

Welcome to the inaugural edition of the Asset Finance & Leasing Newsletter which highlights important case law and developments that could have an impact on your business.

In this Issue

- 1 [New GAP Insurance Rules](#), by Rachael Browning and Timothy Anson
- 2 [NRAM v. McAdam](#), by Rachael Browning and Timothy Anson
- 3 [Improving Individual Accountability](#), by Joanne Davis
- 5 [CRA 2015 Briefing 06-15](#), by Kevin Heath and Mike Kilbee

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New GAP Insurance Rules

The FCA published new rules in June governing the sale of add-on Guaranteed Asset Protection (GAP) insurance. The rules came into force on 1 September 2015 and apply to commercial customers as well as retail customers. GAP insurance is used to protect the insured party against any shortfall between the purchase price, or total amount payable under a credit or hire agreement, and the amount an insurer will pay out, which is usually linked to market value at the time of the loss. The add-on market for these products is when GAP insurance is sold alongside a motor vehicle.

The FCA has introduced the new rules out of a concern that GAP products being sold as an add-on have led to poor competition in the GAP market. The FCA has observed that typical customer behavior is to purchase such products almost as an afterthought at the point of sale, rather than with the diligence seen when purchasing other financial products. This analysis has been reached at least in part through the application of behavioral economics – something particularly in vogue with the FCA at the moment.

The rules themselves, published in PS15/13, have two main elements for firms distributing add-on GAP insurance:

- i) to provide retail and commercial customers with prescribed information to encourage them to shop around and be more engaged when making decisions about purchasing GAP products; and
- ii) to introduce a deferral period – referred to by the FCA as the “deferred opt-in” – with the result that GAP insurance cannot be introduced and sold on the same day.

Prescribed Information

The customer must be given the following information:

- Total GAP premium separate from any other prices and costs
- Significant features, benefits, exclusions and limits and cross-reference to relevant product documents
- The fact that GAP is sold by other distributors
- The duration of the policy
- Whether GAP is optional or compulsory
- How the deferred opt-in period works, including the date the prescribed information was provided to the customer and when the sale can be concluded by the firm

The information:

- Must be appropriate to the circumstances of the customer;
- Must be specifically brought to the customer's attention and clearly identifiable as key information; and
- Must be communicated in a clear and accurate manner, in writing or any durable medium.

Although there are no mandatory record keeping requirements, firms need to demonstrate when and how the prescribed information has been provided to the customer.

The Deferred Opt-in

Under the deferred opt-in, a GAP contract with a customer cannot be concluded by a firm until at least two days have passed since the prescribed information was provided. The customer can initiate the conclusion of the sale the day after receiving the prescribed information, so long as:

- it is the customer that initiates the conclusion of the GAP contract;

- the customer consents to the firm concluding the GAP contract earlier than provided for; and
- the customer confirms they understand they are choosing not to be subject to the deferred opt-in period.

More Rules to Come?

The FCA published an additional consultation paper in March 2015 that emerged from the same market study as was behind PS15/3 and its preceding consultation paper, CP14/29. The consultation period closed on this additional paper in June. We await the FCA's response to the industry's views.

NRAM v. McAdam

Introduction

In December 2014 the High Court's judgment in this test case left NRAM (previously Northern Rock PLC) with a potential liability of £258 million. This was as a consequence of NRAM using the same paperwork for both regulated and unregulated agreements, including for the wider suite of pre-contractual and contractual documentation between 1999 and March 2008. The High Court's view was that as a result this gave customers with such unregulated agreements the same rights and remedies as customers with standard regulated agreements.

Unfortunately for NRAM, the statements it provided in line with its s.77A responsibilities were defective. Consequently, customers with standard regulated agreements who received such defective statements had no liability to pay interest or default sums in respect of the period of non-compliance. The High Court's view was that customers with unregulated agreements also had no liability for interest or default sums due to their contractual paperwork also stating that the agreement was regulated. As mentioned, NRAM's total liability has been estimated as potentially £258 million.

Unsurprisingly NRAM sought to appeal the High Court's judgment.

The Court of Appeal

The Court of Appeal identified five potential issues to address as to whether customers who took out unsecured loans of more than £25,000 under agreements that incorrectly stated they were regulated by the CCA were entitled to the same rights and remedies as customers with agreements that were regulated by the CCA:

- i) whether it is possible to 'contract in' to the CCA;
- ii) whether the provisions of the CCA were incorporated into the agreement;
- iii) whether NRAM expressly or impliedly agreed that the borrower was to have the protections available under the CCA, irrespective or not it actually did;
- iv) if the statutory wording in the relevant statements did not constitute a contractual term, whether it gave rise to an estoppel;
- v) whether there was a representation or warranty that the agreement was a regulated agreement when it was not.

Contracting In To The CCA

The Court was of the opinion that it was conceptually possible for parties to contract into the Act and subsequently give the court's the power to enforce. However, this could only be achieved through very clear wording and in NRAM's case no such wording was present. Touching on this point from a different angle later in the judgment, the Court's view on the whole in relation to 'contracting in' seems to be that parties

cannot do so on a wholesale basis to allow the provisions to apply. Instead, they need to use wording that clearly indicates that it is the parties' intention that the provisions apply. Quoting an article by Mr R.E. Megarry:

"The difference is between saying, 'The Acts shall apply' and saying, 'I agree to your having by contract the same rights as if the Acts applied'."

Incorporating CCA Provisions In To The Agreement

On this point the Court gave a clear judgment that was extremely favorable from a lender's perspective. The agreement did not expressly incorporate any specific rights or remedies under the CCA into the agreement, such as by stating "you (the consumer) are entitled to the rights available under s.77A of the Consumer Credit Act 1974". The question before the Court on this issue therefore was whether the term "regulated by the Consumer Credit Act" expressly incorporated the provisions of the CCA en masse.

As touched upon above in relation to contracting in wholesale, the Court of Appeal disagreed with High Court's view that the phrase "regulated by" was sufficient to incorporate the provisions of the CCA, instead taking the view that the phrase "regulated by" was a statement of fact. In the Court of Appeal's view these words were not clear words of incorporation.

For the general rights and remedies under the CCA to be enforceable under an unregulated agreement, the agreement itself would need to expressly include them, for example by stating a clause along the lines "(this agreement is) subject to the rights and remedies under the Consumer Credit Act 1974".

Whether NRAM Agreed To CCA Protections For The Consumer

The Court of Appeal took the view that statements such as "This is a Credit Agreement regulated by the Consumer Credit Act 1974" did not treat borrowers on unregulated deals as if they had the benefit of unspecified statutory protections afforded to regulated borrowers under the CCA. In the Court's own words, statements such as the one mentioned above:

"do not reflect any bilateral agreement between the parties that they intend to apply the provisions of the 1974 Act by contract to an agreement that lies outside its scope, in the event that the representation is untrue"

The words are simply a factually inaccurate description of the nature of the agreement with no contractual ramifications or obligations coming about as a result.

Estoppel

The Court of Appeal rejected the High Court's view that – in the event that no contractual term was incorporated into the agreement – NRAM was estopped, specifically contractual estoppel, estoppel by convention or estoppel by representation, from denying the respondents had the benefit of the rights available under the CCA.

Representation Or Warranty?

The Court of Appeal found on this issue that the statements to the effect that the agreement was regulated were both representations and contractual warranties that the agreement was regulated by the CCA and consequently that the customers were entitled to the rights and remedies afforded by the Act. In the event that these representations and warranties were false, which on construction the Court of Appeal found them to be, the customers would be entitled to sue under the Misrepresentation

Act 1967 and therefore a breach of contract and breach of warranty had occurred.

However, it was accepted by all parties that the breach occurred at the time the loan agreements were entered into which in turn allowed NRAM a limitation defence.

Going Forward

This is obviously an extremely positive judgment from the perspective of lenders. The only potential downside is the view taken by the Court of Appeal that incorrectly stating an agreement as being regulated by the CCA amounts to a misrepresentation and a contractual warranty for which a customer can sue for breach.

That said, the NRAM situation arose in part because agreements in excess of £25,000 did not fall into the category of regulated consumer credit. With the £25,000 cap now removed entirely, the provision of any credit to an individual or relevant recipient of credit will require the use of a regulated credit agreement, unless of course the agreement is exempt in which circumstances the prescribed requirements for that particular exemption will need to be followed. As such, the only remaining category of unregulated lending that remains is primarily that to companies and partnerships of four or more.

Were a lender to state on its agreements with companies and partnerships of four or more that the deal was regulated, it would be interesting to see if the courts adopted the view that such a statement constituted a misrepresentation and breach of contractual warranty or that an entity which materially was not a consumer could adopt consumer rights. The prudent thing to do however is, as always, for lenders to ensure that their standard contracts and supporting contractual documentation do not incorrectly state they are something they are not.

Improving Individual Accountability

The rules on individual accountability are being introduced following changes set out in the Banking Reform Act, to improve professional standards and culture within the UK banking industry. The main rules will come into effect on 7 March 2016.

The rules will make it easier for firms and regulators to be clear about who is responsible for what. Its effect should drive up standards, and make firms easier to run and to supervise. The rules will also allow senior managers to be held to account for misconduct that falls within their area of responsibility. It will also hold individuals working at all levels within relevant firms to appropriate standards of conduct.

Who it Applies to

The rules apply to:

- banks
- building societies
- credit unions
- the nine largest investment banks that are regulated by the PRA
- branches of foreign banks operating in the UK

Key Features

The key features of the new rules are:

- **Senior Managers Regime.** This focuses on the most senior individuals in firms who hold key roles or have

overall responsibility for whole areas of relevant firms. Firms need to:

- ensure each Senior Manager has a Statement of Responsibilities setting out the areas for which they are personally accountable
- introduce a Firm Responsibilities Map: and
- ensure that all Senior Managers are pre-approved by the regulators before carrying out their roles.

The good news is that existing Approved Persons will not be required to go through a fresh round of pre-approval in order to be 'grandfathered' into the new regime. Firms will be required to submit a grandfathering notification, which will let firms map existing approved persons to an equivalent Senior Manager Function.

The Government has also proposed that Senior Managers in the banking sector should be subject to a 'duty of responsibility' which means senior managers will be required to take the steps that it is reasonable for a person in that position to take to prevent a regulatory breach from occurring. This replaces the Presumption of Responsibility and is currently being debated in Parliament.

The main changes are:

- **Certification Regime.** This applies to 'material risk-takers' and other staff who pose a risk of significant harm to the firm or any of its customers (eg, staff who give investment or mortgage advice or who administer benchmarks). Firms need to:

- identify all certified individuals by 7 March 2016
- assess them as fit and proper by 7 March 2017, and
- have procedures in place to re-assess the fitness and propriety of certified staff on an annual basis

- **Conduct Rules.** These are high-level rules that apply directly to nearly all staff (apart from ancillary staff e.g. catering staff). Firms need to:

- ensure that staff who are subject to the rules are aware of them and how they apply to their jobs

The Conduct Rules apply for Senior Managers and staff in the Certification Regime from March 2016, and apply to everyone else from March 2017.

- **The regime for branches.** The rules apply the same principles to branches of foreign banks, but tailor them to account for the different governance structures in branches (notably that the ultimate Board will likely reside overseas). For branches of European banks the rules also reflect the split of responsibilities between the FCA as the 'Host state regulator', and the European 'Home state regulator' as set out in EU law.
- **Remuneration. Changes have been made to the Remuneration Code to encourage** more effective risk management and better align individual decision making with good standards of conduct.
- **Whistleblowing.** New rules introduced to strengthen whistleblowing systems and controls in firms and to promote a culture where people can speak up were published in October 2015 and take effect in September 2016. These rules apply to deposit-takers (meaning banks, building societies and credit unions) with assets over £250m, Solvency II insurers and PRA-designated investment firms.

Timing of the Rule Changes

The rule changes for the banking sector will occur in stages – the main rules come into effect on 7 March 2016.

What does this mean for board structures?

The regulator (whether this be the PRA or the FCA) intends to work very closely with Boards, more so than in the past. The PRA's objectives is around the safety and soundness of firms that they supervise. Their secondary objective is in respect of competition.

The PRA will have a focus on risk assessment and will want to understand how firms take and manage risk, the controls they have and the quality of risk management. The PRA will be raising the standards in this area. The PRA have made it clear that they are a judgement-based supervisor through applying judgement against a framework of rules and regulation.

The regulator has made it clear that: -"Ensuring the Bank of England has the instruments necessary to achieve its financial stability objective will depend on the EU continuing to have regulations of the highest standards, which strike the appropriate balance between harmonisation and flexibility, and which accommodate necessary national responsibilities, including for supervision". Narrow rules-based approaches to regulation create inflexibility and can be easy to arbitrage. The sensible application of judgement involves looking at a situation from several angles, and employing forward-looking tools such as stress tests.

The role of Boards will be a focus of the regulator to include Executive Senior Management of firms; Boards (with Non-Executives in the majority); and Supervisors.

The PRA will expect Senior Executives to exercise judgement on risks and returns on a day-to-day basis. The regulator want firms to earn sustained and thus sustainable returns through the exercise of good business judgement. Senior Executives are expected to exercise that judgement within frameworks set by, and overseen by, their Boards, namely the overall strategy, the risk appetite and assessment frameworks and the oversight of controls and compliance.

Board should be reminded of their role expected by the regulator be able to set a strategy and risk appetite and oversee implementation. The role of the Executive Supervisor will be to challenge hard and ask for changes, but they do not substitute for the Board or the Executive.

So, what does the Regulator expect of Boards?

In a recent speech by the PRA the three that mentioned where:

- 1) Boards should exercise good judgment in overseeing the running of the firm and to do so on a forward-looking basis;
- 2) Such judgement is improved by good constructive challenge from Non-Executives. A firm's culture should promote discussion.
- 3) The regulator will look to Non-Executives, under the leadership of the Chair, to challenge the Executives in all aspects of the firm's strategy, which includes the viability and sustainability of the business model and the establishment, maintenance and use of the risk appetite and management framework. The Regulator will also look to the Non-Executives to mentor and coach the Executives and balancing this with the essential ability to challenge is a vital component of an effective Board.

In the terms of the Senior Managers Regime, this frames the responsibility of Boards and serves as a usual reminder to Boards to make sure that they review their board structures to met the regulators expectations.

The regulator makes it clear that it is the job of the Executive to be able to explain in simple and transparent terms these complex

matters to Non-Executives. In doing so, they should understand the uncertainty around judgements, in what circumstances they could be wrong, and how there can reasonably be different ways to measure things like liquidity. Non-Executives should not be left to find the answers for themselves, and they should not feel that they have to do so out of a lack of sufficient confidence in what they are being told.

What does a Board need to understand?

The regulator makes it very clear that boards must understand:

- key elements of model design;
- significant assumptions and expert judgements;
- key sensitivities; and
- significant limitations and uncertainty in the model.
- where is the model expected to work well;
- in what circumstances is it likely to break down;
- is the overall model output credible;
- what "moves the dial" in terms of key assumptions or judgements; and
- are those assumptions and judgements reasonable?

Non-Executives should be put in a position to possess a general understanding of the model and meet these expectations without detailed technical knowledge. That's the job of the Executive, to explain complexity, provide good Management Information and enable challenge and thus accountability.

The PRA will overhaul its approach to supervision of governance in firms. Executives should be able to rigorous challenge. Executives should see that their Non-Executive colleagues' experience and knowledge as a means of improving the effectiveness of the Board's judgment through constructive support and challenge.

CRA 2015 Briefing 06-15

(Previously published by Locke Lord in June 2015)

Introduction

The main provisions of the Consumer Rights Act 2015 (CRA) came 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 introduced new requirements on letting agents and controls on "secondary ticketing" and revised procedures for challenging anti-competitive behavior. 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:

- (f) 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;
- (g) Repair or replacement is impossible; or
- (h) 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.



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