractual obligations by mutual agreement of the parties.¹⁰¹⁷ A mere indulgence by the creditor or owner in allowing the debtor or hirer further time to pay, even at his request, would not constitute a modifying agreement, but take effect as a waiver or equitable forbearance.¹⁰¹⁸ And if, for example, a creditor, on request, agrees to take payment by instalments,¹⁰¹⁹ or to reduce the amount of the instalments payable, or to extend the repayment period, or to grant to the debtor a payment “holiday”, this will ordinarily not amount to a variation if the amount payable by the debtor under the agreement remains unchanged, i.e. there is no additional credit charge.¹⁰²⁰ On the other hand, there will undoubtedly be situations where, for example, by mutual agreement, accumulated arrears and future instalments are to be discharged in accordance with a new rescheduled payment pattern. In such a case, it seems probable that this will vary the earlier agreement and so give rise to a modifying agreement.

Form, etc. of modifying agreement

- 41-153 A modifying agreement that is a regulated agreement must, as a general rule, comply with all the provisions of Pt V of the 1974 Act, including the special provisions applicable to modifying agreements contained in the Consumer Credit (Agreements) Regulations.¹⁰²¹ Moreover, the other provisions applicable, e.g. to the supply of copies,¹⁰²² must also be observed. However, if the earlier agreement is a regulated agreement for running-account credit,¹⁰²³ and by the modifying agreement the creditor allows the credit limit to be exceeded but intends the excess to be merely temporary, e.g. a temporary excess drawing on a bank overdraft, Pt V of the 1974 Act (except s.56)¹⁰²⁴ does not apply to the modifying agreement.

Protected goods

- 41-154 Where an agreement varies or supplements a regulated hire-purchase or conditional sale agreement, provision is made in s.90 of the 1974 Act to safeguard the position of the debtor in relation to so-called “protected goods”.¹⁰²⁵

Unilateral or consensual variation?

- 41-155 It is not always easy to draw the line between s.82(1) (variation under a power in the agreement)¹⁰²⁶ and s.82(2) (where a subsequent “agreement” varies or supplements the agreement).¹⁰²⁷ In particular, it is unclear if s.82(1) applies in all cases where a creditor or owner reserves a contractual power to vary, even though the power can only be (or is in fact) exercised at the request or with the consent of the debtor or hirer, or whether it only applies where the creditor or owner has a *unilateral* power of variation so that any requisite request or consent of the debtor or hirer inevitably gives rise to an “agreement” that engages s.82(2) (and the onerous requirements applicable to “modifying agreements”¹⁰²⁸). It may be that much will depend on the appropriateness of imposing the more onerous requirements when s.82(2) applies.

Footnotes

¹ See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989);

- Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).
- 969 See generally, Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-083; and Goode, Consumer Credit: Law and Practice, Pt C, Ch.35. See also the FCA's *Final Guidance: Fairness of variation terms in financial services consumer contracts under the Consumer Rights Act 2015* (FG18/7), December 2018.
- 970 But see [CCA 1974 s.98A](#) (added from 1 February 2011 by [SI 2010/1010 reg.38](#), in implementation of the Consumer Credit Directive (see para.[41-011](#))), below, para.[41-175](#), which makes special provision for the termination of "open-ended" (i.e. of indefinite duration: see [s.189\(1\)](#)) consumer credit agreements, other than overdrafts and agreements secured on land.
- 971 See Vol.I, paras [25-027](#) et seq.
- 972 See above, paras [41-082](#) et seq.
- 973 See Vol.I, paras [25-034](#) et seq. But variation may discharge a guarantor: see below, para.[47-108](#).
- 974 As amended by the [Financial Services and Markets Act 2000 \(Consequential Amendments\) Orders 2005](#) ([SI 2005/2967](#)) and [2008](#) ([SI 2008/733](#)). These amendments sought to ensure that a variation under [s.82\(2\)](#) (see below) does not result in dual regulation of a varied mortgage under both the [Financial Services and Markets Act 2000](#) and the [Consumer Credit Act 1974](#). See also the amendment made by [SI 2008/2826](#) in relation to agreements exempt under [RAO art.60D](#) (previously [CCA 1974 s.16C](#)), above para.[41-041](#). Further amendments were effected in consequence of the Consumer Credit Directive (see above, para.[41-011](#)): see [SI 2010/1010 regs 15, 28 and 29](#) (addition of new subss.(6A)–(6B), (1A)–(1E) and (2B), respectively). For amendments consequent on the transfer of regulation to the FCA (see above, para.[41-002](#)), see [SI 2013/1881 art.20\(3\)](#). See also [CCA 1974 s.189B\(3\)](#), Sch.2A: in [s.82](#), references to "debtor" in relation to "green deal plans" (as defined in [CCA 1974 s.189\(1\)](#), see below, para.[41-261](#)) are to be read as references to the "improver"/"current bill payer"/"previous bill payer" (as defined in [CCA 1974 s.189B\(6\)](#)).
- 975 But [CCA 1974 s.82](#) (see [s.82\(7\)](#)) does not apply to non-commercial agreements (defined in [CCA 1974 s.189\(1\)](#); above, para.[41-050](#)). For regulations made: see [SI 1977/328](#) (as amended by [SI 1979/661](#); [SI 1979/667](#); [SI 2010/1010](#)).
- 976 *Morris v Baron & Co [1918] A.C. 1, 26; United Dominions Corp (Jamaica) Ltd v Shoucair [1969] 1 A.C. 340*. See Vol.I, para.[25-036](#).
- 977 For [CCA 1974 s.82\(2\)](#), see below, paras [41-148](#) et seq.
- 978 The more complex notice provisions imposed by the [Payment Services Regulations 2017](#) ([SI 2017/752](#)) reg.[50](#) in relation to agreements within their scope (as to which, see generally, above, paras [36-225](#) et seq.), has been disapplied in relation to [CCA 1974](#)-regulated agreements: see [SI 2017/752 reg.41\(2\)](#). The FCA's *Review of Retained Provisions of the Consumer Credit Act: Final Report* (see para.[41-004](#) (note), above) proposes (see Annex 5, para.[71](#)) that [s.82\(1\)](#) should be retained in legislation as repeal would adversely affect the appropriate degree of consumer protection. Whilst an FCA rule could impose equivalent obligations on creditors, it could not provide for equivalent consequences (in particular

- automatic invalidity); challenges to unfair variation terms under the [Consumer Rights Act 2015](#) require applications to court by the debtor. However (see para.6.30) the Review notes that the information requirements in secondary legislation could be replaced by FCA rules.
- 979 i.e. prescribed by regulation: see [SI 1977/328](#) (as amended by [SI 1979/661](#); [SI 1979/667](#); [SI 2010/1010](#)).
- 980 See above, para.41-011.
- 981 See [CCA 1974 s.82\(1A\)–\(1D\)](#) [s.78A](#) and below, para.41-147. Section 82(1) also does not apply (see [s.82\(1E\)](#)) to a so-called current account “overrunning”: see the special provisions in the FCA Handbook CONC 4.7 and CONC 6.3.3 and 6.3.4 (previously [CCA 1974 ss.74A](#) and [74B](#)), above, para.41-127.
- 982 See [SI 1977/328](#) (as amended by [SI 1979/661](#); [SI 1979/667](#); [SI 2010/1010](#)).
- 983 Moreover, if the owner reserves the right to determine whether or not to pass on VAT changes (by virtue of the [VAT Act 1994 s.89](#), changes in VAT are automatically incorporated in the consideration *unless* the agreement provides otherwise) the notice requirement is relaxed should the owner decide to pass on the VAT change.
- 984 Replacing (for contracts made on or after 1 October 2015) the [Unfair Terms in Consumer Contracts Regulations 1999 \(SI 1999/2083\)](#) Sch.2 para.1(j) and (k) and para.2(b) (see further, above, paras 40-227 et seq., especially paras 40-265 et seq.). It is submitted that a term which complies with [SI 1977/328](#) (see above) is not for that reason exempted from the Act by [s.73](#). See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-083; and above, paras 40-264 et seq. and below, para.41-297.
- 985 See above, para.41-146 and [Lombard Tricity Finance Ltd v Paton \[1989\] 1 All E.R. 918](#); [Paragon Finance Plc v Nash \[2001\] EWCA Civ 1466](#).
- 986 See above, para.41-011.
- 987 With effect from 1 February 2011, by [SI 2010/1010 reg.27](#). See [CCA 1974 s.189B\(3\)](#), Sch.2A: in [s.78A](#), references to “debtor” in relation to “green deal plans” (as defined in [CCA 1974 s.189\(1\)](#), see below, para.41-261) are to be read as references to the “improver”/“current bill payer” (as defined in [CCA 1974 s.189B\(6\)](#)).
- 988 See [CCA 1974 s.78A\(6\)\(b\)](#). Note also that whilst [s.82](#) does not apply to “non-commercial agreements” (see [s.82\(7\)](#)); for non-commercial agreements see above, para.41-050), [s.78A](#) does.
- 989 See [CCA 1974 s.82\(1B\), \(1D\)](#). There are no special provisions for such reductions (and compare the similar provision in relation to other overdrafts in [CCA 1974 s.78A\(4\)](#), below). Similarly, [s.82\(1\)](#) does not apply to the reduction of *charges* for overdrafts: 82(1C), (1D).
- 990 See [CCA 1974 s.78A\(2\)](#).
- 991 See [CCA 1974 s.78A\(4\)](#).
- 992 See [CCA 1974 s.78A\(6\)](#).
- 993 Because the special provisions in the FCA Handbook CONC 4.7 and CONC 6.3.3 and 6.3.4 (previously [CCA 1974 ss.74A](#) and [74B](#)), see above, para.41-127, apply in such a case.
- 994 See [SI 2008/831 art.4](#): the removal of the financial limit by the [Consumer Credit Act 2006 s.2\(1\)](#) (see above, para.41-005) has no effect for the purposes of the application of [s.82\(2\)](#) where no fresh credit in the form of a “cash loan” is provided or where an *exempt* agreement varies or supplements an existing agreement. The former provision sought to

ensure that the removal of the financial limit did not have the unintended consequence of bringing agreements that were originally exempt from regulation, into regulation as a result of a variation that did not increase the cash available. See *Santander UK Plc v Harrison [2013] EWHC 199 (QB), [2013] C.C.L.R. 4* (noted above at para.41-019): SI 2008/831 art.4 inapplicable as, although new “credit” was provided, it was not in the form of a “cash loan”. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.80-81) that s.82(2) should be retained in legislation as repeal would adversely affect the appropriate degree of consumer protection in so far as an FCA rule could not replicate the unenforceability sanction for non-compliant modifying agreements. On the other hand (see paras 6.31 and 6.43) it states that the obligation to provide information in s.82(2)-(6B) could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation. The Review also suggests that the information requirements associated with modifying agreements should be repealed and replaced by FCA rules and that “there is a case to consider whether it would be possible to clarify and simplify the provisions whilst achieving the policy objectives”.

995 But see *Swift Advances Plc v McKay [2013] NICh 3*: subsequent extensions of credit held *not* to be modifying agreements varying or supplementing the original regulated agreement but new freestanding separate agreements.

996 CCA 1974 s.82(2). See also CCA 1974 Sch.2 Pt II Example 24.

997 See further below, para.41-533.

998 CCA 1974 s.82(2A), added by SI 2005/2967 and amended by SI 2008/733. See also the new CCA 1974 s.82(3)(b) added by SI 2005/2967, noted below at para.41-149 and SI 2008/831 art.4 (variation of agreements above the financial limit made before it was removed), above.

999 Previously, CCA 1974 s.16(6C); see above, para.41-040.

1000 Previously, CCA 1974 s.16C; see above, para.41-041. This is provided for in s.82(2A), as amended by SI 2008/2826.

1001 By amendment to CCA 1974 s.94 (see below, para.41-157).

1002 CCA 1974 s.82(2B), added by SI 2010/1010 reg.29.

1003 Defined in ss.10, 189(1); above, para.41-024. See also s.82(4): if by the modifying agreement the creditor allows the credit limit to be exceeded merely temporarily, Pt V of the Act (i.e. ss.55–74 dealing with the formalities etc. of entering into the agreement), apart from s.56, does not apply to the modifying agreement.

1004 Previously, CCA 1974 s.16C, see above, para.41-041. This is provided for in s.82(3), as amended by SI 2005/2967 to add the reference to agreements that are exempt by virtue of s.16(6C) (as to which, see above, para.41-040) and by SI 2008/2826 to add the reference to s.16C agreements (as to which, see above, para.41-041). Hence again (see s.82(2A) and above, para.41-148) by virtue of the first amendment, potential overlap between the two regulatory regimes for mortgages is avoided. See also, SI 2008/831 art.4 (variation of agreements above the financial limit made before it was removed), above. On the transfer of consumer credit regulation to the FCA (see above, para.41-002), further amendments were made by the SI 2013/1881 art.20(31) so as to (essentially) substitute (i) RAO art.60C(2) for s.16(6C) and (ii) RAO art.60D for s.16C.

- 1005 And not exempted under RAO art.60C(3)–(7) (previously CCA 1974 s.16B) despite providing credit in excess of the financial limit in that article, see above, para.41-047.
- 1006 Unless the earlier or modifying agreement is an exempt agreement under RAO art.60C(2) (previously CCA 1974 s.16(6C), i.e. regulated by the FCA under the Financial Services and Markets Act 2000) or an exempt agreement under RAO art.60D (previously CCA 1974 s.16C): see s.82(2A) noted above at para.41-148.
- 1007 Being exempted under RAO art.60C(3)–(7) (previously CCA 1974 s.16B), see above, para.41-047.
- 1008 This is supported (indirectly) by CCA 1974 Sch.2 Pt II Example 24. For the calculation of the amount of credit under a modifying agreement, see SI 1983/1553 reg.7 (amended by SI 2004/1482 reg.9, SI 2004/2619), and Sch.8 Pt I para.5 (as amended by SI 2004/1482).
- 1009 See below, para.41-539.
- 1010 See above, paras 41-039 et seq., unless exempt under (i) RAO art.60C(2) (see CCA 1974 s.82(2A), added by SI 2005/2967 and amended by SI 2008/733 and SI 2013/1881, to ensure that the two regulatory regimes remain mutually exclusive (see above, para.41-148)) or (ii) RAO art.60D (see s.82(2A), as amended by SI 2008/2826 and SI 2013/1881 art.20(31)).
- 1011 *Bersey v Evans [2001] C.L.Y. 886, Cty Ct.*
- 1012 See above, para.41-103.
- 1013 i.e. cancellable under CCA 1974 s.67; above, para.41-103 (see the definition of “cancellable agreement” in CCA 1974 s.189(1)).
- 1014 CCA 1974 s.82(5), (6A). But see s.82(4): if by the modifying agreement the creditor under an earlier regulated agreement for running-account allows the credit limit to be exceeded merely temporarily, Pt V of the CCA 1974 (which includes CCA 1974 ss.66A and 67) does not apply to the modifying agreement and hence in such a case it will not be subject to the right of withdrawal or cancellation.
- 1015 s.82(5A), added by SI 2005/2967 and amended (to add the references first to ss.16(6C) and 16C, and then to RAO arts 60C(2) and 60D) by SI 2008/2826 and 2013/1881 art.20(31). For exemption under RAO art.60C(2) see above, para.41-040 and for exemption under RAO art.60D see above, para.41-041.
- 1016 CCA 1974 s.82(6), (6B).
- 1017 See Vol.I, para.25-034.
- 1018 See Vol.I, paras 25-042 et seq.; *Broadwick Financial Services Ltd v Spencer [2002] EWCA Civ 35, [2002] 1 All E.R. (Comm) 46* (“concession letter” did not contractually vary the repayment terms).
- 1019 *Re Selectmove Ltd [1995] 1 W.L.R. 474.*
- 1020 If interest is charged under the agreement at a fixed or variable rate on the balance outstanding, it is submitted that there will be no modifying agreement if the rate is not increased, even though an extension of the period of the loan will result in the debtor paying more interest (in total) in fp terms.
- 1021 Either SI 2010/1014 reg.5 or SI 1983/1553 reg.7 and Sch.8 (as amended by SIs 2004/1482, 2004/2619, 2004/3236); see above, paras 41-084 and 41-083, respectively.
- 1022 SI 1983/1557 (as amended by SIs 1984/1108, 1985/666, 1989/591, 2004/2619, 2004/3236); see above, para.41-088.

- 1023 Defined in CCA 1974 ss.10, 189(1); above, para.41-024.
- 1024 CCA 1974 s.82(4). See also CCA 1974 ss.10(2), 18(5) Sch.2 Pt II Examples 22, 23.
- 1025 See below, para.41-365.
- 1026 See above, paras 41-146 et seq.
- 1027 See above, paras 41-148 et seq.
- 1028 See above, para.41-153.

(i) - Appropriation of Payments and Early Settlement

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(i) - Appropriation of Payments and Early Settlement¹⁰²⁹

Appropriation of payments

- 41-156 Where a debtor or hirer is liable to make payments in respect of two or more regulated agreements, and makes a payment in respect of them which is not sufficient to discharge the total amount then due under all the agreements, he may appropriate the payment in or towards satisfaction of the sum due under any one of the agreements or under any two or more of them in such proportions as he thinks fit.¹⁰³⁰ If he fails to appropriate, the ordinary rule of appropriation by a creditor in principle applies.¹⁰³¹ But, in case of such failure to appropriate, where one or more of the agreements is a hire-purchase or conditional sale agreement, a consumer hire agreement, or an agreement in relation to which any security¹⁰³² is provided, the payment must be appropriated towards the satisfaction of the sums due under the several agreements respectively in the proportions which those sums bear to one another.

Early settlement

- 41-157 The debtor under a regulated consumer credit agreement enjoys an indefeasible¹⁰³³ right at any time, by notice¹⁰³⁴ to the creditor and the payment to the creditor of all amounts payable by the debtor to him under the agreement,¹⁰³⁵ to discharge the debtor's indebtedness under the agreement.¹⁰³⁶ In consequence of the implementation of the Consumer Credit Directive,¹⁰³⁷ debtors (other than those with agreements secured on land as these are outside the scope of the Directive) now also enjoy an indefeasible right at any time by notice¹⁰³⁸ to the creditor, to settle

the outstanding amount in *part* by part-payment before the end of the period of 28 days beginning with the day following that on which notice was received by the creditor or such later date as the debtor specifies in the notice.¹⁰³⁹

Rebate on early settlement, etc.

- 41-158 The Treasury is empowered by s.95 of the 1974 Act to make regulations for the allowance of a rebate of charges for credit to the debtor under a regulated consumer credit agreement where on the exercise of his right of early settlement,¹⁰⁴⁰ on refinancing, on breach of the agreement,¹⁰⁴¹ or for any other reason, his indebtedness is discharged in whole or in part or becomes payable before the time fixed by the agreement,¹⁰⁴² or any sum becomes payable by him before the time so fixed.¹⁰⁴³ Pursuant to this power,¹⁰⁴⁴ the Consumer Credit (Early Settlement) Regulations 2004¹⁰⁴⁵ have been made, replacing earlier Regulations.¹⁰⁴⁶ Subject to certain exceptions,¹⁰⁴⁷ an entitlement to rebate arises in the situations referred to in s.95.¹⁰⁴⁸ The terms of the regulations, however, have the effect that a rebate need only be allowed when the debtor actually *pays* any sum.¹⁰⁴⁹
- 41-159 The rebate is, of course, a rebate of charges only. Under the old Regulations,¹⁰⁵⁰ the appropriate formula for calculation of the rebate was a pro rata rule for fixed-sum credit agreements where the credit was repayable in a single lump sum¹⁰⁵¹ and the “rule of 78” for agreements where the credit was repayable by instalments.¹⁰⁵² However, the 2004 Regulations¹⁰⁵³ provide for an actuarial formula for calculating the rebate.¹⁰⁵⁴ In order to compensate the creditor for his setting-up costs and other costs involved in early settlement, the regulations permit the settlement date¹⁰⁵⁵ to be deferred by one month for agreements with a term of more than one year thus making the rebate less than it would have been had that date not been deferred.¹⁰⁵⁶

Compensatory amount

- 41-160 In consequence of the implementation of the Consumer Credit Directive,¹⁰⁵⁷ a new s.95A was added¹⁰⁵⁸ enabling the creditor, in certain circumstances, to claim compensation that is “fair”, “objectively justifiable” and limited in amount, for costs incurred as a result of early repayment of credit (in whole or in part). The circumstances in which this right arises are: (i) that repayment is made during a period where the interest rate is fixed and (ii) the amount of repayment exceeds £8,000 (as long as it is not paid out of the proceeds of payment protection insurance). The right is not available in two categories of agreement: (i) those secured on land (as they are outside the scope of the Directive), and (ii) overdrafts. A new s.95B was added by the Energy Act 2011¹⁰⁵⁹ as

part of the “Green Deal” introduced by that Act.¹⁰⁶⁰ The new section makes alternative (to s.95A) provision enabling the creditor to claim compensation should the debtor discharge his indebtedness under a “green deal plan” early.¹⁰⁶¹

Hire

- 41-161 The right of early repayment in s.94 is inapplicable to *hire* agreements but they generally have a right of early termination.¹⁰⁶²

Calculation of rebate: linked transactions

- 41-162 Subject to certain exceptions,¹⁰⁶³ the rebate is to be calculated by reference to all sums paid or payable by the debtor or a relative¹⁰⁶⁴ of his under or in connection with the agreement (whether to the creditor or any other person) and included in the total charge for credit.¹⁰⁶⁵ Sums paid or payable under linked transactions¹⁰⁶⁶ may therefore be included.¹⁰⁶⁷

Effect on linked transactions

- 41-163 Where for any reason the indebtedness of the debtor under a regulated consumer credit agreement is discharged before the time fixed by the agreement, he and any relative¹⁰⁶⁸ of his is at the same time discharged from any liability under a linked transaction,¹⁰⁶⁹ other than a debt which has already become payable.¹⁰⁷⁰

Footnotes

- ¹ See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).
- ¹⁰²⁹ See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), paras 2-082, 2-095—2-098; and Goode, Consumer Credit: Law and Practice, Pt C, Ch.36.

1030 FCA Handbook CONC 6.4.2R (previously [CCA 1974 s.81\(1\)](#)). But he cannot appropriate so as to place one agreement in credit while leaving another in debit. This provision only applies if there is more than one regulated agreement. If there is only one agreement and there has been no appropriation of payments by the debtor or creditor, in the case of a current account the presumption in *Clayton's case (1816) 1 Mer. 572, 608*, will apply so that payments discharge the oldest debts first. However, in *West Bromwich Building Society's Crammer [2002] EWHC 2618 (Ch)* (a mortgage case) it was held that where there is no appropriation in the case of a debt bearing interest, the general presumption is that payments will discharge interest first, before the earliest items of principal.

1031 See Vol.I, para.[24-058](#).

1032 Defined in [RAO art.60L](#) (to include a guarantee or indemnity): see FCA Handbook, Glossary.

1033 See [CCA 1974 s.173\(1\)](#).

1034 Which need not be in writing unless the agreement is secured on land: [s.94\(6\)\(a\)](#).

1035 Including any amount claimed by the creditor under [CCA 1974 s.95A\(2\)](#) or [95B\(2\)](#) (see below, para.[41-160](#)) and less any rebate allowable under [CCA 1974 s.95](#) (see below, para.[41-158](#)).

1036 [CCA 1974 s.94\(1\)](#). See also [CCA 1974 s.94\(2\)](#) (notice may embody the exercise by the debtor of any option to purchase goods conferred by the agreement, etc.) and [CCA 1974 s.97](#) (right to settlement statement, above, para.[41-141](#)). See [CCA 1974 s.189B\(3\)](#), Sch.2A: in [s.94](#), references to "debtor" in relation to "green deal plans" (as defined in [CCA 1974 s.189\(1\)](#), see below, para.[41-261](#)) are to be read as references to the "improver"/"current bill payer" (as defined in [CCA 1974 s.189B\(6\)](#)). The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above) proposes (see Annex 5, para.161) that the early settlement provisions should be retained in legislation as an FCA rule could not replicate elements of their provisions and hence repeal would adversely affect the appropriate degree of consumer protection. However, the suggestion is made to align the full and partial repayment provisions, to simplify aspects and to review the information provisions.

1037 See above, para.[41-011](#).

1038 Which need not be in writing: [CCA 1974 s.94\(6\)\(b\)](#).

1039 [CCA 1974 s.94\(3\)–\(6\)](#), added from 1 February 2011, by [SI 2010/1010 reg.30](#). The indebtedness is discharged by an amount equal to the sum of the payment and any rebate allowable under [CCA 1974 s.95](#) (see below, para.[41-158](#)) less any amount claimed by the creditor under [CCA 1974 s.95A\(2\)](#) or [95B\(2\)](#) (see below, para.[41-160](#)). Note [CCA 1974 s.82\(2B\)](#), above, para.[41-148](#): [s.82\(2\)](#) inapplicable when repayment amounts and/or duration of the agreement are varied as a result of the discharge of part of the debtor's indebtedness by virtue of [s.94\(3\)](#). For the obligation of the creditor to provide information to the debtor after part settlement, see [CCA 1974 s.97A](#).

1040 Under [CCA 1974 s.94](#); above, para.[41-157](#).

1041 See, e.g. *Overstone Ltd v Shipway [1962] 1 W.L.R. 117*; *Yeoman Credit Ltd v McLean [1962] 1 W.L.R. 131* (common law).

1042 e.g. under an acceleration clause.

- 1043 s.95(1), as amended by [SI 2010/1010 reg.31](#), to add a reference to part-payment. See [CCA 1974 s.189B\(3\)](#), Sch.2A: in s.95, references to “debtor” in relation to “green deal plans” (as defined in [CCA 1974 s.189\(1\)](#), see below, para.41-261) are to be read as references to the “improver”/“current bill payer” (as defined in [CCA 1974 s.189B\(6\)](#)).
- 1044 Previously (before the transfer of consumer credit regulation to the FCA, see above, para.41-002) vested in the Secretary of State.
- 1045 [SI 2004/1483](#), amended by [SI 2004/2619](#), in force 31 May 2005. For transitional provisions, see [reg.10](#) thereof. The regulations were also amended by [SI 2010/1010 regs 77–84](#) (and see [SI 2011/11](#), amending [reg.78](#)) and [SI 2010/1969 reg.26](#), from 1 February 2011 (subject to transitional provisions), in implementation of the Consumer Credit Directive (see above, para.41-011). They were further amended by the [Consumer Credit \(Green Deal\) Regulations 2012 \(SI 2012/2798\)](#), implementing the “Green Deal” introduced by the Energy Act 2011 (see below, para.41-261).
- 1046 [Consumer Credit \(Rebate on Early Settlement\) Regulations 1983 \(SI 1983/1562\)](#), which applied to agreements made before 19 May 1985 if they would have been regulated if made on that date.
- 1047 Agreements for running-account credit (see above, para.41-024), agreements “under which no payments of items included in the total charge for credit are required to be made in respect of the period of time commencing on the settlement date” and certain residential mortgages where no instalments are due whilst the debtor resides on the mortgaged land are excepted by [reg.2\(2\)](#).
- 1048 [SI 2004/1483 reg.2\(1\)](#).
- 1049 In consequence, a creditor may claim and be given judgment for the balance of instalments due under an acceleration clause in the agreement without any deduction of rebate (the rebate to be allowed on actual payment): *Forward Trust Plc v Whymark [1990] 2 Q.B. 70*.
- 1050 [SI 1983/1562](#).
- 1051 [SI 1983/1562 reg.4\(1\)](#) and [Sch.1](#). See also [reg.6](#).
- 1052 [SI 1983/1562 reg.4\(2\)](#) and [Sch.2 Pts I and II](#). See also [regs 4\(3\), 6, 7](#) and [Schs 3, 5](#). For an explanation of the “rule of 78”, see Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.3-264. It should be noted that “the rule of 78”, though prescribed by regulation, had been criticised, especially when applied to long-term agreements: OFT Consultation Document (June 1994), DTI Consultation Document (August 1995) and White Paper Cm. 6040 (2003). Further, the OFT Guidelines concerning “non-status” lenders, provided that lenders inappropriately extracting penalties for early settlement on the basis of “the rule of 78” risked losing their licences. See also *Grangewood Securities Ltd v Ellis Unreported 9 November 2000*, Milton Keynes Cty Ct (extortionate credit bargain); but cf. *Broadwick Financial Services Ltd v Spencer [2002] EWCA Civ 35, [2002] 1 All E.R. (Comm) 446* at [61]–[78].
- 1053 [SI 2004/1483](#), as amended: see above, para.41-158.
- 1054 [SI 2004/1483 reg.4](#), as amended by [SI 2010/1010 reg.81](#) from 1 February 2011 (subject to transitional provisions). Note also the new [reg.4A](#) (rebate when indebtedness is discharged in part), added from 1 February 2011 (subject to transitional provisions) by [SI 2010/1010 reg.81](#). But see the Home Credit Market Investigation Order 2007, as amended, made by

- the Competition Commission under the Enterprise Act 2002 ss.161 and 164, which provides for a more generous (to the debtor) rebate in agreements (“home credit loan agreements”) subject to that Order.
- 1055 SI 2004/1483 reg.5, as amended by SI 2010/1010 reg.83 from 1 February 2011 (subject to transitional provisions), to provide for part-settlement, in implementation of the Consumer Credit Directive (see above, para.41-157).
- 1056 SI 2004/1483 reg.6. But the Home Credit Market Investigation Order 2007, as amended, made by the Competition Commission under the Enterprise Act 2002 ss.161 and 164, renders reg.6 inapplicable to agreements (“home credit loan agreements”) subject to that Order.
- 1057 See above, para.41-011.
- 1058 With effect from 1 February 2011 by SI 2010/1010 reg.32 (as amended by SI 2011/11). See CCA 1974 s.189B(3), Sch.2A: in s.95A, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver”/“current bill payer” (as defined in CCA 1974 s.189B(6)).
- 1059 s.29(2). It was amended by SI 2014/436.
- 1060 See below, para.41-261 and note CCA 1974 s.189B(3), Sch.2A: in s.95B, references to “debtor” in relation to “green deal plans” are to be read as references to the “improver”/“current bill payer” (as defined in CCA 1974 s.189B(6)).
- 1061 See also the Consumer Credit (Green Deal) Regulations 2012 (SI 2012/2798) made under CCA 1974 s.95B.
- 1062 Conferred by CCA 1974 s.101, above, para.35-088.
- 1063 See SI 2004/1483 reg.3(2), as amended by (i) SI 2004/2619 and (ii) SI 2010/1010 reg.80 from 1 February 2011 (subject to transitional provisions), to provide for part-settlement, in implementation of the Consumer Credit Directive (see above, para.41-157).
- 1064 Defined in CCA 1974 ss.184(1), 189(1).
- 1065 CCA 1974 s.95(2). For “total charge for credit”, see above, para.41-061. The creditor may thus be compelled to give a rebate on sums payable, not to himself, but to some other person.
- 1066 Defined in CCA 1974 ss.19(1), 189(1); above, paras 41-056 et seq.
- 1067 Subject to SI 2004/1483 reg.3(2)(b), (c) and SI 1983/1560.
- 1068 Defined in ss.184(1), 189(1).
- 1069 Defined in CCA 1974 ss.19(1), 189(1); above, paras 41-056 et seq.
- 1070 CCA 1974 s.96(1). See CCA 1974 s.189B(3), Sch.2A: in s.96, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver”/“current bill payer” (as defined in CCA 1974 s.189B(6)). See also CCA 1874 s.96(2) (non-application to a linked transaction which is itself an agreement providing the debtor or his relative with credit). But see s.96(3) and SI 1983/1560 (exceptions).

(j) - Restrictions on Enforcement or Termination of Agreement

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(j) - Restrictions on Enforcement or Termination of Agreement ¹⁰⁷¹

Covid-19: Temporary measures to alleviate repayment difficulties

- 41-164 The FCA has used its rule-making and guidance powers over authorised persons

U ¹⁰⁷²

U to require creditors to take various steps to help customers experiencing short-term cash flow problems due to the Covid-19 pandemic. ¹⁰⁷³ These temporary measures apply to most forms of consumer credit, for example, personal loans, ¹⁰⁷⁴ high-cost short-term (“payday”) loans, ¹⁰⁷⁵ credit cards, ¹⁰⁷⁶ overdrafts, ¹⁰⁷⁷ motor finance, ¹⁰⁷⁸ hire-purchase, leasing and pawn broking. ¹⁰⁷⁹ In particular the debtor may apply for a three month ¹⁰⁸⁰ “payment freeze” ¹⁰⁸¹ (although interest will still accrue, except in the case of high-cost short-term loans) without prejudicing their credit rating. Special provision is also made for mortgages ¹⁰⁸² (and insurance ¹⁰⁸³). These temporary measures have not been seamlessly integrated into the consumer credit regime which itself has debtor-protection measures for debtors in financial trouble. For example, the FCA rules impose general obligations on creditors to exercise forbearance when debtors are in difficulties. ¹⁰⁸⁴ Moreover the provisions in the CCA that require warning notices to be given to debtors in various situations still apply. ¹⁰⁸⁵

The general “debt respite scheme”

- 41-165

The [Financial Guidance and Claims Act 2018](#) provides for the creation of a statutory “debt respite scheme” by regulation. The scheme comprises two parts: (a) a “breathing space scheme” and (b) a “statutory debt repayment plan” (“SDRP”).

(a) The “breathing space scheme”

41-165A A so-called “breathing space scheme”,

1086

U available to eligible debtors (domiciled or ordinarily resident in England or Wales), has been established

1087

U to cover debtors with problem debt in two situations. First,

1088

U there is a “breathing space moratorium” for persons with problem debt who receive professional debt advice.

1089

U This is a 60-day moratorium period (subject to a “mid-way review” after 25 days

1090

U), initiated by the debt adviser

1091

U at the request of the debtor (after advice), in which interest, fees and charges are frozen and enforcement action is paused so that debtors have a chance to arrange a sustainable repayment plan with the help of such advice. Creditors are prohibited from contacting debtors during the moratorium period,

1092

U although they may do so if obliged to under the [Consumer Credit Act 1974](#).

1093

U Limitation periods and other deadlines are extended as a result of the moratorium.

1094

U Secondly,

1095

U there is the “mental health crisis moratorium” for persons in receipt of mental health crisis treatment who are given a special route to access the protections of such a moratorium.

41-165B In *Axnoller Events Ltd v Brake*

1096

U HHJ Mathews confirmed that the purpose of the regulations was to provide protections for individuals to allow them to enter into a sustainable debt solution and to encourage more individuals to seek debt advice. Hence in *West One Loans Ltd v Salih*

1097

U an injunction was granted to prevent debtors from applying for successive moratoria (it having been held that if one joint debtor obtained a moratorium this did not prevent other joint debtors from applying for their own moratoria) if their aim was to frustrate the enforcement of the debt rather than to explore a repayment solution. This resulted in the regulations “being openly abused”.

1098

U

(b) The “Statutory Debt Repayment Plan” (“SDRP”)

41-165C The idea here is that people in problem debt be provided with a revised credit agreement as to the amount due and the timetable over which it is to be repaid, with the same legal protections from creditor action as apply in the “breathing space scheme”. The SDRP will be a new statutory debt solution focused on repayment of debt, rather than debt relief. The [2018 Act](#) has been amended by the [Financial Services Act 2021](#),

1099

U to give further powers to implement the scheme effectively, in particular so that it can include debts owed to Government, can be funded by a charging mechanism and so that it can compel creditors to accept amended repayment terms. The Government intends to make regulations to implement the plan but a specific implementation date has not yet been announced.

1100

U

Enforcement notice (non-default cases)

- 41-166 A number of restrictions are imposed upon the power of the creditor or owner to enforce the terms of, or to terminate, a regulated agreement. The first of these restrictions is contained in [s.76 of the 1974 Act](#), which imposes a duty on the creditor or owner to give notice before taking certain action.¹¹⁰¹ Section 76(1) provides that a creditor or owner is not entitled to enforce a term of a regulated agreement by:

- (a) demanding earlier payment of any sum; or
- (b) recovering possession of any goods or land; or
- (c) treating any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred,¹¹⁰²

except by or after giving the debtor or hirer not less than seven days' notice¹¹⁰³ of his intention to do so.¹¹⁰⁴ The purpose of this provision is not only to give some warning to the debtor or hirer of the action contemplated, but also to allow him to apply to the court for a "time order" under [s.129 of the 1974 Act](#) if he has difficulty in paying any sum owing under the agreement.¹¹⁰⁵ Section 76 does not apply to a right of enforcement arising by reason of any *breach* by the debtor or hirer of the regulated agreement, since action by reason of breach is dealt with in [s.87 of the Act](#).¹¹⁰⁶ Nor is a [s.76](#) notice required for *termination* of the agreement, since termination otherwise than for breach is dealt with in [s.98 of the Act](#).¹¹⁰⁷

Specified duration has not ended

- 41-167 The requirement of notice applies only where a period for the duration of the agreement is specified in the agreement, and that period has not ended when the creditor does an act mentioned above; but it so applies notwithstanding that, under the agreement, any party is entitled to terminate it before the end of the period so specified.¹¹⁰⁸ A [s.76](#) notice is therefore required, for example, where an overdraft is granted for 12 months subject to a stipulation that it can be called in at any time, and the overdraft is called in before the 12 months have elapsed. But it is not required where a loan is simply repayable "on demand". Exemption from this section has been granted by regulation to non-commercial agreements¹¹⁰⁹ where no security¹¹¹⁰ is provided.¹¹¹¹

Default notice

- 41-168

Section 87(1)¹¹¹² of the 1974 Act requires the service¹¹¹³ of a “default notice” on the debtor or hirer before the creditor or owner can be entitled, by reason of any *breach* by the debtor or hirer of a regulated agreement:

- (a)to terminate the agreement¹¹¹⁴;
- (b)to demand earlier payment of any sum¹¹¹⁵;
- (c)to recover possession of any goods or land;
- (d)to treat any right conferred on the debtor or hirer by the agreement as restricted or deferred¹¹¹⁶; or
- (e)to enforce any security.¹¹¹⁷

It has been held that a default notice is not required before a default is reported to a credit reference agency as such reporting, in not being an “enforcement” of the agreement,¹¹¹⁸ does not fall within s.87(1).¹¹¹⁹ Express exemption has been granted from the need to serve a default notice to non-commercial agreements¹¹²⁰ where no security¹¹²¹ is provided.¹¹²² In *PRA Group (UK) Ltd v Doyle*,¹¹²³ it was held that the service of a default notice under s.87 was not merely a procedural requirement but (in combination with the terms of the agreement in that case) qualified a creditor’s substantive right. It followed that the cause of action only arose on service of a default notice and that limitation started to run from the date of the default notice.

Form and content of default notice

- 41-169 The default notice must be in the form prescribed by the *Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983*,¹¹²⁴ must include a copy of the “default information sheet”¹¹²⁵ and must specify the nature of the alleged breach.¹¹²⁶ If the breach is “capable of remedy”, the notice must further specify what action is required to remedy it and the date before which that action is to be taken.¹¹²⁷ Where the breach consists of non-payment of money, the amount of the debt must be accurately stated so that the debtor can know how much he must pay to remedy the breach.¹¹²⁸ If the breach is “not capable of remedy”, the notice must further specify the sum (if any)¹¹²⁹ required to be paid as compensation¹¹³⁰ for the breach, and the date before which it is to be paid.¹¹³¹ The date before which remedial action is to be taken or before which compensation is to be paid must not be less than 14 days¹¹³² after the date of service of the default notice, and the creditor must not take the action mentioned above before the date so specified (if no remedial action or compensation is required) before those 14 days have elapsed.¹¹³³ In addition, the default notice must contain information in the prescribed terms about the consequences of failure to comply with it and any other prescribed matters relating to the agreement.¹¹³⁴

“Breach capable of remedy”

- 41-170 The 1974 Act does not define or specify which breaches are and which are not capable of remedy. But some guidance may possibly be obtained from cases decided on the identical expression employed in s.146(1) of the Law of Property Act 1925 (restrictions on and relief against forfeiture of leases). Breach of a covenant to repay the credit or to pay interest is clearly capable of remedy, as is breach of a covenant to pay hire rentals. On the other hand, bankruptcy (if made a breach)¹¹³⁵ would be an irremediable breach¹¹³⁶ and the sale of goods let under a hire-purchase or agreed to be sold under a conditional sale agreement would, it is submitted, likewise be an irremediable breach.¹¹³⁷ If goods are subject to execution or other legal process, or to a lien, whether or not the breach is remediable will depend on the circumstances of the case.¹¹³⁸ Breach of a covenant to repair will normally be remediable; but breach of a covenant to insure will not necessarily be so. It would seem to be immaterial that the breach is not capable of remedy within the time stipulated in the default notice (not being less than 14 days), provided that it could be remedied within a reasonable time.

Cumulative breaches

- 41-171 The default notice must not treat as a breach failure to comply with a provision of the agreement which becomes operative only on breach of some other provision, e.g. a provision whereby the debtor is to pay the whole balance of the credit outstanding in the event of non-payment of a single instalment. But if the breach of that other provision (i.e. the failure to pay the instalment) is not duly remedied or compensation duly paid or (if no remedial action or compensation is required) the 14 days have elapsed, then the creditor may treat the failure (i.e. the failure to pay the balance) as a breach, and the action specified in s.87(1) can be taken without the need for any further default notice.¹¹³⁹ Otherwise, however, it would appear that the creditor or owner cannot take any action specified in s.87(1) unless that action is specified in the notice.¹¹⁴⁰

Application to court

- 41-172 A debtor or hirer on whom a default notice has been served may apply to the court for a “time order” under s.129 of the 1974 Act.¹¹⁴¹

Compliance with default notice

- 41-173 If before the date specified for that purpose in the default notice the debtor or hirer takes the required remedial action or pays the required compensation, the breach is treated as not having occurred.¹¹⁴²

Notice of termination (non-default cases)¹¹⁴³

- 41-174 Section 98(1) of the 1974 Act provides that the creditor or owner is not entitled to terminate early a regulated agreement (other than an agreement of indeterminate duration¹¹⁴⁴) except by or after giving the debtor seven days' notice¹¹⁴⁵ of the termination.¹¹⁴⁶ The section does not, however, apply to termination by reason of any breach by the debtor or hirer of the agreement.¹¹⁴⁷ In cases of breach, a default notice¹¹⁴⁸ must be served. Bankruptcy is, for example, not in itself a breach and if made a ground of termination would require the service of a s.98 notice. No remedial action need be stipulated in the s.98 notice. Nor will any remedial action or payment by the debtor or hirer prevent the notice from taking effect. The remedy of the debtor or hirer is to apply to the court for a "time order" under s.129 of the 1974 Act.¹¹⁴⁹ The remaining provisions of s.98,¹¹⁵⁰ which limit its application, correspond with those of s.76.¹¹⁵¹ Exemption has been granted by regulation from the requirements of s.98 in the case of a non-commercial agreement¹¹⁵² where no security¹¹⁵³ is provided.¹¹⁵⁴

Termination, etc. of open-end consumer credit agreements

- 41-175 In consequence of the implementation of the Consumer Credit Directive¹¹⁵⁵ a new s.98A¹¹⁵⁶ has been added¹¹⁵⁷ to the 1974 Act governing the termination of regulated credit agreements that are "open-ended" (that is, of indefinite duration). However, it does not apply to overdrafts or to agreements secured on land (mortgages are outside the scope of the Directive).¹¹⁵⁸ First,¹¹⁵⁹ it enables a *debtor* by notice and free of charge, to terminate such an agreement at any time. The agreement may provide for a period of notice but this must not exceed one month. Moreover, the creditor may require the notice of termination to be in writing, otherwise it may take any form. But this provision does not affect any right that the debtor has to terminate an agreement for breach of contract in the usual way.¹¹⁶⁰ Second,¹¹⁶¹ it limits the exercise of any contractual right that the *creditor* has to terminate such an agreement in that the termination must be effected by notice

in writing and may not take effect for two months, or such longer period as the agreement may provide. But again, this does not affect any right that the creditor has to terminate an agreement for breach of contract.¹¹⁶² Third,¹¹⁶³ special provision is made governing the termination or suspension of the debtor's right to draw on credit (whether prompted by the debtor's breach of contract or not, although in the former case the usual default notice provision does not apply¹¹⁶⁴). Generally, the creditor must serve a notice in writing, with objectively justified reasons, on the debtor before the termination or suspension takes effect or, if that is "not practicable", immediately afterwards.

Copy of notices to "surety"

- 41-176 When a default notice under s.87(1)¹¹⁶⁵ or a notice under ss.76(1)¹¹⁶⁶ or 98(1)¹¹⁶⁷ is served on a debtor or hirer, a copy of the notice¹¹⁶⁸ must be served by the creditor or owner on any surety (if a different person from the debtor or hirer).¹¹⁶⁹ A failure to comply means that the security is enforceable against the surety, in respect of the breach or other matter to which the notice relates, on an order of the court only.¹¹⁷⁰

Death of debtor or hirer

- 41-177 Section 86 of the 1974 Act is designed to restrict the right of a creditor or owner, e.g. to terminate the agreement or to accelerate payment by reason of the death of the debtor or hirer.¹¹⁷¹ Section 86(1) provides that the creditor or owner under a regulated agreement is not entitled, by reason of the death of the debtor or hirer, to do an act specified in paras (a) to (e) of s.87(1)¹¹⁷² if at the death the agreement is "fully secured". And s.86(2) provides that, if at the death, the agreement is only "partly secured" or "unsecured", the creditor or owner is entitled, by reason of the death of the debtor or hirer, to do such an act on an order of the court only.¹¹⁷³ The terms "fully secured", "partly secured" and "unsecured" are not defined, and difficulties of interpretation arise. In the first place it is uncertain whether "secured" should be construed in its popular sense of supported by real security, or whether personal security,¹¹⁷⁴ i.e. a contract of guarantee or indemnity, will suffice. Secondly, it is uncertain whether an agreement is fully secured if it is expressed to be given in respect of the entire debt or whether reference must be made to the actual value of the security. In the latter case it involves a difficult assessment as to the precise value of the security at the death.

- 41-178 For the purposes of the section, an act is done "by reason of" the death of the debtor or hirer if it is done under a power conferred by the agreement which is either exercisable on his death or exercisable at will and exercised at any time after his death.¹¹⁷⁵ But the application of the section

is otherwise limited¹¹⁷⁶ by provisions corresponding to those contained in s.76(2) and (4) of the 1974 Act.¹¹⁷⁷ It should be emphasised that nothing in s.86 prevents a creditor or owner from taking action under a power conferred by the agreement which is exercisable on the debtor or hirer's default.

Increase of interest rate on default¹¹⁷⁸

- 41-179 Whilst default interest is generally unobjectionable at common law,¹¹⁷⁹ s.93 of the 1974 Act prevents a debtor under a regulated consumer credit agreement from being obliged to pay interest on sums which, in breach of the agreement, are unpaid by him at a rate exceeding the rate payable on the principal apart from any default.¹¹⁸⁰ And where the charge made for credit is not technically interest but, e.g. a finance charge, then that rate of charge is likewise not to be increased on default.¹¹⁸¹ But the section does not prevent interest being charged on interest due but unpaid at a rate not exceeding the rate payable on the principal apart from any default.¹¹⁸² Nor, it is submitted, does the section¹¹⁸³ prevent a creditor (e.g. a bank) stipulating two rates of interest, one for "authorised" overdrafts and the other for overdrafts which are unauthorised. *Carrasco v Johnson*¹¹⁸⁴ established that any provision for default interest caught by s.93 is wholly void, not just void as to any difference between the term and default rates.¹¹⁸⁵
- 41-180 The provisions of the Late Payment of Commercial Debts (Interest) Act 1998 do not apply to consumer credit agreements.¹¹⁸⁶

Contracting out forbidden

- 41-181 The restrictions thus placed upon the right of the creditor or owner to enforce the agreement, or to terminate it, are provisions "for the protection of the debtor or hirer or his relative or any surety", and in consequence cannot be abrogated or diminished, whether directly or indirectly, by a term contained in a regulated agreement or linked transaction, or in any other agreement relating to an actual or prospective regulated agreement or linked transaction.¹¹⁸⁷

Footnotes

- 1 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).
- 1071 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), paras 2-077, 2-087—2-090, 2-099, 2-112.
- ① 1072 See above, para.41-065. Principle for Business 6 (“TCF”) is particularly relevant here, as will be the new Consumer Principle 12 proposed on the introduction of the new “consumer duty”, see above, para.41-065. The measures are only to be applied if not prejudicial to the debtor.
- 1073 There is a useful summary at: <https://www.fca.org.uk/consumers/coronavirus-information-personal-loans-credit-cards-overdrafts> [Accessed 1 September 2021]. For more general “breathing space” measures for debtors in difficulties, see the **Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020** (SI 2010/1311), considered at para.41-165, below.
- 1074 <https://www.fca.org.uk/publications/finalised-guidance/personal-loans-and-coronavirus-updated-temporary-guidance-firms> [Accessed 1 September 2021].
- 1075 <https://www.fca.org.uk/publications/finalised-guidance/high-cost-short-term-credit-agreements-and-coronavirus-updated-temporary-guidance-firms> [Accessed 1 September 2021].
- 1076 <https://www.fca.org.uk/publications/finalised-guidance/credit-cards-including-retail-revolving-credit-and-coronavirus-updated-temporary-guidance-firms> [Accessed 1 September 2021].
- 1077 <https://www.fca.org.uk/publications/finalised-guidance/overdrafts-and-coronavirus-updated-temporary-guidance-firms> [Accessed 1 September 2021]. Customers are entitled £500 interest-free arranged overdraft for three months.
- 1078 <https://www.fca.org.uk/publications/finalised-guidance/motor-finance-agreements-and-coronavirus-updated-temporary-guidance-firms> [Accessed 1 September 2021].
- 1079 <https://www.fca.org.uk/publications/finalised-guidance/rent-own-buy-now-pay-later-and-pawnbroking-agreements-and-coronavirus-updated-temporary-guidance> [Accessed 1 September 2021].
- 1080 Presently extendable to six months.
- 1081 And if security is provided it cannot be enforced.
- 1082 <https://www.fca.org.uk/consumers/mortgages-coronavirus-consumers> [Accessed 1 September 2021].
- 1083 <https://www.fca.org.uk/consumers/insurance-and-coronavirus> [Accessed 1 September 2021].
- 1084 See the FCA Handbook (a) CONC Module, especially CONC 7 and (b) (in relation to regulated mortgages) MCOB Module, especially MCOB 13. See also the Standards of Lending Practice (financial difficulties sections), above, para.41-013.

- 1085 See below, paras 41-166 et seq. The “NOSIAs” (below, paras 41-131 and 41-124) are particularly confusing to debtors subject to the payment freeze.
- ① 1086 Based on an electronic register administered by the Secretary of State: see Pt 4 of the regulations, noted in next footnote. The scheme puts, on a statutory footing, the previous 60-day “breathing space” regime for over-indebted debtors sponsored by HMT.
- ① 1087 By the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (SI 2020/1311).
- ① 1088 See Pts 1 and 2 of the regulations.
- ① 1089 Who must not charge the debtor a fee in connection with the moratorium: reg.4(1).
- ① 1090 See reg.27. This may result in cancellation of the moratorium.
- ① 1091 By notification to the Secretary of State: reg.25. The debt adviser must be an authorised person (see paras 41-071 et seq., above) with FCA permission to carry on the regulated activity of debt-counselling (see para.41-240, below).
- ① 1092 Although they may ask the debt adviser for a review and cancellation of the moratorium on various grounds: see reg.17 and reg.19 (application to court if adviser refuses to cancel).
- ① 1093 See reg.11. Such an obligation may arise under s.76 (para.41-135, below), s.87 (para.41-168, below) or s.98 (para.41-174, below).
- ① 1094 See regs 8 and 9. And see *Axnoller Events Ltd v Brake [2021] EWHC 2308 (Ch)*.
- ① 1095 See Pts 1 and 3 of the regulations. For case law see *Axnoller Events Ltd v Brake [2021] EWHC 2308 (Ch)* and *Lees v Kaye [2022] EWHC 1151 (QB)*.
- ① 1096 *[2021] EWHC 2308 (Ch)* at [14]–[19].
- ① 1097 Unreported 30 March 2022, County Court at Central London, HH Judge Monty QC.
- ① 1098 Per HH Judge Monty [62].
- ① 1099 s.35.
- ① 1100 See now HMT’s Statutory Debt Repayment Plan: Consultation (May 2022) (building on previous consultations in 2018 and 2019) and the draft Debt Respite Scheme (Statutory Debt Repayment Plan etc.) (England and Wales) Regulations 2022.

- 1101 The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above) proposes (see Annex 5, para.88) that [s.76](#) (together with [ss.87](#) and [98](#)) should be retained in legislation as repeal would adversely affect the appropriate degree of consumer protection in giving to consumer a chance to take action to preclude enforcement. Whilst an FCA rule could impose corresponding obligations on creditors, it could not reproduce the consequences of non-compliance. However, the Review notes that there would be scope to improve the associated information requirements. Moreover, it states that "there may be an argument for extending the 7-day period", although it notes that this will mean that creditors would have to wait longer to enforce the agreement: see Annex 6, paras 197–200. Finally (see para.6.30) it notes that the information requirements in secondary legislation could be replaced by FCA rules.
- 1102 But see [s.76\(4\)](#): [s.76\(1\)](#) does not prevent a creditor from treating the right to *draw* on any credit as restricted or deferred (e.g. by putting a stop to further drawings on the same or another account), and taking such steps as may be necessary to make the restriction or deferment effective. See also the specific requirements as to notice in such cases in [CCA 1974 s.98A\(4\)](#) for certain "open-ended" agreements (i.e. credit agreements of no fixed duration), below para.[41-175](#).
- 1103 The notice must be in a form prescribed by the [Consumer Credit \(Enforcement, Default and Termination Notices\) Regulations 1983](#) (SI 1983/1561, as amended by SI 2004/3237 to require it to be in *paper* form and as further amended by SI 2020/1248) [reg.2\(1\)](#) and [Sch.1](#) (as amended by SI 2020/1248). See (i) [CCA 1974 s.86E\(3\)](#) (if a "default sum" (see [CCA 1974 s.187A](#) and above, para.[41-135](#)) is payable, the notice may incorporate the notice of default sum required by [CCA 1974 s.86E](#)) and (ii) [CCA 1974 s.130A\(5\)](#) (if post-judgment interest is payable, the notice may incorporate the notice required under [s.130A\(5\)](#)).
- 1104 See [CCA 1974 s.189B\(3\)](#), [Sch.2A](#): in [s.76](#), references to "debtor" in relation to "green deal plans" (as defined in [CCA 1974 s.189\(1\)](#), see below, para.[41-261](#)) are to be read as references to the "current bill payer"/"previous bill payer" (as defined in [CCA 1974 s.189B\(6\)](#)). A copy must be served on any surety: [s.111](#); below, para.[41-176](#).
- 1105 [CCA 1974 s.129\(1\)\(b\)\(ii\)](#); below, para.[41-203](#). Hence [s.76](#) does not apply once the term of the agreement has expired: *Evans v Finance-U-Ltd [2013] EWCA Civ 869*.
- 1106 [CCA 1974 s.76\(6\)](#). For [CCA 1974 s.87](#), see below, para.[41-168](#).
- 1107 For [CCA 1974 s.98](#), see below, para.[41-174](#). See also [CCA 1974 s.98A](#), see below, para.[41-175](#).
- 1108 [CCA 1974 s.76\(2\)](#).
- 1109 Defined in [CCA 1974 s.189\(1\)](#), see above, para.[41-050](#).
- 1110 Defined in [CCA 1974 s.189\(1\)](#); see below, para.[41-182](#).
- 1111 [CCA 1974 s.76\(5\)](#); [SI 1983/1561 reg.2\(9\)](#). See also [CCA 1974 s.130\(3\)](#).
- 1112 The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above) proposes (see Annex 5, para.94) that [ss.87–89](#) should be retained in legislation as their provisions cannot be replicated by an FCA rule and hence repeal would adversely affect the appropriate degree of consumer protection. However (see para.6.30) the Review notes that the information requirements in secondary legislation could be replaced by FCA rules.

- 1113 Defined in CCA 1974 ss.176, 189(1). See *Lombard North Central v Power-Hines [1995] C.C.L.R. 24, Cty Ct* (notice posted but never received validly served) and *Banco San Juan International Inc v Petroleos De Venezuela Sa [2020] EWHC 2145 (Comm)* (proceedings in commercial context had been properly served on a borrower where it had failed to comply with its contractual obligations to appoint a process agent and so the lender had appointed an agent on its behalf as permitted by the credit agreement). See also the notice requirements under the Pre-Action Protocol on Debt Claims (“Debt PAP”), in force 1 October 2017.
- 1114 For termination in non-breach cases, see CCA 1974 s.98; below, para.41-174. See also CCA 1974 s.98A(3): termination in non-breach cases of certain “open-ended” consumer credit agreements, below para.41-175.
- 1115 e.g. under an “acceleration clause” in the agreement.
- 1116 See s.87(2): this does not prevent the creditor from treating the right to draw upon any credit as restricted or deferred, and taking such steps as may be necessary to make the restriction or deferment effective. See also s.87(5) (added on 10 February 2011 by SI 2010/1010 reg.37): s.87(1)(d) inapplicable to certain “open-ended” agreements (i.e. credit agreements of no fixed duration) as the specific requirements as to notice in such cases is in CCA 1974 s.98A(4), see below para.41-175.
- 1117 s.87(1). See CCA 1974 s.189B(3), Sch.2A: in s.87, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “current bill payer”/“previous bill payer” (as defined in CCA 1974 s.189B(6)). The doing of an act whereby a floating charge becomes fixed is not an enforcement of a security (see CCA 1974 s.185(5) (as amended by the Consumer Credit Act 2006 s.5(8))) and the Agricultural Credits Act 1928): s.87(3). See also CCA 1974 s.111 (service on surety) below, para.41-176.
- 1118 Following *McGuffick v Royal Bank of Scotland Plc [2009] EWHC 2386 (Comm)*, see para.41-128, above.
- 1119 *Boyo v Lloyds Bank Plc [2019] EWHC 2279 (QB)*.
- 1120 Defined in CCA 1974 s.189(1); see above, para.41-050.
- 1121 Defined in CCA 1974 s.189(1); see below, para.41-182.
- 1122 s.87(4); SI 1983/1561 reg.2(9). See also CCA 1974 s.130(3).
- 1123 [2019] EWCA Civ 12. But see the view of Bowden in [2019] J.B.L. 407 that s.87 is merely a procedural requirement and that this decision is per incuriam. Note also *PRA Group (UK) Ltd v Segal Unreported 19 December 2017* (Norwich Cty Ct): the fact that no compliant default notice was sent rendered the relationship “unfair” for the purposes of CCA 1974 s.140A (see below, paras 41-213 et seq.).
- 1124 SI 1983/1561 reg.2(2) and Sch.2, as amended by SI 1984/1109; SI 2004/3237; SI 2007/1167; 2014/2369; 2020/1248 (which altered the wording of the default notice). The default notice must in paper form: see SI 2004/3237.
- 1125 Under CCA 1974 s.86A, see above, para.41-131. See s.88(4A), added with effect from 1 October 2008 (see SI 2007/3300), by the Consumer Credit Act 2006 s.14.
- 1126 CCA 1974 s.88(1)(a). Although the nature of the breach must be specified, it would seem that a notice is not invalidated by the addition of alleged breaches which are disproved, or of acts which are not in fact breaches of the agreement, or of other useless and irrelevant

matter: see (on the similar provision in the Law of Property Act 1925 s.146) *Pannell v City of London Brewery Co* [1900] 1 Ch. 496; *Fox v Jolly* [1916] 1 A.C. 1; *Silvester v Ostrowska* [1959] 1 W.L.R. 1060. Contrast *Guillemard v Silverthorne* (1908) 99 L.T. 584. Note *NRAM Plc v McAdam & Hartley* [2015] EWCA Civ 751, reversing [2014] EWHC 4174 (Comm): (obiter) s.88 does not apply to non-regulated agreements that are documented as regulated agreements.

1127 CCA 1974 s.88(1)(b).

1128 *Woodchester Lease Management Services Ltd v Swain & Co* [1999] 1 W.L.R. 263 cf. *Rankine (Basil) v Halifax Plc* [2009] C.C.L.R. 3 (de minimis error overlooked). But note *Lombard North Central Plc v European Skyjets Ltd (In Liquidation)* [2020] EWHC 679 (QB) (appeal against the refusal to set aside a default judgment for an amount due under a commercial (not regulated consumer credit) agreement succeeded as there was a real prospect of the appellant successfully arguing that the default notice sent in that commercial context inaccurately stated the amount due).

1129 The creditor or owner need not claim compensation if he does not desire to do so: *Lock v Pearce* [1893] 2 Ch. 271; *Rugby School (Governors) v Tannahill* [1935] 1 K.B. 87. But he must still serve a default notice.

1130 See *Duke of Westminster v Swinton* [1948] 1 K.B. 525 (compensation is the amount of the loss or damage sustained by the breach).

1131 CCA 1974 s.88(1)(c).

1132 This period was increased (on 1 October 2006, see SI 2006/1508) from seven days by the Consumer Credit Act 2006 s.14. See *Brandon v American Express Services Europe Ltd* [2011] EWCA Civ 1187: start of 14-day period mis-stated.

1133 CCA 1974 s.88(2).

1134 CCA 1974 s.88(4) (as amended by the Consumer Credit Act 2006 s.14 to include “any other prescribed matters relating to the agreement”); SI 1983/1561 Sch.2. See also s.88(5), whereby the default notice may contain a provision for the creditor or owner taking certain action, e.g. recovering possession of goods at the end of the 14-day or other period, provided that it is stated that the provision will be ineffective if the breach is duly remedied or the compensation duly paid. See also (i) CCA 1974 s.86E(3) (if a “default sum” (see CCA 1974 s.187A and above, para.41-135) is payable, the notice may incorporate the notice of default sum required by s.86E) and (ii) CCA 1974 s.130A(5) (if post-judgment interest is payable, the notice may incorporate the notice required under s.130A(5)).

1135 It is rarely made a breach, so that either s.76 or s.98 would apply: see above, para.41-166; below, para.41-174.

1136 *Civil Service Co-operative Society Ltd v McGrigor’s Trustee* [1923] 2 Ch. 347, 356.

1137 *Scala House & District Property Co Ltd v Forbes* [1974] Q.B. 575. This, at any rate, would be the case where the purchaser acquired a good title to the goods, and probably also where he did not, for repurchase is too speculative a possibility. See also *Kemp v United Dominions Corp (Australia) Ltd* [1970] Qd.R. 323 (hire-purchase).

1138 *Hartley v Larkin* (1950) 66 T.L.R. (Pt 1) 896.

1139 CCA 1974 s.88(5).

1140 CCA 1974 ss.87, 88(4) and SI 1983/1561 Sch.2.

- 1141 CCA 1974 s.129(1)(b)(i); below, para.41-203. See also Vol.I, para.29-269 (relief from forfeiture).
- 1142 s.89. Partial compliance is insufficient: *Price v Romilly [1960] 1 W.L.R. 1360*. See *NRAM Plc v McAdam & Hartley [2015] EWCA Civ 751*, reversing [2014] EWHC 4174 (Comm): (obiter) s.89 does not apply to non-regulated agreements that are documented as regulated agreements. See also CCA 1974 s.189B(3), Sch.2A: in s.89, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “current bill payer”/“previous bill payer” (as defined in CCA 1974 s.189B(6)).
- 1143 See CCA 1974 s.189B(3), Sch.2A: in s.98, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “current bill payer”/“previous bill payer” (as defined in CCA 1974 s.189B(6)).
- 1144 CCA 1974 s.98(2). But see CCA 1974 s.98A(3) (termination of certain “open-ended” agreements, i.e. agreements of no fixed duration), below para.41-175. And note the Consumer Rights Act 2015 Sch.2 paras 8 and 21, above para.40-316, replacing (for contracts made on or after 1 October 2015) the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) Sch.2 paras 1(g) and 2(a), above, para.40-335.
- 1145 The notice must be in the form prescribed by the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 (SI 1983/1561), as amended by SI 2004/3237 to require it to be in *paper* form and as further amended by SI 2020/1248 reg.2(3) and Sch.3 (as amended by SI 2020/1248). A copy must be served on any surety: CCA 1974 s.111; below, para.41-176. See CCA 1974 s.130A(5) (if post-judgment interest is payable, the notice may incorporate the notice required under s.130A(5)).
- 1146 Hence s.98 does not apply once the term of the agreement has expired: *Evans v Finance-U-Ltd [2013] EWCA Civ 869*. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.88) that s.98 (together with ss.76 and 87) should be retained in legislation as repeal would adversely affect the appropriate degree of consumer protection in giving to consumer a chance to take action to preclude termination. Whilst an FCA rule could impose corresponding obligations on creditors, it could not reproduce the consequences of non-compliance. However, the Review notes that there would be scope to improve the associated information requirements. Moreover, it states that “there may be an argument for extending the 7-day period”, although it notes that this will mean that creditors would have to wait longer to terminate the agreement: see Annex 6, paras 197–200. Finally (see para.6.30) it notes that the information requirements in secondary legislation could be replaced by FCA rules.
- 1147 CCA 1974 s.98(6).
- 1148 See above, para.41-168.
- 1149 CCA 1974 s.129(1)(b)(ii); below, para.41-203. See also Vol.I, para.29-269 (relief from forfeiture).
- 1150 subss.(2), (4).
- 1151 subss.(2), (4). See above, para.41-166.
- 1152 Defined in CCA 1974 s.189(1), see above, para.41-050.
- 1153 Defined in CCA 1974 s.189(1); see below, para.41-182.

- 1154 CCA 1974 s.98(5); SI 1983/1561 reg.2(9). See also CCA 1974 s.130(3).
- 1155 See above, para.41-011.
- 1156 The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see Annex 5, para.166) that s.98A should be retained in legislation as an FCA rule could not replicate a statutory right to terminate and hence repeal would adversely affect the appropriate degree of consumer protection.
- 1157 With effect from 1 February 2011 by SI 2010/1010 reg.38.
- 1158 CCA 1974 s.98A(8).
- 1159 CCA 1974 s.98A(1).
- 1160 CCA 1974 s.98A(7).
- 1161 CCA 1974 s.98A(3). Note that CCA 1974 s.129 (time orders, see below, para.41-203) does not apply in relation to a s.98A(3) notice (cf. CCA 1974 ss.76, 87 and 98 notices).
- 1162 CCA 1974 s.98A(7). But note that generally a default notice must then be served under CCA 1974 s.87, see above, para.41-168.
- 1163 CCA 1974 s.98A(4)–(6). Where the Payment Services Regulations 2017 (SI 2017/752) apply (see generally, above, paras 36-225 et seq.), the provisions in reg.71(2)–(5) as to stopping the use of a “payment instrument” are disapplied in cases covered by s.98A(4)–(6): see SI 2017/752 reg.64(2). See the Consumer Credit (Amendment) (EU Exit) Regulations 2018 (SI 2018/1038) reg.2(2): in s.98A(5)(a), on “IP completion day” (31 December 2020 at 11.00pm), “a retained EU obligation” was substituted for “an EU obligation”.
- 1164 See CCA 1974 s.87(5), added by SI 2010/1010 reg.37.
- 1165 See above, para.41-168.
- 1166 See above, para.41-166.
- 1167 See above, para.41-174.
- 1168 Complying with SI 1983/1557 (as amended by SI 2004/2619 and SI 2004/3236), especially reg.10.
- 1169 CCA 1974 s.111(1). For the definition of “surety”, see below, para.41-185. Perhaps because of an oversight, s.111 has not been amended to apply also to a s.98A(3) or (4)(b) creditor’s notice (see above, para.41-175) or the various “NOSIAs” under ss.86B and 86C (see above, paras 41-131 and 41-134).
- 1170 CCA 1974 ss.111(2), 127(1)(c), 142(1). See also CCA 1974 ss.106, 113(3) (effect on security) and below, para.41-201 (powers of court). See CPR Pt 7 PD 7B.
- 1171 See CCA 1974 s.189B(3), Sch.2A: in s.86, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “current bill payer”/“previous bill payer” (as defined in CCA 1974 s.189B(6)). See also s.185(4) (death of one of two or more hirers or debtors). The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see Annex 5, para.94) that s.86 could not be replaced by an FCA rule with corresponding effect and hence proposes that it should be retained in legislation as repeal would adversely affect the appropriate degree of consumer protection in “safeguarding the customer’s family from distress and from unfairness and hardship”.
- 1172 See above, para.41-168.

- 1173 For the powers of the court, see [CCA 1974 s.128](#); below, para.[41-202](#). See also [CPR Pt 7 r.9, 7PD-003](#), 3.1(6), 7.4, 9.3. [CPR Pt 7 PD7B](#).
- 1174 See the definition of “security” in [CCA 1974 s.189\(1\)](#) and below, para.[41-182](#).
- 1175 [CCA 1974 s.86\(6\)](#).
- 1176 [CCA 1974 s.86\(3\), \(4\)](#).
- 1177 See above, para.[41-167](#). See also [CCA 1974 s.98\(2\), \(4\)](#); above, para.[41-174](#). The section does not affect the operation of any agreement providing for payment of sums due under the regulated agreement, or becoming due under it on the death of the debtor or hirer, out of the proceeds of a policy of assurance on his life e.g. under a mortgage protection policy or endowment policy: [s.86\(5\)](#).
- 1178 For interest payable on default sums see [CCA 1974 s.86F](#), above, para.[41-136](#) and for interest on judgment debts, see [CCA 1974 s.130A](#), below, para.[41-207](#). See also [CCA 1974 s.78A](#) (notification of change of interest, above, para.[41-147](#)). The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above) proposes (see Annex 5, para.108) that [s.93](#) should be retained in legislation as repeal would adversely affect the appropriate degree of consumer protection. Whilst an FCA rule could impose corresponding obligations on creditors, it could not automatically render void or invalid a term providing for increased default interest and any challenge to such a term would require the debtor to take the initiative.
- 1179 Unless it is a “penalty”: see below, para.[41-205](#). See [Greenlands Trading Ltd v Pontearso \[2019\] EWHC 278 \(Ch\)](#), in which Nugee J (sitting on an appeal from the county court) upheld a decision that a secured six month bridging loan (not a regulated agreement) with a £1,995 “default administration fee” and 3 per cent per month default interest fee rate to be paid on default, was unfair under the unfair relationship provisions ([CCA 1974 ss.140A–140C](#), see below, paras [41-213](#) et seq.) but only to the extent of the default administration fee, as the default interest rate was regarded as “industry standard”. But see [Banco Santander v Demba and Cortes v Banco de Sabadell \(Joined Cases C-96/16 and C-94/17\)](#) on the application of Unfair Contract Terms Directive (and hence [Consumer Rights Act 2015 Pt 2](#)) to terms charging default interest.
- 1180 i.e. “where the total charge for credit includes an item in respect of interest, at a rate exceeding that rate of interest”: [s.93\(a\)](#). See [McMullon v Secure the Bridge Ltd \[2015\] EWCA Civ 884](#) (so-called “fee” was clearly “interest”). A similar (but not identical) provision was contained in [s.7 of the Moneylenders Act 1927](#) (see [Mutual Loan Fund Association v Sanderson \[1937\] 1 All E.R. 380](#)). This section causes particular difficulty in the case of “interest free” credit, see Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-094. See [CCA 1974 s.189B\(3\), Sch.2A](#): in [s.93](#), references to “debtor” in relation to “green deal plans” (as defined in [CCA 1974 s.189\(1\)](#), see below, para.[41-261](#)) are to be read as references to the “current bill payer”/“previous bill payer” (as defined in [CCA 1974 s.189B\(6\)](#)).
- 1181 [s.93\(b\)](#). In this case, items included in the total charge for credit by virtue of rules made by the FCA under [RAO art.60M\(2\)\(d\)](#) (“linked transactions” see above, paras [41-056](#) et seq.) are to be disregarded.
- 1182 For the positions at common law, see below, paras [41-289](#) et seq. Similarly a provision that “on the debtor making default in payment of any instalment, the *whole amount* of principal

and interest remaining unpaid shall forthwith become due and payable” would not appear to contravene s.93 since “the whole amount of principal and interest” are not sums which are unpaid in breach of the agreement and thus the interest may be increased on them by virtue of the provision. But see CCA 1974 s.95(1) (rebate on early settlement, above para.41-158). As to whether a clause providing for accelerated payment of principal and interest is a penalty, see below, para.41-276, and *Wadham Stringer Finance Ltd v Meaney [1981] 1 W.L.R. 39*. The provision for a rebate in CCA 1974 s.95 (see above, para.41-158) may prevent it being penal: *Forward Trust Plc v Robinson [1987] C.C.L.R. 10, Cty Ct*.

1183 But the FCA has introduced measures regulating (authorised and unauthorised) overdrafts associated with “personal current accounts” (as defined). CONC 5C (a) prohibits a rate of interest for an unarranged overdraft that exceeds the rate for an arranged overdraft and (b) requires charges for overdrafts to take the form of a single, uniform annual interest rate.

1184 *[2018] EWCA Civ 87*.

1185 Although in that case the creditor did eventually get the contractual rate, as the court ordered interest (pre-judgment) at the contractual rate under the County Courts Act 1984 (and after judgment at the rate prescribed by the County Courts (Interest on Judgment Debts) Order 1991 (SI 1991/1184)—which was 8 per cent).

1186 See s.2(5)(a) of the 1998 Act.

1187 CCA 1974 s.173(1), (2). The FCA’s *Review of Retained Provisions of the Consumer Credit Act: Final Report* (see para.41-004 (note), above) proposes (see Annex 5, para.46) that s.173 should be retained in legislation in respect of those CCA provisions that remain in the CCA or other legislation as an FCA rule could not replicate its provisions and hence repeal would adversely affect the appropriate degree of consumer protection.

(k) - Security

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(k) - Security¹¹⁸⁸

“Security” defined

- 41-182 The term *security*, in relation to an actual or prospective consumer credit agreement or consumer hire agreement, or any linked transaction¹¹⁸⁹ is defined to mean a mortgage, charge, pledge, bond, debenture, indemnity, guarantee, bill, note or other right provided by the debtor or hirer, or at his request (express or implied), to secure the carrying out of the obligations of the debtor or hirer under the agreement.¹¹⁹⁰ For the purposes of the 1974 Act,¹¹⁹¹ therefore, security may be either real or personal, and it may be provided by the debtor or hirer, or by a third party (in which case it must be provided at the request, express or implied, of the debtor or hirer). A guarantee or indemnity given by a dealer by way of “recourse” at the request of the financier would not therefore ordinarily constitute security.¹¹⁹²
- 41-183 Difficulty may arise in deciding whether or not certain acts done by the debtor or hirer, or at his request, constitute security.¹¹⁹³ It has, for example, been suggested¹¹⁹⁴ that a “form of consent” given to a mortgagee at the request of the mortgagor by a person in actual occupation of the property to be mortgaged by which that person agrees that his rights in the property under the Land Registration Act 1925¹¹⁹⁵ will be postponed and subject to the rights of the mortgagee, and will not be asserted against the mortgagee, would fall within the definition of “security”.¹¹⁹⁶ It is thought that the common term in bank loan contracts whereby a bank reserves the right to take missed repayments from other accounts kept by the debtor with the bank, in so far as this confers rights on the bank beyond its common law right to combine *current* accounts,¹¹⁹⁷ constitutes “security”. Further, it would seem that an insurance policy effected by the debtor or hirer in respect of goods the subject of a hire-purchase, conditional sale or hiring agreement does not fall within the definition,

even though the agreement requires such insurance to be effected and provides that, in the event of a total loss, the policy moneys are to be paid to the creditor or owner. The primary purpose of such insurance is to protect the creditor against loss caused by the events insured against, and not to secure, i.e. make more certain, the carrying out of the obligations of the debtor or hirer under the agreement.¹¹⁹⁸ On the other hand, an assignment or charge by a debtor of, for instance, a life insurance policy, or moneys standing to his credit in another account, in order to secure a loan, could undoubtedly constitute security.¹¹⁹⁹

“Security instrument”

- 41-184 Any security provided in relation to a regulated agreement by a third party¹²⁰⁰ is required by s.105(1) of the 1974 Act to be expressed in writing. A document made in compliance with this requirement is termed a “security instrument”.¹²⁰¹

“Surety”

- 41-185 The word “surety” is used in the 1974 Act to mean the person by whom any security is provided, or the person to whom his rights and duties in relation to the security have passed by assignment or operation of law.¹²⁰² The expression therefore goes beyond the ordinary legal sense of a guarantor or indemnifier,¹²⁰³ and can in appropriate situations even refer to the debtor or hirer himself if he provides security himself.

Form and content of security instrument

- 41-186 The Treasury is empowered to make regulations prescribing the form and content of security instruments.¹²⁰⁴ Regulations have been made, confined to guarantees and indemnities, in the Consumer Credit (Guarantees and Indemnities) Regulations 1983.¹²⁰⁵ These prescribe the form and content of guarantees and indemnities provided in relation to regulated agreements at the request (express or implied) of the debtor or hirer, and also provide for the legibility and signing of such guarantees and indemnities. A guarantee or indemnity is not properly executed unless a document in the prescribed form, itself containing all the prescribed terms and conforming to these regulations, is signed in the prescribed manner by or on behalf of the surety.¹²⁰⁶

- 41-187

Any security instrument (whether or not a contract of guarantee or indemnity) is not properly executed unless the document embodies all the terms of the security, other than implied terms, and the document, when presented or sent for the purpose of being signed by or on behalf of the surety, is in such a state that its terms are readily legible.¹²⁰⁷

Supply of copies to surety ¹²⁰⁸

- 41-188 When the document is presented or sent for the purpose of being signed by the surety or on his behalf, there must also be presented or sent a copy of the document.¹²⁰⁹ In addition, the surety is entitled to receive a copy of the executed credit or hire agreement. The precise time at which this copy must be given to him depends on whether the security is provided after or at the time when the regulated agreement is made, or before it is made. In the former case, a copy of the executed agreement, together with a copy of any other document referred to in it, must be given to the surety at the time the security is provided.¹²¹⁰ In the latter case, a copy of the executed agreement, together with a copy of any other document referred to in it, must be given to the surety within seven days after the regulated agreement is made.¹²¹¹ Failure to supply such copies means that the security instrument is not properly executed.

Consequence of improper execution

- 41-189 The consequence of improper execution of a security instrument is that the security, so far as provided in relation to a regulated agreement, is enforceable against the surety on an order of the court only.¹²¹² The same consequence applies if a security is not expressed in writing in contravention of s.105(1).¹²¹³ If an application for an order is dismissed by the court, except on technical grounds¹²¹⁴ only, the security, so far as it is provided in relation to a regulated agreement, is rendered invalid.¹²¹⁵

Security provided by debtor or hirer

- 41-190 The [Consumer Credit \(Agreements\) Regulations](#),¹²¹⁶ include provision governing any security provided in relation to a regulated agreement by the debtor or hirer.¹²¹⁷ The [1983 Regulations](#)¹²¹⁸ require documents embodying regulated agreements also to embody¹²¹⁹ the security whilst the [2010 Regulations](#)¹²²⁰ impose the less onerous requirement that documents embodying regulated credit agreements need only “contain details of any security” provided.

Withdrawal of security

- 41-191 If security is provided in relation to a prospective agreement or transaction, the security is enforceable in relation to the agreement or transaction only after the time (if any) when the agreement is made. Until that time the person providing the security is entitled, by notice to the creditor or owner, to withdraw the security.¹²²¹

Enforcement of security

- 41-192 Section 113¹²²² of the 1974 Act is designed to ensure that the creditor or owner cannot, by enforcing security, recover more than they would have been entitled to under the regulated agreement, and so prevents evasion of the Act by the use of security. Where a security is provided in relation to an actual or prospective regulated agreement, the security is not to be enforced so as to benefit the creditor or owner, directly or indirectly, to an extent greater (whether as respects the amount of any payment or the time or manner of its being made) than would be the case if the security were not provided and any obligations of the debtor or hirer, or his relative, under or in relation to the agreement were carried out to the extent (if any) to which they would be enforced under the Act.¹²²³
- 41-193 In accordance with this principle, where a regulated agreement is enforceable on an order of the court¹²²⁴ or of the FCA¹²²⁵ only, any security provided in relation to the agreement is enforceable (so far as provided in relation to the agreement) where such an order has been made in relation to the agreement, but not otherwise.¹²²⁶ The same rules also apply (with appropriate changes of language) where a security is provided in relation to an actual or prospective linked transaction.¹²²⁷

Security rendered invalid

- 41-194 Section 106¹²²⁸ provides that where, under any provision of the 1974 Act, that section “is applied” to any security provided in relation to a regulated agreement, then¹²²⁹:
- (a)the security, so far as it is so provided, is to be treated as never having effect¹²³⁰;
 - (b)any property lodged with the creditor or owner solely for the purposes of the security as so provided shall be returned by him forthwith;

(c)the creditor or owner shall take any necessary action to remove or cancel an entry in any register, so far as the entry relates to the security as so provided; and

(d)any amount received by the creditor or owner on realisation of the security ¹²³¹ shall, so far as it is referable to the agreement, be repaid to the surety.

Examples of situations where s.106 “is applied” to a security are as follows:

(i)where a regulated agreement is cancelled under s.69(1)¹²³² or becomes subject to s.69(2)¹²³³;

(ii)where a regulated agreement is terminated under s.91¹²³⁴;

(iii)where the FCA dismisses, except on technical grounds¹²³⁵ only, an application for an order¹²³⁶ validating agreements made in the context of unauthorised trading¹²³⁷;

(iv)where a court dismisses, except on technical grounds¹²³⁸ only, an application for an order under s.65(1) for the enforcement of an improperly executed agreement¹²³⁹ or under s.105(8) for enforcement of a security that is not in writing¹²⁴⁰ or improperly executed¹²⁴¹ or under subs.(1) or (2) of s.124¹²⁴² for enforcement of an agreement or security after contravention of the prohibition on taking or negotiating negotiable instruments¹²⁴³;

(v)where a declaration is made by a court under s.142(1) (refusal of an enforcement order)¹²⁴⁴ as respects any regulated agreement¹²⁴⁵; and

(vi)where security is provided in relation to a prospective agreement or transaction, and, before the agreement is made, the person providing the security by notice requires that s.106 shall apply to the security.¹²⁴⁶

Pledges

41-195 Sections 114 to 122¹²⁴⁷ of the 1974 Act contain special provisions¹²⁴⁸ relating to articles taken in pawn¹²⁴⁹ under a regulated agreement, other than a non-commercial agreement.¹²⁵⁰ The sections do not apply to a pledge of documents of title¹²⁵¹ or of bearer bonds¹²⁵²; nor, it is submitted, do they apply to choses in action¹²⁵³ or to deeds or certificates of title to land¹²⁵⁴ deposited with a creditor as security.

Pledges: Consumer Credit Directive

41-196 The Consumer Credit Directive¹²⁵⁵ does not apply to pawn agreements but, to maintain a coherent regime, the implementing provisions (which made significant changes to the Consumer Credit Act

1974 regime) generally have been extended to pawn agreements. However, the duty to provide pre-contractual explanations¹²⁵⁶ is modified. Moreover, s.55C (copy of draft agreement¹²⁵⁷) and s.77B (statement of account to be provided on request¹²⁵⁸) are inapplicable and there is no duty to assess the creditworthiness of the pawnor.¹²⁵⁹

Negotiable instruments

- 41-197 The 1974 Act also contains provisions¹²⁶⁰ restricting the taking and negotiating of negotiable instruments¹²⁶¹ in connection with regulated agreements, other than non-commercial agreements.¹²⁶² In the first place, a creditor or owner is prohibited from taking a negotiable instrument, other than a banknote or cheque,¹²⁶³ in discharge of any sum payable by the debtor or hirer under a regulated agreement, or by any person as surety¹²⁶⁴ in relation to the agreement.¹²⁶⁵ Bills of exchange or promissory notes cannot therefore be taken in payment. Secondly, the creditor or owner is prohibited from negotiating¹²⁶⁶ a cheque taken by him in discharge of a sum payable as mentioned above except to a banker.¹²⁶⁷ Thirdly, the creditor or owner is prohibited from taking a negotiable instrument as security for the discharge of any sum payable as mentioned above.¹²⁶⁸ The old practice of taking, for example, a promissory note as security for payment under an instalment credit agreement has therefore been ruled out.

Effect of contravention

- 41-198 After any contravention of these provisions in relation to a sum payable by the debtor or hirer under a regulated agreement, the agreement under which the sum is payable is enforceable against the debtor or hirer on an order of the court only.¹²⁶⁹ After any contravention of these provisions in relation to a sum payable by any surety, the security¹²⁷⁰ is enforceable on an order of the court only¹²⁷¹ and, in such case, if an application for an order is dismissed, except on technical grounds¹²⁷² only, the security is rendered invalid.¹²⁷³
- 41-199 A person who takes a negotiable instrument in contravention of s.123(1) or (3) is not a holder in due course and is not entitled to enforce the instrument.¹²⁷⁴ The 1974 Act does not, however, otherwise seek to undermine the protection of a holder in due course and deals specifically with the effect of contravention on the rights arising under and on the instrument.¹²⁷⁵

Footnotes

- 1 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).
- 1188 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), paras 2-106 —2-127; and Goode, Consumer Credit: Law and Practice, Pt C, Ch.37.
- 1189 Defined in [CCA 1974 ss.19\(1\), 189\(1\)](#); above, paras [41-056](#) et seq.
- 1190 [CCA 1974 s.189\(1\)](#). See the almost identical definition in the [RAO art.60L\(1\)](#) and in the FCA Handbook Glossary (for the purpose of CONC).
- 1191 And the [RAO](#) and the FCA Handbook CONC; see the previous footnote.
- 1192 cf. [Unity Finance Ltd v Woodcock \[1963\] 1 W.L.R. 455](#). See also [Governor and Company of the Bank of Scotland v Euclidian \(No.1\) Ltd \[2007\] EWHC 1732](#): indemnity provided in that case not “security” within the [CCA 1974](#) as it neither secured the carrying out of the debtor’s obligations nor was it provided at his request. For recourse agreements, see below, para.[41-332](#).
- 1193 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf) at para.2-106.
- 1194 [Putnam \[1983\] L.S.Gaz. 219](#).
- 1195 [s.70\(1\)\(g\)](#). See [Williams & Glyn's Bank v Boland \[1981\] A.C. 487](#).
- 1196 Much may depend on the precise wording of the consent.
- 1197 See above, para.[36-326](#) and [Bradford Old Bank Ltd v Sutcliffe \[1918\] 2 K.B. 833, CA](#).
- 1198 This submission was reflected in (the now revoked) [Advertisements and Quotations Regulations 1989 \(SI 1989/1125\) Sch.1 Pt III](#) paras 2, 3; and [SI 1989/1126 Sch.1](#) paras 2, 3, where “security” was stated as an alternative to an insurance policy where the proceeds were to be used to repay the loan. However, the subsequent regulations ([SI 2004/1481](#) and [SI 1999/2725](#), respectively, now revoked, see above, para.[41-069](#)) were less complex and did not contain corresponding provisions.
- 1199 See [CCA 1974 Sch.2 Example 11](#).
- 1200 Which, to be “security” (see above, para.[41-182](#)), must be provided at the request, express or implied, of the debtor or hirer. [Section 105\(6\)](#) confines [s.105\(1\)](#) to security provided by third parties. For security provided by the debtor or hirer, see below, para.[41-190](#).
- 1201 [CCA 1974 s.105\(2\)](#).
- 1202 [CCA 1974 s.189\(1\)](#).
- 1203 See below, Ch.47.
- 1204 [CCA 1974 s.105\(2\), \(3\)](#). For the meaning of “security instrument”, see above, para.[41-184](#).
- 1205 [SI 1983/1556](#), as amended by [SI 2004/3236](#) (electronic form). Previously (before the transfer of consumer credit regulation to the FCA, see above, para.[41-002](#)) the power to make the regulations was vested in the Secretary of State.

- 1206 CCA 1974 s.105(4)(a).
- 1207 CCA 1974 s.105(4)(b), (c).
- 1208 See SI 1983/1557, as amended by SI 2004/2619 and SI 2004/3236 (form of copies). See also above, para.41-137 (supply of information).
- 1209 CCA 1974 s.105(4)(d).
- 1210 CCA 1974 s.105(5)(a).
- 1211 CCA 1974 s.105(5)(b).
- 1212 CCA 1974 s.105(7)(a). See also CCA 1974 ss.127, 173(3); below, para.41-201 and CPR Pt 7 PD 7B.
- 1213 CCA 1974 s.105(7)(b). CPR Pt 7 PD 7B.
- 1214 See CCA 1974 s.189(1), (5).
- 1215 CCA 1974 ss.105(8), 106; below, para.41-194.
- 1216 Made under CCA 1974 s.60, see above, paras 41-082 et seq.
- 1217 CCA 1974 s.105(9).
- 1218 Which now generally only apply to agreements outside the scope of the Consumer Credit Directive (see above, para.41-011), unless the creditor has (in effect) opted out by opting in to the “Directive Regime”. See SI 1983/1553 (as amended by SI 1984/1600; SI 1985/666; SI 1988/2047; SI 1999/3177; (especially) SI 2004/1482; SI 2004/2619; SI 2004/3236; SI 2010/1010; SI 2010/1969) reg.2(10) (credit) and reg.3(7) (hire).
- 1219 Defined in CCA 1974 s.189(1), (4).
- 1220 SI 2010/1014, as amended by SI 2010/1969 regs 41–45. See reg.3(5) and Sch.1 para.23.
- 1221 CCA 1974 s.113(6). The notice must require “that section 106 shall thereupon apply to the security”: see below, para.41-194.
- 1222 The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.113) that s.113 should be retained in legislation as an FCA rule could not reproduce its effect and hence repeal would adversely affect the appropriate degree of consumer protection in that it (together with other “security” provisions) is “an effective anti-avoidance mechanism … support[ing] the other components of the regime for securities”.
- 1223 s.113(1). See CCA 1974 s.189B(3), Sch.2A: in s.113 references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver” (as defined in CCA 1974 s.189B(6)). See *Wilson v First County Trust Ltd [2001] Q.B. 407*; *Wilson v Secretary of State for Trade and Industry [2003] UKHL 40, [2003] 3 W.L.R. 568*. But s.113(7) (as amended by the Minors’ Contracts Act 1987 s.4) provides in effect that, where the debtor or a hirer is, e.g. a minor, s.113(1) does not produce the result that a contract of guarantee or indemnity becomes unenforceable merely by reason of his minority: see *Yeoman Credit Ltd v Latter [1961] 1 W.L.R. 828*; below, paras 47-040—47-041; Vol.I, paras 11-005 et seq.
- 1224 See CCA 1974 s.65(1) (above, para.41-094) and CCA 1974 s.124(1) (below, para.41-198).
- 1225 Previously the OFT. See now the power of the FCA to so order under FSMA 2000 s.28A (above, paras 41-066 and 41-067 and below, paras 41-253 and 41-254).
- 1226 CCA 1974 s.113(2).

- 1227 CCA 1974 s.113(8). This subsection also applies to s.113(3), see below. For the difficulties with the wording of subs.(8), see Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-114.
- 1228 The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.113) that s.106 should be retained in legislation as an FCA rule could not reproduce its effect and hence repeal would adversely affect the appropriate degree of consumer protection in that it (together with other "security" provisions) is "an effective anti-avoidance mechanism ... support[ing] the other components of the regime for securities".
- 1229 Subject to s.177 (saving for registered charges); below, para.41-542.
- 1230 Nor can an unpaid vendor's lien be asserted: *Orakpo v Manson Investments Ltd [1978] A.C. 95*.
- 1231 On the meaning of "realisation" in s.106 see the contrasting decisions: *Re London Scottish Finance (In Administration) [2013] EWHC 4047* ("realisation" should be given its conventional meaning of the *creditor* taking steps to release the value of the collateral (cf. "redemption" meaning the repayment by the *debtor* to obtain the return of the collateral)) and *Wilson v Howard (t/a Howard Pawnbrokers) [2005] EWCA Civ 147, [2005] C.C.L.R. 2* ("realisation" covers repayment by debtor as well as realisation by sale). It is suggested that the former interpretation is to be preferred as otherwise debtors providing security are in a more favourable position than ordinary debtors (who cannot *recover* payments made under unenforceable agreements unless the "unfair relationship" provisions (see below, paras 41-213 et seq.) apply). See also *Wilson v Robertsons (London) Ltd (No.2) [2006] EWCA Civ 1088, [2007] C.C.L.R. 1* (not "realisation" on the facts).
- 1232 CCA 1974 s.113(3)(a); see above, para.41-107. See also s.113(5).
- 1233 CCA 1974 s.113(3)(c); see above, para.41-108. See also s.113(5).
- 1234 CCA 1974 s.113(3)(b); see below, para.41-369.
- 1235 Defined in CCA 1974 s.189(1), (5).
- 1236 Under the Financial Services and Markets Act 2000 s.28A.
- 1237 CCA 1974 s.113(3)(c). For such orders, see above, paras 41-066 and 41-067 and below, paras 41-253 and 41-254.
- 1238 Defined in CCA 1974 s.189(1), (5).
- 1239 CCA 1974 s.113(3)(c); see above, para.41-094.
- 1240 CCA 1974 s.105(1), (7), (8); above, para.41-189.
- 1241 CCA 1974 s.105(4), (5), (7), (8); above, para.41-189.
- 1242 See below, para.41-198.
- 1243 CCA 1974 ss.113(3)(c), 124(3).
- 1244 See below, para.41-211.
- 1245 CCA 1974 s.113(3)(d). But see s.113(4) (declaration as to part only).
- 1246 CCA 1974 s.113(6); above, para.41-191.
- 1247 The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see Annex 5, paras 131–132) that "there would be benefit in modernising [the CCA pawn-broking] provisions to ensure they are fit for purpose and reflect modern forms of communication". The view is further expressed that FCA rules

- could achieve similar results (with debtors' rights being reformulated as creditors' conduct obligations) except in a few cases (see esp. ss.117, 120 and 121) and hence proposes that such provisions should be retained in legislation as repeal would adversely affect the appropriate degree of consumer protection. However "there are arguments for keeping all of sections 116 to 121 in legislation to avoid undue fragmentation of the regulatory regime". Moreover (see para.7-97) the FCA's view is that "the criminal offences in the CCA may no longer be necessary" and this would apply to ss.114(2) and 119.
- 1248 See above, paras 35-137—35-144. See also [CCA 1974 s.130\(3\)](#). Section 114(3)(a) was amended by the [Banking Act 1979 s.38\(2\)](#). For regulations made, see SI 1983/1553; SI 1983/1565; SI 1983/1566; SI 1983/1568; SI 1998/998; SI 2004/3236.
- 1249 Defined in [CCA 1974 s.189\(1\)](#); but the definitions of "pawn" and "pledge" contained in that subsection are circular, for *pawn* refers to "pledge" and "pledge" to "pawn".
- 1250 [CCA 1974 s.114\(3\)\(b\)](#). "Non-commercial agreement" is defined in [CCA 1974 s.189\(1\)](#); above, para.[41-050](#).
- 1251 "Documents of title" is not defined and it is submitted does not therefore bear the extended meaning given by [s.1\(4\) of the Factors Act 1889](#). Credit advanced against the security of documents of title is not otherwise exempted from the regulation of the Act.
- 1252 Added by the [Banking Act 1979](#): see above, para.[35-137](#).
- 1253 *Harrold v Plenty [1901] 2 Ch. 314*.
- 1254 Which create a mortgage or charge. See also *Swanley Coal Co v Denton [1906] 2 K.B. 873*.
- 1255 See above, para.[41-011](#).
- 1256 FCA Handbook CONC 4.2 (previously in [CCA 1974 s.55A](#)), see above, para.[41-079](#).
- 1257 See above, para.[41-081](#).
- 1258 See above, para.[41-130](#).
- 1259 The duty was previously generally imposed by the (now repealed) [CCA 1974 s.55B](#) and is now in the FCA Handbook; see above, para.[41-080](#).
- 1260 [CCA 1974 ss.123–125](#). See [CCA 1974 s.189B\(3\)](#), Sch.2A: in ss.123 and 124, references to "debtor" in relation to "green deal plans" (as defined in [CCA 1974 s.189\(1\)](#), see below, para.[41-261](#)) are to be read as references to the "current bill payer"/"previous bill payer" (as defined in [CCA 1974 s.189B\(6\)](#)). See also above, paras [36-007](#), [36-081](#).
- 1261 Some doubt exists as to the meaning of "negotiable instrument" in these sections. An instrument is only a negotiable instrument if it can be negotiated: [Bills of Exchange Act 1882 s.31\(1\)](#). An instrument may not be in a state of negotiability: see ss.8(1), 36(1). cf. ss.81, 81A (inserted by [s.1 of the Cheques Act 1992](#)). See also *Hibernian Bank Ltd v Gyson and Hanson [1939] 1 K.B. 483*.
- 1262 s.123(5). For the definition of "non-commercial agreement", see [CCA 1974 s.189\(1\)](#); above, para.[41-050](#). See also the exemption by order under [s.123\(6\)](#): SI 1984/435 (certain consumer hire agreements which have a connection with a country outside the UK).
- 1263 Not defined in the Act, but see [s.73 of the Bills of Exchange Act 1882](#).
- 1264 Defined in [CCA 1974 s.189\(1\)](#); above, para.[41-185](#).
- 1265 [CCA 1974 s.123\(1\)](#).
- 1266 Not defined in the Act, but see [s.31 of the Bills of Exchange Act 1882](#).

- 1267 CCA 1974 s.123(2). To a banker within the meaning of s.1 of the Bills of Exchange Act 1882; see above, para.36-250.
- 1268 CCA 1974 s.123(3). As to when a negotiable instrument is considered to have been taken by way of security, see s.123(4).
- 1269 CCA 1974 s.124(1). See also CCA 1974 ss.127 (below, para.41-201), 129(1), 142(1). CPR Pt 7 PD 7B.
- 1270 Defined in CCA 1974 s.189(1); above, para.41-182.
- 1271 CCA 1974 s.124(2). See also CCA 1974 ss.127 (below, para.41-201), 129(1), 142(1). CPR Pt 7 PD 7B.
- 1272 Defined in CCA 1974 s.189(1), (5).
- 1273 CCA 1974 ss.106, 124(3). See above, para.41-194. The same result ensues if an application to enforce the agreement is dismissed except on technical grounds only: see CCA 1974 ss.106, 113(3)(c).
- 1274 CCA 1974 s.125(1).
- 1275 CCA 1974 s.125(2)–(4); see above, paras 36-082 and 36-083.

(I) - Judicial Control

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(I) - Judicial Control ¹²⁷⁶

Jurisdiction and parties

- 41-200 In England and Wales the county court has *exclusive* ¹²⁷⁷ jurisdiction to hear and determine any action by the creditor or owner ¹²⁷⁸ to enforce ¹²⁷⁹ a regulated agreement ¹²⁸⁰ or any security ¹²⁸¹ relating to the action, and any action to enforce a linked transaction ¹²⁸² against the debtor or hirer or his relative. ¹²⁸³ The High Court has no jurisdiction to entertain such an action and it must be transferred to the county court. ¹²⁸⁴ A judgment or order of a county court for payment of a sum in proceedings arising out of a regulated agreement is enforceable in a county court only. ¹²⁸⁵ Except as provided by rules of court, ¹²⁸⁶ all the parties to a regulated agreement, and any surety, ¹²⁸⁷ must be made parties to any proceedings relating to the agreement. ¹²⁸⁸

Enforcement orders in cases of infringement

- 41-201 Section 127(1)¹²⁸⁹ of the 1974 Act confers upon the court a wide discretion as to whether, and, if so, on what terms, it will make an enforcement order ¹²⁹⁰ in cases of various infringements of the Act. In the case of an application for an enforcement order under s.55(2) (disclosure of information), ¹²⁹¹ s.61B(3) (duty to supply copy of overdraft agreement), ¹²⁹² s.65(1) (improperly executed agreements), ¹²⁹³ s.105(7)(a) or (b) (improperly executed security instruments), ¹²⁹⁴ s.111(2) (failure to serve copy of notice on surety), ¹²⁹⁵ or s.124(1) or (2) (taking of a negotiable

instrument in contravention of s.123),¹²⁹⁶ the court is to dismiss the application¹²⁹⁷ if, but only if, it considers it just to do so having regard to:

- (i)the prejudice caused to any person by the contravention in question, and the degree of culpability for it¹²⁹⁸; and
- (ii)the powers conferred on the court by s.127(2) (which permits the court, if it appears just to do so, to reduce or discharge any sum payable by the debtor or hirer, or any surety,¹²⁹⁹ so as to compensate him for prejudice suffered as a result of the contravention in question¹³⁰⁰), and by ss.135¹³⁰¹ and 136¹³⁰² of the Act.¹³⁰³

As has already been pointed out,¹³⁰⁴ the provisions providing for “irredeemably unenforceable” agreements,¹³⁰⁵ where the court was precluded altogether from making an enforcement order, have been repealed.¹³⁰⁶

Enforcement orders on death of debtor or hirer

- 41-202 The court may make an order under s.86(2) of the 1974 Act enforcing an unsecured or partly secured agreement on the death of a debtor or hirer¹³⁰⁷ if, but only if, the creditor or owner proves that he has been unable to satisfy himself that the present and future obligations of the debtor or hirer under the agreement are likely to be discharged.¹³⁰⁸

Time orders

- 41-203 Section 129 of the 1974 Act empowers the court in certain circumstances to make a “time order”.¹³⁰⁹ The four situations where a time order can be made are as follows¹³¹⁰: first,¹³¹¹ on an application by the creditor or owner for an enforcement order¹³¹²; second,¹³¹³ on an application made by a debtor or hirer after service on him of a default notice under s.87,¹³¹⁴ or a notice under s.76(1)¹³¹⁵ or 98(1)¹³¹⁶; third,¹³¹⁷ on an application made by a debtor or hirer after he has been given a “NOSIA” under s.86B¹³¹⁸ or 86C¹³¹⁹; fourth¹³²⁰ in an action brought by a creditor or owner to enforce a regulated agreement or any security,¹³²¹ or recover possession of any goods or land to which a regulated agreement relates.¹³²² It will be seen that the court’s power to make a time order extends to practically all¹³²³ applications and actions connected with the enforcement of a regulated agreement or security provided in relation thereto.

Types of order

- 41-204 The time order must provide for one or both of the two following orders, as the court considers just—(1) payment by the debtor or hirer or any surety¹³²⁴ of any sum owed¹³²⁵ under a regulated agreement or a security¹³²⁶ by such instalments, payable at such times, as the court, having regard to the means¹³²⁷ of the debtor or hirer and any surety, considers reasonable¹³²⁸; (2) the remedying by the debtor or hirer of any breach of a regulated agreement (other than non-payment of money) within such period as the court may specify.¹³²⁹ The first type of order is not dissimilar to the type of instalment order that can already be made by the county court under the *County Courts Act 1984*.¹³³⁰ The second type of order, however, has a more far-reaching effect. Without prejudice to anything done¹³³¹ by the creditor or owner before the commencement of the period specified in this type of order (“the relevant period”), he is precluded, while the relevant period subsists, from taking in relation to the agreement any action such as is mentioned in s.87(1)¹³³² of the *1974 Act* (terminating the agreement, demanding earlier payment of any sum, recovering possession of goods or land, enforcing a security, etc.).¹³³³ Further, if the agreement, for example, provides for the payment of compensation in the event of failure to repair, he cannot treat the provision as to compensation as operative while the relevant period relating to remedying the failure to repair subsists.¹³³⁴ During the relevant period the rights and remedies of the creditor or owner are completely suspended. If the breach to which the order relates is remedied within the relevant period, it is treated as not having occurred.¹³³⁵ If it is not remedied, at the end of the relevant period, but not before,¹³³⁶ the creditor or owner may proceed to enforce his contractual rights.¹³³⁷

Discretionary

- 41-205 The power of the court to make a time order is discretionary. In *First National Bank Plc v Syed*¹³³⁸ the Court of Appeal looked to the position of both the creditor and the debtor in deciding whether it was “just” to make a time order. Thus where there was history of default and merely sporadic payments by the debtor and a merely speculative (as opposed to realistic) prospect of an improvement in the debtor’s finances, it considered that it was not “just” to require the creditor to accept instalments which were too small even to keep down the accruing interest on the debtor’s account.

Variation and revocation

- 41-206

On the application of any person affected by a time order, the court may vary or revoke the order.¹³³⁹

Interest payable on judgment debts

- 41-207 Section 130A¹³⁴⁰ of the 1974 Act imposes notification requirements in relation to post-judgment interest¹³⁴¹ arising by virtue of a term in a regulated agreement, as it is not always obvious to judgment debtors that such interest is still payable.¹³⁴² (The section does not apply in relation to post-judgment interest required to be paid under certain statutory provisions.¹³⁴³) The section provides that a creditor or owner under a regulated agreement (other than a “non-commercial”¹³⁴⁴ or “small”¹³⁴⁵ agreement)¹³⁴⁶ cannot recover such interest on a judgment debt until he gives¹³⁴⁷ the debtor or hirer, free of charge,¹³⁴⁸ notice in the prescribed form¹³⁴⁹ after judgment and continues to give such a notice at intervals of not more than six months. Interest can only start running on the day the first notice is given¹³⁵⁰ and ceases to run if the requisite subsequent notice is not given within the six-month period, although it resumes running the day after notice is given.¹³⁵¹

Protection orders

- 41-208 The court on the application of the creditor or owner under a regulated agreement may make such orders as it thinks just for protecting any property of the creditor or owner, or property subject to any security, from damage or depreciation pending the determination of any proceedings under the Act, including orders restricting or prohibiting use of the property or giving directions as to its custody.¹³⁵²

Power to impose conditions, or suspend operation of order

- 41-209 If it considers it just to do so, the court may, in an order made by it in relation to a regulated agreement, include provisions making the operation of any term of the order conditional on the doing of specified acts by any party to the proceedings.¹³⁵³ In the same circumstances, the court may include provisions suspending the operation of any term of the order either until such time as the court subsequently directs, or until the occurrence of a specified act or omission.¹³⁵⁴ This latter power is used most frequently to suspend an order requiring the debtor under a hire-purchase or conditional sale agreement to deliver up the goods,¹³⁵⁵ or to suspend a possession order in the case

of an agreement secured on land,¹³⁵⁶ but it is not confined to those situations. On the application of any person affected by a provision so inserted by the court, the court may vary the provision.¹³⁵⁷

Power to vary agreements and securities

- 41-210 The court may in an order made by it under the [1974 Act](#) include such provision as it considers just for amending any agreement or security in consequence of a term of the order.¹³⁵⁸

Declaratory orders

- 41-211 [Section 142 of the 1974 Act](#) confers upon the county court¹³⁵⁹ jurisdiction to make declaratory orders in two situations. First, where under any provision of the Act a thing can be done by a creditor or owner on an enforcement order¹³⁶⁰ only, and either (a) the court dismisses (except on technical grounds only)¹³⁶¹ an application for an enforcement order, or (b) where no such application has been made or such an application has been dismissed on technical grounds only, an interested party applies specially¹³⁶² to the court for a declaration, the court may if it thinks just make a declaration that the creditor or owner is not entitled to do that thing,¹³⁶³ and thereafter no application for an enforcement order in respect of it can be entertained.¹³⁶⁴ A debtor or hirer, or a surety, can thus obtain a declaration that the creditor or owner is not entitled to do the thing in question, whether or not the creditor or owner applies to the court for an enforcement order. But this provision does not appear to entitle the creditor or owner to apply for a declaration that he is entitled to do the thing in question.¹³⁶⁵ In *Carey v HSBC Bank Plc*¹³⁶⁶ it was confirmed that [s.142](#) is without prejudice to the general (discretionary) power of the court to grant declarations and that its purpose is to extend this general power so as to, in effect, enable the court (as well as granting the declaration) to bar any further application.
- 41-212 Secondly, where (a) a regulated agreement or linked transaction¹³⁶⁷ is cancelled under [s.69\(1\)](#),¹³⁶⁸ or becomes subject to [s.69\(2\)](#),¹³⁶⁹ or (b) a regulated agreement is terminated under [s.91](#),¹³⁷⁰ and an interested party¹³⁷¹ applies specially¹³⁷² to the court for a declaration, the court may make a declaration to that effect.¹³⁷³

Footnotes

- 1 See Guest and Lloyd, *Encyclopedia of Consumer Credit Law* (1975, looseleaf); Goode, *Consumer Credit: Law and Practice* (looseleaf); Goode, *Consumer Credit Law* (1989); Harding, *Consumer Credit and Consumer Hire* (1995); Philpott et al, *The Law of Consumer Credit and Hire* (2009) Rosenthal, *Consumer Credit Law and Practice—A Guide*, 5th edn (2018).
- 1276 See Guest and Lloyd, *Encyclopedia of Consumer Credit Law* (1975, looseleaf), paras 2-128 —2-145; and Goode, *Consumer Credit: Law and Practice*, Pt C, Ch.46. Note also the requirements of the Pre-Action Protocol on Debt Claims (“Debt PAP”) in force on 1 October 2017.
- 1277 In Northern Ireland the jurisdiction of the county court is permissive and not mandatory: *CCA 1974 ss.141(4), 143, SR 1981/225 Ord.30 r.3*. See (on Northern Irish position): *AIB Group (UK) Plc v Keenan [2012] NIQB 16*. For transfer from the High Court, see *CCA 1974 s.141(2)*, and below. See also *Guildprime Specialists Contractors Ltd v Knight Unreported 24 September 2012, EAT* (EAT has no jurisdiction to consider enforceability of regulated credit agreement (loan to employee)).
- 1278 But a debtor or hirer is not so restricted.
- 1279 See *Mills v Grove Securities Ltd [1996] C.C.L.R. 74, CA*: service of statutory demand under *Insolvency Act 1986 s.268* and (by concession) presentation of a bankruptcy petition by creditor in relation to regulated agreement not “action … to enforce a regulated agreement”.
- 1280 The exclusive jurisdiction does not apply to exempt agreements (see above, para.41-039), but it does apply to “non-commercial agreements” (as defined in *CCA 1974 s.189(1)*, above, para.41-050). See *CPR Pt 7 r.9 7PD-003. County Courts Act 1984 s.21* (actions for recovery of land and actions where title is in question) does not apply to a mortgage securing an agreement which is a regulated agreement (*s.21(9)*). *CPR Pt 7 PD 7B*.
- 1281 Defined in *CCA 1974 s.189(1)*; see above, para.41-182.
- 1282 Defined in *CCA 1974 ss.19(1), 189(1)*; see above, paras 41-056 et seq.
- 1283 *CCA 1974 s.141(1)*. See *CCA 1974 s.189B(3), Sch.2A*: in *s.141(1), (2), (3A), (3B)*, references to “debtor” in relation to “green deal plans” (as defined in *CCA 1974 s.189(1)*, see below, para.41-261) are to be read as references to the “improver”/“current bill payer”/“previous bill payer” (as defined in *CCA 1974 s.189B(6)*). See also the *Civil Jurisdiction and Judgments Act 1982 Pt II* and *Schs 4–7* (and *SI 1990/2591*) and the *Civil Jurisdiction and Judgments Act 1991*. For “relative”, see *CCA 1974 ss.184(1), 189(1)*.
- 1284 *CCA 1974 s.141(2); Sovereign Leasing Plc v Ali [1992] C.C.L.R. 1*. The High Court must of its own motion set aside any default judgment entered in such an action: *Automobile Financial Services v Docherty Unreported 10 November 1987*. Originally it was held that the High Court had no power to strike out such an action, but only to transfer it: *Sovereign Leasing Plc v Ali*, above. But see now *s.40(1)(b) of the County Courts Act 1984*, as substituted by *s.2(1)* of the Courts and Legal Services Act 1990 and *Restick v Crickmore, The Times, 3 December 1993, CA; Barclays Bank Plc v Brooks [1997] C.C.L.R. 60*.
- 1285 High Court and County Courts (Jurisdiction) Order 1991 (*SI 1991/724*) art.8(1A) (as amended by *SI 1995/205*; *SI 1999/1014* and *SI 2014/821*).
- 1286 *CPR Pt 7 r.9, 7PD-003 para.9.1. CPR Pt 7 PD7B paras 9.1 and 9.2*. See *Milne v Open Access Finance Ltd [2020] EWHC 1420 (Ch)* on the meaning of “in accordance with the rules of

- court” in [s.141\(5\)](#), where CPR PD 7B was disappplied as it was not appropriate for a claim of such complexity in that case.
- 1287 Defined in [CCA 1974 s.189\(1\)](#); see above, para.[41-185](#).
- 1288 [CCA 1974 s.141\(5\)](#).
- 1289 See [CCA 1974 s.189B\(3\), Sch.2A](#): in [s.127](#), references to “debtor” in relation to “green deal plans” (as defined in [CCA 1974 s.189\(1\)](#), see below, para.[41-261](#)) are to be read as references to the “improver”/“current bill payer”/“previous bill payer” (as defined in [CCA 1974 s.189B\(6\)](#)). See *Wells v Devani [2019] UKSC 4*, a case on the [Estate Agents Act 1979 s.18\(6\)](#), which is almost identical in terms to [CCA 1974 s.127](#).
- 1290 Defined in [CCA 1974 s.189\(1\)](#). See [CPR Pt 7 r.9 7PD-003 para.3.1\(6\), 7.4, CPR Pt7 PD7B](#). Given the “multifactorial assessment” that must be made by the court, summary judgment is unlikely to be available: *Newmafruit Farms Ltd v Pither [2016] EWHC 2205 (QB), [2017] C.C.L.R. 8*.
- 1291 See above, para.[41-078](#), added on 10 February 2011 by [SI 2010/1010 reg.18](#).
- 1292 See above, para.[41-093](#), added on 10 February 2011 by [SI 2010/1010 reg.12](#).
- 1293 See above, para.[41-094](#).
- 1294 See above, para.[41-189](#).
- 1295 See above, para.[41-176](#).
- 1296 See above, para.[41-198](#).
- 1297 For the effect of dismissal on security, see [CCA 1974 ss.106, 113\(3\)](#); above, para.[41-194](#).
- 1298 For cases where no enforcement order was made, see: *PB Leasing Ltd v Patel and Patel (t/a Plankhouse Stores) [1995] C.C.L.R. 82, Cty Ct; Smerdon v Ellis [1997] C.L.Y. 960, Cty Ct; Re Dixon-Vincent [1997] C.L.Y. 958; Rendle v Hicks [1998] C.L.Y. 2504; Rahman v Brassil [1998] C.L.Y. 2503, Cty Ct*.
- 1299 Defined in [CCA 1974 s.189\(1\)](#); see above, para.[41-185](#).
- 1300 See *National Guardian Mortgage Corp v Wilkes [1993] C.C.L.R. 1, Cty Ct* (interest rate reduced); *Rank Xerox Ltd v Hepple [1994] C.C.L.R. 1, Cty Ct* (amount payable reduced); *Hatfield v Hiscock [1998] C.C.L.R. 68, Cty Ct; London North Securities Ltd v Meadows [2005] EWCA Civ 956, [2005] C.C.L.R. 7* (PPP premium not payable); *Wilson v Hurstanger Ltd 206 WL 2334292, Cty Ct, affirmed [2007] EWCA Civ 299, [2007] C.C.L.R. 2* (administrative and legal costs discharged).
- 1301 See below, para.[41-209](#).
- 1302 See below, para.[41-210](#).
- 1303 See *Nissan Finance UK v Lockhart [1993] C.C.L.R. 39, CA*: Court of Appeal will not normally interfere with the exercise of the discretion conferred by [CCA 1974 s.127\(1\)](#) unless there has been a failure to exercise it on the right principles.
- 1304 See above, para.[41-095](#).
- 1305 The now repealed [CCA 1974 s.127\(3\)–\(5\)](#).
- 1306 [Consumer Credit Act 2006 s.15](#) (in relation to agreements made on or after 6 April 2007).
- 1307 See above, para.[41-177](#); and see [CPR Pt 7 r.9 7PD-003 7.4; CCR Ord.49 r.4\(9\), CPR Pt 7 PD 7B](#).
- 1308 [CCA 1974 s.128](#). See [CCA 1974 s.189B\(3\), Sch.2A](#): in [s.128](#), references to “debtor” in relation to “green deal plans” (as defined in [CCA 1974 s.189\(1\)](#), see below, para.[41-261](#))

- are to be read as references to the “current bill payer”/“previous bill payer” (as defined in CCA 1974 s.189B(6)).
- 1309 See CCA 1974 s.189B(3), Sch.2A: in s.129, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “current bill payer”/“previous bill payer” (as defined in CCA 1974 s.189B(6)). For the content on an application for a time order, see CPR Pt 7 r.9 7PD-003 para.7.3; CCR Ord.49 r.4(5). CPR Pt 7 PD 7B para.3.1; Pt 55 PD 55A, para.7.1; Form N440. See *Jenkins v Cedar Holdings Ltd [1988] C.C.L.R. 34, Cty Ct*: time order made by Registrar was a final and not interlocutory order (so any appeal subject to (now) CPR Sch.2 CCR Ord.37 r.6). See CCA 1974 s.129(3) in relation to Scotland. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.191) that ss.129–133, 136 should be retained in legislation on the grounds that their repeal would adversely affect the appropriate degree of consumer protection, in particular for vulnerable consumers in financial difficulties. However the Review adds that “there may be merit in reviewing the triggers for a time order application and the associated procedures”.
- 1310 CCA 1974 s.129(1), as amended (i) by the *Debtors (Scotland) Act 1987* s.108(1) and Sch.6 para.17 (to refer to the qualification in subs.(3) in relation to Scotland); and (ii) by the *Consumer Credit Act 2006* s.16 (to add subs.(1)(ba), see below).
- 1311 CCA 1974 s.129(1)(a).
- 1312 Defined in CCA 1974 s.189(1) to mean an order under (i) CCA 1974 s.65(1) (above, para.41-094), (ii) CCA 1974 s.105(7)(a) or (b) (above, para.41-189), (iii) CCA 1974 s.111(2) (above, para.41-176) or (iv) CCA 1974 s.124(1) or (2) (above, para.41-198).
- 1313 s.129(1)(b). Note that a notice under CCA 1974 s.98A (see above, para.41-175) is not listed.
- 1314 See above, para.41-172.
- 1315 See above, para.41-166.
- 1316 See above, para.41-174.
- 1317 s.129(1)(ba), added (from 1 October 2008, see SI 2007/3300) by the *Consumer Credit Act 2006* s.16, but regardless of when the agreement was made.
- 1318 See above, para.41-131.
- 1319 See above, para.41-134. But see CCA 1974 s.129A (inserted by *Consumer Credit Act 2006* s.16(2)): debtor or hirer may only make an application for a time order if he has (i) given the creditor or owner a “notice of intent” indicating that he intends to apply for a time order and making proposals as to payment and (ii) waited 14 days.
- 1320 s.129(1)(c).
- 1321 Defined in CCA 1974 s.189(1); see above, para.41-182.
- 1322 See also CCA 1974 ss.90 (below, para.41-365), 92 (below, para.41-370), 126 (below, para.41-541).
- 1323 But not after the service of a s.98A(3) or (4)(b) notice (see above, para.41-175). See also *Mills v Grove Securities Ltd [1996] C.C.L.R. 74* (statutory demand under the *Insolvency Act 1986* can be set aside). But see s.130(3) (pledges).
- 1324 Defined in CCA 1974 s.189(1); see above, para.41-185.
- 1325 See *Cedar Holdings Ltd v Jenkins [1988] C.C.L.R. 34, Cty Ct*; *First National Bank Plc v Syed [1991] 2 All E.R. 250; Ashbroom Facilities v Bodley [1992] C.C.L.R. 31, Cty Ct*; *Cedar*

Holdings Ltd v Thompson [1993] C.C.L.R. 7, Cty Ct; Taylor [1993] Legal Action (8)14. In *Southern and District Finance Plc v Barnes [1995] C.L.Y. 726*, CA Leggatt LJ stated that, once a creditor brings possession proceedings, he demands payment of the whole sum outstanding under the charge and so, whether or not the whole loan has actually been called in, that that sum is “owed”.

1326 Defined in [CCA 1974 s.189\(1\)](#); see above, para.[41-182](#).

1327 Although by [CCA 1974 s.130\(1\)](#) the court is relieved from hearing evidence of means where, in accordance with rules of court, an offer to pay any sum by instalments is made by the debtor or hirer and accepted by the creditor or owner, difficulties can arise where the debtor or hirer makes no such offer, and does not appear, so that there may be no evidence of means.

1328 [CCA 1974 s.129\(2\)\(a\)](#). See also [CCA 1974 s.136](#); below, para.[41-210](#).

1329 [CCA 1974 s.129\(2\)\(b\)](#).

1330 County Courts Act 1984 [s.71](#), as amended by the [Crime and Courts Act 2013](#). A time order of this type does not suspend the remedies of the creditor or owner. But see (in relation to hire-purchase, conditional sale and consumer hire agreements) [CCA 1974 ss.130\(2\), 130\(4\), 133](#) and also [s.135](#).

1331 e.g. the creditor or owner may, for example, already have terminated the agreement but not repossessed goods, or both terminated and repossessed, but not recovered arrears of money due.

1332 See above, para.[41-168](#).

1333 [CCA 1974 s.130\(5\)\(a\)](#).

1334 [CCA 1974 s.130\(5\)\(b\)](#).

1335 [CCA 1974 s.130\(5\)\(c\)](#).

1336 Unless the order is revoked under [CCA 1974 s.130\(6\)](#).

1337 Unless a fresh order is made.

1338 [\[1991\] 2 All E.R. 250](#). See also *Southern and District Finance Plc v Barnes [1995] C.L.Y. 726*, CA (no time order to be made where debtor unlikely to be able to resume repayment by at least the contractual instalments). cf. *Director General of Fair Trading v First National Bank Plc [2001] UKHL 52, [2002] 1 A.C. 481* at [28].

1339 [CCA 1974 s.130\(6\)](#). Presumably the court would revoke a time order on the application of the creditor or owner if the debtor or hirer failed to pay the instalments ordered to be paid.

1340 Inserted by the [Consumer Credit Act 2006 s.17](#) on 1 October 2008 ([SI 2007/3300](#)) and applicable to agreements whenever made but only as regards judgments debts arising after commencement (see the [2006 Act Sch.3 para.13](#)). See [CCA 1974 s.189B\(3\)](#), [Sch.2A](#): in [s.130A](#), references to “debtor” in relation to “green deal plans” (as defined in [CCA 1974 s.189\(1\)](#), see below, para.[41-261](#)) are to be read as references to the “current bill payer”/“previous bill payer” (as defined in [CCA 1974 s.189B\(6\)](#)). The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above) proposes (see Annex 5, para.108) that [s.130A](#) should be retained in legislation as repeal would adversely affect the appropriate degree of consumer protection. Whilst an FCA rule could impose corresponding obligations on creditors, it could not automatically render void or invalid a term providing for post-judgment interest and a challenge to such a term would require the debtor to take the initiative.

- 1341 CCA 1974 s.130A(9) defines this as interest calculated by reference to the period after the giving of the judgment under which the judgment debt is payable.
- 1342 See *Director General of Fair Trading v First National Bank Plc [2001] UKHL 52, [2002] 1 A.C. 481*: such a term, although it took the debtor by surprise, held not to be “unfair” under the Unfair Terms in Consumer Contract Regulations 1999 (SI 1999/2083), above paras 40–354 et seq. As noted above at para.40-243, those regulations are replaced, for contracts made on or after 1 October 2015, by provisions in the Consumer Rights Act 2015 Pt 2.
- 1343 viz (a) the AJ (Scotland) Act 1972 s.4; (b) the Judgements Enforcement (NI) Order 1981; and (c) County Courts Act 1984 s.74, as amended. The County Court (Interest on Judgments Debts) Order 1991 (SI 1991/1184) (L.12) (made under County Courts Act 1984 s.74) provides that interest shall not be payable under that Order where the relevant judgment debt relates to a CCA 1974-regulated agreement. Hence the inclusion of terms allowing interest to be charged after a court judgment in such agreements, at issue in the *First National Bank Plc* case.
- 1344 Defined in CCA 1974 s.189(1), see above, para.41-050.
- 1345 Defined in CCA 1974 s.17, see above, para.41-049.
- 1346 CCA 1974 s.130A(8). And see the further limitation as to interest awarded under statute, noted above.
- 1347 Defined in CCA 1974 s.189(1) (as amended by SI 2004/3236 art.2(2)) to mean “deliver or send by appropriate method”.
- 1348 CCA 1974 s.130A(4).
- 1349 CCA 1974 s.130A(6) and see the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 (SI 2007/1167) regs 34–35 and Sch.5 (as amended by SI 2008/1751). The notice may be incorporated in a statement (e.g. a statement under CCA 1974 ss.77–78) or other notice (e.g. under CCA 1974 s.86B, 86C or 87) given under the Act: CCA 1974 s.130A(5).
- 1350 CCA 1974 s.130A(2).
- 1351 CCA 1974 s.130A(3).
- 1352 CCA 1974 s.131. See also CPR Pt 25; CPR Pt 23.
- 1353 CCA 1974 s.135(1)(a). See also CCA 1974 s.136, below, para.41-210.
- 1354 CCA 1974 s.135(1)(b), subject to the limitations contained in s.135(2) (goods not in possession or control of a person) and s.135(3) (consumer hire agreements).
- 1355 See below, paras 41-379, 41-381 and 41-458. But see CCA 1974 s.135(2).
- 1356 See *Southern and District Finance Plc v Barnes [1995] C.L.Y. 726, CA*: possession order suspended so long as terms of time order complied with.
- 1357 CCA 1974 s.135(4). Presumably the court is entitled thereby to revoke the provision.
- 1358 CCA 1974 s.136. In *Southern and District Finance Ltd v Barnes [1995] C.L.Y. 726*, the Court of Appeal held that the court had jurisdiction in consequence of a time order under CCA 1974 s.129 to reduce the contractual rate of interest in rescheduling the debt. See also *Director General of Fair Trading v First National Bank Plc [2001] UKHL 52, [2002] 1 A.C. 481* at [28]. See also the power of the court to reopen (and hence vary) agreements in the case of “unfair relationships”: CCA 1974 s.140B, below, paras 41-213 et seq.
- 1359 CCA 1974 s.189(1).

- 1360 Defined in CCA 1974 s.189(1) to mean an order under (i) CCA 1974 s.65(1) (above, para.41-094), (ii) CCA 1974 s.105(7)(a) or (b) (above, para.41-189), (iii) CCA 1974 s.111(2) (above, para.41-176) or (iv) CCA 1974 s.124(1) or (2) (above, para.41-198). See *Carey v HSBC Bank Plc [2009] EWHC 3417 (QB)*: no declaration under s.142 where the debtor alleged breach of CCA 1974 s.78 (see above, para.41-132), as the court has no power to make an enforcement order in such a case.
- 1361 Defined in CCA 1974 s.189(1), (5).
- 1362 i.e. under CCA 1974 s.142(1).
- 1363 See CCA 1974 s.113(3)(d): effect on security.
- 1364 CCA 1974 s.142(1). In *Watson v Progressive Financial Services Ltd Unreported 21 April 2009, Liverpool Cty Ct* it was held that the wording of s.142(1) ("is not entitled"; "and thereafter no application ... shall be entertained") presupposes an extant agreement where the creditor still needs to obtain an enforcement order and hence an order under s.142(1) could no longer be made once the debtor had fulfilled his obligations.
- 1365 Nevertheless, it seems the creditor or owner could bring such an action (under the general (discretionary) power of the court to grant declarations) in the High Court (CPR Pt 50 r.2), since this would not be an action to which CCA 1974 s.141 or CCA 1974 s.189(1) applies. On the general (discretionary) power, see *Carey v HSBC Bank Plc*, considered in the text.
- 1366 [2009] EWHC 3417 (QB).
- 1367 Defined in CCA 1974 ss.19(1), 189(1); above, paras 41-056 et seq.
- 1368 See above, para.41-107.
- 1369 See above, para.41-109.
- 1370 See below, para.41-369.
- 1371 This presumably includes the creditor or owner.
- 1372 i.e. under CCA 1974 s.142(2).
- 1373 CCA 1974 s.142(2). Again, this provision would appear to preclude an application for a declaration that the agreement or transaction has *not* been cancelled or *not* become subject to CCA 1974 s.69(2), or that the agreement has *not* been terminated under CCA 1974 s.91.

(m) - Unfair Relationships

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(m) - Unfair Relationships¹³⁷⁴

Extortionate credit bargains

41-213

The [Consumer Credit Act 1974](#)¹³⁷⁵ originally contained provisions¹³⁷⁶ enabling the court to reopen a credit agreement if it found that the credit bargain was “extortionate”.¹³⁷⁷ The threshold for intervention (that payments were “grossly exorbitant” or the bargain otherwise “grossly” contravened fair dealing) was very high¹³⁷⁸ and hence very few challenges on this basis were successful.¹³⁷⁹ The [Consumer Credit Act 2006](#) repealed and replaced these provisions¹³⁸⁰ with new [ss.140A–140D](#).¹³⁸¹ The new provisions essentially lower the threshold to one of a relationship between the creditor and the debtor (taking into account both the credit agreement and “any related agreement”) that is “unfair to the debtor”.¹³⁸² Such a claim succeeded in the Supreme Court in the context of the sale of PPI in *Plevin v Paragon Personal Finance Ltd*.

1383



Wide application of “unfair relationship” provisions

41-214

It is important to note four points concerning the application of the “unfair relationship” provisions. First, the scope of the provisions is wide in generally extending to all consumer credit agreements

with individuals¹³⁸⁴ and hence they apply irrespective of the size of the loan or purpose of the credit.¹³⁸⁵ The provisions apply not only to regulated credit agreements but also to most “exempt agreements”,¹³⁸⁶ as well as “non-commercial agreements”¹³⁸⁷ (and even, in theory, “small agreements”¹³⁸⁸). They do not, however, apply to an agreement that is an exempt agreement by virtue of being a regulated land mortgage or home purchase plan.

¹³⁸⁹



“Any related agreement”

- 41-215 Second, the power of the court is not confined to an examination and reopening of the terms of the credit agreement itself (the “main agreement”¹³⁹⁰), but extends to an examination and reopening of “any related agreement”.¹³⁹¹ This term is defined¹³⁹² to cover three categories of agreement: (a) any earlier credit agreement(s) consolidated by the main agreement to be reopened¹³⁹³; (b) a “linked transaction”¹³⁹⁴ in relation to the main agreement or any previous agreement consolidated by it¹³⁹⁵; and (c) any security¹³⁹⁶ provided in relation to the main agreement, any previous credit agreement consolidated by it or a linked transaction within (b).¹³⁹⁷

“Spent” agreements

- 41-216 Third, even if the relationship between the creditor and debtor has come to an end, most usually if the debtor has repaid the credit, this does not preclude the court making a determination.¹³⁹⁸ Thus it may reopen credit agreements even if they have ended.¹³⁹⁹

Discretion

- 41-217 Finally, even if the relationship is found to be “unfair to the debtor”, the court has a residual discretion whether or not to reopen the credit agreement.¹⁴⁰⁰ The court might refuse to do so if, for example, the debtor unduly delayed in seeking relief¹⁴⁰¹ or the debtor failed to disclose his true financial position¹⁴⁰² or the debtor obtained the credit by false representations¹⁴⁰³ or if the debtor, who was not naïve or unsophisticated, did not complain either at the time or when giving evidence in hindsight.¹⁴⁰⁴

When relationship is “unfair to the debtor”

- 41-218 Section 140A(1) enables a court to make an order under s.140B¹⁴⁰⁵ if it finds that the relationship between the creditor and the debtor arising out of a credit agreement, or that agreement taken with any “related agreement”,¹⁴⁰⁶ is “unfair to the debtor” as a result of one or more of three factors. Those factors¹⁴⁰⁷ are: (a) any of the terms of the agreement (or any “related agreement”); (b) the way in which the creditor has exercised or enforced any of his rights under the agreement (or any “related agreement”); (c) “any other thing done (or not done) by, or on behalf of, the creditor (whether occurring before or after the making of the agreement or any ‘related agreement’). In relation to (b) and (c), the court is required¹⁴⁰⁸ to look not only to the creditor’s actions (or inaction) but also to those of an “associate” or “former associate” of the creditor.¹⁴⁰⁹
- 41-219 Determining whether one or more of the three factors in s.140A(1) give rise to an “unfair” relationship, s.140A(2) requires the court to “have regard to all matters it thinks relevant”, the subsection making it clear that these may include matters “relating to” the debtor and to the creditor (or an “associate” or “former associate” of the creditor¹⁴¹⁰). This general wording is a departure from the old “extortionate credit bargain” provisions; they listed various “factors” in relation to the debtor and creditor that the court was obliged to have regard to.¹⁴¹¹ It seems clear that this reference to “matters relating to” the debtor or creditor is intended to preserve the relevance of those previously listed factors.¹⁴¹² Moreover, it was held in *Pilgrim Rock v Iwanuik*¹⁴¹³ that the behaviour of a person who was neither an agent¹⁴¹⁴ nor an associate¹⁴¹⁵ of the creditor might still be relevant under s.140A(2), even though his actions could not otherwise¹⁴¹⁶ be attributed to the creditor. It was said that “by reason of the language of [subs.(2)], the court’s enquiry was not limited to matters legally attributable to the creditor” and hence background information as to the person who controlled the corporate creditors (in particular that this person and the debtor were joint venturers and friends and not dealing at arm’s length) was relevant under s.140A(2).
- 41-219A It should be noted that when deciding if a relationship is fair or unfair, the fact that it was fair or unfair at the start of the credit agreement does not mean it will necessarily continue to be such throughout the agreement. This was confirmed in *Smith v Royal Bank of Scotland Plc*¹⁴¹⁷
- U** where the Court of Appeal held that, for the purposes of limitation,¹⁴¹⁸

U a relationship that was originally unfair (due to the non-disclosure of PPI commission) ceased to be unfair whilst the credit agreement continued (once all sums due under the PPI agreement had been paid and no liability remained

¹⁴¹⁹

U). However, the court was “entitled to take all relevant matters into account whenever they took place, and that will include a related agreement such as the PPI agreement even if that PPI agreement itself had come to an end before the point in time that the unfairness of the relationship is being assessed”.

¹⁴²⁰

U

- 41-220 In *Kerrigan v Elevate Credit International Ltd*¹⁴²¹ an analogy was drawn with the “unfair prejudice” company law jurisprudence¹⁴²² stating that “unfair relationship … is a concept which must be applied judicially and upon rational principles”.¹⁴²³

Post-contracting behaviour

- 41-221 Factors (b) and (c) in s.140A(1)¹⁴²⁴ are novel in that they relate to the creditor’s post-contracting behaviour.¹⁴²⁵ Other statutory provisions, for example the **Unfair Contract Terms Act 1977**¹⁴²⁶ and the **Consumer Rights Act 2015 Pt 2**¹⁴²⁷ are more limited in focusing on the contractual terms *at the time of contracting*.¹⁴²⁸

“Terms of the agreement or any related agreement”

- 41-222 The first factor¹⁴²⁹ that can render the relationship “unfair to the debtor” is the actual terms of the credit agreement or any “related agreement”.¹⁴³⁰ It should be noted that, unlike the position under the **Consumer Rights Act 2015 Pt 2**,¹⁴³¹ the question is not whether the *terms themselves* are “unfair”, but whether the *terms render the relationship* “unfair to the debtor”. Usually, the most relevant terms are likely to be those concerning the charge for credit (especially interest).¹⁴³² However, other terms, for example those requiring the payment of excessive early redemption fees¹⁴³³ may, at least if considered in the context of other terms of the credit agreement, be held to render the relationship “unfair to the debtor”.¹⁴³⁴ Moreover, the terms of “any related

agreement”¹⁴³⁵ are also relevant, for example those in linked transactions that might impose obligations on a debtor¹⁴³⁶ to a third party. Hence in *Link Financial Ltd v North Wilson*¹⁴³⁷ the credit relationship was held to be “unfair” because of the “draconian effect” of a term in the timeshare agreement that was financed by the credit agreement.¹⁴³⁸ And in *Arthistory Ltd v Campbell*

¹⁴³⁹

U a relationship between a creditor and debtors who were under immediate financial pressure due to home-repossession threats (by another creditor) was held to be unfair, *inter alia*,¹⁴⁴⁰

U because the creditor had extracted an option agreement over his security (the home). Given the adequate security over the home, there was no sound commercial reason for the option agreement nor was it a legitimate and proportionate attempt by the creditor to protect its position.

Charge for credit

41-223 It is clear that the charge for credit, although normally a “core term” under the **Consumer Rights Act 2015**¹⁴⁴¹

U and hence generally not open to challenge under that Act, is very relevant in determining if the relationship is “unfair to the debtor” under the “unfair relationship” provisions.¹⁴⁴²

U The previous “extortionate credit bargain” provisions explicitly required the court to have regard to the “interest rates prevailing at the time [the agreement] was made”.¹⁴⁴³

¹⁴⁴³

U The case-law under the “unfair relationship” provisions has so far generally followed¹⁴⁴⁴

U the previous approach under the old “extortionate credit bargain” provisions of judging interest rates against the market rate for that type of loan.¹⁴⁴⁵

¹⁴⁴⁵

U Thus rates charged by banks, building societies and finance houses are of little relevance where money has been borrowed from a moneylender in circumstances that or for a purpose for which such institutions would not have lent money. Further, in relation to the (now repealed) Moneylenders Act, it had been said that “the rate of interest might in certain circumstances be of itself a fallacious test as to whether the transaction was harsh and unconscionable. In many

circumstances one shilling interest for a week on £1, or five shillings interest on £1 for a short period, though an enormous rate of interest ought not to be set aside".

¹⁴⁴⁶

U However, whilst under the old extortionate credit bargain provisions a subsequent rise or fall in interest rates was irrelevant,

¹⁴⁴⁷

U this may now be a relevant "matter",

¹⁴⁴⁸

U especially as the third factor

¹⁴⁴⁹

U refers to inaction (for example, not lowering interest rates) by the creditor after the making of the agreement.

Exercise or enforcement of rights by creditor

41-224

The second factor ¹⁴⁵⁰ that can render a relationship "unfair to the debtor" is "the way in which the creditor has exercised or enforced any of his rights" under either the credit agreement itself or "any related agreement". ¹⁴⁵¹ It would seem that when debts have been assigned to a new "creditor", a far harsher enforcement approach by such an assignee (than the original creditor would have been expected to adopt), could render the relationship "unfair". ¹⁴⁵² Although it is the exercise or enforcement of the *creditor's* rights that are material (and not, for example, the rights of third parties to any "related agreements"), the court must have regard ¹⁴⁵³ to activities by or on behalf of an "associate" ¹⁴⁵⁴ or "former associate" of the creditor. ¹⁴⁵⁵ Requiring the court to evaluate how a creditor exercises or enforces his contractual rights is a further novel feature of these provisions. In the business context, the courts have so far not found that the enforcement by creditors of agreements on default have given rise to "unfair relationships", ¹⁴⁵⁶ although there are dicta that "arbitrary" or "exploitative" enforcement could do so. ¹⁴⁵⁷ Similarly, in so far as it was held that the reporting of arrears to a credit reference agency was not an "enforcement" of a temporarily unenforceable agreement (due to a breach of s.77 ¹⁴⁵⁸) it was further held that this did not give rise to an "unfair relationship". ¹⁴⁵⁹ However, in the consumer context there are various regulatory standards requiring creditors to exercise forbearance and consideration towards borrowers experiencing difficulty ¹⁴⁶⁰ and it is likely these will inform decisions on whether enforcement in those contexts has rendered a relationship "unfair". In *Re London Scottish Finance (In Administration)* ¹⁴⁶¹ it was held that in the case of "irredeemably" ¹⁴⁶² unenforceable credit agreements, the sending of letters demanding payment of arrears and stating that failure could result in the loss of the debtors' home (which was untrue) gave rise to an "unfair relationship" if

this threat was a (not necessarily the only) cause of the debtors' decision to pay. But demanding payment in the case of an unenforceable (but potentially enforceable under s.127) agreement did not.¹⁴⁶³

Any other action by creditor

41-225

U The third factor¹⁴⁶⁴ that can render a relationship "unfair to the debtor" is any other¹⁴⁶⁵ action or inaction¹⁴⁶⁶ by, or on behalf of,¹⁴⁶⁷ the creditor either before or after the making of the credit agreement or "any related agreement".¹⁴⁶⁸ Again,¹⁴⁶⁹ the court must have regard¹⁴⁷⁰ to activities by or on behalf of an "associate"¹⁴⁷¹ or "former associate" of the creditor¹⁴⁷² but not the activities of third parties to any "related agreements" (unless they are agents or associates).¹⁴⁷³ This third factor covers pre-contracting behaviour such as (mis)statements¹⁴⁷⁴

U made by the creditor, his agents or "associates" before the credit agreement (or "related" agreement) as well as their post-contracting behaviour. Initially, the courts were generally reluctant to undermine well-established principles of common law¹⁴⁷⁵ or to augment existing regulatory regimes by imposing novel duties on creditors whether at the time of contracting or thereafter.¹⁴⁷⁶ However, in *Plevin v Paragon Personal Finance Ltd*¹⁴⁷⁷ the sale of (expensive¹⁴⁷⁸) PPI (payment protection insurance) in circumstances where neither the large amount nor existence of the commission received by the creditor¹⁴⁷⁹ was revealed to the debtor, was held by the Supreme Court to give rise to an "unfair relationship" despite the sale having been effected in accordance with the relevant regulatory regime.¹⁴⁸⁰ Moreover, on the special facts of *Patel v Patel*,¹⁴⁸¹ the omission to reduce the interest rate (when the bank base rate reduced) and to provide any elementary periodic documentary evidence of the debtor's (rising) indebtedness over a long period of time (together with an initial "extortionate" interest rate) gave rise to an "unfair relationship". An expansive approach to the jurisdiction was also adopted in *Scotland v British Credit Trust Ltd.*¹⁴⁸² The limitation period for a claim in misrepresentation had expired but, citing *Patel*,¹⁴⁸³ the Court of Appeal did not regard this as precluding a finding that those misrepresentations rendered the credit relationship "unfair".¹⁴⁸⁴

Applications¹⁴⁸⁵

41-226

An application that the credit or “related agreement” be reopened may be made by the debtor or a surety,¹⁴⁸⁶ even though no proceedings have been instituted by the creditor.¹⁴⁸⁷ Such an application may, in England and Wales, be brought only in the county court.¹⁴⁸⁸ Moreover, a credit or “related agreement” may also be reopened at the instance of the debtor or a surety:

- (i)in any proceedings to which the debtor and creditor are parties, being proceedings to enforce the credit agreement or any “related agreement”¹⁴⁸⁹; or
- (ii)at the instance of a debtor or a surety in other proceedings in any court where the amount paid or payable under the credit agreement is relevant.¹⁴⁹⁰

A party to any such proceedings is entitled, in accordance with the rules of court, to have any person who might be the subject of an order under s.140B to be made a party.¹⁴⁹¹

Onus of proof

41-227

Section 140B(9)

1492

U of the 1974 Act provides that if, in proceedings under s.140B, the debtor or a surety alleges that the relationship between the creditor and debtor is “unfair to the debtor”, it is for the creditor to prove the contrary.

1493

U Hence it is clear, that the “legal” or persuasive burden of proof rests throughout on the creditor, who must satisfy the court, on the balance of probabilities, that the credit relationship is not “unfair to the debtor”.

1494

U In earlier editions of this work it was submitted that the “evidential burden”, that is, the burden of producing sufficient evidence to raise the issue rests initially on the debtor, and that the court need not consider the issue if the debtor does no more than plead that the credit relationship is “unfair” to him without producing any or any sufficient evidence to require the court to consider it.

1495

U This approach appears to have been applied in *Carey v HSBC Bank Plc*,¹⁴⁹⁶

U where the claimant debtor adduced no evidence but merely relied on the creditor’s failure to supply a s.78 copy in breach of that provision.

1497

U It was held that this in itself could not found an “unfair relationship” claim and the claim was dismissed.

1498

U However, in *Bevin v Datum Finance Ltd*,

1499

U where the debtor was seeking to set aside a statutory demand in bankruptcy proceedings and it was not clear that all the relevant evidence was before the court, Peter Smith J. disapproved the suggestion that the evidential burden lay on the debtor and required the creditor to adduce evidence to disprove the mere allegation of “unfair relationship”. It is suggested that whilst in principle it is enough for the debtor merely to allege an “unfair relationship” for the issue to be raised, if the debtor is the claimant then in practice he will need to provide supporting evidence if a CPR Pt 18 request for “further information” is served by the creditor.

1500

U Moreover, even if the debtor is the defendant, it is suggested that if the creditor’s evidence provides no suggestion that the relationship is unfair, the court is likely to regard the creditor as having discharged the burden and to dismiss the debtor’s claim.

1501

U

Nature of relief 1502

41-228

In reopening the agreement, the court may, ¹⁵⁰³ make one or more of the seven types of order listed in s.140B(1) of the 1974 Act, viz:

(a)require the creditor, or any associate ¹⁵⁰⁴ or former associate of his, to repay the whole or part of any sum paid by the debtor or surety ¹⁵⁰⁵ by virtue of the agreement or any related agreement, ¹⁵⁰⁶ whether paid to the creditor or to any other person ¹⁵⁰⁷;

(b)require the creditor, or any associate ¹⁵⁰⁸ or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement ¹⁵⁰⁹;

(c)reduce or discharge any sum payable by the debtor or surety ¹⁵¹⁰ by virtue of the agreement or any related agreement ¹⁵¹¹;

(d)direct the return to a surety ¹⁵¹² of any property provided by him for the purposes of the security ¹⁵¹³;

(e)otherwise set aside the whole or part of any duty imposed on the debtor or a surety ¹⁵¹⁴ by virtue of the agreement or any related agreement ¹⁵¹⁵;

(f)alter the terms of the agreement or any related agreement ¹⁵¹⁶;

(g)direct accounts to be taken ¹⁵¹⁷ between any persons. ¹⁵¹⁸

- 41-229 It is important to note that the court may require the creditor to repay sums paid to a person other than himself, ¹⁵¹⁹ and this is reinforced and extended by a specific provision ¹⁵²⁰ to the effect that an order may be made notwithstanding that its effect is to place a burden on the creditor (or any associate or former associate of his) in respect of an advantage unfairly enjoyed by another person. Moreover, it seems that there is no requirement that the “unfairness” should actually cause any loss for an award of substantial damages to be made, although relief should not give a claimant a windfall but rather should reflect (as closely as possible) the overall position that would have applied had the matters giving rise to the “unfairness” not taken place. ¹⁵²¹

Compromise of claim

- 41-230 In *Holyoake v Candy* ¹⁵²² the claimants had entered into an agreement compromising (inter alia) their unfair relationship claim. Nugee J., after referring to *Binder v Alachouzos* ¹⁵²³ a case on a compromise of a claim challengeable under the old **Moneylenders Act** and other case law on the compromising of claims under consumer protection statutes, held that a compromise agreement settling an unfair relationship claim did not in principle act as a jurisdictional bar to the Court considering whether the relationship between the parties was unfair but on the facts he upheld the compromise on the basis of the policy of the Court to encourage good faith compromises. Although the compromise agreement was either a “credit agreement” ¹⁵²⁴ on the facts or a “related agreement” ¹⁵²⁵ he nevertheless declined to decide “whether technically … the relationship was not unfair because the parties had agreed to compromise that issue; or whether … that even if unfair, [he declined] to make any order in these respects under s.140B” as “the practical result” was the same: the claims it covered were effectively compromised and hence dismissed. This issue was considered and the reasoning approved in the permission to appeal hearing ¹⁵²⁶ where David Richards LJ opined ¹⁵²⁷ that:

“This does not open the door to unscrupulous lenders forcing borrowers into compromise agreement. The court will be astute to look as whether an agreement was entered into in good faith or with the benefit of advice.”

Reopening past or “spent” transactions

- 41-231 Although the old “extortionate credit bargain” provisions¹⁵²⁸ contained no such express words, the courts assumed that they were entitled to reopen an agreement which has been closed and settled,¹⁵²⁹ but exercised their discretion with some reluctance after the lapse of a considerable period of time.¹⁵³⁰ The new “unfair relationship” provisions explicitly state that the court may determine that a relationship is unfair “notwithstanding that the relationship may have ended”¹⁵³¹ and therefore the court may clearly make an order under s.140B in such a case.

Retrospective effect and limitation

- 41-232 The court’s powers are not limited to agreements made after the entry into force of the “unfair relationship” provisions but, subject to transitional provisions, extend to agreements and transactions made before that date.

¹⁵³²

U The limitation period for actions under the old “extortionate credit bargain” provisions caused controversy and similar issues arise under the new provisions. First, it seems¹⁵³³

U that a debtor who invokes the provisions is making a “claim for relief” for the purposes of the Limitation Act 1980 and, hence, that claim (even if raised by way of defence¹⁵³⁴

¹⁵³⁴

U) is subject to the appropriate limitation period. In principle, the limitation period for an action under the new provisions is 12 years under s.8(1) of the Limitation Act 1980 since the claim is a claim on a specialty.

¹⁵³⁵



- 41-232A But second, in relation to a claim for repayment (as opposed, for example, to a claim for relief from future liability), s.9(1) of the 1980 Act prescribes a limitation period of six years for “an action to recover any sum recoverable by virtue of any enactment”.

¹⁵³⁶

U In *Canada Square Operations Ltd v Potter*

1537

U the unfair relationship provisions were held to confer a statutory “right of action” (in that case, for non-disclosure of PPI commission giving rise to an unfair relationship) and hence resulted in the creditor committing a “breach of duty” under the [Limitation Act 1980 s.32\(2\)](#).

1538

U Accordingly, the primary limitation period for recovery of the deliberately undisclosed and hence unrecovered balance of commission was disapplied under [Limitation Act 1980 s.32\(1\)\(b\)](#).

41-232B The limitation period will run from the date on which the cause of action accrued. It was held in

U *Patel v Patel*

1539

U that the cause of action under the new (unfair relationship) provisions is a continuing one accruing from day to day until the relationship ends.

1540

U This is in contrast to the position under the old extortionate credit bargain provisions where, after much controversy, it was assumed

1541

U that the cause of action accrued at the date of the agreement. *Patel* concerned the post-contracting behaviour (and omissions) of the creditor and it may be that if the allegations relate only to the terms and/or the pre-contracting behaviour of the debtor, then the date of the agreement is a more appropriate date from which the limitation period should run.

1542

U In any event, if the provisions are invoked by way of legal set-off or counterclaim, such a claim is deemed to have been commenced on the date of the original action.

1543

U Further, in *Smith v Royal Bank of Scotland Plc*

1544

U it was held that an ongoing relationship may change from being unfair at the outset (due to the non-disclosure of PPI commission) to becoming fair later (once all sums due under the PPI agreement had been paid and no liability remained) and in such a case the limitation period will start to run at that point.

41-232C

U

As regards the accrual of the cause of action for the recovery of money paid, the case law under the old extortionate bargain provisions was inconsistent and inconclusive: it accrued either at the date of the agreement

¹⁵⁴⁵

 or when the payment had been made.

¹⁵⁴⁶

 Case law under the new (unfair relationship) provisions suggests that the later is the correct view.

¹⁵⁴⁷



^{41-232D} If an unfair relationship claim is successful, this may result, in effect, in the extension of the normal limitation period that would normally apply to the relevant concurrent common law claim. ¹⁵⁴⁸ But, in exercise of its discretion under these statutory provisions, ¹⁵⁴⁹ the court may, in any event, reject a delayed claim. ¹⁵⁵⁰

“Unfair terms”

⁴¹⁻²³³ The terms of a credit agreement where the debtor is a consumer may also be challenged by him as “unfair” and so not binding on him under the *Consumer Rights Act 2015 Pt 2*. ¹⁵⁵¹

Footnotes

¹ See Guest and Lloyd, *Encyclopedia of Consumer Credit Law* (1975, looseleaf); Goode, *Consumer Credit: Law and Practice* (looseleaf); Goode, *Consumer Credit Law* (1989); Harding, *Consumer Credit and Consumer Hire* (1995); Philpott et al, *The Law of Consumer Credit and Hire* (2009) Rosenthal, *Consumer Credit Law and Practice—A Guide*, 5th edn (2018).

¹³⁷⁴ See Guest and Lloyd, *Encyclopedia of Consumer Credit Law* (1975, looseleaf), paras 2-141A —2-141D; and Goode, *Consumer Credit: Law and Practice*, Pt C, Ch.47; *Brown [2009] L.M.C.L.Q. 90; Lomnicka [2012] J.B.L. 713; Brown (2016) 36(2) L.S. 230–257*. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.⁴¹⁻⁰⁰⁴ (note), above) proposes (see Annex 5, para.205) that *ss.140A–140C* should be retained in legislation as they could not be replaced by FCA rules without adversely affecting the

appropriate degree of consumer protection. Moreover the FCA stated that it did not consider it necessary to provide guidance on the meaning of “unfairness” in these provisions (although previously the OFT had done so, see below, para.41-213).

- 1375 See also (on the existing equitable jurisdiction of the Chancery Division in relation to mortgages) *Cityland and Property (Holdings) Ltd v Dabrah [1968] Ch. 166*.
- 1376 See the similar provision in the *Insolvency Act 1986* s.343 for the reopening of credit transactions of an individual who is adjudged bankrupt. See also *Insolvency Act 1986* s.244 (winding-up of companies).
- 1377 ss.137–140 came into force on 16 May 1977, *SI 1977/325 (c.11)*. See 29th edn of this work, para.41-193 and *Bentley and Howells [1989] Conv. 234*. The OFT reviewed ss.137–140 in *Unjust Credit Transactions* (1991) and recommended the widening of the operation of the sections by the substitution of “unjust credit transaction” for “extortionate credit bargain”, but this was never implemented and has been overtaken by the introduction of the new “unfair relationship” provisions.
- 1378 *Broadwick Financial Services v Spencer [2002] EWCA Civ 35, [2002] 1 All E.R. (Comm) 446* at [80]. See also *First National Securities Ltd v Bertrand [1980] C.C.L.R. 1, Cty Ct; A Ketley Ltd v Scott [1981] I.C.R. 241; Wills v Wood (1984) 128 S.J. 222, CA; Davies v Directloans Ltd [1986] 1 W.L.R. 823*.
- 1379 In *Woodstead Finance v Petrou, The Times*, 23 January 1986, the Court of Appeal did not disturb a mortgage at an APR of 42.5 per cent p.a. as this rate was normal for short-term loans. And see *A Ketley Ltd v Scott [1981] I.C.R. 241*; and *Davies v Directloans Ltd [1986] 1 W.L.R. 823*, where interest rates of 48 per cent and 21.7 per cent (APR), on agreements that were secured by a land mortgage, were upheld. Contrast, however, *Barcabe v Edwards [1983] C.C.L.R. 11, Cty Ct*, interest of 100 per cent p.a. (APR 319 per cent) on unsecured loan reduced to 40 per cent p.a.; *Devogate v Jarvis Unreported 1987, Cty Ct*, interest of APR 39 per cent reduced to 30 per cent where loan was well secured; *Shahabinia v Gyachi Unreported 1988* interest rates on non-commercial loans of 104 per cent, 78 per cent and 156 per cent reduced to 15 per cent; *Prestonwell Ltd v Capon Unreported 1988, Cty Ct*, interest rate of 42 per cent flat reduced by half, the risk being low; *Castle Phillips & Co v Wilkinson [1992] C.C.L.R. 83*, Cty Ct interest rate of 4 per cent per month (interest being deducted from the loan) on secured “bridging” loan reduced to 20 per cent p.a.; *Batooneh v Asombang [2003] EWHC 2111 (QB)* (interest rate of 100 per cent on informal commercial loan reduced to 25 per cent); *County Leasing Ltd v East [2007] EWHC 2907* (reopening of business loan of over £370,000).
- 1380 *Consumer Credit Act 2006* ss.19–22 on 6 April 2007 (*SI 2007/123*). The new provisions essentially apply to agreements *whenever made*, as long as they have not been paid off (become “completed agreements”) by 6 April 2008 (see the (complex) transitional provisions in the *2006 Act Sch.3 para.1(2)* (definition of “completed agreement”) and para.14). On the application of the transitional provisions, see *Soulsby and Soulsby v FirstPlus Financial Group Plc Unreported 5 March 2010, QBD, Leeds & District Registry Mercantile Court* (old provisions applied) and *Barnes v Black Horse Ltd [2011] EWHC 1416 (QB)* (new provisions applied, see below, para.41-215).

1381 s.140D (Advice and information from OFT) was repealed on 1 April 2014, by SI 2013/1881 art.20(4), when consumer credit regulation was transferred to the FCA (see above, para.41-002) as the FCA has general power to issue guidance under the *Financial Services and Markets Act 2000* s.139A. But the FCA stated in its Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) that it did not consider it necessary to provide guidance on the meaning of “unfairness” in these provisions (although previously the OFT had done so; see para.41-213, below).

1382 See further, below, paras 41-218—41-225.

① 1383 [2014] UKSC 61 (see further below, para.41-225) and see *Scotland v British Credit Trust Ltd [2014] EWCA Civ 790*. For previous cases where the claim was successful, see: *Patel v Patel [2009] EWHC 3264* (“exorbitant” interest and lack of transparency in loans between friends); *Morrison v Betterpace Ltd (t/a Log Book Loans) Unreported 1 September 2009, Lowestoft Cty Ct* (APR of 485.25 of refinancing loan reduced to APR of 343.4 per cent charged on previous loan); *MBNA Europe Ltd v Thorius, Newcastle Cty Ct [2010] E.C.C. 8* (sale of PPI); *Barons Finance Ltd v Olubisi Unreported 26 April 2010, Mayor’s & City of London Ct* (vulnerable consumer “exploited”)); *Nelmes v NRAM Plc [2016] EWCA Civ 491* (in business context, payment by the lender of a “procurement fee” (being half the arrangement fee charged by the lender to the borrower) to the borrower’s broker deprived the borrower of the disinterested advice of his broker and hence rendered the credit relationship “unfair”; lender accountable to borrower for all the undisclosed “procurement fee” plus interest from the date of payment); *Townson v FCE Bank Plc (t/a Ford Credit) Unreported 23 June 2016, Birmingham Cty Ct* (“unfair relationship” found where PPI (of which the debtor was unaware and by implication did not want) was sold by car dealer to a debtor under a hire-purchase agreement). For successful post-Plevin cases, see *Doran v Paragon Personal Finance Ltd Unreported 28 June 2018* (Manchester Cty Ct); *Goldhill Finance Ltd v Berry Unreported 26 October 2018* (London Cty Ct) (exercise of common law right to possession after stay of execution of warrant of possession); *Pilgrim Rock v Iwanuik [2019] EWHC 203 (Ch)* (rate of interest compounded quarterly rising to 9 per cent in the event of default, where the creditor had done nothing to enforce its rights for four years while interest was accruing at the escalated default rate); *Greenlands Trading Ltd v Pontearso [2019] EWHC 278 (Ch)* (as to “default administration fee”); *Wood v Commercial First Business Ltd [2019] EWHC 2205 (Ch)* (undisclosed commission deprived the debtor of the disinterested advice of the broker); *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm)* (some (but not all) “pay-day” loans “unfair”); *Arthistory Ltd v Campbell [2022] EWHC 848 (Ch)* (regulated mortgage contract unfair on a number of grounds). For cases where the claim was unsuccessful, see: *Khodari v Tamimi [2009] EWCA Civ 1109, [2010] C.C.L.R. 3* (“very large” 10 per cent charge for short-term loans to wealthy compulsive gambler, where credit risk was high and “defendant wanted these loans and could well afford to repay them”); *Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257, [2009] C.C.L.R. 9* ((obiter) funding agreement to assist acquisition of control of company); *McGuffick v RBS Plc [2009] EWHC 2386* (reporting to credit reference agencies whilst agreement was “temporarily unenforceable” due to breach of CCA 1974 s.77); *Carey v HSBC Bank Plc*

[2009] EWHC 3417 (QB) (breach of CCA 1974 s.78); *Shaw v Nine Regions Ltd* [2009] EWHC 3514 (“log book” loan with high interest rate of 119 per cent per annum); *Black Horse Ltd v Speak* [2010] EWHC 1866 (QB); *Consolidated Finance Ltd v Hunter* [2010] B.P.I.R. 1322 (loan at market rate for similar short-term bridging loans); *Paragon Mortgages Ltd v McEwan-Peters* [2011] EWHC 2491 (Comm); *Rahman v HSBC Bank Plc* [2012] EWHC 11 (Ch); *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm), noted at [2013] C.C.L.R. 5; *Chubb v Dean* [2013] EWHC 1282 (Ch); *Conlon v Black Horse Ltd* [2013] EWCA Civ 1658, [2014] C.C.L.R. 4; *Gardner v Clydesdale Bank Ltd* [2013] EWHC 4356 (Ch); *Link Financial Ltd v North Wilson* [2014] EWHC 252 (Ch), [2014] C.C.L.R. 6; *Scotland v British Credit Trust Ltd* [2014] EWCA Civ 790 (mis-selling of PPI); *Graves v Capital Home Loans* [2014] EWCA Civ 1297 (buy-to-let loan); *McMullon v Secure the Bridge Ltd* [2015] EWCA Civ 884 (bridging loan); *Barclays Bank Plc v McMillan* [2015] EWHC 1596 (Comm) (loan to finance US law firm’s partner’s capital subscription on usual terms); *Bluestone Mortgages Ltd v Momoh* [2015] EW Misc B4 (CC) (refusal of permission to appeal the decision of the county court that failure to notify in advance that mortgagee would invoke usual clause in buy-to-let mortgage permitting him to pay outstanding lease charges if mortgagor failed to do so, did not give rise to an unfair relationship); *Commercial First Business Ltd v Pickup* [2017] C.T.L.C. 1, [2017] C.C.L.R. 15 (although only the fact (and not the amount) of commission was disclosed by the brokers, the debtors were experienced property investors and knew all the relevant facts (*Deutsche Bank (Suisse) SA v Khan* applied)); *Clydesdale Bank Plc v Gough (t/a JC Gough & Sons)* [2017] EWHC 2230 (Ch) (in business lending context where debtor and guarantor had independent legal advice, no unfairness found in the way the lender had exercised or enforced its rights against both); *Santander UK Plc v Wells* [2017] EWHC 2413 (Ch) (claimant had delayed too long in making claim); *Ulster Bank Ltd v Esmaili* [2017] NICh 14; (no unfairness found in business lending context where debtor was experienced property developer); *Holyoake v Candy* [2017] EWHC 3397 (Ch) (permission to appeal refused by Court of Appeal: [2018] C.C.L.R. 8) (Nugee J rejected an “unfairness” claim in business lending context, applying *Deutsche Bank (Suisse) SA v Khan*, above, where both debtor and creditor were property developers); *Carney v NM Rothschild and Sons Ltd* [2018] EWHC 958 (Comm); (no “unfairness” where the debtors received independent advice and the loan agreement made it clear (via “basis” clauses) that the creditor was not providing advice); *Hodell v Clydesdale Bank Plc* [2018] EWHC 1009 (QB) (no “unfair relationship” in commercial lending to experienced property development partnership); *Greenlands Trading Ltd v Pontearso* [2019] EWHC 278 (Ch) (as to “industry standard” default interest); *Broomhead v National Westminster Bank Plc* [2018] EWHC 1574 (Ch); *Praetura Asset Finance Ltd v Wood* [2019] EWHC 2231 (Comm) (brief dismissal of unfair relationship allegation in the context of a large business loan); *Promontoria (Henrico) Ltd v Samra* [2019] EWHC 2327 (Ch) and *Credit Capital Corp Ltd v Watson* [2021] EWHC 466 (QB) (refusal to find an unfair relationship in a secured business loan); *Bank of Beirut (UK) Ltd v Moukarzel* [2021] EWHC 3777 (Comm) (restructuring of business loan); *Campbell v Tyrrell* [2022] EWHC 423 (Ch) (business loan).

1384 “Credit agreement” for these purposes is defined in CCA 1974 s.140C(1) to mean (essentially) a consumer credit agreement (see above, para.41-016). Hence corporate debtors

are not covered: *Bank of Ireland (UK) Plc v McLaughlin* [2016] NICA 33, [2017] C.C.L.R. 5 (refusal of appeal from the lower court ([2014] N.I.Q.B. 104) that a guarantor of a corporate debtor could not invoke the unfair relationship provisions); *Newmafruit Farms Ltd v Pither* [2016] EWHC 2205 (QB), [2017] C.C.L.R. 8 (corporate debtor could not invoke the unfair relationship provisions). Moreover, s.140C(2) defines “debtor” and “creditor” for these purpose to cover assignees, in the same way as does CCA 1974 s.189(1) in relation to consumer credit agreements. See the definition of “credit” in CCA 1974 s.9(1): above, para.41-019. The power to reopen does not apply to hiring agreements, but see CCA 1974 s.132 (above, para.35-090). Nor does it apply to a sale and leaseback transaction: *Lavin v Johnson* [2002] EWCA Civ 1138 (not “credit”, for the purposes of the previous extortionate credit bargain provisions). See also *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (funding agreement did not provide “credit”). See s.140C(5)-(6) (adaptation of language). And see CCA 1974 s.189C(1)(a): a “green deal consumer credit agreement” (as defined in CCA 1974 s.189B(8)) to mean a green deal plan (as defined in CCA 1974 s.189(1), see below, para.41-261) that is to be treated as a consumer credit agreement for the purpose of this Act by virtue of CCA 1974 s.189B(1) is to be treated as credit agreement for the purposes of s.140A and 140B. And note CCA 1974 s.189B(3), Sch.2A: in s.140A, references to “debtor” in relation to “green deal plans” are to be read as references to the “improver”/“current bill payer”/“previous bill payer” (as defined in CCA 1974 s.189B(6)).

1385 *Patel v Patel* [2009] EWHC 3264: business loan (albeit between family members) of £200,000 re-opened. And note the “buy-to-let” loans considered (but not re-opened) in *Paragon Mortgages Ltd v McEwan-Peters* [2011] EWHC 2491 (Comm); *Graves v Capital Home Loans Ltd* [2014] EWCA Civ 1297; *Bluestone Mortgages Ltd v Momoh* [2015] EW Misc B4 (CC) and *Nelmes v NRAM Plc* [2016] EWCA Civ 491. See also *Holyoake v Candy* [2017] EWHC 3397 (Ch) (business loan of £12 million—but no “unfairness”) and *Pilgrim Rock v Iwanuik* [2019] EWHC 203 (Ch) (commercial loan between co-venturers (albeit to an individual) where interest was compounded quarterly and rose to higher default rate, where creditor had done nothing to enforce its rights for four years while interest was accruing at the escalated default rate). But it is generally more difficult to challenge business credit: see the cases cited in para.41-213, above, especially *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm), applied in many subsequent cases, e.g. *Holyoake v Candy* [2017] EWHC 3397 (Ch) and *Credit Capital Corp Ltd v Watson* [2021] EWHC 466 (QB).

1386 For exempt agreements, see above, paras 41-039 et seq. There are two exceptions: see below.

1387 Defined in CCA 1974 s.189(1); above, para.41-050; *Khodari v Tamimi* [2009] EWCA Civ 1109.

1388 CCA 1974 s.17; above, para.41-049.

① 1389 i.e. exempt under RAO art.60C(2) (see above, para.41-040): s.140A(5). See *AIB v Donnelly* [2015] NI Master 13 (Master Hardstaff) (confirmation that unfair relationship provisions do not apply to FSMA 2000 regulated mortgage contracts). Hence when the Mortgage Credit Directive (see above, para.41-003) was implemented on 21 March 2016 and most second charge residential mortgages became “regulated mortgage contracts” under the 2000 Act regime, this protection was lost for such residential mortgages. But see *Arthistory Ltd v*

- Campbell [2022] EWHC 848 (Ch)*, where this point was not taken before Deputy Judge of the High Court Lesley Anderson QC and she held that a relationship with a regulated mortgage contract at its core was unfair.
- 1390 As so designated in CCA 1974 s.140C(4).
- 1391 CCA 1974 s.140A(1); s.140B.
- 1392 CCA 1974 s.140C(4).
- 1393 CCA 1974 s.140C(4)(a). See s.140C(7) (meaning of “consolidated” for these purposes) and s.140C(8) (series of consolidated agreement are “related agreements” in relation to final main agreement). See *Barnes v Black Horse Ltd [2011] EWHC 1416 (QB)*: “related” agreements that were consolidated into a new agreement were subject to the old “extortionate credit bargain” provisions (see above, para.41-213) and not the new “unfair relationship” regime (because they were “completed” agreements, see the transitional provisions in the **Consumer Credit Act 2006 Sch.3 para.14**, above, para.41-214), but they were nevertheless held relevant to the application of s.140A to the new agreement (even though no order under s.140B could be made in relation to them).
- 1394 CCA 1974 s.19, see above, paras 41-056 et seq. And see CCA 1974 s.140A(5): if main (credit) agreement is not regulated, to be treated as such for purposes of deciding if a transaction is a “linked transaction”. Examples are compulsory PPI (CCA 1974 s.19(1)(a)) and optional PPI (CCA 1974 s.19(1)(c)); see *Townson v FCE Bank Plc (t/a Ford Credit Unreported 23 June 2016, Birmingham Cty Ct* (PPI policy held to be a “linked transaction” within s.19(1)(c) in relation to the credit agreement (and hence a “related transaction”) and “unfair relationship” found where that PPI (of which the debtor was unaware and by implication did not want) was sold by car dealer to a debtor under a hire-purchase agreement). See also the linked transactions considered relevant in *Holyoake v Candy [2017] EWHC 3397 (Ch)*.
- 1395 CCA 1974 s.140C(4)(b).
- 1396 CCA 1974 s.189(1) and see above, para.41-182. See CCA 1974 s.140C(6) (if main (credit) agreement is not regulated, to be treated as such for purposes of definition of “security” in CCA 1974 s.189(1) in this context).
- 1397 CCA 1974 s.140C(4)(c).
- 1398 CCA 1974 s.140A(4), see below.
- 1399 See further, below, para.41-231.
- 1400 *Holyoake v Candy [2017] EWHC 3397 (Ch)* (claimant was held to be mendacious); *Santander UK Plc v Wells [2017] EWHC 2413 (Ch)* (claimant had delayed too long, without an excuse, in making claim).
- 1401 This would apply especially to a “spent” agreement: see para.41-216 (and, for decisions on “spent” agreements under the old “extortionate credit bargain” provisions, see *First National Securities Ltd v Bertrand [1980] C.C.L.R. 1, Cty Ct*; and *Davies v Directloans Ltd [1986] 1 W.L.R. 823*). See now: *Santander UK Plc v Wells [2017] EWHC 2413 (Ch)* (claimant had delayed too long in making claim).
- 1402 *A Ketley Ltd v Scott [1981] I.C.R. 241* (a decision under the old “extortionate credit bargain” provisions).

- 1403 *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm)* (debtors' misrepresentations of their income in the context of so-called "payday loans" were relevant (but not conclusively so) in determining whether the relationship was "unfair"). See also *A Ketley Ltd v Scott*, above (inflated valuation of security given); for further refusals under the old "extortionate credit bargain" provisions, see *First National Securities Ltd v Bertrand Unreported 1978, Cty Ct; Premier Finance Co Ltd v Gravesande [1983] C.C.L.R. 1, Cty Ct*. But in *Link Financial Ltd v North Wilson [2014] EWHC 252 (Ch), [2014] C.C.L.R. 6*, misrepresentations by the debtor did not, on the facts, preclude a finding that the relationship was "unfair".
- 1404 *Greenlands Trading Ltd v Pontearso [2019] EWHC 278 (Ch)* per Nugee J, obiter. However Nugee J added that the question of whether a relationship was unfair was a matter for the court and that the views of the borrower, in particular whether they regarded the relationship as unfair, were generally irrelevant.
- 1405 See below, para.41-228.
- 1406 See above, para.41-215.
- 1407 *CCA 1974 s.140A(1)(a)-(c)*.
- 1408 *CCA 1974 s.140A(3)*.
- 1409 "Associate" is defined in *CCA 1974 s.184*. But, as noted below (paras 41-224 and 41-225), the actions (or inaction) of a third party to a *related* agreement (who is not an "associate" or "former associate") is not relevant.
- 1410 See previous note.
- 1411 The (repealed) *s.138(2)(b), (3)-(5)*, As well as these factors, the court had to have regard to "interest rates prevailing" at the time of contracting and "any other relevant considerations": (repealed) *s.138(2)(a), (b)*.
- 1412 The (repealed) *s.138(3)* listed (as factors applicable in relation to the debtor) the debtor's age, experience, business capacity and state of health, and the degree to which he was under financial pressure, and the nature of that pressure. Although there was no specific requirement that these subjective factors should have been known to the creditor, nor that a particular factor should have influenced the terms of the credit bargain, the courts implied such requirements: *Coldunell Ltd v Gallon [1986] 1 Q.B. 1184, CA* and see *Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 (Comm)*, noted at [2013] C.C.L.R. 5, where Hamblen J adopted a similar approach. The (repealed) *s.138(4)* listed (as factors applicable in relation to the creditor) the degree of risk accepted by him (having regard to the value of any security provided), his relationship to the debtor and whether a "colourable cash price" was quoted for any goods or services included in the credit bargain.
- 1413 *[2019] EWHC 203 (Ch)*.
- 1414 And hence potentially relevant under subs.(1)(c) ("on behalf of"), see below.
- 1415 See subs.(3), considered above.
- 1416 Under subs.(1)(c) nor subs.(3), see two previous notes.
- ① 1417 *[2021] EWCA Civ 1832*.
- ② 1418 See further the discussion at para.41-232, below.

① 1419 Despite the fact the debtor remained ignorant of the commission.

① 1420 [2021] EWCA Civ 1832 at [45].

1421 [2020] EWHC 2169 (Comm).

1422 See Companies Act 2006 Pt 30.

1423 Citing Lord Hoffman in the leading unfair prejudice case of *O'Neill v Phillips* [1999] UKHL 24. Moreover, the judge took the view that there was no requirement that a breach should cause loss for an award of substantial damages to be made; see further para.41-229, below.

1424 See below, paras 41-224 and 41-225.

1425 CCA 1974 s.140A(1)(c) also covers pre-contracting behaviour: see below, para.41-225.

1426 See above, Vol.I, paras 17-069 et seq.

1427 Replacing (for contracts made on or after 1 October 2015) the **Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)**, see above, paras 40-227 et seq.

1428 As did the (now repealed) “extortionate credit bargain” provisions themselves.

1429 CCA 1974 s.140A(1)(a).

1430 Defined in s.140C(4), see above, para.41-215.

1431 Replacing (for contracts made on or after 1 October 2015) the **Unfair Terms in Consumer Contract Regulations 1999 (SI 1999/2083)**, see above, paras 40-227 et seq. For the application of the predecessor regulations to a mortgage, see *Falco Finance Ltd v Gough* [1999] C.C.L.R. 16, Cty Ct.

1432 See below, para.41-223.

1433 Early redemption payments under *regulated* agreements are controlled by the Act (see above, para.41-082) and it is a moot point whether those protections will, in effect, be extended to non-regulated agreements on the basis that any other approach would be “unfair to the debtor”.

1434 For case-law under the old “extortionate credit bargain” provisions (which required “grossly exorbitant” payments), see *Grangewood Securities Ltd v Ellis* Unreported 9 November 2000, Milton Keynes Cty Ct. But see *Broadwick Financial Services v Spencer* [2002] EWCA Civ 35, [2002] 1 All E.R. (Comm) 446 [61]–[78].

1435 Defined in s.140C(4), see above, para.41-215.

1436 Or his relative.

1437 [2014] EWHC 252 (Ch), [2014] C.C.L.R. 6.

1438 A “related agreement” within s.140C(4)(b): a linked transaction under s.19(1)(b).

① 1439 [2022] EWHC 848 (Ch).

① 1440 There were other factors, e.g. (i) high interest rate and “exit fee” in the context of unfulfilled promises to waive these, (ii) speed of transacting.

① 1441 See above, paras 40-448 et seq.

① 1442

For successful “interest rate” challenges see: *Patel v Patel [2009] EWHC 3264* (inter alia, “exorbitant” interest) and some county court decisions (*Morrison v Betterpace Ltd (t/a Log Book Loans) Unreported 1 September 2009, Lowestoft Cty Ct* (APR of 485.25 of refinancing loan reduced to APR of 343.4 per cent charged on previous loan) and *Barons Finance Ltd v Olubisi Unreported 26 April 2010 Mayor’s & City of London Court* (vulnerable consumer “exploited”)); *Pilgrim Rock v Iwanuik [2019] EWHC 203 (Ch)* (secured loan in the context of a joint venture, where the rate of interest was 6 per cent compounded quarterly rising to 9 per cent on default (and where the creditor had done nothing to enforce its rights for four years while interest was accruing at the escalated default rate)); *Arthistory Ltd v Campbell [2022] EWHC 848 (Ch)* (28 per cent (not waived as promised) on a secured bridging loan (in addition to other factors)). For unsuccessful challenges see *Khodari v Tamimi [2009] EWCA Civ 1109, [2010] C.C.L.R. 3* (“very large” 10 per cent charge for short-term loans); *Shaw v Nine Regions Ltd [2009] EWHC 3514* (APR 341 per cent and interest rate of 119 per cent p.a.); *Consolidated Finance Ltd v Hunter [2010] B.P.I.R. 1322* (loan at market rate for similar short-term bridging loans); *Chubb v Dean [2013] EWHC 1282 (Ch)* (charges ((i) interest of 1.85 per cent per month compounded monthly and (ii) a 1.25 per cent per month “facility fee”) “even in combination” merely represented a “stiff commercial bargain”; an unfair relationship would have required a “very much higher interest rate”); *Holyoake v Candy [2017] EWHC 3397 (Ch)* (“steep” fees, with no explanation of how they had been calculated or whether they were in line with industry norms, for extending credit agreement did not render business credit “unfair”); *Greenlands Trading Ltd v Pontearso [2019] EWHC 278 (Ch)* (default interest rate upheld as “industry standard”); *OMI Facilities v Singh [2021] CSOH 45* (a “harsh” rate of interest of 3.75 per cent per month on a high risk, unsecured, short-term bridging loan).

① 1443 (The repealed) s.138(2)(a).

① 1444 Implicitly; the case-law under the new provisions has made no reference to the old “extortionate credit bargain” case-law. See the cases cited above (but see *Holyoake v Candy [2017] EWHC 3397 (Ch)* which referred to *A Ketley Ltd v Scott [1981] I.C.R. 241*) and see *Greenlands Trading Ltd v Pontearso [2019] EWHC 278 (Ch)*, noted in next note. For the old case-law on interest rates, see *A Ketley Ltd v Scott [1981] I.C.R. 241*; *Davies v Directloans Ltd [1986] 1 W.L.R. 823*; *Woodstead Finance v Petrou, The Times, 23 January 1986, CA*; *Broadwick Financial Services Ltd v Spencer [2002] EWCA Civ 35, [2002] 1 All E.R. (Comm) 446*.

① 1445 The OFT’s Guidance under (the now repealed) CCA 1974 s.140D (Unfair Relationships: Enforcement action under Part 8 of the Enterprise Act 2002 (OFT 854Rev), May 2008, revised August 2011) also accepted that this should be the approach, para.3.21, even requiring the cost to be “much higher” than market rates for an “unfair relationship” to arise. And see *Greenlands Trading Ltd v Pontearso [2019] EWHC 278 (Ch)*, where Nugee J did not disturb a default interest rate as it was “industry standard” and *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm)* where regard was had to prevailing interest

rates in the payday lending sector in determining if the high interest rates charged rendered the relationship “unfair”. But see the rather conflicting case law on bridging loans: *OMI Facilities v Singh [2021] CSOH 45* (a “harsh” rate of interest of 3.75 per cent per month on a high risk, unsecured, short-term bridging loan upheld) and *Arthistory Ltd v Campbell [2022] EWHC 848 (Ch)* (a similar rate on a consumer secured bridging loan (in addition to other factors) rendered the relationship “unfair”, without expert evidence on market rates of such loans).

1446 *Blair v Buckworth (1908) 24 T.L.R. 474, 476.*

1447 The wording was: “prevailing at the time [the agreement] was made”. See *Paragon Finance Plc v Nash [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685; Broadwick Financial Services v Spencer [2002] EWCA Civ 35, [2002] 1 All E.R. (Comm) 446; Paragon Finance Plc v Pender [2005] EWCA Civ 760, [2005] C.C.L.R. 5.*

1448 CCA 1974 s.140A(2). See *Patel v Patel [2009] EWHC 3264 (QB)*.

1449 CCA 1974 s.140A(1)(c), see below, para.41-225.

1450 CCA 1974 s.140A(1)(b).

1451 Defined in CCA 1974 s.140C(4), see above, para.41-215.

1452 The point was not argued (although that seemed to be the real grievance of the debtors) in *Hancock v Promontoria (Chestnut) Ltd [2020] EWCA Civ 907*.

1453 “... except to the extent that it is not appropriate to do so”.

1454 Defined in CCA 1974 s.184.

1455 CCA 1974 s.140A(3).

1456 *Bluestone Mortgages Ltd v Faith Momoh [2015] EW Misc B4 (CC)* (refusal of permission to appeal the decision of the county court that failure to notify in advance that mortgagee would invoke usual clause in buy-to-let mortgage permitting him to pay outstanding lease charges if mortgagor failed to do so, did not give rise to an unfair relationship); *Clydesdale Bank Plc v R Gough t/t JC Gough & Sons and Anne Michelle Gough [2017] EWHC 2230 (Ch)* (where debtor and guarantor had independent legal advice, no unfairness found in the way the lender had exercised or enforced its rights against both); *Holyoake v Candy [2017] EWHC 3397 (Ch); Broomhead v National Westminster Bank Plc [2018] EWHC 1574 (Ch)*.

1457 *Maple Leaf Macro Volatility Master Fund v Rouvroy [2009] EWHC 257 (Comm); Paragon Mortgages Ltd v McEwan-Peters [2011] EWHC 2491 (Comm); Rahman v HSBC Bank Plc [2012] EWHC 11 (Ch); Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 (Comm)*, noted at [2013] C.C.L.R. 5; *Graves v Capital Home Loans [2014] EWCA Civ 1297*. See also *Goldhill Finance Ltd v Berry Unreported 26 October 2018* (London Cty Ct): unfair relationship arose where creditor sought to exercise his common law right to possession of debtor’s property after the court had stayed execution of a warrant of possession. See also *Credit Capital Corp Ltd v Watson [2021] EWHC 466 (QB)* at [59], where this proposition in para.41-224 (in the last edition) was cited with implicit approval.

1458 See above, para.41-128.

- 1459 *McGuffick v RBS Plc [2009] EWHC 2386* (Comm).
- 1460 See the FCA Handbook (a) CONC Module, especially CONC 7 and (b) (in relation to regulated mortgages) MCOB Module, especially MCOB 13. See also the Standards of Lending Practice (financial difficulties sections), above, para.[41-013](#).
- 1461 *[2013] EWHC 4047 (Ch)*.
- 1462 By virtue of the now repealed CCA 1974 s.127(3), see above, para.[41-095](#).
- 1463 *McGuffick v RBS Plc [2009] EWHC 2386 (Comm)* (above) followed. See also *PRA Group (UK) Ltd v Segal* Unreported 19 December 2017 (Norwich Cty Ct): it was legitimate to ring, send text messages and write to the debtor to try and obtain payment as these were legitimate debt collection tools that did not make the relationship unfair. However the fact that a non-compliant default notice was sent (see CCA 1974 s.[87](#), above paras [41-168](#) et seq.) rendered the relationship unfair.
- 1464 CCA 1974 s.[140A\(1\)\(c\)](#).
- 1465 i.e. other than the exercise or enforcement of rights by the creditor, referred to in CCA 1974 s.[140A\(1\)\(b\)](#), see above, para.[41-224](#).
- 1466 “any other thing done (or not done)”. In *Pilgrim Rock v Iwanuik [2019] EWHC 203 (Ch)* a relationship was found to be unfair where (inter alia) a creditor had done nothing to enforce its rights for four years while interest was accruing at an escalated default rate. See also *PRA Group (UK) Ltd v Doyle [2019] EWCA Civ 12* where the first instance judge held that the unfair relationship provisions would prevent the creditor delaying unduly in enforcing his rights so as to prolong the limitation period (see above, para.[41-168](#)), but Etherton MR did not consider it “necessary or appropriate … to speculate” on whether this was the case.
- 1467 It was confirmed in *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61* (reversing [2013] EWCA Civ 1658 (followed in *Scotland v British Credit Trust Ltd [2014] EWCA Civ 790*)) that these words required an agency relationship and should not be construed more broadly. It would also seem (although this issue was not determined by the Supreme Court) that (if applicable) the “deemed agency” in CCA 1974 s.[56\(2\)](#) (see, above, para.[41-077](#) and below, para.[41-306](#)) could also render a creditor liable under s.[140A\(1\)\(c\)](#) for the acts of a “negotiator” (and see *Scotland v British Credit Trust Ltd [2014] EWCA Civ 790*)).
- 1468 Defined in CCA 1974 s.[140C\(4\)](#), see above, para.[41-215](#).
- 1469 See the similar position under CCA 1974 s.[140A\(1\)\(b\)](#), above, para.[41-224](#).
- 1470 “except to the extent that it is not appropriate to do so”.
- 1471 Defined in CCA 1974 s.[184](#).
- 1472 CCA 1974 s.[140A\(3\)](#).
- 1473 But see *Pilgrim Rock v Iwanuik [2019] EWHC 203 (Ch)*, above, paras [41-218](#)—[41-219](#) (behaviour of a person who was neither an agent nor an associate of the creditor might still be relevant under s.[140A\(2\)](#)).
- 1474 For cases under the Moneylenders Acts jurisdiction reopening loans on this basis, see *Victorian Daylesford Syndicate Ltd v Dott [1905] 2 Ch. 624*; *Carringtons Ltd v Smith [1906] 1 K.B. 79*; and (debtor improperly induced to borrow) *Lewis v Mills (1914) 30 T.L.R. 438*. See also (debtor’s vulnerability known to creditor): *Bonnard v Dott (1906) 21 T.L.R. 491*; *Part v Bond (1906) 22 T.L.R. 253*; *Blair v Buckworth (1908) 24 T.L.R. 474*; and (debtor

- did not understand terms): *Levene v Greenwood* (1904) 20 T.L.R. 389; *Carringtons Ltd v Smith*, above; *Levene v Titchener* (1907) 23 T.L.R. 508; *Harris v Clarson* (1910) 27 T.L.R. 30; *Stirling v Rose* (1913) 30 T.L.R. 67. See *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm), noted at [2013] C.C.L.R. 5 (misrepresentations alleged but not proved) and *Arthistory Ltd v Campbell* [2022] EWHC 848 (Ch) (misrepresentation that onerous interest rate and exit fee would be waived).
- 1475 Such as (i) the law on misrepresentation (see Neuberger LJ in *Harrison v Black Horse Ltd* [2011] EWCA Civ 1128 at [30]–[31], criticising the “open-ended approach” of the judge in *Yates v Nemo Personal Finance* Unreported 14 May 2010, Manchester Cty Ct; (ii) promissory estoppel (see *Paragon Mortgages Ltd v McEwan-Peters* [2011] EWHC 2491 (Comm)); (iii) fiduciary law, breaches of statutory duty and negligence (see *Harrison v Black Horse Ltd* [2010] EWHC 3152 (QB)). But see *Barnes v Black Horse Ltd* [2011] EWHC 1416 (QB), per HH Judge Waksman QC: “it is not inconceivable that matters that may not be sufficient to generate duties of a fiduciary or tortious nature, or breaches thereof”, may be relevant in the unfair relationship context.
- 1476 See *Lomnicka* [2012] J.B.L. 713 at 727 and Lomnicka, “The impact of rule-making by financial services regulators on the common law: the lessons of PPI”, in Gullifer and Vogenauer (eds) English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale (2014), Ch.4. See the views of HH Judge Waksman QC in *Carey v HSBC Bank Plc* [2009] EWHC 3417 (QB) (refusal to give the “more dramatic remedy” available under the “unfair relationship” provisions when a more limited sanction (temporary unenforceability) was available under the CCA 1974) and in *Carney v NM Rothschild and Sons Ltd* [2018] EWHC 958 (Comm); (although it did not matter that the limitation period for the common law claims for bad advice and misrepresentation had expired, “the same elements as are required by the [common law] cause of action should be shown when such matters are raised as constituting an unfair relationship”). But note *Scotland v British Credit Trust Ltd* [2014] EWCA Civ 790 per Kitchen LJ (the fact that there was an alternative (albeit time-barred) claim under CCA 1974 s.75 (see below, para.41-307) did not preclude application of s.140A).
- 1477 [2014] UKSC 61.
- 1478 The premium (for a £60,000 loan) was £10,200 for five years; equivalent standalone cover would only have cost £2,083.84.
- 1479 87 per cent of the premium, paid by the insurer, an associated company of the creditor. The FCA has intervened in relation to PPI (see FCA PS 17/3: Payment protection insurance complaints: Feedback on CP16/20 and final rules and guidance (March 2017)) and has set a single 50 per cent commission “tipping point” (with undisclosed profit-share (as defined) being treated in the same way as undisclosed commission) at which it states that firms should presume, for the purposes of handling PPI complaints and making recompense (the excess over 50 per cent together with interest), that the failure to disclose commission gives rise to an unfair relationship under s.140A.
- 1480 In the “ICOB” (now ICOBS) Module of the FCA Handbook, issued by the FSA under statutory powers (FSMA 2000 s.138 replaced by new s.137A) after the requisite rigorous consultation which considered at length, and decided against, requiring positive disclosure

of the fact and amount of commissions. In the Court of Appeal in *Harrison v Black Horse Ltd [2011] EWCA Civ 1128*, at [58] (overruled by the Supreme Court) Neuberger MR had stated that the “touchstone must ... be the standard imposed by the regulatory authorities ... not resort to a visceral instinct that the relevant conduct is beyond the pale”.

1481 *[2009] EWHC 3264 (QB)*. A family elder was advanced a loan of £200,000 in 1992 for his small retail businesses by his younger, but commercially much more sophisticated, former protégé at the “exorbitant” rate of 20 per cent per annum compounded monthly when the bank rate was 7 per cent. With very few repayments demanded, the indebtedness had grown to over £1m.

1482 *[2014] EWCA Civ 790*.

1483 See also below, para.41-232.

1484 This was so even when the creditor’s right of recourse against the misrepresentor (whether statutory (under s.75(2), see below, para.41-307) or common law/contractual (in relation to a s.56 agency claim, see above, para.41-077)) was also time-barred. See also *Carney v NM Rothschild and Sons Ltd [2018] EWHC 958 (Comm)*; (unfair relationship claim available even when the limitation period for the common law claims for bad advice and misrepresentation had expired).

1485 The relevant provisions (CCA 1974 s.140B(1) and s.140B(2)) are similar to the now repealed CCA 1974 s.139(2) and s.139(1) (as amended). See CCA 1974 s.189B(3), Sch.2A: in s.140B, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see below, para.41-261) are to be read as references to the “improver”/“current bill payer”/“previous bill payer” (as defined in CCA 1974 s.189B(6)).

1486 Defined in CCA 1974 s.189(1); see above, para.41-185. See also CCA 1974 s.140C(2).

1487 CCA 1974 s.140B(2)(a). And see *Central Bridging Loans Ltd v Anwer [2019] EWHC 1602 (Ch)* (application by debtor to set aside statutory demand for unpaid loan adjourned after debtor subsequently made a claim under s.140).

1488 CCA 1974 s.140B(4) For applications in the county court, see CPR Pt 9 7PD–003. For Scotland, see s.140B(4)(b), (5). For Northern Ireland, see s.140B(4)(c), (6), (7). See also the Civil Jurisdiction and Judgments Act 1982 ss.16–19 and Sch.4. CPR Pt 7 PD 7B.

1489 Defined in CCA 1974 s.140C(4); see above, para.41-215. For case-law under the (now repealed) “extortionate credit bargain” provisions, see *City Mortgage Corp Ltd v Baptiste [1997] C.C.L.R. 64*. See also *Rahman v Sterling Credit Ltd [2001] 1 W.L.R. 496, CA*: an application by way of counterclaim (under (the now repealed) CCA 1974 s.139(1)) could be made in proceedings to enforce a possession order already made, as these were proceedings to enforce any security (and see now the definition of “related agreement” in CCA 1974 s.140C(4) which covers security).

1490 CCA 1974 s.140B(2)(c).

1491 CCA 1974 s.140B(8). See *Milne v Open Access Finance Ltd [2020] EWHC 1420 (Ch)* on the meaning of “in accordance with the rules of court” in s.140B(8).

① 1492 See the (now repealed) provision to similar effect in relation to the “extortionate credit bargain” provisions in CCA 1974 s.171(7).

① 1493

cf. the “watershed” of 48 per cent in the (repealed by the [Consumer Credit Act 1974](#)) [Moneylenders Act 1927 s.10](#) below, under which the burden of proof rested upon the debtor.

- ① 1494 In [*Kerrigan v Elevate Credit International Ltd \[2020\] EWHC 2169 \(Comm\)*](#); HH Judge Worster (it is submitted erroneously) stated that ““the onus is on the lender to prove fairness”. It is suggested that the lender has no positive duty to prove fairness but rather it has to disprove unfairness.

- ① 1495 The position was clearer under the now repealed “extortionate credit bargain” provisions in that [CCA 1974 s.138\(2\)](#) referred to “such evidence as is adduced”. In [*Coldunell v Gallon \[1986\] Q.B. 1184, 1202*](#) Oliver LJ said that the creditor’s burden in relation to the old “extortionate credit bargain” provisions “is sufficiently discharged by showing that the bargain was on its face a proper and not an extortionate credit bargain and that the [creditor] acted in a way that an ordinary commercial lender would be expected to act”. See [*Bank of Beirut \(UK\) Ltd v Moukarzel \[2021\] EWHC 3777 \(Comm\)*](#) per O’Sullivan QC sitting as a Deputy Judge of the High Court (“if the [creditor] relies on evidence which is uncontested and suggests no basis on which the relationship could be said to be unfair, then the evidential burden, or the burden to raise specific complaints, switches to the debtor, who is then required to identify facts which suggest unfairness” (at [31])).

- ① 1496 [*\[2009\] EWHC 3417 \(QB\)*](#), [134], [193]–[194].

- ① 1497 On [CCA 1974 s.78](#), see above, para.[41-132](#).

- ① 1498 [*\[2009\] EWHC 3417 \(QB\)*](#), [134], [193]–[194]. HH Judge Waksman QC also stated: “It is equally appropriate to strike [the claim] out on the basis of no reasonable grounds”.

- ① 1499 [*\[2011\] EWHC 3542 \(Ch\)*](#). [*Carey v HSBC Bank Plc*](#) was not cited.

- ① 1500 See also (i) [*Campbell v Tyrrell \[2022\] EWHC 423 \(Ch\)*](#) at [90], per HHJ Hodge QC sitting as a judge of the High Court (“a debtor who alleges that the relationship between the creditor and the debtor is unfair [is required] to identify those particular facts and matters which the creditor is required to address when establishing the fairness of their relationship”) and (ii) [*Bank of Beirut \(UK\) Ltd v Moukarzel \[2021\] EWHC 3777 \(Comm\)*](#) at [31], cited above.

- ① 1501 As occurred in [*Carey v HSBC Bank Plc*](#) and [*Axton v GE Money Mortgages Ltd \[2015\] EWHC 1343 \(QB\)*](#) ([*Datum Finance Ltd*](#) distinguished and summary judgment given where debtor had no prospects of success). See also [*Bluestone Mortgages Ltd v Momoh \[2015\] EW Misc B4 \(CC\)*](#) ([*Datum Finance Ltd*](#) noted but the Court of Appeal nevertheless refused permission to appeal a summary judgment that the relationship was not unfair even though no evidence was adduced by the creditor to discharge the burden of proof). It is suggested that [*Datum Finance*](#) is of doubtful authority in the light of [*Axton v GE Money Mortgages Ltd*](#), [*Bluestone Mortgages Ltd v Momoh*](#) and [*Campbell v Tyrrell \[2022\] EWHC 423 \(Ch\)*](#).

And see *Re M [2010] EWHC 2324 (Admin)*: leave to amend to include a s.140A claim on appeal refused, where no supporting evidence provided. In *Promontoria (Henrico) Ltd v Samra [2019] EWHC 2327 (Ch)* at [26] it was said that the debtor still had the burden of proving his allegations to the normal civil standard and that “the onus placed on the creditor ... does not have the effect that factual allegations made by [the debtor] must be accepted unless they can be positively disproved by contrary evidence”. See also *Credit Capital Corp Ltd v Watson [2021] EWHC 466 (QB)* at [55], where the last sentence in para.41-227 (in the last edition) was cited with approval.

1502 The relevant provision ([CCA 1974 s.140B\(1\)](#)) is very similar to the (now repealed) [CCA 1974 s.139\(2\)](#), as amended, but note the new provisions in [s.140B\(1\)\(b\)](#) and [\(c\)](#).

1503 See above, para.41-217, as to the court’s discretion.

1504 Defined in [CCA 1974 s.184](#).

1505 Defined in [CCA 1974 s.189\(1\)](#), see above, para.41-185.

1506 See above, para.41-215.

1507 [CCA 1974 s.140B\(1\)\(a\)](#), previously [CCA 1974 s.139\(2\)\(c\)](#), with the addition of the power to make an order against an associate or former associate as well as the creditor. And see [s.140B\(3\)](#), noted below. For orders to repay premiums of mis-sold PPI policies see *Scotland v British Credit Trust Ltd [2014] EWCA Civ 790* and *Plevin v Paragon Personal Finance Ltd [2016] C.C.L.R. 5, 2 March 2015*, Manchester Cty Ct (the sequel to *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61*), where the amount of commission received by the PPI seller was, on the facts, regarded as the appropriate remediation. In *Nelmes v NRAM Plc [2016] EWCA Civ 491* the court ordered the repayment of a secret commission paid by the lender to the borrower’s broker, plus interest. In *Swift Advances Plc v Scott [2019] NICh 16* (where an unfair relationship was found in a PPI mis-selling case given (i) the PPI term was half the period of the loan and (ii) a substantial undisclosed commission was paid to the broker) the relief granted was that the borrowers had no obligation to pay the PPI premium or any interest thereon). But see above, para.41-225: the FCA has suggested that the recompense when complaints are settled by firms should be the excess over 50 per cent of the premium together with interest. See also *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm)*: in the context of “unfair” high-interest short-term (so-called “payday”) loans, the repayment of interest and any arrears of interest and charges in relation to that loan and subsequent loans was “likely to be [an] appropriate” issue as to quantification, being “best explored in the context of a particular case”.

1508 Defined in [CCA 1974 s.184](#).

1509 See above, para.41-215. [CCA 1974 s.140B\(1\)\(b\)](#). There was no corresponding provision in the (now repealed) [CCA 1974 s.139\(2\)](#). See *Link Financial Ltd v North Wilson [2014] EWHC 252 (Ch)* (order that no further sum was payable under the credit agreement); *Scotland v British Credit Trust Ltd [2014] EWCA Civ 790* (debtor not liable to repay the loan so far as it related to a mis-sold PPI policy).

1510 Defined in [CCA 1974 s.189\(1\)](#), see above, para.41-185.

1511 [CCA 1974 s.140B\(1\)\(c\)](#). See above, para.41-215. There was no corresponding provision in the (now repealed) [CCA 1974 s.139\(2\)](#). See *Patel v Patel [2009] EWHC 3264 (QB)*: reduction of amount contractually due by ordering the debtor to repay the amount initially

advanced, with such repayments as the debtor had made being regarded as satisfying any entitlement to interest. In *Greenlands Trading Ltd v Pontearso [2019] EWHC 278 (Ch)* Nugee J upheld, on appeal, the decision to discharge the liability to pay a “default administration fee” of £1,998 (where default interest was also payable but left undisturbed). See also s.140B(3), noted below.

- 1512 Defined in CCA 1974 s.189(1), see above, para.41-185.
- 1513 CCA 1974 s.140B(1)(d), previously CCA 1974 s.139(2)(d).
- 1514 Defined in CCA 1974 s.189(1), see above, para.41-185.
- 1515 CCA 1974 s.140B(1)(e), previously s.139(2)(e). See above, para.41-215. See *Pye v Ambrose [1994] C.L.Y. 594, [1994] N.P.C. 53*: jurisdiction in s.139(2)(e) confined to relieving the debtor from payment of a sum of money and did not extend to relieving him from an obligation to convey property.
- 1516 CCA 1974 s.140B(1)(f), previously s.139(2)(e). See above, para.41-215. In *Pilgrim Rock v Iwanuik [2019] EWHC 203 (Ch)* Fancourt J upheld on appeal, the decision to vary the terms of the loan agreement to reduce the rate of interest, to provide for compounding annually rather than quarterly and to lengthen the term thereby limiting the period for which default interest could be charged.
- 1517 Or in Scotland, an accounting to be made.
- 1518 CCA 1974 s.140B(1)(g), previously s.139(2)(a).
- 1519 CCA 1974 s.140B(1)(a).
- 1520 CCA 1974 s.140B(3).
- 1521 *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm)*, in contrast to the claim under FSMA 2000 s.138D where normal tortious causation principles were applied. Moreover it was held that where a claimant established that the lender should have declined a pay-day loan application, then loss of credit rating was a recoverable loss which could be presumed, and hence general damages were an appropriate remedy (although in that case, the credit ratings of the claimants were already tarnished)
- 1522 [2017] EWHC 3397 (Ch); (and see also the comment to the refusal of permission to appeal at [2018] C.C.L.R. 8). But this decision was distinguished in *CFL Finance Ltd v Laser Trust [2021] EWCA Civ 228* where, although it was accepted that the compromise agreement (scheduled to a Tomlin order) could, if it contractually deferred payment of a debt owing, constitute a “credit agreement”, on the facts (the compromise of a contested claim, not the deferment of a debt) it did not do so.
- 1523 [1972] 2 Q.B. 151.
- 1524 An agreement compromising a claim, scheduled to a Tomlin order, can, in principle, be a “credit agreement”: *CFL Finance Ltd v Laser Trust [2021] EWCA Civ 228*, overruling, on this point, by implication, *CFL Finance Ltd v Bass [2019] EWHC 1839 (Ch)*.
- 1525 As a “linked transaction” under s.19(1)(c)(ii), (2)(a), see above, para.41-215.
- 1526 See [2018] C.C.L.R. 8. See also *CFL Finance Ltd v Bass [2019] EWHC 1839 (Ch)* (compromise upheld and, on assumption (not accepted on appeal: [2021] EWCA Civ 228) compromise was a “credit agreement” not found to be an “unfair relationship”).
- 1527 At [17].

- 1528 The now repealed CCA 1974 ss.137–140, see above, para.41-213. There was express provision in the Moneylenders Act 1900 s.1 allowing past transactions to be reopened and excess payments recovered, although the courts imposed certain limitations on their exercise of this power: see Meston on Moneylenders, 5th edn, pp.197–200.
- 1529 *Davies v Directloans Ltd [1986] 1 W.L.R. 823*. See also *First National Securities Ltd v Bertrand [1980] C.C.L.R. 1, Cty Ct*. And note Consumer Credit Act 2006 Sch.3 para.15(2) (reopening, under the old provisions, of agreement coming to an end before their repeal).
- 1530 See *Santander UK Plc v Clive Roger Wells & Graham Mervyn Wells; Hertford Solutions LLP and Philip Thomas Chave (intervening) [2017] EWHC 2413 (Ch)*: claim under new “unfair relationship” provisions rejected as claimant had delayed too long in making it.
- 1531 CCA 1974 s.140A(4).
- ① 1532 See *Patel v Patel [2009] EWHC 3264* (agreement made in 1992). The (complex) transitional provisions are in Consumer Credit Act 2006 Sch.3 paras 14–16. See above, para.41-213. The impact of the transitional provisions in relation to pre-transitional “related agreements” (which provisions provide that s.140B(1)(a) does not apply to payments under “related agreements” that ended before 6 April 2008) was considered in *Smith v Royal Bank of Scotland Plc [2021] EWCA Civ 1832*: if a payment is considered to have been made *both* by virtue of the “related agreement” and also by virtue of the credit agreement, the court can make an order under s.140B(1)(a) in so far as the payment was made by virtue of the credit agreement.
- ① 1533 See further discussion below.
- ① 1534 In *Nolan v Wright [2009] EWHC 305 (Ch), [2009] C.C.L.R. 8* the view that the limitation period would not apply if the debtor raised the provisions by way of defence to reduce the amount claimed (put forward by Dobson (1998) 142 S.J. 274, and see, in another context, *Henriksens A/S v Rolimpex [1974] 1 Q.B. 233, CA*, especially 245G, above, para.31-123) was rejected. But see note referring to Limitation Act 1980 s.35(1)(b), below.
- ① 1535 Which covers an obligation imposed by statute: *Collin v Duke of Westminster [1985] Q.B. 581*. See (on the old provisions) *Nolan v Wright [2009] EWHC 305, [2009] C.C.L.R. 8*, relying on dicta (after concession by counsel) in *Rahman v Sterling Credit Ltd [2001] 1 W.L.R. 496, CA*. However, *Paragon Finance Plc v Nash and Staunton [2001] EWCA Civ 1466*; left the “specialty” point open when counsel sought to challenge Rahman on the basis that the point was conceded by counsel. Since then, in *Nolan* (HH Judge Hodge (sitting as a Deputy High Court Judge) regarded the point as settled by *Rahman* and in *Patel v Patel [2009] EWHC 3264 (QB)*; Leggatt QC (sitting as a Deputy High Court Judge) cited both *Rahman* and *Nolan* and assumed that the action was within s.9. Moreover, the point was regarded (obiter) as settled in *Bhattacharya v Oaksix Holdings Ltd [2021] EWHC 1326 (Ch)* (claims under FSMA 2000 s.26 (and s.28)).
- ① 1536

Rahman v Sterling Credit Ltd [2001] 1 W.L.R. 496, CA. See *Doran v Paragon Personal Finance Ltd Unreported 28 June 2018* (Manchester Cty Ct): *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61* applied to claim for PPI premium plus interest although claim was made 13 years after the credit and PPI agreements were made but less than five years after loan was repaid.

① 1537 [2021] EWCA Civ 339.

① 1538 That term was interpreted widely (following *Giles v Rhind [2008] EWCA Civ 118*) so as to cover a “legal wrongdoing of any kind, giving rise to a right of action” and not in the more narrow sense of a breach of duty in the contractual, tortious, equitable or fiduciary sense.

① 1539 [2009] EWHC 3264 (QB), see above, para.41-225, distinguishing *Rahman v Sterling Credit Ltd [2001] 1 W.L.R. 496, CA* and *Nolan v Wright [2009] EWHC 305 (Ch)*.

① 1540 Hence, it accrues at the date of trial in the case of an extant relationship and otherwise at the date when the relationship ended. *Patel* was applied in (i) *Doran v Paragon Personal Finance Ltd [2018] 6 WLUK 518* (Manchester Cty Ct) (a claim made more than 13 years after the agreement was made but less than five years after the loan was repaid was successful as it fell within the six-year limitation period); (ii) *Wood v Commercial First Business Ltd [2019] EWHC 2205 (Ch)* (upheld on appeal on another point: [2021] EWCA Civ 471) (time would only begin to run for limitation purposes when the credit relationship ended, which in that case was on the coming into effect of an order rescinding the mortgage). But *Rahman v Sterling Credit Ltd [2000] EWCA Civ 222, [2001] 1 W.L.R. 496* (a case under the old extortionate bargain provisions, see next footnote) was not considered: see note to *Wood* at [2020] C.C.L.R. 4.

① 1541 In *Nolan v Wright [2009] EWHC 305 (Ch), [2009] C.C.L.R. 8* (relying on dicta in *Rahman v Sterling Credit Ltd [2001] 1 W.L.R. 496, CA*). It was so held in *First National Bank Plc v Ann [1997] C.L.Y. 963, Cty Ct*.

① 1542 See *Bhattacharya v Oaksix Holdings Ltd [2021] EWHC 1326 (Ch)* in relation to claims under FSMA 2000 s.26 (and s.28) where *Patel* was distinguished: “unlike the situation in *Patel*, there is no need for the claimant to plead facts arising during the currency of the agreement”.

① 1543 Limitation Act 1980 s.35(1)(b)—although the court has a discretion to order that it be dealt with as a separate action (CPR Pt 20 r.9(1), made under Limitation Act 1980 s.35), in which case the limitation period will start when that cause of action accrued (see *Ernst and Young v Butte Mining Plc [1997] 1 W.L.R. 1485*).

① 1544 [2021] EWCA Civ 1832. See para.41-219, above.

① 1545 *Rahman v Sterling Credit Ltd [2001] 1 W.L.R. 496, CA* (obiter).

- ① 1546 *Nolan v Wright [2009] EWHC 305 (Ch)* (HH Judge Hodge) (obiter). See also per Leggatt QC in *Patel v Patel [2009] EWHC 3264 (QB)* at [66].
- ① 1547 See *Smith v Royal Bank of Scotland Plc [2021] EWCA Civ 1832* at [38], which approved a statement to this effect in the Encyclopedia of Consumer Credit Law. This view is consistent with the reasoning in *Bhattacharya v Oaksix Holdings Ltd [2021] EWHC 1326 (Ch)*, that the date on which the debtor can bring a claim under FSMA 2000 s.28 (in that case when they repaid the capital and could claim for amounts they had paid) was the relevant date.
- 1548 See *Scotland v British Credit Trust Ltd [2014] EWCA Civ 790* (limitation period for a claim in misrepresentation had expired but, citing *Patel*, the Court of Appeal did not regard this as precluding a finding that those misrepresentations rendered the relationship “unfair”. This was so even though the creditor’s right of recourse against the misrepresentor (whether statutory (under CCA 1974 s.75(2)) or common law/contractual (in relation to a CCA 1974 s.56 claim)) was also time barred). See also *Carney v NM Rothschild and Sons Ltd [2018] EWHC 958 (Comm)* (limitation period had expired for the common law bad advice and misrepresentation claims and yet unfair relationship provisions were considered potentially applicable).
- 1549 See para.41-217, above.
- 1550 *Santander UK Plc v Wells [2017] EWHC 2413 (Ch)* (claimant had delayed too long in making claim, having had plenty of opportunity to make it earlier but having “chosen or neglected not to do so and [having] given no adequate explanation therefor”).
- 1551 Replacing, for contracts made on or after 1 October 2015, the **Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)**, as amended by SI 2001/1186. See above, paras 40-227 et seq. and, for a case applying those regulations to a mortgage: *Falco Finance Ltd v Gough [1999] C.C.L.R. 16* (above, para.41-222).

(n) - Ancillary Credit Businesses

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(n) - Ancillary Credit Businesses¹⁵⁵²

Ancillary credit businesses

- 41-234 The consumer credit regulatory regime applies not only to business concerned with consumer credit and consumer hire agreements themselves but also extends to what the [Consumer Credit Act 1974](#) terms “ancillary credit businesses” and affects certain agreements made by, with or through a person who carries on an “ancillary credit business”. The categories of “ancillary credit businesses” were originally defined in [s.145 of the 1974 Act](#), but the definitions are now found in the [Financial Services and Markets Act 2000 \(Regulated Activities\) Order 2001 \(“RAO”\)](#),¹⁵⁵³ as amended since the transfer of regulation from the OFT to the FCA.¹⁵⁵⁴

Credit broking: general

- 41-235 The definition of “credit broking” is now in [art.36A of the RAO](#).¹⁵⁵⁵ There are six categories of “credit broking”, the first three¹⁵⁵⁶ essentially replace (but reword) the old categories of “credit brokerage”¹⁵⁵⁷ and the last three¹⁵⁵⁸ are new. It is important to note that the definition extends to cover, not merely brokers in the ordinary sense of that word, but also, in certain circumstances, (i) dealers and providers of services financed by regulated credit agreements, (ii) estate agents and (iii) accountants and lawyers.¹⁵⁵⁹ Moreover, although termed “*credit* broking”, the first three categories also cover brokers of *hire* agreements. Credit broking only arises in relation to an “individual” or “relevant recipient of credit” (which excludes bodies corporate and partnerships with over three partners¹⁵⁶⁰) and hence (for example) the effecting of introductions of companies to sources of credit, etc. is not credit broking. However, the agreements need not be “regulated

“agreements” but only agreements that would be regulated but for the exemptions, other than the “number of payment” exemption in [art.60F of the RAO](#).¹⁵⁶¹ The first three categories of credit broking comprise the introduction of individuals, etc. desiring to obtain credit (or to obtain goods on hire) to a source of credit (or hire) or to other credit brokers. The last three (new) categories of credit broking only apply to *credit* and not hire agreements and cover certain activities on behalf of the borrower or lender preparatory to the making of the credit agreement. A person undertaking credit broking is excluded from the definition of “providing credit information services” in [art.89A of the RAO](#).¹⁵⁶²

Promotion

- 41-236 Credit broking activity should be distinguished from the preliminary activity of mere *promotion* of credit or hire¹⁵⁶³ in that the first three categories presuppose an individual who (already) “wishes” to obtain credit or hire whilst the last three concern concrete steps taken towards a particular credit agreement.

Credit broking: exclusions

- 41-237 There are a number of exclusions that apply to the general definition of “credit broking” in [art.36A of the RAO](#). In particular, the old exclusion for individuals who “canvass off trade premises”,
¹⁵⁶⁴
- U “restricted-use credit agreements”
¹⁵⁶⁵
 - U financing a transaction between the lender and the borrower or regulated consumer hire agreements, is maintained.
¹⁵⁶⁶
 - U The old exclusion for members of the legal profession in the context of “contentious business” has been widened.
¹⁵⁶⁷
 - U Other exclusions ensure that if the activity is regulated under another category, it is not also credit broking.
¹⁵⁶⁸

U It is proposed that once “Buy-Now Pay-Later” (“BNPL”) products are rendered “regulated agreements”,

1569

U retailers that offer this as a payment option be exempted from regulation as credit-brokers.

1570

U The rationale is that such brokers are unlikely to push consumers to BNPL products unsuitable for them because, unlike in most regulated products, retailers do not receive a commission for brokering BNPL agreements but instead pay a fee to the lender to provide the credit. Hence the retailers’ incentives are different to those offering other credit agreements, as they are limited to driving sales of their product, rather than profiting from the provision of credit.

Debt-adjusting: general

41-238 The definition of “debt-adjusting” is now in [art.39D of the RAO](#).¹⁵⁷¹ It re-enacts, with some terminological differences, the definition in the now repealed [s.145\(5\) of the 1974 Act](#). It should be noted that, like all ancillary credit activities in relation to debt,¹⁵⁷² it applies to debts due under “credit agreements” and “consumer hire agreements”, as defined in [arts 60B](#) and [60N](#) ([respectively](#)) of the RAO¹⁵⁷³ to cover agreements that are not necessarily “regulated” agreements, although the borrower or hirer (as the case may be) must be an individual or “relevant recipient of credit” (which excludes bodies corporate and partnerships with over three partners¹⁵⁷⁴). Debt-adjusting is defined to mean, in relation to debts due (whether overdue or not) under such agreements: (a) negotiating with the lender or owner, on behalf of the borrower or hirer, terms for the discharge of a debt; or (b) taking over, in return for payments by the borrower or hirer, his obligation to discharge a debt; or (c) any similar activity concerned with the liquidation of a debt. Examples of debt-adjusters are, or may be, professionals such as solicitors¹⁵⁷⁵ and accountants as well as dealers who negotiate settlements for their customers, and consumer advice agencies. A person undertaking debt-adjusting is excluded from the definition of “providing credit information services” in [art.89A of the RAO](#).¹⁵⁷⁶

Debt-adjusting: exclusions

41-239 There are a number of exclusions that apply to “debt-adjusting”. First, it is not debt-adjusting for a person to do anything in relation to a debt arising under an agreement if he already has a certain status in relation to the agreement.¹⁵⁷⁷ Thus (i) the lender or owner under the agreement (this includes an assignee such as a factoring or block-discounting firm) or (ii) the supplier (such as a dealer in relation to loans made by “connected” lenders that finance his sales (but not in relation to

hire-purchase, conditional sale or hire agreements made by his customer)) or (iii) the credit-broker who has acquired the business of the person who was the supplier in relation to the agreement, are all excluded from the definition. Second, the old exclusion for members of the legal profession in the context of “contentious business” is widened.¹⁵⁷⁸ Third, if the activity is in relation to regulated mortgages and home purchase plans (and hence regulated as such), it is excluded from the definition.¹⁵⁷⁹ Finally there are exclusions for energy suppliers,¹⁵⁸⁰ local authorities¹⁵⁸¹ and insolvency practitioners.¹⁵⁸²

Debt-counselling: general

41-240 The definition of “debt-counselling” is now in [art.39E of the RAO](#).¹⁵⁸³ It re-enacts, with some terminological differences, the definition in the now repealed [s.145\(6\) of the 1974 Act](#). It should be noted that, like all ancillary credit activities in relation to debt,¹⁵⁸⁴ it applies to debts and payments under “credit agreements” and “consumer hire agreements”, as defined in [arts 60B and 60N of the RAO](#) (respectively)¹⁵⁸⁵ to cover agreements that are not necessarily “regulated” agreements, although the borrower or hirer (as the case may be) must be an individual or “relevant recipient of credit” (which excludes bodies corporate and partnerships with over three partners¹⁵⁸⁶). The FCA has issued Guidance on the scope of debt-counselling: see the FCA Handbook, PERG 17. Essentially it covers the giving of “advice” (which connotes recommendations and not just information) to borrowers or hirers about the liquidation of debts “due” (whether overdue or not) under such agreements. Professionals such as solicitors¹⁵⁸⁷ and accountants as well as bankers, brokers and consumer advice agencies, may be debt-counsellors. A person undertaking debt-counselling is excluded from the definition of “providing credit information services” in [art.89A of the RAO](#).¹⁵⁸⁸ It should be noted that “debt advisers” under the “debt respite scheme”¹⁵⁸⁹ must be authorised¹⁵⁹⁰ debt counsellors.

Debt-counselling: exclusions

41-241 Essentially the same exclusions as those applicable to debt-adjusting¹⁵⁹¹ apply to debt-counselling.

Debt-collecting: general

41-242

The definition of “debt-collecting” is now in [art.39F of the RAO](#).¹⁵⁹² It re-enacts, with some terminological differences (and the addition of the reference to [art.39H of the RAO](#)), the definition in the now repealed [s.145\(7\) of the 1974 Act](#). It should be noted that, like all ancillary credit activities in relation to debt,¹⁵⁹³ it applies to debts and payments under “credit agreements” and “consumer hire agreements”, as defined in [arts 60B and 60N of the RAO](#) (respectively)¹⁵⁹⁴ to cover agreements that are not necessarily “regulated” agreements, although the borrower or hirer (as the case may be) must be an individual or “relevant recipient of credit” (which excludes bodies corporate and partnerships with over three partners¹⁵⁹⁵). It also applies to debts under a so-called “relevant article 36H agreement”.¹⁵⁹⁶ However an activity does not fall within the definition of “debt-collecting” if the activity *itself* falls within the definition of “operating an electronic system in relation to lending” within [art.36H of the RAO](#).¹⁵⁹⁷ The definition of “debt-collecting” covers “the taking of steps to procure payment of debts” due under such agreements. This will obviously cover debt-collecting agencies. A person undertaking debt-collecting is excluded from the definition of “providing credit information services” in [art.89A of the RAO](#).¹⁵⁹⁸

Debt-collecting: exclusions

- ⁴¹⁻²⁴³ Essentially the same exclusions as those applicable to debt-adjusting¹⁵⁹⁹ apply to debt-collecting. Hence, for example, if the creditor or owner (including a factoring or block-discounting firm collecting debts as assignee) merely collects debts due to himself or a “supplier” procures the payment of debts under an agency discounting agreement, this is not “debt-collecting” within the definition. Moreover, if the activity falls within [art.36H of the RAO](#) (operating an electronic system in relation to lending)¹⁶⁰⁰ it is not “debt-collecting” within [art.39F of the RAO](#).¹⁶⁰¹

Debt administration: general

- ⁴¹⁻²⁴⁴ The definition of “debt administration” is now in the [art.39G of the RAO](#).¹⁶⁰² It re-enacts, with some terminological differences (and the addition of the reference to [art.36H of the RAO](#)) the now repealed [s.145\(7A\) of the 1974 Act](#).¹⁶⁰³ It should be noted that, like all ancillary credit activities in relation to debt¹⁶⁰⁴ it applies to rights and duties under “credit agreements” and “consumer hire agreements”, as defined in [arts 60B and 60N of the RAO](#) (respectively)¹⁶⁰⁵ to cover agreements that are not necessarily “regulated” agreements, although the borrower or hirer (as the case may be) must be an individual or “relevant recipient of credit” (which excludes bodies corporate and partnerships with over three partners¹⁶⁰⁶). As with debt-collecting, it also applies to debts under a so-called “relevant article 36H agreement”.¹⁶⁰⁷ However, an activity does not fall within the definition of “debt administration” if the activity *itself* falls within the definition of “operating an

“electronic system in relation to lending” within [art.36H of the RAO](#).¹⁶⁰⁸ The definition covers the taking of steps (so far as this is not “debt-collecting”¹⁶⁰⁹) on behalf of the lender or owner, either (a) to perform duties under such an agreement or (b) to exercise or to enforce rights under such an agreement. A person undertaking debt-administration is excluded from the definition of “providing credit information services” in [art.89A of the RAO](#).¹⁶¹⁰

Debt administration: exclusions

- 41-245** Essentially the same exclusions as those applicable to debt-adjusting¹⁶¹¹ apply to debt administration. Hence, for example, if the creditor or owner (including a factoring or block-discounting firm collecting debts as assignee) merely takes those steps that would amount to “debt administration” in relation to agreements with himself or a “supplier”, it is not undertaking “debt administration” within the definition. Moreover, if the activity falls within [art.36H of the RAO](#) (operating an electronic system in relation to lending)¹⁶¹² it is not “debt administration” within [art.39G of the RAO](#).¹⁶¹³

Providing credit information services: general

- 41-246** The definition of “providing credit information services” is now in [art.89A of the RAO](#).¹⁶¹⁴ It replaces the old definition in the now repealed [s.145\(7B\)–\(7D\)](#) of the 1974 Act.¹⁶¹⁵ The definition covers two categories of activity. The first is acting on behalf of an “individual” or “relevant recipient of credit” (which excludes bodies corporate and partnerships with over three partners¹⁶¹⁶) so as to discover and correct records “relevant to their financial standing” held by certain business (credit reference agencies and others in the credit and hire industries (collectively referred to as “credit information agencies” and defined in [art.89A\(6\) of the RAO](#))). It should be noted that the information need not specifically relate to regulated credit agreements. The second is the giving of advice (to an individual or relevant recipient of credit) in relation to the first activity. Hence it is enough to advise the borrower how they might discover and correct records themselves (rather than acting on their behalf).

Providing credit information services: exclusions

- 41-247** There are a number of exclusions that apply to this ancillary credit activity. First, there is the usual exclusion for lawyers.¹⁶¹⁷ Second, anyone already regulated (as lender or other ancillary

credit service provider) does not also fall within art.89A.¹⁶¹⁸ Moreover, art.89A(5) of the RAO makes it clear that arts 89A and 36H (operating an electronic system in relation to lending)¹⁶¹⁹ are mutually exclusive so if an activity falls within the latter, it cannot also be the provision of credit information services within art.89A. Finally, there are exclusions for local authorities¹⁶²⁰ and insolvency practitioners.¹⁶²¹

Providing credit references: general

41-248 The definition of “providing credit references” is now in art.89B of the RAO.¹⁶²² It replaces and clarifies the old definition of “credit reference agency” in the now repealed s.145(8) of the 1974 Act. The new definition adds the requirement that the business must “primarily consist of” furnishing the information. That “information” must satisfy three conditions. First, it must be information relevant to the financial standing of an “individual” or “relevant recipient of credit” (which excludes bodies corporate and partnerships with over three partners¹⁶²³), although the information need not relate to “regulated” credit agreements. Hence providing financial information about companies is not covered. Second, the information must be “collected”, that is to say, assembled or brought together. Third, it must be collected “for that purpose”, i.e. for the purpose of furnishing persons with information relevant to the financial standing of individuals, etc. Thus a referee (for example a bank) who habitually furnishes information based on its own accounts as between itself and its customers does not come within the definition since the information arises simply in the course of conducting its own business and is not collected for that purpose. Even more obviously, information about an employee collected by his employer in a personnel file, though it may in some respects be information relevant to the financial standing of the employee, is not collected by the employer for that purpose. In any event, under the new version of the definition in art.89B both the bank and the employer would be excluded as their business does not “primarily” consist of furnishing such information. Credit reference agencies are obliged to disclose and correct information.¹⁶²⁴ Moreover, as a result of the implementation of the Consumer Credit Directive,¹⁶²⁵ when a creditor under a prospective regulated agreement refuses credit on the basis of information obtained from a credit reference agency, he is obliged (unless the agreement was to be secured on land), when informing the debtor of the refusal, also to inform the debtor that the refusal is on that basis and to provide the particulars of the agency.¹⁶²⁶ Failure to comply is an offence.¹⁶²⁷

Providing credit references: exclusions

41-249

Essentially similar exclusions as those applicable to providing credit information services¹⁶²⁸ apply to providing credit references. They are: (i) the usual exclusion for lawyers¹⁶²⁹; (ii) if an activity falls within art.36H of the RAO (operating an electronic system in relation to lending)¹⁶³⁰ it cannot also be the provision of credit references within art.89B¹⁶³¹; (iii) the usual exclusions for local authorities¹⁶³² and insolvency practitioners.¹⁶³³

Authorisation

- 41-250 As noted above¹⁶³⁴ from 1 April 2014, the licensing regime under the **1974 Act** (as reformed by the **Consumer Credit Act 2006**) was replaced by the authorisation regime under the **Financial Services and Markets Act 2000 (FSMA 2000)**, operated by the Financial Conduct Authority (FCA). Section 19 of FSMA 2000 imposes a “general prohibition” on anyone undertaking a “regulated activity” in the United Kingdom unless they are either an “authorised” or “exempt” person. The ancillary credit activities considered above¹⁶³⁵ are “specified” under the **RAO**. This means that if undertaken “by way of business”,¹⁶³⁶ they are “regulated activities”¹⁶³⁷ and hence a person needs authorisation from the FCA in order to undertake them in the United Kingdom unless he is an “exempt person” (under **FSMA 2000 s.38** (exemption by Treasury Order) or **s.39** (“appointed representatives”)).

“Business”

- 41-251 Only “specified activities” undertaken “by way of business” are “regulated activities” requiring FCA authorisation.¹⁶³⁸ A special meaning is given to the term “by way of business” in relation to “not-for-profit bodies” (as defined) that carry on debt-adjusting,¹⁶³⁹ debt-counselling¹⁶⁴⁰ or providing credit information services,¹⁶⁴¹ by Order made under **s.419 of the FSMA 2000**.¹⁶⁴² Essentially, as long as such a body does not carry on that activity only on an occasional basis, it is to be regarded as carrying on that activity “by way of business” whether or not it would otherwise be regarded as doing so. Otherwise the phrase “by way of business” is left undefined in the **FSMA 2000**.¹⁶⁴³

Regulatory control

- 41-252

Authorisation under the **FSMA 2000** brings with it all the regulatory control that the FCA may exercise under that Act over “authorised persons”.¹⁶⁴⁴ There are special provisions in relation to ancillary credit businesses in the FCA Handbook, CONC Module.¹⁶⁴⁵

Trading whilst unauthorised

- 41-253 The consequences (criminal and civil) for undertaking regulated activities whilst not authorised or exempt are considered above.¹⁶⁴⁶

Regulated agreements made on introduction by unauthorised credit-broker

- 41-254 The effect on agreements made on an introduction by an unauthorised person, in particular an unauthorised broker, are considered above.¹⁶⁴⁷ Essentially, this means, for example, that a bank or other lender must ensure that, where business is introduced by a broker or dealer (whether under pre-existing arrangements or not), that broker or dealer is authorised, otherwise, without an order of the FCA, the consequent agreement and security may be unenforceable and voidable.

Seeking business: promotion

- 41-255 The original provisions in the **1974 Act** regulating advertisements and quotations in relation to ancillary credit businesses have been replaced¹⁶⁴⁸ by the provisions of the **FSMA 2000** “financial promotion” regime.¹⁶⁴⁹ The relevant provisions are now the FCA rules in the FCA Handbook, CONC 3 (promotion) and 4.1 (quotations). Infringement of these provisions is no longer a criminal offence but (as well as giving rise to the usual consequences for breach of FCA rules¹⁶⁵⁰) may also breach the **Consumer Protection from Unfair Trading Regulations 2008**.¹⁶⁵¹

Canvassing certain ancillary credit services off trade premises

- 41-256 Section 154¹⁶⁵² of the 1974 Act renders it an offence to canvas off trade premises (as defined in s.153 in similar terms to those used in s.48(1)¹⁶⁵³) certain ancillary credit services, namely,

credit-broking,¹⁶⁵⁴ debt-adjusting,¹⁶⁵⁵ debt-counselling¹⁶⁵⁶ or the provision of credit information services.¹⁶⁵⁷

Right to recover brokerage fees

41-257 Section 155 of the 1974 Act confers a right in certain circumstances¹⁶⁵⁸ to recover from the credit-broker brokerage fees paid in advance in the event that an introduction by a credit-broker does not bear fruit within six months.¹⁶⁵⁹ The section applies¹⁶⁶⁰ where an individual has sought an introduction for a purpose that would have been fulfilled by his entry into (a) a regulated agreement or (b) an agreement for credit secured on land (in the case of an individual desiring to obtain credit to finance the acquisition or provision of a dwelling) or (c) an exempt agreement¹⁶⁶¹ or (d) an agreement which is not a regulated credit agreement or a regulated consumer hire agreement but which would be such an agreement if the law applicable to the agreement were the law of a part of the United Kingdom. However, it does not apply¹⁶⁶² where the credit-broker is an authorised person (or appointed representative) and the fee relates to a regulated mortgage¹⁶⁶³ or home purchase plan (i.e. the activity is excluded from the definition of “credit broking” by art.36E of the RAO¹⁶⁶⁴).

When s.155 applies, the excess over £5¹⁶⁶⁵ of a fee or commission for his services charged by a credit-broker to an individual ceases to be payable or, as the case may be, is recoverable by the individual if the introduction does not result in his entering into a “relevant agreement” (for whatever reason) within the six months following the introduction.¹⁶⁶⁶ For this purpose, an agreement is a “relevant agreement” in relation to an individual if it is the *type* of agreement sought by that individual.¹⁶⁶⁷

Right to recover other payments

41-258 In the case of an individual desiring to obtain credit under a consumer credit agreement, any sum payable or paid by him to a credit-broker otherwise than as a fee or commission for the credit-broker’s services is to be treated as such a fee or commission if it enters, or would enter, into the total charge for credit.¹⁶⁶⁸ Since the provisions as to the total charge for credit¹⁶⁶⁹ in certain circumstances embrace sums paid under a linked transaction, e.g. surveyor’s or valuer’s fees, such fees will become recoverable from the credit-broker notwithstanding that he has paid them over to a third party. The onus is on the individual to request the refund, although there is now a requirement that the broker inform the individual of his right to a refund when this arises (for example where no introduction is made or no relevant agreement will be entered into).¹⁶⁷⁰

“Credit intermediaries”

41-259 As a result of the implementation of the Consumer Credit Directive¹⁶⁷¹ various obligations are imposed on so-called “credit intermediaries”, i.e. persons (other than the creditor) who, in the course of business, carry out, for a fee, various activities preparatory to the conclusion of regulated credit agreements (other than those secured on land as these are outside the scope of the Directive) with or for “individuals”. The term “credit intermediaries” covers not only those regulated as credit-brokers¹⁶⁷² but also certain other persons who escape such regulation.¹⁶⁷³ As regards the former, the FCA Handbook, CONC 3.7.3R and CONC 4.4.2R impose the relevant obligations. As regards the latter, the obligations are imposed by the **Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013**.¹⁶⁷⁴ Three obligations are imposed on such persons. First, they must disclose the extent to which they act independently (and in particular whether they work exclusively with a creditor). Second, if they act for a debtor and charge him a fee, they must “ensure” that the fee is disclosed to the debtor and then agreed in writing *before* the agreement is concluded. Third, they must also disclose such a fee to the creditor if he needs it to calculate the APR.¹⁶⁷⁵

Footnotes

- 1 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).
- 1552 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), paras 2-146 —2-161; and Goode Consumer Credit: Law and Practice, Pt C, Ch.48.
- 1553 SI 2001/544.
- 1554 Especially by the **Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013** (SI 2013/1881) arts 4, 5 and 8. See above, para.41-002.
- 1555 With exclusions in RAO arts 36B–36G, see below, para.41-237.
- 1556 RAO art.36A(1)(a)–(c).
- 1557 In the now repealed CCA 1974 s.145(2)–(4). Note the change in terminology from “credit brokerage” (in the CCA 1974) to “credit broking” (in the RAO).
- 1558 RAO art.36A(1)(d)–(f). On RAO art.36A(1)(d) and (e), see *Palmeri v Charles Stanley & Co [2020] EWHC 2934 (QB)* at [82]–[91].
- 1559 But note the exclusion for lawyers in the context of contentious business, below, para.41-237.
- 1560 As defined in RAO art.60L.

1561 For these exemptions, see above, paras 41-042 et seq.

1562 See below, para.41-246.

1563 See above, para.41-069.

① 1564 For example in the context of mail order.

① 1565 See above, para.41-027.

① 1566 RAO art.36B.

① 1567 RAO art.36F (as substituted by SI 2015/853 art.3(2)).

① 1568 See (i) RAO art.36(2): activity within RAO art.36H (operating an electronic system in relation to lending, see below, para.41-260); (ii) RAO art.36D (activities within RAO arts 60B(1) and 60L(1): entering into agreements as lender or owner respectively, see above, para.41-063); (iii) RAO art.36E (activities in relation to regulated mortgages and home purchase plans—but note the new version of art.36E inserted on 21 March 2016, by SI 2015/910 art.3 and Sch.1 para.4(7), when the Mortgage Credit Directive (see above, para.41-003) was implemented. Note also the addition of art.36FA (registered social landlord exemption) by SI 2019/1067.

① 1569 See above para.41-042.

① 1570 See HMT's Regulation of Buy-Now Pay-Later: Response to consultation (June 2022), para.3.14 et seq.

1571 With exclusions in RAO arts 39H–39L, see below, para.41-239.

1572 See below, paras 41-240—41-245.

1573 See above, paras 41-016 and 41-036.

1574 As defined in RAO art.60L.

1575 But note the exclusion for lawyers, below, para.41-239.

1576 See below, para.41-246.

1577 RAO art.39H.

1578 RAO art.39K (as substituted by SI 2015/853 art.3(3)).

1579 RAO art.39J.

1580 RAO art.39I.

1581 RAO arts 39L and 72G.

1582 RAO arts 39L and 72H.

1583 With exclusions in arts 39H–39L of the RAO, see below, para.41-241.

1584 See above, para.41-238 and below, paras 41-238 and 41-239, 41-242—41-245.

1585 See above, paras 41-016 and 41-036.

1586 As defined in RAO art.60L.

1587 But note the exclusion in the context of contentious business, below, para.41-241.

1588 Below, para.41-246.

- 1589 See para.41-165, above.
- 1590 See para.41-250, below.
- 1591 See above, para.41-239. But see the exclusion from art.39E for pensions guidance in art.39KA, added by SI 2015/489 art.2(4).
- 1592 With exclusions in arts 39H–39L of the RAO, see below, para.41-243.
- 1593 See above, paras 41-238—41-241 and below, para.41-244.
- 1594 See above, paras 41-016 and 41-036.
- 1595 As defined in RAO art.60L.
- 1596 As defined in RAO art.39F(4) and hence art.39H(4)–(6), see below, paras 41-260 and 41-245.
- 1597 See below, para.41-260.
- 1598 See below, para.41-246.
- 1599 See above, para.41-239.
- 1600 See below, para.41-260.
- 1601 See RAO art.39F(3).
- 1602 With exclusions in arts 39H–39L of the RAO, see below, para.41-244.
- 1603 Added on 16 June 2006 by the Consumer Credit Act 2006 s.24(2).
- 1604 See above, paras 41-238—41-242.
- 1605 See above, paras 41-016 and 41-036.
- 1606 As defined in RAO art.60L.
- 1607 As defined in RAO art.39F(4) and hence art.39H(4)–(6), see below, para.41-260.
- 1608 See below, para.41-260.
- 1609 See above, para.41-242.
- 1610 See below, para.41-246.
- 1611 See above, para.41-239.
- 1612 See below, para.41-260.
- 1613 See RAO art.39G(3).
- 1614 With the exclusions in arts 89C–89D of the RAO, see below, para.41-247.
- 1615 Added on 1 October 2008 by the Consumer Credit Act 2006 s.25.
- 1616 As defined in RAO art.60L.
- 1617 RAO art.89C (as substituted by SI 2015/853 art.3(7)).
- 1618 See RAO art.89A(4).
- 1619 See below, para.41-260.
- 1620 RAO arts 89D(2) and 72G.
- 1621 RAO arts 89D(2) and 72H.
- 1622 With the exclusions in arts 89C–89D of the RAO, see below, para.41-249.
- 1623 As defined in RAO art.60L.
- 1624 See CCA 1974 ss.157–160, as amended by the Data Protection Act 1998 s.62 (and for regulations made under ss.157 and 158, see SI 2000/291).
- 1625 See above, para.41-011.
- 1626 CCA 1974 s.157(A1), added from 1 February 2011 by SI 2010/1010 reg.40.
- 1627 See CCA 1974 s.157(3).
- 1628 See above, para.41-247.
- 1629 RAO art.89C (as substituted by SI 2015/853 art.3(7)).

- 1630 See below, para.41-260.
- 1631 See RAO art.89B(3).
- 1632 RAO arts 89D(2) and 72G.
- 1633 RAO arts 89D(2) and 72H.
- 1634 See para.41-063.
- 1635 See paras 41-234—41-247.
- 1636 See below, para.41-251.
- 1637 See the FSMA 2000 s.22.
- 1638 See FSMA 2000 s.22.
- 1639 See above, para.41-238.
- 1640 See above, para.41-240.
- 1641 See above, para.41-246.
- 1642 See the Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 (SI 2001/1177) art.3E, added on 1 April 2014 by SI 2013/1881 art.13.
- 1643 See further, above para.41-064.
- 1644 See further, above, para.41-065.
- 1645 See especially, CONC 2.4—2.6.
- 1646 See above, para.41-066.
- 1647 See above, para.41-067.
- 1648 Since 1 April 2014, following the transfer of consumer credit regulation to the FCA (see above, para.41-002).
- 1649 See further, above, para.41-069.
- 1650 See above, para.41-065.
- 1651 See above, paras 40-174 et seq.
- 1652 The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see para.7-97) that "the criminal offences in the CCA may no longer be necessary", but it also notes (para.7.103) that "there may be arguments in favour of keeping the current offences in respect of canvassing ... this merits further consideration".
- 1653 See above, para.41-070.
- 1654 See above, para.41-235.
- 1655 See above, para.41-238.
- 1656 See above, para.41-240.
- 1657 See above, para.41-246.
- 1658 But see *Silvercloud Finance Solutions Ltd (t/a Broadscope Finance) v High Street Solicitors Ltd [2020] EWHC 878 (Comm)* on the position of credit brokers' fees at common law, where it was held that to give business efficacy to the broking contract in that case it was necessary to imply a term that the broker was only entitled to their arrangement fee if they could prove that their proposal was the effective cause of the loan obtained by their client (which they were unable to do in that case).
- 1659 For a fuller discussion, see Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-156 and see the guidance in FCA Handbook, CONC 2.5.9 and CONC 6.8.3 (more limited than the now revoked OFT's Guidance: Credit brokers and intermediaries:

OFT guidance for brokers, intermediaries and the consumer credit and hire businesses which employ or use their services (OFT 1288, November 2011), especially Ch.6). There are particular difficulties in deciding what is a “fee or commission” (e.g. sums charged by brokers for “packaging agents”) for these purposes. And note s.173 (contracting out not possible). Apart from s.155 there may be rights to recovery at common law (for example on the grounds that the basis for the payment has totally failed, see above paras 32-063 et seq. and see previous footnote). The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see Annex 5, para.9) that s.155 could be repealed and replaced by an FCA rule imposing a corresponding obligation on creditors without adversely affecting the appropriate degree of consumer protection. This would have the advantage of (i) bringing it together with existing FCA CONC provisions on credit broker fees and (ii) providing an opportunity to consider some of the suggestions for reform noted in the Review (see Ch.5, paras 5.56–5.58).

1660 See CCA 1974 s.155(2).

1661 See above, paras 41-039 et seq.

1662 See CCA 1974 s.155(2A).

1663 See below, para.41-533.

1664 See above, para.41-237.

1665 The amount was raised from £1 to £3 by SI 1983/1571 and to £5 by SI 1998/997.

1666 CCA 1974 s.155(1). The six-month limit was set before faster, digital communications became common. See also CCA 1974 ss.70(7), 181. If, after making a “relevant agreement”, the debtor exercises his right to withdraw (under CCA 1974 s.66A, see above, para.41-103) or cancel (CCA 1974 s.67, see above, para.41-103), it seems s.155 applies as the agreement is (in statutory terms) “treated as if it had never having been entered into”.

1667 CCA 1974 s.155(3). The OFT Guidance (see above) stated that the credit-broker’s licence was at risk if he did not inform the debtor of (a) the amount of the fee before undertaking the credit brokerage services and (b) the debtor’s right under s.155. For similar obligations, see now the FCA Handbook, CONC 4.4.2R(2) and (4) and, in relation to (b), see para.41-259, below.

1668 CCA 1974 s.155(4).

1669 See above, para.41-061.

1670 See the FCA Handbook, CONC 4.4.2(4).

1671 See above, para.41-011.

1672 See above, para.41-235.

1673 For example, by virtue of the exclusions in RAO arts 36B(1), 36F and 72G (see above, para.41-237).

1674 SI 2013/1881 art.12.

1675 See above, para.41-061.

(o) - Operating an Electronic System in Relation to Lending

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(o) - Operating an Electronic System in Relation to Lending

Operating an electronic system in relation to lending

41-260

U The development of the “peer to peer” (P2P) lending industry required a regulatory response as the borrowers were largely not protected by the [1974 Act](#) (as the relevant agreements were usually “non-commercial agreements”)

1676

U) and the lenders were largely unprotected because “P2P platforms” were not regulated under the [FSMA 2000](#). Hence on 1 April 2014

1677

U a number of new “regulated activities” in relation to P2P lending were introduced by [art.36H](#) of the [RAO](#).

1678

U Article 36H is a very complex provision and specifies nine activities in total, the main activity being that specified by [art.36H\(1\)](#) (operating an electronic system) whilst the others (in [art.36H\(3\)](#)) cover activities carried on in the course of, or in connection with, the carrying on of that “main” activity. The “main” activity of “operating an electronic system” is defined as enabling the operator (“A”) to “facilitate” persons (“B” and “C”) becoming the lender and borrower under a so-called “[article 36H agreement](#)” (as defined), where that system is capable of determining which agreements should be made available to each of B and C. As is the case with the regulated activities of lending under regulated credit agreements

1679

U and undertaking ancillary credit businesses,

1680

U all the consequences of FCA regulation under the FSMA 2000 follow in relation to this P2P regulated activity. In particular there is the requirement of authorisation from the FCA

1681

U and consequent FCA control of that activity.

1682

U

Footnotes

1 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).

① 1676 See above, para.41-050.

① 1677 See above, para.41-002.

① 1678 Added by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 (SI 2013/1881) art.4, as amended by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014 (SI 2014/366) art.2(9). See the exclusions in arts 36I and 36IA. For some discussion of peer-to-peer lending in the context of preliminary issue proceedings, see *Milne v Open Access Finance Ltd [2022] EWHC 72 (Ch)*.

① 1679 See above, para.41-064.

① 1680 See above, para.41-234.

① 1681 See, in relation to ordinary lending, above, para.41-064. See also *Milne v Open Access Finance Ltd [2022] EWHC 72 (Ch)* (preliminary proceedings considering peer-to-peer lending).

① 1682 See, in relation to ordinary lending, above, para.41-065. For special P2P regulatory provisions, see FCA Handbook, CONC 3.7A (financial promotion); CONC 4.3 (pre-contractual requirements); CONC 5.5 (creditworthiness assessment); CONC 7.17–7.19 (NOSIAs etc.); CONC 11.2 (cancellation). But borrowers are not protected by the Financial

Services Compensation Scheme. See also the new P2P rules in Modules SYSC and COBS (in force 9 December 2019) announced by the FCA's Policy Statement PS 19/14 (June 2019).

End of Document

© 2022 SWEET & MAXWELL

(p) - Green Deal Plans

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 1. - The Regulation of Consumer Credit¹

(p) - Green Deal Plans

Green deal plans

- 41-261 The introduction of “green deal plans” by the [Energy Act 2011](#) has necessitated the amendment ¹⁶⁸³ and modification ¹⁶⁸⁴ of the [1974 Act](#) in so far as it applies to the loan component of such plans. ¹⁶⁸⁵ “Green deal plans” are defined by [s.1 of the Energy Act 2011](#), essentially as arrangements that enable owners or occupiers of residential or commercial property to finance energy-saving measures to their property by instalments added to their energy bills (which bills are reduced because of the energy savings). If the property is a domestic property or the occupier or owner of the property is an individual, a *green deal plan* (as so defined) is treated as a “consumer credit agreement” for the purposes of the [1974 Act](#) and is termed a “green deal consumer credit agreement”. ¹⁶⁸⁶ It is treated as an agreement for fixed-sum credit within [s.10\(1\)\(b\) of the 1974 Act](#) ¹⁶⁸⁷ and if a regulated agreement, ¹⁶⁸⁸ it is to be treated as a restricted-use agreement within [s.11\(1\)\(a\)](#). ¹⁶⁸⁹ It is also treated as credit agreement for the purposes of the “unfair relationship” provisions. ¹⁶⁹⁰ As well as amending various provisions of the [1974 Act](#) in so far as they apply to a “green deal consumer credit agreement” (in particular, ss.[77](#), [77A](#), [77B](#), [86B](#) ¹⁶⁹¹) and introducing a new [s.95B](#) (compensatory amount of early settlement), ¹⁶⁹² the definitions of “debtor” and “creditor” when they occur in the various sections of [1974 Act](#) are given an extended meaning ¹⁶⁹³ to cover persons beyond the original parties to the green deal financing agreement. In particular, as the liability for repayment attaches to whoever is the “bill payer” from time to time, the definition of “debtor” is modified accordingly.

Footnotes

- 1 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf); Goode, Consumer Credit: Law and Practice (looseleaf); Goode, Consumer Credit Law (1989); Harding, Consumer Credit and Consumer Hire (1995); Philpott et al, The Law of Consumer Credit and Hire (2009) Rosenthal, Consumer Credit Law and Practice—A Guide, 5th edn (2018).
- 1683 See especially, the Energy Act 2011 ss.25–30 and the Consumer Credit (Green Deal) Regulations 2012 (SI 2012/2798).
- 1684 See especially the Consumer Credit Act 1974 (Green Deal) (Amendment) Order 2014 (SI 2014/436) and the Consumer Credit (Information Requirements and Duration of Licences and Charges) (Amendment) Regulations 2014 (SI 2014/2369).
- 1685 Note the transitional provisions for green deal plans made between 1 April 2014 and 14 July 2014 in the Financial Services and Markets Act 2000 (Regulated Activities) (Green Deal) (Amendment) Order 2014 (SI 2014/1850) art.12.
- 1686 See CCA 1974 s.189B.
- 1687 See above, para.41-026 and CCA 1974 s.189C(1)(a).
- 1688 See s.8(3), above, para.41-017.
- 1689 See above, para.41-027 and CCA 1974 s.189C(2).
- 1690 See CCA 1974 s.189C(1)(a)—although CCA 1974 s.140C(2) does not apply (see CCA 1974 s.189C(3)). For these provisions, see above, paras 41-213 et seq.
- 1691 See above, paras 41-128—41-131.
- 1692 See above, para.41-160.
- 1693 By CCA 1974 s.189B and Sch.2A.

(a) - Loans of Money

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 2. - Loans and Interest

(a) - Loans of Money

Definition of loan

41-262

U A contract of loan of money is a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest.¹⁶⁹⁴ In many circumstances, the question whether a particular transaction is, in law, a “loan” or not will be immaterial, since the transaction will take effect according to the intention of the parties, however the contract may be classified. But in some circumstances it is necessary to define the nature of a transaction because of particular statutory provisions which may apply to contracts of “loan” but not to other contracts.

¹⁶⁹⁵

U In these circumstances the question is, in the last resort, always a question of construction of the particular statutory provision, and it would be unsafe to assume that a transaction which would be classified as a loan for the purposes of one statute will necessarily be so classified for the purposes of other statutory provisions. But subject to this caveat, the authorities on the meaning to be attached to the word “loan” in a particular statutory context are useful in showing the normal commercial definition of a contract of loan.

Money paid to third party

41-263

Where A pays money to B at the request of C, on the terms that he is to be repaid by C, it is sometimes difficult to say whether the transaction amounts to a loan by A to C. There is no doubt that, in certain contexts, money paid by A to B at the request of C could properly be said to be money paid by A to C,¹⁶⁹⁶ but that does not necessarily mean that the transaction is a loan for all purposes.¹⁶⁹⁷ In *Potts Executors v IRC*¹⁶⁹⁸ a company director had an arrangement with the company whereby the company paid various accounts on behalf of the director, debiting him with the payments in its books, and crediting him with director's fees and sums paid by him to the company. It was held by the House of Lords (in the context of a taxing statute) that the payments by the company were not payments by way of loan to the director. It was said in this case that whether a payment of this kind amounts to a loan must depend on all the circumstances. Thus disbursements by a solicitor on behalf of a client could not be said to be payments by way of loan to the client in the ordinary way because the payments would be made as an incident to a wider relationship than that merely of lender and borrower. "On the other hand, [this] kind of wider relationship ... may provide opportunity for transactions within it which are exceptional and beyond the normal scope of the relationship and which may properly be describable as loans and as nothing else".¹⁶⁹⁹

- 41-264 Similarly, in *Re HPC Productions Ltd*¹⁷⁰⁰ it was held that payments made by an overseas company at the request of a United Kingdom resident were not loans made to him within the meaning of the **Exchange Control Act 1947**. In this case it was suggested that an important factor to be considered in deciding whether such a transaction amounts to a loan is whether the recipient of the money is accountable for it to the person at whose request it has been paid. If he is so accountable, this points to the transaction being a loan. On the other hand, this is not a decisive consideration, for there is no doubt that in some circumstances the transaction will be a loan even where the recipient is not so accountable. Thus money paid by a banker by means of a cheque drawn on an overdrawn account is undoubtedly money lent to the customer whether the recipient is liable to repay the money to the customer, or whether he is entitled to retain it in settlement of some obligation due to him.¹⁷⁰¹ "If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money".¹⁷⁰²

Loans distinguished from other forms of debt

- 41-265 The **Consumer Credit Act 1974** deliberately extends its coverage to embrace forms of financial accommodation other than loans,¹⁷⁰³ as at common law not every form of indebtedness amounts to a loan. A person who buys goods on credit is not borrowing money from the seller.¹⁷⁰⁴ And a company that issues loan or debenture stock as a consideration for the acquisition of property is not borrowing money.¹⁷⁰⁵ Even where money passes from one party to the other, this does not necessarily make the transaction one of loan for there are many ways of raising cash besides

borrowing money.¹⁷⁰⁶ The purchase of bills¹⁷⁰⁷ or book debts¹⁷⁰⁸ at a discount is not a lending of money, even where the seller gives a collateral security which has the effect of making him personally liable for the amount raised.¹⁷⁰⁹ Nor does the ordinary hire-purchase transaction amount to a loan of money; although the economic effect of such a transaction may be the same as that of a loan, the legal effect is quite different.¹⁷¹⁰

41-266 Borderline cases may, however, arise, and it is difficult to state with any certainty whether or not certain types of instalment credit transaction, for example, check and voucher trading,¹⁷¹¹ revolving shop credit accounts,¹⁷¹² and credit cards,¹⁷¹³ involve loans of money. Further, transactions of the kinds referred to in the preceding paragraph may sometimes amount to contracts of loan, for the real purpose of the parties may be to effect a loan, and the other features of the transaction (such as the purchase of book debts or the making of a hire-purchase agreement) may be merely a front, intended to hide the real nature of the transaction. But it must be stressed that what matters is the real *legal* nature of the transaction and not its economic nature, and the courts will not go behind the actual agreement made unless there is evidence that the parties did not intend the relationship between them to be governed by the ostensible agreement which they have made.¹⁷¹⁴ Thus, if a company wishes to acquire property in consideration of the issue of loan stock, a transaction in these terms will not amount to a borrowing of money as mentioned above. If, on the other hand, the parties make a contract which indicates that their intention is that the company should purchase the property at a stated sum, and that the company should then borrow that sum from the seller, and secure the loan by an issue of debenture or loan stock, there will undoubtedly be a loan to the company.¹⁷¹⁵

Borrower not personally liable

41-267 Although a borrower is in the ordinary way personally liable to repay a loan, whatever security he may give for it, it is perfectly possible to have a contract of loan in which the borrower is under no personal liability.¹⁷¹⁶ Thus, where property was conveyed to a trustee on trust for the creditors of the settlor, and one of the creditors lent money to the trustee for the purpose of enabling the trustee the better to realise the property, and the money was expressed to be repayable out of the trust property, the court refused to imply any personal obligation on the part of the trustee.¹⁷¹⁷ So also, where a trustee advanced money to herself and a co-trustee for the purposes of the trust estate, the transaction was held to be a loan under s.408 of the Income Tax Act 1952 even on the assumption that her only right was to reimbursement in equity out of the trust property.¹⁷¹⁸

Proof of loan

- 41-268 If money is proved, or admitted, to have been paid by A to B, then in the absence of any circumstances suggesting a presumption of advancement, there is *prima facie* an obligation to repay the money; accordingly if B claims that the money was intended as a gift, the onus is on him to prove this fact.¹⁷¹⁹

Breach of executory contract: remedies of borrower ¹⁷²⁰

- 41-269 If a person contracts to lend money,¹⁷²¹ and then, in breach of contract, refuses or fails to advance the money, the borrower cannot sue for the money agreed to be loaned as a debt, for this would be tantamount to an order of specific enforcement, and such an order will not normally be granted for a contract of loan.¹⁷²² But the borrower can claim damages for the failure to advance the money. The damages will very often be merely nominal,¹⁷²³ but if expense has been reasonably incurred in procuring the loan elsewhere, that expense is recoverable as special damage provided it was caused by the breach and was within the contemplation of the parties.¹⁷²⁴ If the borrower can only procure the loan from other sources at a higher rate of interest than that agreed under the contract, and this was reasonably foreseeable at the time when the contract was made, it seems that the borrower can recover the additional interest he will have to pay as damages from the lender.¹⁷²⁵ If the borrower is unable to raise the money from other sources at all, and he is consequently unable to enter into or complete some transaction for which the money is required, the lender may be liable for loss of profit on such a transaction or other consequential loss.¹⁷²⁶ But it would have to be shown that the lender had express notice of the purpose for which the money was required,¹⁷²⁷ and possibly also that the loan was agreed to be made for that purpose and for no other. The same principles will no doubt apply where it is agreed that the borrower shall be entitled to draw down the loan in tranches during a specified period, but the lender, without any breach on the part of the borrower, refuses to allow the borrower to draw down the balance of the loan.¹⁷²⁸

Breach of executory contract: remedies of lender

- 41-270 An action by a person who has agreed to lend money against a borrower who has refused to take the loan would be something of a rarity in practice, but (although specific performance is again unavailable¹⁷²⁹) there seems no reason in principle why an action for damages should not lie where the lender can prove actual damage as a result of the breach, and the damage was reasonably

foreseeable at the time of making the contract.¹⁷³⁰ Damages would presumably be assessed on the same principles as those discussed in the preceding paragraph.

Time for repayment

- 41-271 Where money is lent without any stipulation as to the time of repayment, a present debt is created which is generally repayable at once without any previous demand.¹⁷³¹ But it is, of course, open to the parties to fix a time for repayment, or to agree that the loan will only be repayable on demand, and doubtless suitable implications as to such matters would readily be made in appropriate circumstances. In some cases, as, for example, in the case of money in a bank account, it is well settled that the loan is only repayable on demand, either on the ground of an implied term to that effect or on the ground of mercantile custom.¹⁷³² Where the loan is repayable on demand, the making of a valid demand is a pre-condition of the debt becoming due. In order to constitute a valid demand:

“there must be a clear intimation that payment is required . . .; nothing more is necessary, and the word ‘demand’ need not be used, neither is the validity of a demand lessened by its being clothed in the language of politeness; it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect.”¹⁷³³

The demand may be for “all monies due” and the amount need not be specified.¹⁷³⁴ Money payable on demand is repayable immediately on demand being made. The borrower is allowed only such time as is necessary to implement the mechanics of payment needed to discharge the debt before being in default; he is not allowed a reasonable time, for example, to muster the resources to pay the debt.¹⁷³⁵

Term loans

- 41-272 A loan may be made for a specified period (a term loan). In such a case repayment is due at the end of the specified period and, in the absence of any express provision or implication to the contrary, no further demand for repayment is necessary. Sometimes when making a term loan the lender will stipulate, either in the contract of loan or in the security document, that the loan is repayable on demand. Such a provision might be construed simply to mean that the loan is in fact repayable on demand but, if no demand is made, then in any event at the end of the term.¹⁷³⁶ However, if the loan is made for a fixed period of time and for a specific purpose, the two provisions will in some cases be inconsistent with each other, since the parties cannot be taken to have agreed both

that the borrower is to have the use of the money for the fixed period and that the lender is to have the unqualified right to require repayment on demand at any time. It is submitted that, in the event of an inconsistency, the court is entitled to construe the contract in accordance with its main object and intent¹⁷³⁷: if the lender makes the loan for a purpose which to his knowledge clearly involves the borrower in incurring expenditure and liabilities with a view to ultimate profit, the court may be entitled to read the repayment on demand provision as subject to the provision as to the duration of the loan, or possibly even to ignore it altogether.¹⁷³⁸

Proof of repayment

- 41-273 Once a debt is proved to have existed, its continuation is presumed¹⁷³⁹; thus the obligation to repay a loan is presumed to continue to exist unless the borrower proves that the loan has been repaid¹⁷⁴⁰ or otherwise discharged, or such repayment or discharge can properly be inferred from all the circumstances.¹⁷⁴¹ A receipt is not conclusive but only *prima facie* evidence that a loan has been repaid.¹⁷⁴²

Breach of contract to repay

- 41-274 Where the borrower fails to repay the loan in accordance with the terms of the contract, the lender has an action against the borrower for the money. It had been held that at common law the lender could not normally recover interest by way of damages for the period between the date when the loan should have been repaid and the date of payment or judgment,¹⁷⁴³ although he could do so where the loan was expressly made to carry interest, even though no express agreement was made for the payment of interest for any period after repayment should have been made.¹⁷⁴⁴ Moreover, if, by reason of the late payment the lender had actually incurred interest charges in obtaining finance from an alternative source, such loss could be recoverable as special damage, provided that it was in the reasonable contemplation of the parties at the time the contract was made that such charges would be incurred.¹⁷⁴⁵ Thus in most cases, in the absence of contractual provision, any right of the lender to obtain interest would arise only under statute.¹⁷⁴⁶ The general common law rule that damages were not recoverable for late payment was heavily criticised over the years and eventually departed from by the House of Lords in *Sempra Metals Ltd v Commissioners of Inland Revenue*.¹⁷⁴⁷ Hence there is no longer such an exception to the general principles applicable to damages. A creditor receiving late payment may now therefore, in accordance with ordinary principles applicable to damages for breach of contract (including remoteness and mitigation),¹⁷⁴⁸ recover any lost interest (including compound interest¹⁷⁴⁹), provided that the loss is pleaded and proven.

“No set-off” clauses

- 41-275 A “no set-off” clause in a loan agreement is not contrary to public policy or to s.49(2) of the Senior Courts Act 1981.¹⁷⁵⁰ But such a clause might be held to be unenforceable in certain circumstances under the Unfair Contract Terms Act 1977¹⁷⁵¹ or the Consumer Rights Act 2015,¹⁷⁵² although in *Deutsche Bank (Suisse) SA v Khan*¹⁷⁵³ a “conventional ‘no set-off’ clause” withstood challenge under those provisions. The statutory set-off in a bankruptcy or winding-up is mandatory.¹⁷⁵⁴

Acceleration clauses

- 41-276 Loan agreements, and in particular those that provide for repayment of the loan by instalments, frequently stipulate that, if the borrower defaults,¹⁷⁵⁵ the loan and interest are to become immediately due and payable. The question then arises whether such a stipulation imposes a penalty and is therefore unenforceable.¹⁷⁵⁶ A clause that stipulates for accelerated payment of principal together with accrued interest is not penal.¹⁷⁵⁷ But if interest is payable on the balance outstanding, then it would seem that a stipulation for payment of future interest is penal and unenforceable.¹⁷⁵⁸ On the other hand, it has been held that, if the agreement stipulates for repayment of principal together with a certain sum by way of interest on a given date or by (say) monthly instalments of principal and interest, then a stipulation for accelerated payment of the entire sum payable is not penal.¹⁷⁵⁹

Events of default

- 41-277 Except where the loan agreement expressly or impliedly provides that the loan is repayable on demand,¹⁷⁶⁰ the right of the lender to accelerate payment will depend upon the occurrence of one or more of a number of “events of default” specified in the loan agreement. The principal occurrences in respect of which an event of default will be stated to occur are failure to pay interest or an instalment of principal when due, non-compliance with any other covenant in the agreement, and breach of any representation or warranty made or given in respect of the agreement. In addition, the following occurrences are often made events of default

¹⁷⁶¹

U : the insolvency of the borrower, the presentation of a petition or the passing of a resolution for the winding-up of the borrower, the appointment of an administrator, the appointment of a receiver of any of the assets of the borrower, the levying of execution or any legal process on any of his property, and (if the borrower is a partnership) the dissolution of the partnership. In some cases it may be required that any breach by the borrower of the loan agreement be “material” or “substantial” before it is to have this effect, or, if the breach is remediable, that the borrower be notified of the breach and allowed a certain period of time within which to remedy it. But, unless otherwise stipulated, there is generally no obligation ¹⁷⁶² on the lender, for example to notify the borrower that he is in arrears or to allow him further time to pay, and the right of the lender to call for immediate repayment of the outstanding balance of the loan may arise automatically upon the occurrence of an event of default.

Defective notice

- 41-278 A notice of acceleration purporting to have been given under an “events of default” clause when no event of default has arisen will normally be merely ineffective and will not, in the absence of any contractual obligation (express or implied) between the person giving the notice and the borrower, give rise to any liability on the part of that person to the borrower. ¹⁷⁶³

Cross-default clauses

- 41-279 The purpose of a cross-default clause is to enable the lender to accelerate payment upon default by the borrower in the performance of his obligations under any other agreement with the lender or, in some cases, with any associated company of the lender. The cross-default clause may be drafted even more widely so as to confer a right to accelerate should any indebtedness of the borrower to any other lender not be paid when due for payment or, if payable on demand, should not be paid when demanded. While it may be objected that it is unfair to the borrower that a lender should be entitled to require immediate repayment under a loan agreement when the borrower has fully performed all of his obligations under that agreement, there is no doubt that such a clause will be upheld in a commercial agreement. ¹⁷⁶⁴

Failure of purposes for which money lent

- 41-280 Where money is lent for some specific purpose, and the purpose fails for one reason or another, the lender may sometimes have equitable remedies in rem under a so-called “Quistclose Trust” (after

the case of that name) for the recovery of his money which are superior to an action in personam on the loan, since they may enable the lender to recover the money even where the borrower is insolvent.¹⁷⁶⁵ The nature of such a trust and when it arises are issues of some complexity, but in the loan context it has been said that “the question in every case is whether the parties intended the money to be at the free disposal of the recipient”.¹⁷⁶⁶

Secured loans

- 41-281 A loan may, and in practice commonly will, be secured in one of a number of different ways. But the existence of security does not mean that the lender is bound to look only to the security for repayment of the debt. *Prima facie* the borrower’s personal obligation remains unaffected by the security, and the lender may either disregard the security and sue the borrower on the loan,¹⁷⁶⁷ or he may realise the security, and, if it proves insufficient, sue for the balance. But if the lender chooses to sue on the loan he is under an obligation, on payment of the debt, to hand over the security, and if he is unable to do so (e.g. because he has improperly parted with it) he cannot have judgment for the debt.¹⁷⁶⁸ Acceptance of a negotiable instrument, such as a promissory note, as security for a loan does not suspend the lender’s right of action on the loan or extinguish the debt¹⁷⁶⁹; but if it is accepted in payment, the lender’s right of action on the loan may be suspended during the currency of the instrument, since it normally amounts to conditional payment of the debt.¹⁷⁷⁰ It is also possible that the lender may agree to look only to the security for repayment, thereby leaving the borrower free of any personal obligation, so that the borrower will not be liable even if the security is insufficient: whether this is so in any particular case depends on the intention of the parties and the construction of any written agreement between them.¹⁷⁷¹ But in the absence of special circumstances a court is unlikely to infer that the borrower is under no personal liability. Indeed, even in the absence of an express promise to repay the loan, a personal liability may be inferred despite the existence of some security.¹⁷⁷²
- 41-282 There are, broadly, two kinds of security that may be given for a loan. The first is so-called personal security, consisting in a guarantee by a third party of the borrower’s indebtedness or an indemnity by a third party against loss sustained by the lender in the event that the borrower fails to repay,¹⁷⁷³ or a negotiable instrument such as a promissory note. The second is so-called real security, consisting in rights in or over property belonging to the borrower (or, sometimes, a third party) which are created in favour of or transferred to the lender and to which the lender can have resort in the event of the borrower’s failure to repay and in priority to the claims of other (unsecured) creditors of the borrower. Real security may be taken over land or an interest in land, chattels, documents representing chattels such as bills of lading, sea and air waybills, delivery orders and warehouse receipts,¹⁷⁷⁴ or over legal rights only, such as stocks and shares, insurance policies,¹⁷⁷⁵ credit balances,¹⁷⁷⁶ accounts receivable,¹⁷⁷⁷ or intellectual or industrial

property rights. The lender may take physical possession of the property, as in the case of a pledge.¹⁷⁷⁸ But more often the security will be non-possessory, and will consist of a mortgage, charge (fixed or floating), bill of sale, hypothecation, assignment or declaration of trust of rights in or over the property. The formalities for the creation or transfer of the security, the remedies available for its enforcement, priorities, the right to the proceeds and the right to trace, and the circumstances in which a third party may acquire an overriding title to the collateral will depend upon the form of security employed and the nature of the collateral. It would be impractical to attempt to discuss such matters in this chapter and reference should therefore be made to specialist works. There is at present no general system for the registration of security interests in property other than land.¹⁷⁷⁹ But certain security interests may require to be registered (though not necessarily as a condition of their validity), for example, under the Bills of Sale Act (1878) Amendment Act 1882,¹⁷⁸⁰ the Companies Act 2006,¹⁷⁸¹ the Agricultural Credits Act 1928¹⁷⁸² and the Agricultural Marketing Act 1958,¹⁷⁸³ the Merchant Shipping Act 1995,¹⁷⁸⁴ the Civil Aviation Act 1982,¹⁷⁸⁵ the Insolvency Act 1986¹⁷⁸⁶ and the Co-operative and Community Benefit Societies Act 2014.¹⁷⁸⁷

Pari passu and negative pledge clauses

- 41-283 So-called negative pledge clauses take a variety of forms. Their purpose is to protect a first lender should the borrower seek to incur further indebtedness from subsequent lenders. Historically they were included in floating charge agreements and limited the authority of the chargor to deal with the collateral, in particular to create any subsequent security ranking in priority to or pari passu with the charge.¹⁷⁸⁸ But modern more complex forms of clause can arise in any loan contract¹⁷⁸⁹ and often preclude the borrower from incurring any further secured debt without the consent of the lender or even (the so-called affirmative negative pledge clause¹⁷⁹⁰) requiring the borrower to give parity of position to the first lender¹⁷⁹¹ should the borrower incur further secured debt. Whilst such a clause clearly has contractual effect and can be enforced by the lender by injunction should he realise that the borrower is about to breach it,¹⁷⁹² whether it has any effect on third parties is less clear. Much will depend on the terms of the clause but it seems clear that in some circumstances it will affect subsequent lenders. Ordinary principles of agency will determine if third parties dealing with collateral that is the subject of a floating charge with a negative pledge clause, are bound by it.¹⁷⁹³ Moreover, such a clause is now registrable under the Companies Act 2006.¹⁷⁹⁴ But beyond this, whether the clause can have any proprietary effect is subject to much dispute and has yet to be authoritatively determined.¹⁷⁹⁵

Subordination agreements

- 41-284 A subordination agreement is one by which a creditor agrees that his security or claim to a debt shall be subordinated to the security or claim of another creditor of the borrower. Subordination agreements may take many forms.¹⁷⁹⁶ The legal problems created by subordination and, in particular, whether it is possible to contract out of pari passu distribution on insolvency,¹⁷⁹⁷ lie outside the scope of this chapter.¹⁷⁹⁸

Unconscionable bargains with expectant heirs

- 41-285 During the eighteenth and nineteenth centuries courts of equity developed a principle that enabled them to set aside loans¹⁷⁹⁹ at exorbitant rates of interest made to “expectant heirs”.¹⁸⁰⁰ In the *Earl of Aylesford’s* case,¹⁸⁰¹ the plaintiff, who was 22 years of age, and entitled to large property in the event of his surviving his father, borrowed money at about 60 per cent on bills; the court restrained an action upon the bills and decreed that they should be delivered up on payment of the sums actually advanced and interest at 5 per cent. Since most of these cases were decided, a number of statutes have been passed which make recourse to this equitable principle unnecessary in most circumstances, most recently, the *Consumer Credit Act 1974*.¹⁸⁰² In a modern case in which the principle was invoked, the Court of Appeal refused to apply it on the ground that the borrower had renewed bills several times after he had sold his reversion and therefore ceased to be an “expectant heir”.¹⁸⁰³ The court also used language which might be understood to mean that they thought the whole principle was obsolete; but there have been a number of cases in which contracts have been set aside as unconscionable.¹⁸⁰⁴

Illegal loans

- 41-286 A loan prohibited by statute is illegal and irrecoverable,¹⁸⁰⁵ and so is a loan made for the express purpose of accomplishing an illegal object.¹⁸⁰⁶

Student loans

41-287



These are governed by Pt II of the Teaching and Higher Education Act 1998 and regulations 1807

U made thereunder.

Footnotes

- 1694 It is arguable that a promise to make a loan without interest is, while still executory, unsupported by consideration and therefore unenforceable. There appears to be no authority on the question.
- 1695 For an example of a statutory provision that only applied to a “loan” (and hence where the meaning of that term was crucial), see *Belize Bank Ltd v Association of Concerned Belizeans [2011] UKPC 35*. See also Insolvency Act 1986 Sch.4ZZA para.13(2)(i): prohibition of certain “ipso facto” clauses inapplicable to “financial services consisting of lending”. Hence this exemption only applies to loans and other similar contracts explicitly listed (e.g. factoring, financial leasing: see para.13(2)(i) and (ii)) but not to vendor credit. See further below para.41-277 (loans) and 41-435 (vendor credit). See also *Santander UK Plc v Harrison [2013] EWHC 199 (QB), [2013] C.C.L.R. 4* on the meaning “cash loan” (see above, para.41-019 and para.41-148).
- 1696 *Parsons v Equitable Investment Co Ltd [1916] 2 Ch. 527; Law v Coburn [1972] 1 W.L.R. 1238.*
- 1697 See, e.g. *Hussey v Palmer [1972] 1 W.L.R. 1286* (constructive or resulting trust).
- 1698 *[1951] A.C. 443.*
- 1699 *[1951] A.C. 443 at 465.*
- 1700 *[1962] Ch. 466.*
- 1701 *Cunliffe Brooks & Co v Blackburn Benefit Society (1884) 9 App. Cas. 857.*
- 1702 *Cuthbert v Robarts, Lubbock & Co [1909] 2 Ch. 226, 233.*
- 1703 s.9(1); above, para.41-019.
- 1704 *Chow Yoong Hong v Choong Fah Rubber Manufactory [1962] A.C. 209, 216* (for the purposes of money lending control).
- 1705 *IRC v Port of London Authority [1923] A.C. 507* (tax context).
- 1706 *Chow Yoong Hong v Choong Fah Rubber Manufactory*, above, at 216.
- 1707 *Transport & General Credit Corp Ltd v Morgan [1939] Ch. 531; IRC v Rowntree & Co Ltd [1948] 1 All E.R. 482; Chow Yoong Hong case, above.*
- 1708 *Olds Discount Co Ltd v John Playfair Ltd [1938] 3 All E.R. 275.*
- 1709 *Olds Discount Co Ltd v John Playfair*, above; and see *Chow Yoong Hong v Choong Fah Rubber Manufactory [1962] A.C. 209; Re Securitibank Ltd [1978] 1 N.Z.L.R. 97.*
- 1710 *British Ry Traffic and Electric Co v Kahn [1921] W.N. 52; Automobile and General & Finance Corp Ltd v Morris (1929) 73 S.J. 451; Olds Discount Co Ltd v Cohen [1938] 3 All E.R. 281n.; Trade Promotion Trust Ltd v Young (1940) 84 S.J. 646; Premor Ltd v Shaw Bros [1964] 1 W.L.R. 978.* For hire-purchase, see below, paras 41-310 et seq.

- 1711 *Goldberg v Tait* [1950] N.Z.L.R. 976; *Cash Order Purchases v Brady* [1952] N.Z.L.R. 898; *Premier Clothing Co v Hillcoat* [1969] C.L.Y. 2279a; see below, para.41-485.
- 1712 *NG Napier Ltd v Patterson*, 1959 S.C.(J.) 48; *MacDonald v NG Napier Ltd*, 1960 S.L.T. 345; *NG Napier Ltd v Corbett*, 1962 S.L.T. (Sh Ct) 90.
- 1713 See below, paras 41-476 et seq.
- 1714 On the characterisation of transactions generally, see *Welsh Development Agency v Export Finance Co Ltd* [1992] B.C.C. 270 (sale or security); and *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28, [2001] 2 A.C. 710 (fixed or floating charge).
- 1715 *Spargo's Case* (1872-73) L.R. 8 Ch. 407.
- 1716 *Levett v Barclays Bank Plc* [1995] 1 W.L.R. 1260, 1271.
- 1717 *Mathew v Blackmore* (1857) 1 H. & N. 762.
- 1718 *De Vigier v IRC* [1964] 1 W.L.R. 1073.
- 1719 *Seldon v Davidson* [1968] 1 W.L.R. 1083; *Chapman v Jaume* [2012] EWCA Civ 476. This approach has not been accepted in Australia (see e.g. *Alexiadis v Zirpiadis* (2013) 302 A.L.R. 148) but has been followed in New Zealand (*Re Matthews* [1993] 2 N.Z.L.R. 91).
- 1720 For a discussion in the context of the model contract of the Loan Markets Association, Multicurrency Term and Revolving Facilities Agreement (April 2009), see *Rawlings* (2012) J.B.L. 89.
- 1721 Exceptionally, a loan agreement may confer a discretion on the lender whether to make an advance or not: *McKay (t/a Mckay Law Solicitors and Advocates) v Centurion Credit Resources LLC* [2012] EWCA Civ 1941.
- 1722 *Sichel v Mosenthal* (1862) 30 Beav. 371; *South African Territories v Wallington* [1898] A.C. 309; *Re Smelting Corp* [1915] 1 Ch. 472. But specific performance may now be ordered of a contract to take debentures in a company although such a contract is in law an agreement to make a loan: *Companies Act 2006* s.740. cf. also *Beswick v Beswick* [1968] A.C. 58.
- 1723 *Manchester and Oldham Bank v Cook* (1884) 49 L.T. 674, 678; *Western Wagon & Property Co v West* [1892] 1 Ch. 271, 277; *South African Territories v Wallington* [1897] 1 Q.B. 692 (affirmed [1898] A.C. 309). See Vol.I, paras 29-199—29-200.
- 1724 *Prehn v Royal Bank of Liverpool* (1870) L.R. 5 Ex. 92; *Bahamas Sisal Plantation v Griffin* (1897) 14 T.L.R. 139; *Astor Properties Ltd v Tunbridge Wells Equitable Friendly Society* [1936] 1 All E.R. 531.
- 1725 *South African Territories v Wallington*, above, at 696–697. The damages would doubtless have to be discounted to allow for the fact that the additional interest would have to be paid over a period of time.
- 1726 *Manchester and Oldham Bank v Cook* (1884) 49 L.T. 674; *Astor Properties Ltd v Tunbridge Wells Equitable Friendly Society*, above; *General Securities Ltd v Don Ingram Ltd* [1940] 3 D.L.R. 641.
- 1727 *Manchester and Oldham Bank v Cook*, above, at 678, 679.
- 1728 *Bank Bumiputra Malaysia Bhd v Mae Perkayuan Sdn Bhd* [1993] 1 S.C.R. 385 Malaysia.

- 1729 *Rogers v Challis (1859) 27 Beav. 175.*
- 1730 McGregor on Damages, 21st edn, para.30-031.
- 1731 *Norton v Ellam (1837) 2 M. & W. 461*; *Atterbury v Jarvie (1857) 2 H. & N. 114, 120*; *Re George (1890) 44 Ch. D. 627.*
- 1732 *Joachimson v Swiss Bank Corp [1921] 3 K.B. 110*; *National Bank of Commerce v National Westminster Bank [1990] 2 Lloyd's Rep. 514.*
- 1733 *Re Colonial Finance, Mortgage, Investment and Guarantee Corp Ltd (1905) 6 S.R.N.S.W. 6, 9*; cited with approval in *Re a Company [1985] B.C.L.C. 37* and in *Bank of Credit and Commerce International SA v Blattner Unreported 20 November 1986, CA* (available on Westlaw).
- 1734 *Bunbury Foods Pty Ltd v National Bank of Australia Ltd (1984) 153 C.L.R. 491*; *Bank of Baroda v Panessar [1987] Ch. 335.*
- 1735 *Brighty v Norton (1862) 3 B. & S. 312*; *Toms v Wilson (1862) 4 B. & S. 442, 453*; *Moore v Shelley (1883) 8 App. Cas. 285, 293*; *R.A. Cripps & Son Ltd v Wickenden [1973] 1 W.L.R. 944*; *Bank of Baroda v Panessar*, above. See also *UBS AG v Rose Capital Ventures Ltd [2018] EWHC 3137 (Ch)*, applying *Braganza v BP Shipping Ltd [2015] UKSC 17* (no implication of any limitations on the express right of a creditor, in an on-demand five year loan, to demand full payment at its “absolute discretion” after three months’ notice). But see the *Consumer Rights Act 2015 Sch.2 para.8*, replacing (for contracts made on or after 1 October 2015) the *Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) Sch.2 para.1(g)* above, para.40-335.
- 1736 See *UBS AG v Rose Capital Ventures Ltd [2018] EWHC 3137 (Ch)*, previous footnote.
- 1737 See Vol.I, (generally) paras 15-011 et seq., esp. paras 15-072 and 15-080. Note *Alexander v West Bromwich Mortgage Co Ltd [2016] EWCA Civ 496.*
- 1738 *Titford Property Co Ltd v Cannon Street Acceptances Unreported 1975* (Goff J), reproduced in Cresswell, Encyclopedia of Banking Law, pp.71-72. But see *Lloyds Bank Plc v Lambert [1999] 1 All E.R. (Comm) 161*; *Bank of Ireland AMCD (Property Holdings) Ltd [2001] 2 All E.R. (Comm) 494.*
- 1739 *Jackson v Irvin (1809) 2 Camp. 48, 50*; *Penny v Foy (1828) 8 B. & C. 11.*
- 1740 This may be proved by any evidence: see Vol.I, para.24-057.
- 1741 *Douglass v Lloyds Bank (1929) 34 Com. Cas. 263.*
- 1742 See Vol.I, para.24-057.
- 1743 *Page v Newman (1829) 9 B. & C. 378*; *London, Chatham & Dover Ry v South Eastern Ry [1893] A.C. 429*; *President of India v La Pintada Compania Navegacion SA [1985] A.C. 104.*
- 1744 *Cook v Fowler (1874) L.R. 7 H.L. 27*; *Re Roberts (1880) 14 Ch. D. 49.* Damages for the “detention” of the debt were recoverable, though not necessarily at the contract rate.
- 1745 *Trans Trust SPRL v Danubian Trading Co [1952] 2 Q.B. 297, 306, 307*; *Wadsworth v Lydell [1981] 1 W.L.R. 598.* See also *Ozalid Group (Export) Ltd v African Continental Bank Ltd [1979] 2 Lloyd's Rep. 231*; *Bacon v Cooper (Metals) Ltd [1982] 1 All E.R. 397.* cf. *Compania Financiera “Soleada” SA v Hamoor Tanker Corp Inc [1981] 1 W.L.R. 274.* See Vol.I, paras 29-199, 29-288 et seq.

- 1746 In particular under the Senior Courts Act 1981 s.35A, the County Courts Act 1984 s.69, and the Arbitration Act 1996 s.49. See Vol.I, paras 29-199 et seq.; below, para.41-299.
- 1747 [2007] UKHL 34, [2007] 3 W.L.R. 354. The decision was technically obiter on this point (the claim being for repayment of sums) but their Lordships went out of their way to review the general law on the recovery of interest as damages and the case has since been regarded as authority for that proposition (see e.g. *Mortgage Express v Countrywide Surveyors Ltd* [2016] EWHC 1830 (Ch) (“The law relating to interest as damages was radically altered by this decision of the House of Lords”); *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2013] EWHC 3249 (Ch) (reversed on another point, [2016] EWCA Civ 376).
- 1748 See generally, Vol.I, Ch.29.
- 1749 See below, para.41-293.
- 1750 *Coca-Cola Financial Corp v Finsat International Ltd* [1998] Q.B. 43.
- 1751 See Vol.I, para.17-108. But see *Surzur Overseas Ltd v Ocean Reliance Shipping Ltd* [1997] C.L.Y. 906; *Skipskreditforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep. 66; *WRM Group Ltd v Wood* [1998] C.L.C. 189; *FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd* [2012] EWHC 2477 (Comm), [2012] 2 Lloyd's Rep 479. See the unsuccessful attempt to invoke that Act in *African Export-Import Bank v Shebah Exploration and Product Co Ltd* [2016] EWHC 311 (Comm) (syndicated loan).
- 1752 Replacing (for contracts made on or after 1 October 2015) the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083). See above, paras 40-227 et seq. [2013] EWHC 482 (Comm). It was also held not to give rise to an “unfair relationship” under the CCA 1974 (see above, paras 41-213 et seq.).
- 1753 *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] A.C. 785; *Stein v Blake* [1996] A.C. 243.
- 1754 See below, para.41-277.
- 1755 See Vol.I, para.29-246.
- 1756 *The Angelic Star* [1988] 1 Lloyd's Rep. 122, followed in *ZCCM Investments Holdings Plc v Konkola Copper Mines Plc* [2017] EWHC 3288 (Comm) and *Holyoake v Candy* [2017] EWHC 3397 (Ch) at 466.
- 1757 *The Angelic Star*, above, per Donaldson MR at 125.
- 1758 *Protector Endowment Loan & Annuity Co v Grice* (1880) 5 Q.B.D. 592; *Wallingford v Mutual Society* (1880) 5 App. Cas. 685. See also *Wadham Stringer Finance Ltd v Meaney* [1981] 1 W.L.R. 39. Contrast *United Dominions Trust Ltd v Patterson* [1973] N.I. 142; *United Dominions Trust v Thomas* [1976] C.L.Y. 1618, Cty Ct. See Vol.I, para.29-246. But see the Consumer Rights Act 2015 Pt 2, replacing (for contracts made on or after 1 October 2015) the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) above paras 40-227 et seq.
- 1759 A loan may be advanced for a fixed term but nevertheless be repayable at any time on demand, see above, para.41-267.
- 1760 The outlawing of certain “ipso facto” clauses (clauses triggered by a company’s entry into insolvency proceedings) by amendments made to the Insolvency Act 1986 by

- Corporate Insolvency and Governance Act 2020, does not apply to “financial services consisting of lending” (see Insolvency Act 1986 Sch.4AAZ para.13(1)(i)). Hence such clauses are effective in loan contracts.
- 1762 Except in the case of a regulated agreement under the Consumer Credit Act 1974, see ss.76, 86B, 86C, 87, 98, 98A(3) (see above, paras 41-131, 41-134, 41-166, 41-168, 41-174, 41-175). See also the “unfair relationship” provisions (above, paras 41-213 et seq., especially *Patel v Patel [2009] EWHC 3264 (QB)*, above, para.41-225) and, in the case of consumer contracts, the Consumer Rights Act 2015 Pt 2, replacing (for contracts made on or after 1 October 2015) the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) Sch.2 para.1(g); above, para.40-335).
- 1763 *Concord Trust v Law Debenture Trust Corp [2005] UKHL 27, [2005] 1 W.L.R. 1592* at [30]–[45]. See also, on inaccurate default notices, *Lombard North Central Plc v European Skyjets Ltd (In Liquidation) [2020] EWHC 679 (QB)* at [46] and for the position in relation to regulated agreements under the Consumer Credit Act 1974, para.41-169, above.
- 1764 Such a clause survived challenge (in the business context) under the “unfair relationship” provisions (above, paras 41-213 et seq.) in *Rahman v HSBC Bank Plc [2012] EWHC 11 (Ch)*. But where the borrower is a consumer, see the Consumer Rights Act 2015 Pt 2, replacing (for contracts made on or after 1 October 2015) Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) reg.5, above, paras 40-273 et seq.
- 1765 *Barclays Bank Ltd v Quistclose Investment Ltd [1970] A.C. 567; affirming [1968] Ch. 540*. See also *Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd [1985] Ch. 207; Re EVTR [1987] B.C.L.C. 646, CA; Twinsectra Ltd v Yardley [2002] UKHL 12, [2002] 2 A.C. 164*. Contrast *Westdeutsche Landesbank Girozentrale v Islington London BC [1996] A.C. 669* (loan for ultra vires purpose).
- 1766 per Lord Millett in *Twinsectra Ltd v Yardley [2002] 2 A.C. 164, 185*. See discussions (and further references) in the specialist texts, e.g. Beale, Bridge, Gullifer and Lomnicka, The Law of Security and Title-Based Financing (2017), paras 8.128 et seq. See also Swadling (ed.) The Quistclose Trust: Critical Essays (2004); Chambers, Resulting Trusts (1997), Ch.3; Worthington, Proprietary Interests in Commercial Transactions (1996), Ch.3; Millett (1985) 101 L.Q.R. 269; Rickett (1991) 107 L.Q.R. 608; Bridge (1992) 12 O.J.L.S. 333; Ho and Smart (2001) 21 O.J.L.S. 267; Glister [2004] L.M.C.L.Q. 460.
- 1767 *China and Southsea Bank Ltd v Tan Soon Gin [1990] 1 A.C. 536, 545; National Westminster Bank Plc v Kitch [1996] 1 W.L.R. 1316; Re Bank of Credit and Commerce International SA (No.8) [1998] A.C. 214*.
- 1768 *Ellis & Co's Trustee v Dixon-Johnson [1925] A.C. 489*.
- 1769 *Re Rankin and Shilday [1927] N.I. 162; Modern Light Cars Ltd v Seals [1934] 1 K.B. 32*.
- 1770 See, e.g. *Bolt & Nut Co (Tipton) Ltd v Rowlands, Nicholls & Co Ltd [1964] 2 Q.B. 10*; Vol.I, para.24-072.

- 1771 *Barclays Bank v Beck* [1952] 2 Q.B. 47; *Lloyds Bank v Margolis* [1954] 1 W.L.R. 644; *Levett v Barclays Bank* [1995] 1 W.L.R. 1260, 1271. See also *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] B.C.C. 388; *Re Bank of Credit and Commerce International SA (No.8)* [1998] A.C. 214; *Fairmile Portfolio Management Ltd v Davies Arnold Cooper* [1998] C.L.Y. 2520.
- 1772 *Yates v Aston* (1843) 4 Q.B. 182; *Marryat v Marryat* (1860) 28 Beav. 224; *Isaacson v Harwood* (1868) L.R. 3 Ch. App. 225; *Saunders v Milsome* (1866) L.R. 2 Eq. 573; *Jackson v North Eastern Ry* (1877) 7 Ch. D. 573; *MS Fashions Ltd v Bank of Credit and Commerce International SA* [1993] Ch. 425, 431 (but see the observations on this case in *Re Bank of Credit and Commerce International SA (No.8)*, above).
- 1773 See below, Ch.47.
- 1774 See, e.g. *Factors Act 1889* s.1(4).
- 1775 See below, Ch.44.
- 1776 *Re Bank of Credit and Commerce International SA (No.8)* [1998] A.C. 214; see above, Ch.36.
- 1777 See Vol.I, Ch.22.
- 1778 See above, para.35-121.
- 1779 But see the (unimplemented) proposals for such a system in (i) the (Crowther) Report of the Committee on Consumer Credit (1971) Cmnd.4596, (ii) A Review of Security Interests in Property by Professor A.L. Diamond (DTI Paper, 1989) and (iii) the Law Commission's Company Security Interests (Law Com No.296, 2005).
- 1780 See below, para.41-523.
- 1781 s.860. See Vol.I, para.12-046.
- 1782 s.9.
- 1783 s.15.
- 1784 s.16 and Sch.1; see below, para.41-528.
- 1785 s.86; see below, para.41-529.
- 1786 s.344.
- 1787 Pt 5 (Charges over society's assets).
- 1788 See *Re Automatic Bottle Makers Ltd* [1926] Ch. 412, CA.
- 1789 They are particularly prevalent in international/syndicated loans. See Wood, International Loans, Bonds Guarantees and Legal Opinions, 2nd edn (2007), paras 5-008 et seq.; Tennekoon, The Law and Regulation of International Finance, 2nd edn (1998); Cranston, Principles of Banking Law, 3rd edn (2018), pp.433 et seq. esp. 440.; *Boardman & Crosthwaite* (1986) 3 J.I.B.L. 162; *Maxton* [1993] J.B.L. 458; *Wo* (1999) 14 J.I.B.L. 360; *McKnight* (2002) 17 J.I.B.L. 193, 203.
- 1790 *Stone* (1991) 6 J.I.B.L. 364.
- 1791 Either pari passu security over the collateral or security over other collateral of equal value. For the many varieties of such clauses and their possible different consequences, see the texts cited in the footnotes above.
- 1792 And breach is a "default event", see above, para.41-277.

- 1793 In particular, the issue will turn on whether the chargor has ostensible authority to deal with the collateral. See *English & Scottish Mercantile Investment Co Ltd v Brunton [1892] 2 Q.B. 700*, 707 and Vol.I, Ch.21, esp. para.21-063.
- 1794 s.859D(2)(c), added on 3 April 2013 by SI 2013/600.
- 1795 For discussions written before the possibility of registering negative pledge clauses under the 2006 Act, see Gough, Company Charges, 2nd edn (1996), p.357; Goode and Gullifer on Legal Problems of Credit and Security, 6th edn (2017), paras 1.71–1.78; *Farrar (1974) 38 Conv. N.S. 315, 319*; Beale, Bridge, Gullifer and Lomnicka, The Law of Security and Title-Based Financing (2018), paras 8.81 et seq. See also Gullifer and Payne, Corporate Finance Law: Principles and Policy, 3rd edn (2019), paras 6.3.1.6.1 et seq.
- 1796 See, e.g. *Cheah v Equiticorp Finance Group Ltd [1992] 1 A.C. 472* (variation of mortgage priorities); *Banque Financière de la Cité SA v Parc (Battersea) Ltd [1999] 1 A.C. 221* (letter of postponement); *Re SSSL Realisations (20–02) Ltd [2004] EWHC 1760 (Ch)*.
- 1797 See *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd [1972] A.C. 785*; *British Eagle International Airlines Ltd v Air France [1975] 1 W.L.R. 758*; *Re Maxwell Communications Corp Plc (No.3) [1993] B.C.C. 369*.
- 1798 See Wood, Project Finance, Securitisations, Subordinated Debt (2007), Chs 10–14; Beale, Bridge, Gullifer and Lomnicka, The Law of Security and Title-Based Financing (2018), paras 14-108 et seq. (“priority agreements” between secured creditors) and paras 8.104 et seq. (“contractual subordination” between unsecured creditors); *Powell [1993] L.M.C.L.Q. 357*.
- 1799 The principle also applied to the sale of a reversion at an undervalue. By s.174 of the Law of Property Act 1925, a sale of a reversion can no longer be set aside merely because it was at an undervalue, but this does not affect the court’s jurisdiction to deal with unconscionable bargains.
- 1800 *Earl Chesterfield v Janssen (1750) 2 Ves. Sen. 125*; *Earl of Aylesford v Morris (1872-73) L.R. 8 Ch. App. 484*; *O’Rorke v Bolingbroke (1877) 2 App. Cas. 814*; *Nevill v Snelling (1880) 15 Ch. D. 679*; *Fry v Lane (1888) 40 Ch. D. 312*; *James v Kerr (1889) 40 Ch. D. 449*; *Rees v De Bernardy [1896] 2 Ch. 437*.
- 1801 *(1872-73) L.R. 8 Ch. App. 484*.
- 1802 See the “unfair relationship” provisions in ss.140A–140C (above, paras 41-213 et seq.). Previous statutes (repealed by that Act) were the Infants Relief Act 1874 and Betting and Loans (Infants) Act 1892.
- 1803 *Levin v Roth [1950] 1 All E.R. 698n*.
- 1804 See above, Vol.I, paras 10-161—10-181.
- 1805 *Boissevain v Weil [1950] A.C. 327*; see Vol.I, paras 18-189 et seq.
- 1806 *Boissevain v Weil*, above; as to money lent for gaming or to pay gaming debts, see below, para.43-035.
- 1807

Education (Student Support) Regulations 2011 (SI 2011/1986), as amended. See also the Education (Student Loans) (Repayment) Regulations 2009 (SI 2009/470), as (extensively) amended.

End of Document

© 2022 SWEET & MAXWELL

(b) - Interest

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 2. - Loans and Interest

(b) - Interest ¹⁸⁰⁸

General rule at common law

41-288 At common law, the general rule was that interest was not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect.¹⁸⁰⁹ Thus, in the absence of express stipulation, it has been held that interest was not payable on the price of goods sold, although the price was payable on a certain day¹⁸¹⁰; nor for money lent to, or paid for, the defendant¹⁸¹¹; nor on a claim for money had and received to the plaintiff's use unless fraud was proved¹⁸¹²; nor on a guarantee¹⁸¹³; nor on money due on a building contract for work done by the contractor, payment for which is in arrears.¹⁸¹⁴ This principle differs from the (now abolished) rule already noted,¹⁸¹⁵ that interest could not normally be awarded by way of damages for non-payment of money. The former principle means that interest is not payable under the contract itself, in the absence of express agreement or custom; the latter rule meant that interest could not be awarded by way of damages for breach of contract. The former principle remains in force, though its scope has been reduced by both equitable and statutory developments.¹⁸¹⁶

Interest payable by agreement, course of dealing or custom

41-289 Contractual interest is, of course, payable wherever there is an express agreement to that effect. Such an agreement may also be inferred from a course of dealing between the parties, e.g. if it has been frequently charged and paid without objection in similar accounts.¹⁸¹⁷ Similarly, an obligation to pay interest may arise from the custom or usages of a particular trade or business.¹⁸¹⁸

- 41-290 A contract to pay interest up to the date of repayment of the debt does not necessarily imply an agreement to pay interest beyond that date in the event of default in repayment¹⁸¹⁹ but in this situation interest (though not necessarily at the contract rate) can be awarded by way of damages.¹⁸²⁰

Interest payable in equity

- 41-291 In certain circumstances, the rule in equity is that interest is payable even in the absence of any agreement or custom to that effect, though subject, of course, to a contrary agreement. Thus, interest is payable on a mortgage debt even though the deed contains no mention of interest.¹⁸²¹ So also the right of a surety who has paid the creditor, to be indemnified by the principal debtor, carries a right to interest.¹⁸²² Again, where the debtor is in a fiduciary position towards the creditor, and has in his hands moneys due to the creditor, any interest actually earned by the use of the money is recoverable by the creditor,¹⁸²³ and, indeed, it seems that interest would be recoverable even if it had not actually been earned.¹⁸²⁴ A trustee or fiduciary may be charged compound interest where he has wrongly profited, or may be presumed to have so profited, from having the use of another person's money.¹⁸²⁵ A claim for compound interest on money obtained or retained by fraud is also maintainable in equity.¹⁸²⁶

Sale of land

- 41-292 A vendor of land is entitled to require the purchaser to pay interest on his unpaid purchase-money from the date when he takes, or might safely take, possession of the land.¹⁸²⁷ This principle is not confined to the sale of land, but extends to any contract, specific performance of which would be ordered by the court, and in which the defendant has obtained possession of the subject matter before payment of the price.¹⁸²⁸ It also extends to the expropriation of land under statutory powers,¹⁸²⁹ but not to the requisitioning of goods,¹⁸³⁰ though subject, of course, to express statutory provision in both cases.

Compound interest

- 41-293

Compound interest is payable either by agreement or custom, but not otherwise.¹⁸³¹ By the practice of bankers, interest on a customer's indebtedness is periodically added to the capital sum advanced, so that, in effect, compound interest is achieved.¹⁸³² At one time there was a tendency to look for actual acquiescence by the customer in the practice for holding that it was binding upon him.¹⁸³³ But it is now clear that the right to capitalise interest can be implied into the banker-customer relationship by the usage of bankers.¹⁸³⁴ In *National Bank of Greece SA v Pinios Shipping Co (No.1)*,¹⁸³⁵ the House of Lords held that a banker's entitlement to capitalise interest did not, as had previously been suggested,¹⁸³⁶ arise only in respect of "mercantile accounts current for mutual transactions" and that the entitlement continued until payment or judgment, notwithstanding that the banker demanded repayment of the balance due to him from the customer. It may therefore be assumed that earlier authorities to the effect that the banker's entitlement ceases when the customer dies,¹⁸³⁷ becomes bankrupt,¹⁸³⁸ or closes his account¹⁸³⁹ are no longer good law.

Trustees and fiduciaries

- 41-294 Compound interest has always been awarded in equity against a trustee or other person owing fiduciary duties who is accountable for profits made from his position. The justification for this is that, if he has improperly obtained or retained or misapplied trust money, then he must account for the profit which he made, or ought to or is presumed to have made, from the use of the money.¹⁸⁴⁰

Tender of payment

- 41-295 Where a debt carries interest, and the creditor refuses a proper tender of the full amount of the capital sum and interest, he is not entitled to claim interest for any further period if the money is set aside by the debtor, and is available for repayment at any time thereafter.¹⁸⁴¹

Rates of interest

- 41-296 Since the Usury Laws Repeal Act 1854 there was, until recently (apart from the discretionary power of the court to alter interest rates conferred by the "unfair relationship" provisions in the Consumer Credit Act 1974)¹⁸⁴²

U and by the [Insolvency Act 1986](#)¹⁸⁴³) no specific statutory control over the rate of interest that may be agreed by the parties to a transaction.¹⁸⁴⁴ But in response to the rise of the “pay-day lending” industry, the Financial Conduct Authority was initially given the power to control the cost of credit and various other terms in certain credit agreements¹⁸⁴⁵ and now has an *obligation* to make rules controlling the cost of “high-cost short-term credit” (as defined).¹⁸⁴⁶ The FCA has also imposed a price cap on certain “rent-to-own” agreements.¹⁸⁴⁷

Variation of interest rate

41-297 The rate of interest stipulated in a loan agreement may be either a fixed rate or a rate that automatically varies, for example, in accordance with movements in a base rate or inter-bank rate or by reference to an index or some other factor specified in the agreement. But some loan agreements provide that the lender has the power to vary the interest rate unilaterally at his discretion.¹⁸⁴⁸ Such a provision is not unlawful as such at common law, but very clear words are required to achieve that result.¹⁸⁴⁹ The power is, however, even at common law not completely unfettered. In *Paragon Finance Plc v Nash*¹⁸⁵⁰ the Court of Appeal held that the unilateral power of a mortgagee to set the rate of interest from time-to-time was subject to an implied term that the discretion to vary rates should not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily or in a way in which no reasonable lender, acting reasonably, would do, although on the facts it was held that there was no real prospect of the defendant borrower proving a breach of this implied term at trial.¹⁸⁵¹ Some further protection is afforded to a borrower who is a consumer¹⁸⁵² by Sch.2 to the [Consumer Rights Act 2015 Pt 1](#)¹⁸⁵³ which contains an indicative and non-exhaustive list¹⁸⁵⁴ of the terms which may be regarded as unfair. It includes terms “enabling the trader to alter the terms of the contract unilaterally without a valid reason which is specified in the contract”,¹⁸⁵⁵ although this is expressly stated not to include¹⁸⁵⁶:

“... a term by which a supplier of financial services reserves the right to alter the rate of interest payable by or due to the consumer, or the amount of other charges for financial services without notice where there is a valid reason, if (a) the supplier is required to inform the consumer of the alteration at the earliest opportunity, and (b) the consumer is free to dissolve the contract immediately.”

How a creditor exercises its powers of variation may also render a credit relationship “unfair” under the “unfair relationship” provisions of the [Consumer Credit Act 1974](#)¹⁸⁵⁷ and hence enable the court to exercise its wide powers to reopen a credit agreement under those provisions. In addition, now that consumer credit is regulated by the Financial Conduct Authority under the [Financial Services and Markets Act 2000](#),¹⁸⁵⁸ the wide regulatory powers under that Act may be used

to control the exercise of such a power.¹⁸⁵⁹ Moreover, consumers are also protected by various statutory notification requirements¹⁸⁶⁰ as regards interest rate variations, and the Standards of Lending Practice¹⁸⁶¹ also stipulate for the provision by banks and building societies of information as to changes in interest rates.

Default interest

- 41-298** A lender has a legitimate commercial interest in applying a higher rate of interest to a borrower who is in default because that borrower then represents an increased credit risk.

1862

U However, contractual provision for payment of a higher rate of interest after a default in payment by the borrower is open to attack as a penalty.

1863

U But a clause that provides for interest to increase on default will not be held to give rise to a penalty if the increase is not retrospective but only prospective from the date of default, if the dominant contractual purpose of the clause is not to deter default, and if the increase is modest and commercially justifiable by reason of the increased credit risk represented by a debtor in default.

1864

U It is submitted that the old practice of banks to charge a certain rate of interest on “authorised” overdrafts (incurred by prior arrangement with the bank), and a higher rate on “unauthorised” overdrafts (incurred without prior arrangement or in excess of the authorised overdraft limit), would not have been held to impose a penalty.

1865

U However, where the borrower is a consumer, a provision for payment of a higher rate of interest on default is open to challenge as being “unfair”, and so not binding on the consumer, under the [Consumer Rights Act 2015 Pt 2](#).

1866

U Moreover, the “unfair relationship” provisions of the [Consumer Credit Act 1974](#) may apply to enable the court to reopen the agreement.

1867



Interest payable by statute

- 41-299 Various statutes provide for the payment of interest in special cases. The most important of these enactments is the [Late Payment of Commercial Debts \(Interest\) Act 1998](#),¹⁸⁶⁸ which imports an obligation to pay statutory (simple) interest on debts arising under certain contracts for the supply of goods or services¹⁸⁶⁹ where the purchaser and the supplier are each acting in the course of a business. The rate of interest is that prescribed by order.¹⁸⁷⁰ Other general statutory provisions are contained in: the [Judgments Act 1838](#) (interest on High Court judgment debts),¹⁸⁷¹ the [Bills of Exchange Act 1882](#) (interest on dishonoured bills and notes),¹⁸⁷² the [Partnership Act 1890](#) (interest on money advanced by partner to firm and on profits made after dissolution),¹⁸⁷³ the [Arbitration Act 1996](#) (power of the arbitral tribunal to award interest),¹⁸⁷⁴ the [Senior Courts Act 1981](#) (interest on debt or damages in the High Court)¹⁸⁷⁵ and the [County Courts Act 1984](#) (interest on debt or damages and on judgements in the county court).¹⁸⁷⁶
- 41-300 Further provision for the payment of interest is made by a number of miscellaneous enactments. Thus, after payment of all debts of a bankrupt, interest for the period since the commencement of the bankruptcy is payable under the [Insolvency Act 1986](#)¹⁸⁷⁷ if any assets remain, and similar provisions exist in relation to insolvent companies.¹⁸⁷⁸ There are also a number of rules of court dealing with payment of interest in various circumstances.¹⁸⁷⁹

Contractual interest after judgment

- 41-301 Often it is agreed that interest at the contractual rate is payable “after as well as before any judgment”.¹⁸⁸⁰ The validity of such a provision depends on “whether the covenant for the payment of interest is an independent covenant or a covenant which is merely ancillary to the payment of the principal money”.¹⁸⁸¹ If the covenant is merely ancillary, the promise merges in the judgment.¹⁸⁸² In *Director General of Fair Trading v First National Bank Plc*¹⁸⁸³ the House of Lords held that a term in a consumer contract that the borrower was to continue to pay interest at the contractual rate until the discharge of any judgment obtained by the lender, was not an unfair term under the [Unfair Terms in Consumer Contracts Regulations 1994](#).¹⁸⁸⁴ However, if an agreement regulated by the [Consumer Credit Act 1974](#) contains such a term, the creditor or owner is now¹⁸⁸⁵ obliged to notify the debtor or hirer that such post-judgment interest is accruing.¹⁸⁸⁶

Footnotes

- 1808 See also Vol.I, paras 29-286 et seq.
- 1809 *Page v Newman* (1829) 9 B. & C. 378, 381; *Re Gosman* (1881) 17 Ch. D. 771; *London, Chatham & Dover Ry v South Eastern Ry* [1893] A.C. 429; *President of India v La Pintada Compania Navegacion SA* [1985] A.C. 104; *Mathew v TM Sutton Ltd* [1994] 1 W.L.R. 1455.
- 1810 *Gordon v Swan* (1810) 12 East 419; *Chalie v Duke of York* (1806) 6 Esp. 45.
- 1811 *Calton v Bragg* (1812) 15 East 223; *Carr v Edwards* (1822) 3 Stark. 132.
- 1812 *Johnson v The King* [1904] A.C. 817. But see below, para.41-291.
- 1813 *Hare v Rickards* (1831) 7 Bing. 254, 256.
- 1814 *Hill v South Staffs Ry* (1874) L.R. 18 Eq. 154.
- 1815 Above, para.41-274.
- 1816 See below, paras 41-291, 41-299.
- 1817 *Great Western Insurance Co v Cunliffe* (1874) L.R. 9 Ch. 525; *Re Marquis of Anglesey* [1901] 2 Ch. 548; *Re Duncan & Co* [1905] 1 Ch. 307.
- 1818 *Ikin v Bradley* (1818) 8 Taunt. 250; *Lloyds Bank Plc v Voller* [2000] 2 All E.R. (Comm) 987 and *Emerald Meats (London) Ltd v AIB Group (UK) Plc* [2002] EWCA Civ 460 (interest on bank overdrafts). See also below, para.41-293 (compounding of interest). *Cook v Fowler* (1874) L.R. 7 H.L. 27, 37.
- 1819 Above, para.41-274. In *Chubb v Dean* [2013] EWHC 1282 (Ch) it was confirmed that, in absence of agreement, the High Court only had power to award post-judgment interest pursuant to statute (in particular only at the rate provided for by the *Judgments Act 1838*, see below, para.41-299).
- 1820 Above, para.41-274. In *Chubb v Dean* [2013] EWHC 1282 (Ch) it was confirmed that, in absence of agreement, the High Court only had power to award post-judgment interest pursuant to statute (in particular only at the rate provided for by the *Judgments Act 1838*, see below, para.41-299).
- 1821 *Re Kerr's Policy* (1869) L.R. 8 Eq. 331; *Re Drax* [1903] 1 Ch. 781; *Mendl v Smith* (1943) 112 L.J. Ch. 279; *Ezekiel v Orakpo* [1997] 1 W.L.R. 340, 346; *Al Wazir v Islamic Press Agency Inc* [2001] EWCA Civ 1276, [2002] 1 Lloyd's Rep. 410.
- 1822 *Petre v Duncombe* (1851) 20 L.J. Q.B. 242; *Re Fox, Walker & Co* (1880) 15 Ch. D. 400.
- 1823 *Brown v IRC* [1965] A.C. 244; but as to the particular case of solicitors, see now *Solicitors Act 1974* s.33, as amended (from 31 March 2009) by the *Legal Services Act 2007* Sch.16 para.33(5).
- 1824 *Burdick v Garrick* (1870) L.R. 5 Ch. App. 233; *Harsant v Blaine Macdonald & Co* (1887) 56 L.J. Q.B. 511; *Dominion Coal Co v Maskinonge S.S. Co* [1922] 2 K.B. 132; *Mathew v TM Sutton Ltd* [1994] 1 W.L.R. 1455; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669. In *Barclay v Harris* (1915) 85 L.J. K.B. 115 it was held that interest can only be claimed as from the time when payment is requested, even in cases of fiduciary relationships, but where interest has actually been earned this cannot stand with *Brown v IRC*, above.
- 1825 See below, para.41-294.

- 1826 *Johnson v The King* [1904] A.C. 817, 822. But not on damages for deceit at common law: *Black v Davies* [2005] EWCA Civ 531.
- 1827 *Birch v Joy* (1852) 3 H.L.C. 565; *International Ry v Niagara Parks Commission* [1941] A.C. 328, 344; *Re Priestley's Contract* [1947] Ch. 469. See also *De Bernales v Wood* (1812) 3 Camp. 258; *Babacomp Ltd v Rightside Properties Ltd* (1975) 234 E.G. 201 (interest payable by vendor on deposit not returned).
- 1828 *International Ry v Niagara Parks Commission* [1941] A.C. 328.
- 1829 *Inglewood Pulp Co v New Brunswick Electric Power Commission* [1928] A.C. 492.
- 1830 *Swift & Co v Board of Trade* [1925] A.C. 520.
- 1831 *Fergusson v Fyffe* (1841) 8 Cl. & F. 121, 140; *Williamson v Williamson* (1869) L.R. 7 Eq. 542. *Re M* [2010] EWHC 2324 (Admin) (contractual requirement for compound interest after the indebtedness not repaid); *Porter Capital Corp v Masters* [2013] EWHC 3929 (agreement expressly provided for payment of compound interest). Note *Consumer Credit Act 1974 s.86F(2)* (above, para.41-136: debtor or hirer under a regulated agreement under that Act (see paras 41-005 et seq., above) is only liable to pay simple interest in connection with a “default sum” (as defined in s.187A) payable under the agreement).
- 1832 But the question arises whether interest can be capitalised, in the absence of express agreement, at shorter periods than yearly or half-yearly rests. This was discussed in *National Bank of Greece SA v Pinios Shipping Co (No.1)* [1990] 1 A.C. 637 (where quarterly rests were conceded). See also *Kitchen v HSBC Bank Plc* [2000] 1 All E.R. (Comm) 787 (quarterly rests).
- 1833 *Lord Clancarty v Latouche* (1810) 1 Ball. & B. 120; *Crosskill v Bower* (1863) 32 Beav. 86, 100; *Deutsche Bank v Banque des Marchands de Moscou* (1931) 4 Legal Decisions Affecting Bankers 293, 295; *IRC v Graham* [1937] 2 K.B. 179, 192.
- 1834 *Paris Banking Co Ltd v Yates* [1898] 2 Q.B. 460, 466; *Yourell v Hibernian Bank Ltd* [1918] A.C. 372; *IRC v Holder* [1931] 2 K.B. 81, 96, 98; affirmed on different grounds: *Holder v IRC* [1932] A.C. 624; *Paton v IRC* [1938] A.C. 341, 349, 357, 364; *National Bank of Greece SA v Pinios Shipping Co (No.1)* [1990] 1 A.C. 637.
- 1835 *[1990] 1 A.C. 637.*
- 1836 *Fergusson v Fyffe* (1841) 8 Cl. & F. 121; *Deutsche Bank v Banque des Marchands de Moscou* (1931) 4 Legal Decisions Affecting Bankers 293; *National Bank of Greece SA v Pinios Shipping Co (No.1)* [1988] 2 Lloyd's Rep. 126, CA.
- 1837 *Fergusson v Fyffe* (1841) 8 Cl. & F. 121, 140; *Williamson v Williamson* (1869) L.R. 7 Eq. 542.
- 1838 *Crosskill v Bower* (1863) 32 Beav. 86.
- 1839 *Crosskill v Bower*, above.
- 1840 *Attorney-General v Alford* (1854) 4 De G.M. & G. 843, 851; *Burdick v Garrick* (1870) L.R. 5 Ch. App. 233; *Wallersteiner v Moir* (No.2) [1975] Q.B. 373; *President of India v La Pintada Compania Navigacion SA* [1985] A.C. 104, 116; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669. See also *Guardian Ocean Cargoes Ltd v Banco do Brasil SA* [1994] 2 Lloyd's Rep. 152 and *Tuke v Hood* [2020] EWHC 2843 (Comm).

- 1841 *Kinnaird v Trollope* (1889) 42 Ch. D. 610; *Bank of NSW v O'Connor* (1889) 14 App. Cas. 273, 282–284; *Edmondson v Copland* [1911] 2 Ch. 301; *Barratt v Gough-Thomas* [1951] Ch. 242.
- 1842 ss.140A–140C, see above, paras 41-213 et seq., esp. para.41-223. See, for example, *Arthistory Ltd v Campbell* [2022] EWHC 848 (Ch) (annual interest rate of 28 per cent on a bridging loan to consumer (together with other factors) rendered the relationship “unfair”) and *Pilgrim Rock v Iwanuik* [2019] EWHC 203 (Ch), in which Fancourt J upheld on appeal the decision to vary the terms of the loan agreement to reduce the rate of interest, to provide for compounding annually rather than quarterly and to lengthen the term thereby limiting the period for which default interest could be charged. cf. *OMI Facilities Ltd v Singh* [2021] CSOH 45 (a “harsh” rate of interest on a high risk, unsecured, short-term bridging loan, freely entered into between two experienced businessmen, did not give rise to an “unfair relationship” as it protected the “legitimate interest of the creditor”).
- 1843 ss.244 and 343.
- 1844 However, there is power under the Credit Unions Act 1979 s.11(5) to limit the interest that can be charged by credit unions: see the Credit Unions (Maximum Interest Rate on Loans) Order 2013 (SI 2013/2589) (3 per cent per month).
- 1845 Financial Services and Markets Act 2000 s.137C (added by the Financial Services Act 2012 s.24).
- 1846 Financial Services and Markets Act 2000 s.137C, as amended by the Financial Services (Banking Reform) Act 2013 s.131(1). The rules are in the CONC Module of the FCA Handbook: see CONC 5A.
- 1847 i.e. conditional sale (below, paras 41-443 et seq.) or hire-purchase (below, paras 41-360 et seq.) agreements for “household goods” (as defined): see the FCA’s document: *Rent-to-own price cap – feedback on CP18/35 and final rules*, PS19/6 (March 2019). The provisions are in the FCA’s Handbook, CONC 5B. The sanction (see CONC 5B.6.1) is that charges in excess of the cap are unenforceable.
- 1848 Subject to any statutory notification requirements noted below.
- 1849 *Lombard Tricity Finance Ltd v Paton* [1989] 1 All E.R. 918. Applied in *Amberley UK Ltd v West Sussex CC* [2011] EWCA Civ 11 (power to raise care home fees) and *Daniels v Lloyds Bank Plc* [2018] EWHC 660 (Comm) (bank’s power to vary the terms of an executive director’s long term incentive plan). But contrast *Alexander v West Bromwich Mortgage Co Ltd* [2016] EWCA Civ 496 (power to vary interest inconsistent with mortgage offered as “tracker mortgage”).
- 1850 [2001] EWCA Civ 1466, [2000] 1 W.L.R. 685 (pet. dis. [2002] 1 W.L.R. 2263) followed in *Broadwick Financial Services Ltd v Spencer* [2002] EWCA Civ 35, [2002] 1 All E.R. (Comm) 446 and applied (in context of raising fees and costs) in *Addison v Esso Petroleum Co Ltd* [2003] EWHC 1730 (Comm) (affirmed, on a different point, [2004] EWCA Civ 1470).
- 1851 And see *Sterling Credit Ltd v Rahman (No.2)* [2002] EWHC 3008 (Ch), [2003] C.C.L.R. 13 (no implied obligation to *reduce* interest rate); *Paragon Finance Plc v*

- Plender* [2005] EWCA Civ 760, [2005] C.C.L.R. 5 (lender increased rates due to adverse financial circumstances).
- 1852 But in a commercial context see *Myers v Kestrel Acquisitions Ltd (Kestrel)* [2015] EWHC 916 (Ch) (no implied duty to vary in good faith).
- 1853 Replacing (for contracts made on or after 1 October 2015) the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083), as amended; above paras 40-227 et seq. See the decisions of the CJEU on this aspect of the Unfair Contract Terms Directive 1993, in particular the Grand Chamber ruling in *Gómez del Moral Guasch v Bankia SA (C-125/18) EU:C:2020:138*.
- 1854 s.63, replacing (for contracts made on or after 1 October 2015) the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) reg.5(5). FCA's *Final Guidance: Fairness of variation terms in financial services consumer contracts under the Consumer Rights Act 2015* (FG18/7), December 2018.
- 1855 Consumer Rights Act 2015 Sch.2 para.11 (and see also para.12), replacing, with minor changes in wording (for contracts made on or after 1 October 2015) the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) Sch.2 para.1(j) and see also SI 1999/2083 Sch.2 para.1(k), above, paras 40-338 et seq.
- 1856 Consumer Rights Act 2015 Sch.2 paras 22 (and see also para.23), replacing, with minor changes in wording (for contracts made on or after 1 October 2015) the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) Sch.2 para.2(b). See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-083.
- 1857 See above, paras 41-213 et seq.
- 1858 See above, para.41-002. Note in particular Principle for Business 6 (as amplified in the FCA Handbook CONC Module) which states that a firm "must pay due regard to the interests of its customers and treat them fairly".
- 1859 Via disciplinary powers, see above, para.41-065. See also, in relation to "regulated mortgage contracts", the FCA's discussion paper, DP14/2: Variation Terms: Assessing the Fairness of Changes to Mortgage Contracts (July 2014) and its consultation paper: GC18/2: Fairness of variation terms in financial services consumer contracts under the Consumer Rights Act 2015 (May 2018).
- 1860 Consumer Credit Act 1974 s.82(1) (above, para.41-146) and the FCA Handbook, CONC 4.7 (replacing the repealed Consumer Credit Act 1974 s.78A (above, para.41-147) (notice required in the case of regulated agreements); Payment Services Regulations 2017 (SI 2017/752) (above, paras 36-225 et seq.) (notice required in the case of certain "payment services contracts").
- 1861 See above, para.41-013.
- 1862 *Lordsvale Finance Plc v Bank of Zambia* [1996] Q.B. 752; *Taiwan Scot Co Ltd v Masters Golf Co Ltd* [2009] EWCA Civ 685; *ZCCM Investments Holdings Plc v Konkola Copper Mines Plc* [2017] EWHC 3288 (Comm); *Cargill International Trading PTE Ltd v Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm) [50] ("The person who has defaulted is necessarily a greater credit risk and 'money is more expensive for a less good credit risk than for a good credit risk'").

- 1863 *Astley v Weldon* (1801) 2 B. & P. 346, 353; *Wallis v Smith* (1882) 21 Ch. D. 243; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] A.C. 79, 86; *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67, see above, paras 29-203 et seq. In *Ahuja Investments Ltd v Victorygame Ltd* [2021] EWHC 2382 (Ch) a 12 per cent default interest rate that represented a 400 per cent increase in the contractual interest rate (3 per cent per month) was considered on the facts to be “so obviously extravagant, exorbitant and oppressive” as to amount to a penalty. See also *Consumer Credit Act 1974* s.93 (above, para.41-179) and s.86F (above, para.41-136: interest on default sum can only be simple). A reduction in the rate of interest in the event of prompt payment will not make the unreduced interest penal: *Astley v Weldon*, above, at 353; *Herbert v Salisbury and Yeovil Railway Co* (1866) L.R. 2 Eq. 221; *Wallingford v Mutual Society* (1880) 5 App. Cas. 685, 702. See also *Euro London Appointments Ltd v Claessens International Ltd* [2006] EWCA Civ 385, [2006] 2 Lloyd's Rep. 436.
- 1864 *Lordsvale Finance Plc v Bank of Zambia* [1996] Q.B. 752 (approved in *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67 at [26]-[28], [146]-[148], [222] and [239]-[241]); *Lancore Services Ltd v Barclays Bank Plc* [2008] EWHC 1264 (Ch); *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm), noted at [2013] C.C.L.R. 5; *Holyoake v Candy* [2017] EWHC 3397 (Ch); *Lombard North Central Plc v European Skyjets Ltd (In Liquidation)* [2020] EWHC 679 (QB). Contrast *Jeancharm Ltd v Barnet Football Club Ltd* [2003] EWCA Civ 58, [2003] 92 Const. L.R. 26 (default interest of 5 per cent per week held penal). For default interest being held penal, on the basis that “the size of the uplift [was] in its nature a punishment for or deterrent to breach, rather than an ordinary commercial re-rating to reflect a change in risk (or administration cost)” see also *Hong Leuong Finance Ltd v Tan Gin Huay* [1999] 2 S.L.R. 153; *Beil v Mansell* (No. 2) (2006) 2 Qd. R. 499 and *Elberg v Fraval* [2012] VSC 342, all cited in *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67 at [147]-[148].
- 1865 See also above, para.41-179. But this practice is outlawed from 6 April 2020: see the FCA’s Overdraft Policy Statement PS 19/16 (June 2019).
- 1866 Replacing, with minor changes in wording, (for contracts made on or after 1 October 2015) the *Unfair Terms in Consumer Contracts Regulations 1999*, see above, paras 40-227 et seq. and for a case under those regulations: *Falco Finance Ltd v Gough* (1999) 149 N.L.J. 7.
- 1867 See below, para.41-305. But an “industry standard” default rate was not disturbed in *Greenlands Trading Ltd v Pontearso* [2019] EWHC 278 (Ch). cf. *Pilgrim Rock v Iwanuik* [2019] EWHC 203 (Ch).
- 1868 As amended, especially by the *Late Payments of Commercial Debts Regulations 2002* (SI 2002/1674). See Vol.I, paras 29-291 et seq.

- 1869 s.2 (other than an excepted contract). Consumer credit agreements are excepted ([s.2\(5\)\(a\)](#)).
- 1870 SI 2002/1675 art.4 (presently 8 per cent over the official dealing rate of the Bank of England).
- 1871 s.17 (as replaced by [SI 1998/2940 art.3](#)). See Vol.I, para.[29-305](#).
- 1872 s.57, as amended. See above, para.[36-117](#).
- 1873 s.24(3) and 42.
- 1874 s.49. See above, para.[34-137](#).
- 1875 s.35A, inserted by [s.15](#) and Sch.1 Pt I of the Administration of Justice Act 1982. See Vol.I, para.[29-295](#) (power of high court).
- 1876 s.69, as amended (interest on debt or damages) and s.74, as amended (and [County Courts \(Interest on Judgment Debts\) Order 1991 \(SI 1991/1184\) \(L.12\)](#)) (interest on county court judgment debts). See *McMullon v Secure the Bridge Ltd [2015] EWCA Civ 884* (award of 8 per cent interest in case of CCA 1974-regulated agreement).
- 1877 s.328(4), (5), as amended by the [Banks and Building Societies \(Priorities on Insolvency\) Order 2018 \(SI 2018/1244\)](#). cf. s.322(2).
- 1878 s.189.
- 1879 See, e.g. [CPR rr.12.6, 14.14, 40.8](#).
- 1880 For a case where there was no such agreement (and hence where the High Court only had power to award post-judgment interest pursuant to statute) see *Chubb v Dean [2013] EWHC 1282 (Ch)*.
- 1881 *Economic Life Assurance Society v Usborne [1902] A.C. 147, 152* (no merger). See also *Popple v Sylvester (1882) 22 Ch. D. 98*; *Re Sneyd (1883) 25 Ch. D. 338*; *Ealing London BC v El Isaac [1980] 1 W.L.R. 932, 936*; *Director General of Fair Trading v First National Bank Plc [2001] UKHL 52, [2002] 1 A.C. 481*.
- 1882 *Re Sneyd (1883) 25 Ch. D. 338*; see Vol.I, para.[28-009](#).
- 1883 *[2001] UKHL 52, [2002] 1 A.C. 481*.
- 1884 SI 1994/3159, subsequently replaced by the [Unfair Terms in Consumer Contracts Regulations 1999 \(SI 1999/2083\)](#), and revoked and replaced, for contracts made on or after 1 October 2015, by the [Consumer Rights Act 2015 Pt 2](#); see above, paras [40-243 et seq.](#)
- 1885 From 1 October 2008: see [SI 2007/3300 art.3\(3\)](#) and Sch.3.
- 1886 See [Consumer Credit Act 1974 s.130A](#) (added by the [Consumer Credit Act 2006 s.17](#)), above, para.[41-207](#).

(c) - Effect of Consumer Credit Regulation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 2. - Loans and Interest

(c) - Effect of Consumer Credit Regulation

Moneylenders Acts

- 41-302 The [Moneylenders Acts 1900 to 1927](#) placed severe restrictions upon the conduct of business by persons engaged in money lending. However, the Acts applied only to loans made by moneylenders.¹⁸⁸⁷ Further, as a general rule, the slightest infringement of the statutory requirements rendered the whole loan irrecoverable and any security unenforceable, with the result that borrowers were encouraged to take technical points which were wholly devoid of merit.¹⁸⁸⁸ The Acts were entirely repealed and replaced by the [Consumer Credit Act 1974](#).¹⁸⁸⁹

Consumer credit regulation

- 41-303 The consumer credit regulation regime applies to contracts of loan. Any agreement whereby one person lends or agrees to lend to an individual¹⁸⁹⁰ (including a sole trader or partnership of three or fewer persons) any amount¹⁸⁹¹ is a consumer credit agreement¹⁸⁹² for the purposes of regulation, and, if the agreement is not an exempt agreement,¹⁸⁹³ it is a “regulated agreement”.¹⁸⁹⁴ The regulatory provisions relating to the authorisation and control of consumer credit businesses,¹⁸⁹⁵ and the regulation of regulated credit agreements, have been discussed in the first section of the present chapter.

Overdrafts

- 41-304 Special dispensation was originally provided for most overdrafts from the documentation and cancellation provisions in Pt V of the Consumer Credit Act 1974. However, the implementation of the Consumer Credit Directive,¹⁸⁹⁶ which itself contains special provisions for overdrafts, has resulted in complex modifications (which depend on the type of overdraft) of Pt V in relation to overdrafts.¹⁸⁹⁷ In particular, there is now an obligation to supply a copy of an overdraft agreement.¹⁸⁹⁸ Moreover, non-business overdrafts are subject to (special) pre-contract disclosure obligations¹⁸⁹⁹ and to the new (general) duty to assess creditworthiness.¹⁹⁰⁰ There are also special information provisions regarding the consequences of “overrunning” (i.e. overdrawing without a pre-arranged overdraft or exceeding a pre-arranged overdraft limit).¹⁹⁰¹ The remainder of the 1974 Act generally continues to apply, for example, the provisions of the Act relating to the variation of agreements,¹⁹⁰² the service of enforcement,¹⁹⁰³ default¹⁹⁰⁴ or termination¹⁹⁰⁵ notices (and other requisite notices during the course of the agreement),¹⁹⁰⁶ security,¹⁹⁰⁷ the form of guarantees and indemnities given in respect of the overdraft,¹⁹⁰⁸ and in particular the exclusive jurisdiction of the county court over actions brought by the creditor to enforce the overdraft agreement or any security relating to it.¹⁹⁰⁹ However, the FCA has made special provision for overdrafts in its Handbook.¹⁹¹⁰

Unfair relationships

- 41-305 The provisions of the Consumer Credit Act 1974 relating to “unfair relationships” apply to loans to individuals¹⁹¹¹
- U and they have been invoked in a number of cases concerning loans.¹⁹¹²
 - U Many cases have concerned business loans and in that context the challenge has almost always been unsuccessful.¹⁹¹³
 - U

Liability of creditor for acts of supplier: antecedent negotiations

- 41-306 Where a creditor lends or agrees to lend money to a debtor under a regulated agreement in order to enable the debtor to obtain goods or services from a supplier, the creditor may in certain circumstances be liable in respect of misrepresentations made or undertakings given or breaches of contract committed by the supplier. In the first place, where negotiations¹⁹¹⁴ (“antecedent negotiations”) are conducted with the debtor by the supplier¹⁹¹⁵ in relation to a transaction¹⁹¹⁶ financed or proposed to be financed by a debtor-creditor-supplier agreement¹⁹¹⁷ within s.12(b)¹⁹¹⁸ or 12(c)¹⁹¹⁹ of the [Consumer Credit Act 1974](#), they are deemed to be conducted by the supplier (“the negotiator”)¹⁹²⁰ in the capacity of agent of the creditor as well as in his actual capacity.¹⁹²¹ Thus the creditor will be liable in respect of any misrepresentations made or undertakings given by the negotiator on his behalf.

“Connected lender liability”: Misrepresentation or breach by supplier

- 41-307 Secondly, under s.75(1) of the [Consumer Credit Act 1974](#),¹⁹²² if the debtor under a debtor-creditor-supplier agreement¹⁹²³ falling within s.12(b)¹⁹²⁴ or 12(c)¹⁹²⁵ of that Act has, in relation to a transaction¹⁹²⁶ financed by the agreement, any claim against the supplier¹⁹²⁷ in respect of a misrepresentation¹⁹²⁸ or breach of contract, he has a like claim¹⁹²⁹ against the creditor, who, with the supplier, is accordingly jointly and severally liable to the debtor.¹⁹³⁰ If, therefore, the transaction financed by the loan agreement is a contract of sale of goods, and the quality of the goods is such that the supplier is in breach, say, of the conditions as to satisfactory quality or fitness for purpose of the goods implied by the [Sale of Goods Act 1979](#),¹⁹³¹ then the creditor is jointly and severally liable with the supplier in damages (including damages for consequential loss) to the debtor, and, in the event that the debtor is entitled to and does reject the goods, is similarly liable with the supplier to repay to the debtor any sums paid by or on behalf of the debtor to the supplier. However, subject to any agreement between them, the creditor is entitled to be indemnified by the supplier for loss suffered by the creditor in satisfying this liability, including costs reasonably incurred by him in defending proceedings instituted by the debtor.¹⁹³² Further, in any action brought against the creditor, he is entitled, in accordance with rules of court,¹⁹³³ to have the supplier made a party to the proceedings.¹⁹³⁴

Exceptions

- 41-308 The liability of the creditor under s.75(1) of the Act does not apply to a claim under a non-commercial agreement.¹⁹³⁵ Nor does it apply so far as the claim relates to any single item to which the supplier has attached a *cash* price not exceeding £100¹⁹³⁶
- U** or more than £30,000.¹⁹³⁷

Additional “connected lender liability”

- 41-309 A new s.75A was added¹⁹³⁸ to the *Consumer Credit Act 1974* in implementation of the Consumer Credit Directive,¹⁹³⁹ which contains additional provisions on creditor liability. The liability is generally¹⁹⁴⁰ narrower in scope than that imposed by s.75. First, s.75A does not apply to credit agreements outside the scope of the Directive.¹⁹⁴¹ Second, it only applies in the case of so-called “linked credit agreements” (a “Directive” concept), defined¹⁹⁴² to mean regulated consumer credit agreements that: (i) “exclusively” finance an agreement for the supply of specific goods or service¹⁹⁴³; and (ii) where either: (a) the creditor uses the services of the supplier in connection with the preparation or making of the credit agreement, or (b) the specific goods or services are “explicitly specified” in the credit agreement. The section provides that if the debtor under such a “linked credit agreement” has a claim against the supplier in respect of a breach of contract (only), the debtor may pursue that claim against the creditor but only where, essentially, the debtor is unable to obtain satisfaction from the supplier. Thus, the section only provides for so-called “second in line” liability on the part of the creditor. Third, the section does not apply if the cash value of the goods or services is £30,000 or less.¹⁹⁴⁴ Hence, it will apply (to situations otherwise within its scope), where s.75 is unavailable because the cash price exceeds that sum and s.75 will apply (to situations otherwise within its scope) where the cash price is £30,000 or less (as long as it is above £100).

Footnotes

- 1887 They did not apply to other forms of credit and certain types of business, e.g. banking was exempted (see *Moneylenders Act 1900* s.6(d); *Companies Act 1967*

- s.123). Moreover, (although passed for the protection of the private borrower) the Acts protected large corporations borrowing substantial sums of money.
- 1888 See, e.g. *Askinex Ltd v Green [1969] 1 Q.B. 272*; *Congresbury Motors v Anglo-Belge Finance Co [1971] Ch. 81* (reversed by *Orakpo v Manson Investments Ltd [1978] A.C. 95*).
- 1889 s.192(3)(b), (4) and Sch.5. These Acts were repealed in stages, but the final repeal (from 19 May 1985) was effected by SI 1983/1551 (c.44); but see art.6(3).
- 1890 As defined, see above, para.41-016.
- 1891 Until 6 April 2007, the Consumer Credit Act 1974 imposed a financial limit, see above, para.41-005.
- 1892 See above, para.41-016.
- 1893 See above, paras 41-039 et seq.
- 1894 See above, para.41-017.
- 1895 See above, para.41-065.
- 1896 See above, para.41-011.
- 1897 See s.74 as amended by SI 2010/1010 reg.17.
- 1898 s.61B, added on 1 February 2011 by SI 2010/1010 reg.9, as amended by SI 2010/1969 reg.7. The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) states (see para.6.31) that the obligation in s.61B could be replaced by a corresponding FCA rule but that breach of such an FCA rule would not carry the same sanction and hence proposes that the existing sanction (that the agreement is enforceable only by order of the court) should be retained in legislation.
- 1899 See above, para.41-078.
- 1900 See above, para.41-080.
- 1901 FCA Handbook, CONC 4.7 and CONC 6.3.3–6.3.4 (replacing the repealed Consumer Credit Act 1974 Pt VA (ss.74A and 74B), added on 1 February 2011 by SI 2010/1010 regs 21 and 22 (as amended by 2010/1969 regs 9 and 10)), noted above at para.41-127.
- 1902 s.82(1); above, para.41-145. But note, in relation to overdrafts, the new s.82(1B)–(1E) (added on 1 February 2011 by SI 2010/1010 reg.28) and the new s.78A(4), the combined effect of which is that only *increases* in charges and interest rate need be notified.
- 1903 s.76; above, para.41-166.
- 1904 s.87; above, para.41-168.
- 1905 s.98; above, para.41-174. But note that s.98A (above, para.41-175) dealing with the termination of agreements of indefinite duration, does not apply to overdrafts: s.98A(8).
- 1906 s.78 (above, para.41-132), s.86C (above, para.41-134) and s.86E (above, para.41-135).
- 1907 s.113; above, para.41-192.
- 1908 SI 1983/1556; above, para.41-186.
- 1909 s.141(1); above, para.41-200.
- 1910 See its measures in the CONC Module regulating (authorised and unauthorised) overdrafts associated with “personal current accounts” (as defined). CONC 5C concerns pricing and the FCA (a) prohibits a rate of interest for an unarranged overdraft that exceeds the rate for an arranged overdraft and (b) requires charges for overdrafts

to take the form of a single, uniform annual interest rate. CONC 5D requires banks to monitor and sometimes to react to overdraft repeat use.
1911 ss.140A–140C, above, paras 41-213 et seq.

1912 *Plevin v Paragon Personal Finance Ltd [2014] UKSC 61* (sale of PPI with loan rendered relationship “unfair” on facts); *Patel v Patel [2009] EWHC 3264 (QB)* (“exorbitant” interest “unfair”); cf. *Khodari v Tamimi [2009] EWCA Civ 1109, [2010] C.C.L.R. 3* (“very large” 10 per cent charge for short-term loans to wealthy compulsive gambler, where credit risk was high and “defendant wanted these loans and could well afford to repay them”, not “unfair relationship”); *Consolidated Finance Ltd v Hunter [2010] B.P.I.R. 1322* (loan at market rate for similar short-term bridging loans not “unfair”); *Carey v HSBC Bank Plc [2009] EWHC 3417 (QB)*; *Black Horse Ltd v Speak [2010] EWHC 1866 (QB)*; *Link Financial Ltd v North Wilson [2014] EWHC 252 (Ch), [2014] C.C.L.R. 6*; *McMullon v Secure the Bridge Ltd [2015] EWCA Civ 884*; *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm)* (some (but not all) “pay-day loans” “unfair”); *Arthistory Ltd v Campbell [2022] EWHC 848 (Ch)*. And see cases in next footnote.

1913 *Paragon Mortgages Ltd v McEwan-Peters [2011] EWHC 2491 (Comm)* (buy to let); *Holyoake & Hotblack Holdings Ltd v Nicholas Candy, Christian Candy, CPC Group Ltd [2017] EWHC 3397 (Ch)*. See especially the business bank loan cases: *Rahman v HSBC Bank Plc [2012] EWHC 11 (Ch)*; *Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 (Comm)*, noted at [2013] C.C.L.R. 5 and cited in many subsequent “business” cases; *Chubb v Dean [2013] EWHC 1282 (Ch)*; *Gardner v Clydesdale Bank Ltd [2013] EWHC 4356 (Ch)*; *Barclays Bank Plc v McMillan [2015] EWHC 1596 (Comm)*; *Clydesdale Bank Plc v R Gough t/t JC Gough & Sons and Anne Michelle Gough [2017] EWHC 2230 (Ch)*; *Santander UK Plc v Clive Roger Wells & Graham Mervyn Wells [2017] EWHC 2413 (Ch)*; *Ulster Bank Ltd v Esmaili [2017] NICh 14*; *Holyoake v Candy [2017] EWHC 3397 (Ch)* (permission to appeal refused by Court of Appeal: [2018] C.C.L.R. 8); *Carney v NM Rothschild and Sons Ltd [2018] EWHC 958 (Comm)*; *Hodell v Clydesdale Bank Plc [2018] EWHC 1009 (QB)*; *Broomhead v National Westminster Bank Plc [2018] EWHC 1574 (Ch)*; *Greenlands Trading Ltd v Pontearso [2019] EWHC 278 (Ch)*; *Wood v Commercial First Business Ltd [2019] EWHC 2205 (Ch)*; *Praetura Asset Finance Ltd v Wood [2019] EWHC 2231 (Comm)*; *Promontoria (Henrico) Ltd v Samra [2019] EWHC 2327 (Ch)*; *Credit Capital Corp Ltd v Watson [2021] EWHC 466 (QB)*; *OMI Facilities Ltd v Singh [2021] CSOH 45*; *Bank of Beirut (UK) Ltd v Moukarzel [2021] EWHC 3777 (Comm)*. But see *Pilgrim Rock v Iwanuik [2019] EWHC 203 (Ch)* (commercial loan between co-venturer friends found to be “unfair”).

1914 See Consumer Credit Act 1974 (CCA 1974) s.56(1), (4).

1915 Defined in CCA 1974 s.189(1).

1916 See above, para.41-027.

- 1917 Defined in CCA 1974 ss.12, 189(1); above, paras 41-030—41-031.
- 1918 See above, para.41-032.
- 1919 See above, para.41-033.
- 1920 CCA 1974 s.56(1); above, para.41-075. See *Scotland v British Credit Trust Ltd [2014] EWCA Civ 790*.
- 1921 CCA 1974 s.56(2). See also s.56(3), (4), and above, para.41-077.
- 1922 For problems arising under s.75, see Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-076; *Hare [2008] L.M.C.L.Q. 338*; *Bispinger [2011] J.B.L. 457*. See also *Rampion v Franfinance SA (C-429/05) EU:C:2007:575, [2008] C.M.L.R. 8, ECJ* (scope of art.11(2) of Consumer Credit Directive (87/102), implemented in the UK by s.75). For a case on the operation of s.75 in the context of a trust account set up by a car sales company to compensate customers who had purchased long-term car maintenance packages in the event that the company entered into liquidation and could no longer provide the package services, see *Re CC Automotive Group Ltd (In Liquidation) [2019] EWHC 2771 (Ch)*. The Law Commissions' Joint Paper: Consumer Redress for Misleading and Aggressive Practices Cm.8323 (March 2012), para.7.139 proposed that a “misleading practice” should qualify as a “misrepresentation” under s.75 but, although originally included in the draft of SI 2014/870, this did not appear in the enacted version. The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.61) that s.75 (and s.75A, below, para.41-309) should be retained in legislation as an FCA rule could not replicate its provisions and hence repeal would adversely affect the appropriate degree of consumer protection. However, various problems with s.75 are noted (see the Review, Ch.5, para.5.34) and it is suggested that they be considered and that the scope of s.75 be clarified.
- 1923 Defined in CCA 1974 ss.12, 189(1); above, paras 41-030—41-031.
- 1924 See above, para.41-032.
- 1925 See above, para.41-033.
- 1926 See above, para.41-027. For liability if the transaction is effected abroad, see *Office of Fair Trading v Lloyds TSB Bank Plc [2007] UKHL 48* and (for the position in relation to credit cards generally) below, para.41-490. The transaction financed (or to be financed) by the loan will be a “linked transaction” (see CCA 1974 s.19(1)(b), above, para.41-058).
- 1927 Defined in CCA 1974 s.189(1).
- 1928 See Misrepresentation Act 1967 s.2(5) added by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) reg.5: new s.2(4) and (5) (also added by those regulations) do not preclude a CCA 1974 s.75(1) damages claim if one would, but for those provisions, be available. (This is because the new s.2(4) and (5) essentially preclude a claim under s.2(1) of the 1967 Act if a claim for redress under the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277), as amended by SI 2014/870, is available; such a claim under the regulations (as opposed to a claim for “misrepresentation” under the 1967 Act) is not covered by s.75.)

- 1929 Whilst the “like claim” does not include a right to rescind the credit agreement on the ground that the debtor is entitled to rescind the supply agreement, it is an implied term of the credit agreement that it is conditional on the survival of the supply agreement and hence the credit agreement may be rescinded on that (implied term) ground: *Durkin v DSG Retail Ltd [2014] UKSC 21* (disapproving *United Dominions Trust v Taylor, 1980 S.L.T. 28 Sh Ct*). Alternatively (see below) the debtor is entitled to recover from the creditor sums paid to the supplier under the supply agreement when rescinded. For the right of the debtor to set off his monetary claim under s.75(1) against any claim by the creditor under the credit agreement, see *Morgan & Sons Ltd v Martin Johnson & Co Ltd [1949] 1 K.B. 107*; *Hanak v Green [1958] 2 Q.B. 9* and CPR Pt 16 r.6.
- 1930 s.75(1) applies notwithstanding that the debtor, in entering into the transaction, exceeded the credit limit (defined in CCA 1974 ss.10(2), 189(1); above, para.41-024) or otherwise contravened any term of the agreement: s.75(4).
- 1931 *Grant v Electro Centre Ltd [2007] 4 C.L. 66*, Cty Ct and see below, paras 46-094 et seq. and for “consumer contracts” made on or after 1 October 2015, the Consumer Rights Act 2015, see generally paras 40-494 et seq.
- 1932 s.75(2). See the discussion of the nature and scope of the indemnity in *Office of Fair Trading v Lloyds TSB Bank Plc [2007] UKHL 48, [2008] 1 A.C. 316*. And note *Parker v Black Horse Ltd Unreported 17 December 2010, Dartford Cty Ct* where it was held that a creditor, who could not recover his costs from an unsuccessful “small claims” claimant under CPR r.27.14, could recover those costs from the supplier under s.75(2): “liability” in s.75(2) covered mere “exposure to a claim” and hence there was no need for any actual liability under s.75(1) to the claimant to be established against the supplier.
- 1933 CPR Pt 20.
- 1934 s.75(5).
- 1935 s.75(3)(a). For “non-commercial agreement”, see above, para.41-050. But no exception exists under CCA 1974 s.56(2) (above, para.41-306) for non-commercial agreements: see s.74(1)(a). See also the exception for charge cards (s.75(3)(c) noted below, para.41-491).
- 1936 Hence contactless payments by credit card (where the limit (and hence in practice the maximum cash price) is £100) are exempt.
- 1937 s.75(3)(b). The lower limit was raised from £30 to £100, and the upper limit from £10,000 to £30,000, by SI 1983/1878. But the limitations in s.75(3)(b) do not apply to the liability of the creditor under CCA 1974 s.56(2) (above, para.41-306).
- 1938 On 1 February 2011 by 2010/1010 reg.25 (as amended by SI 2010/1969 reg.11). See CCA 1974 s.189B(3), Sch.2A: in s.75A, references to “debtor” in relation to “green deal plans” (as defined in CCA 1974 s.189(1), see above, para.41-261) are to be read as references to the “improver” (as defined in CCA 1974 s.189B(6)). See the recommendation in the FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) at Annex 5, para.61 that s.75A (and s.75, above, para.41-307) should be retained in legislation as an FCA rule could not

replicate its provisions and hence repeal would adversely affect the appropriate degree of consumer protection.

1939 See above, para.[41-011](#). See especially art.15.2 (and 15.3) of the Directive.

1940 But see below: it (unlike [s.75](#)) applies where the cash price is over £30,000.

1941 [s.75A\(6\)\(b\)–\(c\)](#) and [\(7\)](#), viz: (i) credit in excess of £60,260, (ii) “business” credit and (iii) agreements secured on land. Since the [Mortgage Credit Directive](#) (see above, para.[41-003](#)) was implemented on 21 March 2016, exemption (i) no longer applies to so-called “residential renovation agreements” (as defined in [CCA 1974 s.189\(1\)](#) to mean, essentially, unsecured loans to renovate residential property) above this threshold: see amendment to [s.75A](#) in [SI 2015/910 art.3](#) and [Sch.1 para.2\(7\)](#).

1942 In [s.75A\(5\)](#).

1943 Hence [s.75A](#) (unlike [s.75](#)) does not apply to payments by credit card.

1944 [s.75A\(6\)\(a\)](#).

(a) - In General

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 3. - Hire-Purchase Agreements

(a) - In General ¹⁹⁴⁵

Nature of hire-purchase

- 41-310 A hire-purchase agreement may be defined as an agreement under which an owner lets chattels of any description out on hire and further agrees that the hirer may either return the goods and terminate the hiring or elect to purchase the goods when the payments for hire have reached a sum equal to the amount of the purchase price stated in the agreement or upon payment of a stated sum. ¹⁹⁴⁶ The essence of the transaction is therefore (i) a bailment of goods by the owner to the hirer; and (ii) an agreement by which the hirer has the option to return or purchase the goods at some time or other.

Option to purchase goods

- 41-311 One reason for the popularity of hire-purchase as a vehicle of instalment credit lies in the fact that, until the full price is paid, the property in the goods remains in the owner, and in such a way that the hirer is normally unable to pass a good title to a third party during the continuance of the bailment. ¹⁹⁴⁷ If the agreement gives to the hirer a true option to return or purchase the goods, he is under no obligation to purchase them; he is therefore not a person who has “agreed to buy the goods” and so cannot pass a good title to a third party under s.25 of the Sale of Goods Act 1979. ¹⁹⁴⁸

Moneylenders Acts

- 41-312 A second reason for the popularity of hire-purchase was that it does not involve any lending of money,¹⁹⁴⁹ and so fell outside the control of the (now repealed) Moneylenders Acts 1900 to 1927. The normal methods of financing hire-purchase transactions by the “direct collection” method¹⁹⁵⁰ or by block discounting¹⁹⁵¹ or the purchase of bills of exchange at a discount¹⁹⁵² were not within the Acts. Thus, the financier did not have to hold a moneylender’s licence; he was free to employ agents, e.g. dealers, to obtain business; and the hire-purchase agreement itself did not have to meet the highly technical requirements of the Acts. However, as noted above, the Consumer Credit Act 1974 repealed the Moneylenders Acts and brought hire-purchase within its control.¹⁹⁵³

Bills of sale

- 41-313 Yet a third reason for the growth of hire-purchase is that hire-purchase agreements are not bills of sale.¹⁹⁵⁴ As the property in the chattels remains in the owner, the document by which the hiring is effected does not require to be registered as a bill of sale under the Bills of Sale Acts 1878 and 1882¹⁹⁵⁵ unless it does not represent the real transaction between the parties, and its intention is merely to create a security for money; in such a case, the courts must disregard the form, and look to the true nature of the transaction.¹⁹⁵⁶ The most satisfactory way of deciding what is the true nature of the transaction is to see whether the documents set out the deal between the parties as it took place and at the time it took place, or whether the facts, or some of them, therein recorded do not represent that which happened, but were falsified in order to give the transaction an innocent appearance.¹⁹⁵⁷ A “refinancing” transaction under which the owner of goods sells the goods to a finance company and then immediately enters into a hire-purchase agreement whereby he agrees to hire back the goods is unimpeachable if there is a genuine sale of the goods and a genuine and independent hiring back.¹⁹⁵⁸ But if the sale and rehiring are, in fact, a sham, the transaction may be invalid and unenforceable by reason of the Bills of Sale Acts.¹⁹⁵⁹ In order that the transaction should be considered to be a sham, it is not sufficient if one party alone, e.g. the hirer, intends to deceive the other into thinking that the transaction is genuine. There must be a common intention that the acts or documents are not to create the legal rights and obligations that they give the appearance of creating.¹⁹⁶⁰

Common law and statute

41-314

The most important question for the lawyer is whether or not a hire-purchase agreement falls within the statutory control of the consumer credit regulatory regime, in particular the [Consumer Credit Act 1974](#).¹⁹⁶¹ However, only certain aspects of hire-purchase are regulated and hence it will often be necessary to consider common law principles as laid down by the courts. The implied conditions on the part of the owner relating to title, quality, fitness for purpose, and correspondence with description or sample are those contained in the [Supply of Goods \(Implied Terms\) Act 1973](#) and for “consumer contracts”¹⁹⁶² those in the [Consumer Rights Act 2015](#).¹⁹⁶³ The rights and liabilities of third parties relating to the goods let on hire are determined by the [Factors Act 1889](#),¹⁹⁶⁴ the [Sale of Goods Act 1979](#), the [Hire-Purchase Act 1964](#), and a number of other enactments.¹⁹⁶⁵

Footnotes

- 1945 The treatises on this subject are Campbell-Salmon, *Hire-Purchase and Credit-Sales Law and Practice* (1962); Goode, *Hire-Purchase Law and Practice*, 2nd edn (1970); Guest, *The Law of Hire-Purchase* (1966) and Supplement (1969); Wild, *The Law of Hire-Purchase*, 2nd edn (1965). For more recent consideration, see Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* (2018), paras 7.34–7.42; 19.23–19.29.
- 1946 For the definition of “hire-purchase agreement” in the consumer credit regulatory regime, see below, para.41-360.
- 1947 *Helby v Matthews* [1895] A.C. 471; *Payne v Wilson* [1895] 2 Q.B. 537; *Belsize Motor Supply Co v Cox* [1914] 1 K.B. 244; *Lewis v Thomas* [1919] 1 K.B. 319; *Modern Light Cars Ltd v Seals* [1934] 1 K.B. 32; *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* [1934] 2 K.B. 305; *United Dominions Trust (Commercial) Ltd v Parkway Motors Ltd* [1955] 1 W.L.R. 719; *Close Asset Finance Ltd v Care Graphics Machinery Ltd* [2000] C.C.L.R. 43. But see *Forthright Finance Ltd v Carlyle Finance Ltd* [1997] 4 All E.R. 90.
- 1948 Re-enacting s.9 of the [Factors Act 1889](#) and replacing s.25(2) of the [Sale of Goods Act 1893](#); see below, paras 46-220 et seq. and 41-403. The option to purchase fee may be nominal even if the hirer is bound to pay all instalments: *Close Asset Finance Ltd v Care Graphics Machinery Ltd* [2000] C.C.L.R. 43.
- 1949 *British Ry Traffic and Electric Co Ltd v Kahn* [1921] W.N. 52; *Automobile and General & Finance Corp Ltd v Morris* (1929) 73 S.J. 451; *Old Discount Co Ltd v Cohen* [1938] 3 All E.R. 281n.; *Premor Ltd v Shaw Bros* [1964] 1 W.L.R. 978, 985. Unless the hire-purchase agreement is a refinancing transaction (below, para.41-313) and a sham: *North Central Wagon and Finance Co Ltd v Brailsford* [1962] 1 W.L.R. 1288.
- 1950 *Trade Promotion Trust Ltd v Young* (1940) 84 S.J. 646.
- 1951 *Olds Discount Co Ltd v John Playfair Ltd* [1938] 3 All E.R. 275.
- 1952 *Transport & General Credit Corp Ltd v Morgan* [1939] Ch. 531; *Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] A.C. 209.
- 1953 See below, paras 41-360 et seq.
- 1954 See below, para.41-523.

- 1955 *Re Robertson* (1878) 9 Ch. D. 419; *Crawcour v Salter* (1881) 18 Ch. D. 30; *Manchester, Sheffield and Lincolnshire Ry v North Central Wagon Co* (1888) 13 App. Cas. 554; *United Forty Pound Loan Club v Bexton* [1891] 1 Q.B. 28n.; *Modern Light Cars Ltd v Seals* [1934] 1 K.B. 32; *Olds Discount Co Ltd v Krett* [1940] 2 K.B. 117; *Re Apex Supply Co Ltd* [1942] Ch. 108. See *Diamond* (1960) 23 M.L.R. 399, 516.
- 1956 See the cases cited below, and generally below, para.41-523.
- 1957 *Polsky v S and A Services* [1951] 1 All E.R. 185, 189.
- 1958 *Yorkshire Ry Wagon Co v Maclare* (1882) 21 Ch. D. 309; *British Ry Traffic and Electric Co v Kahn* [1921] W.N. 52; *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* [1934] 2 K.B. 305; *Olds Discount Co Ltd v Krett* [1940] 2 K.B. 117.
- 1959 *Re Watson* (1890) 25 Q.B.D. 27; *Madell v Thomas & Co* [1891] 1 Q.B. 230; *Maas v Pepper* [1905] A.C. 102; *Motor Trade Finance Ltd v HE Motors Ltd* Unreported 26 March 1926, HL; *Polsky v S and A Services*, above; *R. v Deller* (1952) 36 Cr. App. R. 184; *North Central Wagon and Finance Co v Brailsford* [1962] 1 W.L.R. 1288; *Bennett v Griffin Finance Ltd* [1967] 2 Q.B. 46. See also the now repealed (and not replaced) Companies Act 1985 s.396(1)(c)) and relevant case-law (*Stoneleigh Finance Ltd v Phillips* [1965] 2 Q.B. 537; *Re Curtain Dream Plc* [1990] B.C.L.C. 925; *Welsh Development Agency v Export Finance Co* [1992] B.C.C. 270).
- 1960 *Stoneleigh Finance Ltd v Phillips*, above; *Snook v London and West Riding Investments Ltd* [1967] 2 Q.B. 786. See generally on shams, *Vella* [2008] L.M.C.L.Q. 488.
- 1961 The Act entirely repealed (s.192(3)(b) and Sch.5) the *Hire-Purchase Act 1965* as from 19 May 1985: see *SI 1983/1551 (c.44)*; but see art.6(1), (2).
- 1962 Made on or after 1 October 2015.
- 1963 See below, paras 41-320—41-322.
- 1964 See Vol.I, paras 21-088 et seq.
- 1965 See below, paras 41-402—41-417.

(b) - At Common Law

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 3. - Hire-Purchase Agreements

(b) - At Common Law

The agreement

- 41-315 At common law a hire-purchase agreement may be made in any form, i.e. it may be made under seal, in writing or by word of mouth.¹⁹⁶⁶ The normal rules of construction apply, and any ambiguity in a written agreement will be construed against the drafter of the document.¹⁹⁶⁷ Capacity to contract is regulated by the general law of contract.¹⁹⁶⁸

Formation

- 41-316 An offer to enter into a contract of hire-purchase is normally constituted by the hirer signing the hire-purchase document, and the acceptance by the owner executing the document that the hirer has signed.¹⁹⁶⁹ But the acceptance must also be communicated to the hirer, and, until this is done, the hirer is free to withdraw his offer.¹⁹⁷⁰ At common law,¹⁹⁷¹ a dealer who negotiates the transaction is not an agent of the owner for the purpose of fixing the owner with knowledge that the offer was made subject to an oral stipulation qualifying the hirer's liability¹⁹⁷²; but the dealer is the agent of the owner for the purpose of communicating the withdrawal of the offer.¹⁹⁷³ Where a fraudster assumes the identity of another person whose signature he forges on the hire-purchase agreement, the agreement may be void for mistake.¹⁹⁷⁴

Hirer bound by apparent agreement

- 41-317 Where the hirer signs the document in blank, leaving the dealer to fill in the details in accordance with a collateral understanding between them, and the dealer fills in details that are at variance with this understanding, the hirer will ordinarily be precluded from denying the validity of the ostensible agreement,¹⁹⁷⁵ unless the circumstances are such that he could successfully plead non est factum.¹⁹⁷⁶

Effect if contract void

- 41-318 Where a hire-purchase agreement is void for lack of agreement, any sum paid by the hirer to the dealer by way of deposit, whether in cash or by way of allowance for goods tendered in part-exchange, is recoverable from the owner as money paid on a consideration that has totally failed.¹⁹⁷⁷

Delivery of goods

- 41-319 In the absence of any term to the contrary, it is the duty of the owner to deliver the goods to the hirer whose hiring commences when the goods are delivered to him.¹⁹⁷⁸ If, after entering into the agreement, the owner does not deliver the goods, the hirer cannot as a rule obtain specific performance,¹⁹⁷⁹ but is entitled to damages for breach of contract.¹⁹⁸⁰

Title to goods

- 41-320 Owing to the element of sale in hire-purchase transactions, the common law implied into the agreement a condition that the owner is capable of conferring a good title both at the time when the goods are delivered to the hirer and at the time when the hirer exercises his option to purchase.¹⁹⁸¹ But the implied terms as to title are now contained in [s.8 of the Supply of Goods \(Implied Terms\) Act 1973](#).¹⁹⁸² The relevant provision for “consumer contracts”¹⁹⁸³ are in the [Consumer Rights Act 2015](#).¹⁹⁸⁴ There is a statutory implied condition¹⁹⁸⁵ on the part of the creditor¹⁹⁸⁶ that he will have a right to sell the goods at the time when the property is to pass.¹⁹⁸⁷ Where the breach of this term consists in a failure to pass a good title to the goods, at common law the hirer is

entitled to recover all sums paid by him as on a total failure of consideration, and it seems that the creditor will not be entitled, either by set-off or counterclaim, to payment by the hirer for the period during which the hirer had use of them.¹⁹⁸⁸ In consumer contracts the *Consumer Rights Act 2015* provides additional remedies.¹⁹⁸⁹ There are also implied warranties¹⁹⁹⁰: that (i) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the hirer before the agreement is made; and (ii) that the hirer will enjoy quiet possession of the goods except so far as it may be disturbed by any person entitled to the benefit of any charge or encumbrance so disclosed or known.¹⁹⁹¹

Limited title

41-321 In a hire-purchase agreement, in the case of which there appears from the agreement or is to be inferred from the circumstances of the agreement an intention that the creditor¹⁹⁹² should transfer only such title as he or a third person may have,¹⁹⁹³ there is:

(a)an implied warranty¹⁹⁹⁴ that all charges or encumbrances known to the creditor and not known to the hirer have been disclosed to the hirer before the agreement is made; and

(b)an implied warranty¹⁹⁹⁵ that neither:

(i)the creditor; nor

(ii)in a case where the parties to the agreement intend that any title which may be transferred shall only be such title as a third person may have, that person; nor

(iii)anyone claiming through or under the creditor or that third person otherwise than under a charge or encumbrance disclosed or known to the hirer, before the agreement is made, will disturb the hirer's quiet possession of the goods.¹⁹⁹⁶

41-322 Liability for breach of the obligations arising from *s.8 of the Supply of Goods (Implied Terms) Act 1973* above cannot be excluded or restricted by reference to any contract term.¹⁹⁹⁷

Acceptance of delivery

41-323 It is the duty of the hirer to accept delivery of the goods hired; if he refuses to do so, the owner's remedy is not to sue for the rent agreed, but to bring an action for damages.¹⁹⁹⁸ The measure of damages is *prima facie* a sum representing the whole of future unpaid instalments, less (i) the value of the goods at the time of refusal to accept; and (ii) a discount in respect of the earlier return to the owner of his capital outlay.¹⁹⁹⁹

Payment of rent

- 41-324 The hirer must pay the rent agreed upon. In the absence of a contrary stipulation, he has no right to pay in advance,²⁰⁰⁰ nor, if allowed to pay in advance, to deduct a sum by way of rebate of interest.²⁰⁰¹ Failure by the hirer to pay one or two instalments of rent does not necessarily amount to a repudiation of the agreement²⁰⁰²; the default must either be a breach of condition²⁰⁰³ or be such as to evince an intention not to go on with the agreement.²⁰⁰⁴ In the absence of a repudiation, the owner's remedy is to sue for arrears of rent alone.²⁰⁰⁵

Care of goods

- 41-325 The hirer is under a duty to take reasonable care of the goods hired,²⁰⁰⁶ but he is not responsible for fair wear and tear unless there is an express term of the contract to this effect.²⁰⁰⁷ Most hire-purchase agreements, however, require the hirer to keep the goods in good order, repair and condition. In such a case, the hirer's duty is to keep the goods in the condition in which they may reasonably be expected to be if he looks after them properly: he need not put the goods in a better condition than they were when he hired them.²⁰⁰⁸

Insurance

- 41-326 The hirer is under no duty to insure unless there is an express stipulation to this effect in the agreement.²⁰⁰⁹

Guarantee and indemnity

- 41-327 It is common practice for the owners of goods let on hire-purchase to require a third party to guarantee the due performance by the hirer of his obligations under the contract.²⁰¹⁰ Such a guarantee, or some memorandum or note thereof, must be in writing and signed by the guarantor or some other person thereunto by him lawfully authorised, otherwise it is unenforceable.²⁰¹¹ It must also be supported by consideration, and it is usual to state that the guarantee is made in consideration of the owner entering into the hire-purchase agreement or of his letting the goods on hire.²⁰¹² Past consideration, e.g. where the owner has already executed the agreement or let

the goods on hire, is insufficient.²⁰¹³ There can, in general, be no valid guarantee of a debt or obligation incurred under a hire-purchase agreement which is for some reason void.²⁰¹⁴

- 41-328 A contract of guarantee must be distinguished from a contract of indemnity.²⁰¹⁵ A contract of indemnity is subject to no requirement of form; if made in connection with a void hire-purchase agreement, it is itself not invalidated²⁰¹⁶; and the rights and obligations of the parties differ materially from those incurred under a contract of guarantee.²⁰¹⁷

Rights of guarantor

- 41-329 If sued by the owner on the contract of guarantee, a guarantor is entitled to be credited with any sums paid by the hirer to the owner²⁰¹⁸ and he can also rely on any defence which the hirer possesses against the owner.²⁰¹⁹ When he has paid what is due, he is entitled to be subrogated to the rights of the owner against the hirer and can claim the benefit of any security given to the owner by the hirer.²⁰²⁰ But he does not succeed to the owner's licence to seize the goods let on hire nor to the owner's right to possession of them, and it is probable that he is not entitled to exercise the hirer's option to purchase the goods.²⁰²¹ A guarantor who has paid what is due is also normally entitled to be indemnified by the hirer against all payments properly made by him to the owner.²⁰²² And, once he becomes compellable to pay the debt, he can claim contribution from any other guarantor who is liable on the same demand.²⁰²³

Discharge of guarantor

- 41-330 Except where it is provided to the contrary,²⁰²⁴ any variation of the principal agreement by the owner and hirer without his consent will normally discharge the guarantor from his obligations under the contract of guarantee.²⁰²⁵ The guarantor will also be released if the owner enters into a binding agreement with the hirer to grant him an extension of time for payment, unless the owner at the same time expressly reserves his rights against the guarantor or the extension of time is allowed with the guarantor's consent.²⁰²⁶ But a mere omission to press the hirer for payment will not have this effect. The termination of the hiring or the hire-purchase agreement, whether upon a repudiation by the hirer accepted by the owner,²⁰²⁷ or by the owner under the terms of the agreement, or voluntarily by the hirer,²⁰²⁸ will not discharge the guarantor from liability.²⁰²⁹

41-331

Any terms or conditions attached to the enforcement of the contract of guarantee must be strictly complied with²⁰³⁰; but a failure by the owner to comply with such terms or conditions will not necessarily render the guarantee unenforceable, but may give rise to a counterclaim for damages only.²⁰³¹

Recourse agreements

- 41-332 Many modern hire-purchase transactions are conducted under the “direct collection” system of finance, in which the dealer does not himself let the goods to the hirer, but sells them to a finance company which then lets them to the hirer. In order to safeguard themselves, finance companies occasionally require the dealer to enter into an agreement under which the dealer becomes a surety for the due performance by the hirer of his obligations. This agreement is known as a “recourse agreement”.²⁰³² The dealer may, at the same time, be appointed the company’s agent to collect the hire-purchase instalments²⁰³³ or to take possession of the goods on behalf of the company in the event of breach by the hirer.²⁰³⁴ Recourse agreements normally take the form of a guarantee of the hirer’s obligations under the hire-purchase agreement²⁰³⁵ or of an indemnity against loss caused to the finance company by the hirer’s default,²⁰³⁶ and the dealer’s liability will depend upon which form of agreement is entered into.

Termination of agreement by performance

- 41-333 The most usual way in which a hire-purchase agreement is terminated is by performance, i.e. where the hirer pays all the instalments and exercises his option to purchase. If payment is made by a third party, for example, where another finance company or dealer “settles” the balance outstanding under the agreement, this payment is considered to have been made on behalf of the hirer and the owner’s title to the goods vests in the hirer and not in the third party.²⁰³⁷

Termination of agreement by repudiation

- 41-334 A hire-purchase agreement will also be terminated if one party repudiates the agreement and the repudiation is accepted by the other. A clear case of repudiation will arise when the hirer renounces the agreement by refusing to go on with it.²⁰³⁸ On the other hand, where the hirer does not renounce the agreement, but is merely guilty of a failure of performance, the owner will not be entitled to treat the agreement as repudiated unless the hirer’s default is a breach of condition or goes to the

root of the contract.²⁰³⁹ A failure by the hirer to pay any of the monthly instalments, other than the initial deposit, has been held to amount to a repudiation where the default continued for six months.²⁰⁴⁰ But a mere failure to pay one or two instalments, even after a warning letter from the owner, has been held not to amount to a repudiation.²⁰⁴¹ However, the agreement itself may make punctual payment of instalments of the essence of the contract,²⁰⁴² so that any default in payment will entitle the owner to treat the contract as repudiated.²⁰⁴³

Termination of agreement by the hirer

- 41-335 All hire-purchase agreements must confer upon the hirer an option (as opposed to an obligation) to buy the goods.²⁰⁴⁴ The terms of the agreement must be looked at to ascertain whether and under what conditions he is entitled to terminate the agreement before it has run its full course.²⁰⁴⁵

Termination of agreement by the owner

- 41-336 The terms of the hire-purchase agreement invariably confer upon the owner a power to terminate the agreement, or the bailment thereunder, in the event of any breach by the hirer, even though such a breach does not amount to a repudiation of the contract.²⁰⁴⁶ The owner may also reserve the right to terminate upon the happening of an event other than breach, for example, upon the hirer's death, or bankruptcy. It is important to note that it is possible to terminate the hiring (bailment) without terminating the agreement for all purposes.

Termination of the hiring

- 41-337 It is well established as a general rule of the law of bailment that any act which is inconsistent with the terms of the bailment, such as a sale,²⁰⁴⁷ or pledge,²⁰⁴⁸ of the chattel bailed, determines the bailment and the immediate right to possession of the chattel reverts to the bailor.²⁰⁴⁹ The fact that the agreement makes specific provision for termination of the hiring, e.g. on notice, in the event of default by the hirer does not ordinarily displace this rule.²⁰⁵⁰ But, in other events, the terms of the agreement must be looked at to ascertain what the rights of the owner are in respect of the event which has taken place. Where the agreement states that the hiring is automatically to determine, it will be terminated forthwith if the event occurs. But if the termination is made contingent upon notice being given or a declaration being made, the hiring is not terminated until the notice is given or the declaration is made.²⁰⁵¹

- 41-338 A term in the form that the owner “may forthwith and without notice terminate the hiring” does not automatically terminate the hiring upon the happening of the event, and there must be some further unequivocal act on the part of the owner (such as seizure of the goods) which demonstrates his intention to terminate the hiring.

[2052](#)

- U** But since the owner can terminate the hiring at any time, he has an immediate right to possession of the goods and this entitles him to retake possession of them from the hirer, or to claim damages from any person who wrongfully interferes with the goods. [2053](#)

Contrasted with termination of the agreement

- 41-339 Although the hiring may have been terminated by the owner, the hire-purchase agreement can nevertheless continue in existence. [2054](#) In such a case, the hirer may still be entitled in theory to pay the balance of the hire-purchase price and exercise his option to purchase. [2055](#) The continued existence of the agreement may possibly affect the measure of damages recoverable in an action of conversion brought by the owner against the hirer or a third party. [2056](#)

- 41-340 As in the case of the termination of the bailment, a provision that the agreement shall ipso facto determine upon the happening of a certain event will terminate the agreement automatically when the event occurs

[2057](#)

- U**; and a provision that the owner may terminate the agreement by notice to the hirer requires the giving of such notice. [2058](#) Where the agreement provides that the owner “may terminate this agreement”, such a term confers upon the owner an option to terminate; but the option has to be exercised, otherwise the agreement continues in force. [2059](#)

Notice of default

- 41-341 At common law, [2060](#) it is not necessary for the owner to give the hirer notice of his default before terminating the agreement or the hiring, unless there is an express term to this effect. [2061](#)

Waiver of right to terminate

- 41-342 The owner may be held to have waived his right to terminate the agreement upon breach, or to have waived a notice of termination, if he accepts arrears of hire-rent with knowledge of the breach or does some act which unequivocally indicates his intention to allow the agreement to continue. ²⁰⁶²

Repossession of the goods

- 41-343 Before the owner can lawfully repossess the goods let on hire, he must have a right to immediate possession of the goods, and so must prove that the hiring has determined or is terminable at will. ²⁰⁶³ A wrongful repossession by the owner will render him liable in damages to the hirer. ²⁰⁶⁴

Retaking without action

- 41-344 In the absence of any statutory restriction, ²⁰⁶⁵ an owner who is entitled to immediate possession may retake his goods either peaceably or by reasonable force from anyone who is wrongfully detaining them. ²⁰⁶⁶ But, unless he is given a licence to do so, it seems he may not enter upon the land of the hirer, or of a third party, in order to retake them. ²⁰⁶⁷ If a licence to seize is granted by the terms of the agreement, it is personal to the licensee and cannot be assigned. ²⁰⁶⁸ In any event, it is an offence under the *Criminal Law Act 1977* ²⁰⁶⁹ to enter by force. By resuming possession of the goods the owner does not abandon his right to sue for arrears of rent ²⁰⁷⁰; and where a judgment for arrears of rent is unsatisfied, the owner is not deprived by the judgment of his right to retake the goods. ²⁰⁷¹

Recovery by action ²⁰⁷²

- 41-345 In most cases where the hirer refuses permission for the retaking of the goods, it will be more prudent for the owner to resort to court action to recover them. In an action for wrongful interference with goods the court may make an order for delivery up of the goods, with or without the option to pay their value, ²⁰⁷³ and for payment of any consequential damages. ²⁰⁷⁴ Alternatively a claim may be made for damages alone. The measure of damages is normally the value of the

goods²⁰⁷⁵; but where the balance of the hire-purchase price outstanding is less than the value of the goods, the measure of damages is the balance of the hire-purchase price outstanding at the date of their conversion.²⁰⁷⁶

Retention of sums paid by the hirer

- 41-346 Upon the termination of the hire-purchase agreement, the owner is *prima facie* entitled to retain all sums already paid by the hirer whether by way of deposit, initial payment or instalments of hire-rent. If a deposit or initial payment is stated in the agreement to have been made in consideration of the grant of an option to purchase, it can nevertheless not be recovered if the agreement is prematurely determined. It cannot be claimed that the consideration for the deposit has totally failed, since the option to purchase exists from the moment of signing the contract even though it may be subject to the condition that the hirer should duly perform the whole of his obligations under the agreement.²⁰⁷⁷

Relief from forfeiture

- 41-347 The court has the power to relieve the hirer from forfeiture of the goods and to reinstate his rights under the contract²⁰⁷⁸ by granting him an extension of time to pay off the arrears or to remedy any other breach by him of the agreement.²⁰⁷⁹ In exercising its discretion to grant relief, the court will take into account the following factors:

- (i)whether or not the hirer is in default under the agreement;
- (ii)whether significant prejudice would be caused to the owner by the grant of the relief; and
- (iii)whether to refuse relief would give the owner a substantial windfall profit or cause the hirer a disproportionate loss.²⁰⁸⁰

Sums paid by hirer

- 41-348 The view has been advanced²⁰⁸¹ that the court also has power in equity to relieve the hirer from the forfeiture of instalments and other sums already paid. In *Stockloser v Johnson*,²⁰⁸² a buyer under a terminated conditional sale agreement²⁰⁸³ claimed the return of the instalments that he had paid on the ground that the forfeiture clause in the agreement was penal and unconscionable. The Court of Appeal found that it was not in fact penal, but by a majority²⁰⁸⁴ they recognised

the general power of the court to grant equitable relief against the forfeiture of instalments upon the buyer's breach where the sum forfeited was out of all proportion to the damage suffered and where it would be unconscionable for the seller to retain the money.²⁰⁸⁵ But such a principle has not so far been applied to the retention of sums paid by the hirer under a hire-purchase agreement. When *Stockloser v Johnson* was discussed by the Court of Appeal in *Campbell Discount Co Ltd v Bridge*,²⁰⁸⁶ the court showed itself disinclined to accept the principle. And when that decision was considered by the House of Lords,²⁰⁸⁷ it was reversed on a ground which did not involve consideration of *Stockloser v Johnson*, and only Lord Denning mentioned the ability of equity to restore money already paid by the hirer if it was a penal sum.²⁰⁸⁸ Further, in *Galbraith v Mitchenall Estates Ltd*,²⁰⁸⁹ Sachs J. refused to apply the principle to the forfeiture of instalments paid under a contract of simple hire even though the terms of the contract were "hideously harsh". This reluctance may be justified in hire and hire-purchase cases as in law the payments are "rent" under a bailment for possession and use of the goods (rather than part-payment for goods, as in the case of conditional sale) and are recoverable as an accrued debt even when the owner subsequently terminates.²⁰⁹⁰ In *Cavendish Square Holdings BV v Makdessi*²⁰⁹¹ the Supreme Court declined to opine at length on forfeiture clauses (as the allegation was that the relevant clauses were penalty not forfeiture clauses) and hence only referred to *Stockloser v Johnson* in passing.

Recovery of instalments in arrear

- 41-349 The owner is entitled to recover from the hirer as an accrued debt any instalment of hire-rent in arrear at the termination of the hiring²⁰⁹² and the right to receive payment of such a debt is a separate cause of action from the right to recover possession of the goods let on hire²⁰⁹³ and from the right to recover damages for breach of contract.²⁰⁹⁴

Damages for breach of contract by hirer

- 41-350 Any breach by the hirer of the terms of the hire-purchase agreement will entitle the owner to sue for damages for breach of contract. But the measure of the damages recoverable depends on whether or not the breach by the hirer amounts to a repudiation²⁰⁹⁵ of the agreement.

Breach amounting to repudiation

- 41-351

Where a breach by the hirer amounts to a repudiation, with the result that the owner terminates the agreement and recovers possession of the goods, the owner is entitled to recover damages based on his loss of profit unless the right to damages is excluded by the terms of the agreement²⁰⁹⁶ or he elects to proceed under an effective minimum payment provision.²⁰⁹⁷ In *Yeoman Credit Ltd v Waragowski*,²⁰⁹⁸ the Court of Appeal held that, where the hirer repudiates the agreement, the measure of damages recoverable is based on the hire-purchase price of the goods, less:

- (i)the sums already paid or payable²⁰⁹⁹ by the hirer at the moment of termination;
- (ii)the value of the goods repossessed, or, if the goods have been sold, the proceeds of their sale²¹⁰⁰;
- (iii)the amount (if any) payable on the exercise of the option to purchase²¹⁰¹; and
- (iv)a discount in respect of the earlier return to the owner of his capital outlay.²¹⁰²

The owner is, however, under a duty to mitigate his loss²¹⁰³ and must, for example, obtain the best price which can reasonably be obtained if he sells the goods repossessed.²¹⁰⁴ If the hire-purchase agreement is subject to the *Consumer Credit Act 1974* and hence the debtor has a statutory right to terminate the contract on payment of half the total price,²¹⁰⁵ it would seem that the possibility that the hirer could limit his liability by voluntarily terminating in this way should be taken into account in assessing the amount of damages recoverable by the owner.²¹⁰⁶

No repudiation

41-352 Where, on the other hand, the breach by the hirer does not amount to a repudiation by him of the hire-purchase agreement, but the owner terminates the hiring or the agreement by virtue of a right vested in him under the terms of the agreement,²¹⁰⁷ he cannot claim damages for loss of profit as upon a repudiation. He can only recover from the hirer:

- (i)the arrears of instalments (with interest) (if any) up to the time when he terminates the hiring²¹⁰⁸;
- (ii)damages for any other breach committed up to the date of such termination, e.g. for failure to repair²¹⁰⁹; and
- (iii)the cost of searching for and repossessing the goods, if this should be specifically provided for in the agreement.²¹¹⁰

The reason for this limitation is that the termination is due, not to the hirer's breach of contract, but to the owner's election to determine. He is therefore not entitled to recover damages for his loss of profit, depreciation of the goods, or any breaches committed after the termination.²¹¹¹ Where an owner expressly undertakes to sell the goods on termination and to apply the proceeds to reduce

the liability of the hirer, a term that he will take reasonable care to obtain the true market value will be implied.²¹¹²

Minimum payment clauses ²¹¹³

- 41-353 Where the agreement provides that, on termination of the hiring, the owner shall be entitled to repossess the goods and to claim in addition either a proportion of the outstanding instalments or a further fixed sum by way of depreciation or otherwise, it was at one time considered that the owner was in all cases entitled to rely on the terms of the agreement and that the question of a penalty or liquidated damages could not arise; and this was so whether the agreement was terminated by the owner or by the hirer.²¹¹⁴ But in *Cooden Engineering Co Ltd v Stanford*²¹¹⁵ the Court of Appeal, by a majority, held that the question whether a minimum payment clause imposed a penalty or liquidated damages would have to be considered if a breach of the contract was in fact proved. This case was followed by Denning L.J. in *Lamdon Trust v Hurrell*,²¹¹⁶ where a clause in the agreement bound the hirer, in the event of breach and consequent repossession, to pay such further sum as would bring up his total payments to 75 per cent of the hire-purchase price by way of depreciation of the goods. It was held that this sum was a penalty, since it was imposed as a mere “rule of thumb” and was not a genuine pre-estimate of the damage likely to be suffered.

Operative on events other than breach

- 41-354 In both of these cases, the event relied upon to substantiate the owner’s claim was a breach by the hirer in failing to pay the rent by the due date and the question remained open whether a different conclusion would be reached if the right to determine the agreement and to claim payment were based on some event other than breach, such as the death, bankruptcy or liquidation of the hirer.²¹¹⁷ In the earlier case of *Associated Distributors Ltd v Hall*²¹¹⁸ the Court of Appeal had held that the question of a penalty or liquidated damages did not arise where the hirer *voluntarily* terminated the agreement: a sum payable upon such a contingency could not be considered a penalty since it was not payable in respect of any breach. This approach has now been approved in by the Supreme Court in *Cavendish Square Holdings BV v Makdessi*²¹¹⁹ where it declined to follow Australian authority extending the doctrine of penalties to clauses operative on events other than breach.²¹²⁰

Bridge v Campbell Discount Co Ltd

- 41-355

The law relating to minimum payment clauses in hire-purchase agreements was reviewed, and to some extent clarified, by the House of Lords in *Bridge v Campbell Discount Co Ltd*.²¹²¹ The law on penalties generally has been reconsidered by the Supreme Court decision *Cavendish Square Holdings BV v Makdessi*,²¹²² and the old general test of whether the clause was not a genuine pre-estimate of the respondents' loss was replaced with the test of whether it comprised:

“... a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.”²¹²³

However it seems clear that where the legitimate interest is in performance (and hence compensation) the approach in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* is “usually ... perfectly adequate to determine [the clause's] validity”.²¹²⁴ In *Bridge*, the respondents let to the appellant a van under a hire-purchase agreement. The terms of the agreement provided (i) that the appellant hirer might at any time terminate the agreement by giving notice to the respondents; and (ii) that if for any reason the agreement was terminated before the vehicle became his property, he would pay to the respondents “by way of compensation for depreciation” of the vehicle such further sums as would with those already paid or payable, be equal to two-thirds of the hire-purchase price. Subsequently the appellant wrote to the respondents saying that he would not be able to pay any further instalments, and asking to be informed when and where he would have to return the van. The Court of Appeal²¹²⁵ construed the letter as a voluntary termination of the agreement in accordance with the power conferred upon the appellant by its terms; since there had been no breach of the agreement, the law relating to penalties did not apply.²¹²⁶ The appellant was therefore liable to pay the sum stipulated in the minimum payment clause.

- 41-356 This decision of the Court of Appeal was reversed by the House of Lords. Their Lordships held that the letter written by the appellant was not an exercise by him of his right to terminate, but a breach of contract.²¹²⁷ As a result, the law relating to penalties did apply, and their Lordships unanimously concluded that the minimum payment clause imposed a penalty. It could not, so it was said, be a genuine estimate of the respondents' loss (which was then the test of whether a clause was a penalty or not under *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*²¹²⁸) through depreciation of the goods, since the sum payable under it was largest at the commencement of the hiring and grew progressively smaller as time went on.²¹²⁹ It was also pointed out that the sum exigible was expressed as a proportion of the hire-purchase price regardless of the fact that this contained a considerable interest element²¹³⁰ and also of the fact that the realisable value of the goods repossessed might, in many circumstances, exceed the one-third balance that the owner had not received. The House of Lords therefore ordered the actual damage suffered by the respondents to be assessed.²¹³¹

The House of Lords did not specifically strike down every clause designed to compensate the owner for depreciation of the goods let on hire, but it is unlikely that any such clause will now be upheld if it purports to give the owner a sum expressed as a proportion of the hire-purchase price.²¹³² Such a clause, it is submitted, will only be valid if:

- (i)it is expressed in some other way, e.g. as a proportion of the cash price of the goods;
- (ii)it increases rather than decreases as the hiring continues²¹³³;
- (iii)it does not secure to the owner a profit over and above the hire-purchase price when the value of the goods repossessed is taken into account²¹³⁴; and
- (iv)it has regard to the particular nature and condition of the goods in question.²¹³⁵

In view of these difficulties, minimum payment clauses are now invariably formulated, not to compensate the owner for depreciation of the goods, but to compensate him for his loss of profit or as liquidated damages for breach of the agreement. But it must be remembered that the owner can only recover substantial damages including his loss of profit if the hirer repudiates the agreement.²¹³⁶ So, for example, if a minimum payment clause simply provides for the payment to the owner of the outstanding balance of the hire-purchase price as liquidated damages for breach, it is unlikely that it will be held to do other than impose a penalty.²¹³⁷ Damages for loss of future rentals are irrecoverable where there has been no repudiation,²¹³⁸ and a clause designed to confer upon the owner a right to such damages in this event will be penal and void.

- 41-358 Since the House of Lords came to the conclusion in *Bridge v Campbell Discount Co Ltd* that the appellant was in breach of the hire-purchase agreement, it was strictly unnecessary for them to decide whether the law relating to penalties, or any form of equitable relief,²¹³⁹ was available to a hirer when the hiring was determined by a hirer's option or by an event specified in the contract and not involving breach. But Lord Simonds and Morton thought that there was no possibility of alleviation where the hirer terminated the contract and that the case of *Associated Distributors v Hall*²¹⁴⁰ was rightly decided.²¹⁴¹ Lord Denning thought that the courts had power to grant relief no matter for what reason the hiring was terminated.²¹⁴² Lord Devlin also considered that a court could intervene, but on the narrower ground that, when (as in this case) the clause falsely stated that a sum was payable as compensation for "depreciation", it was in any event unenforceable.²¹⁴³ Lord Radcliffe refused to express an opinion.²¹⁴⁴ In the light of this difference of opinion, the Court of Appeal has subsequently taken the view²¹⁴⁵ that the case of *Associated Distributors v Hall* still stands, so that no question of a penalty can arise if the hirer voluntarily terminates the agreement or the agreement is terminated on some event other than breach²¹⁴⁶ and the Supreme Court has since confirmed that a clause can only be a penalty if it gives rise to a secondary obligation arising upon breach.²¹⁴⁷

Challenge under statute

- 41-359 A minimum payment clause in an agreement would be open to challenge under the “unfair relationship” provisions of the [Consumer Credit Act 1974](#)²¹⁴⁸ and under the [Consumer Rights Act 2015 Pt 2](#).²¹⁴⁹

Footnotes

- 1966 *Re Fowler* (1883) 23 Ch. D. 261. For the requirements of form and copies under the Consumer Credit Act 1974 ss.60, 61, 61A see above, paras 41-082 et seq.
- 1967 *Webster v Higgin* [1948] 2 All E.R. 127; *Abingdon Finance Ltd v Champion* [1961] C.L.Y. 3931. See Vol.I, para.15-109.
- 1968 See, e.g. *Mercantile Union Guarantee Corp v Ball* [1937] 2 K.B. 498; *Yeoman Credit Ltd v Latter* [1961] 1 W.L.R. 828; *Stadium Finance Ltd v Helm* (1965) 109 S.J. 471 (minority). See Vol.I, Chs 7-14.
- 1969 Contrast *Carlyle Finance Ltd v Pallas Industrial Finance Ltd* [1999] 1 All E.R. (Comm.) 659; *Hitchens v General Guarantee Corp Ltd* [2001] EWCA Civ 359.
- 1970 *Financings Ltd v Stimson* [1962] 1 W.L.R. 1184. cf. *Lowe v Lombank Ltd* [1960] 1 W.L.R. 196, 206; *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428; *Maurice Lee Ltd v Rotheroe and Unipower Ltd* Unreported 16 May 1973, CA. See Vol.I, Ch.4. But the agreement may, and usually does, otherwise provide.
- 1971 But see the Consumer Credit Act 1974 s.56, see above, paras 41-073 and 41-306.
- 1972 *Eastern Distributors Ltd v Goldring* [1957] 2 Q.B. 600; *Northgran Finance Ltd v Ashley* [1963] 1 Q.B. 476.
- 1973 *Financings Ltd v Stimson* [1982] 1 W.L.R. 1184.
- 1974 *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2003] 3 W.L.R. 1371; see Vol.I, paras 5-037 et seq.
- 1975 *United Dominions Trust Ltd v Western* [1976] Q.B. 513, disapproving *Campbell Discount Co Ltd v Gall* [1961] 1 Q.B. 431. cf. *Unity Finance Ltd v Hammond* (1965) 109 S.J. 70; *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242. See also *British Ry Traffic and Electric Co v Roper* (1939) L.T. 217; *Eastern Distributors Ltd v Goldring* [1957] 2 Q.B. 600; *Spencer v North Country Finance Co Ltd* [1963] C.L.Y. 212; *Hodge Industrial Securities Ltd v Cooper*, *The Guardian*, 14 December 1961, CA; *Astley Industrial Trust Ltd v Rollinson*, *The Guardian*, 19 February 1963, CA; *General & Finance Facilities v Hughes* (1966) 116 New L.J. 1474, CA; *P.B. Leasing Ltd v Patel* [1995] C.C.L.R. 82.
- 1976 *Mercantile Credit Co Ltd v Hamblin*, above; *Saunders v Anglia Building Society* [1971] A.C. 1004. See Vol.I, para.5-049; but contrast Consumer Credit Act 1974 s.61 (above, paras 41-103 et seq.).

- 1977 *Branwhite v Worcester Works Finance Ltd* [1969] 1 A.C. 552.
- 1978 *National Cash Register Co Ltd v Stanley* [1921] 3 K.B. 292; *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936. cf. *Bentworth Finance v Lubert* [1968] 1 Q.B. 680 (car log-book not handed over).
- 1979 See Vol.I, Ch.30. cf. *Sale of Goods Act 1979* s.52; see below, para.46-448.
- 1980 The measure of damages is presumably to be calculated on the same principle as in the case of failure to deliver goods sold: see below, paras 46-390 et seq., and *Sale of Goods Act 1979* s.51(2).
- 1981 *Karflex Ltd v Poole* [1933] 2 K.B. 251, as interpreted in *Mercantile Union Guarantee Corp Ltd v Wheatley* [1938] 1 K.B. 490; and *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 K.B. 576.
- 1982 Amended by (i) s.192 and Sch.4 para.35, of the *Consumer Credit Act 1974* and by s.7 and Sch.2 para.4, of the *Sale and Supply of Goods Act 1994* and (ii) amended, for contracts made on or after 1 October 2015, by the *Consumer Rights Act 2015* s.60 and Sch.1 para.2. Section 8 corresponds closely in language to s.12 of the *Sale of Goods Act 1979*. See below, para.46-075. For a case on s.8(1)(a) and(b), see *Caithness Flagstone Ltd v Ballyvesey Holdings Ltd* [2020] SAC (Civ) 1.
- 1983 For contracts made on or after 1 October 2015.
- 1984 *Consumer Rights Act 2015* s.17. See above, paras 40-510 et seq.
- 1985 *Supply of Goods (Implied Terms) Act 1973* s.8(3). Except in a case where s.8(2) applies.
- 1986 Defined in *Supply of Goods (Implied Terms) Act 1973* s.15(1) to mean the owner or his assignee.
- 1987 *Supply of Goods (Implied Terms) Act 1973* s.8(1)(a). Corresponding terms are “treated as included” in consumer contracts made on or after 1 October 2015 under *Consumer Rights Act 2015* s.17(1)(b), see below, para.46-448.
- 1988 *Karflex Ltd v Poole* [1933] 2 K.B. 251; *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 K.B. 576; *Barber v NWS Bank Plc* [1996] 1 W.L.R. 641.
- 1989 *Consumer Rights Act 2015* ss.19–27. See above, paras 40-514 et seq.
- 1990 *Supply of Goods (Implied Terms) Act 1973* s.8(3). Except in a case where s.8(2) applies.
- 1991 *Supply of Goods (Implied Terms) Act 1973* s.8(1)(b), considered in *Caithness Flagstone Ltd v Ballyvesey Holdings Ltd* [2020] SAC (Civ) 1; see also below, para.46-078. Corresponding terms are “treated as included” in consumer contracts made on or after 1 October 2015 under *Consumer Rights Act 2015* s.17(2)), with the extended statutory rights available in such cases (*Consumer Rights Act 2015* ss.19–27 and above, paras 40-514 et seq.).
- 1992 The term given to the owner by statute.
- 1993 See below, para.46-084.
- 1994 *Supply of Goods (Implied Terms) Act 1973* s.8(3).
- 1995 *Supply of Goods (Implied Terms) Act 1973* s.8(3).
- 1996 *Supply of Goods (Implied Terms) Act 1974* s.8(2). Corresponding terms are “treated as included” in consumer contracts made on or after 1 October 2015 ((*Consumer*

- Rights Act 2015 s.17(4)–(7)), with the extended statutory rights available in such cases ([Consumer Rights Act 2015 ss.19–27](#) and above, paras 40-514 et seq.).
- 1997 Unfair Contract Terms Act 1977 s.6(1) and s.31(4) (repealing Supply of Goods (Implied Terms) Act 1973 s.12(2), (8), (9)). For contracts made on or after 1 October 2015, the relevant provision for “consumer contracts” is the [Consumer Rights Act 2015 s.31\(1\) \(i\)](#), above, para.40-535. For a successful exclusion of liability in a non-consumer context, see *Caithness Flagstone Ltd v Ballyvesey Holdings Ltd [2020] SAC (Civ) 1*. *National Cash Register Co Ltd v Stanley [1921] 3 K.B. 292*; *Karsales (Harrow) Ltd v Wallis [1956] 1 W.L.R. 936*.
- 1998 *Interoffice Telephones v Robert Freeman Co [1958] 1 Q.B. 190* (overruling *British Stamp and Ticket Automatic Delivery Co Ltd v Haynes [1921] 1 K.B. 377*); *Robophone Facilities Ltd v Blank [1966] 1 W.L.R. 1428*. cf. *Bentworth Finance v Jennings (1961) 111 L.J. 488*; *Bentworth Finance v Reader (1961) 112 L.J. 208*.
- 2000 Aliter in a credit sale; *Lancashire Waggon Co Ltd v Nuttall (1879) 42 L.T. 465*.
- 2001 *Taylor v Wylie Lockhead Ltd, 1912 S.C. 978*; *Higgs v Hodge Industrial Securities Ltd (1966) 111 S.J. 14*. But see the rebate provisions in [Consumer Credit Act 1974 ss.94, 95](#) (above, paras 41-157 et seq.).
- 2002 *Financings Ltd v Baldock [1963] 2 Q.B. 104*; *Brady v St Margaret's Trust [1963] 2 Q.B. 494*; *Anglo-Auto Finance Co Ltd v James [1963] 1 W.L.R. 1042*; *Kelly v Sovereign Leasing [1995] C.L.Y. 720, Cty Ct. Contrast Cramer v Giles (1883) Cab. & El. 151*.
- 2003 *Lombard North Central Plc v Butterworth [1987] Q.B. 527* (where time of payment was expressly made of the essence of the agreement). But such a term in a consumer contract (a) may be unfair and so not binding on the hirer under the [Consumer Rights Act 2015 Pt 2](#), replacing, for contracts made on or after 1 October 2015, the [Unfair Terms in Consumer Contracts Regulations 1999 \(SI 1999/2083\)](#); above, paras 40-227 et seq., or (b) might give rise to an “unfair relationship” under the [Consumer Credit Act 1974 ss.140A–140C](#), above, paras 41-213 et seq.
- 2004 *Yeoman Credit Ltd v Waragowski [1961] 1 W.L.R. 1124*; *Overstone Ltd v Shipway [1962] 1 W.L.R. 117, 123*; *Financings Ltd v Baldock [1963] 2 Q.B. 104*, at 117, 122. See below, para.41-334.
- 2005 *Financings Ltd v Baldock [1963] 2 Q.B. 104*.
- 2006 See above, para.35-079; below, para.41-374.
- 2007 *Blakemore v Bristol & Exeter Ry (1858) 8 El. & Bl. 1035*; *Coupé Co v Maddick [1891] 2 Q.B. 413*; see above, para.35-082.
- 2008 *Brady v St Margaret's Trust Ltd [1963] 2 Q.B. 494*. See also *Acceptance Co v Pike (1961) 111 L.J. 424* (statutory agreement).
- 2009 See also *Spruce v Unity Finance (1961) 105 S.J. 254* (no duty to inform owner of insurance taken out).
- 2010 For the position under the [Consumer Credit Act 1974](#), see above, paras 41-182 et seq.
- 2011 Statute of Frauds 1677 s.4; see below, paras 47-043 et seq. But see [Consumer Credit Act 1974 s.105](#); above, para.41-186.
- 2012 The consideration need not be mentioned in the note or memorandum: [Mercantile Law Amendment Act 1856 s.3](#).

- 2013 *Astley Industrial Trust Ltd v Grimston Electric Tools Ltd* (1965) 109 S.J. 149. cf. *Hewison v Ricketts* (1894) 63 L.J. Q.B. 711.
- 2014 *Coutts & Co v Browne-Lecky* [1947] K.B. 104; *Stadium Finance Ltd v Helm* (1965) 109 S.J. 471 (minority, under the Infants' Relief Act 1874, now repealed). See also *Brown v Blaine* (1884) 1 T.L.R. 158 (non-compliance with the Bills of Sale Acts), and below, paras 47-027, 47-042.
- 2015 See below, para.47-008. But see the position under the Consumer Credit Act 1974, above, para.41-192.
- 2016 *Yorkshire Ry Wagon Co v Maclure* (1881) 19 Ch. D. 478; reversed on different grounds (1882) 21 Ch. D. 309; *Yeoman Credit Ltd v Latter* [1961] 1 W.L.R. 828.
- 2017 *Sterling Industrial Facilities v Lydiate Textiles* (1962) 106 S.J. 669; *Scottish Midland Guarantee Trust v Woolley* (1964) 114 L.J. 272; *Goulston Discount Co Ltd v Clark* [1967] 2 Q.B. 493. But see *Goulston Discount Co Ltd v Sims* (1967) 111 S.J. 682; *Goulston Discount Co Ltd v Sims* (1968) 112 S.J. 670.
- 2018 But not with sums paid by a third party without the authority of the hirer: *Chatterton v Maclean* [1951] 1 All E.R. 761.
- 2019 *Bechervaise v Lewis* (1872) L.R. 7 C.P. 372. As to the availability of rights of set-off or counterclaim, see below, para.47-091.
- 2020 See below, para.47-149.
- 2021 *Chatterton v Maclean* [1951] 1 All E.R. 761.
- 2022 See below, para.47-131.
- 2023 See below, para.47-171.
- 2024 *British Motor Trust Co Ltd v Hyams* (1934) 50 T.L.R. 230.
- 2025 *Holme v Brunskill* (1877) 3 Q.B.D. 495; see below, para.47-108.
- 2026 *Midland Motor Showrooms Ltd v Newman* [1929] 2 K.B. 256. Contrast *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 K.B. 346 (express provision inserted). *Moschi v Lep Air Services Ltd* [1973] A.C. 331; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129, below, paras 47-103 and 47-104.
- 2028 Contrast *Western Credit Ltd v Alberry* [1964] 1 W.L.R. 945.
- 2029 *Chatterton v Maclean* [1951] 1 All E.R. 761. A lawful seizure of the goods by the owner does not discharge the guarantor's liability: *Brooks v Beirnstein* [1909] 1 K.B. 98. cf. *Hewison v Ricketts* (1894) 63 L.J. Q.B. 711 (conditional sale).
- 2030 *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 K.B. 346. cf. *United Dominions Trust (Commercial) Ltd v Eagle Aircraft* [1968] 1 W.L.R. 74.
- 2031 *Bowmaker (Commercial) Ltd v Smith* [1965] 1 W.L.R. 855; *United Dominions Trust (Commercial) Ltd v Eagle Aircraft* [1968] 1 W.L.R. 74.
- 2032 It does not constitute "security" for the purposes of the consumer credit regime; see above, para.41-130.
- 2033 *Olds Discount Ltd v John Playfair Ltd* [1938] 3 All E.R. 275; *Olds Discount Ltd v Krett* [1940] 2 K.B. 117.
- 2034 *Watling Trusts Ltd v Briffault Range Co Ltd* [1938] 1 All E.R. 525; *Reliance Car Facilities Ltd v Roding Motors* [1952] 2 Q.B. 844. A dealer who repossesses goods on

- the company's behalf cannot pass a good title to a third party under s.24 of the Sale of Goods Act 1979: *Olds Discount Ltd v Krett* [1940] 2 K.B. 117.
- 2035 *Midland Counties Motor Finance Co Ltd v Slade* [1951] 1 K.B. 346; *Unity Finance Ltd v Woodcock* [1963] 1 W.L.R. 455.
- 2036 *Sterling Industrial Facilities v Lydiate Textiles* (1962) 106 S.J. 669; *Scottish Midland Guarantee Trust v Woolley* (1964) 114 L.J. 272; *Goulston Discount Co Ltd v Clark* [1967] 2 Q.B. 493; *Goulston Discount Co Ltd v Sims* (1967) 111 S.J. 682; *Goulston Discount Co Ltd v Sims* (1968) 112 S.J. 670.
- 2037 *Bennett v Griffin Finance Ltd* [1967] 2 Q.B. 46; *Hodge Industrial Securities Ltd v Hynes* Unreported 22 March 1971, CA.
- 2038 *Overstone Ltd v Shipway* [1962] 1 W.L.R. 117. Contrast *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 Q.B. 54.
- 2039 See Vol.I, Ch.27.
- 2040 *Yeoman Credit Ltd v Waragowski* [1961] 1 W.L.R. 1124.
- 2041 *Financings Ltd v Baldock* [1963] 2 Q.B. 104. See also *Brady v St Margaret's Trust Ltd* [1963] 2 Q.B. 494; *Anglo-Auto Finance Co Ltd v James* [1963] 1 W.L.R. 1042; *Kelly v Sovereign Leasing* [1995] C.L.Y. 720, Cty Ct.
- 2042 See Vol.I, para.27-029. cf. *Kelly v Sovereign Leasing* [1995] C.L.Y. 720, Cty Ct.
- 2043 *Lombard North Central Plc v Butterworth* [1987] Q.B. 527; *BMW Financial Service (GB) Ltd v Hart* [2012] EWCA Civ 1959. But such a term in a consumer contract (a) may be unfair and so not binding on the hirer under the Consumer Rights Act 2015 Pt 2, replacing, for contracts made on or after 1 October 2015, the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) (see above, paras 40-227 et seq.) or (b) might give rise to an "unfair relationship" under the Consumer Credit Act 1974 ss.140A–140C, above, paras 41-213 et seq.
- 2044 See above, para.41-311. For the statutory right of termination under the Consumer Credit Act 1974 s.99, see below, para.41-371.
- 2045 In *United Dominions Trust (Commercial) Ltd v Ennis* [1968] 1 Q.B. 54, it was held that the hirer must be aware of any onerous conditions before he will be considered to have exercised his right to terminate.
- 2046 *William v Black Horse Ltd* [2019] EWHC 2433 (QB) (seizure by someone with authority to do so, e.g. the police). But see Consumer Credit Act 1974 ss.86B, 86E, 87, 98 (above, paras 41-131, 41-135, 41-168, 41-174). On the owner's rights on such termination see below, paras 41-343 et seq.
- 2047 *Cooper v Willomatt* (1845) 1 C.B. 672; *Fenn v Bittleston* (1851) 7 Ex. 152. Offering goods for sale is enough: *Northern General Wagon & Finance Co Ltd v Graham* [1950] 2 K.B. 7 (instructing auctioneer to sell).
- 2048 *Singer Manufacturing Co v Clark* (1879) 5 Ex. D. 37; *Nyberg v Handelaar* [1892] 2 Q.B. 202.
- 2049 See above, para.35-014.
- 2050 *Union Transport Finance Ltd v British Car Auctions* [1978] 2 All E.R. 385. cf. *North General Wagon & Finance Co Ltd v Graham* [1950] 2 K.B. 7, 11.

- 2051 *North General Wagon & Finance Co Ltd v Graham* [1950] 2 K.B. 7, at 13; *Reliance Car Facilities v Roding Motors* [1952] 2 Q.B. 844.
- 2052 *North General Wagon & Finance Co Ltd v Graham* [1950] 2 K.B. 7; *Moorgate Mercantile Co Ltd v Finch and Read* [1962] 1 Q.B. 701. But note the outlawing of certain “ipso facto” clauses (clauses triggered by a company’s entry into insolvency proceedings) in the case of contracts for the supply of goods and services by amendments made to the **Insolvency Act 1986** by **CIGA 2020 s.14** and **Sch.12**, adding a new **s.233B**.
- 2053 *Jelks v Hayward* [1905] 2 K.B. 460; *North General Wagon & Finance Co Ltd v Graham* [1950] 2 K.B. 7; *Moorgate Mercantile Co Ltd v Finch and Read*, above; *Union Transport Finance Ltd v British Car Auctions Ltd* [1978] 2 All E.R. 385.
- 2054 *Whiteley Ltd v Hilt* [1918] 2 K.B. 808, 822.
- 2055 Most hire-purchase agreements, however, make the exercise of the option to purchase dependent upon the due observance by the hirer of the terms of the agreement.
- 2056 *Belsize Motor Supply Co v Cox* [1914] 1 K.B. 244; *Whiteley Ltd v Hilt* [1918] 2 K.B. 808. cf. *Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 W.L.R. 295; *Belvoir Finance Co Ltd v Stapleton* [1971] 1 Q.B. 210; *VFS Financial Services (UK) v Euro Auctions (UK) Ltd* [2007] EWHC 1492 and below, para.41-420.
- 2057 But see *Hackney Furnishing Co v Watts* [1912] 3 K.B. 225; *Jay's Furnishing Co v Brand* [1915] 1 K.B. 458; see below, para.41-431. But note the outlawing of certain “ipso facto” clauses (clauses triggered by a company’s entry into insolvency proceedings) in the case of contracts for the supply of goods and services by amendments made to the **Insolvency Act 1986** by **CIGA 2020 s.14** and **Sch.12**, adding a new **s.233B**. The exemption in **Sch.4ZZA para.13** for “financial contracts” does not, in terms, apply to hire-purchase (although it does, in terms, apply to finance leasing and factoring).
- 2058 *Smart v Holt* [1929] 2 K.B. 303; *Drages Ltd v Owen* (1935) 52 T.L.R. 108; *Reliance Car Facilities Ltd v Roding Motors* [1952] 2 Q.B. 844.
- 2059 *Belsize Motor Supply Co v Cox* [1914] 1 K.B. 244; *United Dominions Trust (Commercial) Ltd v Marcus* (1951) 101 L.J. 417. See also *BMW Financial Service (GB) Ltd v Hart* [2012] EWCA Civ 1959 (limitation period for recovery of unpaid balance ran from the date the owner gave notice of termination for hirer’s breach since, as matter of construction of the contract, the owner’s right to claim that amount only arose then (and not earlier, when hirer failed to pay two instalments, see above para.41-334)).
- 2060 For the position under the **Consumer Credit Act 1974**, see above, para.41-168. See also the “unfair relationship” provisions (**ss.140A–140C**, above, paras 41-213 et seq.), especially **s.140A(1)(b)**, para.41-221.
- 2061 But see *Reynolds v General and Finance Facilities* (1963) 107 S.J. 889; *Eshun v Moorgate Mercantile Co Ltd* [1971] 1 W.L.R. 722, 725.
- 2062 *Keith, Prowse & Co v National Telephone Co* [1894] 2 Ch. 147; *Reynolds v General and Finance Facilities*, above. See also *Tommey v Finextra* (1962) 106 S.J. 1012 and

- Vol.I, Ch.27. Waiver of the right to terminate does not necessarily preclude an action for damages for breach: *Stephens v Junior Army and Navy Stores Ltd* [1914] 2 Ch. 516. See above, para.41-337.
- For the measure of damages, see *Kelly v Sovereign Leasing* [1995] C.L.Y. 720, Cty Ct. See the Consumer Credit Act 1974 s.90 (below, para.41-365), and the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, below, para.41-440.
- Blades v Higgs* (1861) 10 C.B.(N.S.) 713; (1865) 11 H.L.C. 621; *Devoe v Long* [1951] 1 D.L.R. 203. But the position is far from clear, especially when, as here, the goods have come into the defendant's hands, not by a trespass, but by a consensual delivery. See *Branston* (1912) 28 L.Q.R. 262; and generally Clerk & Lindsell on Torts, 23rd edn (2020), para.29-14. See also the restriction imposed by the Consumer Credit Act 1974 s.92; below, para.41-370.
- Again, the question is disputed; see Clerk & Lindsell on Torts, 23rd edn (2020), para.29-14.
- Brown v Metropolitan Counties Life Assurance Society* (1859) 1 El. & El. 832; *Re Davis & Co* (1888) 22 Q.B.D. 193; *Chatterton v Maclean* [1951] 1 All E.R. 761.
- s.6 (as amended). cf. *Hemmings v Stoke Poges Golf Club* [1920] 1 K.B. 720.
- Brooks v Beirnstein* [1909] 1 K.B. 98. Compare the position in regard to a conditional sale (below, para.41-444); *Hewison v Ricketts* (1894) 63 L.J. Q.B. 711; *Att-Gen v Pritchard* (1928) 97 L.J. Q.B. 561; *Taylor v Thompson* [1930] W.N. 16.
- South Bedfordshire Electrical Finance Ltd v Bryant* [1938] 3 All E.R. 580.
- CPR Pt 16, PD 16, para.6.1.
- Torts (Interference with Goods) Act 1977 s.3. Note s.3(8)(a): the section is without prejudice to the remedies afforded by the Consumer Credit Act 1974 s.133 (see below, para.41-378).
- Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 Q.B. 246; *Hillesden Securities v Ryjack* [1983] 1 W.L.R. 959. See also *BMW Financial Services (GB) Ltd v Taylor* [2006] 1 C.L. 113, Cty Ct (costs of recovery and tracing hirer recoverable under express term).
- Chubb Cash Ltd v John Crilley & Son* [1983] 1 W.L.R. 599. Consequential damages are recoverable if not too remote: *Hillesden Securities v Ryjack* [1983] 1 W.L.R. 959.
- Wickham Holdings Ltd v Brooke House Motors Ltd* [1967] 1 W.L.R. 295; *Belvoir Finance Co Ltd v Stapleton* [1971] 1 Q.B. 210; *VFS Financial Services (UK) v Euro Auctions (UK) Lid* [2007] EWHC 1492. See also *Belsize Motor Supply Co v Cox* [1914] 1 K.B. 244; *Whiteley v Hilt* [1918] 2 K.B. 808. cf. *Astley Industrial Trust v Miller* [1968] 2 All E.R. 36 (detinue).
- Kelly v Lombard Banking Co Ltd* [1959] 1 W.L.R. 41. See also *Brooks v Beirnstein* [1909] 1 K.B. 98.
- Note that automatic relief, without the need to go to court, is given by the Consumer Credit Act 1974 for hirers ("debtors") under regulated agreements under that Act who remedy a breach after the service of the requisite default notice: see above, paras 41-168 et seq.

- 2079 *Goker (Ali) v NWS Bank Queen's* [1990] C.C.L.R. 34 (but, on facts, relief refused); *Transag Haulage Ltd v Leyland Daf Finance Plc* [1994] 2 B.C.L.C. 88. See generally, Vol.I, para.29-269 and *Stockloser v Johnson* [1954] 1 Q.B. 476, at 499, 502; *Re Piggin, Dicker v Lombank* (1962) 112 L.J. 424; *Barton Thompson & Co Ltd v Stapling Machine Co Ltd* [1966] Ch. 499, 509; *Shiloh Spinners Ltd v Harding* [1973] A.C. 691, 722, 723; *StarSide Properties Ltd v Mustapha* [1974] 1 W.L.R. 816, 822; *BICC Plc v Burndy Corp* [1985] Ch. 232; *On Demand Information Plc v Michael Gerson (Finance) Plc* [2002] UKHL 13, [2003] 1 A.C. 368. Contrast *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 W.L.R. 1129, HL; *Scandinavian Trading Co AB v Flota Petrola Ecuatoriana (The Scaptrade)* [1983] Q.B. 529; affirmed [1983] 2 A.C. 694; *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 W.L.R. 776, HL; *The Jotunheim* [2004] EWHC 671 (Comm), [2005] 1 Lloyd's Rep. 181; *Celestial Aviation 71 Ltd v Paramount Airways Private Ltd* [2010] EWHC 185 (operating lease).
- 2080 *Transag Haulage Ltd v Leyland Daf Finance Plc* [1994] 2 B.C.L.C. 88; cf. *Goker (Ali) v NWS Bank Queen's* [1990] C.C.L.R. 34.
- 2081 *Diamond* (1956) 19 M.L.R. 498; (1958) 21 M.L.R. 199. Contrast *Prince* (1957) 20 M.L.R. 620. See also *Atiyah* (1958) 5 B.L.R. 24, 35 and *Beatson* (1981) 97 L.Q.R. 389. For agreements regulated by the *Consumer Credit Act 1974*, note (a) the power of the court in relation to "unfair relationships" to re-open agreements and hence order repayment, above, paras 41-226 et seq.; (b) that breach of the "protected goods" provision by the creditor requires him to repay all sums paid by the hirer, below, para.41-365.
- 2082 [1954] 1 Q.B. 476.
- 2083 The distinction is important: contrast *Brooks v Beirnstein* [1909] 1 K.B. 98; with *Hewison v Ricketts* (1894) 63 L.J. Q.B. 711; *Att-Gen v Pritchard* (1928) 97 L.J. K.B. 561; *Taylor v Thompson* [1930] W.N. 16.
- 2084 Somervell and Denning LJ. The dissenting judge (Romer LJ) said that no relief from forfeiture could be given "in the absence of some special circumstances such as fraud, sharp practice or other unconscionable conduct".
- 2085 Following *Steedman v Drinkle* [1916] 1 A.C. 275; see Vol.I, para.29-267.
- 2086 [1961] 1 Q.B. 431, 445; below, para.41-355.
- 2087 *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600.
- 2088 At 631. See also *Cadogan Petroleum Holdings Ltd v Global Process Systems LLC* [2013] 2 Lloyd's Rep. 26: *Stockloser v Johnson* considered when availability of jurisdiction was conceded but not applied in relation to repayments towards acquisition of gas plants.
- 2089 [1965] 2 Q.B. 473. And see *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117: no jurisdiction to relieve from forfeiture of 30 per cent of purchase price retained by buyer in sale and leaseback agreement.
- 2090 *Brooks v Beirnstein* [1909] 1 K.B. 98: see above.
- 2091 [2015] UKSC 67. See above, paras 29-266 et seq. The Supreme Court left open whether the penalty rules apply to forfeiture provisions of this type, so as to render the provision invalid. But it suggested that even if the provision is valid (as a genuine pre-estimate

- of the innocent party's loss or as a "legitimate deterrent"), in an appropriate case the court may still be able to grant relief against forfeiture.
- 2092 *Overstone Ltd v Shipway* [1962] 1 W.L.R. 117; *Anglo-Auto Finance Ltd v Race Unreported* 28 January 1971, CA; *Hyundai Heavy Industries Co Ltd v Papadopoulos*, above. For procedure, see CPR Pt 16 PD 16 6.2. See also CPR Pt 7 PD 7B 3.3, 8.2. For interest on arrears, see *Financings Ltd v Baldock* [1963] 2 Q.B. 104; Senior Courts Act 1981 s.35A; County Courts Act 1984 s.69.
- 2093 *South Bedfordshire Electrical Finance Ltd v Bryant* [1938] 3 All E.R. 580.
- 2094 *Overstone Ltd v Shipway* [1962] 1 W.L.R. 117.
- 2095 See above, para.41-334.
- 2096 *Overstone Ltd v Shipway* [1962] 1 W.L.R. 117; *Yeoman Credit Ltd v Odgers* [1962] 1 W.L.R. 215.
- 2097 See below, para.41-353.
- 2098 *[1961] 1 W.L.R. 1124*.
- 2099 Arrears of instalments are in any event recoverable: see above, para.41-349.
- 2100 In *Bentworth Finance v Jennings* (1961) 111 L.J. 488, it was said that the owner was under a duty to mitigate his loss by re-letting the goods: sed quaere? See also *Bentworth Finance v Reader* (1961) 112 L.J. 208 (sale permitted). A sale is standard practice.
- 2101 This does not refer to any sum already paid by the hirer in consideration of the grant of an option to purchase (see above, para.41-311) but to a (usually nominal) sum to be paid by the hirer at the end of the hiring period.
- 2102 *Overstone Ltd v Shipway* [1962] 1 W.L.R. 117; *Yeoman Credit Ltd v McLean* [1962] 1 W.L.R. 131.
- 2103 In *Yeoman Credit Ltd v Coleman*, *The Times*, 28 September 1960, Master Jacob held that a finance company was under a duty to mitigate its loss by suing the dealer who negotiated the transaction in respect of defects in the goods before suing the hirer for damages for breach of contract. But see *Samuels* (1962) 25 M.L.R. 25.
- 2104 *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600, 635; *Financings Ltd v Baldock* [1963] 2 Q.B. 104, 107.
- 2105 The "voluntary termination right" (VTR) under s.99, see below, para.41-371.
- 2106 See above, Vol.I, para.29-092. But see a county court decision to the contrary: *First Response Finance v Donnelly* [2007] C.C.L.R. 4, Cty Ct.
- 2107 See above, para.41-336.
- 2108 See above, para.41-349.
- 2109 *Brady v St Margaret's Trust Ltd* [1963] 2 Q.B. 494.
- 2110 *Anglo-Auto Finance Ltd v James* [1963] 1 W.L.R. 1042; *BMW Financial Services (GB) Ltd v Taylor* [2006] 1 C.L. 113 (a breach case).
- 2111 *Elsey & Co Ltd v Hyde* (1926), Jones and Proudfoot, *Notes on Hire-Purchase Law*, 2nd edn, p.113; *Financings Ltd v Baldock* [1963] 2 Q.B. 104; *Brady v St Margaret's Trust Ltd*, above; *Anglo-Auto Finance Ltd v James*, above; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683; *Eshun v Moorgate Mercantile Co Ltd* [1971] 1 W.L.R. 722; *Capital Finance Co v Donati* (1977) 121 S.J. 270, CA; *Lombard North Central Plc*

- v Butterworth [1987] Q.B. 527, 540–543. Contrast *Esanda Finance Corp v Plessnig* (1988) 166 C.L.R. 131, HC of Australia.
- 2112 *Lombard North Central Plc v Nugent* [2013] EWHC 1588 (QB).
- 2113 See generally *Atiyah* (1958) 5 B.L.R. 24, 31; *Goode* (1962) 112 L.J. 216, 231; *Hughes* [1962] J.B.L. 252; *Ziegel* [1964] C.L.J. 60; Vol.I, paras 29-203 et seq.; below, paras 41-359, 41-372.
- 2114 *Elsey & Co Ltd v Hyde* (1926), *Jones and Proudfoot* at p.107; *Chester & Cole Ltd v Avon* (1926), *Jones and Proudfoot* at p.115; *Chester & Cole Ltd v Wright* (1930), *Jones and Proudfoot* at p.124; *Associated Distributors Ltd v Hall* [1938] 2 K.B. 83; *Re Apex Supply Co Ltd* [1942] Ch. 108. cf. *Roadways Transport Development Ltd v Browne and Gray* (1928), *Jones and Proudfoot* at p.118.
- 2115 [1953] 1 Q.B. 86.
- 2116 [1955] 1 W.L.R. 391.
- 2117 See *Elsey & Co Ltd v Hyde* (1926), *Jones and Proudfoot* at p.107; *Re Garrod, Jones and Proudfoot*, above p.167; *Bell Bros (HP) Ltd v Aitken*, 1939 S.C. 577; *Re Apex Supply Co Ltd* [1942] Ch. 108. cf. *Cooden Engineering Co Ltd v Stanford* [1953] 1 Q.B. 86, at 98. [1938] 2 K.B. 83. But see below, para.41-358.
- 2118 [2015] UKSC 67 at [41]–[43], [129]–[130], [163]–[165].
- 2119 See Vol.I, para.29-248.
- 2120 [1962] A.C. 600.
- 2121 [2015] UKSC 67.
- 2122 per Lord Neuberger JSC at [32]; see also Lord Mance JSC at [152] and Lord Hodge JSC at [255]).
- 2123 per Lord Neuberger JSC at [32])
- 2124 [1961] 1 Q.B. 445.
- 2125 The court also considered that no other form of “equitable” relief was available to the hirer on the particular facts of the case: see above, para.41-348; below, para.41-358.
- 2126 [1962] A.C. 600, 615, 621, 631, 632. cf. at 613. See also *United Dominions Trust Ltd v Ennis* [1968] 1 Q.B. 54.
- 2127 [1915] A.C. 79, 86, since reconsidered (but in this context not doubted) in *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67, see above.
- 2128 [1962] A.C. 600 at 614, 616, 623, 628, 634.
- 2129 See above, para.41-351.
- 2130 The county court judge subsequently assessed the damages as £30, instead of the £206 claimed by the respondents.
- 2131 *Lombank Ltd v Excell* [1964] 1 Q.B. 415; *EP Finance Co Ltd v Dooley* [1963] 1 W.L.R. 1313. It would seem from these cases that *Phonographic Equipment Ltd v Muslu* [1961] 1 W.L.R. 1379 is inconsistent with the decision of the House of Lords in *Bridge*, despite the fact that it was followed in *Lombank Ltd v Cook* [1962] 1 W.L.R. 1133; and in *Lombank Ltd v Archbold* [1962] C.L.Y. 1409.
- 2132 *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600; *EP Finance Co Ltd v Dooley* [1963] 1 W.L.R. 1313.

- 2134 *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600; *Lombank Ltd v Excell* [1964] 1 Q.B. 415.
- 2135 *Lombank Ltd v Excell* [1964] 1 Q.B. 415.
- 2136 See above, para.41-351.
- 2137 *Anglo-Auto Finance Co Ltd v James* [1963] 1 W.L.R. 1042. Contrast *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428 (hire); *JA Leasing v Humphrey* (1971) 46 A.L.J.R. 106.
- 2138 *Financings Ltd v Baldock* [1963] 2 Q.B. 104; *Brady v St Margaret's Trust Ltd* [1963] 2 Q.B. 494; *Anglo-Auto Finance Co Ltd v James*, above; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683; *Capital Finance Co v Donati* (1977) 121 S.J. 270. Contrast *Esanda Finance Corp v Plessnig* (1988) 166 C.L.R. 131, HC of Australia.
- 2139 In the Court of Appeal, there was a difference of opinion as to the circumstances (if any) in which a court could intervene by granting the hirer some form of equitable relief: see [1961] 1 Q.B. 445.
- 2140 [1938] 2 K.B. 83; above, para.41-354.
- 2141 [1962] A.C. 600, 613, 614.
- 2142 [1962] A.C. 600 at 631, a view supported by the Law Commission in Penalty Clauses and Forfeiture of Moneys Paid (WP No.61, 1975), para.17.26.
- 2143 [1962] A.C. 600 at 634.
- 2144 [1962] A.C. 600 at 635.
- 2145 *Goulston Discount Co Ltd v Harman* (1962) 106 S.J. 369. cf. *United Dominions Trust Ltd v Ennis* [1968] 1 Q.B. 54, 64, 67. See also *Granor Finance Ltd v Liquidator of Fastore Ltd*, 1974 S.L.T. 296 (termination on liquidation); and *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 1 W.L.R. 399; Vol.I, paras 29-244 et seq.
- 2146 *Associated Distributors v Hall* was followed (in a swaps agreement context) in *Lomas v JFB Firth Rixson Inc* [2010] EWHC 3372 (Ch) (reversed, on other points: [2012] EWCA Civ 419).
- 2147 *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67, noted above, para.41-355 and see Vol.I, para.29-248.
- 2148 See above, paras 41-213 et seq. See also below, para.41-372.
- 2149 Replacing (for contracts made on or after 1 October 2015) the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083); see above, paras 40-215 et seq.

(c) - Effect of Consumer Credit Regulation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 3. - Hire-Purchase Agreements

(c) - Effect of Consumer Credit Regulation

Definition

41-360 The consumer credit regulatory regime defines

U 2150

U “hire-purchase agreement” to mean an agreement, other than a conditional sale agreement,²¹⁵¹ under which (a) goods²¹⁵² are bailed in return for periodical payments by the person to whom they are bailed, and (b) the property in the goods will pass to that person if the terms of the agreement are complied with and one or more of the following occurs—(i) the exercise of an option to purchase by that person, (ii) the doing of any other specified act by any party to the agreement, (iii) the happening of any other specified event.²¹⁵³ A new term was introduced in April 2019 for the purposes of imposing a price cap²¹⁵⁴: a “rent-to-own” agreement, which means a hire-purchase (or conditional sale²¹⁵⁵) agreement in relation to “household goods”.²¹⁵⁶

Scope of regulation

41-361 Hire-purchase agreements are essentially treated in the same way as conditional sale agreements²¹⁵⁷ and hence as *credit*, not hire, agreements. Hence a hire-purchase agreement with an individual²¹⁵⁸ is to be regarded as a fixed-sum credit²¹⁵⁹ agreement where the amount of credit is the balance financed.²¹⁶⁰ A hire-purchase agreement with an individual is therefore a regulated credit agreement unless it is an exempt agreement.²¹⁶¹ A regulated hire-purchase agreement is

a debtor-creditor-supplier agreement²¹⁶² for restricted-use credit.²¹⁶³ But it cannot be a “small” agreement.²¹⁶⁴

Parties

41-362 By reason of the fact that a hire-purchase agreement is deemed to be a fixed-sum credit agreement, the owner is referred to as the “creditor” or “lender” and the hirer as the “debtor” or “borrower”.²¹⁶⁵ The terms *owner* and *hirer* refer to consumer hire agreements only.²¹⁶⁶

Unfair relationships

41-363 The provisions of the **Consumer Credit Act 1974** relating to “unfair relationships” apply to hire-purchase agreements where the debtor is an individual.²¹⁶⁷

Application of the regulatory regime

41-364 The provisions of the regime relating to the authorisation and control, etc. of consumer credit businesses and the regulation of consumer credit agreements have been dealt with in the first section of this chapter²¹⁶⁸ and they apply to the business of bailing goods on hire-purchase and to hire-purchase agreements. Although the Consumer Credit Directive²¹⁶⁹ does not apply to hire-purchase agreements, in order to maintain a coherent regime (in particular because conditional sales are within the Directive), the consumer credit regime, as amended in implementation of that Directive, has been extended to hire-purchase agreements. But there are a number of specific provisions that apply in particular to regulated hire-purchase (and conditional sale) agreements.²¹⁷⁰ Moreover, the FCA has imposed a price cap on hire-purchase (and conditional sale²¹⁷¹) agreements in relation to “household goods”.²¹⁷²

Protected goods

41-365 Restrictions are imposed on the recovery of possession where the debtor is in breach of a regulated hire-purchase agreement

2173

U and the debtor has paid or tendered

2174

U to the creditor one-third or more of the total price

2175

U of the goods. The goods then become “protected goods”.

2176

U Under [s.90\(1\) of the Consumer Credit Act 1974](#), the creditor is not entitled to recover possession of protected goods from the debtor except on an order of the court.

2177

U An exception exists if the debtor has terminated, or terminates, the agreement

2178

U; and the restriction does not apply to the recovery of protected goods from a person other than the debtor.

2179

U But otherwise the creditor’s right to seize the goods is curtailed,

2180

U and if the restriction applies to an agreement at the death of the debtor, it continues to apply (in relation to the possessor of the goods) until the grant of probate or administration.

2181

U

41-366 It is to be noted that goods are not protected goods, even though one-third or more of the total price may have been paid, unless the debtor is in breach of the agreement.²¹⁸² Before one-third of the total price has been paid or tendered, or if the debtor is not in breach of the agreement, the creditor may retake possession of the goods,²¹⁸³ provided that he is then entitled to immediate possession of them.²¹⁸⁴

Successive agreements

41-367 [Section 90 of the 1974 Act](#) also contains provisions designed to ensure that a debtor who has paid one-third or more of the total price under an earlier agreement does not lose the possibility of protection under the section by entering into a new agreement with the creditor whereby the goods comprised in the earlier agreement are transferred to a new agreement, with or without other

goods.²¹⁸⁵ [Section 90\(3\) of the Act](#), in effect, provides that where one-third or more of the total price has been paid under the earlier agreement, any goods comprised in both the earlier and the new agreement will be protected goods if the debtor is in breach of the new agreement, whether or not one-third or more of the total purchase price has been paid under the new agreement. Further, if the new agreement is a modifying agreement, as defined in [s.82\(2\) of the 1974 Act](#),²¹⁸⁶ it seems that, on breach of the modifying agreement, all the goods in the modifying agreement become protected goods.²¹⁸⁷

Consent to repossession

- 41-368 There is, however, no contravention of [s.90\(1\) of the 1974 Act](#) if, at the time of recovery of possession, the debtor consents thereto.²¹⁸⁸ But the consent of the debtor must be an “unqualified and informed” consent.²¹⁸⁹

Consequences of contravention

- 41-369 The consequences of recovery of possession of protected goods in breach of [s.90](#) are severe.²¹⁹⁰ The regulated agreement, if not previously terminated, terminates.²¹⁹¹ The debtor is further released from all liability under the agreement and is entitled to recover from the creditor all sums paid by the debtor under the agreement.²¹⁹² Any security²¹⁹³ provided in relation to the agreement, or to a linked transaction,²¹⁹⁴ is rendered invalid.²¹⁹⁵

Entry on premises

- 41-370 The creditor is not entitled to enter any premises

 [2196](#)

 [2197](#) to take possession of goods subject to a regulated hire-purchase agreement

 [2198](#) except under an order of the court.

 This restriction applies whether or not the goods are “protected goods”.

2199

U Contravention of this prohibition is actionable as a breach of statutory duty.

2200

U A licence to enter and seize the goods conferred by the agreement will be of no effect.

2201

U But this does not prevent entry upon premises with the consent of the occupier given at the time.

2202

U In *Moneybarn No.1 Ltd v Harris*

2203

U it was held that art.8 of the European Convention on Human Rights (the right to respect for private and family life, and home), if engaged, did not inhibit the court's power to grant possession from the debtor's premises: "A balance requires to be struck between the interests of the [creditor] and the [debtor] in circumstances where the [debtor] retains the property of the [creditor]".

Debtor's right to terminate agreement

41-371 Section 99 of the Consumer Credit Act 1974 gives to the debtor an indefeasible²²⁰⁴ right (a "VTR"—voluntary termination right) to terminate a regulated hire-purchase agreement²²⁰⁵ at any time before the final payment falls due.²²⁰⁶ The right is exercisable by giving notice to any person entitled or authorised to receive the sums payable under the agreement, e.g. to a person deputed by the creditor to collect the instalments.²²⁰⁷ Termination, however, does not affect any liability under the agreement which has accrued before the termination.²²⁰⁸

Minimum payment

41-372 Upon termination under s.99, the debtor becomes *prima facie* liable (unless the agreement provides for a smaller payment,²²⁰⁹ or does not provide for any payment) to pay to the creditor the amount (if any) by which one-half²²¹⁰ of the total price²²¹¹ exceeds the aggregate of the sums paid and the sums due in respect of the total price immediately before the termination.²²¹² But if he has paid, or becomes liable to pay, more than one-half of the total price before the termination, he is not entitled to recover, or be relieved from, the excess.

41-373

It is important, however, to note the qualification attached to this “minimum payment” by s.100(3) of the 1974 Act:

“If in any action the court is satisfied that a sum less than the amount [of one-half the total price] would be equal to the loss sustained²²¹³ by the creditor in consequence of the termination of the agreement by the debtor, the court may make an order for the payment of that sum in lieu of the amount [of one-half the total price].”

The one-half minimum payment is thus merely the *maximum* amount recoverable by the creditor when the debtor exercises his statutory right of termination.²²¹⁴

Recompense

- 41-374 If the debtor has contravened an obligation to take reasonable care of the goods, the amount of one-half the total price is to be increased by the sum required to recompense the creditor for that contravention, and the qualification mentioned above likewise has effect accordingly.²²¹⁵

Wrongful possession

- 41-375 Where the debtor, on his termination of the agreement, wrongfully retains possession of goods to which the agreement relates, then, in any action brought by the creditor to recover possession of the goods from the debtor, the court, unless it is satisfied that having regard to the circumstances it would not be just to do so, must order the goods to be delivered to the creditor without giving the debtor an option to pay the value of the goods.²²¹⁶

Installation charges

- 41-376 Where under a hire-purchase agreement²²¹⁷ the creditor is required to carry out any installation and the agreement specifies, as part of the total price, the amount to be paid in respect of the installation²²¹⁸ (the “installation charge”) the reference in s.90(1)(b)²²¹⁹ of the Act to one-third of the total price and the reference in s.100(1)²²²⁰ of the Act to one-half of the total price are to be construed as references to the aggregate of the installation charge and (as the case may be) to one-third or one-half of the remainder of the total price.²²²¹ This is best explained by illustration:

(i) In a case where the total price is £1,400, of which £200 is specified as an installation charge, if it is sought to discover whether the goods have become protected goods ([s.90](#)), the statutory one-third would be £600, arrived at by deducting the installation charge from the total price, taking one-third of the balance, viz £400, and then adding the £200 installation charge.

(ii) If it is sought to discover the statutory one-half of the total price ([s.100](#)) in the above example, the installation charge is first deducted from the total price leaving a balance of £1,200. Take one-half of this, viz £600, and then add back the installation charge in full, making a total of £800.

Time orders

- 41-377 In the case of a regulated hire-purchase agreement, as with any regulated agreement, the court is empowered to make a “time order” under [s.129 of the Consumer Credit Act 1974](#) in certain circumstances.²²²² But, in the case of a hire-purchase agreement,²²²³ the court may, when making a time order under [s.129\(2\)\(a\)](#) (for payment of any sum owed by instalments), deal with sums which, although not payable by the debtor at the time the order is made, would, if the agreement continued in force, become payable under it subsequently.²²²⁴ Thus the court can, for example, not only order that the debtor be allowed time to pay off arrears and by instalments commensurate with his means, but also that his obligation to pay future instalments of rentals be rescheduled in a similar manner. Also, if the debtor is in possession of the goods following the making of a time order, he is to be treated as a bailee of the goods under the terms of the agreement, notwithstanding that the agreement has been terminated.²²²⁵ His position in this respect may therefore be described as that of a “statutory bailee”.²²²⁶

“Return orders” and “transfer orders”

- 41-378 Certain special powers are conferred upon the court by [s.133 of the Consumer Credit Act 1974](#) in relation to a regulated hire-purchase agreement²²²⁷ where an application is made for an enforcement order²²²⁸ or for a time order,²²²⁹ or where an action is brought by the creditor to recover possession of goods to which the agreement relates.²²³⁰ These special powers are, if it appears to the court just to do so, to make a return order or a transfer order.²²³¹

- 41-379 A return order is an order for the return to the creditor of goods to which the agreement relates.²²³² Such an order can be either unconditional or (by virtue of [s.135 of the 1974 Act](#))²²³³ suspended. Thus the court can, by combining a time order made under [s.129](#) with a suspended return order, make an order equivalent to the “postponed order” under (the now repealed) [s.35\(4\)\(b\) of the Hire-Purchase Act 1939](#).

Purchase Act 1965, that is to say, to order that the goods be returned to the creditor and suspend the operation of the order on condition that the debtor pays the unpaid balance of the total price by such instalments and at such times as the court provides in the time order. It is this combination of orders that is most extensively used.

- 41-380 A transfer order is an order for the transfer to the debtor of the creditor's title to certain goods to which the agreement relates ("the transferred goods"), and the return to the creditor of the remainder of the goods.²²³⁴ Where a transfer is made, the transferred goods are to be such of the goods to which the agreement relates as the court thinks just; but a transfer order can be made only where "the paid-up sum²²³⁵ exceeds the part of the total price referable to the transferred goods²²³⁶ by an amount equal to at least one-third of the unpaid balance of the total price".²²³⁷
- 41-381 Even though a return order or transfer order has been made, the debtor can, before the goods enter the possession of the creditor, on payment of the balance of the total price and fulfilment of any other necessary conditions, claim the goods ordered to be returned to the creditor.²²³⁸ Similarly, if in pursuance of a time order or under s.133, the total price of goods is paid and any other necessary conditions are fulfilled, the creditor's title vests in the debtor.²²³⁹

Monetary judgment on non-compliance

- 41-382 If, in contravention of a return order or transfer order, any goods to which the order relates are not returned to the creditor, the court, on the application of the creditor, may—(a) revoke so much of the order as relates to those goods; and (b) order the debtor to pay to the creditor the unpaid portion of so much of the total price as is referable to those goods.²²⁴⁰

Adverse possession

- 41-383 In an action for the return of goods wrongfully detained a claimant must show that the defendant has wrongfully neglected or refused to deliver up the goods so that the defendant's possession of the goods is adverse.²²⁴¹ Since the creditor is, for example, precluded from recovering protected goods otherwise than by action,²²⁴² and he might in consequence be said to be bound to acquiesce in the debtor's continuing in possession of the goods, difficulties could arise in relation to the creditor's need to prove adverse possession in an action to recover possession of the goods.²²⁴³ Such difficulties are obviated by s.134(1) of the 1974 Act,²²⁴⁴ which provides that where the creditor brings an action or makes an application to enforce a right to recover possession of goods

comprised in a regulated hire-purchase agreement²²⁴⁵ from the debtor and proves that a demand for delivery of the goods was included in the default notice,²²⁴⁶ or that, after the right to recover possession of the goods accrued but before the action was begun or the application was made, he made a request in writing to the debtor to surrender the goods, then, for the purposes of the claim of the creditor to recover possession of the goods, the possession of them by the debtor is to be deemed to be adverse to the owner. However, nothing in s.134(1) is to affect a claim for damages for conversion.²²⁴⁷

Footnotes

- 2150 See Consumer Credit Act 1974 (“CCA 1974”) s.189(1) and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (“RAO”) art.60L(1), as inserted by SI 2013/1881 art.6. See also the almost identical definition in the Consumer Rights Act 2015 s.7 and the identical definition in the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (SI 2020/1311) reg.2 and the draft Debt Respite Scheme (Statutory Debt Repayment Plan etc.) (England and Wales) Regulations reg.2.
- 2151 Defined in CCA 1974 s.189(1) and RAO art.60L(1); see below, para.41-443.
- 2152 Defined in CCA 1974 s.189(1) (but not in the RAO).
- 2153 cf. *R. v RW Proffitt Ltd [1954] 2 Q.B. 35*.
- 2154 See the FCA’s document: *Rent-to-own price cap – feedback on CP18/35 and final rules*, PS19/6 (March 2019). The provisions are in the FCA’s Handbook, CONC 5B. The sanction (see CONC 5B.6.1) is that charges in excess of the cap are unenforceable.
- 2155 See below, para.41-443.
- 2156 As defined in CONC 5B. See, *passim*, that Module of the FCA Handbook.
- 2157 See below, paras 41-443 et seq.
- 2158 See above, para.41-016.
- 2159 See above, para.41-026.
- 2160 See CCA 1974 s.9(3) (and Sch.2 Pt II Example 10) and RAO art.60L(8). The balance financed is therefore equal to the total price (defined in CCA 1974 s.189(1) and RAO art.60L(1)) of the goods less the aggregate of the deposit (also defined in CCA 1974 s.189(1) and RAO art.60L(1)) (if any) and the total charge for credit (see above, para.41-061). Hence the £25,000 ceiling in the “business” exemption (see above, para.41-047) is calculated by taking the total price and deducting any deposit.
- 2161 See above, para.41-017.
- 2162 See above, paras 41-030—41-031.
- 2163 See above, para.41-027.
- 2164 See above, para.41-049.
- 2165 See above, para.41-016.
- 2166 See above, para.41-038.

- 2167 ss.140A–140C, above, paras 41-213 et seq. And note the price cap imposed in relation
to “household goods”, noted above, para.41-360.
2168 paras 41-001—41-261.
- 2169 See above, para.41-011. Art.2(2)(d) of the Directive excludes hire-purchase from its
scope.
- 2170 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), paras
2-091—2-093, 2-100—2-101, 2-130—2-136.
- 2171 Below, para.41-443.
- 2172 See above, para.41-360 and the FCA Handbook, CONC 5B.
- 2173 Or conditional sale agreement: see below, para.41-452 and *Moneybarn No.1 Ltd v Harris [2022] SAC (Civ) 11* (a conditional sale case) where ss.90 and 92 (see below para.41-370) were invoked.
- 2174 See CCA 1974 s.189(1): “payment” includes tender.
- 2175 Defined in CCA 1974 s.189(1). For installation charges, see below, para.41-376. The
“total price” does not include default interest or other charges payable on default: *Julian Hodge Bank Ltd v Hall [1998] C.C.L.R. 14*.
- 2176 CCA 1974 s.90(7). The FCA’s Review of Retained Provisions of the Consumer Credit
Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.100)
that ss.90–92 should be retained in legislation as repeal would adversely affect the
appropriate degree of consumer protection.
- 2177 CPR Pt 7 PD 7B. *Grace v Black Horse Ltd [2014] EWCA Civ 1413* (“order of court”
can be an oral rather than the usual written order). As to the (ir)relevance of ECHR art.8,
see *Moneybarn No.1 Ltd v Harris [2022] SAC (Civ) 11* (a conditional sale case), where
ss.90 and 92 (see below para.41-370) were invoked. A similar restriction was imposed
by s.33 of the Hire-Purchase Act 1965. Contrast *Bentinck Ltd v Cromwell Engineering Co Ltd [1971] 1 Q.B. 324* (abandoned goods); *Lombank v Dowdall (1973) 118 S.J. 96, CA* (deteriorating vehicle garaged by creditor to order of debtor); *Black Horse Ltd v Smith [2002] 5 C.L. 105, Cty Ct* (damaged car “released” to garage).
- 2178 CCA 1974 s.90(5). cf. *United Dominions Trust (Commercial) Ltd v Ennis [1968] 1 Q.B. 54*; *FC Finance Ltd v Francis (1970) 114 S.J. 568, CA* (termination as a result
of repudiation by the debtor is not termination by the debtor); *Chartered Trust Plc v Pitcher [1988] R.T.R. 72*.
- 2179 Contrast *Bentinck Ltd v Cromwell Engineering Co Ltd [1971] 1 Q.B. 324*. See also *FC Finance Ltd v Francis (1970) 114 S.J. 568, CA*; *Kassam v Chartered Trust Plc [1998] R.T.R. 220*.
- 2180

Menzies v United Motor Finance Corp [1940] 1 K.B. 559; Carr v James Broderick & Co Ltd [1942] 2 K.B. 275; Thomas v Varney (1957) 107 L.J. 412; United Dominions Trust (Commercial) Ltd v Kesler (1963) 107 S.J. 15; Unity Finance Ltd v Woodcock [1963] 1 W.L.R. 455; Capital Finance Co Ltd v Bray [1964] 1 W.L.R. 323. But see *Santander UK Plc v Creighton and Simpson [2019] SAC (Civ) 36* (followed in *Moneybarn No.1 Ltd v Harris [2022] SAC (Civ) 11* (a conditional sale case)) which confirmed that s.90 merely required the creditor to obtain a court order and in no way otherwise affected the substantive rights of the creditor when breach occurred.

2181 *CCA 1974 s.90(6).* cf. *Peacock v Anglo-Auto Finance Co Ltd (1968) 112 S.J. 746.* After the grant of probate or administration, the restriction continues to apply, since the personal representatives become the “debtor”: *CCA 1974 s.189(1).*

2182 This was a departure from the regime of s.33 of the Hire-Purchase Act 1965.
 2183 But see the need for notices under *CCA 1974 ss.76, 86B, 86E, 98* (above, paras 41-166, 41-131, 41-135, 41-174).

2184 See above, para.41-351.

2185 This is similar to the position under s.47 of the Hire-Purchase Act 1965.
 2186 See above, para.41-148.

2187 *CCA 1974 s.90(4)* and see Guest and Lloyd, *Encyclopedia of Consumer Credit Law* (1975, looseleaf), para.2-091.

2188 *CCA 1974 s.173(3)*: consent cannot be given earlier, for example in the agreement itself. See *McDonald v Bowmaker (Ireland) Ltd (1950) 84 I.L.T. 64; Thomas v Varney (1957) 107 L.J. 412; Mercantile Credit Co Ltd v Cross [1965] 2 Q.B. 205; Hunter v Lex Vehicle Finance Ltd [2005] EWHC 223, [2005] B.P.I.R. 586.* cf. *United Dominions Trust (Commercial) Ltd v Kesler (1963) 107 S.J. 15.*

2189 *Chartered Trust Plc v Pitcher [1988] R.T.R. 72.*

2190 *CCA 1974 s.91.* See also *CCA 1974 s.142(2)* (declaration) and *Capital Finance Co Ltd v Bray [1964] 1 W.L.R. 323.* In the summary of the judgment submitted to the court in *Grace v Black Horse Ltd [2014] EWCA Civ 1413*, [46] the s.91 sanction was described as “draconian”, but the FCA’s *Review of the retained provisions of the Consumer Credit Act: Final Report* (see para.41-004 (note), above) expressed the view that s.91 “promotes appropriate emphasis on compliance with the key provisions in relation to protected goods”.

2191 *CCA 1974 s.91(a).*

2192 *CCA 1974 s.91(b).* But see *Carr v James Broderick & Co Ltd [1942] 2 K.B. 275.*

2193 As defined in *CCA 1974 s.189(1)*; see above, para.41-182. But see *Unity Finance Ltd v Woodcock [1963] 1 W.L.R. 455* (guarantor under a recourse agreement also protected).

2194 *CCA 1974 s.113(8).* For “linked transaction”, see *CCA 1974 ss.19(1), 189(1)*; above, paras 41-056 et seq.

2195 *CCA 1974 ss.106, 113(3)(b);* above, para.41-194.

2196 For the meaning of “premises”, in other contexts, see, e.g. *Andrews v Andrews and Mears [1908] 2 K.B. 567, 570; West Mersea UDC v Fraser [1950] 2 K.B. 119; Gardiner*

- v *Sevenoaks RDC* [1950] 2 All E.R. 84; *John A Pike (Butchers) Ltd v Independent Insurance Co Ltd* [1998] Lloyd's Rep. I.R. 410, CA; *Spring House v Mount Cook Land* [2001] EWCA Civ 1833, [2002] 2 All E.R. 822.
- 2197 The provision is applicable also to a regulated conditional sale agreement (below, para.41-447) and to a regulated consumer hire agreement (above, para.41-037).
- 2198 CCA 1974 s.92(1). See CPR Pt 7 PD 7B. The FCA's *Review of the retained provisions of the Consumer Credit Act: Final Report* (see para.41-004 (note), above) states (see Annex 5, para.100) that s.92 should be retained in legislation as repeal would adversely affect the appropriate degree of consumer protection as an FCA rule could not make corresponding provision.
- 2199 See above, paras 41-365 et seq. See *Moneybarn No.1 Ltd v Harris* [2022] SAC (Civ) 11.
- 2200 CCA 1974 s.92(3). Moreover, the usual disciplinary sanctions are available to the FCA, see above para.41-065. See *Bowmaker Ltd v Tabor* [1914] 2 K.B. 1; *Carr v James Broderick & Co Ltd* [1942] 2 K.B. 275; *Smart Bros Ltd v Ross* [1943] A.C. 84; *Fileman v British Ry Traffic and Electricity Co Ltd* (1945) 173 L.T. 407; *Harris v Lombard (New Zealand) Ltd* [1974] 2 N.Z.L.R. 161. In many situations, damages may be nominal only.
- 2201 CCA 1974 s.173(1).
- 2202 CCA 1974 s.173(3).
- 2203 [2022] SAC (Civ) 11 (a conditional sale case) where ss.90 and 92 were invoked.
- 2204 See CCA 1974 s.173(1). See also *Acceptance Co v Pike* (1961) 111 L.J. 424.
- 2205 The provision applies also to conditional sale agreements, with certain modifications: see below, para.41-455.
- 2206 CCA 1974 s.99(1). cf. *Wadham Stringer Finance Ltd v Meaney* [1981] 1 W.L.R. 39 (acceleration clause in conditional sale agreement). Despite calls for its abolition, it was decided, after consultation, to retain the VTR, see: A Consultation on Voluntary Termination of Hire Purchase and Conditional Sale Agreements under the Consumer Credit Act 1974, DTI, Sept 2004 and OFT 761. Note also the FCA's *Review of the retained provisions of the Consumer Credit Act: Final Report* (see para.41-004 (note), above) which states (see Annex 5, para.166) that ss.99–100 should be retained in legislation as an FCA rule could not replicate their effects. However the view was expressed that “there may be merit in a review of the provisions, and how they operate, taking into account changes in the market and the relevant products”.
- 2207 CCA 1974 s.99(1).
- 2208 CCA 1974 s.99(2).
- 2209 See above, paras 41-353—41-358 for the effectiveness of minimum payment clauses at common law.

- 2210 For installation charges, see below, para.[41-376](#).
- 2211 Defined in [CCA 1974 s.189\(1\)](#).
- 2212 [CCA 1974 s.100\(1\)](#). This corresponds to (the now repealed) [s.28\(1\) of the Hire-Purchase Act 1965](#). Thus, for example, if the total price is £3,600, and the debtor terminates after he has paid £1,000 and owes £200 in unpaid instalments, he must pay the £200 ([s.99\(2\)](#) and see above, paras [41-349](#), [41-350](#)) and a further £600 so as to bring his total payments up to one-half of the total price.
- 2213 For a discussion of the meaning of the “loss sustained”, see Goode, *Hire-Purchase Law and Practice*, 2nd edn, pp.406–407; Guest, *The Law of Hire-Purchase* (1966), para.609; *Booth & Phipps Garages Ltd v Milton [2000] C.L.Y. 2601, Cty Ct*.
- 2214 See also [CCA 1974 s.113\(1\), \(8\)](#) (security); above, para.[41-192](#). See above, para.[41-351](#) as to the possible relevance of the VTR in limiting the damages recoverable when the debtor breaches the agreement.
- 2215 [CCA 1974 s.100\(4\)](#).
- 2216 [CCA 1974 s.100\(5\)](#).
- 2217 Or conditional sale agreement: see below, paras [41-452](#), [41-455](#).
- 2218 Defined in [s.189\(1\)](#).
- 2219 See above, para.[41-365](#).
- 2220 See above, para.[41-373](#).
- 2221 [CCA 1974 ss.90\(2\), 100\(2\)](#).
- 2222 See above, para.[41-203](#) and [CPR Pt 7 PD 7B; Pt 55 PD 55A para.7.1 Form N440](#).
- 2223 Or conditional sale agreement.
- 2224 [CCA 1974 s.130\(2\)](#).
- 2225 [CCA 1974 s.130\(4\)](#). This provision applies also to a regulated consumer hire agreement.
- 2226 As was the case under the [Hire-Purchase Act 1965 s.38\(1\)](#) when the goods were protected goods. See also *Bentworth Finance v Jones (1963) 114 L.J. 140*.
- 2227 Or conditional sale agreement.
- 2228 See above, para.[41-201](#).
- 2229 [CCA 1974 s.129](#); above, para.[41-203](#).
- 2230 This is not confined to actions to recover protected goods (see above, paras [41-365](#) et seq.). For the particulars required in the case of such a claim, see [CPR Pt 7 PD 7B](#).
- 2231 [CCA 1974 s.133\(1\)](#). See *Torts (Interference with Goods) Act 1977 s.3(8)(a)*: power of court under [s.3](#) is without prejudice to the remedies afforded by [CCA 1974 s.133](#).
- 2232 [CCA 1974 s.133\(1\)\(i\)](#).
- 2233 See above, para.[41-209](#).
- 2234 [CCA 1974 s.133\(1\)\(ii\)](#). This corresponds to the rarely used “split order” that could be made under [s.35\(4\)\(c\) of the Hire-Purchase Act 1965](#).
- 2235 See [CCA 1974 s.133\(2\)](#) for the definition of “the paid-up sum” and for its adjustment to take account of a sum owed by the creditor to the debtor, and for the deduction of any sum owed by the debtor in relation to the goods (otherwise than as part of the total price) from the paid-up sum.
- 2236 See [CCA 1974 s.133\(6\)](#).

- 2237 “Total price” is defined in [CCA 1974 s.189\(1\)](#). As a mathematical formula the maximum value of the goods capable of being transferred (V) can be expressed as: “ $V = p-u/3$ ” where p is the paid up sum and u the unpaid balance of the total price.
- 2238 [CCA 1974 s.133\(4\)](#).
- 2239 [CCA 1974 s.133\(5\)](#).
- 2240 [CCA 1974 s.133\(6\)](#).
- 2241 [*Clements v Flight \(1846\) 16 M. & W. 42.*](#)
- 2242 See above, para.[41-365](#).
- 2243 [*Smart Bros Ltd v Pratt \[1940\] 2 K.B. 498, 504.*](#)
- 2244 Similar but narrower provisions appeared in [s.10 of the Hire-Purchase Act 1938](#) and [s.48 of the Hire-Purchase Act 1965](#).
- 2245 [CCA 1974 s.134\(1\)](#) also applies to regulated conditional sale and consumer hire agreements.
- 2246 Under [CCA 1974 s.88\(5\)](#), see above, para.[41-169](#). It is therefore clear that [CCA 1974 s.134\(1\)](#), unlike (the now repealed) [s.48\(1\) of the Hire-Purchase Act 1965](#), allows the demand for delivery up of the goods to be included in the default notice.
- 2247 [CCA 1974 s.134\(2\)](#).

(d) - Defective Goods

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 3. - Hire-Purchase Agreements

(d) - Defective Goods

Warranties and representations by dealers

- 41-384 In many hire-purchase transactions, the hirer enters into the agreement on the faith of statements made to him by a dealer with whom he is in no direct contractual relationship. The dealer usually sells the goods to a finance company, and the hire-purchase agreement is made between the hirer and the finance company. At common law the dealer is not normally an agent of the finance company in respect of any statements made by him to the hirer, even though he may decide and state the purchase price, receive the proposal form and initial deposit, and be paid a commission by the finance company.²²⁴⁸ But the courts have held that, in appropriate circumstances, the hirer may sue the dealer on a collateral warranty and recover damages for the breach of it.²²⁴⁹ The dealer may also be liable in deceit and possibly for negligent misstatement²²⁵⁰ even if the statements do not amount to a warranty.²²⁵¹ He can also be sued in tort for negligence if he puts into circulation goods that he knows or ought to know are dangerous or defective and the hirer or some third person is injured as a result.²²⁵²
- 41-385 However, under the [Consumer Credit Act 1974](#),²²⁵³ any representations (including any condition or warranty, and any other statement or undertaking, whether oral or in writing)²²⁵⁴ made by a dealer who is a negotiator²²⁵⁵ in antecedent negotiations²²⁵⁶ prior to the making of a regulated hire-purchase agreement are deemed to have been made by him in the capacity of agent of the creditor as well as in his actual capacity.²²⁵⁷ The finance company will therefore be liable for representations made by the dealer in such circumstances.

Implied terms

- 41-386 Sections 9 to 11 of the Supply of Goods (Implied Terms) Act 1973²²⁵⁸ import into every hire-purchase agreement certain implied terms as to the quality and fitness for purpose of the goods, and their correspondence with description and sample. These implied terms correspond very closely with the terms implied in contracts of sale of goods by virtue of ss.13 to 15 of the Sale of Goods Act 1979.²²⁵⁹ The Consumer Rights Act 2015²²⁶⁰ makes separate provision for “consumer” agreements and treats similar (but more expansive²²⁶¹) terms “as included” in “consumer” hire-purchase agreements (the terms being the same as for sales contracts).²²⁶² It also confers extensive remedies for their breach.²²⁶³ The exclusion of these implied terms and of the liability of the creditor for the breach of them is ineffective, either absolutely or subject to certain qualifications, the extent depending on whether they are “consumer” contracts or not.²²⁶⁴

Letting by description

- 41-387 By s.9(1) of the 1973 Act, where under a hire-purchase agreement goods are bailed by description, there is implied in the agreement a term²²⁶⁵ that the goods will correspond with the description²²⁶⁶; and if under the agreement the goods are bailed by reference to a sample as well as a description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.²²⁶⁷ Goods are not prevented from being bailed by description by reason only that, being exposed for sale or hire, they are selected by the hirer.²²⁶⁸ The Consumer Rights Act 2015 makes almost identical provision for “consumer” hire-purchase (and sales) agreements.²²⁶⁹

Satisfactory quality

- 41-388 By s.10(2) of the 1973 Act,²²⁷⁰ where the creditor²²⁷¹ bails goods under a hire-purchase agreement in the course of a business²²⁷² there is an implied term²²⁷³ that the goods supplied under the agreement are of satisfactory quality.²²⁷⁴ But this implied term does not extend to any matter making the quality of goods unsatisfactory (a) which is specifically drawn to the hirer’s attention before the agreement is made; or (b) where the hirer examines the goods before the agreement is made, which that examination ought to reveal; or (c) where the goods are bailed by reference to a sample, which would have been apparent on reasonable examination of the sample.²²⁷⁵ If the hirer

deals as consumer²²⁷⁶ the creditor may be responsible for any public statements on the specific characteristics of the goods made about them by himself, the producer²²⁷⁷ or his representative particularly in advertising or on labelling.²²⁷⁸ The **Consumer Rights Act 2015** makes almost identical provision for “consumer” hire-purchase (and sales) agreements.²²⁷⁹

Fitness for purpose

41-389 By **s.10(3) of the 1973 Act**, where the creditor²²⁸⁰ bails goods under a hire-purchase agreement in the course of a business²²⁸¹ and the hirer, expressly or by implication, makes known to the creditor, or to a credit-broker²²⁸² in the course of negotiations conducted by that broker in relation to goods sold by him to the creditor before forming the subject matter of the hire-purchase agreement, any particular purpose for which the goods are being bailed, there is an implied term²²⁸³ that the goods supplied under the agreement are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied,²²⁸⁴ except where the circumstances show that the hirer does not rely, or that it is unreasonable for him to rely,²²⁸⁵ on the skill or judgment of the creditor or credit-broker.²²⁸⁶ The **Consumer Rights Act 2015** treats a similar term “as included” in “consumer” hire-purchase (and sales) agreements.²²⁸⁷

Sample

41-390 By **s.11 of the 1973 Act**, where under a hire-purchase agreement goods are bailed by reference to a sample, there is an implied term²²⁸⁸ —(a) that the bulk will correspond with the sample in quality; and (b) that the hirer will have a reasonable opportunity of comparing the bulk with the sample; and (c) that the goods will be free from any defect, making their quality unsatisfactory,²²⁸⁹ which would not be apparent on reasonable examination of the sample.²²⁹⁰ The **Consumer Rights Act 2015** treats a similar term as included in ‘consumer’ hire-purchase (and sales) agreements.²²⁹¹ Moreover, it includes an additional term that the goods match a model seen or examined.²²⁹²

Remedies for breach

41-391 Breach of any of the terms implied by **ss.9 to 11 of the Supply of Goods (Implied Terms) 1973 Act** normally entitles the hirer to assert the remedies available to him for breach of condition, that is to say, he can reject the goods and treat the agreement as repudiated and sue for damages for any loss

or damage (including consequential loss) which he may have suffered as a result of the breach.²²⁹³ The hirer may elect not to treat the breach of condition as a ground for treating the contract as repudiated, but mere acceptance of the goods does not preclude this remedy.²²⁹⁴ A refusal by the creditor to remedy the defects in the goods bailed constitutes a continuing breach of the agreement and the hirer may refuse to continue with the agreement as the creditor will not honour his obligation.²²⁹⁵ Alternatively the hirer can affirm the agreement and sue for damages.²²⁹⁶ However, if the hirer does not deal as consumer,²²⁹⁷ and the breach is so slight that it would be unreasonable for him to reject them, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty,²²⁹⁸ i.e. be remediable in damages only. The additional remedies conferred on the consumer by Pt 5A of the Sale of Goods Act 1979²²⁹⁹ and by Pt 1B of the Supply of Goods and Services Act 1982²³⁰⁰ do not apply to hire-purchase agreements.²³⁰¹ The Consumer Rights Act 2015 repeals those provisions and extends to hirers the much more extensive remedies provided for under that Act.²³⁰²

Total failure of consideration

- 41-392 There is some authority for the view that, where the goods are so defective that they are totally unfit for the purpose for which they are let or where they seriously fail to correspond with description, the hirer is entitled at common law to recover all sums which he has paid as upon a total failure of consideration,²³⁰³ provided that he takes immediate steps to rescind the agreement.²³⁰⁴

Measure of damages

- 41-393 If the hirer elects to treat the contract as repudiated and to sue for damages, there is some doubt as to the measure of damages which he is entitled to recover at common law.²³⁰⁵ But it would seem that he is entitled to claim the return of all moneys paid by him at the time of the termination of the agreement, together with any sum actually expended on repairing the goods bailed, less a deduction for the use of the goods during the period they were in his possession.²³⁰⁶ He would also be entitled to recover any additional cost involved in obtaining equivalent goods on hire-purchase elsewhere. If, on the other hand, the breach of the agreement amounts to or is to be treated as a breach of warranty only, or if the hirer elects to affirm the contract and sue for damages, the measure of damages would appear to be the cost of putting the goods into a proper state of repair together with damages for loss of use while they are being put into repair.²³⁰⁷

Exclusion of implied terms: consumer agreements

- 41-394 Liability for breach of the obligations arising from [ss.9, 10 or 11 of the Supply of Goods \(Implied Terms\) Act 1973](#) cannot be excluded or restricted by any contract term as against a person “dealing as consumer” as presently defined in the [Unfair Contract Terms Act 1977](#).²³⁰⁸ It is important to note that this definition is in no way connected with the concept of a consumer credit agreement in the [Consumer Credit Act 1974](#).²³⁰⁹ For the purposes of the [1977 Act](#), the hirer “deals as consumer” if he neither makes the agreement in the course of a business²³¹⁰ nor holds himself out as so doing, and if the creditor does make the agreement in the course of a business and (unless the hirer is an individual) the goods²³¹¹ bailed are of a type ordinarily supplied for private use or consumption.²³¹² The onus of proving that the hirer did not deal as a consumer lies upon the creditor.²³¹³ Terms excluding or restricting liability may also be held to be unfair and so not binding the consumer under the [Consumer Rights Act 2015 Pt 2](#).²³¹⁴ The [Consumer Rights Act 2015](#) also provides²³¹⁵ that liability for breach of the corresponding terms “treated as included” by that Act cannot be excluded or restricted by any contract term as against the consumer.²³¹⁶ Terms excluding or restricting liability may also be held to be unfair and so not binding the consumer under the more general provisions on unfair terms in that Act.²³¹⁷

Exclusion of implied terms: non-consumer agreements

- 41-395 In the case where the hirer does not “deal as consumer” (as defined above) the liability under [ss.9, 10 or 11 of the 1973 Act](#) can be excluded or restricted by reference to a contract term, but only insofar as the term satisfies the requirement of reasonableness.²³¹⁸ In order to assist the court to determine whether or not any such term would be reasonable, certain “guidelines” are set out in [Sch.2 to the 1977 Act](#). But the court is also specifically enjoined to have regard in general²³¹⁹ to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.²³²⁰ It might be thought that an exemption clause in a commercial hire-purchase agreement which excluded the terms as to quality and fitness implied by the [1973 Act](#) would be considered reasonable in circumstances where the owner (a finance company) would not see the goods before their delivery to the hirer by the supplying dealer,²³²¹ but it would appear that this may not be the case.²³²²

Construction of clause

- 41-396 A number of cases have arisen where the courts, applying the principle of “fundamental breach”²³²³ have held that the exemption clause in question did not cover the breach which occurred.²³²⁴ Such cases must now be considered to have been decided by reference to the true construction of the particular clause, since there is no rule of common law which would prevent an owner, by means of an appropriately drafted exemption clause, from excluding or restricting his liability even for a “fundamental breach”.²³²⁵ In any event, such cases are of much less importance since the enactment of the [Unfair Contract Terms Act 1977](#), the [Consumer Rights Act 2015 Pt 2](#)²³²⁶ and the “unfair relationship” provisions of the [Consumer Credit Act 1974](#).²³²⁷

Collateral warranty: acknowledgment by hirer

- 41-397 The protection afforded by an otherwise effective exemption clause may prove nugatory where either the owner or his agent has furnished an independent collateral warranty in return for which the hirer has entered into the hire-purchase agreement.²³²⁸ However, it now seems that a properly drafted “acknowledgement” by a contracting party of past or present facts (e.g. that he has not, expressly or by implication, made known any particular purpose for which the goods are being hired) can, contrary to previous authority,²³²⁹ in principle be binding on the basis of the developing doctrine of contractual estoppel.²³³⁰

Footnotes

- 2248 *North Central Wagon and Finance Co Ltd v White and Powell* [1955] C.L.Y. 1204; *Campbell Discount Co Ltd v Gall* [1961] 1 Q.B. 431; *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508; *Branwhite v Worcester Works Finance Ltd* [1969] 1 A.C. 552; *Williams (JD) & Co v McCauley Parsons and Jones* [1994] C.C.L.R. 78; *Woodchester Equipment (Leasing) Ltd v British Association of Canned and Preserved Foods Importers and Distributors Ltd* [1995] C.L.Y. 2459; *PB Leasing Ltd v Patel* [1995] C.C.L.R. 82; *Lombard North Central Plc v Gate* [1998] C.C.L.R. 51, Cty Ct; *Brewer v Mann* [2012] EWCA Civ 246. See *Guest* (1963) 79 L.Q.R. 33; *Hughes* (1964) 27 M.L.R. 395. Contrast *Purnell Secretarial Services Ltd v Lease Management Services Ltd* [1994] C.C.L.R. 127 and *Van Gordon v Volkswagen Financial Services (UK) Ltd (t/a Audi Finance)* Unreported 30 April 2019 (Nottingham Cty Ct) (on facts, supplier was agent at common law).

- 2249 *Webster v Higgin* [1948] 2 All E.R. 127; *Brown v Sheen and Richmond Car Sales Ltd* [1950] 1 All E.R. 1102; *Andrews v Hopkinson* [1957] 1 Q.B. 229; *Smith v Spurling Motor Bodies Ltd* (1961) 105 S.J. 967; *Yeoman Credit Ltd v Odgers* [1962] 1 W.L.R. 215. See Vol.I, para.15-018. It is possible that a warranty similar to the term implied by s.14(3) of the Sale of Goods Act 1979 might be imported into such a transaction: *Andrews v Hopkinson*, above, at 237. Contrast *Drury v Victor Buckland Ltd* [1941] 1 All E.R. 269.
- 2250 See Vol.I, Ch.9. The Misrepresentation Act 1967 s.2(1), would not appear to apply in this situation.
- 2251 cf. *Garbett v Rufford Motor Co Ltd*, *The Guardian*, 12 March 1962.
- 2252 *Herschthal v Stewart Ardern Ltd* [1940] 1 K.B. 155; *Andrews v Hopkinson* [1957] 1 Q.B. 229. See also the Consumer Protection Act 1987; below, paras 46-457 et seq.
- 2253 See above, para.41-073.
- 2254 See CCA 1974 s.189(1): definition of “representation”.
- 2255 Defined in CCA 1974 s.56(1), see above, para.41-075.
- 2256 Defined in CCA 1974 s.56(1), see above, para.41-073.
- 2257 CCA 1974 s.56(2). But it was held in *Van Gordon v VWFS (UK) Ltd (t/a Audi Finance)* Unreported 30 April 2019 (Nottingham Cty Ct) that s.56 does not apply to subsequent negotiations concerning the repair of the goods (although on the facts the dealer was held to be the agent of the creditor at common law).
- 2258 Re-enacted (as from 19 May 1985: see SI 1983/1551 (c.44)) by s.192 of and Sch.4 para.35, to the Consumer Credit Act 1974 and amended by the Supply of Goods and Services Act 1982 s.17(1), the Sale and Supply of Goods Act 1994 s.7 and Sch.2, and the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.13 (revoked, with effect from 1 October 2015, by the Consumer Rights Act 2015 s.60 and Sch.1 para.53).
- 2259 See below, paras 46-086—46-115.
- 2260 For contracts made on or after 1 October 2015.
- 2261 See, in particular, the new terms as to conformity with model seen or examined (s.14, above, para.40-504) and as to incorrect installation (s.15, above, para.40-505).
- 2262 And note that certain pre-contract information provided under the Consumer Contract (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) are treated as terms of the contract: Consumer Rights Act 2015 s.12 and see above, para.40-502.
- 2263 The terms are set out in the Consumer Rights Act 2015 ss.9–15, 18 (see above, paras 40-499 et seq.) and the remedies in ss.19–27 (above, paras 40-514 et seq.).
- 2264 See Vol.I, para.17-097; below, para.46-117. For an exclusion clause (between business people) effectively excluding s.10(2) of the 1973 Act (see below, para.41-388) see *Caithness Flagstone Ltd v Ballyvesey Holdings Ltd* [2020] SAC (Civ) 1.
- 2265 In England and Wales and Northern Ireland, this term is a condition: s.9(1A).
- 2266 Supply of Goods (Implied Terms) Act 1973 s.9(1). See, e.g. *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936; *Astley Industrial Trust Ltd v Grimley* [1963] 1 W.L.R.

- 584, 597; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683, 708; *Brewer v Mann* [2012] EWCA Civ 246.
- 2267 For the analogous case of sale by description, see below, para.46-086.
- 2268 **Supply of Goods (Implied Terms) 1973 Act s.9(2).**
- 2269 For contracts made on or after 1 October 2015. See *Consumer Rights Act 2015* s.11 (but note the additional provisions in s.11(4)–(5)). See above, para.40-501.
- 2270 As amended by s.17(1) of the Supply of Goods and Services Act 1982 and s.7 of the Sale and Supply of Goods Act 1994. See *Garside v Black Horse Ltd* [2010] EWHC 190 (QB) (not a sale by sample, hence s.10(2) applied).
- 2271 Defined in s.15(1) of the 1973 Act to mean the owner or his assignee.
- 2272 Defined in s.15(1) of the 1973 Act. See also s.10(5).
- 2273 In England and Wales and Northern Ireland, this term is a condition: s.10(7).
- 2274 **Supply of Goods (Implied Terms) 1973 Act s.10(2), as amended by (i) s.17(1) of the Supply of Goods and Services Act 1982; (ii) Sale and Supply of Goods Act 1994, and (iii) Consumer Rights Act 2015 s.60 and Sch.1 para.3.** See *Garside v Black Horse Ltd* [2010] EWHC 190 (QB) (not a sale by sample, hence s.10(2) applied). “Satisfactory quality” is defined in s.10(2A), (2B) of the 1973 Act. See below, paras 46-099—46-100. For second hand goods, see, e.g. *Bartlett v Sidney Marcus Ltd* [1965] 1 W.L.R. 1013; *Crowther v Shannon Motor Co* [1975] 1 W.L.R. 30. See also *Lamarra v Capital Bank Plc*, 2006 S.L.T. 1045 (relevance of warranty in determining satisfactory quality): below, para.46-099.
- 2275 For the corresponding provision in the *Sale of Goods Act 1979*, see below, para.46-095.
- 2276 This expression is not defined in the 1973 Act. cf. below, para.46-121.
- 2277 Defined in s.15(1) of the 1973 Act.
- 2278 **Supply of Goods (Implied Terms) 1973 Act s.10(2D), (2E), (2F), inserted by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.13.** Note the corresponding provisions for “consumer” hire-purchase (and sales) agreements in the *Consumer Rights Act* s.9(5)–(7), above, para.40-504 and note s.18 (no other implied requirement as to quality), above, para.40-472.
- 2279 For contracts made on or after 1 October 2015. See *Consumer Rights Act 2015* s.9(5)–(7), above, para.40-504 and note s.18 (no other implied requirement as to quality), above, para.40-507.
- 2280 Defined in **Supply of Goods (Implied Terms) 1973 Act s.15(1)** to mean the owner or his assignee.
- 2281 Defined in s.15(1) of the 1973 Act. See also s.10(5).
- 2282 Defined in s.10(6) of the 1973 Act.
- 2283 In England and Wales and Northern Ireland, this term is a condition: s.10(7).
- 2284 *Lowe v Lombank Ltd* [1960] 1 W.L.R. 196; *Unity Finance Ltd v Hammond* (1965) 109 S.J. 70; *Porter v General Guarantee Corp* [1982] R.T.R. 384.
- 2285 cf. *Yeoman Credit Co Ltd v Apps* [1962] 2 Q.B. 508; *Astley Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584.
- 2286 **Supply of Goods (Implied Terms) 1973 Act s.10(3).** For the corresponding provision in the *Sale of Goods Act 1979*, see below, para.46-105.

- 2287 For contracts made on or after 1 October 2015. See [Consumer Rights Act 2015 s.10](#), above, para.[40-500](#) and note [s.18](#): no other implied requirement as to quality, above, para.[40-507](#).
- 2288 In England and Wales and Northern Ireland, this term is a condition: [s.11\(2\)](#).
- 2289 Defined in [s.10\(2A\), \(2B\), \(2D\)–\(2F\) of the 1973 Act](#).
- 2290 [Supply of Goods \(Implied Terms\) 1973 Act s.11](#). For the corresponding provision in the [Sale of Goods Act 1979](#), see below, para.[46-113](#).
- 2291 For contracts made on or after 1 October 2015. See [Consumer Rights Act 2015 s.13](#). See above, para.[40-503](#).
- 2292 See [Consumer Rights Act 2015 s.14](#). See above, para.[40-504](#).
- 2293 See [Yeoman Credit v Odgers Vospers Motor House \(Plymouth\) \(Third Party\) \[1962\] 1 W.L.R. 215, CA; Brewer v Mann \[2012\] EWCA Civ 246](#) (obiter, breach of [s.9\(1\)](#)); [Van Gordon v Volkswagen Financial Services \(UK\) Ltd \(t/a Audi Finance\) Unreported 30 April 2019 \(Nottingham Cty Ct\)](#) (breach of [s.9](#)).
- 2294 cf. [Sale of Goods Act 1979 s.11\(4\)](#); below, para.[46-068](#).
- 2295 [Yeoman Credit Ltd v Apps \[1962\] 2 Q.B. 508; Ditchburn Equipment Ltd v Crich \(1966\) 110 S.J. 266, CA](#). This sentence was cited with approval in [Garside v Black Horse Ltd \[2010\] EWHC 190 \(QB\) \[30\]](#).
- 2296 See below, para.[41-393](#).
- 2297 Defined as in [Pt I of the Unfair Contract Terms Act 1977](#); see below, para.[46-121](#).
- 2298 [s.11A](#). For the corresponding provision in the [Sale of Goods Act 1979](#), see below, para.[46-070](#).
- 2299 Inserted by reg.4 of the [Sale and Supply of Goods to Consumers Regulations 2002 \(SI 2002/3045\)](#).
- 2300 Inserted by reg.9 of the [Sale and Supply of Goods to Consumer Regulations 2002 \(SI 2002/3045\)](#).
- 2301 At least until the hirer exercises his option to purchase and buys the goods.
- 2302 For contracts made on or after 1 October 2015. See above, paras [40-514](#) et seq. See especially [ss.19–27](#), in part replacing those now available under [Pt 5A \(ss.48A to 48F\) of the 1979 Act](#) for buyers dealing “as consumer” (now defined in [Sale of Goods Act 1979 s.61\(1\)](#) by reference to (now repealed) [Unfair Contract Terms Act 1977 s.12](#)) when the goods do not conform to the contract of sale.
- 2303 [Karsales \(Harrow\) Ltd v Wallis \[1956\] 1 W.L.R. 936; Yeoman Credit Ltd v Apps \[1962\] 2 Q.B. 508 at 521, 524; Unity Finance Ltd v Hammond \(1965\) 109 S.J. 70](#).
- 2304 cf. [Yeoman Credit Ltd v Apps](#), above; [Charterhouse Credit Co Ltd v Tolly \[1963\] 2 Q.B. 683](#).
- 2305 Contrast [Yeoman Credit Co Ltd v Apps \[1962\] 2 Q.B. 508](#) with [Charterhouse Credit Co Ltd v Tolly \[1963\] 2 Q.B. 683](#), both considered in [Brewer v Mann \[2012\] EWCA Civ 246](#).
- 2306 [Charterhouse Credit Co Ltd v Tolly \[1963\] 2 Q.B. 683; Garside v Black Horse Ltd \[2010\] EWHC 190 \(QB\); Brewer v Mann \[2012\] EWCA Civ 246; Van Gordon v Volkswagen Financial Services \(UK\) Ltd \(t/a Audi Finance\) Unreported 30 April 2019 \(Nottingham Cty Ct\)](#) (damages for breach of [s.9](#)).

- 2307 *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683 at 711–712; *Brewer v Mann* [2012] EWCA Civ 246. See also *Brown v Sheen and Richmond Car Sales Ltd* [1950] 1 All E.R. 1102. Contrast *Doobay v Mohabeer* [1967] 2 A.C. 278.
- 2308 s.6(2). See Vol.I, para.17-097. See also *Hughes v Hall & Hall* [1981] R.T.R. 430 DC (offence to include void exclusion term by (now repealed) Consumer Transactions (Restrictions on Statements) Order 1976 (SI 1976/1813)).
- 2309 See above, para.41-016.
- 2310 Defined in s.14 of the 1977 Act.
- 2311 Defined in s.14 of the 1977 Act.
- 2312 s.12, as amended by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.14. See below, para.46-121.
- 2313 s.12(3).
- 2314 Replacing (for contracts made on or after 1 October 2015) the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) as amended; see above, paras 40-215 et seq. See also the “unfair relationship” provisions of the Consumer Credit Act 1974 (above, paras 41-213 et seq.).
- 2315 For contracts made on or after 1 October 2015.
- 2316 *Consumer Rights Act 2015* s.31. See above, para.40-453. See also *Hughes v Hall & Hall* [1981] R.T.R. 430 DC (offence to include void exclusion term by (now revoked) Consumer Transactions (Restrictions on Statements) Order 1976 (SI 1976/1813)).
- 2317 i.e. ss.61–76 (and see s.62(8)(a)), see further above, paras 40-229 et seq. See also the “unfair relationship” provisions of the Consumer Credit Act 1974 ss.140A–140C (above, paras 41-213 et seq.).
- 2318 1977 Act s.6(3) (replaced by s.6(1A), by the Consumer Rights Act 2015 s.60 and Sch.4 para.8, when in force). The burden of proving that the contract term satisfies the requirements of reasonableness is on the person claiming that it does: s.11(5) of the 1977 Act. See Vol.I, para.17-104.
- 2319 As opposed to the particular guidelines: s.11(2). See Vol.I, para.17-101; below, para.46-122.
- 2320 Unfair Contract Terms Act 1977 s.11(1). See Vol.I, para.17-099.
- 2321 *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321, 331–332 (conditional sale); *Abbey National Business Equipment Leasing Ltd v Dora Ife* [2003] 12 C.L. 70, Cty Ct.
- 2322 *Sovereign Finance Ltd v Silver Crest Furniture Ltd* [1997] C.C.L.R. 76, following *Purnell Secretarial Services v Lease Management Services* [1994] C.C.L.R. 127 (hire).
- 2323 See Vol.I, para.17-023.
- 2324 *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936; *Yeoman Credit Co Ltd v Apps* [1962] 2 Q.B. 508; *Charterhouse Credit Co Ltd v Tolly* [1963] 2 Q.B. 683; *Farnworth Finance Facilities v Attryde* [1970] 1 W.L.R. 1053; *Guarantee Trust of Jersey Ltd v Gardner* (1973) 117 S.J. 564. Contrast *Handley v Marston* (1962) 106 S.J. 327; *Astley Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584. See Vol.I, para.17-031.
- 2325 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Photo Production Ltd v Securicor Transport Ltd* [1980]

- A.C. 827; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; see Vol.I, paras 17-023—17-027.
- 2326 Replacing (for contracts made on or after 1 October 2015) the **Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)** as amended; see above, paras 40-227 et seq.
- 2327 ss.140A–140C, above, paras 41-213 et seq.
- 2328 See above, para.41-384, especially *Webster v Higgin* [1948] 2 All E.R. 127; see generally, Vol.I, para.17-065.
- 2329 That this could only operate by way of estoppel by representation: *Lowe v Lombank Ltd* [1960] 1 W.L.R. 196, see Vol.I, para.17-064.
- 2330 *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, disapproving *Lowe v Lombank Ltd* [1960] 1 W.L.R. 196. See Vol.I, para.9-154 and generally, Braithwaite, “*The Origins and Implications of Contractual Estoppel*” [2016] 132 L.Q.R. 120.

(i) - Assignment

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 3. - Hire-Purchase Agreements

(e) - Rights and Liabilities of Third Parties

(i) - Assignment

Assignment by owner

- 41-398 The owner of goods let under a hire-purchase agreement can assign two things: his interest in the agreement and his interest in the goods themselves. An assignment by the owner of his entire interest in the agreement will transfer to the assignee all the owner's rights under the agreement except those that are personal to him such as a licence to enter and seize the goods hired. Such an assignment does not have to be registered as a bill of sale²³³¹ and is governed by the normal rules regarding the assignment of choses in action.²³³²
- 41-399 Where, however, the owner assigns or purports to assign his interest in the goods themselves, the document by which the assignment is effected may be registrable as a bill of sale under the [Bills of Sale Acts 1878](#) and [1882](#). If the assignment is by way of security or if the owner retains the contractual right to possession of the goods,²³³³ the assignment is within the provisions of the Acts.²³³⁴ But an assignment that is absolute and made in pursuance of a "block discounting" agreement between the owner and a finance company is unlikely to be invalidated as an unregistered bill of sale.

Charge over rentals

41-400

Where the owner of goods charges in favour of a bank the rentals payable under hire-purchase agreements but continues to collect them as agent of the bank, he does not receive the rentals in a fiduciary capacity, being free to deal with the money as his own until required by the bank to pay them into a separate account.²³³⁵

Assignment by hirer

- 41-401 The hirer can legitimately assign only his interest in the agreement since he has no property in the goods themselves.²³³⁶ Most agreements, however, specifically prohibit such assignment.

Footnotes

- 2331 *Re Davis & Co (1888) 22 Q.B.D. 193; Re Isaacson [1895] 1 Q.B. 333.* Nor is it (if absolute) a loan; *Olds Discount Co Ltd v John Playfair Ltd [1938] 3 All E.R. 275.* But see the now repealed (and not replaced) Companies Act 1985 s.396(1)(e), (f) and relevant case-law: *Re George Inglefield Ltd [1933] Ch. 1; Illingworth v Houldsworth [1904] A.C. 355; Lloyds and Scottish Finance v Cyril Lord Carpet Sales Ltd (1979) 129 N.L.J. 366, HL.*
- 2332 See Vol.I, Ch.22.
- 2333 *Ancona v Rogers (1876) 1 Ex. D. 285, 292; Lincoln Waggon and Engine Co v Mumford (1880) 41 L.T. 655, 658.* This can only happen in the unlikely event of the owner assigning his property interest alone, while retaining a contractual right to recover possession of the goods.
- 2334 It was previously within the now repealed (but not replaced) Companies Act 1985 s.396(1)(c).
- 2335 *Royal Trust Bank v National Westminster Bank Plc [1996] 2 B.C.L.C. 699.* See also *Re Spectrum Plus Ltd [2005] UKHL 41, [2005] 2 A.C. 680.*
- 2336 But see *Belsize Motor Supply Co v Cox [1914] 1 K.B. 244; Whiteley Ltd v Hilt [1918] 2 K.B. 808; Wickham Holdings Ltd v Brooke House Motors Ltd [1967] 1 W.L.R. 295* (disapproving *United Dominions Trust (Commercial) Ltd v Parkway Motors Ltd [1955] 1 W.L.R. 719.*)

(ii) - Title of Third Parties

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 3. - Hire-Purchase Agreements

(e) - Rights and Liabilities of Third Parties

(ii) - Title of Third Parties

Nemo dat quod non habet

- 41-402 The absence of any property in the goods in the hirer means that, as a general rule, he can pass no title to a third party. Any purported conveyance of the goods, as by way of sale,²³³⁷ pledge²³³⁸ or execution of a bill of sale,²³³⁹ will not cause the property in the goods to vest in a third party, for nemo dat quod non habet.²³⁴⁰ In certain exceptional circumstances, however, statute or common law provides that a person who has no right to dispose of goods may nevertheless pass a good title to another. It is therefore necessary to examine these situations and to inquire whether they will affect the owner's title to the goods.

Buyer in possession

- 41-403 Section 25 of the Sale of Goods Act 1979²³⁴¹ provides that where a person "having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods", he may transfer a title to the goods to a third party who receives the same in good faith and without notice of the right of the original seller in respect of the goods. By virtue of this section the hirer of goods under a true hire-purchase agreement, which gives him an option to return or purchase the goods, can pass no title since, until he exercises his option to purchase, he has neither bought nor agreed to buy the goods.²³⁴²

Seller in possession

- 41-404 Section 24 of the Sale of Goods Act 1979²³⁴³ provides that where a person, “having sold goods, continues, or is, in possession of the goods”, he is similarly enabled to transfer a good title to a third party who receives the goods in good faith and without notice of the previous sale. It was at one time thought that a person who sold goods to a finance company, which then let the goods to him under a hire-purchase agreement, could pass no title to the goods even though they had never left his possession. He was considered to be in possession of the goods as bailee under the agreement, and not as seller under the contract of sale.²³⁴⁴ But in *Pacific Motor Auctions (Pty) Ltd v Motor Credits (Hire-Finance) Ltd*²³⁴⁵ the Privy Council held that the subsection applied unless there was a break in the continuity of the physical possession of the seller²³⁴⁶ and that it was not sufficient for the seller to attorn to the buyer as bailee.

Mercantile agents

- 41-405 Section 2 of the Factors Act 1889 provides that where a mercantile agent²³⁴⁷ is, with the consent of the owner, in possession of goods, any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of business as a mercantile agent shall be as valid as if he were expressly authorised by the owner of the goods to make the same.²³⁴⁸ Where goods are let to a mercantile agent under a hire-purchase agreement, this section will not normally apply, for he is in possession of the goods as hirer and not as mercantile agent.²³⁴⁹ But the position is otherwise if the hire-purchase agreement is part of a “stocking transaction” under which the mercantile agent keeps the goods for display and sale with the implied authority of the owner to dispose of the goods to his customers.²³⁵⁰

Dispositions of motor vehicles

- 41-406 Part III (ss.27 to 29) of the Hire-Purchase Act 1964²³⁵¹ enables a hirer or a conditional buyer of a motor vehicle (referred to as “the debtor”) to pass a good title in certain circumstances to a third party.²³⁵² It applies to all hire-purchase agreements,²³⁵³ even if the debtor is a body corporate.²³⁵⁴ Part III prima facie applies “where a motor-vehicle²³⁵⁵ has been let under a hire-purchase agreement, and, at a time before the property in the vehicle has become vested in the debtor²³⁵⁶ he disposes²³⁵⁷ of the vehicle to another person”.²³⁵⁸ The debtor continues as such whether the agreement has before that time been terminated²³⁵⁹ or not. This covers the situation

where the terms of the agreement provide that, if the debtor disposes of, or attempts to dispose of, the vehicle, the agreement is ipso facto determined. Such a device cannot defeat the operation of the Act.

Trade or finance purchasers

41-407 The Act draws a distinction between a “trade or finance purchaser” (who does not acquire a good title) and a “private purchaser” (who acquires a good title if bona fide). A “trade or finance purchaser” is a purchaser²³⁶⁰ who, at the time of the disposition made to him, carries on a business which consists, wholly or partly:

- (a)of purchasing motor vehicles for the purpose of offering or exposing them for sale; or
- (b)of providing finance by purchasing motor vehicles for the purpose of bailing or (in Scotland) hiring them under hire-purchase agreements or agreeing to sell them under conditional sale agreements.

A *private purchaser* means a purchaser who, at the time of the disposition made to him, does not carry on any such business.²³⁶¹ Obvious examples of trade or finance purchasers are motor dealers and finance companies but the definition has been held to cover any financier that uses motor vehicles as security.²³⁶² No title passes to trade or finance purchasers,²³⁶³ and they can only take advantage indirectly of the Act’s provisions, i.e. where they derive title from a bona fide private purchaser.²³⁶⁴

Situations covered

41-408 The circumstances in which a third party will acquire a good title to the goods are three in number:

First disposition to private purchaser

41-409 First, where the disposition is to a private purchaser, and he is a purchaser of the motor vehicle in good faith and without notice of the hire-purchase agreement, the disposition has effect as if the title of the owner to the vehicle (the “creditor”) had been vested in the debtor immediately before the disposition.²³⁶⁵ Thus if a motor vehicle is let under a hire-purchase agreement to A, who wrongfully disposes of it to B, a bona fide private purchaser, B will acquire a good title to the vehicle.

Subsequent disposition to private purchaser

- 41-410 Secondly, if the first disposition of the vehicle is to a trade or finance purchaser (known as the original purchaser), then if the person who is the first private purchaser of the vehicle after that disposition is a purchaser in good faith and without notice of the hire-purchase agreement, the disposition to that private purchaser has effect as if the title of the creditor to the vehicle had been vested in the debtor immediately before he disposed of it to the original purchaser.²³⁶⁶ Thus if a motor vehicle is let under a hire-purchase agreement to A, who wrongfully disposes of it to B, a trade or finance purchaser, who then disposes of it to C, a bona fide private purchaser, C will acquire a good title to the vehicle. Even if the vehicle has passed through the hands of a number of trade or finance purchasers, the first bona fide private purchaser is protected. But if the first private purchaser is mala fide,²³⁶⁷ this provision does not apply so as to protect subsequent private purchasers in good faith.

Subsequent disposition to private purchaser under hire-purchase agreement

- 41-411 Thirdly, if, in the second instance mentioned above, the disposition whereby the first private purchaser becomes a purchaser of the vehicle in good faith and without notice of the hire-purchase agreement is itself a letting under a hire-purchase agreement, and the person who is the creditor in relation to that agreement disposes of the vehicle to the first private purchaser, or a person claiming under him, by way of transferring to him the property in the vehicle in pursuance of a provision in the agreement in that behalf, the first private purchaser can acquire a good title to the vehicle by reason of this transfer of property, whether he is then bona fide or not.²³⁶⁸ Suppose, therefore, that a motor vehicle is let under a hire-purchase agreement to A. A sells the vehicle to a finance company, which then lets it under a hire-purchase agreement to B. Provided that B was, at the time of the letting, a bona fide private purchaser, the letting under the hire-purchase agreement is a valid letting; and if, in pursuance of this agreement, the finance company transfers the property in the vehicle to B, he acquires a good title even though at the time the property is transferred he had been informed of the original hire-purchase agreement and so had notice thereof.

Good faith and notice

- 41-412 The expression “in good faith” is not defined in the [1964 Act](#), but generally a purchaser is deemed to be in good faith when he acts honestly, whether he acts negligently or not.²³⁶⁹ The Act provides

that he is to be taken to be a purchaser without notice of a hire-purchase agreement if, at the time of the disposition made to him, he has no actual notice that the vehicle is or was the subject of any such agreement.²³⁷⁰ Constructive notice is therefore insufficient.

Presumptions

- 41-413 Once it is proved in any proceedings (whether criminal or civil) relating to a motor vehicle (i) that the vehicle was let under a hire-purchase agreement; and (ii) that a person (whether a party to the proceedings or not) became a private purchaser of the vehicle in good faith and without notice of the hire-purchase agreement; certain *rebuttable* presumptions arise in favour of a litigant who seeks to rely on the protection conferred by [Pt III of the 1964 Act](#).²³⁷¹ A litigant might otherwise find it difficult to prove the precise chain of dealings between himself and the debtor, or the state of mind of the parties to these transactions. The presumptions enable him to surmount these difficulties and to connect the links in the chain; but they do not apply where all the transactions are fully known.²³⁷²

Extent of protection

- 41-414 It is important to realise that the only persons who can claim the protection of [Pt III of the 1964 Act](#) are the first bona fide private purchaser and those who claim under such a purchaser. An intermediate trade or finance purchaser is not protected, and will be liable for wrongful interference to the true owner of the vehicle.²³⁷³ If the first private purchaser is mala fide, neither he nor any person claiming under him will be protected.²³⁷⁴ And the liability of the debtor, both civil and criminal, remains.²³⁷⁵
- 41-415 The third party does not obtain a guaranteed title, but only such title as, immediately before the disposition by the debtor, was vested in the person who was then the creditor in relation to the hire-purchase agreement.²³⁷⁶ But the provisions of the Act operate without prejudice to the provisions of the [Factors Acts](#) or of any other enactment enabling the apparent owner of the goods to dispose of them as if he were the true owner.²³⁷⁷
- 41-416 [Part III of the 1964 Act](#) leaves few loopholes of which the creditor could take advantage, except, possibly, if the hire-purchase agreement was completely void, e.g. for mistake as to the person.²³⁷⁸ It is submitted that a bona fide private purchaser would not fail to acquire a good title merely because the agreement was voidable for fraud (even if subsequently avoided),²³⁷⁹ or “void” for

illegality,²³⁸⁰ or unenforceable against the hirer by reason of the fact that it failed to satisfy the formal and other requirements laid down by the *Consumer Credit Act 1974*.²³⁸¹

Sale in market overt

- 41-417 Section 22(1) of the *Sale of Goods Act 1979*, which provided for the acquisition by the buyer of a good title to goods sold in market overt, has been repealed.²³⁸²

Estoppel against owner

- 41-418 The owner of goods comprised in a hire-purchase agreement will not be estopped from asserting his title to the goods by the mere fact that he has delivered possession of the goods to the hirer.²³⁸³ And in the case of a motor car let on hire-purchase, the delivery of the registration document to the hirer will raise no estoppel.²³⁸⁴ Failure by a finance company to notify a central agency²³⁸⁵ that keeps a record of hire-purchase transactions will not ordinarily give rise to an estoppel.²³⁸⁶ However, if a finance company alters such an entry so as to represent that the agreement has been settled and that it no longer has title to the goods, this creates an estoppel precluding it from asserting its title in a claim for conversion.²³⁸⁷

Estoppel against hirer

- 41-419 If a person who owns goods enters into an arrangement with a dealer to deceive a finance company, and signs and delivers to the dealer hire-purchase forms which either represent that the goods are the property of the dealer or that the dealer has the owner's authority to sell the goods to the company, the company will acquire a good title to the goods by estoppel.²³⁸⁸ This title will prevail, not only against the owner of the goods, but also against his privies and assigns.²³⁸⁹ Further, he will be precluded from denying the validity of the consequent hire-purchase agreement. However, even if the "hirer" is not privy to the representation of title made by the dealer, but merely provides the means for the dealer's fraud (as by signing the hire-purchase agreements in blank without examining them), he may still be bound, unless he can rely on a plea of non est factum.²³⁹⁰

Recovery from third parties

- 41-420 If the goods come into the hands of a third party from whom the owner wishes to recover them, he must rely upon his rights of action in tort. Although an owner is entitled to retake his goods peaceably from a third party without title who refuses to deliver them up to him,²³⁹¹ any licence to enter premises contained in the agreement will not extend to this situation.²³⁹² In practice, however, an owner will normally sue the third party for wrongful interference with the goods.²³⁹³ In the action, he must probably prove his right to immediate possession of the goods.²³⁹⁴ The measure of damages is normally the value of the goods converted²³⁹⁵; but where the unpaid balance of the hire-purchase price is less than the value of the goods, the measure of damages is limited to the loss which the owner has suffered.²³⁹⁶

Rights of third party

- 41-421 Unless the disposition of the goods by the hirer to the third party constitutes an assignment to the third party of the hirer's rights under the contract,²³⁹⁷ the third party cannot claim to exercise the hirer's option to purchase. His only remedy lies against the person from whom he himself obtained the goods. In the case of a sale of goods, the third party may recover the whole purchase price as money paid upon a consideration which has totally failed.²³⁹⁸ Yet a sale by the hirer to a third party is not void, but at most voidable for fraud, so that if the "price" paid by the third party consists wholly or in part of chattels, the third party cannot recover the chattels from a person who buys them from the hirer in good faith and for value.²³⁹⁹

Feeding title

- 41-422 Where the hirer, having parted with the goods, pays to the owner the balance of the instalments and exercises his option to purchase, the title so acquired may go to feed the previously defective titles of subsequent buyers and enure to their benefit.²⁴⁰⁰ Except in the case of claims that are made before the option to purchase is exercised, there will be no total failure of consideration, nor even a breach of condition, but merely a breach of warranty.²⁴⁰¹

Footnotes

- 2337 *Modern Light Cars Ltd v Seals* [1934] 1 K.B. 32; *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* [1934] 2 K.B. 305; *North General Wagon and Finance Co Ltd v Graham* [1950] 2 K.B. 7; *United Dominions Trust (Commercial) Ltd v Parkway Motors Ltd* [1955] 1 W.L.R. 719.
- 2338 *Helby v Matthews* [1895] A.C. 471; *Belsize Motor Supply Co v Cox* [1914] 1 K.B. 244.
- 2339 *Lewis v Thomas* [1919] 1 K.B. 319.
- 2340 Sale of Goods Act 1979 s.21(1); below, para.46-193.
- 2341 Re-enacting s.9 of the Factors Act 1889 and replacing s.25(2) of the Sale of Goods Act 1893. See below, para.46-220.
- 2342 *Payne v Wilson* [1895] 2 Q.B. 537; *Helby v Matthews* [1895] A.C. 471; *Belsize Motor Supply Co v Cox* [1914] 1 K.B. 244; *Modern Light Cars Ltd v Seals* [1934] 1 K.B. 32; *United Dominions Trust (Commercial) Ltd v Parkway Motors Ltd* [1955] 1 W.L.R. 719; *Close Asset Finance Ltd v Care Graphics Machinery Ltd* [2000] C.C.L.R. 43. But see *Forthright Finance Ltd v Carlyle Finance Ltd* [1997] 4 All E.R. 90.
- 2343 Re-enacting s.8 of the Factors Act 1889 and replacing s.25(1) of the Sale of Goods Act 1893. See below, para.46-214.
- 2344 *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* [1934] 2 K.B. 305; *Eastern Distributors Ltd v Goldring* [1957] 2 Q.B. 600; *Halfway Garage (Nottingham) v Lepley* The Guardian, 8 February 1964. Contrast *Union Transport Finance Ltd v Ballardie* [1937] 1 K.B. 510 (transaction a complete sham).
- 2345 [1965] A.C. 867, followed in *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1972] 1 Q.B. 210, CA.
- 2346 *Mitchell v Jones* (1905) 24 N.Z.L.R. 932; *Olds Discount Co Ltd v Krett* [1940] 2 K.B. 117.
- 2347 Defined in s.1 of the Act.
- 2348 See Vol.I, paras 21-088—21-090; below, para.46-204.
- 2349 *Staffs Motor Guarantee Ltd v British Wagon Co Ltd* [1934] 2 K.B. 305 at 313; *Astley Industrial Trust v Miller* [1968] 2 All E.R. 36; *Belvoir Finance Co Ltd v Harold G Cole & Co Ltd* [1969] 1 W.L.R. 1877.
- 2350 *St Margaret's Trust v Castle* [1964] C.L.Y. 1685; *Pacific Motor Auctions (Pty) Ltd v Motor Credits (Hire-Finance) Ltd*, above. cf. *Belvoir Finance Co Ltd v Harold G. Cole & Co Ltd* [1969] 1 W.L.R. 1877.
- 2351 As amended (from 19 May 1985: see SI 1983/1551 (c.44)) by s.192 of and Sch.4 para.22 to the Consumer Credit Act 1974. And note the amendment of s.27(5) (as so re-enacted) by the Sale of Goods Act 1979 s.63 and Sch.2. See *Davies* [1995] J.B.L. 36.
- 2352 See below, paras 41-408 et seq.
- 2353 Even if they fall outside the Consumer Credit Act 1974: see above, para.41-016.
- 2354 *Ford Motor Credit Co v Harmack* [1972] C.L.Y. 1649.

- 2355 Defined in s.29(1) as “a mechanically propelled vehicle”, hence it is questionable whether low emission vehicles such as electric cars are covered.
- 2356 Defined in s.29(4) and including the “statutory bailee” following the making of a time order under the *Consumer Credit Act 1974* s.130(4). See also *Ford Motor Credit Co v Harmack [1972] C.L.Y. 1649* (company hirer); *Keeble v Combined Lease Finance Plc [1996] C.C.L.R. 63, CA* (partners); *Majid v TMV Finance [1999] C.L.Y. 2448, Cty Ct* (agent).
- 2357 “Disposition” is defined in s.29(1) to mean “sale” or “hire-purchase”. In *VFS Financial Services Ltd v JF Plant Tyres Ltd [2013] EWHC 346 (QB), [2013] 1 Lloyd's Rep. 462* “sale” was given its normal meaning and hence did not cover a transfer in settlement of debts (as opposed to a transfer for money). See also *Dodds v Yorkshire Bank Finance [1992] C.C.L.R. 92, CA, Kulkarni v Manor Credit (Davenham) Ltd [2010] EWCA Civ 69*.
- 2358 s.27(1). “Person” includes a body corporate: *Interpretation Act 1978* s.5 and Sch.1.
- 2359 s.29(2). See *Chartered Trust Plc v Conlay [1998] C.L.Y. 2516, Cty Ct* (termination held to include rescission for fraud).
- 2360 See s.29(3).
- 2361 s.29(2). A trade purchaser who purchases a vehicle for his own use does not thereby become a private purchaser: *Stevenson v Beverley Bentinck Ltd [1976] 1 W.L.R. 483*. But in *GE Capital Bank Ltd v Rushton [2005] EWCA 1556, [2006] 1 W.L.R. 899* at [39] Moore-Bick LJ stated that s.29(2) “is intended to direct attention not merely to the business of the purchaser immediately prior to and at the time of the disposition but also the purpose for which the vehicle is bought”.
- 2362 On the basis that such secured creditors fall within both s.29(2)(a) (in that a secured creditor sells the security on default) and s.29(2)(b) (sed quaere): *Welcome Financial Services Ltd v Nine Regions Ltd (t/a Log Book Loans) [2010] 2 Lloyd's Rep. 426* (loans secured against the borrower’s vehicle by means of a bill of sale).
- 2363 They are likely to consult one or more of the databases (HPI, Autocheck) that list outstanding hire-purchase and conditional sale agreements. See, Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* (2018), paras 9.26 et seq.
- 2364 cf. *Soneco Ltd v Barcross Finance Ltd [1978] R.T.R. 444*.
- 2365 s.27(2).
- 2366 s.27(3).
- 2367 For a presumption of good faith, see s.28(4).
- 2368 s.27(4).
- 2369 *Dodds v Yorkshire Bank Finance [1992] C.C.L.R. 92, CA; GE Capital Bank Ltd v Rushton [2005] EWCA 1556, [2006] 1 W.L.R. 899*; Bills of Exchange Act 1882 s.90; Sale of Goods Act 1979 s.61(3). cf. *Mercantile Credit Co Ltd v Waugh (1978) 32 Hire Trading 16*.
- 2370 Hire-Purchase Act 1964 s.29(3). See *Barker v Bell [1971] 1 W.L.R. 983*.
- 2371 s.28. See also s.28(5) (admission of facts) and *Ford Motor Credit Co v Harmack [1972] C.L.Y. 1649*.

- 2372 *Soneco Ltd v Barcross Finance Ltd [1978] R.T.R. 444.*
2373 s.27(6).
2374 *Soneco Ltd v Barcross Finance Ltd*, above.
2375 *Soneco Ltd v Barcross Finance Ltd*, above; *Barber v NWS Bank Plc [1996] 1 W.L.R. 641*; cf. *Freeman v Walker [2001] EWCA 923, [2003] C.C.L.R. 4*.
2376 s.29(5).
2377 s.27(5)(b) as amended by the *Sale of Goods Act 1979 s.63* and *Sch.2*.
2378 See Vol.I, paras 5-036 et seq.; *Moorgate Mercantile Co Ltd v Bowman (1974) 28 Hire Trading (No.2)*, at 25, Cty Ct. *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2003] 3 W.L.R. 586*.
2379 See Vol.I, Ch.9; *Chartered Trust Plc v Conlay [1998] C.L.Y. 2516, Cty Ct*; *Chartered Trust Plc v Bamford [1999] C.L.Y. 2512, Cty Ct*. Contrast *Morley v Maybray Motors Ltd (1971) 25 Hire Trading (No.3) 15, Cty Ct*; *Cawston v Chartered Trust Plc [2002] C.L.Y. 2602, Cty Ct*.
2380 See Vol.I, Ch.19. But see *Morley v Maybray Motors Ltd*, above.
2381 See above, paras 41-078—41-095. See *R. v Modupe [1991] Crim. L.R. 531*; *Hitchens v General Guarantee Corp Ltd [2001] EWCA Civ 359*.
2382 Sale of Goods (Amendment) Act 1994 (as from 3 January 1995); see below, para.46-207.
2383 *Heap v Motorists Advisory Agency Ltd [1923] 1 K.B. 577*; *Central Newbury Car Auctions Ltd v Unity Finance Ltd [1957] 1 Q.B. 371, 388*; *Astley Industrial Trust v Miller [1968] 2 All E.R. 36*; see below, para.46-197.
2384 *Central Newbury Car Auctions Ltd v Unity Finance Ltd [1957] 1 Q.B. 371, 388*.
2385 Such as HPI Ltd or Autocheck; see above, para.41-407.
2386 *Moorgate Mercantile Co Ltd v Twitchings [1977] A.C. 890*; *United Dominions Trust (Commercial) Ltd v Cartwright [1961] C.L.Y. 3925, CA*. See also *Cadogan Finance Ltd v Lavery and Fox [1982] Com. L.R. 248* (aircraft).
2387 *Chatfields-Martin Walter Ltd v Lombard North Central Plc [2014] EWHC 1222 (QB)* (*Moorgate Mercantile Co Ltd v Twitchings* distinguished).
2388 *Eastern Distributors Ltd v Goldring [1957] 2 Q.B. 600*; *Spencer v North Country Finance Co Ltd [1963] C.L.Y. 212*; *Stoneleigh Finance Ltd v Phillips [1965] 2 Q.B. 537*; *Kingsley v Sterling Industrial Securities Ltd [1967] 2 Q.B. 747*; *Snook v London and West Riding Investments Ltd [1967] 2 Q.B. 786*. See below, para.46-199.
2389 *Eastern Distributors Ltd v Goldring [1957] 2 Q.B. 600*.
2390 *United Dominions Trust Ltd v Western [1976] Q.B. 513*. cf. *Mercantile Credit Co Ltd v Hamblin [1965] 2 Q.B. 242*. See also *Saunders v Anglia Building Society [1971] A.C. 1004* (Vol.I, paras 5-049 et seq.).
2391 cf. *Greenwood v Bennett [1973] 1 Q.B. 195*; and *Thomas v Robinson [1977] 1 N.Z.L.R. 385* (improvements).
2392 See above, para.41-344. See also *Miller v Strohmenger (1887) 4 T.L.R. 133*; *British Economical Lamp Co Ltd v Empire (Mile End) Ltd (1913) 29 T.L.R. 386*.
2393 Torts (Interference with Goods) Act 1977 ss.1, 3. See *CPR Pt 16 PD 16 6.1*.

- 2394 *Belsize Motor Supply Co v Cox [1914] 1 K.B. 244*; and see above, para.41-337. cf.
North West Securities v Alexander Breckon [1981] R.T.R. 518.
- 2395 See *Chubb Cash Ltd v John Crilley & Son [1983] 1 W.L.R. 599*. In addition the
owner may recover consequential loss: see *Strand Electric and Engineering Co Ltd
v Brisford Entertainments Ltd [1952] 2 Q.B. 246*; *Hillesden Securities Ltd v Ryjack
[1983] 1 W.L.R. 959* (hire charges). But see the Torts (Interference with Goods) Act
s.6 (improvements).
- 2396 *Belsize Motor Supply Co v Cox [1914] 1 K.B. 244*; *Whiteley Ltd v Hilt [1918] 2 K.B.
808*; *Wickham Holdings Ltd v Brooke House Motors Ltd [1967] 1 W.L.R. 295*; *Belvoir
Finance Co Ltd v Stapleton [1971] 1 Q.B. 210*. cf. *Astley Industrial Trust v Miller
[1968] 2 All E.R. 36* (detinue). See also Torts (Interference with Goods) Act s.3(6).
- 2397 See above, para.41-401.
- 2398 *Butterworth v Kingsway Motors [1954] 1 W.L.R. 1286*. See also *Rowland v Divall
[1923] 2 K.B. 500*; *Bowmaker (Commercial) Ltd v Day [1965] 1 W.L.R. 1396*; below,
para.46-081.
- 2399 *Robin and Rambler Coaches Ltd v Turner [1947] 2 All E.R. 284*.
- 2400 *Butterworth v Kingsway Motors [1954] 1 W.L.R. 1286*. See also *Blundell-Leigh v
Attenborough [1921] 3 K.B. 235*. Contrast *Karflex Ltd v Poole [1933] 2 K.B. 251*;
Mercantile Union Guarantee Corp Ltd v Wheatley [1938] 1 K.B. 490; *West (HW) Ltd
v McBlain [1950] N.I. 144*.
- 2401 *Butterworth v Kingsway Motors [1954] 1 W.L.R. 1286*.

(iii) - Fixtures and Accession

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 3. - Hire-Purchase Agreements

(e) - Rights and Liabilities of Third Parties

(iii) - Fixtures and Accession

Fixtures to land 2402

- 41-423 The owner of goods let on hire-purchase may lose the property in the goods by reason of the fact that they have been so attached to land as to become a fixture.²⁴⁰³ The mere fact that the goods attached are let under a hire-purchase agreement does not in itself prevent them from becoming fixtures, nor does an express prohibition in the hire-purchase agreement against attaching the goods to land.²⁴⁰⁴ The owner may nevertheless, as against the hirer, validly reserve the right to enter and seize the goods affixed.²⁴⁰⁵ Such a right of entry and seizure creates an equitable interest in land.²⁴⁰⁶ This interest is important because it may bind third parties such as a mortgagee of the hirer. The respective rights of a mortgagee of the hirer and the owner of the goods will depend on whether the mortgage was created before or after the goods were affixed to the mortgaged land and whether the mortgage is legal or equitable. *Prima facie* the mortgagee, if he has registered his mortgage, is entitled to the goods as fixtures. But, where the mortgage is a legal mortgage and was created before the goods were affixed, the owner of the goods will have priority if the goods let on hire are trade fixtures, since by leaving the mortgagor (the hirer) in possession a legal²⁴⁰⁷ mortgagee impliedly authorises²⁴⁰⁸ him to hire and bring and fix goods necessary for his business and to agree with their owner that he shall have the right to remove them at the end of the term for which they were hired.²⁴⁰⁹ Where the mortgage is created after the goods are affixed, then the owner of the goods will have priority only if (i) the mortgage is equitable²⁴¹⁰; or (ii) the mortgage is a legal mortgage of unregistered land²⁴¹¹; and the mortgagee took the mortgage with actual notice that the fixtures were the subject of a hire-purchase agreement.²⁴¹²

- 41-424 As against a landlord of the hirer, it would seem that the owner of goods let to a tenant and which have become tenant's fixtures may enter the premises and remove them if and so long as the hirer would himself as tenant be entitled to sever the fixtures and remove them. ²⁴¹³

Accession

- 41-425 Goods let on hire-purchase which are attached to, or combined with, goods which are the property of another person may be affected by the common law principles of accession and confusion of chattels. ²⁴¹⁴ If livestock let on hire-purchase produce young, in the absence of any contrary agreement, the young belong to the hirer and not to the owner of the dams. ²⁴¹⁵

Footnotes

- 2402 See generally: Goode, *Hire-Purchase Law and Practice*, 2nd edn, Ch.32; Guest, *The Law of Hire-Purchase* (1966) Ch.18; *Guest and Lever* (1963) 27 Conv. N.S. 30; *Giddings* (1993) *Butterworths Journal of International Banking and Financial Law* (June) 263; *Bennett and Davis* (1994) 110 L.Q.R. 448.
- 2403 *Melluish v BMI (No.3) Ltd* [1996] A.C. 454.
- 2404 *Hobson v Gorringe* [1897] 1 Ch. 182, 193, 195; *Reynolds v Ashby & Son Ltd* [1903] 1 K.B. 87, 97; affirmed [1904] A.C. 466. See also *Gough v Wood & Co* [1894] 1 Q.B. 713; *Crossley Bros Ltd v Lee* [1908] 1 K.B. 86; *Ellis v Glover & Hobson Ltd* [1908] 1 K.B. 388, 398; *Vaudeville Electric Cinema Ltd v Muriset* [1923] 2 Ch. 74, 87. Contrast *Lyon & Co v London City and Midland Bank* [1903] 2 K.B. 135 (hire).
- 2405 But such a right is excluded in the case of CCA 1974-regulated agreements by CCA 1974 ss.92, 173(1), above, para.41-370.
- 2406 *Gough v Wood & Co* [1894] 1 Q.B. 713 at 722; *Hobson v Gorringe* [1897] 1 Ch. 182 at 192; *Reynolds v Ashby & Son Ltd* [1903] 1 K.B. 87 at 101; *Re Samuel Allen & Sons Ltd* [1907] 1 Ch. 575; *Re Morrison, Jones & Taylor Ltd* [1914] 1 Ch. 50; *Harmer v London City and Midland Bank Ltd* (1918) 87 L.J. K.B. 973. The interest is not registrable: *Poster v Slough Estates Ltd* [1969] 1 Ch. 495; *Shiloh Spinners Ltd v Harding* [1973] A.C. 691.
- 2407 But not an equitable mortgagee, since the mortgagor then remains in possession as of right.
- 2408 But the implied authority will be negated where the mortgage expressly prohibits the removal of fixtures; *Ellis v Glover & Hobson Ltd* [1908] 1 K.B. 388.
- 2409 *Gough v Wood & Co* [1894] 1 Q.B. 713 at 720; *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch. 273. See also *Ellis v Glover & Hobson Ltd* [1897] 1 Ch.

- 182 at 396. But the right to enter, sever and remove the fixture ends when the mortgagee takes possession of the mortgaged land: *Hobson v Gorringe [1897] 1 Ch. 182* at 189; *Reynolds v Ashby & Son Ltd [1903] 1 K.B. 87*.
- 2410 See *Meux v Jacobs (1873) L.R. 7 H.L. 481* (bill of sale).
- 2411 Because the right to enter and remove fixtures is not registrable, a mortgagee of registered land will not be bound by it even with express notice.
- 2412 *Gough v Wood & Co [1894] 1 Q.B. 713* at 717, 722; *Hobson v Gorringe [1897] 1 Ch. 182* at 192; *Reynolds v Ashby & Son Ltd [1903] 1 K.B. 87* at 101; *Re Samuel Allen & Sons Ltd [1907] 1 Ch. 575* at 581; *Re Morrison, Jones & Taylor Ltd [1914] 1 Ch. 50* at 59.
- 2413 *Crossley Bros Ltd v Lee [1908] 1 K.B. 86*; *Becker v Riebold (1913) 30 T.L.R. 142*. See Goode, Hire-Purchase Law and Practice, 2nd edn (1975) at p.736; Guest, The Law of Hire-Purchase (1966) at p.960. See also the **Agricultural Holdings Act 1986 s.10**: tenant's right to remove fixtures.
- 2414 *Guest (1964) 27 M.L.R. 505*; *Matthews [1981] C.L.J. 340*; *Matthews [1981] C.L.P 159*. See *Thomas v Robinson [1977] 1 N.Z.L.R. 385*.
- 2415 *Tucker v Farm and General Investment Trust Ltd [1966] 2 Q.B. 421*.

(iv) - Liens

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 3. - Hire-Purchase Agreements

(e) - Rights and Liabilities of Third Parties

(iv) - Liens

Liens

⁴¹⁻⁴²⁶ Certain classes of persons, such as innkeepers,²⁴¹⁶ artificers²⁴¹⁷ and common carriers²⁴¹⁸ are entitled to a lien on goods owned by one person until a debt owed to them by another person has been paid.²⁴¹⁹ The hirer of goods let under a hire-purchase agreement may allow the goods to pass into the possession of such persons with the result that the owner of the goods, when he seeks to retake them, may be met by the claim of a lien. Cases concerning hire-purchase agreements have mainly been decided in relation to the lien of artificers for repairs executed to the goods comprised in the agreement.

Authority to create lien

⁴¹⁻⁴²⁷ A hirer can create a lien binding on the owner of the goods if he has actual or ostensible authority to do so.²⁴²⁰ He will have actual authority to create a lien if:

- (i)the owner specifically authorised him to give possession of the goods to an artificer for repair; or
- (ii)the terms of the agreement are such that the owner must have envisaged the possibility of the creation of a lien, for example, by requiring the hirer to keep the goods in repair; or
- (iii)it is reasonably incidental to the ordinary use of the goods that the hirer should give possession of them to an artificer for the purpose of repair.²⁴²¹

But even if the actual authority of the hirer to create a lien is excluded by an express term of the agreement, he may still have ostensible authority to do so.²⁴²² In order, however, to create an artificer's lien, the hirer must be in lawful possession of the goods, so that, if the hiring has come to an end, no lien can arise which is binding on the owner.²⁴²³

Determination of lien

- 41-428 The existence of the lien is dependent on the repairer continuing in possession of the goods²⁴²⁴; but a temporary loss of possession, as where the hirer takes the goods out each day to use them, does not determine the lien.²⁴²⁵

Power of sale

- 41-429 At common law, an artificer is not entitled to sell the goods over which he exercises a lien.²⁴²⁶ But under the **Torts (Interference with Goods) Act 1977**, a bailee of uncollected goods is empowered to sell the goods upon compliance with certain conditions.²⁴²⁷ Except where it is authorised by the court,²⁴²⁸ the sale does not deprive the owner of his property in the goods. But the bailee is placed under a duty to return to the hirer, rather than to the owner, the amount by which the gross proceeds of sale exceed his charges in relation to the goods.²⁴²⁹

Footnotes

- 2416 An innkeeper has a lien over all goods brought by a guest to his inn even though the goods are the property of a third party: *Threlfall v Borwick* (1875) *L.R. 10 Q.B.* 210; *Robins & Co v Gray* [1895] 2 *Q.B.* 501; *Chesham Automobile Supply Ltd v Beresford Hotel (Birchington) Ltd* (1913) 29 *T.L.R.* 584. See also **Hotel Proprietors Act 1956** (extent of lien); **Innkeepers Act 1878 s.1** (power of sale). See above, paras 35-101 et seq.
- 2417 See below, paras 41-426—41-428.
- 2418 *Exeter Carriers' Case*, cited in *Yorke v Grenaugh* (1702) 2 *Ld. Raym.* 866, 867; see above, para.38-052. cf. *Singer Manufacturing Co v L & SW Ry* [1894] 1 *Q.B.* 833, where the railway probably held the goods as warehousemen, and not as carriers.
- 2419 See Halsbury's Laws of England, 4th edn, Vol.28, Title "Lien". See also Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* (2018), Ch.5B (possessory liens).

- 2420 *Tappenden v Artus* [1964] 2 Q.B. 185. Contrast *Hiscox v Greenwood* (1802) 4
Especially 174; *Buxton v Baughan* (1834) 6 Car. & P. 674; *Pennington v Reliance Motor
Works* [1923] 1 K.B. 127 (no authority).
- 2421 *Keene v Thomas* [1905] 1 K.B. 136; *Green v All Motors Ltd* [1917] 1 K.B. 625;
Albemarle Supply Co Ltd v Hind & Co [1928] 1 K.B. 307; *Tappenden v Artus* [1964]
2 Q.B. 185.
- 2422 *Albemarle Supply Co Ltd v Hind & Co* [1928] 1 K.B. 307, where the artificer had
knowledge of the hire-purchase agreement, but not of its terms.
- 2423 *Bowmaker Ltd v Wycombe Motors Ltd* [1946] K.B. 505. Contrast *Keene v Thomas*
[1905] 1 K.B. 136; *Green v All Motors Ltd* [1917] 1 K.B. 625 (mere breach of
agreement).
- 2424 *Pennington v Reliance Motor Works* [1923] 1 K.B. 127.
- 2425 *Albemarle Supply Co Ltd v Hind & Co* [1928] 1 K.B. 307.
- 2426 *Thames Iron Works Co v Patent Derrick Co* (1860) 1 J. & H. 93. But see CPR Pt 25.
- 2427 s.12. See above, paras 35-095—35-099.
- 2428 s.13(2).
- 2429 s.12(5).

(v) - Execution

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 3. - Hire-Purchase Agreements

(e) - Rights and Liabilities of Third Parties

(v) - Execution

Execution

- 41-430 Goods which are in the possession of a hirer under a hire-purchase agreement may be seized in execution against him, and his interest therein sold; but the general property in the goods cannot be disposed of by the person charged with the enforcement of a writ or warrant of execution.²⁴³⁰ If the hirer has no interest in the goods, or if his interest determines before or upon seizure in execution, the seizure will be unlawful.²⁴³¹ Nevertheless, a certain measure of protection is afforded to sheriffs and other officers by the *Courts Act 2003*.²⁴³² Where such protection exists, the remedy of the owner is to bring an action against the execution creditor to recover the proceeds of sale.²⁴³³ A purchaser who buys the goods obtains a good title to them unless it is proved that he had notice, or might by making reasonable enquiry have ascertained, that the goods were not the property of the execution debtor.²⁴³⁴

Distress

- 41-431 A landlord's power at common law to distrain upon all goods found upon the demised premises has now been abolished.²⁴³⁵ Historically, the position in relation to hire-purchase was complex. Essentially, in order to bring himself within the general protection from distress provided for goods of third parties²⁴³⁶ the owner had to both (a) provide for the termination of the agreement, either automatically²⁴³⁷ or by notice to the hirer,²⁴³⁸ before or upon the levying of distress by

the landlord²⁴³⁹ and (b) effectively notify the hirer, before the landlord levied distress, of the withdrawal of his consent to the hirer's being in possession of the goods.²⁴⁴⁰

Footnotes

- 2430 *Dean v Whittaker* (1824) 1 Car. & P. 347.
- 2431 *Jelks v Hayward* [1905] 2 K.B. 460. But see *Consumer Credit Act 1974* s.98, above, para.41-174.
- 2432 Sch.7 para.11 (previously the Senior Courts Act 1981 s.138B(1), inserted by s.1(2) of and Sch.2 to the Statute Law (Repeals) Act 1989).
- 2433 *Jones Brothers (Holloway) Ltd v Woodhouse* [1923] 2 K.B. 117.
- 2434 *Courts Act 2003* Sch.7 para.11(2) (previously Senior Courts Act 1981 s.138B(1), inserted by s.1(2) and Sch.2 of the Statute Law (Repeals) Act 1989). On similar statutory provisions, see *Curtis v Maloney* [1951] 1 K.B. 736; *Singh v Kenyan Insurance* [1954] A.C. 287.
- 2435 By the *Tribunals Courts and Enforcement Act 2007* s.71 (from 6 April 2014).
- 2436 Provided by the (now repealed) *Law of Distress Amendment Act 1908* s.4.
- 2437 *Times Furnishing Co Ltd v Hutchings* [1938] 1 K.B. 775. But see *Consumer Credit Act 1974* s.98, above, para.41-174.
- 2438 *Smart Bros Ltd v Holt* [1929] 2 K.B. 303. See also *Consumer Credit Act 1974* s.98, above, para.41-174.
- 2439 Because “goods bailed under a hire-purchase agreement” where the relevant agreement had not been terminated were excluded from protection by the (now repealed) *Law of Distress Amendment Act 1908* s.4A. Hence the owner’s rights could be overridden by the landlord: see *Hackney Furnishing Co v Watts* [1912] 3 K.B. 225; *Jay’s Furnishing Co v Brand & Co* [1915] 1 K.B. 458 (decided on the previous wording “goods comprised in any hire-purchase agreement made by such tenant” in s.4(1) of the 1908 Act). This was so even if some other person (not the tenant) was the hirer: contrast *Shenstone v Freeman* [1910] 2 K.B. 84; *Rogers, Eungblut & Co v Martin* [1911] K.B. 19 (decided on the previous wording in s.4(1) of the 1908 Act). But where a default notice was required to be served (under the *Consumer Credit Act 1974* s.87(1)) before the owner termination (see above, para.41-168) the statutory protection of the 1908 Act was not excluded during the period between the service of the default notice and the date on which the notice expired or was earlier complied with: s.4A(1) of the 1908 Act.
- 2440 Because the general protection for third party goods was lost where the tenant was the “reputed owner” of them, even if the agreement was terminated (see *Times Furnishing Co Ltd v Hutchings* [1938] 1 K.B. 775). See *Smart Bros Ltd v Holt* [1929] 2 K.B. 303; *Drages Ltd v Owen* (1935) 52 T.L.R. 108; *Perdana Properties Bhd v United Orient Leasing Co Sdn Bhd* [1981] 1 W.L.R. 1496.

(vi) - Insolvency

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 3. - Hire-Purchase Agreements

(e) - Rights and Liabilities of Third Parties

(vi) - Insolvency

Bankruptcy of hirer

41-432 The estate of a bankrupt hirer, including the benefit of any hire-purchase contract,

U 2441

U vests in the trustee in bankruptcy immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee, with the owner having the right to prove for any liability arising under the contract.²⁴⁴² Most hire-purchase agreements, however, provide that, if a bankruptcy order is made against the hirer or the hirer petitions for his own bankruptcy, then either the hire-purchase agreement and the hiring are forthwith and automatically to come to an end²⁴⁴³ or the owner is entitled to terminate the agreement. Once the agreement so terminates, it would seem that the hirer will have no interest in the goods or in the agreement which could pass to his trustee in bankruptcy.²⁴⁴⁴

41-433 There is no longer any “reputed ownership” provision, such as once existed in the **Bankruptcy Act 1914**,²⁴⁴⁵ whereby the trustee was entitled to claim goods in the reputed ownership of the bankrupt. But, if the trustee seizes or disposes of any property which is not comprised in the bankrupt’s estate, and at the time of the seizure or disposal the trustee believes and has reasonable grounds for believing that he is entitled to seize or dispose of that property, the trustee is not liable to any person in respect of any loss or damage resulting from the seizure or disposal except insofar as that loss or damage is caused by the negligence of the trustee.²⁴⁴⁶

41-434 The trustee may disclaim any unprofitable contract. [2447](#)

Winding-up or receivership of hirer

41-435 Where the hirer is a company, the hire-purchase agreement again historically provided for its automatic determination or termination by the owner in the event of a winding-up petition being presented against the hirer or the hirer passing a resolution for voluntary winding-up. However, now certain “ipso facto” clauses (clauses triggered by a company’s entry into insolvency proceedings) are rendered inoperative in the case of contracts for the supply of goods and services, by amendments made to the [Insolvency Act 1986](#) by the [Corporate Insolvency and Governance Act 2020](#) (“CIGA 2020”).

[2448](#)

U Whilst certain financial services contracts are exempted, including “financial services consisting of lending”,

[2449](#)

U it would seem that, given the explicit reference to finance leasing and factoring in the list of exempted financial services contracts (but no explicit reference to vendor credit),

[2450](#)

U vendor credit contracts such as hire-purchase are not covered by exemption. Hence “ipso facto” clauses in so far as they become operative on the entry by a corporation into insolvency proceedings are no longer effective. If termination is effective (for example it occurs before the proceedings are commenced), the hirer company will, after termination, have no interest in the goods which can vest in the liquidator.

[2451](#)

U The same applies where an administrative receiver is appointed.

[2452](#)

U However, in order to give company debtors a “breathing space” in times of temporary financial difficulty, amendments made by the [CIGA 2020](#) enable the directors to apply to court for a moratorium, similar to that which operates in the case of an administration,

[2453](#)

U so that (inter alia) the permission of the court is needed in order to repossess goods under any hire-purchase agreement.

41-436

A liquidator may disclaim any unprofitable contract.²⁴⁵⁴

Administration ²⁴⁵⁵

- 41-437 Where an administration application in respect of a company has been made, no step may be taken to repossess goods in the company's possession under any hire-purchase agreement,²⁴⁵⁶ except with permission of the court.²⁴⁵⁷ Further, during the period while the company is in administration, no step may be taken to repossess goods in the company's possession under any hire-purchase agreement,²⁴⁵⁸ except with the consent of the administrator or the permission of the court.²⁴⁵⁹ A moratorium or "freeze" is thus imposed on the owner's right of repossession. On an application by the administrator, the court may, if it is satisfied that the disposal of the goods would be likely to promote the purpose of administration in respect of the company, enable the administrator to dispose of the goods as if all rights of the owner under the agreement were vested in the company.²⁴⁶⁰ The administrator may thus overreach the property rights of the owner in the goods. Some protection is, however, afforded to the owner in that the net proceeds of the disposal²⁴⁶¹ are required to be applied towards discharging the sums payable under the hire-purchase agreement.²⁴⁶²

Voluntary arrangements

- 41-438 A similar moratorium against repossession of goods in a company's possession under a hire-purchase agreement can be obtained by the directors of the company where they propose a voluntary arrangement under Pt I of the Insolvency Act 1986.²⁴⁶³ This facility is, however, restricted to "eligible companies", that is to say small companies (with certain exceptions).²⁴⁶⁴

Footnotes

2441 See Insolvency Act 1986 s.283. The *rights* under a hire-purchase agreement, being choses in action, do not fall within the exemption (from vesting) for a "tool of the trade" (even though the subject matter of the agreement could be such "tool"): see *Dragan Mikki v William Duncan* [2016] EWCA Civ 1312, considered in *Birdi v Price* [2018] EWHC 2943 (Ch).

2442 Insolvency Act 1986 s.306.

- 2443 This is not permissible where the agreement is a regulated agreement under the Consumer Credit Act 1974: see [CCA 1974 s.98\(1\)](#), above, para.[41-174](#).
- 2444 [Crawcour v Salter \(1881\) 18 Ch. D. 30](#); [McEntire v Crossley Bros Ltd \[1895\] A.C. 457](#); [Re Apex Supply Co Ltd \[1942\] Ch. 108](#). See [Dragan Mikki v William Duncan \[2016\] EWCA Civ 1312](#) at [20]. Contrast [Re Piggin, Dicker v Lombank \(1962\) 112 L.J. 424](#). s.38(c).
- 2445 [Insolvency Act 1986 s.304\(3\)](#). And the trustee has a lien on the property or its proceeds of sale for expenses in connection with the seizure or disposal.
- 2446 [Insolvency Act 1986 s.315](#).
- 2448 s.14 and Sch.12, adding a new [s.233B](#).
- 2449 Sch.4ZZA para.13(2)(i), and see above para.[41-262](#).
- 2450 Sch.4ZZA para.13(2)(i) and (ii).
- 2451 Under [s.145 of the Insolvency Act 1986](#) or otherwise.
- 2452 But see above, para.[41-347](#) (relief against forfeiture) and [Re Piggin, Dicker v Lombank \(1962\) 112 L.J. 424](#). See also [Lipe Ltd v Leyland DAF Ltd \[1993\] B.C.C. 385](#) (conditional sale agreement).
- 2453 See below, para.[41-437](#). The relevant provisions are in the new Pt A1 of the [Insolvency Act 1986](#), inserted by the [2020 Act](#). See generally [Insolvency Act 1986 Pt A1 Ch.4](#) and esp. s.A21(1)(d) (effect on hire-purchase).
- 2454 [Insolvency Act 1986 s.178](#).
- 2455 Sch.B1 to the [Insolvency Act 1986](#) was inserted by [s.248](#) and Sch.16 to the [Enterprise Act 2002](#) and replaces [Insolvency Act 1986 Pt II](#).
- 2456 This includes conditional sale agreements and chattel leasing agreements and retention of title agreements: Sch.B1 para.111(1).
- 2457 [Insolvency Act 1986 Sch.B1 para.44](#).
- 2458 This includes conditional sale agreements and chattel leasing agreements and retention of title agreements: Sch.B1 para.111(1).
- 2459 [Insolvency Act 1986 Sch.B1 para.43](#).
- 2460 [Insolvency Act 1986 Sch.B1 para.72\(1\)](#).
- 2461 In the event of a shortfall in the proceeds below the open market value of the goods, an additional amount may be added to make good the deficiency: Sch.B1 para.72(3).
- 2462 [Insolvency Act 1986 Sch.B1 para.72](#).
- 2463 [Insolvency Act 1986 s.1A](#) and Sch.A1, inserted by the [Insolvency Act 2000 s.1](#).
- 2464 [Insolvency Act 1986 Sch.A1 para.2](#).

(f) - Miscellaneous Restrictions

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 3. - Hire-Purchase Agreements

(f) - Miscellaneous Restrictions

Control of hire-purchase finance

- 41-439 The disposition of goods on hire-purchase terms can be controlled by orders made in pursuance of powers conferred by the [Emergency Laws \(Re-enactments and Repeals\) Act 1964](#).²⁴⁶⁵ Historically, the orders made restricted the credit facilities offered by hire-purchase, conditional sale and credit-sale transactions relating to consumer goods by laying down minimum payments to be made before the contract was entered into and by limiting the time over which the instalments might be spread. All such orders have now been revoked,²⁴⁶⁶ but the Act remains in force in this respect.

Reserve and auxiliary forces

- 41-440 By the [Reserve and Auxiliary Forces \(Protection of Civil Interests\) Act 1951](#)²⁴⁶⁷ wide discretionary powers are conferred upon the court in respect of, inter alia, hire-purchase and conditional sale agreements entered into by members of the reserve and auxiliary forces. It may be necessary to obtain leave of the court before retaking possession of the goods or before enforcing any judgment against such a hirer.²⁴⁶⁸ The court may even make an order restoring the goods to the hirer where the owner has taken possession of them.²⁴⁶⁹

Consumer protection

- 41-441 Part I of the Consumer Protection Act 1987²⁴⁷⁰ imposes strict liability in respect of defective (i.e. unsafe) products, and Pt II of the Act²⁴⁷¹ empowers the Secretary of State to make safety regulations,²⁴⁷² to serve “prohibition notices”, “suspension notices” and “notices to warn” in respect of unsafe goods. References in the Act to supplying goods include entering into a hire-purchase agreement to furnish the goods.²⁴⁷³

Enterprise Act 2002

- 41-442 The provisions of Pt 8 of the Enterprise Act 2002²⁴⁷⁴ relating to the enforcement of certain consumer legislation extend to the supply of goods under a hire-purchase agreement, a credit sale agreement or a conditional sale agreement.²⁴⁷⁵

Footnotes

- 2465 s.1, as amended, in particular, by s.192 of and Sch.4 para.23 to the Consumer Credit Act 1974 from 19 May 1985: see SI 1983/1551 (c.44).
- 2466 By SI 1982/1034.
- 2467 As amended, in particular, by s.192 of and Sch.4 paras 12, 13, to the Consumer Credit Act 1974 from 19 May 1985: SI 1983/1551 (c.44).
- 2468 Reserve and Auxiliary Forces Act 1951 s.2, as amended. cf. *Smart Bros Ltd v Ross [1943] A.C. 84.*
- 2469 Reserve and Auxiliary Forces Act 1951 s.4, as amended.
- 2470 Consumer Protection Act 1987 ss.1–9; below, paras 46–457 et seq. Pt III (dealing with misleading price indications) was repealed by the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.30(1) and Sch.2 para.34.
- 2471 ss.11–19; below, para.46–472.
- 2472 For details of the regulations made, see Miller, Product Liability and Safety Encyclopedia (1991, looseleaf), IV. See also the General Product Safety Regulations 2005 (SI 2005/1803), as amended, especially in consequence of Brexit, by the Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/203).

- 2473 [s.46\(1\)\(b\)](#). But where a finance company acquires the goods from a dealer in order to finance their acquisition by a consumer, it is the dealer not the finance company that is regarded as supplying the goods for the purposes of liability: [s.46\(2\)](#).
- 2474 [ss.210–236](#).
- 2475 See above, paras [40-136](#) et seq.

End of Document

© 2022 SWEET & MAXWELL

Section 4. - Conditional Sale Agreements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 4. - Conditional Sale Agreements

Conditional sale of goods

- 41-443 A contract of sale of goods may be absolute or conditional.²⁴⁷⁶ An agreement to sell²⁴⁷⁷ goods may therefore be made subject to a condition that the transfer of property from the seller to the buyer is to take place only when the total price of the goods has been paid and that, until that time, although possession of the goods is to be delivered to the buyer, they are to remain the property of the seller. As an instrument of instalment credit, a conditional sale agreement closely resembles a hire-purchase agreement.²⁴⁷⁸ But it differs from a hire-purchase agreement in that the buyer is bound under the terms of the agreement to purchase the goods²⁴⁷⁹ and does not (as in the case of a hire-purchase agreement) hire the goods with an option to purchase them.²⁴⁸⁰

Remedies of seller

- 41-444 Conditional sale agreements invariably contain a provision for termination of the agreement and resumption of possession of the goods by the seller in the event of the buyer's default in the payment of instalments and of other contingencies, e.g. bankruptcy of the buyer.
²⁴⁸¹

U But it has been held that, in the absence of a stipulation to the contrary, the repossession of the goods by the seller determines the agreement and the seller thereby abandons his right to recover from the buyer or any guarantor²⁴⁸² the arrears of instalments remaining unpaid, but accrued due, before he repossessed the goods.²⁴⁸³ This, of course, is not so in the case of hire-purchase agreements.²⁴⁸⁴ But it would seem that the seller could recover an equivalent sum as damages

for breach of contract.²⁴⁸⁵ Certain conditional sale agreements further provide, as an alternative to termination and repossession, that the seller may elect to pass the property in the goods to the buyer and recover from the buyer the unpaid balance of the purchase price of the goods.

Conditional sale of land

- 41-445 A modern phenomenon has been the appearance of conditional sales of land, especially of dwelling-houses, with a provision in the agreement for resumption of possession by the seller in the event of non-payment of instalments of the purchase price.²⁴⁸⁶

Definition

- 41-446 A conditional sale agreement is defined in the consumer credit regulatory regime

U ²⁴⁸⁷

U to mean “an agreement for the sale of goods or land under which the purchase price or part of it is payable by instalments and the property in the goods or land is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods or land) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled”. It will be noted that this definition embraces land²⁴⁸⁸ as well as goods. A new term was introduced in April 2019 for the purposes of imposing a price cap²⁴⁸⁹: a “rent-to-own” agreement, which means a conditional sale (or hire-purchase²⁴⁹⁰) agreement in relation to “household goods”.²⁴⁹¹

Scope of regulation

- 41-447 A conditional sale agreement is a consumer credit agreement, for fixed-sum credit,²⁴⁹² if the debtor, i.e. the buyer, is an individual.²⁴⁹³ The agreement will be a regulated credit agreement unless it is an exempt agreement.²⁴⁹⁴ A regulated conditional sale agreement is a debtor-creditor-supplier agreement²⁴⁹⁵ for restricted-use credit.²⁴⁹⁶

- 41-448 Unlike a credit-sale agreement,²⁴⁹⁷ a conditional sale agreement under £50 cannot be a “small agreement”.²⁴⁹⁸

- 41-449 Authorisation is required to carry on a business involving consumer credit agreements (other than exempt agreements)²⁴⁹⁹ and the general provisions of the regulatory regime apply,²⁵⁰⁰ although there are certain provisions that apply in particular to regulated conditional sale agreements.²⁵⁰¹ Most of these provisions are equally applicable to hire-purchase agreements.²⁵⁰²

Parties

- 41-450 In the regulatory regime, the seller under a conditional sale agreement is referred to as the “creditor” or “lender” and the buyer as the “debtor” or “borrower”.²⁵⁰³

Unfair relationships

- 41-451 The provisions of the [Consumer Credit Act 1974](#) relating to “unfair relationships” apply to conditional sale agreements where the debtor is an individual.²⁵⁰⁴

Protected goods

- 41-452 The concept of “protected goods”²⁵⁰⁵ applies to a regulated conditional sale agreement as it does to a regulated hire-purchase agreement,
 ²⁵⁰⁶
 provided that the property in the goods remains in the creditor.²⁵⁰⁷

Entry on premises

- 41-453 The restriction placed upon entry on premises without an order of the court applies to a regulated conditional sale agreement as it does to a regulated hire-purchase agreement.²⁵⁰⁸

Recovery of land

- 41-454 At any time when the debtor is in breach of a regulated conditional sale agreement relating to land, the creditor is entitled to recover possession of the land from the debtor, or any person claiming under him, on an order of the court only.²⁵⁰⁹ Any clause to the contrary contained in the agreement is void²⁵¹⁰; but recovery of possession is permissible with the consent of the debtor given at the time.²⁵¹¹ An entry in contravention of this prohibition is actionable as a breach of statutory duty.²⁵¹²

Right to terminate conditional sale agreement

- 41-455 The statutory right of the debtor under s.99 of the Consumer Credit Act 1974 to terminate the agreement (the “VTR”) applies to a regulated conditional sale agreement as it does to a regulated hire-purchase agreement,²⁵¹³ except in the case of an agreement relating to land after the title to the land has passed to the debtor.²⁵¹⁴ The right to terminate is also taken away in the case of a conditional sale agreement relating to goods, where the property in the goods, having become vested in the debtor, is transferred to a person who does not become the debtor under the agreement.²⁵¹⁵ But otherwise the fact that the property in the goods has become vested in the debtor does not abrogate his right of termination. If, however, in those circumstances, the debtor does terminate the agreement, the property in the goods thereupon reverts in the person (the “previous owner”) in whom it was vested immediately before it became vested in the debtor.²⁵¹⁶

Liability of debtor

- 41-456 The liability of the debtor on the exercise of his statutory right of termination is the same as in the case of a hire-purchase agreement.²⁵¹⁷

Time orders

- 41-457 The supplemental provisions relating to time orders in the case of hire-purchase agreements apply also in the case of conditional sale agreements.²⁵¹⁸

Return orders and transfer orders

- 41-458 The power of the court to make a return order or transfer order in respect of goods applies to a regulated conditional sale agreement.²⁵¹⁹

Adverse possession

- 41-459 The provisions of s.134 of the Consumer Credit Act 1974 relating to evidence of adverse possession of goods apply to conditional sale agreements.²⁵²⁰

Title to goods

- 41-460 The terms about title implied on the part of the seller in any conditional sale agreement are those contained in s.12 of the Sale of Goods Act 1979,²⁵²¹ and these cannot be excluded.²⁵²² The Consumer Rights Act 2015 contains the relevant statutory terms for “consumer” contracts.²⁵²³

Defective goods

- 41-461 The terms as to quality, fitness for purpose, and correspondence with description and sample implied on the part of the seller in contracts of sale of goods by ss.13 to 15 of the Sale of Goods Act 1979²⁵²⁴ are implied in every conditional sale agreement. The Consumer Rights Act 2015 treats similar (but more expansive²⁵²⁵) terms “as included” in “consumer” conditional sales contracts²⁵²⁶ (the terms being the same as for hire-purchase agreements)²⁵²⁷ and will confer extensive remedies for their breach.²⁵²⁸ The exclusion of such implied terms and of the liability of the creditor for their breach are and will continue to be ineffective, either absolutely or subject to certain qualifications, the extent depending on whether they are “consumer” contracts or not.²⁵²⁹

- 41-462 In relation to the term as to fitness for purpose implied by s.14(3) of the 1979 Act,²⁵³⁰ since under a conditional sale agreement the purchase price or part of it is payable by instalments, the particular purpose for which the goods are being bought may be made known, expressly or by implication, to the credit-broker²⁵³¹ (e.g. to a dealer) by whom the goods have been previously sold to the

seller, in order to satisfy the requirements of the subsection.²⁵³² Moreover, in order to displace the implied term, the seller has to prove that the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the skill or judgment both of the seller and of the credit-broker.²⁵³³

Special provisions as to remedies

- 41-463 Section 11(4) of the *Sale of Goods Act 1979* (whereby in certain circumstances a breach of condition in a contract of sale is treated only as a breach of warranty)²⁵³⁴ did not apply to conditional sale agreements²⁵³⁵ where the buyer dealt as consumer and now generally only applies to non-consumer contracts.²⁵³⁶ Further, a breach of condition (whether express or implied) to be fulfilled by the seller under any such agreement is to be treated as a breach of warranty, and not as grounds for rejecting the goods and treating the agreement as repudiated, if (but only if) it would have fallen to be so treated had the condition been contained or implied in a corresponding hire-purchase agreement²⁵³⁷ as a condition to be fulfilled by the owner.²⁵³⁸
- 41-464 The *Consumer Rights Act 2015* makes special provision for extensive remedies²⁵³⁹ in the case of “consumer ‘goods’ contracts”,²⁵⁴⁰ a term that includes both (conditional and credit) sales contracts and hire-purchase agreements.

Title of third parties

- 41-465 One of the most significant differences between a hire-purchase and a conditional sale agreement lies in the fact that a conditional buyer can pass a good title to a third party under s.25(1) of the *Sale of Goods Act 1979*.²⁵⁴¹ But, where a conditional sale agreement is a consumer credit agreement,²⁵⁴² the buyer is deemed not to be a person who has bought or agreed to buy goods²⁵⁴³ and in consequence cannot pass a good title to a third party by virtue of that subsection.²⁵⁴⁴ The provisions of Pt III of the *Hire-Purchase Act 1964*,²⁵⁴⁵ which relate to the disposition of motor vehicles, nevertheless apply to motor vehicles that have been agreed to be sold under a conditional sale agreement²⁵⁴⁶ as they apply to motor vehicles which have been let under a hire-purchase agreement.²⁵⁴⁷ As a result, a conditional sale agreement now confers less security than a hire-purchase agreement vis-à-vis third parties only if the agreement is not a consumer credit agreement and either (i) the goods agreed to be sold do not consist of a motor vehicle; or (ii) they do consist of a motor vehicle, but the vehicle is wrongfully disposed of to a trade or finance purchaser (and not to a private purchaser) within the meaning of the *Hire-Purchase Act 1964*.²⁵⁴⁸ In these situations

a third party may acquire a good title from a buyer under a conditional sale agreement where he would not acquire one from a hirer under a hire-purchase agreement, but otherwise the security is identical.

Distress

- 41-466 As noted above, a landlord's power at common law to distrain upon all goods found upon the demised premises has now been abolished.²⁵⁴⁹

Miscellaneous restrictions

- 41-467 The miscellaneous restrictions referred to in paras 41-410—41-413 of this chapter also apply to conditional sale agreements.

Footnotes

2476 [Sale of Goods Act 1979 s.2\(3\).](#)

2477 [Sale of Goods Act 1979 s.2\(5\).](#)

2478 Historically, conditional sale in many cases replaced hire-purchase as a financing mechanism because it was possible so to draft the agreement as to confer partial exemption from value added tax and to obtain tax relief on finance charges by turning them into interest. But the value added tax exemption was extended to hire-purchase and the tax relief on interest has been (to a great extent) withdrawn.

2479 But see [Consumer Credit Act 1974 s.99](#), below, para.41-455.

2480 For the consequences, see below, para.41-465.

2481 See below, para.41-452. See also above para.41-435, where it is noted that certain “*ipso facto*” clauses (clauses triggered by a company’s entry into insolvency proceedings) are rendered inoperative in the case of contracts for the supply of goods and services (including conditional sale agreements) by amendments made to the [Insolvency Act 1986](#) by [CIGA 2020](#).

2482 *Hewison v Ricketts* (1894) 63 L.J. Q.B. 711.

2483 *Hewison v Ricketts* (1894) 63 L.J. Q.B. 711; *Att-Gen v Pritchard* (1928) 97 L.J. K.B. 561.

2484 *Brooks v Beirnstein* [1909] 1 K.B. 98; see above, para.41-344.

2485 *Att-Gen v Pritchard* (1928) 97 L.J. K.B. 561; *Taylor v Thompson* [1930] W.N. 16.

- 2486 No doubt the object has been to avoid both the Rent Acts and the relief traditionally given to mortgagors of land. But see *Starsside Properties Ltd v Mustapha [1974] 1 W.L.R. 816*.
- 2487 See Consumer Credit Act 1974 (“CCA 1974”) s.189(1) and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (“RAO”) art.60L(1), as inserted by SI 2013/1881 art.6. This definition corresponds to that contained in (the now repealed) s.1(1) of the Hire-Purchase Act 1965, but is extended to land. See the similar definition of “conditional sales contract” (but not covering land) in the Consumer Rights Act 2015 s.5(3) (for the purposes of Pt 1 of that Act), above, para.40-490 and in the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (SI 2020/1311) reg.2 and the draft Debt Respite Scheme (Statutory Debt Repayment Plan etc.) (England and Wales) Regulations reg.2.
- 2488 Defined in CCA 1974 s.189(1).
- 2489 See the FCA’s document: *Rent-to-own price cap – feedback on CP18/35 and final rules*, PS19/6 (March 2019). The provisions are in the FCA’s Handbook, CONC 5B. The sanction (see CONC 5B.6.1) is that charges in excess of the cap are unenforceable.
- 2490 See above, para.41-360.
- 2491 As defined in CONC 5B. See, *passim*, that Module of the FCA Handbook.
- 2492 See above, para.41-026.
- 2493 See above, para.41-016.
- 2494 See above, para.41-017. The £25,000 ceiling in the “business purpose” exemption (see above, para.41-047) is calculated by taking the total amount payable under the agreement (less any deposit or initial payment paid), but subtracting any item in the total charge for credit such as credit charges or interest (as these are not “credit”: see above, para.41-061).
- 2495 See above, paras 41-030—41-031.
- 2496 See above, para.41-027.
- 2497 See below, para.41-468.
- 2498 CCA 1974 s.17(1)(a). A hire-purchase agreement similarly cannot qualify as a “small agreement”, see above, para.41-361.
- 2499 See above, para.41-063.
- 2500 See above, paras 41-001—41-261.
- 2501 Especially CCA 1974 ss.90–92, 99–100, 129–130, 133–135.
- 2502 See above, paras 41-360—41-383.
- 2503 See above, para.41-018.
- 2504 CCA 1974 ss.140A–140C, paras 41-213 et seq. And note the price cap imposed in relation to “household goods” agreements, noted above, para.41-446.
- 2505 CCA 1974 s.90(7).
- 2506 CCA 1974 ss.90, 91. See above, para.41-365. *Moneybarn No.1 Ltd v Harris [2022] SAC (Civ) 11, [2022] C.C.L.R. 6* was a conditional sale case where s.90 was invoked.

- 2507 CCA 1974 s.90(1)(c).
- 2508 CCA 1974 s.92(1); above, para.[41-370](#).
- 2509 CCA 1974 s.92(2). See also [CCA 1974 s.113\(1\), \(2\), \(8\)](#).
- 2510 CCA 1974 s.173(1).
- 2511 CCA 1974 s.173(3).
- 2512 CCA 1974 s.92(3). See above, para.[41-370](#).
- 2513 See above, para.[41-371](#).
- 2514 CCA 1974 s.99(3).
- 2515 CCA 1974 s.99(4). See the definition of “debtor” in [CCA 1974 s.189\(1\)](#); above, para.[41-018](#).
- 2516 CCA 1974 s.99(5) (i.e. normally in the creditor, and not in the dealer who negotiated the transaction). If the previous owner has died, or any other event has occurred whereby the property, if vested in him immediately before that event, would thereupon have vested in some other person, the property is to be treated as having devolved as if it had been vested in the previous owner immediately before that event, as the case may be: [s.99\(5\)](#), proviso.
- 2517 CCA 1974 s.100; see above, paras [41-372](#)—[41-376](#).
- 2518 CCA 1974 s.130(2), (4); see above, para.[41-377](#).
- 2519 CCA 1974 s.133; above, paras [41-378](#)—[41-381](#) (including a suspended return order coupled with a time order: above, para.[41-379](#)).
- 2520 Above, para.[41-383](#).
- 2521 Below, para.[46-075](#).
- 2522 Unfair Contract Terms Act 1977 s.6(1)(a). See below, para.[46-085](#).
- 2523 Made on or after 1 October 2015. See [s.17](#), above, para.[40-510](#). Exclusion will also not be possible: the [Consumer Rights Act 2015 s.31\(1\)\(i\)](#), above, para.[40-535](#).
- 2524 See below, paras [46-086](#)—[46-115](#).
- 2525 See, in particular, the more extensive implied term as to quality ([s.9](#), above, para.[40-499](#)) and the new terms as to conformity with model seen or examined ([s.14](#), above, para.[40-504](#)) and as to incorrect installation ([s.15](#), above, para.[40-505](#)).
- 2526 Made on or after 1 October 2015.
- 2527 And note that certain pre-contract information provided under the [Consumer Contract \(Information, Cancellation and Additional Charges\) Regulations 2013 \(SI 2013/3134\)](#) are treated as terms of the contract: [s.12](#) and see above, para.[40-502](#).
- 2528 The terms are set out in the [Consumer Rights Act ss.9–15, 18](#) (see above, paras [40-499](#) et seq.) and the remedies in [ss.19–27](#) (above, paras [40-514](#) et seq.).
- 2529 See Vol.I, para.[17-097](#); below, paras [46-117](#)—[46-125](#). See also [Hughes v Hall & Hall \[1981\] R.T.R. 430 DC](#) (offence to include void exclusion term by (now repealed) [Consumer Transactions \(Restrictions on Statements\) Order 1976 \(SI 1976/1813\)](#)).
- 2530 See below, para.[46-105](#). The statutory term for consumer contracts made on or after 1 October 2015 is in the [Consumer Rights Act 2015 s.10](#), see above, para.[40-500](#).
- 2531 Defined in [Sale of Goods Act 1979 s.61\(1\)](#).
- 2532 See below, para.[46-106](#).
- 2533 See below, para.[46-108](#).

- 2534 See below, para.[46-068](#).
- 2535 Defined in s.15(1) of the Supply of Goods (Implied Terms) Act 1973, as amended by s.192 of and Sch.4 para.36 to the Consumer Credit Act 1974.
- 2536 See previously, Supply of Goods (Implied Terms) Act 1973 s.14(1), as amended by the Unfair Contract Terms Act 1977 s.31(3) and Sch.3 (and by s.192 of and Sch.4 para.26 to the Consumer Credit Act 1974) but repealed by the Consumer Rights Act 2015 (for contracts made on or after 1 October 2015 (see the 2015 Act s.60 and Sch.1 para.6)). Section 11(4) was simultaneously confined to non-consumer contracts (see new s.11(4A), added by 2015 Act s.60 and Sch.1 para.10).
- 2537 Defined in the Supply of Goods (Implied Terms) Act 1973 s.15(1) (amended as above).
- 2538 s.14(2) (amended as above).
- 2539 Including the additional remedies of repair or replacement of the goods, reduction of the purchase price or rejecting the goods and treating the contract as at an end.
- 2540 For contracts made on or after 1 October 2015. See Consumer Rights Act 2015 Act s.3, applying ss.19–27 (as to remedies, see above, paras 40-514 et seq.) to “goods contracts”. It repealed (see s.60 and Sch.1 para.27) and replaced the “remedies” provisions in Sale of Goods Act 1979 Pt 5A (ss.48A to 48F), inserted by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045).
- 2541 Or s.9 of the Factors Act 1889; *Lee v Butler [1893] 2 Q.B. 318*; *Hull Rope Works Co Ltd v Adams (1895) 73 L.T. 446*; *Wylde v Legge (1901) 84 L.T. 121*. But see *Newtons of Wembley Ltd v Williams [1965] 1 Q.B. 560*.
- 2542 Within the meaning of s.8(1) of the Consumer Credit Act 1974 (see above, para.41-447).
- 2543 Sale of Goods Act 1979 s.25(2), (4), Sch.1 para.9 and Sch.4 para.2; Consumer Credit Act 1974 s.192 and Sch.4 paras 2 and 4.
- 2544 Or of s.9 of the Factors Act 1889.
- 2545 As amended by s.192 of and Sch.4 para.22 to the Consumer Credit Act 1974.
- 2546 Defined in s.29(1) of the 1964 Act. These provisions apply regardless of the fact that the debtor is not an individual, i.e. is a body corporate.
- 2547 See above, para.[41-406](#).
- 2548 See above, para.[41-407](#).
- 2549 See above, para.[41-431](#). Historically, the position of goods subject to a conditional sale agreement was similar to that of those subject to a hire-purchase agreement.

Section 5. - Credit-Sale Agreements

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 5. - Credit-Sale Agreements

Credit-sale

- 41-468 A credit-sale agreement may be defined as an absolute ²⁵⁵⁰ contract of sale of goods in pursuance of an agreement under which payment of the whole or part of the purchase price is deferred. Statutory definitions of a credit-sale have sometimes included conditional sales, ²⁵⁵¹ but this is not so in the case of the *Consumer Credit Act 1974* ²⁵⁵² where *credit-sale agreement* is defined to mean “an agreement for the sale of goods under which the purchase price or part of it is payable by instalments, but which is not a conditional sale agreement”. Unlike a conditional sale agreement, the property in goods sold under a credit-sale agreement is transferred to the buyer when the agreement is made. Since the seller is no longer the owner of the goods he cannot repossess them in the event of default of the buyer in the payment of the instalments or otherwise, ²⁵⁵³ his only remedy being to sue for the unpaid instalments of the price. ²⁵⁵⁴

Scope of regulation

- 41-469 A credit-sale agreement is a consumer credit agreement ²⁵⁵⁵ if the debtor, i.e. the buyer, is an individual ²⁵⁵⁶ and it is a regulated agreement if it is not an exempt agreement. ²⁵⁵⁷ A regulated credit-sale agreement is a debtor-creditor-supplier agreement ²⁵⁵⁸ for restricted-use credit. ²⁵⁵⁹ It is usually, but not invariably, for fixed-sum credit. ²⁵⁶⁰ The general provisions of the consumer credit regulatory regime apply in respect of authorisation and the regulation of the credit aspect of the agreements. ²⁵⁶¹ In the regime, the seller under a credit-sale agreement is referred to as the “creditor” or “lender” and the buyer as the “debtor” or “borrower”. ²⁵⁶²

Unfair relationships

- 41-470 The provisions of the [Consumer Credit Act 1974](#) relating to “unfair relationships” apply to credit sale agreements where the debtor is an individual.²⁵⁶³

Under-£50 agreements

- 41-471 Most of [Pt V of the Consumer Credit Act 1974](#), relating to the making of the agreement, its form and content, signature, and supply of copies to the debtor,²⁵⁶⁴ do not apply to “small” (under-£50) restricted-use²⁵⁶⁵ (and hence credit-sale agreements) nor can such agreements be “cancellable” agreements.²⁵⁶⁶

Implied terms

- 41-472 The terms as to title, quality, fitness for purpose,²⁵⁶⁷ and correspondence with description and sample, implied in any credit-sale agreement are those contained in [ss.12 to 15 of the Sale of Goods Act 1979](#).²⁵⁶⁸ The [Consumer Rights Act 2015](#) treats similar (but more expansive²⁵⁶⁹) terms “as included” in “consumer” sales contracts, and confers extensive remedies for their breach.²⁵⁷⁰ The exclusion of these implied terms and of the liability of the creditor for the breach of them is ineffective, either absolutely or subject to certain qualifications, depending on whether they are “consumer” contracts or not.²⁵⁷¹

Remedies of buyer

- 41-473 The remedies of the buyer are those conferred by the [Sale of Goods Act 1979](#),²⁵⁷² and, for “consumer” sales contracts, those additional remedies conferred by the [Consumer Rights Act 2015](#)²⁵⁷³ including the additional remedies of repair or replacement of the goods, reduction of the purchase price or rejecting the goods and treating the contract as at an end.

Title of third parties

- 41-474 Since the property in the goods passes to the buyer when the agreement is made, he can pass a title to the goods to a third party by virtue of his ownership of them.²⁵⁷⁴

Other statutes

- 41-475 The [Consumer Protection Act 1987](#)²⁵⁷⁵ and the [Enterprise Act 2002](#)²⁵⁷⁶ apply to the supply of goods under credit-sale agreements.

Footnotes

- 2550 [Sale of Goods Act 1979 s.2\(1\), \(3\).](#)
 2551 e.g. [Advertisements \(Hire-Purchase\) Act 1967 s.7\(2\)](#) (now repealed).
 2552 s.189(1). There is no corresponding definition in the [Financial Services and Markets Act 2000 \(Regulated Activities\) Order 2001 \(SI 2001/544\)](#) ("RAO") art.60L(1).
 2553 A provision to this effect in the agreement would render the agreement void as an unregistered bill of sale: see [Bills of Sale Act 1878 s.3](#); and below, para.41-523.
 2554 Most credit-sale agreements provide that, on default by the buyer, the balance of the purchase price shall immediately become payable. But see the notices required under [Consumer Credit Act 1974 ss.76\(1\)\(a\), 86D, 87\(1\)\(b\), 98\(1\)](#) (above, paras 41-166, 41-134, 41-168, 41-174) and see also the repayment and rebate provisions in [Consumer Credit Act 1974 ss.94, 95](#) (above, paras 41-143—41-145).
 2555 CCA 1974 s.8(2); see above, para.41-016. See also Sch.2 Pt II Example 5.
 2556 Defined in [CCA 1974 s.189\(1\)](#); see above, para.41-016.
 2557 See above, para.41-017 and for "exempt agreements", above, paras 41-039 et seq. For the calculation of the ceiling for the "business purpose" exemption in RAO art.60C(3)—(7), see above, para.41-447 and Sch.2 Pt II Example 5.
 2558 CCA 1974 s.12(a); above, paras 41-030—41-031.
 2559 CCA 1974 s.11(1)(a); above, para.41-027.
 2560 CCA 1974 s.10(1)(b); above, para.41-026. In certain cases, e.g. shop "option" or "budget" or "subscription" accounts, a credit-sale agreement can be for running-account credit. Also if a credit card is provided by the retailer, it can also be a credit-token agreement within [CCA 1974 s.14](#) (above, para.41-035; below, para.41-498). But see [CCA 1974 ss.51, 66, 74\(2\), 78\(7\), 85\(3\)](#) on exemptions for "small" credit-sale agreements.

- 2561 See above, paras 41-005—41-259.
- 2562 See above, para.41-018.
- 2563 ss.140A–140C, above, paras 41-213 et seq.
- 2564 CCA 1974 ss.60–65. Sections 59 and 66 also do not apply.
- 2565 CCA 1974 s.74(1)(d). For the definition of small agreement, CCA 1974 see ss.17(1), 189(1); above, para.41-049. The limit was raised from £30 by SI 1983/1878.
- 2566 However, the right of withdrawal under CCA 1974 s.66A is available (see above, para.41-103) and CCA 1974 ss.55 (regulations on disclosure of information, above, para.41-078) and CCA 1974 s.56 (antecedent negotiations, above, para.41-073) do apply: CCA 1974 s.74(2). But see CCA 1974 s.74(2A) (in s.74(2) limit is £42 for agreements within the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134)).
- 2567 The particular purpose for which the goods are bought may be made known to the credit-broker (e.g. a dealer) who has previously sold the goods to the seller: see above, para.41-462, below and para.46-106.
- 2568 See below, paras 46-075—46-115.
- 2569 See, in particular, the more extensive term as to quality (s.9) and the new terms as to conformity with model seen or examined (s.14, above, para.40-504) and as to incorrect installation (s.15, above, para.40-505). And note that certain pre-contract information provided under the Consumer Contract (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) are treated as terms of the contract: s.12 and see above, para.40-502.
- 2570 For contracts made on or after 1 October 2015. The terms are set out in the Consumer Rights Act ss.9–15, 18 (see above, paras 40-499 et seq.) and the remedies in ss.19–27 (see above, paras 40-514 et seq.).
- 2571 See Vol.I, above para.17-097; below, paras 46-117—46-125. See also *Hughes v Hall & Hall [1981] R.T.R. 430 DC* (offence to include void exclusion term by (now repealed) Consumer Transactions (Restrictions on Statements) Order 1976 (SI 1976/1813)).
- 2572 See below, Ch.46.
- 2573 For contracts made on or after 1 October 2015. See especially Consumer Rights Act 2015 Act s.3, applying ss.19–27 (as to remedies, see above, paras 40-514 et seq.) to “goods contracts”. It repealed (see s.60 and Sch.1 para.27) and replaced the “remedies” provisions in Sale of Goods Act 1979 Pt 5A (ss.48A to 48F), inserted by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045).
- 2574 cf. *Car and Universal Finance Co Ltd v Caldwell [1965] 1 Q.B. 525*; *Newtons of Wembley Ltd v Williams [1965] 1 Q.B. 560*; below, para.46-211.
- 2575 See above, para.41-441.
- 2576 See above, para.41-442.

Section 6. - Credit and Other Payment Cards, and Checks

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 6. - Credit and Other Payment Cards, and Checks

Credit cards

- 41-476 Credit cards are a relatively modern phenomenon,²⁵⁷⁷ but credit card business has grown rapidly in recent years. A credit card transaction may be two-party or three-party or four-party. In a two-party transaction the issuer of the card is itself the supplier of the goods or services bought on credit and the cardholder purchases the goods or services from it. In the United Kingdom two-party credit cards are mainly issued by retail shops and stores. The holder of the card produces the card at the shop or store, or at a branch, and is then permitted to make a purchase on credit. The card will have been issued to the holder in pursuance of an agreement made between himself and the issuer of the card, which agreement will, for example, establish his credit limit and the terms of payment. A two-party transaction, at least insofar as it relates to the purchase of goods, would appear to constitute a credit-sale agreement.²⁵⁷⁸
- 41-477 In a three-party transaction, the issuer of the card is not the same person as the supplier but a separate entity. The issuer enters into arrangements (usually in the form of a "master" or "merchant" agreement) with approved suppliers who undertake to supply goods or services to the cardholder on production of the card. In a four-party transaction the arrangements are indirect, e.g. through membership of the "Mastercard" or "Visa" scheme so that the issuer is not the person who approves the supplier but both the issuer and supplier are members of a scheme.²⁵⁷⁹ Payment for the goods or services is agreed to be made by the issuer of the card (subject to discount) on the rendering of an account by the supplier (in the three-party case) or the operator of the scheme (in the four-party case), usually electronically in the form of or accompanied by a sales document authenticated by the customer. A separate agreement is also entered into between the issuer and the cardholder establishing the holder's credit limit, the terms of payment and the other conditions governing the use of the card.²⁵⁸⁰ In some three-party or four-party credit card transactions the documentation may be so formulated as to involve an assignment²⁵⁸¹ by the supplier to the issuer

of the cardholder's account with (i.e. his debt to) the supplier created by the purchase.²⁵⁸² But in most such transactions there is no such assignment, and the issuer relies directly and solely on the rights created by his agreement with the cardholder.²⁵⁸³ In *Re Charge Card Services Ltd*,²⁵⁸⁴ the Court of Appeal stated that, in a three-party transaction, the underlying contractual scheme was established by two separate bilateral contracts, i.e. between the issuer and the supplier and between the cardholder and the issuer. The actual sale and purchase of the commodity was the subject of a third bilateral contract between the supplier and the cardholder. In that case it was held that, unlike payment by cheque,²⁵⁸⁵ payment by credit card was not conditional payment only, but absolute payment. Accordingly, where the issuer company became insolvent and went into liquidation, suppliers had no recourse against the cardholders. The debts incurred by the use of the card were payable to the issuer or (in that case) to a factor to whom they had been assigned by the issuer company.

- 41-478 The term "credit card" is not a term of art. But it has become increasingly common for that term to be reserved for a card issued under an agreement by which the cardholder can obtain *extended* credit, as opposed to a "charge card" which provides credit only for a limited period. Credit is provided by a credit card agreement in one of two ways. First, the cardholder may be given the option either to pay off the entire debit balance outstanding on the account, or to pay only a minimum sum, interest being charged on the debit balance remaining unpaid.²⁵⁸⁶ This is sometimes referred to as an "option" account. Secondly, the agreement may provide for the making by the cardholder of fixed monthly payments (a "budget" or "subscription" account) and the cardholder's credit limit may be a specified sum or a multiple (say, 24 times) of the fixed monthly payment.²⁵⁸⁷ Interest is again charged on the debit balance from time to time outstanding. In either case, payments made by the cardholder will "refresh" the account, that is to say, will enable them to obtain further credit up to their stipulated credit limit.
- 41-479 Certain credit cards now in use also enable the cardholder to obtain cash on presentation of the card.²⁵⁸⁸ Many credit card agreements further provide for the issue of additional cards to relatives, employees, etc. of the principal cardholder or for use on a company account. The principal cardholder (or account holder) is liable for debts incurred by the use of the additional cards by the so-called "authorised users".

Charge cards

- 41-480 The expression "charge card" is usually reserved for a card issued under an agreement that requires the cardholder to settle their account in full within a fixed period after a statement is rendered. If they fail to pay by the due date, there is a breach of the agreement and default interest (or "liquidated damages" for the breach) will be payable. No extended credit is, however, allowed. The

cardholder's commitment is to make a single payment to settle their entire indebtedness recorded on the statement by the due date. Like credit cards, a charge card transaction may be two-party²⁵⁸⁹ or three-party.²⁵⁹⁰ Some charge cards also enable the holder to obtain cash on presentation of the card.

Debit cards

- 41-481 Debit cards²⁵⁹¹ resemble credit cards and charge cards in appearance and similarly enable the cardholder to purchase goods and services from suppliers with whom arrangements have been made for the acceptance of the card. The issuer of the card is usually (but not invariably) a bank or building society with whom the cardholder maintains an ordinary (e.g. current) account. By their agreement with the issuer of the card, the cardholder authorises the issuer to debit that account with the debts incurred by the use of the card. Debits will reach the account within a short period of time, i.e. usually within two or three days. If, for example, the account to be debited is the cardholder's current account with a bank, and the account is in credit, the debits will reduce the credit balance standing on the account. If the account is in overdraft, then the debits will increase the debit balance on the account. The extent of the credit facility afforded by the card depends, therefore, for the most part, on the overdraft arrangements arrived at between the cardholder and the issuer of the card. Debit cards issued by banks and building societies can normally also be used as cash cards²⁵⁹² to obtain cash.
- 41-482 Debit cards have become more prevalent with the development of EFTPOS facilities (electronic funds transfer at point of sale). In an EFTPOS transaction, the card is passed through a reader in a terminal installed at the supplier's point of sale and, subject to acceptance, payment is made to the supplier by an electronic transfer of funds from the account of the cardholder to the account of the supplier. Transactions will not be accepted unless the cardholder's account is in credit or within a previously agreed overdraft limit. The customer is required to key in a personal identification number (PIN) or (increasingly rarely in the UK) sign a receipt or terminal pad (his signature being checked against that on the card) as a protection against fraud. More recently, "contact payment" has been made possible,²⁵⁹³ within a certain limit per transaction, where the cardholder merely taps the card against a terminal and thereby authorises the debit from their account.

Cash cards

- 41-483 Cash cards, or ATM (automatic teller machine) cards, are again usually, but not invariably, issued by banks and building societies and enable the cardholder to obtain cash by using the card to operate an automatic teller machine. Withdrawals by this means are normally debited by electronic

means directly to the account (e.g. a current account) of the customer with the issuer of the card. The machine will be programmed so as to refuse payment unless the cardholder's instruction is accompanied or preceded by his PIN, and unless the cardholder's account is in credit or there is a previously agreed credit facility. However, although most machines are online, thus enabling the withdrawal instruction to be checked against the cardholder's current balance at the time the instruction is received, in other cases the balance is the previous day's balance, and there may even be a "down time" each day during which the cardholder's balance cannot be checked. Many such cards can nowadays be used, not only to obtain cash from the ATMs of the issuer of the card, but also from machines of other banks and building societies with whom arrangements have been made for acceptance of the card. Networks (e.g. "Link") are currently in operation, which provide arrangements for wider or reciprocal acceptance of such cards.

Electronic purses

- 41-484 These are sometimes referred to as "digital cash cards" or "stored value cards". They are cards on which "value" is stored electronically in the form of pre-paid units of money. The card can be used by the cardholder to pay for goods or services supplied, units of value being transferred electronically from buyer to seller. Some cards contain a magnetic strip, but others carry more complex information stored in a microchip. Some cards are reloadable and can be charged with additional value, while others lack this facility and are considered disposable once the entire value has been spent. In some cases, the card can be used by the cardholder to purchase goods or services only from the card issuer or card issuer's organisation. In other cases, however, as in multi-party credit card or charge card transactions, the card may be used to effect purchases from any supplier who has agreed to accept payment in this form and the supplier will be reimbursed in respect of the purchases made by use of the card. Electronic purses are a relatively recent development and the exact relationships between the participants (the scheme originator, participating banks, supplier and cardholder) have yet to be established. ²⁵⁹⁴

Check and voucher trading

- 41-485 Check and voucher trading are now almost obsolete. A check is a document issued by the check trader, and purchased by the customer, which entitles the customer to purchase goods of the face value of the check from retail shops approved by the check trader. The customer may make an initial payment to the check trader, usually of 5 per cent of the face value of the checks purchased, and is then issued with checks of a total value of (say) £100 in smaller denominations. The total face value of the checks so purchased is paid by the customer to the check trader by instalments, the instalments being collected from the customer at their home by a collecting agent (who also

supplies fresh checks when required). An agreement is entered into between the check trader and each approved retailer whereby the retailer undertakes to honour checks presented to them by supplying goods to the face value of the check, and the check trader undertakes to reimburse the retailer, but after deduction of a discount, at periodic intervals on receipt of invoices backed by the returned checks. Check trading involves, in relation to each customer, regular, but relatively small, sums. It arguably results in a loan of money by the check trader to the customer,²⁵⁹⁵ but an alternative view is that the proper form of action for recovery of instalments unpaid is one for money paid by the check trader to the retailer at the customer's request.²⁵⁹⁶

- 41-486 Voucher trading closely resembles check trading, the voucher taking the place of the check. But the **U** voucher is usually of a much larger face value, and that face value is frequently of the precise value of the goods to be purchased; the repayment period is much longer; there is no initial "poundage", but finance charges are levied and paid together with the instalments; and the voucher may be tenable at only one retail shop or chain of shops.²⁵⁹⁷

The consumer credit regulatory regime

- 41-487 The application of the consumer credit regulatory regime to the various types of card agreement mentioned above is a matter of some complexity,²⁵⁹⁸ and, in some cases, not free from doubt. Moreover, with the appearance of "multi-function" cards, each separate function has to be considered in the context of the regime. In broad terms, the position is as set out in the following paragraphs:

(i) Credit card²⁵⁹⁹ agreements:

- 41-488 Credit card agreements (whether two-party, three-party or four-party) made between the issuer (the creditor) and the cardholder (the debtor) under which extended credit is provided to the debtor will almost invariably²⁶⁰⁰ be regulated agreements for the purposes of the regime, unless the debtor is not an individual, i.e. is a body corporate or large partnership.²⁶⁰¹ The conduct of its business by the creditor will require FCA authorisation,²⁶⁰² but suppliers will not ordinarily require authorisation, unless they introduce customers to the creditor.²⁶⁰³ Such agreements will be regulated by the general provisions of the regime.

41-489

A two-party credit card agreement will normally be for running-account credit.²⁶⁰⁴ Insofar as the card may be used to obtain goods or services from the creditor, it will be a debtor-creditor-supplier²⁶⁰⁵ for restricted-use credit.²⁶⁰⁶ The creditor, as supplier of the goods or services, will be liable directly to the debtor if the goods or services are defective.²⁶⁰⁷ Insofar as the card may be used to obtain cash, it will be a debtor-creditor²⁶⁰⁸ agreement for unrestricted-use credit.²⁶⁰⁹

41-490 A three-party or four-party credit card agreement will similarly normally be for running-account credit.²⁶¹⁰ Insofar as the card may be used to obtain goods or services, it will be a debtor-creditor-supplier agreement²⁶¹¹ for restricted-use credit.²⁶¹² The issuer of the card, as creditor, will be liable, under s.75 of the Consumer Credit Act 1974,²⁶¹³ jointly and severally with the supplier in respect of any claim that the debtor may have in respect of a misrepresentation or breach of contract in relation to the transaction financed by the agreement, i.e. the supply of the goods or services. Insofar as the card may be used to obtain cash, the agreement is probably a debtor-creditor²⁶¹⁴ agreement for unrestricted-use credit.²⁶¹⁵

(ii) Charge card²⁶¹⁶ agreements:

41-491 Although before the implementation of the Consumer Credit Directive²⁶¹⁷ these agreements were often “exempt agreements”,²⁶¹⁸ this is no longer generally²⁶¹⁹ the case. Hence, they are treated no differently from credit card agreements, except in one important respect: their exemption from the “connected lender” liability under s.75 has been preserved.²⁶²⁰

(iii) Debit card²⁶²¹ agreements:

41-492 Debit card agreements give rise to greater difficulties.²⁶²² If the cardholder has an overdraft facility, then it is clear that, insofar as the card may be used to obtain goods or services from suppliers on credit, there will be a debtor-creditor-supplier agreement²⁶²³ for restricted-use credit.²⁶²⁴ The issuer of the card will therefore be subject to liability under s.75 of the Consumer Credit Act 1974.²⁶²⁵ If the cardholder does not have an overdraft facility, the position is less clear as a result of s.14(3) of the 1974 Act, which arguably “deems” credit to arise whenever a debit card is used.²⁶²⁶ However, the preferred view is that s.14(3) merely clarifies, but only in circumstances where the debtor uses a credit facility, *when and by whom* credit is provided (on the supply of the goods or services²⁶²⁷). In an EFTPOS transaction, it is clear that the EFTPOS arrangements between the suppliers and the card issuers do not themselves give rise to a debtor-creditor-supplier agreement.²⁶²⁸ The most significant consequence is that the card issuer, as

creditor, will not (merely because of those arrangements) be subject to liability under s.75 of the 1974 Act.²⁶²⁹

- 41-493 Insofar as the debit card may be used to obtain cash,²⁶³⁰ it will be a debtor-creditor agreement²⁶³¹ for unrestricted-use credit.²⁶³² Insofar as the agreement enables the debtor to overdraw on a current account, the Consumer Credit Act 1974 (especially Pt V) will apply, as modified in relation to such overdraft agreements.²⁶³³

(iv) Cash card (ATM card)²⁶³⁴ agreements:

- 41-494 Cash card (ATM card) agreements also give rise to some uncertainty. Since withdrawals are normally debited directly to the account (e.g. a current account) of the customer with the issuer of the card, it is necessary to ascertain whether the issuer of the card has agreed to provide the customer with credit, for example, an overdraft, in which case there will be a debtor-creditor agreement²⁶³⁵ for unrestricted-use credit.²⁶³⁶ But if the automated teller machine is so programmed as to prevent any withdrawal when the customer's account is overdrawn or which would cause a debit balance to arise on the customer's account, or (semble) if the terms of the agreement are such as to prohibit the use of the card except in respect of a credit balance on the account, then there will be no agreement to provide the customer with credit and no regulated agreement. However, different considerations may apply if the customer may use the card to obtain cash from ATMs of banks and building societies other than the issuer of the card. It is possible that a deemed extension of credit may then in some cases²⁶³⁷ arise under s.14(3) of the 1974 Act,²⁶³⁸ and if that is the case it is immaterial that there is no agreement by the issuer to provide the customer with credit.

- 41-495 Cash cards operated in connection with current accounts with banks²⁶³⁹ will, in so far as they enable the debtor to overdraw on a current account, be subject to the modified provisions of the regulatory regime (especially Consumer Credit Act 1974 Pt V) applicable to overdraft agreements.²⁶⁴⁰

(vi) Electronic purse²⁶⁴¹ agreements:

- 41-496 In principle, since the cardholder pre-pays the value loaded electronically on the card, it would seem that no credit is provided and so there will be no consumer credit agreement. But the

provision is not free from doubt.²⁶⁴² The only credit that would be provided is if the issuer provides credit facilities to the cardholder when issuing the digital cash.

(vi) Checks²⁶⁴³ trading agreements:

41-497 Checks trading agreements will be debtor-creditor-supplier agreements²⁶⁴⁴ for restricted-use credit.²⁶⁴⁵ The credit is fixed-sum credit.²⁶⁴⁶

“Credit-token” and “credit-token agreements”

41-498 The definitions of “credit-token”²⁶⁴⁷ and “credit-token agreement”²⁶⁴⁸ have been referred to previously in this chapter.²⁶⁴⁹ It should be noted that the definition of “credit-token” is not limited to a regulated agreement, but only a regulated agreement can be a “credit-token agreement”. For credit-token agreements that are (exceptionally) not covered by the *Consumer Credit (Agreements) Regulations 2010*²⁶⁵⁰ and hence subject to the “old” regime,²⁶⁵¹ certain special provisions are made for such agreements.²⁶⁵² Moreover, for all credit-token agreements there are certain special requirements as to copies.²⁶⁵³

41-499 Both two-party, three-party and four-party credit cards will be credit-tokens as will charge cards²⁶⁵⁴ and, since extended credit is granted, the agreement will (if the debtor is an individual and the agreement is not an exempt agreement) be a regulated agreement²⁶⁵⁵ and a credit-token agreement.²⁶⁵⁶

41-500 Debit cards will certainly be credit-tokens if the cardholder has an overdraft and may even be credit-tokens if this is not the case.²⁶⁵⁷ Whether or not a debit card agreement is a credit-token agreement depends on whether the agreement is a regulated agreement.²⁶⁵⁸

41-501 Cash (ATM) cards will not be credit-tokens if the card can only be used to effect withdrawals from machines operated by the issuer of the card and only when the account is in credit.²⁶⁵⁹ But if the card can be used to effect withdrawals from the machines of others than the issuer of the card, the card may be a credit-token²⁶⁶⁰ and the card agreement a credit-token agreement.²⁶⁶¹

41-502

Electronic purses are probably not credit-tokens.²⁶⁶²

- 41-503 Checks are credit-tokens²⁶⁶³ and the agreements are credit-token agreements.²⁶⁶⁴

Prohibition of unsolicited credit-tokens²⁶⁶⁵

- 41-504 Under the [Consumer Credit Act 1974 s.51](#), it was formally an offence to give a person a credit-token if they had not asked for it and the request had to be contained in a document signed by the person making the request. When consumer credit regulation was transferred to the FCA²⁶⁶⁶ that section was repealed²⁶⁶⁷ and its provisions essentially replaced by FCA rules in the FCA Handbook.²⁶⁶⁸ Hence breach of the prohibition now gives rise to the usual sanctions for breach of FCA rules.²⁶⁶⁹

Restrictions on provision of “credit card cheques”

- 41-505 In the wake of disquiet about the unsolicited sending of “credit card cheques” by credit card issuers to their cardholders, new Consumer Credit Act 1974 ss.51A–51B were enacted prohibiting²⁶⁷⁰ the provision of such cheques unless the recipient had “asked for them” or the underlying credit-token agreement was a “business” agreement. When consumer credit regulation was transferred to the FCA²⁶⁷¹ those sections were repealed²⁶⁷² and their provisions were replaced by FCA rules in the FCA Handbook.²⁶⁷³ Hence breach of the prohibition now gives rise to the usual sanctions for breach of FCA rules.²⁶⁷⁴

Acceptance of credit-token

- 41-506 The debtor accepts a credit-token when it is signed, or a receipt for it is signed, or it is first used, either by the debtor himself or by a person who, pursuant to the agreement, is authorised by him to use it.²⁶⁷⁵ Unless the debtor has previously accepted the credit-token, or the use constitutes an acceptance of it by him, he is not liable under a credit-token agreement for use made of the credit-token.²⁶⁷⁶

Misuse of credit-token ²⁶⁷⁷

41-507 Section 84 of the Consumer Credit Act 1974 contains provisions designed to limit the debtor's liability for misuse of a credit-token. Although, in principle, the debtor under a regulated consumer credit agreement is not liable to the creditor for any loss arising from use of the credit facility by another person not acting, or to be treated as acting,²⁶⁷⁸ as the debtor's agent,²⁶⁷⁹ this does not prevent the debtor under a credit-token agreement from being made liable to the extent of £50²⁶⁸⁰ (or the credit limit²⁶⁸¹ if lower) for loss to the creditor arising from use of the credit-token²⁶⁸² by other persons during a period beginning when the credit-token ceases to be in the possession of any authorised person²⁶⁸³ and ending when the credit-token is once more in the possession of an authorised person. Hence, misuse, for example, of a lost or stolen credit card by an unauthorised person, will involve the debtor in a maximum liability of £50. But this limitation does not extend to a term of the credit-token agreement which makes the debtor liable (to any extent) for loss to the creditor from use of the credit-token by a person who acquired possession of it with the debtor's consent,²⁶⁸⁴ though without his authority to use it.

41-508 The further protection previously conferred on consumers²⁶⁸⁵ by the two sets of regulations made in implementation of two EC Directives on "distance contracts"²⁶⁸⁶: the Consumer Protection (Distance Selling) Regulations 2000²⁶⁸⁷ and the Financial Services (Distance Marketing) Regulations 2004

²⁶⁸⁸

U has been revoked.²⁶⁸⁹

41-509 In any event, however, no liability can be imposed on the debtor in respect of any use of the credit-token after the creditor has been given notice that the credit-token has been lost or stolen, or is for any other reason liable to misuse.²⁶⁹⁰ Notice may be given orally or in writing,²⁶⁹¹ and takes effect when it is received; but where it is given orally, and the agreement so requires, it is to be treated as not taking effect if not confirmed in writing within seven days.²⁶⁹² The credit-token agreement must contain, in the prescribed²⁶⁹³ manner, particulars of the name, address and telephone number of a person stated to be the person to whom notice is to be given. Failure to comply with this requirement results in the release of the debtor from liability for misuse of the credit-token.²⁶⁹⁴

41-510

Where proceedings are brought by the creditor under a credit-token agreement, if the debtor alleges that any use made of the credit-token was not authorised by him, it is for the creditor to prove either (i) that the use was so authorised; or (ii) that the use occurred before the creditor had been given notice as mentioned above.²⁶⁹⁵

- 41-511 Any sum paid by the debtor for the issue of the credit-token (such as a “membership” or annual fee) is, to the extent (if any) that it has not been previously offset by use made of the credit-token, to be treated as paid towards satisfaction of any liability of the debtor.²⁶⁹⁶
- 41-512 It is important, however, to appreciate that, under the [1974 Act](#),²⁶⁹⁷ the limitation of the debtor’s liability applies only to loss arising from use of the *credit facility* provided by the creditor to the debtor, and there is nothing in the Act²⁶⁹⁸ to prevent the debtor from being made fully liable to the creditor for misuse of a credit-token in connection with a credit balance in favour of the debtor. So, for example, where a cash card is a credit-token, the conditions of use of the card could require the debtor fully to indemnify the creditor against any unauthorised withdrawal of cash while the debtor’s account is in credit.²⁶⁹⁹

Issue of new credit-tokens

- 41-513 Except in the case of a “small” (under-£50)²⁷⁰⁰ credit-token agreement,²⁷⁰¹ if a credit-token (other than the first) is given by the creditor to the debtor, a copy of the executed agreement (if any) and of any other document referred to in it must also be given to the debtor.²⁷⁰² Non-compliance with this requirement means that, while the default continues, the creditor is not entitled to enforce the agreement.²⁷⁰³

Payment Services Regulations 2017: general

- 41-514 The [Payment Services Regulations 2017 \(PSRs\)](#)²⁷⁰⁴ are of relevance to payment cards in that all the cards considered in this section²⁷⁰⁵ fall within the definition in those Regulations of a “payment instrument” issued under a “payment services” contract. Hence, such cards are subject to the consumer protection provisions in those Regulations concerning information provision and the rights and liabilities of the parties. [Part 6 of the Regulations](#) imposes a number of “information” obligations in relation to payment services provided under a “framework contract” and so is *prima facie* applicable to the contract between the cardholder and the card issuer. [Part 7 of the Regulations](#) regulates the rights and obligations of the parties in relation to the provision of

payment services and hence again the legal relationship between the cardholder and the issuer. For example, there are elaborate general provisions concerning the imposition of charges,²⁷⁰⁶ consent and withdrawal of consent by the cardholder to a payment transaction,²⁷⁰⁷ incorrectly executed payment transactions,²⁷⁰⁸ unauthorised payment transactions²⁷⁰⁹ and the execution of payment transactions.²⁷¹⁰ Contracting-out of most of these protections²⁷¹¹ is permitted, unless the “payment services user” is a “consumer”, a “micro-enterprise” or a “charity”, terms that are all defined in the Regulations.²⁷¹²

Relationship with consumer credit regulatory regime²⁷¹³

- 41-515 If payment cards are issued under “regulated agreements” within the meaning of the consumer credit regulatory regime,²⁷¹⁴ then the PSRs consumer protection provisions are generally excluded as they would otherwise duplicate the provisions of that regime.²⁷¹⁵ In addition, the PSRs provisions are significantly modified in relation to certain “low-value payment instruments”, that is cards that can be used only to execute individual payment transactions of €60 or less,²⁷¹⁶ or have a spending limit of €300 or less²⁷¹⁷ or (in the case of electronic purses) that store funds that do not exceed €500.²⁷¹⁸ Broadly speaking, only minimal information need be provided²⁷¹⁹ and contracting-out of some of the provisions is permitted.²⁷²⁰

Payment Services Regulations 2017: misuse of cards

- 41-516 The PSRs provide a comprehensive liability framework in relation to the misuse of those payment cards within their scope. First, express obligations are imposed on the cardholder both to “take all reasonable steps” to keep his personalised security credentials (for example, his PIN) safe²⁷²¹ and to notify the issuer “in the agreed manner and without undue delay” once he becomes aware of the loss, theft, misappropriation or unauthorised use of the card.²⁷²² These obligations apply even in relation to “credit tokens” covered by the consumer credit regulatory regime.²⁷²³
- 41-517 Except in the case of agreements that are regulated by the consumer credit regime (which has other detailed provisions concerning credit token misuse²⁷²⁴), failure to comply with these PSRs obligations “with intent or gross negligence” or acting “fraudulently” renders the cardholder liable for *all* losses incurred in respect of an unauthorised transaction.²⁷²⁵ Corresponding obligations are imposed on the card issuer to ensure that “appropriate means are available at all times” to so notify of possible misuse²⁷²⁶ and to prevent any use once notification has been made.²⁷²⁷ The issuer is

also obliged to ensure that personalised security features “are not accessible” to persons other than the cardholder²⁷²⁸ and the issuer bears the risk of sending the card or any personalised security features.²⁷²⁹ If the cardholder disputes a transaction, the onus is on the issuer to prove that the transaction was “authenticated”, accurately recorded and “not affected by a technical breakdown or some other deficiency”.²⁷³⁰ And the mere use of the card as recorded by the issuer “is not in itself necessarily sufficient” to prove either that the transaction was authorised by the payer or that the payer acted fraudulently or failed with intent or gross negligence to comply with his notification obligation²⁷³¹ so as to make him liable to an unlimited extent.²⁷³² Again, all these card issuer obligations also apply in relation to regulated agreements covered by the consumer credit regulatory regime.²⁷³³

Comparison with consumer credit Act regulatory regime

- 41-518 The PSRs liability provisions for misuse of cards are similar, but by no means identical, to those applicable to credit tokens issued under “credit-token agreements” in the Consumer Credit Act 1974.²⁷³⁴ To avoid duplication, if the card is issued under an agreement that is regulated by the consumer credit regulatory regime, the 1974 Act provisions apply instead of those in the PSRs.²⁷³⁵ The overall result under both liability regimes is similar but there are significant differences in the detail. First, there is a general provision in the PSRs²⁷³⁶ requiring the card issuer to refund “as soon as practicable”²⁷³⁷ transactions that are “not authorised” in accordance with the PSRs’ provision relating to the giving (and withdrawal) of consent to payment transactions by the cardholder.²⁷³⁸ This corresponds to the general provision in s.83 of the 1974 Act²⁷³⁹ but there are clear differences in that s.83 only applies to the use of a “credit facility”²⁷⁴⁰ and says nothing about the timing of refunds.
- 41-519 Secondly, as is the case under the 1974 Act, the PSRs provide derogations from this general principle so as to impose a degree of liability on the cardholder. However, these PSRs derogations apply as a matter of law and so, unlike the position under the 1974 Act, do not need to be contractually imposed. Moreover, although they are similar in effect to those under the 1974 Act, there are differences in the detail. Thus, the cardholder is generally liable up to a maximum of £35 for loss arising from the use of a lost, stolen or misappropriated²⁷⁴¹ card.²⁷⁴² Moreover, under the PSRs the cardholder is liable for *all* loss in two cases. The first is where he has acted “fraudulently”, a term that is not defined but that clearly connotes knowing that misuse is occurring. The second case where the cardholder is liable for all the loss is where he has “with intent or gross negligence” failed to comply with his obligations²⁷⁴³ to “take all reasonable steps” to keep his personalised security features safe and to notify the issuer “in the agreed manner and without undue delay” once he becomes aware of the possible misuse of the card.²⁷⁴⁴ Where the issuer has not complied with

the obligation to ensure that “appropriate means are available at all times” to so notify of possible misuse,²⁷⁴⁵ then, unless the cardholder has acted fraudulently, he is not liable for any loss (not even for the first £35).²⁷⁴⁶ And again, unless the cardholder has acted fraudulently, his liability terminates (even for the first £35) when he gives the issuer notice “in the agreed manner”²⁷⁴⁷ of possible misuse.

- 41-520 There is no provision in the PSRs that corresponds directly to s.66 of the 1974 Act, which only imposes liability on a cardholder once he has “accepted” the card.²⁷⁴⁸ However, the PSRs state that the issuer is to bear the risk of sending the card or any personalised security features²⁷⁴⁹ and the burden is on him to prove that any transaction was “authenticated”.²⁷⁵⁰

Payment Services Regulations 2017: unsolicited payment cards

- 41-521 The PSRs forbid the sending of an unsolicited “payment instrument”²⁷⁵¹ except by way of replacement of one already issued.²⁷⁵²

Payment Services Regulations 2017: the card agreement

- 41-522 Card agreements are “framework contracts” for the purposes of the PSRs. Hence the relevant “information” provisions in Pt 6²⁷⁵³ of those regulations apply. However, again to avoid duplication, where the same information is required to be provided both by Pt 6 and by the consumer credit regime, if it is provided in compliance with the consumer credit regime in a manner that complies with Pt 6, it need not be provided twice.²⁷⁵⁴ Hence where the PSRs require “extra” items of information not required by the consumer credit regime, these “extras” must also be given in the case of regulated agreements.²⁷⁵⁵ In outline, the PSRs “information” requirements are as follows. First, pre-contracting information (which may take the form of the draft contract) must usually be provided “in good time” to the cardholder before he is bound by the contract.²⁷⁵⁶ Secondly, the cardholder is given the right, during the contract and free of charge,²⁷⁵⁷ to obtain certain information and the terms of the contract.²⁷⁵⁸ Thirdly, there are elaborate provisions concerning the notification of variations in the contractual information and terms.²⁷⁵⁹ Finally, there are provisions concerning information to be provided in relation to each payment transaction²⁷⁶⁰ and provisions governing the termination of the contract by either party.²⁷⁶¹ Note also the rights and obligations imposed by Pt 7 of the PSRs, some of which are

again excluded or modified in relation to agreements that are “regulated agreements” under the consumer credit regulatory regime.²⁷⁶²

Footnotes

- 2577 For an excellent historical review, see *E. E. Bergsten*, “*Credit Cards—A Prelude to a Cashless Society*” (1967) 8 BC Ind. & Com. L Rev. 485. See also Diamond (ed.) *Instalment Credit* (1970), pp.86 et seq. (R.M. Goode); Stephenson, *Credit, Debit and Cheque Cards* (1993); Smith and Robertson, “Plastic Money”, in Brindle and Cox (eds), *Law of Bank Payments*, 5th edn (2017).
- 2578 See *NG Napier Ltd v Patterson*, 1959 S.C. (J.) 48; *Napier (NG) Ltd v Corbett*, 1962 S.L.T. 90 Sh Ct. An alternative analysis is that there is a loan made by the issuer to the holder for the purchase of the issuer’s goods. See *MacDonald v NG Napier Ltd*, 1960 S.L.T. 345.
- 2579 On four-party cards, see *Office of Fair Trading v Lloyds TSB Bank Plc* [2007] UKHL 48. See also *Bank of Scotland v Truman* [2005] EWHC 583, [2005] C.C.L.R. 3 (a “five-party” arrangement whereby the supplier appointed another as agent for processing the credit card payment). In so far as such agents do not vet the suppliers they sign up, it is questionable if such arrangements fall within CCA 1974 s.75 (see para.41-490, below). *Mekwin v National Westminster Bank Plc* [1998] C.C.L.R. 22 (issuer retains ownership of card).
- 2580 Or an agreement to assign.
- 2581 The arrangement is then: (a) an immediate debt of the whole amount of the purchase is created between the holder and the supplier; (b) this debt is assigned by the supplier to the issuer; (c) the debt is paid by the holder to the issuer in accordance with the terms of the agreement made between them. But see *Commissioners of Customs and Excise v Diners Club Ltd* [1988] 2 All E.R. 1016.
- 2582 This arrangement arguably involves a loan of money by the issuer to the holder; see above, para.41-266.
- 2583 [1989] Ch. 497. See also *Commissioners of Customs and Excise v Diners Club Ltd*, above; *Richardson v Worrall* (1985) 58 T.C. 642; *R. v Department of Social Security Ex p. Overdrive Credit Card Ltd* [1991] 1 W.L.R. 635.
- 2584 See Vol.I, para.24-073.
- 2585 Most three-party and four-party cards are in this form.
- 2586 This type of transaction is usually designed to enable the cardholder to purchase goods or services from a particular store or group of stores.
- 2587 An additional charge may be made for the use of this facility, or interest may be charged (sometimes at a higher rate) from the date the cash is withdrawn.
- 2588 Issued by a shop or store.
- 2589 e.g. Diners’ Club and American Express.
- 2590 e.g. Visa Debit.

- 2592 See below, para.[41-483](#).
- 2593 This is also the case for credit cards: see above, para.[41-476](#).
- 2594 See Reed and Davies, Digital Cash—the Legal Implications (1995); *Finlayson-Brown (1997) J.I.B.L.* 362; Effros, Current Law Issues Affecting Central Banks (1998), Ch.6; Hooley “Payment in a Cashless Society” in The Realm of Company Law—A Collection of Papers in honour of Professor Leonard Sealy (1998), p.245; Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-015.
- 2595 *Goldberg v Tait [1950] N.Z.L.R.* 976; *Cash Order Purchases Ltd v Brady [1952] N.Z.L.R.* 898; *Premier Clothing and Supply Co Ltd v Hillcoat [1969] C.L.Y* 2279a, Cty Ct. cf. *Progressive Supply Co Ltd v Dalton [1942] 2 All E.R.* 646, [1943] Ch. 54; *Davies v Customs and Excise Commissioners [1975] S.T.C.* 28.
- 2596 See above, para.[41-266](#).
- 2597 The voucher trader is very often a wholly-owned subsidiary of the retailing company.
- 2598 See, in particular, Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), especially at para.2-015; and Goode, Consumer Credit: Law and Practice, Pt C, Ch.39.
- 2599 See above, para.[41-476](#).
- 2600 Unless exempt as high net worth or business debtors, see above, paras [41-046](#) and [41-047](#).
- 2601 Neither are “individuals”, as defined: see above, para.[41-016](#).
- 2602 See above, para.[41-063](#).
- 2603 In which case they will be “credit brokers”; cf. (mere promotion) *Brookes v Retail Credit Cards Ltd [1986] Crim. L.R.* 327; above, para.[41-235](#).
- 2604 See above, para.[41-024](#).
- 2605 See above, paras [41-030](#)—[41-031](#). It will be a category 12(a) agreement.
- 2606 See above, para.[41-027](#).
- 2607 i.e. under the *Sale of Goods Act 1979*, or under the *Supply of Goods and Services Act 1982*, or at common law.
- 2608 See above, para.[41-034](#).
- 2609 See above, para.[41-029](#).
- 2610 See above, para.[41-024](#).
- 2611 See above, paras [41-030](#)—[41-031](#). It will be a category 12(b) agreement, see above, para.[41-032](#). *Office of Fair Trading v Lloyds TSB Bank Plc [2006] EWCA Civ* 268 (*affirmed, on another point: [2007] UKHL 48*) confirmed that there were the requisite “arrangements” in a four-party credit card transaction. And see *Bank of Scotland v Truman [2005] EWHC 583, [2005] C.C.L.R.* 3 (still “arrangements” between a fifth party with agency relationship with party to four-party credit card). It remains a moot point whether suppliers who use “master merchants” (who do not vet the suppliers they deal with) to process payments through the card schemes have requisite “arrangements” with the relevant credit card issuer or whether [s.187\(3\)](#) would apply to deny this.
- 2612 See above, para.[41-027](#).
- 2613 See above, para.[41-307](#) (subject, in particular, to the £100 minimum cash price referred to in that section). And it was held that the protection applies even where card (issued

- under a “United Kingdom credit agreement”) finances a “foreign transaction”: *Office of Fair Trading v Lloyds TSB Bank Plc [2007] UKHL 48*. CCA 1974. S.75A (see above, para.41-309) does not apply.
- 2614 See above, para.41-034.
- 2615 See above, para.41-029.
- 2616 See above, para.41-480.
- 2617 See above, para.41-011.
- 2618 Under the (now repealed) original version of [art.3\(1\)\(a\)\(ii\) of the Consumer Credit \(Exempt Agreements\) Order 1989 \(SI 1989/869\)](#), see above, para.41-042.
- 2619 Unless the agreement falls within any of the general exemptions, see above, paras 41-039 et seq.
- 2620 [CCA 1974 s.75\(3\)\(b\)](#), added on 1 February 2011, by [SI 2010/1010 reg.24](#).
- 2621 See above, para.41-481.
- 2622 See Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-015.
- 2623 See above, paras 41-030—41-031 (unless debtor is a body corporate or large partnership). It will be a category 12(b) agreement; see above, para.41-032.
- 2624 See above, para.41-027.
- 2625 See above, para.41-307.
- 2626 It states that the card issuer “shall be taken to provide him with credit drawn on whenever a third party supplies him with cash, goods or services”. This provision is not replicated in the FCA Handbook Glossary definition of “credit token”, see below, para.41-498.
- 2627 See previous note: “whenever a third party supplies him ...”.
- 2628 See [CCA 1974 s.187\(3A\)](#) (inserted by the [Banking Act 1987 s.89](#)) which states that “arrangements shall ... be disregarded for the purposes of subs.(1) and (2) if they are arrangements for the electronic transfer of funds from a current account at a bank within the meaning of the [Bankers’ Books Evidence Act 1879](#)”. See above, paras 41-030—41-031.
- 2629 See above, para.41-307.
- 2630 See above, para.41-492 as to the uncertainty whether the cardholder must use a credit facility.
- 2631 See above, para.41-034.
- 2632 See above, para.41-029.
- 2633 See above, para.41-304.
- 2634 See above, para.41-483.
- 2635 See above, para.41-034.
- 2636 See above, para.41-029.
- 2637 Unless, as in many cases, the cash-dispensing bank acts merely as agent for the issuer of the card.
- 2638 See above, para.41-492.
- 2639 Or building societies.
- 2640 See above, para.41-304.

- 2641 See above, para.[41-484](#).
- 2642 Owing to the provisions of [CCA 1974 ss.14\(1\)\(b\), 14\(3\)](#) of the Act; see Guest and Lloyd, Encyclopedia of Consumer Credit Law (1975, looseleaf), para.2-015.
- 2643 See above, para.[41-485](#).
- 2644 See above, paras [41-030—41-031](#). They will be a category 12(b) agreements, see above, para.[41-032](#).
- 2645 See above, para.[41-027](#).
- 2646 See above, para.[41-026](#).
- 2647 [CCA 1974 s.14\(1\), \(3\), \(4\)](#). The definition in the FCA Handbook Glossary is similar (omitting the provisions in [s.14\(3\)](#), considered above, para.[41-492](#)).
- 2648 [CCA 1974 s.14\(2\)](#).
- 2649 See above, para.[41-035](#). And note that the definition of “relevant voucher” in the Home Credit Market Investigation Order 2007, made by the Competition Commission under the Enterprise Act 2002 ss.161, 164 is in almost identical terms to that of “credit-token” in the [CCA 1974](#).
- 2650 [SI 2010/1014](#), above, para.[41-084](#).
- 2651 See above, para.[41-083](#).
- 2652 See [CCA 1974 s.63\(4\)](#): copy of executed agreement required under [CCA 1974 s.63\(2\)](#) (see above, para.[41-090](#)) need not be given within the seven days following the making of the agreement if it is given before or at the time when the credit-token is given to the debtor. And see [CCA 1974 s.64\(2\)](#): the notice of cancellation rights under [s.64\(1\)\(b\)](#) (see above, para.[41-092](#)) need not be sent by post within those seven days if either is sent by post to the debtor before the credit-token is given to him, or if it is sent by post to him together with the credit-token.
- 2653 [Consumer Credit \(Cancellation Notices and Copies of Documents\) Regulations 1983 \(SI 1983/1557\) reg.8](#) (copies under [CCA 1974 s.85](#)).
- 2654 Under [CCA 1974 s.14\(1\)\(a\) or \(b\)](#) and the equivalent provisions in the FCA Handbook Glossary definition of “credit token”.
- 2655 See above, para.[41-017](#).
- 2656 [CCA 1974 s.14\(2\)](#).
- 2657 Under [s.14\(1\)\(b\)](#) and the equivalent provisions in the FCA Handbook Glossary definition of “credit token”. See above, para.[41-492](#) as to whether [CCA 1974 s.14\(3\)](#) operates to “deem” credit to be provided in all [s.14\(1\)\(b\)](#) cases.
- 2658 See above, para.[41-017](#).
- 2659 See [CCA 1974 s.14\(1\)\(a\)](#) and the equivalent provisions in the FCA Handbook Glossary definition of “credit token”.
- 2660 Under [CCA 1974 s.14\(1\)\(b\), \(4\)](#) and the equivalent provisions in the FCA Handbook Glossary definition of “credit token”.
- 2661 See [CCA 1974 s.14\(3\)](#) and above, paras [41-492](#) and [41-494](#).
- 2662 But again (see above, para.[41-492](#)) [CCA 1974 s.14\(3\)](#) may “deem” credit to be provided.
- 2663 Under [CCA 1974 s.14\(1\)\(a\) or \(b\)](#) and the equivalent provisions in the FCA Glossary definition of “credit token”.

- 2664 [CCA 1974 s.14\(2\)](#); see above, para.41-035.
- 2665 There is a more general prohibition of unsolicited credit in the [Financial Services \(Distance Marketing\) Regulations 2004 \(SI 2004/2095\)](#) reg.15 (as partly revoked by SI 2008/1277). And see the provision in the [Payment Services Regulations 2017 \(SI 2017/752\)](#) reg.73(1)(b) (below, para.41-521) prohibiting unsolicited “payment instruments”, noted in para.41-521, below.
- 2666 See above, para.41-002.
- 2667 On 1 April 2014 by the [Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) \(No.2\) Order 2013 \(SI 2013/1881\)](#) art.20(15). But see the [Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) Order 2014 \(SI 2014/366\)](#) art.13: notwithstanding the repeal of s.51, it continued to have effect for the purposes of the [Payment Services Regulations 2009](#) reg.52(a) (disapplication of certain regulations in the case of consumer credit agreements) and hence it continued to apply in relation to regulated credit agreements in place of [reg.58\(1\)\(b\)](#) of those regulations. However, those regulations have been replaced by [SI 2017/752](#), which result in the similar prohibition in [reg.73\(1\)\(b\)](#) now applying in all cases: see below, para.41-521.
- 2668 See CONC 2.9 (prohibiting the giving of unsolicited credit-tokens by FCA-authorised persons).
- 2669 See above, para.41-065. Hence breach is no longer criminal. Breach of the [Payment Services Regulations 2017 \(SI 2017/752\)](#) reg.73(1)(b) may also arise with similar consequences: see below, para.41-521.
- 2670 The sanction was criminal but the consequent transactions were not affected.
- 2671 See above, para.41-002.
- 2672 On 1 April 2014 by the [Financial Services and Markets Act 2000 \(Regulated Activities\) \(Amendment\) \(No.2\) Order 2013 \(SI 2013/1881\)](#) art.20(16).
- 2673 See CONC 2.3.5R (restricting the provision of credit card cheques by FCA-authorised persons).
- 2674 See above, para.41-065. Hence breach is no longer criminal.
- 2675 [CCA 1974 s.66\(2\)](#). The burden of proof is on the creditor: [CCA 1974 s.171\(4\)\(a\)](#). The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.124) that [s.66](#) (together with ss.83 and 84, below, para.41-507) should be retained in legislation in respect of CCA-regulated credit facilities that do not involve the provision of “payment services” within the [Payment Services Regulations 2017 \(PSRs\) \(SI 2017/752\)](#) Pt 7, so that [s.66](#) should continue to apply where a credit token is not a “payment instrument” within the [PSRs](#). Otherwise the FCA’s view is that “the overall protection is broadly comparable” under the [CCA](#) and the [PSRs](#) and hence that the advantages of a more unified regime suggest that the [CCA](#) provisions be replaced with the [PSRs](#) where a [CCA](#)-regulated agreement is also an agreement for payment services.
- 2676 [CCA 1974 s.66\(1\)](#).
- 2677 Compare the position in relation to the misuse of “payment instruments” under the [Payment Services Regulations 2017 \(SI 2017/752\)](#), noted below, paras 41-516—41-519. The FCA’s Review of Retained Provisions of the Consumer Credit

Act: Final Report (see para.[41-004](#) (note), above) proposes (see Annex 5, para.124) that ss.[83](#) and [84](#) (together with [s.66](#), above, para.[41-506](#)) should be retained in legislation in respect of [CCA](#)-regulated credit facilities that do not involve the provision of “payment services” within the [PSRs Pt 7](#), so that those sections will continue to apply where a credit token is not a “payment instrument” within the [PSRs](#). Otherwise the FCA’s view is that “the overall protection is broadly comparable” under the [CCA](#) and the [PSRs](#) and hence that the advantages of a more unified regime suggest that the [CCA](#) provisions be replaced with the [PSRs](#) where a [CCA](#)-regulated agreement is also an agreement for payment services.

- 2678 Presumably by reason of ostensible authority.
- 2679 [CCA 1974 s.83\(1\)](#). See *NRAM Plc v McAdam & Hartley [2015] EWCA Civ 751*, reversing [2014] EWHC 4174 (Comm): (obiter) [s.83](#) does not apply to non-regulated agreements that are documented as regulated agreements.
- 2680 The amount was raised from £30 by [SI 1983/1571](#). It was not increased by [SI 1998/997](#).
- 2681 See above, para.[41-025](#).
- 2682 For the position where two or more credit-tokens are given under one agreement, see [CCA 1974 s.84\(8\)](#).
- 2683 The debtor, the creditor, and any person authorised by the debtor to use the credit-token are “authorised persons” [CCA 1974 s.84\(7\)](#).
- 2684 [CCA 1974 s.84\(2\)](#).
- 2685 “Consumer” is defined in [reg.3\(1\)](#) of the 2000 Regulations and [reg.2\(1\)](#) of the 2004 Regulations.
- 2686 Defined in both sets of Regulations (in [regs 3\(1\)](#) and [2\(1\)](#), respectively) as contracts “concluded … under an organised distance sale or service provision scheme run by the supplier who … makes exclusive use of … distance communication”.
- 2687 [SI 2000/2334](#), as amended by [SI 2004/2095](#) and [SI 2005/689](#). These implemented the Distance Contracts Directive 97/7.
- 2688 [SI 2004/2095](#). These implement the Distance Marketing Directive (DMD) 2002/65 (to be repealed and replaced by provisions as to financial services distance contracts in a new Ch.IIIa in the Consumer Rights Directive (2011/83/EU)).
- 2689 The relevant provisions were repealed by the [Payment Services Regulations 2009](#) ([SI 2009/209](#)) Sch.6 Pt 2.
- 2690 [CCA 1974 s.84\(3\)](#).
- 2691 [CCA 1974 s.84\(3\)](#).
- 2692 [CCA 1974 s.84\(5\)](#).
- 2693 By the [Consumer Credit \(Credit-Token Agreements\) Regulations 1983](#) ([SI 1983/1555](#)).
- 2694 [CCA 1974 s.84\(4\)](#).
- 2695 [CCA 1974 s.171\(4\)\(b\)](#).
- 2696 [CCA 1974 s.84\(6\)](#).
- 2697 [CCA 1974 s.84](#) is drafted as an exception to [CCA 1974 s.83](#), and [CCA 1974 s.83\(1\)](#) only applies to “loss arising from use of the credit facility”.

- 2698 But protection may be afforded for misuse of cards when the account is in credit by (a) the [Payment Services Regulations 2009](#) (see below, paras [41-514](#) et seq., especially para.[41-516](#)) or (b) the “BCOBS” Module of the Financial Conduct Authority’s Handbook, (see above, paras [36-220](#) et seq.), see BCOBS 5.1.11–5.1.12.
- 2699 Historically, the old “Lending Code” limited the extent to which a subscribing financial institution could make a consumer liable for misuse of a facility in credit but the Standards of Lending Practice (which replace it, see above, para.[41-013](#)) do not contain equivalent explicit constraints, although it is understood that in practice lenders have continued to apply the same approach to the misuse of a facility in credit.
- 2700 See [CCA 1974 s.17](#); above, para.[41-049](#).
- 2701 [CCA 1974 s.85\(3\)](#).
- 2702 [CCA 1974 s.85\(1\)](#). See also [SI 1983/1557 reg.8](#). The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above) contains (see Annex 5, para.124) some discussion of [s.85](#) setting out options for its amendment, especially as customers can require/obtain a copy of the agreement under [ss.77–79](#) (above, paras [41-127](#) et seq.): see Review Annex 6, paras 193–196. The Review states (see para.6.31) that the obligation to provide information in [s.85](#) could be replaced by a corresponding FCA rule but that breach of such a FCA rule would not carry the same sanction and hence proposes that the existing sanction should be retained in legislation.
- 2703 [CCA 1974 s.85\(2\)\(a\)](#). Originally, if the default continued for one month, an offence was committed ([s.85\(2\)\(b\)](#)) but this provision was repealed by the [Consumer Protection from Unfair Trading Regulations 2008 \(SI 2008/1277\) reg.30\(1\)](#) and Sch.2 para.22.
- 2704 [SI 2017/752](#), replacing the [PSR 2009 \(SI 2009/209\)](#). See also above, paras 36-225 et seq.
- 2705 There is an exclusion for store cards issued by a retailer for use in his store and for cards that can only be used in a limited number of outlets or for a limited range of goods and services and for ATM cards: [PSRs Sch.1 paras 2\(k\) and \(o\)](#).
- 2706 [PSRs reg.66](#). This applies both to agreements regulated under the consumer credit regime and (see [PSRs reg.65](#)) to “low value payment instruments” unless disapplied by contract. But see [reg.63\(5\)\(a\)](#) (contracting out: general).
- 2707 [PSRs reg.67](#). This also applies both to agreements regulated under the consumer credit regime and (see [PSR reg.65](#)) to “low value payment instruments” unless disapplied by contract. But see [reg.63\(5\)\(a\)](#) (contracting out: general). [Reg.76](#) requires the card issuer to refund unauthorised transactions, but this does not apply to agreements regulated under the consumer credit regime (see [reg.64](#)), which have their own provisions ([CCA 1974 ss.83 and 84](#), see above, para.[41-507](#)).
- 2708 [PSRs reg.74](#). This is disapplied ([reg.64\(3\)](#)) in relation to agreements regulated under the consumer credit regime (in the light of [CCA 1974 ss.66, 83 and 84](#), see above, paras [41-506–41-507](#)), but (see [PSRs reg.65](#)) it applies to “low value payment instruments” unless disapplied by contract. Contracting out is generally (but see [reg.63\(5\)\(b\)](#)) not permitted.
- 2709 [PSRs regs 74–80](#).

- 2710 PSRs regs 81–84, applicable also both to agreements regulated under the consumer credit regime and (see PSRs reg.65) to “low value payment instruments” unless disapplied by contract. But see reg.63(5)(a) (contracting out permitted to some extent).
- 2711 Contracting-out is permitted in relation to all of Pt 6 (information provisions, see reg.40(7)) but some provisions in Pt 7 are mandatory (see especially reg.71 (limits on use of cards), reg.72 (obligations of cardholder), reg.73 (obligations of card issuer), reg.74 (notification of errors) and reg.76 (liability of issuer)).
- 2712 PSRs reg.2(1). A “consumer” is “an individual ... acting for purposes other than a trade, business or profession”.
- 2713 The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.124) that CCA 1974 ss.66, 83 and 84 (above, paras 41-506, 41-507) should be retained in legislation in respect of CCA-regulated credit facilities that do not involve the provision of “payment services” within the PSRs Pt 7, so that those sections will continue to apply where a credit token is not a “payment instrument” within the PSRs. Otherwise the FCA’s view is that “the overall protection is broadly comparable” under the CCA and the PSRs and hence that the advantages of a more unified regime suggest that the CCA provisions be replaced with the PSRs where a CCA-regulated agreement is also an agreement for payment services.
- 2714 See above, paras 41-487 et seq.
- 2715 PSRs regs 41 and 64.
- 2716 If the payment transaction is executed wholly in the UK, otherwise the limit is €30.
- 2717 If the payment transaction is executed wholly in the UK, otherwise the limit is €150.
- 2718 PSRs regs 42 and 65. There are special provisions in relation to liability for misuse in relation to electronic purses in reg.65(3).
- 2719 PSRs reg.42(2)(a).
- 2720 PSRs reg.42(2)(b), (c) and reg.65(2). Note also reg.65(3) (electronic money).
- 2721 PSRs reg.72(3).
- 2722 PSRs reg.72(1).
- 2723 See above, para.41-498. Moreover, contracting-out (except in the case of non-consumers) is not permitted (see reg.63(5)) but as regards “low value instruments”, contracting out of the second obligation (in reg.72(1)(b) (obligation to notify loss or misuse of instrument)) is permitted (see reg.65(2)(a)).
- 2724 See above, para.41-507.
- 2725 PSRs reg.77(3), see below. The issuer must “must provide supporting evidence” of any fraud or failure to comply he alleges: reg.75(4).
- 2726 PSRs reg.73(1)(c), and, on request, to provide the cardholder with the means to prove that such notification was made (reg.73(1)(d)).
- 2727 PSRs reg.73(1)(f).
- 2728 PSRs reg.73(1)(a).
- 2729 PSRs reg.73(2).
- 2730 PSRs reg.75(1).

- 2731 i.e. his obligation to notify on becoming aware of possible misuse imposed by reg.72(1)(b), see above.
- 2732 Under PSRs reg.77(2), see below.
- 2733 Moreover, contracting-out (except in the case of non-consumers) is not permitted in relation to obligations in reg.73 (although it is allowed for those in reg.75) and, as regards “low value instruments”, some contracting out is permitted. See PSRs reg.63(3) and reg.65(2), respectively.
- 2734 See above, para.41-507. See para.41-515, above where it is noted that FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) notes that “the overall protection is broadly comparable” under the CCA and the PSRs and hence that the advantages of a more unified regime suggest that the CCA provisions be replaced with the PSRs where a CCA-regulated agreement is also an agreement for payment services.
- 2735 PSRs reg.64(3) and (4).
- 2736 PSRs reg.76.
- 2737 “... and in any event no later than the end of the business day following the day on which it becomes aware of the unauthorised transaction”: reg.76(2). But see the qualifications in reg.76(3)–(5).
- 2738 In PSRs reg.67.
- 2739 See para.41-507, above.
- 2740 See above, para.41-512.
- 2741 “... where the [cardholder] has failed to keep the personalised security features ... safe.”
- 2742 PSRs reg.77(1). The corresponding provision in the 1974 Act, s.84, has been altered from £50 to £35 by PSRs reg.156 Sch.8 para.1(b) but refers to the card not being in the cardholder’s “possession”.
- 2743 Under PSRs reg.72, see above, para.41-516.
- 2744 PSRs reg.77(3). The corresponding provision in the 1974 Act refers to losses caused by misuse of the card by a person who acquires possession with the cardholder’s consent. Imposed by PSRs reg.73(1)(c).
- 2745 PSRs reg.77(4)(b).
- 2746 “[U]nder” PSRs reg.72(1)(b) which refers to notice “in the agreed manner and without undue delay”.
- 2747 See above, para.41-506.
- 2748 PSRs reg.73(2).
- 2749 PSRs reg.75(1).
- 2750 See above, para.41-514.
- 2751 PSRs reg.73(1)(b). Breach is actionable as a breach of statutory duty by a private person suffering loss (see PSRs reg.148(1)(b)). Compare the prohibition (with the same sanction) in the FCA Handbook, CONC replacing the repealed CCA 1974 s.51, noted above, para.41-504.
- 2752 See above, para.41-514.
- 2753 PSRs reg.41(3). Moreover, reg.50 (changes in contractual information) and reg.51 (termination of framework contract) do not apply: reg.41(2).

- 2755 For example, any information e.g. as to interest and currency exchange rates in PSRs Sch.4 must be provided under PSRs regs 48 and 49.
- 2756 PSRs reg.48 (the requisite information is set out in Sch.4)—unless this cannot be done in the case of a “distance” contract concluded at the user’s request, in which case it must be provided immediately after the contract is made. See also reg.55 (communication of information). Reg.48 does not generally apply to CCA 1974 regulated agreements, which have their own requirements as to pre-contract information (see above, para.41-078), but the “extra” PSRs information, e.g. as to details of interest and exchange rates, must be supplied.
- 2757 PSRs reg.56(1).
- 2758 PSRs reg.49 (the requisite information is set out in Sch.4). Further information may be charged for, at cost: reg.56(2). See also reg.55 (communication of information). Reg.49 does not apply to agreements regulated under the consumer credit regime (reg.41), which have their own information requirements (see above, paras 41-127 et seq.), except in so far as Sch.4 requires “extra” information to be provided.
- 2759 PSRs reg.50. Reg.50 does not apply to agreements regulated under the consumer credit regime (reg.41), which have their own provisions as to variation (CCA 1974 s.82, above, paras 41-145 et seq.).
- 2760 PSRs regs 52–54. See also reg.55 (communication of information).
- 2761 PSRs reg.51. Reg.51 does not apply to agreements regulated under the consumer credit regime which have their own provisions as to termination (CCA 1974 s.87, 98 above, paras 41-168 and 41-174).
- 2762 See PSRs reg.64. and above, para.41-515.

Section 7. - Mortgages of Personal Property

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 7. - Mortgages of Personal Property

Bills of Sale Act 1882 ²⁷⁶³

- ⁴¹⁻⁵²³ Credit provided on the security of personal chattels ²⁷⁶⁴ that are retained in the possession of the debtor is likely to fall within the control of the [Bills of Sale Act \(1878\) Amendment Act 1882](#) if the transaction is contained in, or represented by, a document. Under this Act, a bill of sale given as security for the payment of money by the grantor of the bill must be in the statutory form, ²⁷⁶⁵ and it must be attested ²⁷⁶⁶ and registered. ²⁷⁶⁷ If it is not in the statutory form, it is absolutely void, although the creditor can recover the money lent, with reasonable interest, as money had and received. ²⁷⁶⁸ If it is in the statutory form, but is not duly attested or not duly registered, it is void as regards the personal chattels comprised in it, that is to say, the security is rendered void, although the creditor remains entitled to enforce the personal covenants contained in the bill, such as those which relate to the repayment of money advanced and the payment of interest. ²⁷⁶⁹
- ⁴¹⁻⁵²⁴ Such a bill of sale cannot, in general, include any reference to after-acquired chattels ²⁷⁷⁰; and a bill of sale made or given in consideration of any sum under £30 is void. ²⁷⁷¹
- ⁴¹⁻⁵²⁵ The [1882 Act](#) has been interpreted with great strictness, and the technicality of this branch of the law is notorious. ²⁷⁷² While a substantial number of security bills are in fact registered each year, the Act has severely inhibited the use of chattel mortgages as security for credit transactions, although so-called “log-book loans”, where a loan is provided on the security of a car, are not uncommon. ²⁷⁷³ But the Act does not apply to mortgages or charges of goods created by companies incorporated under the [Companies Acts](#). ²⁷⁷⁴

Consumer credit

- 41-526 The [1882 Act](#) was not repealed by the [Consumer Credit Act 1974](#). Agreements within the control of the consumer credit regulatory regime which are secured by a bill of sale given as security for the payment of money must therefore comply with the requirements (including those relating to security) of that regime as well as those of the [Act of 1882](#). More particularly, however, para.1 of [s.7 of the 1882 Act](#) (which entitles a grantee of a bill of sale to take possession of the chattels assigned in the event of default in payment or in performance of any covenant contained in the bill) is, by [s.7A\(1\) of the Act](#),²⁷⁷⁵ made inapplicable to a default relating to a bill of sale given by way of security for the payment of money under a regulated agreement to which [s.87\(1\)](#)²⁷⁷⁶ of the [Consumer Credit Act 1974](#) applies—(a) unless the restriction imposed by [s.88\(2\)](#) of that Act (preventing certain action before the expiry of time for remedying the default)²⁷⁷⁷ has ceased to apply to the bill of sale; or (b) if, by virtue of [s.89 of that Act](#), the default is to be treated as not having occurred.²⁷⁷⁸ Further, where [para.1 of s.7 of the 1882 Act](#) does apply, application by the debtor for relief must be made in the case of such a bill of sale to the county court instead of to the High Court as provided in the [1882 Act](#).²⁷⁷⁹

Distress

- 41-527 As noted above, a landlord's power at common law to distrain upon all goods found upon the demised premises has now been abolished.²⁷⁸⁰ Historically, goods comprised in a bill of sale were excluded from the protection of the [Law of Distress Amendment Act 1908](#) except during the period between the service of a default notice²⁷⁸¹ under [s.87 of the Consumer Credit Act 1974](#) in respect of the goods and the date on which the notice expired or was earlier complied with.²⁷⁸²

Ships or vessels

- 41-528 Transfers or assignments of any ship or vessel or any share thereof fall outside the [Bills of Sale Acts](#).²⁷⁸³ A mortgage of a registered ship or a share therein is governed by the [Merchant Shipping Act 1995](#).²⁷⁸⁴ A mortgage of an unregistered vessel may be effected at common law.²⁷⁸⁵

Aircraft

- 41-529 The mortgaging of aircraft registered in the United Kingdom nationality register is governed by the [Civil Aviation Act 1982](#)²⁷⁸⁶ and orders made relating thereto.²⁷⁸⁷ The [Bills of Sale Acts](#) do not apply to such mortgages.²⁷⁸⁸

Agricultural charges

- 41-530 An agricultural charge on farming stock and assets is not within the [Bills of Sale Acts](#)²⁷⁸⁹ but must be registered in the register of agricultural charges at the Land Registry.²⁷⁹⁰

Mortgage or charge of choses in action

- 41-531 A mortgage or charge of a chose in action,²⁷⁹¹ e.g. a debt, life insurance policy,²⁷⁹² a contractual right, share in a company, etc. if made by an individual, is outside the [Bills of Sale Act 1882](#)²⁷⁹³ but may be within the consumer credit regulatory regime.²⁷⁹⁴

Book debts

- 41-532 A general assignment of book debts by a trader may in certain circumstances require registration as if the assignment were an absolute bill of sale²⁷⁹⁵ and a charge on book debts of a company or of certain other intangible moveable property vested in a company must be registered under the [Companies Act 2006](#).²⁷⁹⁶

Footnotes

- 2763 It was expected that the [Bills of Sale Acts](#) would be replaced by a new Goods Mortgages Act which was expected to introduce protection measures for borrowers mortgaging their personal property (e.g. their cars under so-called “log-book loans”, see below para.41-525) similar to those available under the [Consumer Credit Act 1974](#) in relation

- to hire-purchase and conditional sale (see above, paras 41-360 et seq. and 41-447 et seq.). However, in May 2018 the government announced that it had abandoned this proposal but it has since (May 2021) been re-introduced as a private members' bill (starting in the House of Lords).
- 2764 Bills of Sale Act 1878 s.4; Bills of Sale Act 1890.
- 2765 Bills of Sale Act (1878) Amendment Act 1882 s.9 and Sch.
- 2766 ss.8, 10.
- 2767 ss.8, 11.
- 2768 *Davies v Rees* (1886) 17 Q.B.D. 408; *North Central Wagon & Finance Co Ltd v Brailsford* [1962] 1 W.L.R. 1288. See also *Bradford Advance Co Ltd v Ayers* [1924] W.N. 152.
- 2769 s.8; *Heseltine v Simmons* [1892] 2 Q.B. 547.
- 2770 s.5. There will also (semble) be a breach of ss.4 and 9 of the Act, and the bill will be void: *Thomas v Kelly* (1888) 13 App. Cas. 506.
- 2771 s.12.
- 2772 See *Graham S McBain*, "Repealing the Bills of Sale Acts", [2011] J.B.L. 475.
- 2773 See, for example, *Welcome Financial Services Ltd v Nine Regions Ltd (t/a Log Book Loans)* [2010] 2 Lloyd's Rep. 426; *Evans v Finance-U-Ltd* [2013] EWCA Civ 869.
- 2774 *Re Standard Manufacturing Co* [1891] 1 Ch. 627; Bills of Sale Act (1878) Amendment Act 1882 s.17. But a charge created by a company must be registered under Companies Act 2006 s.860 (see the previous more specific provision in Companies Act 2006 s.860(7)(b) (replacing s.396(1)(e) of the Companies Act 1985) cf. *Stoneleigh Finance Ltd v Phillips* [1965] 2 Q.B. 537.
- 2775 Added by s.192 of and Sch.4 para.1 to the Consumer Credit Act 1974 from 19 May 1985: SI 1983/1551 (c.44).
- 2776 See above, para.41-168.
- 2777 See above, para.41-169.
- 2778 See above, para.41-173.
- 2779 Bills of Sale Act (1878) Amendment Act 1882 s.7A(2) (added by s.192 of and Sch.4 para.1 to the Consumer Credit Act 1974).
- 2780 See above, para.41-431.
- 2781 See above, para.41-168.
- 2782 Law of Distress Amendment Act 1908 s.4A(2) (added by s.192 of and Sch.4 para.5 to the Consumer Credit Act 1974). See also s.4 (as amended by s.192(4) of and Sch.5 to the 1974 Act).
- 2783 Bills of Sale Act 1878 s.4.
- 2784 s.16 and Sch.1. See also Companies Act 2006 s.860 (previously the more specific s.860(7)(h) (previously Companies Act 1985 s.396(1)(h))).
- 2785 The exception in s.4 of the Bills of Sale Act 1878 was not limited to transfers or assignments within the Merchant Shipping Act 1894, nor were the words "ship or vessel" limited to ships registered or registrable under the 1894 Act: *Union Bank of London v Lenanton* (1878) 3 C.P.D. 213; *Gapp v Bond* (1887) 19 Q.B.D. 200.
- 2786 s.86.

- 2787 Mortgaging of Aircraft Order (SI 1972/1268) as amended by SI 1981/611.
- 2788 SI 1972/1268 para.16(1). But see Companies Act 2006 s.860 (previously the more specific s.860(7)(h) (replacing Companies Act 1985 s.396(1)(h)), above.
- 2789 Agricultural Credits Act 1928 s.8(1).
- 2790 s.9.
- 2791 See Vol.I, Ch.22.
- 2792 Policies of Assurance Act 1867; see below, para.44-067.
- 2793 Bills of Sale Act 1878 s.4; *Re Isaacson [1895] 1 Q.B. 33*.
- 2794 But a mortgage or charge of a chose in action is not a pledge: see above, para.41-195.
- 2795 Insolvency Act 1986 s.344. See Vol.I, para.22-064.
- 2796 s.860, previously the more specific s.860(7)(f). See Vol.I, para.22-067.

Section 8. - Mortgages of Land

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 41 - Credit and Security

Section 8. - Mortgages of Land

Consumer credit regulation

- 41-533 The [Consumer Credit Act 1974 \(CCA 1974\)](#) can apply to an agreement notwithstanding that it is secured by a mortgage or charge on land or relates to an advance for the purchase of land.²⁷⁹⁷ But certain land mortgage transactions are “exempt agreements” under the regime.²⁷⁹⁸ Most importantly²⁷⁹⁹ most residential mortgages²⁸⁰⁰ and so-called “regulated home purchase plans”,²⁸⁰¹ are “exempt agreements” for the purposes of the regime because they are regulated under a special regime established under the [Financial Services and Market Act 2000 \(FSMA 2000\)](#). Hence there are presently two statutory regimes for the regulation of land mortgages, both now administered by the Financial Conduct Authority.²⁸⁰² Other categories of “exempt” land mortgages are considered above.²⁸⁰³ Moreover, land mortgages may take advantage of the more general exemptions for “high net worth” debtors²⁸⁰⁴ and for credit agreements entered into for the debtor’s business purposes.²⁸⁰⁵ Although otherwise not covered by the [CCA 1974](#) regime, such exempt agreements (apart from those regulated under the [FSMA 2000](#) regime²⁸⁰⁶) are nevertheless not excepted from the “unfair relationship” provisions.²⁸⁰⁷

Impact of Consumer Credit Directive

- 41-534 The Consumer Credit Directive²⁸⁰⁸ does not apply to land mortgages. Hence, its implementation did not require changes to the old consumer credit regime applicable to mortgages and this generally remained applicable to them. Hence, the new “Directive” provisions, such as the new duties of pre-contractual explanation²⁸⁰⁹ and of creditworthiness assessment²⁸¹⁰ and the new right to *part* settle a regulated agreement²⁸¹¹ do not apply to agreements secured on land. However,

as will be noted further below, mortgagees may opt into the new [Disclosure of Information Regulations 2010](#)²⁸¹² and, hence, into the new [Agreements Regulations 2010](#).²⁸¹³ In such a case, the general Total Charge for Credit rules²⁸¹⁴ will then apply to determine the “total charge for credit” and “APR”.

The Mortgage Credit Directive

- 41-535 The [Mortgage Credit Directive](#)²⁸¹⁵ applies to most consumer residential land mortgages.²⁸¹⁶ As the UK already had a well-developed residential land mortgage regulatory regime under the [2000 Act](#), it was decided that implementation be achieved by modifying that regime.²⁸¹⁷ Moreover, the opportunity was taken to extend that regime to those (second charge) residential mortgages originally within the [CCA 1974](#) regime. This was achieved by altering the definition of “regulated mortgage contract” under the 2000 regime to cover all mortgages of land in the EEA (as a result of Brexit, this has been amended to land in the UK²⁸¹⁸) where at least 40 per cent of the land is used as a dwelling.²⁸¹⁹ Hence such “regulated mortgage contracts” are exempt from the [CCA 1974](#) regime.²⁸²⁰ In addition, as the Directive permits buy-to-let residential mortgages to be subject to an “appropriate framework” rather than the requirements of the Directive,²⁸²¹ the UK decided to introduce a special regime (a modified version of “full” [FSMA 2000](#) regulation requiring registration rather than [Pt 4A](#) permission) applicable to businesses lending to consumers for buy-to-let purposes.²⁸²²

Promotion

- 41-536 Since the transfer of consumer credit regulation to the FCA,²⁸²³ the advertising of residential land mortgages has been regulated as “financial promotion” under the [Financial Services and Markets Act 2000](#).²⁸²⁴ Hence the implementation on the [Mortgage Credit Directive](#)²⁸²⁵ had little effect in this regard.²⁸²⁶

Form, etc.

- 41-537 The requirements of the [1974 Act](#) relating to the form and content, signature, supply of copies, etc. of the agreement and of the security²⁸²⁷ apply where a regulated agreement is secured by a land mortgage.²⁸²⁸ As land mortgages are outside the scope of the Consumer Credit Directive,²⁸²⁹

the old **Consumer Credit (Disclosure of Information) Regulations 2004**,²⁸³⁰ the old **Consumer Credit (Agreements) Regulations 1983**,²⁸³¹ and the old copy requirements in ss.61–64²⁸³² *prima facie* remain applicable to land mortgages within the 1974 regime. However, lenders under such mortgagees may choose to opt into and comply with the new “Consumer Credit Directive” regime by providing pre-contract information in compliance with the new **Consumer Credit (Disclosure of Information) Regulations 2010**,²⁸³³ unless the agreement is one to which s.58 applies,²⁸³⁴ in which case (as the **Disclosure of Information Regulations** do not apply to such mortgages²⁸³⁵) the mortgagee may opt-in by providing a copy of the unexecuted agreement complying with the **Agreement Regulations 2010**.²⁸³⁶ If the mortgagee has chosen to opt into the Directive regime, then the new **Consumer Credit (Agreements) Regulations 2010**,²⁸³⁷ and the new copy requirement in s.61A²⁸³⁸ (unless s.58 applies to the agreement) will also become applicable. Finally, the “over-running” information requirements²⁸³⁹ are modified in relation to overdrafts secured on land.

Cancellation

- 41-538 The right to cancel a regulated agreement conferred in certain circumstances by **s.67 of the 1974 Act**²⁸⁴⁰ is removed where the agreement is secured on land, or is a restricted-use credit agreement to finance the purchase of land, or is an agreement for a bridging loan in connection with the purchase of land.²⁸⁴¹ Cancellation of an executed agreement would cause considerable difficulty in relation to mortgages and charges on land. But the right of cancellation is in part replaced by special provisions that give to the debtor an opportunity for withdrawal from a prospective land mortgage.

Special “pause” provisions²⁸⁴²

- 41-539 These special provisions in principle apply in a case where a prospective regulated agreement is to be secured on land (the “mortgaged land”).²⁸⁴³ The procedure is then as follows: the creditor or owner must give the debtor or hirer an advance copy of the unexecuted agreement which contains notice in the prescribed²⁸⁴⁴ form indicating the right of the debtor or hirer to withdraw from the prospective agreement, and how and when the right is exercisable. This copy must be given to him *before* the unexecuted agreement is sent to him for his signature, and it must be accompanied by a copy of any other document²⁸⁴⁵ referred to in the unexecuted agreement, e.g. a copy of the deed of mortgage or charge.²⁸⁴⁶ Not less than seven days after this copy has been given, the unexecuted agreement must be sent to the debtor or hirer for his signature.²⁸⁴⁷ The debtor must be allowed a period (“the consideration period”) in which to consider, in isolation, whether or not

he wishes to go through with the transaction. The consideration period starts with the giving of the advance copy as mentioned above and ends at the expiry of seven days after the day on which the unexecuted agreement is sent to him for his signature, or on its return after signature by him, whichever first occurs.²⁸⁴⁸ During the consideration period the creditor or owner must refrain from approaching the debtor or hirer, whether in person, by telephone or letter, or in any other way, except in response to a specific request made by the debtor or hirer after the beginning of the consideration period.²⁸⁴⁹ Further, no notice of withdrawal must have been received by the creditor or owner before the sending of the unexecuted agreement.²⁸⁵⁰ This procedure is very elaborate and cumbrous. Since an advance copy, and copies under ss.62 and 63 of the Act, must be sent to each debtor,²⁸⁵¹ no less than six copies may be required where there are joint mortgagors.²⁸⁵² The procedure is no doubt designed to ensure that borrowers are not exposed to undue, or, indeed any, pressure; but it also places a considerable period of delay in the path of those who wish to obtain immediate finance. The special pause provisions do not, however, apply to a restricted-use credit agreement to finance the purchase of the mortgaged land, or to an agreement for a bridging loan in connection with the purchase of the mortgaged land or other land.²⁸⁵³

Failure to comply

- 41-540 A failure to comply with the special pause provisions means that the agreement is not properly executed.²⁸⁵⁴ It is enforceable against the debtor or hirer on an order of the court only.²⁸⁵⁵ The security,²⁸⁵⁶ so far as it is provided in relation to the agreement, is enforceable where such an order has been made, but not otherwise.²⁸⁵⁷ And where an application for an order is dismissed, except on technical grounds only, the security is rendered invalid.²⁸⁵⁸

Enforcement

- 41-541 Section 126 of the Consumer Credit Act 1974²⁸⁵⁹ renders a land mortgage securing one of three categories of agreement enforceable on an order of the court only. Those three categories are: (a) a regulated agreement²⁸⁶⁰; (b) a regulated mortgage contract²⁸⁶¹; and (c) a consumer credit agreement which would, but for the “investment mortgage” exemption,²⁸⁶² be a “regulated agreement”. This does not, however, prevent enforcement at any time with the consent of the mortgagor given at that time.²⁸⁶³ Breach of s.126 could result in the usual disciplinary consequences²⁸⁶⁴ and an injunction could be obtained to restrain enforcement of a mortgage in contravention of the section or to restore possession to the mortgagor.²⁸⁶⁵ Moreover, the “unfair

relationship” provisions may apply.²⁸⁶⁶ Control may be exercised by the court in accordance with Pt IX of the 1974 Act.²⁸⁶⁷

Saving for registered charges, etc.

- 41-542 Protection is afforded in certain circumstances by the [Consumer Credit Act 1974 s.177](#) to the proprietor of a registered charge (within the meaning of the [Land Registration Act](#)).²⁸⁶⁸

Footnotes

- 2797 See Guest and Lloyd, [Encyclopedia of Consumer Credit Law](#) (1975, looseleaf), paras 2-059, 2-061, 2-066, 2-068, 2-127; Goode, [Consumer Credit: Law and Practice](#), Pt C, Ch.38.
- 2798 See above, paras [41-039](#) et seq.
- 2799 See above, para. [41-040](#). The relevant provision is now in the [Regulated Activities Order 2001 \(SI 2001/544\) \(“RAO”\) art.60C\(2\)](#).
- 2800 i.e. “regulated mortgage contracts” within the [RAO art.61](#) as amended by [SI 2001/3544 art.8](#); [SI 2006/2383 art.17](#) and (as a result of Brexit) [SI 2019/632 reg.145](#).
- 2801 Within the [RAO art.63F\(3\)\(a\)](#) as added (on 6 April 2007) by [SI 2006/2383 art.18](#).
- 2802 Since the transfer of consumer credit regulation from the OFT to the FCA: see above, para. [41-002](#). It may be that in the future the regime originating in the [CCA 1974](#) will be “folded into” the more recent [FSMA 2000](#) regime and the decision will be taken to disapply the [CCA 1974](#) and CONC to all new secured lending on land.
- 2803 para. [41-040](#). There is also a special exemption for so-called “investment mortgages”: [RAO art.60D](#), see above, para. [41-047](#).
- 2804 See above, para. [41-046](#). The relevant provision is in the [RAO art.60H](#), as amended on 21 March 2016, when the [Mortgage Credit Directive](#) (see above, para. [41-003](#)) was implemented so as to ensure that the exemption is compatible with it: [SI 2015/910 art.3](#) and [Sch.1 para.4\(18\)](#). And note the “Brexit” amendment made by the [Financial Services and Markets Act 2000 \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/632\) reg.141](#).
- 2805 See above, para. [41-048](#). The relevant provision is in the [RAO art.60C\(3\)–\(7\)](#). Moreover, second charge business loans are not “regulated mortgage contracts”: see new [RAO art.61A\(1\)\(c\)](#), added by [SI 2015/910 art.3](#) and [Sch.1 para.4\(22\)](#) and amended (as a result of Brexit) by [SI 2019/632](#).
- 2806 See [CCA 1974 s.140A\(5\)](#). Hence when the [Mortgage Credit Directive](#) (see above, para. [41-003](#) and below para. [41-432](#)) was implemented on 21 March 2016 and second charge residential loans become regulated under [FSMA 2000](#), they lost the protection of those provisions.

- 2807 See above, paras 41-213 et seq. For the application of those provisions to land mortgages, see *Consolidated Finance Ltd v Hunter [2010] B.P.I.R. 1322*, Macclesfield Cty Ct; *Paragon Mortgages Ltd v McEwan-Peters [2011] EWHC 2491 (Comm)*; *Goldhill Finance Ltd v Berry [2018] 10 WLUK 480, London Cty Ct*; *Promontoria (Henrico) Ltd v Samra [2019] EWHC 2327 (Ch)*. See also *McMurtry, "Consumer Credit Act mortgages: unfair terms, time orders and judicial discretion" [2010] J.B.L. 107*.
- 2808 See above, para.[41-011](#).
- 2809 FCA Handbook, CONC 4.2 and 4.3, see above, para.[41-079](#).
- 2810 FCA Handbook, CONC 5 and 6.2, see above, para.[41-080](#).
- 2811 See above, para.[41-157](#).
- 2812 SI 2010/1013, as amended by SI 2010/1969 regs 31–40 and SI 2011/11 reg.8 (see above, para.[41-078](#)).
- 2813 SI 2010/1014, as amended by SI 2010/1969 regs 41–45 (see above, para.[41-084](#)).
- 2814 Above, para.[41-061](#) and not the Total Charge for Credit Rules applicable to regulated mortgage contracts.
- 2815 Directive 2014/17/EU.
- 2816 See Directive 2014/17/EU art.3(1) and note the exemptions/qualifications in art.3(2). It was implemented on 21 March 2016: see next note.
- 2817 See in particular the legislative amendments in the *Mortgage Credit Directive Order 2015 (SI 2015/910)*. See also the amendments to the FCA Handbook.
- 2818 Amended by the *Financial Services and Markets Act 2000 (Amendment) (EU Exit) Regulations 2019 (SI 2019/632)* Pt 3 reg.145(3).
- 2819 See the amendment to be made to RAO art.61(3) by SI 2015/910 art.3 and Sch.1 para.4(21). But note the exclusions in the new RAO art.61A, added by SI 2015/910 art.3 and Sch.1 para.4(22) and amended (as a result of Brexit) by SI 2019/632.
- 2820 See above, para.[41-040](#).
- 2821 Directive 2014/17/EU art. 4.
- 2822 See *Mortgage Credit Directive Order 2015 (SI 2015/910)* Pt 3 and Sch.2 (and the FCA rules made thereunder).
- 2823 See above, para.[41-002](#).
- 2824 See above, para.[41-069](#).
- 2825 Directive 2014/17/EU, see above, para.[41-535](#).
- 2826 Although note the amendment to the FPO made by SI 2015/910 art.3 and Sch.1 para.12.
- 2827 See above, paras [41-186](#) et seq.
- 2828 See also *United Bank of Kuwait Plc v Sahib [1997] Ch. 107* (equitable mortgage outside the Act made by informal deposit of title deeds void for non-compliance with the requirements of s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989).
- 2829 See above, para.[41-011](#) and below para.[41-539](#).
- 2830 SI 2004/1481 (see above, para.[41-078](#)).
- 2831 SI 1983/1553 (see above, para.[41-083](#)). The old *Consumer Credit (Total Charge for Credit) Regulations 1980 (SI 1980/51)*, now replicated in the FCA Handbook, also apply (see above, para.[41-061](#)).

- 2832 Above, paras [41-090—41-091](#).
- 2833 [SI 2010/1013](#) (see above, para.[41-078](#)).
- 2834 Below, para.[41-539](#).
- 2835 But see below, para.[41-539](#).
- 2836 [SI 2010/1014](#), as amended by [SI 2010/1969](#) regs [41—45](#), above, para.[41-084](#).
- 2837 As well as the new [Consumer Credit \(Total Charge for Credit\) Regulations 2010](#) ([SI 2010/1011](#)), now replicated in the FCA Handbook, see above, para.[41-061](#).
- 2838 Above, para.[41-093](#).
- 2839 Now in the FCA Handbook, CONC 4.7 and CONC 6.3.3 and 6.3.4, see above, para.[41-127](#).
- 2840 See above, para.[41-103](#). The new 14-day “right of withdrawal” introduced by [CCA 1974 s.66A](#) as a result of the implementation of the Consumer Credit Directive (see above, paras [41-011](#) and [41-102](#)) does not apply to land mortgages.
- 2841 [CCA 1974 s.67\(1\)\(a\)](#).
- 2842 For the problems associated with these provisions, see Guest and Lloyd, [Encyclopedia of Consumer Credit Law](#) (1975, looseleaf), paras 2-059, 2-062. The FCA’s Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.[41-004](#) (note), above) proposes (see Annex 5, para.21) that [s.58](#) should be retained in legislation as an FCA rule could not replicate its provisions as to the consequences of non-compliance and hence repeal would adversely affect the appropriate degree of consumer protection. However, this will not be necessary if the decision is taken to disapply the [CCA](#) and CONC to all new secured lending on land.
- 2843 [CCA 1974 s.58\(1\)](#).
- 2844 i.e. prescribed by the [Consumer Credit \(Cancellation Notices and Copies of Documents\) Regulations 1983](#) ([SI 1983/1557](#)), especially reg.4 (as amended by [SI 2004/3236](#) art.6(3)) and Sch. Pt I paras 1, 2.
- 2845 See above, para.[41-089](#), and [CCA 1974 s.180](#).
- 2846 [CCA 1974 s.58\(1\)](#). The copy must be a “true” copy ([SI 1983/1557](#) reg.3(1)), i.e. complete except for execution, and not merely the form of the mortgage or charge.
- 2847 [CCA 1974 s.61\(2\)\(b\)](#). The unexecuted agreement may now be transmitted in electronic form: [SI 2004/3236](#) art.2(2).
- 2848 [CCA 1974 s.61\(3\)](#).
- 2849 [CCA 1974 s.61\(2\)\(c\)](#).
- 2850 [CCA 1974 s.61\(2\)\(d\)](#).
- 2851 See [CCA 1974 s.185](#).
- 2852 But see the alleviation as to the supply of documents referred to in the agreement by an amendment of the [Consumer Credit \(Cancellation Notices and Copies of Documents\) Regulations 1983](#) ([SI 1983/1557](#)), effected by [SI 1989/591](#).
- 2853 [CCA 1974 ss.58\(2\), 61\(2\)\(a\)](#).
- 2854 [CCA 1974 s.61\(2\)](#).
- 2855 [CCA 1974 s.65\(1\)](#). A retaking of land to which a regulated agreement relates is an enforcement of the agreement: [s.65\(2\)](#). See CPR Pt 7 PD 7B 3.2; Pt 55 PD 55A; and *National Guardian Mortgage Corp v Wilkes [1993] C.C.L.R. 1, Cty Ct*.

- 2856 Defined in CCA 1974 s.189(1); above, para.41-182.
- 2857 CCA 1974 s.113(2).
- 2858 CCA 1974 ss.106, 113(3)(c); above, para.41-194.
- 2859 As substituted on 30 March 2014 by Financial Services and Markets Act 2000 (Consumer Credit) (Miscellaneous Provisions) (No.2) Order 2014 (SI 2014/506) art.5(4). The FCA's Review of Retained Provisions of the Consumer Credit Act: Final Report (see para.41-004 (note), above) proposes (see Annex 5, para.208) that s.126 should be retained in legislation as it could not be replicated by an FCA rule and hence repeal would adversely affect the appropriate degree of consumer protection.
- 2860 See above, para.41-017.
- 2861 See above, paras 41-040 and 41-533.
- 2862 See RAO art.60D, above, paras 41-041 and 41-533.
- 2863 CCA 1974 s.173(3).
- 2864 See above, para.41-065.
- 2865 CCA 1974 s.170(2).
- 2866 ss.140A–140C (above, paras 41-213 et seq.), see especially s.140A(1)(b), above, para.41-221. However, they do not apply to “regulated mortgage contracts”: s.140A(5).
- 2867 See above, paras 41-200 et seq. The provisions of Pt IV of the Administration of Justice Act 1970 do not apply to a mortgage securing a regulated agreement: s.38A of the 1970 Act inserted by Consumer Credit Act 1974 s.192 and Sch.4 para.30, from 19 May 1985: SI 1983/1551 (c.44).
- 2868 CCA 1974 s.177(1) (but see s.177(3), (4)) (as amended by the Land Registration Act 2002 s.133 and Sch.11 para.11). Section 177(3) was extended to debt administration business by the Consumer Credit Act 2006 s.24(5). See also s.104 of the Law of Property Act 1925 and s.177(2) of the 1974 Act. It is doubtful whether breach of s.126 creates a “defect in title”, or whether these provisions relate, e.g. to a security rendered void under s.106.

Section 1. - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 1. - Introduction

Mark R. Freedland and Jeremias F.B.B. Adams-Prassl

Contract law and statute law in relation to employment

42-001 The legal regulation of the individual employment relationship is a highly complex body of law which, while it still has at its core the common law of the contract of employment, today consists largely of provisions contained in statutes, statutory regulations and retained EU law.² In this chapter, the first aim is to be as complete as space permits in the treatment of the common law of the contract of employment, both as a system of rights and remedies in itself, and as a conceptual system upon which much of the statutory regulation is constructed and depends. The other aim is to indicate in reasonable detail the main areas in which the common law of the contract of employment is overlaid by statute law.³ It is, however, to be stressed that a complete account of that body of statute law, together with all its interpretative case law, would now occupy much more space than is available for that purpose in this work, and would, moreover, depart further from the law of contract than is consonant with the purpose of this work. For more comprehensive treatments of the statute law of the individual employment relationship, reference should be made to treatises entirely devoted to employment law.⁴ Much, though by no means all, of the statute law regulating the individual employment relationship was consolidated first into the [Employment Protection \(Consolidation\) Act 1978](#), and later into the [Employment Rights Act 1996](#), into which many subsequent amendments have since been integrated, especially though not solely by the [Employment Acts 2002](#) and [2008](#). Where the relevant statute law is not contained in the latter consolidation, that is specifically indicated in the course of this chapter.

Implications of the United Kingdom's Exit from the European Union

42-002

The European Union has long been an important source of employment rights and obligations in the United Kingdom. Throughout this chapter, we refer to legislation and implementing measures giving effect to EU law. These include the [Working Time Regulations](#),⁵ the [TUPE Regulations](#),⁶

U and regulations for the protection of fixed-term, part-time,⁷ and agency workers⁸ which have been retained in domestic law,⁹ as well as primary legislation such as the [Equality Act 2010](#).¹⁰ One notable exception to this general proposition is the fact that the EU Charter of Fundamental Rights no longer forms part of domestic law.¹¹ At the time of writing, the government had not proposed any specific repeals or amendments to EU-derived employment law; any such change would furthermore be subject to the non-regression provisions in the EU-UK Trade and Cooperation Agreement.¹²

The contract of employment or of service and contracts for services

- 42-003 There is no comprehensive definition of the contract of employment.¹³ The decided cases merely indicate a number of indicia or factors which are relevant to a finding that a particular contract is one of employment, or a “contract of service”.¹⁴ The presence or absence of any one such factor is not conclusive, since the decision depends on the combined effect of all the relevant factors, when those pointing towards “employment” are weighed up with those pointing against. A contract of employment or of service is generally contrasted with a contract in which an independent contractor is engaged to perform a particular task, often known as a “contract for services”.¹⁵ In order to identify the contract of employment, it is useful first to describe its normal forms and then to indicate the current approach to defining it, which is developed in greater detail in the second section of this chapter.

The normal forms of the contract of employment

- 42-004 It could, at least until recent transformations in the practice of the labour market, be said that in the normal case of employment¹⁶ the employee is selected by his or her employer, works “full-time” as part of the employer’s organisation, with regular working hours, at a fixed place of work, with equipment provided by the employer, and under some degree of supervision (arranged by the employer) over his or her method of working; the employee enjoys a fixed wage or salary paid at regular intervals, fixed holidays on full pay, and has some security of employment in that he or she cannot be dismissed without notice (except for misconduct), and until the expiration of his notice of dismissal he or she is entitled to receive his or her full wages or salary, whether or not his or her

employer can actually provide him or her with work to do.¹⁷ The instances which come before courts are those where some, but not all, of these normal features of employment are present, and it must be decided whether the departures from the normal patterns of employment are sufficiently important to justify the conclusion that the relationship is not employment for the purpose of the legal rule in question.¹⁸

However, a large and increasing proportion of the workforce is now employed in “marginal”, “atypical” or “flexible” forms of employment, such as part-time, temporary or agency employment, as well as work under so-called “zero-hours contracts”.¹⁹ In such cases, it may be even more than usually difficult to decide whether or not a contract of employment exists.²⁰

The modern approach to definition of the contract of employment

42-005 The traditional statements of what constitutes a contract of service placed most emphasis on the power of the employer to control the work of the employee,²¹ when contrasting that contract with a contract with an independent contractor. The traditional distinction was that whereas the employer could merely direct *what* work was to be done by the independent contractor, he or she might also direct *how* the work was to be done by an employee.²² The current approach to this distinction, and hence to the definition of the contract of employment, has four main elements:

- (1)the denial of the supremacy of the control test, whilst still acknowledging its importance²³;
- (2)the use of some form of “organisation” test²⁴;
- (3)a growing preference for asking whether the worker is “in business on his or her own account”—though it has been denied that this is the fundamental test²⁵;
- (4)the assertion that exhaustive definition is futile and that the method of classification is by the accumulation of relevant factors in each case²⁶;
- (5)an increasing tendency to treat the distinction as one to be applied at first instance rather than by an appellate court.²⁷

It should also be noted that the relationship of employment is to be contrasted not only with that between employer and independent contractor but also with those of agency,²⁸ bailment²⁹ and, at least traditionally, partnership.³⁰ It may also still be important for certain purposes to distinguish between the contract of employment and the contract of apprenticeship³¹; the way in which that distinction is to be drawn was considered by the Court of Appeal in *Flett v Matheson*.³² The **Consumer Rights Act 2015** explicitly distinguishes between “consumer contracts” and those of employment or apprenticeship.³³ This chapter will consider first the legal consequences which attach to employment (but not to other relationships) and then consider the tests used to decide whether a contract is one of employment, or one with an independent contractor.

Legal consequences of a contract of employment

42-006 The importance of the distinction between an employee and an independent contractor, agent, partner (or person in another such relationship), is that certain legal rules apply to the parties in a relationship of employment which do not apply (or do not normally apply) to other relationships. Some of the distinctive legal consequences of the employment relationship are:

(1) An extensive duty (both at common law and by statute) is placed on the employer to take measures to protect the health, safety and welfare of his or her employees, and to provide safe equipment and premises, and a safe system of working.³⁴

(2) An employer is vicariously liable for the torts committed by his or her employee “in the course of his or her employment”,³⁵ whereas the person who engages an independent contractor is not normally liable for torts committed by him or her during the work he contracted to do.³⁶

(3) Many obligations (e.g. obedience to lawful and reasonable orders of the employer) are imposed on employers and employees as implied terms in the contract of employment, which may not be owed by or to an independent contractor.³⁷

Statutory consequences

42-007 A substantial number of statutory provisions impose duties on an employer in relation to its employees, or confer benefits on employees. For example:

(1) The employer will be responsible for contributions in respect of an “employed earner” under the [Social Security Contributions and Benefits Act 1992](#)³⁸ and the employee will be entitled to claim the benefits payable to a person “employed in employed earner’s employment”.³⁹

(2) The contracts of employment legislation⁴⁰ and the redundancy payments legislation⁴¹ apply to “employees”.⁴²

(3) The unfair dismissal legislation⁴³ applies to “employees”⁴⁴ defined⁴⁵ as workers under contracts of employment, other than in police service.⁴⁶

(4) The Employment Rights and Trade Union and Labour Relations (Consolidation) Acts also embody a series of rights of “employees” (such as rights in relation to maternity,⁴⁷ trade union membership and activities,⁴⁸ and insolvency of the employer)⁴⁹; and the procedures for handling redundancies apply to “employees” as defined in [s.295 of the Trade Union and Labour Relations \(Consolidation\) Act 1992](#).

(5)The [Transfer of Undertakings \(Protection of Employment\) Regulations 2006](#)⁵⁰ deal with the rights and obligations relating to employers and employees on certain transfers or mergers of undertakings, businesses or parts of businesses. *Employee* is defined for this purpose as any individual who works for another person whether under a contract of service or apprenticeship or otherwise but so as not to include anyone who provides services under a contract for services.⁵¹

These and other statutory provisions assume that there is a general legal concept of “a contract of employment” or “a contract of service” by using these terms without any statutory definition.⁵² Thus, the trade dispute immunity contained in [s.13\(1\) of the Trade Union and Labour Relations Act 1974](#)⁵³ referred to the contract of employment. Similarly, the [Companies Act 1948](#) was treated as referring to a contract of employment when it spoke of payments made “on account of wages or salary”.⁵⁴ (The relevant provision has now been consolidated into the [Insolvency Act 1986](#).⁵⁵)

Classification for particular purposes

- 42-008 Although, as the foregoing paragraphs show, a uniform concept of the contract of employment or service seems to be assumed in legislation and judge-made law, it is nevertheless true that the court will generally classify a relationship in the light of the particular purpose for which the classification is required, and since there is no single test to determine who is an employee it may be possible for the court to classify a particular relationship as employment for the purpose of one of the foregoing rules, but not for another.⁵⁶ Insofar as there is a current trend, it would seem to be towards unity rather than diversity of definition, but for the possible emergence of a greater willingness to engage in a different approach to classification in the safety at work field, see the decision of the Court of Appeal in [Lane v Shire Roofing Co \(Oxford\) Ltd.](#)

⁵⁷



The contract of service or personally to execute any work or labour: “workers” and “persons employed”

- 42-009 In the area of employment legislation, there is one major type of variant upon the contract “of employment” or “service” which is very extensively used and requires distinct consideration. This variant adds to the basic concept of the contract of employment by including any other contract personally to execute any work or labour. This addition brings in some contracts between

employers and independent contractors, i.e. some contracts which are not contracts of employment. The conditions for this extension outside the contract of employment are that the contract shall be for personal performance by the worker⁵⁸ and probably that it shall be for work alone rather than for work and materials. The extended formula probably includes some labour-only sub-contractors who would be held not to have contracts of employment.⁵⁹ Where this kind of formula is used, it is sometimes coupled with the terminology of “workman” or “worker” to distinguish it from the simple concept of “employee”, but, as the ensuing examples show, there is a lack of consistency in this respect:

(1)The provisions, formerly contained in the [Industrial Courts Act 1919](#), for courts of inquiry into industrial disputes, apply in relation to trade disputes defined with reference to “workers” which includes both contracts of employment and any other contract whereby the worker undertakes to do or to perform personally any work or services for another party to the contract who is not a professional client of his.

⁶⁰

 The provisions made by the [Employment Relations Act 1999](#) concerning the recognition of trade unions by employers apply in relation to the same category of “workers”.

⁶¹



(2)[Employment Rights Act 1996 Pt II](#) (which deals with protection of workers in relation to the payment of wages, and replaces the [Truck Acts 1831–1940](#)) applies to *workers*, the worker being defined as an individual who has entered into or works under a contract of service or apprenticeship or any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

⁶²

 The same formula has been used to identify the scope of a number of major pieces of recent employment legislation, such as the [National Minimum Wage Act 1998](#),

⁶³



the [Working Time Regulations 1998](#),

⁶⁴



and the [Part-time Workers \(Prevention of Less Favourable Treatment\) Regulations 2000](#).

⁶⁵

 The Supreme Court, in its decision in *Pimlico Plumbers v Smith*, found that a self-employed plumber was a worker for the purposes of these provisions, emphasising in particular that a limited substitution right in the worker’s contract could not defeat a personal service obligation so as to disqualify the claimant from being regarded as a “worker” (or, likewise, from being regarded as an “employee” in “employment” for the purposes of employment equality legislation).

⁶⁶

U Professional cycling athletes, on the other hand, have been held not to qualify as workers given an absence of mutuality of obligation in their relationship with the relevant sports federation.

⁶⁷



(3) In a recent string of cases arising from intermittent work arrangements, often mediated by online platforms, in the so-called “on-demand”, “platform” or “gig economy”, the employment tribunals and employment appeal tribunals,

⁶⁸



as well as the Court of Appeal,

⁶⁹

U have generally taken the view that individuals were employed as workers. These decisions were unanimously upheld by the Supreme Court in *Uber v Aslam*

⁷⁰

U: given the tight control exercised by the company over all aspects of its service provisions, contractual documentation purporting to establish drivers’ self-employed status was to be disregarded.

“[I]n applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. … the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. … a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a ‘worker’ who is employed under a ‘worker’s contract’.”

⁷¹



For a notably different outcome, albeit in the context of trade union recognition, see the CAC’s decision in *Independent Workers’ Union of Great Britain v Roofoods Ltd (t/a Deliveroo)*.

⁷²

U Where online platforms rely on sophisticated algorithmic management techniques to condition individual behaviour, this is likely to lead to classification as a “worker”, as illustrated in *Stuart Delivery Ltd v Augustine*.

⁷³



(4) The **Equality Act 2010** applies its various provisions concerning employment equality to persons in *employment*, defined as “employment under a contract of service or apprenticeship or a contract personally to execute any work or labour”.

⁷⁴

U
75

In its decision in *Jivraj v Hashwani*,

the Supreme Court has adopted a narrow construction of the concept of “employment under a contract personally to execute any work or labour” as that concept is used in the various kinds of employment discrimination legislation detailed under this head of this paragraph, holding that it is in effect limited to work taking place under the direction of the employer.

76

U

(5)The **Trade Union and Labour Relations (Consolidation) Act 1992** defines “trade disputes” and “trade unions” in terms of “workers” and defines “workers” as in example (2) above.

77

U

(6)The concept of “worker”—defined as in example (4) above—is invoked in relation to the duty of employers to disclose information to the representatives of workers for the purposes of collective bargaining.

78

U

Footnotes

¹ Freedland (Gen. ed.), The Contract of Employment (2016); Freedland, The Personal Employment Contract (2003); Gaymer, The Employment Relationship (2001); Brodie, The Employment Contract: Legal Principles, Drafting, and Interpretation (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, The Legal Construction of Personal Work Relations (2011).

² See para.[42-002](#).

³ Given the fast-moving response to the COVID-19 pandemic, we omit discussion of successive rounds of the government’s “furlough” regime.

⁴ See, for instance, Z Adams, C Barnard, S Deakin and S Fraser Butlin, Deakin & Morris’s Labour Law, 7th edn (2021); Harvey on Industrial Relations and Employment Law (1972 and updated).

⁵ See para.[42-115](#).

⁶ See paras [42-184](#) and [42-268](#). For an illustration of the continuing impact of the jurisprudence of the Court of Justice see *McTear Contracts Ltd v Bennett; Mitie Property Services UK Ltd v Bennett [2021] I.R.L.R. 444*, EAT, in which the EAT applied the decision in *ISS Facility Services v Govaerts (C-344/18) EU:C:2020:239, [2020] I.C.R. 1115* in interpreting

- the **TUPE Regulations**. This extends to the purely domestic provisions of the Regulations in order to ensure consistency: see [2021] *I.R.L.R.* 444 at [36].
- 7 See paras 42-159—42-160.
- 8 See paras 42-027—42-029.
- 9 By virtue of the European Union (Withdrawal) Act 2018 s.2, as amended by the European Union (Withdrawal Agreement) Act 2020. For a detailed discussion, see Vol.I, paras 1-016 et seq.
- 10 On the interpretation of retained EU law, see Vol.I, para.1-027.
- 11 **European Union (Withdrawal) Act 2018 s.5 (4).**
- 12 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (30 December 2020) arts 386–389. On the TCA see Vol.I, para.1-012.
- 13 On the question of whether the employment relationship should be viewed in terms of contract or as a “status” see *Rideout* [1966] *C.L.P.* 111; *Kahn-Freund* (1967) 30 *M.L.R.* 635; compare *Hepple* (1986) 15 *I.L.J.* 83.
- 14 *Simmons v Heath Laundry* [1910] 1 *K.B.* 543, 550; *Short v J & W Henderson Ltd* (1946) 62 *T.L.R.* 427, 429; *Kilboy v South Eastern Fire Area Joint Committee*, 1952 *S.C.* 280, 285–286; *Market Investigations Ltd v Minister of Social Security* [1969] 2 *Q.B.* 173, 184; *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 *Q.B.* 497.
- 15 See below, para.42-005.
- 16 *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 *Q.B.* 437, 446.
- 17 All these features are considered in more detail, see below, paras 42-010—42-024.
- 18 *Short v J & W Henderson Ltd* (1946) 62 *T.L.R.* 427, 429.
- 19 See para.42-033, below.
- 20 See Lewis (ed.), *Labour Law in Britain* (1986), Ch.6 (Leighton) passim; Freedland, *The Personal Employment Contract* (2003), pp.18–22; and see below, paras 42-026—42-029.
- 21 e.g. *Sadler v Henlock* (1855) 4 *E. & B.* 570. For the importance of the control test in modern law, see below, paras 42-012—42-015.
- 22 *R. v Walker* (1858) 27 *L.J.M.C.* 207, 208. This distinction is considered in greater detail, see below, paras 42-012—42-014.
- 23 *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 *Q.B.* 497; *Construction Industry Training Board v Labour Force Ltd* [1970] 3 *All E.R.* 220; *Warner Holidays Ltd v Secretary of State for Social Services* [1983] *I.C.R.* 440. See below, para.42-026.
- 24 *Stevenson, Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 *T.L.R.* 101, 111; cf. *Market Investigations Ltd v Minister of Social Security* [1969] 2 *Q.B.* 173, 184. See below, para.42-016.
- 25 *Nethermere (St Neots) Ltd v Gardner* [1984] *I.C.R.* 612, 619. But, for further evidence of the tendency, at least in the case of skilled workers, to prefer a business test—here in the form of “whose business is it?”—see *Lane v Shire Roofing Co (Oxford) Ltd* [1995] *I.R.L.R.* 593.

- 26 *Argent v Minister of Social Security* [1968] 1 W.L.R. 1749; *Maurice Graham Ltd v Brunswick* (1974) 16 K.I.R. 158, 165.
- 27 *Global Plant Ltd v Secretary of State for Social Services* [1972] 1 Q.B. 139; *Maurice Graham Ltd v Brunswick* (1974) 16 K.I.R. 158. See below, para.42-011.
- 28 See Vol.I, Ch.21.
- 29 See above, Ch.35.
- 30 For discussion, see para.42-031, below.
- 31 Compare para.42-192, and paras 42-209—42-210.
- 32 [2006] EWCA Civ 53, [2006] I.R.L.R. 277.
- 33 Consumer Rights Act 2015 s.61(2); See above, paras 40-030 et seq., above.
- 34 A new framework for the statutory duties was established by the *Health and Safety at Work, etc. Act 1974*. The Act is applied generally to “persons at work” (s.1(1)(a)), which includes the self-employed (s.52(1)); but within that framework certain duties are specifically imposed upon employers to their employees (s.2(1)). See below, para.42-112.
- 35 See Atiyah, *Vicarious Liability in the Law of Torts* (1967).
- 36 Atiyah at pp.327 et seq. But some relationships other than that of employment may also invoke vicarious liability in tort, e.g. *Ormrod v Crosville Motor Services Ltd* [1953] 1 W.L.R. 1120; cf. *Att-Gen for New South Wales v Perpetual Trustee Co Ltd* [1955] A.C. 457. The scope of vicarious liability on the borderlines of employment has been subject to extensive litigation at the highest appellate levels in recent years. See *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] A.C. 1; *Woodland v Swimming Teachers Association* [2013] UKSC 66, [2014] A.C. 537; *Cox v Ministry of Justice* [2016] UKSC 10, [2016] A.C. 660; *Armes v Nottinghamshire CC* [2017] UKSC 60, [2018] A.C. 355; and *Barclays Bank Plc v Various Claimants* [2020] UKSC 13, [2020] 2 W.L.R. 960, where the Supreme Court declined the suggestion that employers’ vicarious liability could be systemically aligned with the statutory concept of the “worker”.
- 37 See below, para.42-053.
- 38 Pt 1.
- 39 Social Security Contributions and Benefits Act 1992 ss.94(1), 108(1).
- 40 Contained in Employment Rights Act 1996 Pts I, IX; see below, paras 42-042 et seq., 42-168.
- 41 Contained in Employment Rights Act 1996 Pt XI; see below, paras 42-255 et seq.
- 42 Defined by Employment Rights Act 1996 s.230(1) (“employee”), s.230(2) (“contract of employment”).
- 43 See below, paras 42-221 et seq.
- 44 By Employment Rights Act 1996 s.230(1).
- 45 Employment Rights Act 1996 s.200. The exclusion of those in the police service has been held to extend to prison officers: *Home Office v Robinson* [1982] I.C.R. 31; and it has been held that police cadets are not “employees” within the meaning of that term in the unfair dismissal legislation: *Wiltshire Police Authority v Wynn* [1980] I.C.R. 649.
- 46 Employment Rights Act 1996 s.200.
- 47 See below, para.42-204.

- 48 Trade Union and Labour Relations (Consolidation) Act 1992 Pt III. See below, paras 42-118—42-119.
- 49 See below, para.42-204.
- 50 SI 2006/246. See below, para.42-184.
- 51 SI 2006/246 reg.2(1).
- 52 Income and Corporation Taxes Act 1988 s.19(1) (Sch.E); and see below, para.42-009, “Contract of service or personally to execute any work or labour”.
- 53 The corresponding provision, no longer confined to contracts of employment, is now contained in **Trade Union and Labour Relations (Consolidation) Act 1992** s.219(1).
- 54 s.319(4), dealing with preferential payments on a winding-up. See *Re General Radio Co Ltd [1929] W.N. 172*; *Re CW & AL Hughes Ltd [1966] 1 W.L.R. 1369*; *Redbridge LBC v Dhinsa [2014] EWCA Civ 178*, [2014] I.C.R. 834; and see below, paras 42-186—42-187.
- 55 s.386 and Sch.6 paras 9 et seq.
- 56 e.g. *Wardell v Kent CC [1938] 2 K.B. 768*; *Hewitt v Bonvin [1940] 1 K.B. 188, 191–192* (cf. at 194–195); *Denham v Midland Employers Mutual Assurance Ltd [1955] 2 Q.B. 437*; but it has been suggested that where a worker who has elected to be treated as self-employed for tax purposes later claims statutory rights as an employee, the Inland Revenue should take action to recover the fiscal advantage the worker gained from being assessed under Sch.D rather than Sch.E: *Young & Woods Ltd v West [1980] I.R.L.R. 201, 208*, [34] (per Ackner LJ). [1995] I.R.L.R. 493. Comparison should now be made with the decision in *R. (on the application of Health and Safety Executive) v Pola [2009] EWCA Crim 655*, where the Court of Appeal limited the application of the requirement of continuing mutuality of obligation, confirming that in this particular interpretative context there was no requirement of a continuing or overarching obligation between the periods when the workers in question were at work. cf. the approach of the European Court of Justice in the context of the Lugano Convention 2007, where senior directors with significant influence over their own contractual arrangements were held not to be employed under contracts of service: *Bosworth v Arcadia Petroleum Ltd (C-603/17) EU:C:2019:310*, and *Alta Trading UK Ltd (formerly Arcadia Petroleum Ltd) v Bosworth [2021] EWCA Civ 687*, [2021] I.C.R. 1358.
- 57
- 58 See *Ingram v Barnes (1857) 7 E. & B. 115*; *Broadbent v Crisp [1974] I.C.R. 248*. In *Mirror Group Newspapers Ltd v Gunning [1986] I.C.R. 145* the Court of Appeal held that the expression referred to a contract the dominant purpose of which was the execution of personal work or labour. See *Wright v Redrow Homes (North West) Ltd [2004] EWCA Civ 469*, [2004] I.C.R. 1126 where the contracts of independent individual bricklaying contractors were construed as intended to require them to work “personally” so as to constitute them as “workers”; compare para.42-022.
- 59 *Stuart v Evans (1883) 49 L.T. 138*; and see below, para.42-026.
- 60 Trade Union and Labour Relations (Consolidation) Act 1992 ss.215, 218.
- 61 See Trade Union and Labour Relations (Consolidation) Act 1992 Sch.A1 para.165, referring to s.296(1)(a) and (b).

- ⑥2 Employment Rights Act 1996 s.230(3). A relatively inclusive approach to the construction of the category of “workers” was taken by the Employment Appeal Tribunal in *James v Redcats (Brands) Ltd [2007] I.C.R. 1006*. Compare the similarly inclusive approach to the category of “worker” taken by the Court of Appeal in *Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005, [2013] I.C.R. 415* which concerned a doctor engaged on a self-employed basis to carry out cosmetic surgical procedures, and contrast *Suhail v Barking, Havering & Redbridge NHS Trust Unreported 11 June 2015, EAT*.
- ⑥3 ss.1(2), 54(3). Many of the statutory formulations of categories of “workers” expressly include those working under contracts of apprenticeship. In *Edmonds v Lawson [2000] I.C.R. 567*, it was held that, on the particular facts, a pupil barrister did not have a contract of apprenticeship and hence was not a “worker” within the meaning of s.54 of the National Minimum Wage Act 1998.
- ⑥4 SI 1998/1833 regs 3(2), 2(1). In *Byrne Brothers (Formwork) Ltd v Baird [2002] I.R.L.R. 96*, the Employment Appeal Tribunal held that building trade workers working as self-employed labour-only sub-contractors qualified as “workers” within the meaning of the Working Time Regulations 1998 (in which the term is defined in the same way as under s.230(6) of the Employment Rights Act 1996) although they clearly were not employed under contracts of employment and had some power to provide a substitute to carry out their work. Compare para.42-022. Compare *Cotswold Developments Construction Ltd v Williams [2006] I.R.L.R. 181*, which confirms the role of mutuality of obligation in deciding whether the contractual relationship of “worker” and employer exists in a given case. Compare also in this respect *Community Dental Centres Ltd v Sultan-Darmon [2010] UKEAT/0532/09/1208, [2010] I.R.L.R. 1024* where the Employment Appeal Tribunal held that there was insufficient mutuality of obligation to support the conclusion that there was a contractual relation of “worker” and employer. Compare now also *Conroy v Scottish Football Association Ltd [2014] UKEATS 0024/13/JW*.
- ⑥5 SI 2000/1551 regs 3(1), 2, 1(2). See below, paras 42-159—42-160.
- ⑥6 [2018] UKSC 29. The general approach was applied in *Addison Lee Ltd v Lange [2019] I.C.R. 637*, EAT.
- ⑥7 *Varnish v British Cycling Federation (t/a British Cycling) [2021] I.C.R. 44, EAT*. On mutuality of obligations and the legal status of football referees (albeit in the tax context), see *Revenue and Customs Commissioners v Professional Game Match Officials Ltd [2021] EWCA Civ 1370, [2022] 1 All E.R. 971*. Status decisions, particularly where personal service companies are involved, remain highly fact-specific: compare *Revenue and Customs Commissioners v Atholl House Productions Ltd [2022] EWCA Civ 501, [2022] S.T.C. 837* and *Kickabout Productions Ltd v Revenue and Customs Commissioners [2022] EWCA Civ 502, [2022] S.T.C. 876*.

- ⑥8 *Aslam v Uber BV* [2018] I.R.L.R. 97, EAT; *Addison Lee Ltd v Gascoigne* [2018] I.C.R. 1826, EAT.
- ⑥9 [2018] EWCA Civ 2748 (Underhill LJ dissenting).
- ⑦0 *Uber BV v Aslam* [2021] UKSC 5. For subsequent application, see e.g. *Nursing and Midwifery Council v Somerville* [2022] EWCA Civ 229, [2022] I.C.R. 755.
- ⑦1 [2021] UKSC 5 at [87]. See also the discussion below, para.42-025, and also Vol.I, para.1-071 (Classification by the contract and protective statutes).
- ⑦2 [2018] I.R.L.R. 84 (CAC) (not workers for purposes of either s.296 of the Trade Union and Labour Relations (Consolidation) Act 1992, or s.230(3)(b) of the Employment Rights Act 1996). Moreover, the union's subsequent judicial review application which had received permission to proceed in part was rejected in *R. (on the application of Independent Workers Union of Great Britain) v Central Arbitration Committee* [2018] EWHC 3342 (Admin) and [2021] EWCA Civ 952, [2022] 2 All E.R. 1105. Compare also the Court of Appeal's decision regarding foster carers: *National Union of Professional Foster Carers (NUPFC) v Certification Officer* [2021] EWCA Civ 548, [2021] 4 All E.R. 826, the reasoned order of the Court of Justice of the European Union in *B v Yodel Delivery Network Ltd (C-692/19) EU:C:2020:288*, [2020] I.R.L.R. 550, and a decision concerning the employment status of black-cab drivers in *Johnson v Transopco UK Ltd* [2022] EAT 6, [2022] I.C.R. 691.
- ⑦3 [2021] EWCA Civ 1514, [2022] I.C.R. 511; clarifying the application of the Supreme Court's guidance in *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51, [2017] I.C.R. 657, discussed further at para.42-009(2) above.
- ⑦4 s.83(2). See *Mingeley v Pennock and Ivory* [2004] EWCA Civ 328, [2004] I.C.R. 727, where the relationship between a taxi-driver and the organisation co-ordinating his work was held not to amount to a contract personally to execute any work or labour. It was expressly recognised in *Quinnen v Hovells* [1984] I.C.R. 525 that this category may include self-employed persons who comply with its requirements. See also *Mirror Group Newspapers Ltd v Gunning* [1986] I.C.R. 145. In *Tanna v Post Office* [1981] I.C.R. 374 it was held that full effect must be given to the word "personally", so that the case was not covered of a sub-postmaster who was responsible for seeing that the work of the Post Office was carried out either by himself or by staff chosen by him. In *Sheehan v Post Office Counters Ltd* [1999] I.C.R. 734, the Employment Appeal Tribunal confirmed the "dominant purpose of personal performance" test as propounded in *Mirror Group Newspapers Ltd v Gunning* [1986] I.C.R. 145, and applied it to hold, much as in *Tanna v Post Office* [1981] I.C.R. 374, that a sub-postmaster was not employed under "a contract personally to do any work". This view of the situation of those persons was confirmed in *Wolstenholme v Post Office Ltd* [2003] I.R.L.R. 546. Comparison should now be made with the decision in *Muschett v HM Prison Service*

[2010] EWCA Civ 25, [2010] I.R.L.R. 451, where the Court of Appeal held that there was no contractual obligation between the agency worker and the Prison Service as the end-user of his services such as was necessary to establish a “contract personally to execute any work or labour”. In *Burton v Higham* [2003] I.R.L.R. 257 it was held that temporary agency workers came within this definition although not within the definition of “employees” having contracts of employment. See *South East Sheffield Citizens Advice Bureau v Grayson* [2004] I.R.L.R. 353, EAT, where an unpaid volunteer worker was held to fall outside this definition; and the Court of Appeal similarly so decided in *X v Mid-Sussex Citizens Advice Bureau* [2011] EWCA Civ 28. The Supreme Court, [2012] UKSC 59, [2013] 1 All E.R. 1038 confirmed the decision of the Court of Appeal, holding that unpaid volunteer workers were outside the scope of disability discrimination protection afforded by Directive 2000/78/EC. cf. also now *Unite the Union v Nailard* [2016] I.R.L.R. 906.

①75 [2011] UKSC 40, [2011] 1 W.L.R. 1872. This continues to cast some doubt, which it will require further litigation to resolve, on the standing and relevance of the authorities cited in the preceding footnote. In *Halawi v WDFG UK Ltd (t/a World Duty Free)* [2014] EWCA Civ 1387, [2015] I.R.L.R. 50, Arden LJ expressed concern at the resulting exclusionary effects of this approach; though cf. also *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] I.R.L.R. 628. In the case of personal service companies, another avenue for recourse could be found in *EAD Solicitors LLP v Abrams* [2015] I.R.L.R. 978, EAT. Compare also the Supreme Court’s decision in *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] 1 W.L.R. 2047, discussed further at para.42-031 below.

①76 For an application in the context of locum doctors see *Alemi v Mitchell* [2021] I.R.L.R. 270, EAT.

①77 ss.1, 218(1), 244(1), 296(1). Compare *Smith v Carillion (JM) Ltd* [2015] EWCA Civ 209, [2015] I.R.L.R. 467.

①78 Trade Union and Labour Relations (Consolidation) Act 1992 s.181.

Section 2. - The Factors Identifying a Contract of Employment

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 2. - The Factors Identifying a Contract of Employment

The factors to be considered

42-010 The case law suggests⁷⁹ that the factors relevant to the process of identifying a contract of employment may usefully be listed as follows:

- (1)the degree of control exercised by the employer;
- (2)whether the worker's interest in the relationship involved any prospect of profit or risk of loss;
- (3)whether the worker was properly regarded as part of the employer's organisation;
- (4)whether the worker was carrying on business on his own account or carrying on the business of the employer;
- (5)the provision of equipment;
- (6)the incidence of tax and national insurance;
- (7)the parties' own view of their relationship;
- (8)the structure of the trade or profession concerned and the arrangements within it.

These and other aspects of the relationship that have been regarded as important to the task of classification are considered in the following paragraphs. Valuable guidance about the way classification should be approached is provided by the judgments of the Privy Council in the case of *Lee Ting Sang v Chung Chi-Keung*⁸⁰ and of the Court of Appeal in *Hall (Inspector of Taxes) v Lorimer*.⁸¹

The legal interpretation of the facts

42-011

The particular words found in the contract between the parties are not conclusive, since the law is only concerned with the nature or substance of the relationship which the contract has created.⁸² Once the relevant facts (which may include the terms of the contract) have been ascertained, the determination whether it is a contract of employment or not is a question of placing the correct legal interpretation upon those facts.⁸³ “Once the primary facts are found, then it is a pure question of law as to what is the reasonable inference based on the legal interpretation of the contract”.⁸⁴ But the *answer* to the question involves issues of fact and of degree which it is for the tribunal of first instance to determine.⁸⁵ The recent tendency has been for appellate courts to confine their intervention to cases where they find a positive error of law at first instance; to cases, that is, where they find that there was no evidence to support the conclusion reached at first instance or where they find that no reasonable person acting judicially and properly instructed as to the relevant law could reach such a decision.⁸⁶

Control and superintendence

- 42-012 An employer normally has the power to direct and control the work of the employee; “but the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done”.⁸⁷ The greater the amount of control exercised over the details of the work to be done, the more likely is the inference that the relationship is one of employment.⁸⁸ But the question of control is only one of the factors to be considered and it is far from conclusive,⁸⁹ e.g. a superior employee may exercise control over subordinate employees,⁹⁰ and even have the power to appoint and dismiss them, and yet both may be employees of the same employer. The control test must give way, within the same firm or organisation, to another factor, viz that both persons are on the same payroll.⁹¹ Thus the master of a ship,⁹² the general manager or director of a company,⁹³ or even the works foreman in a factory, may have authority to engage or dismiss employees, but this does not make them employers or prevent them from being employees.⁹⁴ The same holds for the relationship between senior civil servants and their subordinates.⁹⁵ A skilled employee will normally not be subject to actual control over the details of his or her work⁹⁶; but he or she is likely to be an employee if he or she is paid by and can be dismissed by the employer,⁹⁷ or if the employer can “give general directions as to the work the other is or is not to do”,⁹⁸ or as to working hours⁹⁹ and working place,¹⁰⁰ or “in incidental or collateral matters”.¹⁰¹ However, it is generally true that the greater the degree of independence from continuous and detailed control enjoyed by the person in question, the more likely the inference that it is not a contract of employment.¹⁰² Moreover, even if an apparent employer does exercise powers of control, discipline, engagement and dismissal over workers, the facts may be such that the workers in question are not working for the apparent employer at all, and that the apparent employer is merely licensing them to contract with others.¹⁰³

Method of control

- 42-013 Sometimes the distinction between an employee and an independent contractor depends on the method of control:

“... it is more usual to exercise the control desired through the medium of the contract itself when one is dealing with an independent contractor, and through day-to-day instructions during the performance of the contract when one is dealing with a servant”.¹⁰⁴

But some contracts may prescribe the employee’s duties in great detail without ceasing to be contracts of employment, if there are other indications of the relationship of employment, e.g. the power to dispense with the services of the employee if the employer is not satisfied with the manner in which he or she carries them out.¹⁰⁵

Control and the corporate employer¹⁰⁶

- 42-014 Company directors with service agreements may be employees of the company, although there is virtually no control exercised over them by superiors

¹⁰⁷

; even a managing director of a “one-person” company may be an employee under a contract of service with the company he or she controls.¹⁰⁸ This reflects the legal separation between the company and its directors; it is an assertion of the corporate entity doctrine rather than a conscious departure from the control test. It would seem that there is no rule of law that an individual such as managing director with a controlling beneficial interest in the shares of a company cannot be regarded as an employee of the company for the purposes of employment protection legislation.¹⁰⁹ On the other hand, the members of a co-operative association of workers do not turn themselves into employees merely by adopting a corporate form and electing a board of directors to manage their association.¹¹⁰ In *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld*,¹¹¹ the Court of Appeal provided guidance on the question of whether and when controlling shareholders and directors can claim to be treated as employees of their insolvent companies so as to enable them to claim payment from the Secretary of State.¹¹² While it was confirmed that a controlling shareholder and director can also be an employee, it

was also indicated that there may need to be an inquiry as to whether the claimed contract of employment truly represents the character of the relationship, as in cases where an allegation is made that the purported contract is a sham.¹¹³

Transfer of control

- 42-015 An employee may remain in a relationship of employment with his or her employer despite the fact that the employer has placed the employee temporarily under the control of another person¹¹⁴ (e.g. an independent contractor¹¹⁵). Thus the temporary transfer of an employee in connection with the hire of equipment—as where a crane driver is provided when a crane is hired out—does not normally result in a transfer of the contract of employment away from the original employer,¹¹⁶ who may, moreover, be estopped from denying that he or she is the employer where no formal transfer has been agreed with the employee.¹¹⁷ However, in a case where a company contracted for the provision of drivers for the operation of a private parcel delivery by another company, it was held by the Court of Appeal that the drivers were transferred into the temporary employment of the latter company, because the latter company had a sufficient degree of control over the work of the drivers.¹¹⁸ The mere fact that a nurse is under the control of a surgeon while an operation is in progress in an operating theatre does not mean that the nurse becomes the surgeon's employee, at least not for the purposes of vicarious liability.¹¹⁹ If the owner or occupier of premises where work is in progress retains some control over the work in order to maintain some degree of supervision over the activities on his or her premises¹²⁰ he or she will not, merely on that account, become an employer of those doing the work.¹²¹ However, special considerations apply where an employment agency arranges for a worker to carry out work under the control of the agency's client. This situation is considered in a later paragraph.¹²²

The “organisation” test

- 42-016 An employee is usually a regular unit in the complex organisation of a business: he or she is an integral part of the firm, not a casual or temporary person engaged only for the purpose of completing a specific task which is accessory to the main business.¹²³ Thus, doctors and nurses who are paid by a hospital authority, and are part of the regular staff of the hospital, are employees¹²⁴; but a consultant or anaesthetist selected and employed by the patient themselves may not be an employee of the hospital authority.¹²⁵ The organisation test has more recently been reformulated in a negative form as: “Is the person who has engaged himself or herself to perform these services performing them as a person in business on his or her own account?”.¹²⁶ Expressed in that form, this test has become one of the most significant criteria for identifying the contract

of employment.¹²⁷ That this is the case was confirmed by the judgment of the Privy Council in the case of *Lee Ting-Sang v Chung Chi-Keung*.¹²⁸

Power of selection and appointment

- 42-017 Usually, it is one indication of “employment” that the employer has the power to select and to appoint the employee, but the absence of this power is not conclusive against a contract of employment, e.g. where shipowners accepted dockers on a rota basis.¹²⁹ The employer will often delegate the power of selection of employees, sometimes to a superior employee,¹³⁰ sometimes even to an independent contractor.¹³¹ Although a statute may give to a specified official the power of making appointments to posts in a public body, the latter will be the employer.¹³² The power of a patient to select a surgeon to perform an operation used to be an important factor (especially when the patient pays the surgeon) indicating that the hospital is not the employer of the surgeon in this respect.¹³³

The power to dismiss or suspend

- 42-018 The power of dismissal¹³⁴ or suspension is an important indication of the relationship of employment¹³⁵: although a person may have no right to control the manner in which another does work, if the former can dispense with the services of the latter by giving a certain period of notice, the relationship will normally be one of employment,¹³⁶ since an independent contractor cannot be “dismissed”. But other factors may outweigh the power to dismiss: thus, although a cloakroom attendant could be suspended or dismissed by restaurant proprietors, she was remunerated only by tips, did not need to keep any fixed working hours, and was free not to attend whenever she pleased: hence she was held not to be employed under a contract of service.¹³⁷ The fact that a public body has only a restricted power of dismissal does not preclude a contract of employment.¹³⁸

Payment of wages or salary

- 42-019 The payment of “wages” or “salary”¹³⁹ or of holiday pay¹⁴⁰ is another important pointer to the relationship of employment. Normally a regular, fixed sum is payable to an employee, but it is possible for an employee to be remunerated solely by tips received from others¹⁴¹ or wholly on a commission basis.¹⁴² Similarly, the manner in which the remuneration is to be calculated may

point to a contract of employment; the typical employee is paid according to time worked,¹⁴³ but sometimes an employee may be paid by the piece,¹⁴⁴ and sometimes by commission.¹⁴⁵ If, however, payment is “by the job”, i.e. in relation to a complete task, this points, though not conclusively, to a contract with an independent contractor.¹⁴⁶

Supply of equipment and ownership of assets

- 42-020 If one party to the contract supplies the tools, machines or equipment used by the other party, this points to a contract of employment,¹⁴⁷ since an independent contractor normally provides these for herself or himself.¹⁴⁸ In *Ready-Mixed Concrete (South-East) Ltd v Minister of Pensions and National Insurance*¹⁴⁹ an owner-driver of a concrete-mixing lorry was held to be an independent contractor largely by reference to his ownership of the lorry, despite the facts that the lorry was subject to a hire-purchase agreement with an associated company and that the driver was in various senses required to work as part of the company’s organisation.

The fixing of times and place of work

- 42-021 The power to fix the hours or times when a person is to work,¹⁵⁰ or when he or she is to take his holidays, is another pointer to a contract of employment; another is the power to direct *where* he or she must work.¹⁵¹ But these factors are not conclusive: an independent contractor may work regularly on the employer’s premises,¹⁵² whilst an employee may have complete freedom as to times of work within the period of a particular task assigned to the employee.¹⁵³ These factors are closely linked with the question of the extent of the obligation to work or to employ, which is discussed in a later paragraph.¹⁵⁴

Personal performance

- 42-022 A person cannot normally be an employee if he or she is entitled to delegate the entire performance of his or her work to another person¹⁵⁵; but a person may possibly be an employee, although he or she personally (with the permission of the employer) employs assistants to help.¹⁵⁶ The Court of Appeal has more recently reasserted the requirement of personal performance,¹⁵⁷ in the form of a holding that the presence of a substitution clause in a lorry driver’s work contract deprived

that contract of the *mutuality of obligation*¹⁵⁸ of personal performance which would have been necessary to identify it as a contract of employment.¹⁵⁹

The extent of the obligation to work or to employ

42-023 If the contract entitles¹⁶⁰ some person to the full-time or exclusive services of the other person, this points to the contract being one of employment.¹⁶¹ But if it is left entirely to one party to the contract to choose whether to do any work or not (e.g. a travelling salesperson wholly on commission), there is almost certainly not a contract of employment.¹⁶² The courts may exceptionally recognise that there is a short-term contract of employment for each assignment undertaken or performed.¹⁶³ However, the more likely analysis in such a case will be that there is no continuous contract in being between the parties, and that the short-term contracts in respect of each task are not contracts of employment.¹⁶⁴ The case law at one stage seemed to suggest that there could be a continuing contract of employment although the employer had a power of indefinite lay-off.¹⁶⁵ It has since been held¹⁶⁶ that for there to be a continuing contract of employment linking up intermittent periods of employment (a so-called “global” contract of employment), there must be some degree of continuing mutual obligation on the employer to offer employment and on the employee to accept employment. The requisite degree of mutuality of obligation cannot be inferred from a “course of dealing” if that amounts to no more than the fact of intermittent employment with one employer, even over a long period of time.¹⁶⁷ Where the employer of a casual worker has clearly disclaimed from the outset any continuing obligation to provide any work at all, it may amount to an error of law to hold that a continuing contract of employment exists with that worker between periods of actual employment.¹⁶⁸ The decision of the House of Lords in *Carmichael v National Power Plc*¹⁶⁹ reinforces the stringency with which the mutuality of obligation requirement is applied in order to decide whether casual workers have continuing contracts of employment. Difficult questions continue to arise with regard to multilateral employment situations, such as those involving service recipients or customers of a proprietor/employer. In *Stringfellow Restaurants Ltd v Quashie*,¹⁷⁰ the Court of Appeal held that an Employment Tribunal had been entitled to conclude that the relation between a lap dancer and the club for which or at which she worked did not consist of a continuing contract of employment, primarily on the basis of an absence of continuing contractual obligations—thus identifying that worker as self-employed rather than an employee.¹⁷¹

Payment of social security contributions and income tax

42-024

The deduction by the employer of income tax and employed earner's social security contributions under the PAYE system (and formerly the payment of National Insurance contributions by the employer stamping the employee's national insurance card) are indications that the parties themselves view their relationship as one of employment.¹⁷² But neither this nor the failure to make these payments or deductions is conclusive as to the nature of the relationship in the eyes of the law.¹⁷³

The intention of the parties

- 42-025 A number of decisions have considered the question of whether an express intention to constitute an employment relationship in the form of a contract for services succeeds in excluding the statutory effects accorded to the employment relationship when constituted as a contract of service.¹⁷⁴ The result of those decisions would seem to be as follows. A genuine intention to transform an employment relationship into a situation where the worker is self-employed will be effective, as where the worker becomes an independent commission agent.¹⁷⁵ Moreover, where a situation is in doubt or ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal situation between them shall be.¹⁷⁶ However, while the expression of the parties' intention may be a relevant factor, it is not a conclusive factor in deciding what is the true nature of the contract; and where there is no written contract, the court is entitled to find contractual terms by implication.¹⁷⁷ Hence,

“It is by now well settled that the label which the parties choose to use to describe their relationship cannot alter or decide their true relationship; but, in deciding what the relationship is, the expression by them of their true intention is relevant but not conclusive. Its importance may vary according to the facts of the case.”¹⁷⁸

Moreover even where a worker has deliberately and openly chosen to be classified as self-employed, he or she may resile from that position where he or she is objectively an employee and would if held to his or her chosen classification be estopped from invoking a statute made for his or her benefit.¹⁷⁹ In *Protectacoat Firthglow Ltd v Szilagyi*¹⁸⁰ the Court of Appeal held that, in determining whether a person, who was working under documents purporting to create a partnership agreement and a service agreement with the partnership, was its employee within the meaning of s.230 of the Employment Rights Act 1996, the employment tribunal was entitled, if the document purporting to retain the services of a person did not represent the true relationship of the parties, to treat it as a sham and to assume jurisdiction on the footing that a contract of employment existed. A similar approach has since been taken both by the Court of Appeal and the Supreme Court in *Autoclenz Ltd v Belcher*.¹⁸¹ The Supreme Court confirmed that the approach should be to identify the actual legal obligations between the parties by ascertaining what was actually agreed between the parties, either as set out in the written terms, or, if it is alleged that those terms are not

accurate, what is proved to be their actual agreement at the time the contract was concluded. The Supreme Court, moreover, agreed with the Court of Appeal's view that:

“... while employment is a matter of contract, the factual matrix in which the contract is cast is not ordinarily the same as that of an arm's length commercial contract” and asserted that “the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed.”¹⁸²

The *Autoclenz* approach was further developed, in close connection with the need for purposive interpretation of employment-protective statutory provisions, in the context of contractual relationships between gig economy platforms and their workers in the Supreme Court's decision in *Uber v Aslam*.¹⁸³

Special cases: (1) labour-only sub-contracting

- 42-026 Labour-only sub-contracting is the practice by which a main contractor on a project secures the labour required by contracting with one or more sub-contractors. It is normally the intention that there will be no contract of employment involved in this sub-contracting relationship. Labour-only sub-contracting became widespread in the building industry.¹⁸⁴ In relation to that industry, successive *Finance Acts* have made provision for deduction in respect of income tax to be made by main contractors from any payments to labour-only sub-contractors unless the sub-contractor holds a certificate of exemption.¹⁸⁵ Various different kinds of labour-only sub-contracting arrangement are found in practice, and their legal effects are a matter of difficulty. There are two main types of sub-contracting arrangement: the two-party arrangement where the worker contracts directly with the main contractor, and the three-party arrangement where there is an intermediary, such as a gang-leader or a sub-contracting company, who contracts with the main contractor to provide labour and with the worker to obtain labour. In any given case, there may be room for argument about whether the arrangement is of the two-party or three-party type. If the arrangement is of the two-party type, the contract will normally purport to be a contract for services and not a contract of employment. The courts have sometimes found that there is indeed no contract of employment in such cases¹⁸⁶; but the arrangement may be held to fall within statutes dealing with the employment relationship¹⁸⁷ and has even been classified as a true contract of service despite the parties' clear intention that it should be regarded as a contract for services.¹⁸⁸ A variant upon the two-party type of arrangement is that whereby the worker contracts as one of a firm of partners; in this case the existence of a contract of employment is clearly negated. If the labour-only sub-contracting arrangement is held to be of the three-party type, more complex questions arise. The contract between the main contractor and the intermediate sub-contractor will normally not be a contract of employment.¹⁸⁹ The contract between the intermediate sub-contractor and the worker may be

a contract of employment,¹⁹⁰ or a contract for services.¹⁹¹ An important decision in favour of the contract of employment analysis was that of the Privy Council on appeal in *Lee-Ting Sang v Chung Chi-Keung*.¹⁹² It should follow from the three-party classification of the arrangement that there is no contract (of employment or for services) between the main contractor and the worker; but there may be held to be an employment relationship between them for statutory purposes.¹⁹³ Some statutes have expressly deemed the worker an employee of the main contractor.¹⁹⁴

Special cases: (2) agency workers

- 42-027 Where, as now happens in an increasingly wide range of occupations, employment is obtained via an employment agency, radically divergent analyses of the legal relationships may occur. The worker may be held to have contracted with the agency and not with the client under whose control he or she is placed.¹⁹⁵ In other cases, the worker may be held to have contracted with the client and merely to have received an introduction from the agency.¹⁹⁶ On either view, it has then to be decided whether the worker is an employee. It has been suggested that in the case where the worker is under contract with the agency, there is a *sui generis* type of contract for the provision of services to a third party.¹⁹⁷ It has also been held¹⁹⁸ that where temporaries on the books of an employment agency were under no obligation to accept bookings offered by the employers, who in turn had no obligation to find work for their temporaries, the relationship between the employers and the temporaries lacked the elements of continuity and care associated with the contract of employment. Some labour-only sub-contracting arrangements are comparable to employment via an agency,¹⁹⁹ and both systems can raise problems insofar as they can involve the avoidance of the ordinary legal consequences of employment under contracts of employment.²⁰⁰
- 42-028 The case law is rather fluctuating on the question whether and when an agency worker has a contract of employment either with the agency or with its client business to which the agency sends the worker. The prevailing trend seemed to have been set by the assertion in the leading case of *McMeechan v Secretary of State for Employment*²⁰¹ that there is no rule of law against there being a contract of employment either with the agency or with the client business. However, the Court of Appeal in *Dacas v Brook Street Bureau (UK) Ltd*, held that the temporary agency worker was not an “employee” of the agency, though she might be an employee of the end-user of her services.²⁰² The approach in the *Dacas* case was applied to similar effect in *Bunce v Postworth Ltd (t/a Skyblue)*.²⁰³ There was at one stage in recent years a readiness to discern an “implied contract of employment” arising between the worker and the client business arising out of an assignment or series of assignments over a long period of time.²⁰⁴ However, the Court of Appeal ruled in *James v Greenwich BC*²⁰⁵ that such a contract can be implied only where it is “necessary” to do so,²⁰⁶ their view being that if this represented a lacuna in the law determining the rights of

agency workers, it could be filled only by legislation. The fact that an individual has a contract of employment with one employer does not preclude their being a worker in the extended agency work sense under s.43K of the Employment Rights Act 1996.²⁰⁷

42-029 The conduct of the business of employment agencies is regulated by the [Employment Agencies Act 1973](#),
208

209 **U** and by regulations made thereunder.

210 **U** The conditions of employment of agency workers are further regulated by the [Agency Workers Regulations 2010](#).

211 **U** The main effect of these Regulations is to provide a right on the part of agency workers, after a qualifying period of 12 weeks' employment, to the same basic terms and conditions of employment

212 **U** as those which they would have been accorded if they had been recruited directly by the hirer of their services from the temporary work agency.

213 **U**

Special cases: (3) office-holders

42-030 There is authority to the effect that the fact that a person is the holder of a public ecclesiastical or tenured office does not ipso facto prevent that person from being classified as working under a contract of employment.²¹³ Those authorities show that the holding of office neither requires nor excludes the conclusion that the holder is an employee, but simply leaves that question to be decided according to the normal criteria.²¹⁴ Similarly, in the context of the civil service, "appointment" of a worker may refer either to office holding or to contractual employment.²¹⁵ In *Gilham v Ministry of Justice*, the Court of Appeal found that judges were office holders, and therefore excluded from statutory whistleblower protection.²¹⁶ This was overturned on appeal to the Supreme Court, where it was held that s.230(3)(b) was to be interpreted as including judicial office holders in its material scope.²¹⁷ There is a further, and again quite distinct, question as to whether a contract of employment contains:

“... elements of a public character which would enable the court to extend to the employee the protection flowing from the right to be heard enjoyed by the holders of an office.”²¹⁸

Such a “right to be heard” may exist in conjunction with a contract of employment²¹⁹ or in the absence of a contract of employment²²⁰; its presence or absence is in no way conclusive of whether or not the legal relationship takes the form of a contract of employment.

Special cases: (4) partnerships and limited liability partnerships

- 42-031 The traditional assumption that partnership and employment status are mutually exclusive categories²²¹ has come under scrutiny in the Supreme Court’s decision in *Bates van Winkelhof v Clyde & Co LLP*.²²² In multi-tiered partnerships, the question as to whether an individual is a genuine “co-adventurer” or an employee under the traditional tests will therefore become increasingly important.²²³ In the case of Limited Liability Partnerships,²²⁴ previous decisions denying employee status to salaried LLP partners²²⁵ are similarly likely to come under scrutiny.²²⁶

Special cases: (5) employee shareholders

- 42-032 The *Growth and Infrastructure Act 2013* s.31 introduced a new employment status, that of “employee shareholder”. Under this provision, if an employee or person entering into employment agrees to become an “employee shareholder” in consideration of receipt of shares to the value of £2,000 or more in the employing company, he or she becomes subject to a special kind of contract of employment of which the particular incident is that certain statutory rights normally enjoyed by employees under contracts of employment are not applicable—notably, the general right not to be unfairly dismissed, and to a redundancy payment upon dismissal by reason of redundancy. Reference should be made to the detailed legislation in order to ascertain the exact conditions upon which this new status may be conferred and the exact consequences that it will have.²²⁷ As of 1 December 2016, the tax benefits associated with the employee shareholder employment status have no longer been available to new entrants. The government has announced its intention to legislate and close the status itself to new entrants “at the next legislative opportunity”.²²⁸ It has been held that employees who have already entered into an employee shareholder agreement need an explicit agreement to regain their statutory rights.²²⁹

Special cases: (6) zero-hours contracts

- 42-033 There has been considerable recent discussion of so-called zero-hours contracts, that is to say arrangements for employment without any fixed minimum working hours. Such arrangements will be regarded as constituting contracts of employment if the usual tests are met, in particular the requirement of continuing mutual obligation.

230

U Following extensive consultation, provision was made in the [Small Business, Enterprise and Employment Act 2015](#) to deal with one of the problems with such arrangements by ensuring that those working under zero-hours contracts cannot be required to work exclusively for the one employer concerned.

231

U It has since been confirmed that a lack of exclusivity in “portfolio” work arrangements can be compatible with “worker” status under [s.230\(3\)\(b\) of the Employment Rights Act 1996](#).

232

U

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 79 *Addison v London Philharmonic Ltd* [1981] *I.C.R.* 261, 271. See also *Warner Holidays Ltd v Secretary of State for Social Services* [1983] *I.C.R.* 440; *Collins* (1990) 10 *O.J.L.S.* 353. [1990] 2 *A.C.* 374.
- 81 [1994] *I.C.R.* 218.
- 82 *Short v J & W Henderson Ltd* (1946) 62 *T.L.R.* 427; *Morren v Swinton and Pendlebury BC* [1965] 1 *W.L.R.* 576, 581; see below, para.42-025.
- 83 *Benmax v Austin Motor Co Ltd* [1955] *A.C.* 370.
- 84 *Morren v Swinton and Pendlebury BC*, see above, at 583. cf. cases decided under the old Workmen’s Compensation Acts: *Bobbey v WM Crosbie & Co Ltd* (1915) 114 *L.T.* 244; *Easdown v Cobb* [1940] 1 *All E.R.* 49. (This was treated as a matter of law if it depended on

- the interpretation of a written contract: *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd [1924] 1 K.B. 762.*)
- 85 *O'Kelly v Trusthouse Forte Plc [1983] I.C.R. 728.*
- 86 *Global Plant Ltd v Secretary of State for Health and Social Security [1972] 1 Q.B. 139;* *Maurice Graham Ltd v Brunswick (1974) 16 K.I.R. 158.* The foregoing passage of text was judicially cited in *Addison v London Philharmonic Ltd [1981] I.C.R. 261, 268, D-F.* This tendency has been confirmed and re-emphasised in *O'Kelly v Trusthouse Forte Plc [1983] I.C.R. 728;* and *Nethermere (St Neots) Ltd v Gardner [1984] I.C.R. 612.*
- 87 *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd [1947] A.C. 1, 17.* See also *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd [1924] 1 K.B. 762* at 776–779.
- 88 *Simmons v Heath Laundry [1910] 1 K.B. 543, 550;* *Whittaker v Minister of Pensions and National Insurance [1967] 1 Q.B. 156.*
- 89 In *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 Q.B. 497,* it was ruled that control by the employer was not sufficient to identify the contract as one of employment and that the other aspects of the contract must not be inconsistent with the relationship of employment; cf. *Hitchcock v Post Office [1980] I.C.R. 100* (sub-postmaster not employee of Post Office despite their control of him). Compare also *Jennings v Forestry Commission [2008] EWCA Civ 581, [2008] I.C.R. 988.*
- 90 This will of necessity be the position when a corporation employs several persons. cf. *Re Church of England Curates [1912] 2 Ch. 563.*
- 91 See below, paras 42-016—42-019.
- 92 *Hedley v Pinkney & Sons S.S. Co Ltd [1894] A.C. 222.*
- 93 *Performing Right Society Ltd v Ciryl Theatrical Syndicates Ltd [1924] 1 K.B. 1.* See also *Folami v Nigerline (UK) Ltd [1978] I.C.R. 277;* *Eaton v Robert Eaton Ltd [1988] I.C.R. 302* (managing director).
- 94 *Bird v O'Neal [1960] A.C. 907, 920.*
- 95 *Bainbridge v Postmaster-General [1906] 1 K.B. 178;* *Fraser v Balfour (1918) 87 L.J. K.B. 1116, HL.*
- 96 *Simmons v Heath Laundry [1910] 1 K.B. 543, 553;* *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd [1947] A.C. 1.* (See also the “organisation” test: see below, para.42-016.)
- 97 *Morren v Swinton and Pendlebury BC [1965] 1 W.L.R. 576.*
- 98 *Stagecraft Ltd v Minister of National Insurance, 1952 S.C. 288, 302;* *Whittaker v Minister of Pensions and National Insurance [1967] 1 Q.B. 156.*
- 99 e.g. if the contract provided that the person was to devote the whole of his working time to the employer: *Whittaker v Minister of Pensions and National Insurance*, above, at 167; cf. *Greater London Council v Minister of Social Security [1971] 1 W.L.R. 641* (school dentist). See below, para.42-021.
- 100 *Walker v Crystal Palace Football Club Ltd [1910] 1 K.B. 87* (professional football player); *Zuijis v Wirth Brothers Pty Ltd (1955) 93 C.L.R. 561, 572* (acrobat); *Whittaker v Minister of Pensions and National Insurance*, above (trapeze artist). See below, para.42-021.

- 101 *Zuijis v Wirth Brothers Pty Ltd*, above, at 571. Doctors employed by a hospital are another illustration: see below, para.42-016.
- 102 *Simmons v Heath Laundry [1910] 1 K.B. 543, 550*; cf. *Challinor v Taylor [1972] I.C.R. 129*; *Addison v London Philharmonic Ltd [1981] I.C.R. 261* (part-time orchestral musicians self-employed where although there was control, it was the minimum necessary to do the work); to like effect is *Midland Sinfonia Concert Society Ltd v Secretary of State for Social Services [1981] I.C.R. 454* at 466 F–G. Contrast now, however, *White v Troutbeck SA [2013] EWCA Civ 1171, [2013] I.R.L.R. 949* (low level of day-to-day control not enough to negate employment status).
- 103 *Cheng Yuen v Royal Hong Kong Golf Club [1988] I.C.R. 131* (golf caddie not employee of golf club). Compare now *Stringfellow Restaurants Ltd v Quashie [2012] EWCA Civ 1735, [2013] I.R.L.R. 99*; para.42-023 below.
- 104 Atiyah, *Vicarious Liability in the Law of Torts* (1967), p.42.
- 105 *Amalgamated Engineering Union v Minister of Pensions and National Insurance [1963] 1 W.L.R. 441, 454*. See below, para.42-018.
- 106 See J. Prassl, *The Concept of the Employer* (2015) 19ff.
- ①07 *Trussed Steel Concrete Co Ltd v Green [1946] Ch. 115, 121*; see *Parsons v AJ Parsons & Sons Ltd [1978] I.C.R. 456*. See now also *Stack v Ajar-Tec Ltd [2015] EWCA Civ 46, [2015] I.R.L.R. 474*. The case law reminds us that not all directors are employees, however: see *Rainford v Dorset Aquatics Ltd [2021] 12 WLUK 203*, EAT.
- 108 *Lee v Lee's Air Farming Ltd [1961] A.C. 12* (workman's compensation case). See also *Folami v Nigerline (UK) Ltd [1978] I.C.R. 277*; *Eaton v Robert Eaton Ltd [1988] I.C.R. 302* (managing director). See now also *Secretary of State for Business, Innovation and Skills v Knight [2014] I.R.L.R. 605, EAT*: sole shareholder and managing director can be employee of company so as to claim redundancy payment in insolvency.
- 109 *Bottrill v Secretary of State for Trade and Industry [2000] 1 All E.R. 915*. The compatibility of majority shareholding with employee status was further confirmed by the decision of the Court of Appeal in *Sellars Arenascene Ltd v Connolly (No.2) [2001] I.R.L.R. 222*. Compare also *Nesbitt v Secretary of State for Trade and Industry [2007] I.R.L.R. 847*.
- 110 *Winfield v London Philharmonic Ltd [1979] I.C.R. 726*; contrast *Drym Fabricators Ltd v Johnson [1981] I.C.R. 274* which was decided on a simple corporate entity basis; sed quaere. 111 *[2009] EWCA Civ 280, [2007] I.C.R. 1183*.
- 112 Under Pt XII of the Employment Rights Act 1996, see para.42-205.
- 113 As to which, see below, para.42-025.
- 114 *Wardell v Kent CC [1938] 2 K.B. 768, 783*. But see now *Construction Industry Training Board v Labour Force Ltd [1970] 3 All E.R. 220*; *Cross v Redpath Dorman Long Ltd [1978] I.C.R. 730* and see below, para.42-026.
- 115 *Clelland v Edward Lloyd Ltd [1938] 1 K.B. 272*.
- 116 *Mersey Docks and Harbour Board v Coggins & Griffith Ltd [1947] A.C. 1*.
- 117 *Smith v Blandford Gee Cementation Ltd [1970] 3 All E.R. 154*.
- 118 *Interlink Express Parcels Ltd v Night Trunkers Ltd [2001] R.T.R. 23*. Various passages from the present chapter were quoted with approval by Arden LJ.

- 119 *Morris v Winsbury-White* [1937] 4 All E.R. 494. See also *Perionowsky v Freeman* (1866) 4 F. & F. 977.
- 120 Or in order to protect his property: *Doggett v Waterloo Taxi-Cab Co Ltd* [1910] 2 K.B. 336, 341, 343.
- 121 *Marrow v Flimby and Broughton Moor Coal and Fire Brick Co Ltd* [1898] 2 Q.B. 588; *Fitzpatrick v Evans & Co* [1902] 1 K.B. 505; *Gould v Minister of National Insurance* [1951] 1 K.B. 731.
- 122 See below, paras 42-027—42-029; cf. *Road Transport Industry Training Board v Ongaro* [1977] I.C.R. 523.
- 123 *Stevenson, Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 T.L.R. 101, 111; *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 Q.B. 248, 295; *Roe v Minister of Health* [1954] 2 Q.B. 66, 90.
- 124 *Cassidy v Ministry of Health* [1951] 2 K.B. 343, 362.
- 125 *Roe v Minister of Health*, above, at 82; *Higgins v North Western Metropolitan Regional Hospital Board* [1954] 1 W.L.R. 411. See Atiyah at pp.87–89.
- 126 *Market Investigations Ltd v Minister of Social Security* [1969] 2 Q.B. 173, 187.
- 127 *Ferguson v John Dawson Ltd* [1976] I.R.L.R. 346, 352; *Young & Woods Ltd v West* [1980] I.R.L.R. 201, 205; *Hitchcock v Post Office* [1980] I.C.R. 100, 105 E–H; *Addison v London Philharmonic Ltd* [1981] I.C.R. 261, 272D–273C.
- 128 [1990] 2 A.C. 374.
- 129 *Short v J & W Henderson Ltd* (1946) 62 T.L.R. 427, 429.
- 130 cf. *Parker v Walker*, 1961 S.L.T. 252.
- 131 *Morren v Swinton and Pendlebury BC* [1965] 1 W.L.R. 576.
- 132 *Kilboy v South Eastern Fire Joint Area Committee*, 1952 S.C. 280.
- 133 *Roe v Minister of Health* [1954] 2 Q.B. 66, 82, see above, para.42-016. cf. *Hall v Lees* [1904] 2 K.B. 602.
- 134 “Dismissal” is not relevant for this purpose if it merely means that the engagement of a person on a day-to-day basis will not be continued in future: *Doggett v Waterloo Taxi-Cab Co Ltd* [1910] 2 K.B. 336.
- 135 *Short v J & W Henderson Ltd* (1946) 62 T.L.R. 427, 429; *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1947] A.C. 1, 20.
- 136 *Binding v Great Yarmouth Port and Haven Commissioners* (1923) 16 B.W.C.C. 28; *Amalgamated Engineering Union v Ministry of Pensions and National Insurance* [1963] 1 W.L.R. 441, 454; *Ferguson v John Dawson Ltd* [1976] I.R.L.R. 346, 349; cf. *Drym Fabricators Ltd v Johnson* [1981] I.C.R. 274, 275, G–H.
- 137 *Pauley v Kenaldo Ltd* [1953] 1 W.L.R. 187, 191.
- 138 *Barber v Manchester Regional Hospital Board* [1958] 1 W.L.R. 181.
- 139 *Short v J & W Henderson Ltd* (1946) 62 T.L.R. 427, 429.
- 140 *Hobbs v Royal Arsenal Co-operative Society Ltd* (1930) 23 B.W.C.C. 254; cf. *Wright v Att-Gen for Tasmania* (1954) 94 C.L.R. 409.
- 141 *Pauley v Kenaldo Ltd* [1953] 1 W.L.R. 187, 191; *Benjamin v Minister of Pensions and National Insurance* [1960] 2 Q.B. 519.

- 142 *Hobbs v Royal Arsenal Co-operative Society Ltd*, above. cf. *Parker v Walker*, 1961 S.L.T. 252. See *Tyne & Clyde Warehouses Ltd v Hamerton* [1978] I.C.R. 661; *102 Social Club v Bickerton* [1977] I.C.R. 911.
- 143 But sometimes an independent contractor is paid by time: *Robinson v Scarisbrick* (1939) 32 B.W.C.C. 285.
- 144 *Sadler v Henlock* (1855) 4 E. & B. 570.
- 145 See above.
- 146 See below, para.42-023.
- 147 *Binding v Great Yarmouth Port and Haven Commissioners* (1923) 16 B.W.C.C. 28. Compare, for the converse situation, *Jennings v Forestry Commission* [2008] EWCA Civ 581, [2008] I.C.R. 988.
- 148 *Humberstone v Northern Timber Mills* (1949) 79 C.L.R. 389; cf. *Hitchcock v Post Office* [1980] I.C.R. 100, 108H.
- 149 [1968] 2 Q.B. 497.
- 150 *M'Cready v DJ Dunlop & Co* (1900) 2 F. 1027, 1031. cf. *Neale v Atlas Products (Vic) Pty Ltd* (1954) 94 C.L.R. 419.
- 151 *Simmons v Heath Laundry Co* [1910] 1 K.B. 543, 550; *Re Ashley and Smith Ltd* [1918] 2 Ch. 378; *Stagecraft Ltd v Minister of National Insurance*, 1952 S.C. 288.
- 152 *Templeton v William Parkin & Co Ltd* (1929) 140 L.T. 519; *Westall Richardson Ltd v Roulson* [1954] 1 W.L.R. 905.
- 153 *Market Investigations v Minister of Social Security* [1969] 2 Q.B. 173.
- 154 See below, para.42-012.
- 155 *Braddell v Baker* (1911) 104 L.T. 673, 676. cf. *Hill v Beckett* [1915] 1 K.B. 578; *Pauley v Kenaldo Ltd* [1953] 1 W.L.R. 187, 191. See Atiyah, Vicarious Liability in the Law of Torts (1967), pp.59–62; cf. *Hitchcock v Post Office* [1980] I.C.R. 100, 109 AC.
- 156 This was assumed in *Robinson v Hill* [1910] 1 K.B. 94. In certain cases, the assistants may be employees of the main employer, e.g. if he has delegated to the superior employee the power to engage assistants: see *Bobbey v WM Crosbie & Co Ltd* (1915) 114 L.T. 244; cf. above, para.42-017.
- 157 In *Express and Echo Publications Ltd v Tanton* [1999] I.C.R. 693. The requirement of personal performance was strictly maintained and applied in *Staffordshire Sentinel Newspapers Ltd v Potter* [2004] I.R.L.R. 752, EAT, so that an express power for the worker to substitute another worker was treated as negating a contract of employment although the power was subject to the approval of the employer. Compare also para.42-009.
- 158 As to which see below, para.42-023.
- 159 Compare, however, the decision of the Employment Appeal Tribunal in *Macfarlane v Glasgow City Council* [2001] I.R.L.R. 7, to the effect that the worker's capacity to perform via a substitute in exceptional circumstances is not necessarily inconsistent with the existence of a contract of employment.
- 160 The mere fact that a person has for a long time worked exclusively for another is not relevant: *Humberstone v Northern Timber Mills* (1949) 79 C.L.R. 389.
- 161 *Bauman v Hulton Press Ltd* [1952] 2 All E.R. 1121, 1124. See also *Hobbs v Royal Arsenal Co-operative Society Ltd* (1930) 23 B.W.C.C. 254.

- 162 *Egginton v Reader* [1936] 1 All E.R. 7; *Chadwick v Pioneer Private Telephone Co Ltd* [1941] 1 All E.R. 522; *Pauley v Kenaldo Ltd* [1953] 1 W.L.R. 187, 191; *WHPT Association v Social Services Secretary* [1981] I.C.R. 737, 750H–751C; cf. also *Mailway (Southern) Ltd v Willsher* [1978] I.C.R. 511 (part-time packer); but contrast *Airfix Footwear Ltd v Cope* [1978] I.C.R. 1210 (regularly employed outworker held an employee). Compare now *Mingeley v Pennock and Ivory* [2004] EWCA Civ 328, [2004] I.C.R. 727, where the relationship between a taxi-driver and the organisation co-ordinating his work was held not to amount to a contract personally to execute any work or labour.
- 163 *Market Investigations Ltd v Minister for Social Security* [1969] 2 Q.B. 173; but they did not so recognise in *O'Kelly v Trusthouse Forte Plc* [1983] I.C.R. 728; *Nethermere (St Neots) Ltd v Gardiner* [1984] I.C.R. 612.
- 164 *Writers Guild of GB v BBC* [1974] I.C.R. 234.
- 165 *Puttick v John Wright & Sons (Blackhall) Ltd* [1972] I.C.R. 457; *Airfix Footwear Ltd v Cope* [1978] I.C.R. 1210.
- 166 *O'Kelly v Trusthouse Forte Plc* [1983] I.C.R. 728; *Nethermere (St Neots) Ltd v Gardiner* [1984] I.C.R. 612; *Hellyer Bros Ltd v McLeod* [1987] I.C.R. 526.
- 167 *Hellyer Bros Ltd v McLeod* [1987] I.C.R. 526.
- 168 *Clark v Oxfordshire HA* [1998] I.R.L.R. 125 (staff nurse on “nurse bank”, but stated to have no entitlement to guaranteed or continuous work).
- 169 [1999] I.C.R. 1226 (power station guides working on casual as required basis held not to have continuing contracts of employment). That decision of the House of Lords was applied by the Court of Appeal in *Stevedoring & Haulage Services Ltd v Fuller* [2001] EWCA Civ 651, [2001] I.R.L.R. 627 to the effect that dock workers working on an “ad hoc and casual basis” were held to have no continuing contracts of employment. Compare, however, *Cornwall CC v Prater* [2006] EWCA Civ 102, [2006] I.C.R. 731, where the Court of Appeal displayed a greater willingness than had previously been shown to regard a sequence of casual work contracts as each consisting of a contract of employment, and as all being linked up into a period of “continuous employment”, as to which see para.42-169. But in the rather different context of unpaid voluntary workers, the approach in the *Carmichael* case received a stricter application in *Melhuish v Redbridge Citizens Advice Bureau* [2005] I.R.L.R. 419. Contrast, however, in the context of remunerated employment, *Wilson v Circular Distributors Ltd* [2006] I.R.L.R. 38, where the attempt to argue that the employer was under no clear obligation to provide work and that the claimant accordingly had no contract of employment was unsuccessful. Compare now *Littlewood v Revenue and Customs Commissioners* [2009] S.T.C. (S.C.D.) 243.
- 170 [2012] EWCA Civ 1735, [2013] I.R.L.R. 99.
- 171 Contrast with that decision, however, *Drake v Ipsos Mori UK Ltd* [2012] I.R.L.R. 973, EAT.
- 172 *Short v J & W Henderson Ltd* (1946) 62 T.L.R. 427, 429; *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 Q.B. 437; cf. *Pauley v Kenaldo Ltd* [1953] 1 W.L.R. 187, 191 (person stamping her own card as a “self-employed person”).
- 173 *Maurice Graham Ltd v Brunswick* (1974) 16 K.I.R. 158, pace the suggestion of Fisher J in *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All E.R. 220, 226 D–F; *Ferguson v John Dawson Ltd* [1976] I.R.L.R. 346, 349–350; *Thames Television Ltd v*

- Wallis [1979] I.R.L.R. 136, 137, [15]. cf. Narich Pty Ltd v Commissioner of Pay-Roll Tax [1984] I.C.R. 286.*
- 174 *Ferguson v John Dawson Ltd [1976] I.R.L.R. 346; Davis v New England College of Arundel [1977] I.C.R. 6; BSM (1257) Ltd v Secretary of State for Social Services [1978] I.C.R. 894; Massey v Crown Life Insurance Co [1978] I.C.R. 590; Tyne & Clyde Warehouses Ltd v Hamerton [1978] I.C.R. 661; Young & Woods Ltd v West [1980] I.R.L.R. 201; Addison v London Philharmonic Ltd [1981] I.C.R. 261.*
- 175 *Massey v Crown Life Insurance [1977] I.C.R. 590, 595 E-H.*
- 176 *[1977] I.C.R. 590* at 595C, per Lord Denning MR.
- 177 *Ferguson v John Dawson Ltd [1976] I.R.L.R. 346.*
- 178 *Young & Woods Ltd v West [1980] I.R.L.R. 201, 208*, per Ackner LJ. cf. *Warner Holidays Ltd v Secretary of State for Social Services [1983] I.C.R. 440; Narich Pty Ltd v Commissioner of Pay-roll Tax [1984] I.C.R. 286*. In *Smith v Reliance Water Controls Ltd [2003] EWCA Civ 1153*, Arden LJ stressed the importance, in cases where there was an express change of status from employee to self-employed worker, of nevertheless weighing all the objective factors according to the test laid down in the *Market Investigations* case to assess whether the contract was a contract of employment. Compare also *RNLI v Bushaway [2005] I.R.L.R. 675*, in which a contract of employment was held to arise between the end-user and the worker in a triangular employment situation despite an express agreement that the claimant was to be regarded as self-employed, which agreement contained an “entire contract” clause; see also Vol.I, para.15-031.
- 179 *Young & Woods Ltd v West [1980] I.R.L.R. 201* at 207, per Stephenson LJ.
- 180 *[2009] EWCA Civ 98, [2009] I.C.R. 835.*
- 181 *[2009] EWCA Civ 1046, [2011] UKSC 41, [2011] 4 All E.R. 745*. For subsequent instances of this approach, see for example *Boss Projects LLP v Bragg [2013] UKEAT 0330/13/SM* (express term of “in business on own account” disregarded). Compare now also *Farmer v Heart of Birmingham Teaching Primary Care Trust [2016] I.C.R. 1088, EAT*, where the employment judge found that a written agreement identifying a “legal employer” did not reflect the reality of the situation.
- 182 *[2011] UKSC 41*, at [32]–[35], per Lord Clarke.
- 183 *Uber BV v Aslam [2021] UKSC 5*, especially at [71]ff. See also the discussion in para.42-009 (3) above.
- 184 See the Report of the Committee of Inquiry under Professor Phelps-Brown into certain matters concerning labour in Building and Civil Engineering, Cmnd.3714 (1968).
- 185 See Finance Act 2004 Pt 3 Ch.3, “Construction Industry Scheme”.
- 186 *Westall Richardson Ltd v Roulson [1954] 2 All E.R. 448; Re CW & AL Hughes Ltd [1966] 1 W.L.R. 1369.*
- 187 cf. *Rennisson & Son v Ministry of Social Security [1970] C.L.Y. 1755*. The statutory formula, “a contract personally to execute any work or labour” (used, for example, in *Equal Pay Act 1970 s.1(6)*); *Sex Discrimination Act 1975 s.82(1)* presumably covers such a contract: see above, para.42-009. In *Byrne Brothers (Formwork) Ltd v Baird [2002] I.C.R. 667*, the Employment Appeal Tribunal held that building trade workers working as self-employed labour-only sub-contractors qualified as “workers” within the meaning of the *Working Time*

Regulations 1998 (in which the term is defined in the same way as under s.230(6) of the Employment Rights Act 1996) although they clearly were not employed under contracts of employment and had some power to provide a substitute to carry out their work.

- 188 *Ferguson v John Dawson Ltd [1976] I.R.L.R. 346.*
- 189 *Emerald Construction Co Ltd v Lowthian [1966] 1 W.L.R. 691.*
- 190 cf. *Maurice Graham Ltd v Brunswick (1974) 16 K.I.R. 158.*
- 191 *Construction Industry Training Board v Labour Force Ltd [1970] 3 All E.R. 220; Jones v Minton Construction Ltd (1973) 15 K.I.R. 309.*
- 192 [1990] 2 A.C. 374.
- 193 *Donaghey v Boulton & Paul Ltd [1968] A.C. 1* (breach of statutory duty).
- 194 Wages Councils Act 1979 s.21 (now repealed by the *Wages Act 1986* which is now spent).
cf. Sex Discrimination Act 1975 s.9 (discrimination against contract workers).
- 195 *O'Sullivan v Thompson-Coon (1973) 14 K.I.R. 108.*
- 196 *Alderton v Richard Burgon Associates (Manpower) Ltd [1974] Crim. L.R. 318.*
- 197 *Construction Industry Training Board v Labour Force Ltd [1970] 3 All E.R. 220, 225F* (Cooke J). cf. *Ironmonger v Movefield Ltd [1988] I.R.L.R. 461.*
- 198 *Wickens v Champion Employment [1984] I.C.R. 365, 371D.*
- 199 cf. *Construction Industry Training Board v Labour Force Ltd [1970] 3 All E.R. 220.*
- 200 See above, paras 42-025—42-026.
- 201 [1997] I.C.R. 549.
- 202 *Dacas v Brook Street Bureau (UK) Ltd [2004] EWCA Civ 217, [2004] I.R.L.R. 358.*
- 203 [2005] EWCA Civ 490, [2005] I.R.L.R. 557; compare the decision of the Court of Appeal in *Consistent Group Ltd v Kalwak [2008] EWCA Civ 430, [2008] I.R.L.R. 505.*
- 204 *Franks v Reuters Ltd [2003] I.R.L.R. 423*; contrast the earlier *Hewlett Packard Ltd v O'Murphy [2002] I.R.L.R. 4.*
- 205 [2008] EWCA Civ 35, [2008] I.R.L.R. 302. Comparison should now be made with the decision in *Muschett v HM Prison Service [2010] EWCA Civ 25, [2010] I.R.L.R. 451*, where the Court of Appeal held that there was no contractual obligation between the agency worker and the Prison Service as the end-user of his services such as was necessary to establish a “contract personally to execute any work or labour”. (It would follow that there was no contract of employment between them.) Compare also *RSA Consulting Ltd v Evans [2010] EWCA Civ 866*, where the Court of Appeal held that the assessment of whether it was necessary to imply a “worker’s” contract between the claimant and an intermediary agency must not be limited to documentary evidence alone and must extend to consideration of the actual relationship between the parties; a further exploration of that position is to be found in the decision of the Court of Appeal in *Evans v Parasol Ltd [2010] EWCA Civ 866, [2011] I.C.R. 37*. The negative tendency against finding a contract of employment between the agency worker and the end-user was further manifested in *Alstom Transport v Tilson [2010] EWCA Civ 1308*.
- 206 The test being that laid down by Bingham LJ in *The Aramis [1989] 1 Lloyd's Rep. 213* at 224. Compare now also *Smith v Carillion (JM) Ltd [2015] EWCA Civ 209, [2015] I.R.L.R. 467.*

- 207 *Day v Lewisham and Greenwich NHS Trust* [2017] EWCA Civ 329, [2017] I.R.L.R. 623; see also *McTigue v University Hospital Bristol NHS Foundation Trust* [2016] I.R.L.R. 742, EAT.
- 208 As amended by Employment Protection Act 1975 s.114 and Sch.13, which transfer the licensing of private employment agencies from local authorities to the Secretary of State for Employment; and further amended by s.31 of and Sch.7 to the Employment Relations Act 1999. The regime also covers the supply of genuinely self-employed individuals: *Simply Learning Tutor Agency Ltd v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 2461 (Admin), [2021] I.C.R. 79.
- 209 A series of regulations were revised and replaced by the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319). Those have since been amended by the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2007 (SI 2007/3575) and by the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010 (SI 2010/1782) with effect from 1 October 2010. See now also the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2016 (SI 2016/510).
- 210 SI 2010/93, in force from 1 October 2010, implementing the EU Temporary Agency Work Directive 2008/104/EC, [2008] O.J. L327/9. (SI 2010/93 was amended by SI 2011/1941 to correct drafting errors.)
- 211 This does not, however, extend to an entitlement to the same number of hours: *Kocur v Angard Staffing Solutions Ltd* [2019] EWCA Civ 1185, [2020] 1 All E.R. 791.
- 212 reg.5, subject to reg.7 which specifies the qualifying period. Compare, however, *Moran v Ideal Cleaning Services Ltd* [2014] 2 C.M.L.R. 37, EAT: permanent secondees from an agency not within scope of Agency Workers Regulations 2010. In *Coles v Ministry of Defence* [2015] I.R.L.R. 872, EAT the confinement of the equal treatment obligation to basic working and employment conditions was emphasised in the context of recruitment to jobs; this approach was confirmed in *Angard Staffing Solutions Ltd v Kocur* [2022] EWCA Civ 189, [2022] I.C.R. 854. For a detailed discussion of less favourable treatment, see *Kocur v Angard Staffing Solutions Ltd* [2018] I.R.L.R. 388, EAT, and [2019] EWCA Civ 1185, [2020] 1 All E.R. 791. For the apportionment of liability to compensation as between the agency and the end-user of the worker's services in respect, for example, of pay inequality between women and men, see *London Underground v Amissah* [2019] EWCA Civ 125.
- 213 *102 Social Club v Bickerton* [1977] I.C.R. 911; *Barthorpe v Exeter Diocesan Board of Finance* [1979] I.C.R. 900. It was also so held by the Employment Appeal Tribunal in *Johnson v Ryan* [2000] I.C.R. 236, where it was decided that the holding of the statutory office of rent officer was not inconsistent with employee status.
- 214 The older cases concerning ecclesiastical office-holders, particularly *Re National Insurance Act 1911—Re Employment of Church of England Curates* [1912] 2 Ch. 563 were doubted in the *Barthorpe* case so far as they suggested an inconsistency between employment and

office—see *[1979] I.C.R. at 903G–906D*, per Slynn J; though that suggestion had appeared to be reinstated, so far as ecclesiastical office is concerned, by a dictum in *President of the Methodist Conference v Parfitt [1984] I.C.R. 176, 184H* (Dillon LJ), and when *Re National Insurance Act 1911*, above, was approved and applied, so far as it held that a curate in the Church of England is not employed under a contract of employment, in *Diocese of Southwark v Coker [1998] I.C.R. 140*. However, authority in favour of the approach taken in the *Barthorpe* case, and against the approach taken in the *Parfitt* case, is provided by the decision of the House of Lords in *Percy v Church of Scotland Board of National Mission [2005] UKHL 73, [2006] 2 A.C. 28*, followed in *New Testament Church of God v Stewart [2007] I.R.L.R. 178, EAT* (upheld by CA on its special facts, *[2007] EWCA Civ 1004, [2008] I.C.R. 282*) and in *President of the Methodist Conference v Preston [2011] EWCA Civ 1581*; taken cumulatively, these decisions effectively negate any presumptions against intention to create legal relations or against the existence of mutuality of obligation in the construction of the relationships between ministers of religion and their churches; see also *JGE v Trustees of Portsmouth Roman Catholic Diocesan Trust [2012] EWCA Civ 938* in which a Roman Catholic priest was held to have been in a relationship sufficiently “akin to employment” to constitute a basis for imposing vicarious liability. In *President of the Methodist Conference v Preston [2013] UKSC 29, [2013] 2 A.C. 163*, however, the Supreme Court, reversing the above-cited decision of the Court of Appeal, held that the relationship between a Methodist minister and the Methodist Church did not, by reason of the particular way in which that relationship had been constituted, take the legal form of a contract of employment, rather consisting of the holding of an office under the constitutional provisions of that Church. Though compare Lady Hale’s dissenting opinion, and now also *Sharpe v Worcester Diocesan Board of Finance Ltd [2015] EWCA Civ 399, [2015] I.R.L.R. 663*. See further Ecclesiastical Offices (Terms of Service) Measure 2009 (No.1), as amended.

- 215 *Secretary of State for Justice v Betts [2017] I.R.L.R. 804, EAT.*
- 216 *[2017] EWCA Civ 2220, [2018] I.R.L.R. 315.*
- 217 *[2019] UKSC 44, [2019] 1 W.L.R. 5905.*
- 218 *102 Social Club v Bickerton [1977] I.C.R. 911, 917F*, per Phillips J.
- 219 cf. *Malloch v Aberdeen Corp [1971] 1 W.L.R. 1578, 1595*, per Lord Wilberforce; see below, para.42-196.
- 220 cf. *Ridge v Baldwin [1964] A.C. 40, 65*, per Lord Reid.
- 221 Derived from Partnership Act 1890 s.1.
- 222 *[2014] UKSC 32, [2014] 1 W.L.R. 2047* at [29]. The case itself addressed the question of whether an equity partner in a limited liability partnership was a “worker” employed by the LLP within the meaning of s.230(3)(b) of the Employment Rights Act 1996. See also *CVS Solicitors LLP v van der Borgh [2013] Eq. L.R. 934*.
- 223 In line with the Supreme Court’s decision in *Autoclenz Ltd v Belcher [2011] UKSC 41, [2011] 4 All E.R. 745*; and para.42-025, above.
- 224 “Bodies corporate” under the Limited Liabilities Partnership Act 2000 s.1.
- 225 *Kovats v TFO Management LLP [2009] UKEAT 0357/08/2104, [2009] I.C.R. 1140; Tiffin v Lester Aldridge LLP [2012] EWCA Civ 35, [2012] 1 W.L.R. 1887.*

- 226 Especially by reason of [Limited Liabilities Partnership Act 2000 s.4\(4\)](#). See further *J. Prassl*, “*Members, Partners, Employees, Workers? Partnership Law and Employment Status revisited*” (2014) 43 *I.L.J.* 495; cf. also the treatment of salaried LLP members as employees for tax purposes: [Income Tax \(Trading and Other Income\) Act 2005 Pt 9](#) (as amended).
- 227 [s.31](#) introduced [ss.47G, 104G, and 205A](#) into [Employment Rights Act 1996](#). The provisions came into force on 1 September 2013—[SI 2013/1766](#). See *J. Prassl*, “*Employee Shareholder ‘Status’: Dismantling the Contract of Employment*” (2013) 42 *I.L.J.* 307.
- 228 <https://www.gov.uk/guidance/employee-shareholders>.
- 229 [Barrasso v New Look Retailers Ltd \[2020\] I.C.R. 448](#).
- ②230 See for example [St Ives Plymouth Ltd v Haggerty \[2008\] UKEAT 0107/08/MAA](#); cf. para.[43-023](#), above.
- ②231 Small Business, Enterprise and Employment Act 2015 s.[153](#), inserting a new [s.27A](#) into the [Employment Rights Act 1996](#) (in force as of 26 May 2015). See now also the [Exclusivity Terms in Zero Hours Contracts \(Redress\) Regulations 2015 \(SI 2015/2021\)](#).
- ②232 [Nursing and Midwifery Council v Somerville \[2021\] I.C.R. 1448](#), EAT.

Section 3. - Formation of the Contract

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 3. - Formation of the Contract

Formation and variation of the contract

- 42-034 The general principles of the law of contract apply to contracts of employment, which must therefore comply with the rules, such as that requiring consideration, discussed in Vol.I, above. Although these general principles are relevant, there is often no genuine bargaining between the parties to the individual contract of employment, since the terms are typically determined either unilaterally by the employing enterprise itself or by collective agreements²³³ and sometimes by statutory regulation.²³⁴ The terms are often not negotiable by the individual employee, and the contract is thus a “contract of adhesion”²³⁵: the prospective employee must take employment on the proffered terms if he or she wishes to obtain any employment in that section of industry. It has long been recognised that “it is nowadays often impossible to regard the employment of each individual worker as the result of a separate bargain struck between master and servant”.²³⁶ Similar arguments apply to variations of contractual terms as put forward by employers,²³⁷

U or as resulting from collective agreements.²³⁸ In *Sparks v Department for Transport*²³⁹ the High Court held that in the absence of an explicit agreement, the employer could only make unilateral changes to terms and conditions if they were not detrimental to employees. Moreover, any explicit contractual power to vary must be stated in express and clear terms.²⁴⁰

- 42-035 The case-law increasingly identifies an important question as to the time at which the contract of employment is deemed to have been formed, in the frequent case where there is an interval of time between the acceptance of a job offer and the commencement of actual employment. In *Welton v Deluxe Retail Ltd*²⁴¹ Langstaff J in the Employment Appeal Tribunal lends support to the view that there is a contract of employment in being during that interval, rather than merely a preliminary

“contract for employment”. There is also an important question as to whether and when the promotion or moving of an employee to a new post or grade with the same employer will involve the formation of a new contract of employment rather than the variation of an existing one; this may be determinative of whether terms and conditions are carried forward from the original contract of employment. In *FW Farnsworth Ltd v Lacy*²⁴² Hildyard J held that upon a “step change of grade”, the employment relationship obviously and materially changed to such an extent as to imply the making of a new contract. However, it should be noted that in *Pat Systems v Neilly*²⁴³ Underhill J took the view that the validity of a restrictive covenant in a contract of employment should in any case be assessed as at the moment when it was explicitly entered into by the employee, rather than by considering whether subsequent variations or replacements of the contract of employment might have validated an originally invalid restrictive covenant, for example by promoting the employee into a position to which the covenant was more appropriate.²⁴⁴

Capacity

- 42-036 The capacity of persons in special categories to enter contracts of employment is discussed in Vol.I, above.²⁴⁵ The special position of Crown servants is discussed fully in specialised texts,²⁴⁶ and is mentioned only briefly in this chapter.²⁴⁷ It is clear that the relationship of employment is not incompatible with that of husband and wife, so that one spouse may enter into a contract of employment with the other.²⁴⁸ Employment legislation tended to assume this, but to exclude some of the statutory consequences of employment in the case of contracts of employment between spouses.²⁴⁹

Crown employment

- 42-037 Even when the relationship between a Crown employee and the Crown can be regarded as contractual²⁵⁰ (a conclusion more readily reached in view of recent decisions such as that in *R. v Lord Chancellor's Department Ex p. Nangle*²⁵¹), the relationship may nevertheless be regarded as terminable at the pleasure of the Crown, so that no claim for wrongful dismissal will lie against the Crown.²⁵² Any agreement providing that the service can only be terminated on a certain procedure being complied with may be held to be a fetter upon the power of the Crown to dismiss at pleasure and therefore unenforceable.²⁵³ Crown employees have been regarded as probably unable to sue for remuneration due to them²⁵⁴; furthermore, the redundancy payments legislation²⁵⁵ does not bind the Crown.²⁵⁶ However, recent legislation concerning individual employment rights has in several instances been extended to Crown employment,²⁵⁷ and the Crown employee has thus been placed in a position more akin to that of other employees than was formerly the case.²⁵⁸

Public policy, restraint of trade, and illegality

42-038 The courts will not enforce a contract of employment the terms of which are so stringent that the employee is virtually treated as his employer's "slave or chattel", without any freedom in his or her private life.²⁵⁹ Such terms might also amount to a contravention of modern slavery legislation.²⁶⁰ Contracts of employment which unduly restrict the employee in the exercise of his or her profession or calling may, in certain circumstances, be subject to the doctrine of restraint of trade²⁶¹; that doctrine will also apply to covenants imposed upon an employee which restrict his freedom of action after the termination of his or her contract of employment. A full discussion of the principles applicable to such covenants can be found in Ch.18 on "Illegality and Public Policy" in Vol.I.²⁶²

Effect of illegality on statutory rights

42-039 An apparent contract of employment may be unenforceable by reason of its illegality,²⁶³ with the result that the worker may lack the status of an employee for statutory purposes. This may arise where the purported contract involves, for instance, sexually immoral purposes.²⁶⁴ It might possibly occur where the worker is an immigrant and the purported contract contravenes restrictions placed upon his or her freedom to work under the legislation controlling immigration. (In this connection, it should be noted that the *Asylum and Immigration Act 1996* made it an offence on the part of an employer to employ a person who is in the United Kingdom without valid and subsisting leave to be so).²⁶⁵ However, it appears from the decision of the Supreme Court in *Hounga v Allen* that there needs to be a sufficiently close connection between the illegality and the claim, and that any such connection may be disregarded in favour of workers who have been "trafficked" into the country or otherwise gravely exploited.

²⁶⁶

U The question of illegality has frequently arisen where the purported contract involves a fraud on the Revenue.²⁶⁷ But while unprepared to offer a forum where tainted contracts can be relied upon,²⁶⁸ the courts have been reluctant to let employees easily lose their statutory rights by reason of illegalities of which their employers were the prime movers, and have accordingly required that the illegality should be part of the contract or of the employee's purpose in entering into the contract²⁶⁹ or, if not ex facie part of the contract, then subjectively known to the employee as being integral to its performance.²⁷⁰ In *Hewcastle Catering Ltd v Ahmed* it was held that where the

employees had not benefited from and were not essential parties to the fraud, it would be contrary to public policy for them to be deprived of compensation for being unfairly dismissed because they had assisted in the investigation of the fraud.²⁷¹ It was held, moreover, in *Leighton v Michael*²⁷² that an employee whose wages were paid without deduction of tax could nevertheless complain of unlawful sex discrimination in employment without enforcing, relying on or founding a claim on the contract of employment. That decision was approved, and applied in circumstances regarded as comparable, in *Hall v Woolston Hall Leisure Ltd.*²⁷³ It was held in *Brigden v American Express Bank Ltd*²⁷⁴ that an employee may in certain circumstances be able to claim that a term of the contract of employment is void as being unreasonable by virtue of s.3 of the Unfair Contract Terms Act 1977²⁷⁵; the Court of Appeal, however, disapproved that decision and held to the contrary in *Keen v Commerzbank AG*.²⁷⁶

Gangmasters Licensing Act 2004

- 42-040 The Gangmasters Licensing Act 2004, the essential provisions of which were brought into effect from April 1, 2005, requires individuals to be licensed as gangmasters if they are to engage in the supplying of workers for the use of their services in agricultural work and various kinds of gathering, harvesting, processing or packaging of foodstuffs. Sections 12–14 of that Act create a series of criminal offences involving the disregarding of these licensing requirements, including an offence of acting as a gangmaster without a licence, and an offence of entering into arrangements with gangmasters who are not licensed. The principles discussed in this paragraph will apply to determine whether and when contracts of employment will be rendered unenforceable because their formation or performance involves the commission of one or more of those offences.

Selection for employment and the terms on which employment may be offered

- 42-041 Statute law imposes various restrictions upon the freedom of employers to select the individuals with whom they may make contracts of employment and the terms on which employment may be offered. These measures are mainly directed against various kinds of discrimination in the selection of employees. They are as follows:

(1) Racial discrimination:

Under the Equality Act 2010, it is unlawful for an employer to discriminate on racial grounds²⁷⁷ against an applicant for employment; (a) in the arrangements made for determining who should be offered the employment; or (b) in the terms on which the employment is offered; or (c) by refusing to offer the employment.²⁷⁸ Enforcement of these

requirements is by means of employment tribunal proceedings,²⁷⁹ which may lead to an order for compensation or other remedies.²⁸⁰

(2) Sex discrimination:

Under the [Equality Act 2010](#) it is unlawful for an employer to discriminate²⁸¹ as regards the sex²⁸² of applicants for a job: (a) in the arrangements the employer makes for determining who shall be offered the job; or (b) in the terms on which the job is offered; or (c) by refusal to offer the job.²⁸³ Contravention of these requirements may be the subject of a complaint to an employment tribunal,²⁸⁴ which may award compensation²⁸⁵ among other remedies.²⁸⁶

(3) Discrimination against married persons and civil partners:

Under the [Equality Act 2010](#), provisions similar to those concerned with sex discrimination apply to discrimination against married persons and civil partners (by comparison with the treatment which a single person would in comparable circumstances receive).²⁸⁷

(4) Pregnancy and maternity discrimination:

Provision is made by the [Equality Act 2010](#) against pregnancy and maternity discrimination in “work cases”²⁸⁸; the provisions are described more fully in a later paragraph²⁸⁹ in respect of such discrimination occurring during the period of employment; particular provision is made against such discrimination as to the arrangements which an employer makes for deciding to whom to offer employment, and as to the terms on which employment is offered, or by not offering employment.²⁹⁰

(5) Disability discrimination:

The [Disability Discrimination Act 1995](#), which replaced the [Disabled Persons \(Employment\) Act 1944](#), conferred new rights on disabled persons in respect of access to employment and the terms on which employment may be offered. A number of significant amendments were made with effect from October 2004 by Regulations implementing EC Directive 2000/78.²⁹¹ The [Disability Discrimination Act 2005](#) amended and extended in various respects the provisions of the [Disability Discrimination Act 1995](#) concerning disability discrimination in employment. Corresponding provisions are now made by the [Equality Act 2010](#); in brief summary, the provisions are as follows. It is unlawful under the [2010 Act](#) for an employer of employed persons²⁹² to discriminate against a disabled person in the arrangements made for determining who should be offered employment, or in the terms on which employment is offered, or by refusing to offer employment.²⁹³ An employer engages in unlawful discrimination by failing without justification to discharge a duty to make reasonable adjustments to the arrangements under which employment is offered and to any physical feature of the employment premises which are such as to place the disabled person at a substantial disadvantage in comparison with persons who are not disabled.²⁹⁴ Unlawful disability discrimination may be the subject of complaint to an employment tribunal, which has remedial powers similar to those which it has in relation to sex or race discrimination.²⁹⁵

(6) Religion or belief and sexual orientation:

Provisions concerning access to employment very closely comparable to those relating to sex and race discrimination, and victimisation in connection with sex and race discrimination, have been made, with effect from 2 December 2003, with regard to religion or belief and with regard to sexual orientation, by, respectively, the [Employment Equality \(Religion or Belief\) Regulations 2003](#)²⁹⁶ and the [Employment Equality \(Sexual Orientation\) Regulations 2003](#).²⁹⁷ Both of these sets of regulations were enacted in implementation of the requirements of Council Directive 2000/78 establishing a general framework for equal treatment in employment and vocational training.²⁹⁸ Corresponding provisions are now contained in the [Equality Act 2010](#).²⁹⁹

(7) Age:

Provisions concerning access to employment generally comparable to those relating to discrimination on the grounds of sex, race, disability, religion or belief and sexual orientation were made, with effect from October 2006, with regard to age by the [Employment Equality \(Age\) Regulations 2006](#),³⁰⁰ and corresponding provisions are now contained in the [Equality Act 2010](#),³⁰¹ as since significantly amended by the [Employment Equality \(Repeal of Retirement Age Provisions\) Regulations 2011](#).³⁰²

(8) Victimisation in connection with discrimination:

The provisions concerned with discrimination on all these grounds also apply to victimisation, in the sense of discriminatory treatment of persons taking action connected with asserting rights under or alleging contravention of the [Equality Act 2010](#).³⁰³

(9) Rehabilitation of offenders:

The [Rehabilitation of Offenders Act 1974](#) provides that a conviction which has become spent or any circumstances auxiliary thereto or any failure to disclose a spent conviction shall not be a proper ground for excluding a person from any office, profession, occupation or employment.³⁰⁴ However, no enforcement mechanism is provided, so that where the exclusion from employment takes the form of a simple refusal to engage a particular applicant not previously employed by the employer, it is not yet clear whether the applicant can found any claim on that statutory provision or make good any claim by invoking its aid.³⁰⁵

(10) Trade union membership:

It is unlawful for an employer to refuse a person employment because he or she is, or is not, a member or is unwilling to accept a requirement to become, or to cease to be, a member of a trade union.³⁰⁶ Once employed, moreover, an employee acquires certain statutory rights in connection with trade union membership, non-membership, and activities.³⁰⁷

Form: written particulars

- 42-042 By statute, the contracts of employment of merchant seamen must be in writing.³⁰⁸ But the common law does not require any particular formalities or form for contracts of employment.³⁰⁹ However, legislation now imposes on employers the obligation to give to employees written particulars of certain of the terms of their employment. By [s.1 of the Employment Rights Act 1996](#),³¹⁰ an employer, subject to certain exceptions, is obliged not later than two months³¹¹ after the beginning of an employment to give to his employee a written statement identifying the parties, specifying the date when the employment began (stating whether any employment with a previous employer counts as part of the employee's continuous period of employment³¹² with him and if so specifying the date on which the continuous period of employment began), and giving the following particulars of the terms of employment (as at a specified date not more than one week earlier than the statement):
- (a)the scale or rate of remuneration (or the method of calculation);
 - (b)the intervals at which remuneration is paid;
 - (c)any terms and conditions relating to hours of work including terms relating to normal working hours;
 - (d)any terms and conditions relating to—
 - (i)holidays and holiday pay (including entitlement to accrued holiday pay on the termination of employment);
 - (ii)incapacity for work due to sickness or injury, including any provisions for sick pay;
 - (iii)pensions and pension schemes³¹³ ;
 - (e)the length of notice which the employee is obliged to give and entitled to receive to determine his contract of employment³¹⁴ ;
 - (f)the title of the job which the employee is employed to do or a brief description of the work for which the employee is employed;
 - (g)where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;
 - (h)either the place of work or an indication that the employee works at various places;
 - (i)any collective agreements directly affecting the terms and conditions of employment; and
 - (j)where the employee is required to work abroad for more than one month, various details of that employment abroad.

Particulars of disciplinary and dismissal procedures

- 42-043 The written particulars must in addition specify any disciplinary rules applicable to the employee³¹⁵ (except such as relate to health or safety at work which must, under s.2(3) of the Health and Safety at Work, etc. Act 1974, be included in the written statement of health and safety policy required to be issued to employees)³¹⁶ or at least refer to a document reasonably accessible to the employee which specifies the rules. There must also be specified a person to whom the employee can apply if dissatisfied with any disciplinary decision relating to him; and a person to whom the employee can apply to seek redress of any employment grievance; the manner of making such applications; and any steps consequent upon any such application.³¹⁷ With effect from October 2004, these particulars must also cover the procedure which applies when an employee is disciplined or dismissed.³¹⁸ Employers with fewer than 20 employees were exempt from the requirement to include a note about disciplinary rules and procedures in the written statement of main terms and conditions³¹⁹; but that exemption ceased to have effect from October 2004.³²⁰

Statement of initial employment particulars; and use of alternative document to give particulars

- 42-044 Formerly, the obligation to provide written particulars could generally be discharged by referring to other documents, such as collective agreements, containing the required information; but that facility of reference to other documents was then restricted to certain particulars only³²¹; and most of the particulars must be gathered together in a single document known as the “statement of initial employment particulars”.³²² However, with effect from 4 October 2004, provision was made for particulars to be given in the alternative form of a written contract of employment or letter of engagement, including such documents given to the employee before his employment begins.³²³

Changes in terms

- 42-045 Any change in the terms of employment to be included in the statement is likewise to be notified to the employee within one month after the change.³²⁴ The employer may, for this purpose, refer the employee to some document which is made reasonably accessible to him to the extent, but only to the extent, that the obligation to give the original particulars may be so discharged.³²⁵ A change in the name of the employer must be notified to the employee as a change of terms,³²⁶

as must a change in the identity of the employer which does not break the employee's continuity of employment,³²⁷ in which case the date must be specified on which the employee's period of continuous service began.³²⁸

Effect of particulars

- 42-046 If the written statement describes itself as a contract of employment and if its receipt is acknowledged by the employee, the statement may be deemed to be the contract of employment itself and not a mere description of the contract, with the consequent application of the parol evidence rule to exclude inconsistent evidence of contractual terms verbally agreed.³²⁹ Even where that does not occur, the written statement may form the basis of an estoppel against the employer³³⁰; and the employee's acquiescence in the statement may, exceptionally, have the effect of raising an estoppel against him.³³¹

Failure to provide accurate statement or to notify change in terms

- 42-047 If an employer fails to comply with his obligation to give his employee a written statement of the specified terms of employment,³³² the matter may be referred to an employment tribunal which is empowered to determine which particulars ought to have been given.³³³ The tribunal is also empowered to "substitute other particulars", as it may determine to be appropriate, when an incomplete or inaccurate statement has been given.³³⁴ If the employer fails to give written particulars of a term, he or she may be unable to sue his employee for breach of that term; but the court might hold that it is not the intention of the Act that such a failure should affect the enforceability of the contract.³³⁵ Failure to notify changes in terms and inaccurate notification of changes are treated in the same way as failure to provide an accurate original statement.³³⁶ It is not fully clear whether or when failure to notify changes in terms and failure to complain of lack of notification of changes appear not to vitiate or create an estoppel against a valid contractual variation.³³⁷

Compensation for failure with respect to the provision of employment particulars

- 42-048 In addition to the powers and remedies described in the previous paragraph, provision is made by s.38 of the Employment Act 2002, with effect from 4 October 2004, for employment tribunals

to award compensation to an employee where the lack, incompleteness or inaccuracy of the employment particulars provided by the employer is established in the course of proceedings under specified employment tribunal jurisdictions.³³⁸ In particular, the tribunal must in those circumstances increase any award made against the employer in respect of the claim under the other jurisdiction(s) by a minimum amount of two weeks' pay and may increase any such award by the higher amount of four weeks' pay, or must award a minimum amount of two weeks' pay and may award a higher amount of four weeks' pay where compensation is not a remedy available for the claim in question, or where the tribunal does not award compensation in respect of that claim. There is, however, no duty to make or increase an award in this way "if there are exceptional circumstances which would make an award or increase ... unjust or inequitable".³³⁹

Footnotes

¹ Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

²³³ See below, paras 42-049 et seq.

²³⁴ See below, paras 42-057 et seq.

²³⁵ Compare Vol.I, para.10-173.

²³⁶ *Re Walker [1944] 1 All E.R. 614, 616.*

²³⁷ Such as the unilaterally proposed pay rise which was found to be contractually binding in *Hershaw v Sheffield City Council [2014] I.C.R. 1120, EAT*, or the contractual check-off mechanism which was held not to be derogable in *Cavanagh v Secretary of State for Work and Pensions [2016] EWHC 1136, [2016] I.R.L.R. 591*. On the latter point, see now also *Cox v Secretary of State for the Home Department [2022] EWHC 680 (QB), [2022] I.R.L.R. 502*.

²³⁸ Compare *Cabinet Office v Beavan [2014] I.R.L.R. 434, EAT* as to the question of whether the employee's acceptance of a pay increase derived from a collective agreement also connotes acceptance of other changes to terms and conditions of employment which would result from that agreement.

²³⁹ *[2015] EWHC 181 (QB), [2015] I.R.L.R. 641.*

²⁴⁰ *Norman v National Audit Office [2015] I.R.L.R. 634, EAT.*

²⁴¹ *[2013] I.R.L.R. 166, EAT.*

²⁴² *[2012] EWHC 2830 (Ch), [2013] I.R.L.R. 198.*

²⁴³ *[2012] EWHC 2609 (QB), [2012] I.R.L.R. 979.*

²⁴⁴ See especially *[2012] EWHC 2609 (QB)* at [57].

²⁴⁵ Ch.11 (Personal incapacity): e.g. minors: Vol.I, paras 11-030—11-031.

²⁴⁶ See, for example, Watt, Ch.11 of Sunkin and Payne, *The Nature of the Crown* (1999).

- 247 See below, para.42-037.
- 248 *Re Kendrew* [1953] Ch. 291.
- 249 The exclusionary provisions were repealed by the Employment Act 1982.
- 250 cf. *Att-Gen for Guyana v Nobrega* [1969] 3 All E.R. 1604; *Kodeeswaran v Att-Gen of Ceylon* [1970] A.C. 1111. cf. now, *R. v Civil Service Appeal Board Ex p. Bruce* [1989] I.C.R. 171. [1992] 1 All E.R. 897.
- 251 cf. *Dunn v R* [1896] 1 Q.B. 116; *Dunn v Macdonald* [1897] 1 Q.B. 401; *Hales v R* (1918) 34 T.L.R. 589; *Denning v Secretary of State for India* (1920) 37 T.L.R. 138; *Shenton v Smith* [1895] A.C. 229 (medical officer employed by Government of Western Australia dismissed at pleasure); *Terrell v Secretary of State for the Colonies* [1953] 2 Q.B. 482 (colonial judge dismissed at pleasure); *IRC v Hambrook* [1956] 2 Q.B. 641, 654. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] I.C.R. 14, Lord Diplock, at 39C, referred to “the rule of terminability of employment in the civil service without notice, of which the existence is beyond doubt”. cf. *Wade* (1985) 101 L.Q.R. 153 et seq. and 180 et seq.
- 252 *Rodwell v Thomas* [1944] K.B. 596; *Riordan v War Office* [1959] 1 W.L.R. 1046 (upheld by the CA [1961] 1 W.L.R. 210, without reference to this point).
- 253 *Mitchell v R* (1890) 1 Q.B. 121n; *Leaman v R* [1920] 3 K.B. 663; *Lucas v Lucas and High Commissioner for India* [1943] P. 68; cf. *Dudfield v Ministry of Works*, *The Times*, 24 January 1964 (printed in Wedderburn, Cases and Materials on Labour Law (1967), p.296). See *Logan* (1945) 61 L.Q.R. 240.
- 254 Contained in Employment Rights Act 1996 Pt XI.
- 255 Civil servants are specifically excluded from the redundancy payments legislation by Employment Rights Act 1996 s.159(b).
- 256 Employment Rights Act 1996 s.191(1), (2) (unfair dismissal) (including members of the military services—s.192(1), and s.191(1), (2)) applying to the Crown some but not all of the rights of individual employees created by the Employment Protection Act 1975 (including members of the military services—Employment Rights Act 1996 s.192(1)), Equality Act 2010 s.83(2)(b). See also now Employment Rights Act 1996 s.193(1), (2) (“national security”).
- 257 cf. *R. v Civil Service Appeal Board Ex p. Bruce* [1989] I.C.R. 171; *R. v Lord Chancellor's Department Ex p. Nangle* [1992] 1 All E.R. 897. For the case of office holders more generally, see *Secretary of State for Justice v Betts* [2017] I.R.L.R. 804, EAT above, para.42-030.
- 258 *Davies v Davies* (1887) 36 Ch. D. 359, 393; *Horwood v Millar's Trading Co* [1917] 1 K.B. 305. cf. *Gaumont-British Picture Corp Ltd v Alexander* [1936] 2 All E.R. 1686; *Nokes v Doncaster Amalgamated Collieries* [1940] A.C. 1014, see below, para.42-183.
- 259 Modern Slavery Act 2015 (c.30).
- 260 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269, 294, 307, 328, 336; cf. *Instone v A Schroeder Music Publishing Co Ltd* [1974] 1 W.L.R. 1308; *Greig v Insole* [1978] 1 W.L.R. 302, 325F–326D.
- 261 See above, Vol.I, paras 18-151 et seq.
- 262 See Vol.I, paras 18-001 et seq.
- 263 See above, Vol.I, paras 18-151 et seq.
- 264 *Coral Leisure Group Ltd v Barnett* [1981] I.C.R. 503, 506 D–F, per Browne-Wilkinson J.

- 265 s.8. See *V v Addey & Stanhope School Governing Body* [2004] EWCA Civ 1065, [2004] 4 All E.R. 1056. That decision was applied in *Blue Chip Trading Ltd v Helbawi* [2008] UKEAT 0397/08/2011, [2009] I.R.L.R. 128, where however the contract of employment was treated as severable and recovery was allowed in respect of the lawful elements. It should be noted that further restrictions upon immigration and obligations in respect of immigration are imposed by the *Immigration Asylum and Nationality Act 2006*, and the *Borders Citizenship and Immigration Act 2009*, to which reference should be made.
- 266 • *Hounga v Allen* [2014] UKSC 47, [2014] 1 W.L.R. 2889. See now also *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467; *Okedina v Chikale* [2019] EWCA Civ 1393; and *Robinson v HRH Al Qasimi* [2021] EWCA Civ 862, [2021] I.C.R. 1533.
- 267 *Miller v Karlinski* (1945) 62 T.L.R. 85; *Napier v National Business Agency* [1951] 2 All E.R. 264; *Tomlinson v Dick Evans "U" Drive Ltd* [1978] I.C.R. 639; *Davidson v Pillay* [1979] I.R.L.R. 275; *Corby v Morrison* [1980] I.C.R. 564; *Newland v Simons & Willer Ltd* [1981] I.C.R. 521. cf. *Hyland v JH Barker (North West) Ltd* [1985] I.C.R. 861.
- 268 A vivid paraphrase received judicial approval in *Tomlinson v Dick Evans "U" Drive Ltd* [1978] I.C.R. 639, 642B, per Bristow J.
- 269 269 *Coral Leisure Group Ltd v Barnett* [1981] I.C.R. 503. cf. *Hyland v JH Barker (North West) Ltd* [1985] I.C.R. 861.
- 270 270 *Davidson v Pillay* [1979] I.R.L.R. 275; *Corby v Morrison* [1980] I.C.R. 564. The court in the latter case was however sceptical of the acceptance of the employee's innocence in the former case—[1980] I.C.R. 564 at 570 E–G. Compare *Enfield Technical Services Ltd v Payne, Grace v BF Components Ltd* [2008] EWCA Civ 393, [2008] I.R.L.R. 500.
- 271 271 [1992] I.C.R. 626; compare *Annandale Engineering v Samson* [1994] I.R.L.R. 59; but contrast *Salvesen v Simons* [1994] I.R.L.R. 52.
- 272 272 [1995] I.C.R. 1091.
- 273 273 [2000] I.C.R. 99, CA. The approach in the *Woolston Hall Leisure* case was reiterated and applied in *Colen v Cebrian (UK) Ltd* [2003] EWCA Civ 1676, [2004] I.C.R. 568; and in *Wheeler v Qualitydeep Ltd (t/a Thai Royale Restaurant)* [2004] EWCA Civ 1085, [2005] I.C.R. 265, where the requirement of active participation by the employee in the illegality as to performance was insisted upon; compare now, however, *V v Addey & Stanhope School Governing Body* [2004] EWCA Civ 1065.
- 274 274 [2000] I.R.L.R. 94, QBD.
- 275 275 As to which, see generally Vol.I, paras 17-075 et seq.
- 276 276 [2006] EWCA Civ 1536, [2007] I.C.R. 623.
- 277 277 As defined by ss.9, 13(1), (5), 19.
- 278 278 s.39(1), subject to the exception contained in s.83(11) and Sch.9 Pt 1 (occupational requirements).
- 279 279 ss.124–126.
- 280 280 s.124(2)(b), (6).
- 281 281 As defined by ss.9, 13(1), (6), 19.
- 282 282 Or on the grounds of gender reassignment; s.7.

- 283 s.39(1), subject to a defined exception where being of a certain gender is an occupational requirement, s.83 and Sch.9 Pt I.
- 284 s.120.
- 285 s.124(2)(b).
- 286 s.124(2)(a), (c), (3)–(7).
- 287 s.8.
- 288 s.18.
- 289 See para.42-135 below.
- 290 s.39(1).
- 291 The Disability Discrimination Act 1995 (Amendment) Regulations 2003 (SI 2003/1673), implementing Council Directive 2000/78.
- 292 For the broad category of workers included, see s.83(2), and for the extension to contract workers, s.41. The 1995 Act s.7 originally restricted the application of the Act to employers of 20 or more employed persons; that exemption for small businesses was removed with effect from October 2004 by reg.7 of the 2003 Regulations.
- 293 See ss.6, 15, 39(1).
- 294 See ss.20, 39(5).
- 295 See ss.120, 124.
- 296 SI 2003/1660, in particular reg.6(1).
- 297 SI 2003/1661, in particular reg.6(1).
- 298 Directive 2000/78.
- 299 ss.10, 12, 39 subject to s.83(11) and Sch.9 Pt 1 (occupational requirements).
- 300 SI 2006/1031, similarly enacted in implementation of the requirements of Council Directive 2000/78 establishing a general framework for equal treatment in employment and vocational training.
- 301 ss.10, 12, 39 subject to s.83(11) and Sch.9 Pt 2 (exceptions relating to age).
- 302 SI 2011/1069 which, inter alia, repealed para.9 of Sch.9 Pt 2 (applicants at or approaching retirement age).
- 303 See ss.27, 39(3).
- 304 s.4(3)(b). The term “spent conviction” is defined by s.1(1) with reference to s.5. The Data Protection Act 1998 s.56 makes it a criminal offence to require job applicants or existing employees to make subject access requests in lieu of providing a normal criminal record check, which would not disclose spent convictions.
- 305 Compare, however, para.42-066, see below, where the effect of s.4(3)(a) upon non-disclosure of a conviction, in connection with an application for employment, is discussed.
- 306 Trade Union and Labour Relations (Consolidation) Act 1992 s.137, originally s.1 of the Employment Act 1990.
- 307 See below, paras 42-118—42-119.
- 308 Merchant Shipping Act 1995 s.25 (“crew agreements”); and the requirements for written particulars made by Pt I of the Employment Rights Act 1996 accordingly do not apply to merchant mariners—see Employment Rights Act 1996 s.199(1).

- 309 Specific requirements of form are, however, made by the *Apprenticeships (Form of Apprenticeship Agreement) Regulations 2012* (SI 2012/844).
- 310 **Employment Rights Act 1996 ss.1–7, 210–219.**
- 311 This obligation applies irrespective of whether the contract is flexible as to whether its duration will exceed the two-month period: *Stefanko v Maritime Hotel Ltd (In Voluntary Liquidation) [2019] I.R.L.R. 322*, EAT.
- 312 As assessed under the provisions detailed below, paras 42-169—42-172.
- 313 Subject to the proviso to s.1(4)(d)(iii) of the Employment Rights Act 1996, made by s.1(5) relating to statutory schemes. It must also be stated whether a contracting-out certificate is in force for the employment concerned: s.3(5).
- 314 See below, paras 42-167 et seq.
- 315 Employment Rights Act 1996 s.3(1)(a).
- 316 Employment Rights Act 1996 s.3(2).
- 317 Employment Rights Act 1996 s.3(1)(b), (c).
- 318 Employment Rights Act 1996 s.3(1)(aa), (b)(i), (2) as inserted or amended by s.35 of the Employment Act 2002 with effect from that date.
- 319 Employment Rights Act 1996 s.3(3).
- 320 By virtue of s.36 of the Employment Act 2002, implemented with effect from that date.
- 321 Employment Rights Act 1996 s.2(2), (3), and s.6. See further below, para.42-056.
- 322 Employment Rights Act 1996. See s.2(4).
- 323 By virtue of s.37 of the Employment Act 2002, inserting new ss.7A and 7B of the Employment Rights Act 1996, to be implemented with effect from that date.
- 324 Employment Rights Act 1996 s.4(1), (3).
- 325 Employment Rights Act 1996 s.4(2), (3), (4), (5) and s.6.
- 326 Employment Rights Act 1996 s.4(6)(a).
- 327 Employment Rights Act 1996 s.4(6)(b).
- 328 Employment Rights Act 1996 s.4(8).
- 329 *Gascol Conversions Ltd v Mercer [1974] I.C.R. 420*.
- 330 cf. *Smith v Blandford Gee Cementation Ltd [1970] 3 All E.R. 154*; but contrast *Parkes Classic Confectionery Ltd v Ashcroft [1973] I.T.R. 43*; and *System Floors Ltd v Daniel [1981] I.R.L.R. 475, 476*—“Nor are the statements of the terms finally conclusive: at most, they place a heavy burden on the employer to show that the actual forms of contract are different from those which he has set out in the statutory statement” (Browne-Wilkinson J).
- 331 cf. *Soutar v Fisher (1975) 10 I.T.R. 38; Boyce v Torquay Cemetery Co [1975] I.R.L.R. 80*; but see *Jones v Associated Tunnelling Co Ltd [1981] I.R.L.R. 477, 481*—“In our view to imply an agreement to vary or to raise an estoppel against the employee on the grounds that he has not objected to a false record by the employers of the terms actually agreed is a course which should be adopted with great caution” (Browne-Wilkinson J).
- 332 Employment Rights Act 1996 s.1. See above, paras 42-042—42-046.
- 333 Employment Rights Act 1996 s.11(1), (2), 12(2); see *Owens v Multilux Ltd [1974] I.R.L.R. 113; Leighton v Construction Industry Training Board [1978] I.C.R. 577; WPM Retail Ltd v Lang [1978] I.C.R. 787*; and *Mears v Safecar Security Ltd [1982] I.C.R. 626*, for discussion

of the scope of this power. cf. *Eagland v British Telecommunications Plc* [1993] I.C.R. 644. It was held by the Court of Appeal in *Southern Cross Healthcare Ltd v Perkins* [2010] EWCA Civ 1442 that this power does not extend to the construction of the terms of the contract of employment themselves save so far as might be necessary in order to assess whether the statutory statement correctly reflected those terms.

- 334 Employment Rights Act 1996 s.12(2); see *Mears v Safecar Security Ltd* [1982] I.C.R. 626.
- 335 cf. *Anderson v Daniel* [1924] 1 K.B. 138, 149.
- 336 Employment Rights Act 1996 s.11(1).
- 337 cf. *Chant v Turriff Construction Ltd* (1966) 2 I.T.R. 380; *Parkes Classic Confectionery v Ashcroft* (1973) 8 I.T.R. 43; *System Floors Ltd v Daniel* [1981] I.R.L.R. 475; *Jones v Associated Tunnelling Co Ltd* [1981] I.R.L.R. 477. Note that in *Scally v Southern Health Board* [1991] I.C.R. 771 a failure by the employer to inform the employee of a new pension entitlement was treated as a breach of an implied term of the contract of employment. See below, para.42-042.
- 338 The jurisdictions are specified under s.38(1) by Sch.5, subject to the possibility of amendment by ministerial order. The list includes all the major employment tribunal jurisdictions over employment rights.
- 339 Employment Act 2002 s.38(5).

(a) - Collective Agreements as Contracts

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 4. - Collective Agreements and Statutory Awards of Terms

(a) - Collective Agreements as Contracts

Legal enforceability

- 42-049 Although there was between 1975 and 1980, and has since 1999 been, legal provision which may be used to secure compulsory recognition of trade unions,³⁴⁰ the tradition and style of British collective bargaining strongly reflects its voluntary and informal development. The leading decision on the legal status of a collective agreement³⁴¹ confirmed the majority³⁴² opinion of those concerned with such agreements that they are not normally intended to create legal relations.³⁴³ This means that they are binding in honour only, and that their enforcement must depend on industrial and political pressure. This view is given statutory force under the **Trade Union and Labour Relations (Consolidation) Act 1992**³⁴⁴ and the presumption which it creates against intention to make a legally enforceable contract can be rebutted only where an agreement is in writing stating specifically that a legally enforceable contract is intended³⁴⁵; in the latter case it is conclusively presumed that a legally enforceable agreement was intended.³⁴⁶ The same presumptions apply to the different parts of agreements where an agreement is in writing, and is stated to be intended to be legally enforceable as to part only.³⁴⁷
- 42-050 The process by which collective agreements are made is known as “collective bargaining” rather than “contract”³⁴⁸ and the application to them of the ordinary rules of the law of contract could lead to great difficulties. Some collective agreements are vague as to who are the parties (e.g. between “the Workpeople’s side and the Employer’s side of” the industry) and their language is often not legal language; there would be many difficulties in interpreting them if they were held to be legally enforceable. However, the former statutory obstacle to enforcement of collective agreements,³⁴⁹

which applied to certain collective agreements even if they could be shown to be intended to have contractual force, has long since been removed entirely.³⁵⁰

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 340 Employment Protection Act 1975 ss.11–16, repealed by the Employment Act 1980; Trade Union and Labour Relations (Consolidation) Act 1992 Ch.VA and Sch.1 inserted by the Employment Relations Act 1999.
- 341 *Ford Motor Co Ltd v AEF* [1969] 2 Q.B. 303.
- 342 To the contrary, see Gayler, *Industrial Law* (1955), pp.172–174; and cf. *Edwards v Skyways Ltd* [1964] 1 W.L.R. 349; *East London Bakers' Union v Goldstein*, *The Times*, 9 June 1904 (printed in Wedderburn at p.272); *Selwyn* (1969) 32 M.L.R. 377; (1970) 33 M.L.R. 117, 238.
- 343 Kahn-Freund in Flanders and Clegg (eds), *The System of Industrial Relations in Great Britain* (1954), p.57, and in (1942) 6 M.L.R. 112, 115–116; Wedderburn, *Cases and Materials on Labour Law*, pp.267–281; Wedderburn, *The Worker and the Law*, 2nd edn, pp.171–180, and in 24 M.L.R. 572, 583–584; *Ardley and Morey v London Electricity Board*, *The Times*, 16 June 1956; cf. *Spring v National Amalgamated Stevedores and Dockers' Society* [1956] 1 W.L.R. 585, 592; *Ayling v London and India Docks Committee* (1893) 9 T.L.R. 409; *Hepple* [1970] C.L.J. 122.
- 344 Trade Union and Labour Relations (Consolidation) Act 1992 s.179.
- 345 Trade Union and Labour Relations (Consolidation) Act 1992 s.179(1); see *National Coal Board v National Union of Mineworkers* [1986] I.C.R. 736. Compare also now *Malone v British Airways Plc* [2010] EWHC 302 (QB), [2010] I.R.L.R. 431 where it was held that there was no sufficient objective intention to give the terms of the collective agreement legal enforceability regarding cabin crew complements at the behest of any individual crew member.
- 346 Trade Union and Labour Relations (Consolidation) Act 1992 s.179(2).
- 347 Trade Union and Labour Relations (Consolidation) Act 1992 s.179(3).
- 348 See Kahn-Freund in Flanders and Clegg (eds), *The System of Industrial Relations in Great Britain* (1954), pp.57 et seq.
- 349 Trade Union Act 1871 s.4(4).
- 350 Industrial Relations Act 1971 Sch.9 (itself repealed by Trade Union and Labour Relations Act 1974 s.1).

(b) - Incorporation of Collective Agreements into Individual Contracts of Employment

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 4. - Collective Agreements and Statutory Awards of Terms

(b) - Incorporation of Collective Agreements into Individual Contracts of Employment

Agency and collective agreements

- 42-051 A collective agreement might, in theory, be made by the negotiating parties as agents for their respective members, but the associations and unions making collective agreements appear to act as principals, and not as agents on behalf of their members³⁵¹; although some dicta³⁵² suggest that there is agency in this bargaining procedure.³⁵³ Many difficulties would arise if the agency doctrine were accepted, e.g. what would be the position of non-unionists in the industry who were not represented in the collective bargaining? or of members who join the union after the date of the collective agreement? It may, however, be legitimate to employ the agency doctrine when union officials negotiate a settlement of a dispute on behalf of a few employees identified by name.³⁵⁴

In *Harris v Richard Lawson Autologistics Ltd*³⁵⁵ the Court of Appeal held that a shop steward had ostensible authority to negotiate an agreement on holiday pay on behalf of the members of the Transport and General Workers' Union employed by the company concerned, and that it was reasonable for the company to conclude that the revised terms had been adopted by the workers concerned although they had not been put to those workers for their approval.

Express incorporation

- 42-052 It is clear that the terms of a collective agreement may be *expressly* incorporated by a reference in an individual contract of employment.³⁵⁶ In 1958, the Court of Appeal held that a provision in

a collective agreement between the National Coal Board and a trade union had been incorporated into the individual contracts of employment, so that the employee was liable for breach of the obligation to work “such days or part days in each week as may be reasonably required by the management”.³⁵⁷ But express reference in an individual contract of employment to a collective agreement as regulating the employee’s wages or other substantive conditions of service will normally be held not to incorporate procedural provisions of the collective agreement.³⁵⁸ There may be express incorporation of terms from a collective agreement where the employer, for the purpose of complying with the statutory obligation to give written particulars of the terms of employment,³⁵⁹ issues the employee with a document styling itself a contract of employment, which refers to one or more collective agreements, and which is signed as received by the employee.³⁶⁰ The express incorporation, into individual contracts, of “no-strike” obligations derived from collective agreements is now subject to certain special statutory conditions which are considered below.³⁶¹ Express incorporation can give rise to an enforceable term in the individual contract of employment although, as is frequently the case, the collective agreement is expressed to be binding in honour only as between the parties to it.³⁶² As to the latitude of construction which is allowed (or denied) in relation to changed industrial relations circumstances, see *Adams v British Airways Plc.*³⁶³ In the absence of any contrary intention, where terms from a collective agreement are specifically incorporated into individual contracts, the relevant terms will be those contained in the current collective agreement, and thus they may be varied from time-to-time.³⁶⁴ On the other hand, once a term derived from a collective agreement has been incorporated into individual contracts, the termination of the collective agreement does not in itself affect the incorporated terms.³⁶⁵

Incorporation by implication

- 42-053 The problem of incorporation is more difficult when there is no relevant express term in the individual contract of employment, but it is alleged that the parties have tacitly agreed to incorporate terms of the relevant collective agreement.³⁶⁶ There is some informative case law from periods when national and local sectoral collective bargaining was more widespread than it is today. When the employee knows of the terms of the collective agreement, it may well be legitimate to infer that it was the presumed common intention of both parties to the contract that these terms should apply when the contract itself was silent on any issue.³⁶⁷ The terms of a collective agreement accepted by a Joint Council cannot be incorporated by implication if the functions of the Joint Council are not executory but “purely consultative”³⁶⁸ and not intended to create legally enforceable rights of action.³⁶⁹ The terms of a national collective agreement may be modified by a local collective agreement between the employers and union representatives, and in these circumstances the appropriate inference should be that it is the local agreement which is incorporated into individual contracts of employment.³⁷⁰ However, the cases show some tendency

to treat the local agreement as not intended to affect the terms of individual contracts, particularly when the local agreement is a less formal one than the national agreement.³⁷¹ In determining whether a particular part of a collective agreement has been incorporated into the individual contracts of employment of the employees, it is necessary to look at the content and character of those parts and whether they were apt to be a term of the contracts.³⁷² A part of a collective agreement may, for instance, be treated as designed to give flexible and informal guidance as to what is expected to happen in given situations, in a way which is inconsistent with contractual rights being created.³⁷³ In the case of *Henry v London General Transport Services Ltd*³⁷⁴ Lindsay J in the Employment Appeal Tribunal gave some important indications as to when the terms of individual contracts of employment will be treated as having been varied as the result of a collective agreement negotiated between the employer and a trade union or trade unions. In the instant case, it was held that individual contracts had been so varied by a collective agreement for the reduction of wages which had been acted upon for two years; it followed that the employers had not made an unlawful deduction from wages³⁷⁵ in paying the reduced remuneration.

- 42-054 In most collective agreements there will be many terms not directly applicable to the individual employee, e.g. procedural matters between the unions and the employers, and these may be held not appropriate to be incorporated by implication into individual contracts.³⁷⁶ As the result of a statutory provision which is considered below,³⁷⁷ “no strike” obligations contained in collective agreements can be incorporated into individual contracts by an implied term only where certain stringent requirements are observed. Also, since an express term in a contract must prevail over any alleged implied term, an express term in an individual contract of employment will displace any term in a collective agreement which would otherwise be incorporated in the contract under the implied-term doctrine.³⁷⁸

Incorporation of “no-strike” obligations

- 42-055 Section 180 of the Trade Union and Labour Relations (Consolidation) Act 1992 imposes special safeguards upon the incorporation, into individual contracts of employment, of “no-strike” obligations derived from collective agreements. Section 180 enacts that provisions in collective agreements placing restrictions upon strikes or other industrial action by workers will not be incorporated into individual contracts of employment unless the collective agreement:

- (a) is in writing; and
- (b) expressly states that its “no-strike” provisions are liable to be incorporated into individual contracts of employment; and
- (c) is reasonably accessible to the workers affected at their place of work and is available to be consulted during working hours.

The union(s) concerned must be independent union(s)³⁷⁹ and the ordinary rules of express³⁸⁰ or implied³⁸¹ incorporation must be satisfied. It is not clear how wide a range of collectively bargained terms fall within this provision; many clauses relating to dispute procedures could be regarded as terms which “have the effect of restricting the right” to take industrial action. Such clauses might in any event not be appropriate for incorporation into individual contracts, and s.180³⁸² should not be seen as altering the doctrine of appropriateness for incorporation.

Effect of statement of particulars under the contracts of employment legislation

42-056 Before 1993, it could be said that the obligation imposed by the contracts of employment legislation³⁸³ on employers to issue a written statement giving certain particulars of the terms of employment had greatly strengthened the likelihood of incorporation, since the written notice was allowed to refer directly to the collective agreement. If the employee accepted the terms of the written statement without demur, the giving and the receipt of the notice would, in the absence of any indication to the contrary, often be treated as having the effect of incorporating the terms of the collective agreement into the individual contract of employment of each employee.³⁸⁴ However, under the current legislation, the facility of reference to collective agreements is restricted to certain particulars only,³⁸⁵ and the written particulars are required to specify any collective agreements which directly affect the terms and conditions of the employment in question.³⁸⁶ Moreover, it should be remembered that the written particulars are merely strong, and not conclusive, *evidence* of the terms of the contract,³⁸⁷ unless, perhaps, the employee signs a copy of the particulars which is retained by the employer and the document can be regarded as the contract itself.³⁸⁸ Where the written particulars are regarded merely as evidence of the contract, rather than the contract itself, there should accordingly be no objection to parol evidence tending to add to, vary or contradict the effect of the written particulars; but once the written statement is regarded as an actual contractual instrument, the parol evidence rule does come into effect against evidence of inconsistent verbal agreements.³⁸⁹

Footnotes

1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

351 *Holland v London Society of Compositors* (1924) 40 T.L.R. 440.

- 352 *Rookes v Barnard* [1961] 2 All E.R. 825, 827 (there is no mention of this in [1964] A.C. 1129, but it was doubted in the Court of Appeal [1963] 1 Q.B. 623, 675); *Edwards v Skyways Ltd* [1964] 1 W.L.R. 349, 354, 357 (“representatives”: it was conceded in this case that the union was acting as agent; the court also treated the negotiated terms of settlement as a standing offer by the company, which each individual employee could “accept”: [1964] 1 W.L.R. 349 at 353); *Chappell v Times Newspapers Ltd* [1975] I.C.R. 145, 172 D, H.
- 353 Discussed by *Kahn-Freund* (1942) 6 M.L.R. 112; in Flanders and Clegg (eds), *The System of Industrial Relations in Great Britain* (1954), pp.55 et seq. and in Ginsberg (ed.), *Law and Opinion in England in the 20th Century* (1959), pp.215–263; *Wedderburn* (1961) 24 M.L.R. 572, 583; (1962) 25 M.L.R. 513, 526–530; and in *The Worker and the Law*, 3rd edn, pp.327–329; cf. *Ford Motor Co Ltd v AEF* [1969] 2 Q.B. 303, 331.
- 354 *Deane v Craik, The Times, 16 March 1962* (see *Wedderburn, Cases and Materials on Labour Law* (1967), p.459; sed contra in *The Worker and the Law*, 3rd edn, p.328). cf. *Edwards v Skyways Ltd* [1964] 1 W.L.R. 349; *The Burton Group v Smith* [1977] I.R.L.R. 350.
- 355 [2002] I.C.R. 765.
- 356 *Hooker v Lange, Bell & Co* [1937] 4 L.J.N.C.C.R. 199 (“at union rates”); *Young v Canadian Northern Ry* [1931] A.C. 83; *National Coal Board v Galley* [1958] 1 W.L.R. 16. cf. *Hulland v Saunders* [1945] K.B. 78; *Secretary of State for Employment v ASLEF (No.2)* [1972] I.C.R. 19, especially, per Roskill LJ at 69.
- 357 *National Coal Board v Galley* [1958] 1 W.L.R. 16. cf. *Spring v National Amalgamated Stevedores and Dockers' Society* [1956] 1 W.L.R. 585.
- 358 *R. v Industrial Disputes Tribunal Ex p. Portland UDC* [1955] 1 W.L.R. 949; *National Coal Board v National Union of Mineworkers* [1986] I.C.R. 736.
- 359 See above, paras 42-042—42-044 and see below, para.42-056.
- 360 *Gascol Conversions Ltd v Mercer* [1974] I.C.R. 420; cf. *Secretary of State for Employment v ASLEF (No.2)* [1972] I.C.R. 19, 53H–54A, 69C–70F; *System Floors Ltd v Daniel* [1981] I.R.L.R. 475.
- 361 See below, para.42-055; *Bloomfield v Springfield Hosiery Ltd* [1972] I.C.R. 91, 93E.
- 362 *Marley v Forward Trust Group Ltd* [1986] I.C.R. 891.
- 363 [1995] I.R.L.R. 577.
- 364 *National Coal Board v Galley* [1958] 1 W.L.R. 16; see as to the effect of the employer's resignation from the employers' federation that made the agreement, *Burroughs Machines Ltd v Timmoney* [1977] I.R.L.R. 404. Compare, however, *Ackinclose v Gateshead MBC* [2005] I.R.L.R. 79, EAT, where it was held that when a contract of employment only made reference to a national agreement as the relevant collective agreement without any further reference or incorporation, a successor agreement would not thereby be incorporated so as to take effect following transfer of the employment in question from a local authority employer party to the national bargaining structure to a private employer not party to that structure. Contrast, however, *Griffiths v Salisbury DC* [2004] EWCA Civ 162, where an agreement implementing the national agreement was held to be incorporated in the individual contract and where therefore a backdated pay freeze imposed under that agreement was effective.
- 365 *Robertson v British Gas Corp* [1983] I.C.R. 351; *Gibbons v Associated British Ports* [1985] I.R.L.R. 376. See also now *Whent v T Cartledge Ltd* [1997] I.R.L.R. 153.

- 366 On the doctrine of implied terms, see Vol.I, Ch.16, especially para.16-035.
- 367 *McLea v Essex Lines* (1933) 45 *Ll.L. Rep.* 254; *Tomlinson v LMS Ry* [1944] 1 All E.R. 537; *Hulland v Saunders* [1945] K.B. 78; *Joel v Cammell Laird (Ship Repairers) Ltd* [1969] I.T.R. 206. cf. incorporation of customary terms: *Sagar v Ridehalgh* [1931] 1 Ch. 310.
- 368 *Dudfield v Ministry of Works*; *Faithfull v Admiralty*, *The Times*, 24 January 1964 (printed in Wedderburn, Cases and Materials on Labour Law (1967), pp.296–300).
- 369 cf. *Grieve v Imperial Tobacco Ltd*, *The Guardian*, 30 April 1963 (see Wedderburn at p.118).
- 370 *Clift v West Riding CC*, *The Times*, 10 April 1964 (see Wedderburn at p.293). The written particulars to be supplied to the employee under the contracts of employment legislation, see above, paras 42-042—42-044, will now usually specify to which agreement reference is made.
- 371 *Loman and Henderson v Merseyside Transport Services Ltd* (1967) 3 K.I.R. 726, 732; *Gascol Conversions Ltd v Mercer* [1974] I.C.R. 420, 425 B-C. Compare also the decision of the Court of Appeal in *Keeley v Fosroc International Ltd* [2006] EWCA Civ 1277, [2006] I.R.L.R. 961, and the comments by Auld LJ on the construction of which terms will be treated as apt for incorporation where a staff handbook or collective agreement is generally incorporated (by express words) into individual contracts of employment.
- 372 *Alexander v Standard Telephones and Cables (No.2)* [1991] I.R.L.R. 286. Compare now *Anderson v London Fire and Emergency Planning Authority* [2013] EWCA Civ 321, [2013] I.R.L.R. 459 in which Maurice Kay LJ sets out, at [16], a general approach to the incorporation by implication into contracts of employment of terms from collective agreements which treats the whole issue as one of “giving a fair meaning to the words used in the factual context (known to the parties) which gave rise to the agreement”, following the approach which Sir Thomas Bingham MR had taken in *Adams v British Airways Plc* [1996] I.R.L.R. 574, CA.
- 373 *Wandsworth LBC v D'Silva* [1998] I.R.L.R. 193.
- 374 [2001] I.R.L.R. 132; upheld by the Court of Appeal: [2002] I.C.R. 910.
- 375 As to which see below, para.42-102.
- 376 *Barber v Manchester Regional Hospital Board* [1958] 1 W.L.R. 181, 190. cf. *Rodwell v Thomas* [1944] K.B. 596, 601; *British Leyland Ltd v McQuilken* [1978] I.R.L.R. 245 (long-term planning agreement). Compare *Kaur v MG Rover Group Ltd* [2004] EWCA Civ 1507, [2005] I.R.L.R. 40, where a set of provisions concerning job security in a collective agreement were held to be inappropriate for incorporation into individual contracts of employment, as to certain of them because they were aspirational in character, and as to certain others because they were essentially collective undertakings rather than undertakings to individuals. Compare also now *Malone v British Airways Plc* [2010] EWHC 302 (QB), [2010] EWCA Civ 1225 where it was held both at first instance and on appeal to the Court of Appeal that a collective agreement regarding cabin crew complements was intended for planning for the deployment of cabin crew generally and not apt for incorporation into the contract of employment of each individual crew member.
- 377 See below, para.42-055.
- 378 cf. *Simpson v Kodak* [1948] 2 K.B. 184.
- 379 Defined in s.5.

- 380 See above, para.42-052.
- 381 See above, para.42-053.
- 382 See above, para.42-053.
- 383 See above, paras 42-042 et seq.
- 384 *Camden Exhibition and Display Ltd v Lynott [1966] 1 Q.B. 555, 562–563, 565; Grime (1966) 29 M.L.R. 199; Tarmac Roadstone Holdings Ltd v Peacock [1973] I.C.R. 273; Soutar v Fisher (1975) 10 I.T.R. 38.*
- 385 Employment Rights Act 1996 s.2(2), (3) and s.6.
- 386 Employment Rights Act 1996 s.1(4)(j).
- 387 *Turriff Construction Co Ltd v Bryant (1967) 2 I.T.R. 292, 294; Gascol Conversions Ltd v Mercer [1974] I.C.R. 420, 427; Jones v Associated Tunnelling Ltd [1981] I.R.L.R. 477, 481, [21]–[22].* See also above, para.42-046.
- 388 cf. *Gascol Conversions Ltd v Mercer [1974] I.C.R. 420; System Floors Ltd v Daniel [1981] I.R.L.R. 475, 476,* [10] treats this as applicable only where the employee acknowledges receipt of the document *specifically as a correct contract.*
- 389 *Gascol Conversions Ltd v Mercer*, above, at 426F.

(c) - Statutory Awards of Terms

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 4. - Collective Agreements and Statutory Awards of Terms

(c) - Statutory Awards of Terms

Statutory awards of terms generally

- 42-057 It is appropriate to consider together with collective agreements certain statutory and governmental provisions which have this in common with collective agreements, that they establish terms and conditions of employment which are incorporated into the individual contracts of employment within the sphere of their operation. In these instances, the contract of employment provides the means of giving legal effect to a process by which terms of employment are determined at a collective level.³⁹⁰

Statutory arbitration awards following non-disclosure

- 42-058 A source of implied terms in individual contracts of employment arises from the provisions of the [Employment Protection Act 1975](#) concerning disclosure of information by employers to trade unions.³⁹¹ In these provisions, the sanction upon the employer consists in the right of the aggrieved trade union to apply to the Central Arbitration Committee,³⁹² complaining of the employer's breach of duty³⁹³ and making a claim for changes in the terms and conditions of employment of the relevant group of employees.³⁹⁴ If the Committee upholds the complaint of breach of duty, it may make an award³⁹⁵ as to certain terms and conditions³⁹⁶ of employment which will form part of the individual contracts of employment³⁹⁷ of the employees concerned.³⁹⁸ In this way, the collective procedural duties of the employer (that is, in certain circumstances to disclose information to recognised trade unions for the purposes of collective bargaining) are enforced by the right of the

union to obtain a compulsory arbitration by the Central Arbitration Committee whose award will take legal effect via individual contracts of employment.

Provisions for statutory awards of terms and conditions or minimum terms and conditions in particular industries³⁹⁹

- 42-059 The Wages Councils system formerly provided awards of minimum terms in particular industries⁴⁰⁰; the most recent provisions to be abolished were for the setting of minimum terms and conditions of employment for agricultural workers by the Agricultural Wages Board.⁴⁰¹ There are some remaining provision for the fixing by the Secretary of State of remuneration and terms and conditions of teachers employed by local education authorities.⁴⁰²

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 390 The provisions, which fell into this category, of the [Employment Protection Act 1975](#) concerning statutory extension of terms and conditions of employment ([Sch.11](#)) and for statutory arbitration awards following non-recognition of unions ([s.16](#)), were repealed by the [Employment Act 1980](#) s.19.
- 391 [Trade Union and Labour Relations \(Consolidation\) Act 1992](#) ss.181–185.
- 392 [Trade Union and Labour Relations \(Consolidation\) Act 1992](#) s.183(1).
- 393 [Trade Union and Labour Relations \(Consolidation\) Act 1992](#) s.183(1) and [s.184\(1\)](#) (further complaint arising from failure to disclose information).
- 394 [Trade Union and Labour Relations \(Consolidation\) Act 1992](#) s.185(1).
- 395 [Trade Union and Labour Relations \(Consolidation\) Act 1992](#) s.185(3).
- 396 [Trade Union and Labour Relations \(Consolidation\) Act 1992](#). As specified by [s.185\(3\), \(4\)](#).
- 397 [Trade Union and Labour Relations \(Consolidation\) Act 1992](#) s.185(5) (which also limits the subsequent variation of the terms implied into individual contracts to prevent the employer from contracting out of the award with any individual employee).
- 398 [Trade Union and Labour Relations \(Consolidation\) Act 1992](#). As specified by [s.185\(3\), \(4\)](#).
- 399 Compare now the general minimum wage provisions of and under the [National Minimum Wage Act 1998](#), discussed see below, paras 42-082—42-083.
- 400 Until its total abolition by the [Trade Union Reform and Employment Rights Act 1993](#).

- 401 Enterprise and Regulatory Reform Act 2013 s.[72](#), with effect from 25 June 2013: SI 2013/1455.
 - 402 School Teachers' Pay and Conditions Act 1991, as significantly amended by the Education Act 2002 ss.[130](#), [216](#) and Sch.22 Pt I.
-

End of Document

© 2022 SWEET & MAXWELL

Section 5. - Rights and Duties Under and Associated with a Contract of Employment

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 5. - Rights and Duties Under and Associated with a Contract of Employment

Introduction

- 42-060 The express terms of the contract of employment will govern any aspect of the relationship between the parties which falls within those terms. But in practice many aspects of the relationship will be left to implied terms which the parties must have intended to be incorporated into the contract.⁴⁰³ The rights and duties of the respective parties are thus often left to be governed by a set of normally implied terms, and this section will proceed to consider, first, the duties of the employee, and, secondly, the duties of the employer. It is obvious that the duty of the one party in a particular aspect will be a right when viewed from the point of view of the other. It will appear in the course of this discussion that the rights and duties under a contract of employment are in some cases the result of an interaction between common law and statute law and that in many other cases there are rights and duties associated with the contract of employment which are entirely the product of statutes. Whilst it is useful to consider the statutory consequences of a contract of employment alongside the consequences normally implied at common law, it is important to keep the two categories distinct because the statutory consequences will not normally be susceptible of exclusion by express contractual terms in the way that the common law consequences will normally be.⁴⁰⁴ The rules about exclusion of statutory provisions by express contracting out are specially mentioned where necessary in the ensuing discussion; in the absence of special reference thereto, it should be assumed that the statutory rights and duties cannot be modified or excluded by contract.⁴⁰⁵

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 403 cf. see above, paras [42-051—42-056](#) on the incorporation of the terms of a collective agreement into the individual contract of each employee.
- 404 See below, paras [42-090—42-091](#), [42-098—42-105](#), [42-112—42-115](#), [42-118](#) (statutory consequences).
- 405 This is generally the case for the provisions of the *Employment Rights Act 1996*, see [s.203](#). See also, for example, the *Equality Act 2010*, see below, para.[42-122](#) and para.[42-129](#).

(a) - Duties of the Employee

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 5. - Rights and Duties Under and Associated with a Contract of Employment

(a) - Duties of the Employee

Duty to exercise skill

- 42-061 An employee who holds himself out as being skilled to do a certain type of work and is employed on that basis impliedly undertakes that he or she possesses and will exercise reasonable skill or competence in that work; throughout the period of the employment he or she owes a duty to his or her employer to perform his or her work with reasonable skill or competence.⁴⁰⁶ In the leading, though now antiquated, case on this point, the defendant advertised for a scene painter, the plaintiff applied for the job and was engaged, and the defendant was held entitled to dismiss him without notice when he showed himself to be incompetent as a scene painter.⁴⁰⁷ The employee's implied undertaking that he possesses the necessary skill may include an implied undertaking by the employee to indemnify his employer if the latter is held vicariously liable to a third person in respect of a tort committed by the employee against the third person arising out of a failure to exercise that skill.⁴⁰⁸ It has been held that an employee is expected, under the terms of his or her employment, to adapt to new methods and techniques in performing his or her duties, provided that the employer arranges for him or her to receive the necessary instruction in the new skills, and that the nature of the work does not alter so radically as to be no longer the work the employee agreed to perform.⁴⁰⁹

Duty to exercise reasonable care

- 42-062

Even where the employee does not profess a particular skill or competence requiring training or experience,⁴¹⁰ there is an implied term in the contract that the employee will exercise reasonable care in the performance of his or her duties.⁴¹¹ Breach of this duty will not entitle the employer to dismiss the employee summarily unless the breach goes to the root of the contract,⁴¹² but it may give rise to an obligation to indemnify the employer.⁴¹³ It would seem that the restrictions placed upon contracting out of liabilities resulting from negligence by [s.2 of the Unfair Contract Terms Act 1977](#) do not apply to provisions in a contract of employment excluding, or restricting liability for breach of, this duty, because the provisions of [s.2](#) do not extend to the contract of employment except in favour of the employee.⁴¹⁴ Under [s.7 of the Health and Safety at Work, etc. Act 1974](#), it is the duty of every employee while at work to take reasonable care for the health and safety of himself or herself and of other persons who may be affected by his or her acts or omissions at work,⁴¹⁵ and, as regards any duty imposed on the employer by any health and safety legislation, to co-operate with the employer as far as necessary to enable the duty to be complied with.⁴¹⁶ This provision may give rise to criminal liability⁴¹⁷ but does not give rise to civil liability.⁴¹⁸

Obedience to lawful and reasonable orders

- 42-063 The employee impliedly contracts to obey the lawful and reasonable orders of his or her employer (or the employer's delegate) within the scope of the employment he or she contracted to undertake: this obligation is usually discussed in relation to summary dismissal.⁴¹⁹ The scope of the employment undertaken by the employee has been held to include adaptation to new methods and techniques of performing his duties.⁴²⁰ It is a further implied term that the employer should not require an employee to do anything illegal, such as to drive a vehicle which is not insured against third-party risks as required by the road traffic legislation⁴²¹; the employer will be liable to indemnify an employee if the latter is held liable to a third person as a result of the unlawful act which the employer required the employee to do.⁴²²

Duty of fidelity

- 42-064 It is another implied term in a contract of employment that the employee will serve the employer with fidelity and in good faith.⁴²³ Thus an employee, during his or her period of employment, may not solicit the customers of his or her employer to transfer their custom to him or her after he or she has left the employment⁴²⁴; nor may the employee solicit orders from the employer's customers or suppliers, or otherwise deal with them, on his or her own behalf rather than the employer's behalf.⁴²⁵ But in the absence of a special covenant⁴²⁶ a former employee cannot be restrained from soliciting or doing business with the customers of a former employer.⁴²⁷ This proposition has

been the subject of an important reaffirmation, in the context of a contract of employment between a solicitor-employee and the firm by which he was employed in *Wallace Bogan & Co v Cove*.⁴²⁸ An employee cannot, however, rid themselves of the duty of fidelity to which the employee is subject during the currency of his or her employment by wrongfully repudiating his or her contract of employment.⁴²⁹ On the other hand, an employee is not in breach of his or her duty of fidelity at a given moment merely because at that time he or she intends to act subsequently in a way which would be in breach of his or her fiduciary duty.⁴³⁰

Work for another employer

42-065 Acceptance of employment with one employer implies an obligation not to work for another employer so long as the first employment continues, if the other employment would be inconsistent with the first employment,⁴³¹ but there are severe restrictions upon the availability of an order for specific performance, or an injunction to enforce this kind of obligation.⁴³² In his or her spare time (when the employee is not obliged to work for his employer) an employee is normally entitled to work for a third person.⁴³³ But he or she may not, consistently with his or her duty to his or her employer, do in his or her spare time something which would inflict great harm on the employer's business.⁴³⁴

Duties to disclose information

42-066 A further instance of an employee's duty of fidelity is that, although the employee is under no duty to disclose his or her own previous breaches of duty,⁴³⁵ the employee may, in the circumstances of a particular case, be under a duty to disclose the misconduct of fellow-employees⁴³⁶; there is, however, no authority that the latter duty is generally to be implied in a contract of employment.⁴³⁷ In one case,⁴³⁸ an employee was held to be so senior in the managerial hierarchy as to have a duty in the circumstances of the case to report the misconduct of his superiors or subordinates even though thereby incriminating himself. The decision in *Tesco Stores Ltd v Pook* suggests that a sufficiently senior employee may in certain circumstances come under a generally implied duty to disclose his or her own breaches of trust as well as those of other employees.⁴³⁹ Insofar as the employee's duty of fidelity requires disclosure of his or her own or another's personal circumstances, that duty is now limited by s.4(3)(a) of the Rehabilitation of Offenders Act 1974, which provides that such a duty shall not extend to requiring the disclosure of a spent conviction⁴⁴⁰ or any circumstances ancillary to a spent conviction, whether the conviction be one's own or another's. The section goes on to provide, inter alia, that:

“... any failure to disclose a spent conviction ... shall not be a proper ground for dismissing ... a person from any ... employment, or for prejudicing him in any way in any ... employment.”⁴⁴¹

An employee also owes a duty to convey to his or her employer information of value to the employer which the employee obtained in the course of his or her employment; and the employee will be restrained from using the information if he or she deliberately conceals it, intending to make use of it for his or her own advantage.⁴⁴²

Duty to refrain from disruption

- 42-067 It has also been held that the employee’s duty of fidelity includes a duty to refrain from wilful disruption of the functioning of the enterprise.⁴⁴³ Although this duty seems to extend to individual acts,⁴⁴⁴ it applies primarily as a limit upon the employee’s right to take certain kinds of industrial action. It is further considered in that context later in this section.⁴⁴⁵

Duty not to disclose confidential information⁴⁴⁶

- 42-068 It is an implied term in every contract of employment that the employee will not disclose or make public any professional or trade secret or confidential information which the employee learns by reason of his or her employment.⁴⁴⁷ The employee also impliedly undertakes that he or she will not use to the detriment of his or her employer any information which he or she has obtained in confidence in the course of or as a result of his or her employment.⁴⁴⁸ This implied duty was reaffirmed and its scope further defined in *Thomas Marshall Ltd v Guinle*⁴⁴⁹ where Megarry VC suggested that there were four elements in the identifying of confidential information or trade secrets which the courts will protect, namely:

- (1)the owner’s belief that release of information would be injurious to him or advantageous to rivals;
- (2)the owner’s belief in confidentiality of the information;
- (3)the reasonableness of these beliefs;
- (4)the assessment of the information in the light of the usage and practices of the particular industry or trade.

The employee will be restrained by injunction from publishing or using any such confidential information.⁴⁵⁰ And a third party who receives⁴⁵¹ information conveyed to him or her in

breach of confidence by an employee or former employee may also be restrained from using the information.⁴⁵² Moreover, it appears to follow from the decision in *Seager v Copydex Ltd*⁴⁵³ that the remedy of damages may be available in such cases against both the employee or ex-employee and the third-party recipient. In one case,⁴⁵⁴ an employee secretly copied from his employer's order book a list of the names and addresses of customers with the intention of using it for the purpose of soliciting from them orders for himself; when he used it for this purpose he was held liable in damages, and was also restrained by injunction from making further use of the information.

- 42-069 An employee is, however, entitled after the termination of his employment to make use of knowledge and experience honestly acquired in the course of the employment, so long as it was not acquired surreptitiously, nor was it detailed information entrusted to the employee expressly or impliedly in confidence.⁴⁵⁵ So if a person, after his or her employment has ceased, embodies in a book the product of his knowledge and skill ("know-how") as a professional which was acquired in the course of his or her work, the copyright vests in him or her.⁴⁵⁶ In the leading case of *Faccenda Chicken Ltd v Fowler*,⁴⁵⁷ the court insisted that the duty not to disclose confidential information becomes confined, once the employee's employment has ceased, to a duty not to disclose the employer's trade secrets, and cannot be more widely invoked to place fetters on the ability of ex-employees to compete. However, the decision and reasoning of the Court of Appeal in *Thomas v Farr Plc*⁴⁵⁸ suggest that the difficulty of policing a post-employment confidentiality clause may be adduced in support of the validity of a relatively wide non-competition covenant.

Exceptions to duty of confidence

- 42-070 There are some exceptions to the employee's duty not to disclose secrets, although it has been held to be a breach of the contract of employment for the employee to disclose a document which is libellous.⁴⁵⁹ In the case of documents which disclose fraud on the part of the employer an injunction will not be granted to prevent their disclosure.⁴⁶⁰ The Court of Appeal has said that there is no duty to keep the information secret when it relates to misconduct on the part of the employer of such a nature that it ought in the public interest to be disclosed to those who have a proper interest in receiving it, e.g. an agreement to maintain prices which is not registered as required by restrictive trade practices legislation.⁴⁶¹ It has, however, been argued⁴⁶² that some contracts of employment may contain an implied term ousting the rule in *Bent's Brewery Co Ltd v Hogan*⁴⁶³ (which treats it as a breach of confidence on the employee's part to disclose certain information about his or her employment to trade union representatives). A further set of exceptions to the employee's duty of confidence is provided by the *Public Interest Disclosure Act 1998*, the provisions of which are described in a later paragraph.⁴⁶⁴

Duty to account

- 42-071 An employee is bound to account to his or her employer for all property entrusted to him or her by the employer, and for all property received by him or her from a third person for or on account of the employer.⁴⁶⁵ An employee is also obliged to account to his or her employer for any bribe,⁴⁶⁶ secret profit⁴⁶⁷ or secret commission which he or she has received in connection with the employer's affairs, or earned by virtue of his or her position as employee.⁴⁶⁸ The employer's right to recover the bribe or secret profit received by the employee arises despite the fact that the employee's act in receiving or earning the money was criminal, and despite the fact that the employer suffered no loss.⁴⁶⁹ A further illustration of the duty to account occurs where an employee, upon the termination of his or her employment, is obliged to repay to the employer any commission paid to the employee in advance which had not actually been earned by the employee before his or her employment terminated.⁴⁷⁰ In the important case of *Nottingham University v Fishel*,⁴⁷¹ Elias J held that the employment relationship did not give rise in and of itself to a general fiduciary duty to account, so that such a duty arises only where specific terms or aspects of the relationship give rise to it.

Inventions and patents

- 42-072 Sections 39–43 of the Patents Act 1977 deal with employees' inventions.⁴⁷² The details of those provisions lie outside the scope of the present work. They deal with the circumstances in which an employee's invention will be taken to belong to the employer⁴⁷³; with the compensation of employees for certain inventions⁴⁷⁴; with the amount of such compensation⁴⁷⁵; and with the enforceability of contracts relating to employees' inventions.⁴⁷⁶

Copyright and design right

- 42-073 The law of copyright was restated with amendments by Pt I of the Copyright, Designs and Patents Act 1988, which also conferred a design right in original designs.⁴⁷⁷ Under that Act,⁴⁷⁸ the author of a work is the first owner of any copyright in it⁴⁷⁹ subject (inter alia)⁴⁸⁰ to the provision that where a literary, dramatic, musical or artistic work or a film is made by an employee in the course of his or her employment, the employer is the first owner of any copyright in the work subject to any agreement to the contrary.⁴⁸¹ So far as the ownership of design right is concerned, the designer is the first owner of any design right in a design which is not created in pursuance of a

commission or in the course of employment.⁴⁸² However, where a design is created in pursuance of a commission, the person commissioning the design is the first owner of any design right in it⁴⁸³; and where, in other cases, a design is created by an employee in the course of his or her employment, the employer is the first owner of any design right in it.⁴⁸⁴ The provisions relating to design right are not expressly subject to agreement to the contrary; but design right is transmissible by written and signed assignment,⁴⁸⁵ and provision is made for the assignment of prospective ownership of future design right.⁴⁸⁶

Duty to indemnify the employer⁴⁸⁷

- 42-074 If the employee, in breach of his or her duty to an employer to exercise a reasonable degree of competence in a particular skill or to take reasonable care in his or her work,⁴⁸⁸ causes damage or injury by negligence to a third person, and the employer pays damages to the third person on account of the employer's vicarious liability for the employee's tort, the employer can recover an indemnity⁴⁸⁹ from the employee.⁴⁹⁰ It is arguable that the indemnity need not be based on an implied term in the contract of employment to the effect that the employee undertakes to indemnify the employer in these circumstances (although courts have put it on this ground)⁴⁹¹; it can be based on the breach of the employee's contractual duty to take care, with the measure of damages for that breach being the amount paid to the third person (which is a reasonably foreseeable loss resulting from that breach). So where a man employed to drive a lorry negligently backed it and injured a fellow-employee, the employer was entitled to recover from the driver the full amount of damages payable to the injured employee, together with the costs of defending the action brought by the latter.⁴⁹² In another case,⁴⁹³ the court held that since the employee was engaged as a storekeeper, he did not impliedly agree to indemnify his employers if he negligently injured someone by his negligence in any other capacity; thus, no contractual indemnity could be recovered from him when he injured someone by his negligent driving in the course of his employment.⁴⁹⁴ It has been argued that this conclusion is difficult to justify: the only term which need be implied is one that the employee will take reasonable care while about his or her employer's business.⁴⁹⁵ Although that argument might be upheld, the enforcement of the employee's duty to indemnify the employer has been considerably restricted by developments described in the next paragraph. On the other hand, it would seem that the enforcement of the implied duty to indemnify is not restricted by s.4 of the Unfair Contract Terms Act 1977 because that applies to unreasonable indemnities arising from express terms, not from implied terms of the kind involved here.⁴⁹⁶

No general duty on employer to insure the employee against tortious liability

- 42-075 Even if the employer is insured against his vicarious liability, the employee will not normally be entitled to claim the benefit of the insurance (except in the case of motor insurance)⁴⁹⁷ since there is no privity of contract.⁴⁹⁸ Nor can the employee maintain that there is an implied term in the contract of employment to the effect that the employer agrees to take out insurance cover on behalf of the employee to protect him or her from liabilities arising from any tortious act committed by him or in the course of his or her employment.⁴⁹⁹ This seems contrary to the common expectations of the parties,⁵⁰⁰ and although a government committee once investigated the situation,⁵⁰¹ no change in the law has been made by Parliament because there is an agreement⁵⁰² among nearly all insurance companies engaged in employers' liability insurance not to make claims for indemnities from employees (using the name of the employer under the doctrine of subrogation)⁵⁰³ except in cases of collusion or wilful misconduct by the employee, or where the employer consents to the claim being brought.⁵⁰⁴ The agreement made by the insurance companies is now reinforced by judicial reluctance to compel an employer to seek indemnity from his employee at the instance of an insurer of the employer claiming to be subrogated to the employer's right against the employee.⁵⁰⁵

Contribution

- 42-076 Since the employer who is liable under the doctrine of vicarious liability is a joint tortfeasor with the employee who committed the tort, the employer is also entitled to contribution (which may, in the court's discretion, amount to a full indemnity)⁵⁰⁶ from the employee under statute.⁵⁰⁷ If some blame attaches to the employer, e.g. for giving a task to the employee for which he or she lacked sufficient experience, the employer may not recover a full indemnity.⁵⁰⁸

Authority of employee to make contracts

- 42-077 The relationship between employer and employee does not, of itself, confer any authority on the employee to make contracts binding on the employer. But an employee may, in appropriate circumstances, be an agent of his or her employer with such authority; the ordinary principles of agency apply to this situation, and reference should be made to the chapter on agency.⁵⁰⁹

Duties in relation to industrial action—(1) strikes

- 42-078 It used to be thought clear that if employees strike without giving the required notice to terminate their contracts they will be in breach of contract when they withdraw their labour.⁵¹⁰ In *Rookes v Barnard*⁵¹¹ it was conceded that a “no strike” clause in the relevant collective agreement had been incorporated into each employee’s contract of employment⁵¹²; hence it was held that it would be a breach of contract for the employees to strike. Moreover, some dicta in that case⁵¹³ made it clear that any strike, even in the absence of a “no strike” clause, and even if the strikers gave proper notice to terminate their contracts,⁵¹⁴ would be in breach of contract because there was no genuine intention to terminate the contracts. As a result of these dicta, the normal strike notice came to be regarded as a notice of intention to break the contracts of employment by suspending performance of the employees’ duties, and not a notice of termination, since this would affect pension rights, rights to holidays with pay, etc.⁵¹⁵ It later appeared, however, from the decision in *Morgan v Fry*⁵¹⁶ that some contracts of employment may be subject to an implied term conferring a right to suspend the performance of the contract by way of strike action, provided no less notice of the action is given than would be required for a lawful termination of the contract. Section 147 of the Industrial Relations Act 1971 provided a statutory rule about the effect of strike action upon contracts of employment, but with the repeal of that provision in 1974,⁵¹⁷ the common law again prevailed. The common law position was re-examined in *Simmons v Hoover Ltd*⁵¹⁸ with the conclusion that strike action did not operate to suspend the contract of employment but as a repudiatory breach of the contract which gave the employer the option of accepting the repudiation as a termination of the contract.⁵¹⁹ It was held that:

“... if *Morgan v Fry* has introduced into the law the concept of the suspension of a contract it is only an embryonic form, for none of the consequences has been worked out; and it is difficult to see how this could be done except by legislation.”⁵²⁰

Duties in relation to industrial action—(2) action other than strikes

- 42-079 The question of whether various forms of industrial action other than strikes involve breach of contract on the part of employees has to be considered in relation to the particular kind of act or omission concerned. The “work-to-rule”, although designed not to involve breach of contract, may nevertheless be treated as the breach of an implied contractual duty to refrain from disruption of the functioning and purposes of the employing enterprise: such a duty, which can be characterised as a duty of co-operation or an aspect of the duty of fidelity,⁵²¹ was recognised in *Secretary of*

State for Employment v ASLEF (No.2).⁵²² Such an implied term was held, in the case of *British Telecommunications Plc v Ticehurst*⁵²³ to have been breached by a concerted action of withdrawal of goodwill on the part of managerial employees. On the other hand, the duty of co-operation probably does not go to the lengths of requiring the employee to undertake to work normally in response to an ultimatum by the employer.⁵²⁴ The “go-slow” may be expected to involve breach of contract as a contravention of the employer’s implied standing instructions about how work is to be carried out. The “blacking” of particular goods or equipment (in the sense of refusal to handle or use them) may constitute breach on similar reasoning; but may avoid the characterisation of breach if the employer has not specifically required the particular goods or equipment to be handled or used.⁵²⁵ On the other hand, one case treated refusal by miners to descend in a lift to work with non-union employees as not merely breach of contract but tantamount to total withdrawal of labour.⁵²⁶ The contractual status of an overtime ban will depend upon whether the employee can be regarded as having contracted to work such overtime hours as the employer may require him or her to.⁵²⁷ It is possible for the employee to be under such an obligation although the employer may not correspondingly contract to provide a fixed minimum or maximum of overtime work.⁵²⁸ In *Ministry of Justice v Prison Officers’ Association*⁵²⁹ it was held on the facts of the case that the implied duty of loyalty or good faith would not be breached by industrial action consisting of refusal to undertake voluntary tasks or roles which were clearly not contractually stipulated ones: earlier authorities pertaining to this question were considered, applied, and distinguished so far as it was necessary to do so. The effect of industrial action other than strikes upon entitlement to remuneration is considered in a later section.⁵³⁰

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 406 *Harmer v Cornelius* (1858) 5 C.B.(N.S.) 236. cf. *Jones v Manchester Corp* [1952] 2 Q.B. 852; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] A.C. 555 (lorry driver). The terms of the contract may make the employer sole judge of the employee’s competence, provided the employer decides bona fide: *Diggle v Ogston Motor Co* (1915) 112 L.T. 1029.
- 407 *Harmer v Cornelius* (1858) 5 C.B.(N.S.) 236. As to summary dismissal, see below, para.42-194. As to unfair dismissal, see below, para.42-231.
- 408 See below, para.42-079.
- 409 *Cresswell v Board of Inland Revenue* [1984] I.C.R. 508.
- 410 See above, para.42-061.

- 411 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] A.C. 555; *Janata Bank v Ahmed* [1981] I.C.R. 791. And see the cases cited see below, para.42-194.
- 412 See below, para.42-188.
- 413 See below, para.42-074. But cf. *Harvey v RG O'Dell Ltd* [1958] 2 Q.B. 78 (storekeeper does not warrant his skill as driver: see below, para.42-074).
- 414 Unfair Contract Terms Act 1977 s.1(2) and Sch.1 para.4.
- 415 s.7(a).
- 416 s.7(b).
- 417 s.33(1)(a), (3).
- 418 s.47(1)(a), (4).
- 419 See below, para.42-193. As to unfair dismissal, see below, paras 42-230 et seq.
- 420 *Cresswell v Board of Inland Revenue* [1984] I.C.R. 508; see above, para.42-061. However, *Bull v Nottinghamshire Fire and Rescue Authority* [2007] EWCA Civ 240, [2007] B.L.G.R. 439 indicates that the employer cannot unilaterally impose its managerial aspirations without clear evidence of their incorporation into the contracts of employment in question.
- 421 *Gregory v Ford* [1951] 1 All E.R. 121. cf. *Semtex Ltd v Gladstone* [1954] 1 W.L.R. 945.
- 422 *Gregory v Ford* [1951] 1 All E.R. 121. See below, para.42-117; cf. Vol.I, para.32-136.
- 423 *Robb v Green* [1895] 2 Q.B. 315; *Wessex Dairies Ltd v Smith* [1935] 2 K.B. 80; *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch. 169; *Sanders v Parry* [1967] 1 W.L.R. 753. See also *Morison v Moat* (1851) 9 Hare 241. It was confirmed in *Lonmar Global Risks Ltd v West* [2010] EWHC 2878 (QB), [2011] I.R.L.R. 138, reiterating the view previously taken in *University of Nottingham v Fishel* [2000] I.C.R. 1462, that the duty of loyalty or good faith is not without more to be equated with a fiduciary obligation; compare the discussion of the “duty to account” in para.42-071. Compare also *Threlfall v ECD Insight Ltd* [2012] EWHC 3543 (QB), [2013] I.R.L.R. 185 where Lang J reinforces the proposition that a senior employee with a duty of fidelity as to act in good faith vis-à-vis the employer is nevertheless not thereby necessarily or ordinarily under a fiduciary obligation to that employer. The contrast between the duty of fidelity owed by an employee and the fiduciary duty owed by a company director had also been emphasised by the Court of Appeal in *Ranson v Customer Systems Plc* [2012] EWCA Civ 841, [2012] I.R.L.R. 769 and had also been invoked by the Court of Appeal in *Caterpillar Logistics Services (UK) Ltd v Huesca de Crean* [2012] EWCA Civ 156, [2012] 3 All E.R. 129 as a factor in refusing to the employer of barring-out relief against a former employee. cf. now *Human Kind Charity v Gittens* [2019] 10 WLUK 813, EAT.
- 424 *Wessex Dairies Ltd v Smith* [1935] 2 K.B. 80; *Sanders v Parry* [1967] 1 W.L.R. 753.
- 425 *Thomas Marshall Ltd v Guinle* [1978] I.C.R. 905, 922E-H.
- 426 *National Provincial Bank of England v Marshall* (1888) 40 Ch. D. 112.
- 427 *Re Irish* (1888) 4 Ch. D. 49. cf. *Faccenda Chicken Ltd v Fowler* [1986] I.C.R. 297; *Balston Ltd v Headline Filters Ltd* [1987] F.S.R. 330. But a former employee may be restrained from using trade secrets or confidential information: see below, paras 42-070—42-071. In *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB), [2013] I.R.L.R. 344 it was confirmed that, although the employee was relieved of the obligation of

- work while on “garden leave”, the negative obligations imposed on him by his employment contract remained part of his duties.
- 428 [1997] *I.R.L.R.* 453.
- 429 *Thomas Marshall Ltd v Guinle* [1978] *I.C.R.* 905, 920H–921C. cf. *Evening Standard Ltd v Henderson* [1987] *I.C.R.* 588.
- 430 *Horcal Ltd v Gatland* [1984] *I.R.L.R.* 288.
- 431 cf. the special cases of *Lumley v Wagner* (1852) 1 *De G.M. & G.* 604; *National Provincial Bank of England v Marshall* (1888) 40 *Ch. D.* 112.
- 432 These remedies are discussed see below, paras 42-214—42-216. cf. *Evening Standard Ltd v Henderson* [1987] *I.C.R.* 588. Compare also *GFI Group Ltd v Eaglestone* [1994] *I.R.L.R.* 119.
- 433 *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] *Ch.* 169. cf. *Nova Plastics Ltd v Froggatt* [1982] *I.R.L.R.* 146.
- 434 *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] *Ch.* 169 at 178 (spare-time work for trade rival was restrained by injunction).
- 435 *Bell v Lever Bros* [1932] *A.C.* 161.
- 436 *Swain v West (Butchers) Ltd* [1936] 3 *All E.R.* 261. Compare also *Dunn v AAH Ltd* [2010] *EWCA Civ* 183, [2010] *I.R.L.R.* 709, with regard to disclosure by a finance director of fraud in which an ex-employee was implicated.
- 437 *Swain v West (Butchers) Ltd* [1936] 3 *All E.R.* 261.
- 438 *Sybron Corp v Rochem Ltd* [1985] *Ch.* 299.
- 439 [2003] *EWHC* 823 (*Ch.*), [2004] *I.R.L.R.* 618. See also *Thomson Ecology Ltd v Apem Ltd* [2013] *EWHC* 2875 (*Ch.*), [2014] *I.R.L.R.* 184.
- 440 Defined by s.1 by reference to a set “rehabilitation period”. *Data Protection Act 1998* s.56 makes it a criminal offence to require job applicants or existing employees to make subject access requests in lieu of providing a normal criminal record check, which would not disclose spent convictions.
- 441 Rehabilitation of Offenders Act 1974 s.4(3)(b). cf. *Property Guards Ltd v Taylor and Kershaw* [1982] *I.R.L.R.* 175.
- 442 *Cranleigh Precision Engineering Co Ltd v Bryant* [1965] 1 *W.L.R.* 1293, 1319; *Industrial Development Consultants Ltd v Cooley* [1972] 1 *W.L.R.* 443.
- 443 *Secretary of State for Employment v ASLEF (No.2)* [1972] 2 *Q.B.* 455, 491, 498, 509. See also below, para.42-079.
- 444 *Secretary of State for Employment v ASLEF (No.2)* [1972] 2 *Q.B.* 455 at 492, 508.
- 445 See below, paras 42-078—42-079.
- 446 *North* [1965] *J.B.L.* 397, [1966] *J.B.L.* 31, [1968] *J.B.L.* 32; (1972) 12 *J.S.P.T.L.* 149; *Gareth Jones* (1970) 86 *L.Q.R.* 463.
- 447 *Amber Size and Chemical Co v Menzel* [1913] 2 *Ch.* 239; *Alperton Rubber Co v Manning* (1917) 86 *L.J. Ch.* 377; *British Industrial Plastics v Ferguson* [1940] 1 *All E.R.* 479; *Initial Services Ltd v Putterill* [1968] 1 *Q.B.* 396. As to particulars in an action for breach of this term, see *Sorbo Rubber Sponge Products v Defries* (1930) 47 *R.P.C.* 454.
- 448 *Merryweather v Moore* [1892] 2 *Ch.* 518; *Bent's Brewery Co v Hogan* [1945] 2 *All E.R.* 570; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 *W.L.R.* 1293. cf. as to the supplying

- of information about fellow-employees to a competitor interested in recruitment, *GD Searle & Co Ltd v Celltech Ltd* [1982] F.S.R. 92.
- 449 [1978] I.C.R. 905, 926D-G. The implied duty here served to protect the employer from “use” of the information, whereas the express covenant in question dealt only with “disclosure” thereof.
- 450 *Merryweather v Moore* [1892] 2 Ch. 518; *Robb v Green* [1895] 2 Q.B. 315; *Amber Size & Chemical Co v Menzel* [1913] 2 Ch. 239; *Reid and Sigrist Ltd v Moss and Mechanism Ltd* (1932) 49 R.P.C. 461; *Under Water Welders & Repairers Ltd v Street and Longthorne* [1968] R.P.C. 498; *Industrial Furnaces Ltd v Reaves* [1970] R.P.C. 605. But what was previously a trade secret of the employer may cease to be such when a specification for a patent relating to the secret is published by the employer: *Mustad & Son v Dosen* [1964] 1 W.L.R. 109n. (It is otherwise if publication is by a third person: *Cranleigh Precision Engineering Ltd v Bryant*, above, at 1311–1320.)
- 451 It is not necessary that the third party should know when he receives the information that it is given to him in breach of confidence: *Printers & Finishers Ltd v Holloway* [1965] 1 W.L.R. 1, 7. See also *Prince Albert v Strange* (1849) 1 Mac. & G. 25.
- 452 *Cranleigh Precision Engineering Ltd v Bryant*, above. See also *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1963) 65 R.P.C. 203, 213, 215.
- 453 [1967] 1 W.L.R. 923; on the quantum of damages, see *Seager v Copydex Ltd (No.2)* [1969] 1 W.L.R. 809.
- 454 *Robb v Green* [1895] 2 Q.B. 315. See also *Louis v Smellie* (1896) 73 L.T. 226; *Baker v Gibbons* [1972] 1 W.L.R. 693.
- 455 *Morris v Saxelby* [1915] 2 Ch. 57, 88; affirmed [1916] 1 A.C. 688; *United Indigo Chemical Co v Robinson* (1931) 49 R.P.C. 178; *Wessex Dairies Ltd v Smith* [1935] 2 K.B. 80, 89; *Worsley & Co v Cooper* [1939] 1 All E.R. 290; *Printers & Finishers Ltd v Holloway* [1965] 1 W.L.R. 1; *United Sterling Corp Ltd v Felton & Mannion* [1974] R.P.C. 162. On express covenants relating to trade secrets, see Vol.I, para.18-156.
- 456 *Stevenson, Jordan and Harrison v Macdonald and Evans* [1952] 1 T.L.R. 101. On copyright, see below, para.42-073.
- 457 [1986] I.C.R. 297; compare also *Balston Ltd v Headline Filters Ltd* [1987] F.S.R. 330.
- 458 [2007] EWCA Civ 118, [2007] I.C.R. 932.
- 459 *Weld-Blundell v Stephens* [1919] 1 K.B. 520, [1919] A.C. 956; *Bradstreets British Ltd v Harold Mitchell & Carapanayoti Co Ltd* [1933] Ch. 190.
- 460 *Gartside v Outram* (1856) 26 L.J. Ch. 113.
- 461 *Initial Services Ltd v Putterill* [1968] 1 Q.B. 396.
- 462 Hepple, Employment Law, 4th edn (1981), para.312.
- 463 [1945] 2 All E.R. 570.
- 464 See below, para.42-164.
- 465 *Biddle v Bond* (1865) 6 B. & S. 225, 231; *Parker v McKenna* (1874) L.R. 10 Ch. App. 96.
- 466 *Att-Gen v Goddard* (1929) 98 L.J. K.B. 743.
- 467 *Reading v Att-Gen* [1951] A.C. 507.
- 468 See Vol.I, para.32-174; see also *Industrial Development Consultants Ltd v Cooley* [1972] 1 W.L.R. 443.

469 *Reading v Att-Gen [1951] A.C. 507.*

470 *Bronester Ltd v Priddle [1961] 1 W.L.R. 1294.* (The obligation will depend on the construction of the particular contract of employment.) cf. as to accidental overpayment of wages, *Avon CC v Howlett [1983] 1 W.L.R. 605; Att-Gen's Reference No.1 of 1983 [1984] 3 All E.R. 369.*

471 [2000] I.C.R. 1462, QBD. The approach taken in that case was followed and developed by the Court of Appeal in *Helmet Integrated Systems Ltd v Tunnard [2006] EWCA Civ 1735, [2007] I.R.L.R. 126*, to the effect that employees do not automatically owe fiduciary obligations to their employer as a consequence merely of their general duty of loyalty, so that in the instant case the employee owed no fiduciary obligation in respect of activities during employment which were preparatory, but no more than preparatory, to competitive activity in which the employee was planning to engage after leaving his current employment.

472 Phillips & Hoolahan, Employees' Inventions in the United Kingdom, Law and Practice (1982).

473 s.39.

474 s.40.

475 s.41.

476 s.42.

477 Pt III of the Act.

478 In force, so far as relevant, from 1 August 1989.

479 s.11(1).

480 See s.11(3) (Crown copyright, parliamentary copyright, copyright of international organisations).

481 s.11(2) as amended by SI 1996/2967.

482 s.215(1). (See also s.219.) (Note the special provision of s.220 (qualification by reference to first marketing).)

483 s.215. (See also s.219.)

484 s.215(3).

485 s.222.

486 s.223.

487 See Atiyah, Vicarious Liability in the Law of Torts (1967), pp.421–432.

488 See above, paras 42-061—42-062.

489 The employer may, alternatively, be entitled to claim *contribution* from his employee: see below, para.42-076.

490 *Lister v Romford Ice and Cold Storage Co Ltd [1957] A.C. 555; Semtex Ltd v Gladstone [1954] 1 W.L.R. 945.*

491 *Lister v Romford Ice and Cold Storage Co Ltd [1957] A.C. 555; Harvey v RG O'Dell [1958] 2 Q.B. 78.*

492 *Lister v Romford Ice and Cold Storage Co Ltd [1957] A.C. 555.*

493 *Harvey v RG O'Dell Ltd [1958] 2 Q.B. 78.* (Contribution amounting to a full indemnity under a statute was recovered: see below, para.42-076).

494 Compare para.42-062.

- 495 *Jolowicz* (1959) 22 M.L.R. 71, 289; Atiyah at p.424.
- 496 Compare above, para.[40-272](#). In any event, s.4 protects a person “dealing as consumer”— see above, para.[40-262](#) (which relate to the [Unfair Terms in Consumer Contracts Regulations 1999 \(SI 1999/2083\)](#)); and in its decision in *Keen v Commerzbank AG* [2006] EWCA Civ 1536, [2007] I.C.R. 623 the Court of Appeal makes clear its view that this does not include an employee.
- 497 Road Traffic Act 1988 s.148(4). See *Tattersall v Drysdale* [1935] 2 K.B. 174; *Austin v Zurich General Accident Insurance Co Ltd* [1944] 2 All E.R. 243, 248; affirmed on other grounds: [1945] 1 All E.R. 316; *Semtex Ltd v Gladstone* [1954] 1 W.L.R. 945.
- 498 See Vol.I, Ch.20.
- 499 *Lister v Romford Ice and Cold Storage Co Ltd* [1957] A.C. 555 (a majority decision). *Gregory v Ford* [1951] 1 All E.R. 121 should still be applicable where insurance on behalf of the employee is still compulsory. See Deakin & Morris, Labour Law, 6th edn (2012), para.4.108 for an argument about the possible impact of the implied obligation of mutual trust and confidence, as to which compare below, paras [42-154](#)—[42-157](#).
- 500 *Williams*, 20 M.L.R. 220, 437; *Jolowicz* [1956] C.L.J. 101, [1957] C.L.J. 21; (1959) 22 M.L.R. 71, 189. Compare Deakin & Morris, Labour Law, 6th edn (2012), para.4.108.
- 501 See *Lord Gardiner* (1959) 22 M.L.R. 652.
- 502 Whitmore, Employers’ Liability Insurance (1962), p.18, publishes the text.
- 503 See below, para.[42-093](#).
- 504 For other details of these arrangements, see Atiyah at pp.426–427.
- 505 *Morris v Ford Motor Co* [1973] Q.B. 792.
- 506 *Ryan v Fildes* [1938] 3 All E.R. 517; *Semtex Ltd v Gladstone* [1954] 1 W.L.R. 945.
- 507 Civil Liability (Contribution) Act 1978 s.1. See Clerk & Lindsell on Torts, 23rd edn (2020), para.4-37—4-39; *Ronex Properties Ltd v John Laing Construction Ltd* [1983] Q.B. 398; *Harper v Gray & Walker (a firm)* [1985] 1 W.L.R. 1196.
- 508 *Jones v Manchester Corp* [1952] 2 Q.B. 852. See Atiyah at pp.428–432.
- 509 See Vol.I, Ch.21.
- 510 e.g. *Parkin v South Hetton Coal Co Ltd* (1907) 97 L.T. 98; affirmed 98 L.T. 162. [1964] A.C. 1129.
- 512 See above, paras [42-052](#)—[42-056](#).
- 513 [1964] A.C. 1129, 1204, 1237. cf. in the *Court of Appeal* [1963] 1 Q.B. 623, 682–683. See Grunfeld, Modern Trade Union Law (1966), pp.317–334.
- 514 Under s.86 of the Employment Rights Act 1996, most employees must now give not less than one week’s notice to terminate their contract, see below, para.[42-168](#).
- 515 *JT Stratford & Son Ltd v Lindley* [1965] A.C. 269, 285. The Contracts of Employment Act 1963 Sch.I para.[7\(2\)](#), assumed that some strikes were not in breach of contract since it provided that “continuity of employment” was not to be interrupted unless a strike was in breach of contract (cf. para.[11\(1\)](#) of the Sch.); these words were accordingly repealed: Redundancy Payments Act 1965 s.37 (see now Employment Rights Act 1996 s.216).
- 516 [1968] 2 Q.B. 710.
- 517 Trade Union and Labour Relations Act 1974 s.1.

518 [1977] I.C.R. 61.

519 [1977] I.C.R. 61 at 76A–F. cf. *Chappell v Times Newspapers Ltd* [1975] I.C.R. 145, 174H–175A (where Lord Denning MR had been clear that a strike was a breach, though less clear that it was a repudiation of the contract); *Haddow v ILEA* [1979] I.C.R. 202. For an argument that the repudiation analysis does not apply where the strike is engineered or provoked by the employer, see Hepple, Employment Law, 4th edn (1981), para.491. For the question whether strike action may constitute not just repudiation but also self-dismissal, see below, para.42-197.

520 [1977] I.C.R. 61, 75H.

521 See above, paras 42-064—42-067.

522 [1972] 2 Q.B. 455, 491–492, 498, 508–509. (See *Napier* (1972) 1 I.L.J. 125.) cf. *Solihull Metropolitan Borough v NUT* [1985] I.R.L.R. 211 (in relation to teachers' lunchtime duties).

523 [1992] I.C.R. 383.

524 See *Fisher v York Trailers Ltd* [1979] I.C.R. 834, 838A–C, per Slynn J. cf. *Chappell v Times Newspapers Ltd* [1975] I.C.R. 145 (which indicates, however, that the employee may be unable to enforce the contract against the employer in such a situation: see below, para.42-216); compare also, however, *British Telecommunications Plc v Ticehurst* [1992] I.C.R. 383.

525 *Thomson & Co Ltd v Deakin* [1952] 1 Ch. 646.

526 *Bowes & Partners Ltd v Press* [1894] 1 Q.B. 202.

527 cf. *Camden Exhibition & Display Ltd v Lynott* [1966] 1 Q.B. 555.

528 e.g. *Tarmac Roadstone Holdings Ltd v Peacock* [1973] I.C.R. 273.

529 [2017] EWHC 1839 (QB).

530 See below, para.42-097.

(i) - Remuneration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 5. - Rights and Duties Under and Associated with a Contract of Employment

(b) - Duties of the Employer

(i) - Remuneration

Remuneration

- 42-080 The duty of the employer to remunerate an employee for services will normally⁵³¹ be found by construing the terms of the contract of employment in the light of the particular circumstances.⁵³² The remuneration will frequently be specified in a collective agreement,⁵³³ whose terms are incorporated into individual contracts of employment⁵³⁴; or the remuneration may be fixed by some special negotiating machinery or statutory authority.⁵³⁵ Remuneration during illness is discussed in a separate paragraph.⁵³⁶ Most problems of construction will arise in the case of special terms in individual contracts. Thus, where an employee agreed to look for payment only to some particular fund and not to the employer personally, the employee had no right of action against the latter in the event of failure to recover from the fund.⁵³⁷ If the contract provides for the employee to receive a sum part of which is stated to be a salary and part to be for expenses, the whole contract will be unenforceable if the provision relating to expenses is intended to evade tax liabilities.⁵³⁸ It is a basic principle that an employee is paid for carrying out contractual duties, and must show himself or herself ready and willing to do so if he or she is to claim the corresponding contractual remuneration, so that where, for instance, the employee refuses to work according to new methods which are within his or her terms and conditions of employment, the employer is entitled to withhold payment.⁵³⁹ Difficult questions of construction arise with regard to the complex compensation and benefit arrangements which are frequently made with managerial or executive employees. In *Mallone v BPB Industries Plc*,⁵⁴⁰ the Court of Appeal construed the

discretion to cancel mature options under a senior executive share option scheme as being limited by the requirement that it be exercised rationally with regard to the performance of the employee in question; a similar construction was applied with regard to performance bonus in *Clark v Nomura International Plc.*⁵⁴¹

No express or fixed provision for remuneration

- 42-081 If the contract is silent as to remuneration, but the circumstances⁵⁴² show that the services of the employee were not to be rendered gratuitously,⁵⁴³ there is early authority to the effect that the law will imply a term by which the employer undertakes to pay a reasonable sum of money by way of remuneration.⁵⁴⁴ In fixing what is a reasonable remuneration the court must look at all the circumstances, including conversations and correspondence between the parties, to see what sum they considered reasonable.⁵⁴⁵ The principle that a term specifying a “reasonable” remuneration will be implied when the exact amount has not been fixed extends to additional remuneration as well as to basic remuneration; thus where an employer wrote to his secretary saying that instead of a rise in salary, he would pay her a bonus on net trading profits of the previous year, the Court of Appeal held that this amounted to an undertaking to pay a reasonable sum as a bonus.⁵⁴⁶ Where there is an arrangement for work to be done with remuneration at the discretion of the employer, early authorities seemed to treat the arrangement as creating no contractual right to remuneration.⁵⁴⁷ But there are also decisions suggesting that a court would endeavour, if possible, to construe a similar provision as a contract of employment⁵⁴⁸ for reasonable remuneration.⁵⁴⁹ However, where the articles of association of a company provided that “A managing director shall receive such remuneration … as the directors may determine”, it was held that in the absence of any such determination of an amount the managing director was not entitled to any remuneration, even on the basis of quantum meruit.⁵⁵⁰ The situation where an annual hours contract is silent as to payment for overtime working was considered in the case of *Ali v Christian Salvesen Food Services Ltd.*⁵⁵¹ Uncertainties of the kind discussed here may in practice be considerably reduced by the employer’s obligation under the contracts of employment legislation to give the employee written particulars of terms relating to remuneration and the intervals at which remuneration is paid,⁵⁵² and by the employer’s obligation under the employment protection legislation to give the employee an itemised pay statement at the time of each payment of remuneration,⁵⁵³ which is discussed in a later paragraph.⁵⁵⁴ It should, however, be pointed out that some of the difficulties discussed in this paragraph raise the logically prior question of whether the arrangement concerned is a contract of employment at all.⁵⁵⁵

The national minimum wage

42-082

U The National Minimum Wage Act 1998⁵⁵⁶ confers upon workers an entitlement to be paid at least the national minimum wage by their employers. In brief summary, the provisions of the Act are as follows.⁵⁵⁷ The category of “workers” is broadly defined⁵⁵⁸ (but so as to exclude contracts of apprenticeship)⁵⁵⁹ so as to extend beyond those having contracts of employment as such; special provision is also made which applies the Act to agency workers and to home workers who are not otherwise “workers”,⁵⁶⁰ and power is given to apply the Act to other individuals who are not otherwise “workers”.⁵⁶¹ There has been a major question as to whether, and in what circumstances, tips paid by customers to or for workers such as waiters can be counted by employers in fulfilment of their obligation to pay the national minimum wage. In *Revenue and Customs Commissioners v Annabel's (Berkeley Square) Ltd*⁵⁶² the Court of Appeal held that money payments made in the form of discretionary service charges by customers to waiters and bar staff by credit or debit card or by cheque, and collected by the proprietor/employer to be transmitted to employees via a “tronc” system, administered by an employee called the “troncmaster”, did not count towards the meeting of the requirement of s.1 of the National Minimum Wage Act 1998. Another major issue concerns the qualification of workers’ time spent “on-call”, in particular where this takes place on the employer’s premises. This has now been held to count as “time work”.⁵⁶³ In *Royal Mencap Society v Tomlinson-Blake*, however, the Supreme Court held that where workers are permitted to sleep during on-site shifts, only time actually spent awake and working could be included in calculating working time.

564



42-083

The Act provides for the making of regulations determining the hourly rate of remuneration by referral to the Low Pay Commission, and for excluding certain classes of persons or making modifications in relation to them.⁵⁶⁵ In the event of non-compliance by the employer with the minimum wage requirements for any “pay reference period”, the worker shall be taken to be entitled under his or her contract to be paid, as additional remuneration in respect of that period, the amount which is the difference between what he or she actually received and what he or she would have received for that period had he or she been remunerated by the employer at a rate equal to the national minimum wage,⁵⁶⁶ and officers appointed to enforce the legislation may also sue for that additional remuneration on behalf of the worker.⁵⁶⁷ Moreover, workers are given the rights not to suffer detriment, enforceable by complaint to an employment tribunal, nor to be unfairly dismissed by reason of asserting their right to the minimum wage.⁵⁶⁸

Holidays and holiday pay

- 42-084 An employee's right to holidays depends usually on the express or implied terms of his or her contract of employment

 569

 ; the terms of a collective agreement⁵⁷⁰ frequently provide for holidays and holiday pay, and these terms are likely to be incorporated into individual contracts of employment.⁵⁷¹ It is also a general requirement under the contracts of employment legislation for employees to be given written particulars of any terms and conditions of employment relating to entitlement to holidays, including public holidays, and holiday pay.⁵⁷² The particulars must be sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on termination of employment, to be precisely calculated.⁵⁷³

Holiday Pay under the Working Time Regulations and Directive

- 42-085 The *Working Time Regulations*,⁵⁷⁴ as described more fully in a later paragraph,⁵⁷⁵ now confer an important general entitlement to a minimum period of paid holiday. In *Lock v British Gas Trading Ltd (C-539/12)*,⁵⁷⁶ the CJEU held that the Working Time Directive required that holiday pay not be limited to basic salary where commission was part of the employee's remuneration. This approach to "normal remuneration" was essentially followed in *Dudley MBC v Willetts*,⁵⁷⁷ when the Employment Appeal Tribunal held that voluntary overtime pay could be included for purposes of holiday pay calculation. In *Harpur Trust v Brazel*, the Court of Appeal held that in the case of part-time workers, holiday pay entitlement was not to be pro-rated by reference to the fact that a worker had not worked for the entire year.⁵⁷⁸ Moreover, in *King v Sash Window Workshop Ltd*, it was held that EU law prohibits national provisions or practices that prevent a worker from carrying over or accumulating, until the termination of the employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because the employer refused to remunerate that leave.⁵⁷⁹ In *Smith v Pimlico Plumbers* the Court of Appeal held that the principle in *King* equally applies to leave taken without pay in previous years.

 580



Rolled-up holiday pay

- 42-086 The issue of whether holiday pay entitlements can be discharged by the payment of “rolled-up” holiday pay was referred to the ECJ by the Court of Appeal in *Caulfield v Marshalls Clay Products Ltd.*⁵⁸¹ In the joined cases *Robinson-Steele v RD Retail Services Ltd, Caulfield v Hanson Clay Products*,⁵⁸² the ECJ held the practice of payment of “rolled-up holiday pay” to be unlawful, as failing to comply with the paid holiday obligations imposed by the Working Time Directive. However, in *SumSION v BBC (Scotland)*,⁵⁸³ the EAT took a wide view of the employer’s entitlement to stipulate when leave may be taken. See also *NHS Leeds v Larner*,⁵⁸⁴ in which the Court of Appeal held that, in the case of a worker who had been on long-term sick leave, upon the termination of her employment during that sick leave, her entitlement to four weeks’ holiday pay representing the four weeks’ annual leave required by the Working Time Directive was not forfeited by reason of her never actually having requested any holiday while on sick leave. It was, however, left open whether the same rule applies to the worker’s additional holiday entitlement under the Working Time Regulations. Compare furthermore the decision in *Bollack v Klaas & Kock*, where the CJEU held that the death of worker does not extinguish paid annual leave accrual.⁵⁸⁵

Payment during absence due to sickness: the position at common law

- 42-087 The position at common law is that the right of the employee to claim salary or wages during his or her absence from work on account of illness or injury depends entirely on the terms of his or her contract. Particulars of terms relating to incapacity for work due to sickness or injury, including any provisions for sick pay, must be issued to the employee under the Contracts of Employment legislation.⁵⁸⁶ There are provisions under that legislation requiring the employer to allow sick pay where absence due to sickness occurs during a statutory period of notice.⁵⁸⁷ A large proportion of contracts of employment now include some form of scheme for payment during absence due to sickness. If no express term deals with the matter, the court must attempt to infer an implied term from all the relevant circumstances. In older authorities, the following considerations have been thought relevant in determining such an implied term.

(1) If it is known to the parties that, in practice, the particular employer does not pay wages during illness to employees engaged in a capacity similar to that of the one in question,⁵⁸⁸ it is an implied term of the contract that no wages are payable during the employee’s illness.⁵⁸⁹ On the other hand, if it is known to both parties that wages are usually paid during illness it will be an implied term of the contract that the employee shall be entitled to his wages throughout the period of his employment despite any absence due to illness.⁵⁹⁰

(2) If the employee receives sick pay out of a fund to which both the employer and the employees contribute, the employee is not entitled to wages while he or she receives benefits from the fund.⁵⁹¹ On the other hand, the receipt of social security sickness benefits does not of itself prevent the employee from claiming wages during the time he or she is in receipt of those benefits.⁵⁹²

(3) When the employee is paid by time, e.g. by the hour, and is not paid for any time in which he or she does not work, the employee will not normally be entitled to wages in respect of periods of absence through illness.⁵⁹³ Similarly an employee paid by piecework (without any provision for guaranteed remuneration) is not entitled to wages if, through illness, he or she is unable to work.⁵⁹⁴

(4) Contracts of employment have been said to be of two kinds, one in which the consideration for the wages is actual work, and the other in which it is readiness and willingness to work, if of ability to do so.⁵⁹⁵ It has been thought that in the former case, wages are not payable during the employee's illness, whilst in the latter case they are.⁵⁹⁶ In *Beveridge v KLM UK Ltd*⁵⁹⁷ it was ruled that an employee who offers her services to an employer is entitled, at common law, to be paid unless a specific condition of the contract regulates otherwise. However, that pronouncement has to be related to the specific context in which an employee claimed to be fit and certified to return to work, while the employers required their own medical adviser to confirm.

(5) It has been held that where there is a contractual obligation to pay sick pay, but no agreed term as to its duration, a term should be implied which is reasonable having regard to the normal practice in the industry.⁵⁹⁸

(6) It should be noted that the existence of an express sick pay scheme may result in an implied term restricting the employer's power to terminate the contract during the absence of the employee due to sickness.⁵⁹⁹

A common law presumption of entitlement to sick pay?

42-088 The decision in *Orman v Saville Sportswear Ltd*⁶⁰⁰ suggested that a presumption of entitlement to sick pay should be applied to contracts of employment in general. It was said that:

“Where the written terms of the contract of service are silent as to what is to happen in regard to the employee's rights to be paid whilst he is absent from work due to sickness, the employer remains liable to continue paying so long as the contract is not determined by proper notice, except where a condition to the contrary can properly be inferred from all the facts and the evidence in the case. If the employer ... seeks to establish an implied condition that no wages are payable, it is for him to make it out.”⁶⁰¹

In this case no such term could be implied because it was clear on the evidence that the plaintiff would not have agreed to it. The status of the suggested presumption of entitlement to sick pay was hard to assess. The question was re-examined and the authorities were reviewed in *Mears v Safecar Security Ltd*,⁶⁰² with the conclusion that it was wrong to apply a general presumption of entitlement to sick pay; the correct approach was to consider the circumstances according to the kind of factors listed above⁶⁰³; it was said that:

“It may be, at the end of the day, if there are no factors either way which can properly be relied upon, that the correct inference is that if a man is employed for a period on a wage, then, if nothing else can be found, the presumption will be that the wage is to be paid during the period of employment; but if there are other factors it seems to us that they come in at the beginning of the exercise and not after certain presumptions have been made.”⁶⁰⁴

Moreover, the judgment of the Employment Appeal Tribunal, which was upheld by the Court of Appeal, in that case suggests that even where there was an implied provision for payment during sickness, it was subject to deduction of social security sickness benefit received by the employee.⁶⁰⁵

Statutory sick pay

- 42-089 Part XI of the Social Security Contributions and Benefits Act 1992 provides for the payment of statutory sick pay by employers.⁶⁰⁶ The employee⁶⁰⁷ is entitled to statutory sick pay for days where three qualifying conditions are satisfied,⁶⁰⁸ namely, that the day in question (1) is part of a period of incapacity for work⁶⁰⁹; (2) falls within a period of entitlement⁶¹⁰; and (3) is a qualifying day.⁶¹¹ The entitlement derived from these conditions is then subjected to certain limitations.⁶¹² The overall effect⁶¹³ is that the employee is entitled to statutory sick pay for certain periods of incapacity up to a limit of 28 weeks' entitlement in any three years.⁶¹⁴ Each period of incapacity must consist of a minimum of four consecutive days; the days in question must be, in effect, working days or their equivalent; and the first three days of any one period⁶¹⁵ of incapacity are excluded.⁶¹⁶ There must be prescribed notification of incapacity for work to the employer.⁶¹⁷ Statutory sick pay is at prescribed rates, set by and under the Act,⁶¹⁸ subject to provisions for periodical review by the Secretary of State.⁶¹⁹ Provision was formerly but is no longer made, except in the case of small employers, for recovery by employers of amounts paid by way of statutory sick pay by setting such sums off against national insurance contributions or reclaiming them from the National Insurance Fund.⁶²⁰ Provision is also made to ensure that payments of statutory sick pay operate in discharge of liability to contractual remuneration and vice versa.⁶²¹

The determination of questions of entitlement to statutory sick pay is to be carried out by the national insurance adjudication system with some modifications.⁶²² Enforcement of entitlement as so determined is by County Court process.⁶²³ Provision is made to prevent employers from avoiding their liability to statutory sick pay by contracting out or by obliging an employee to make payments towards his or her statutory sick pay.⁶²⁴ It is suggested that the provisions for statutory sick pay do not affect the express or implied⁶²⁵ provisions of the contract of employment for sick pay or the continuance of remuneration during absence due to sickness, save insofar as the statute prevents the avoidance of statutory sick pay by contract,⁶²⁶ and insofar as it makes provision for mutual discharge of liabilities for statutory and for contractual sick pay.⁶²⁷

Remuneration during suspension from work on medical grounds

- 42-090 Employees engaged upon certain industrial processes involving potential health hazards may be temporarily suspended from their normal work, usually on the advice of an Employment Medical Adviser, under certain statutory health and safety regulations, or by reason of a recommendation in a code of practice issued or approved under [s.16 of the Health and Safety at Work, etc. Act 1974](#).⁶²⁸ The employment protection legislation gives the employee a right to be remunerated by their employer during suspension on medical grounds, for a period not exceeding 26 weeks.⁶²⁹ The employee cannot claim this right in respect of periods during which he or she is incapable of work by reason of disease or bodily or mental disablement⁶³⁰; he or she must at such times rely on such entitlement to sick pay or sickness or industrial injuries benefits as he or she may possess. Nor may the employee claim the right to remuneration on suspension on medical grounds, in respect of a time during which the employer has offered suitable alternative work and the employee has unreasonably refused to perform the work.⁶³¹ The amount of the entitlement is determined by the statutory concept of a week's pay.⁶³² The employer may set off any contractual remuneration the employer pays at such times against the statutory entitlement and vice versa.⁶³³ The employee may complain to an employment tribunal of the employer's failure to pay the statutory entitlement and the tribunal may order the employer to pay the amount due.⁶³⁴

Statutory maternity pay

- 42-091 Under the provisions of [Pt XII of the Social Security Contributions and Benefits Act 1992](#) as amended or expanded by statutory regulations, a woman who is or has been an employee is entitled to statutory maternity pay for a Maternity Pay Period of up to 52⁶³⁵ weeks where she satisfies the statutory conditions. A number of the provisions relating to statutory maternity pay either require regulations to be made, or enable other provisions to be defined or modified by regulations,

and reference should be made to the regulations which have been made in accordance with those provisions.⁶³⁶

Statutory paternity pay

- 42-092 Under the provisions of Pt XIIZA of the Social Security Contributions and Benefits Act 1992, inserted by the Employment Act 2002,⁶³⁷ as expanded by statutory regulations, an employee is entitled to statutory paternity pay for a Paternity Pay Period of up to two weeks where he satisfies the statutory conditions. The right to paternity pay is extended to the partner of an adopting parent, or to the member of an adopting couple who does not take adoption leave and pay.⁶³⁸ A number of the provisions relating to statutory paternity pay either require regulations to be made, or enable other provisions to be defined or modified by regulations, and reference should be made to the regulations which have been made in accordance with those provisions.⁶³⁹ The Work and Families Act 2006 conferred a further entitlement in certain circumstances to additional statutory paternity pay in the cases either of birth or adoption of a child.⁶⁴⁰

Statutory adoption pay

- 42-093 Under the provisions of Pt XIIIB of the Social Security Contributions and Benefits Act 1992, inserted by the Employment Act 2002,⁶⁴¹ as expanded by statutory regulations, an employee is entitled to statutory adoption pay for an Adoption Pay Period normally of 26 weeks where he satisfies the statutory conditions. The right to adoption pay applies to the adopting parent, or to the member of an adopting couple who elects to take it.⁶⁴² A number of the provisions relating to statutory adoption pay either require regulations to be made, or enable other provisions to be defined or modified by regulations, and reference should be made to the regulations which have been made in accordance with those provisions.⁶⁴³

Opportunity to earn and the right of lay-off

- 42-094 Where the employee's remuneration is dependent upon the number of hours he works within each week or upon the amount of his or her output (as in piece-work systems or systems of payment by commission) the question arises whether the employer impliedly contracts not only to pay for work done but also to provide a certain minimum remunerative opportunity for the employee and to make good any shortfall below that minimum. There is some older authority to the effect that the courts will imply an obligation on the employer's part to provide the piece-work employee with

the opportunity in each week to earn a reasonable average rate of remuneration for the employment concerned.⁶⁴⁴ On the other hand, older authorities suggest that a contract which contains no such obligation at all on the employer's part will be void for want of mutuality where the employee is under some obligation to work.⁶⁴⁵ Another approach to the same problem is to consider the extent to which the employer is entitled to lay the employee off work; that is to say, to suspend contractual working (and remuneration accordingly) by reason of lack of available work to be done.⁶⁴⁶ There is older authority implying in the employer's favour a wide right of lay-off—the leading case was that of a coal-mining company which successfully asserted the right to lay off underground workers (without remuneration) while the workings underwent maintenance.⁶⁴⁷ In *Bond v CAV Ltd*⁶⁴⁸ it was said that it is plain that there is no general right to lay off without pay at common law, and that such a right exists only in very limited circumstances. If such an issue were to recur, the employer would probably have to base the claim to a right of lay-off on the existence of a practice of lay-off in the particular employment concerned, and would have to show the practice to have contractual force. It is unlikely that such a claim could be based on a term implied in the contracts of piece-workers generally. It is also thought that an arrangement purporting to give the employer an *unlimited* right of lay-off should not be classified as a continuous contract of employment; or, in other words, that in such a case no contract of employment subsists between periods of contractual working.⁶⁴⁹ In *Dakri & Co Ltd v Tiffen*,⁶⁵⁰ it was said that “unless a time was specified in the contract, then the law implies that the lay-off is to be for not more than a reasonable time”. In practice, the employer's right of lay-off is often curtailed by guaranteed pay provisions, which are considered in the next paragraph.

Provisions for guaranteed remuneration

- 42-095 There are various kinds of provision by which employees whose remuneration depends upon actual work rather than their availability for work are partly protected from the consequences of being laid off work or put on short-time working by a guarantee of minimum remuneration in those circumstances. In many cases such provision is, or at least used to be, made as a term in individual contracts of employment incorporating the results of collective bargaining.⁶⁵¹ Where the individual contract contains such a term, the unilateral suspension by the employer of the guaranteed pay agreement has been held to constitute a repudiatory breach of contract by the employer.⁶⁵² Another source of guaranteed pay provisions used to be wages regulation orders emanating from Wages Councils,⁶⁵³ which frequently resulted in the incorporation of such provisions as terms in the contracts of employment of employees within the particular industries concerned.⁶⁵⁴ A further innovation in this direction was made originally by the *Contracts of Employment Act 1963*⁶⁵⁵ which provided a scheme of guaranteed minimum remuneration during the minimum periods of notice required by that Act.⁶⁵⁶ The next development was the creation of a general right of employees to guarantee payments under the *Employment Protection Act 1975*. Under these provisions, as re-enacted in the *Employment Rights Act 1996*, an employee is

entitled to a guarantee payment from his employer if his or her employer fails to provide him with work on a normal working day.⁶⁵⁷ The employee must have been continuously employed by the employer for not less than one month before the day concerned.⁶⁵⁸ An employee is not entitled to a guarantee payment if the failure to provide him or her with work is the consequence of industrial action involving any employee of his or her employer or of an associated employer.⁶⁵⁹ Nor will an employee be entitled to a guarantee payment if the employer has offered the employee suitable alternative work and he or she has unreasonably refused that offer.⁶⁶⁰ The guarantee payment is payable only where the employee has a pattern of normal working hours⁶⁶¹ as statutorily defined.⁶⁶² The payment is calculated on a basis which approximates the guarantee payment to the employee's normal week's pay for his or her statutory "normal working hours".⁶⁶³ The guarantee payment is, however, limited to a prescribed sum,⁶⁶⁴ and the entitlement to it is limited to a maximum of five days, or the employee's number of working days in a normal week if that is less than five,⁶⁶⁵ in any period of three months.⁶⁶⁶ Contractual remuneration paid by the employer may be set off against the obligation to make guarantee payments (and vice versa),⁶⁶⁷ so that the employee whose remuneration is not dependent on being provided with work on particular days will automatically receive remuneration satisfying the obligation to make guarantee payments.⁶⁶⁸ The employee has a right to complain to an employment tribunal that his or her employer has failed to make a guarantee payment,⁶⁶⁹ and the tribunal may order the payment of the amount of guarantee payment due.⁶⁷⁰ The Secretary of State is given extensive powers to vary the limits upon and method of calculation of guarantee payments.⁶⁷¹

Payment during disciplinary suspension

- 42-096 Since suspension from work is often in practice a part of the disciplinary procedures used by employers, it is important to consider the circumstances in which the employee will or will not be entitled to remuneration in respect of a period of disciplinary suspension. There is no generally implied contractual right on the part of employers to suspend employees without pay on disciplinary grounds.⁶⁷² It must be shown that there is an express or implied term in the particular contract justifying this inroad upon the employer's normal obligations to the employee; and written particulars of such terms must now be given to employees.⁶⁷³ It has been held that the contractual provision of a particular procedure for disciplinary suspension will exclude any right of disciplinary suspension outside that procedure,⁶⁷⁴ and it seems that disciplinary suspension cannot be justified by reference to the employer's contractual right to *dismiss* for misconduct.⁶⁷⁵ An express right to disciplinary suspension has, however, been construed as a right to impose suspension with loss of pay,⁶⁷⁶ and such loss of pay may be inherent in the method of calculation of remuneration or otherwise be indicated as the intention of the parties.⁶⁷⁷ Although disciplinary suspension without pay results in a kind of deduction from wages, it was held⁶⁷⁸ that when the

right to suspend was suitably formulated, it fell outside the prohibitions upon deductions then contained in the Truck Acts.⁶⁷⁹ Similarly, disciplinary suspension without pay would probably not constitute a deduction from wages contravening s.14 of the Employment Rights Act 1996⁶⁸⁰ and in any event would not do so where the disciplinary suspension was authorised by any provision of the contract of employment which had been notified in writing to the worker concerned,⁶⁸¹ or where it was imposed on account of the worker's having taken part in any industrial action.⁶⁸²

The effect of industrial action upon entitlement to remuneration

42-097 In *Henthorn and Taylor v CEGB*,⁶⁸³ the Court of Appeal held that there was a general common law principle that a plaintiff who claims that he or she is entitled to be paid money under a contract which he or she alleges the defendant has broken must prove that he or she was ready and willing to perform the contract; and that this rule meant that an employer sued for wages could plead that employees who had been "working to rule" had not been ready and willing to perform their part of the contract, without thereby assuming the burden of so proving. This doctrine not only serves to explain why an employee is not entitled to remuneration while striking, but also suggests that an employee may readily be found to have disentitled themselves from remuneration not only by taking part in a "go-slow" or a "work-to-rule" but also by associating themselves with threats of future industrial action.⁶⁸⁴ It is a doctrine which in effect may give the employer indirectly a power of lock-out which is not directly conceded by the common law of implied terms of the contract of employment.⁶⁸⁵ It is arguable that the common law doctrine in question, when properly understood, should disable the employee from claiming to be "ready and willing" only when his or her conduct amounts to a repudiation of his contract or a breach going to the root of it.⁶⁸⁶ Several decisions have confirmed the existence of this common law doctrine and its applicability to industrial action.⁶⁸⁷ These cases show that if the industrial action consists of a partial or conditional refusal to perform the employee's contractual duties, and if the employer accepts the partial or conditional performance offered by the employee,⁶⁸⁸ then the employee is entitled to the appropriate proportion of his ordinary remuneration. It is not yet clear whether and in what circumstances that proportion is arrived at by, on the one hand, applying the principle of equitable set-off,⁶⁸⁹ or, on the other hand, calculating remuneration due on a quantum meruit basis.⁶⁹⁰ If the employer makes it quite clear that a partial or conditional performance of contractual duties is not acceptable as substantial performance of those duties, then that partial or conditional performance does not entitle the employee to any remuneration; it is as if there has been no performance.⁶⁹¹

Remuneration during statutory time off

42-098

The **Employment Protection Act 1975** and the **Employment Act 1980** conferred upon employees the right in certain circumstances to time off work for particular purposes. These, as contained in the **Trade Union and Labour Relations (Consolidation) Act 1992** and **Employment Rights Act 1996** are: for carrying out trade union duties,⁶⁹² for taking part in trade union activities,⁶⁹³ for performing public duties,⁶⁹⁴ to look for work or make arrangements for training in the case of employees declared redundant,⁶⁹⁵ or for ante-natal care.⁶⁹⁶ These rights are described later⁶⁹⁷; reference is made to them here because the employee is in some cases given a statutory right to remuneration during such time off, so that these rights are in those cases also rights to guaranteed *remuneration* during absence from work for the recognised statutory purposes. The statutory rights to time off include a right to guaranteed remuneration in the case of time off for carrying out trade union duties,⁶⁹⁸ and in the case of time off to look for work or make arrangements for training.⁶⁹⁹ In the case of time off for carrying out trade union duties, the guaranteed remuneration is calculated as the amount the employee would have received for that time spent at work if he or she is paid solely with reference to time.⁷⁰⁰ If he or she is paid partly by reference to the amount of work done, the payment is arrived at by applying the employee's average hourly earnings rate to the time spent off work.⁷⁰¹ The amount of contractual remuneration paid in respect of such a period of time off may be set off against this statutory liability and vice versa.⁷⁰² The employee may complain to an employment tribunal of failure to make the statutory payment⁷⁰³ and an employment tribunal finding the complaint substantiated must order the payment to be made.⁷⁰⁴ In the case of time off to look for work or to make arrangements for training, the guaranteed remuneration is calculated on the generally more restrictive basis of an "appropriate hourly rate"⁷⁰⁵ arrived at by applying the statutory "week's pay"⁷⁰⁶ to the statutory "normal working hours"⁷⁰⁷ for the employee concerned. The amount is in this case also limited to two-fifths of one week's pay for the employee concerned.⁷⁰⁸ The relationship to contractual remuneration and the enforcement mechanism are the same as in relation to remuneration for time off for union duties.⁷⁰⁹ In the case of the right to time off for ante-natal care, also, an "appropriate hourly rate" of remuneration is defined,⁷¹⁰ and the usual sort of provisions are made with regard to the relationship with contractual remuneration⁷¹¹ and to enforcement.⁷¹² In the case of the rights to time off which do not include a statutory right to guaranteed remuneration,⁷¹³ it will depend upon the nature and construction of the contract of employment whether the employee loses remuneration in respect of the time spent off work. If the remuneration is normally varied with reference to the time spent at work within each week, the employee will lose remuneration by virtue of the application of that normal pattern, unless a particular agreement to the contrary can be implied.

Equality of pay between men and women

- 42-099 Employers were placed by the **Equal Pay Act 1970** (as subsequently amended by, in particular, the **Equal Pay (Amendment) Regulations 1983**⁷¹⁴ and the **Sex Discrimination Act 1986** and the

Employment Equality (Sex Discrimination) Regulations 2005⁷¹⁵) under obligations to eliminate certain inequalities of pay between men and women. Despite the title of the Act, however, these obligations were not confined to remuneration but extend to all terms and conditions of employment. Corresponding provisions are now made by the **Equality Act 2010** and those provisions of the **Equal Pay Act** are accordingly considered in later paragraphs under the broader head of equality of terms and conditions of employment between men and women.⁷¹⁶ Inequalities of treatment as between men and women employees (including inequalities in relation to pay) are also now subject to the wider provisions concerning sex discrimination in employment which were originally made by the **Sex Discrimination Act 1975**, and were then amended by the **Sex Discrimination Act 1986**. Corresponding provisions are now made by the **Equality Act 2010** which are considered in later paragraphs⁷¹⁷ under the general heading of sex discrimination in the treatment of employees.

The right to itemised statements of pay and deductions

- 42-100 Under Pt I of the **Employment Rights Act 1996**, an employer is obliged to give each employee an itemised pay statement at the time of each payment of wages or salary.⁷¹⁸ The statement must give particulars of the gross amount of the remuneration, any deductions and the purpose for which they have been made, of the net amount of the remuneration and the amount and method of any part payment made in a different way⁷¹⁹ (such as in kind to the extent permissible).⁷²⁰ Fixed deductions may be dealt with by a standing statement of fixed deductions made in writing and particularising the amount, frequency and purpose of each deduction; if such a standing statement is made, it will be effective for 12 months to reduce the employer's duty to particularise fixed deductions in each itemised pay statement so that it becomes a duty simply to give the aggregate amount of the fixed deductions described in the standing statement.⁷²¹ The standing statement may be kept up-to-date by written notice to the employee,⁷²² but there must be a re-issue of the statement in a consolidated form each year.⁷²³ An employee who complains of failure to give him or her an itemised pay statement may refer to an employment tribunal the question of what particulars ought to have been given.⁷²⁴ When a reference is made to a tribunal in these cases, the tribunal shall, where it finds a deficiency, make a declaration to that effect,⁷²⁵ and may in addition order the employer to repay to the employee any un-notified deductions made during the 13 weeks preceding the application to the tribunal.⁷²⁶

The protection of wages legislation

- 42-101 Before 1986, a number of restrictions were placed upon payment of wages in kind, deductions from wages, and payment of money wages other than in cash, by the **Truck Acts 1831–1940** as

modified by the [Payment of Wages Act 1960](#). That legislation was repealed⁷²⁷ and replaced by [Pt I of the Wages Act 1986](#). That Act imposed certain general restrictions on deductions made from workers' wages, or payments received from workers, by their employers⁷²⁸; it also imposed restrictions on deductions from wages, or payments by workers, in retail employment, on account of cash shortages or stock deficiencies⁷²⁹; and provided for complaint to an employment tribunal in respect of contraventions.⁷³⁰ The [Wages Act 1986](#) has subsequently been consolidated into the [Employment Rights Act 1996](#). The relevant provisions are described in greater detail in the next two paragraphs. They extend to Crown employment,⁷³¹ and there is power to extend them to employment outside the United Kingdom.⁷³² The remedy for any contravention of them is by way of complaint to an employment tribunal as provided by the statute, and not otherwise⁷³³; a provision in an agreement is void so far as it purports to limit or exclude them, or to preclude complaint of contravention unless it is a settlement promoted by a conciliation officer.⁷³⁴ Provision is made to ensure that complaint can also be made that a deduction has not been itemised as required by [ss.11 and 12 of the Employment Rights Act 1996](#),⁷³⁵ but double recovery is prevented.⁷³⁶ A complaint to an employment tribunal must be brought within three months of the deficient wage payment or the payment by the worker which is in issue (or of the latest of a series of such) or, if that is not reasonably practicable, within such further period as the tribunal considers to be so.⁷³⁷ The remedies consist of a declaration and an order to the employer to pay or repay as necessary to repair the contravention.⁷³⁸

General restrictions on deductions made, or payments received, by employers

42-102 Under [ss.13–15 of the Employment Rights Act 1996](#), an employer shall not make any deduction from any wages of any worker employed by him or her,⁷³⁹ or receive any payment from any worker employed by him or her,⁷⁴⁰ unless the deduction or payment is made by virtue of any statutory provision or any provision of the worker's contract,⁷⁴¹ or the worker has previously agreed to it in writing.⁷⁴² A provision in a worker's contract must, in order to sustain a deduction or payment, be comprised in a written term previously copied by the employer to the worker⁷⁴³ or in a term whose effect the employer has previously notified in writing to the worker.⁷⁴⁴ These requirements do not apply to deductions or payments:

- (1)by way of reimbursement of the employer in respect of overpayment of wages or in respect of expenses⁷⁴⁵;
- (2)in consequence of statutory disciplinary proceedings⁷⁴⁶;
- (3)in pursuance of a duty on the part of the employer to deduct and pay over to a public authority⁷⁴⁷;

(4)in pursuance of an arrangement for deduction and payment over to a third person to which the worker has previously agreed in writing⁷⁴⁸;

(5)on account of the worker having taken part in a strike or other industrial action⁷⁴⁹; or

(6)in satisfaction of a court or tribunal order for payment by the worker to the employer.⁷⁵⁰

The wages which are protected include:

(1)any fee, bonus, commission, holiday pay or other emolument referable to the employment⁷⁵¹;

(2)any sum payable under a statutory reinstatement or re-engagement order or a statutory order for the continuation of a contract of employment⁷⁵²;

(3)a statutory guarantee payment or other statutory payment in lieu of wages, statutory sick pay or maternity, paternity, or adoption pay⁷⁵³; and

(4)any payment in the nature of a non-contractual bonus.⁷⁵⁴

Specifically excluded, however, are:

(1)payments by way of advance under a loan agreement by way of advance of wages,⁷⁵⁵ or any payment of expenses⁷⁵⁶;

(2)any payment by way of a pension, retirement gratuity or compensation for loss of office or redundancy payment⁷⁵⁷;

(3)any payment to the worker other than in the capacity of a worker⁷⁵⁸; and

(4)any payment or benefit in kind, unless it is a voucher or stamp with a fixed money value and capable of being exchanged for money, goods or services.⁷⁵⁹

A worker is defined for this purpose as a person who has entered into or works under a contract of service, of apprenticeship, or for the personal performance of any work or services unless for a client or customer of a profession or business undertaking carried on by that person.⁷⁶⁰ Any deficiency, in the amount of wages paid on a particular occasion compared with the amount of wages properly payable on that occasion qualifies as a deduction from the wages, except insofar as it is attributable to an error of computation of the gross amount of wages then payable.⁷⁶¹ It was held in *Bruce v Wiggins Teape (Stationery) Ltd*⁷⁶² that unilateral reduction of wages by the employer might amount to unauthorised deduction within the meaning of the Act. The complete withholding of a week's wages has been held to constitute a deduction within the meaning of the statute.⁷⁶³ In *New Century Cleaning Co Ltd v Church*,⁷⁶⁴ the reduction of the job rates or piece rates for work which determined the amount of wages under a team-working payment system was held not to amount to an unauthorised deduction from payable wages within the meaning of the Act. Compare also the decision of the Employment Appeal Tribunal in *Davies v Wyatt (Decorators) Ltd*⁷⁶⁵ where it was held that a unilateral reduction of wages in order to discharge the employer's liability under the *Working Time Regulations*⁷⁶⁶ to provide for paid leave resulted in an unauthorised and unlawful deduction from wages. In *Delaney v RJ Staples*,⁷⁶⁷ the House of

Lords held that payment in lieu of notice, being related to the termination of employment, did not come within the definition of wages for this purpose.

Deductions from wages of and payments by workers in retail employment

- 42-103 Part II of the Employment Rights Act 1996 also provides for certain additional protection in the case of workers in retail employment,⁷⁶⁸ the essence of which is that deductions from the wages of such workers, and payments by such workers to their employers, on account of a cash shortage or stock deficiency, may not in aggregate exceed 10 per cent of the gross wages payable to the worker on the pay day in question⁷⁶⁹ (though that requirement does not apply in relation to such deductions from the final instalment of wages, or to such payments made at or after the time of the payment of the final instalment of wages).⁷⁷⁰ Moreover, such a payment may only be received by the employer if the employer has previously notified the worker in writing of the worker's total liability to him or her in respect of the shortage or deficiency in question, and has made the demand for the payment in writing on a pay day not before the notification of total liability.⁷⁷¹ Furthermore, such a deduction or the first in a series of such deductions, or a demand for such a payment or the first in a series of demands for such payments, may only be made within 12 months of the employer's establishing the existence of the cash shortage or stock deficiency in question, or of any earlier date when he or she ought reasonably to have established it.⁷⁷² *Retail employment* is defined in terms of the carrying out of retail transactions (meaning the sale or supply of goods or supply of services) directly with members of the public or with fellow workers or other individuals in their personal capacities, or the collection of amounts payable in connection therewith.⁷⁷³

Attachment of earnings

- 42-104 In some instances an employer may lawfully make deductions from remuneration in implementation of judicial orders attaching earnings of the employee in execution of judgment debts and certain other court orders. The wages of "servants, labourers or workmen" were the subject of special legislation excluding attachment orders⁷⁷⁴ but this was overridden by subsequent legislation later consolidated into the Attachment of Earnings Act 1971.⁷⁷⁵ Under that Act, various courts have power to make an attachment of earnings order to secure payments under a maintenance order, or the payment of certain judgment debts, or payments under an administration order, or the payment of any sum adjudged to be paid by a conviction, or by a legal aid contribution order.⁷⁷⁶ An attachment of earnings order requires the employer to make periodical deductions from the debtor's earnings and to pay them to the collecting officer of the court.⁷⁷⁷ On each occasion on which the employer makes a deduction from the debtor's earnings in compliance with an attachment order, he or she must give the debtor a statement in writing of the total amount of

the deduction.⁷⁷⁸ He or she may presumably include this in a statutory itemised pay statement,⁷⁷⁹ but it will presumably not be sufficient to deal with it by a statutory standing statement of fixed deductions.⁷⁸⁰ The employer is authorised to make a small deduction from the remuneration of the employee concerned, at a rate determined under the legislation, towards his administrative expenses while he or she is implementing an attachment order.⁷⁸¹

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 531 On the employer's right to make a deduction on account of bad work, see below, para.42-102.
- 532 e.g. *Aris-Bainbridge v Turner Manufacturing Co* [1951] 1 K.B. 563 (HC) (commission payable on the annual turnover of an employer's business: lump-sum payments under settlements of wartime contracts held to be included in the turnover). Compare *Judge v Crown Leisure Ltd* [2005] EWCA Civ 571, [2005] I.R.L.R. 823, where the Court of Appeal upheld a decision of an employment tribunal that a verbal promise at a Christmas party eventually to place the claimant on the same salary scale as another employee was too indefinite to have contractual force, rejecting, however, the argument that this was a question of intention to create legal relations. Compare now also *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394, [2013] 3 All E.R. 607, where it had been held that an announcement of a "guaranteed" minimum bonus paid could be regarded as "the stuff of contractual obligation" although communicated in a collective informal "town hall forum" to a workforce at large.
- 533 See above, paras 42-049 et seq.
- 534 See above, paras 42-051 et seq.
- 535 See above, paras 42-057—42-059.
- 536 See below, paras 42-087—42-088.
- 537 *Landman v Entwistle* (1852) 7 Ex. 632; *De Vries v Corner* (1866) 13 L.T. 636.
- 538 *Napier v National Business Agency Ltd* [1951] 2 All E.R. 264. See above, para.42-039 and cases there cited.
- 539 *Cresswell v Board of Inland Revenue* [1984] I.C.R. 508. cf. also below, para.42-097 (effect of industrial action upon entitlement to remuneration).
- 540 [2002] I.C.R. 1045.
- 541 [2000] I.R.L.R. 766. Compare also *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] I.C.R. 402; the decisions of the High Court in *Takacs v Barclays Services Jersey Ltd* [2006] I.R.L.R. 877, QBD and of the Court of Appeal in *Keen v Commerzbank AG* [2006] EWCA Civ 1536, [2007] I.C.R. 623, below, para.42-156; *Khatri*

- v *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA* [2010] EWCA Civ 397, where the requirement of rational exercise of discretions with regard to the awarding of bonuses was reaffirmed. See also *GX Networks Ltd v Greenland* [2010] EWCA Civ 784 where the Court of Appeal was similarly reluctant to treat as unfettered an employer's discretion, expressed to be "by exception only", to cap an employee's commission on sales; *Rutherford v Seymour Pierce Ltd* [2010] EWHC 375 (QB), [2010] I.R.L.R 606 where at first instance an implied term, allegedly customary within the City of London, requiring that the employee must in order to qualify for a bonus be still employed at the time due for payment, was rejected as not being necessary to give business efficacy to the contract, as not being equitable and reasonable, and as not representing a notorious, invariable, or certain custom.
- 542 *Way v Latilla Ltd* [1937] 3 All E.R. 759. See also *Higgins v Hopkins* (1848) 3 Exch. 163, 166; *Hulse v Hulse* (1856) 17 C.B. 711; *Lamburn v Cruden* (1841) 2 M. & G. 253; *Reeve v Reeve* (1858) 1 F. & F. 280.
- 543 If the services were to be performed gratuitously, there will normally be no valid contract because of the absence of consideration: *Lees v Whitcomb* (1828) 5 Bing. 34; Vol.I, Ch.6.
- 544 *Morrison v Baillie* (1855) 2 Macq.H.L. 80; *Price v Hong Kong Tea Co* (1861) 2 F. & F. 466; *Att-Gen v Drapers' Co* (1869) L.R. 9 Eq. 69; *North v Bassett* [1892] 1 Q.B. 333; cf. *Brown v Nairne* (1839) 9 C. & P. 204. Compare *Driver v Air India Ltd* [2011] EWCA Civ 830 where the Court of Appeal rejected the employer's contention that payment for overtime was discretionary as being contrary to the general position that where a contractual payment was not specified, the law implied a reasonable sum. As to implied terms generally, see Vol.I, Ch.16; as to quantum meruit claims generally, see Vol.I, paras 32-004, 32-077—32-081.
- 545 *Way v Latilla Ltd* [1937] 3 All E.R. 759, HL.
- 546 *Powell v Braun* [1954] 1 W.L.R. 401; see *WPM Retail Ltd v Lang* [1978] I.C.R. 787; cf. *William Sindall Ltd v North West Thames RHA* [1977] I.C.R. 294.
- 547 *Taylor v Brewer* (1813) 1 M. & S. 290; *Roberts v Smith* (1859) 4 Hurl. & N. 315. cf. *Jewry v Busk* (1814) 5 Taunt. 302.
- 548 See also see below, para.42-094 for the question of whether a contract of employment must provide the employee with *some* degree of remunerative opportunity.
- 549 *Bryant v Flight* (1839) 5 M. & W. 114. But see *Obu v A Strauss & Co Ltd* [1951] A.C. 243, 250.
- 550 *Re Richmond Gate Property Co Ltd* [1965] 1 W.L.R. 335, see Vol.I, para.32-090.
- 551 [1997] I.C.R. 25.
- 552 Employment Rights Act 1996 s.1(4).
- 553 Employment Rights Act 1996 ss.8–12.
- 554 See below, para.42-100.
- 555 See Freedland, The Personal Employment Contract (2003), pp.60–64. It was held in *102 Social Club Ltd v Bickerton* [1977] I.C.R. 911 that receipt of an honorarium did not create a contract of employment.
- 556 In force at various dates from April 1999 (SI 1998/2574).
- 557 The National Minimum Wage Regulations 2015 (SI 2015/621) consolidate and update all previous Regulations enacted under the National Minimum Wage Act 1998.
- 558 See s.54.

- 559 As to which compare *Chassis & Cab Specialist Ltd v Lee [2011] UKEAT/0268/10/JOJ*.
- 560 See ss.34, 35.
- 561 See s.41. Trainees on Government training schemes are excluded by virtue of the **National Minimum Wage Regulations 1999 (Amendment) Regulations 2001 (SI 2001/1108)** in force from 1 May 2001.
- 562 *[2009] EWCA Civ 361, [2007] I.C.R. 1123*.
- 563 *Whittlestone v BJP Home Support Ltd [2014] I.C.R. 275, EAT*; cf. *Esparon (t/a Middle West Residential Care Home) v Slavikovska [2014] I.R.L.R. 598, EAT*. Different considerations may apply where the worker's home was her place of work: *Shannon v Rampersad (t/a Clifton House Residential Home) [2015] I.R.L.R. 982, EAT*.
- ⑤64 *[2021] UKSC 8, [2022] 1 All E.R. 497*.
- 565 See ss.2–8.
- 566 See s.17.
- 567 See s.20. The Employment Relations Act 2004 ss.44–46 made extensive additions and amendments to the regime for the enforcement of the national minimum wage, with effect from 6 April 2005.
- 568 See ss.23–25. The enforcement mechanisms were further reinforced, with effect from July 2003, by the provisions of the **National Minimum Wage Enforcement Notices Act 2003**. The **Employment Act 2008** ss.8–12 made further additions and amendments to the regime for the enforcement of the national minimum wage, with effect from April 2009. Section 152 of the **Small Business, Enterprise and Employment Act 2015** modified s.19A of the National Minimum Wage Act 1998 to increase the relevant financial penalties.
- ⑤69 As well as the nature of the contractual arrangement, such as zero-hours provisions: *Agbeze v Barnet, Enfield and Haringey Mental Health NHS Trust [2022] I.R.L.R. 115*, EAT.
- 570 See above, paras 42–049 et seq.
- 571 See above, paras 42–051 et seq.
- 572 Employment Rights Act 1996 s.1(4)(d)(i).
- 573 Employment Rights Act 1996 s.1(4)(d)(i). Voluntary overtime cannot automatically be excluded for such purposes: *Patterson v Castlereagh BC [2015] NICA 47*.
- 574 SI 1998/1833 in force from 1 October 1998. See reg.13 as amended by the **Working Time (Amendment) Regulations 2001 (SI 2001/3256)**.
- 575 See below, para.42–115.
- 576 *[2014] 3 C.M.L.R. 53, [2014] I.C.R. 813*. For the domestic follow-up, see *Lock v British Gas Trading Ltd [2016] EWCA Civ 983, [2016] I.R.L.R. 946*.
- 577 *[2017] I.R.L.R. 870, EAT*.
- 578 *[2019] EWCA Civ 1402*.
- 579 *C-214/16 EU:C:2017:914 (CJEU), [2018] 2 C.M.L.R. 10*.
- ⑤80 *Smith v Pimlico Plumbers Ltd [2022] EWCA Civ 70, [2022] I.C.R. 818*.
- 581 *[2004] EWCA Civ 422, [2004] 2 C.M.L.R. 45*.

- 582 *C-131/04 and C-257/04 EU:C:2006:177*, [2006] *I.C.R.* 932.
583 [2007] *I.R.L.R.* 678.
584 [2012] *EWCA Civ 1034*, [2012] *4 All E.R.* 1006.
585 *C-118/13 EU:C:2014:1755 (CJEU)*.
586 Employment Rights Act 1996 s.1(4)(d)(ii).
587 Employment Rights Act 1996 s.88(1).
588 e.g. where there was a notice in the place of employment that half-pay up to a total of 21 days a year would be paid *as a matter of grace* during illness: *Petrie v Mac Fisheries Ltd [1940]* *1 K.B.* 258; or where the employee had been ill on several previous occasions and had not asked for nor been paid any wages: *O'Grady v Saper Ltd [1940]* *2 K.B.* 469.
589 *Petrie v Mac Fisheries [1940]* *1 K.B.* 258; *O'Grady v Saper Ltd [1940]* *2 K.B.* 469.
590 *K v Raschen* (1878) 38 *L.T.* 38.
591 *Niblett v Midland Ry* (1907) 23 *T.L.R.* 240.
592 cf. *Marrison v Bell [1939]* *2 K.B.* 187.
593 *Hancock v BSA Tools Ltd [1939]* *4 All E.R.* 538.
594 See *Browning v Crumlin Valley Collieries [1926]* *1 K.B.* 522.
595 *Petrie v Mac Fisheries Ltd [1940]* *1 K.B.* 258; *O'Grady v M Saper Ltd [1940]* *2 K.B.* 469; *Hancock v BSA Tools Ltd [1939]* *4 All E.R.* 538. See also *Lord Denning (1939) 55 L.Q.R.* 353.
596 *Cuckson v Stones* (1859) *1 E. & E.* 248; *Warren v Whittingham* (1902) 18 *T.L.R.* 508; *Marrison v Bell [1939]* *2 K.B.* 187. The headnote is inaccurate: *O'Grady v Saper Ltd [1940]* *2 K.B.* 469, 473.
597 [2000] *I.R.L.R.* 765.
598 *Howman & Son v Blyth [1983]* *I.C.R.* 416.
599 Compare *Aspden v Webbs Poultry & Meat Group (Holdings) Ltd [1996]* *I.R.L.R.* 521. (As to the effect on such a scheme of the termination of the insurance policy which supports it, compare *Bainbridge v Circuit Foil (UK) Ltd [1997]* *I.C.R.* 541). See also, in the disability context, *Awan v ICTS UK Ltd [2019]* *I.C.R.* 696.
600 [1960] *1 W.L.R.* 1055.
601 [1960] *1 W.L.R.* 1055 at 1064–1065.
602 [1981] *I.C.R.* 409, *EAT*; upheld by the Court of Appeal [1982] *I.R.L.R.* 183.
603 See above, para.42-087.
604 [1981] *I.C.R.* 409, 419C–D, per Slynn J, a passage adopted by the Court of Appeal [1982] *I.R.L.R.* 183, 189.
605 [1981] *I.C.R.* 409 at 419D–421B, distinguishing *Sun and Sand Ltd v Fitzjohn [1979]* *I.C.R.* 268 as based upon a concession by counsel for the employers.
606 The Statutory Sick Pay Scheme has been in force since 6 April 1983. For details of its operation, reference should be made to the following regulations: Statutory Sick Pay (General) Regulations 1982 (SI 1982/894); Statutory Sick Pay (Compensation of Employers and Miscellaneous Provisions) Regulations 1983 (SI 1983/376); Statutory Sick Pay (General) Amendment Regulations 1985 (SI 1985/126); Statutory Sick Pay (Additional Compensation of Employers and Consequential Amendments) Regulations 1985 (SI 1985/1411) and successive amending regulations.

- 607 Defined in s.163(1).
- 608 s.151(1).
- 609 As defined by s.152.
- 610 Defined by s.153.
- 611 See s.154.
- 612 By s.155.
- 613 This is necessarily a simplification, and further reference should be made to the detailed provisions of ss.152–155 and regulations for which provision is made by ss.153(5), 153(10), 155(5), 152(4).
- 614 See ss.155 as amended by the Social Security (Incapacity for Work) Act 1994 s.8 and SI 1982/894.
- 615 Periods of incapacity separated by no more than two weeks are consolidated together by s.152(3).
- 616 See ss.152(2), (3), (4), (6), 154, 155(1).
- 617 s.156 and regulations made under s.156(1).
- 618 s.157(1), (3).
- 619 s.157(2).
- 620 s.159 and regulations made thereunder. The Statutory Sick Pay Act 1994 removed the right of employers, other than small employers, to recover sums paid by them by way of statutory sick pay.
- 621 s.160 and Sch.2.
- 622 Statutory Sick Pay Percentage Threshold Order 1995 (SI 1995/512).
- 623 Statutory Sick Pay Percentage Threshold Order 1995 (SI 1995/512).
- 624 s.151(2).
- 625 See above, paras 42-087—42-088.
- 626 See s.151(2), (3) of the 1992 Act.
- 627 See s.160 and Sch.12 para.2 of the 1992 Act.
- 628 See Employment Rights Act 1996 s.64; and the Employment Protection (Medical Suspension) Order 1980 (SI 1980/1581).
- 629 Employment Rights Act 1996 s.64; subject to the exclusion in s.199(2) (share fishermen).
- 630 Employment Rights Act 1996 s.65(3).
- 631 Employment Rights Act 1996 s.65(4)(a) (see also s.65(4)(b)—compliance with employer's reasonable requirements to ensure the availability of his services).
- 632 Employment Rights Act 1996 s.69(1) and ss.220–229.
- 633 Employment Rights Act 1996 s.69(3).
- 634 Employment Rights Act 1996 s.70.
- 635 Increased from 26 weeks by s.1 of the Work and Families Act 2006 as from 1 October 2006.
- 636 Especially the Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960), as lately amended by the Social Security, Statutory Maternity Pay and Statutory Sick Pay (Miscellaneous Amendments) Regulations 2002 (SI 2002/2690).
- 637 s.2, as from 8 December 2002, the entitlement to statutory paternity pay taking effect from 6 April 2003.

- 638 See s.171ZB of the Social Security Contributions and Benefits Act 1992 and Pt 3 of the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002/2822).
- 639 Especially the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002/2822).
- 640 ss.6–10, inserting new ss.171ZEA–171ZEE to the 1992 Act.
- 641 s.4, as from December 2002, the entitlement to statutory adoption pay taking effect from April 2003.
- 642 See s.171ZL(2) of the Social Security Contributions and Benefits Act 1992.
- 643 Especially the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002/2822).
- 644 *Devonald v Rosser & Sons* [1906] 2 K.B. 728.
- 645 *R. v Welch* (1853) 2 El. & Bl. 357; *Whittle v Frankland* (1862) 2 B. & S. 49; *Thomas v Vivian* (1872) 37 J.P. 228. (These cases recognise a wide but not unlimited right to lay the employee off.)
- 646 In *Johnson v Cross* [1977] I.C.R. 872, the Employment Appeal Tribunal duly applied *Devonald v Rosser & Sons* as representing a restriction on the employer's power of lay-off, but rather curiously interpreted that restriction as amounting to a duty to provide a reasonable level of work for the one week's minimum period of notice required of the employee by the contracts of employment legislation, see below, para.42–168.
- 647 *Browning v Crumlin Valley Collieries Ltd* [1926] 1 K.B. 522. This was treated, questionably, as a case where the stoppage of work was beyond the employer's control. See also the cases cited in the previous and the next note.
- 648 [1983] I.R.L.R. 360, 366.
- 649 The decision to the contrary in *Puttick v John Wright & Sons Ltd* [1972] I.C.R. 457 was necessary for the avoidance of an injustice in the particular circumstances.
- 650 [1981] I.C.R. 256, 260C. Compare, however, *Craig v Bob Lindfield & Son Ltd* [2016] I.C.R. 527, EAT.
- 651 Some details are given in Freedland, *The Contract of Employment* (1976), pp.93–95.
- 652 *Powell Duffryn Ltd v House* [1974] I.C.R. 123.
- 653 Wages Councils were abolished by s.35 of Trade Union Reform and Employment Rights Act 1993.
- 654 See Freedland at pp.92–93.
- 655 First consolidated into the Contracts of Employment Act 1972 and then into the Employment Protection (Consolidation) Act 1978 and then consolidated into the Employment Rights Act 1996.
- 656 See now Employment Rights Act 1996 s.87(3) and ss.88–91.
- 657 ss.28–35 (excluding share fisherman: s.199). For guidance on the interpretation of s.28, see *Abercrombie v Aga Rangemaster Ltd* [2013] EWCA Civ 1148, [2014] 1 All E.R. 1101.
- 658 s.29.
- 659 s.29(3).
- 660 s.29(4), (5).

- 661 s.30(1).
- 662 ss.221–229.
- 663 s.30(2)–(4).
- 664 s.31(1) and regulations made from time to time.
- 665 s.31(3)–(5).
- 666 s.31(2).
- 667 s.32(2).
- 668 Employment Rights Act 1996 s.32(3). See *Cartwright v G Clancey Ltd [1983] I.C.R. 552*.
- 669 s.34(1) (limitation period—s.34(2)).
- 670 s.34(3).
- 671 s.33.
- 672 *Hanley v Pease & Partners Ltd [1915] 1 K.B. 698*; *Marshall v English Electric Ltd [1945] 1 All E.R. 653*.
- 673 Employment Rights Act 1996 s.3; see above, para.42-043.
- 674 *Gorse v Durham CC [1971] 1 W.L.R. 775*.
- 675 cf. *Warburton v Taff Vale Ry (1902) 18 T.L.R. 420*.
- 676 *Wallwork v Fielding [1922] 2 K.B. 66*. However, in *North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387* it was held that, in the case of *interim* suspension pending or during disciplinary proceedings where the contract did not address the question of payment, the default position should be that the suspension should not attract the deduction of pay.
- 677 cf. *Marshall v English Electric Ltd [1945] 1 All E.R. 653*.
- 678 *Bird v British Celanese Ltd [1945] K.B. 336*.
- 679 See below, para.42-101.
- 680 See below, para.42-103.
- 681 Employment Rights Act 1996 s.13(1), (2).
- 682 Employment Rights Act 1996 s.14(5). See *Norris v London Fire and Emergency Planning Authority [2013] I.C.R. 819, EAT*.
- 683 [1980] I.R.L.R. 361.
- 684 cf. *Chappell v Times Newspapers Ltd [1975] I.C.R. 145*.
- 685 cf. *Cummings v Charles Connell & Co Ltd, 1969 S.L.T. 25*.
- 686 cf. *Secretary of State for Employment v ASLEF (No.2) [1972] I.C.R. 19*.
- 687 *Royle v Trafford BC [1984] I.R.L.R. 184*; *Sim v Rotherham MBC [1986] I.C.R. 897*; *Miles v Wakefield MDC [1987] I.C.R. 368*; *Wiluszynski v Tower Hamlets LBC [1989] I.C.R. 493*; *McPherson v Lambeth LBC [1988] I.R.L.R. 470*; compare also *Spackman v London Metropolitan University [2007] I.R.L.R. 74*.
- 688 *Wiluszynski v Tower Hamlets LBC [1989] I.C.R. 493*; *McPherson v Lambeth LBC [1988] I.R.L.R. 470*.
- 689 *Sim v Rotherham MBC [1986] I.C.R. 897*.
- 690 *Miles v Wakefield MDC [1987] I.C.R. 368*, per Lords Brightman and Templeman, sed contra Lord Bridge. Compare now *Cooper v Isle of Wight College [2007] EWHC 2831, [2008] I.R.L.R. 124*.

- 691 *McPherson v Lambeth LBC [1988] I.R.L.R. 470; Wiluszynski v Tower Hamlets LBC [1989] I.C.R. 493.*
- 692 Trade Union and Labour Relations (Consolidation) Act 1992 s.168.
- 693 Trade Union and Labour Relations (Consolidation) Act 1992 s.170.
- 694 Employment Rights Act 1996 s.50–s.51(1).
- 695 Employment Rights Act 1996 ss.52–54.
- 696 Employment Rights Act 1996 ss.55–57.
- 697 See below, paras 42-120—42-126.
- 698 Trade Union and Labour Relations (Consolidation) Act 1992 s.169.
- 699 Employment Rights Act 1996 s.53.
- 700 Trade Union and Labour Relations (Consolidation) Act 1992 s.169(2).
- 701 s.169(3).
- 702 s.169(4).
- 703 s.169(5).
- 704 s.172(1).
- 705 Employment Rights Act 1996 s.56(1).
- 706 Employment Rights Act 1996 ss.221–229.
- 707 Employment Rights Act 1996 s.234.
- 708 Employment Rights Act 1996 ss.53(5), 54(4).
- 709 Employment Rights Act 1996 s.53(7).
- 710 Employment Rights Act 1996 s.56(1)–(4).
- 711 Employment Rights Act 1996 s.56(5)–(6).
- 712 Employment Rights Act 1996 s.57(1)–(5).
- 713 i.e. the rights to time off for trade union activities—[s.28](#), and for public duties—[Employment Rights Act 1996 s.50](#); see below, paras 42-122—42-123.
- 714 SI 1983/1794.
- 715 SI 2005/2467.
- 716 See below, para.42-130.
- 717 See below, paras 42-131—42-135.
- 718 Employment Rights Act 1996 s.8. (Merchant seamen are excluded: [s.199](#).)
- 719 Employment Rights Act 1996 s.8(2)(a)–(d). The statement is not required to include particulars of tips paid to a waiter by customers, nor of an amount deducted by the employer in respect of tips—*Cofone v Spaghetti House Ltd [1980] I.C.R. 155*.
- 720 Some very limited restrictions upon payments in kind are imposed by the [Employment Rights Act 1996](#)—see below, para.42-100.
- 721 Employment Rights Act 1996 s.9(1), (2).
- 722 Employment Rights Act 1996 s.9(3).
- 723 Employment Rights Act 1996 s.9(4).
- 724 Employment Rights Act 1996 s.11(1).
- 725 Employment Rights Act 1996 s.12(3).
- 726 Employment Rights Act 1996 s.12(4), (5).

- 727 Wages Act 1986 s.11 and Sch.1 which lists the legislation in full.
- 728 s.1, since consolidated into Employment Rights Act 1996 ss.13–16.
- 729 See now Employment Rights Act 1996 ss.17–22.
- 730 See now Employment Rights Act 1996 ss.23–26, 203–205.
- 731 Employment Rights Act 1996 s.191(1)–(4) and s.192(1).
- 732 Employment Rights Act 1996 s.201.
- 733 Employment Rights Act 1996 s.205(2).
- 734 Employment Rights Act 1996 s.203(1), (2).
- 735 See above, para.42–098.
- 736 Employment Rights Act 1996 s.26.
- 737 Employment Rights Act 1996 s.23.
- 738 Employment Rights Act 1996 ss.24 and 25. The Employment Act 2008 s.7(1) provided, with effect from April 2009, for the insertion of a new s.24(2) into the Employment Rights Act 1996, which enables an Employment Tribunal to award compensation for financial loss which is sustained by the worker and is attributable to unlawful deduction from or unauthorised payment of wages.
- 739 Employment Rights Act 1996 s.13(1). See *Agarwal v Cardiff University; Tyne and Wear Passenger Transport Executive (t/a Nexus) v Anderson* [2018] EWCA Civ 2084, [2019] I.C.R. 433.
- 740 Employment Rights Act 1996 s.15(1).
- 741 Employment Rights Act 1996 s.13(1)(a). On the question of when it is appropriate to imply terms into the contract of employment in order to decide whether a deduction is authorised, see *Luke v Stoke on Trent City Council* [2007] EWCA Civ 761, [2007] I.C.R. 1678. Compare *Bateman v Asda Stores Ltd* [2010] I.R.L.R. 370 where it was held by the EAT that an imposed transfer to a new pay structure, less favourable than the old one for the complainant employee, did not represent an unauthorised deduction from wages because it was sustained by a wide power of variation of terms which the employer had reserved to itself by a provision in the staff handbook which was regarded as having contractual force despite its apparently unrestricted character.
- 742 Employment Rights Act 1996 s.13(1)(b).
- 743 Employment Rights Act 1996 s.13(2)(a) and s.15(2)(a).
- 744 Employment Rights Act 1996 s.13(2)(b) and s.15(2)(b).
- 745 Employment Rights Act 1996 s.14(1) and s.16(1).
- 746 Employment Rights Act 1996 s.14(2) and s.16(2).
- 747 Employment Rights Act 1996 s.14(3).
- 748 Employment Rights Act 1996 s.14(4).
- 749 Employment Rights Act 1996 s.14(5) and s.16(3). See *Sunderland Polytechnic v Evans* [1993] I.C.R. 392. In *Hartley v King Edward VI College* [2015] EWCA Civ 455, [2015] I.R.L.R. 650 the Court of Appeal held that the appropriate amount to be deducted for a day's strike is 1/260th of a worker's annual salary.
- 750 Employment Rights Act 1996 s.14(6) and s.16(4).

- 751 Employment Rights Act 1996 s.27(1)(a); it was held in *Ainsworth v IRC [2009] UKHL 31, [2009] I.C.R. 985* that this includes holiday pay due under the Working Time Regulations 1998.
- 752 Employment Rights Act 1996 s.27(1)(g), (h).
- 753 Employment Rights Act 1996 s.27(1)(b)–(f).
- 754 Employment Rights Act 1996 s.27(3). It was held in *Farrell Matthews & Weir v Hansen [2005] I.C.R. 509, EAT* that there was no reason to construe s.27(3) as meaning that non-contractual bonuses could not come within the definition of wages unless they were actually paid.
- 755 Employment Rights Act 1996 s.27(2)(a).
- 756 Employment Rights Act 1996 s.27(2)(b).
- 757 Employment Rights Act 1996 s.27(2)(c), (d).
- 758 Employment Rights Act 1996 s.27(2)(e).
- 759 Employment Rights Act 1996 s.27(5).
- 760 Employment Rights Act 1996 s.230(3).
- 761 Employment Rights Act 1996 s.13(3), (4).
- 762 [1994] I.R.L.R. 536.
- 763 *Pename Ltd v Paterson [1989] I.C.R. 12*. It was reconfirmed in *Elizabeth Claire Care Management Ltd v Francis [2005] I.R.L.R. 858* that non-payment of remuneration may qualify as “deduction from wages”.
- 764 [2000] I.R.L.R. 27, CA.
- 765 [2000] I.R.L.R. 759.
- 766 See below, para.42-115.
- 767 [1992] I.C.R. 483.
- 768 Employment Rights Act 1996 ss.17–22.
- 769 Employment Rights Act 1996 ss.18(1), 17(1)–(3), (6), 19(1)–(4), 21(1), (2), 20(5), 21(3) and 22(4).
- 770 Employment Rights Act 1996 s.22(1)–(3).
- 771 Employment Rights Act 1996 s.20(1)–(3)(a) and s.20(4).
- 772 Employment Rights Act 1996 ss.18(2)(3), 20(3)(b), 20(5).
- 773 Employment Rights Act 1996 s.17(2), (3).
- 774 Wages Attachment Abolition Act 1870 s.1.
- 775 See Freedland, Attachment of Earnings (1971), for a description of the Act’s provisions.
- 776 s.1.
- 777 s.6 (see s.23 for offence of non-compliance with the order on the part of the employer and penalty on summary conviction of a fine).
- 778 s.7(4)(b).
- 779 See the Employment Rights Act 1996 s.8, and see above, para.42-098.
- 780 See Employment Rights Act 1996 s.9 and see above, para.42-098.
- 781 Attachment of Earnings Act 1971 s.7(4).

(ii) - Other Duties

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 5. - Rights and Duties Under and Associated with a Contract of Employment

(b) - Duties of the Employer

(ii) - Other Duties

The duty to provide work

- 42-105 It has been shown in an earlier paragraph that the employer is under some degree of obligation to provide work when such provision of work is necessary to enable the employee to earn remuneration.⁷⁸² The further question arises of whether the employer is under a duty to provide work independently of the immediate remunerative opportunity which the work may provide. The assumption has tended to be that in the normal case of employment, the employer is under no obligation to provide the employee with work to do; it is sufficient for the employer to pay the agreed salary or wages regularly.⁷⁸³ Thus where a commercial traveller⁷⁸⁴ or a sales representative⁷⁸⁵ is employed at a salary for a fixed period, as long as the salary is paid, there has been thought to be no obligation to provide work “to enable the employee to become au fait at [sic] his work”.⁷⁸⁶ However, it may be legitimate to infer in certain contracts that the employer is to give the employee (e.g. an actor or singer)⁷⁸⁷ an opportunity for publicity to advance his or her career and reputation.⁷⁸⁸ Moreover, when a man was employed as chief sub-editor of a Sunday newspaper for three years and the paper was sold, it was held that, although his salary was continued, the employers had broken the contract because “by selling the newspaper they destroyed the office to which they had appointed him”.⁷⁸⁹ A more generalised approach to the right to work has been discussed. In *Langston v AUEW*⁷⁹⁰ the Court of Appeal thought it arguable that there was an implied right to work in contracts of employment generally, in the sense of a right to the satisfaction involved in working, earning one’s remuneration by work, and having a useful function in the enterprise. Lord Denning MR referred, more specifically, to “a right to have the

opportunity of doing his work when it is there to be done”⁷⁹¹ while Cairns LJ spoke of “not merely a right to be paid his agreed wage but a right to come to work to earn it”.⁷⁹² But the existence of such a right was only there decided to be arguable (and, in the view of Cairns and Stephenson LJJ, very dubiously arguable).⁷⁹³ In the subsequent proceedings,⁷⁹⁴ the National Industrial Relations Court which existed at that period held that the employee concerned, a spot welder, had no such general right to work, but that he did have the right to such allocation of hours and overtime work as would give him the opportunity of earning such premium payments as he could expect to earn in his normal working conditions.⁷⁹⁵

The duties of the employer relating to safety, health and welfare of employees

- 42-106 A full description of the law relating to the safety, health and welfare of employees is outside the scope of the present chapter. A very brief outline is given in the next two paragraphs, which deal with employer’s liability and with statutory duties generally. Beyond that, reference should be made to the treatises which concentrate upon this particular aspect of the law of employment.⁷⁹⁶

Employer’s liability to provide for safety of employee

- 42-107 It is the common law duty of the employer to each of his or her employees to take reasonable care to see that the plant, tools, equipment, premises and system of work used in his business are safe⁷⁹⁷ and to select and engage other employees who are competent.⁷⁹⁸

Defective equipment

- 42-108 The employer is under no absolute duty at common law to warrant the safety of its employee. Therefore, where the employee was injured by a latent defect in a tool which the employer had bought from a reputable retailer who in turn had bought it from reputable manufacturers, it was held that the employer was not liable because the employer had in fact fulfilled his duty to take reasonable care.⁷⁹⁹ The law in this particular type of case was altered by the [Employer’s Liability \(Defective Equipment\) Act 1969](#). Under that Act, an employer is liable when:

- (a) an employee suffers personal injury in the course of his employment in consequence of a defect in equipment provided by his or her employer for the purposes of his business; and

(b) the defect is attributable wholly or partly to the fault of a third party (whether identified or not). ⁸⁰⁰

The law on contributory negligence applies to such a claim ⁸⁰¹; but any agreement purporting to exclude or limit the liability of the employer under the Act is void. ⁸⁰²

Action in tort

- 42-109 In general, the duty to use reasonable care may be enforced either by an action in tort for negligence or by an action for breach of an implied term in the contract of employment ⁸⁰³; but the action is usually brought in tort. It has been said in the House of Lords that the question whether there has been a breach of the duty is largely a question of fact, in the sense of an appraisal of the particular facts in the light of the broad legal principles which apply. ⁸⁰⁴ For these reasons a detailed analysis of the cases has been omitted from this work and must be sought in works on the law of torts. ⁸⁰⁵ It is, however, important to note that it was held in *Walker v Northumberland CC*⁸⁰⁶ that the employer was liable in respect of psychiatric illness suffered by the employee as the result of stress associated with his workload, and which the employer had been, in the particular circumstances of the case, negligent in failing to prevent. In *Sutherland v Hatton*, ⁸⁰⁷ the Court of Appeal reviewed the law concerning the employer's liability to the employee in respect of psychiatric illness caused by stress at work. Guidelines were laid down for determining the incidence and extent of such liability, this liability being the same whether regarded for the tort of negligence or under an implied term in contracts of employment. The guidelines emphasise that the ordinary principles of employer liability apply; they require it to be demonstrated that the risk of injury to health from stress at work should be reasonably foreseeable in relation to the particular employee, that if so the employer is in breach of duty as having failed to take steps which were reasonable in the circumstances, and that if so the particular breach of duty caused or materially contributed to the harm in question. In *Barber v Somerset CC*, ⁸⁰⁸ the House of Lords broadly endorsed the guidelines laid down in *Sutherland v Hatton*, though applying them to somewhat different outcomes in the particular cases which were under appeal. In *Daw v Intel Corp (UK) Ltd*, ⁸⁰⁹ the Court of Appeal considered the extent to which employers could discharge this duty of care by the provision of counselling services, making it clear that such provision would not operate as a panacea in all cases.
- 42-110 Although there may be differences between the relevant rules of tort and contract, ⁸¹⁰ it seems to be assumed by the courts and the profession that the rules to be applied when an employee brings an action against an employer for personal injuries suffered by the former in the course of his employment are the rules of tort. ⁸¹¹ This may perhaps be justified on the basis that there is an implied term in the contract of employment to the effect that if the employee suffers personal

injury as the result of a breach of a tortious or statutory duty⁸¹² of the employer, the liability of the employer and the remedy of the employee are to depend on the rules of tort.⁸¹³

Compulsory employers' liability insurance

- 42-111 Under the provisions of the [Employers' Liability \(Compulsory Insurance\) Act 1969](#),⁸¹⁴ an employer carrying on any business in Great Britain is required to maintain insurance under an approved policy with an authorised insurer against liability for bodily injury or disease sustained by his employees and arising out of and in the course of their employment in Great Britain.⁸¹⁵ The term "employee" here means an individual who has entered into or works under a contract of service or apprenticeship.⁸¹⁶ Insurance need not be maintained in respect of certain close relatives of an employer,⁸¹⁷ nor in respect of employees not ordinarily resident in Great Britain.⁸¹⁸ Local authorities, statutory nationalised corporations and certain employers specified by regulation are exempted from the obligation to insure.⁸¹⁹ There is provision for regulations to secure the issue and production for inspection of insurance certificates.⁸²⁰ Failure to insure is an offence subject to a fine⁸²¹; there is a fixed amount for which insurance must be maintained in respect of claims arising out of any one occurrence.⁸²²

Statutory duties of the employer relating to safety, health and welfare

- 42-112 Apart from the statutory modifications of employers' liability considered in the two previous paragraphs, the statute law relating to the safety, health and welfare of employees can conveniently be considered in three parts.

(1) A wide range of duties is imposed on an employer by a system of statutes and regulations relating to particular types of workplace, industrial process or safety hazard. The statutory framework of this system is contained principally in the [Mines and Quarries Act 1954](#), the [Agriculture \(Safety, Health and Welfare Provisions\) Act 1956](#), the [Factories Act 1961](#), the [Offices, Shops and Railway Premises Act 1963](#),⁸²³ and in the [Management of Health and Safety at Work Regulations 1992](#).⁸²⁴ Breaches of the statutes are sanctioned by criminal penalties upon the employer (and sometimes upon the employee), but such breaches may, in the case of certain duties, give an employee injured by the breach a cause of action for damages against his employer.⁸²⁵ The enumeration of those duties and the detailed description of the actions for breach of statutory duty are outside the scope of the present work.

(2) The modern framework of statute law concerning safety, health and welfare at work was established by the [Health and Safety at Work, etc. Act 1974](#).⁸²⁶ The principal effects of the Act upon the employment relationship are as follows:

(a)The Act imposes a set of general duties upon employers, all of which are directed towards making the employer ensure the health, safety and welfare at work of all his employees.⁸²⁷ The duties extend the employers' common law duty in various directions,⁸²⁸ but do not create a cause of action on which civil proceedings may be based.⁸²⁹

(b)Included among the general duties is a duty to make to all employees, and to keep up-to-date, a statement of the employers' general policy with respect to the employees' health and safety at work and of the arrangements for carrying out that policy.⁸³⁰

(c)Further included among the general duties is a power of the Secretary of State to make regulations providing for the appointment by recognised trade unions of safety representatives from amongst the employees,⁸³¹ and a duty on the part of the employer to consult such representatives with a view to making and maintaining effective arrangements for the health and safety of employees.⁸³²

(d)The authorities entrusted by or under the Act with the enforcement of health and safety obligations⁸³³ are empowered to appoint inspectors⁸³⁴ who are placed under a duty to pass on to employees and their representatives information relating to health and safety, where it is necessary in order to keep them adequately informed about health and safety matters.⁸³⁵ The information may include that which the inspectors themselves may obtain in exercise of their powers of entry and investigation.⁸³⁶

(e)Provision is made for the appropriate Secretary of State to make health and safety regulations, which may replace existing statutory provisions, for any of the general purposes of Pt I of the Act.⁸³⁷ This provided authority for the gradual replacement of the existing statutory framework and regulations by a completely new structure, to be augmented by codes of practice issued by the Health and Safety Commission.⁸³⁸

(f)Provision was made, by Pt III of the Act, from which employees generally have benefited, for extending the scope of the Building Regulations⁸³⁹ and for including among the purposes for which they may be made, the securing of the health, safety, welfare and convenience of persons in or about buildings and of others who may be affected by buildings or matters connected with buildings.⁸⁴⁰

(3)The Employment Rights Act 1996 makes provision for a right of employees not to suffer detriment in health and safety cases, and for treating certain dismissals as unfair in health and safety cases. These provisions confer protections upon employees who are carrying out health and safety duties as designated by the employer, or are safety representatives or members of safety committees carrying out their functions, or who report safety or health hazards to the employer, or who absent themselves from the workplace in circumstances of danger, or who in those circumstances take protective measures.⁸⁴¹

Hours of work

- 42-113 The employer is required to give the employee written particulars of any terms and conditions relating to hours of work (including any relating to normal working hours).⁸⁴² It is often necessary for various statutory purposes to determine whether an employee has normal working hours and if so what those hours are.⁸⁴³ This frequently involves a decision about the contractual status of overtime working. The prevailing view has been that in order for overtime to form part of “normal working hours” it must be contractually obligatory upon both parties.⁸⁴⁴ It also appears that most overtime working arrangements will be classified as not being contractually obligatory upon the employee.⁸⁴⁵

Statutory restrictions on hours of work

- 42-114 Various statutory provisions have imposed maxima upon the working hours and employment in certain circumstances of women, young persons and children.⁸⁴⁶ Further statutory provisions have imposed limits upon the hours of work of all employees in certain industries.⁸⁴⁷ Many of these restrictions were repealed or amended by ss.8 and 9 of the Employment Act 1989, to which reference should now be made. Terms and conditions of employment relating to hours of work may now fall within the provisions concerning equal terms and conditions of employment as between men and women, and the provisions for elimination of various kinds of discrimination in employment, which are considered in subsequent paragraphs of the present section.⁸⁴⁸

The Working Time Regulations

- 42-115 Important controls upon working time, required by the EC Working Time Directive⁸⁴⁹ and the Young Workers Directive,⁸⁵⁰ were introduced by the Working Time Regulations 1998,⁸⁵¹ which have been the subject of various subsequent amending Regulations.⁸⁵² The main provisions of these Regulations are, in brief summary, as follows. The Regulations apply to “workers”; the original restriction to those above the minimum school leaving age was revoked in 2003.⁸⁵³ “Workers” are so defined as not to be confined to those with contracts of employment, though so as to exclude the genuinely self-employed.⁸⁵⁴ “Working time” is to be interpreted widely and purposively, including for example travel from a worker’s place of residence to customer premises,⁸⁵⁵ the attendance of meetings as a trade union or health and safety representative,⁸⁵⁶

or when a worker is logged into a gig economy platform and under an obligation to accept tasks if offered.⁸⁵⁷

The Regulations set a working time limit of an average of 48 hours per week, with a standard averaging period of 17 weeks which may be extended to up to 52 weeks by a collective agreement between employer(s) and trade union(s), or by a “workforce agreement” between employers and elected workforce representatives, or, in the case of employers of no more than 20 workers, which the workers sign individually.⁸⁵⁸ Workers may agree in writing as individuals to disapply the weekly working hours limit.⁸⁵⁹ Provision is made for remedies,⁸⁶⁰ and to protect workers from suffering detriment (such as a denial of promotion or of training opportunities) because they refuse to agree to disapply the limits.⁸⁶¹ There are also measures by which night workers are subject to a working time limit of an average of 8 hours in each 24 hour period, and by which night workers whose work involves special hazard or heavy physical or mental strain are subject to an 8 hour limit for each 24 hour period.⁸⁶² Stricter limits upon maximum working time and night work are set for young workers.⁸⁶³ There are also measures relating to rest breaks and rest periods, whereby workers are entitled to one day off each week and young workers are entitled to two days off each week,⁸⁶⁴ whereby workers are entitled to 11 hours consecutive rest per day and young workers are entitled to 12 hours consecutive rest per day,⁸⁶⁵ and whereby workers are entitled to a rest break of at least 20 minutes in a working day of longer than 6 hours, and young workers are entitled to a rest break of at least 30 minutes in a working day of longer than 4.5 hours.⁸⁶⁶ It is incumbent on the employer proactively to ensure that working arrangements allow for workers to take their due rest breaks.⁸⁶⁷ Certain of those provisions are subject to exceptions in respect of collective or “workforce” agreements.⁸⁶⁸ The Regulations also confer upon workers within their scope, an entitlement to four weeks paid annual leave.⁸⁶⁹ There is provision for the enforcement of the limits on weekly working time and night work by the health and safety enforcing authorities,⁸⁷⁰ and for workers to assert in claims or complaints to employment tribunals, their entitlements, such as to rest periods and breaks and paid annual leave, and their rights to be protected from detriment, such as for refusing to agree to disapply limits on working time.⁸⁷¹ The Court of Justice has given a wide interpretation to these provisions: in *Ville de Nivelles v Matzak*, for example, it was held that even standby time spent at home could count as “working time”.⁸⁷²

Employee's belongings

- 42-116 Although an employer is under a duty to take reasonable care for his or her employee's personal safety,⁸⁷³ the employer has been thought to be under no similar duty to take positive steps to protect employee's personal belongings; thus, the employer of an actor was not liable when the actor's clothing was stolen from a dressing-room.⁸⁷⁴ However, a failure on the part of the employer to

take reasonable steps to protect the employee's personal belongings might possibly amount to a breach of the implied obligation of mutual trust and confidence.⁸⁷⁵

Duty to indemnify the employee

- 42-117 The relationship of employment imposes a duty on the employer to indemnify or reimburse the employee against all expenses, losses and liabilities incurred by the employee in the execution of his employer's instructions, or within the authority granted to him by the employer, or during the reasonable performance of his employment.⁸⁷⁶ Thus an employer who failed to insure his vehicle in respect of third-party risks⁸⁷⁷ was obliged to indemnify his employee who drove the vehicle in the course of his employment and who was held liable to a third person injured by his negligent driving.⁸⁷⁸ Nor, it was held in *Reid v Rush & Tompkins Group Plc*,⁸⁷⁹ is the employer under any implied obligation to advise an employee working overseas to arrange his own insurance cover against accidents. But there is no general duty to keep the employee insured against all third party risks or to indemnify the employee against liability for his or her own negligence.⁸⁸⁰ Ancient authority suggests that if the act or omission of the employee was manifestly unlawful, he or she is not entitled to such an indemnity⁸⁸¹; but he may still be entitled to an indemnity from his employer if the act was apparently lawful⁸⁸² or he was ignorant of the facts which made it unlawful⁸⁸³ and could not be presumed to know that the particular transaction was unlawful.⁸⁸⁴

The rights of the employee in relation to trade union membership and activities

- 42-118 Under the provisions of ss.146 to 151 of the Trade Union and Labour Relations (Consolidation) Act 1992 as subsequently amended,⁸⁸⁵
- U** a worker⁸⁸⁶
 - U** has a right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act,⁸⁸⁷
 - U** by his employer if the act or failure takes place for the purpose of preventing or deterring him from becoming a member of an independent trade union, or penalising him for doing so,

888

U or from taking part in the activities of an independent trade union at any appropriate time, or penalising him for doing so,

889

U or compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

890

U This protection has however been held not to extend to participation in industrial action, potentially leaving UK law in breach of ECHR art.11.

891

U The **Employment Relations Act 2004** established new or enhanced rights for workers not to be offered inducements relating to trade union membership and collective bargaining, and extended their rights not to suffer detrimental action in circumstances relating to trade union membership.

892

U

- 42-119 A worker may complain to an employment tribunal of an alleged infringement of any of these rights,⁸⁹³ and the employer has to show the purpose of the act or omission in question.⁸⁹⁴ A complaint upheld by the tribunal must be the subject of a declaration and may be the subject of an award of compensation.⁸⁹⁵

Statutory rights of employees to time off

- 42-120 The **Trade Union Labour Relations (Consolidation) Act 1992** and the **Employment Rights Act 1996** as subsequently amended require employers to allow employees time off for various particular purposes.⁸⁹⁶ Special procedures are created for the enforcement of these rights,⁸⁹⁷ but they must in addition modify, pro tanto, the ordinary effects of the contract of employment so far as the employee's obligation to attend for work is concerned. The extent to which these rights include the right to *remuneration* during the time off has been considered in an earlier paragraph.⁸⁹⁸ Some⁸⁹⁹ of the most important rights to time off are as follows:

(1) Trade union officials; industrial relations duties and training:

42-121

An employer must permit an employee who is an official of an independent trade union⁹⁰⁰ recognised⁹⁰¹ by the employer to take time off work to carry out duties concerned with industrial relations between the employer or an associated employer and their employees, or to undergo training in industrial relations of a relevant and approved kind.⁹⁰² The amount of time off to be allowed, and the circumstances in which it is to be allowed, are the subject of guidance contained in a Code of Practice issued by the Advisory, Conciliation and Arbitration Service (“the Service”).⁹⁰³ Section 14 of the Employment Act 1989 amended what was then s.27 of the 1978 Act so that the duties in respect of which an employer is required to allow officials of a trade union time off with pay are limited to duties concerned with matters in respect of which the employer recognises the trade union.

(2) Trade union activities:

42-122 An employer must permit an employee who is a member of an independent trade union recognised by the employer to take time off work for the purpose of taking part in any trade union activity of a recognised independent trade union of which the employee is a member or of which he is acting as a representative, provided that the activities do not themselves consist of industrial action.⁹⁰⁴ The amount of such time off and the circumstances in which it must be allowed are to be the subject of guidance contained in a Code of Practice to be issued by the Service.⁹⁰⁵

(3) Public duties:

42-123 An employer must permit employees who hold certain public offices (such as that of justice of the peace) or who are members of certain public bodies (such as a local authority or statutory tribunal) to take time off work for the performance of their duties in the discharge of their office or of the functions of the public body to which they belong.⁹⁰⁶ The amount of time off thus required is the amount which is reasonable having regard to the extent of the public duties concerned, the amount of time off work already permitted under this head or for trade union duties or activities, and the effect of the employees’ absence on the running of the employer’s business.⁹⁰⁷

(4) Employees under notice of redundancy; time off to look for work or make arrangements for training:

42-124

An employee who has been given notice of dismissal by reason of redundancy is entitled during his period of notice to be allowed by his employer reasonable time off work to look for new employment or to make arrangements for training for future employment,⁹⁰⁸ provided that by the time of expiry of his statutory period of notice, or such longer notice as is actually given, the employee has been continuously employed for two years or more.⁹⁰⁹

(5) Ante-natal care:

- 42-125 An employee who has, on the advice of a doctor, midwife or health visitor, made an appointment for the purpose of ante-natal care has the right not to be unreasonably refused time off during her working hours to enable her to keep the appointment.⁹¹⁰

(6) Time off for domestic reasons relating to dependants:

- 42-126 The [Employment Relations Act 1999](#) created a new entitlement for an employee to be allowed a reasonable amount of time off for specified domestic reasons involving incidents befalling the dependants of the employee and requiring action by the employee.⁹¹¹ The provisions of the newly inserted [s.57A of the Employment Rights Act 1996](#) entitle an employee to be allowed a reasonable amount of time off for specified domestic reasons involving the care of dependants of the employee, and new [s.57B](#) enables the employee to complain to an employment tribunal that the employer has unreasonably refused to permit that time off. Further provisions protect the employee from being subjected to detriment, or from being dismissed, by his or her employer by reason of exercising or seeking to exercise this right to time off.⁹¹²

Effect of failure to allow time off

- 42-127 An appropriately qualified employee may complain to an employment tribunal of failure to allow him or her time off in accordance with any of the foregoing provisions for time off.⁹¹³ If the complaint is upheld, the tribunal must, in the cases of time off for trade union duties, trade union activities and public duties, make a declaration to that effect and may in those cases award compensation assessed with regard to the employer's default, and to any loss sustained by the employee.⁹¹⁴ If a complaint is upheld of failure to allow a redundant employee time off to look for work or make arrangements for training, the tribunal must make a declaration to that effect and must also order the employer to pay to the employee an amount equal to the remuneration to which he or she would have been entitled if he or she had been allowed the time off,⁹¹⁵ the total amount recoverable being limited to two-fifths of a week's pay of the employee concerned.⁹¹⁶ If a

complaint is upheld of unreasonable refusal of time off for ante-natal care, or of remuneration due for that time off, the tribunal must make a declaration to that effect and must order the employer to pay the equivalent or due remuneration.⁹¹⁷ (The rights to remuneration during time off in this case and in the case of the other rights to time off have been described in an earlier paragraph).⁹¹⁸

Provisions against sex discrimination during the period of employment

42-128 The legislation concerning sex discrimination in relation to employment deals with the three stages of the employment relationship:

- (1)formation of the contract under which a person is employed;
- (2)during the period of employment; and
- (3)the termination of employment.

The provisions concerning sex discrimination in the formation and termination of the employment relationship are considered elsewhere in the present chapter.⁹¹⁹ The provisions concerning sex discrimination during the period of employment are themselves of two kinds:

- (1)provisions originally in the [Equal Pay Act 1970](#), known as the “Equal Pay Legislation”, and now contained in the [Equality Act 2010](#), for an equality clause in individual contracts under which a person is employed;
- (2)other provisions, formerly in the [Sex Discrimination Act 1975](#) and now in the [Equality Act 2010](#) against sex discrimination during the period of employment generally (and after the period of employment).

These provisions are described in the ensuing paragraphs.⁹²⁰

Equality clauses in contracts of employment (1) gender equality

42-129 The [Equality Act 2010](#), consolidating provisions previously contained in the [Equal Pay Act 1970](#) as subsequently amended, principally by the [Sex Discrimination Act 1975](#) and by the [Equal Pay \(Amendment\) Regulations 1983](#),⁹²¹ provides for mandatory implication of an equality clause into the contracts under which certain persons are employed.⁹²² The equality clause requires an individual woman (or man) to be accorded contractual terms not less favourable than those accorded to an employed person of the opposite sex.⁹²³ The corresponding provisions in the antecedent legislation were held to require a term-by-term equalisation of the compared contracts of employment, for the purpose of which different elements of remuneration and benefits are to be regarded as distinct terms.⁹²⁴ The equality clause applies where a woman and a man are employed

on “equal work”, a concept which includes (1) like work, (2) work rated as equivalent in the same employment, or (3) work which is, in terms of the demands made on the one (for instance under such headings as effort skill and decision-making), of equal value to that of the other.⁹²⁵

Like work means work of the same or a broadly similar nature as the other work in question,⁹²⁶ whilst “work rated as equivalent” means work accorded a value equal to that of the other work in question in a job evaluation study (assuming the removal of differentiations between men’s work and women’s work in the system of evaluation).⁹²⁷ For the purposes of the equality clause, the comparators include but are limited to those in the employment of the same employer or of an associated employer, working at the same establishment or at another establishment but at which terms of work common to both apply.⁹²⁸ The operation of this threshold test was explained in detail in the Supreme Court’s judgment in *Asda Stores Ltd v Brierley*.⁹²⁹

⁹²⁹

U The equality clause operates to bring less favourable terms in the contract up to the level of their more favourable counterparts, and to bring about the inclusion of terms not included in the contract which are included in the more favourable counterpart contract.⁹³⁰ The equality clause does not operate upon a variation between the contract and its counterpart if the employer shows that the variation is genuinely due to a material factor which is not the difference of sex; that factor must be a material difference between the woman’s case and the man’s, reliance on which is a proportionate means of achieving a legitimate aim where like work or work rated as equivalent is in issue.⁹³¹ An employed person may present a claim to an employment tribunal in respect of the breach of a contractual term modified or included by the operation of an equality clause.⁹³² The tribunal may award arrears of remuneration or damages,⁹³³ provided that arrears of remuneration are not awarded in respect of a time before the “arrears day”.⁹³⁴ An employer may apply to an employment tribunal for a declaration to resolve a dispute concerning the effect of an equality clause.⁹³⁵ Finally, any court may refer to an employment tribunal a question arising in proceedings before the court in respect of the operation of an equality clause.⁹³⁶ Where, on a complaint or reference to an employment tribunal, a dispute arises as to whether any work is of equal value within the meaning of the statute, the tribunal may determine that question, or may require a member of the panel of independent experts⁹³⁷ to prepare a report with respect to that question.⁹³⁸

Equality clauses in contracts of employment (2) maternity equality

42-130 Provision was made by the *Equality Act 2010 ss.72–74* for the contracts under which women are employed to be treated as including a maternity equality clause. The main effect of the maternity equality clause is to ensure that pay and bonus pay for a woman on maternity leave keep pace with the pay and bonus pay which the woman would have received if she had not been on maternity leave.⁹³⁹ In order to avoid re-duplication or conflict as between these provisions for a maternity equality clause and the general provisions against pregnancy and maternity

discrimination,⁹⁴⁰ provision is made to exclude the latter provisions where the maternity equality clause is applicable.⁹⁴¹

Sex discrimination during and after the period of employment

- 42-131 The [Sex Discrimination Act 1975](#) as amended by the [Sex Discrimination Act 1986](#) and by subsequent legislation made wide provisions concerning sex discrimination against an employed person during and after the period of employment; corresponding provisions are now made by the [Equality Act 2010](#).⁹⁴² It is unlawful for an employer to discriminate⁹⁴³ against an employed person in the way that access is afforded, or by refusing or deliberately omitting to afford access, to opportunities for promotion, transfer or training or to any other benefits, facilities or services.⁹⁴⁴ It is also made unlawful for the employer to discriminate against an employed person on the grounds of sex by dismissing the employed person⁹⁴⁵ or by subjecting him or her to any other detriment⁹⁴⁶ (such as suspension of employment where that is not imposed on employed persons of the opposite sex).

Exceptions to requirement not to discriminate

- 42-132 There are some exceptions to these requirements not to discriminate during employment. The main exception consists in provision that the requirements relating to opportunities for promotion, transfer or training do not apply in respect of an employment for which being of a particular sex is an occupational requirement as statutorily defined.⁹⁴⁷ It is also provided that the provision of benefits, facilities or services to employees falls outside these provisions if those benefits, facilities or services are also provided to the public⁹⁴⁸ unless their provision to the employed persons differs in a material respect from their provision to the public, or their provision to the employed person is regulated by the contract under which that person is employed or the benefits, facilities or services relate to training.⁹⁴⁹

Complaints procedure

- 42-133 An employed person may complain of contravention of the statutory requirements to an employment tribunal⁹⁵⁰ which may if it upholds the complaint award one or more of the following remedies:
- (a) an order declaring the rights of the parties⁹⁵¹;

(b)an order for compensation⁹⁵² assessed on the basis which would apply if the complaint were a tort action in the High Court⁹⁵³; or

(c)a recommendation of a particular course of action for the purpose of minimising the detriment complained of, with a sanction of compensation in the event of non-compliance limited as under sub-para.(b) above.⁹⁵⁴

Relationship to gender equality clauses

42-134 The relationship between the provisions concerning sex discrimination during the period of employment described in the immediately preceding paragraphs⁹⁵⁵ and the provisions concerning gender equality clauses described in an earlier paragraph⁹⁵⁶ are as follows. Within their area of application, the gender equality clause provisions automatically remove certain inequalities by the operation of those clauses. The sex discrimination provisions, on the other hand, render unlawful certain acts of discrimination during the period of employment which fall outside the scope of an equality clause in that they do not themselves consist of the setting of contractual terms. It is provided that the latter provisions do not in general apply where the former provisions do⁹⁵⁷; however, there are certain defined circumstances in which the sex discrimination provisions may nevertheless operate in relation to contractual pay where direct discrimination or combined discrimination are involved.⁹⁵⁸ The upshot is that the sex discrimination provisions can apply in respect of matters not included in the contract under which a person is employed, can apply outside the area of comparison existing between workers doing like work or equivalently rated work, and are not limited to comparison between *actual* cases (that is to say, they can extend to comparison with a hypothetical employed person of the opposite sex).⁹⁵⁹

Pregnancy and maternity discrimination during the period of employment

42-135 Provision is made by s.18 of the Equality Act 2010 to ensure that it counts as unlawful discrimination for an employer, during the period in which a woman is pregnant or on ordinary or additional maternity leave,⁹⁶⁰ to treat her unfavourably because of the pregnancy or because of illness suffered by her as a result of it, or because she is on compulsory maternity leave or because she is seeking to exercise the right to ordinary or additional maternity leave.⁹⁶¹ In particular an employer must not discriminate against a woman in the above-mentioned sense as to her terms of employment,⁹⁶² or in the way that access is afforded to her or not afforded to her to opportunities to promotion, transfer, or training, or for receiving any other benefit, facility, or service⁹⁶³ or by

subjecting her to any other detriment.⁹⁶⁴ There is a right to complain to an employment tribunal in respect of such discrimination⁹⁶⁵; and the tribunal has power to award remedies including that of compensation.⁹⁶⁶

Discrimination against married persons and civil partners during and after the period of employment

- 42-136 The [Sex Discrimination Act 1975](#) (as amended by the [Sex Discrimination Act 1986](#) and the [Civil Partnership Act 2004](#)) made provision concerning direct and indirect discrimination against married persons and civil partners in the employment field which was broadly similar to the provisions relating to sex discrimination during the period of employment described in the previous paragraphs, with this main difference, that the exception where being of a particular gender was a genuine occupational qualification had no application and no counterpart in cases of discrimination against married persons or civil partners. Corresponding provisions are now contained in the [Equality Act 2010](#).⁹⁶⁷

Racial discrimination during the period of employment

- 42-137 Under the provisions of the [Race Relations Act 1976](#) (as amended by subsequent legislation), it was unlawful for an employer or any person concerned with the employment of others to discriminate against any person employed on work of any description by refusing or deliberately omitting to afford or offer him the like terms of employment, the like conditions of work and the like opportunities for training and promotion as the employer makes available for persons of the like qualifications employed in like circumstances on work of that description. This provision afforded a continuing protection during employment, as well as at the stage of the initial offer of employment. Contravention of this provision was subject to the same enforcement mechanism as applies to the corresponding provisions relating to the formation of the employment relationship. Corresponding provisions are now contained in the [Equality Act 2010](#).⁹⁶⁸

Disability discrimination during the period of employment

- 42-138 In a way which is comparable with the protections against sex and race discrimination described in the foregoing paragraphs, the provisions of the [Disability Discrimination Act 1995](#) imposed continuing duties upon employers during the period of employment, making it unlawful for an employer to discriminate against a disabled person whom he or she employs in the terms of

employment which he or she affords him or her, in the opportunities which he or she affords him or her for promotion, training, transfer, or receiving any other benefit, or by refusing him or her any such benefit, and in particular requiring the employer to make reasonable adjustment to ensure that the disabled person is not placed at a substantial disadvantage. The [Disability Discrimination Act 2005](#) amended and extended in various respects the provisions of the [Disability Discrimination Act 1995](#) concerning disability discrimination in employment. Corresponding provisions are now contained in the [Equality Act 2010](#).⁹⁶⁹

Equality with regard to religion or belief, sexual orientation, and age during the period of employment

- 42-139 Provisions very closely comparable to those relating to sex and race discrimination, were made, with effect from December 2003, with regard to religion or belief, with regard to sexual orientation, and with regard to age by, respectively, the [Employment Equality \(Religion or Belief\) Regulations 2003](#),⁹⁷⁰ the [Employment Equality \(Sexual Orientation\) Regulations 2003](#),⁹⁷¹ and the [Employment Equality \(Age\) Regulations 2006](#),⁹⁷² all of these sets of regulations being enacted in implementation of the requirements of Council Directive 2000/78 establishing a general framework for equal treatment in employment and vocational training.⁹⁷³ Corresponding provisions are now contained in the [Equality Act 2010](#).⁹⁷⁴

Victimisation and harassment during and after the period of employment

- 42-140 The various aforementioned provisions of the [Equality Act 2010](#) concerning discrimination during and after the period of employment are reinforced by provision against discrimination by way of victimisation, and against harassment.⁹⁷⁵ Such victimisation occurs where a person subjects another person to a detriment by reason of the fact that the person victimised has done, or where it is believed that he or she has done or may do, any of a series of “protected acts” concerned with the claiming of rights under or assertion of contravention of the Act.⁹⁷⁶ In such cases, the exception relating to occupational requirement⁹⁷⁷ does not apply and has no counterpart. *Harassment* is essentially defined as unwanted conduct, related to the protected characteristics of age, disability, gender reassignment, race, religion or belief, sex, and sexual orientation, which has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for a person.

⁹⁷⁸

U It is provided that employers must not harass persons in their employment or who have applied to them for employment⁹⁷⁹; and employers are treated as harassing where in certain circumstances they fail to take reasonably practicable steps to prevent a third party from so doing.⁹⁸⁰ The provisions in s.40 holding employers vicariously liable for such third party harassment have however been repealed as of 1 October 2013.⁹⁸¹

Terms involving unlawful discrimination

- 42-141 Under s.142 of the Equality Act 2010, a term of a contract, or in certain circumstances a term of a non-contractual agreement, is unenforceable where it involves unlawful discrimination, in which case provision exists for any person interested in such a contract to apply to a county court for an order removing or modifying such a term.⁹⁸² Further provision is made by s.145 of the Act to render void any term of a collective agreement, including an agreement not intended to be a legally enforceable contract, and to render unenforceable any rule of an employing undertaking so far as it constitutes, promotes, or provides for treatment which is unlawful under the Act.⁹⁸³

Protection of rehabilitated offenders during the period of employment

- 42-142 Under the Rehabilitation of Offenders Act 1974,⁹⁸⁴ it is provided that a spent conviction or any circumstances ancillary thereto or any failure to disclose a spent conviction or any such circumstances shall not be a proper ground for prejudicing a person in any way in any occupation or employment.⁹⁸⁵ This appears to extend to detriments suffered by an employee during his or her period of employment. However, no machinery of enforcement is provided in relation to this enactment. The ability of this provision to have any specific effect on the rights of the employee during employment therefore depends upon whether it could be used as the basis of a new cause of action based upon breach of statutory duty⁹⁸⁶ or upon a notion of the right to work,⁹⁸⁷ and upon whether it can serve as a canon of construction of the employee's contractual rights, in relation, for instance, to a disciplinary procedure.

Rights in connection with parenthood and family responsibility

- 42-143 In this and the succeeding paragraphs, a brief summary is provided of the rights in connection with parenthood and family responsibility (formerly described as "maternity rights" but now constituting a broader category of rights)⁹⁸⁸ for which provision is made by Pt VIII of the

Employment Rights Act 1996 as amended by subsequent legislation⁹⁸⁹ and by Pt 8A of that Act as inserted by the **Employment Act 2002**. This legislation makes the following sets of provisions for rights in connection with parenthood, which are respectively summarised in the following paragraphs: (1) maternity leave; (2) adoption leave; (3) parental leave; (4) paternity leave; and (5) flexible working. There is also summarised, in this connection, the new legislation which makes provision for: (6) protection from detriment in connection with parenthood. In the cases of maternity leave, adoption leave, and paternity leave, associated provision is made for rights to maternity pay, adoption pay, and paternity pay, and those rights were detailed earlier in this chapter.⁹⁹⁰ Other statutory rights in connection with parenthood and family responsibility are also described elsewhere in this chapter⁹⁹¹; particular note should be taken of the articulation of general notions of pregnancy and maternity equality and pregnancy and maternity discrimination in the **Equality Act 2010**, as described earlier in this chapter.⁹⁹²

(1) Maternity leave

42-144 Part VIII Ch.I of the **Employment Rights Act 1996** deals with maternity leave. Section 71 and the associated regulations provide for an “ordinary maternity leave period” of 26 weeks⁹⁹³ of which the characteristic is that the employee is entitled to return to her own previous job; s.72 and its associated regulations⁹⁹⁴ provide for a compulsory maternity leave period of not less than two weeks; new s.73 and its associated regulations provide for an additional maternity leave period of 26 weeks from the beginning of the week of childbirth, of which the characteristic is that the employee is entitled to return to work though not necessarily to her own previous job.

(2) Adoption leave

42-145 Part VIII Ch.IA of the **Employment Rights Act 1996**, as inserted by the provisions of the **Employment Act 2002** deals with adoption leave. Section 75A and the associated regulations provide, in the case of qualified employees who adopt a child individually, or for one partner of a couple who adopt a child jointly, for an “ordinary adoption leave period” of 26 weeks from the beginning of the week of adoption which is normally paid leave; s.75B and its associated regulations provide for an additional adoption leave period of 26 weeks from the beginning of the week of adoption, in respect of which there is no statutory right to pay.

(3) Parental leave

42-146 Part VIII Ch.II of the **Employment Rights Act 1996** deals with parental leave. Sections 76 to 79 and the regulations made thereunder confer an entitlement, upon employees who satisfy the

specified conditions, to be absent from work for up to 13 weeks for the purpose of caring for a child of theirs, before the child's fifth birthday. This is extended to 18 weeks before the child's eighteenth birthday in the case of disabled children. [Section 80](#) provides for an employee to complain to an employment tribunal that his or her employer has unreasonably postponed such leave or prevented or attempted to prevent the employee from taking such leave. Shared parental leave is covered by the provisions of Pt VIII Ch.1B ([ss.75E to 75K](#)).

(4) Paternity leave

42-147 [Part VIII Ch.III of the Employment Rights Act 1996](#), as inserted by [Pt 1, Ch.1 of the Employment Act 2002](#), deals with paternity leave. [Sections 80A to 80E](#) and the regulations made thereunder confer an entitlement, upon employees who satisfy the specified conditions, to be absent from work for up to two weeks for the purpose of caring for a newly born child of theirs and to support the child's mother, and also confer a corresponding entitlement in the case of adoption. ⁹⁹⁵

(5) Flexible working: the right to request contract variation

42-148 The [Employment Act 2002](#) makes provision under the title of “flexible working” ⁹⁹⁶ for parents, who are qualifying employees, of children aged under six or disabled children aged under 18, to have the right to apply to their employer for a contract variation relating to hours or times of work, or location of work as between home and a place of business of the employer, or for such other aspects of terms and conditions of employment as may be specified by regulations. That right imposes duties upon the employer, first to process the application in the manner prescribed by regulations, and secondly to refuse the application only where “he considers” that one or more of a prescribed set of grounds for refusal, such as “the burden of additional costs” applies or apply. ⁹⁹⁷ [Section 12 of the Work and Families Act 2006](#), amending new [s.80F of the Employment Rights Act 1996](#), extends the category of employees who are entitled to request flexible working by including “carers” within the scheme. The categories of adult relatives in respect of whom such a request may be made are specified by regulations. ⁹⁹⁸

(6) Protection from detriment in connection with parenthood and family responsibility

42-149 By a succession of enactments beginning with the [Employment Relations Act 1999](#), ⁹⁹⁹ there have been conferred upon employees a series of protections against detriment in connection with various aspects of parenthood and family responsibility or with the exercise of rights relating to

parenthood and family responsibility. As a brief summary of the effect of those enactments, an employee has the right not to suffer detrimental treatment at work (other than dismissal, which is the subject of separate provision)¹⁰⁰⁰ for the reason that:

- she is pregnant or has given birth to a child; or
- she has exercised or has sought to exercise the rights to maternity leave or maternity pay; or
- she or he has exercised or has sought to exercise the rights to parental leave; or
- she or he has exercised or has sought to exercise the rights to time off for domestic reasons (to care for dependants)¹⁰⁰¹; or
- he has exercised or has sought to exercise the rights to paternity leave or paternity pay; or
- she or he has exercised or has sought to exercise the rights to adoption leave or adoption pay, or the rights to paternity leave or paternity pay which apply to adoptive parents¹⁰⁰²; or
- she or he has exercised or has sought to exercise the rights which relate to flexible working.¹⁰⁰³

An employee may complain to employment tribunal of subjection to detriment for any of these reasons,¹⁰⁰⁴ and the tribunal may award the remedies of declaration and/or compensation.¹⁰⁰⁵

References and testimonials

- 42-150 Early authorities suggest that an employer need not give his employee a reference or testimonial when the employment ends, nor answer any inquiries from prospective employers of a former employee.¹⁰⁰⁶ It was once said¹⁰⁰⁷ to be an unreasonable custom that, on quitting at the end of the first month by notice given in the first fortnight, a domestic employee was entitled to have the character reference she came with handed to her to enable her to show it to her next employer. If the employer does give a reference or testimonial to an employee, an employer may be guilty of an offence¹⁰⁰⁸ if the employer gives a false character, either orally or in writing¹⁰⁰⁹; the employer may also be liable in damages to a subsequent employer who suffers loss by engaging the employee in reliance upon the reference if it contains a statement of fact which the employer knows to be untrue,¹⁰¹⁰ or (possibly) if the employer is negligent in making statements in it.¹⁰¹¹ It was held in *Spring v Guardian Assurance Plc*¹⁰¹² that an employer who gave a reference to an employer of one of his ex-employees did owe a duty of reasonable care to the ex-employee to ensure that the facts stated in the reference were accurate, in accordance with the earlier decision recognising such a duty in the case of *Lawton v BOC Transhield Ltd.*¹⁰¹³ The duty of care which was recognised in *Spring v Guardian Assurance Plc* was later expounded by the Court of Appeal¹⁰¹⁴ as a duty to provide a true, fair and accurate reference when taken as a whole rather than as a series of discrete statements. It has since been ruled¹⁰¹⁵ that there is only a duty to take reasonable care not

to give misleading information about the worker in question, and not a duty to give a reference that is full and comprehensive. The Court of Appeal has in a later case¹⁰¹⁶ upheld a decision of the County Court that the employers were negligent in providing a reference in respect of the claimant to subsequent employers which relied upon allegations of dishonest conduct which they had not properly investigated, and has since¹⁰¹⁷ held that there was no liability for negligent misstatement where the former employing company claimed that the former employee had left owing repayment of an advance commission payment, but where that was not asserted to any third party or in any reference given to a potential employer. The former employee will have an action for libel or slander against the employer for any untrue statement in the reference or testimonial which injures his or her reputation only if he or she can prove malice on the part of the employer,¹⁰¹⁸ since the occasion is one protected by the defence of qualified privilege.¹⁰¹⁹ If a written character reference is produced by the employee to the prospective employer, the document will usually belong to the employee, who will be entitled to damages if the prospective employer destroys or defaces it.¹⁰²⁰

References and the Rehabilitation of Offenders Act 1974

- 42-151 The writing of references and testimonials may be affected by the provisions of the [Rehabilitation of Offenders Act 1974](#). If a reference is given in answer to questions, the questions are to be treated as not related to spent convictions or their ancillary circumstances and no penalty or liability can attach to failure to disclose these in the answer.¹⁰²¹ If the writer of a reference or testimonial does refer to spent convictions, and is sued for defamation for so doing, the writer cannot rely on the defence of justification (truth) if the statement is shown to have been made with malice.¹⁰²² The Act created a new offence of unauthorised disclosure of spent convictions which may be committed by a person who has in the course of his or her official duties had access to any “official record” or the information in it and who discloses a spent conviction other than in the course of his or her duties.¹⁰²³

Data protection and privacy

- 42-152 The common law of the contract of employment has little to say about data protection and employees’ privacy, though the employer’s implied duty to deserve the trust and confidence of the employee might be invoked.¹⁰²⁴ However, there is an increasingly significant body of statute law in this area, of which the main provisions, in very brief summary, are as follows. An extensive and elaborate regime of data protection was envisaged by the European Union’s General Data Protection Regulation.¹⁰²⁵ The [Data Protection Act 2018](#) was enacted to complement the requirements of that Regulation. Under the provisions of the Act and the Regulation, data controllers—which includes employers—are required to abide by a series of data protection

principles,¹⁰²⁶ and also to give effect to special controls placed upon the use of a category of data designated as “special categories of personal data”.¹⁰²⁷ The Act confers important rights upon data subjects, such as employees, in particular the right of access, in and on certain conditions, to personal data,¹⁰²⁸ and rights in relation to automated decision-making which place significant restrictions on the way that the appraisal of employees’ performance may be conducted.¹⁰²⁹

Privacy and the Human Rights Act

- 42-153 More generally, employees of public authorities may be able to invoke against their public authority employers the right to respect for private and family life which is embodied in art.8 of the European Convention on Human Rights and is incorporated into the law of the United Kingdom by virtue of the provisions of the *Human Rights Act 1998*.¹⁰³⁰ In *Antovic and Mirkovic v Montenegro* the European Court of Human Rights held that art.8 could also be engaged in the context of professional activities in a public university,¹⁰³¹ and in *Lopez Ribalda v Spain*, the Court was particularly critical of covert electronic surveillance in the workplace.¹⁰³²

Trust and confidence and other associated implied duties

- 42-154 The decision of the Court of Appeal in *Western Excavating (ECC) Ltd v Sharp*,¹⁰³³ that the statutory concept of constructive dismissal¹⁰³⁴ was to be interpreted as requiring either fundamental breach or repudiation of the contract of employment, has proved a fruitful source of case law about the employer’s implied duties under the contract of employment and has given rise to the recognition of a number of new general and particular implied duties. The most important of those is a general implied duty to preserve the trust and confidence that an employee should have in his or her employer.¹⁰³⁵ This implied term received the recognition of the House of Lords in *Malik v Bank of Commerce and Credit International SA*,¹⁰³⁶ where it was held that there might be a breach of the implied term of trust and confidence, giving rise to “stigma damages”, where the conduct of the employer’s business was so disreputable as to damage the employee’s prospects of obtaining other employment.¹⁰³⁷ Other implied duties so recognised have been: an implied duty not to behave arbitrarily, capriciously and inequitably in matters concerning remuneration¹⁰³⁸; an implied duty to investigate a genuine and bona fide safety grievance¹⁰³⁹; an implied duty to take reasonable steps to maintain an appraisal of a probationer during a trial period, giving guidance by advice or warning where necessary.¹⁰⁴⁰ This whole development can be seen as the counterpart of the employee’s duty of contractual co-operation¹⁰⁴¹; but it stops short of an absolutely general implied term requiring the employer to behave reasonably towards the employee.¹⁰⁴² Moreover,

it has not permitted an argument to succeed that an employer's equal opportunity policy must be regarded as an implied term of the contract of employment capable of overriding an express term in conflict with the policy.¹⁰⁴³

Extensions of the implied obligation of trust and confidence

- 42-155 A significant extension of the development occurred (outside the context of constructive dismissal) in *Scally v Southern Health Board*,¹⁰⁴⁴ where the House of Lords held that where a contract of employment negotiated between employers and a representative body, or otherwise settled on a non-individual basis, contained a term conferring on the employee a valuable right contingent upon his acting as required, of which he could not be expected to be aware unless that term was brought to his attention, there was an implied obligation on the employer to take reasonable steps to bring the term to the employee's attention so as to enable him to enjoy the right in question. The implied obligation has been held to apply in the following situations: the Employment Appeal Tribunal has held that a local authority employer was vicariously liable for a breach of the implied obligation of trust and confidence where a councillor subjected the employee to harassment in the course of his work¹⁰⁴⁵; the Court of Appeal has held that another local authority employer was in breach of the implied obligation of trust and confidence where the employee was suspended, pending the investigation of an allegation of abuse of a child in her care, without sufficient cause¹⁰⁴⁶; the Court of Appeal has also held that an employing company was liable for breach of the implied obligation of trust and confidence in failing to offer a revised contractual package of pay and benefits to one worker which was offered to others in a similar situation.¹⁰⁴⁷

Further applications and extensions of the implied obligation of trust and confidence

- 42-156 There continue to be cases in which employing enterprises are held to be in breach of specific obligations which are implied in and from the particular circumstances but are derived from or associated with the general implied obligation as to trust and confidence.¹⁰⁴⁸ The decision of the Court of Appeal in *Horkulak v Cantor Fitzgerald International*¹⁰⁴⁹ confirmed the application of the implied obligation to the exercise of a contractual discretion as to the level of bonus payment to be awarded. The decisions of the High Court in *Takacs v Barclays Services Jersey Ltd*¹⁰⁵⁰ and of the Court of Appeal in *Keen v Commerzbank AG*¹⁰⁵¹ suggest that the implied controls upon the exercise of contractual discretions with regard to bonus payments are increasingly being envisaged in terms of obligations on the part of the employer to refrain from irrational or perverse exercise or non-exercise of such discretions, and also to refrain from termination of employment

for the purpose of avoiding liability to bonus payment. In *Braganza v BP Shipping Ltd*,¹⁰⁵² the Supreme Court highlighted the extension of the implied term of trust and confidence to the employer's exercise of contractual discretion, holding that “[a]ny decision-making function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence”.¹⁰⁵³ The Court opined in *Bradbury v BBC* that an employer's several actions might cumulatively amount to a breach of the implied term.¹⁰⁵⁴

The limits of the implied obligation of trust and confidence

- 42-157 Although the implied obligation as to trust and confidence has thus continued to be extended in various directions in recent years, limiting decisions and limiting doctrines also present themselves. In *BCCI v Ali (No.2)*,¹⁰⁵⁵ the Court of Appeal upheld the finding that two former employees had not shown a sufficiently strong causative link between the employer's breach of the implied term of trust and confidence and their difficulty in obtaining subsequent employment; the indications are that claims to stigma damages will in practice be difficult to establish. Most importantly, in *Johnson v Unisys Ltd*¹⁰⁵⁶ the House of Lords held that the implied obligation of mutual trust and confidence did not apply to limit the manner in which an employer exercised a power of dismissal, so that a claim for “stigma damages” or for damages for distress or injury to feelings could not be made where that would be the basis of the claim. This was said to be for the reason that Parliament when enacting the provisions concerning remedies for unfair dismissal had intended that those provisions should provide the sole source of complaint and compensation for injury caused by the manner of dismissal from employment. That has left a difficulty of deciding whether, when dismissal eventuates from or at the end of a course of conduct on the part of the employing enterprise which would otherwise be regarded as a breach of the implied obligation of trust and confidence, the course of conduct is not to be so regarded by reason of the rule in *Johnson v Unisys*. In *Eastwood v Magnox Electric Plc, McCabe v Cornwall CC*¹⁰⁵⁷ the House of Lords sought definitively to draw the boundary between the area of exclusion of liability for breach of the implied term of trust and confidence envisaged in the *Johnson* case, and the area of pre-dismissal conduct on the part of the employer, apparently including conduct capable of being treated as constructive dismissal, within which liability for breach of the implied term may arise; their approach was to distinguish those situations in which a cause of action for breach of the implied obligation had arisen before the dismissal took place, and to regard that cause of action as vested and protected from the *Johnson* exclusion.¹⁰⁵⁸ The existence of the “*Johnson* exclusion” and the delineation of its scope in the *Eastwood* case were confirmed by the Supreme Court in the case of *Edwards v Chesterfield Royal Hospital NHS Trust*¹⁰⁵⁹ so that the implied obligation of trust and confidence has effectively been precluded from attaching to the conduct of dismissal proceedings, as also has been the associated liability to damages for loss suffered as a result of a breach of a term (express or implied) in the contract of employment as to the manner of dismissal, unless the loss can be said to precede and be independent of the

dismissal.¹⁰⁶⁰ Moreover, the decision of the Employment Appeal Tribunal in *Claridge v Daler Rowney Ltd*¹⁰⁶¹ seemed to confirm the emergence of a doctrine adumbrated in *Abbey National Plc v Fairbrother*¹⁰⁶² to the effect that, at least in the context of the carrying out of grievance procedures, the employer will not be regarded as having constructively dismissed the employee or as having acted in breach of the obligation of mutual trust and confidence if the employer's conduct lay within the range of reasonable responses which the generality of employers might have made. However, in *Bournemouth University Higher Education Corp v Buckland*,¹⁰⁶³ the Court of Appeal rejected the argument that a "band of reasonable responses" test should apply to determine what constitutes fundamental breach of contract and therefore constructive dismissal on the part of the employer. Moreover, further illustration of the way in which failures in disciplinary or dismissal procedure may nevertheless amount to breach of the implied obligation of trust and confidence is provided by the decision in *Lakshmi v Mid-Cheshire Hospitals NHS Trust*¹⁰⁶⁴; and comparison should also be made with the decision in *Lauffer v Barking, Havering and Redbridge University Hospitals NHS Trust*.¹⁰⁶⁵

Disclosures of information in the public interest

- 42-158 Provision is made by the **Public Interest Disclosure Act 1998**¹⁰⁶⁶ for the protection of workers who make certain disclosures of information in the public interest, and to allow such individuals to bring action in respect of victimisation.¹⁰⁶⁷ In brief summary, these provisions are as follows. The protection applies to an especially enlarged category of *workers* which includes, for example, certain persons being provided with work experience or training for employment, although they do not have contracts of employment.¹⁰⁶⁸ Claims can be brought both against a worker's employer, an end-user of agency services, or both if the exercise of employer functions is shared.¹⁰⁶⁹ The protection applies to qualifying disclosures, which are defined by reference to the kind of failure they tend to show—for example, the commission of criminal offences, miscarriages of justice or danger to health and safety,¹⁰⁷⁰ and by reference to the persons to whom the disclosures are made—for example, to the employer or other responsible person, to a legal adviser, or to a Minister of the Crown—and the circumstances in which they are made—for example disclosure in good faith of exceptionally serious failure which it is reasonable in all the circumstances to make.¹⁰⁷¹ It has been held that in a whistle-blower case where the disclosure related to a breach of the worker's own contract of employment, or some other matter under s.43B(1) where the interest was personal in character, there might nevertheless be features of the case making it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.¹⁰⁷² The Act confers upon workers the right not to suffer detriment on the ground that the worker has made a protected disclosure,¹⁰⁷³ and provides for them to enforce that right by complaint to an employment tribunal,¹⁰⁷⁴ which may award compensation within prescribed limits.¹⁰⁷⁵ It is also provided that a dismissal, the reason or principal reason for which is that the employee made a

protected disclosure, will be automatically treated as unfair for the purposes of the unfair dismissal legislation.¹⁰⁷⁶ It is further provided that any provision in any agreement between a worker and his or her employer is void insofar as it purports to preclude the worker from making a protected disclosure—that is, insofar as it seeks to impose a countervailing duty of confidentiality.¹⁰⁷⁷

Duties to avoid less favourable treatment of part-time work and fixed-term work

- 42-159 Two important measures have been taken in response to EU Directives, conferring (to the extent defined) upon those working under certain specific types of employment contract or arrangement a right to equality of treatment with those employed under the corresponding “standard” type of employment contract or arrangement. The *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000*,¹⁰⁷⁸ implementing Council Directive 97/81 on part-time work,¹⁰⁷⁹ require part-time workers¹⁰⁸⁰ not to be treated less favourably than full-time workers of the same employer who work under the same type¹⁰⁸¹ of employment contract,¹⁰⁸² on the ground of being a part-time worker, unless there is objective justification for that less favourable treatment.¹⁰⁸³ A part-time worker may complain to an employment tribunal of the violation of that right.¹⁰⁸⁴
- 42-160 The provisions have been subject of intensive litigation with regard to judicial office holders. In *Christie v Department for Constitutional Affairs*,¹⁰⁸⁵ it was held that a part-time tribunal chairman came within the *Regulations*. More generally, in *O'Brien v Department of Constitutional Affairs* the Court of Appeal held that part-time judicial office holders are not “workers” for the purpose of these *Regulations*¹⁰⁸⁶; however, in *O'Brien v Ministry of Justice* the CJEU suggested that this decision was non-compliant with the Directive.¹⁰⁸⁷ In *O'Brien v Department of Constitutional Affairs* the Supreme Court duly held that the decision of the CJEU did require a recognition that the part-time Recorder was entitled to be regarded as a “worker” for the purposes of the *2000 Regulations*.¹⁰⁸⁸ *O'Brien* was distinguished in *Gilham v Ministry of Justice*,¹⁰⁸⁹ where a narrower interpretation was favoured in the context of purely domestic employment rights. The Court of Appeal dismissed a further appeal in the latter case.¹⁰⁹⁰
- 42-161 Rather similarly, though by no means identically, the *Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002*¹⁰⁹¹ implementing¹⁰⁹² Council Directive 99/70 on fixed-term work, require fixed-term employees¹⁰⁹³ not to be treated less favourably than comparable permanent employees of the same employer engaged in the same or broadly similar work¹⁰⁹⁴ on the ground that the worker is part-time, unless that less favourable treatment is justified on objective grounds. The right of no less favourable treatment is conferred by reg.3; it is a right not to

be treated less favourably, on the ground of being a fixed-term employee, than the employer treats a comparable permanent employee as regards the terms of contract or by being subjected to any other detriment, if the treatment is not justified on objective grounds.¹⁰⁹⁵ Regulation 4 provides that less favourable treatment with regard to any contract term is to be regarded as justified on objective grounds if the terms of the fixed-term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment. A fixed-term employee may complain to an employment tribunal of the violation of that right.¹⁰⁹⁶

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 782 See above, para.42-092.
- 783 *Collier v Sunday Referee Publishing Co Ltd [1940] 2 K.B. 647, 650.*
- 784 *Lagerwall v Wilkinson, Henderson & Clarke Ltd (1899) 80 L.T. 55.*
- 785 *Turner v Sawdon & Co [1901] 2 K.B. 653.*
- 786 *[1901] 2 K.B. 653* at 657.
- 787 *Clayton & Waller v Oliver [1930] A.C. 209; Withers v General Theatre Corp Ltd [1933] 2 K.B. 536.*
- 788 cf. *Collier v Sunday Referee Publishing Co Ltd [1940] 2 K.B. 647, 650.*
- 789 cf. *Collier v Sunday Referee Publishing Co Ltd [1940] 2 K.B. 647, 650.* See also *Driscoll v Australian RMSN Co (1859) 1 F. & F. 458* (employers sold ship in which the employee served).
- 790 *[1974] I.C.R. 180, 190B–F* (Lord Denning MR).
- 791 *[1974] I.C.R. 180* at 190F–G.
- 792 *[1974] I.C.R. 180* at 192E–F.
- 793 *[1974] I.C.R. 180* at 192F–G, 193F–G.
- 794 *Langston v AUEW (No.2) [1974] I.C.R. 510, 521D–522F.*
- 795 *[1974] I.C.R. 510* at 522D–H.
- 796 Munkman, *Employer's Liability at Common Law*, 15th edn (2009); Redgrave's *Health and Safety*, 7th edn (2010).
- 797 *Wilsons & Clyde Coal Co v English [1938] A.C. 57; Wilson v Tyneside Window Cleaning Co [1958] 2 Q.B. 110.* Compare now *Jagedo v Smiths Industries Ltd [1982] I.C.R. 47; Johnstone v Bloomsbury HA [1992] 1 Q.B. 333.* Note the discussion of s.2(1) of the *Unfair Contract Terms Act 1977*.
- 798 *Black v Fife Coal Co Ltd [1912] A.C. 149.*

- 799 *Davie v New Merton Board Mills Ltd* [1959] A.C. 604.
- 800 s.1(1). See *Knowles v Liverpool City Council* [1994] I.C.R. 243.
- 801 s.1(1).
- 802 s.1(2).
- 803 *Matthews v Kuwait Bechtel Corp* [1959] 2 Q.B. 57, CA; *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, [2015] I.R.L.R. 112.
- 804 *Qualcast (Wolverhampton) Ltd v Haynes* [1959] A.C. 743, 755, 757–758, 759, 761. See also *General Cleaning Contractors Ltd v Christmas* [1953] A.C. 180; *Latimer v AEC Ltd* [1953] A.C. 643, 658.
- 805 See Clerk & Lindsell on Torts, 23rd edn (2020), Ch.12.
- 806 [1995] I.C.R. 702.
- 807 [2002] I.C.R. 613.
- 808 [2004] UKHL 13, [2004] 1 W.L.R. 1089.
- 809 [2007] EWCA Civ 70, [2007] I.R.L.R. 355.
- 810 e.g. relating to remoteness of damage: *Koufos v C Czarnikow Ltd* [1969] 1 A.C. 350.
- 811 e.g. *Doughty v Turner Manufacturing Co Ltd* [1964] 1 Q.B. 518.
- 812 viz a duty which would be owed irrespective of the contract. But the *Occupiers' Liability Act 1957* has not been treated as relevant in these cases, and that presumably would also be the case for the *Defective Premises Act 1972*. cf. as to the employee of a sub-contractor on a building site, *Ferguson v Welsh* [1987] 3 All E.R. 777.
- 813 A similar assumption must be made in a case such as *Re Polemis and Furness, Withy & Co Ltd* [1921] 3 K.B. 560, where, although there was a contract between the parties, the Court of Appeal decided the problem of remoteness of damage by reference to the rules of tort.
- 814 See *Simpson* (1972) 35 M.L.R. 63; *Hasson* (1974) 3 I.L.J. 79.
- 815 s.1 (the terms “approved policy” and “authorised insurer” being defined by s.1(3) as amended by the *Financial Services and Markets Act 2000*).
- 816 s.2(1).
- 817 s.2(2)(a).
- 818 s.2(2)(b).
- 819 s.3. See SI 1971/1933, SI 1974/208, SI 1975/1443, SI 1998/2573; and *National Health Service and Community Care Act 1990* Sch.8 Pt I para.1.
- 820 s.4. See *Employers' Liability (Compulsory Insurance) General Regulations 1971* (SI 1971/1117) as amended by SI 1974/208 and SI 1975/194. The *Employers' Liability (Compulsory Insurance) General Regulations* have been amended in various respects by the *Employers' Liability (Compulsory Insurance) General (Amendment) Regulations 1994*, and, more recently, SI 2004/2882.
- 821 s.6.
- 822 See *Employers' Liability (Compulsory Insurance) General Regulations 1971* (SI 1971/1117) reg.3.
- 823 A fuller list of the relevant statutes is contained in Sch.1 to the *Health and Safety at Work, etc. Act 1974* as since amended.

- 824 SI 1992/2051, implementing European Union Council Directive 89/391 (the Framework Directive).
- 825 Clerk & Lindsell on Torts, 23rd edn (2020), paras 12-74—12-81.
- 826 Based upon the Report of the Robens Committee, “Safety and Health at Work”, Cmnd.5034 (1972). See *Lewis* (1975) 38 M.L.R. 442–448; (1975) 4 I.L.J. 34–38.
- 827 s.2 as supplemented by regulations.
- 828 See above, para.42-107, and s.2(2)–(7) of the Act.
- 829 s.47(1)(a). Criminal penalties are provided by s.33 (as extended by ss.36 and 37), and administrative sanctions (which extend to the existing statutory provisions described in the first part of the present paragraph) are provided by ss.21–24 in the form of a power on the part of the inspectorate to issue improvement and prohibition notices.
- 830 s.2(3).
- 831 s.2(4). See the Safety Representatives and Safety Committees Regulations 1977 (SI 1977/500). See also *White v Pressed Steel Fisher* [1980] I.R.L.R. 176, EAT.
- 832 s.2(6) as amended by Employment Protection Act 1975 s.116 and Sch.15 para.2, to limit this duty to consultation with trade union safety representatives.
- 833 s.18(7) as amended by Employment Protection Act 1975 s.116 and Sch.15 para.8, to extend to agricultural operations. The responsibility devolves primarily upon the Health and Safety Executive established by s.10 of the Act. See the Health and Safety (Enforcing Authority) Regulations 1977 (SI 1977/746) as amended by SI 1980/1744.
- 834 s.19. The provision has been used to establish a combined unified inspectorate under the aegis of the Health and Safety Executive.
- 835 s.28(8). cf. also s.28(3)(b) which can create a privilege for disclosure of information to trade union safety representatives and cf. s.28(9) as amended by Employment Protection Act 1975 s.116 and Sch.15 para.9.
- 836 s.28(8)(a) referring to s.28(7), referring in turn to s.20.
- 837 s.15 as amended by Employment Protection Act 1975 s.116 and Sch.15 para.6, to extend the new system to agricultural operations.
- 838 ss.16–17 as amended by Employment Protection Act 1975 s.116 and Sch.15 para.7, to extend the new system to agricultural operations.
- 839 s.61, amending the Public Health Act 1936 ss.61–62 (itself later overtaken by the Building Act 1984).
- 840 s.61(2)(a).
- 841 Employment Rights Act 1996 ss.44, 48, 49, 98(6), 100, 105(3), 108(3), 117(3), (4), 118, 119(1), 120, 122(3), 125, 128–132, 236(3). See *Ewing* (1993) 22 I.L.J. 165, 170–171.
- 842 Employment Rights Act 1996 s.1(4)(c).
- 843 e.g. for the purposes of the Employment Rights Act 1996 ss.162, 135, 155 and 139 (calculation of redundancy payment); Employment Rights Act 1996 ss.87–91 rights of employee during period of notice); Employment Rights Act 1996 s.30 (calculation of guarantee payment). See below, para.42-262.
- 844 *Tarmac Roadstone Holdings Ltd v Peacock* [1973] I.C.R. 273; see below, para.42-262.

- 845 cf. *Pearson v William Jones Ltd* [1967] 1 W.L.R. 1140; *The Darlington Forge Ltd v Sutton* [1968] I.T.R. 196; *Turriff Construction Co Ltd v Bryant* [1967] 2 I.T.R. 292; *Tarmac Roadstone Holdings Ltd v Peacock* [1973] I.C.R. 273. See below, para.42-262.
- 846 Employment of Women, Young Persons and Children Act 1920; Hours of Employment (Conventions) Act 1936; Shops Act 1950; Young Persons (Employment) Acts 1938 and 1964; Factories Act 1961 Pt VI; Children and Young Persons Act 1933 s.18; Children and Young Persons Act 1963 ss.37–44; Employment of Children Act 1973 s.1. See Hepple and O'Higgins, Encyclopedia of Labour Relations Law, paras 1-105, 1-230 and 1-231.
- 847 Coal Mines Regulation Act 1908 s.1, as amended by Coal Mines Act 1919 s.1; Mines and Quarries Act 1954 s.189; Transport Act 1968 Pt VI; Factories Act 1961 s.76; Shops Act 1950. See Encyclopedia of Labour Relations Law, para.1-232. The Baking Industry (Hours of Work) Act 1954 was repealed by s.8 of the Sex Discrimination Act 1986.
- 848 See below, paras 42-128—42-139.
- 849 Directive 2003/88.
- 850 Directive 94/33.
- 851 SI 1998/1833, in force from 1 October 1998.
- 852 The Working Time Regulations 1999 (SI 1999/3372), the Working Time (Amendment) Regulations 2001 (SI 2001/3256), the Working Time (Amendment) Regulations 2002 (SI 2002/3128), and the Working Time (Amendment) Regulations 2003 (SI 2003/1684). See also now the Working Time (Amendment) Regulations 2006 (SI 2006/99) and, in relation to agricultural workers, the Working Time (Amendment) (England) Regulations 2013 (SI 2013/2228).
- 853 SI 1998/1833 reg.26 was revoked by SI 2003/1684 reg.9.
- 854 See regs 3, 36; and see above, para.42-009.
- 855 *Federacion de Servicios Privados del sindicato Comisiones obreras (CC OO) v Tyco Integrated Security SL* (C-266/14) EU:C:2015:578, [2016] 1 C.M.L.R. 22.
- 856 *Edwards v Encirc Ltd* [2015] I.R.L.R. 528, EAT.
- 857 *Addison Lee Ltd v Lange* [2019] I.C.R. 637, EAT.
- 858 See reg.23 and Sch.1. It was, however, held in *Barber v RJB Mining (UK) Ltd* [1999] I.C.R. 679, QBD that where an employer seeks to require workers to work longer hours than the maximum hours applicable to them under the Regulations, and they are unwilling to agree to do so, they may be granted a declaration that the employer's attempt so to require them to exceed the statutory maximum violates an obligation which has become part of their contract of employment.
- 859 See reg.5.
- 860 See reg.30. Compensation was held not to extend to injury to feelings in *Santos Gomes v Higher Level Card Ltd* [2018] EWCA Civ 418, [2018] I.C.R. 1571.
- 861 See reg.31.
- 862 See reg.6.
- 863 See new regs 5A, 6A, inserted by the Working Time (Amendment) Regulations 2002 (SI 2002/3128).
- 864 See reg.11.

- 865 See reg.10.
- 866 See reg.12. Whether rest pursuant to reg.24(a) is “equivalent” to the 20-minute break is a question of fact to be determined by the Employment Tribunal: *Network Rail Infrastructure Ltd v Crawford* [2019] EWCA Civ 269, [2019] 2 All E.R. 1095.
- 867 *Grange v Abellio London Ltd* [2017] I.R.L.R. 108, EAT.
- 868 See reg.23. Compare, as to collective agreements, *Prison Service v Bewley* [2004] I.C.R. 422, EAT.
- 869 See reg.13 as amended by the Working Time (Amendment) Regulations 2001 (SI 2001/3256). For details, see above, para.42-084.
- 870 See reg.28.
- 871 See regs 30–32.
- 872 C-518/15 EU:C:2018:82.
- 873 See above, para.42-107.
- 874 *Deyong v Shenburn* [1964] K.B. 227; cf. *Edwards v West Herts Group Hospital Management Committee* [1957] 1 W.L.R. 415.
- 875 See below, paras 42-154—42-157.
- 876 *Adamson v Jarvis* (1827) 4 Bing. 66; *Re Famatina Development Corp* [1914] 2 Ch. 271.
- 877 As required by the Road Traffic Act 1988 s.143.
- 878 *Gregory v Ford* [1951] 1 All E.R. 121.
- 879 [1990] 1 W.L.R. 212.
- 880 *Semtex Ltd v Gladstone* [1954] 1 W.L.R. 945; *Lister v Romford Ice and Cold Storage Ltd* [1957] A.C. 555. See above, paras 42-074—42-075.
- 881 cf. *Southern v How* (1618) Cro. Jac. 468.
- 882 *Adamson v Jarvis* (1827) 4 Bing. 66.
- 883 *Burrows v Rhodes* [1899] 1 Q.B. 816; *Thacker v Hardy* (1878) 4 Q.B.D. 685.
- 884 *Southern v How* (1618) Cro. Jac. 468; *Adamson v Jarvis*, see above.
- 885 The most important amendments were made by s.13 of the Trade Union Reform and Employment Rights Act 1993, by s.2 of and Sch.2 to the Employment Relations Act 1999, and also by ss.29–32 of the Employment Relations Act 2004, inserting the new ss.145A–145B of the Trade Union and Labour Relations (Consolidation) Act 1992. As to the latter, see now *Kostal UK Ltd v Dunkley* [2021] UKSC 47, [2022] 2 All E.R. 607 (on the legality of direct offers to employees during a collective bargaining process).
- 886 Excluded classes of employees are: share fishermen—s.284, work outside Great Britain—s.285. Crown employees are included—s.273. The Employment Relations Act 2004 s.31 amended ss.146–151 of the 1992 Act to extend, to workers who are not employees, the existing protections of employees against detrimental action by their employer for being, or not being, a member of a trade union or for taking part in the activities of their union.

887

The effects of deliberate omission, as well as of positive action, are now included, reversing by statute the decision of the House of Lords on this point in *Associated Newspapers Ltd v Wilson; Associated British Ports Ltd v Palmer [1995] I.C.R. 406*.

⑧888 s.146(1)(a). See *Jet2.Com Ltd v Denby [2018] I.C.R. 597*, EAT. Compare, in relation to unfair dismissal, see below, para.42-235.

⑧889 s.146(1)(b). See *Robb v Leon Motor Services Ltd [1978] I.C.R. 506*, EAT, and *Marley Tile Co v Shaw [1980] I.C.R. 72*. See also *Department of Transport v Gallacher [1994] I.C.R. 967*, and *University College London v Brown [2021] I.R.L.R. 200*.

⑧890 s.146(1)(c).

⑧891 *Mercer v Alternative Future Group Ltd [2022] EWCA Civ 379*, [2022] I.R.L.R. 517. See also *Ryanair DAC v Morais [2022] I.C.R. 565*, EAT (appeal pending).

⑧892 ss.29–32 of the 2004 Act make a series of additions and amendments to ss.146–151 of the Trade Union and Labour Relations (Consolidation) Act 1992; s.29 of the 2004 Act inserts new ss.145A–F into the 1992 Act.

893 s.146(5) (limitation period—[s.147](#)).

894 s.148(1) (as amended by the Employment Relations Act 2004) (see also [s.148\(2\)](#)—disregard of industrial pressure).

895 s.149(1). Compensation is asserted in accordance with the provisions of [s.149](#). See *Brassington v Cauldron Wholesale Ltd [1978] I.C.R. 405*, EAT.

896 Employment Rights Act 1996 ss.50–63C, Trade Union and Labour Relations (Consolidation) Act 1992 ss.168–173. Employees excluded are: those working abroad, Employment Rights Act 1996 s.196, Trade Union and Labour Relations (Consolidation) Act 1992 s.285. Crown employees are included, Employment Rights Act 1996 ss.191–193, Trade Union and Labour Relations (Consolidation) Act 1992 s.273, subject to a power of exemption on the grounds of national security in [s.275](#).

897 Employment Rights Act 1996 ss.51, 54, 57 and 60; Trade Union and Labour Relations (Consolidation) Act 1992 ss.168, 170, 171, 172.

898 See above, para.42-098; and *Corner v Buckinghamshire CC [1978] I.C.R. 836*, EAT.

899 Other such rights, not described in detail here, are those for occupational pension scheme trustees—Employment Rights Act 1996 ss.58–60; for employee representatives—Employment Rights Act 1996 ss.61–63; for young persons for study or training—Employment Rights Act 1996 ss.63A–63C inserted by the Teaching and Higher Education Act 1998 s.32; and for union learning representatives and consultation by union members with union learning representatives—Trade Union and Labour Relations (Consolidation) Act 1992 s.168A, 170(2A)–(2C) inserted by s.43 of the Employment Act 2002 with effect from 27 April 2003. A new kind of statutory right to time off has been conferred on employees by [s.40 of the Employment Relations Act 2004](#), which by inserting a new [s.43M](#) into the Employment Rights Act 1996 protects employees from being subjected to detriment by the

- employee by reason of being summoned for or being absent from work on jury service, with effect from 6 April 2005.
- 900 As defined by [Trade Union and Labour Relations \(Consolidation\) Act 1992 s.5](#) (definition of “independent”) and [s.1](#) (definition of “trade union”).
- 901 As defined by [s.178\(3\)](#).
- 902 Trade Union and Labour Relations (Consolidation) Act 1992 s.[168](#). See *Beal v Beecham Group Ltd [1982] I.C.R. 460; Thomas Scott & Sons (Bakers) Ltd v Allen [1983] I.R.L.R. 329; Ashley v MOD [1984] I.C.R. 298*.
- 903 Trade Union and Labour Relations (Consolidation) Act 1992 s.[168\(3\)](#).
- 904 [s.170\(1\), \(2\)](#).
- 905 [s.170\(3\)](#).
- 906 Employment Rights Act 1996 s.[50\(1\)–\(3\), \(5\)–\(9\)](#). Rights extended to members of police authorities by the [Time Off for Public Duties Order 1995 \(SI 1995/694\)](#) with effect from 1 April 1995.
- 907 Employment Rights Act 1996 s.[50\(4\)](#). See *Corner v Buckinghamshire CC [1978] I.C.R. 836, EAT*.
- 908 Employment Rights Act 1996 s.[52\(1\)](#). See *Dutton v Hawker Siddeley Aviation Ltd [1978] I.C.R. 1057, EAT*.
- 909 Employment Rights Act 1996 s.[52\(2\)](#).
- 910 Employment Rights Act 1996 s.[55\(1\)–\(3\)](#).
- 911 Employment Relations Act 1999 s.[8](#) and Pt II of Sch.[4](#), with effect from 15 December 1999.
- 912 See below, paras [42-149](#), [42-242](#).
- 913 Employment Rights Act 1996 s.[51\(1\)](#), [54\(1\)](#), [57\(1\)](#); Trade Union and Labour Relations (Consolidation) Act 1992 ss.[168\(4\)](#), [169\(5\)](#), [170\(4\)](#) (limitation periods—Employment Rights Act 1996 ss.[51\(2\)](#), [54\(2\)](#), [57\(2\)](#); Trade Union and Labour Relations (Consolidation) Act 1992 s.[171](#)).
- 914 Employment Rights Act 1996 s.[51\(3\)](#), [54\(4\)](#) and [Trade Union and Labour Relations \(Consolidation\) Act 1992 s.172](#).
- 915 Employment Rights Act 1996 s.[54\(3\)](#), referring to [s.53\(3\)](#) referring to [Employment Rights Act 1996 s.53\(4\)](#).
- 916 Employment Rights Act 1996 s.[53\(5\)](#) and [54\(4\)](#).
- 917 Employment Rights Act 1996 s.[57\(3\)–\(5\)](#).
- 918 See above, para.[42-096](#).
- 919 See above, para.[42-041](#) and see below, para.[42-253](#).
- 920 See below, paras [42-131](#)—[42-135](#).
- 921 [SI 1983/1794](#).
- 922 Equality Act 2010 ss.[64–69](#). By [s.83\(2\)](#), these provisions extend to employment under contracts of service or of apprenticeship or personally to execute any work or labour; see above, para.[42-009](#).
- 923 [s.66](#).
- 924 *Hayward v Cammell Laird Shipbuilders Ltd (No.2) [1988] I.C.R. 464*.
- 925 [s.65](#).

926 s.65(2).

927 s.65(4).

928 See s.79(1)–(4). See *British Coal Corp v Smith* [1996] I.C.R. 515, HL. Compare *Allonby v Accrington & Rossendale College* (C-256/01) EU:C:2004:18, [2004] I.R.L.R. 224, ECJ, as to the construction of the “same employment” concept in accordance with art.141(1) of the EC Treaty. Compare also *DEFRA v Robertson* [2005] EWCA Civ 138, [2005] I.C.R. 750, expounding the notion of attributability of differences between terms and conditions of employment to a “single source” which had been articulated by the ECJ in *Lawrence v Regent Office Care Ltd* (C-320/00) EU:C:2002:498, [2002] E.C.R. I-7325. See further *North v Dumfries and Galloway Council* [2013] UKSC 45, [2013] 4 All E.R. 413, and *ASDA Stores Ltd v Brierley* [2019] EWCA Civ 44, [2019] 2 C.M.L.R. 18.

⑨29 [2021] UKSC 10, [2021] 4 All E.R. 305.

930 s.66(2).

931 See s.69(1)–(3); leading authorities on the interpretation of the corresponding provisions in the antecedent legislation include *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] I.C.R. 715; (No.2) [1981] I.C.R. 592; *Rainey v Greater Glasgow Health Board* [1987] A.C. 224; *Leverton v Clwyd CC* [1989] I.C.R. 33; *Enderby v Frenchay HA* [1994] I.C.R. 112. The decision of the House of Lords in *North Yorkshire CC v Ratcliffe* [1995] I.C.R. 833 placed some restriction upon the scope for treating market forces as a material factor other than the difference of sex. See also *Strathclyde Regional Council v Wallace* [1998] I.C.R. 205; *Glasgow City Council v Marshall* [2000] I.C.R. 196; *Middlesborough Council v Surtees* [2007] I.R.L.R. 869.

932 s.127.

933 s.132(1)–(2).

934 s.132(3)–(4).

935 s.127(3).

936 s.128.

937 See s.131(8).

938 s.131.

939 s.74.

940 The provisions in question are those of s.18. See above, para.42-135.

941 s.76.

942 The provisions concerned apply to employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour—s.83(2) (definition of employment); see above, para.42-009. Corresponding provisions are made for discrimination on the grounds of gender reassignment by s.7. The provisions are extended to discrimination occurring after the employment relationship has come to an end where the discrimination arises out of and is closely connected to the relationship in question—s.108.

943 *Discrimination* (meaning sex discrimination in this context) is defined by ss.13 (direct discrimination) and 19 (indirect discrimination).

944 s.39(2)(b).

- 945 See below, para.42-253.
- 946 s.39(2)(d).
- 947 s.83(11) and Sch.9 Pt 1.
- 948 In which event the matter is determined under Pt 3 of the Act, and in particular s.29.
- 949 s.83(11) and Sch.9 para.19.
- 950 s.120.
- 951 s.124(2)(a).
- 952 s.124(2)(b).
- 953 s.124(6) referring to s.119.
- 954 s.124(2)(c), (7).
- 955 paras 42-131—42-133.
- 956 para.42-129.
- 957 See s.70.
- 958 See s.71.
- 959 See Deakin & Morris, Labour Law, 6th edn (2012), para.6.50.
- 960 As to which see below para.42-144.
- 961 s.18(1)—(4).
- 962 s.39(2)(a).
- 963 s.39(2)(b).
- 964 s.39(2)(d).
- 965 s.120.
- 966 s.124.
- 967 ss.8, 12–14, 39. The provisions are extended to discrimination occurring after the employment relationship has come to an end where the discrimination arises out of and is closely connected to the relationship in question—s.108. Provision for complaint to an employment tribunal is made by s.120(1), and for the awarding of remedies by s.124.
- 968 ss.9, 12–14, 39 subject to s.83(11) and Sch.9 Pt 1 (occupational requirements). The provisions are extended to discrimination occurring after the employment relationship has come to an end where the discrimination arises out of and is closely connected to the relationship in question—s.108. Provision for complaint to an employment tribunal is made by s.120(1), and for the awarding of remedies by s.124.
- 969 ss.6, 12–14, 20 (duty to make adjustments), 39 subject to s.83(11) and Sch.9 Pt 1 (occupational requirements). The provisions are extended to discrimination occurring after the employment relationship has come to an end where the discrimination arises out of and is closely connected to the relationship in question—s.108. Provision for complaint to an employment tribunal is made by s.120(1), and for the awarding of remedies by s.124. Compare also *Hainsworth v Ministry of Defence* [2014] EWCA Civ 763, [2014] I.R.L.R. 728 (employer's reasonable adjustment duty did not extend to an employee's association with a disabled person), and *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] I.C.R. 1194.
- 970 SI 2003/1660; in particular reg.6(2)–(4).
- 971 SI 2003/1661; in particular reg.6(2)–(4).

- 972 SI 2006/1031.
- 973 Directive 2000/78.
- 974 ss.5, 10, 12–14, 39 subject to s.83(11) and Sch.9 Pt 1 (occupational requirements) and Pt 2 (exceptions relating to age). The provisions are extended to discrimination occurring after the employment relationship has come to an end where the discrimination arises out of and is closely connected to the relationship in question: s.108. Provision for complaint to an employment tribunal is made by s.120(1), and for the awarding of remedies by s.124.
- 975 ss.26–27. The provisions are extended to harassment occurring after the employment relationship has come to an end where the harassment arises out of and is closely connected to the relationship in question—s.108.
- 976 s.27(1)–(5).
- 977 s.83(11) and Sch.9 Pt 1.
- 978 s.26(1), (5); there is a further extension involving unwanted conduct of a sexual nature, as to which see s.26(2). Constructive dismissal can similarly constitute unwanted conduct: *Driscoll v V&P Global Ltd [2021] I.R.L.R. 891*, EAT.
- 979 s.40(1). Provision for complaint to an employment tribunal is made by s.120(1), and for the awarding of remedies by s.124. This has now been held to extend to post-employment victimisation: *Rowstock Ltd v Jesseymey [2014] EWCA Civ 185, [2014] 1 W.L.R. 3615*.
- 980 s.40(2)–(4).
- 981 Enterprise and Regulatory Reform Act 2013 (Commencement No.3, Transitional Provisions and Savings) Order 2013 (SI 2013/2227).
- 982 s.143.
- 983 In which case provision is made by s.146 for complaint to an employment tribunal, which may make an order declaring such a term to be void or such a rule to be unenforceable.
- 984 In force from 31 July 1975, subject to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023).
- 985 s.4(3)(b). “Spent conviction” is defined in s.1, by reference to s.5.
- 986 See Clerk & Lindsell on Torts, 23rd edn (2020), Ch.12, s.3.
- 987 cf. *Nagle v Feilden [1966] 2 Q.B. 633*; *Edwards v SOGAT [1971] Ch. 354* and see above, para.42–105.
- 988 Pt VIII of the Employment Rights Act 1996 still has the heading “Maternity Rights”, but that heading no longer describes all the chapters comprising that part of the Act.
- 989 The combined provisions of s.7 of and Sch.4 Pt I to the Employment Relations Act 1999, and the Maternity and Parental Leave, etc. Regulations 1999 (SI 1999/3312) replaced (with effect from 15 December 1999) the provisions of Pt VIII of the Employment Rights Act 1996 with a new and more elaborate set of rights to maternity and parental leave, which were such as to implement the provisions of Council Directive 96/34 on the framework agreement on parental leave. Provisions about paternity leave and adoption leave were added by Pt 1 Ch.1 of the Employment Act 2002, and further provisions about maternity leave were made by Pt 1 Ch.2 of that Act. Subsequent changes have been made by the Maternity and Parental Leave (Amendment) Regulations 2001 (SI 2001/4010); the Maternity and Parental Leave (Amendment) Regulations 2002 (SI 2002/2789); the Paternity and Adoption

- Leave Regulations 2002 (SI 2002/2788); the Paternity and Adoption Leave (Amendment) Regulations 2004 (SI 2004/923); and the Maternity and Parental Leave, etc. and the Paternity and Adoption Leave (Amendment) Regulations 2006 (SI 2006/2014).
- 990 See above, paras 42-089—42-091.
- 991 The further rights conferred apart from Employment Rights Act 1996 Pts VIII and 8A are the right to time off for dependants—see above, para.42-126, and certain rights in connection with dismissal—see below, para.42-242.
- 992 See above, paras 42-130—42-135.
- 993 This period was increased from 18 weeks with effect from 6 April 2003, under the provisions of Pt 1 Ch.2 of the Employment Act 2002. A new s.71(3) was substituted by s.11(1) of and Sch.1 para.31 to the Work and Families Act 2006, which would enable that period to be further increased by regulations.
- 994 SI 1999/3312 regs 6, 7.
- 995 For a challenge under the Equality Act 2010 to the shared parental leave regime, see *Ali v Capita Customer Management Ltd [2019] EWCA Civ 900*.
- 996 The provisions are those of s.47, inserting new Pt 8A “Flexible Working” into the Employment Rights Act 1996. See now also the Flexible Working Regulations 2014 (SI 2014/1398), which extend the right to make a flexible working application to all employees who have been continuously employed for a period of at least 26 weeks.
- 997 In *Shaw v CCL Ltd [2008] I.R.L.R. 284*, EAT it was held that, although there is no right to return to work on a part time basis, refusal of such request may amount to unlawful direct or indirect sex discrimination, as such amounting to breach of the implied obligation as to mutual trust and confidence, and entitling the employee to resign and claim constructive unfair dismissal.
- 998 SIs 2006/3314 and 2007/1184. Moreover, SI 2009/595 extended the category of children in respect of whom such a request may be made so that it extends to children under 17 (with effect from April 2009).
- 999 s.9 and Sch.4 Pt III.
- 1000 See below, para.42-242.
- 1001 Employment Rights Act 1996 s.47C (as inserted by the Employment Relations Act 1999), as supplemented by reg.19 of the Maternity and Parental Leave, etc. Regulations 1999 (SI 1999/3312).
- 1002 Employment Rights Act 1996 s.47C (as amended by the Employment Act 2002), as supplemented by reg.28 of the Paternity and Adoption Leave Regulations 2002 (SI 2002/2788).
- 1003 Employment Rights Act 1996 s.47E (as inserted by s.47(1), (3) of the Employment Act 2002) (originally numbered s.47D, that number being corrected to 47E).
- 1004 Employment Rights Act 1996 s.48 (as amended by the Employment Relations Act 1999 and by the Employment Act 2002).
- 1005 Employment Rights Act 1996 s.49.
- 1006 *Carroll v Bird (1800) 3 Esp. 201; Handley v Moffatt (1872) 21 W.R. 231*. Even if the former employer gives some information, he is under no obligation to give all the information he has about the employee: *Wilkin v Reed (1854) 15 C.B. 192*. The employer is now, however,

- under a statutory obligation to give the employee a written statement of the reasons for his dismissal, see below, para.[42-200](#).
- 1007 *Moult v Halliday* [1898] 1 Q.B. 125, 129, 130. (On the right to the property in such a reference, see the cases cited below.)
- 1008 Servants' Characters Act 1792 (repealed by the Statute Law (Repeals) Act 2008 Sch.1 Pt 3).
- 1009 See *R. v Costello and Bishop* [1910] 1 K.B. 28.
- 1010 *Foster v Charles* (1830) 7 Bing. 105 (an action for deceit). cf. *Wilkin v Reed* (1854) 15 C.B. 192.
- 1011 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465. (The principles laid down in this case may be wide enough to justify the courts in holding that a duty of care arises between the employer who gives the reference, and a subsequent employer who acts in reliance on it. See Clerk & Lindsell on Torts, 23rd edn (2020), paras 7-103 et seq. *Esso Petroleum Co v Mardon* [1976] 1 Q.B. 801).
- 1012 [1995] 2 A.C. 296.
- 1013 [1987] I.C.R. 7.
- 1014 In *Bartholomew v Hackney LBC* [1999] I.R.L.R. 246, CA. Yet further exposition of the requirement of fairness of references for former employees is provided by the Court of Appeal in *Jackson v Liverpool City Council* [2011] EWCA Civ 1068, [2011] I.R.L.R. 1009; the relevance of the public law duty of honesty and integrity was considered *AB v A Chief Constable* [2014] EWHC 1965 (QB), [2014] I.R.L.R. 700.
- 1015 In *Kidd v AXA Equity and Law Life Assurance Society Plc* [2000] I.R.L.R. 301, QBD. Compare now also, to comparably restrictive effect, *Aspin v Metric Group Ltd* [2004] EWHC 1265.
- 1016 *Cox v Sun Alliance Life Ltd* [2001] I.R.L.R. 448. Compare *Hincks v Sense Network Ltd* [2018] EWHC 533 (QB), [2018] I.R.L.R. 614.
- 1017 In *Legal & General Assurance Ltd v Kirk* [2002] I.R.L.R. 124.
- 1018 Unless the case can be brought within a duty of care in negligence, see above, or if the employer communicates the reference to a person who has no "proper interest" in receiving it.
- 1019 Clerk & Lindsell on Torts, 23rd edn (2020), paras 21-98 et seq.
- 1020 See *Wennhak v Morgan* (1888) 20 Q.B.D. 635, 638, 640. (But cf. *Taylor v Rowan* (1835) 7 Car. & P. 70.)
- 1021 s.4(2)—“spent conviction” is defined in s.1 by reference to s.5.
- 1022 s.8(5).
- 1023 s.9.
- 1024 See below, para.[42-154](#).
- 1025 Regulation 2016/679 ('GDPR').
- 1026 GDPR art.4; Ch.II.
- 1027 GDPR art.9. These notably include trade union membership.
- 1028 GDPR art.13ff.
- 1029 GDPR art.22.
- 1030 Compare *Halford v United Kingdom* [1997] I.R.L.R. 471 (ECtHR), applied in *Copland v United Kingdom* (2007) 45 E.H.R.R. 37 (ECtHR). See also *Swansea v Gayle* [2013] I.R.L.R.

- 768, *EAT*: covert monitoring of employee outside the workplace not in violation of right to respect for private life.
- 1031 *Application No. 70838/13, Judgment of 28 November 2017.*
- 1032 *Applications Nos 1874/13 and 8567/13, Judgment of 9 January 2018.* See also App. No.61496/08 *Bărbulescu v Romania.*
- 1033 [1977] I.C.R. 221.
- 1034 See below, paras 42-198—42-199.
- 1035 *Courtaulds Northern Textiles Ltd v Andrew* [1979] I.R.L.R. 84; *Post Office v Roberts* [1980] I.R.L.R. 347; *Woods v WM Car Services Ltd* [1981] I.C.R. 666; *Bliss v South East Thames RHA* [1987] I.C.R. 700.
- 1036 [1998] A.C. 20.
- 1037 A conclusion which the House of Lords ruled was not precluded by their older decision in *Addis v Gramophone Co Ltd* [1909] A.C. 488. However, it should be noted that such “stigma damages” are effectively excluded from the assessment of damages for wrongful dismissal, in particular where the wrongfulness consists in failure to follow contractual dismissal procedures, by the doctrine propounded in *Johnson v Unisys Ltd* [2001] I.C.R. 480 as re-confirmed by the Supreme Court in *Edwards v Chesterfield Royal Hospital NHS Trust* [2011] UKSC 58; see below, paras 42-157, 42-209—42-210.
- 1038 *FC Gardner Ltd v Beresford* [1978] I.R.L.R. 63.
- 1039 *British Aircraft Corp v Austin* [1978] I.R.L.R. 332. See, for authority for the view that the duty of trust and confidence results in a general implied duty to provide an effective grievance procedure, *WA Goold (Pearmark) Ltd v McConnell* [1995] I.R.L.R. 516.
- 1040 *White v London Transport Executive* [1982] Q.B. 489.
- 1041 Compare above, paras 42-064 (duty of fidelity), 42-067 (duty to refrain from disruption).
- 1042 *Post Office v Roberts* [1980] I.R.L.R. 347, 350, [28]. In *Waltham Forest LBC v Omilaju (No.2)* [2004] EWCA Civ 1493, [2005] I.R.L.R. 35 it was reasserted that the test of whether an act was capable of breaching the implied obligation was an objective one, so that the employee’s subjective loss of trust and confidence was not sufficient in itself. In *Nottinghamshire CC v Meikle* [2004] EWCA Civ 859, [2004] 4 All E.R. 97, the objectivity of the test had been likewise asserted, but to the contrary effect that it was not necessary for the employee subjectively to have lost confidence in her employer in an overall sense. In *Baldwin v Brighton and Hove City Council* [2007] I.C.R. 680 it was held that it was not necessary to show that the employer’s conduct was intended, as well as likely, to destroy the relationship of mutual trust and confidence.
- 1043 *Grant v South-West Trains Ltd* [1998] I.R.L.R. 188.
- 1044 [1991] I.C.R. 771. Compare however *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] I.R.L.R. 377, in which it was held that there is no general obligation upon the employer to take reasonable care for the employee’s economic well-being, and that the application of the criteria articulated in the *Scally* case did not require disclosure on the present facts. To similar effect has been *Lennon v Commissioner of Police of the Metropolis* [2004] EWCA Civ 130.
- 1045 *Moores v Bude-Stratton Town Council* [2001] I.C.R. 271.

- 1046 *Gogay v Hertfordshire CC [2000] I.R.L.R. 703*, cf. now *Lambeth LBC v Agoreyo [2019] EWCA Civ 322*, where the Court of Appeal reinstated the County Court's finding that the employer had "reasonable and proper cause" to suspend a teacher pending further disciplinary investigation.
- 1047 *Transco Plc v O'Brien [2002] EWCA Civ 379, [2002] I.C.R. 721*.
- 1048 *Jenvey v Australian Broadcasting Corp [2003] I.C.R. 79; Glendale Managed Services v Graham [2003] I.R.L.R. 465*. Compare, at one further remove, *Hagen v ICI Chemicals and Polymers Ltd [2002] I.R.L.R. 31*. Compare also now *Bunning v GT Bunning & Sons Ltd [2005] EWCA Civ 104* where it was held to be arguable that a failure to conduct a proper risk assessment of the continued employment of the employee as a welder, as required by Regulations when she became pregnant, might constitute a serious breach of the implied obligation as to trust and confidence. Compare also *Greenhof v Barnsley MBC [2006] I.R.L.R. 98*, where it was held that a serious failure to make reasonable adjustments in favour of a disabled person, as required by the **Disability Discrimination Act 1995**, amounted to a breach of the implied obligation as to trust and confidence and a constructive dismissal; and *Deadman v Bristol CC [2007] EWCA Civ 822, [2007] I.R.L.R. 888*, where it was held that, as an aspect of maintaining mutual trust and confidence, the employer was obliged to follow the procedures for the investigation of complaints which it had published and implemented. Compare also now *Shaw v CCL Ltd [2008] I.R.L.R. 284, EAT* where it was held that, although there is no right to return to work on a part time basis, refusal of such request may amount to unlawful direct or indirect sex discrimination, as such amounting to breach of the implied obligation as to mutual trust and confidence and entitling the employee to resign and claim constructive unfair dismissal. A different kind of extension took place in *Tullit Prebon Plc v BGC Brokers LP [2011] EWCA Civ 131*, where the Court of Appeal held that the implied obligation as to mutual trust and confidence applied to and came into operation under a set of "forward contracts" under which a group of brokers employed by TP engaged to join BGCB at future dates, and that BGCB placed itself in repudiatory breach of those "forward contracts" by conspiring to bring about a mass early departure of those brokers whether or not lawful grounds existed for those departures. By contrast, TP were held not to be in breach of their implied obligation as to mutual trust and confidence to those brokers in seeking to persuade them renege on their "forward contracts" with BGCB, the intention being to reinforce rather than to abandon the relations between TP and the brokers. Compare also *IBM United Kingdom Holdings Ltd v Dalgleish [2014] EWHC 980 (Ch)* at [1537]–[1594]: breach of implied contractual duty of trust and confidence through failure to consult on pension changes (especially given previous statements).
- 1049 *[2004] EWCA Civ 1287, [2005] I.C.R. 402*.
- 1050 *[2006] I.R.L.R. 877 (QB)*.
- 1051 *[2006] EWCA Civ 1536, [2007] I.C.R. 623*. Compare also now *Khatri v Coöperatieve Centrale Raiffeisen-Boerenleenbank BA [2010] EWCA Civ 397*, where the requirement of rational exercise of discretions with regard to the awarding of bonuses was reaffirmed, and *Patural v DB Services (UK) Ltd [2015] EWHC 3659 (QB), [2016] I.R.L.R. 286*. See now also *Faieta v ICAP Management Services Ltd [2017] EWHC 2995 (QB), [2018] I.R.L.R. 227*.
- 1052 *[2015] UKSC 17, [2015] 1 W.L.R. 1661*.

- 1053 [2015] UKSC 17 at [32]. Compare now also *Hills v Niksun Inc* [2016] EWCA Civ 115, [2016] I.R.L.R. 715, as well as *Stevens v University of Birmingham* [2015] EWHC 2300 (QB), [2015] I.R.L.R. 899 and *Simpkin v Berkeley Group Holdings Plc* [2016] EWHC 1619 (QB), [2017] 1 Costs L.O. 13.
- 1054 [2015] EWHC 1368 (Ch), [2015] Pens. L.R. 457.
- 1055 [2002] I.C.R. 1258, CA. In *Holladay v East Kent Hospitals NHS Trust* [2003] EWCA Civ 1696, (2004) 76 B.M.L.R. 201 it was held that the breach of the implied obligation must be a material cause of the event (arrest on suspicion of theft) which had caused the employee harm, but that it was not necessary to conclude that the event would not have occurred but for the breach.
- 1056 [2001] I.C.R. 480. Compare *Reda v Flag Ltd* [2002] I.R.L.R. 747, PC.
- 1057 [2004] UKHL 35, [2005] 1 A.C. 503. The implied term imports an obligation not deliberately to mislead an employee as to reasons for dismissal: *Rawlinson v Brightside Group Ltd* [2018] I.R.L.R. 180, EAT.
- 1058 Compare also *GAB Robins (UK) Ltd v Triggs* [2008] EWCA Civ 17, [2008] I.R.L.R. 317.
- 1059 [2011] UKSC 58.
- 1060 See further below, paras 42-198—42-199, 42-209—42-210.
- 1061 [2008] I.R.L.R. 672.
- 1062 [2007] I.R.L.R. 320, EAT.
- 1063 [2010] EWCA Civ 121, [2010] I.R.L.R. 445.
- 1064 [2008] EWHC 878 (QB).
- 1065 [2009] EWHC 2360 (QB), [2010] Med. L.R. 68.
- 1066 Referred to in this paragraph as the 1998 Act. The Act came into force on 2 July 1999. In *Miklasewicz v Stolt Offshore Ltd* [2002] I.R.L.R. 344, the Court of Session held that its provisions applied to a disclosure before that date giving rise to a dismissal after that date.
- 1067 These provisions mainly take the form of sections in a new Pt IVA of the Employment Rights Act 1996, inserted by s.1 of the 1998 Act.
- 1068 Employment Rights Act 1996 s.43K. Indeed, this has been held to include a health and safety consultant supplied by an agency and operating via his own service company: *Keppel Seghers UK Ltd v Hinds* [2014] I.R.L.R. 754, EAT. Though cf. *Day v Lewisham and Greenwich NHS Trust* [2016] I.R.L.R. 415, EAT.
- 1069 *McTigue v University Hospital Bristol NHS Foundation Trust* [2016] UKEAT/0354/15/JOJ, [2016] I.R.L.R. 742.
- 1070 Employment Rights Act 1996 s.43B. See *Norbrook Laboratories (GB) Ltd v Shaw* [2014] I.C.R. 540, EAT.
- 1071 Employment Rights Act 1996 ss.43C–43H.
- 1072 *Chesterton Global Ltd (T/A Chestertons) v Nurmohamed* [2017] EWCA Civ 979, [2017] I.R.L.R. 837.
- 1073 Employment Rights Act 1996 s.47B as inserted by s.2 of the 1998 Act. See *Timis v Osipov* [2018] EWCA Civ 2321, [2019] I.C.R. 655.
- 1074 Employment Rights Act 1996 s.48(1A) as amended by s.3 of the 1998 Act.
- 1075 Employment Rights Act 1996 s.49(6) as amended by s.4 of the 1998 Act.
- 1076 Employment Rights Act 1996 s.103A as inserted by s.5 of the 1998 Act.

1077 Employment Rights Act 1996 s.43J.

1078 SI 2000/1551, in force from 1 July 2000. See also now the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2001 (SI 2001/1107), in force from 1 May 2001, and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2035), in force from 1 October 2002, which make further consequential provisions.

1079 Directive 97/81 as extended to the UK by Directive 98/23.

1080 As defined in reg.1(2), similarly as in Employment Rights Act 1996 s.230(3). Compare *Christie v Department for Constitutional Affairs* [2007] I.C.R. 1553, EAT, where it was held that a part-time tribunal chairman came within the Regulations. In *O'Brien v Department of Constitutional Affairs* [2008] EWCA Civ 1448, [2009] I.R.L.R. 294 the Court of Appeal held that part-time judicial office holders are not “workers” for the purpose of these Regulations; however, in *O'Brien v Ministry of Justice (C-393/10) EU:C:2012:110* the ECJ suggested that this decision was non-compliant with the Directive. In *O'Brien v Department of Constitutional Affairs* [2013] UKSC 6, [2013] 1 W.L.R. 522 the Supreme Court duly held that the decision of the ECJ did require a recognition that the part-time Recorder was entitled to be regarded as a “worker” for the purposes of the 2000 Regulations. *O'Brien* was distinguished in *Gilham v Ministry of Justice* [2017] I.R.L.R. 23, EAT, where a narrower interpretation was favoured in the context of purely domestic employment rights. The Court of Appeal dismissed a further appeal in the latter case, [2017] EWCA Civ 2220, [2018] I.R.L.R. 315.

1081 See reg.2. See for the judicial construction of this Regulation, and the clarification of the notion of comparable workers which it articulates, *Mathews v Kent and Medway Towns Fire Authority* [2006] UKHL 8, [2006] I.C.R. 365, and cf. now also *Roddis v Sheffield Hallam University* [2018] I.R.L.R. 706, EAT, and *British Airways Plc v Pinaud* [2018] EWCA Civ 2427, [2019] I.C.R. 487.

1082 SI 2000/1551.

1083 See reg.5(2).

1084 See regs 5(2), 8.

1085 [2007] I.C.R. 1553, EAT.

1086 [2008] EWCA Civ 1448, [2009] I.R.L.R. 294.

1087 C-393/10, EU:C:2012:110.

1088 [2013] UKSC 6, [2013] 1 W.L.R. 522.

1089 [2017] I.R.L.R. 23, EAT.

1090 [2017] EWCA Civ 2220, [2018] I.R.L.R. 315. cf. with regard to limitations periods and the judicial pension scheme, *Miller v Ministry of Justice* [2019] UKSC 60.

1091 SI 2002/2034, in force from 1 October 2002.

1092 But also in certain respects going beyond the scope of the Directive, the whole set of Regulations being made under the authority of ss.45, 51(1) of the Employment Act 2002.

1093 As defined in reg.1(2), “employee” being defined by s.45(6) of the Employment Act 2002 as in Employment Rights Act 1996 s.230(1).

1094 See reg.2(1).

1095 In *Department for Work and Pensions v Webley* [2004] EWCA Civ 1745, [2005] I.C.R. 577 it was confirmed that the employer’s allowing a fixed-term contract to expire by effluxion of

time without renewal does not in itself constitute a detriment, or less favourable treatment of a fixed-term employee than of a permanent employee, within reg.3 of the 2002 Regulations. 1096 SI 2002/2034 reg.7.

End of Document

© 2022 SWEET & MAXWELL

(a) - Termination by Notice

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 6. - Termination of the Contract

(a) - Termination by Notice

Construction of the contract

- 42-162 Apart from any relevant statutory provision,¹⁰⁹⁷ any question as to the duration of the employment, its terminability by notice, the length of the notice required to determine it, or the time at which notice to determine it may be given, will depend on the intention of the parties, either revealed in the express or implied terms of their contract, or to be inferred from all the surrounding circumstances. If there are express terms relevant to these issues, the problem is one of construction. Thus, an early authority held that a contract of employment "for 12 months certain", and to "continue from time to time, until three months' notice in writing be given by either party, to determine the same", could be determined at the expiration of the first year, by giving three months' previous notice.¹⁰⁹⁸ Where the agreement was "for 12 months certain, *after which time* either party should be at liberty to terminate the agreement, by giving the other a three months' notice", it was held that the engagement could be determined by either party at the end of 12 months, without giving any notice.¹⁰⁹⁹ But where a similar agreement provided that it was to hold good for 12 months, with six months' notice thereafter to terminate, it was held that notice could not be given until the 12 months had expired.¹¹⁰⁰
- 42-163 Under the provisions of Pt I of the Employment Rights Act an employer is required to give an employee, not later than two months after employment has begun, written particulars of terms of employment stating inter alia the length of notice which the employee is obliged to give and entitled to receive to determine his or her contract of employment,¹¹⁰¹ or stating if there is no term as to notice,¹¹⁰² and, where the employment is not intended to be permanent, stating the period for which it is expected to continue, or, if the contract is for a fixed term, stating the date when

the contract expires.¹¹⁰³ The employee may require a reference to an employment tribunal to have such particulars supplied,¹¹⁰⁴ and either party may refer the question of the accuracy of particulars to an employment tribunal.¹¹⁰⁵ The particulars given by an employer are not themselves normally contractual documents, but will provide strong presumptive evidence as to the provisions of the contract of which they purport to give details.¹¹⁰⁶

Form of notice

- 42-164 In the absence of express or specifically implied contractual provision dealing with the matter, there is no rule as to the form of notice; it may be oral or in writing, as long as the intention to terminate is clear.¹¹⁰⁷ Moreover, even where a written contract of employment requires notice to terminate to be given in writing, the contract may nevertheless be terminated by word of mouth by agreement between the parties.¹¹⁰⁸ When an employee is given oral notice terminating his or her employment, the period of notice given is counted as running from the beginning of the day after that upon which the notice is given.¹¹⁰⁹ However, it seems that employers will not be allowed to invoke notions of “constructive notice” where notice has not actually been received by an employee.¹¹¹⁰ Where, moreover, an employee is employed under a fixed-term contract, it is necessary to distinguish between notice to terminate and notification that the contract will terminate by effluxion of time.¹¹¹¹

“Permanent” employment

- 42-165 A provision for “permanent employment” or “pensionable employment” does not normally mean for life or even until the normal age of retirement: apart from a special condition in the contract, such employment can be terminated by reasonable notice.¹¹¹² But since it is a problem of construing the particular contract, words such as “permanent” may in some circumstances mean employment for life.¹¹¹³ The mere fact that the employee becomes a member of the endowment and pension scheme for the permanent staff of the employer raises no implied term that the employment cannot be determined on reasonable notice.¹¹¹⁴ However, in *McClelland v Northern Ireland General Health Services Board*,¹¹¹⁵ it was held that a contract of employment based upon an advertisement for “permanent and pensionable” employment, and which contained express provision for termination in the event of “gross misconduct” on the part of the employee, was not impliedly terminable by the employer by reasonable notice in any other event.

Employment for an unspecified period: terminability by reasonable notice

- 42-166 If a contract of employment makes no express or specifically implied provision for its duration or termination by notice, there is likely to be implied at common law a presumption that the contract is for an indefinite period and terminable by a reasonable notice given by either party.¹¹¹⁶ The older case law, generalising a custom formerly attaching to the employment of agricultural workers, revealed a presumption in such circumstances that the contract of employment was for a fixed term of a year or for a series of such terms.¹¹¹⁷ Although that presumption could still be found at work in later cases,¹¹¹⁸ it now appears to have given way entirely to the presumption of an indefinite duration and terminability by reasonable notice.¹¹¹⁹ The latter presumption is itself subject to the statutory provisions concerning minimum entitlements to notice.¹¹²⁰ The statutory provisions may in many cases, especially in relation to manual workers with some seniority of employment, give rise to longer periods of entitlement than the common law would presume as a matter of “reasonable notice” in the particular circumstances; the details of the two sets of rules are considered in the following paragraphs.

The length of notice: common law

- 42-167 Although the contracts of employment legislation¹¹²¹ prescribes *minimum* periods of notice to terminate a contract of employment, the common law rules on the subject may, in particular cases, require a longer period of notice to terminate a contract. The general rule is that the length of notice depends on the intention of the parties, revealed in their contract, as to what constitutes reasonable notice.¹¹²² All the circumstances, such as the type of employment, local, trade¹¹²³ or professional¹¹²⁴ customs on the topic, the intervals at which remuneration is paid, or the period in relation to which the remuneration is stated (e.g. “£450 a year”),¹¹²⁵ have been regarded as relevant in fixing what amounts to reasonable notice in an individual case. A number of the many older reported decisions on this question are summarised in the footnotes below, but they do not lay down any rule of law and are merely guides to what may in the past have been held to be reasonable in different circumstances. They are summarised under the headings of clerical workers,¹¹²⁶ managers and directors,¹¹²⁷ editors and journalists,¹¹²⁸ commercial travellers and salespersons,¹¹²⁹ superior employees in manual occupations¹¹³⁰ and in non-manual occupations.¹¹³¹ At common law,¹¹³² a period as short as one week might be regarded as reasonable notice for subordinate employees.¹¹³³ The notice need not, in the absence of express provision, be given on a pay day, nor need it expire at the end of any period for which salary or

wages are calculated,¹¹³⁴ but a term of the contract or a custom may require the notice to expire at the end of a particular period of employment.¹¹³⁵

Statutory minimum periods of notice

⁴²⁻¹⁶⁸ The contracts of employment legislation¹¹³⁶ prescribes minimum periods of notice which must be given to terminate contracts of employment of persons who have been continuously employed¹¹³⁷ for one month or more.¹¹³⁸ For less than two years' continuous employment, not less than one week's notice must be given by the employer; for two years or more but less than 12 years, not less than one week's notice for each year of service; for 12 years or more, not less than 12 weeks' notice.¹¹³⁹ An employee who has been continuously employed for one month or more must give not less than one week's notice to terminate his contract of employment.¹¹⁴⁰ Contractual provisions for shorter notice take effect subject to the foregoing provisions, but either party may still waive his right to notice, or accept a payment in lieu of notice.¹¹⁴¹ The foregoing provisions apply to a contract for a term certain of one month or less, provided the period of continuous employment has been three months or more.¹¹⁴² In general, these provisions do not affect any right of either party to treat the contract as terminable without notice by reason of such conduct by the other party as would have enabled him so to treat it before the passing of the legislation.¹¹⁴³ If an employer fails to give the required notice,¹¹⁴⁴ the rights conferred by the legislation¹¹⁴⁵ on the employee during the minimum period of notice applicable to the employee shall be taken into account in assessing the employer's liability for breach of contract.¹¹⁴⁶

“Continuous employment”

⁴²⁻¹⁶⁹ The legislation¹¹⁴⁷ contains detailed rules for ascertaining the length of an employee's period of employment and whether it has been “continuous”.¹¹⁴⁸ The main provisions are: years are to be computed as aggregated periods making up twelve months¹¹⁴⁹; a week means a week ending with Saturday¹¹⁵⁰; periods of absence from employment will still count as periods of continuous employment, even where there is no contract of employment in force during the absence, if they come within the following descriptions:

- (a)when the employee is incapable of work in consequence of sickness or injury for up to 26 weeks¹¹⁵¹;
- (b)when the employee is absent on account of a temporary cessation of work¹¹⁵²; or

(c)when the employee is absent under an arrangement or custom whereby the employment continues.¹¹⁵³

The treatment of part-time employment

42-170 Formerly, the provisions here referred to, by defining “continuous employment” so as to exclude part-time employment below the stated thresholds of weekly hours, have excluded part-time employment as thus defined from the scope of various statutory employment protection rights, most significantly rights to protection against unfair dismissal and to redundancy payments. It was clear from the decision of the House of Lords in *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission*¹¹⁵⁴ that some or all of these exclusionary provisions in relation to part-time employment violated EU requirements of equal pay and treatment as between men and women (that is to say, they unlawfully discriminated against women). The exclusionary provisions were, accordingly, removed by the **Employment Protection (Part-time Employees) Regulations 1995.**¹¹⁵⁵

The treatment of periods of strike or lockout

42-171 Any week in which the employee takes part in a strike will not count towards the period of continuous employment.¹¹⁵⁶ On the other hand, continuity of employment is preserved in relation to weeks in which the employee takes part in a strike or is absent from work because of a lockout by the employer, provided those weeks occurred after 1963.¹¹⁵⁷ This provision has been held to apply even where the employee was dismissed during the strike and re-engaged after the strike had ended.¹¹⁵⁸

Other provisions concerning continuity

42-172 The legislation also contains provisions preserving the continuity of employment in the event of reinstatement after military service¹¹⁵⁹ and causing previous employments to count towards the total period of employment where the change from one employment to the next was:

(a)a transfer between associated employers¹¹⁶⁰; or

(b)consequent upon the transfer of the trade, business or undertaking in which the employee was employed¹¹⁶¹; or

(c)a transfer from an employer to his or her personal representatives upon his or her death¹¹⁶² ; or

(d)a consequence of a change in the partners, personal representatives or trustees who employed the employee.¹¹⁶³

The legislation does not require that the period of “continuous employment” should be under a single contract: it may be “continuous” under a whole succession of new contracts between the same parties.¹¹⁶⁴ It has been held that appointment of a receiver out of court does not normally determine current contracts of employment,¹¹⁶⁵ but that if the receiver does make a new contract with the employee, the receiver does so as agent of the company so that continuity of employment is not broken.¹¹⁶⁶ Informal work prior to the start date of an individual’s employment contract does not count towards the qualifying period.¹¹⁶⁷

The right to guaranteed remuneration during a statutory period of notice

- 42-173 Not only does the contract of employment legislation provide for minimum periods of notice, but it also provides for guaranteed minimum remuneration during such periods. The 1996 Act¹¹⁶⁸ prescribes the rights of employees for the period of notice required by the Act¹¹⁶⁹; these rights cannot be excluded or limited by the contract.¹¹⁷⁰ If during “the normal working hours”¹¹⁷¹ of the period of notice the employee is ready and willing to work but no work is provided, or the employee is incapable of work because of sickness or injury, or absent from work in accordance with the terms of his or her employment relating to holidays, the employer must pay him or her for the normal working hours he or she has lost at an average hourly rate of remuneration based upon the statutory calculation of a week’s pay.¹¹⁷² Where there are no “normal working hours” but the employee is ready and willing to work or incapable of work through sickness or injury, or absent on holiday, the employer must, for each week of the period of notice, pay the employee a statutory week’s pay.¹¹⁷³ The liability of the employer under these provisions does not arise if the notice to be given by the employer to terminate the contract exceeds, by one week or more, the minimum period of notice required by the Act.¹¹⁷⁴ Payments such as sick pay or holiday pay count towards the employer’s liability under the Act.¹¹⁷⁵ Moreover, if the employer ordinarily reduces the amount of sick pay in respect of short-term incapacity benefit or industrial injury benefit claimable by the employee, the employer may continue to do so during a statutory period of notice.¹¹⁷⁶ If the employee gives notice, the employer’s liability does not arise unless and until the employee leaves the service of the employer in pursuance of the notice.¹¹⁷⁷ No payment need be made for the employee’s absence from work with the leave of the employer granted at the request of the employee¹¹⁷⁸; nor is any payment due if the employee gives notice and then, on or before termination of the contract, takes part in a strike of employees of the employer.¹¹⁷⁹ If the employer breaks the contract during the period of notice, payments made thereafter under the Act go towards

mitigating damages recoverable by the employee for loss of earnings¹¹⁸⁰; if the employee breaks the contract during the period of notice, and the employer rightfully treats the breach as terminating the contract, the employer need pay nothing for the remaining period of the notice.¹¹⁸¹ It was held in *Secretary of State for Employment v Wilson*¹¹⁸² and confirmed in *Westwood v Secretary of State for Employment*¹¹⁸³ that the rights conferred by those provisions take effect via the contract of employment so that the common law rules as to mitigation of loss¹¹⁸⁴ apply when quantifying the loss attributable to denial of these rights.

Footnotes

1 Freedland (Gen. ed.), The Contract of Employment (2016); Freedland, The Personal Employment Contract (2003); Gaymer, The Employment Relationship (2001); Brodie, The Employment Contract: Legal Principles, Drafting, and Interpretation (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, The Legal Construction of Personal Work Relations (2011).

1097 See below, paras 42-169—42-174.

1098 *Brown v Symons* (1860) 8 C.B.(N.S.) 208; cf. *Costigan v Gray & Bovier Engines* (1925) 41 T.L.R. 372.

1099 *Langton v Carleton* (1873) L.R. 9 Ex. 57.

1100 *Jacks v Palmer's Shipbuilding & Iron Co* (1928) 98 L.J. K.B. 366.

1101 Employment Rights Act 1996 s.1(4)(e). See generally above, para.42-042, and below, paras 42-167—42-168.

1102 Employment Rights Act 1996 s.2(1).

1103 Employment Rights Act 1996 s.1(4)(g).

1104 Employment Rights Act 1996 s.11(1).

1105 Employment Rights Act 1996 s.11(2).

1106 See above, para.42-056.

1107 cf. *Stephenson v London Joint Stock Bank Ltd* (1903) 20 T.L.R. 8. See, as to contingent or equivocal notice, *Rai v Somerfield Stores Ltd* [2004] I.C.R. 656, EAT.

1108 *Latchford Premier Cinema Ltd v Ennion* [1931] 2 Ch. 409, 410.

1109 *West v Kneels* [1984] I.C.R. 146.

1110 *McMaster v Manchester Airport Plc* [1998] I.R.L.R. 112.

1111 Compare *London Underground Ltd v Fitzgerald* [1997] I.C.R. 271.

1112 *McClelland v Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594, 601; *Walsh v Dublin HA* (1962) 98 I.L.T.R. 82.

1113 *Salt v Power Plant Co Ltd* [1936] 3 All E.R. 322, 325. Quaere, whether this should not have been construed as employment until the normal age of retirement. cf. *Ivory v Palmer* [1975] I.C.R. 340. cf. *Duke v Reliance Systems Ltd* [1982] I.C.R. 449.

1114 *Ward v Barclay Perkins & Co* [1939] 1 All E.R. 287.

1115 [1957] 1 W.L.R. 594.

- 1116 See Freedland, *The Contract of Employment* (1976), pp.151–153 and cases there cited. The principle was established in cases such as *Vibert v Eastern Telegraph Co* (1883) *Cab. & E. 17*; *Lowe v Walter* (1892) 8 *T.L.R.* 358, 367; *Crean v Wright* (1876) 1 *C.P.D.* 591; *Payzu Ltd v Hannaford* [1918] 2 *K.B.* 348.
- 1117 *Bailey v Rimmell* (1836) 1 *M. & W.* 506; *Beeston v Collyer* (1827) 4 *Bing.* 309; *Lilley v Elwin* (1848) 11 *Q.B.* 742; *Turner v Robinson* (1833) 5 *B. & Ad.* 789; *Fawcett v Cash* (1834) 5 *B. & Ad.* 904; *Buckingham v Surrey & Hants Canal Co* (1882) 46 *L.T.* 885; *Taylor v Garnett* (1892) 8 *T.L.R.* 647; *Cayme v Allan Jones & Co* (1919) 35 *T.L.R.* 453.
- 1118 *Vernon v Findley* [1938] 4 *All E.R.* 311; reversed on other grounds [1939] 2 *All E.R.* 716; *Jackson v Hayes Candy & Co* [1938] 4 *All E.R.* 587; *Mulholland v Bexwell Estates Co* (1950) 66 *T.L.R. (Pt 2)* 764.
- 1119 *De Stempel v Dunkels* [1938] 1 *All E.R.* 238; *Fisher v WB Dick & Co Ltd* [1938] 4 *All E.R.* 467; *Adams v Union Cinemas Ltd* [1939] 3 *All E.R.* 136; *James v Thomas H Kent & Co Ltd* [1951] 1 *K.B.* 551; *Richardson v Koefod* [1969] 1 *W.L.R.* 1812.
- 1120 See below, para.42-168.
- 1121 See below, para.42-168.
- 1122 A custom cannot prevail over the express terms of the contract relating to notice or the length of notice required: *Evans v Roe* (1872) *L.R. 7 C.P.* 138; *Baxter v Nurse* (1844) 6 *Man. & G.* 935.
- 1123 *Foxall v International Land Credit Co* (1867) 16 *L.T.* 637. Domestic service used to be the subject of a particularly well established custom for a month's notice on either side—see, for the details, *Moult v Halliday* [1898] 1 *Q.B.* 125; *George v Davies* [1911] 2 *K.B.* 445.
- 1124 A producer or owner of a play has been held to be entitled to terminate the run of the play by giving a fortnight's notice according to the custom of the theatrical profession (*Gubertini v Waller* [1947] 1 *All E.R.* 746). Musicians not employed for a fixed term have been held to be, by custom, entitled to a fortnight's notice: *Davson v France* (1959) 109 *L.J.* 526.
- 1125 *Cayme v Allan Jones & Co* (1919) 35 *T.L.R.* 453.
- 1126 The length of notice for a clerk has been from one month for a clerk payable fortnightly (*Vibert v Eastern Telegraph Co* (1883) 1 *Cab. & E. 17) to three months for those in a superior position (*Fairman v Oakford* (1860) 5 *Hurl. & N.* 635, 636; *Foxall v International Land Credit Co* (1867) 16 *L.T.* 637); a person called a general manager (though in fact only a superior clerk) was entitled to three months' notice (*Mulholland v Bexwell Estates Co* (1950) 66 *T.L.R. (Pt 2)* 764; followed in *SW Strange Ltd v Mann* [1965] 1 *W.L.R.* 629, 642); clerk to merchant, six weeks held insufficient (*De Stempel v Dunkels* [1938] 1 *All E.R.* 238). Month in this context means a calendar month: *P Phipps & Co (Northampton & Towcester Breweries) Ltd v Rogers* [1925] 1 *K.B.* 14, 26, 27.*
- 1127 Marine superintendent of shipping company, 12 months (*Kaukul v Anglo-Soviet Shipping Co Ltd* (1931) 41 *LL.R. Rep.* 90); manager of life insurance department of an insurance company, one month held insufficient (*Jupiter General Insurance Co v Shroff* [1937] 3 *All E.R.* 67); controller of cinemas, six months (*Adams v Union Cinemas Ltd* [1939] 3 *All E.R.* 136); production manager at a factory one week insufficient (*Orman v Saville Sportswear Ltd* [1960] 1 *W.L.R.* 1055); a director under an implied general contract of employment was entitled to three months' notice (*James v Thomas H Kent & Co* [1951] 1 *K.B.* 551); a director

- and company secretary of a furniture firm, entitled to three months (*HW Smith (Cabinets) Ltd v Brindle [1973] I.C.R. 12, 21*).
- 1128 Newspaper editor, 12 months (*Grundy v Sun Printing Association (1916) 33 T.L.R. 77; Brennan v Gilbert-Smith (1892) 8 T.L.R. 284*—a case where a custom appears to have been established), although six months has been found to be reasonable (*Fox-Bourne v Vernon & Co Ltd (1894) 10 T.L.R. 647*) and was apparently treated as an established custom for editors in *McCabe v Pathé, etc. Ltd (1919) 35 T.L.R. 313*, where it was held that the editor of a film newsreel was entitled only to one month's notice; sub-editor of newspaper, six months, evidence of custom (*Chamberlain v Bennett (1892) 8 T.L.R. 234*); foreign correspondent to The Times, six months (*Lowe v Walter (1892) 8 T.L.R. 358*); a journalist and photographer, six months (*Bauman v Hulton Press Ltd [1952] 2 All E.R. 1121*); regular contributors to newspaper, one month (*Re Illustrated Newspaper Corp (1900) 16 T.L.R. 157*); advertising agent for a newspaper, one month (*Hiscox v Batchellor (1867) 15 L.T. 543*).
- 1129 Commercial traveller, three months (*Metzner v Bolton (1854) 9 Exch. 518; Grundon v Master & Co (1885) 1 T.L.R. 205*); one month (*Sellers v London Counties Newspapers [1951] 1 K.B. 784*); one month, pursuant to a custom of the trade (*Parker v Ibbetson (1858) 4 C.B. (N.S.) 347*); salesman, three months (*Fisher v WB Dick & Co Ltd [1938] 4 All E.R. 467*); cf. a commercial agent (analogous to an employee), three months (*Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd [1955] 2 Q.B. 556, 581, 583*).
- 1130 Head gardener, one month (*Nowlan v Ablett (1835) 2 C.M. & R. 54*); farm bailiff, one month (*Johnson v Blenkensopp (1841) 5 Jur. 870*).
- 1131 Governess, schoolmistress, three months (*Todd v Kerrich (1852) 8 Exch. 151*); private tutor, three months (*Wilson v Ucelli (1929) 45 T.L.R. 395*); chief officer of a passenger steamer, 12 months (*Savage v British India Steam Navigation Co (1930) 46 T.L.R. 294*); claims assessor in insurance office, 10 weeks (*Constable v Stuartson (1932) 44 Ll.L. Rep. 91*); employed chartered engineer, at least six months, possibly 12 (*Hill v CA Parsons & Co Ltd [1972] 1 Ch. 305*).
- 1132 See below, para.42-168 for statutory provisions.
- 1133 e.g. for a milk roundsman: *Evans v Ware [1892] 3 Ch. 502*. See also *Evans v Roe (1872) L.R. 7 C.P. 138* (foreman paid a weekly wage of £2).
- 1134 cf. *Ryan v Jenkinson (1855) 25 L.J. Q.B. 11; Lowe v Walter (1892) 8 T.L.R. 358*.
- 1135 *Metzner v Bolton (1854) 9 Exch. 518*.
- 1136 As originally enacted in the Contracts of Employment Act 1963 and later amended and consolidated into in the Employment Rights Act 1996 Pt IX.
- 1137 Defined in the Act: see below, paras 42-169—42-173.
- 1138 **Employment Rights Act 1996 s.86.** Various categories of employment are exempted from the application of these provisions of the Act: the master, skipper or seamen on certain ships and fishing boats (s.199(1) Employment Rights Act 1996).
- 1139 Employment Rights Act 1996 s.86(1).
- 1140 Employment Rights Act 1996 s.86(2). On the effect of notice to strike, see above, para.42-078.
- 1141 Employment Rights Act 1996 s.86(3). See *Secretary of State for Employment v Rooney [1977] I.C.R. 440*.

- 1142 Employment Rights Act 1996 s.86(4).
- 1143 Employment Rights Act 1996 s.86(6). This subsection preserves the employer's power to dismiss for misconduct, incompetence, etc.: see below, paras 42-188 et seq.
- 1144 Employment Rights Act 1996 s.86.
- 1145 Employment Rights Act 1996 ss.87–91(4) (see below, para.42-188).
- 1146 Employment Rights Act 1996 s.91(5). Held in *Secretary of State for Employment v Wilson* [1977] I.R.L.R. 483, [1978] I.C.R. 200; and in *Westwood v Secretary of State for Employment* [1985] A.C. 20, to mean that the rights conferred by the legislation took effect as contractual rights and so were subject to common law rules of mitigation; see below, paras 42-206—42-207.
- 1147 Employment Rights Act 1996 ss.210–219. The legislation is now to be read subject to the Employment Protection (Continuity of Employment) Regulations 1996 (SI 1996/3147), in force from 13 January 1997, which provide for the preservation of continuity of employment in certain special circumstances relating to the remedy of reinstatement or re-engagement of the employee.
- 1148 This term, and “continuously”, is used in s.86 of Employment Rights Act 1996.
- 1149 Employment Rights Act 1996 s.210(3).
- 1150 Employment Rights Act 1996 s.235(1).
- 1151 Employment Rights Act 1996 s.212(3)(a).
- 1152 Employment Rights Act 1996 s.212(3)(b), see *Fitzgerald v Hall, Russell & Co Ltd* [1970] A.C. 984 (*held*, that the reference is to work for the employee, not to the employer's work); *Hunter v Smith's Dock Co Ltd* [1968] 1 W.L.R. 1865; *Thompson v Bristol Channel Ship Repairers Ltd* [1970] 1 Lloyd's Rep. 105; *Clarke Chapman-John Thompson Ltd v Walters* [1972] 1 W.L.R. 378; *Puttick v John Wright & Sons (Blackwall) Ltd* [1972] I.C.R. 457; *McGarry v Earls Court Stand Fitting Co Ltd* [1973] I.C.R. 100; *Rashid v Inner London Education Authority* [1977] I.C.R. 157; and *Hanson v Fashion Industries* [1981] I.C.R. 35. *Flack v Kodak Ltd* [1986] I.C.R. 775; *Ford v Warwickshire CC* [1983] I.C.R. 273 (a series of consecutive fixed-term contracts, each for an academic year, with a summer break between each contract). Contrast, however *Surrey CC v Lewis* [1987] I.C.R. 982 (concurrent fixed-term contracts of varying length). Compare *Cornwall CC v Prater* [2006] EWCA Civ 102, [2006] I.C.R. 731, where the Court of Appeal displayed a greater willingness than had previously been shown to regard a sequence of casual work contracts as being linked up, by periods of “temporary cessation of work” into a period of “continuous employment”. See also para.42-023, and compare *Welton v Deluxe Retail Ltd* [2013] I.R.L.R. 166, EAT.
- 1153 Employment Rights Act 1996 s.212(3)(c); see *Wishart v National Coal Board* [1974] I.C.R. 460; and *Corton House v Skipper* [1981] I.C.R. 307. Compare now also *Welton v Deluxe Retail Ltd* [2013] I.R.L.R. 166, EAT, where it was held that the “arrangement” cannot be a retroactive one.
- 1154 [1995] 1 A.C. 1.
- 1155 SI 1995/31 with effect from 6 February 1995.
- 1156 Employment Rights Act 1996 s.216(1).
- 1157 Employment Rights Act 1996 s.216(2)–(3).
- 1158 *Bloomfield v Springfield Hosiery Finishing Co Ltd* [1972] I.C.R. 91.

- 1159 Employment Rights Act 1996 s.217.
- 1160 Employment Rights Act 1996 s.218(6). See *Zarb v British and Brazilian Produce Co (Sales) Ltd [1978] I.R.L.R. 78; Hillingdon AHA v Kaunders [1979] I.C.R. 472*; and *Merton LBC v Gardiner [1981] I.C.R. 186, CA*. Compare also *Da Silva v Composite Mouldings & Design Ltd [2009] I.C.R. 416*.
- 1161 Employment Rights Act 1996 s.218(2). See *Dallow Industrial Properties Ltd v Else [1967] 2 Q.B. 449; Kenmir Ltd v Frizzell [1968] 1 W.L.R. 329; Woodhouse v Peter Brotherhood Ltd [1972] 2 Q.B. 520; Secretary of State for Employment v Rooney [1977] I.C.R. 440; Dhami v Top Spot Night Club Ltd [1977] I.R.L.R. 231; Young v Daniel Thwaites & Co Ltd [1977] I.C.R. 877; Pambakian v Brentford Nylons Ltd [1978] I.C.R. 665; Rastill v Automatic Refreshment Services Ltd [1978] I.C.R. 289*. In *Lord Advocate v de Rosa [1974] 1 W.L.R. 946*, it was held that the provision of the 1963 Contracts of Employment Act corresponding to the present s.218(2) was not to be treated as qualified, in a redundancy payments case, by s.3(2) or s.13(2) of the Redundancy Payments Act 1965 s.136(1)–(3) of the 1996 Act. In *Evenden v Guildford City Association Football Club Ltd [1975] I.C.R. 367*, it was held that the limits of para.17(2) could be transcended, in a redundancy payments case, by reference to s.9(2)(a) of the Redundancy Payments Act 1965 (s.210(5) of the 1996 Act) (presumption of continuity); but this was overruled in *Secretary of State for Employment v Globe Elastic Thread Ltd [1979] I.C.R. 706*. The provision of s.218(2) should be considered in conjunction with those of the Transfer of Undertakings (Protection of Employment) Regulations 2006—see below, para.42-184.
- 1162 Employment Rights Act 1996 s.218(4). See *Rowley Holmes & Co v Barber [1977] 1 W.L.R. 371*.
- 1163 Employment Rights Act 1996 s.218(5). See *Harold Fielding Ltd v Mansi [1974] I.C.R. 347*; and *Allen & Son v Coventry [1980] I.C.R. 9*; and see below, para.42-185.
- 1164 *Re Mack Trucks (Britain) Ltd [1967] 1 W.L.R. 780, 787*.
- 1165 See below, para.42-187.
- 1166 *Re Mack Trucks (Britain) Ltd*, above; cf. *Deaway Trading Ltd v Calverley [1973] I.C.R. 546*.
- 1167 *O'Sullivan v DSM Demolition Ltd [2020] I.R.L.R. 840, EAT*.
- 1168 Employment Rights Act 1996 ss.87–91.
- 1169 Employment Rights Act 1996 s.86(1); see above, para.42-168.
- 1170 Employment Rights Act 1996 s.203.
- 1171 As defined by s.234 of Employment Rights Act 1996. See below, para.42-262.
- 1172 Employment Rights Act 1996 s.88(1). The “week’s pay” is calculated by reference to ss.220–229 of Employment Rights Act 1996. See below, para.42-261.
- 1173 Employment Rights Act 1996 s.89(1)–(4), the week’s pay being calculated as above. See below, para.42-261.
- 1174 Employment Rights Act 1996 s.87(4). The better view seems to be that this includes the case where the implied obligation to give reasonable notice see above, paras 42-166–42-167, applies to produce a period exceeding the applicable statutory minimum period by one week or more.
- 1175 Employment Rights Act 1996 ss.88(2), 89(4).
- 1176 Employment Rights Act 1996 s.90.

- 1177 Employment Rights Act 1996 ss.88(3), 89(5).
- 1178 Employment Rights Act 1996 s.91(1).
- 1179 Employment Rights Act 1996 s.91(2).
- 1180 Employment Rights Act 1996 s.91(3).
- 1181 Employment Rights Act 1996 s.91(4).
- 1182 [1977] *I.R.L.R.* 483.
- 1183 [1985] *A.C.* 20.
- 1184 See below, paras 42-206—42-207.

(b) - Termination by Payment in Lieu of Notice

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 6. - Termination of the Contract

(b) - Termination by Payment in Lieu of Notice

The contractual status of payments in lieu of notice

42-174 Contracts of employment are frequently in practice terminated by payment in lieu of notice. There is some doubt as to the contractual status of a payment in lieu of notice.¹¹⁸⁵ One view is that in the absence of express provision to the contrary in the original contract of employment, the payment is normally to be regarded as liquidated damages for a breach of contract consisting in the refusal to allow the employee to work out his notice.¹¹⁸⁶ Some payments in lieu of notice can be viewed as an ordinary giving of notice accompanied by a waiver of services by the employer which is accepted by the employee.¹¹⁸⁷ Another view might be that a right to terminate by payment in lieu of notice can be viewed as a normally implied corollary of a contractual right on the part of an employer to terminate by notice, unless it is clear that the employee has some special interest in being allowed to work out his notice.¹¹⁸⁸ In the case of *Delaney v Staples*,¹¹⁸⁹ Lord Browne-Wilkinson distinguished four principal categories of payment in lieu of notice, while making it clear that this was not necessarily an exhaustive list.¹¹⁹⁰ The categories, and the contractual status of each, were, in effect:

- (1)the employer gives proper notice of termination to the employee, tells the employee that he or she need not work until the termination date and gives him or her the wages attributable to the notice period in a lump sum. In this case, commonly called “garden leave”, there is no breach of contract by the employer; the employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages;
- (2)the contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In this case, summary dismissal accompanied by payment in lieu of notice is not in breach of contract;

(3) at the end of the employment, the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice. Again, the employer is not in breach of contract;

(4) the employer summarily dismisses the employee without the agreement of the employee and tenders a payment in lieu of notice. In this case, which is the most common one, the employer is in breach of contract, and the payment in lieu of notice is in the nature of liquidated damages.

Subsequent case law suggests that the contractual status of payments in lieu of notice will now be determined by applying these four categories to the particular facts in question.¹¹⁹¹ Difficult issues may nevertheless still arise. The Supreme Court's decision in *Société Générale (London Branch) v Geys*¹¹⁹² raised complex issues as to whether the employer had correctly and validly exercised a contractual right to terminate the contract of employment by payment in lieu of notice.¹¹⁹³ Lady Hale, agreeing with the majority of the Supreme Court, opined that it is an "obviously necessary incident of the employment relationship" that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate.¹¹⁹⁴ In *Cerberus Software Ltd v Rowley*¹¹⁹⁵ it was held that an employee, who had been wrongfully summarily dismissed, but the terms of whose contract were such that the employer could lawfully have terminated by six months' notice or payment in lieu of notice, could claim the payment in lieu only subject to the duty to mitigate his loss. In contrast to that is *HQ Service Children's Education (MOD) v Davitt*¹¹⁹⁶ where payment in lieu was made but the contract was deemed to have been terminated by notice which the employee had not been required to work out. As to payments in lieu of notice and "garden leave", comparison may be made with the decision in *Symbian Ltd v Christiansen*,¹¹⁹⁷ which deals with the application of the restraint of trade doctrine to contractual arrangements for garden leave.

The statutory and contractual effects of payment in lieu of notice

- 42-175 The view was at one stage taken¹¹⁹⁸ that the provision now contained in s.86(3) of the Employment Rights Act 1996 treats payment in lieu of notice as a derogation from the statutory obligation to give certain minimum periods of notice unless the employee accepts the payment when it is made, though it has more recently been held that if the contract of employment provides for payment in lieu of notice, or if the parties agree upon a payment in lieu of notice no shorter than the period to which the employee is entitled by contract or statute, the last part of s.86(3) applies, and a payment in lieu of notice can properly terminate the contract of employment.¹¹⁹⁹ However, in *Hardy v Polk Ltd*¹²⁰⁰ Burton P held, in effect, that s.86 did not create an entitlement to payment in lieu of notice, or a claim in debt for failure to give the statutory minimum period of notice or payment in lieu thereof. Whether a payment in lieu of notice is regarded as a contractual right of the employer or as liquidated damages (as to which, reference may be made to the previous paragraph), the question of its quantum arises, and early authority suggests that it might not include any allowance

for benefits conferred gratuitously, or in kind, during employment.¹²⁰¹ The question also arises of the time at which the termination of the contract takes effect. The view of such payments as liquidated damages for breach seems to require the view that termination is immediate upon the ending of actual employment.¹²⁰² The view of such arrangements as involving a waiver of the right to the services of the employee may result in an extension of the date of termination to the date at which the notice in lieu of which payment is made would have expired.¹²⁰³ Where an arrangement for payment in lieu of notice does result in a continuation of the contract for the duration of the notice period, the question whether the employee forfeits the right to the payment by taking other work depends upon whether that amounts on the facts to a repudiatory breach on the employee's part.¹²⁰⁴

Footnotes

¹ Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

1185 See Freedland, *The Personal Employment Contract* (2003), pp.305 et seq.

1186 *Dixon v Stenor Ltd [1973] I.C.R. 157, 158G.*

1187 *Lees v Arthur Greaves Ltd [1974] I.C.R. 501.*

1188 cf. *White v Riley [1921] 1 Ch. 1, 6.*

1189 *[1992] I.C.R. 483.*

1190 *[1992] I.C.R. 483* at 488–9.

1191 cf. *Abrahams v Performing Right Society Ltd [1995] I.C.R. 1028; Gregory v Wallace [1998] I.R.L.R. 387.* Compare also *Locke v Candy & Candy Ltd [2010] EWCA Civ 1350, [2011] I.R.L.R. 163*, where it was held that the express contractual entitlement to payment in lieu of notice should be construed so as to include compensation equivalent to the annual bonus which would have been payable had the full period of notice been served.

1192 *[2012] UKSC 63, [2013] 1 A.C. 523.*

1193 See also Vol.I, para.27-001.

1194 *[2012] UKSC 63* at [57].

1195 *[2001] I.R.L.R. 160, CA.*

1196 *[1999] I.C.R. 978, EAT.*

1197 *[2000] I.R.L.R. 879, CA.*

1198 *Chapman, Blair & Atchinson v Executors of WG Leadley (1966) 1 T.R. 84* (Sir Diarmaid Conroy QC) (commenting on the corresponding provision in the Contracts of Employment Act 1963).

1199 *Rex Stewart Jeffries Parker Ginsberg Ltd v Parker [1988] I.R.L.R. 483, 486.*

1200 *[2004] I.R.L.R. 420, EAT.*

1201 cf. *Gordon v Potter [1859] 1 F.& F. 644.*

1202 *Dixon v Stenor* [1973] I.C.R. 157.

1203 *Lees v Arthur Greaves* [1974] I.C.R. 501; but contrast *Dedman v British Building Appliances Ltd* [1974] I.C.R. 53.

1204 *Hutchings v Coinseed Ltd* [1998] I.R.L.R. 190.

(c) - Termination by Agreement or by Expiry of Fixed Period

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 6. - Termination of the Contract

(c) - Termination by Agreement or by Expiry of Fixed Period

Termination by prior agreement or expiry of fixed period: fixed-term contracts and limited-term contracts

- 42-176 When we speak of the termination of contracts of employment by agreement, we normally intend to refer to an agreement made subsequently to the original formation of the contract of employment in question. We might, however, properly also include within this category the termination of the contract of employment by prior agreement, which is to say by an agreement made when the contract of employment itself is made and as part of that contract. A contract of employment containing such an agreement will normally be referred to as a “fixed-term contract”, though the duration of a contract of employment may be limited other than by reference to a period of time (or to a period of notice), for example by reference to the completion of a task,¹²⁰⁵ in which case it may not be appropriate to refer to it as a “fixed-term contract”. It should also be noted that the termination of a fixed term contract on completion of the fixed term may be referred to as a termination “by effluxion of time” or “by expiry of the fixed term” rather than as termination by agreement. Moreover, it should also be noted that for the purposes of statutory rights associated with the termination of employment, such as the rights to statutory redundancy payment or not to be unfairly dismissed, the expiry of a fixed-term contract without renewal is treated as a *dismissal*, and is considered under that heading later in this chapter.¹²⁰⁶ Finally, and most important, it should be noted that the **Fixed-term Employees Regulations 2002**¹²⁰⁷ introduced the new terminology of “limited-term contracts” and substituted that new terminology for the previously used terminology of “contract for a fixed term” in relation to many statutory employment rights.¹²⁰⁸ A statutory definition is provided for the “limited-term contract”¹²⁰⁹ which is very similar to the definition of the previously used terminology of the “contract for a fixed term”, and coincides with the conception of the fixed-term contract articulated in the present paragraph: that is to say, it includes contracts limited either by the expiry of a fixed period of

time, or by the completion of a defined task, or by the occurrence of another previously specified limiting event. At the same time, the terminology of “fixed-term” contracts is used in the [Fixed-term Employees Regulations](#) themselves, and is defined ¹²¹⁰ in almost the identical way, except that the limiting event of the attainment of normal retirement age is excluded. For the avoidance of the confusion which might otherwise result, the terminology of the “fixed-term contract” is retained throughout this chapter except where the particular context specially requires otherwise.

The conversion of successive fixed-term contracts into the contracts of employment of “a permanent employee”

- 42-177 The operation and effect of fixed-term contracts of employment has been extensively modified by the [Fixed-term Employees Regulations 2002](#), ¹²¹¹ which were made under the authority of [s.45 of the Employment Act 2002](#), mainly with the purpose of implementing Council Directive 99/70 on fixed-term work, and came into force on 1 October 2002. The Regulations make two main sets of new provisions, one conferring a right of no less favourable treatment upon fixed-term employees as compared with permanent employees, and the other converting certain successive fixed-term contracts of employment into the contracts of employment of permanent employees. The right of no less favourable treatment was considered in an earlier section of this chapter ¹²¹²; the conversion of successive fixed-term contracts into the contracts of employment of “a permanent employee” is considered in this paragraph. That conversion is effected by and according to [reg.8](#). It occurs where an employee is employed under a fixed-term contract ¹²¹³ which follows successively upon a previous fixed-term contract or has itself previously been renewed, and where the employee has been continuously employed for four years under a renewed fixed-term contract or successive fixed-term contracts; the conversion takes effect either when such a contract is entered into or renewed, or when the employee has been continuously employed for four years, whichever is the later. ¹²¹⁴ There is some need for clarification of what it means to convert a fixed-term contract into the contract of employment of “a permanent employee”. It would seem to mean a conversion into a contract of employment which is of indefinite duration, terminable upon reasonable notice ¹²¹⁵ and subject to the statutory minimum periods of notice. ¹²¹⁶ Comparison should be made with the case law, considered in an earlier paragraph, ¹²¹⁷ concerning the construction of provisions for “permanent employment” in contracts of employment.

Termination by subsequent agreement

- 42-178 In accordance with general contractual principles, it is open to an employer and employee at any time during the currency of a contract of employment to terminate the contract by agreement. ¹²¹⁸ The agreement will be effective by virtue of the mutual release by the parties of their obligations

under the contract of employment.¹²¹⁹ The agreement may be subject to terms, provided these do not, for instance, constitute an unlawful restraint of trade.¹²²⁰ The agreement will be effective to override formal or substantive restrictions placed on the termination of the contract by the original contract itself.¹²²¹ Because a termination by agreement may not be a “dismissal” for statutory purposes, the industrial (now, employment) tribunals and courts have been vigilant in distinguishing between genuinely bilateral termination and ostensible agreements generated solely by the employer.¹²²² It used to be thought that there might be a termination by agreement rather than a dismissal where the parties agree in advance that the employee’s failure to return to work on a due date will operate to determine the contract,¹²²³ unless there was simply a unilateral stipulation by the employer to that effect.¹²²⁴ However, the Court of Appeal has held that the fact that there is some measure of agreement on the part of the employee to the termination of a contract of employment does not of itself prevent an employee from counting as dismissed for the purposes of the [Act of 1978](#) (now the [1996 Act](#)); and that a provision for automatic termination of a contract of employment for failure to report for work on one specific future date was void by virtue of [s.140\(1\) of that Act](#), now [s.203 of the 1996 Act](#), as purporting to limit the operation of the statutory right not to be unfairly dismissed, by trying to convert that right into a merely conditional one.¹²²⁵ Nevertheless, there may be held in appropriate circumstances to be a “consensual resignation” rather than a dismissal, for example under a genuinely consensual early retirement scheme.¹²²⁶ A termination of a contract of employment by agreement occurs also where there is an agreed change in the terms and conditions of employment, for instance by way of promotion, which is sufficiently fundamental to constitute the rescission of the original contract and its replacement by a new contract on different terms.¹²²⁷

Retirement

- 42-179 The notion of “retirement” from employment is one which is far from precise either in practical or in legal terms. In practical terms its normal or approximate meaning is the ending of the employment of a worker by reason of his or her having reached the end of his or her normal working life or career. In legal terms this may take various forms, such as termination of the contract of employment by the employing enterprise, perhaps by notice to terminate, or termination by expiry of a fixed-term contract of employment, or it might be regarded as termination by agreement, whether prior or ad hoc, or it might consist of termination by the worker (the latter especially in the case of so-called “early retirement”, itself a notion with further imprecisions).¹²²⁸ Without defining the notion of “retirement”, the [Employment Equality \(Age\) Regulations 2006](#)¹²²⁹ attached very significant new legal incidents to it,¹²³⁰ some of which were immediately embodied in the unfair dismissal provisions of the [Employment Rights Act 1996](#) and the rest of which were subsequently transposed into the [Equality Act 2010](#). Many of those provisions, in particular those which had authorised employers to maintain a “default retirement age” of 65 or more, were

repealed by the [Employment Equality \(Repeal of Retirement Age Provisions\) 2011](#).¹²³¹ The result is that if an employer requires an employee to retire from his or her employment, while no breach of the employee's contract of employment may be involved—that is to say, while the retirement may take the form of a contractually lawful termination of employment—the imposition of retirement upon the employee may nevertheless represent an unfair dismissal¹²³² and/or a dismissal which amounts to unlawful age discrimination.¹²³³

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 1205 Such a contract may more readily be classified as a contract for services; cf. above, para.[42-004](#).
- 1206 See above, para.[42-128](#) (unfair dismissal), and below, [42-256](#) (redundancy payments).
- 1207 SI 2002/2034.
- 1208 SI 2002/2034 reg.11 and Sch.2, amending *Employment Rights Act 1996* ss.29, 65, 86, 92, 105, 108, 109, 136, 145, 199, 203, 235.
- 1209 SI 2002/2034 reg.11 and Sch.2 Pt 1 para.3, inserting new *Employment Rights Act 1996* s.235(2A)–(2B).
- 1210 SI 2002/2034 reg.1(2).
- 1211 SI 2002/2034.
- 1212 See above, paras [42-159](#)—[42-160](#).
- 1213 As defined in reg.1(2).
- 1214 Under reg.8(4), any period of continuous employment falling before 10 July 2002 is to be disregarded. It should be noted that, by virtue of reg.8(2)(b), the conversion effect occurs only if the employment of the employee under a fixed-term contract was not justified on objective grounds; as to the assessment of objective justification, compare *Duncombe v Department for Education and Skills [2011] UKSC 14*. Compare now also *Hudson v Department for Work and Pensions [2012] EWCA Civ 1416, [2013] 1 All E.R. 1370* where the Court of Appeal considers the working of reg.8 and construes the scope of reg.18 as excepting employees currently employed on fixed-term contracts made pursuant to a Government training scheme, but does not exclude such employment under past contracts.
- 1215 See above, para.[42-165](#).
- 1216 See above, para.[42-167](#).
- 1217 See above, para.[42-164](#).
- 1218 See Vol.I, paras [25-001](#) et seq.
- 1219 Hence an “accord and satisfaction”—see *Lees v Arthur Greaves Ltd [1974] I.C.R. 501, 506D*. In *Lambert v Croydon College [1999] I.C.R. 409*, the Employment Appeal Tribunal held

that a compromise agreement for early retirement on grounds of ill-health could validly fix the “effective date of termination of employment” for statutory purposes, see below, paras 42-225—42-226, even though it fixed it at a date earlier than that on which the agreement was made. In *Bank of Credit and Commerce International SA (In Liquidation) v Ali* [2001] I.C.R. 337, it was held in the House of Lords that the standard settlement agreement which ACAS proposes to parties to employment tribunal proceedings, known as the COT3 agreement, did not extend to the release of future liability from potential claims which could not have been foreseen or in the contemplation of the parties when the agreement was made—such as, in this case, the claim for “stigma damages” which had subsequently been successfully made against the BCCI by some of its former employees, see below, paras 42-209—42-210. Compare *Solelectron Scotland Ltd v Roper* [2004] I.R.L.R. 4, EAT as to the validity of a compromise agreement which could be regarded as limiting the application of the TUPE Regulations.

- 1220 See Vol.I, paras 18-151 et seq. and cf. *Wyatt v Kreglinger & Fernau* [1933] 1 K.B. 793. In *Fish v Dresdner Kleinwort Ltd* [2009] EWCA Civ 2246, [2009] I.R.L.R. 1035 it was held that the express provisions of termination agreements for the payment of bonus and severance pay could not be cut down by reference to fiduciary obligations or obligations of mutual trust and confidence owed by the employees, who had been senior managers, to the employer, although those payments had been reduced for remaining senior managers by reason of the impact of the banking crisis of 2008.
- 1221 e.g. *Latchford Premier Cinema Ltd v Ennion & Paterson* [1931] 2 Ch. 409, see above, para.42-164.
- 1222 *East Sussex CC v Walker* (1972) 7 I.T.R. 280; and, in the context of transfer to different work or work on different terms, *Marriott v Oxford & District Co-operative Society Ltd (No.2)* [1970] 1 Q.B. 186; *Sheet Metal Components Ltd v Plumridge* [1974] I.C.R. 373. A further example of this vigilance is provided by the decision of the Court of Appeal in *Hellyer Bros v Atkinson* [1994] I.R.L.R. 88.
- 1223 *British Leyland Ltd v Ashraf* [1978] I.C.R. 979.
- 1224 *Midland Electric Ltd v Kanji* [1980] I.R.L.R. 185.
- 1225 *Igbo v Johnson Mathey Chemicals Ltd* [1985] I.C.R. 505; overruling *British Leyland Ltd v Ashraf* [1978] I.C.R. 979.
- 1226 *Birch v University of Liverpool* [1985] I.C.R. 470.
- 1227 See Freedland, *The Contract of Employment* (1976), pp.72–76; and cf. *Meek v Port of London Authority* [1918] 2 Ch. 96; *SW Strange Ltd v Mann* [1965] 1 W.L.R. 629; *BBC v Ioannu* [1974] I.R.L.R. 77 at [17] (decision affirmed [1975] I.C.R. 267).
- 1228 Compare Freedland, *The Personal Employment Contract* (2003), pp.400–401, 429–431.
- 1229 SI 2006/1031.
- 1230 See also para.42-232.
- 1231 SI 2011/1069 which took full effect on 1 October 2011.
- 1232 As to which see para.42-232.
- 1233 As to which see para.42-253.

(d) - Termination Under the Doctrine of Frustration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 6. - Termination of the Contract

(d) - Termination Under the Doctrine of Frustration

Frustration

- 42-180 The doctrine of frustration applies to a contract of employment.¹²³⁴ Death of either party and permanent illness of the employee discussed in the following paragraphs, are instances where the doctrine applies. But other events may frustrate a contract of employment: a contract between a variety artiste and a manager was held to be frustrated by the calling up of the artiste for military service, even though the parties, so far as possible, treated the contract as subsisting throughout the War.¹²³⁵ It was held in *Hare v Murphy Bros Ltd*¹²³⁶ that a contract of employment may be terminated when the employee is sentenced to a substantial term of imprisonment, and there was some suggestion in the judgments of the Court of Appeal that this could be regarded as a termination under the doctrine of frustration.¹²³⁷ In a later case, it was held that a contract of apprenticeship was frustrated when the apprentice received a custodial sentence, and that he could not negate that frustration as being induced by his own fault.¹²³⁸

Death of either party

- 42-181 The death of either party terminates the contract of employment, unless the contract expressly or implicitly provides otherwise. The contract is terminated only as from the time of death so that any right of action which has accrued to either party before that time remains enforceable¹²³⁹; but no claim lies to enforce rights which would accrue only after that time.¹²⁴⁰ The death of the employer normally operates to terminate the contract of employment just as the death of the employee: the personal representative of the employer is not normally obliged to continue the

employment.¹²⁴¹ On the death of either party, a claim lies for the salary or wages of the employee up to the date of the death which terminates the contract.¹²⁴² Moreover, legislation now protects the position of employees in respect of their statutory rights in the event of the employer's death, and in certain circumstances securing those rights for the estate of the employee in the event of the employee's death.¹²⁴³ It is provided, furthermore, that where, upon the death of an employer, an employee takes up employment with the personal representatives, the period of employment with the deceased employer counts as part of the period of continuous employment with the personal representatives for the purposes of statutory rights depending upon length of service or requiring a qualifying period of service.¹²⁴⁴

Illness frustrating the contract

- 42-182 If the illness or injury is of such a nature, or if it appears likely to continue for such a period, as to defeat the purpose or object of the employment, the contract of employment will be frustrated.¹²⁴⁵ The effect of the expected¹²⁴⁶ period of the illness must depend upon the period and nature of the employment. In *Marshall v Harland & Wolff Ltd*,¹²⁴⁷ the test was formulated as follows:

“Was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and accepted by the employer under the agreed terms of his employment?”

Although in that case the principle was maintained¹²⁴⁸ that there need be no act of the employer marking the point of time at which the frustration occurred, the current judicial approach to frustration by incapacity of the employee due to illness seems to be on the whole a cautious one which emphasises that frustration must be a conclusion made necessary by the circumstances of the particular employment.¹²⁴⁹ There is even some suggestion that frustration by illness cannot in practice arise at all in relation to contracts of employment terminable by notice as distinct from contracts of employment for a substantial fixed term not terminable by notice,¹²⁵⁰ though the better view seemed to regard the doctrine of frustration as restricted rather than totally excluded where the employer has the power to terminate by notice.¹²⁵¹ This was confirmed in a more recent case¹²⁵² where it was held that the contract of employment of a skilled workman was, though a periodic contract terminable by relatively short notice, nevertheless terminated by frustration without notice when it became apparent to both parties that the employee had become incapacitated by sickness from ever again performing his contract of employment. If a contract of employment is frustrated, the legal consequences upon the rights and obligations of the parties will be determined by the ordinary legal rules applicable to frustration.¹²⁵³ Early authority suggests that if the illness

or injury is of a type or of a duration which does not frustrate the contract of employment, it is nevertheless a justification for the employee's failure to work while the illness or injury continues.¹²⁵⁴

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 1234 See Vol.I, paras 26-037 et seq. So also does the distinct doctrine of supervening legal impossibility—*Tarnesby v Kensington Chelsea & Westminster AHA [1981] I.R.L.R. 369*.
- 1235 *Morgan v Manser [1948] 1 K.B. 184*.
- 1236 *[1974] I.C.R. 603*.
- 1237 *[1974] I.C.R. 603* at 607E–F (per Lord Denning MR), 607H–608A (Stephenson LJ), 608E–F (Lawton LJ); not followed, however, in *Norris v Southampton City Council [1982] I.C.R. 177*. Compare now the restricted approach to frustration of the contract of employment which was taken in *Four Seasons Healthcare Ltd v Maughan [2005] I.R.L.R. 324*.
- 1238 *Shepherd & Co Ltd v Jerrom [1986] I.R.L.R. 358*. See Vol.I, para.26-091.
- 1239 *Stubbs v Holywell Ry (1867) L.R. 2 Ex. 311*.
- 1240 *Graves v Cohen (1930) 46 T.L.R. 121*; cf. *Harvey v Tivoli (Manchester) Ltd (1907) 23 T.L.R. 592*. Contrast *Phillips v Alhambra Palace Co [1901] 1 K.B. 59*. This is merely an application of the general rule as to frustration.
- 1241 *Farrow v Wilson (1896) L.R. 4 C.P. 744*. But cf. *Graves v Cohen (1930) 46 T.L.R. 121, 123–124*.
- 1242 Law Reform (Frustrated Contracts) Act 1943, see Vol.I, paras 26-104 et seq., also, possibly, by the Apportionment Act 1870 (see below, para.42-202).
- 1243 See ss.136(5), 206, 207 of Employment Rights Act 1996.
- 1244 Employment Rights Act 1996 s.218(4); see above, para.42-172.
- 1245 *Poussard v Spiers & Pond (1876) 1 Q.B.D. 410* (opera singer engaged for three months, unable to perform on first night and duration of illness uncertain—contract frustrated); *Storey v Fulham Steel Works (1907) 24 T.L.R. 89* (engagement for five years as manager—after two years, six months' illness—no frustration); *Warburton v Co-operative Wholesale Society [1917] 1 K.B. 663*. For the question of payment during absence due to sickness, see above, paras 42-087—42-089. For the relationship with the reasonable adjustment duty (disability), see now *Warner v Armfield Retail & Leisure Ltd [2014] I.C.R. 239, EAT*.
- 1246 cf. the cases on the effect on an ordinary contract of a delay whose duration is uncertain; Vol.I, para.26-035.
- 1247 *[1972] I.C.R. 101, 105A–B*.
- 1248 *[1972] I.C.R. 101* at 106F.

- 1249 *[1972] I.C.R. 101* at 105B–106A, 106H–107C; *Puttick v John Wright & Sons (Blackwall) Ltd [1972] I.C.R. 457*; *Hebden v Forsey & Son [1973] I.C.R. 607*.
- 1250 *Harman v Flexible Lamps Ltd [1980] I.R.L.R. 418, 419*, [7].
- 1251 cf. *Egg Stores Ltd v Leibovici [1977] I.C.R. 260, 264C–265E*; *Hart v AR Marshall Ltd [1977] I.R.L.R. 61, 62*, [5]–[7]. The “short-term periodic contract of employment” referred to by Phillips J in those cases is the ordinary contract of employment of indeterminate duration impliedly terminable by notice, see above, para.42–166.
- 1252 *Notcutt v Universal Equipment Co (London) Ltd [1986] I.C.R. 414*.
- 1253 See Vol.I, paras 26–100 et seq.
- 1254 *Boast v Firth (1868) L.R. 4 C.P. 1*.

(e) - Assignment, Winding-up and Changes in the Employing Enterprise

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 6. - Termination of the Contract

(e) - Assignment, Winding-up and Changes in the Employing Enterprise

Transfer of employment: (1) the position at common law

- 42-183 A contract for personal service cannot be assigned by one party without the consent of the other.¹²⁵⁵ Thus where two companies were amalgamated under an order of the court, the employer's rights under a contract of employment could not be assigned to the new company without the consent of the employee.¹²⁵⁶ Similarly, it has been held that the sale by a receiver (appointed by the debenture-holders) of the company's business as a going concern may operate to terminate the contracts of employment of all the company's employees.¹²⁵⁷ Where the identity of the employer is changed in such circumstances that statutory continuity of employment is preserved,¹²⁵⁸ the new employer is not required to issue a complete new set of statutory particulars of terms of employment¹²⁵⁹ unless there is some change in the terms; the change in the identity of the employer can in those circumstances be notified by way of amendment of the existing particulars as if it were simply itself a change of terms.¹²⁶⁰ This should not, however, be seen as overriding the requirement of the employee's consent to the change of employer.¹²⁶¹

Transfer of employment: (2) the effect of the TUPE Regulations

42-184



The position concerning transfer of employment as described in the previous paragraph was very significantly altered by the [Transfer of Undertakings \(Protection of Employment\) Regulations 1981](#).

1262

U More recently, the existing [Transfer of Undertakings \(Protection of Employment\) Regulations](#) were revised and replaced by the [Transfer of Undertakings \(Protection of Employment\) Regulations 2006](#) (“the TUPE Regulations”).

1263

U The Regulations provide that upon a transfer of an undertaking to which the regulations apply,

1264

U or upon a “service provision change”

1265

U —that is to say, in essence, where services are either outsourced, brought back in house, or assigned by a client to a new contractor—the contract of employment of any person employed immediately before the transfer

1266

U by the transferor in the undertaking or part transferred shall not be terminated by the transfer but, if it is a contract which would otherwise have been terminated by the transfer

1267

U shall have effect after the transfer as if originally made with the transferee of the undertaking.

1268

U The contractual obligations may also be transferred to multiple transferees.

1269

U However, the employees in question may lodge an objection to being employed by the transferee, in which case the transfer operates to terminate the contract of employment, though this is not to be treated as a dismissal of the employee.

1270

U So in such cases, if the employee does not lodge an objection, there is an automatic novation of the contract of employment, which is extended by the regulations to include all the transferor’s rights powers duties and liabilities under or connection with the contract.

1271

U This would seem to include accumulated entitlement to statutory employment rights based on the contract of employment insofar as not otherwise transferred by other statutory rules relating to the continuity of employment.

1272

U The question of the effectiveness of variations in transferred contracts had proved a very difficult one under the pre-[2006 Regulations](#).

[1273](#)

U The Regulations now provide that in respect of a contract of employment which is or will be transferred, any purported variation will be void if it is by reason of the transfer itself or for a connected reason which is not an economic technical or organisational reason entailing changes in the workforce,

[1274](#)

U but that otherwise a variation may validly be agreed.

[1275](#)

U This is not limited to variations to the employee's detriment.

[1276](#)

U The Regulations also, however, provide that where a transfer involves or would involve a substantial change in working conditions to the material detriment of the employee in question, that employee may treat the contract of employment as having been terminated, and that the employee shall be treated as having been dismissed by the employer.

[1277](#)

U Moreover, the Regulations also expressly preserve any independently arising right of an employee "to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer".

[1278](#)

U

Dissolution or change in composition of partnership [1279](#)

42-185 A dissolution of partnership of employers may operate as a wrongful dismissal [1280](#); but if the continuing partners offer new employment on the old terms and the employee unreasonably refuses it, he or she is only entitled to nominal damages in an action for such dismissal. [1281](#) There are provisions whereby statutory continuity of employment is preserved in the event of a change in the membership of a partnership of employers, [1282](#) and these provisions have been held to extend to the case of a change from employment by a partnership to employment by the sole surviving partner. [1283](#) It should be noted that, under the provisions of the [Limited Liability Partnerships Act 2000](#), employing partnerships may now be constituted in this new form of corporate entity, in which case different considerations apply.

Corporate insolvency and restructuring (1) ¹²⁸⁴

- 42-186 As the law of corporate insolvency and restructuring is itself subject to changes over time which cannot be fully detailed here, it is emphasised that the case law which is treated in this and the following paragraph must be understood in the context of its own contemporary company law regime. In the case of a company, the making of a compulsory winding-up order has been thought to operate automatically as notice of (wrongful) discharge to the employees of the company, since it amounts to notice that the company cannot continue to fulfil its obligations under its contracts of employment. ¹²⁸⁵ This would seem correct if there is an immediate termination of employment when the winding-up order is made. If, after the making of the order, the employment is continued by the liquidator, various views of the resulting situation are possible. The liquidator may be viewed as continuing the employment as the agent of the company. ¹²⁸⁶ In that case the making of the order could be seen as having *no* effect on the continuity of employment, ¹²⁸⁷ or as the giving of due notice to terminate, the period of notice to be worked out in the employment of the liquidator. ¹²⁸⁸ Alternatively, the order could still be viewed as a wrongful dismissal, but a wrongful dismissal rendered merely technical by the continuance of employment by the liquidator as agent of the company. ¹²⁸⁹ If the liquidator is viewed as employing in his or her personal capacity and not as the agent of the company, the winding-up order must then be seen as a wrongful dismissal followed by transfer of employment to the liquidator. ¹²⁹⁰ A resolution for voluntary winding-up accompanied by a discontinuance of employment will constitute a wrongful dismissal of the employees. ¹²⁹¹ Where the employment is continued by the liquidator after the resolution, the question of whether the resolution constitutes a wrongful repudiation has been thought to depend upon whether it is clear that the company cannot continue to fulfil its obligations. ¹²⁹² The better view would seem to be that the employee can in general in such cases opt to treat the resolution as a wrongful dismissal. ¹²⁹³

Corporate insolvency and restructuring (2)

- 42-187 The view has been taken that where a receiver and manager is appointed to a company by the court, the receiver does not generally act as the agent of the company, ¹²⁹⁴ and it would seem accordingly that there is a wrongful dismissal of employees of the company ¹²⁹⁵ (followed by transfer of employment to the receiver). On the other hand, where a receiver and manager is appointed to a company out of court by the debenture holders, the view has been taken that he or she will normally be empowered to act as the agent of the company in continuing the employment of its employees. ¹²⁹⁶ There may nevertheless be held to be a wrongful dismissal of employees upon the appointment of the receiver out of court if (a) the employment of the employee concerned

is of such a nature that its continuance was inconsistent with the appointment of a receiver and manager¹²⁹⁷; or if (b) the receiver is regarded as continuing the employment on behalf of the debenture holders rather than on behalf of the company itself,¹²⁹⁸ though the latter view of the receiver's position pending liquidation of the company was preferred in *Deaway Trading Ltd v Calverley*.¹²⁹⁹ A receiver and administrator was rendered personally liable, by s.44(1) (b) of the Insolvency Act 1986 on any contract of employment adopted by him in the carrying out of his function. The circumstances in which a contract of employment would be held to have been so adopted were considered by the Court of Appeal and the House of Lords in *Re Paramount Airways Ltd (No.3)*.¹³⁰⁰

Footnotes

¹ Freedland (Gen. ed.), The Contract of Employment (2016); Freedland, The Personal Employment Contract (2003); Gaymer, The Employment Relationship (2001); Brodie, The Employment Contract: Legal Principles, Drafting, and Interpretation (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, The Legal Construction of Personal Work Relations (2011).

¹²⁵⁵ See Vol.I, para.26-056.

¹²⁵⁶ *Nokes v Doncaster Amalgamated Collieries* [1940] A.C. 1014; cf. *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 Q.B. 437.

¹²⁵⁷ *Re Foster Clark Ltd's Indenture Trusts* [1966] 1 W.L.R. 125 sed quaere; insofar as the decision is founded on *Brace v Calder* [1895] 2 Q.B. 253, it is questionable because sale of the business does not dissolve the employing entity as dissolution of a partnership does, cf. see below, para.42-185. On the appointment of a receiver, see below, para.42-187.

¹²⁵⁸ See above, para.42-172.

¹²⁵⁹ See above, para.42-042.

¹²⁶⁰ Employment Rights Act 1996 s.2(2), (3).

¹²⁶¹ cf. *Ubsdell v Paterson* [1973] I.C.R. 86, 89C; *Cartin v Botley Garages Ltd* [1973] I.C.R. 144.

¹²⁶² SI 1981/1794, made under the European Communities Act 1972 in implementation of EEC Directive 77/187 of the Council of 14 February 1977, on the approximation of the laws of the Member States relating to the safe-guarding of employees' rights in the event of transfer of undertakings, businesses and parts of businesses; amended by the Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1987 (SI 1987/442). For recent judicial analyses of the aims and effects of the Directive and the Regulations, see *Unison v Allen* [2007] I.R.L.R. 975; *Computershare Investor Services Plc v Jackson* [2007] EWCA Civ 1065, [2008] I.R.L.R. 70; and *Regent Security Services Ltd v Power* [2007] EWCA Civ 1188, [2008] I.R.L.R. 66.

¹²⁶³ SI 2006/246, implementing amendments to Directive 77/187 which were made by Directive 98/50 and consolidated into the replacement Directive 2001/23. See now also the Collective

Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 (SI 2014/16). For a full overview, see *J. McMullen*, “*TUPE: ringing the (wrong) changes*” (2014) 43 *I.L.J.* 149.

- ① 1264 See reg.3(1)(a), 3(2), 3(4)–(6). The key concept is that of the “economic entity”, as to which see, most recently, *Wain v Guernsey Ship Management Ltd* [2007] EWCA Civ 294, [2007] I.C.R. 1350. By reg.3(1)(a), the regulations apply to the transfer of an undertaking *from one person to another*—which excludes share takeovers of companies, where, however, a transfer provision is in a sense unnecessary because no change in the identity of the employer is involved; compare, however, *Print Factory (London) 1991 Ltd v Millam* [2007] EWCA Civ 322, [2007] I.C.R. 1331, which shows the difficulty of distinguishing, at the margin, between a share sale and the transfer of an undertaking.
- ① 1265 See reg.3(1)(b), 3(3).
- ① 1266 See reg.4(3) and compare *Secretary of State for Employment v Spence* [1987] Q.B. 179; *Litster v Forth Dry Dock & Engineering Co Ltd* [1989] I.R.L.R. 161.
- ① 1267 See reg.4(1), cf. above, para.42-183, below, paras 42-186—42-188.
- ① 1268 See reg.4(1). See now *Alemo-Herron v Parkwood Leisure Ltd* (C-426/11) EU:C:2013:521, [2014] All E.R. (EC) 400; See *J. Prassl*, “*Freedom of contract as a general principle of EU law? Transfers of undertakings and the protection of employer rights in EU labour law*” (2013) 42 *I.L.J.* 434, and Vol.I, paras 2-007—2-008, above.
- ① 1269 *ISS Facility Services v Govaerts* (C-344/18) EU:C:2020:239, [2020] I.C.R. 1115, as applied domestically in *McTear Contracts Ltd v Bennett; Mitie Property Services UK Ltd v Bennett* [2021] I.R.L.R. 444, EAT.
- ① 1270 SI 2006/246 reg.4(1), (7).
- ① 1271 SI 2006/246 reg.4(2)(a). But criminal liability is excepted by reg.4(6).
- ① 1272 See above, para.42-169.
- ① 1273 It had been under consideration by the House of Lords in the case of *Wilson v St Helen's BC* [1998] I.C.R. 1141.
- ① 1274 SI 2006/246 reg.4(4), subject to reg.9 which is more permissive towards variations of contract where transferors are subject to insolvency proceedings. See *Kavanagh v Crystal Palace FC 2000 Ltd* [2013] EWCA Civ 1410, [2014] 1 All E.R. 1033, and *Manchester College v Hazel* [2014] EWCA Civ 72, [2014] I.R.L.R. 392. For an illustration of how a

transfer can be the sole or principal reason, even where other factors are in play, see *Hare Wines Ltd v Kaur* [2019] EWCA Civ 216.

1275 SI 2006/246 reg.4(5).

1276 *Ferguson v Astrea Asset Management Ltd* [2020] I.C.R. 1517, EAT.

1277 SI 2006/246 reg.4(9) subject to reg.9 which is more permissive towards variations of contract where transferors are subject to insolvency proceedings. See below, paras 42-198—42-199 as to the impact of reg.4(9) upon the pre-existing law.

1278 SI 2006/246 reg.4(11); as to the extent of such a right, compare below, paras 42-198—42-199 on constructive dismissal.

1279 See Freedland, *The Personal Employment Contract* (2003), at pp.500–501.

1280 *Titmus v Rose & Watts* [1940] 1 All E.R. 599; but it may not do so where there is no fundamental disruption to the work of the partnership, as where one partner among a number retires or dies: cf. *Phillips v Alhambra Palace Co* [1901] 1 Q.B. 59; *Tunstall v Condon* [1980] I.C.R. 786, 790F–791F.

1281 *Brace v Calder* [1895] 2 Q.B. 253. On mitigation, see Vol.I, paras 29-096 et seq.

1282 Employment Rights Act 1996 s.218(5). See above, para.42-172.

1283 *Stevens v Bower* [2004] EWCA Civ 496, [2004] I.C.R. 1582 where the approach earlier taken in *Harold Fielding Ltd v Mansi* [1974] I.C.R. 347 was rejected and it was held that the employees in question had continuity of service despite the change in the status of their employer from that of a partnership of solicitors to that of a sole practitioner.

1284 See Freedland, *The Personal Employment Contract* (2003), at pp.501—505.

1285 See Graham, “*The Effect of Liquidation on Contracts of Service*” (1952) 15 M.L.R. 48, 52; citing *Re Oriental Bank Corp Ltd* (1886) 32 Ch. D. 366. See *Deaway Trading Ltd v Calverley* [1973] I.C.R. 46, 550H–551D.

1286 cf. *McEwan v Upper Clyde Shipbuilders Ltd (In Liquidation)* [1972] I.T.R. 296 (Industrial Tribunal).

1287 *Ex p. Harding* (1868) L.R. 3 Eq. 341.

1288 This seems to be the correct view of *Re Oriental Bank Corp Ltd* (1886) 32 Ch. D. 366.

1289 cf. *McEwan v Upper Clyde Shipbuilders Ltd (In Liquidation)* [1972] I.T.R. 296.

1290 cf. *Golding and Howard v Fire, Auto and Marine Insurance Co Ltd (In Liquidation)* [1968] I.T.R. 372 Industrial Tribunal.

1291 *Reigate v Union Manufacturing Co Ltd* [1918] 1 K.B. 592; *Fowler v Commercial Timber Co Ltd* [1930] 2 K.B. 1.

1292 Graham, “*The Effect of Liquidation on Contracts of Service*” (1952) 15 M.L.R. 48, 54; and see Davies, *Modern Company Law*, 6th edn (1997), pp.833 et seq.

1293 Contra, *Midland Counties Bank v Attwood* [1905] 1 Ch. 357; but see *Reigate v Union Manufacturing Co Ltd* [1918] 1 K.B. 592, 606 where Scrutton LJ exposed a fallacy in the earlier case. See also Freedland, *The Contract of Employment* (1976), pp.335–337.

1294 cf. *Burt Boulton & Hayward Ltd v Bull* [1895] 1 Q.B. 276, 279.

- 1295 *Reid v Explosives Co Ltd* (1887) 19 Q.B.D. 264.
- 1296 *Re Foster Clarke Ltd's Indenture Trusts* [1966] 1 W.L.R. 125, 128B-G; *Re Mack Trucks (Great Britain) Ltd* [1967] 1 W.L.R. 780, 786C-E.
- 1297 *Re Mack Trucks (Great Britain) Ltd* [1967] 1 W.L.R. 780, 786C; but this doctrine held inapplicable even to a managing director in *Griffiths v Secretary of State for Social Services* [1974] Q.B. 468.
- 1298 cf. *Hopley-Dodd v Highfield Motors Ltd* [1969] I.T.R. 289 Industrial Tribunal.
- 1299 [1973] I.C.R. 546, 552D-E.
- 1300 Sub nom. *Powdrill v Watson* [1994] I.C.R. 395, CA, [1995] 2 A.C. 394, HL. The Insolvency (No. 2) Act 1994 amended s.44 of the 1986 Act to reverse certain of the effects of that decision in respect of contracts of employment adopted on or after 15 March 1994. The resulting position has been stated in detail in an earlier chapter of this work; see Vol.I, para.12-050.

(f) - Summary Dismissal

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 6. - Termination of the Contract

(f) - Summary Dismissal

Summary dismissal generally

- 42-188 The law concerning summary dismissal used to form a very prominent part of the law of the contract of employment. This was because the common law implied very wide rights of summary dismissal into contracts of employment, and also because the common law duties of the employee were worked out in the context of actions concerning summary dismissals alleged to be wrongful.¹³⁰¹ The law of summary dismissal has been considerably reduced in its importance for two reasons, first, because the employer's rights of summary dismissal have, since the decision in *Laws v London Chronicle Ltd*,¹³⁰² been regarded as confined to cases of repudiation or fundamental breach of contract by the employee, in accordance with general contractual principles.¹³⁰³ Secondly, the justifiability of dismissal is now in practice normally raised as an issue of unfair dismissal,¹³⁰⁴ and the question of whether a summary dismissal was wrongful dismissal at common law has to that extent lost its former significance. The following paragraphs should be read as subject to those general considerations.

Misconduct

- 42-189 Where the employee is guilty of sufficient misconduct in his or her capacity as an employee he or she may be dismissed summarily without notice and before the expiration of a fixed period of employment.¹³⁰⁵ Although the power of dismissal in these circumstances may be by virtue of an implied term in the contract,¹³⁰⁶ it is also possible to view it as a power to rescind the contract upon a repudiatory breach of contract committed by the employee.¹³⁰⁷ There is no rule of law

defining the degree of misconduct which will justify dismissal.¹³⁰⁸ The test to be applied must vary with the nature of the business and the position held by the employee,¹³⁰⁹ and reported cases are therefore only a general guide. The general rule is that if the employee does anything which is incompatible with the due or faithful¹³¹⁰ discharge of his or her duty to his or her employer, he or she may be dismissed without notice¹³¹¹; the employee's conduct need not be dishonest, since it is sufficient if it is "conduct of such a grave and weighty character as to amount to a breach of the confidential relationship"¹³¹² between employer and employee. So where a manager of a betting shop borrowed money from petty cash to place a bet in another betting shop, knowing that his employer would not have granted permission for this borrowing had he been asked, the employer was justified in dismissing him summarily, even though the manager put an IOU in the till, and was not surreptitious.¹³¹³ On the other hand, even (conceded) gross negligence on the part of a senior social worker was held not to amount to "gross misconduct" meriting summary dismissal within the meaning of her contractual dismissal procedure.¹³¹⁴

Illustrations of misconduct

42-190

- U** Many of the decisions on misconduct date from the last century, and may be out of accord with current social conditions. However, courts may endeavour to adapt to modern circumstances the principles derived from the older cases, and there is scope for judicial innovation when principles have to be applied to novel situations. Insubordination,¹³¹⁵ breach of confidence in disclosing trade or other secrets,¹³¹⁶ taking a secret commission¹³¹⁷ and drunkenness affecting performance of duties¹³¹⁸ are kinds of misconduct which have, in the circumstances of the case, justified summary dismissal. An employee may obviously be dismissed for dishonesty or fraud in his employment.¹³¹⁹ But conviction¹³²⁰ of a crime is sufficient only if the conduct constituting the crime is inconsistent with the proper performance of his or her duties as an employee.¹³²¹ In the absence of fraud, there is no obligation on a prospective employee to disclose to his or her prospective employer all the facts which might be material to the latter's decision whether or not to employ him or her, nor, during the employment, to disclose his or her own misconduct.¹³²² Thus, the mere concealment of a material fact, without fraud, does not entitle the employer to dismiss the employee.¹³²³ In *Adesokan v Sainsbury's Supermarkets Ltd* the Court of Appeal held that an act of gross negligence might in an appropriate case amount to gross misconduct justifying dismissal where it inflicted grave damage upon the relationship between the parties.

1324



Misconduct outside hours of employment

- 42-191 It has been held that dishonesty committed by the employee outside the hours of his employment will justify summary dismissal where it reveals the employee as “unfit for a position of trust and confidence”.¹³²⁵ Other forms of misconduct outside the course of employment may justify dismissal if the misconduct is incompatible with the due or faithful discharge of the employee’s duty qua employee, as where the confidential clerk to a merchant was speculating to an enormous amount on the Stock Exchange in “differences”.¹³²⁶ Again, where the employee presided irregularly at a canteen committee meeting (held outside his ordinary hours of employment) at which he assaulted a fellow employee and was disrespectful to a superior officer, the employer was justified in dismissing him summarily.¹³²⁷ The older authorities suggest that it is doubtful whether an employee’s immorality unconnected with the employment¹³²⁸ can justify dismissal without notice, unless the immorality is such as to show that he or she could not reasonably be trusted in the particular employment concerned.¹³²⁹

Misconduct of apprentice

- 42-192 Special rules have been held to apply to minors who are employed as apprentices.¹³³⁰ It has been held that conduct on the part of an apprentice which might justify the dismissal of an adult, such as words irritating his or her fellow employees and leading to the loss of the employer’s time, does not justify the dismissal of the apprentice,¹³³¹ nor does insolence and insubordination.¹³³² Nor is it sufficient for the employer to show that the apprentice has repudiated the contract, unless it also appears that the repudiation was for the benefit of the apprentice.¹³³³ Since the covenants by the employer in an apprenticeship deed were regarded as independent covenants, it has been held to be normally no excuse for the breach of the employer’s obligations that the apprentice had broken his obligations.¹³³⁴ But where an apprentice by his or her own wilful act prevents an employer from teaching him, the employer could set this up as a defence to an action on the covenant to keep, teach and maintain¹³³⁵; and it has also been held a good defence that the apprentice was an habitual thief.¹³³⁶

Summary dismissal for disobedience

- 42-193 An employee may be summarily dismissed if he or she wilfully disobeys any lawful and reasonable order of his employer, provided that:

“The disobedience must at least have the quality that it is ‘wilful’: it does ... connote a deliberate flouting of the essential contractual conditions.”¹³³⁷

In circumstances which show that the employee is repudiating one of the essential conditions of the contract of employment, a single act of disobedience will justify dismissal.¹³³⁸ But not every order of the employer will be a “lawful order” or a “reasonable order”¹³³⁹ for this purpose, since the employee is not bound to obey an order to do something which is outside the contract of employment,¹³⁴⁰ nor an order which places him or her in danger not reasonably contemplated at the time he or she entered the employment, e.g. an order to remain in a place in which his personal safety is endangered by violence or disease.¹³⁴¹

Summary dismissal for incompetence or negligence

- 42-194 If an employee was engaged on the basis that he or she possessed a particular skill, it has been held that he or she may be dismissed summarily without notice if he fails to display a reasonable degree of competence in that skill.¹³⁴² It has also been held that any employee (whether he or she professes a particular skill or not) is liable to be dismissed summarily if he or she performs his work so negligently that his or her employer’s business is likely to be seriously injured.¹³⁴³ The view has been taken that an isolated act of forgetfulness or carelessness on the part of an employee will not normally entitle the employer to dismiss him or her without notice¹³⁴⁴; but this has been said to be a question “of fact and degree in all cases”¹³⁴⁵;

“... to forget to do a thing which, if not done, may cause considerable damage to the employer, or to his property, ... may be a serious neglect of duty.”¹³⁴⁶

The older cases concerning summary dismissal for incompetence or negligence might well now be held to be restricted in their application by the development of the principle that summary dismissal is justified only by fundamental or repudiatory breach of contract on the part of the employee.¹³⁴⁷

Grounds for dismissal need not be known at the time nor stated

- 42-195 An employer, when he or she dismisses his employee, need not allege any specific act of misconduct on the employee’s part as the ground for the dismissal; it is sufficient if such a ground did exist, whether or not the employer knew of it at the time of the dismissal.¹³⁴⁸ But if the

employer does know of the misconduct in question and thereafter continues the employment, he or she may be taken to have waived his or her right to dismiss the employee on that ground.¹³⁴⁹ The employee now has a statutory right to a written statement of reasons for dismissal.¹³⁵⁰ The existence of that right does not in itself alter this aspect of the law of summary dismissal, unless the employer were held to be estopped from asserting grounds for dismissal which do not form part of a statutory written statement of reasons for dismissal.

The right to be heard on dismissal from public employment

- 42-196 Certain employees whose employment is in some sense public employment or involves the tenure of an office are entitled to the benefit of the application of the principles of natural justice before they can be dismissed.¹³⁵¹ The category of employees so entitled is not yet clearly defined but seems to include employees who are holders of a tenured office¹³⁵² or whose employment takes place under the authority and regulation of a statute or other constituent instrument giving it a public nature.¹³⁵³ It seemed that where the employee has this protection, remedies of a public law nature might be available to invalidate a dismissal not carried out in accordance with the principles of natural justice.¹³⁵⁴ The more recent view has been that a person employed under a contract of employment cannot invoke public law remedies to complain of his or her dismissal even if his or her employment is of a public nature,¹³⁵⁵ though an officer or office-holder who does not have a contract of employment may be able to do so.¹³⁵⁶ In *R. (Shoesmith) v OFSTED*,¹³⁵⁷ a senior manager employed by a local authority did succeed in obtaining judicial review of the decision to dismiss her summarily on the footing that she was an office-holder as well as being a contractual employee; on the other hand, it was held in *Christou v Haringey LBC*¹³⁵⁸ that social workers in that senior manager's department, who were regarded as ordinary contractual employees, could not invoke the doctrines of res judicata or abuse of process to complain of having been subjected to a second internal disciplinary process relating to a particular course of conduct on their part. The question whether an employee dismissed for misconduct is entitled to wages or salary up to the date of his dismissal is discussed in a later paragraph.¹³⁵⁹

Footnotes

1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

1301 cf. above, paras 42-061—42-071.

- 1302 [1959] 1 W.L.R. 698; see below, para.42-193.
- 1303 See Freedland, *The Contract of Employment* (1976), pp.212–219.
- 1304 See below, paras 42-221 et seq. A dismissal can be contractually wrongful without being unfair, and vice versa—cf. *Treganowan v Robert Knee & Co Ltd* [1975] I.C.R. 405.
- 1305 *Spain v Arnott* (1817) 2 Stark. 256; *Atkin v Acton* (1830) 4 C. & P. 208; *Turner v Robinson* (1833) 5 B. & Ad. 789; *Boston Deep Sea Fishing Co v Ansell* (1888) 39 Ch. D. 339. Compare *Cavenagh v William Evans Ltd* [2012] EWCA Civ 697, [2013] 1 W.L.R. 238 in which the *Boston Deep Sea Fishing* case was distinguished on the basis that it did not go so far as to say that after-discovered misconduct provided an employer with a defence to an action for payment of an accrued debt consisting of six months' pay in lieu of notice due upon making the employee redundant.
- 1306 Any express disciplinary rules applicable to the employee must be notified to him: *Employment Rights Act 1996* s.1(4)(a) (see above, para.42-042).
- 1307 See below, para.42-188. In *Ministry of Justice v Parry* [2013] I.C.R. 311, EAT, Langstaff J expounds this approach, holding in particular that the employee's conduct should be seen as a whole, so that an employer would usually be justified in dismissing an employee who committed a further act of misconduct within the period of effect of a warning, even though the act on its own might not merit dismissal.
- 1308 *Clouston & Co v Corry* [1906] A.C. 122. Where the plaintiff was required to serve to the satisfaction of the defendants, it was held that a real though unreasonable dissatisfaction justified them in dismissing him: *Diggle v Ogston Motor Co* (1915) 84 L.J. K.B. 2165.
- 1309 *Jupiter General Insurance Co Ltd v Shroff* [1937] 3 All E.R. 67, 74, PC.
- 1310 The duty of fidelity is discussed see above, para.42-064. It has been held that if the employer produces sufficient evidence to establish a strong *prima facie* case of infidelity on the part of his employee, the onus of rebutting this inference may shift to the employee: *Federal Supply Co v Angehrn* (1910) 103 L.T. 150.
- 1311 *Pearce v Foster* (1886) 17 Q.B.D. 536; *Swale v Ipswich Tannery Ltd* (1906) 11 Com. Cas. 88; *Tomlinson v LMS Ry* [1944] 1 All E.R. 537; *Sinclair v Neighbour* [1967] 2 Q.B. 279.
- 1312 *Sinclair v Neighbour* [1967] 2 Q.B. 279 at 289. Compare now *Leach v OFCOM* [2012] EWCA Civ 959, [2012] I.C.R. 1269 where the Court of Appeal held that the claimant had “abused the trust and confidence placed in him to a degree that was sufficiently serious to justify summary dismissal” (at [56]).
- 1313 *Sinclair v Neighbour* [1967] 2 Q.B. 279.
- 1314 *Dietman v Brent LBC* [1988] I.C.R. 842.
- 1315 *The Marina* (1881) 50 L.J. P. 33. cf. on insolence *Shaw v Chairitie* (1850) 3 Car. & K. 21; *Hicks v Thompson* (1857) 28 L.T. (O.S.) 255; *Edwards v Levy* (1860) 2 F. & F. 94; *Wilson v Racher* [1974] I.C.R. 428 (summary dismissal held not justified by the use of obscene language on a solitary occasion); but see *Pepper v Webb* [1969] 1 W.L.R. 514, see below, para.42-193.
- 1316 See above, paras 42-067—42-070. *Beeston v Collyer* (1827) 2 Car. & P. 607.
- 1317 *Boston Deep Sea Fishing Co v Ansell* (1888) 39 Ch. D. 339; *Federal Supply Co of South Africa v Angehrn* (1910) 103 L.T. 150; *Bell v Lever Bros* [1932] A.C. 161. And see *Reading*

- v Att-Gen [1951] A.C. 507* for the situation where the employer claims the amount of the secret commission from his employee: Vol.I, para.32-174; see above, para.42-071.
- 1318 *Wise v Wilson* (1845) 1 C. & K. 662; *Drysdale v New Era Co* (1936) 55 Ll. L. Rep. 45, 49. cf. *Clouston & Co v Corry* [1906] A.C. 122, 129; *Hands v Simpson Fawcett & Co Ltd* (1928) 44 T.L.R. 295.
- 1319 *Brown v Croft* (1828) 6 Car. & P. 16n; *Cunningham v Fonblanque* (1833) 6 Car. & P. 44, 49; *Phillips v Foxall* (1872) L.R. 7 Q.B. 666.
- 1320 The employee may show he was wrongly convicted: *Parsons v LCC* (1893) 9 T.L.R. 619. The imposition of a custodial sentence may make the contract impossible of further performance —*Hare v Murphy Bros Ltd* [1974] I.C.R. 603; see above, para.42-180.
- 1321 *Hands v Simpson Fawcett & Co Ltd* (1928) 44 T.L.R. 295. See also *Pearce v Foster* (1886) 17 Q.B.D. 536, 539, 540; *Proctor v Bacon* (1886) 2 T.L.R. 845.
- 1322 *Bell v Lever Bros* [1932] A.C. 161, especially at 228; *Healey v Soc Anon Française Rubastic* [1917] 1 K.B. 946, 947. Compare above, para.42-066 on duties to disclose information.
- 1323 *Fletcher v Krell* (1872) 42 L.J. Q.B. 55 (where a governess, described as a spinster, had in fact been married and divorced); *Hands v Simpson Fawcett & Co Ltd* (1928) 44 T.L.R. 295 (commercial traveller, who by terms of employment was to use motor-car, did not disclose previous driving conviction).
- ① 1324 [2017] EWCA Civ 22, [2017] I.R.L.R. 346. cf. *Thompson v Informatica Software Ltd* [2021] 10 WLUK 171, EAT.
- 1325 *Boston Deep Sea Fishing Co v Ansell* (1888) 39 Ch. D. 339; *Pearce v Foster* (1886) 17 Q.B.D. 536 at 539–540. *Federal Supply, etc. of South Africa v Angehrn & Piel* (1910) 103 L.T. 150. cf. *Sinclair v Neighbour* [1967] 2 Q.B. 279.
- 1326 *Pearce v Foster* (1886) 17 Q.B.D. 536.
- 1327 *Tomlinson v LMS Ry* [1944] 1 All E.R. 537.
- 1328 cf. *Gillet v Bullivant* (1846) 7 L.T. 490.
- 1329 *Pearce v Foster* (1886) 17 Q.B.D. 536, 539–540.
- 1330 See Vol.I, paras 11-025—11-028. On apprentices in general, see Fridman, *The Modern Law of Employment* (1963), pp.973–978. The present chapter does not deal with the law as between employer and apprentice except where expressly stated.
- 1331 *Newell v Gillingham Corp* [1941] 1 All E.R. 552.
- 1332 *McDonald v John Twiname Ltd* [1953] 2 Q.B. 304.
- 1333 *Waterman v Fryer* [1922] 1 K.B. 499.
- 1334 *Winstone v Linn* (1823) 1 B. & C. 460; *Phillips v Clift* (1859) 4 H. & N. 168.
- 1335 *Raymond v Minton* (1886) L.R. 1 Ex. 244.
- 1336 *Learoyd v Brook* [1891] 1 Q.B. 431.
- 1337 *Laws v London Chronicle Ltd* [1959] 1 W.L.R. 698, 701.
- 1338 *Laws v London Chronicle Ltd* [1959] 1 W.L.R. 698; cf. *Pepper v Webb* [1969] 1 W.L.R. 514; *Gorse v Durham CC* [1971] 1 W.L.R. 775.
- 1339 *Jacquot v Bourra* (1839) 7 Dowl. 348; cf. now *UCATT v Brain* [1981] I.C.R. 542, 548E–G (order to employee to undertake to settle a libel action to which he was defendant was unreasonable).

- 1340 *Price v Mouat* (1862) 11 C.B.(N.S.) 508; *Kaukul v Anglo-Soviet Shipping Co Ltd* (1931) 41 *Ll.L. Rep.* 90; cf. *Secretary of State for Employment v ASLEF* (No.2) [1972] 2 Q.B. 455.
- 1341 *Turner v Mason* (1845) 14 M. & W. 112, 117, 118; *Bouzourou v Ottoman Bank* [1930] A.C. 271; *Ottoman Bank v Chakarian* [1930] A.C. 277. cf. *McDonald v Moller Line (UK) Ltd* [1953] 2 *Lloyd's Rep.* 662, 667. In *Buckoke v GLC* [1970] 1 W.L.R. 1092, it was held not unlawful for the GLC to have a regulation for firemen employed by them which left it to the discretion of the firemen whether to disregard traffic signals.
- 1342 *Harmer v Cornelius* (1858) 5 C.B.(N.S.) 236. See above, para.42-061.
- 1343 *Callo v Brouncker* (1831) 4 C. & P. 518; *Wise v Wilson* (1845) 1 C. & K. 662; *Edwards v Levy* (1860) 2 F. & F. 94; *Fillieul v Armstrong* (1837) 7 Ad. & El. 557. See above, para.42-062.
- 1344 *Baster v London & County Printing Works* [1899] 1 Q.B. 901, 903.
- 1345 *Baster v London & County Printing Works* [1899] 1 Q.B. 901.
- 1346 *Baster v London & County Printing Works*, above, at 903; *Power v British India Steam Navigation Co Ltd* (1930) 46 T.L.R. 294.
- 1347 See above, para.42-188.
- 1348 *Mercer v Whall* (1845) 5 Q.B. 447, 466; *Ridgway v Hungerford Market Co* (1835) 3 Ad. & El. 171; *Cussons v Skinner* (1843) 11 M. & W. 161; *Spotswood v Barrow* (1850) 5 Ex. 110; *Boston Deep Sea Fishing Co v Ansell* (1888) 39 Ch. D. 339. cf. *Cyril Leonard & Co v Simo Securities Trust Ltd* [1972] 1 W.L.R. 80 (employment as managing agents). The Irish Supreme Court has not followed the proposition in the text: *Carvill v Irish Industrial Bank Ltd* [1968] I.R. 325.
- 1349 *Boston Deep Sea Fishing Co v Ansell*, above, at 358. But the employer does not lose his right of dismissal if he honestly accepts the employee's denial of guilt: *Federal Supply, etc. of South Africa v Angehrn & Piel* (1910) 103 L.T. 150; and if the alleged misconduct consists, not in a single act, but in a series of acts, the whole course of the employee's conduct must be taken into account. Compare now *Cavenagh v William Evans Ltd* [2012] EWCA Civ 697.
- 1350 See below, para.42-200.
- 1351 See Freedland, The Personal Employment Contract (2003), pp.70–71. Compare *McLaughlin v Governor of the Cayman Islands* [2007] UKPC 50, [2007] 1 W.L.R. 2839.
- 1352 cf. *Stevenson v URTU* [1977] I.C.R. 893, 902G–H, per Buckley LJ.
- 1353 cf. *Malloch v Aberdeen Corp* [1971] 1 W.L.R. 1578, 1596, per Lord Wilberforce. Contrast, however, *Gunton v Richmond LBC* [1980] I.C.R. 755, 764B, 774B–F, 777B.
- 1354 See below, paras 42-027—42-029.
- 1355 *R. v East Berkshire HA Ex p. Walsh* [1985] Q.B. 152.
- 1356 *R. v Secretary of State for the Home Department Ex p. Benwell* [1985] Q.B. 554.
- 1357 [2011] EWCA Civ 642, [2011] I.C.R. 1195.
- 1358 [2013] EWCA Civ 178, [2014] Q.B. 131.
- 1359 See below, para.42-203.

(g) - Wrongful Dismissal or Repudiation

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 6. - Termination of the Contract

(g) - Wrongful Dismissal or Repudiation

Termination by wrongful dismissal or wrongful repudiation

- 42-197 As a matter of general contract principle, the wrongful repudiation or wrongful purported termination of a contract cannot in itself terminate the contract,¹³⁶⁰ at least unless it renders any continuance of the contract totally impossible by reason of its catastrophic nature.¹³⁶¹ There is, however, a body of authority which treats wrongful dismissal as an exception to that general principle, so that the contract of employment is said to be terminated by wrongful dismissal even where the employee refuses to accept the dismissal as a termination of the contract.¹³⁶² That view is a conclusion based on the fact that common law and equitable remedies will not normally be so applied as to keep a contract of employment in being following a wrongful dismissal.¹³⁶³ The contrary view is that the contract of employment is not necessarily *in principle* terminated by wrongful dismissal even though no remedy may lie to maintain the contract in being.¹³⁶⁴ That theoretical issue has acquired a new importance because of the statutory consequences now attached to the termination of the contract of employment.¹³⁶⁵ The ultimate answer is that “termination of the contract of employment” is not really a concept with a single clear meaning¹³⁶⁶; but with that qualification the better view now seems to be in favour of regarding wrongful dismissal as not in principle terminatory of the contract unless accepted as such by the employee. Moreover, the courts now seem prepared to take the same view of a wrongful repudiation consisting in a fundamental change by the employer in the terms of employment which is not accepted by the employee as a termination of his or her contract.¹³⁶⁷ The elective view of termination of the contract of employment was followed in granting a declaration that a wrongful dismissal was ineffective to determine the contract¹³⁶⁸; in holding that an unaccepted wrongful repudiation could be the subject of injunctive relief to prevent a wrongful dismissal from taking effect until the proper contractual procedures had been followed¹³⁶⁹; in holding that an employee

could not free himself or herself of his or her obligation not to work for a rival employer during his contractual notice period by a wrongful repudiation which was not accepted by the employer¹³⁷⁰; and in rejecting the view that an employee normally dismisses himself or herself so is not dismissed by his or her employer when he or she commits a repudiatory breach of contract.¹³⁷¹ The Court of Appeal in its decision in *Boyo v Lambeth LBC*¹³⁷² rather doubtfully applied the elective view of wrongful repudiation by the employer. In the case where the employer wrongfully purported to treat the contract of employment as frustrated, the contract was treated, for the purpose of assessing contractual compensation, as not validly terminated until the time that notice to terminate would have expired if given after a disciplinary process had been provided and had been completed within a reasonable period of time. The elective view of the effect of the employer's wrongful and repudiatory purported dismissal was confirmed by the Supreme Court in *Société Générale (London Branch) v Geys*.¹³⁷³ In the particular case, the employee having elected to affirm the contract, the contract of employment was deemed to have remained in being until validly terminated by the eventual proper exercise of a payment in lieu of notice clause,¹³⁷⁴ with the effect that the period of service upon which the employee's bonus entitlement was based was extended by some weeks, and the amount of the bonus entitlement was thereby increased by several million pounds. The current view seems to be that the difficulties raised by this approach in relation to the statute law that depends on the concept of dismissal can satisfactorily be resolved by treating a wrongful dismissal as resulting in an effective termination for statutory purposes whatever its theoretical effect as a matter of common law.¹³⁷⁵ It has been held that a threatened breach by an employing company of its continuing obligation to employ the employee as a director was comparable to an anticipatory repudiatory breach of an executory contract, rather than an actual repudiatory breach, which could therefore be withdrawn at any time before its unequivocal acceptance by the employee.¹³⁷⁶

Footnotes

1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

1360 See above, Vol.I, paras 27-001 et seq.

1361 cf. *Harbutt's "Plasticine" Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 Q.B. 447. cf. also *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch. 233, 251E–254A for discussion of a different kind of exception to the general principle.

1362 *Ridge v Baldwin* [1964] A.C. 40, 64; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 737E–F; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 381E; *Hill v CA Parsons & Co Ltd* [1972] 1 Ch. 305, 314B–E “in the ordinary course of things”; *GKN (Cwmbran) Ltd v Lloyd* [1972] I.C.R. 214, 221B–C; *Sanders v Ernest Neale Ltd* [1974] I.C.R. 565.

- 1363 See below, para.42-214 (specific performance and injunction); paras 42-217—42-218 (declaration).
- 1364 *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 731F–732F; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361, 376C–D.
- 1365 See below, paras 42-221 et seq. (unfair dismissal provisions); paras 42-230 et seq. (redundancy payments legislation); paras 42-253 et seq. (dismissal contravening the **Sex Discrimination Act 1975**).
- 1366 See Freedland, *The Contract of Employment* (1976), pp.299–300.
- 1367 *Rigby v Ferodo Ltd* [1988] I.C.R. 29; cf. *Burdett-Coutts v Hertfordshire CC* [1984] I.R.L.R. 91.
- 1368 *Gunton v Richmond LBC* [1980] I.C.R. 755, Shaw LJ dissenting on this point. *Thomas Marshall Ltd v Guinle* [1978] I.C.R. 905, see above, para.42-067 was approved by the majority. Compare *Marsh v National Autistic Society* [1993] I.C.R. 453, where, however, it was held that the claim for remuneration is thereafter a claim in damages and not in debt.
- 1369 *Dietman v Brent LBC* [1978] I.C.R. 737 (*affirmed by the Court of Appeal on other grounds* [1988] I.C.R. 842). The plaintiff was held on the facts not to be entitled to an injunction, because she had accepted the Council's repudiation before the trial of the action, inter alia by accepting employment elsewhere.
- 1370 *Evening Standard Co Ltd v Henderson* [1987] I.C.R. 388; cf. *Thomas Marshall Ltd v Guinle* [1978] I.C.R. 905.
- 1371 *London Transport Executive v Clarke* [1980] I.C.R. 532, Lord Denning MR dissenting on this point. The majority did not follow the cases that had developed a doctrine of “constructive resignation”, e.g. *Gannon v JC Firth Ltd* [1976] I.R.L.R. 415 (strike action); *Kallinos v London Electric Wire Ltd* [1980] I.R.L.R. 11.
- 1372 [1994] I.C.R. 727.
- 1373 [2012] UKSC 63, [2013] 1 A.C. 523.
- 1374 As to which see above, para.42-174.
- 1375 See *Robert Cort & Son Ltd v Charman* [1981] I.R.L.R. 437 and see below, paras 42-228—42-229.
- 1376 *Norwest Holst Group Administration Ltd v Harrison* [1985] I.C.R. 668.

(h) - Constructive Dismissal

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 6. - Termination of the Contract

(h) - Constructive Dismissal

Termination as the result of constructive dismissal

42-198

- U** For the purposes of the various legislative provisions concerning dismissal, such as the unfair dismissal legislation and the redundancy payments legislation, *dismissal* includes the case where the employee terminates the contract of employment with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.¹³⁷⁷ Where these conditions are fulfilled, the employee's resignation is treated as a constructive dismissal by the employer, provided that the employer's conduct is the main operative cause of the resignation.

¹³⁷⁸

- U** In *Western Excavating (ECC) Ltd v Sharp*,¹³⁷⁹ it was decided that the test for constructive dismissal as so defined was a contractual one, namely whether the employer's conduct amounted to a fundamental breach or repudiation of the contract of employment. This decision has resulted not only in considerable development of case law on the generally implied duties of the employer such as the duty to preserve trust and confidence¹³⁸⁰ but also in extensive discussion in the case law of what constitutes repudiation on the part of the employer. This frequently involves an inquiry into the implied terms of the particular contract concerning geographical mobility¹³⁸¹ or into the question of when the employer repudiates the contract by altering the terms and conditions of employment.¹³⁸² It would seem that the question of whether there has been a repudiation by the employer should be viewed as a mixed question of law and fact with the result that a finding by an employment tribunal about repudiation or fundamental breach of an implied term should be disturbed on appeal only where there was no basis of evidence properly to support such a finding.¹³⁸³ It would also seem that the notion that a party to a contract does not repudiate it by

pursuing a bona fide but mistaken view of its effect ¹³⁸⁴ can have only a very limited application in disputes between employer and employee over terms and conditions of employment. ¹³⁸⁵

- 42-199 There is no constructive dismissal if the employee affirms the contract after and despite the employer's repudiation.

1386

U But delay in accepting the repudiation, and even continuing to work and accept remuneration are not in themselves conclusive of affirmation on the employee's part; there must be a consideration of the whole of the circumstances including factors such as whether the employee acted under protest or not.

1387

U It was held by the Employment Appeal Tribunal in *Morrow v Safeway Stores Ltd*
1388

U that conduct on the part of the employer which was sufficiently undermining of trust and confidence to amount to a breach of the implied obligation of trust and confidence was as such repudiatory of the contract of employment and so entitled the employee to resign and claim to have been constructively dismissed. In *Waltham Forest LBC v Omilaju (No.2)*

1389

U it was held that the final act or "last straw" in a series of actions which cumulatively amounted to constructive dismissal need not itself be a breach of contract or unreasonable; but it had to be more than very trivial and had to be capable of contributing, however slightly, to a breach of the implied obligation as to mutual trust and confidence.

1390

U Instances of individual innocuous conduct may also contribute to an overarching breach of the implied obligation.

1391

U Moreover, instances of discriminatory conduct may render a constructive dismissal discriminatory even if the "last straw" act did not in itself constitute unlawful discrimination.

1392

U It was held by the Court of Appeal in *Rossiter v Pendragon Plc*

1393

U that the test for constructive dismissal in relation to changes of terms and conditions associated with the transfer of an undertaking involved the same requirement of a repudiatory breach of contract as in other situations, this requirement being neither negated nor reduced by the **TUPE Regulations**.

1394

U As has been explained and explored in an earlier paragraph,

1395

U the decision of the House of Lords in the leading case of *Johnson v Unisys Ltd*,

1396

U that the implied obligation as to trust and confidence does not apply to limit the employer's power of dismissal, has left a difficult question as to when that implied obligation is applicable to conduct on the part of the employer which would, if the obligation applies to it, amount to constructive dismissal. In *Edwards v Chesterfield Royal Hospital NHS Trust*

1397

U the Supreme Court confirmed the demarcation of the “*Johnson* exclusion” which had emerged from the *Eastwood* case,

1398

U whereby that exclusion applies in respect of “steps on the part of the employer leading to dismissal” unless the loss complained of as resulting from those steps “precedes and is independent of the dismissal process”.

1399

U According to this demarcation, the mere fact that a step taken by the employer might in itself amount to a *constructive* dismissal, even if it is eventually followed by a distinct act of dismissal on the part of the employer, does not in and of itself place that step within the “*Johnson* exclusion”—so that, for example, the suspension of an employee may still on its facts be held to be in breach of the implied obligation of mutual trust and confidence and may give rise to liability as a contractually wrongful constructive dismissal not caught by the “*Johnson* exclusion”.

1400

U

Footnotes

1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

1377 Employment Rights Act 1996 ss.95(1)(c), 136(1)(c); see below, paras 42-226—42-227, 42-256.

1378

cf. *Jones v Sirl & Son (Furnishers) Ltd [1997] I.R.L.R. 493*. Constructive dismissal may also amount to unwanted conduct for purposes of the Equality Act 2010 s.26: *Driscoll v V&P Global Ltd [2021] I.R.L.R. 891*, EAT. See also above, para.42-140.

- 1379 [1978] *I.C.R.* 221. The decision was applied and reaffirmed in *Bournemouth University Higher Education Corp v Buckland [2010] EWCA Civ 121, [2010] I.R.L.R. 445*, where the Court of Appeal rejected the argument that a “band of reasonable responses” test should apply, and moreover rejected the argument that there was any doctrine of cure of fundamental breach which was special to employment law.
- 1380 See above, para.42-154. Compare now, on the question of breach of the implied term of trust and confidence arising out of the transfer of an undertaking, *Sita (GB) Ltd v Burton [1998] I.C.R. 17*. See also now *Glendale Managed Services v Graham [2003] I.R.L.R. 465*.
- 1381 See *Little v Charterhouse Magna Ltd [1980] I.R.L.R. 19*; *Jones v Associated Tunnelling Ltd [1981] I.R.L.R. 477*.
- 1382 See, e.g. *Ford v Millthorn Toleman Ltd [1980] I.R.L.R. 30*; *Millbrook Furnishing Ltd v McIntosh [1981] I.R.L.R. 309*; *Pedersen v Camden LBC [1981] I.C.R. 674n*. For attempted imposition of a variation in terms, coupled with the threat of dismissal if variation rejected, as constructive dismissal, see *Greenaway Harrison Ltd v Wiles [1994] I.R.L.R. 380*.
- 1383 See *Pedersen v Camden LBC [1981] I.C.R. 674n*; *Millbrook Furnishing Ltd v McIntosh [1981] I.R.L.R. 309*; *Woods v WM Car Services Ltd [1981] I.C.R. 666*. There is, however, authority for the view that the question is one of law for the appellate tribunal—*Walker v Josiah Wedgwood Sons Ltd [1978] I.C.R. 744, 750E-H*, or that if the question is a mixed one, that nonetheless gives the appellate tribunal primary control over the issue—cf. *O'Brien v Associated Fire Alarms Ltd [1968] 1 W.L.R. 1916*.
- 1384 *Sweet & Maxwell Ltd v Universal News Services Ltd [1964] 3 All E.R. 30*; *Woodar Investments v Wimpey Construction Ltd [1980] 1 All E.R. 571*.
- 1385 *Financial Techniques Ltd v Hughes [1981] I.R.L.R. 32* [28], [29], per Templeman LJ; doubting *Frank Wright Ltd v Punch [1980] I.R.L.R. 217*; *Millbrook Furnishing Ltd v McIntosh [1981] I.R.L.R. 309*.
- ① 1386 *Western Excavating (ECC) Ltd v Sharp [1978] I.C.R. 221, 226*; *Bashir v Brillo Manufacturing Co [1979] I.R.L.R. 295*; *Cox Toner International Ltd v Crook [1981] I.C.R. 823*; *Brown v Neon Management Services Ltd [2018] EWHC 2137 (QB), [2019] I.R.L.R. 30*.
- ① 1387 *Bashir v Brillo Manufacturing Co [1979] I.R.L.R. 295* at [15]–[19]; *Cox Toner International Ltd v Crook [1981] I.C.R. 823, 829C–H*. See also *Chindove v Morrisons Supermarket Plc [2014] UKEAT 0043/14/BA*.
- ① 1388 [2002] *I.R.L.R. 9*.
- ① 1389 [2004] *EWCA Civ 1493, [2005] I.R.L.R. 35*.
- ① 1390 Compare also *Bunning v GT Bunning & Sons Ltd [2005] EWCA Civ 104*, in which the judgment of Wall LJ adds further support to the notion of the “last straw” as articulated in

the *Omilaju* case; compare *GAB Robins (UK) Ltd v Triggs* [2008] EWCA Civ 17, [2008] I.R.L.R. 317. cf. also *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, [2018] 4 All E.R. 238, and *De Lacey v Wechsels Ltd (t/a Andrew Hill Salon)* [2021] 3 WLUK 597, EAT.

①1391 *Williams v Governors of Alderman Davies Church in Wales Primary School* [2020] I.R.L.R. 589.

①1392 *De Lacey v Wechsels Ltd (t/a Andrew Hill Salon)* [2021] I.R.L.R. 547, EAT. On the “very essence” of the “last straw” doctrine, see [2021] I.R.L.R. 547 at [71].

①1393 [2002] I.C.R. 1063, CA.

①1394 Compare above, para.42-184, from which it will be seen that reg.4(9) of the 2006 TUPE Regulations apparently provides an alternative statutory form of constructive dismissal in such circumstances.

①1395 See above, para.42-157.

①1396 [2001] I.C.R. 480. In *Kerry Foods Ltd v Lynch* [2005] I.R.L.R. 681, the doctrine in *Johnson v Unisys Ltd* received an important application or extension, in that it was held that where an employing enterprise sought to impose a six-day week on an employee working a five-day week, its conduct amounted not to a repudiatory breach of the obligation as to mutual trust and confidence, but rather to a giving of lawful notice to terminate the contract of employment coupled with an offer of re-engagement on different terms.

①1397 [2011] UKSC 58.

①1398 *Eastwood v Magnox Electric Plc, McCabe v Cornwall CC* [2004] UKHL 35, [2005] 1 A.C. 503.

①1399 Lord Dyson in *Edwards* at [51] quoting from Lord Nicholls in *Eastwood* at [29]. Lord Dyson continued: “In other words ‘the court must decide whether earlier events do or do not form part of the dismissal process’” quoting from Lord Steyn in *Eastwood* at [39].

①1400 Hence the possibility that “an employer may be better off dismissing an employee than suspending him”, an outcome regarded as “unsatisfactory and anomalous” but “the inevitable consequence of the interrelation between the common law and statute”: Lord Dyson in *Edwards* at [51] quoting from Lord Nicholls in *Eastwood* at [15] and [30] to [33].

(a) - Statement of Reasons for Dismissal

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 7. - Remedies, and Rights Incidental to the Termination of Employment

(a) - Statement of Reasons for Dismissal

Written statement of reasons for dismissal

- 42-200 Under s.92 of the Employment Rights Act 1996 an employee¹⁴⁰¹ whose contract of employment is terminated by his or her employer with or without notice¹⁴⁰² or, being a limited-term¹⁴⁰³ contract, expires without renewal,¹⁴⁰⁴ is entitled to be provided by the employer, on request, within 14 days of the request, with a written statement giving particulars of the reason for the dismissal.¹⁴⁰⁵ It seems, however, that the obligation may be complied with by unambiguous reference to earlier letters if copies of them are included.¹⁴⁰⁶ The employee must for this purpose have completed two years of continuous employment¹⁴⁰⁷ by the effective date of termination¹⁴⁰⁸ of his or her contract. An employee may complain to an employment tribunal of an unreasonable failure on the part of his or her employer to provide any, or an adequate and accurate, written statement of reasons.¹⁴⁰⁹ The tribunal, if it upholds the complaint, must make an award of two weeks' pay¹⁴¹⁰ to the employee.¹⁴¹¹ The provisions of s.92 are important in practice, especially in relation to the unfair dismissal legislation.¹⁴¹² They represent a reversal of the common law position as to dismissal where the rule is that no reasons need normally be given.¹⁴¹³ The qualifying period of continuous employment is one year¹⁴¹⁴; but neither that requirement nor the requirement of a request by the employee apply while the employee is pregnant or on maternity leave.¹⁴¹⁵

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 1401 The following categories of employees are excluded: share fishermen—[s.199\(2\) of Employment Rights Act 1996](#); such further categories as may be specified by order—[s.209\(1\) of Employment Rights Act 1996](#). The section *does* apply to Crown employment—[s.191\(1\), \(2\) of Employment Rights Act 1996](#).
- 1402 Employment Rights Act 1996 s.92(1)(a) and [\(b\)](#). Quaere to what extent this includes “constructive” dismissal; cf. *Sutcliffe v Hawker Siddeley Aviation Ltd [1973] I.C.R. 560*.
- 1403 See *British Broadcasting Corp v Ioannu [1975] I.C.R. 267*; and *BBC v Dixon [1979] I.R.L.R. 114, CA*. See also above, para.[42-176](#). For an explanation of the change of terminology from “fixed-term” to “limited-term”.
- 1404 Employment Rights Act 1996 s.92(1)(c).
- 1405 Employment Rights Act 1996 s.92(2). It is not clear how specific the particulars have to be. Particulars are to be express, not by reference: *Horsley Smith & Sherry Ltd v Dutton [1977] I.C.R. 594*.
- 1406 *Gilham v Kent CC [1985] I.C.R. 227*.
- 1407 Employment Rights Act 1996 s.92(3) as amended by the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989) with effect upon periods of employment beginning from 6 April 2012. For the period of “continuous employment”, see [s.210 Employment Rights Act 1996](#) (which includes a presumption of continuity) see above, paras [42-169](#)—[42-172](#).
- 1408 Employment Rights Act 1996 s.92(6).
- 1409 Employment Rights Act 1996 s.93(1) (limitation period—[s.93\(3\) of Employment Rights Act 1996](#)). See *Charles Lang & Sons Ltd v Aubrey [1978] I.C.R. 168*; *Daynecourt Insurance Brokers Ltd v Iles [1978] I.R.L.R. 335*; and *Brown v Stuart Scott & Co [1981] I.C.R. 166*.
- 1410 Employment Rights Act 1996 s.226(2).
- 1411 Employment Rights Act 1996 s.93(2)(b). The tribunal also has a power to declare what it finds were the reasons for dismissal; [Employment Rights Act 1996 s.93\(2\)\(a\)](#).
- 1412 See below, paras [42-221](#) et seq.
- 1413 See above, para.[42-188](#).
- 1414 Employment Rights Act 1996 s.92(3), as amended by the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999 (SI 1999/1436).
- 1415 Employment Rights Act 1996 s.92(4), as amended.

(b) - Recovery of Remuneration

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 7. - Remedies, and Rights Incidental to the Termination of Employment

(b) - Recovery of Remuneration

Payment for services actually rendered

42-201

Where the employee is not paid for a period of employment¹⁴¹⁶ which the employee has actually served, the employee's claim is not one for damages, but for a debt, viz payment of an agreed sum,¹⁴¹⁷ since he or she is entitled to be paid according to the agreed rate.¹⁴¹⁸ It has been held that the employee cannot claim, in addition to the sum due, damages for the delay in paying the salary or wages.¹⁴¹⁹ It appears that if the contract of employment did not specify a particular amount or rate of salary or wages, the employee who is not paid for a period of employment is entitled to sue upon a quantum meruit for a reasonable remuneration.¹⁴²⁰ An employee may be able to make a claim for non-payment of wages to an employment tribunal under Pt II of the Employment Rights Act 1996 on the basis that it represents an unlawful deduction from his wages.

1421



Apportionment of wages or salary¹⁴²²

42-202

Wages or salary were thought not to be apportionable at common law, and early authority held that failure (for any reason other than breach of contract by the employer) by the employee to complete the entire period in respect of which he or she was to receive a definite sum as remuneration meant

that he or she was unable to recover anything at all.¹⁴²³ The terms of the contract of employment could nevertheless make the employer liable to pay a proportionate part of the agreed remuneration if the entire period was not completed.¹⁴²⁴ However, the *Apportionment Act 1870*¹⁴²⁵ provides (*inter alia*) that:

“... all ... annuities ... and other periodical payments in the nature of income ... shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.”

It has been held¹⁴²⁶ that this Act applies to “wages” as well as to “salary”¹⁴²⁷ and it seems just that, if it is not due to the employee’s fault that the period of employment is not completed, the Act should apply.¹⁴²⁸ It was held in *Thames Water Utilities Plc v Reynolds*¹⁴²⁹ that accrual “day by day” is to be calculated by reference to calendar days rather than working days.

Entitlement to apportioned wages or salary upon summary dismissal for misconduct

- 42-203 It has never been decided whether the Act entitles an employee dismissed for misconduct to claim his salary or wages pro rata for the broken period up to the date of the dismissal.¹⁴³⁰ The older cases¹⁴³¹ and those decided without reference to the Act¹⁴³² held that the dismissed employee was not entitled to any wages or salary for the broken period of employment immediately preceding his or her dismissal, because his or her entitlement had not accrued due by then. The employee was, however, entitled to recover any arrears which had already accrued due by that time¹⁴³³ even although they were in respect of a period after he had been guilty of misconduct.¹⁴³⁴ It has been held that the contract may provide that if the employee is dismissed for misconduct, he or she shall forfeit all wages due to him,¹⁴³⁵ but it is possible that such a provision might now be subject to equitable relief against such forfeiture.¹⁴³⁶

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

- 1416 viz a period of employment in respect of which the employee is entitled, by the contract, to be paid a fixed amount.
- 1417 See Vol.I, para.29-010.
- 1418 See above, paras 42-080 et seq.
- 1419 *Harper v Linthorpe Dinsdale Smelting Co* (1909) 101 L.T. 608. Compare, however, Vol.I, para.27-083.
- 1420 See above, para.42-081 and Vol.I, paras 32-077—32-079 for a full discussion of this principle.
- ① 1421 See above, para.42-102, and cf. *Pename Ltd v Paterson* [1989] I.C.R. 12. The employee's claim in respect of "unlawful deduction" may extend to the withholding of part of the employee's remuneration following a purported but wrongful demotion of the employee (*Morgan v West Glamorgan CC* [1995] I.R.L.R. 68, EAT), but does not extend to quantum meruit claims (*Abellio East Midlands Ltd v Thomas* [2022] EAT 20, [2022] I.C.R. 802).
- 1422 See *Williams* (1941) 57 L.Q.R. 373, 375–383.
- 1423 *Cutter v Powell* (1795) 6 T.R. 320, see Vol.I, para.24-029.
- 1424 *Moriarty v Regent's Garage Co Ltd* [1921] 1 K.B. 423; reversed on another ground: [1921] 2 K.B. 766. See also *Swabey v Port Darwin Gold Mining Co* (1889) 1 Megone 385.
- 1425 s.2. Though compare *Amey v Peter Symonds College* [2013] EWHC 2788 (QB), [2014] I.R.L.R. 206, where the s.2 presumption was displaced pursuant to s.7. A similar approach was followed in *Hartley v King Edward VI College* [2015] EWCA Civ 455, [2015] I.R.L.R. 650, but that decision was subsequently overturned by the Supreme Court [2017] UKSC 39, [2017] 1 W.L.R. 2110, where the statutory principle of equal daily apportionment was held to apply and not to have been excluded by the particular contract.
- 1426 *Moriarty v Regent's Garage Co Ltd*, above. The Court of Appeal in this case held that the question of apportionment should not have been considered by the Divisional Court because the point had not been taken in the county court.
- 1427 "Salaries" are, by s.5, expressly included within "annuities".
- 1428 The *Law Reform (Frustrated Contracts) Act 1943* will sometimes apply to this type of situation, and will enable the court to order payment of a "just" amount when the other party has "obtained a valuable benefit" before the frustrating event: s.1(3); see Vol.I, paras 26-114—26-121.
- 1429 [1996] I.R.L.R. 186. Since followed in *Taylor v East Midlands Offender Employment* [2000] I.R.L.R. 760, EAT.
- 1430 *Moriarty v Regent's Garage Co Ltd* [1921] 1 K.B. 423 at 448–449.
- 1431 *Lilley v Elwin* (1848) 11 Q.B. 742; *Ridgway v Hungerford Market Co* (1835) 3 Ad. & El. 171.
- 1432 *Boston Deep Sea Fishing Co v Ansell* (1888) 39 Ch. D. 339; *Healey v Soc Anon Française Rubastic* [1917] 1 K.B. 946.
- 1433 *Taylor v Laird* (1856) 1 Hurl. & N. 266; *Button v Thompson* (1869) L.R. 4 C.P. 330; *Healey v Soc Anon Française Rubastic*, above.
- 1434 *Ramsden v David Sharratt & Sons Ltd* (1930) 35 Com. Cas. 314. (The remedy of the employer is a counterclaim for damages for the employee's breach of duty.)
- 1435 *Walsh v Walley* (1874) L.R. 9 Q.B. 367.

1436 cf. *Stockloser v Johnson* [1954] 1 Q.B. 476 and see Freedland, The Contract of Employment (1976), pp.232–233.

End of Document

© 2022 SWEET & MAXWELL

(c) - Protection of the Employee's Accrued Rights in the Employer's Insolvency

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 7. - Remedies, and Rights Incidental to the Termination of Employment

(c) - Protection of the Employee's Accrued Rights in the Employer's Insolvency

Preferential claims for wages in bankruptcy, or liquidation

- 42-204 Where an employer becomes bankrupt, or, in the cases of a company is wound up, under the [Insolvency Act 1986](#) any arrears of remuneration (up to a limit laid down by statutory instrument¹⁴³⁷) payable to an employee or ex-employee in respect of the whole or any part of the four months before the relevant date, becomes a preferential debt ranking with certain debts due to HMRC, and with certain social security contributions and contributions to occupational pension schemes and state pension scheme premiums, above other debts.¹⁴³⁸ The same preference extends to arrears of accrued holiday remuneration without limit of time or amount.¹⁴³⁹ Amounts payable by way of remuneration are defined to include certain pecuniary rights which may accrue to the employee, namely amounts owed in respect of statutory guarantee payments,¹⁴⁴⁰ remuneration on suspension on medical or maternity grounds,¹⁴⁴¹ any statutorily guaranteed payment during statutory time off,¹⁴⁴² or remuneration under a protective award in respect of redundancy dismissal.¹⁴⁴³

Recourse to the National Insurance Fund on insolvency of employer

- 42-205

Under ss.166 and 167 of the Employment Rights Act 1996 the Secretary of State¹⁴⁴⁴ may, where an employer is insolvent,¹⁴⁴⁵ pay the unpaid amount of a redundancy payment owed to an employee by the insolvent employer, the payment being made directly out of the National Insurance Fund,¹⁴⁴⁶ which is subrogated to the rights of the employer.¹⁴⁴⁷ Under Pt XII of the Employment Rights Act 1996 the same system is extended to a number of other debts owed to the employee by the insolvent¹⁴⁴⁸ employer, which have accrued due by the time of the employer's insolvency and the termination of the employee's employment.¹⁴⁴⁹ It should be noted that the list of such debts is in some respects wider than the list of debts due to the employer which are accorded priority in the employer's insolvency.¹⁴⁵⁰ The list includes¹⁴⁵¹:

- (a)arrears of pay¹⁴⁵² for up to eight weeks;
- (b)statutorily guaranteed payments due in respect of statutory minimum notice periods, or compensation due for failure to give statutory minimum notice¹⁴⁵³;
- (c)arrears of holiday pay, for up to six weeks accruing due in the last 12 months of the employment¹⁴⁵⁴;
- (d)any basic award of compensation for unfair dismissal¹⁴⁵⁵;
- (e)any reasonable sum by way of reimbursement of any fee or premium paid by an apprentice or articled clerk.¹⁴⁵⁶

Insofar as these sums accrue due in respect of particular periods of time, they are limited to the fixed maximum statutory week's pay for this purpose.¹⁴⁵⁷ The employee may complain to an employment tribunal of a failure by the Secretary of State to make or make in full an amount payable to the employee out of the National Insurance Fund under these provisions,¹⁴⁵⁸ and the tribunal may make a declaration upholding the complaint and declaring the amount due.¹⁴⁵⁹ The Secretary of State is subrogated to the rights of the employee in the employer's insolvency,¹⁴⁶⁰ but, since this recourse to the National Insurance Fund is more widely defined than the employee's rights to priority in the employer's insolvency,¹⁴⁶¹ and since the Fund's priority apparently does not extend quite as far as the employee's own priority¹⁴⁶² (not extending to the priorities set out in s.184(1) of the 1996 Act),¹⁴⁶³ the Fund may possibly find itself subrogated to unsecured and non-preferential rights in the insolvency.

Footnotes

¹ Freedland (Gen. ed.), The Contract of Employment (2016); Freedland, The Personal Employment Contract (2003); Gaymer, The Employment Relationship (2001); Brodie, The Employment Contract: Legal Principles, Drafting, and Interpretation (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, The Legal Construction of Personal Work Relations (2011).

- 1437 Sch.6 para.9.
- 1438 s.386 and Sch.6 paras 9–15 (to be read with Sch.4 to the Pension Schemes Act 1993. It should be noted that provision has been made, though not yet implemented, for the repeal of these provisions by s.1295 of and Sch.16 to the Companies Act 2006).
- 1439 Sch.6 para.10.
- 1440 Sch.6 para.13(2)(a).
- 1441 Sch.6 para.13(2)(c).
- 1442 Sch.6 para.13(2)(b).
- 1443 Sch.6 para.13(2)(d).
- 1444 Currently the Department for Business, Enterprise and Regulatory Reform.
- 1445 Defined by s.166(6), (7) of Employment Rights Act 1996 to include individual bankruptcy or composition with creditors, bankruptcy of estate, liquidation of or appointment of receiver to a company.
- 1446 Employment Rights Act 1996 s.167(1).
- 1447 Employment Rights Act 1996 s.167(3).
- 1448 Defined by s.183 as in s.166(6), (7) of Employment Rights Act 1996. This has been held to include a company trading under a company voluntary arrangement (CVA): *Secretary of State for Business, Innovation and Skills v McDonagh [2013] I.C.R. 1177, EAT*.
- 1449 Employment Rights Act 1996 ss.182, 185.
- 1450 See above, para.42-204.
- 1451 Employment Rights Act 1996 s.184(1). For an application in the context of TUPE, see *Graysons Restaurants Ltd v Jones [2019] EWCA Civ 725, [2019] All E.R. 688*.
- 1452 Employment Rights Act 1996 s.184(1)(a), (2). The term probably also includes sick pay.
- 1453 See above, paras 42-168—42-173. This entitlement has been held to be subject to the rules as to mitigation of loss that would have applied to the employee's own claim for damages for breach of contract—*Secretary of State for Employment v Wilson [1977] I.R.L.R. 483*. On the other hand, the entitlement has been held to be limited by the rules determining the statutory week's pay—see below, para.42-261, and not to include contractual fringe benefits falling outside those rules—*Secretary of State for Employment v Haynes [1981] I.R.L.R. 270*.
- 1454 Employment Rights Act 1996 s.184(1)(c); see above, para.42-084.
- 1455 Employment Rights Act 1996 s.184(1)(d); see below, para.42-247.
- 1456 Employment Rights Act 1996 s.184(1)(e).
- 1457 Employment Rights Act 1996 s.186(1); and see the current Employment Protection (Variation of Limits) Order 1992 (SI 1992/312).
- 1458 Employment Rights Act 1996 s.188(1), (2) (note limitation period).
- 1459 Employment Rights Act 1996 s.188(3).
- 1460 Employment Rights Act 1996 ss.189(1), (5).
- 1461 See above, para.42-204.
- 1462 Employment Rights Act 1996 s.189(2).
- 1463 Employment Rights Act 1996 s.184—see above, para.42-204.

(d) - Damages for Wrongful Dismissal

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 7. - Remedies, and Rights Incidental to the Termination of Employment

(d) - Damages for Wrongful Dismissal

Damages for loss of earnings following wrongful dismissal

- 42-206 The remedy of an employee who has been wrongfully dismissed is an action for damages. The normal measure of damages is the amount the employee would have earned under the contract for the period until the employer could lawfully have terminated it, less the amount he or she could reasonably be expected to earn in other employment.¹⁴⁶⁴ The dismissed employee, like any innocent party following a breach of contract by the other party, must take reasonable steps to minimise his or her loss.¹⁴⁶⁵ In the case of wrongful dismissal these reasonable steps mean that the employee must seek and accept any reasonable offer of other employment¹⁴⁶⁶; if he or she fails to take other employment when he or she ought reasonably to have done so, damages will be assessed on the basis of the difference between the salary or wages under the broken contract, and what he or she would have received from the substituted employment. A reasonable offer of alternative employment may come from the defendant himself or herself.¹⁴⁶⁷ A deduction must be made, however, on account of the accelerated receipt of damages for loss of future earnings.¹⁴⁶⁸
- 42-207 The onus of proof is on the defendant employer to produce evidence to show that the dismissed employee ought reasonably to have obtained alternative employment.¹⁴⁶⁹ If the defendant has a right to terminate the contract before the expiry of the term, damages for the wrongful dismissal should be assessed only up to the earliest time at which the defendant could validly have terminated the contract.¹⁴⁷⁰ Thus, if the contract expressly provides that it is terminable upon, e.g. a month's notice, the damages will ordinarily be a month's wages.¹⁴⁷¹ In *Gunton v Richmond LBC*¹⁴⁷² it was held that where a dismissal was wrongful by reason of a failure to comply with a contractually

binding dismissal procedure,¹⁴⁷³ the damages were to be assessed only up to the expiry of the contractually due notice of one month notionally served on the day when the proper disciplinary procedure, if followed, could have been concluded. (In *Edwards v Chesterfield Royal Hospital NHS Trust*¹⁴⁷⁴ a body of doctrine was articulated which, by excluding or severely restricting the awarding of damages at common law for the breach of contractual disciplinary procedures,¹⁴⁷⁵ seemed apt to preclude damages of the kind awarded in the *Gunton* case. However, the Supreme Court declined to overrule *Gunton*, or to declare it to be inapplicable in this respect,¹⁴⁷⁶ so that the possibility still seems to obtain that damages of that kind may be awarded.) Except in cases of alleged bad faith on the part of the employer, the court is not to analyse the chances that the employee would not have been dismissed had the procedure been followed.¹⁴⁷⁷ If the employee's claim is on the ground that the employer dismissed him or her with insufficient notice,¹⁴⁷⁸ in an action for damages the defendant employer is entitled to particulars of the period of time claimed by the plaintiff to constitute reasonable notice.¹⁴⁷⁹ Similarly, the amount of damages for loss of salary and commission which would have been earned during a period of reasonable notice, had it been given, must be specially pleaded.¹⁴⁸⁰ The value of the benefits which the employee receives from the substituted employment should be assessed by looking at the whole of his or her new situation, and not merely by reference to his or her nominal salary or wages. Thus, it was held that where, following his wrongful dismissal, the employee made a substantial investment in another firm and took employment in it at a low salary on the basis that he or she hoped to benefit from an increase in the value of his or her investment, account should be taken of the increase in value (during the relevant period) when assessing damages for wrongful dismissal.¹⁴⁸¹

Damages for other lost benefits

- 42-208 Damages for wrongful dismissal may also include an assessment of other benefits which the dismissed employee would have received from the continuation of his or her employment, e.g. the value of board and lodging or of a rent-free house.¹⁴⁸² But the employee cannot claim for the loss of expected benefits if these were not benefits which the employer was contractually bound to give.¹⁴⁸³ Thus, where the grant of bonuses was entirely in the employer's discretion, damages for wrongful dismissal should not include any compensation for the loss of expected bonuses in the future.¹⁴⁸⁴ But if the employee was entitled, by the terms of his or her employment, to receive gratuities given by customers, the estimated value of these gratuities may be taken into account in assessing damages.¹⁴⁸⁵

Damages for injury to feelings or reputation

- 42-209

If it is a term of the contract, express or implied, that the employer should not only pay a salary, but also give the employee an opportunity of publicity, damages may be awarded for loss of publicity, insofar as the employee has lost an opportunity of enhancing his or her reputation.¹⁴⁸⁶ It used to be considered that in an action for wrongful dismissal (as distinct from one for defamation) the employee is not entitled to damages for the injury caused by the dismissal to his or her existing reputation¹⁴⁸⁷; and that damages could not normally be given, in an action for wrongful dismissal, for injury to the employee's feelings, his or her distress, social discredit or loss of reputation¹⁴⁸⁸: so where an employee was wrongfully dismissed in a humiliating manner, he or she could not recover damages for these results of the dismissal, nor for the extra difficulty in finding other employment which was caused by the circumstances of his or her dismissal.¹⁴⁸⁹ The proposition that damages for wrongful dismissal do not include damages for loss of reputation, or for stigma associated with the employment or the manner of its ending, seemed to have been greatly circumscribed by the decision of the House of Lords in *Malik v Bank of Credit and Commerce International SA*,¹⁴⁹⁰ which did not itself concern a wrongful dismissal as such, but where, in comparable circumstances, the House of Lords refused to follow, or at least greatly circumscribed, the rule in *Addis v Gramophone Co*¹⁴⁹¹ and held that the employees might prove in the employer's liquidation for "stigma damages" reflecting the damage to the employees' prospects of future employment caused by the wrongful and apparently corrupt way in which the employer's business had been run.

42-210 However, in *Johnson v Unisys Ltd*,¹⁴⁹² the House of Lords held that the implied obligation of mutual trust and confidence did not apply to limit the exercise by an employer of a power of dismissal, so that a claim for stigma damages could not be made where that would be the basis of the claim. To that extent, the rule in *Addis v Gramophone Co* is reinstated, at least where it is the manner of a dismissal which is the basis for claiming that it is contractually wrongful, so as to preclude a claim for "stigma damages" or for damages for distress or injury to feelings. However, as has been explained earlier,¹⁴⁹³ the decision of the House of Lords in *Eastwood v Magnox Electric Plc, McCabe v Cornwall CC*¹⁴⁹⁴ limited the scope of that exclusionary rule so that it did not apply to rule out a claim for psychiatric illness alleged to have been caused by a course of harassing conduct associated with disciplinary proceedings against the employee although that course of conduct culminated in his dismissal, on the footing that the course of conduct in question could be regarded as independent of the subsequent dismissal itself. The reinstatement of the doctrine in the *Addis* case has now been effectively completed, and the doctrine itself has even been reinforced, by the Supreme Court in *Edwards v Chesterfield Royal Hospital NHS Trust*.¹⁴⁹⁵ Not only did the Supreme Court take the approach of the House of Lords in the *Addis* case as the starting point for the modern common law position¹⁴⁹⁶ and confirm the existence of the "*Johnson* exclusion" (which as has been explained earlier precluded the implied contractual obligation of trust and confidence from applying to dismissal proceedings¹⁴⁹⁷), but it also articulated the view that even express contractual obligations to follow specified dismissal procedures should not be treated as giving rise to damages at common law for their breach in the current context where the law of unfair dismissal can be seen as providing for the enforcement of such obligations.¹⁴⁹⁸ It should be noted, however,

that the holding of the Supreme Court as thus summarised was the subject of several dissents,¹⁴⁹⁹ and that, within the deciding majority, different views were taken as to the basis on which the doctrine in *Addis* survives.¹⁵⁰⁰ So the controversies surrounding this area of the common law¹⁵⁰¹ cannot be regarded as fully resolved.

Taxation

- 42-211 In an assessment of damages for loss of wages or salary in an action for wrongful dismissal, a deduction must be made on account of estimated income tax which would have been payable in respect of the wages or salary.¹⁵⁰² If the damages exceed £30,000, however, notional tax should not be taken into account in respect of the amount by which the total exceeds £30,000, because tax is chargeable on the excess¹⁵⁰³ in the hands of the plaintiff.¹⁵⁰⁴ (The rule that tax must be deducted applies only where the earnings would have been subject to tax, and the damages awarded to the plaintiff are not subject to tax in his hands).¹⁵⁰⁵ Full details will be found in Vol.I, above.¹⁵⁰⁶

Deductions for social security contributions and benefits

- 42-212 In calculating the damages to be awarded for loss of wages, a deduction should be made for the employee's social security contributions which the employer would have been obliged to deduct from the plaintiff's wages.¹⁵⁰⁷ Similarly, it has been decided¹⁵⁰⁸ that unemployment benefit (now contribution-based Jobseeker's Allowance under the *Jobseekers Act 1995*¹⁵⁰⁹) received by the plaintiff directly mitigates the plaintiff's loss of earnings and should be taken into account by way of deduction in assessing damages for wrongful dismissal.¹⁵¹⁰ But sums received by way of national assistance benefit (now income-based Jobseeker's Allowance under the *Jobseekers Act 1995*), being discretionary payments, should not be taken into account.¹⁵¹¹ Moreover, it was held in *Westwood v Secretary of State for Employment*¹⁵¹² that unemployment benefits were deductible in mitigation of damages only to the extent that they constituted a net gain to the employee, that net gain being reduced by his having exhausted his limited entitlement to that benefit earlier than he would have done if he had not been wrongfully dismissed.

Deductions for redundancy payments and unfair dismissal compensation

- 42-213 It was held at first instance in *Stocks v Magna Merchants Ltd*¹⁵¹³ that in assessing damages for a wrongful dismissal the court should deduct the amount of a redundancy payment received by the

plaintiff employee in respect of that dismissal. It had been thought to follow, although it had not been established by decided cases, that there should also be a deduction of the amount of unfair dismissal compensation received in respect of the dismissal concerned. However, in *O'Laoire v Jackel International Ltd (No.2)*,¹⁵¹⁴ it was held that unless the defendants can prove a double recovery for the same loss, there is no basis for setting off an unfair dismissal compensatory award against common law damages for wrongful dismissal.

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 1464 The same basic approach applies to the wrongful termination of fixed-term contracts: *Hall v London Lions Basketball Club (UK) Ltd [2021] I.R.L.R. 17*. For the working out of the details of this measure of damages in relation to the wrongful dismissal of the chief executive of a large public company, see *Clark v BET Plc [1997] I.R.L.R. 348*.
- 1465 Vol.I, paras 29-096 et seq.
- 1466 *Beckham v Drake (1847–49) 2 H.L.C. 579*; *Reid v Explosives Co (1887) 19 Q.B.D 264*; *Re Newman [1916] 2 Ch. 309*; *Shindler v Northern Raincoat Co Ltd [1960] 1 W.L.R. 1038*; *Yetton v Eastwood Froy Ltd [1967] 1 W.L.R. 104*; see also *Paterson v South-West Scotland Electricity Board, 1951 S.L.T. 9*.
- 1467 *Brace v Calder [1895] 2 Q.B. 253*; *Barnes v Port of London Authority [1957] 1 Lloyd's Rep. 486*; cf. *Jackson v Hughes [1938] 4 All E.R. 587*.
- 1468 *Lavarack v Woods of Colchester Ltd [1967] 1 Q.B. 278*.
- 1469 See Vol.I, para.29-098. The defendant is entitled to particulars of other employment obtained by the plaintiff after his dismissal: *Monk v Redwing Aircraft Co Ltd [1942] 1 K.B. 182*.
- 1470 *British Guiana Credit Corp v Da Silva [1965] 1 W.L.R. 248, 259–260*. Compare also now *Fosca Services (UK) Ltd v Birkett [1996] I.R.L.R. 325*; and *Wise Group v Mitchell [2005] I.C.R. 896*.
- 1471 *Hartley v Harman (1840) 11 A. & E. 798*. See now *Harper v Virgin Net Ltd [2004] EWCA Civ 271*, in which it was held that damages for wrongful dismissal should not include compensation for the chance that, if the employee had not been dismissed with insufficient notice, she would have become time-qualified to make a claim for unfair dismissal. The decision in *Harper v Virgin Net Ltd* was followed and applied in *Wise Group v Mitchell [2005] I.C.R. 896*.
- 1472 [1980] I.C.R. 755; cf. *Dietman v Brent LBC [1987] I.C.R. 787; affirmed on other grounds [1988] I.C.R. 842*. Compare also now *Boyo v Lambeth LBC [1994] I.C.R. 727*; see above, para.42-197.

1473 The judges in the Court of Appeal differed on whether the wrongful dismissal determined the contract in the face of the employee's non-acceptance of it as doing so (see above, para.42-197), but were all agreed that this was correct measure of damages on either footing.

1474 [2011] UKSC 58.

1475 This body of doctrine is explained more fully below at paras 42-209—42-210.

1476 See, per Lord Dyson at [48] and (rather differently) Lord Mance at [94].

1477 *Janicuk v Winerite Ltd* [1998] I.R.L.R. 63.

1478 See above, paras 42-167 et seq.

1479 *Monk v Redwing Aircraft Co Ltd* [1942] 1 K.B. 182.

1480 *Hayward v Pullinger & Partners* [1950] 1 All E.R. 581.

1481 *Lavarack v Woods of Colchester Ltd* [1967] 1 Q.B. 278.

1482 *Lindsay v Queen's Hotel Co* [1919] 1 K.B. 212; *Re English Joint Stock Bank* (1867) L.R. 4 Eq. 350; *British Guiana Credit Corp v Da Silva* [1965] 1 W.L.R. 248, 259–260. In *Silvey v Pendragon Plc* [2001] EWCA Civ 784, the Court of Appeal held that an employee wrongfully dismissed 12 days short of his reaching the age at which pension rights would have accrued was entitled to damages for the loss of those rights and was not precluded from that entitlement by his acceptance of a payment in lieu of notice.

1483 *Lavarack v Woods of Colchester Ltd*, above. It should be noted, however, how the decision in the *Lavarack* case was distinguished by the Court of Appeal in *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] I.C.R. 402.

1484 See para.42-081, above.

1485 *Manubens v Leon* [1919] 1 K.B. 209. cf. *Palmanor Ltd v Cedron* [1978] I.C.R. 1008.

1486 *Marbé v George Edwardes Ltd* [1928] 1 K.B. 269; *Clayton & Waller Ltd v Oliver* [1930] A.C. 209; *Tolnay v Criterion Film Productions Ltd* [1936] 2 All E.R. 1625. cf. *Re Golomb and Porter & Co's Arbitration* (1931) 144 L.T. 583; *Collier v Sunday Referee Publishing Co Ltd* [1940] 2 K.B. 647.

1487 *Withers v General Theatre Corp Ltd* [1933] 2 K.B. 536.

1488 *Addis v Gramophone Co Ltd* [1909] A.C. 488; *British Guiana Credit Corp v Da Silva* [1965] 1 W.L.R. 248, 259; *Bliss v South East Thames RHA* [1987] I.C.R. 700.

1489 *Addis v Gramophone Co Ltd*, above. Contrast the position of the wrongfully dismissed apprentice: see *Dunk v George Waller & Son Ltd* [1970] 2 Q.B. 163.

1490 [1998] A.C. 20.

1491 [1909] A.C. 488.

1492 [2001] I.C.R. 480.

1493 See above, para.42-157.

1494 [2004] UKHL 35, [2005] 1 A.C. 503; compare also *GAB Robins (UK) Ltd v Triggs* [2008] EWCA Civ 17, [2008] I.R.L.R. 317.

1495 [2011] UKSC 58.

1496 See, in particular Lord Dyson at [21].

1497 See above, paras 42-157, 42-198—42-199.

1498 This view is most directly put forward by Lord Dyson at [39] adopting the view of Lord Hoffmann in the *Johnson* case at [66].

1499 On the part of Lady Hale and Lords Kerr and Wilson.

- 1500 Lord Phillips, differing in this respect from Lords Dyson, Walker and Mance, regarded it as being concerned not with the scope of the employer's contractual duty but with the measure and remoteness of damages for breach of that duty at [78]–[81].
- 1501 See Freedland, *The Personal Employment Contract* (2003) at pp.356–368.
- 1502 *Parsons v BNM Laboratories Ltd [1964] 1 Q.B. 95* (following *British Transport Commission v Gourley [1956] A.C. 185*). See *Lyndale Fashion Manufacturers v Rich [1973] 1 W.L.R. 73*. For the manner of calculating the effect of income tax, see *Shore v Downs Surgical Plc [1984] I.C.R. 209*.
- 1503 Income Tax (Earnings and Pensions) Act 2003 ss.403–404.
- 1504 *Bold v Brough, Nicholson & Hall Ltd [1964] 1 W.L.R. 201*.
- 1505 *British Transport Commission v Gourley [1956] A.C. 185*.
- 1506 Vol.I, paras 29-276—29-284.
- 1507 *Cooper v Firth Brown Ltd [1963] 1 W.L.R. 418*. (This was a negligence case, but the same rule, it is submitted, would apply to the assessment of damages in contract for wrongful dismissal.)
- 1508 *Parsons v BNM Laboratories Ltd [1964] 1 Q.B. 95*. cf. *Parry v Cleaver [1968] 1 Q.B. 195* (negligence case, concerning a police pension receivable as of right); *Cheeseman v Bowaters Paper Mills Ltd [1971] 1 W.L.R. 1773*. It was decided by the Court of Appeal in *Hopkins v Norcross [1994] I.C.R. 11* that the employee did not have to give credit for retirement pension payments received following wrongful dismissal, these being exempt collateral benefits within the principle of *Parry v Cleaver [1968] 1 Q.B. 195*.
- 1509 For provisions relating to Universal Credit, see the *Welfare Reform Act 2012*, and regulations thereunder.
- 1510 Claims for damages for wrongful dismissal would seem not to be affected by the recoupment provisions either of the *Social Security (Recovery of Benefits) Act 1997*, which applies to “payments in consequence of any accident, injury or disease” (s.1(1)(a)) or of the *Employment Protection (Recoupment of Benefits) Regulations 1996* (SI 1996/2349), which apply to certain payments awarded by Employment Tribunals but not to common law damages.
- 1511 *Foxley v Olton [1965] 2 Q.B. 306* (criticised by *Ganz (1965) 23 M.L.R. 224*). cf. *Eley v Bedford [1972] 1 Q.B. 155*.
- 1512 [1985] I.C.R. 209.
- 1513 [1973] I.C.R. 530, applying *Parry v Cleaver [1970] A.C. 1*; and *Parsons v BNM Laboratories Ltd [1964] 1 Q.B. 95*. But see *Basnett v J & A Jackson Ltd [1976] I.C.R. 63*.
- 1514 [1991] I.C.R. 718.

(e) - Equitable Remedies and Declarations

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 7. - Remedies, and Rights Incidental to the Termination of Employment

(e) - Equitable Remedies and Declarations

Specific performance and injunction against employees (1)

- 42-214 In order to understand the role of the remedies of specific performance and injunction in the law of the contract of employment, it is necessary to distinguish between, on the one hand, a long history of the granting of those remedies against employees, and, on the other hand, a more recent history of the granting of those remedies against employers also. The granting of orders for specific performance or injunctions in enforcement of contracts of employment against employees is the subject both of a statutory provision and of case law authority. The statutory provision is that of [s.236 of the Trade Union and Labour Relations \(Consolidation\) Act 1992](#), which limits enforcement against employees by providing that no court shall whether by way of an order for specific performance of a contract of employment or an injunction restraining the breach of such a contract compel an employee to do any work or attend any place for the doing of any work. The case law suggests the following rules. The court will not grant specific performance of a contract of employment. Such a contract is one for personal services and comes within the category of contracts whose execution the court cannot supervise and will not, therefore, enforce by an order for specific performance.¹⁵¹⁵ Early authority holds that the same rule applies to a contract of apprenticeship.¹⁵¹⁶ For the same reason, the court will not usually grant an injunction for the fulfilment of a contract of employment¹⁵¹⁷; it will, however, grant an injunction to enforce an express negative stipulation,¹⁵¹⁸ except where the effect of doing so would be to compel the employee to remain in the employment.¹⁵¹⁹ When there is a positive undertaking to serve the plaintiff and a negative stipulation not to serve any other person, an injunction may be granted to enforce the negative stipulation if a breach of the positive undertaking would cause damage, even though the plaintiff fails to prove that a breach of the negative stipulation would do so.¹⁵²⁰ The

availability of an injunction in such cases would be subject, however, to the applicability thereto of s.236 of the Trade Union and Labour Relations (Consolidation) Act 1992, considered earlier in this paragraph.

Specific performance and injunction against employees (2)

- 42-215 In *Thomas Marshall Ltd v Guinle*,¹⁵²¹ the Vice-Chancellor granted interim injunctions to restrain an employee from acts of trade competition and disclosure of information in breach of his implied obligations of fidelity,¹⁵²² holding that the employee's unaccepted wrongful repudiation of his contract of employment had not released him from the obligations thereof,¹⁵²³ and that although the court was powerless to force the employee to work in accordance with his contract, the court could restrain him from committing other breaches of his obligations during the period of his contract. A similar result was reached in *Evening Standard Ltd v Henderson*¹⁵²⁴ where an employer, seeking to restrain the employee, the production manager of an evening newspaper, from working for any rival in the newspaper trade for the duration of the contractual notice period, was prepared to provide the employee with all his contractual benefits until the contract expired without insisting that he perform any services under the contract; the employee would not therefore be forced either to work for the plaintiffs or be reduced to a condition of starvation or idleness, and the balance of convenience was therefore in favour of granting an interlocutory injunction. However, it would now seem that in order to obtain an injunction to enforce the imposition of a period of "garden leave" (that is to say, a period of enforced idleness during which an employee may be prevented from working for any other employer during a period of notice, though not being required or even permitted to work for the original employer), the employer must show that the employee has no contractual entitlement to be allowed to work, and must justify the enforcement as if it were of an express covenant against post-employment competition.¹⁵²⁵

Specific performance and injunction against employers

- 42-216 Until relatively recently, there was little or no indication of any willingness on the part of the courts to grant orders for the specific performance of contracts of employment by employers, or injunctions against dismissal, such as would result in the reinstatement of the employee in an employment from which he or she had been, or was about to be, dismissed. However, in *Hill v CA Parsons & Co Ltd*¹⁵²⁶ an injunction was granted to restrain the implementation of an employer's notice to dismiss where the dismissal would if carried out have been wrongful (by reason of the shortness of notice).¹⁵²⁷ A majority of the Court of Appeal¹⁵²⁸ regarded the normal rule against such injunctions as displaced by:

- (a)the need to preserve the plaintiff's position until the unfair dismissal legislation came into force; and
- (b)the fact that the employer had no lack of confidence in the employee and intended to dismiss him solely because of trade union pressure.¹⁵²⁹

It appears, on the other hand, from the decision in *Chappell v Times Newspapers Ltd*¹⁵³⁰ that employees would be most unlikely to obtain a similar injunction to restrain a dismissal which was a response to industrial action on the part of the employees, because in that situation the courts' normal objection to intervening once the relationship of mutual confidence has been destroyed will apply.¹⁵³¹ Moreover, that decision suggests that employees will be unable to show the readiness, ability and willingness to continue to perform their part of the contract, which is necessary if they are to obtain equitable relief, if they are members of a trade union currently engaged in industrial action and are, or are likely to be, a party to that action.¹⁵³² In certain cases, the courts have been willing to issue interlocutory injunctions to restrain breach of the contract of employment by the employer consisting of purporting to dismiss without following contractual dismissal procedure,¹⁵³³ purporting to re-advertise the post to which the employee had been validly appointed,¹⁵³⁴ or purporting to reorganise the employees' work inconsistently with their contractual job specification.¹⁵³⁵ It has been a condition of that willingness that the court can find that a basis of mutual trust and confidence survives between the employer and the employee.¹⁵³⁶ The Court of Appeal recently held, in *Mezey v South West London and St George's Mental Health NHS Trust*¹⁵³⁷ that there was no reason of principle why the court should be without power, if in all the circumstances it judged it right to do so, to stay a suspension just as it was able to stay a dismissal. A full discussion of the relevant principles will be found in Vol.I, above.¹⁵³⁸

Declaration and other remedies

- 42-217 The Civil Procedure Rules give the court power to make a declaration even where no other consequential relief is or could be claimed.¹⁵³⁹ A party may obtain a declaration that he or she is not bound by a contract because the other party has repudiated it,¹⁵⁴⁰ but such a declaration will not lie if the party seeking the declaration continues to perform his or her duties under the contract. Thus an employee who was still working under his or her contract of employment with a company could not claim a declaration that his or her contract had been repudiated because the chairperson of the company interfered with his or her work.¹⁵⁴¹ It used to be thought that if one party has purported to terminate a contract of employment, the court would grant a declaration that the contract still subsists, where the employed person enjoys a special "status" or "office" by virtue of a statute.¹⁵⁴²

42-218

In *Malloch v Aberdeen Corp*,¹⁵⁴³ a case decided by the House of Lords applying Scottish law, an order for the reduction of a dismissal (which had the effect of nullifying the dismissal) was granted in favour of a teacher who had been dismissed without a hearing. It was held that the legislation controlling the employment of teachers by education authorities in Scotland impliedly conferred a right to be heard before dismissal,¹⁵⁴⁴ and it was held to follow that the teacher thence derived a special status or office which made it appropriate for his dismissal to be nullified.¹⁵⁴⁵ It was thought that similar reasoning might be invoked to support the grant of a declaration of nullity of dismissal or an order of certiorari to quash the dismissal in an English case in which the plaintiff was regarded as having an employment similarly subject to the public law principle of natural justice.¹⁵⁴⁶ The decision in *R. v British Broadcasting Corp Ex p. Lavelle*¹⁵⁴⁷ seemed to suggest that view. However, the cases now suggest that an applicant for judicial review of a dismissal from employment must show that a public law right of his or hers has been infringed; and the fact that he or she is an employee under a contract of employment will normally mean that he or she does not have such a public law right. Thus in *R. v East Berkshire HA Ex p. Walsh*¹⁵⁴⁸ a senior nursing officer failed in such a claim on the ground that he or she was seeking to enforce purely private contractual rights; in *R. v Secretary of State for the Home Department Ex p. Benwell*,¹⁵⁴⁹ on the other hand, a prison officer succeeded because as a holder of the office of constable he or she had no contract of employment and hence no relevant private law rights.

Footnotes

1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

1515 See Vol.I, paras 30-033 et seq.

1516 *Webb v England* (1860) 29 Beav. 44.

1517 *De Francesco v Barnum* (1889) 45 Ch. D. 430; *Ehrman v Bartholomew* [1898] 1 Ch. 671.

1518 *Lumley v Wagner* (1852) 1 De G.M. & G. 604 (opera singer); *Warner Bros v Nelson* [1937] 1 K.B. 209 (film actress).

1519 *Ehrman v Bartholomew* [1898] 1 Ch. 671; *Kirchner v Gruban* [1909] 1 Ch. 413; *Rely-a-Bell Burglar and Fire Alarm Co v Eisler* [1926] Ch. 609.

1520 *Marco Productions Ltd v Pagola* [1945] K.B. 111.

1521 [1978] I.C.R. 905, applied in *SG & R Valuation Service Co LLC v Boudrais* [2008] EWHC 1340 (QB), [2008] I.R.L.R. 770.

1522 See above, para.42-064.

1523 See above, para.42-197.

1524 [1987] I.C.R. 588.

- 1525 *William Hill Organisation Ltd v Tucker* [1999] I.C.R. 291. Compare, however, *SG & R Valuation Service Co LLC v Boudrais* [2008] EWHC 1340 (QB), [2008] I.R.L.R. 770 where the balance of convenience was held to favour the granting of interim relief. Compare now *JM Finn & Co Ltd v Holliday* [2013] EWHC 3450 (QB), [2014] I.R.L.R. 102.
- 1526 [1972] 1 Ch. 305.
- 1527 See above, para.42-167.
- 1528 Lord Denning MR and Sachs LJ; Stamp LJ dissenting.
- 1529 See, per Lord Denning MR at 315A to 316C, Stamp LJ at 320E-H.
- 1530 [1975] I.C.R. 145.
- 1531 See, per Lord Denning MR at 173H-174B, Stephenson LJ at 176B-D, Geoffrey Lane J at 178H-179B.
- 1532 See, per Lord Denning MR at 173D-H, Stephenson LJ at 177A-D and Geoffrey Lane J at 179C-D.
- 1533 *Irani v Southampton & Southwest Hampshire HA* [1985] I.C.R. 590. In *Barros d' Sa v University Hospital Coventry and Warwickshire NHS Trust* [2001] EWCA Civ 983, [2001] I.R.L.R. 691, the Court of Appeal upheld the grant of an injunction preventing the consideration at the appeal stage of a disciplinary procedure of material adverse to the employee which had not been the subject of findings at the original inquiry stage. A further example is provided by *Kircher v Hillingdon Primary Care Trust* [2006] EWHC 21 (QB), [2006] Lloyd's Rep. Med. 215. Comparison should also be made with the decision in *Lauffer v Barking, Havering and Redbridge University Hospitals NHS Trust* [2009] EWHC 2360 (QB), [2010] Med. L.R. 68, and now also with *West London Mental Health NHS Trust v Chhabra* [2013] UKSC 80, [2014] 1 All E.R. 943 at [37] (breach of “implied contractual right to a fair disciplinary process”).
- 1534 *Powell v Brent LBC* [1988] I.C.R. 176.
- 1535 *Hughes v Southwark LBC* [1988] I.R.L.R. 55.
- 1536 *Ali v Southwark LBC* [1988] I.C.R. 567. Compare *Lakshmi v Mid-Cheshire Hospitals NHS Trust* [2008] EWHC 878 (QB), [2008] I.R.L.R. 956, and see *Ashworth v Royal National Theatre* [2014] EWHC 1176 (QB), [2014] I.R.L.R. 526 on the question of the employer’s right to artistic freedom of expression.
- 1537 [2007] EWCA Civ 106, [2007] I.R.L.R. 244.
- 1538 Vol.I, paras 30-030 et seq.
- 1539 RSC Ord.15 r.16 as re-enacted in Sch.1 to the Civil Procedure Rules 1998. The circumstances in which there may be a declaration of continuing breach of a contract of employment were considered in *Birmingham City Council v Wetherill* [2007] EWCA Civ 599, [2007] I.R.L.R. 781.
- 1540 *Spettabile Consorzio Veneziano di Armamento e Navitazione v Northumberland Shipbuilding Co* (1919) 121 L.T. 628. Compare *Kaur v MG Rover Group Ltd* [2004] I.R.L.R. 279, QBD, where a declaration was granted of contractual entitlement not to be made redundant. The decision was reversed on appeal on other, substantive, grounds ([2004] EWCA Civ 1507, [2005] I.R.L.R. 40), but remains of interest as to this remedial point.
- 1541 *Howard v Pickford Tool Co* [1951] 1 K.B. 417; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293, 1304-1305.

1542 *Francis v Municipal Councillors of Kuala Lumpur* [1962] 1 W.L.R. 1411, 1417–1418; *Vine v National Dock Labour Board* [1957] A.C. 488, 500, 507. See further, Vol.I, para.30-034. In *Gunton v Richmond LBC* [1980] I.C.R. 755, the Court of Appeal upheld a declaration that a contract of employment had not been validly terminated by an unaccepted wrongful repudiation by the employer, despite their unanimous view that this was an ordinary contract of employment not conferring any special status, see above, para.42-196. But Shaw LJ dissented from the view that the contract had not come to an end, see above, para.42-197, and thought that declaration was an unnecessary and inappropriate form of relief in this sort of case ([1980] I.C.R. 755 at 764A), Buckley LJ thought that the relationship of employment had been effectively terminated even if the contract had not ([1980] I.C.R. 755 at 778D), and all three judges agreed that the measure of damages should be based not on a total nullification of the purported dismissal but merely on its notional postponement to the date on which it could validly have taken effect, see above, para.42-197 (and also para.42-207 with regard to the relation between the *Gunton* case and the decision in *Edwards v Chesterfield Royal Hospital NHS Trust* [2011] UKSC 58). So the decision scarcely serves to qualify the proposition in the text.

1543 [1971] 1 W.L.R. 1578. See above, para.42-196.

1544 See, per Lord Reid at 1581A–1583B.

1545 See, per Lord Reid at 1584D–E.

1546 cf. per Lord Wilberforce at 1595E–1597E.

1547 [1983] I.C.R. 99.

1548 [1984] I.C.R. 743.

1549 [1984] I.C.R. 723. For the position of Crown servants who have a relationship with the Crown analogous to a contract of employment, see *R. v Civil Service Appeal Board Ex p. Bruce* [1989] I.C.R. 171; and compare above, para.42-196.

(f) - Employment Tribunal Jurisdiction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 7. - Remedies, and Rights Incidental to the Termination of Employment

(f) - Employment Tribunal Jurisdiction

Jurisdiction of employment tribunals in relation to contracts of employment

- 42-219 Under what is now s.3 of the Employment Tribunals Act 1996,¹⁵⁵⁰ the appropriate Minister was empowered (originally in 1971) to make an order to confer upon employment tribunals a jurisdiction to make pecuniary awards based upon contracts of employment.¹⁵⁵¹ The claims concerned include claims for damages for breach of a contract of employment or any other contract connected with employment¹⁵⁵² (but not damages for personal injuries)¹⁵⁵³ and claims for sums due under such contracts.¹⁵⁵⁴ The purpose of this provision is chiefly to enable an employment tribunal to deal with contractual claims which often arise incidentally to claims before employment tribunals for redundancy payments¹⁵⁵⁵ and complaints of unfair dismissal,¹⁵⁵⁶ and thus to avoid an inconvenient separation of common law and statutory jurisdictions. An Order made¹⁵⁵⁷ under this provision enables an employee to bring a claim for damages for breach of the contract of employment, or for a sum due under that contract, before an employment tribunal if the claim arises or is outstanding on the termination of his employment.¹⁵⁵⁸ The Order also enables an employer to make such a claim against an employee where the employee has claimed against him under the Order.¹⁵⁵⁹ There are exclusions of claims about the provision of living accommodation, intellectual property, obligations of confidence on the employee and covenants in restraint of trade.¹⁵⁶⁰ An employee's complaint about a contractual claim must normally be presented within a period of three months beginning with the "effective date of termination" of the contract of employment as defined in s.97(1) of the Employment Rights Act 1996¹⁵⁶¹; an employer's complaint about a contractual claim must normally be presented within six weeks

of receiving a copy of an originating application relating to the employee's complaint.¹⁵⁶² The maximum which a tribunal may order to be paid in respect of a contract claim, or a number of claims relating to the same contract, is £25,000.¹⁵⁶³ The contractual claims before employment tribunals may now be subject to the provisions for other methods of dispute resolution for which provision has been made by the [Employment Rights \(Dispute Resolution\) Act 1998](#).¹⁵⁶⁴

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 1550 Provision was made for industrial tribunals to be known as employment tribunals by [s.1 of the Employment Rights \(Dispute Resolution\) Act 1998](#) (with effect from 1 August 1998: SI 1998/1658).
- 1551 [Employment Tribunals Act 1996](#) (as renamed by the [Employment Rights \(Dispute Resolution\) Act 1998](#)) ss.3(1), 8(1).
- 1552 [Employment Tribunals Act 1996](#) (as renamed by the [Employment Rights \(Dispute Resolution\) Act 1998](#)) s.3(2)(a). cf. *ONI v Unison Trade Union [2018] I.C.R. 1111*, EAT.
- 1553 [Employment Tribunals Act 1996](#) (as renamed by the [Employment Rights \(Dispute Resolution\) Act 1998](#)) s.3(3).
- 1554 [Employment Tribunals Act 1996](#) (as renamed by the [Employment Rights \(Dispute Resolution\) Act 1998](#)) s.3(2)(b).
- 1555 See below, paras 42-254 et seq.
- 1556 See below, para.42-251.
- 1557 [Industrial Tribunals Extension of Jurisdiction \(England and Wales\) Order 1994](#) (SI 1994/1623), in force from 12 July 1994.
- 1558 SI 1994/1623 art.3. It was held in *Sarker v South Tees Acute Hospitals NHS Trust [1997] I.C.R. 673* that this extended to the case of the employer's wrongfully resiling from a contract of employment before employment had commenced; and in *Rock-it Cargo Ltd v Green [1997] I.R.L.R. 581* that it enabled an employee to claim a payment due under a compromise agreement on termination of employment. In *Miller Bros and Butler Ltd v Johnston [2002] I.R.L.R. 386*, the Employment Appeal Tribunal held that this jurisdiction is limited to claims arising or outstanding at the time of the termination of employment, and does not extend to claims arising later even though they arise out of the termination of employment, as, in this case, upon a subsequently finalised compromise agreement. Compare *Peninsula Business Services Ltd v Sweeney [2004] I.R.L.R. 49*, EAT, denying entitlement to commission payments which would normally have accrued due at a date later than that of termination of employment, and where the rules of the commission scheme excluded post-termination accrual.

1559 SI 1994/1623 art.4.

1560 SI 1994/1623 art.5.

1561 SI 1994/1623 art.7. See, for “effective date of termination”, below, paras 42-228—42-229.

1562 SI 1994/1623 art.8.

1563 SI 1994/1623 art.10.

1564 See ss.7–8 (arbitration), ss.9–10 (compromise agreements).

(g) - Employer's Damages

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 7. - Remedies, and Rights Incidental to the Termination of Employment

(g) - Employer's Damages

Damages recoverable by the employer

- 42-220 The employee may be held liable in damages for the breach of any term of his or her contract of employment, whether express or implied,¹⁵⁶⁵ such as by his or her failure to use due care or skill.¹⁵⁶⁶ Early authority holds that the employer is entitled to damages for those consequences which might reasonably be expected to have been in the contemplation of the parties (at the time when the contract of employment was made) as likely to result from the breach.¹⁵⁶⁷ Damages for failure or refusal to work will normally be assessed by reference to the value of the work lost¹⁵⁶⁸ or the cost of procuring a substitute to do the work,¹⁵⁶⁹ less the wages payable under the contract. But the loss of output suffered by the employer's business cannot be caused by any one employee's failure to work when there was a general stoppage by many employees on the same day.¹⁵⁷⁰ The suspension of salary when an employee fails to work is not a "penalty".¹⁵⁷¹ In *Imam-Sadeque v Bluebay Asset Management (Services) Ltd*,¹⁵⁷² it was confirmed that the "penalty" doctrine extended to terms which provided that the contract breaker was to forfeit sums to which he was entitled, or would otherwise have been entitled, from the innocent party; but it was held that it did not apply to a compromise agreement for the termination of a contract of employment insofar as it prevented the employee from acquiring certain fund units in which his contract of employment had given him a contingent future interest.¹⁵⁷³ The employer may, in addition to suspending the salary, be entitled to damages for breach of contract.¹⁵⁷⁴ An employer who is entitled to dismiss his or her employee cannot, however, on that basis alone elect to treat the contract as continuing and suspend him or her for a period so as to prevent him or her (as a punishment) from earning his

wages for that period.¹⁵⁷⁵ The circumstances in which an employer may claim an indemnity from a tortfeasor employee in respect of the claim of a third person have been considered earlier.¹⁵⁷⁶

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).
- 1565 See above, paras 42-060 et seq.
- 1566 *Hindley v Haslam* (1878) 3 Q.B.D. 481; *Sagar v Ridehalgh* [1931] 1 Ch. 310, 316; *Stumore, Weston & Co v Breen* (1886) 12 App. Cas. 698; *Baster v London & County Printing Works* [1899] 1 Q.B. 901.
- 1567 *Cassaboglou v Gibb* (1883) 11 Q.B.D. 797. For these general principles with regard to damages, see Vol.I, paras 29-124 et seq.
- 1568 *Ebbw Vale Steel, etc. Co v Tew* (1935) 79 S.J. 593. cf. *National Coal Board v Gally* [1958] 1 W.L.R. 16.
- 1569 *Richards v Hayward* (1841) 2 Man. & G. 574; *National Coal Board v Gally* [1958] 1 W.L.R. 16.
- 1570 *National Coal Board v Gally*, above.
- 1571 See Vol.I, paras 29-203 et seq. However, in *Giraud UK Ltd v Smith* [2000] I.R.L.R. 763 it was held by the Employment Tribunal that a clause purporting to entitle the employer to make a deduction from the employee's final remuneration payment, which was the equivalent of his pay for the number of days short of the contractually required four weeks' notice to leave given by the employee, was unenforceable as an unlawful penalty clause. The drawing of the distinction between "liquidated damages" and "penalty" clauses, in the context of employers' claims against prospective employees for breach of contract to enter into employment, was further expounded in *Tullett Prebon Group Ltd v El-Hajjali* [2008] EWHC 1924 (QB), [2008] I.R.L.R. 760, where the clause in question was upheld as not being a penalty on the basis that, although the clause had some purpose of deterrence of breach, that was not its predominant purpose.
- 1572 [2012] EWHC 3511 (QB), [2013] I.R.L.R. 344.
- 1573 See now also *Cleeve Link Ltd v Bryla* [2014] I.R.L.R. 86, EAT, and compare *Li v First Marine Solutions* [2014] UKEAT 0045/13/BI.
- 1574 *Gaumont-British Picture Corp Ltd v Alexander* [1936] 2 All E.R. 1686.
- 1575 *Hanley v Pease and Partners Ltd* [1915] 1 K.B. 698. Compare above, para.42-095 which discusses the effect of industrial action upon entitlement to remuneration.
- 1576 See above, para.42-074.

(i) - General Considerations

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 8. - Unfair and Discriminatory Dismissal

(a) - Unfair Dismissal

(i) - General Considerations

Introduction

- 42-221 By [s.22 of the Industrial Relations Act 1971](#) (which came into force on 28 February 1972) in every employment except those excluded by [ss.27–31](#), the employee was given the right not to be unfairly dismissed by his or her employer. That right was made enforceable by a right of complaint to an employment tribunal which was empowered to make a recommendation for re-engagement or reinstatement, or to award compensation. The unfair dismissal provisions of that Act were repealed but re-enacted with only minor amendments by the [Trade Union and Labour Relations Act 1974](#). The [Employment Protection Act 1975](#) made further amendments to those unfair dismissal provisions, and in particular replaced the provisions about remedies with a new and more extensive set of provisions. Hence the present law concerning unfair dismissal is derived from the [Trade Union and Labour Relations Act 1974](#) as amended by the [Employment Protection Act 1975](#). Those provisions were consolidated into [Pt V of the Employment Protection \(Consolidation\) Act 1978](#) which was subsequently amended by the [Employment Acts 1980, 1982, 1988 and 1990](#). Some relevant provisions were transformed into the [Trade Union and Labour Relations \(Consolidation\) Act 1992](#), and some further amendments were made by the [Trade Union Reform and Employment Rights Act 1993](#). The present law is mainly contained in the latest consolidation, [Pt X of the Employment Rights Act 1996](#), as subsequently amended.¹⁵⁷⁷ The case law concerning the interpretation of the unfair dismissal provisions is now very extensive, and in the following account of those provisions it is generally only cases which are broadly relevant to the common law of the contract of employment that are cited.

Employments covered, employments specifically excluded

- 42-222 The unfair dismissal provisions cover every employee under a contract of employment ¹⁵⁷⁸ subject to certain exclusions and to certain extensions, which are described in the next paragraphs. Certain exclusions arise inherently as a matter of common law. Thus a director, acting only as such, may be held not to be an employee for the purposes of these provisions. ¹⁵⁷⁹ A claimant may be excluded where his or her contract of employment is void for illegality, as where a fraud upon the Revenue is involved. ¹⁵⁸⁰ A series of exclusions are made by express statutory provisions. Those in the police service are excluded from the unfair dismissal provisions, ¹⁵⁸¹ as are share-fishermen. ¹⁵⁸² However, in *Wandsworth LBC v Vining* the Court of Appeal relied on s.3 of the Human Rights Act 1998 in narrowly construing the statutory exclusion of those in “police service” so as not to apply to parks police officers. ¹⁵⁸³

Qualifying period

- 42-223 There is an exclusion which normally applies, but does not apply where the dismissal is for any one or more of a set of specified reasons or in any one or more of a set of specified situations ¹⁵⁸⁴; that is to say, the employee is normally excluded where he or she has not been continuously employed for the qualifying period at the effective date of termination of his employment. ¹⁵⁸⁵ The qualifying period is two years ¹⁵⁸⁶; and is one month in relation to dismissal on grounds justifying statutory medical suspension. ¹⁵⁸⁷ There may also be an exclusion on the basis of state immunity, despite the potential conflict with art.6 of the European Convention of Human Rights; the State Immunity Act 1978 could not, however, operate to defeat claims based on employment rights derived from EU law. ¹⁵⁸⁸

Employments to which the unfair dismissal provisions are specifically extended or applied

- 42-224 There is a significant set of types of employment in the public service to which the unfair dismissal legislation is specifically extended or applied, partly in order to ensure that this legislation applies to such employments despite possible doubts whether the public servants concerned are employed under contracts of employment, ¹⁵⁸⁹ and partly in order to modify the application of the legislation in ways regarded as appropriate to the public service relationships in question. ¹⁵⁹⁰ The unfair

dismissal legislation is applied in this way to parliamentary staff, both of the House of Lords¹⁵⁹¹ and of the House of Commons.¹⁵⁹² It is also applied to Crown employment,¹⁵⁹³ in which are included members of the armed forces,¹⁵⁹⁴ but subject to provision that its application to members of the armed forces may be modified (or withdrawn) by Order in Council,¹⁵⁹⁵ and that any Crown employment may be excepted from the legislation by a ministerial certificate that such exception is necessary for the purpose of safeguarding national security.¹⁵⁹⁶

Contracting-out of the unfair dismissal provisions

42-225 An agreement for contracting-out of unfair dismissal liability is normally void and of no effect, as is any agreement not to bring unfair dismissal procedures before an employment tribunal.¹⁵⁹⁷ There are certain limited exceptions to this rule. Formerly, an employer might obtain a waiver of unfair dismissal rights in respect of the expiry without renewal of a fixed-term contract of one year or more,¹⁵⁹⁸ but that facility was later withdrawn.¹⁵⁹⁹ A surviving exception consists in the fact that the parties to a dismissal procedure agreement may jointly apply for an order recognising the agreement recognised as a valid substitute for the unfair dismissal provisions.¹⁶⁰⁰ The Act sets out the matters of which the Secretary of State must be satisfied before he may give this recognition¹⁶⁰¹ and also provides for applications for the revoking of such orders where the agreement has ceased to fulfil the statutory requirements.¹⁶⁰² A second exception is a provision allowing effect to agreements to refrain from presenting or proceeding with a complaint about a dismissal which has actually occurred.¹⁶⁰³ This power to make agreements compromising actions for unfair dismissal is subject to the proviso that some action must first have been taken by a conciliation officer.¹⁶⁰⁴

Footnotes

1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

1577 For example, by the *Public Interest Disclosure Act 1998*—see below, para.42-240.

1578 *Employment Rights Act 1996* s.94, taken in conjunction with s.230(1) of *Employment Rights Act 1996* (definition of “employee”). See above, paras 42-010—42-025, for definition of the contract of employment. As to the implicit exclusion of employees working abroad, see now *Lawson v Serco Ltd [2006] UKHL 3, [2006] I.C.R. 250*, in which the House of Lords allowed the appeals of certain claimants in a group of joined appeals, remitting their cases to

the employment tribunal for rehearing, and further explicated the territorial scope of the right not to be unfairly dismissed. Compare now *Dhunna v Creditsights Ltd [2014] EWCA Civ 1238, [2014] I.C.R. 105*, and *British Council v Jeffery [2018] EWCA Civ 2253, [2019] I.C.R. 929*.

1579 See *Margetts v Underwood (Zelah) [1973] I.T.R. 478*. See above, para.42-014.

1580 cf. *Cole v Fred Stacey Ltd [1974] I.R.L.R. 73*. See above, para.42-038.

1581 Employment Rights Act 1996 s.200(1).

1582 Employment Rights Act 1996 s.199(2).

1583 [2017] EWCA Civ 1092, [2017] I.R.L.R. 1140.

1584 The reasons are as specified by Employment Rights Act 1996 s.108(3) in relation to the qualifying period of employment.

1585 Employment Rights Act 1996 s.108(1). For the definition of “effective date of termination”, see below, paras 42-228—42-229. It is no longer necessary to distinguish between full-time and part-time employees, by reason of the *Employment Protection (Part-time Employees) Regulations 1995 (SI 1995/31)*. The upper age limit of 65 or normal retirement age, which formerly applied, was abolished with effect from 1 October 2006 by the *Employment Equality (Age) Regulations 2006 (SI 2006/1031) Sch.8 para.25*. See also paras 42-179, 42-232.

1586 Employment Rights Act 1996 s.108(1) as amended by the *Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989)* with effect upon periods of employment beginning from 6 April 2012. For “continuously employed” see s.213 Employment Rights Act 1996; see also above, paras 42-169—42-172.

1587 Employment Rights Act 1996 s.108(2).

1588 *Benkharbouche v Embassy of Sudan [2017] UKSC 62, [2017] 3 W.L.R. 957*. For diplomatic immunity in the same context, see *Al-Malki v Reyes [2017] UKSC 61, [2017] 3 W.L.R. 923*.

1589 As to which see above, para.42-037 (Crown employment).

1590 cf. in addition to the employments specifically mentioned in this paragraph, the provisions of s.134 of the Employment Rights Act 1996 relating to teachers in aided schools. The police service is still, however, outside the scope of the provisions: s.200(1) of Employment Rights Act 1996.

1591 Employment Rights Act 1996 s.194.

1592 s.195.

1593 s.191.

1594 s.192.

1595 s.192(3).

1596 s.193. The reviewability of such a certificate was considered in the case of *Council of Civil Service Unions v Minister of the Civil Service (“The GCHQ case”) [1985] A.C. 374*.

1597 Employment Rights Act 1996 s.203(1). See *Sutherland v Network Appliance Ltd [2001] I.R.L.R. 12*—the compromise agreement remains effective in respect of claims for damages for breach of contract. And contrast this position with the Employee Shareholder status, above, para.42-032.

1598 Employment Rights Act 1996 s.197(1).

1599 s.197(1) was repealed by s.18 of the Employment Relations Act 1999.

1600 Employment Rights Act 1996 s.110(1).

- 1601 Employment Rights Act 1996 s.110(3).
- 1602 Employment Rights Act 1996 s.110(4), (5).
- 1603 Employment Rights Act 1996 s.203(2)(e).
- 1604 Employment Rights Act 1996 s.203(2)(e); see *BCCI v Ali [2001] I.C.R. 337* as to the effect of such agreements, known as ACAS COT3 compromise agreements. Compare now the alternative dispute resolution provisions of ss.9–10 of the Employment Rights (Dispute Resolution) Act 1998—see also para.42-270.

(ii) - Dismissal and Effective Date of Termination

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 8. - Unfair and Discriminatory Dismissal

(a) - Unfair Dismissal

(ii) - Dismissal and Effective Date of Termination

The definition of dismissal

- 42-226 Dismissal is defined for the purposes of the unfair dismissal provisions so as to extend to certain types of situation, and to no others. The statutory definition is expressed to be exhaustive.¹⁶⁰⁵ These situations are:
- (a)Where the contract of employment is terminated by the employer, whether it is so terminated by notice or without notice.¹⁶⁰⁶
 - (b)Where the contract is for a limited term¹⁶⁰⁷ and that term expires without being renewed "under the same contract".¹⁶⁰⁸
 - (c)Where the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.¹⁶⁰⁹ There was no corresponding provision in the original unfair dismissal legislation of 1971, but this provision declares the result of case law development.¹⁶¹⁰ Reference may be made to case law concerning both unfair dismissal and redundancy payments for indications as to when the employee's entitlement to claim constructive dismissal arises.¹⁶¹¹
 - (d)Where an employee under notice from his or her employer himself or herself gives notice which terminates earlier than the employer's notice is due to expire; and in that event the reason for dismissal is taken to be the reason for which the employer's notice was given.¹⁶¹²
- 42-227 The operation of this statutory definition of dismissal is affected at various points by the common law concerning the termination of the contract of employment. Events affecting the employer

such as liquidation of an employing company, appointment of a receiver or dissolution of partnership will not as such constitute dismissal,¹⁶¹³ but will often have an effect on the contract of employment which will satisfy the definition of dismissal, or will entitle the employee to terminate his employment and claim constructive dismissal, as involving a unilateral termination of employment, a purported assignment of the contract of employment, or a repudiatory change in the terms and conditions of employment.¹⁶¹⁴ Similarly, suspension of employment by the employer by way of disciplinary action or by way of lay-off in adverse economic conditions will not as such constitute dismissal, but may involve a termination of the contract by the employer or a repudiation of it entitling the employee to accept the termination and then claim constructive dismissal.¹⁶¹⁵ On the other hand certain cases where there might at first sight appear to be a dismissal by the employer may fail to satisfy the definition of dismissal because the contract has been terminated under the doctrine of frustration by, for instance, the prolonged illness of the employee,¹⁶¹⁶ or because the employee has unilaterally terminated the contract¹⁶¹⁷ or rendered it impossible of performance,¹⁶¹⁸ or because there has been a termination by mutual agreement.¹⁶¹⁹ These alternatives to dismissal are firmly established as a matter of principle, but the tribunals and courts will not lightly allow them to operate to defeat claims of unfair dismissal. In *Morton Sundour Fabrics Ltd v Shaw*¹⁶²⁰ it was held that a warning of impending dismissal (for redundancy) at an unspecified future date did not constitute a dismissal for statutory purposes.

The effective date of termination

42-228 The date at which dismissal is deemed to occur, and the date upon which the contract of employment is deemed to terminate are important in the application of the unfair dismissal provisions for the following reasons:

(1)the “effective date of termination of employment” is used to establish:

(a)whether the employee has served the qualifying period¹⁶²¹;

(b)whether the employee presented his complaint in time¹⁶²²;

(c)whether the provisions concerning dismissal in connection with a lock-out, strike or other industrial action are applicable¹⁶²³;

(d)the length of the employee’s period of continuous employment¹⁶²⁴ for the purpose of calculating the amount of the basic award¹⁶²⁵ of compensation for unfair dismissal¹⁶²⁶;

(e)the calculation date of the employee’s “week’s pay”¹⁶²⁷ for the purpose of calculating the amount of basic award of compensation.¹⁶²⁸

(2)the effective date of termination of employment is defined¹⁶²⁹ as:

- (a)in relation to an employee whose contract of employment is terminated by notice, the date on which the notice expires;
- (b)in relation to an employee whose contract is terminated without notice, the date on which termination takes effect;
- (c)in relation to an employee employed under a limited-term contract which expires without being renewed under the same contract, the date on which the termination takes effect.

42-229 For certain above-mentioned purposes for which the definition applies, namely that of the initial qualifying period and that of the calculation of basic award of compensation, the effective date of termination is postponed¹⁶³⁰ to the date when a duly given statutory minimum period of notice¹⁶³¹ would have expired. The application of the above statutory definition to termination by payment in lieu of notice depends upon the view taken of the juridical nature of a payment in lieu of notice, a matter considered in an earlier paragraph.¹⁶³² Where a dismissal is expressed in a notice or letter, it has been held that the termination does not take effect until the employee has read that notice or letter or had a reasonable opportunity to do so.¹⁶³³ Where an employee is suspended without pay pending a domestic appeal against dismissal, it has been held that where the appeal is unsuccessful, the effective date of termination is that of the original dismissal.¹⁶³⁴ If, however, the employee is contractually entitled to remuneration during such suspension, the effective date of termination is postponed until notification of the rejection of the appeal.¹⁶³⁵ Where an employer wrongfully repudiates the contract of employment by wrongful dismissal, it has been held that even if the elective theory whereby wrongful repudiation requires acceptance to terminate the contract is applicable,¹⁶³⁶ the effective date of termination for statutory purposes is nevertheless the date of the summary dismissal rather than the later date on which notice duly given on that date would have expired¹⁶³⁷ (subject only to the statutory extension for the statutory minimum period of notice).¹⁶³⁸

Footnotes

1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

1605 Employment Rights Act 1996 s.95(1), the opening words.

1606 Employment Rights Act 1996 s.95(1)(a). See above, para.42-197, for the question whether the employer can terminate the contract unilaterally in breach of contract. Also see *Chesham Shipping Ltd v Rowe [1977] I.R.L.R. 391*; *Walker v Cotswold Chine Home School* (1977) 12 I.T.R. 342; *Tanner v DT Kean Ltd [1978] I.R.L.R. 110*; *Pambakian v Brentford Nylons Ltd*

- [1978] *I.C.R.* 665 (hiving-down agreement); *British Midland Airways Ltd v Lewis* [1978] *I.C.R.* 782.
- 1607 Now styled a limited-term contract—see above, para.42-177; see *Wiltshire CC v NATFHE* [1980] *I.C.R.* 455; *British Broadcasting Corp v Dixon* [1979] *Q.B.* 546.
- 1608 s.95(1)(b). The concluding words are probably intended to exclude a renewal or re-engagement on different terms and conditions. cf. *British Broadcasting Corp v Kelly-Phillips* [1998] *I.C.R.* 587. That decision was followed, and the reasoning in it was applied, by the Court of Appeal in *Bhatt v Chelsea and Westminster Healthcare NHS Trust* [2000] *C.L.* 193.
- 1609 Employment Rights Act 1996 s.95(1)(c).
- 1610 See *Sutcliffe v Hawker Siddeley Aviation Ltd* [1973] *I.C.R.* 560.
- 1611 See above, paras 42-198—42-199; and *Western Excavating (ECC) Ltd v Sharpe* [1978] *I.C.R.* 221; *FC Gardner Ltd v Beresford* [1978] *I.R.L.R.* 63; *Robinson v Crompton Parkinson Ltd* [1978] *I.C.R.* 401; *Walker v Josiah Wedgwood Sons Ltd* [1978] *I.C.R.* 744; *Warner v Barbers Stores* [1978] *I.R.L.R.* 109; *Simmonds v Dowty Seals Ltd* [1978] *I.R.L.R.* 211; *Palmanor Ltd v Cedron* [1978] *I.C.R.* 1008; *Milthorn Toleman Ltd v Ford* [1978] *I.R.L.R.* 306; *British Aircraft Corp v Austin* [1978] *I.R.L.R.* 332; *Woods v WM Car Services Ltd* [1981] *I.C.R.* 666; *Pedersen v Camden LBC* [1981] *I.C.R.* 674 (note).
- 1612 Employment Rights Act 1996 s.95(2).
- 1613 Contrast here ss.136(5), 139(4), (5) of Employment Rights Act 1996 in connection with redundancy—see below, para.42-259.
- 1614 See generally above, paras 42-183—42-187 (changes in the employing enterprise).
- 1615 See *Powell Duffryn Wagon Co Ltd v House* [1974] *I.C.R.* 123.
- 1616 See *Marshall v Harland Wolff Ltd* [1972] *I.C.R.* 101; *Hebden v Forsey & Son* [1973] *I.C.R.* 607; *Egg Stores (Stamford Hill) Ltd v Leibovici* [1977] *I.C.R.* 260; *Hart v AR Marshall & Sons (Bulwell) Ltd* [1977] *1 W.L.R.* 1067, and see above, para.42-180.
- 1617 For the distinction between dismissal by the employer and “resignation” by the employee, see now *Sandhu v Jan de Rijk Transport Ltd* [2007] *EWCA Civ* 430, [2007] *I.C.R.* 1137; distinguishing *Sheffield v Oxford Controls Ltd* [1979] *I.C.R.* 396.
- 1618 *Hare v Murphy Bros Ltd* [1974] *I.C.R.* 603. Contrast *Forgings & Presswork Ltd v McDougall* [1974] *I.C.R.* 532; and see above, para.42-180.
- 1619 See *MacAlwane v Boughton Estates Ltd* [1973] *I.C.R.* 470; *Lees v Arthur Greaves Ltd* [1974] *I.C.R.* 501; *British Leyland (UK) Ltd v Ashraf* [1978] *I.C.R.* 979; *Midland Electric Manufacturing Co Ltd v Kanji* [1980] *I.R.L.R.* 185; and *Tracy v Zest Equipment Ltd* [1982] *I.C.R.* 481. See above, para.42-178.
- 1620 (1966) 2 *K.I.R.* 1; see now *Haseltine, Lake & Co v Dowler* [1981] *I.R.L.R.* 25; *International Computers Ltd v Kennedy* [1981] *I.R.L.R.* 23.
- 1621 Employment Rights Act 1996 s.108(1)—see above, para.42-128.
- 1622 Employment Rights Act 1996 s.111(2)—see below, para.42-251.
- 1623 See s.238(5) of Trade Union and Labour Relations (Consolidation) Act 1992.
- 1624 See above, para.42-169.
- 1625 See below, para.42-247.
- 1626 Employment Rights Act 1996 s.119(1) and (2).
- 1627 See below, para.42-261.

- 1628 Employment Rights Act 1996 s.226(6).
- 1629 Employment Rights Act 1996 s.97(1). See *Hammerton Shipping Co Ltd v Borg [1977] 12 I.T.R. 54*; and *Robert Cort & Son Ltd v Charman [1981] I.C.R. 816*. Compare *Fitzgerald v University of Kent at Canterbury [2004] EWCA Civ 143, [2004] I.C.R. 737*, in which it was held that a retrospective agreement did not validly alter the effective date of termination. But compare also now *Palfrey v Transco Plc [2004] I.R.L.R. 916, EAT* where a later agreement for payment in lieu of notice was held to have advanced the effective date of termination.
- 1630 Employment Rights Act 1996 s.97(2)–(5). See *Dhami v Top Spot Night Club [1977] I.R.L.R. 231*.
- 1631 See above, para.42-168; *Fox Maintenance Ltd v Jackson [1978] I.C.R. 110*. In *Harper v Virgin Net Ltd [2004] EWCA Civ 271, [2004] I.R.L.R. 390* it was held that the legislation did not bring about a further postponement of the effective date of termination to the later date at which a contractual notice period, longer than the statutory minimum notice period, would have expired. See also *Lancaster & Duke Ltd v Wileman [2019] I.C.R 125, EAT*.
- 1632 See above, para.42-186.
- 1633 *Brown v Southall & Knight [1980] I.C.R. 617*. The decision was followed, and its doctrine was re-vindicated and elaborated, by the Court of Appeal and by the Supreme Court in *Gisda Cyf v Barratt [2009] EWCA Civ 648, [2010] UKSC 41*. See now also *Sandle v Adecco UK Ltd [2016] I.R.L.R. 941, EAT* and especially *Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood [2018] UKSC 22, [2018] 1 W.L.R. 2073*.
- 1634 *Sainsbury Ltd v Savage [1981] I.C.R. 1*.
- 1635 *Drage v Governors of Greenford High School [2000] I.R.L.R. 314*.
- 1636 See above, para.42-197.
- 1637 *Robert Cort & Son Ltd v Charman [1981] I.C.R. 816*; compare also *BMK Ltd v Logue [1993] I.C.R. 601*. In *Lambert v Croydon College [1999] I.C.R. 409*, the Employment Appeal Tribunal held that a compromise agreement (see above, para.42-178) for early retirement on grounds of ill-health could validly fix the effective date of termination of employment for statutory purposes, even though it fixed it at a date earlier than that on which the agreement was made.
- 1638 See above, para.42-173.

(iii) - Unfairness

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 8. - Unfair and Discriminatory Dismissal

(a) - Unfair Dismissal

(iii) - Unfairness

Introduction

- 42-230 Normally, the fairness or unfairness of a dismissal is, under the statutory provisions¹⁶³⁹ decided as a two-stage process. At the first stage, it is for the employer to show that he or she dismissed the employee for a substantial justificatory reason¹⁶⁴⁰ and at the second stage it is for the tribunal to decide whether in the circumstances (including the size and administrative resources of the employer's undertaking) he or she acted reasonably in treating the reason as a sufficient reason for dismissing the employee.¹⁶⁴¹ In the ensuing paragraphs, these two stages are described in more detail and certain situations are described which are governed by special statutory rules ousting the two-stage test of fairness.¹⁶⁴² The principal such situations are concerned with:

- (1) trade union membership and activity¹⁶⁴³;
- (2) dismissal during lock-out, strike or other industrial action¹⁶⁴⁴;
- (3) selection for redundancy¹⁶⁴⁵;
- (4) dismissal on the ground of pregnancy or childbirth or leave for family reasons¹⁶⁴⁶;
- (5) health and safety cases¹⁶⁴⁷;
- (6) jury service¹⁶⁴⁸; and
- (7) dismissal on ground of assertion of statutory right.¹⁶⁴⁹

Substantial reasons for dismissal

42-231 It is provided¹⁶⁵⁰ that at the first stage¹⁶⁵¹ of the determination whether a dismissal was fair or unfair, it is for the employer to show what was the reason or principal reason for the dismissal,¹⁶⁵² and that it was a reason falling within a statutory list¹⁶⁵³ of substantial reasons justifying dismissal.¹⁶⁵⁴ The list is as follows:

(1) Reasons related to the capability¹⁶⁵⁵ or qualifications¹⁶⁵⁶ of the employee for performing work of the kind which he or she was employed to do.¹⁶⁵⁷ This may include supervening ill-health incapacitating the employee from carrying out his or her former work.¹⁶⁵⁸

(2) Reasons related to the conduct of the employee.¹⁶⁵⁹ These need *not* necessarily be reasons going to the lengths of justifying summary dismissal for misconduct at common law.¹⁶⁶⁰

(3) Redundancy of the employee.¹⁶⁶¹ This is defined by reference to the definition of the term used in the redundancy payments legislation.¹⁶⁶²

(4) Contravention of a statutory duty if the employment is continued.¹⁶⁶³ This covers cases such as that where an employee employed as a driver is disqualified from driving or driving a particular type of vehicle by order of a court.

(5) Dismissal of an employee engaged expressly as a statutory replacement employee in order to make it possible for the replaced employee to resume his or her original work.¹⁶⁶⁴

(6) Any other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.¹⁶⁶⁵ This is a residual catch-all category leaving the whole issue ultimately within the discretion of the tribunals and courts. That discretion has not been limited by decided cases; there is no reason to suppose, for instance, that this category need be construed *ejusdem generis* with the other, specific, categories.¹⁶⁶⁶

Special considerations apply to dismissals taking place because of the transfer of an undertaking within the meaning of the [Transfer of Undertakings \(Protection of Employment\) Regulations](#). With effect from April 6, 2006, the existing [Transfer of Undertakings \(Protection of Employment\) Regulations](#) were revised and replaced by the [Transfer of Undertakings \(Protection of Employment\) Regulations 2006](#).¹⁶⁶⁷ The new Regulations contain provisions which clarify the circumstances under which it is unfair for employers to dismiss employees for reasons connected with a relevant transfer.¹⁶⁶⁸

Retirement and unfair dismissal

42-232

Among the very significant new legal incidents which the **Employment Equality (Age) Regulations 2006**¹⁶⁶⁹ attached to the notion of “retirement”¹⁶⁷⁰ was a special regime for “retirement” within the law of unfair dismissal. This special regime was created by introducing new provisions into the **Employment Rights Act 1996**; it was known as the “default retirement age” regime because it authorised employers, on certain specified conditions, to maintain a mandatory retirement age for their employees which by default would be that of 65. These provisions were repealed by the **Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011**,¹⁶⁷¹ and the effect of that repeal, when coupled with the abolition of the previously existing age limits on claims for unfair dismissal which had accompanied the introduction of that special regime, is to expose the imposition of retirement upon an employee by an employer to the general law of unfair dismissal at whatever age it takes place. There is some official indication that employers may be able to maintain their own “employer-justified retirement age” regimes¹⁶⁷²; the scope of this facility has begun to be effectively tested in litigation.

¹⁶⁷³



Reasonableness of dismissal

- 42-233 If the employer shows that he or she has a substantial reason for dismissal within the provisions previously discussed,¹⁶⁷⁴ that does not in itself establish the fairness or unfairness of the dismissal. Except in the special cases which have been enumerated,¹⁶⁷⁵ it is necessary to the second stage of adjudication of fairness. At that stage, the issue of fairness depends upon whether the tribunal is satisfied that in the circumstances the employer acted reasonably in treating the reason shown to him or her as a sufficient reason for dismissing the employee.¹⁶⁷⁶ The tribunals are able to take matters both of substance and procedure into account when deciding the issue of reasonableness. At the substantive level, the tribunals can consider the whole sequence of developments leading to a dismissal¹⁶⁷⁷ and can, in effect, apply their own standards of good employment practice in order to evaluate the dismissal.¹⁶⁷⁸ Moreover, it has long been recognised that the reasonableness of a dismissal also raises procedural considerations¹⁶⁷⁹; the significance of those procedural considerations is now the subject of special statutory provisions concerning dispute resolution which are detailed in later paragraphs.¹⁶⁸⁰ The statute specifically provides that the size and administrative resources of the employer’s undertaking shall be treated as circumstances relevant to the question of reasonableness.¹⁶⁸¹

Cases on “reasonableness”

- 42-234 Leading cases have provided important guidance for the application of this notion of “reasonableness”. The reasonableness of the dismissal must be judged on the basis of facts and circumstances known to the employer and acted upon by him or her at the time of the dismissal and not circumstances which subsequently come to light,¹⁶⁸² though those may affect the amount of compensation.¹⁶⁸³ Nevertheless, in judging the reasonableness of a dismissal, an employment tribunal is entitled to have regard to an employer’s refusal to entertain the employee’s contractual right of appeal, as any evidence given in such an appeal would have been admissible before the tribunal in considering whether the employer’s real reason for dismissal could reasonably be treated as sufficient.¹⁶⁸⁴ Moreover, an employer may be held to have acted unreasonably by failing to take the appropriate procedural steps in deciding to dismiss, although it cannot be said the employee would not have been dismissed but for the procedural defects, unless the employer could reasonably have concluded, when deciding to dismiss, that the procedural steps would have been utterly useless.¹⁶⁸⁵ (Statutory provision was made that failure by an employer to follow a dismissal procedure should not be regarded by itself as making the employer’s action unreasonable if the employer shows that it would have been decided to dismiss the employee even if the procedure had been followed¹⁶⁸⁶; but that provision was subsequently repealed,¹⁶⁸⁷ so that the previously applicable case law is apparently restored to effect.¹⁶⁸⁸)

Dismissal by reason of trade union membership, non-membership or activity

- 42-235 The ordinary rules for determining the fairness of a dismissal¹⁶⁸⁹ are overridden by a special provision¹⁶⁹⁰ that a dismissal is to be regarded as unfair if the reason or principal reason for the dismissal was the employee’s being or proposing to become a member of an independent trade union¹⁶⁹¹ or that he had taken or proposed to take part at any appropriate time in the activities of an independent trade union¹⁶⁹² or the employee’s non-membership of, or refusal to become or remain a member of a trade union.¹⁶⁹³ Where these reasons obtain, the law of unfair dismissal has a specially wide scope,¹⁶⁹⁴ extending to employees who have not served a qualifying period.¹⁶⁹⁵ These provisions provide the counterpart to the rights of employees in respect of trade union membership, non-membership and activity provided during the currency of employment by ss.146–151 of the Trade Union and Labour Relations (Consolidation) Act 1992.¹⁶⁹⁶ Where they apply, the calculation of the basic award of compensation is subject to a statutory minimum,¹⁶⁹⁷ and may obtain special interim relief pending determination of his or her complaint of unfair

dismissal.¹⁶⁹⁸ That interim relief may consist of an order for the continuation of his contract of employment.¹⁶⁹⁹

Dismissal during lock-out, strike or other industrial action

42-236 Where the date on which an employee is dismissed¹⁷⁰⁰ falls during or at the institution of a lock-out by the employer¹⁷⁰¹ or while the employee was taking part in a strike or other industrial action¹⁷⁰² the ordinary provisions about the fairness of dismissal¹⁷⁰³ are overridden by special provisions.¹⁷⁰⁴ The law of unfair dismissal is in those cases totally excluded, there being no determination of fairness or unfairness,¹⁷⁰⁵ save as follows: the law of unfair dismissal is not excluded if it is shown that one or more relevant employees have not been dismissed,¹⁷⁰⁶ or have been offered re-engagement within three months of the dismissal complained of whilst the employee concerned had not had such an offer.¹⁷⁰⁷ The relevant employees are those directly interested in the trade dispute in the contemplation or furtherance of which the lock-out occurred,¹⁷⁰⁸ or those at the establishment at or from which the complainant was working taking part in the strike or other industrial action at the complainant's date of dismissal.¹⁷⁰⁹ However, the foregoing proviso relating to selective dismissal or selective non-re-engagement does not operate in relation to the dismissal of those taking part in *unofficial* industrial action as statutorily defined, as employees dismissed while so doing have no right to complain of unfair dismissal.¹⁷¹⁰ Where the unfair dismissal provisions are not excluded they apply in the ordinary way, except that in cases of selective failure to re-engage,¹⁷¹¹ the ordinary provisions apply to the failure to re-engage rather than to the original dismissal¹⁷¹² (thus bringing into question the selection the employer makes by re-engaging some employees and not others). Where the unfair dismissal provisions are not excluded,¹⁷¹³ a dismissal or failure to re-engage which has as its reason the employee's trade union membership or activity, or non-membership of a non-independent trade union, will be necessarily unfair as in the ordinary case of a dismissal on those grounds not occurring during a lock-out, strike or other industrial action.¹⁷¹⁴ Moreover, the *Employment Relations Act 1999*¹⁷¹⁵ made significant changes to the law relating to unfair dismissal of striking workers. In summary, a new category of "protected industrial action" was created within the existing category of official industrial action, so that in defined situations within this new category, employees are to be regarded as unfairly dismissed if they are dismissed wholly or principally by reason of having taken protected industrial action.¹⁷¹⁶

Fairness in redundancy cases

42-237

The fact that an employee is redundant in the statutory sense¹⁷¹⁷ is in itself a reason capable of establishing the dismissal as a fair one.¹⁷¹⁸ Within that framework the area of overlap between the redundancy payments legislation¹⁷¹⁹ and the unfair dismissal provisions is regulated as follows. First, there are provisions rendering certain dismissals for redundancy automatically unfair.¹⁷²⁰ These provisions apply to dismissals for redundancy where there has been selection between employees in a similar position and the selection was made either on the statutorily inadmissible grounds, such as those concerned with health and safety cases, with pregnancy or childbirth, or with assertion of statutory rights,¹⁷²¹ or on the statutorily defined grounds concerned with trade union membership, non-membership or activity.¹⁷²² Secondly, outside those special provisions, a dismissal for redundancy may also be unfair if the employer's decision to dismiss is judged unreasonable¹⁷²³ as in all ordinary unfair dismissal issues. Thirdly, it seems clear that the presumption of redundancy applying for the purposes of the redundancy payments legislation¹⁷²⁴ may operate to permit that a redundancy payment is due to the employee and yet that the dismissal is not a dismissal for redundancy for the purposes of the unfair dismissal legislation.¹⁷²⁵ Fourthly, there is provision for the reduction of the amount of a basic award of compensation for unfair dismissal by the amount of any redundancy payment made by the employer or awarded by the tribunal in respect of the dismissal concerned.¹⁷²⁶ Finally it should be noted that special considerations apply under the [Transfer of Undertakings \(Protection of Employment\) Regulations 2006](#) where the dismissal is attributable to the transfer of an undertaking.¹⁷²⁷

Dismissal on grounds of pregnancy or leave for family reasons

- 42-238 Under [s.99 of the Employment Rights Act 1996](#) an employee is to be treated as unfairly dismissed if she is dismissed because she is pregnant or for any other reason connected with leave for family reasons as prescribed by regulations. In such cases, the normally applicable provisions concerning the qualifying period for unfair dismissal rights do not apply.¹⁷²⁸

Dismissal in health and safety cases, or on the ground of assertion of statutory right

- 42-239 Provision has been made and is now contained in the [Employment Rights Act 1996](#) for dismissals to be treated as unfair dismissals in particular health and safety cases and in certain cases of dismissal on the ground of assertion of statutory right, as follows. In such cases, the normally applicable provisions concerning the qualifying period for unfair dismissal rights do not apply.¹⁷²⁹

(1) Health and safety cases:

A dismissal is to be regarded as unfair if the reason for it was that the employee was involved in health and safety activities, or was performing representative functions with regard to health and safety, or brought health and safety hazards to the employer's attention, or absented himself or herself from work by reason of health and safety hazards, or took protective measures in circumstances of danger (in each case, subject to the particular conditions laid down in the statutory provision).

1730



(2) Assertion of statutory right:

A dismissal is to be regarded as unfair if the reason for it was that the employee brought proceedings against the employer to enforce a relevant statutory right, or alleged that the employer had infringed such a right of his or hers; the statutory rights in question are, in effect, the individual employment protection rights conferred by the [Employment Rights Act 1996](#) and by the provisions of the [Trade Union and Labour Relations \(Consolidation\) Act 1992](#) concerning deductions from pay, trade union activities and time off.¹⁷³¹

Dismissal on grounds of public interest disclosure

- 42-240 Under the provisions of the [Public Interest Disclosure Act 1998](#),¹⁷³² a dismissal, for which the sole or principal reason is that the worker concerned made a protected public interest disclosure, may be taken to be an unfair dismissal within the meaning of the unfair dismissals legislation, thus coming within the jurisdiction of an Employment Tribunal as such.¹⁷³³

Dismissal on grounds of refusal of Sunday working

- 42-241 It is provided that where an employee who is a "protected shop worker" or "protected betting worker" or an "opted-out shop worker" or "opted-out betting worker" is dismissed, he or she is to be regarded as unfairly dismissed if the reason or principal reason for the dismissal was his or her refusal to do shop work or betting work on Sundays or on a particular Sunday.¹⁷³⁴

Dismissal on grounds connected with parenthood and family responsibility

- 42-242 As with the protections from detriment previously considered,¹⁷³⁵ by a succession of enactments beginning with the *Employment Relations Act 1999*,¹⁷³⁶ there have been conferred upon employees a series of protections against dismissal or selection for redundancy on grounds connected with various aspects of parenthood and family responsibility or with the exercise of rights relating to parenthood and family responsibility. As a brief summary of the effect of those enactments, an employee will be regarded as having been unfairly dismissed or selected for redundancy if the ground for the dismissal or selection for redundancy was that:
- she is pregnant or has given birth to a child; or
 - she has exercised or has sought to exercise the rights to maternity leave or maternity pay; or
 - she or he has exercised or has sought to exercise the rights to parental leave; or
 - she or he has exercised or has sought to exercise the rights to time off for domestic reasons (to care for dependants)¹⁷³⁷; or
 - he has exercised or has sought to exercise the rights to paternity leave or paternity pay; or
 - she or he has exercised or has sought to exercise the rights to adoption leave or adoption pay, or the rights to paternity leave or paternity pay which apply to adoptive parents¹⁷³⁸; or
 - she or he has exercised or has sought to exercise the rights which relate to flexible working.¹⁷³⁹

Footnotes

1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

1639 *Employment Rights Act 1996 ss.98–100, 103–105*. As to the impact of the *Human Rights Act 1998* on the adjudication of unfairness, see *X v Y (Employment: Sex Offender) [2004] EWCA Civ 662, [2004] I.R.L.R. 625*.

1640 *Employment Rights Act 1996 s.98(1)*, see below, para.42-231.

1641 *Employment Rights Act 1996 s.98(4)*.

1642 Compare also *s.98(3A) Employment Rights Act 1996*, and see below, para.42-232 as to the treatment of retirement under the law of unfair dismissal.

- 1643 Trade Union and Labour Relations (Consolidation) Act 1992 s.152; see below, para.42-235.
- 1644 Trade Union and Labour Relations (Consolidation) Act 1992 ss.237–239; see below, para.42-235.
- 1645 Employment Rights Act 1996 s.105. Trade Union and Labour Relations (Consolidation) Act 1992 s.153, see below, para.42-237.
- 1646 Employment Rights Act 1996 s.99 and regulations thereunder. See below, para.42-238.
- 1647 Employment Rights Act 1996 s.100. See below, para.42-238.
- 1648 A new specially designated ground of unfair dismissal has been created by s.40 of the Employment Relations Act 2004, which, by inserting a new s.98B into the Employment Rights Act 1996, renders it unfair to dismiss an employee by reason of his or her being summoned for or being absent from work on jury service, unless the employer shows the likelihood of substantial injury to the undertaking being caused by the absence on jury service. This provision was effective from 6 April 2005.
- 1649 Employment Rights Act 1996 s.104. See below, para.42-239.
- 1650 Employment Rights Act 1996 s.98.
- 1651 See above, para.42-230.
- 1652 Employment Rights Act 1996 s.98(1)(a). In *Royal Mail Ltd v Jhuti [2019] UKSC 55*, the Supreme Court held that the Employment Tribunal was under a duty to ascertain and act on the true reason for dismissal, rather than the proffered reason which was not the genuine one.
- 1653 Employment Rights Act 1996 s.98(2), subject to s.98(2A) with regard to retirement, as to which see below, para.42-232.
- 1654 Employment Rights Act 1996 s.98(1)(b).
- 1655 Defined by s.98(3)(a) Employment Rights Act 1996; compare *Abernethy v Mott, Hay & Anderson [1974] I.C.R. 323*; *Turner v Wadham Stringer Ltd [1974] I.C.R. 277*; *Blackman v Post Office [1974] I.C.R. 151*; *Kraft Foods Ltd v Fox [1978] I.C.R. 311*; *Miller v Executors of JC Graham [1978] I.R.L.R. 309*; *Bristol-Meyers Co Ltd v Matlock [1978] 13 I.T.R. 158*; *Sutton & Gates v Boxall [1979] I.C.R. 67, EAT*.
- 1656 Defined by s.98(3)(b) of Employment Rights Act 1996.
- 1657 Employment Rights Act 1996 s.98(2)(a).
- 1658 cf. *Merseyside and North Wales Electricity Board v Taylor [1975] I.C.R. 185*. See *Patterson v Messrs Bracketts [1977] I.R.L.R. 137*; *Spencer v Paragon Wallpapers Ltd [1976] I.R.L.R. 373*; *Liverpool AHA v Edwards [1977] I.R.L.R. 471*; *Finch v Betabake (Anglia) Ltd [1977] I.R.L.R. 470*; *Williamson v Alcan (UK) Ltd [1978] I.C.R. 104*; *Post Office v Jones [1977] I.R.L.R. 422*; *East Lindsey DC v Daubney [1977] I.R.L.R. 181*.
- 1659 Employment Rights Act 1996 s.98(2)(b). See, among the earlier leading authorities, *Morrish v Henlys (Folkestone) Ltd [1973] I.C.R. 482*; *Wallace v Guy Ltd [1973] I.C.R. 119*; *St Anne's Board Mill Co Ltd v Brien [1973] I.C.R. 444*; *Shipside (Ruthin) Ltd v TGWU [1973] I.C.R. 503*; *Hilti (Great Britain) Ltd v Windridge [1974] I.C.R. 352*; *Atkin v Enfield Group Hospital Management Committee [1975] I.R.L.R. 217*; *Conway v Matthew Wright & Nephew Ltd [1977] I.R.L.R. 89*; *Singh v London County Bus Services [1976] I.R.L.R. 176*; *Trust Houses Forte Ltd v Murphy [1977] I.R.L.R. 186*; *Torr v British Railways Board [1977] I.C.R. 785*; *Redbridge LBC v Fishman [1978] I.C.R. 569*; *Horrigan v Lewisham LBC [1978] I.C.R. 15*; *West Yorkshire MDC v Platts [1978] I.C.R. 33*; *Mansard Precision Engineering Co Ltd*

v Taylor [1978] I.C.R. 828; Nottinghamshire CC v Bowley [1978] I.R.L.R. 252; Johnson Matthey Metals Ltd v Harding [1978] I.R.L.R. 248; Tesco Stores Ltd v Heap [1978] 13 I.T.R. 17; Boychuk v H. & J. Symons Holdings Ltd [1977] I.R.L.R. 395; Coward v John Menzies (Holdings) Ltd [1977] I.R.L.R. 428; British Labour Pump Co Ltd v Byrne [1979] I.C.R. 347; Monie v Coral Racing [1981] I.C.R. 109, CA; Weddell & Co Ltd v Tepper [1980] I.C.R. 286, CA; British Home Stores Ltd v Burchell [1980] I.C.R. 303, EAT; UCATT v Brain [1981] I.C.R. 542, CA; Whitbread & Co Plc v Mills (1988) I.R.L.R. 501; Reilly v Sandwell MBC [2018] UKSC 16, [2018] I.C.R. 705.

1660 See above, paras 42-232 et seq.

1661 Employment Rights Act 1996 s.98(2)(c)—see below, paras 42-237—42-258.

1662 Employment Rights Act 1996 s.235(3).

1663 Employment Rights Act 1996 s.98(2)(d).

1664 Employment Rights Act 1996 s.106(2)–(3) (replacement of employee suspended from work on medical grounds—see above, para.42-090—or on maternity grounds or absent by reason of pregnancy or confinement).

1665 Employment Rights Act 1996 s.98(1)(b).

1666 cf. RS Components Ltd v Irwin [1973] I.C.R. 535; Hollister v National Farmers Union [1979] I.C.R. 542.

1667 SI 2006/246. See above, para.42-184.

1668 See reg.7.

1669 SI 2006/1031.

1670 As to which see also paras 42-041, 42-128.

1671 SI 2011/1069 which took full effect on 1 October 2011.

1672 ACAS Working without the default retirement age-guidance for employers (March 2011).

① 1673 Compare, however, Seldon v Clarkson Wright and Jakes [2010] UKSC 16 from which some incidental guidance may be derived. The maintaining of a retirement age of 65 was subsequently held to have been proportionate on the facts: Seldon v Clarkson Wright & Jakes [2014] I.R.L.R. 748, EAT. See also Pitcher v Chancellor, Masters and Scholars of the University of Oxford; Chancellor, Masters and Scholars of the University of Oxford v Ewart [2022] I.C.R. 338, EAT; and on the linked question of pension entitlements, compare Lord Chancellor v McCloud; Secretary of State for the Home Department v Sargeant [2018] EWCA Civ 2844, [2019] I.R.L.R. 477.

1674 i.e. ss.98(1), (2) of Employment Rights Act 1996.

1675 See above, para.42-230.

1676 Employment Rights Act 1996 s.98(4)–(6).

1677 See, for instance (a) in capability cases: Judge International Ltd v Moss [1975] I.R.L.R. 208; Abernethy v Mott, Hay & Anderson [1974] I.C.R. 323; Luckings v May & Baker Ltd [1974] I.R.L.R. 151; Tan v Berry Bros & Rudd Ltd [1974] I.R.L.R. 244; (b) in conduct cases: Winterhalter Gastronom Ltd v Webb [1973] I.C.R. 245; St Anne's Board Mill Co Ltd v Brien [1973] I.C.R. 444; Morrish v Henley's (Folkestone) Ltd [1973] I.C.R. 482; Shipside (Ruthin) Ltd v TGWU [1973] I.C.R. 503; Tiptools Ltd v Curtis [1973] I.R.L.R. 276; Hilti (Great Britain) Ltd v Windridge [1974] I.C.R. 352; Forgings & Presswork Ltd v MacDougall [1974]

I.C.R. 532; *Treganowan v Robert Knee & Co Ltd* [1975] *I.C.R.* 405; *Shortland v Chantrill* [1975] *I.R.L.R.* 208; *Atkin v Enfield Group Hospital Management Committee* [1975] *I.R.L.R.* 217; (c) in redundancy cases: *Rigby v British Steel Corp* [1973] *I.C.R.* 160; *Axe v British Domestic Appliances Ltd* [1973] *I.C.R.* 133; *Clarkson International Tools Ltd v Short* [1973] *I.C.R.* 191; *Vokes Ltd v Bear* [1974] *I.C.R.* 1; *Bessenden Properties Ltd v Corness* [1974] *I.R.L.R.* 338; *British Olivetti Ltd v Kay* [1975] *I.R.L.R.* 29; *Beardmore v Westinghouse Brake & Signal Co Ltd* [1976] *I.C.R.* 49. See *Khanum v Mid-Glamorgan AHA* [1979] *I.C.R.* 40, *EAT*; *Bailey v BP Oil (Kent Refinery) Ltd* [1980] *I.C.R.* 642, *CA*; *Weddell (W) & Co Ltd v Tepper* [1980] *I.C.R.* 286, *CA*; *UCATT v Brain* [1981] *I.C.R.* 542, *CA*. The Court of Appeal in *Turner v East Midland Trains Ltd* [2012] *EWCA Civ* 1470, [2013] *3 All E.R.* 375 confirmed that in misconduct cases the “band of reasonable responses test” is to be regarded as the overarching one; and it was held that this test met the requirements of art.8 of the European Convention on Human Rights and hence ensured that the legislative provision in question was compliant with the *Human Rights Act 1998*.

1678 It has been held that the fact that tribunals reach opposite conclusions as to fairness on similar facts does not necessarily render either conclusion perverse: *Gilham v Kent CC (No.2)* [1985] *I.C.R.* 233. Compare now the decisions of the EAT in *Haddon v Van den Bergh Foods Ltd* [1999] *I.R.L.R.* 672; and of the Court of Appeal in *Foley v Post Office* [2000] *I.C.R.* 1283.

1679 Because of their bearing on the substantial issue—*Dunning (Shopfitters) Ltd v Jacomb* [1973] *I.C.R.* 448, 452F-H. See also *Alidair v Taylor* [1978] *I.C.R.* 445, *CA*; and *Bailey v BP Oil (Kent Refinery) Ltd* [1980] *I.C.R.* 642.

1680 See below, para.42-270. The provisions came into force on 1 October 2004.

1681 Employment Rights Act 1996 s.98(4).

1682 *Devis & Sons Ltd v Atkins* [1977] *I.C.R.* 662; contrast the law of summary dismissal: see above, para.42-193.

1683 *Devis & Sons Ltd v Atkins* [1977] *I.C.R.* 662 and see below, para.42-247.

1684 *West Midland Co-operative Society Ltd v Tipton* [1986] *I.C.R.* 192. See, in relation to a contractual right of appeal, *Patel v Folkestone Nursing Home Ltd* [2018] *EWCA Civ* 1689, [2018] *I.R.L.R.* 924, and more generally, *Afzal v East London Pizza Ltd (t/a Dominos Pizza)* [2018] *I.C.R.* 1652, *EAT*.

1685 *Polkey v Dayton Services Ltd* [1988] *I.C.R.* 142; overruling *British Labour Pump Co Ltd v Byrne* [1979] *I.C.R.* 347. In *Duffy v Yeomans & Partners Ltd* [1995] *I.C.R.* 1, the Court of Appeal treated it as permissible for the employer to argue that consultation would have been pointless although the employer had not at or before the time of dismissal taken a decision about the utility of consultation.

1686 Employment Rights Act 1996 s.98A(2) inserted by s.34 of Employment Act 2002 with effect from October 2004.

1687 By s.2 of the Employment Act 2008; see below, para.42-270.

1688 That is the view taken in the Explanatory Notes to the Employment Act 2008 at para.18.

1689 i.e. s.98(1), (3) and s.106(1)(2); see above, para.42-230.

1690 Trade Union and Labour Relations (Consolidation) Act 1992 s.152(1). Section 152 of the 1992 Act has been amended by s.32 of the Employment Relations Act 2004 so as to make the dismissal of an employee unfair where it is for making use of the services of his union

or refusing to accept certain specified inducements in respect of trade union membership or collective bargaining. This provision was brought into effect on 1 October 2004.

1691 As defined by ss.1, 5.

1692 s.152(1)(b). See, for the scope of trade union activities, *Morris v Metrolink RATP Dev Ltd [2018] EWCA Civ 1358, [2018] I.R.L.R. 853*. “Appropriate time” is defined by s.152(2). See *Chant v Aquaboats Ltd [1978] I.C.R. 643; City of Birmingham DC v Beyer [1977] I.R.L.R. 211; Marley Tile Co Ltd v Shaw [1980] I.C.R. 72, CA*.

1693 s.152(1)(c). Employment Protection (Consolidation) Act 1978 s.58(3)–(12), which created an important exception in relation to union membership agreements, were repealed by s.11 of the Employment Act 1988.

1694 cf. above, para.42-128.

1695 s.154. See above, para.42-256. See also *Goodwin (H) Ltd v Fitzmaurice [1977] I.R.L.R. 393; Smith v Hayle Town Council [1978] I.R.L.R. 413*.

1696 See above, paras 42-118—42-119.

1697 s.156.

1698 ss.161–163 (see below, para.42-249). See *London City Airport Ltd v Chacko [2013] I.R.L.R. 610, EAT*.

1699 ss.164–166 (see below, para.42-249).

1700 See above, para.42-228 and *Heath v JF Longman (Meat Salesman) Ltd [1973] I.C.R. 407*.

1701 The terminology is not statutorily defined. See *Express & Star Ltd v Bunday [1988] I.C.R. 379*.

1702 There is no statutory definition, for this purpose, of “strike or other industrial action”. See *Power Packing Casemakers Ltd v Faust [1983] I.C.R. 292*.

1703 i.e. Employment Rights Act 1996 ss.98, 104, 105.

1704 Trade Union and Labour Relations (Consolidation) Act 1992 ss.237–238.

1705 s.238(1), (2).

1706 s.238(2)(a).

1707 s.238(2)(b).

1708 s.238(3)(a).

1709 s.238(3)(b).

1710 s.237(1), subject to s.237(1A) which lifts that exclusion in relation to certain specified grounds of dismissal (or selection for redundancy).

1711 i.e. in the case referred to in s.238(2)(b) and which fall outside the exclusion relating to unofficial industrial action which is imposed by s.237(1).

1712 s.239(3).

1713 i.e. in the cases referred to in s.238(2)(a) and (b).

1714 See above, para.42-235.

1715 s.16 and Sch.5.

1716 s.238A. The provisions of s.238A of the 1992 Act concerning “protected industrial action” have been amended by the Employment Relations Act 2004. The 2004 Act ss.27–28, which, by amending s.238A and adding a new s.238B to the 1992 Act, increase the protections against the dismissal of employees taking official lawfully organised industrial action by extending the “protected period” from 8 to 12 weeks, by exempting days of lock-out from

the 12-week protected period, and also defining more closely the actions which employers and unions should undertake by way of recourse to conciliation and mediation with regard to “protected industrial action”. These provisions were brought into effect on 6 April 2005.

- 1717 As defined by s.139(1), (2) of Employment Rights Act 1996, see below, para.42-258, a definition adopted for the purposes of the unfair dismissal legislation by s.235(3) of Employment Rights Act 1996. See *Elliott v University Computing Co (Great Britain) Ltd [1977] I.C.R. 147; Higgs & Hill Ltd v Singh [1977] I.C.R. 193; Robinson v British Island Airways Ltd [1978] I.C.R. 304*.
- 1718 Employment Rights Act 1996 s.98(2)—see above, para.42-231.
- 1719 See below, paras 42-255 et seq.
- 1720 Employment Rights Act 1996 s.105, Trade Union and Labour Relations (Consolidation) Act 1992 s.153.
- 1721 Employment Rights Act 1996 s.105(1)–(3), (7); see below, paras 42-238—42-244.
- 1722 Trade Union and Labour Relations (Consolidation) Act 1992 s.153, referring to s.152(1).
- 1723 Employment Rights Act 1996 s.98(4)–(6); see, as to the early and leading authorities, *Axe v British Domestic Appliances Ltd [1973] I.C.R. 133; Clarkson International Tools Ltd v Short [1973] I.C.R. 191; Rigby v British Steel Corp [1973] I.C.R. 160; Vokes Ltd v Bear [1974] I.C.R. 1; Bessenden Properties Ltd v Corness [1977] I.C.R. 821* (Note); *Cruikshank v Hobbs [1977] I.C.R. 725; Bristol Channel Ship Repairers Ltd v O'Keefe [1978] I.C.R. 691; Vickers Ltd v Smith [1977] I.R.L.R. 11; Moon v Homeworthy Furniture (Northern) Ltd [1977] I.C.R. 117; Kelly v Upholstery & Cabinet Works (Amesbury) Ltd [1977] I.R.L.R. 91; North East Midlands Co-operative Society Ltd v Allen [1977] I.R.L.R. 212; Forman Construction v Kelly [1977] I.R.L.R. 468; Cox v Wildt Mellor Bromley Ltd [1978] I.C.R. 736; Thomas & Betts Manufacturing Co Ltd v Harding [1978] I.R.L.R. 213; Jowett v Earl of Bradford (No.2) [1978] I.C.R. 431; NC Watling & Co Ltd v Richardson [1978] I.C.R. 1049; Clyde Pipeworks Ltd v Foster [1978] I.R.L.R. 313; Williams v Compair Maxam Ltd [1982] I.C.R. 156; Polkey v Dayton Services Ltd [1988] I.C.R. 142*.
- 1724 Employment Rights Act 1996 s.163(2) expressly excluded from unfair dismissal issues by s.7(6) of Employment Tribunals Act 1996.
- 1725 *Midland Foot Comfort Centre Ltd v Moppett [1973] I.C.R. 220*.
- 1726 Employment Rights Act 1996 s.122.
- 1727 Compare above, para.42-181.
- 1728 Employment Rights Act 1996 s.108(3) and s.109(2).
- 1729 See above, para.42-221.
- 1730 Employment Rights Act 1996 s.100. On the application of this section in the context of the Covid-19 pandemic, see *Rodgers v Leeds Laser Cutting Ltd [2022] EAT 69*.
- 1731 Employment Rights Act 1996 s.104(4). See, for the scope of this provision, *Menell v Newell and Wright Transport Contractors Ltd [1997] I.C.R. 1039*.
- 1732 See above, para.42-158.
- 1733 See Employment Rights Act 1996 s.103A as inserted by s.5 of the 1998 Act.

- 1734 See [Employment Rights Act 1996 s.101](#), and, for the provisions identifying protected and opted-out shop and betting workers, [Employment Rights Act 1996 s.41](#). For the effect of opting-out notices upon contracts of employment, see [s.42](#).
- 1735 See above, para.42-149.
- 1736 [s.9](#) and [Sch.4 Pt III](#).
- 1737 Maternity and Parental Leave Etc Regulations 1999 (SI 1999/3312) reg.20.
- 1738 Paternity and Adoption Leave Regulations 2002 (SI 2002/2788) reg.29.
- 1739 [Employment Rights Act 1996 s.104C](#) (as inserted by [s.47\(1\), \(4\) of the Employment Act 2002](#)) (though no corresponding extension appears to have been made to [s.105](#) with regard to selection for redundancy).

(iv) - Remedies

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 8. - Unfair and Discriminatory Dismissal

(a) - Unfair Dismissal

(iv) - Remedies

Introduction

- 42-243 Under the unfair dismissal provisions of the [Industrial Relations Act 1971](#) and of the [Trade Union and Labour Relations Act 1974](#), the normal remedy for unfair dismissal tended to be the award of compensation by an industrial tribunal based upon the pecuniary loss sustained by the employee.¹⁷⁴⁰ The tribunals were also empowered to recommend reinstatement or re-engagement where they judged it practicable for the employer to do so.¹⁷⁴¹ The provisions of the [Trade Union and Labour Relations Act 1974](#) concerning remedies for unfair dismissal were replaced by a new set of provisions in the [Employment Protection Act 1975](#).¹⁷⁴² Under the new provisions, as re-enacted in the [1978 Act](#),¹⁷⁴³ and then in the [1996 Act](#), employment tribunals are empowered to order reinstatement or re-engagement and have extensive ancillary powers in relation to those orders.¹⁷⁴⁴ The remedy of compensation is to consist of a basic award as well as a compensation award.¹⁷⁴⁵ Finally, the tribunals are given extensive powers of interim relief in cases concerning trade union membership, non-membership or activity and in certain cases concerning health and safety.¹⁷⁴⁶

Orders for reinstatement

- 42-244 Where an employment tribunal upholds a complaint of unfair dismissal, it must explain to the complainant what orders of reinstatement or re-engagement it can make and must ask the

complainant whether he or she wishes for such an order.¹⁷⁴⁷ An order may be made if (but only if) the complainant expresses that wish,¹⁷⁴⁸ and may within the discretion of the tribunal be either for reinstatement or re-engagement.¹⁷⁴⁹ In exercising that discretion, the tribunal must first consider reinstatement,¹⁷⁵⁰ taking into account the issues of whether the complainant wishes for reinstatement,¹⁷⁵¹ whether compliance would be practicable for the employer¹⁷⁵² and whether an order for reinstatement would be just in view of the employee's contribution to causing the dismissal.¹⁷⁵³ In considering the issue of practicability of compliance, the tribunal must exclude the difficulty caused by the engagement of a permanent replacement for the dismissed employee unless the employer shows that this was the only way he or she could arrange for the work to be done, or that he or she engaged the replacement after the lapse of a reasonable period without having heard from the dismissed employee that he or she wished to be reinstated or re-engaged and that a permanent replacement had become the only reasonable alternative.¹⁷⁵⁴ The reinstatement order is an order to treat the complainant in all respects as if he or she had not been dismissed¹⁷⁵⁵; the order must specify any amount payable by the employer for benefits (including remuneration) the employee would have received in the interim period,¹⁷⁵⁶ and any rights and privileges, including seniority and pension rights, to be restored to the employee,¹⁷⁵⁷ and the date by which the order must be complied with.¹⁷⁵⁸ The order must also require the employee to be treated as if he or she had benefited from an improvement in his or her terms and conditions of employment which he or she would have enjoyed if he or she had not been dismissed.¹⁷⁵⁹ This will certainly include pay awards occurring between dismissal and reinstatement; it is a matter of interpretation whether it includes the results of a promotion which would have occurred.

Orders for re-engagement

42-245 Where an employment tribunal, having followed the procedure described in the previous paragraph, decides not to make an order for reinstatement, it must consider whether to make an order for re-engagement and on what terms.¹⁷⁶⁰ It must take into account any wish of the complainant as to the nature of the order,¹⁷⁶¹ whether compliance is practicable for the employer or a successor or associated employer,¹⁷⁶²

U and whether an order would be just, and if so on what terms, in view of any contribution by the complainant to causing the dismissal.¹⁷⁶³ The order for re-engagement is an order for the complainant to be engaged by the employer, or by a successor or by an associated employer in some suitable employment.¹⁷⁶⁴ The order may be on such terms as the tribunal decides¹⁷⁶⁵ provided that the re-engagement must be on terms which are, so far as reasonable practicable,¹⁷⁶⁶ as favourable

as an order for reinstatement.¹⁷⁶⁷ The order must specify the identity of the employer,¹⁷⁶⁸ the nature of and remuneration for the employment,¹⁷⁶⁹ the amount payable in respect of benefits, including arrears of pay, lost in the interim period,¹⁷⁷⁰ and any seniority or pension rights to be restored to the employee.¹⁷⁷¹ The tribunals are thus given a very flexible power to achieve the effects of reinstatement in a case where reinstatement is not itself possible or appropriate.

Enforcement of orders for reinstatement or re-engagement

- 42-246 If an order is made for reinstatement or re-engagement and the employee is reinstated or re-engaged, but the terms of the order are not fully complied with, an employment tribunal must make an award of compensation for the loss sustained by the employee in consequence of the failure to comply with the order.¹⁷⁷² If there is no reinstatement or re-engagement in compliance with the order, the tribunal must make an ordinary award of compensation for unfair dismissal.¹⁷⁷³ They may also be under a duty to make an additional award (for the failure to comply with the order).¹⁷⁷⁴ This award must be between 26 and 52 weeks' pay.¹⁷⁷⁵ The additional award (normal or higher as the case may be) must be made unless the employer satisfies the tribunal that it was not practicable to comply with the order.¹⁷⁷⁶ This would seem to enable the employer to show that it has not turned out to be practicable to comply, rather than enabling him or her to reopen the question of whether the order should have been made in the first place. If the complainant himself or herself unreasonably prevents compliance with an order, his or her award of compensation will be reduced by reference to this failure to mitigate his or her loss by allowing the order to be complied with.¹⁷⁷⁷ In general, then, non-compliance with orders for reinstatement or re-engagement attracts the remedy of compensation¹⁷⁷⁸ which may be enhanced by way of penalty for non-compliance; there is, however, no enforcement by way of general sanctions for contempt of court.

Compensation for unfair dismissal; the basic award

- 42-247 Under the [Employment Rights Act 1996](#), an award of compensation for unfair dismissal must be made in any case where a complaint of unfair dismissal is upheld but no order for reinstatement or re-engagement is made.¹⁷⁷⁹ The compensation must consist of a basic award and a compensatory award.¹⁷⁸⁰ The basic award provides a fixed element of compensation for the employee's loss of his accrued rights and protection. It is initially calculated in virtually the same way as a statutory redundancy payment,¹⁷⁸¹ that is to say, it allows one and a half weeks' pay for each year of continuous employment over the age of 41, one week's pay for each such year between 22 and 40 and half a week's pay for each such year up to the age of 22.¹⁷⁸² The calculation is limited to the last 20 years of employment¹⁷⁸³ and to a week's pay not exceeding a stated limit.¹⁷⁸⁴ The basic

award is limited to two weeks' pay in certain redundancy situations where no statutory redundancy payment is payable.¹⁷⁸⁵ There is also provision for the reduction of the basic award,¹⁷⁸⁶ whether or by reference to an unreasonable refusal by the employee to accept an offer of reinstatement by the employer¹⁷⁸⁷; or by reference to any conduct of the employee before the dismissal making it just and equitable to do so.¹⁷⁸⁸

Compensation for unfair dismissal; the compensatory award

- 42-248 Under the [Employment Rights Act 1996](#), compensation for unfair dismissal must include, in addition to the basic award,¹⁷⁸⁹ a compensatory award¹⁷⁹⁰ assessed by reference to the loss sustained by the employee in consequence of the dismissal¹⁷⁹¹ and attributable to action taken by the employer.¹⁷⁹² The loss is ascertained subject to the common law rule concerning the employee's duty to mitigate his or her loss.¹⁷⁹³ The compensatory award is a modified version of the awards of compensation for unfair dismissal made under the earlier legislation,¹⁷⁹⁴ modified by limiting the loss attributable to loss of statutory redundancy rights to the amount by which an immediate or subsequent redundancy payment might have exceeded the basic award¹⁷⁹⁵; and on the other hand by reducing the compensation award by the amount by which a redundancy payment made by the employer in fact exceeds the basic award.¹⁷⁹⁶ These modifications are designed to ensure that the compensatory award will deal only with the marginal differences between the basic award and the employee's actual or potential redundancy rights or redundancy payments received. This suggests that the cases concerning the assessment of compensation under the old law of remedies for unfair dismissal¹⁷⁹⁷ are still applicable,¹⁷⁹⁸ except so far as they are concerned with the relationship between unfair dismissal compensation and redundancy rights and payments.¹⁷⁹⁹ That suggests that compensatory awards will be concerned with loss of future earnings,¹⁸⁰⁰ loss of pension rights,¹⁸⁰¹ loss of rights based on continuity of service,¹⁸⁰² pecuniary loss attributable to the manner of dismissal,¹⁸⁰³ and possibly also loss of death-in-service benefits.¹⁸⁰⁴ It is unclear how far a compensatory award is to be reduced by reference to damages for wrongful dismissal¹⁸⁰⁵ recovered at common law in respect of the same dismissal. An argument based upon the principle of collateral benefits might result in such a reduction.¹⁸⁰⁶ There was some authority for regarding the employee as having suffered no reckonable loss when the unfairness of the dismissal consisted in a procedural defect and when it is judged that the employee would still have been dismissed had the procedure been fair.¹⁸⁰⁷ However, the subsequent preference has clearly been¹⁸⁰⁸ to treat such issues as going to the reduction of compensation by reference to the contributory action of the employee, for which provision is made in relation to the compensatory¹⁸⁰⁹ award. Those provisions are considered in the following paragraph. Provision was also made by [s.3 of the Employment Act 2008](#) for the compensatory award to be reduced or increased by reference to non-compliance with a statutory code of practice

concerning disciplinary and grievance procedures.¹⁸¹⁰ A compensatory award is normally subject to a stated upper limit,¹⁸¹¹ the limit being applied after any reduction by reference to the fault of the employee.¹⁸¹² Section 16 of the Enterprise and Regulatory Reform Act 2013 confers an additional power on employment tribunals to impose financial penalties on employers where the tribunal concludes that the employer has breached a worker's right, and that the breach has one or more aggravating factors.¹⁸¹³

Reduction of compensation by reference to the contributory action of the employee

- 42-249 Under the Employment Rights Act 1996 it is provided that where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of a compensatory¹⁸¹⁴ award by such proportion as it considers just and equitable having regard to that finding. The corresponding provisions in the earlier legislation¹⁸¹⁵ gave rise to controversy about their application, especially in cases of procedural unfairness,¹⁸¹⁶ but this difficulty seems not to arise under the new provisions, referring as they do to any contribution by the employee to the dismissal itself (and not just to the reasons for its unfairness).¹⁸¹⁷ The early case law suggests that this gives tribunals a very wide discretion to consider any relevant conduct on the part of the employee,¹⁸¹⁸ and to reduce the compensation by proportions of up to 100 per cent,¹⁸¹⁹ though the assessment becomes more questionable as it comes near to 100 per cent.¹⁸²⁰

Interim relief in cases concerned with trade union rights or health and safety

- 42-250 An employee who presents a complaint to an employment tribunal that he or she has been unfairly dismissed on the grounds of his membership of or taking part in the activities of an independent trade union (or his intention to join or take part) or of his or her non-membership or refusal to become or remain a member of a trade union, or in one of the statutorily defined health and safety cases, may apply to the tribunal for interim relief pending the determination of the complaint.¹⁸²¹ He or she must complain within seven days of the effective date of termination of employment¹⁸²² and must, in a claim relating to trade union membership or activity, present a supporting written certificate from an authorised official of the independent trade union concerned.¹⁸²³ If when it hears the application for interim relief the tribunal finds it likely that the complaint will ultimately be upheld, the tribunal must make an interim order of reinstatement or re-engagement if the employer is willing for such an order and, if it is for re-engagement, the employee is also

willing.¹⁸²⁴ If the employer is not willing, the tribunal must make an order for the continuation of the contract of employment.¹⁸²⁵ This is in effect an order continuing or reviving the contract of employment pending the hearing of the complaint, but only for the purpose of maintaining the employee's rights to remuneration and preserving his or her rights based upon the continuity of his or her employment.¹⁸²⁶ It is thus not meant to require the employer to keep the employee actually at work, and is apparently not dependent for its effectiveness upon the employee's making himself or herself available for work.¹⁸²⁷ An employee or employer can apply to a tribunal for a variation or revocation of an order for interim relief where there has been a change of circumstances since the order was made.¹⁸²⁸ The tribunal must also make an order for compensation if the employer has failed to comply with the terms of an interim order for reinstatement or re-engagement, or of an order for the continuation of the contract of employment, and it must convert the former type of order into the latter type where the former type of order is not complied with.¹⁸²⁹

Procedure; time within which complaint must be made

42-251 The details of the procedure relating to complaints to employment tribunals under the unfair dismissal provisions¹⁸³⁰ are outside the scope of the present work, but attention is drawn to the provisions concerning the time within which complaint must be made. It is provided that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination or within such further period as the tribunal considers reasonable in a case where it was satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.¹⁸³¹ A body of case law exists concerning the concept of "practicability"¹⁸³² but it is to be borne in mind that the initial cases were concerned with the earlier provision made under the **Industrial Relations Act 1971** which took four weeks instead of three months, as the basic period of limitation. Provision was first made by the **Employment Protection Act 1975** (and now found in the **1996 Act**) to enable a complaint to be brought before a dismissal takes effect, once notice of dismissal has been given,¹⁸³³ thus reversing by statute an earlier judicial ruling.¹⁸³⁴

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

- 1740 Trade Union and Labour Relations Act 1974 Sch.1 para.17(3)—see generally *Norton Tool Co Ltd v Tewson* [1972] I.C.R. 501.
- 1741 Trade Union and Labour Relations Act 1974 Sch.1 para.17(2).
- 1742 ss.71–80.
- 1743 ss.68–79.
- 1744 Employment Rights Act 1996 ss.112–117: see below, paras 42-244—42-247. See now generally *McBride v Scottish Police Authority* [2016] UKSC 27, [2016] I.R.L.R. 633.
- 1745 Employment Rights Act 1996 s.118(2). Further provisions for “special awards” were repealed by the Employment Relations Act 1999 ss.33, 44 and Sch.9.
- 1746 See below, para.42-249.
- 1747 Employment Rights Act 1996 s.112(1), (2).
- 1748 Employment Rights Act 1996 s.112(3).
- 1749 Employment Rights Act 1996 s.113. As to the difference between reinstatement and re-engagement, see *British Airways Plc v Valencia* [2014] I.R.L.R. 683, EAT.
- 1750 Employment Rights Act 1996 s.116(1).
- 1751 Employment Rights Act 1996 s.116(1)(a).
- 1752 Employment Rights Act 1996 s.116(1)(b). See, for early authorities on the issue of practicability: *Curtis v James Paterson (Darlington) Ltd* [1973] I.C.R. 496; *Bateman v British Leyland (UK) Ltd* [1974] I.C.R. 403; *Coleman v Magnet Joinery Ltd* [1975] I.C.R. 46. But these decisions on the corresponding provisions of the 1974 Act may be of limited weight in the interpretation of the more recent provisions. See also *Meridian Ltd v Gomersall* [1977] I.C.R. 597.
- 1753 Employment Rights Act 1996 s.116(1)(c). cf. below, para.42-248—contribution to compensation.
- 1754 Employment Rights Act 1996 s.116(5), (6).
- 1755 Employment Rights Act 1996 s.114(1). See *McBride v Scottish Police Authority* [2016] UKSC 27, [2016] I.R.L.R. 633.
- 1756 Employment Rights Act 1996 s.114(2)(a), subject to s.114(4) of Employment Rights Act 1996 (reduction of employer’s liability by reference to remuneration or payment in lieu of notice or ex gratia payments).
- 1757 Employment Rights Act 1996 s.114(2)(b).
- 1758 Employment Rights Act 1996 s.114(2)(c).
- 1759 Employment Rights Act 1996 s.114(3).
- 1760 Employment Rights Act 1996 s.116(2)–(4).
- 1761 Employment Rights Act 1996 s.116(3)(a).
- ① 1762 Employment Rights Act 1996 s.116(3)(b), subject to s.116(5) of Employment Rights Act 1996 (effect of engagement of permanent replacement). On the correct application of these factors, see *Kelly v PGA European Tour* [2021] EWCA Civ 559, [2021] I.C.R. 1124.
- 1763 Employment Rights Act 1996 s.116(3)(c) (cf. below, para.42-248—contribution to the dismissal as a ground for reducing compensation).
- 1764 Employment Rights Act 1996 s.115(1).
- 1765 Employment Rights Act 1996 s.115(1).

- 1766 For a detailed discussion of the meaning of “practicability” in this context, see *Davies v DL Insurance Services Ltd [2020] I.R.L.R. 490, EAT*.
- 1767 Employment Rights Act 1996 s.116(4) (except where the tribunal takes into account contributory fault under s.116(3)(c)).
- 1768 Employment Rights Act 1996 s.115(2)(a).
- 1769 Employment Rights Act 1996 s.115(2)(b), (c).
- 1770 Employment Rights Act 1996 s.115(2)(d) calculated according to s.115(3) of Employment Rights Act 1996.
- 1771 Employment Rights Act 1996 s.115(2)(e).
- 1772 Employment Rights Act 1996 ss.117(1) and 124(3).
- 1773 Employment Rights Act 1996 s.117(3)(a)—see below, paras 42-247—42-249.
- 1774 Employment Rights Act 1996 ss.117(3)(b), 117(4)(a).
- 1775 Employment Rights Act 1996 s.117(3)(b).
- 1776 Employment Rights Act 1996 s.117(3)(b) and s.117(4)(a) as qualified by s.117(7) of Employment Rights Act 1996 in the case where the employer has engaged a permanent replacement.
- 1777 Employment Rights Act 1996 s.117(8).
- 1778 For an illustration of the additional award under the Employment Rights Act 1996 s.117, see *R. (on the application of Mackenzie) v University of Cambridge [2019] EWCA Civ 1060, [2019] 4 All E.R. 289*.
- 1779 Employment Rights Act 1996 s.112(4).
- 1780 Employment Rights Act 1996 s.118(1).
- 1781 See below, para.42-260.
- 1782 Employment Rights Act 1996 s.119(2). The lower age limit, which had previously applied, was, so far as it had continued to be applicable, abolished with effect from 1 October 2006 by the Employment Equality (Age) Regulations 2006 (SI 2006/1031) Sch.8 para.35. See also below, paras 42-179, 42-260. The period of continuous employment is calculated in accordance with ss.210–219 of Employment Rights Act 1996, see above, paras 42-169—42-172 applied subject to s.119(3) of Employment Rights Act 1996. The “week’s pay” is calculated in accordance with ss.220–229 of Employment Rights Act 1996. See *Palmanor v Cedron [1978] I.C.R. 1008*.
- 1783 Employment Rights Act 1996 s.119(3).
- 1784 Employment Rights Act 1996 s.227(1). The stated limit is periodically adjusted by statutory instrument.
- 1785 Employment Rights Act 1996 s.121.
- 1786 Employment Rights Act 1996 s.122.
- 1787 Employment Rights Act 1996 s.122(1).
- 1788 Employment Rights Act 1996 s.122(2), in order to overcome a problem of unjust enrichment commented upon by the House of Lords in *Devis & Sons Ltd v Atkins [1977] I.C.R. 662, 672, 684, 685*.
- 1789 See above, para.42-247.
- 1790 Employment Rights Act 1996 s.118 referring to ss.123, 124, 124A, 126, 127 of Employment Rights Act 1996.

- 1791 Employment Rights Act 1996 s.123(1) as qualified by s.123(2) of Employment Rights Act 1996. See *W Devis & Sons Ltd v Atkins* [1977] A.C. 931; *Lifeguard Assurance Ltd v Zadrozny* [1977] I.R.L.R. 56; *Trend v Chiltern Hunt Ltd* [1977] I.C.R. 612; *Brittains Arborfield Ltd v Van Uden* [1977] I.C.R. 211; *DG Moncrieff (Farmers) v Macdonald* [1978] I.R.L.R. 112; *Help the Aged Housing Association (Scotland) Ltd v Vidler* [1977] I.R.L.R. 104.
- 1792 Employment Rights Act 1996 s.123(1) as qualified by s.123(5) of Employment Rights Act 1996 (exclusion of effect of pressure on employer by the organising of industrial action).
- 1793 Employment Rights Act 1996 s.123(4). See *Smith Kline & French Laboratories Ltd v Coates* [1977] I.R.L.R. 220; *Peara v Enderlin Ltd* [1980] I.C.R. 804.
- 1794 See Trade Union and Labour Relations Act 1974 Sch.1 paras 17(3), 19.
- 1795 Employment Rights Act 1996 s.123(3).
- 1796 Employment Rights Act 1996 s.123(7).
- 1797 See above, para.42-221.
- 1798 The leading case was *Norton Tool Co Ltd v Tewson* [1972] I.C.R. 501 The principle in the *Norton Tool* case was upheld on the appeal to the House of Lords in *Dunnachie v Kingston-upon-Hull City Council* [2004] UKHL 36.
- 1799 A statement of the law in that particular area being found in *Millington v Goodwin Ltd* [1975] I.C.R. 104.
- 1800 See *Donnelly v Feniger & Blackburn Ltd* [1973] I.C.R. 68; *York Trailer Co Ltd v Sparkes* [1973] I.C.R. 518; *British Olivetti Ltd v Kay* [1975] I.R.L.R. 29; *Shortland v Chantrill* [1975] I.R.L.R. 208; see also on the effect of payment in lieu of notice: *Cawthorn & Sinclair Ltd v Hedger* [1974] I.C.R. 146; *Everwear Candlewick Ltd v Isaac* [1974] I.C.R. 525; *Mullett v Brush Electrical Machines Ltd* [1977] I.C.R. 829; *Youngs of Gosport Ltd v Kendall* [1977] I.C.R. 907; *Green v J Waterhouse & Sons Ltd* [1977] I.C.R. 759; *Tidman v Aveling Marshall Ltd* [1977] I.C.R. 506; *Brownson v Hire Service Shops Ltd* [1978] I.C.R. 517; *Palmanor Ltd v Cedron* [1978] I.C.R. 1008. Compare also *GAB Robins (UK) Ltd v Triggs* [2008] EWCA Civ 17, [2008] I.R.L.R. 317, deciding that this did not include loss of earnings attributable to incapacity brought about by repudiatory conduct on the part of the employer amounting to, and treated by the employee as, constructive dismissal.
- 1801 See *Copson v Eversure Accessories Ltd* [1974] I.C.R. 636; *Smith Kline & French Laboratories Ltd v Coates* [1977] I.R.L.R. 220; *Hill v Sabco Houseware (UK) Ltd* [1977] I.C.R. 888; *Powermatic Ltd v Bull* [1977] I.C.R. 469; *Sweetlove v Redbridge AHA* [1979] I.C.R. 477; *Willment Bros v Oliver* [1979] I.C.R. 378; *Sturdy Finance v Bardsley* [1979] I.C.R. 249; *Manning v Wale (Export) Ltd* [1979] I.C.R. 433; and *Griffin v Plymouth Hospital NHS Trust* [2014] EWCA Civ, [2014] I.R.L.R. 962.
- 1802 See *Brook Bros Ltd v Preece* [1974] I.C.R. 231; *Hilti (Great Britain) Ltd v Windridge* [1974] I.C.R. 352. These matters might, however, be regarded as subsumed into the basic award of compensation.
- 1803 See *Vaughan v Weighpack Ltd* [1974] I.C.R. 525.
- 1804 See *Fox v British Airways Plc* [2013] EWCA Civ 972, [2013] I.C.R. 1257.
- 1805 See above, paras 42-206—42-212.
- 1806 cf. *Stocks v Magna Merchants Ltd* [1973] I.C.R. 530 (common law)—see above, para.42-212. Contrast *Basnett v J & A Jackson Ltd* [1976] I.C.R. 63.

- 1807 *Earl v Slater Wheeler (Airlyne) Ltd* [1972] I.C.R. 508; *British United Shoe Machines Co Ltd v Clarke* [1978] I.C.R. 70; *Barley v Amey Roadstone Corp (No.2)* [1978] I.C.R. 190.
- 1808 Compare, for instance, *Smyth v Autocar Transporters Ltd* [1975] I.C.R. 180 and see generally, below, para.42-248.
- 1809 Employment Rights Act 1996 s.123(6).
- 1810 Amending s.124A of the Employment Rights Act 1996; see below, para.42-270.
- 1811 Employment Rights Act 1996 s.124(1), subject to s.124(1A), (3)-(4), and to s.124A as inserted by s.39 of the Employment Act 2002, and as varied by statutory instrument from time to time.
- 1812 Employment Rights Act 1996 s.124(5).
- 1813 By inserting a new s.12A into the Employment Tribunals Act 1996.
- 1814 Employment Rights Act 1996 s.123(6).
- 1815 Trade Union and Labour Relations Act 1974 Sch.1 para.19(3), reproducing Industrial Relations Act 1971 s.116(3).
- 1816 See, for instance, *Springbank Sand & Gravel Co Ltd v Craig* [1974] I.C.R. 7; *Maris v Rotherham Corp* [1974] I.C.R. 435.
- 1817 The earlier legislation, see above, caused the controversy concerned by requiring the employee's contribution to be to "the matters to which the complaint relates". See *Nudds v W & JB Eastwood Ltd* [1978] I.C.R. 171.
- 1818 *Shortland v Chantrill* [1975] I.R.L.R. 208; *Jamieson v Aberdeen CC* [1975] I.R.L.R. 348, Ct of Session; *George Wimpey & Co Ltd v Cooper* [1977] I.R.L.R. 205; *Garner v Grange Furnishing Ltd* [1977] I.R.L.R. 206; *Kraft Foods Ltd v Fox* [1978] I.C.R. 311; *Hazells Offset Ltd v Luckett* [1977] I.R.L.R. 430; *Ladbroke Racing Ltd v Mason* [1978] I.C.R. 49; *DG Moncrieff (Farmers) v Macdonald* [1978] I.R.L.R. 112; *Brown's Cycles Ltd v Brindley* [1978] I.C.R. 467; *Moncur v International Paint Co Ltd* [1978] I.R.L.R. 223. Compare now also *Cumbria CC v Bates* [2014] UKEAT 0039/13/JOJ (post-termination conduct).
- 1819 *Smyth v Autocar Transporters Ltd* [1975] I.C.R. 180. See also *Courtney v Babcock & Wilcox (Operations) Ltd* [1977] I.R.L.R. 30; contra, *Kemp v Shipton Automation Ltd* [1976] I.R.L.R. 305.
- 1820 *Cooper v British Steel Corp* [1975] I.C.R. 454; and *Trend v Chiltern Hunt Ltd* [1977] I.C.R. 612.
- 1821 Trade Union and Labour Relations (Consolidation) Act 1992 s.161; Employment Rights Act 1996 s.128(1). See *Barley v Amey Roadstone Co Ltd (No.2)* [1978] I.C.R. 190.
- 1822 Trade Union and Labour Relations (Consolidation) Act 1992 s.161(2); Employment Rights Act 1996 s.128(2). As to the "effective date of termination of employment", see above, paras 42-228—42-229.
- 1823 Trade Union and Labour Relations (Consolidation) Act 1992 s.161(3). See *Stone v Charrington & Co Ltd* [1977] I.C.R. 248.
- 1824 Trade Union and Labour Relations (Consolidation) Act 1992 s.163(4)–(6); Employment Rights Act 1996 s.129(5)–(7).
- 1825 Trade Union and Labour Relations (Consolidation) Act 1992 s.163(6); Employment Rights Act 1996 s.129(9).

- 1826 Trade Union and Labour Relations (Consolidation) Act 1992 s.164; Employment Rights Act 1996 s.130.
- 1827 This appears to be the effect of s.164(2). Employment Rights Act 1996 s.130(2).
- 1828 Trade Union and Labour Relations (Consolidation) Act 1992 s.165; Employment Rights Act 1996 s.131.
- 1829 Trade Union and Labour Relations (Consolidation) Act 1992 s.166; Employment Rights Act 1996 s.132.
- 1830 The procedural rules are contained in ss.6–15 of Employment Tribunals Act 1996 (As renamed by the Employment Rights (Dispute Resolution) Act 1998) and in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237) as from time-to-time revised and amended.
- 1831 Employment Rights Act 1996 s.111(2).
- 1832 See among the earlier cases, *Hammond v Haigh Castle & Co Ltd* [1973] I.C.R. 148; *Singh v Post Office* [1973] I.C.R. 437; *Westward Circuits Ltd v Read* [1973] I.C.R. 301; *Leigh v James Arnold Ltd* [1973] I.T.R. 364; *Dedman v British Building Appliances Ltd* [1974] I.C.R. 53; *Porter v Bandridge Ltd* [1974] I.C.R. 943; *Walls Meat Co Ltd v Khan* [1979] I.C.R. 52; *Riley v Tesco Stores Ltd* [1980] I.C.R. 323. *Palmer v Southend-on-Sea BC* [1984] 1 All E.R. 945.
- 1833 Employment Rights Act 1996 s.111(3), (4).
- 1834 *Penrose v Fairey Surveys Ltd* [1973] I.C.R. 26.

(b) - Discriminatory and Victimising Dismissals

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 8. - Unfair and Discriminatory Dismissal

(b) - Discriminatory and Victimising Dismissals

Introduction

42-252 Apart from the unfair dismissals legislation, there have been various other sets of legislative provisions dealing with particular kinds of discriminatory and victimising dismissals, major instances of which have been: (1) the Sex Discrimination Acts 1975 and 1986; (2) the Race Relations Act 1976; (3) the Rehabilitation of Offenders Act 1974; (4) the Disability Discrimination Act 1995; (5) the Employment Equality (Religion or Belief) Regulations, the Employment Equality (Sexual Orientation) Regulations 2003, and the Employment Equality (Age) Regulations 2006.¹⁸³⁵ Most of these provisions have been consolidated into the Equality Act 2010; the provisions in question are briefly summarised in the ensuing paragraphs.

Dismissals unlawful under the Equality Act 2010

42-253 Under the relevant provisions of the Equality Act 2010, the dismissal of an employee by an employer is unlawful if it is discriminatory¹⁸³⁶ in the defined sense that it involves direct¹⁸³⁷ or indirect¹⁸³⁸ discrimination by reference to one or a combination of¹⁸³⁹ a specified set of “protected characteristics”¹⁸⁴⁰ consisting of age,¹⁸⁴¹ disability,¹⁸⁴² gender reassignment,¹⁸⁴³ marriage or civil partnership,¹⁸⁴⁴ pregnancy and maternity,¹⁸⁴⁵ race,¹⁸⁴⁶ religion or belief,
¹⁸⁴⁷

U sex,¹⁸⁴⁸ and sexual orientation.¹⁸⁴⁹ Under further provisions of the same Act, the dismissal of an employee by an employer is also unlawful if it constitutes victimisation¹⁸⁵⁰ in the defined sense that it takes place because the employee does a “protected act”, or because the employer believes that the employee has done or may do such an act,¹⁸⁵¹ defined as consisting of, inter alia, the bringing of proceedings under the Act or the taking of steps in connection with such proceedings, or otherwise the alleging of contravention of the Act.¹⁸⁵² A dismissal¹⁸⁵³ which is unlawful under the provisions of the Act may be the subject of a complaint to an employment tribunal¹⁸⁵⁴ which, if it upholds the complaint, may make an order declaring the rights of the parties,¹⁸⁵⁵ an order for the payment of compensation,¹⁸⁵⁶ formerly but no longer limited in the same way as compensation for unfair dismissal, or a recommendation that a particular course of action be taken by the respondent,¹⁸⁵⁷ presumably including a recommendation for reinstatement or re-engagement.¹⁸⁵⁸ There are provisions to prevent double compensation under this Act and the unfair dismissal provisions in respect of the same dismissal.¹⁸⁵⁹ The definition of discrimination rendered unlawful by this Act, and the scope of and exceptions to its employment provisions have been considered in earlier paragraphs¹⁸⁶⁰ in relation to unlawful discrimination occurring during the period of employment.

Dismissals affected by the Rehabilitation of Offenders Act 1974

42-254 It is provided by the **Rehabilitation of Offenders Act 1974**¹⁸⁶¹ that a conviction which has become spent,¹⁸⁶² or any circumstances ancillary thereto,¹⁸⁶³ or any failure to disclose a spent conviction or any such circumstances shall not be a proper ground for dismissing a person from any office, profession, occupation or employment.¹⁸⁶⁴ There is no machinery provided for the enforcement of that provision, so it can have effect only as a qualification upon rights of summary dismissal arising at common law¹⁸⁶⁵ or as a factor tending to show the unfairness of a dismissal.¹⁸⁶⁶

Footnotes

1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

1835 Respectively **SI 2003/1660**, **SI 2003/1661** and **SI 2006/1031**, all of which were enacted in implementation of Directive 2000/78/EC.

1836 s.39(2)(c).

1837 s.13.

1838 s.19.

1839 s.14.

1840 s.4.

1841 s.5; as to which it should specially be noted that it is provided that dismissal because of age is not discriminatory if the employer shows that it is a proportionate means of achieving a legitimate aim: [s.13\(2\)](#). Such an Employer Justified Retirement Age (EJRA) policy was held to give rise to a lawful ground for dismissal in *Pitcher v Chancellor, Masters and Scholars of the University of Oxford and Saint John the Baptist College in the University of Oxford* Unreported 16 May 2019 (ET 3323858/2016).

1842 s.6.

1843 ss.7, 16.

1844 s.8.

1845 s.18.

1846 s.9.

① 1847 s.10. In *Gray v Mulberry Co (Design) Ltd [2019] EWCA Civ 1720* the notion of “philosophical belief” was held not to extend to a strongly held view about entitlement to copyright; whereas in *Forstater v CGD Europe [2022] I.C.R. 1* the EAT held that the claimant’s “gender-critical belief” fell within the scope of [s.10](#).

1848 s.11.

1849 s.12.

1850 s.39(4)(c) referring to [s.27](#).

1851 s.27(1).

1852 s.27(2)–(5).

1853 The term “dismissal” is not defined in the Act; compare the case law definition of that term under the unfair dismissal provisions—see above, paras [42-226](#)—[42-227](#).

1854 s.120.

1855 s.124(2)(a).

1856 s.124(2)(b).

1857 s.124(2)(c).

1858 Compare above, paras [42-244](#)—[42-245](#).

1859 Employment Rights Act 1996 s.126. See above, para [42-247](#).

1860 Above, paras [42-131](#)—[42-137](#).

1861 Which takes effect subject to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (SI 1975/1023).

1862 Defined by [s.1 of the Act](#). The Data Protection Act 1998 s.56 makes it a criminal offence to require job applicants or existing employees to make subject access requests in lieu of providing a normal criminal record check, which would not disclose spent convictions.

1863 Defined by [s.4\(5\)](#).

1864 s.4(3)(b).

1865 See above, paras [42-187](#) et seq.

1866 See above, paras 42-226 et seq. For a case where a conviction is old but not spent, see *Torr v British Railways Board [1977] I.C.R. 785*.

End of Document

© 2022 SWEET & MAXWELL

(a) - Redundancy Payments

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 9. - Redundancy Payments and Procedure

(a) - Redundancy Payments¹⁸⁶⁷

Introduction

42-255 Part XI of the Employment Rights Act 1996, requires¹⁸⁶⁸ employers to make “redundancy payments” where “an employee who has been continuously employed for the requisite period” (viz two years¹⁸⁶⁹) “(a) is dismissed by his employer by reason of redundancy, or (b) is laid off or kept on short-time” in specified circumstances for four or more consecutive weeks, or for a series of six or more weeks within a period of 13 weeks.¹⁸⁷⁰ The provisions of the Act are detailed, and the following is merely an outline of the main principles of the Act.¹⁸⁷¹ There is, moreover, some significant recent case-law concerning contractual redundancy pay arrangements, in particular addressing the question of whether and when “custom and practice” might give rise to specific contractual obligations.¹⁸⁷²

Dismissal

42-256 The statutory definition of dismissal for the purposes of the redundancy payments legislation is basically the same as that applying for the purposes of the unfair dismissal legislation, considered in an earlier paragraph.¹⁸⁷³ There are, however, some additional elements which are special to this legislation. There are, then, the same basic elements to the definition:

- (1)termination of the contract by the employer with or without notice¹⁸⁷⁴;
- (2)expiry of a limited term contract without renewal¹⁸⁷⁵;

(3)termination by the employee in circumstances where the employer's conduct entitles him or her to terminate without notice ¹⁸⁷⁶; or

(4)employee giving notice to quit anticipating the expiry of a notice already given by the employer. ¹⁸⁷⁷

The case law considered in an earlier paragraph is applicable to these basic elements in the definition. ¹⁸⁷⁸

42-257 There are certain modifications to and extensions of this definition which are particular to the redundancy payments legislation:

(1)If an employee is re-engaged in pursuance of an offer (which need not be in writing) made by the employer before the ending of the previous employment, and if the re-engagement takes effect within four weeks after the ending of the previous employment, the employee is, subject to the rule concerning trial periods, to be regarded as not having been dismissed. ¹⁸⁷⁹ The rule concerning trial periods is that if the re-engagement is upon different terms, the employee may try the new employment for up to four weeks without foregoing his or her right to rely upon the ending of the previous employment as a dismissal. ¹⁸⁸⁰ The trial period may alternatively be for such longer period as is agreed between the parties, before the new employment commences, for the purpose of retraining the employee. ¹⁸⁸¹

(2)It is provided that where an employee terminates his or her contract of employment without notice, being entitled to do so by reason of a lock-out by his employer, the employee's action will not constitute a constructive dismissal on the part of the employer. ¹⁸⁸² By an accident of drafting, it appears that the employee's action will constitute constructive dismissal if accompanied by notice. ¹⁸⁸³

(3)Under s.136 of the 1996 Act, where in accordance with any enactment or rule of law any act on the part of an employer or any event affecting an employer (including his death) ¹⁸⁸⁴ operates to terminate a contract of employment, that act or event is to be treated as a termination of the contract by the employer, ¹⁸⁸⁵ and hence as a dismissal subject to the rules about re-engagement, and trial periods. ¹⁸⁸⁶ This provision would apparently apply, for instance, to frustration of the contract of employment by an event affecting the employer. ¹⁸⁸⁷

Redundancy

42-258 The concept of redundancy is statutorily defined; by s.139(1) of the 1996 Act a dismissal is by reason of redundancy if the dismissal is wholly or mainly attributable to:

(a)the cessation or intended cessation of the business for which the employee was employed, either generally or in the place where the employee was so employed; or to

(b)the diminution or expected diminution of the requirements of that business for employees to carry out work of a particular kind either generally or in the place where the employee was employed.

The definition has been held to be exhaustive¹⁸⁸⁸ (although it is not expressed to be exhaustive by the statute itself). The attributability of the dismissal to the statutory grounds for redundancy has been held to be a subjective matter, in the sense that there is no redundancy if the employer genuinely and without misdirecting himself or herself believes in the existence of a ground for dismissal falling outside the statutory definition of redundancy and genuinely acts upon that ground believed to be present.¹⁸⁸⁹ This question of attributability is in any case decided in the context of a presumption of redundancy which arises under and for the purposes of the redundancy payment legislation once there has been shown to be a dismissal.¹⁸⁹⁰ For the purposes of the statutory definition, the “place where the employee was employed” has been held to include the area within which he or she could be required to work under his contract of employment¹⁸⁹¹; but the courts will not imply an obligation of geographical mobility on the part of the employee unless there is some particular evidence of an implied term to that effect.¹⁸⁹² The second limb of the statutory definition, by referring to the need for work of a particular kind, defined redundancy in terms of the job itself rather than the employee himself or herself. Hence a marginal shift in the nature of the employer’s requirements may create a situation in which there is no redundancy although the employee remains available to continue his or her work as originally defined.¹⁸⁹³ Moreover it has been held that the employer may seek to impose variations in incidental terms and conditions of employment to reduce his or her or its labour costs, without thereby creating a redundancy in relation to an employee who is unwilling to accept such variations.¹⁸⁹⁴ There is also a major statutory qualification upon the concept of redundancy in that an employee is not entitled to a redundancy payment if he unreasonably refuses an offer of renewal of contract or re-engagement which would have taken effect within four weeks of his or her dismissal and was an offer of the same employment as he previously had or of suitable employment in relation to him or her.¹⁸⁹⁵ The same rule applies where the employee unreasonably terminates his or her employment during a trial period on new terms.¹⁸⁹⁶ Decided cases give some slight assistance in applying this concept of unreasonable refusal of suitable employment.¹⁸⁹⁷

Lay-off and short-time

- 42-259 If an employer lays an employee off work or places him or her on short-time in breach of his or her contract,¹⁸⁹⁸ that is likely to constitute a dismissal for the purposes of the redundancy payments legislation,¹⁸⁹⁹ or to entitle the employee to terminate his employment and rely on the transaction as a constructive dismissal.¹⁹⁰⁰ However, special provision was thought necessary to prevent employers from avoiding liability for redundancy payments by repeated or prolonged exercise of rights to lay employees off work or put them on short-time. It is therefore provided

that an employee who is laid off or kept on short-time to the specified extent and who complies with the statutory procedure is entitled to a redundancy payment.¹⁹⁰¹ The specified extent is four consecutive weeks or six weeks falling within a 13-week period.¹⁹⁰² An employee is laid off when he or she gets no pay of any kind from his employer for the week concerned because, although he or she is available for work, there is none for him or her to do.¹⁹⁰³ A week counts as a week of short-time if, because of a shortage of work, the employee gets less than half a week's pay for that week.¹⁹⁰⁴ The statutory procedure consists in the employee first serving on his or her employer a written notice of intention to claim a redundancy payment because of a lay-off or short-time.¹⁹⁰⁵ The employer has the opportunity to contest liability by serving a written counter-notice asserting that there is a reasonable prospect of resumption of normal working.¹⁹⁰⁶ The employee must follow up his or her notice of intention to claim by a notice to terminate his or her employment within a time limit which varies according to whether the employer has served a counter-notice or not.¹⁹⁰⁷ This whole procedure is elaborate and not frequently invoked in practice.

Redundancy payments

- 42-260 Statutory redundancy payments are calculated according to the length of the employee's period of continuous employment.¹⁹⁰⁸ There is a two years' minimum qualifying period of service,¹⁹⁰⁹ and the payments are calculated according to the following scale:
- for each year of employment at age 41 or over, one-and-a-half weeks' pay;
 - for each year of employment at age 22 or over but under 41, one week's pay;
 - for each year of employment at under 22, half a week's pay.¹⁹¹⁰
- Up to 20 years' past service may be counted for this purpose.¹⁹¹¹

The *period of continuous employment* is basically¹⁹¹² assessed in accordance with the provisions of the contracts of employment legislation, which have been considered in an earlier paragraph.¹⁹¹³ There are certain provisions which modify that method of assessment for the purposes of the redundancy payments legislation. Periods of employment abroad for which no employer's social security contributions were payable do not count, but do not break the continuity of employment.¹⁹¹⁴ A period of employment does not count in respect of which a redundancy payment was made to an employee who was later re-engaged, or whose contract of employment was renewed, by his or her employer or his or her employer's successor where a change of ownership of the business has occurred; moreover, continuity of employment is in such cases broken by the making of the earlier redundancy payment.¹⁹¹⁵ The other statutory concepts used in the calculation of redundancy payments, namely those of the "week's pay" and "normal working hours" are considered in the two following paragraphs.

The week's pay

- 42-261 The statutory week's pay which forms the basis of the calculation to a redundancy payment ¹⁹¹⁶ is assessed in accordance with ss.220–229 of the 1996 Act. Under those provisions the calculation varies according to whether the employee has normal working hours. ¹⁹¹⁷ If he or she does, and his or her pay does not vary within those hours with the amount of work done, his or her week's pay means his or her earnings for his or her normal weekly working hours. ¹⁹¹⁸ Conditional bonus entitlements are not included in this calculation. ¹⁹¹⁹ If the employee has normal working hours but his or her pay varies within those with the amount of work done (as where he or she is paid by piece rates or commission ¹⁹²⁰) his or her week's pay means the pay for his or her normal working hours at the average hourly rate ¹⁹²¹ prevailing during the last 12 weeks of employment. ¹⁹²² If the employee has no normal working hours, his or her week's pay means his or her average weekly pay during the last 12 weeks of employment. ¹⁹²³ There is a limit, which is varied from time-to-time, upon the amount of the week's pay which can be taken into account for the purpose of calculating a redundancy payment. ¹⁹²⁴

Normal working hours

- 42-262 The calculation of the statutory week's pay, considered in the previous paragraph, depends upon whether the employee has normal working hours and, if so, what those hours are. ¹⁹²⁵ The question of whether an employee has a pattern of normal working hours is partly ¹⁹²⁶ determined by s.234 of the Employment Rights Act 1996 ¹⁹²⁷ which provides that an employee is deemed to have normal working hours where he or she is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period. ¹⁹²⁸ In such a case the basic rule is that the fixed number of hours shall be the normal working hours. ¹⁹²⁹ If, however, there is a minimum working week which exceeds the number of hours without overtime, the minimum working week shall be the normal working hours. ¹⁹³⁰ This formula is intended to exclude voluntary overtime while including hours which, although paid at premium rates, are in fact part of the obligatory working week. The effect of this formula as judicially interpreted is that overtime working will count towards the normal working week if, but only if, it is obligatory upon the employers to provide it as well as upon the employees to work it. ¹⁹³¹ The decided cases indicate a reluctance to regard overtime working as contractually obligatory upon the employee. ¹⁹³²

Exclusions from the Act

- 42-263 This part of the [1996 Act](#) applies to all ¹⁹³³ employees ¹⁹³⁴ who are not specifically excluded. But in many situations no claim to a statutory redundancy payment arises ¹⁹³⁵: if the contract of employment was terminated by reason of redundancy where the employer was “entitled to terminate [it] without notice by reason of the employee’s conduct” ¹⁹³⁶; or if a collective agreement has been recognised by the Secretary of State as the basis of an order excluding the statutory provisions. ¹⁹³⁷ Other categories excluded from the operation of the Act include: certain employees on fishing vessels, ¹⁹³⁸ and public officers and civil servants. ¹⁹³⁹ There was formerly provision for waiver of the statutory right in relation to the expiry of certain fixed-term contracts, but that has since been abolished. ¹⁹⁴⁰

Settlement of disputes: time within which claims must be made

- 42-264 Any question arising under the redundancy payments legislation as to the right of an employee to a redundancy payment, or as to the amount of a redundancy payment, is to be referred to and determined by an employment tribunal. ¹⁹⁴¹ The description of the procedure relating to such applications is outside the scope of the present work. Suffice it to deal here with the time within which claims must be made. An employee is not entitled to a redundancy payment unless within six months of the ending of his or her employment ¹⁹⁴² the payment has been agreed and paid or the employee has claimed the payment by notice in writing to the employer or has referred a redundancy payments issue to an employment tribunal or presented a complaint of unfair dismissal to an employment tribunal. ¹⁹⁴³ However, an employment tribunal may waive the time limits where the employee claims the payment or presents an issue or complaint to an employment tribunal within the following six months and where the employment tribunal thinks it just and equitable that the employee should receive a redundancy payment. ¹⁹⁴⁴

Footnotes

- 1 Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

- 1867 See, generally, Grunfeld, *The Law and Practice of Redundancy*, 3rd edn (1989); Bourn, *The Law of Redundancy* (1983).
- 1868 The Act prevails over any provisions in a contract which are inconsistent with it: [s.203 of Employment Rights Act 1996](#).
- 1869 [Employment Rights Act 1996 s.155](#). On the meaning of “continuous employment” see below, para.[42-260](#), and above, para.[42-170](#). The requirement of “continuous employment” formerly excluded part-time employment but no longer does so by reason of [SI 1995/31](#). See above, para.[42-170](#).
- 1870 [Employment Rights Act 1996 ss.148–152](#).
- 1871 The redundancy payments’ legislation formerly made provision for rebates to employers from a Redundancy Fund, but that system of rebates was abolished by the [Employment Act 1989](#).
- 1872 *Shumba v Park Cakes Ltd [2013] EWCA Civ 974, [2013] I.R.L.R. 800; Allen v TRW Systems Ltd [2013] EWCA Civ 1388; Peacock Stores v Peregrine [2014] UKEAT 0315/13/SM.*
- 1873 See above, para.[42-180](#).
- 1874 [Employment Rights Act 1996 s.136\(1\)\(a\)](#). See *Burton Group Ltd v Smith [1977] I.R.L.R. 351* (under receiving notice); *Pambakian v Brentford Nylons Ltd [1978] I.C.R. 665* (hiving-down agreement). Note here and generally the application of the Transfer of Undertakings (Protection of Employment) Regulations, as amended by the Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1987 ([SI 1987/442](#)).
- 1875 [Employment Rights Act 1996 s.136\(1\)\(b\)](#). See, for the definition of the “limited-term contract”, previously “fixed-term contract”, *BBC v Ioannu [1975] I.C.R. 267*. cf. *North-East Coast Shiprepairers Ltd v Secretary of State for Employment [1978] I.C.R. 755*. See *British Broadcasting Corp v Dixon [1979] I.C.R. 281*.
- 1876 [Employment Rights Act 1996 s.136\(1\)\(c\)](#) (the former requirement that the employee should terminate *without notice* being removed). See *Priestner v Ball (1977) 12 I.T.R. 451; Wilson-Undy v Instrument & Control Ltd [1976] I.C.R. 508*.
- 1877 [Employment Rights Act 1996 s.142](#) (which qualifies the rule by setting up a special procedure enabling the employer to challenge the employee’s action on the merits).
- 1878 See above, para.[42-226](#).
- 1879 [Employment Rights Act 1996 s.138\(1\)](#).
- 1880 [Employment Rights Act 1996 s.138\(2\)–\(5\)](#).
- 1881 [Employment Rights Act 1996 s.138\(3\), \(6\)](#).
- 1882 [Employment Rights Act 1996 s.136\(2\)](#).
- 1883 This results from the failure to adapt [s.136\(2\)](#) of Employment Rights Act 1996 to keep it in step with what is now [s.136\(1\)](#) of Employment Rights Act 1996, see above.
- 1884 [Employment Rights Act 1996 s.174](#). See *Ranger v Brown [1978] I.C.R. 603*.
- 1885 [Employment Rights Act 1996 s.136\(5\)](#).
- 1886 [Employment Rights Act 1996 s.139\(4\), \(5\)](#).
- 1887 See above, para.[42-180](#).
- 1888 *Hindle v Percival Boats Ltd [1969] 1 W.L.R. 174* (Lord Denning MR dissenting on this point). cf. *Delanair Ltd v Mead [1976] I.R.L.R. 340; Thomas v Jones [1978] I.C.R. 274; North-East Coast Shiprepairers Ltd v Secretary of State for Employment [1978] I.C.R. 755*.

- 1889 *Hindle v Percival Boats Ltd* [1969] 1 W.L.R. 174 (Lord Denning MR dissenting on this point also).
- 1890 Employment Rights Act 1996 s.163(2). See *Express Lift Co Ltd v Bowles* [1977] I.C.R. 474.
- 1891 *United Kingdom Atomic Energy Authority v Claydon* [1974] I.C.R. 128.
- 1892 *O'Brien v Associated Fire Alarms Ltd* [1968] 1 W.L.R. 1916; *Rowbotham v Arthur Lee & Sons Ltd* [1975] I.C.R. 109. Contrast *Stevenson v Teesside Bridge and Engineering Ltd* [1971] 1 All E.R. 296.
- 1893 Compare *North Riding Garages Ltd v Butterwick* [1967] 2 Q.B. 56; *Vaux & Associated Breweries Ltd v Ward* (1969) 7 K.I.R. 308; *Robinson v British Island Airways Ltd* [1978] I.C.R. 304; *Ranson v G & W Collins Ltd* [1975] I.C.R. 765. Compare now *Safeway Stores Plc v Burrell* [1997] I.C.R. 523.
- 1894 *Chapman v Goonvean and Rostowrack China Clay Co Ltd* [1973] I.C.R. 310; *Johnson v Nottinghamshire Combined Police Authority* [1974] I.C.R. 170; *Lesney Products Ltd v Nolan* [1977] I.C.R. 235.
- 1895 Employment Rights Act 1996 ss.141(1)–(3), 146(2). See also s.140(1) of Employment Rights Act 1996 (effect of employee's misconduct). See *Allman v Rowland* [1977] I.C.R. 201.
- 1896 Employment Rights Act 1996 s.141(4). *Camela v Sheerlyn Productions Ltd* [1976] I.C.R. 531.
- 1897 *Carson Co v Robertson* [1967] I.T.R. 484; *Taylor v Kent CC* [1969] 2 Q.B. 560; *Collier v Smiths Dock Ltd* [1969] 2 Lloyd's Rep. 222; *Ingham v Bristol Piping Co Ltd* [1970] I.T.R. 218; *Morganite Crucible Ltd v Street* [1972] I.C.R. 110; *Kaye v Cooks (Finsbury) Ltd* [1973] 3 All E.R. 434; *Kane v Raine & Co* [1974] I.C.R. 300; *Rowbotham v Arthur Lee & Sons Ltd* [1975] I.C.R. 109; *Kennedy v Werneth Ring Mills Ltd* [1977] I.C.R. 206; *Forrester v Strathclyde Regional Council* [1977] I.T.R. 424. But compare now *Readman v Devon Primary Care Trust* [2013] EWCA Civ 1110, [2013] I.R.L.R. 878.
- 1898 See above, para.42-094.
- 1899 See above, para.42-256.
- 1900 cf. *Powell Duffryn Wagon Co Ltd v House* [1974] I.C.R. 123.
- 1901 Employment Rights Act 1996 s.148.
- 1902 Employment Rights Act 1996 s.148(2).
- 1903 Employment Rights Act 1996 s.147(1).
- 1904 Employment Rights Act 1996 s.147(2).
- 1905 Employment Rights Act 1996 s.148(1).
- 1906 Employment Rights Act 1996 s.151(2).
- 1907 Employment Rights Act 1996 s.150(1), (2).
- 1908 Employment Rights Act 1996 s.162(1). See *Stowe-Woodward Ltd v Beynon* [1978] I.C.R. 609. The rules relating to the computation of "continuous employment" formerly excluded part-time employment but no longer do so by reason of SI 1995/31. See above, para.42-170.
- 1909 Employment Rights Act 1996 s.155.
- 1910 Employment Rights Act 1996 s.162(1), (2). The upper and lower age limits, which had previously applied, were, so far as they had continued to be applicable, abolished with effect

- from 1 October 2006 by the Employment Equality (Age) Regulations 2006 (SI 2006/1031) Sch.8 para.35. See also paras 42-179, 42-260.
- 1911 Employment Rights Act 1996 s.162(3).
- 1912 Employment Rights Act 1996 s.162(1)(a). See *Wood v York City Council [1978] I.C.R. 840*.
- 1913 See above, paras 42-169—42-172.
- 1914 Employment Rights Act 1996 s.215(2)–(5).
- 1915 Employment Rights Act 1996 s.214.
- 1916 See above, para.42-260.
- 1917 As to “normal working hours”, see the following paragraph.
- 1918 Employment Rights Act 1996 s.221(2). See *Lake v Essex CC [1978] I.C.R. 657*; *Bullock v Merseyside CC [1978] I.C.R. 419*; *A. & B. Marcusfield v Melhuish [1978] I.R.L.R. 484* (regular bonus); *Cole v Birmingham City DC [1978] I.C.R. 1004*; *Weevsmay v Kings [1977] I.C.R. 244*.
- 1919 *Econ Engineering v Dixon [2020] I.C.R. 1331, EAT*.
- 1920 Employment Rights Act 1996 s.221(4).
- 1921 cf. *Adams v John Wright & Sons (Blackwall) Ltd [1972] I.T.R. 191*; *Mole Mining Ltd v Jenkins [1972] I.C.R. 282*.
- 1922 Employment Rights Act 1996 s.221(3).
- 1923 Employment Rights Act 1996 s.222.
- 1924 The limit is fixed by s.227(1)(c) of Employment Rights Act 1996, and is from time-to-time revised by regulations.
- 1925 See above, para.42-261.
- 1926 There is no exhaustive definition of all the cases where there are normal working hours. Compare *Minister of Labour v Country Bake Ltd [1968] 5 K.I.R. 332*.
- 1927 See *Fox v C Wright (Farmers) Ltd [1978] I.C.R. 98*.
- 1928 Employment Rights Act 1996 s.234(1), (2).
- 1929 Employment Rights Act 1996 s.234(1), (2).
- 1930 Employment Rights Act 1996 s.234(3). See *Ogden v Ardpahalt Asphalt Ltd [1977] 1 W.L.R. 1112*.
- 1931 *Tarmac Roadstone Holdings Ltd v Peacock [1973] I.C.R. 273*. See *ITT Components Group (Europe) v Kolah [1977] I.C.R. 740*.
- 1932 *Pearson v William Jones Ltd [1967] 1 W.L.R. 1140*; *Turriff Construction Ltd v Bryant (1967) 2 K.I.R. 659*; *Loman and Henderson v Merseyside Transport Services Ltd (1967) 3 K.I.R. 726*; *The Darlington Forge Ltd v Sutton [1968] I.T.R. 196*; *Lynch v Dartmouth Auto Castings Ltd [1969] I.T.R. 273*; *Redpatch Dorman Long (Contracting) Ltd v Sutton [1972] I.C.R. 477*; *Gascol Conversions Ltd v Mercer [1974] I.C.R. 420*. Contrast *Armstrong Whitworth Rolls Ltd v Mustard [1971] 1 All E.R. 598*.
- 1933 Except for certain relatives of the employer, the Act applies to a domestic servant in a private household: s.161(1) of Employment Rights Act 1996. See *Tomlinson v Dick Evans “U” Drive Ltd [1978] I.R.L.R. 77* (illegal contract).
- 1934 The term is defined in s.230(1).

- 1935 The upper age limits, which had formerly applied, were, so far as they had continued to be applicable, abolished with effect from 1 October 2006 by the [Employment Equality \(Age\) Regulations 2006](#) (SI 2006/1031) Sch.8 para.30. See also paras [42-179](#), [42-260](#).
- 1936 Employment Rights Act 1996 s.140(1).
- 1937 Employment Rights Act 1996 s.157.
- 1938 Employment Rights Act 1996 s.199(2).
- 1939 See s.159 of Employment Rights Act 1996. (See above, para.[42-037](#).)
- 1940 Employment Rights Act 1996 s.197, repealed by the [Fixed-term Employees Regulations 2002](#) (SI 2002/2034) reg.11 and Sch.2.
- 1941 Employment Rights Act 1996 s.163. The [Employment Act 2008](#) s.7(2) provided, with effect from 6 April 2009 ([SI 2008/3232](#)), for the insertion of a new [s.163\(5\)](#) into the [Employment Rights Act 1996](#) which enables an Employment Tribunal to award compensation for financial loss which is sustained by the employee and is attributable to the non-payment of a redundancy payment to which he or she is entitled.
- 1942 See [s.164\(1\)](#) of [Employment Rights Act 1996](#) referring to the “relevant date” and hence to [s.235\(1\)](#) of [Employment Rights Act 1996](#) which refers to ss.[145](#), [153](#) of [Employment Rights Act 1996](#). See *Watts v Rubery Owen Conveyancer Ltd [1977] I.C.R. 429*.
- 1943 Employment Rights Act 1996 s.164(1). See *Nash v Ryan Plant International Ltd [1977] I.C.R. 560*.
- 1944 Employment Rights Act 1996 s.164(2), (3).

(b) - Redundancy Procedure

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 9. - Redundancy Payments and Procedure

(b) - Redundancy Procedure¹⁹⁴⁵

Introduction

42-265 Part IV Ch.II of the Trade Union and Labour Relations (Consolidation) Act 1992 imposes procedural requirements upon employers in the handling of redundancies. The procedural obligations are of two types:

(a)the obligation to consult with representatives of recognised trade unions or of employees;
and

(b)the obligation to give advance warning of certain redundancies to the Secretary of State.

These provisions, described in the next two paragraphs, represent an intention to give effect to the European Union Directive on the Approximation of the Laws of the Member States relating to Collective Redundancies.¹⁹⁴⁶ They were further amended by the Trade Union Reform and Employment Rights Act 1993 and give effect to an amending Directive of 1992.¹⁹⁴⁷

Consultation with the representatives of recognised trade unions or of employees

42-266 Significant changes to these consultation requirements have continued to be made by statutory instruments.¹⁹⁴⁸ In brief summary,¹⁹⁴⁹ requirements to consult in relation to proposed redundancies and proposed transfers of undertakings are no longer confined to consultation with the representatives of recognised trade unions; they are now requirements to consult, at the choice of the employer, either with the representatives of recognised trade unions or with elected

representatives of the employees who are affected by the proposed redundancies or the proposed transfer. The requirement to consult in relation to proposed redundancies now attaches only where it is proposed to make 20 or more employees redundant within a period of 90 days or less.¹⁹⁵⁰ The consultation must begin in good time,¹⁹⁵¹ and certain minimum periods are laid down: it must begin within 45 days for 100 or more dismissals within a period of 90 days, and otherwise within 30 days.¹⁹⁵² The obligation to consult requires the employer to disclose prescribed information¹⁹⁵³ about ways of avoiding the dismissals, reducing the numbers to be dismissed, and mitigating the consequences of the dismissals, and requires the employer to undertake that consultation with a view to reaching agreement with the appropriate representatives.¹⁹⁵⁴ The employer may be held to be released from the provisions as to minimum periods of consultation and as to disclosure, consideration of representations and reply if he or she can show that it was not in the circumstances reasonably practicable for him or her to comply with those obligations.¹⁹⁵⁵

- 42-267 The sanction for failure to comply with the duty to consult is the obtaining of a protective award by complaint to an employment tribunal.¹⁹⁵⁶ The protective award is an award of entitlement to remuneration to the affected employees for periods up to a maximum of 90 days.¹⁹⁵⁷ The entitlement to remuneration is subject to safeguards for both parties, in relation for instance to the employee's absence from work or the unavailability of work.¹⁹⁵⁸ If an employee unreasonably refuses an offer from his or her employer of a new contract or renewal of the old contract, he or she will lose his entitlement to remuneration under the award.¹⁹⁵⁹ An employee may complain to an employment tribunal that he or she has not been paid the amount due under an award.¹⁹⁶⁰ The tribunal shall if the complaint is well-founded order the employer to pay the amount due.¹⁹⁶¹
- 42-268 A similar requirement of consultation with trade union or employee representatives now arises under the **Transfer of Undertakings (Protection of Employment) Regulations 2006**¹⁹⁶² in relation to the transfer of an undertaking or service provision change within the meaning of the regulations.¹⁹⁶³ The obligations to inform and consult arise in relation to affected employees both of the transferor and of the transferee employer.¹⁹⁶⁴ A recognised union, or employee representatives, may complain to an employment tribunal of failure on the part of either employer to inform or consult¹⁹⁶⁵ and may obtain an award of up to 13 weeks' pay for the affected employees.¹⁹⁶⁶

Notification of proposed redundancies to the Secretary of State

- 42-269 Under Pt IV Ch.II of the **Trade Union and Labour Relations (Consolidation) Act 1992** as subsequently amended, an employer who proposes to dismiss 100 or more employees¹⁹⁶⁷ as

redundant¹⁹⁶⁸ at one establishment¹⁹⁶⁹ within 90 days or less, must give written notification of the proposal to the Secretary of State¹⁹⁷⁰ at least 90 days before the first of those dismissals takes effect.¹⁹⁷¹ If the proposal is to dismiss 20 or more employees within 90 days or less, the notification must be given at least 30 days before the first of the dismissals.¹⁹⁷² The **Collective Redundancies (Amendment) Regulations 2006**¹⁹⁷³ amend s.193 of the **Trade Union and Labour Relations (Consolidation) Act 1992** to provide that, in addition to the existing requirements of that section, an employer proposing collective redundancies must notify the Secretary of State of his or her proposal before he or she gives notice to an employee to terminate an employee's contract of employment in respect of any of those dismissals. In a case where consultation with trade union or employee representatives is statutorily required¹⁹⁷⁴ the notification must identify the representatives concerned and state the date when consultation began.¹⁹⁷⁵ Where appropriate, a copy of the notification must go to the recognised union.¹⁹⁷⁶ The sanction for failure to give the required notification to the Department is that the Secretary of State may institute criminal proceedings against the employer, who will be liable on summary conviction to a fine not exceeding level 5 on the standard scale.¹⁹⁷⁷ The purpose of the notification procedure was originally stated to be:

“... to enable the manpower services of the Department to take any necessary measures for re-deployment or re-training of the workers involved, to enable the Government to consider any further steps that may be needed to avoid or minimise the effects of the redundancy, and to provide documentary evidence in all but the smallest redundancies of the commencement of consultations.”¹⁹⁷⁸

Footnotes

¹ Freedland (Gen. ed.), *The Contract of Employment* (2016); Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

¹⁹⁴⁵ See *Freedland* (1976) 5 *I.L.J.* 24; *Ewing* (1993) 22 *I.L.J.* 176–178.

¹⁹⁴⁶ Council Directive 75/129.

¹⁹⁴⁷ s.34, implementing Council Directive 92/56.

¹⁹⁴⁸ Beginning with the **Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995** (SI 1995/2587) with effect from 26 October 1995. See now also the **Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014** (SI 2014/16).

¹⁹⁴⁹ The provisions summarised are those of **Trade Union and Labour Relations (Consolidation) Act 1992** s.188 as subsequently amended. See also the **Collective Redundancies and**

- Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999 (SI 1999/1925), and the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 (SI 2013/763), in force from 6 April 2013, which shortened the relevant consultation periods and excluded the expiry of fixed term contracts from counting towards the numerical thresholds.
- 1950 s.188(1). The restriction to “at one establishment” had been placed in doubt by *USDAW v Ethel Austin Ltd (In Administration)* [2014] EWCA Civ 142, [2014] 2 C.M.L.R. 45, but was subsequently confirmed by the CJEU in *USDAW v Ethel Austin Ltd (C-80/14 EU:C:2015:291*, [2015] 3 C.M.L.R. 32. A seagoing vessel was held to be an “establishment” in *Seahorse Maritime Ltd v Nautilus International* [2018] EWCA Civ 2789, [2019] I.R.L.R. 286.
- 1951 s.188(1A).
- 1952 s.188(1A).
- 1953 s.188(4); note the new para.(f) as inserted by Trade Union Reform and Employment Rights Act 1993 s.34(2)(a).
- 1954 s.188(2).
- 1955 s.188(7); and see also s.189(6) (onus of proof on employer). See, among the earlier leading authorities, *Association of Patternmakers and Allied Craftsmen v Kirvin Ltd* [1978] I.R.L.R. 318; *Amalgamated Society of Boilermakers, Shipwrights, Blacksmiths & Structural Workers v George Wimpey (M E & C) Ltd* [1977] I.R.L.R. 95; *Clarks of Hove Ltd v Bakers’ Union* [1978] I.C.R. 1076; *UCATT v H Rooke & Son (Cambridge) Ltd* [1978] I.C.R. 818; *Hamish Armour v ASTMS* [1979] I.R.L.R. 24; and *USDAW v Leancut Bacon Ltd* [1981] I.R.L.R. 295.
- 1956 See Trade Union and Labour Relations (Consolidation) Act 1992 s.189(1) (limitation period —s.189(5)). See, as to the making of the award, *Susie Radin Ltd v GMB* [2004] EWCA Civ 180, [2004] 2 All E.R. 279.
- 1957 Trade Union and Labour Relations (Consolidation) Act 1992 s.189(4). See, as to length of award, *Sir Alfred McAlpine & Son (Northern) Ltd v Foulkes* [1977] I.C.R. 748; *Talke Fashions Ltd v Amalgamated Society of Textile Workers and Kindred Trades* [1977] I.C.R. 833.
- 1958 s.190.
- 1959 s.191.
- 1960 s.192(1), (2).
- 1961 s.192(3).
- 1962 With effect from 6 April 2006, the existing Transfer of Undertakings (Protection of Employment) Regulations were revised and replaced by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).
- 1963 SI 2006/246 reg.13. The regulations do not apply to a takeover by transfer of share control: see reg.3(1) and above, para.42-184.
- 1964 SI 2006/246 reg.13(1).
- 1965 SI 2006/246 reg.15(1).
- 1966 SI 2006/246 reg.16(3).
- 1967 For the excluded classes of employees, see Trade Union and Labour Relations (Consolidation) Act 1992 ss.284, 285, 282(1).

1968 See above, para.42-258.

1969 See, for the meaning of this term, *Kapur v Shields [1976] I.C.R. 26*.

1970 That is to say, currently, the Department of Business, Energy, and Industrial Strategy.

1971 Trade Union and Labour Relations (Consolidation) Act 1992 s.193(1)–(6), subject to s.193(7) (reasonable practicability).

1972 Trade Union and Labour Relations (Consolidation) Act 1992 s.193(2).

1973 SI 2006/2387.

1974 See above, para.42-266.

1975 s.193(4).

1976 s.193(6) subject to s.193(7) (reasonable practicability).

1977 s.194.

1978 Consultative Document on the Employment Protection Bill (1974), para.66.

Section 10. - Statutory Dispute Resolution Provisions

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 42 - Employment¹

Section 10. - Statutory Dispute Resolution Provisions

Statutory dispute resolution provisions

- 42-270 The [Employment Act 2002](#), contained, inter alia, a set of provisions introducing new statutory dispute resolution procedures ([ss.29–34](#) and [Schs 2–4](#)) which had a great potential impact on the law of the contract of employment.¹⁹⁷⁹ However, the [Employment Act 2008](#) repealed those provisions and replaced them with a set of provisions reflecting a different approach, for the adjustment of a large set of compensatory awards by reference to non-compliance with statutory codes of practice concerned with dispute resolution.¹⁹⁸⁰ Specific provision was made for such adjustment of compensatory awards for unfair dismissal¹⁹⁸¹; a code of practice on disciplinary and grievance procedures has been issued as the point of reference for that particular purpose.¹⁹⁸² In connection with the statutory dispute resolution provisions, reference should also be made to the right for workers to be accompanied by certain trade union officials or fellow workers at non-trivial disciplinary and grievance hearings. That right was originally conferred by [ss.10–12 of the Employment Relations Act 1999](#). [Section 37 of the Employment Relations Act 2004](#) amended [s.10 of the 1999 Act](#), with effect from October 2004, in order further to clarify the role of the companion at such disciplinary and grievance hearings. Reference should also be made to the [Employment Tribunals \(Early Conciliation: Exemptions and Rules of Procedure\) Regulations 2014](#),¹⁹⁸³ which impose a duty to involve ACAS before the issuance of an Employment Tribunal Claim.

Footnotes

¹ Freedland (Gen. ed.), [The Contract of Employment](#) (2016); Freedland, [The Personal Employment Contract](#) (2003); Gaymer, [The Employment Relationship](#) (2001); Brodie, [The Employment Contract: Legal Principles, Drafting, and Interpretation](#) (2008) (on Scottish

law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

1979 These provisions were implemented and amplified by the [Employment Act 2002 \(Dispute Resolution\) Regulations 2004 \(SI 2004/752\)](#).

1980 s.3(1) inserting into the [Trade Union and Labour Relations \(Consolidation\) Act 1992](#) a new s.207A providing for the statutory codes of practice which may be issued under that Act to be admissible in evidence before and able to be taken into account by employment tribunals.

1981 s.3(2) amending s.124A of the [Employment Rights Act 1996](#); see above, para.[42-248](#).

1982 ACAS Code of Practice 1—Disciplinary and Grievance Procedures (April 2009).

1983 SI 2014/254.