

# CRA 2015 Briefing 06-15

**Authors** Kevin Heath and Mike Kilbee

## Introduction

The main provisions of the Consumer Rights Act 2015 (CRA) will come into force on 1 October 2015.

The CRA consolidates key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts. Other provisions introduce new requirements on letting agents and controls on “secondary ticketing” and revised procedures for challenging anti-competitive behaviour. The CRA is in three parts:

**Part 1 – Consumer Contracts for Goods, Digital Content and Services.** The contracts in question will be B2C. “Consumers” for this purpose are individuals who are acting for the purposes that are wholly or mainly outside of their trade, business, craft or profession. If there is a dispute, it will be for the trader to prove that the individual was not acting as a “consumer.”

**Part 2 – Unfair Terms in Consumer Contracts.** The same definition of “consumer” applies; and

**Part 3 – Enforcement Powers; Private Actions in Competition Law; Duties of Letting Agents; Secondary Ticketing.**

*This briefing explains some of the main provisions. It does not attempt to cover every provision.*

## Consumer Contracts For Goods

Includes sales contracts, hire, hire-purchase and contracts for the transfer of goods. Each of these is a “contract to supply goods”.

Sales contracts for second hand goods sold at public auctions which individuals can attend in person are outside the scope of this part of the CRA except for rights and remedies relating to pre-contract information under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (Consumer Contracts Regulations 2013), delivery of the goods and the passing of risk.

## Implied Terms

The CRA sets out contractual rights which cannot be excluded or restricted. These cover:

- Satisfactory quality – goods must be of “satisfactory quality”, i.e. the standard that a “reasonable person” would consider satisfactory taking account of any description, the price, and other relevant circumstances such as any public statement or advert by the trader, producer or their representative but this does not include anything specifically drawn to the consumer’s attention pre-contract or, if the consumer examines the goods pre-contract, anything that examination ought to reveal. Other aspects of quality in “appropriate cases” include fitness for all the purposes for which goods of that kind are usually supplied; appearance and finish; freedom from minor defects; safety; and durability.
- Fitness for purpose – goods must be reasonably fit for a particular purpose if made known by the consumer (expressly or impliedly) to the trader or, where applicable, to a supplier which is credit-broker.

- Description – goods must match (i) the description if goods are supplied by description; (ii) the sample if supplied by reference to a sample seen by the consumer; and (iii) the model if goods are supplied by reference to a model seen by the consumer.
- Installation – if the installation of goods is part of the contract, then goods will not conform to the contract if they are installed incorrectly by or on behalf of the trader.
- Digital content – if goods include digital content and that digital content does not conform with the contract then the goods will not conform either.
- Right to supply – the trader must have the right to sell the goods at the time when ownership is to be transferred or, in the case of hire, must have the right to transfer possession of the goods at the beginning of the hire period and the consumer will enjoy quiet possession for that period. Various limitations may apply if agreed by or disclosed to the consumer.
- If the Consumer Contracts Regulations 2013 apply then most of the items of pre-contract information will be terms of the contract.

The rights relating to satisfactory quality, fitness for purpose, matching description, matching sample and the right to supply correspond to the equivalent provisions in the Sale of Goods Act, The Supply of Goods and Services Act and The Supply of Goods (Implied Terms) Act, as appropriate.

### Consumer Remedies

The CRA introduces a new regime for consumer remedies if goods do not conform to the contract. The remedies available are (depending upon the breach in question):

- (a) A short-term right to reject;
- (b) A right to reject (i.e. not the short-term right);
- (c) A right to repair or replacement of the goods;
- (d) A right to a reduction in the price or a final right to reject;
- (e) A right to recover costs.

The CRA, however, provides that this new regime does not prevent consumers from seeking other remedies generally available such as damages, specific performance or (if the trader is in breach of an express term of the contract rather than a term arising under the CRA) acceptance of a repudiation by the trader.

### Short-Term Right To Reject

Arises

Arises if there is a breach of a term implied by the CRA that the goods are to be of satisfactory quality; fit for a particular purpose; match description; match sample; match model.

If the goods include digital content and that digital content does not conform to the terms implied by the CRA, then the short-term right to reject the goods will arise.

Exercise Of Right

The consumer may exercise the right to reject by indicating by words or action to the trader that he is rejecting the goods and treating the contract as at an end.

The consumer must exercise his short-term right to reject by the end of 30 days beginning with the day after all of the following have happened:

- Ownership of the goods has been transferred to the consumer (or in the case of the hire of goods, a hire-purchase agreement or a conditional sales contract, possession of the goods has been transferred to the consumer),
- The goods have been delivered, and
- If the contract requires the trader to install the goods or take other action to enable the consumer to use the goods, the trader has notified the consumer that the goods have been installed or the other action has been taken.

The trader and the consumer may agree a longer period than this 30 days but a shorter period will not be binding on the consumer unless the goods are perishable.

The consumer may exercise his short-term right to reject even before the 30 day period has commenced.

If the consumer requests or agrees to the repair or replacement of the goods before the expiry of the 30 day period then that will have the effect of stopping time running. There will then be a "waiting period" which ends on the day on which the consumer receives the goods from the trader in response to that request or agreement for repair or replacement. The consumer will then have the longer of 7 days or the original time limit extended by the "waiting period" in which to exercise the short-term right to reject if the goods then still do not conform to the contract.

### **Right To Reject**

Arises

Arises if there is a breach of the implied term that the trader has the right to sell or transfer the goods at the time when ownership is to be transferred (or, in the case of the hire of goods, that the trader has the right to transfer possession for the period of hire).

Exercise Of Right

The consumer may exercise the right to reject by words or action indicating that he is rejecting the goods and treating the contract as at an end.

### **Right To Repair Or Replacement**

Arises

Arises in the same circumstances as the short-term right to reject but arises also if there is breach of the requirement (if applicable) that the goods are installed correctly by the trader or a requirement that is stated in the contract.

For the purposes of this right to repair or replacement, if the goods do not conform to the contract at any time within 6 months of delivery, then the goods will be deemed not to have conformed on the day of delivery. There are exceptions to this 6 month rule if either it is shown that the goods did conform when delivered or the rule is not compatible with the type of goods or the way in which they fail to conform.

Exercise Of Right

The CRA does not lay down any particular requirements or any timescale for the exercise of this right. If the consumer also has a short-term right to reject, then he may decide to require the trader to repair or replace the goods before the expiry of the time limit for the exercise of this right to reject.

The trader must repair or replace the goods within a reasonable time and without significant inconvenience to the consumer. The trader is not, however, obliged either to repair the goods or to replace the goods if that remedy is impossible or if one or other of those two remedies is disproportionate compared to the other one. In these circumstances, it appears that the ball would be back in the consumer's court and the consumer would have to decide whether to require the trader to provide the other one of these two remedies or, if it is still applicable, to exercise his short-term right to reject or to exercise his right to a reduction in price or final right to reject.

If the consumer has required the trader either to repair or replace the goods then he cannot exercise the short-term right to reject without giving the trader a reasonable time to do so. The consumer may, however, still exercise the short-term right to reject (if it is applicable) if it would cause significant inconvenience to the consumer to allow the trader a reasonable time to repair or replace.

### **Right To Reduction In Price Or A Final Right To Reject**

Arises

Arises in the same circumstances as the right to a repair or replacement of the goods.

Similarly to the right to repair or replacement, if the goods do not conform to the contract at any time within 6 months of delivery then they will be deemed not to have conformed on the day of delivery.

Exercise Of Right

The right to a price reduction or the final right to reject are alternative remedies and the consumer may only exercise one of them. The consumer may only exercise the right if either:

- (a) The trader has provided one repair (and a repair will still be just one repair even if it is to repair several faults) or one replacement and the goods still do not conform to the contract;
- (b) Repair or replacement is impossible; or
- (c) The consumer has required the trader to repair or replace the goods but the trader has not done so within a reasonable time and without significant inconvenience to the consumer.

It is probably the case that condition (a) is intended to mean that the trader has repaired or replaced the goods at least once.

### **Rejection – Refund Of Money Paid, Etc.**

If the consumer exercises his right to reject under the CRA then:

- The trader must refund all money paid by the consumer without undue delay and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to it; and
- The consumer must make the goods available for collection by the trader (or to return them to the trader if that is agreed).

The amount of the refund may be subject to a deduction for the use the consumer has had of the goods. No such deduction may be made if the final right to reject is exercised in the first 6 months unless the goods are a motor vehicle (or other types of goods as may be specified in an order made under the CRA). A motor vehicle constructed or adapted for use by a disabled person is not subject to this restriction.

In the case of the hire of goods, entitlement to a refund applies only to money paid for a period of hire after the contract is treated as at an end.

If part of the price for the rejected goods was by way of a part exchange then the consumer is entitled to the return to him of those part exchanged goods. If the trader is unable to return the part exchanged goods then the CRA provides no further specific remedy with regard to the value of the part exchanged goods. The CRA acknowledges, however, that the consumer may have a claim for damages against the trader.

### **Price Reduction**

If the consumer claims a price reduction rather than exercises his final right to reject then the trader must reduce the price "by an appropriate amount" and to make a refund accordingly. The amount of the reduction may be anything up to the full amount of the price.

### **Recovery Of Costs**

If there is a breach of terms implied in respect of pre-contract information under the Consumer Contracts Regulations 2013 (if applicable) the consumer may recover costs arising from the breach up to the price paid.

### **Partial Rejection Of Goods**

If the contract is for multiple goods and the right to reject under the CRA arises in respect of some but not all of the goods then the consumer may either reject all of the goods or reject some or all of the goods that do not conform to the contract.

If, however, there are multiple goods which, together, form a "commercial unit" and the division of that unit would materially impair the value of the goods or the character of the unit then the consumer cannot reject some items without also rejecting the rest of them.

### **Other Rights And Remedies Applicable To Goods Contracts**

#### **Delivery Of Wrong Quantity**

The CRA applies the provisions corresponding to section 30 of the Sale of Goods Act but applies them to all contracts to supply goods.

#### **Instalment Deliveries**

The CRA applies the provisions corresponding to section 31 of the Sale of Goods Act but applies them to all contracts to supply goods.

#### **Delivery of Goods**

The provisions relating to the delivery of goods apply only to sales contracts with consumers. The provisions correspond to regulation 42 of the Consumer Contracts Regulations 2013.

#### **Passing Of Risk**

The provisions relating to the passing of risk apply only to sales contracts with consumers. The provisions correspond to regulation 43 of the Consumer Contracts Regulations 2013.

#### Goods Under Guarantee

These provisions, relating to guarantees given in relation to goods which are the subject of a contract to supply goods, correspond to regulation 15 of the Sale and Supply of Goods to Consumers Regulations 2002.

### Consumer Contracts For Digital Content

Digital content is defined as data which are produced and supplied in digital form. Examples are the data on a DVD, an e-book, game or music download, software download or satnav data. It is separate from the medium upon which the content is stored or processed.

As noted earlier, if an item of goods includes digital content and that content does not conform with the contract as it relates to that content then the goods will not conform either.

The CRA will not apply if the digital content is supplied free but will apply if supplied with goods or services or other digital content which the consumer does pay for and consumers generally have to pay for the digital content in question or for goods, services or other digital content.

#### Implied Terms

The CRA sets out contractual rights which cannot be excluded or restricted. These cover:

- Satisfactory quality – this is similar to contracts to supply goods (see above).
- Fitness for purpose – the digital content must be reasonably fit for a particular purpose if made known by the consumer (expressly or impliedly) to the trader or, where applicable, to a supplier which is credit-broker.
- Description – the digital content must match any description of it given by the trader to the consumer.
- Availability of processing facility – if the supply includes the provision by the trader of a processing facility under which the consumer may transmit digital content to the trader and receive digital content from the trader then that facility must be available for a reasonable time and the implied terms as to quality, fitness and description apply to all further digital content transmitted under the facility.
- Right to supply – the trader must have the right to supply the digital content.
- If the Consumer Contracts Regulations 2013 apply then certain items of pre-contract information will be terms of the contract.

#### Consumer Remedies

The CRA introduces a new regime for consumer remedies if the digital content does not conform to the implied terms.

The CRA does not prevent the consumer from seeking other remedies generally available such as damages, specific performance, recovery of money paid where there has been failure of consideration. The consumer cannot, however, treat the contracts as repudiated for breach of the above implied terms.

#### Right To Repair Or Replacement

Arises

Arises if there is a breach of a term implied by the CRA that the digital content is to be of satisfactory quality, fit for purpose, match description (including certain related pre-contract information under the Consumer Contracts Regulations 2013).

#### Exercise Of Right

The trader must repair or replace the digital content if required to do so by the consumer within a reasonable time and without significant inconvenience to the consumer. The trader is not, however, obliged either to repair the digital content or to replace the digital content if that remedy is impossible or if one or other of those two remedies is disproportionate compared to the other one.

The CRA does not lay down any particular requirements or any timescale for the exercise by the consumer of his right to repair or replacement of the digital content.

If the consumer has required the trader either to repair or to replace the digital content, he must give the trader a reasonable time to do so before requiring the trader to provide the other of those two remedies unless giving that time would cause significant inconvenience to the consumer.

For the purposes of this right to repair or replacement, if the digital content does not conform to the contract at any time within 6 months of the date of supply then the digital content will be deemed not to have conformed when it was supplied. There are exceptions to this 6 month rule if either it is shown that the digital content did comply with these implied terms when supplied or the rule is not compatible with the nature of the digital content or the way in which it fails to conform.

#### Right To Reduction In Price

Arises

Arises in the same circumstances as the right to repair or replacement.

#### Exercise Of Right

The consumer may only exercise the right to a price reduction if either:

- (a) Repair or replacement is impossible; or
- (b) The consumer has required the trader to repair or replace the digital content but the trader has not done so within a reasonable time and without significant inconvenience to the consumer.

#### Right To A Refund

Arises

Arises if there is a breach of the implied term that the trader has the right to supply the digital content.

#### Exercise Of Right

If the breach affects only some of the digital content, this right to a refund applies only to the part which is affected and does not extend to any part of the price attributable to digital content that is not affected by the breach.

#### Recovery Of Costs

If there is a breach of terms implied in respect of pre-contract information under the Consumer Contracts Regulations 2013 (if applicable), the consumer may recover costs arising from the breach up to the price paid.

#### Damage To Device Or To Other Digital Content

If the digital content causes damage to a device or to other digital content belonging to the consumer and the damage is of a kind

that would not have occurred if the trader had exercised reasonable care and skill then the trader will be liable to repair the damage or compensate the consumer.

## Consumer Contracts For Services

The CRA refers to services generally but excludes contracts of employment or apprenticeship.

### Implied Terms

The CRA sets out contractual rights which apply to contracts to supply a service and which cannot be excluded or restricted.

These cover:

- Reasonable care and skill – the trader must perform the service with reasonable care and skill.
- Information to be binding – anything said or written to the consumer by or on behalf of the trader which is about the trader or the service will be a term of the contract if either it is taken into account by the consumer when deciding to enter into the contract or when making a decision about the service afterwards.
- Reasonable price – if the consumer has not paid for the service and the contract does not expressly fix the price or say how it is to be fixed and if the price is not fixed by any information which has been given by the trader to the consumer then the customer must pay a reasonable price for the service and no more.
- Performance within a reasonable time – if the contract does not expressly fix the time for the performance of the service nor say how it is to be fixed and, if any information given by the trader does not fix the time, then the trader must perform the service within a reasonable time.
- If the Consumer Contracts Regulations 2013 apply then information under them will be terms of the contract.

### Consumer Remedies

If the service does not conform to the implied term as to reasonable care and skill or if the service does not conform to the implied terms relating to information given as to the performance of the service, then the remedies available to the consumer are:

- (a) The right to require repeat performance;
- (b) The right to a reduction in price.

If the trader is in breach of an implied term relating to information given but not relating to the service itself then the consumer has a right to a price reduction.

If the trader is in breach of the term that the service must be performed within a reasonable time as referred to above, the consumer has the right to a price reduction.

The CRA does not, however, prevent the consumer from seeking other remedies including damages, recovery of money paid for failure of consideration, specific performance, treating the contract as repudiated.

### Right To Repeat Performance

#### Exercise Of Right

The consumer may require the trader to repeat the performance of the service as necessary it so that it is performed with reasonable care and skill and in accordance with any term implied as a result of information given to the consumer as referred to above. The trader must provide the repeat performance within a reasonable time and without significant inconvenience to the consumer.

The consumer cannot, however, require repeat performance if that is impossible.

### Right To Reduction In Price

#### Exercise Of Right

If the consumer has the right to a price reduction and the right to require repeat performance then the consumer is only entitled to a price reduction if either:

- (a) It is impossible for the trader to complete the performance of the service; or
- (b) The consumer has required repeat performance but the trader has not done so within a reasonable time and without significant inconvenience to the consumer.

### Unfair Terms In Consumer Contracts

Part 2 of the CRA replaces the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) which will be revoked.

It also replaces the provisions of the Unfair Contract Terms Act 1977 (UCTA) barring terms excluding or restricting liability for death or personal injury resulting from negligence and related provisions. UCTA will, however, continue to apply to contracts which are not consumer contracts.

These provisions in Part 2 apply not only to consumer contracts between traders and consumers but also to “consumer notices” whether or not forming part of a contract. A consumer notice is a notice or announcement in any medium, whether or not in writing, if it either:

- Relates to the rights or obligations between the trader and consumer, or
- Seeks to exclude or restrict the trader’s liability.

A “shrink-wrap” software licence, for example, will be a consumer notice if it is not actually a term of the contract.

### Terms To Be Fair

Unfair terms in consumer contracts or consumer notices are not binding on the consumer. The test remains unchanged from the UTCCR – a term is unfair if, contrary to the requirement of good faith, it causes “a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer”. There is a “grey list” of terms that may be regarded as unfair (but not automatically unfair). This reflects the grey list in the UTCCR. Three items have, however, been added:

- A term requiring the consumer to pay a disproportionately high amount of compensation if the consumer decides not to conclude or perform the contract;
- A term allowing the trader to decide on the features of the goods or services or other subject matter of the contract after the consumer has become bound;
- A term allowing the lender to set the price after the consumer has been bound by the contract where no price or method of calculating it has been agreed when the consumer becomes bound.

### Excluded Terms

In similar manner to the UTCCR, contracts cannot be assessed for the fairness of terms specifying the main subject matter of the contract or of the price payable. The wording used, however, is intended to allow the fairness test to be applied to terms relating to the price other than the amount payable.

These exclusions apply only if the relevant terms are in plain and intelligible language, legible (if written) and prominent.

### No Exclusion Of Liability For Death Or Personal Injury

Part 2 applies to consumer contracts (but not, for example, B2B contracts) the provision previously in UCTA that a trader cannot exclude or limit liability for death or personal injury resulting from negligence. This extends to consumer notices.

There are various, detailed exceptions to this provision but these do not relate to consumer contracts generally.

### Transparency

Part 2 reflects the provisions of UTCCR requiring that a written term in a consumer contract is transparent. This extends to consumer notices. A term is transparent if it is in plain and intelligible language and is legible.

### Enforcement Of Unfair Terms Provisions

The lead enforcement authority is the Competition and Markets Authority. Other regulators authorised to enforce the provisions include Trading Standards Departments, the Financial Conduct Authority and the Information Commissioners Office.

In legal proceedings relating to any particular consumer contract, the courts have a duty to consider whether a term is fair even if the point is not raised by the consumer.

### Part 3 Of The CRA

Part 3 of the CRA makes detailed amendments to various existing enforcement provisions such as under the Enterprise Act 2002.

There are provisions intended to make it easier for consumers and businesses to apply for redress where there has been an infringement of competition law and to promote voluntary redress schemes.

Lettings agents will be obliged to publicise their fees and to publicise whether they are a member of a client money protection scheme and which redress scheme they have joined.

The CRA introduces certain new requirements and protections in the online secondary ticketing market. This is where tickets for sporting, etc. events are re-sold after having been acquired from the event organiser. Enforcement is by Trading Standard Departments.

*“The CRA consolidates key consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts.”*

### About the Authors



Kevin Heath, a partner in Locke Lord's London office, has more than two decades of experience in banking and finance litigation and reorganisation, restructuring and insolvency. He expanded the asset finance consumer credit litigation team at his previous firm and also managed a team of 40 solicitors in that high profile practice.



Mike Kilbee is of counsel in the London office of Locke Lord LLP where he acts for clients in retail banking and asset finance. He worked as an in-house lawyer for over thirty years and was formerly Legal Director for Lloyds TSB Asset Finance Division. Since then, He has been a consultant in a London law firm where he has advised on a wide range of banking and asset finance matters and related topics.