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Article

Accepted Version

The Legacy of the Cameron-Clegg Coalition Programme of Reform of the Law on the Supply of Goods, Digital Content and Services to Consumers

James Devenney*

Introduction

The Cameron-Clegg coalition (2010-2015) oversaw a programme of "fundamental" reform of core consumer law in the UK.[1] These reforms were partly driven by EU legislation,[2] particularly the Consumer Rights Directive (2011).[3] Other factors were more native to the UK. Thus, against the backdrop of the global financial crisis and a desire to strengthen the UK economy, this programme of reform was fuelled by a market-driven approach to consumer law.[4] More specifically, consumer law and confident consumers were viewed as key ingredients to the efficient functioning of the market and the development of the economy.[5] The centrepiece of the resulting reforms is, undoubtedly, the Consumer Rights Act 2015 which, eventually, gained Royal Assent after an epic[6] passage through Parliament:

> "I am glad I have woken the hon. Gentleman…The Government have had a year in which to get the [Consumer Rights] Bill through…This Government have an inbuilt practice of trying to get Bills through the House as quickly as possible, which is why they have ended up with a logjam in the other place. That is not good for this House, because the Bills do not receive proper scrutiny… They have not only needed amendment in the other place but come back to this House, at which point the Government themselves have had to table reams and reams of amendments. That is about *bad drafting of legislation*."[7]

* McCann FitzGerald Chair in International Law and Business, UCD, Ireland & Professor of Transnational Commercial Law, University of Reading, UK.

1 See Department for Business, Innovation and Skills [BIS], *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.3.

2 See *Consumer Rights Act 2015: Explanatory Notes* pp.2-5.

3 Directive 2011/83/EU [2011] OJ L 304/64.

4 See, for example, BIS, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.9. On the approach of the Blair administration see W. Grant, *Economic Policy in Britain* (Palgrave, 2002) at p.230ff.

5 Cf. B. Heiderhoff & M. Kenny, 'The Commission's 2007 Green Paper on the Consumer Acquis: deliberate deliberation?' [2007] *ELR* 740 at 742.

6 The key provisions largely came into force on 1st October 2015 and do not have retrospective effect.

7 Hansard HC vol 590 col 684-685 (12 January 2015) *per* Kevan Jones MP (emphasis added).

Unfortunately, as subsequently noted by the Court of Appeal,[8] the spectre of these drafting issues haunt the Act; and the Law Commission have already called for a significant amendment to the Act.[9] This paper, which focuses primarily on Part 1 of the Act, will explore these criticisms, highlighting the (unnecessary) complexity created by the Act. It will also explore the policy aims of the Act arguing that whilst many of the stated policy aims undoubtedly make good political sound bites, some of them were formulated with insufficient precision, depth or appreciation of existing nuances in the law. Indeed this paper will question to extent to which the strategies adopted by the Act have, or indeed could have, achieved the stated policy aims. In particular, it will lament the continued (conservative with a small 'c') use of particular concepts and understandings. Significantly the paper will also place the Act in the context of other developments in consumer law, including the Consumer Protection (Amendment) Regulations 2014,[10] Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013[11] and relevant case law of the Court of Justice of the European Union. It will argue, on the one hand, that there is dissonance between the Act and some of these other developments and, on the other hand, that aspects of the Act sit uncomfortably with EU Law (which will it seems continue to be highly relevant even after Brexit).[12] Overall, and despite some welcome developments, this paper will argue that these reforms and an Act which had such an epic passage through Parliament are an epic disappointment.

Policy Aims

(a) Streamlining of Consumer Rights[13]

One of the drivers for reform was the view that UK consumer law had become "unnecessarily complex".[14] There are, of course, a number of reasons why this may have been the case.[15] To give just one example: the way in which the UK has often implemented EU directives by merely copying them into secondary legislation,[16] with little attempt to integrate them into existing frameworks, has sometimes done little to aid the coherence of consumer law (such as with the previously overlapping, yet contrasting, provisions of the Unfair Contract Terms

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[8] *Salt v. Stratstone Specialist Limited* [2015] EWCA Civ 745 at [49] *per* Roth J.

[9] See Law Commission, *Consumer Prepayments on Retailer Insolvency* Law Com. No 368 (2016) at p.114: "We recommend that section 4 of the Consumer Rights Act 2015 should be amended to include new rules about when a buyer acquires ownership of goods in a contract for the sale of goods from a business to a consumer."

[10] SI 2014/870.

[11] SI 2013/3134.

[12] The Department for exiting the European Union has stated: "[t]o maximise certainty, therefore, the Bill will provide that any question as to the meaning of EU-derived law *will be determined in the UK courts by reference to the CJEU's case law as it exists on the day we leave the EU*." (Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union*, (Cm 9446, updated May 2017) at 2.14 (emphasis added)).

[13] BIS, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.5.

[14] *Ibid.*

[15] Cf. J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' (2001) 54 *Current Legal Problems* 103.

[16] See HM Treasury, *Davidson Review: Implementation of EU Legislation* (2006).

Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999).[17] Yet a spring clean of the statute books is not a panacea; much more needs to be, for example, done in terms of disseminating information about consumer rights and remedies before it can be claimed (with real force) that "… [the Consumer Rights Act 2015] streamline[s] key consumer rights so that people can access what they need to know more easily and effectively".[18] Moreover, there are also risks with such spring cleaning exercises. First there is a danger that the streamlining will go too far and the resultant law will be sanitised to such an extent that important intricacies, nuances or safeguards will be lost.[19] We shall return to this point below when we consider the definition of a consumer in the Consumer Rights Act 2015.[20] Secondly, and this is linked to the fact that interpretation does not take place in a vacuum,[21] there is a risk that spring cleaning will result in a conflation of differing policy aims. To give an obvious example, some of the relevant provisions of the Consumer Rights Act 2015 emanate from EU legislation[22] and all that this entails in terms of interpretation etc;[23] and whilst it may be that UK and EU consumer law are converging on a market orientated approach to consumer law where consumer as regarded as significant actors, it needs to be borne in mind that national and EU approaches to consumer policy may have different drivers.[24] This is, of course, linked to a more general point: there needs to be clarity and transparency about the objective or, more likely, objectives of relevant areas of consumer law;[25] and this needs to be balanced against the policy aim of accessible consumer rights.[26] It may be that a better way of balancing these two competing aims would have been to supplement the statute, which will almost inevitably contains detailed legal language, with documents written for consumers and which distil consumer rights etc.[27]

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[17] See, for example, Law Commission, *Unfair Terms in Contracts*, (Law Com No 2929 (2005), Cm 6464) at [3].

[18] See Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.4.

[19] For example, s.14(2), Sale of Goods Act 1979 previously provided: "Where the seller sells goods in the course of a business, there is an implied term that *the goods supplied under the contract* are of satisfactory quality" (emphasis added). This wording, which was introduced into the Sale of Goods Act 1893 in 1973, clearly included packaging etc. as well as goods which should not have been supplied under the contract: see M. Bridge, *Benjamin's Sale of Goods* (9th edn., Sweet & Maxwell, London, 2014) at 11-030. Interestingly s.9, Consumer Rights Act 2015 reverts back to the initial wording: "Every contract to supply goods is to be treated as including a term that the quality of *the goods* is satisfactory" (emphasis added). Will the courts interpret this phase widely along the lines of *Wilson and Another v Rickett Cockerell & Co. LD* [1954] 1 Q.B. 598?

[20] See XXX.

[21] Cf. *Bank of England v. Vagliano Bros* [1891] AC 107.

[22] For a list of the seven main pieces of EU legislation implemented, or partially implemented, by the Consumer Rights Act 2015 see *Consumer Rights Act 2015: Explanatory Notes* p.3.

[23] See, generally, J. Devenney & M. Kenny, 'Unfair Terms, Surety Transactions and European Harmonisation: A Crucible of Europeanised Private Law?' [2009] *Conv.* 295-309.

[24] Cf. B. Heiderhoff & M. Kenny, op. cit. at 742.

[25] See XXX.

[26] See Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.4.

[27] Cf. Law Commission, *Unfair Terms in Contracts*, (Law Com No 2929 (2005), Cm 6464) at [2.53]: "The Consultation Draft included examples of the kind of term that amounts to an exclusion or restriction of liability within the meaning of the legislation or that fall within our replacement for the UTCCR's Indicative List of terms that may be regarded as unfair. While many consultees welcomed this, it was put to us that previous experience

The Explanatory Notes also highlight the fragmentation of consumer law prior to the Consumer Rights Act 2015.[28] Fragmentation has, of course, been a concern in relation to the interaction between EU Law and national law.[29] Yet there has also been fragmentation within UK consumer law as a result, for example, of the patchwork[30] of relevant provisions. The Consumer Rights Act 2015 did attempt to consolidate some of UK consumer law but, in so doing, creates different fault lines. For example, in relation to the sale of goods, the rules relating to the passing of property in goods are not consolidated in the Consumer Rights Act 2015.[31] This is not the place to rehearse the important of the passing of property in relation to sale of goods contracts[32] and the Act does deal with issues of risk.[33] However, other issues remain which raise issues about consumer protection, and ultimately consumer confidence, in the event of the seller's insolvency.[34] This was also seen as a significant omission from the proposal for a Common European Sales Law (CESL) and it was for this reason that the Law Commissions recommended including personal property law within the proposed CESL:

> "Ideally, we think that the protection should go further than section 18 of the UK Sale of Goods Act 1979: property in the goods should pass as soon as the goods are labelled…This would mean that if a UK trader using the CESL becomes insolvent and, at that moment, its delivery van has reached the Polish border, the driver can continue to deliver the goods to the Polish consumers, rather than returning them to the UK."[35]

Interestingly, after the Consumer Rights Act 2015 gained Royal Assent, the Law Commission started to consult on these issues[36] and proposed "…that consumer-specific provisions would be better made as amendments to the 2015 Act itself."[37] Similarly, issues around digital content overlap enormously with intellectual property rights, which are currently found in a different branch of the law, and this is another source of fragmentation.[38] One further example is the traditional distinction in the Law of England and Wales between terms and representations. The Act provides that certain terms (for example, that the "quality of the

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of using examples in legislation has not always been happy: the examples may quickly become out of date and may turn out to be incorrect."

[28] *Consumer Rights Act 2015: Explanatory Notes* p.2.

[29] See J. Devenney & M. Kenny (eds.), *The Transformation of European Private Law: Consolidation, Codification or Chaos?* (Cambridge University Press, 2013).

[30] See, for example, J. Devenney, 'Private Redress Mechanisms in England and Wales for Unfair Commercial Practices' (2016) 5 *EuCML* 100.

[31] There are s number of provisions of the Sale of Goods Act 1979 which will continue to apply to consumers: see *Consumer Rights Act 2015: Explanatory Notes* p.24 which helpfully summarised these provisions.

[32] See J. Devenney & M. Kenny, 'Omission of Personal Property from the Proposed CESL: The Hamlet Syndrome...Without the Prince?' [2015] *JBL* 607.

[33] Consumer Rights Act 2015, s.29.

[34] See R. Bradgate, *Commercial Law* (3rd edn., OUP, 2000) p.391.

[35] Law Commission, *An Optional Common European Sales Law: Advantages and Problems Advice to the UK Government* (November 2012).

[36] Law Commission, *Consumer Prepayments on Retailer Insolvency* ((2015) Consultation Paper No. 221). At p.1 it is stated: "Consumers often pay for goods and services in advance of receiving them. This is common practice for a range of products - from flights and theatre tickets to football season tickets and magazine subscriptions…If the company that has taken the prepayment becomes insolvent, consumers risk losing their money."

[37] *Ibid* at p.168.

[38] See also European Commission, 'A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen, 6th May 2015' (IP/15/4919). See also *Consumer Rights Act 2015: Explanatory Notes* p.69.

goods is satisfactory"[39]) are included in, for example, contracts to supply goods. The factors identified as being relevant to whether or not the quality of the goods is satisfactory have, in the context of the s.14(2) of the Sale of Goods Act 1979, been developed in an iterative fashion[40] and have eroded the term-representation dichotomy by, to some extent, giving contractual relevance to statements which might previously have been regarded as representations.[41] Take, for example, the former s.14(2D) of the Sale of Goods Act 1979 (which can be traced to the EU Consumer Sales Directive[42] and which has evolved into s.9(4)-(7) of the Consumer Rights Act 2015). This amendment to the Sale of Goods Act 1979, which confirmed the relevance of particular public statements to the test of satisfactory quality, blurred (or, perhaps, formalised a blurring of[43]) the distinction between terms and representations by rendering such statements part of the contractual landscape. S.13 of the Sale of Goods Act 1979 (which was a forerunner of s.11 Consumer Rights Act 2015) might have blurred the distinction even further by rendering all descriptive statements contractually binding[44] although the Courts, ultimately,[45] construed s.13 restrictively. This blurring on the term-representation dichotomy is continued by the Consumer Rights Act 2015 which, for example, includes a provision making certain pre-contractual (and indeed some post-contractual!) information binding:

> "(1) 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."

The key point for present purposes – as already recognised by Package Travel, Package Holidays and Package Tours Regulations 1992[46] - is that non-contractual representations may, in reality, shape a consumer's expectations as much as a contractual statement and, whilst the line between terms and representations continues to be blurred, there is fragmentation by the absence of the full treatment of representations in the Act.[47]

(b) Clarification of Aspects of Consumer Law[48]

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[39] S.9(1) Consumer Rights Act 2015.
[40] See M. Furmston & J. Chuah (eds.), *Commercial Law* (2nd edn., Pearson, 2013) at p. 195ff.
[41] For example, *Beale v. Taylor* [1967] 1 WLR 1193.
[42] Directive 99/44/EC.
[43] See C. Willett, M. Morgan-Taylor and A. Naidoo, op. cit. at 111.
[44] A potential criticism of the case of *Beale v. Taylor* [1967] 1 WLR 1193.
[45] See *Ashington Piggeries v. Christopher Hill Ltd* [1972] AC 441.
[46] SI 1992/3288.
[47] See J. Devenney & G. Howells, 'Integrating Remedies for Misrepresentation: Co-Ordinating a Coherent and Principled Framework' in R. Merkin & J. Devenney (eds.), *Essays In Memory of Jill Poole: Coherence, Modernisation and Integration in Contract, Commercial and Corporate L*aws (forthcoming, Routledge 2018).
[48] Op. cit. at p.5.

A second driver for reform was the perceived need to clarify particular aspects of consumer law.[49] Again a number of examples could be mentioned but, for present purposes, we will limit ourselves to two examples. First, the uncertainty surrounding the scope of Regulation 6(2) of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999), which provided for important limitations on the reach of those Regulations, in the light of the decision of the Supreme Court in *Office of Fair Trading v. Abbey National Plc*.[50] Secondly, where applicable, the uncertainty surrounding the length of time a consumer has to reject faulty goods.[51] The Consumer Rights Act 2015 at least attempts to tackle both of these issues.[52] Yet other areas of uncertainty are not tackled by the Consumer Rights Act 2015;[53] whilst others are only clarified in the accompanying Explanatory Notes;[54] and some fresh uncertainties are created.[55]

(c) Modernisation of Consumer Law, Particularly for the Digital Age[56]

A further driver for reform was the need for modernisation, or at least updating, of the law particularly in a digital age. Various examples could be given but we will limit ourselves to one at this point: the vexed question of whether the sale of computer software comes within the Sale of Goods Act 1979 which, following *St Albans City and DC v International Computers Ltd*,[57] seemed to depend on whether the software was transferred on a physical medium (such as a disk) or downloaded across the internet.[58] Indeed more recently HHJ Waksman QC has observed:

> "…whatever the perception may have been in 1996, there is no logic in making the status of software as goods (or not) turn on the medium by which they were delivered or installed, as noted above."[59]

The Consumer Rights Act 2015 makes specific new provision in respect of contracts to supply digital content.[60]

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[49] See, for example, The Law Commission, *Consumer Remedies for Faulty Goods* ((2009) LAW COM No 317) at 1.21: "Consultees told us that the problem with the right to reject is uncertainty over how long it lasts. This uncertainty brings complexity to what is intended to be a simple and certain tool."

[50] [2009] UKSC 6.

[51] Cf. Law Commission, *Consumer Remedies for Faulty Goods* ((2009) Law Com 317).

[52] Probably unsuccessfully in the case of the former: see J. Devenney & M. Kenny, 'The Post-Brexit Legacy of EU Consumer Law in the UK: Chronic Rejection or Continued Acceptance?' (2017) 1 *EuCML* 1.

[53] For example, in relation to the provisions on unfair terms (Part 2) the relevant standard to apply to some of the provisions.

[54] For example, how a reduction in price under s.24 should be assessed which is discussed on p.36 of the *Consumer Rights Act 2015: Explanatory Notes.*

[55] For example, the measure of damages for breach of contract to supply goods to consumers: see XXX.

[56] *Ibid.*

[57] [1997] F.S.R. 251.

[58] Cf. R. Bradgate, 'CONSUMER RIGHTS IN DIGITAL PRODUCTS: A research report prepared for the UK Department for Business, Innovation and Skills' (2010) at pp.4-5: "As a result two consumers buying the same product with the same defect have different rights in law, the one buying a program on CD being treated as buying goods the other buying a program in intangible form by downloading it from the internet being held not to have purchased goods and therefore not to be entitled to the protection of the Sale of Goods Act."

[59] *Software Incubator Limited v Computer Associates UK Limited* [2016] EWHC 1587 (QB) at [52].

[60] See below at XXX.

(d) Deregulation for Businesses[61]

Deregulation can result in efficiency savings for businesses.[62] In terms of costs for businesses thought also needs to be given to the costs associated with differences in consumer law regimes both within the UK[63] and elsewhere;[64] yet caution also needs to be exercised in connection with harmonisation in not stifling innovation of entrepreneurship.[65] Deregulation can, of course, also positively impact on consumers in lowering prices.[66]

(e) Selective Enhancement of Consumer Protection[67]

Although one aim of the Act was selective enhancement of consumer protection, much more focus is on notions of confident consumers and consumers as economic actors.[68] This is, of course, consistent with recent trends;[69] yet retorts to notions of confident consumers, and its linkage with competition in the market, can often be vague and unsatisfying.[70] For example, stating that "clearer consumer rights…will help to promote confident consumers"[71] has a certain seductiveness about it but, as noted above[72] and in addition to the *nature*[73] of those consumer rights, we must be careful not to view this as a panacea; much will depend on, for example, dissemination of information on rights to consumers, consumer education and redress mechanisms and assistance.[74] Indeed, as lawyers, we need to be careful not to over-estimate the *direct* impact of consumer rights on consumer decision-making.[75] One, related,

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[61] *Ibid.*

[62] See the claim in Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.5: "The reforms taken together are estimated to be worth over £4 billion to the UK economy over 10 years in quantified net benefits." .

[63] On the impact of devolution see Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.7.

[64] In relation to the EU Internal Market see EU Commission, *Green Paper on policy options for progress towards a European Contract Law for consumers and businesses*(COM(2010) 348 final) at p.2: "…differences between national contract laws may entail additional transaction costs and legal uncertainty for businesses and lead to a lack of consumer confidence in the internal market. Divergences in contract law rules may require businesses to adapt their contractual terms."

[65] See N. Reich, 'Competition of Legal Orders: A New Paradigm of EC Law?' (1992) 29 *CMLRev*. 861.

[66] See V. Goldberg, 'Institutional Change and the Quasi-Invisible Hand' (1974) 17 *Journal of Law and Economics* 461.

[67] *Ibid.*

[68] See Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.4.

[69] See J. Devenney, 'Conceptualising Consumers in the Law of England and Wales', in F. Klinck & K. Riesenhuber, *Verbraucherleitbilder: Interdisziplinare Und Europaische Perspektiven*, (De Gruyer, 2015) p.164.

[70] Cf. Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) pp.4 and 9.

[71] *Ibid.*

[72] See XXX.

[73] Cf. Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) p.15 where it is stated that the reforms will result in "more *effective* consumer rights" (emphasis added).

[74] On the landscape of consumer enforcement bodies: see Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) pp.9 and 15.

[75] Cf. for example, S. Della Vigna & U. Malmendier 'Contract Design and Self-Control: Theory and Evidence' (2004) CXIX *Quarterly Journal of Economics* 353.

theme that emerged from the legislative process was the centrality of "clear and honest information"[76] to these reforms. Again, in terms of consumer protection, care must be taken to recognise the limits on the extent to which the provision of information can cure the many varied and complex disadvantages under which different consumers *may* be operating.[77]

Contracts to Supply Goods to Consumers[78]

(a) Introduction

Goods can, of course, be supplied to consumers in a number of ways such as under a contract of sale, a contract of hire, a hire-purchase contract, a contract of barter or a contract for work and materials. Prior to the Consumer Rights Act 2015 contracts to supply goods to consumers were regulated by a variety of statutes. Some of the relevant provisions resonated across these statutes (such as the requirement that the goods needed to be of satisfactory quality[79]). There was, therefore, an argument to consolidate some of these provisions under the umbrella of contracts to supply goods[80] which would avoid (or perhaps largely avoid) the need make sometimes fine distinctions between the different contracts[81] especially where some legally very different transactions are, from the point of view of a consumer, functionally identical.[82] This is broadly the approach which the Consumer Rights Act 2015 (Part 1, Chapter 2) adopts, at least in respect of provisions relating to the rights and remedies of consumers under a "contract to supply goods".[83] One consequence of this consolidation of contracts to supply goods is that the 'additional' remedies introduced by the Sale and Supply of Goods Regulations 2002[84] to transpose the Consumer Sales Directive[85] are extended to hire and hire-purchase contracts.[86]

(b) Application

S.1(1) of the Act states that Part 1 "…applies where there is an agreement between a trader and a consumer for the trader to supply goods, digital content or services, if the agreement

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[76] See Department for Business, Innovation and Skills, *Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights* (BIS/13/916, June 2013) pp.2 and 15.
[77] See J. Devenney, 'Conceptualising Consumers in the Law of England and Wales', op. cit.
[78] On choice of law see s.32 of the Act.
[79] Cf. M. Bridge, *Benjamin's Sale of Goods* (9th edn., Sweet & Maxwell, London, 2014) at 1-041.
[80] See, generally, Department for Business, Innovation and Skills, *Consolidation and Simplification of UK Consumer Law* (November 2010).
[81] Cf. *Robinson v. Graves* [1935] 1 KB 579.
[82] For example the distinction between a hire-purchase contract and a conditional sale contract where the price is payable in instalments: see *Forthright Finance Ltd v. Carlyle Finance Ltd* [1997] 4 All ER 90. The functional equivalence has, to some degree, been recognised by the legislature: see s.27, Hire Purchase Act 1964.
[83] S.3(4). S.3(2) outlines when Part 1, Chapter 2 applies. For some purposes under the Act, distinctions between different types of contracts to supply goods are drawn: see, for example, s.17(3) (which is oddly drafted in that it appears to suggest, on a literal interpretation, that an owner may disturb a hirer's quiet possession without having a legitimate ground for some doing!).
[84] SI 2002/3045.
[85] Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/7.
[86] Cf. Law Commission, *Consumer Remedies for Faulty Goods* ((2009) Law Com 2.48-2.49).

is a contract."[87] Central to the operation of this Part of the Act is the term "trader" which is defined, by s.2(2), in the following terms:

> "…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."

Thus if, for example, the seller of goods does not come within this definition, particular statutory rights under ss.9-18 of the Act will not be applicable. Under ss.14(2) and (3) of the Sales of Goods Act 1979 the implied terms that the goods are of satisfactory quality and fit for purpose only apply where the seller sold the goods in the "course of a business". However, s.12 of the Sale of Goods Act (which contains implied terms relating to title etc.), s.13 of the Sale of Goods Act 1979 (an implied term that the goods correspond to description) and s.15 (provisions relating to sales by sample) are not limited to situations where the seller sells in the course of a business. Thus, to this extent, the Act reduces the reach of the protective provisions contained in such provisions although the extent of the problem with non-trader dealers is not clear[88] and it may be that the common law will reach the same result anyway in some cases.[89] Much will also depend on the interpretation of s.2(2). At one stage it was assumed, as a result of *R & B Customs Brokers v United Dominions Trust Ltd*[90], that a restrictive interpretation of the phrase "in the course of a business" would be taken, thus curtailing the reach of ss.14(2)-(3). That case involved the phrase "deals as consumer" under s.12 of the Unfair Contract Terms Act 1977 which was then[91] defined, as follows, using the phrase "in the course of a business":

> "(1) A party to a contract "deals as consumer" in relation to another party if—
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> (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
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> (b) the other party does make the contract in the course of a business…"

Ultimately the Court of Appeal was of the opinion that for these purposes a transaction would only be "in the course of a business" if it was either an integral part of the business or carried out with sufficient regularity.[92] This case was intriguing for a number of reasons. First, neither phrase used in the judgment (integral or sufficient regularity) is without ambiguity. Secondly, the case demonstrated that a company could sometimes be a consumer for the purposes of the Unfair Contract Terms Act 1977. Thirdly, the phrase "in the course of a business" was interpreted differently by the Court of Appeal in *Stevenson v Rogers*[93] directly in the context of the Sale of Goods Act 1979. In that case a fisherman sold his boat and the question for the court was whether or not the Sale of Goods Act 1979, s.14(2) implied a term into this contract

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[87] Cf. s.33(2) (on contracts to supply digital content) where some free gifts are explicitly stated to come within the relevant provisions.

[88] Although consider the increased use of platforms such as eBay.

[89] Although cf. (in slightly different context) *PST Energy 7 Shipping LLC Product Shipping & Trading SA v. OW Bunker Malta Ltd* [2016] UKSC 23.

[90] [1988] 1 WLR 321.

[91] Following the Consumer Rights Act 2015, UCTA 1977 no longer applies to consumers.

[92] [1988] 1 WLR 321 at 330.

[93] [1999] QB 1028.

which, in turn, depended on whether or not the sale was "in the course" of the fisherman's business. The Court of Appeal, acknowledging the different interpretation under the pre-Consumer Rights Act 2015 version of the Unfair Contract Terms Act 1977,[94] held that the sale was "in the course of a business" and therefore the Sale of Goods Act 1979, s.14(2) applied.[95]

At one level, of course, different interpretations of the phrase "in the course of a business" under *different statutes* need not be problematic.[96] Yet, in the current context, the situation was more complicated as the Sale of Goods Act 1979 and the Unfair Contract Terms Act 1977 overlapped.[97] This, of course, goes someway to demonstrating the need, discussed above, to streamline consumer law; and there was a desire[98] to align with definitions in the Consumer Rights Directive. Yet care needs to be taken: the different interpretations, to some extent, increased protection for consumers; the wide interpretation in s.14 maximising the reach of those provision with the restrictive interpretation of s.12 curtailing, subject to the interplay between s.12(1)(a) and 12(1)(b), the circumstances in which a seller could exclude or limit liability. At this stage, it is important to make two points. First, in any spring clean it is important to have an awareness of the impact it may have on these types of nuances. Secondly, should a wide or narrow lens be used in determining whether or not "…a person acting for purposes relating to that person's trade, business, craft or profession"? The point might be illustrated further by reference to *Standard Bank London Ltd v Apostolakis*[99] which actually involved the converse definition, that of a consumer. In that case the defendants (a lawyer and civil engineer) used their personal wealth to enter into a foreign exchange contract with a bank in Greece. One of the questions for the Court was whether or not they acted as "consumers" under the UTCCR 1999. Longmore J. held that the defendants were consumers for the purposes of the UTCCR 1999:

> "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."[100]

Interestingly, it seems that the Greek courts adopted a different view in the same case.[101]

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[94] "To apply the reasoning in the *R & B Customs* case…in the interests only of consistency, thereby undermining the wide protection for buyers which section 14(2) was intended to introduce, would in my view be an unacceptable example of the tail wagging the dog": [1999] QB 1028 at 1041 per Potter LJ.

[95] See also I. Brown, 'Sales of goods in the course of a business' (1999) 115 LQR 384.

[96] See *Feldarol Foundry Plc v Hermes Leasing (London) Ltd* [2004] EWCA Civ 747 at [18] Tuckey LJ.

[97] See s.61, Sale of Goods Act 1979.

[98] See *Consumer Rights Act 2015: Explanatory Notes* p.14. However, there are differences between the definitions in the Directive and in the Act. For example, in relation to the definition of a "consumer" the Act uses the phrase "*wholly or mainly* outside the individual's trade, business, craft or professional" (emphasis added) whereas the Directive uses the phrase "…acting for purposes which are outside his trade, business, craft or profession".

[99] [2002] CLC 933.

[100] *Ibid* at 936.

[101] *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm) at [209].

The term "consumer" has various meaning throughout the Law of England and Wales.[102] For the purposes of the Act a "consumer" is defined as "…an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession."[103] A number of observations need to be made in respect of this provision. First, under the Act only natural persons can be consumers. This is in contrast to the position under s.12 of UCTA 1977 where, for example, small companies could be classified as consumers.[104] This engages the debate about whether, for example, small enterprises should be given (some of) the same protection as consumers,[105] especially where the corporate veil merely masks the economic reality.[106] Secondly, there are doubts about whether or not the CJEU would define a "consumer" in the same way[107] and the consequent issues of fragmentation.[108] Thirdly, as already noted, such a definition can be viewed, with differing results, through a wide or a narrow lens. Moreover, the question of whether or not "…an individual acting for purposes that are *wholly or mainly*[109] outside that individual's trade, business, craft or profession" is a matter of degree. So to what extent, if at all, might perceptions of the vulnerability, or otherwise, of the party in question impact on this decision? *Barclays Bank Plc v. Kufner*,[110] provides some suggestion that this judgement may be affected by perceptions of vulnerability:

> "I must confess that I reach this conclusion without regret, for I cannot believe that the framers of the Regulations or the 1993 Directive intended that someone with the bargaining power of Mr Kufner and who procures the purchase of the component parts of a business at the cost of several millions of Euros should have the protection afforded by the legislation."[111]

(c) Consumer Rights under a Contract to Supply Goods

Part 1, Chapter 2 of the Consumer Rights Act 2015 sets out various statutory rights in respect of contracts to supply goods. These statutory rights are formulated by "including a term" in the contract that, for example, the "quality of the goods is satisfactory"[112] (and many are fortified by s.31 which prohibits their exclusion or restriction). Such a technique, where Parliament supplements the terms of a contract to supply goods, is, of course, well known. However, there are two notable features to the approach of the Consumer Right Act 2015 in this regard. First, there is a subtle shift away from the language of an *implied* term to merely "including a term" in the relevant contract. Secondly, and more importantly, unlike under the Sale of Goods Act 1979 such terms are not classified as conditions or warranties with the

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[102] See J. Devenney, 'Conceptualising Consumers in the Law of England and Wales', op. cit. Cf. *Overy v Paypal (Europe) Ltd* [2012] EWHC 2659.
[103] See s.2(3).
[104] *R & B Customs Brokers v United Dominions Trust Ltd* [1988] 1 WLR 321.
[105] Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at [5.5]ff.
[106] Law Commission, *Unfair Terms in Contracts*, (Law Com. No 292 (2005)) at [5.14].
[107] See H. Beale (ed.), *Chitty on Contracts*, (32nd edn., Sweet & Maxwell, London, 2015) para. 38-040.
[108] *Ibid.*
[109] Emphasis added.
[110] [2008] EWHC 2319 (Comm).
[111] At [31] *per* Field J.
[112] S.9(1).

associated impact on available remedies. Instead the Consumer Rights Act 2015 expressly sets out the remedies for breach of these statutory terms. At one level this, as was the intention,[113] simplifies this area of law: there is no need for businesses or consumers to understand the significance of the distinction between conditions are warranties.[114] Yet any such gains need to be set against the complexity of the (partial[115]) remedial framework under the Act.[116]

A number of the terms now included, by virtue of the Consumer Rights Act 2015, into relevant contracts are familiar: for example the goods must be of satisfactory quality (s.9), the goods must be fit for a particular purpose (s.10), the goods must correspondence with sample (s.13)[117] and the trader must have the right to supply the goods etc. (s.17).[118] Therefore the previous case law under, for example, s.14, Sale of Goods Act 1979 will be relevant although care should be taken to recognise the purely consumer context of the new regime.[119] S.11(1) ("Every contract to supply goods by description is to be treated as including a term that the goods will match the description"), resonates with, for example, s.13, Sale of Goods Act 1979. Yet s.13, Sale of Goods Act 1979, at least as interpreted by the House of Lords in *Ashington Piggeries Ltd v. Christopher Hill Ltd,*[120] is an enigma; essentially the House of Lords took a rather narrow, generic approach to the meaning of 'description' for the purposes of s.13, Sale of Goods Act 1979.

This, combined with the fact that s.13 seems not to traverse the traditional term-representation dichotomy, raises a real question about the utility of s.13, Sale of Goods Act 1979. Is such an approach to be carried over into the Consumer Rights Act 2015? We have already noted the need to recognise the consumer context of the new regime as well as the possible role of representations in shaping consumer expectations. Yet there is little express direction towards a different interpretation of s.11, Consumer Rights Act 2015. On the other hand s.11(4) provides:

> "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 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) (main characteristics of goods) is to be treated as included as a term of the contract."

The "main characteristics" of the goods is arguably wider than words which "identify the kind of goods". There are also some new terms under the Act, in particular s.14 ("[g]oods to match

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[113] See Department for Business, Innovation and Skills, *Consolidation and Simplification of UK Consumer Law* (November 2010) at 7.32: "Classifying terms as either conditions or warranties, whilst not problematic for those legally trained, is likely to mean very little to the ordinary consumer."

[114] Although it may be necessary for other purposes such as breach of an express term: cf. s.19(11)(e).

[115] See, for example, s.19(11) on remedies not consolidated in the Act.

[116] See below at XXX.

[117] S.13 actually uses the phrase "match the sample".

[118] Presumably this will be interpreted widely as in *Niblett v. Confectioners' Materials Co* [1921] 3 KB 387 (trademark infringements).

[119] See H. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-462.

[120] [1972] AC 441.

a model seen or examined"[121]) and s.12 ("[o]ther pre-contract information included in contract"):

> "(1) This section applies to any contract to supply goods. (2) Where regulation 9,[122] 10[123] or 13[124] of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013…required the trader to provide information to the consumer before the contract became binding, any of that information that was provided by the trader other than information about the goods and mentioned in paragraph (a) of Schedule 1 or 2 to the Regulations (main characteristics of goods) is to be treated as included as a term of the contract."

This provision is not straightforward, not least as s.12(1) states that it "applies to any contract to supply goods" whereas the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 sometimes limit a particular information requirement to a particular type of contract (for example a sales contract[125]).[126] Moreover it is not always clear exactly how some of these terms, emanating are to operate,[127] particularly when read with s.12(3), Consumer Rights Act 2015.[128] For example, under Schedule 1, paragraph (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…". Presumably this does not mean that, for example, the trader cannot change telephone number or cannot change it without the agreement of the consumer (or all relevant consumers!)? Is the relevant requirement to somehow make available[129] changes to a telephone number?[130]

(d) Unfair Commercial Practices…and the Privatisation of Remedies

Before we move on to consider remedies for breach of the foregoing statutory rights, we need to consider, briefly, recent statutory developments in relation to unfair commercial practices. As is well-known, the Consumer Protection from Unfair Trading Regulations 2008 ("CPUTR 2008")[131] largely transpose the Unfair Commercial Practices Directive[132] into the UK. A commercial practice is defined widely[133] and in *R v. X Ltd*[134] the Court of Appeal confirmed that isolated incidents can constitute a commercial practice. For present purposes, it suffices

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121 See *Consumer Rights Act 2015: Explanatory Notes* para. 77: "An example is a consumer viewing a television on the shop floor but receiving a boxed television from the stockroom. Under this section the delivered model should match the viewed model (unless any differences are brought to the consumer's attention before it is bought)."
122 On-premises contracts.
123 Off-premises contracts. See, in particular, Regulation 10(1).
124 Distance contracts. See, in particular, Regulation 13(1).
125 Defined by Regulation 5.
126 See, for example, Schedule 2, para. (p).
127 See also Regulation 18.
128 "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."
129 See Regulation 8.
130 In Schedule 2 the corresponding requirement is expressed in slightly different terms.
131 SI 2008/1277.
132 Directive 2005/29/EC, OJ L149/22.
133 Regulation 2.
134 [2013] EWCA Crim 818.

to note that an unfair commercial practice can include misleading actions and omissions.[135] There is, therefore, an overlap with the general law of misrepresentation. This is pertinent to the current discussion for, at least, two reasons. First, as argued above,[136] non-contractual representations can certainly shape consumer expectations and, therefore, the term-representation dichotomy creates a fragmentation; a fragmentation which, although in places eroded, is generally maintained by the Consumer Rights Act 2015. Secondly, despite the theoretical distinction between terms and representations,[137] it is clear that these two concepts are contextually closely related – indeed the distinction is often a fine one and a particular statement may even be both a term and a representation.[138] Moreover an oddity of the current position is that damages, under the general law of misrepresentation, for pre-contractual statements which were, in a general sense, not important enough to form part of the contract can sometimes, depending on the precise facts, exceed in quantum the damages which would have been payable had the statement in question been a contractual term.[139] The key point, of course, is that by excluding remedies for misrepresentation from the Consumer Rights Act 2015 this fragmentation is further entrenched and - an Act which sought to, for example, streamline - only paints a partial picture of the relevant landscape.

The CPUTR 2008 originally relied on a system of public enforcement, meaning a consumer wanting private redress from an unfair commercial practice had to fashion a remedy from pre-existing doctrines. Yet such an exercise was not always straightforward.[140] Ultimately this resulted in calls for reform, especially against the backdrop of the strain on the public purse post-financial crisis.[141] The Consumer Protection (Amendment) Regulations 1999 (CPAR 2014) inserted a new Part 4A into CPUTR 2008 giving consumers specific private rights of redress in relation to the CPUTR 2008: the remedies are the unwinding of a contract, a discount and damages. Consumers are given these private redress rights in relation to misleading actions and aggressive practices but not specifically misleading omissions.[142] Generally, and subject to rules on double recovery, these remedies operate in addition to existing possibilities for private redress under the general law.[143] Unfortunately the CPAR 2014 is not a model of clarity in drafting. The remedy of unwinding is contained in the (amended) CPUTR 2008, Regulations 27E-H, with Regulations 27E-F dealing with business to consumer contracts.[144] The consequences of unwinding are that the contract comes to an end, the trader may have to give the consumer a refund and the goods must be made available for collection by the

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[135] See Regulation 3(4).
[136] See XXX.
[137] See E. Peel, *Treitel: The Law of Contract*, 14th ed., (Sweet & Maxwell: London, 2015) Ch. 9.
[138] See Misrepresentation Act 1967, s.1.
[139] See J. Devenney, 'Re-Examining Damages for Fraudulent Misrepresentation: Towards a More Measured Response to Compensation and Deterrence' in L. Di Matteo, K. Rowley, Q. Zhou & S. Santier, *Current Issues in Commercial Contracts: Transatlantic Perspectives* (Cambridge University Press, 2013).
[140] Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Cm 8328 (2012)) viii.
[141] *Ibid.*
[142] CPUTR 2008, Regulation 27B.
[143] See CPUTR 2008, Regulation 27L but cf. Misrepresentation Act 1967 s.2(4).
[144] "[A] contract with a trader for the sale or supply of a product by the trader"..

trader.[145] Under 27E(1) unwinding is available "…if the consumer indicates to the trader that the consumer rejects the product, and does so (a) within the relevant period [90 days], and (b) at a time when the product is capable of being rejected."[146] Significantly a consumer is generally not required to account for use of the product.[147]

In terms of the remedy of a discount the (amended) CPUTR 2008 also provide a, fairly crude, sliding scale of the quantum of discounts.[148] In terms of damages, which is of course an established remedy for misrepresentation in England and Wales, significantly a consumer is given the right to claim damages for "alarm, distress or physical inconvenience or discomfort" subject to a remoteness test.[149] Unlike the other remedies, there is a due diligence defence (s27J(5)(b): "the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice").

(e) Remedies under the Consumer Rights Act 2015, Part 1, Chapter 2 - Overview

Ss.19-24 of the Consumer Rights Act 2015 make provision in respect of remedies for breach of the statutory rights discussed above[150] and a number of points need to be made about the scheme in the Act. First, the remedial scheme adopted by the Act is not exhaustive; as is recognised by s.19(9)-(11) a consumer may have additional[151] remedies not covered by the Act including damages, specific performance and termination.[152] This is, perhaps, unfortunate given that one of the aims of the Act was to streamline this area of law. Interestingly the Act provides[153] that s.51 (damages for non-delivery) and s.53 (damages for defective goods) of the Sale of Goods Act 1979 no longer apply to consumers. Presumably, however, a claim for damages by a consumer will still be assessed by analogy to, for example, the s.53, Sale of Goods Act 1979? If so, presumably a consumer will still face difficulties in obtaining compensation for non-pecuniary losses such as anxiety, distress and upset;[154] which makes an interesting contrast with the position for misrepresentation under the CPAR 2014. On the other hand, a number of the remedies of the seller are still governed by, for example,

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[145] Regulation 27F(1).
[146] Regulation 27E(8).
[147] Cf. Regulation 27F(7) in relation to continuous contracts such as some utility contracts.
[148] Regulation 27I (4): "Subject to paragraph (6), the relevant percentage is 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%."
Regulation 27I(6) concerns products where the contract price exceeds £5,000.
[149] Regulation 27J (1).
[150] At XXX
[151] Cf. s.19(10).
[152] Note s.19(12): "It is not open to the consumer to treat the contract as at an end for breach of a term that this Chapter requires to be treated as included in the contract, or on the grounds that, under section 15 or 16, goods do not conform to the contract, except as provided by subsections (3), (4) and (6)."
[153] See Schedule 1, paras 28-30.
[154] Cf. *Farley v Skinner (No.2)* [2001] UKHL 49.

the Sale of Goods Act 1979.[155] Again it might have been thought helpful to include such important remedies into the new Act.[156]

Secondly the Act adopts are rather elaborate[157] framework for remedies, which is, perhaps, unfortunate given the streamlining and clarifying objectives of the Act. At the start of the relevant remedies section of the Act, 19(1) outlines when goods *conform to the contract*:[158] essentially where the express terms as well as ss. 9 (satisfactory quality), 10 (fitness for a particular purpose), 11 (match description), 13 (match model), 14 (match sample), 15 (situations where installation forms part of the contract) and 16 (link with digital content) are complied with.[159] Given that these sections already signpost the relevant remedies[160] it seems over-complicated to have this further layer between rights and remedies. S.19(3) then goes on to specify the remedies for breach of all except two (namely express terms and s.15) of the requirements mentioned in s.19(1):

> "(a) the short-term right to reject (sections 20 and 22);
> (b) the right to repair or replacement (section 23); and
> (c) the right to a price reduction or the final right to reject (sections 20 and 24)."

S.19(4) provides that the right to "repair or replacement" and the "right to price reduction or the final right to reject" are available for breach of an express term of breach of s.15; whereas, under s.19(6), breach of s.17(1) (right to supply etc.) gives rise to a "right to reject". By contrast, where s.12 is breached:

> "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."[161]

One can, of course, appreciate that, despite the move away from the traditional condition-warranty dichotomy, different terms may merit different remedies;[162] yet surely there is a less cumbersome way of so doing than is found in the Act? Moreover what are the remedies for breach of s.17(2) (freedom from charges and encumbrances as well as quiet enjoyment)? Would price reduction not be an appropriate remedy?[163]

The third, overall, point to make relates to the remedy of specific performance. As is well known, the courts in England and Wales have traditionally tended not to grant specific

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[155] See, for example, s.49, Sale of Goods Act 1979 (action for the price) and s.50, Sale of Goods Act 1979 (damages for non-acceptance).
[156] Cf. s.19(11)(d).
[157] H. Beale (ed.), *Chitty on Contracts*, (32nd edn., Sweet & Maxwell, London, 2015) para. 38-477.
[158] Cf. s.19(2) (materials supplied by the consumer).
[159] The language used in s.19(1) might be clearer: for example, "the goods not failing to conform" in (b).
[160] See s.15(2).
[161] S.19(5).
[162] Cf. Department for Business, Innovation and Skills, *Consolidation and Simplification of UK Consumer Law* (November 2010) chapter 7.
[163] Under s.12(2) Sale of Goods Act 1979, where the equivalent of this term was classified as a warranty: see 12(5A).

performance where damages would be an adequate remedy. A consumer would need to show, for example, that the goods were unique in some way in order to obtain an order for specific performance. Given, the performance based nature of some of the remedies in the Act, might this change? Similar issues were mooted following the introduction, as a result of the Consumer Sales Directive, of the additional remedies for consumers in the Sale of Goods Act 1979 back in 2003.[164] There appears to be no clear evidence of such a shift at the moment. On the other hand, we must remember the EU origin of these provisions and s.58 of the Act provides that a court has power to order specific performance of the remedy of repair or replacement.

(f) Right(s) to Reject

Traditionally a consumer buyer, faced with, for example, a breach of one of the statutory implied terms under the Sale of Goods Act 1979,[165] could prima facie reject the goods. This was potentially a powerful self-help remedy for a consumer which also allowed the consumer to reclaim the price paid (if any) and claim damages for non-delivery.[166] S.35 of the Sale of Goods Act 1979 (before the reforms emanating from the Consumer Rights Act 2015) provided that a buyer would be deemed to have 'accepted' the goods and, therefore to have lost the right of rejection in three situations: (i) express intimation; (ii) an act inconsistent with the ownership of the seller; or (iii) lapse of a reasonable time. Yet, despite reforms made in 1994,[167] the doctrine of acceptance caused uncertainty for buyers and sellers. For example, where the property has passed to the buyer what was meant by an act inconsistent with the ownership of the seller?[168] What was meant by a reasonable time?

The Consumer Rights Act 2015 amended s.35 of the Sale of Goods Act 1979 so as to remove consumer cases for its ambit.[169] In broad terms it also provides for two rights of rejection: a short-term right under s.22 and a final right of rejection under s.24 (this is, of course, in addition to the new right of unwinding introduces for misrepresentation by the CPAR 2014!). In broad terms the short term right of rejection is a curtailed form of the traditional right of rejection and the final right of rejection is the right of rescission required under the Consumer Sales Directive. S.20[170] makes provision common to both forms of rejection: the consumer can reject by indicating to the trader the he/she is rejecting the goods and "treating the

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[164] See C. Willett, M. Morgan-Taylor and A. Naidoo, 'The Sale and Supply of Goods to Consumers Regulations' [2004] *JBL* 94, 111.
[165] Sale of Goods Act 1979, ss.12-15.
[166] Under s.51.
[167] Sale and Supply of Goods Act 1994.
[168] See *Kwei Tek Chao v. British Traders and Shippers Ltd* [1954] 2 QB 459.
[169] Schedule 1, paragraph 24.
[170] See also s.25(5)-(6) in relation to delivery of the wrong quantity.

contract as at an end";[171] the consumer is entitled to a refund following rejection;[172]the consumer must make goods available for collection "or (if there is an agreement for the consumer to return rejected goods) to return them as agreed."[173] This last provision is a development on s.36, Sale of Goods Act 1979 which merely provided: "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them." S.36 of the Sale of Goods Act 1979 was sometimes thought to be harsh on the seller given that the risk is on them.[174] Leaving aside questions of how and when the agreement to return the goods mentioned is s.20(7)(b) is formed, this may be a situation where the Sale of Goods Act 1979 is more generous to buyers than the new Act![175] S.20(15) helpfully provides that the refund must be given within 14 days; although, less helpfully from a consumer perspective, the clock starts ticking when the "trader agrees that the consumer is entitled to a refund."[176]

The time limit for the short-term right to reject is set-out in s.22. Essentially a consumer has 30 days[177] in which to exercise the short-term right of rejection:

> "…beginning with the first day after these have all happened—
>
> (a) ownership or (in the case of a contract for the hire of goods, a hire-purchase agreement or a conditional sales contract) possession of the goods has been transferred to the consumer,
>
> (b) the goods have been delivered, and
>
> (c) where the contract requires the trader to install the goods or take other action to enable the consumer to use them, the trader has notified the consumer that the action has been taken."

The virtue of this provision is that it gives a clear (or, perhaps, fairly clear given the fact that there are exceptions[178] and the clock starts ticking once, amongst others things, ownership has passed which, as this is based on the intention of the parties,[179] can, sometimes, give rise to difficulties[180]) period in which the reject the goods; and the period seems, broadly, to accord with the expectations of consumers.[181] Yet, on the other hand, it does seem, in broad

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[171] Interesting the Act refers to rejecting the goods and treating the contract as at an end (see, for example, s.20(4)). Cf. s.25(4) (delivery of the wrong quantity) where a clear distinction is drawn between rejection and termination.
[172] S.20(7)(a). In relation to hire contracts, credit is given for use of the goods before rejection: see s.20(13). This does not, explicitly at least, seem to be the case with the other contracts in this Chapter. *Quaere*: is the law of unjust enrichment excluded here?
[173] S.20(7)(b).
[174] See M. Bridge, *Benjamin's Sale of Goods* (9th edn., Sweet & Maxwell, London, 2014) at 12-067. Cf. the duties of the buyer as a bailee.
[175] Note s.20(8) on costs, which seems to state that the trader must pay reasonable costs for the consumer to return the goods regardless of what is agreed in the above mentioned agreement.
[176] On the means of refund see s.20(16)-(17).
[177] Note that this can be extended, by not reduced, by agreement: see ss.22(1)-(2).
[178] See s.20(4).
[179] See s.18, Sale of Goods Act 1979.
[180] Cf. *Kulkarni v. Manor Credit (Davenham) Ltd* [2010] EWCA Civ 69.
[181] See Law Commission, *Consumer Remedies for Faulty Goods* ((2009) LAW COM No 317) at 3.52: "A secondary reason for choosing a 30-day period is that it appears to correspond with consumers'

terms, to reverse the general direction of travel in respect of the time in which rejection had to be exercised under s.35 of the Sale of Goods Act 1979;[182] and it makes an interesting contrast with the 90 day 'unwinding period' under the CPAR 2014! Moreover, it is not clear that 30 days is enough for some, more complex, goods.[183] There is, of course, the final right of rejection which is further mapped out in s.24 and will be discussed further below.

(g) Right to Repair or Replacement

The former provisions on repair and replacement in the Sale of Goods Act 1979, emanating from the Consumer Rights Directive, are largely carried through to the s.23 of the Consumer Rights Act 2015. Thus the trader must repair or replace the goods "within a reasonable time and without causing significant inconvenience to the consumer";[184] the trader must bear the costs of the repair or replacement (including, for example, postage);[185] neither of these remedies can be exercised if it is impossible or disproportionate to the other of these remedies;[186] and a consumer who requires or agrees the repair or replacement of goods cannot exercise the (now) short term right of rejection or the other remedy (of repair or replacement as the case might be) without giving the trader a reasonable time to repair or replace as the case might be.[187] The Act adds a basic definition of repair.[188] On the other hand, there is still some uncertainty over the proportionate test (particularly when dealing with low value goods) and the test for significant inconvenience;[189] and this uncertainty may, given potential underlying inequalities in bargaining power, work to a trader's advantage when seeking to resist a claim for repair or replacement.[190]

(h) Right to price reduction and final right to reject

The second level of remedies (price reduction or final right of rejection[191]) envisaged under the Consumer Sales Directive are provided for by s.24, Consumer Rights Act 2015. As second level remedies they are only available where: a repair or replacement has not been successful;[192] repair and replacement are impossible;[193] or, following a request to repair or replace the goods, the trader breaches s.23(2)(a) (obligation to repair or replace within a

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expectations…When consumers were asked to say how long the right should last, the most common reply, given by 30% of consumers, was that the right should last for about a month."

[182] See *Fiat Auto Financial Services v. Connelly* 2007 S.L.T. (Sh. Ct) 111 (on the facts rejection of defective car possible after nine months).

[183] Cf. Law Commission, *Consumer Remedies for Faulty Goods* ((2009) LAW COM No 317) at 3.66ff.

[184] S.23(2)(a).

[185] S.23(2)(b).

[186] S.23(3). Note under s.48B(3), Sale of Goods Act 1979 there was a further limitation: namely if "disproportionate in comparison to an appropriate reduction in the purchase price under paragraph (a), or rescission under paragraph (b), of s.48C(1)…".

[187] See s.23(6)-(7).

[188] S.23(8).

[189] Defined in s.23(4)-(5)..

[190] *Quaere*: the burden of proof in relation to these limitations.

[191] S.24(5) makes it clear that these remedies operate as alternatives.

[192] S.24(5)(a). See also s.24(6)-(7) on meaning of repair and replacement.

[193] S.24(5)(b).

reasonable time and without significant inconvenience on consumer).[194] The remedy of price reduction requires a trader to reduce (and return if already paid or transferred[195]) some or all[196] of the price (or other consideration)[197] under the contract.[198] Unlike under the CPAR 2014,[199] where there is (a fairly crude) sliding scale of reductions, under the Act the price (or other consideration) is only stated as needing to be reduced by "an appropriate amount".[200] Again this uncertainty may, given potential underlying inequalities in bargaining power, work to a trader's advantage when seeking to resist a claim for a certain amount of reduction. Under the final right of rejection, any refund to the consumer may be reduced on account of the consumer's use of the goods[201] although this is subject to qualifications.[202]

(i) Other rules

Part 1 of the Act also makes various other provisions in relation to goods contracts. Thus s.28 makes provision, in relation to a "sales contract",[203] in respect of delivery.[204] Prior to the Act, the Sale of Goods Act 1979 made provision in relation to delivery in all contracts of sale of goods.[205] Delivery was defined not as sending the goods as a consumer would perhaps expect but as a "voluntary transfer of possession from one person to another".[206] Significantly, delivery could be symbolic or constructive.[207] In terms of the time for delivery, the Sale of Goods Act 1979 provided: "Where…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."[208] S.29(3) of the Sale of Goods Act 1979 is dis-applied to consumer sales by the Consumer Rights Act 2015.[209] The genesis of this provision was Article 18 of the Consumer Rights Directive, now transposed by s.28(3)-(4) of the Consumer Rights Act 2015. Interesting s.59 defines delivery in similar terms to the 1979 Act.[210] This, of course, raises the question of whether or not this provision would be interpreted in a similar fashion to s.29(3) of the Sale of Goods Act 1979. From the point of view of consumer clarity this would be unfortunate given the

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194 S.24(5)(c).
195 S.24(1).
196 S.24(2). *Quaere*: what adjustments, if any, need to be made for use in such a situation?.
197 Where the consideration is partly monetary and party non-monetary it is not clear whether or not the consumer or trader has a choice which to reduce.
198 Cf. s.24(4).
199 See above at XXX.
200 S.24(7).
201 S.24(8).
202 See s.24(9)-(10).
203 Was this a missed opportunity to consolidate delivery provisions in all contracts for the supply of goods?
204 Note also s.26(5) on instalment deliveries.
205 With the exception of s.29(3), Sale of Goods Act 1979 those provisions still apply to consumers which links to the fragmentation point above at XXX.
206 S.61.
207 Cf. *Albright & Wilson UK v. Biachem Ltd* [2002] UKHL 37.
208 S.29(3), Sale of Goods Act 1979.
209 See s.29(3A), Sale of Goods Act 1979.
210 "'[D]elivery' means voluntary transfer of possession from one person to another".

colloquial use of the word delivery[211] and, indeed, it is not clear that such an approach would conform with the Directive.[212]

S.26 makes provision in relation to delivery by instalments. S.26(1) provides (as did s.31 of the Sale of Goods Act 1979) that, unless otherwise agreed, the consumer is not obliged to accept delivery by instalments. Where delivery by instalments has been agreed and one or more of the instalments delivered is defective, can the consumer reject the totality of the goods and/or terminate the whole contract? Traditionally this would, at least in part, depend on whether or not the delivery obligation was divisible or indivisible, a distinction which was far from straightforward;[213] and, indeed, on the doctrine of acceptance.[214] The latter is, of course, gone in relation to consumer sales[215] but s.26 is premised on the latter (applying to divisible contracts).[216] This is, perhaps, unfortunate from a consumer clarity perspective, not least as nowhere in the Act is the distinction between divisible and indivisible obligations mentioned or explained.[217] The position is further complicated by curious provisions in s.20(20)-(21). S.20(20) provides:

> "(20) Subsection (21) qualifies the application in relation to England and Wales…of the rights mentioned in subsections (1) to (3) where—
>
> (a) the contract is a severable contract,
>
> (b) in relation to the final right to reject, the contract is a contract for the hire of goods, a hire-purchase agreement or a contract for transfer of goods, and
>
> (c) section 26(3) does not apply."

Again the phrase "severable contract" may not mean much to the average consumer.[218] S.20(20)(c) seems to suggest that the provision applies to contracts other than those to which s.26(3) applies; in other words, severable contracts other than contracts where delivery is made by instalments which are separately paid for. Yet if this is the case, why are sales contracts taken out of the scope of s.20(20) by s.20(20)(b)? Could it be that s.26 was, despite its wording, only intended to apply to sales contracts?

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[211] How would the average consumer interpret s.28(2) ("[u]nless the trader and the consumer have agreed otherwise, the contract is to be treated as including a term that the trader must *deliver the goods to* the consumer" (emphasis added))?

[212] See Recital 55: "…consumer should be considered to have acquired the physical possession of the goods when he has received them."

[213] *Ibid.* See also *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* [1934] 1 K.B. 148.

[214] Certainly prior to the reform made to the Sale of Goods Act 1979 in 1995.

[215] See above at XXX.

[216] S.26 applied "…if the contract provides for the goods to be delivered *by stated instalments*, *which are to be separately paid for*" (emphasis added).

[217] S.26(3)-(4) merely states that the ability to reject the totality of the goods depends on the "circumstances of the case"! .

[218] S.20(21) provides: "The consumer is entitled, depending on the terms of the contract and the circumstances of the case—(a) to reject the goods to which a severable obligation relates and treat that obligation as at an end (so that the entitlement to a refund relates only to what the consumer paid or transferred in relation to that obligation), or (b) to exercise any of the rights mentioned in subsections (1) to (3) in respect of the whole contract."

Contracts to Supply Digital Content to Consumers

(a) Introduction

Part 1, Chapter 3 makes specific new provision in respect of contracts to supply digital content and at this point a number of points needs to be made in respect of these provisions. First, the provisions adopt a traditional contractual framework using, for example, what used to be called implied terms. Secondly, s.33 deals with the contracts covered by Chapter 3. S.33(1) provides that the Chapter 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."[219] Thus, in terms of furnished consideration, Chapter 3 is narrower than Chapter 2 (where, of course, contracts supported by other forms of consideration are included[220]).[221] On the other hand s.33(3) extends the definition of the price[222] to include (in the words of the relevant Explanatory Notes): "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)." Moreover s.33(2) extends the coverage of the chapter to certain "free" digital content which is supplied with goods, services or other digital content (if the consumer has paid a price for those goods, services or other digital content).

Thirdly, in terms of overlap with different Chapters in Part 1, s.1(4) makes it clear that more than one Chapter can apply to a particular contract if it is a "mixed contract".[223] Yet the demarcation is not entirely satisfactory. Take, for example, the case of bespoke software supplied to a consumer. This could arguably come within s.33(1) as a supply of digital content but it could also arguably come within s.48[224] as a contract to supply a service.[225] If the former option is taken the digital content would, for example, need to meet the (strict liability) standard of satisfactory quality;[226] whereas if the latter option is taken the obligation would the (qualified liability) standard of reasonable care and skill[227] would instead be applied.

(b) Obligations

Ss.34-41 of the Act establish consumers' statutory rights in respect of the supply of digital content. Some of these rights, which are expressed through the contract containing a term to that end, are familiar and effectively mirror some of the obligations in goods contracts under

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[219] Emphasis added.
[220] See XXX.
[221] Note, however, s.33(5)-(6) and (9)-(10) giving the Secretary of State power to extend the reach of this Chapter.
[222] "The references in subsections (1) and (2) to the consumer paying a price include references to the consumer using, by way of payment, any facility for which money has been paid."
[223] See also s.16 providing that goods do not conform to the contract if those goods include digital content which does not conform to the contract under s.42(1).
[224] See below at XXX.
[225] Cf. *Saphena Computing Ltd v Allied Collection Agencies Ltd* 3 May 1989 (unreported).
[226] See below at XXX
[227] See below at XXX.

ss. 9-18 of the Act.[228] Thus the digital content must be of satisfactory quality,[229] the digital content must be fit for purpose[230] and the digital content must match any description.[231] Similarly s.37 makes provision, similar to s.12,[232] in respect of particular pre-contractual information.[233] S.41, will deals with a trader's right to supply digital content is also broadly familiar although, given that it is common for digital content to be merely licensed to the consumer, it uses the language of "right to supply" rather than "right to sell".[234] Curiously, however, s.41 does not include terms about quiet enjoyment[235] and it does not apply to free digital content.[236]

Other provisions are less familiar. For example, s.39 deals, in fairly technical language, with transmission and continued transmission. The focus of s.39 is on situations where the digital content is not supplied on a tangible medium (e.g. a disk or embedded in, for example, a washing machine[237]). S.39(1)-(2) deals with the point of supply, which is akin to the point of delivery in relation to goods contract:

> "For the purposes of this Chapter, the digital content is supplied—
>
> (a) when the content reaches the device, or
> (b) if earlier, when the content reaches another trader chosen by the consumer to supply, under a contract with the consumer, a service by which digital content reaches the device."[238]

S.39(3)-(6) deals with situations where the consumer is to access the digital content through a "processing facility".[239] In such situations the processing facility must be available for a reasonable time (or other time specified in the contract)[240] and ss.34-36 apply to each provision of digital content under such a facility.[241]

Finally under s.47 liability for breach of ss.34, 35, 36, 37 or 41 cannot be excluded or restricted.

(c) Remedies

Chapter 3 also sets-out various remedies for situations where the trader fails to comply with the relevant statutory rights. Perhaps disappointingly from the point of view of clarity in

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[228] Which, of course, raises the question of whether or not the consolidation aspect of the Act might have been more effective.
[229] S.34. There are, however, some slight differences. Thus: s.34(3) does not (in contrast to s.9(3)) refer to appearance and finish; and s.34(4) refers to trail versions instead of, under s.9(4), samples.
[230] S.35.
[231] S.36. Note, however, that, unlike s.11, s.36 is not framed in terms of supplying *by* description.
[232] See above at XXX.
[233] See s.42 for remedies for breach of this term.
[234] As under, for example, s.17(1)(b).
[235] Cf. *Rubicon Computer Systems Ltd v. United Paints Ltd* (2000) 2 TCLR 454.
[236] On which see above at XXX. Nor does it apply where the consumer provides non-monetary (in the extended sense described above at XXX) consideration.
[237] See *Consumer Rights Act 2015: Explanatory Notes* para 192.
[238] S.39(2).
[239] Defined in s.39(4).
[240] S.39(5).
[241] S.39(6).

respect of consumer rights, the remedies outlined in Chapter 3 represent only some of the remedies available; remedies such as damages, specific performance and the recovery of money where the consideration has failed are governed by the general law.[242] On the other hand, it is not possible to treat a contract at an end for breach of ss. 34, 35, 36, 37 and 41.[243] This provision, which is linked to the practical difficulties around effectively returning digital content,[244] means that, in a sense, means that consumers of digital content are less protected than consumers of goods.[245] S.42(2) provides two levels of remedy when the digital content does not conform to the contract:[246] (a) the right to repair or replacement and (b) the right to a price reduction. The detail of the remedies of repair and replacement[247] largely mirror the corresponding provisions in relation to goods contracts.[248] The remedy of price reduction[249] also resonates with the remedy of price reduction in relation to goods contracts although there are some noticeable differences.[250]

Chapter 3 also provides remedies in three other situations. First, in respect of breach of s.41 (right of trader to supply digital content), s.45 provides a consumer with a right to a refund[251] which, presumably, is without reduction due to use.[252] Secondly, for breach of s.37 (other pre-contractual information included in contract), s.42(4) provides a remedy of costs resulting from the breach (up to the amount of the price paid[253]). Finally, under s.46 a consumer is explicitly given remedies where:

> "(a) a trader supplies digital content to a consumer under a contract,
>
> (b) the digital content causes damage to a device or to other digital content,
>
> (c) the device or digital content that is damaged belongs to the consumer, and
>
> (d) the damage is of a kind that would not have occurred if the trader had exercised reasonable care and skill."

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[242] S.42(7).
[243] S. 42(8).
[244] See BIS, *Enhancing Consumer Confidence by Clarifying Consumer Law* (July 2012) para 7.138. On the other hand the remedy of rejection continues to be available for breach of an express term of a contract to supply digital content.
[245] Cf. s.16 (where digital content is provided on, for example, a disk).
[246] Conformity is judged by reference to ss.34-36 of the Act. On presumptions of non-conformity see s.42(9)-(10).
[247] See s.43.
[248] See s.23.
[249] See s.44. The price could be reduced by 100%: see s.44(2).
[250] Under Chapter 3, subject to s.43(2) (repair or replacement to occur within a reasonable time and without significant inconvenience to the consumer), more than one attempt at repair or replacement may be possible before the right to price reduction becomes available.
[251] Note s.45(2): "If the breach giving the consumer the right to a refund affects only some of the digital content supplied under the contract, 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."
[252] See XXX.
[253] This includes s.33(3).

The remedies are repair[254] and compensation.[255] The latter remedy is intriguing as, arguably, that remedy would be available for breach of the term in s.34 or s.35.[256] Indeed a claim under s.34 or s.35 might be preferable on the ground of the strict liability nature of such a claim.[257] The former remedy (repair) is innovative in that it seeks repair of damaged devices or digital content not supplied under the contract.[258]

Contracts to Supply a Service

(a) Introduction

Part 1, Chapter 4 of the Consumer Rights Act deals with contracts "for a trader to supply a service to a consumer."[259] It makes, what might be termed, general provisions in relation to such contracts; leaving in place more specific provisions in particular service areas such as financial services;[260] this is, of course, understandable given the highly specialised nature of some of those areas but it does result in a degree of fragmentation in relation to services and it may be necessary for the legislature to give further thought to the interactions in the (consumer) services legislative landscape.

(b) Terms of the Contract

Part 1, Chapter 4 makes a number of provisions in relation to the terms of a "contract to supply a service."[261] Some of these provisions are framed in fairly familiar terms: s.49 states that such contracts include a "term that the trader must perform the service with reasonable care and skill";[262] s.51 provides, in broad terms, that a reasonable price must be paid for a service where the price is not provided for by the contract; and s.52 provides for a term that a service must be provided in a reasonable time if the time is not provided for by the contract. Other provisions are less familiar. We have already mentioned the blurring of the distinction between terms and representations in s.50(1)-(2).[263] Moreover it is not possible to *exclude* liability for breach of s.49 or s.50 of the Consumer Rights Act 2015.[264] S.57(3) provides:

> "A term of a contract to supply services is not binding on the consumer to the extent that it would restrict the trader's liability arising under any of sections 49 and 50 and, where they apply, sections 51 and 52 (reasonable price and reasonable time), if it would prevent the consumer in an appropriate case from

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[254] See s.46(3)-(4).
[255] See s.46(5)-(6).
[256] By analogy with *H Parsons (Livestock) Ltd v. Uttley Ingham Co Ltd* [1978] QB 791.
[257] Cf. H. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-523.
[258] The nature of the 'damages' under s.46 is not clear. The *Consumer Rights Act 2015: Explanatory Notes* para 219 might be taken as suggesting the tortious measure.
[259] S.48(1).
[260] See s.53.
[261] Phrase used in s.48(4).
[262] Note s.15 of the Act which provides for strict liability in relation to a service: "(1) 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."
[263] See XXX.
[264] See s.57(1)-(2).

recovering the price paid or the value of any other consideration. (If it would not prevent the consumer from doing so, Part 2 (unfair terms) may apply.)"

Unfortunately the drafting of this sub-section is not the model of clarity! Does it mean that it is never possible to *restrict* liability under s.49 and s.50? If so, would it not have been better to phrase s.57(1)-(2) in terms of exclude or restrict? Or does it mean that it is not possible to *restrict* liability under s.49 and s.50 to a sum below the contract price?[265] Furthermore the Consumer Rights Act does not explicitly prevent the exclusion of liability arising under s.51 or s.52 but, at least on the second interpretation advanced in relation to the restriction of liability under s.49 and s.50, it would seem to be implicit in the barrier of the purchase price.[266]

(c) Remedies

The Act makes provision for breach of its statutory rights in relation to services contracts in ss.54-56. The remedies provided are, as in the case elsewhere in the Act not exhaustive. Thus, in addition or instead of the remedies outlined in the Act,[267] a consumer may, for example and where appropriate, claim damages, specific performance or termination of the contract.[268] The framework of remedies provided by the Act in relation to services contracts is, perhaps, over-elaborate. Essentially where the service those not conform to the contract, two remedies are provided by the Act: the right to repeat performance[269] and the right to a price reduction.[270] Conformity with the contract means compliance with s.49 (reasonable care and skill) and "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*."[271] The relevant terms under s.50 include the term relating to things said and written by the trader[272] as well information to be provided by the trader under Regulations 9, 10 or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. Thus, in relation to the latter information, reference has to be made to, for example, Regulation 9 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 which, in turn, refers onwards to Schedule 1 of the same Regulations! Moreover it may be that there will be some debate as to whether some of the information which a trader is required to provide relates to "*the performance of the service*." For example, would the trader's complaint handling policy come within this provision?[273] Indeed, more generally, how, if at all, does the remedy of repeat performance operate where there has been a failure to provide relevant information under the Consumer Contracts (Information, Cancellation

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[265] "It also makes clear that a trader cannot limit its liability for breach of these sections to less than the contract price": *Consumer Rights Act 2015: Explanatory Notes* p.66.
[266] In terms of the scope of exclusions and restrictions see s.57(4)-(5).
[267] Note s.54(6) which provides that the consumer cannot claim twice for the same loss.
[268] S.54(7). Note also s.54(1) on rights in the contract.
[269] S.55.
[270] S.56.
[271] S.54(2) (emphasis added).
[272] See above at XXX.
[273] Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, Schedule 1, para. (f).

and Additional Charges) Regulations 2013? On one view, the remedy of repeat performance does not apply as s.50(3) seems limited to information *actually provided.*[274] Yet, even if s.50(3) is so limited, how would the remedy of repeat performance apply to certain informational requirements such as the provision of incorrect information about, if applicable, trader's complaint handling policy? Is it sufficient that the correct information is subsequently provided (where, perhaps, the consumer wishes to complain, not about the service provided, but about the manner in which the price was fixed under s.51(1)(b)[275])?[276]

Where there is a "breach of a term that section 50 requires to be treated as included in the contract but that does *not* relate to the service"[277] or s.52 (performance in a reasonable time) then the sole remedy provided by the Act is a reduction in price (this is, of course, in addition to other remedies existing outside of the Act). Where, on account of the service not conforming with the contract, the consumer potentially has a right to repeat performance and a right to a reduction in price, those remedies operate in a hierarchical fashion with the second remedy only available where repeating performance is impossible[278] or the trader has failed to repeat performance within a reasonable time and without significant inconvenience to the consumer.[279] The (new) right to require repeat performance is explained in s.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."[280]

Significantly there is no requirement for it to be a proportionate remedy[281] and so a consumer could, potentially, require repeat performance at a cost disproportionate to the benefit gained as a result of the repeat performance.[282] It is not at all clear, given the deregulation agenda, that this have been an intended consequence of s.55. The right to a reduction in price (which can be a reduction amounting to the full price[283]) is outlined in s.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)."[284]

A refund under this section must be given without "undue delay" and within 14 days of the *trader agreeing* that the consumer is entitled to a refund.[285] The formulation of this provision,

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[274] There may still, however, be a breach of contract.
[275] *Quaere*: could rudeness during the performance of a service potentially breach s.49?
[276] Perhaps on the ground that this 'part' of the service consists of providing information.
[277] S.54(4) (emphasis added).
[278] S.56(3)(a) referring to s.55(3). See also *Consumer Rights Act 2015: Explanatory Notes* at para. 263: "A consumer cannot require re-performance if it is impossible, for example this might apply if the service was time specific."
[279] S.56(3)(b) referring to s.55(2)(a). See also s.55(4).
[280] Emphasis added.
[281] See H. Beale (ed.), *Chitty on Contracts*, (32nd Edn., Sweet & Maxwell, London, 2015) para. 38-541..
[282] *Quaere*: when a court would order specific performance of this right (see s.58).
[283] See s.56(2).
[284] See s.56(5)-(6).
[285] S.56(4).

which relies on the trader's agreement, is, perhaps, unfortunate for the point of view of certainty for consumers.

Conclusion

The Cameron-Clegg coalition (2010-2015) initiated a significant programme of reform in respect of core consumer law. That programme resulted, for example, in: a clearer separation of legislative provisions relating to consumer and commercial transactions; the consistent use of key concepts across a large part of core consumer law; a consolidation of the law on the supply of goods to consumers; the clarification of particular aspects of core consumer law (such as the amount of time a consumer has to reject faulty goods); specific new provision in respect of contracts to supply digital content; the creation of specific rights of private redress for unfair commercial practices; and a more integrated and coherent framework for the regulation of unfair terms. These reforms took place against the spectre of the global financial crisis. This can be seen, for example, in the (partial) privatisation of remedies for unfair commercial practices which, as we have seen, was driven by the weakness of the public purse. It can also be seen in the way in which the coalition adopted a largely market-driven approach to consumer; where consumer law and confident consumers were viewed as key ingredients to the efficient functioning of the market and the development of the economy.

The key aims of this programme of reform were: to streamline consumer rights; to clarify aspects of consumer law; to modernise consumer law, particularly for the digital age; to deregulate for businesses; and to selectively enhance consumer protection. Yet this programme of reform was beset by drafting problems, omissions, seemingly unintentional results, internal inconsistencies and tensions with EU law (which, as noted above, will survive Brexit). Overall the resulting reforms suffer from five major deficiencies. First, there is a lack of clarity in terms the policy or policies behind a number of the reform; the retorts to notions of confident consumers, and its linkage with competition in the market, were vague and unsatisfying. Secondly, the reforms were often excessively complex; this is particularly so in relation to the remedies regime for both unfair commercial practices and the consumer supply contracts. Thirdly, whilst some consolidation occurred as a result of this programme of reform, more fragmentation was created both within national law and with EU law; and in a number of instances the Sale of Goods Act 1979 was preferable for consumers. Fourthly the reforms are tied to conceptual conservatism. For example, the Consumer Rights Act 2015 is built on a traditional contract model, which recognises the term-representation dichotomy. Yet non-contractual representations may, in reality, shape a consumer's expectations as much as a contractual statement and, whilst the line between terms and representations continues to be blurred, there is fragmentation by the absence of the full treatment of representations in the Act. Finally, the idea that a major piece of consumer legislation, even legislation which is better drafted that the Consumer Rights Act 2015 and which will almost inevitably contains detailed legal language, can without more make consumer rights more accessible is, with respect, misconceived. If consumers are to be more confident, then

different strategies for distilling and disseminating consumer rights (such as the Law Commission's recommendation in its 2005 report on *Unfair Terms in Contracts* to incorporate examples, which could then be extracted), need to be embraced.

Unfortunately there appears little appetite to address these issues at the present time.[286]

[286] See Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union*, (Cm 9446, updated May 2017) at 2.17.