The Consumer Rights Act 2015

Over a century ago now, in 1893, Parliament passed a fairly ground breaking piece of legislation which was called the Sale of Goods Act. In those days, as I understand it, people bought things like ginger beer (with added snails) and lots of generic goods requiring detailed rules about sale by sample and such like matters.

About 100 years later Parliament got the idea that we not only buy ginger beer but we also pay for services. This resulted in a somewhat complicated Act called the Supply of Goods and Services Act 1982.

Now, only about 40 years after the internet was invented, Parliament has realised that rather than ginger beer we are spending our money on online "freemium" games and internet content, not all of it pornographic.

When you download that new game onto your tablet or phone with all those cunning incentives which allow you shortcuts if you pay for something extra what are you actually doing? Are you buying anything? If so, is it a good, a service or a licence? What rights do you have when the content stops working or causes your device to crash or turns out to have a virus within it? It is into this exciting world that Parliament has now trod.

The Act will be coming into force on 1st October 2015 for the most part with some minor parts coming into force last May, mainly for England. Vince Cable, the erstwhile Business Secretary (and who was up for his result) said:

> *"This is the biggest shake up of consumer law for a generation, bringing legislation in line with the fact many people now buy online.*
>
> *Consumers will now be much better informed and protected when buying goods or services on the internet. They will now be entitled to get for the first time a free repair or replacement for any faulty digital content."*

Does it live up to this hype?

Well, as a consolidation Act it is a bit of a disappointment. The Unfair terms in Consumer Contract Regulations 1999 and the Sale and Supply of Goods to Consumers Regulations 2002 are revoked. In contrast the Consumer Protection from Unfair Trading Regulations 2008 (which broadly replaced the Trade Description Act under an EU Directive) is untouched. Elsewhere the position is a little more complicated.

The Sale of Goods Act 1979, for example, is amended by Schedule 1 in a variety of ways starting with this in paragraph 9:

"In section 1 (contracts to which Act applies), after subsection (4) insert—

"(5) Certain sections or subsections of this Act do not apply to a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies.

(6) Where that is the case it is indicated in the section concerned."

Similar revisals are made to the Supply of Goods and Services Act 1982, the Supply of Goods (Implied Terms) Act 1973 and the Unfair Contract Terms Act 1977 (although with added regulatory powers).

We can only presume that the drafters have shares in Westlaw.

So what is new in the Act? I would seek to address this in 3 broad chapters:

- Updates on remedies for consumer contracts;
- Material relating to digital downloads;
  and
- Secondary Selling

<u>Updates on remedies for Consumer Contracts</u>

Section 19 of the Act is concerned with the ways in which consumers might enforce the rights they are given in the event that the various sections which broadly repeat the 1979 and 1982 Acts requirements are not met. Subsection (3) provides these are:

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

Looking at these in turn section 20 has a range of rights which, if not always completely new, are certainly more specific than before. Subsection (8) provides:

"Whether or not the consumer has a duty to return the rejected goods, the trader must bear any reasonable costs of returning them, other than any costs incurred by the consumer in returning the goods in person to the place where the consumer took physical possession of them."

So if it costs money to return goods to Amazon, AO or your curry delivery service you are entitled to be reimbursed for that cost.

Where there is a right to a refund the section provides that the refund will be the same amount as originally paid with no right on the part of the trader to make charges. Furthermore subsection (15) provides:

"A refund under this section must be given without undue delay, and in any event within 14 days beginning with the day on which the trader agrees that the consumer is entitled to a refund."

Subsection (21) provides that the right:

"to reject the goods to which a severable obligation relates and treat that obligation as at an end (so that the entitlement to a refund relates only to what the consumer paid or transferred in relation to that obligation)".

So if you have a delivery from Tesco Direct of 6 bottles of Chablis and one is off your right will be restricted to that bottle.

The right to this short term rejection is limited in terms of s22 to a period of 30 days from the date on which possession, delivery or installation of the goods occurs. This is subject to 2 further limitations. Firstly, if the goods are perishable then a shorter period will apply. Secondly, the right to this short term rejection is lost if the consumer agrees that the trader is to be given an opportunity to repair.

This creates what is described as a "waiting period" which effectively stops the clock on this right and runs from the period in which the agreement to repair is made to the point when this was done. If the goods are disconform to contract after this waiting period there is a further 7 day period in which the short term right to reject might be exercised.

The right to repair is dealt with under s23. Again there is specific provision that this right, if exercised, must be complied within a reasonable time, without significant inconvenience to the consumer and with the trader bearing all of the costs related to that repair unless the repair is impossible or disproportionate compared with the other remedies.

Section 24 provides that the consumer has a final right to reject or a reduction in price (but not both) in the event that there has been an attempt to repair and the goods remain disconform to contract.

The general tenor of these provisions is that they are much more specific and contain far more time limits than the laws they are replacing. It is not immediately obvious that a consumer has to be “reasonable” in exercising rights of rejection and it will be interesting to see if concepts such as materiality, which proved so problematic with minor defects in new cars, continue to play a role. S9 (3)(c) provides that freedom from minor defects is a part of satisfactory quality. This is not new but it will be interesting to see how these matters are interpreted in light of the more specific rights given by part 1 of the Act.

Digital Downloads and Consumer Contracts

Part 1 of the Act seeks to bring together contracts between a trader (defined in s2 as “a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf) and a consumer (an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession) for the trader to supply goods, digital content or services, if the agreement is a contract.

This is an interesting starting point. When you download Clash of Clans, Quizup or Candy Crush for free is that a contract?

No. Section 33 (1) provides:

“(1) This Chapter applies to a contract for a trader to supply digital content to a consumer, if it is supplied or to be supplied for a price paid by the consumer.”

On the other hand when you buy your gems or extra Hearthstone packs you have a contract. Subsection (3) provides:

“*The references in subsections (1) and (2) to the consumer paying a price include references to the consumer using, by way of payment, any facility for which money has been paid.”*

Furthermore, “free” content which is contingent upon a price being paid for something else is also covered. Subsection (2) provides:

“*This Chapter also applies to a contract for a trader to supply digital content to a consumer, if—*

(a) it is supplied free with goods or services or other digital content for which the consumer pays a price, and

(b) it is not generally available to consumers unless they have paid a price for it or for goods or services or other digital content."

So "free" anti-viral software with a laptop or bonus material provided on the pre-purchase of a game is also covered.

Section 34 provides:

"(1) Every contract to supply digital content is to be treated as including a term that the quality of the digital content is satisfactory.

(2) The quality of digital content is satisfactory if it meets the standard that a reasonable person would consider satisfactory, taking account of—

(a) any description of the digital content,

(b) the price mentioned in section 33(1) or (2)(b) (if relevant), and

(c) all the other relevant circumstances (see subsection (5))."

This is of course very familiar territory, basically applying the tests found in s14(2) of the Sale of Goods Act 1979 to digital content. There are some additional tweaks, however. S37 (3) provides:

"*Any information that is provided by the trader about the digital content that is information mentioned in paragraph (a), (j) or (k) of Schedule 1 or paragraph (a), (v) or (w) of Schedule 2 (main characteristics, functionality and compatibility) to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) is to be treated as included as a term of the contract."*

Regulation 10 of those provisions provides that:

"(1) Before the consumer is bound by an off-premises contract, the trader—

(a) must give the consumer the information listed in Schedule 2 in a clear and comprehensible manner, and

(b) if a right to cancel exists, must give the consumer a cancellation form as set out in part B of Schedule 3."

That information in Schedule 2 includes the following:

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

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

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

Any contract for the provision of digital content will now have to specify this information but the penalties for failing to do so are disappointingly modest. Section 42(4) of the 2015 Act provides that:

"the consumer has the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid for the digital content or for any facility within section 33(3) used by the consumer."

More significantly subsection (8) provides: *"It is not open to the consumer to treat the contract as at an end for breach of a term to which any of subsections (2), (4) or (5) applies."*

<u>Remedies for digital content</u>

One of the underlying themes of the 2015 Act is, where possible, to remove terms like "reasonable" and make more specific provision as to the rights. It is perhaps unfortunate that this has not been taken even further. A good example of this, however, is in relation to digital content. Section 49 (9) provides:

"For the purposes of subsection (2), digital content which does not conform to the contract at any time within the period of six months beginning with the day on which it was supplied must be taken not to have conformed to the contract when it was supplied."

This is qualified to a modest extent by subsection (10) which provides that the trader has the right to prove it actually was working on the date it was supplied or that it has been used for a purpose not contemplated.

As we have already seen when you download your freemium game you do not have a contract. When you pay for the additional content you do. What, however, is the position in respect of updates?

Section 39 provides that, where there is a contract to supply digital content, each provision is a supply to which the requirements of quality, fitness for a particular purpose and description apply. Where, however, the contract requires access to a processing facility subsection (5) provides:

"*The contract is to be treated as including a term that the processing facility (with any feature that the facility is to include under the contract) must be available to the consumer for a reasonable time, unless a time is specified in the contract.*"

So if you buy a game such as Sim City, GTA5 or COD (not a fish apparently) where online servers are required the supplier is undertaking that these servers will be available for a reasonable time after the game is purchased. If you are providing such a facility, whether it is a game or otherwise you should stipulate the period that you are undertaking to provide that additional service in the sale.

A more complicated provision arises where the contract does not make this provision but the supplier provides "free" updates.

Section 46 provides that if the digital content damages the device, is supplied under a contract and is not the sort of damage that would arise if the supplier had exercised ordinary skill and care then a claim can be made.

I think that the key to the extent of this provision is found in the provisions of s33 that I have already quoted. If you would not be able to get access to that update without the contract that you had entered into for the original digital content then you would have a claim under the contract.

Finally, s47 very substantially restricts or excludes any provision which does seeks to exclude any of the rights given by the Act. The Competition and Markets Authority are given the right to consider complaints and seek interdicts etc. S68, a disappointment to lawyers everywhere, provides that a trader must ensure that a written term of a consumer contract is transparent, that is in plain, intelligible language and legible. Transparent or not it is thought that clauses of the following type are no longer to be permitted:

"By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and for ever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamesation.co.uk or one of its duly authorised minions."

Secondary Selling

The secondary selling provisions are an attempt to provide some regulation of the common practice of ticket reselling and the wild west atmosphere of E–bay and Gumtree (other markets for stolen goods are available).

Section 90 provides that where a seller re-sells a ticket for a recreational, sporting or cultural event in the United Kingdom through a secondary ticketing facility he must comply with the terms of that section.

In the House of Lords it was suggested that the level of fraud in this market amounts to something close to £1.5bn a year which seems to make regulations specifying in what particular part of the venue you are entitled to go and what the face value of the ticket might have been seem a pretty modest response.

The Act then goes further in support of these hardworking scalpers by prohibiting the blacklisting of those who resell tickets and by making it illegal for the venue or event organiser to void the ticket unless this was a condition of the original contract of sale for the ticket from the organiser of the event. Furthermore s90 (7) provides that:

"*Part 2 (unfair terms) may apply to a term of a contract which, apart from that Part, would permit the cancellation of a ticket for a recreational, sporting or cultural event in the United Kingdom, or the blacklisting of the seller of such a ticket, in circumstances other than those mentioned in subsection (2) or (3).*"

In short, even if there is a contractual term in the original contract that term is likely to be deemed unfair and unenforceable unless you can demonstrate that it is reasonable in the particular circumstances. This might arise if one has a selected audience or particular issues of security which require some sort of identification or checks to be carried out on those attending.

Section 92 imposes an obligation on these secondary ticket marketers to report any criminal activity (such as fraud) to the police.

As a result of their Lordship's disquiet at the prospect of never being able to buy a ticket from Ticketmaster again (having been beaten by armies of nimble fingered scalpers) the Secretary of State has an obligation to review how these new arrangements are working and to provide a report. Even in the brave new world of internet commerce there is still time for a second look.

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