

The Customer's Always Right - Consumer Law in the Digital Age

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1. Introduction

- 1.1 In one of its last acts before the 2015 general election, and shortly before the dissolution of parliament, the Consumer Rights Act 2015 was (rather quietly) granted Royal Assent. Characterised in some quarters as the biggest shake up in consumer law for over 30 years, though with a distinct lack of fanfare or coverage, one could be forgiven for not having marked the date.
- 1.2 The purpose of this note is to provide a broad exploration of the 2015 Act and to examine how far the consumer landscape has changed and developed.

2. Overview

- 2.1 Perhaps the first question to ask is why there was any need for change at all.
- 2.2 Arguably, the pace of technology and the growth in the retail industry, as well as the diversity and complexity of the products and services available to consumers (particularly online) had begun to outstrip the ability of the pre-existing law to deal with it.
- 2.3 Consumer law historically has developed in a piecemeal fashion over a number of years, trickling down from EU Directives implemented domestically in legislation and regulation. Anecdotally, this has tended to cause a degree of confusion and particular issues with new technologies.
- 2.4 By way of example, once consumers were able to download music onto their computers instead of going out and buying a CD, what was it they were buying? If a CD does not play properly, it is clearly goods which are not of satisfactory quality. The customer could simply go back to the retailer, exercise their statutory right of rejection under the Sale of Goods Act 1979 and ask for a refund.
- 2.5 How does the 1979 Act operate in the case of a digital download? Is the customer purchasing goods, services or perhaps some combination of the two? What is clear is that the consumer is not purchasing anything physical, but rather a licence to play and use intellectual property. What then is the situation if the download does not work, or causes some damage to the customer's computer or iPad? What are the remedies, and how does a consumer pursue them?
- 2.6 By the time of the 2015 Act, the Sale of Goods Act 1979 was over 35 years old and the Supply of Goods and Services Act 1982 not far behind it. Such legislation was simply not designed for the kind of goods and services which are commonly supplied and purchased in the 21st century and the regulations that have been implemented over the years to fill in the gaps have created a somewhat confusing landscape.

2.7 One of the key stated purposes of the 2015 is consolidation and simplification. The pre-2015 landscape would tend to leave consumers and businesses navigating an array of regulation including:

- Sale of Goods Act 1979
- Supply of Goods and Services Act 1982
- Unfair Contract Terms Act 1977
- Unfair Terms in Consumer Contracts Regulations 1999
- Consumer Protection from Unfair Trading Regulations 2008
- Consumer Protection (Amendment) Regulations 2014

2.8 It is not a leap of imagination to conclude that consumers often found it difficult to understand their rights and to ascertain when and how they had been infringed, bearing in mind that, frequently, consumer rights disputes (unless they are “class action” type cases brought on a larger scale by a group of consumers all suffering with the same problem) have tended to be well within the small claims limit (particularly since that was increased to £10k), leaving many aggrieved consumers to represent themselves and try to unravel this complex area of law.

2.9 Most of this is now incorporated into 2015 Act, though note this only applies to contracts entered into from 1st October 2015, so there are still plenty of cases to be argued under the old regime.

2.10 Similarly, the pre-2015 law remains relevant in the following situations:

2.10.1 SOGA, SGSA and UCTA will still apply to business to business contracts (in so far as they ever did); it is only the consumer element that changes. The 2015 Act also keeps the prohibition on exclusion of liability clauses for personal injury and death.

2.10.2 The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 will still apply in cases of distance-selling and off premises type contracts over what information needs to be provided to the consumer pre-contract.

2.11 What does the Act do?

2.11.1 The Act applies to all consumer contracts for the supply of goods, services and digital content entered into after 1st October 2015; there is no retrospective application.

2.12 What is a consumer contract?

- 2.12.1 It has to be said this has been a somewhat difficult question to grapple with in consumer law, particularly in field of consumer credit. Lenders and sole traders, for example, often engage in lengthy argument as to whether the borrower is protected by the Consumer Credit Act when the loan or purchase has been, at least in part, for business purposes.
- 2.12.2 A consumer contract is a contract between a “trader” and a “consumer” for the trader to supply goods, digital content or services.
- 2.12.3 By section 2(2), a “trader” means a person (and that can be a legal or a natural 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.
- 2.12.4 By section 2(3), a “consumer” means an individual (which must mean a natural person only) acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.
- 2.12.5 The definition of a “consumer” in the Unfair Terms in Consumer Contracts Regulations 1999 was exactly the same, save that it did not include the term “*craft*”. It remains to be seen what significance that has. It is not immediately obvious whether there is a qualitative difference between a person’s “*craft*” and a person’s “*profession*”.
- 2.12.6 Authorities preceding the Consumer Rights Act 2015 remain relevant for the purposes of assessing whether or not a party is a consumer. The reason for that is that the 1999 regulations were repealed and re-enacted by the 2015 Act and the statutory definitions are virtually identical.
- 2.12.7 The case of *Evans -v- Cherry Tree Finance* [2008] EWCA Civ 331 provides a useful starting point.

Facts:

Mr Evans and his wife carried on business from a property they owned which was partly residential and partly business, though each part had a separate address. Mr Evans applied to Cherry Tree for a loan so he could buy his wife’s interest in the property as part of the divorce settlement. The application form was headed “Secured Credit Agreement for a Commercial Loan”. Mr Evans gave his address as the residential property and the business

address as the security address and stated that the purpose of the loan was to repay existing mortgage and pay ex-wife the balance due under the divorce settlement.

Inevitably, Mr Evans defaulted on the loan and the property was repossessed, but he then brought proceedings against Cherry Tree claiming he was not bound by the terms of the loan which included a penalty clause because, under consumer protection legislation, that was unfair.

The Court of Appeal held:

The loan was for a purpose outside his business/trade. Looked at objectively the loan was to enable him to continue his livelihood, but that was not the only purpose because one of the stated purposes was to pay off an existing mortgage. Mr Evans was therefore able to obtain the benefit of consumer protection legislation.

2.12.8 The critical point then is that the non-business purpose need not be the sole purpose of the contract. The new Act is triggered, and the party concerned is a consumer, if the contract is for purposes which are “*wholly or mainly*” outside that person’s business.

2.12.9 The burden of proof is on the Trader to show that the person he/she was dealing with was not a consumer – s.2(4).

2.12.10 As to what constitutes a “trader”, there is not yet any authority providing a more complete or substantial definition.

2.13 Mixed Contracts

2.13.1 One key matter that has now been simplified is the common problem of mixed goods and services contracts. The example frequently given (and which was explored in the government’s white paper preceding the Act) is the tailored suit. Undoubtedly, the consumer has paid in part for a service provided by the tailor who has taken measurements, professionally assessed the consumer’s requirement and then sends the suit when manufacture is complete.

2.13.2 It may, in part, be an academic question whether this is a contract for the provision of goods or services. However, the consumer bringing a claim would, prior to the 2015 Act, have had to plead the right Act or the right regulations, specifying under each of those Acts what remedy they are seeking and how.

2.13.3 Section 1(4) of the 2015 Act alleviates that problem and states:

“in each case, the Chapter [relating to goods, services or digital content] applies even if the contract covers something covered by another Chapter”.

2.13.4 For example, where a consumer purchases a laptop computer which is pre-loaded with software which turns out to be defective, the consumer can choose whether to use the “digital content” remedies (Chapter 3) or the “goods” remedies (Chapter 2) under the Act. The effect is that he can reject the goods (i.e. the laptop) with the faulty software loaded on it because that is what Chapter 2, pertaining to goods, allows him to do.

2.13.5 However, that does not prevent the trader from severing or separating out the various elements of the mixed contract in the terms and conditions so as to specify what remedies apply to each element, provided of course that the trader does not attempt, when considered objectively, to contract out of the statutory protections.

2.14 Regulation of guarantees

2.14.1 While beyond the scope of this note, in brief, the Act sets out information which must be set out in the guarantee and provided to the customer without any additional charge. The effect under the Act is that the guarantee becomes a contractual obligation owed by the guarantor to the consumer in addition to the rights under the Act.

2.15 Enforcement powers

2.15.1 Schedule 5 also sets out a comprehensive regime for enforcement powers of regulatory authorities to ensure compliance with the Act.

2.16 Unfair Terms

2.16.1 In many respects, the provisions in the 2015 Act regulating unfair terms are simply a consolidation exercise arising out of UCTA and the 1999 regulations.

2.16.2 However, the Act still does not provide a complete code for dealing with unfair terms. For example, the common law on “onerous clauses” and the guidance of Lord Denning in *Thornton -v- Shoe Lane Parking* [1970] EWCA Civ 2 remain relevant.

2.16.3 The central point is that an unfair term is not binding on a consumer. The same applies to unfair notices; that is anything outside of the contract which purports to exclude or restrict a trader's liability to a consumer (and such notices do not need to be in writing).

2.16.4 Section 62 states that a term is "unfair" if:

"...contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer"

2.16.5 This is a familiar looking test as it is exactly the same as that in the 1999 Regulations. To that extent, the previous authorities interpreting the 1999 Regulations remain relevant (e.g. Lord Bingham's guidance in *Interfoto -v- Stiletto Visual* [1987] EWCA Civ 6 describing "good faith" as "playing fair", "coming clean", "cards on the table", "containing no concealed pitfalls or traps".

2.17 The "Duty" to Consider Fairness

2.17.1 The key innovation in the new regime for unfair terms arises under section 71. It is now the duty (not discretion) of the Court, on its own initiative (and whether pleaded or not) to assess the fairness of terms of the contract, so long as it has sufficient legal and factual material before it to do so.

2.17.2 On the one hand, one can foresee that the burden on the Courts at first instance is going to be significantly increased because in any case involving a consumer and a trader for supply of goods, services or digital content, it has a duty to consider the fairness of the terms of the contract even though that issue is not raised in the pleadings.

2.17.3 In the view of the author though, it may not practically make much of a difference for two reasons. Firstly if neither party has pleaded or raised the question of fairness, they are unlikely to provide the Court with enough factual and legal information at trial (in witness statements, documentation or authority) to properly determine the matter. Secondly, and given that most individual consumer cases will not exceed the small claims limit, there is the practical question of proportionality and court time in, what tends to be, a practice of block listing such claims.

2.17.4 The practical lesson to take from this, if representing a business, is not to wait for the consumer to raise the issue of fairness. The business needs to take a good look at the question of fairness in its contractual terms and revise them if necessary to avoid litigation.

2.17.5 If the business is involved in a dispute with a consumer, it is worth going through the terms to prepare for where the difficulties may lie.

2.17.6 On the consumer's side, the burden is perhaps not as great because one can take the view that the Court is obliged to consider the matter anyway. Nevertheless, there is something to be said for providing the Court with enough material to actually take a view on fairness, including when and how was contract negotiated, what the background is and what the relative position of the parties was at the material time.

2.18 The Grey List

2.18.1 The Act (which adds some terms to the earlier list in the 1999 Regs) contains a list of terms which are presumed unfair, unless the contrary is proved by the trader. They are set out in full at Schedule 2 and include things like:

- Terms which permit the trader to determine the characteristics of the subject matter of the contract after the consumer has become bound by it
- A term which requires the consumer to pay the trader a disproportionately high sum in compensation if the consumer decides not to conclude or perform the contract
- A term enabling the trader to unilaterally alter the characteristics of the goods, digital content or services to be provided.

2.18.2 "*Core provisions*" are exempted from the test of fairness under section 64. Core provisions are terms which "*specify the main subject matter of the contract or the price payable*" provided both of those matters are transparent and prominent.

2.18.3 If however the term in question is in the Grey List, even if it is a core provision, it still has to satisfy the test of fairness – s.64(6).

3. Remedies for Defective Goods and Services

3.1 In terms of the remedies available for defective goods and services the Act is structured so that there is an overview provision (Section 19 for goods and Section 54 for services) setting out the remedies available for the differing transgressions in respect of goods and services. Each of the remedies are then dealt with in separate provisions which set out such matters as any relevant time limits and the consequences of any particular remedy. Both Vince Cable, the Business Secretary at the time of the passing of the Act and Jo Swinson, the Consumer Affairs Minister both made reference to consumers

and businesses struggling to understand the previous rules in this area and expressed the hope that the new Act would provide a much more user friendly interface. In reality, the difficulties that many consumers faced under the old law was in proving to the satisfaction of the court that the sale of goods contract had been breached by the supply of goods that were not, for example of satisfactory quality. The new Act will do nothing (nor should it) to alleviate this type of difficulty.

- 3.2 The right to reject goods rather than a right to accept a repudiatory breach is not a new provision. The old Sections 48A to 48D of the Sale of Goods Act 1979 as inserted into that Act by the Sale and Supply of Goods to Consumers Regulations 2002 provided those sorts of remedies and have been largely re-enacted. However, what is new is the short term right to reject goods and the introduction of price reduction and repeat performance for defective services.

The Short-Term Right to Reject

- 3.3 The Short-Term right to reject arises when goods fail to comply with terms implied into contracts by:
- Section 9: Goods to be of satisfactory quality;
 - Section 10: Goods to be fit for a particular purpose;
 - Section 11: Goods to be as described;
 - Section 13: Goods to match a pre-contract sample;
 - Section 14: Goods to match a pre-contract model;
 - Section 16: Goods including digital content where that content does not conform.
- 3.4 This remedy must be exercised within 30 days of the occurrence of three factors: firstly that ownership or, in the case of a hire contract, a hire purchase contract or a conditional sale contract, possession of the goods has passed to the consumer; second the goods have been delivered and thirdly, where the contract requires the trader to install the goods or to take any other action to allow the consumer the use the goods, the trader notifies the consumer that that action has been taken. The short term right to reject though can be exercised before any of these three things have occurred. If however the goods are perishable and are likely to perish within a shorter period then the short term right to reject must be exercised within the shorter period.
- 3.5 The 30 day period can be suspended. If the consumer requests or agrees to the repair or replacement of the goods then the 30 day period or the shorter period is suspended for the duration of the waiting period. The waiting period is defined as commencing on the day that the consumer requests or agrees to the repair or the replacement and ending on the day that repaired or replacement goods are received.

If the repaired or replacement goods do not conform to the contract then the time limit for exercising the short term right to reject is either 7 days after the waiting period ends or, if later, the original time limit extended by the waiting period.

- 3.6 The right is exercised by the consumer indicating to the trader that the goods are rejected and the contract is treated as at an end. The indication can either be oral or by conduct but must be clear enough to be understood by the trader. Once exercised the contract is at an end and the consumer becomes entitled to a refund of whatever sums were paid by the consumer under the contract. The refund must be given without undue delay but in any event within 14 days from the day on which the trader agrees that the consumer is entitled to a refund.

The Final Right to Reject

- 3.7 The Final Right to Reject is available when the goods do not conform to all of the same terms as per the Short Term Right to Reject. In addition, it is available for a failure to comply with the term implied by Section 15 (where installation is required there is non-conformity if the installation is not correct) and a breach of the requirements for the goods set out in the contract. It may only be exercised after there has been one repair or replacement without producing conforming goods, or it is not possible or proportionate to repair or replace the goods or the trader has failed to repair or replace the goods within a reasonable time and without significant inconvenience to the consumer. Further, if the consumer opts to receive a final price reduction then the final right to reject may not be exercised by the consumer.
- 3.8 While there is no time limit for the exercise of this remedy (save presumably the primary limitation period of 6 years from date of breach), if non-conformity occurs within 6 months from the date of delivery then the goods are deemed not to have conformed at the time of the contract. Further, whilst normally a trader is entitled to make a deduction from any refund to take account of the use to which the consumer has put the goods, no deduction may be made if the final right to reject is exercised within 6 months from the date of delivery. There is an exception to this rule which applies where the goods are a motor vehicle which is itself subject to a further exception where the motor vehicle was constructed or adapted for use by a person with some physical defect or disability.
- 3.9 As with the short term right to reject the consequence of the exercise of this remedy is that the goods are rejected and the contract is treated as being at an end.

Other Situations Where Rejection Is Permitted

- 3.10 Section 17 of the Act is the equivalent of the old Section 12 of the Sale of Goods Act 1979. A breach of the term implied by Section 17 gives rise to a right to reject that is not limited by either Sections 22 or

24 being the provisions dealing with the short term and final rights to reject. Thus it would appear that where there is a breach of Section 17 then there is no right for the trader to apply a deduction, always assuming that that provision is a limitation.

- 3.11 The default position is that in a sales contract there is an implied term that the trader will deliver the goods. Where the trader delivers the wrong quantity of goods then various rights arise. Where the trader delivers too small a quantity of goods then the consumer may reject them or accept them but if the consumer accepts them he must pay for the goods at the contract rate. If the trader delivers too large a quantity of goods, the consumer may accept the contract quantity of goods and reject the rest or may reject all of the goods or may accept all of the goods. If he elects the latter then he must pay for the goods at the contract rate. Rejection of the goods does not necessarily mean that the contract is at an end.
- 3.12 The time for delivery of the goods can be set by the contract. If there is no express agreement then there will be an implied term that the goods will be delivered within a reasonable time without undue delay and in any event within 30 days from the date of the contract. If the trader refuses to deliver the goods or delivery of the goods at the agreed time was essential given all the circumstances of the case at the time of the contract or before the contract was made the consumer informed the trader that delivery of the goods at the agreed time was essential and delivery was late then the consumer may reject the goods as delivered. Again, this will not necessarily mean that the contract is at an end which will depend on the terms of the contract. Having said that it is difficult to envisage circumstances where the contract could subsist where late delivery has occurred in a case where delivery by the agreed date was essential. In any other case of late delivery, the consumer may give the trader a further appropriate period of time to deliver and if the trader still fails to deliver then the consumer may treat the contract as being at an end.
- 3.13 In circumstances of late delivery where the contract is not treated as at an end, the consumer may still reject the goods that have been delivered or cancelling an order for any of the goods. In these circumstances, the trader is bound to reimburse the consumer for all payments made in respect of rejected goods or cancelled orders.

Right to Repair or Replace

- 3.14 The right to require repair or replacement arises when the goods do not conform to the same terms as with the final right to reject. A consumer who opts for one of these remedies may not then opt for the other or exercise the short term right to reject before a reasonable time has elapsed to allow the trader to carry out the opted for remedy. This is subject to the important exception of significant inconvenience. It would appear from the way that the Act is drafted that a reasonable time does not need to be given to

the trader if by so doing the consumer would be significantly inconvenienced. The trader is obliged to bear all of the costs of the repair or the replacement and must carry out the remedy within a reasonable time and without significant inconvenience.

- 3.15 These remedies are not available where to repair or to replace would be impossible or disproportionate. A repair or replacement is disproportionate to the other one where it imposes costs on the trader which when compared with the other are unreasonable having regard to the value of conforming goods, the significance of the lack of conformity and whether the other remedy could be effected without significant inconvenience

The Right to Price Reduction

- 3.16 As stated above, this remedy is available as an alternative to the final right to reject and may only be exercised where there has been one attempt at repair or replacement that has failed to produce conforming goods or where repair or replacement is impossible or disproportionate. The right is a right to reduce the price of the goods by an appropriate amount and to receive a refund of the price over an above the reduced price. An appropriate reduction can amount to the totality of the price. Problems may arise where part of the price paid was in say goods (for example where a car is purchased by means of a part exchange). In those circumstances the remedy may not apply if what the consumer transferred cannot be divided up to allow the trader to retain the reduced price or if the article exchanged cannot be returned in its original state. In those circumstances, the final right to reject may be the best remedy to elect.

Remedies in Respect of Services

- 3.17 The provisions relating to remedies in respect of services are significantly less detailed than the remedies in respect of goods. In effect there are two remedies laid down by the Act. They are the right to repeat performance and the right to a price reduction. Both remedies are available when the trader fails to perform the service with reasonable care and skill or fails to comply with any pre-contract information given about the service pursuant to Section 50 of the Act. Where the service is performed late or does not comply with any pre-contract information that was provided and was not about the service then the only remedy available is price reduction. The Act specifically preserves other remedies that might be available for example, damages and orders for specific performance.
- 3.18 If the remedy of repeat performance is required then the trader must complete such repeat performance as is necessary to provide conformity with the contract within a reasonable time and without causing undue inconvenience to the consumer. The trader must bear any necessary costs in carrying out the repeat performance. The consumer may not require repeat performance if such repeat performance is

impossible. It seems that a consumer may require repeat performance even where the costs of such would be disproportionate when compared with say, the appropriate price reduction.

3.19 The remedy of price reduction is only available where repeat performance is impossible or where repeat performance was elected but the trader failed to carry out the repeat performance within a reasonable time and without significant inconvenience to the consumer. As with goods, the price will be reduced by an appropriate amount which might be the whole price and the consumer is entitled to a refund of any sums paid over the reduced price.

Summary

3.20 At first blush the remedies for non-conforming goods and services are complicated and there is much cross referencing between the various different provisions. However, once lawyers become familiar with the new provisions, it is to be expected that the Act will be easier to use than the provisions it replaced. Whether it will be possible for the lay consumer to use without the assistance of a lawyer must be open to considerable doubt.

4. Digital Content

2.19 For the first time, consumers are afforded statutory protection in respect of the quality and fitness etc. of “digital content”.

2.20 The statutory definition of “digital content” is, at s.1(8), “data which are produced and supplied in digital form”. As such, the ambit of Chapter 3 of the Act is inherently broad and will include the following:

- computer games
- virtual items purchased within computer games (e.g. in-app purchases and credits)
- television programmes
- films
- books (if not in hard copy)
- mobile phone apps
- systems software for operating goods – e.g. domestic appliances, toys, motor vehicles.

2.21 Because of the way “digital content” is scoped in Chapter 3 of the Act, namely “*contracts 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*”, it will not apply content supplied without charge e.g. free downloads.

2.22 However, if such free content is supplied with other goods, services or digital content for which a price is paid, the content would be caught by the provisions under Chapter 3 as it is a “mixed contract”.

2.23 It is worthy of note however that, under s.33(4), a trader does not supply digital content to a consumer for the purposes of Chapter merely because the trader supplies a service by which digital content reaches the consumer. So, for example, mobile phone contracts are not covered by this part. Although a phone call, text message or MMS is digital content, the contract concerns the service for that content to reach the customer, not the digital content itself.

2.24 Rights

2.24.1 Like goods and services, the Act implies terms into contracts for the supply of digital content.

2.24.2 **S.34: Content to be of satisfactory quality** – this is determined by the standard that a “*reasonable person would consider satisfactory*” taking account of the description of the content, the price and “*any other relevant circumstance*”. Public statements about the content can also be relevant, and there are the usual exceptions for defects specifically drawn to the consumer’s attention or which the consumer’s examination ought to have revealed. The aspects of quality in the Act include fitness for the purposes commonly supplied, freedom from minor defects, safety and durability.

2.24.3 It is a relatively novel question for the Courts though as to what a “reasonable consumer” might expect of brand new software. To a degree, one might anticipate and reasonably expect that software is released with unanticipated bugs or problems at the outset, but that these matters will be dealt with by way of patches, upgrades or fixes over time. That may be different however if the software is a premium package for which thousands of pounds are paid.

2.24.4 **S.35: Fitness for a particular purpose** (whether or not that is a purpose for which the content is usually supplied) – This is a fairly familiar implied term, and the key exception is where the consumer does not rely on the skill or judgment of the trader.

2.24.5 **S.36: Digital content is to match any description** of it given by the trader to the consumer.

2.24.6 The last of these warrants further analysis. Many consumers purchase full version software after they have spent some time using a trial version. Even if the final software matches, or is better than, the trial version, if the trader has given some other description about the software, it is that description that the final version must match.

2.24.7 Section 36 also incorporates as terms of the contract the matters which the trader is obliged to provide the consumer with pre-contract under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which are:

- The main characteristics of the content supplied;
- The functionality, including applicable technical protection measures, of digital content;
- Any relevant compatibility of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of.

2.24.8 **S.39: Where the trader who supplies the software by transmission** gives the consumer access to that software by a processing facility, the processing facility (with any feature that the facility is to include under the contract) must be available to the consumer for a reasonable time, unless a time is specified in the contract.

2.24.9 By way of example, if a customer purchases an annual subscription to use cloud storage or anti-virus software, the trader must afford the customer access to such online facility for the full period of 12 months.

2.24.10 **S.40: Where the trader** (or a third party – usually the person who has written the software) **supplies the digital content subject to a right for the trader or the third party to do so subject to future modifications** (e.g. upgrades and fixes), each of those modifications is also subject to an implied term as to fitness, quality and matching description etc.

2.24.11 **S.41: The implied term that the trader has the right to supply the digital content to the consumer.**

2.24.12 The last of these is particularly important. Unlike goods, it is often the case that neither the trader nor the consumer actually own the software itself – the intellectual property to the software remains with the originator. The Act gets around this, but maintains analogous protection, by implying a term that the trader has permission from the owner of the IP rights to supply the software to the consumer.

2.25 Remedies

- 2.25.1 **If the breach relates to quality, fitness or description**, the consumer has a right to repair/replacement (s.43) and a price reduction (s.44). The consumer DOES NOT have the right to a refund.
- 2.25.2 **If the breach in respect of the pre-contract information (s.37)**, which are treated as terms of the contract, the consumer has the right to recover from the trader any costs incurred as a result of the breach, up to the price paid (s.42(4)).
- 2.25.3 **If the breach is of the implied term as to the right to supply (s.41)**, the consumer has a right to a refund (s.42(5)).
- 2.25.4 There is no right to reject the digital content in any of the above situations UNLESS it forms part of a “mixed contract”.
- 2.25.5 If the consumer shows that the digital content is defective (i.e. does not conform to the contract) within six months of its supply, it is presumed to have been defective on the day it was supplied.
- 2.25.6 In all these cases, the customer is not entitled to treat the contract as at an end. They merely entitle the consumer to the statutory remedies. Unlike the situation with goods, the consumer does not have the right to reject the digital content.
- 2.25.7 This aptly illustrates the significance of whether or not it the content is supplied as part of a “mixed contract” If the digital content fails to meet the statutory requirements but is supplied with goods (e.g. pre-loaded onto a laptop, or software in a washing machine), the goods and software are a whole item which can be rejected under the remedies relating to goods. If the contract is for digital content only, there is no right to rejection.

2.26 Operation of the remedies

- 2.26.1 **Repair/replacement:** This is the consumer's first step. If he decides that he wants the quality defect remedied by means of a repair or replacement the trader must do so within a reasonable time and without significant inconvenience to the consumer.
- 2.26.2 The trader must also bear any necessary costs incurred in doing so, including, in particular, the cost of any labour, materials or postage.

- 2.26.3 The consumer does not have the right to remedy a quality defect by means of repair or replacement if it is impossible to do so or disproportionate compared to another available remedy.
- 2.26.4 **Price reduction:** The ability for a consumer to have the right to require a price reduction is only triggered if repair and replacement are not possible or the customer has requested repair/replacement and this has not been carried out within a reasonable time and without significant inconvenience to him.
- 2.26.5 Where the right to a price reduction is triggered then this must be refunded without undue delay, and in any event within 14 days of the trader agreeing that the consumer is entitled to a refund.
- 2.26.6 Critically, s.44 says gives a right to a price reduction of “an appropriate amount”. This is likely to be a matter for the Court’s discretion and will, in the view of the author, depend largely upon the extent to which the digital content as supplied deviates from the implied terms.
- 2.26.7 **S.46** - if the trader provides the consumer with digital contents that damages the consumer’s computer, or tablet, or corrupts some other digital content on his device, the trader must (at the consumer’s election) repair the damage, which must again be done within a reasonable time, without significant inconvenience and without cost to the consumer OR pay “appropriate” compensation, which must be given without undue delay, and in any event within 14 days of the trader agreeing to pay the compensation.

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