
RESEARCH ARTICLE

The Differences Made by the Transposition of the Consumer Sales and Guarantees Directive (1999) into English law: Could a case be made for extending the Changes to Non-Consumer Contracts?

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ABSTRACT

It used to be a principle of English law that a seller or a party to a contract was not under a legal obligation to disclose to the buyer or the other party to the contract any facts relating to the contract, even if that fact “would have materially influenced”¹ his decision to the contract. This principle was governed by the legal maxim of *caveat emptor*, i.e., let the buyer beware. The rule of *caveat emptor* ‘used’ to apply to a contract of sale of goods and other forms of contract except if the buyer could show that there was an express warranty of quality or there was fraud on the part of the seller. However, in relation to the sale of goods, which is the subject matter of this article, it may be argued that besides this known exception, the rule “has been tempered”² by an implied condition in the common law that where the goods are sold by description, they shall be of merchantable quality “[answering] the description in the contract”³. Although a purchaser could not benefit from this common law implied condition in the sale of specific goods, where he expressly demanded the goods for a particular purpose, there was an implied condition that the goods should be reasonably fit for that purpose.⁴ These common law rules applied even before the Sale of Goods Act 1893. Firstly, this article brings out and analyses, in terms of the sale of goods, some of the differences that have been affected by the transposition of the Directive on consumer sales and guarantees into English law through the 2002 Regulations, with emphasis on the key provisions of the Regulations, i.e., Reg. 3, 4, 5, and 15-16. Secondly, as these Regulations, as well as the changes they brought, aimed at protecting person “who deals as consumer” or consumers generally, this article argues whether or not a case could be made for extending these changes to non-consumer contracts. It may be interesting to note that, whereas the changes made by the 1994 Act were “plainly directed towards finding a formulation which is appropriate to the consumer as well as to commercial sales,”⁵; the 2002 Regulations, on the other hand, are directed only to consumers.

KEYWORDS

Sales of goods, *caveat emptor*, implied terms, express terms

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¹ G. Applebey, *Law of Contract* (London: Sweet & Maxwell, 2001) para. 15.1

² C. J Miller and R. S. Goldberg, *Product Liability* (New York: Oxford University Press, 2004) para. 4.39, p. 103

³ *Gardiner v Gray* (1815) 4 Camp 144, per Lord Allen Borough

⁴ C. J Miller & R. S. Goldberg, n. 3 above, para 4.40, p. 109

⁵ *Benjamin's Sale of Goods*, n 10 above, para. 11-046

1. Introduction

As society was becoming complex, there was a pressing social need to change the rules on contract of sale; and it soon became “inconvenient and impractical”⁶ to allow parties to the contract or even only one of them to absolutely dictate, directly or indirectly what the terms of the contract should or should not be, particularly where one of the parties was gullible or inexperienced. Hence there was a need to set a fair standard governing the parties’ contractual relationships. The doctrine of “gap filling”⁷ became inevitable to “[achieve] substantive fairness”⁸ between the parties to the contract, particularly in the sale of goods. The main aim of the doctrine is, on the one hand, to give effect to the presumed intentions of the parties and, on the other, to establish a fair balance between the parties to the contract, notwithstanding the principle of freedom of contract. This is because, as G. Applebey told us:

“The parties may simply not have the time or energy to list all the possible circumstances which might arise during the contract, [or] they may not foresee events, or deliberately say nothing for fear of putting the other party off contracting in the first place...or that the language used was vague or ambiguous, or the cost of dealing with the matter was greater than the risk...”⁹

The doctrine of gap filling was incorporated into the Sale of Goods Act 1893 (SoGA), particularly under sections 13, 14, and 15. The 1893 Act was replaced by the Sale of Goods Act 1979. And in 1994, some amendments were also made to the 1979 Act. One of the purposes of the SoGA is to provide a certain ‘standard’ or guide to the parties to the contract of sale so that none of the parties could not take for granted “the haste, ignorance, gullibility, inferior bargaining power or simple imprudence”¹⁰ of the other party to the contract. The 1893 Act, in particular, is “generally taken to be the starting point of the modern law and, with it, consumers’ rights.”¹¹ For instance, section 12 of the SoGA 1979 is to the effect that in a contract of sale, there is an implied condition that the seller has the right to sell, subject, of course, to the exceptions in the *nemo dat* rule. Accordingly, “this provision is applicable to all sales whether commercial, consumer or purely private”.¹² Section 13, on the other hand, has an ‘implied’ term (later made a condition)¹³ that in a sale by description, there is an implied condition that the goods will correspond with their description. If the sale is both by sample and by description, then the goods must correspond with both their description and sample. Section 13 also applies to “all contracts for the sale of goods”¹⁴, “regardless of the status of the seller or buyer,”¹⁵; and “whether the buyer is a private individual or a business”¹⁶. Section 14, which provided for an implied condition of ‘merchantable quality’, is now amended by section 14(2A) and (2B) of the SoGA 1994 with an implied condition of ‘satisfactory quality’. Goods are of satisfactory quality if a reasonable person could regard them as such, regard being had to their description, price (where is relevant), and “all other relevant circumstances”¹⁷ The amendment is also to the effect of considering fitness for purpose as an integral aspect of quality regard also being had to the goods’ appearance, finishing, absence of or freedom from minor defects, safety and durability.¹⁸

In 2002 the Government of the United Kingdom, implementing the Consumer Sales and Guarantees Directive,¹⁹ passed the Sale and Supply of Goods to Consumer Regulations 2002,²⁰ whereby some amendments were still made to the SoGA 1979, all in an attempt to fairly and justly fill the gap between parties to the contract of sale of goods; particularly this time between consumers on the one hand and sellers and manufactures on the other.

⁶ G. Applebey, n 1 above para.12.14.

⁷ *ibid*; para 12.15, p. 198; see also Ayres and Gartner ‘Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules’ (1989) 99 YLJ 87.

⁸ *ibid*; para. 12.14

⁹ *ibid*; para. 12.15

¹⁰ *Benjamin’s Sale of Goods* (London: Sweet & Maxwell, 2002) para. 14-001, p. 647

¹¹ G. Applebey, n 1 above para. 12.20, p. 201

¹² *Benjamin’s Sale of Goods*, *supra*, para. 14.007, p. 651

¹³ See Sale and Supply of Goods Act, 1994.

¹⁴ *Benjamin’s Sale of Goods*, n 10 above, para. 14-009.

¹⁵ R. Bradgate and C. Twigg-Flesner, *Blackstone’s Guide to Consumer Sales and Associated Guarantees* (New York: Oxford University Press, 2003) para. 3.3.3, p. 47

¹⁶ G. Appplebey, n 1 above, para 12.20

¹⁷ Section 14 (2A)

¹⁸ Section 14 (2B)

¹⁹ [1999] OJ L 171/12

²⁰ SI 2002/3045

It was argued that “in broad terms, the Directive seeks to enhance market integration through the harmonisation of rules relating to the conformity of goods”²¹. However, although this may be correct, the complex economic reality of the 21st-century business transaction is worth mentioning as one of the reasons necessitating the changes. It may be interesting to note that, in both the Directive and the Regulations, consumers are given appreciable protection; and the preamble to the EC treaty and Article 95 of the treaty speaks of high consumer protection as well as “consumer-welfarism”²². However, whether or not consumer protection is achieved by the transposition of the Directive into English law remains a debatable point. It should also be noted that, although the Directive has brought some new rights and remedies to the existing ones, it did not require member states to completely do away with the existing consumer rights and remedies under their respective laws. That is to say, “the Directive allows Member States to adopt or maintain existing provisions in force to ensure a high level of consumer protection”²³. This implies, therefore, that the existing English law on consumer protection will continue to operate ‘hand-in-hand’ with the new changes. It is pointed out that as some of the changes brought by the Directive either “already conformed or provided better protection”²⁴ to consumers, “the requirement of the Directive presented no problems for Scots or English law”²⁵. We will also soon find out that, although some of the changes brought by the Regulations are clearly required by the Directive, some of the amendments brought by the Regulations are not required by the Directive. There are also certain parts of the Directive that the Regulations completely ignored.

1.1 Conformity to the Contract and Amendment to Satisfactory Quality Standard:

Article 2(1) of the Directive imposes an obligation on the seller in a ‘strong tune’ that he “must” deliver to the consumer goods that are in conformity with the contract of sale. By Article 2(2), goods delivered to the consumer “are presumed in conformity to the contract if they:

- a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
- b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;
- c) are fit for the purposes for which goods of the same type are normally used;
- d) show the quality and performance which are normally in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

Article 2(3) is to the effect that whereas at the time of the completion of the contract, the consumer was aware, or could “not reasonably be unaware”²⁶ of the lack of conformity; or where the lack of conformity is as the result of the materials supplied by the consumer, there is deemed no lack of conformity. Article 2(4) seems to be providing possible defences for the seller as a result of his public statements showing the quality and performance of the goods with the burden on him to show that:

- a) he was not and could not reasonably have been aware of the statement in question, or
- b) that by the time of the conclusion of the contract, the statement had been corrected, or
- c) that the decision to buy the goods could not have been influenced by the statement.

Article 2(5) of the Directive provides that where the installation is part of the contract between the seller and a consumer, and there is a lack of conformity as a result of correct installation, then it would be regarded just like a lack of conformity of the goods generally if the goods are installed by the seller or under his responsibility. This provision also applies where “the product is intended to be installed by the consumer, is installed by the consumer, and incorrect installation is due to a shortcoming in the installation instructions”²⁷. But this provision seems to be ignored by the Regulations.

Generally speaking, Article 2 covers a variety of principles pertaining to the sale of goods, most of which have to do with the elements of quality standards. The Article is tactfully implemented by Regulations 3, which amended section 14(2) of the SoGA 1979. A new section 14(2D) is now inserted; stating that “if the buyer deals as consumer...the relevant circumstances”²⁸ mentioned

²¹ C. Willet, M. Morgan-Taylor and A. Naidoo ‘Sale and Supply of Goods to Consumers Regulations 2002’ [2004] J.B.L. p. 95

²² Brownsword ‘Contract Law: Themes for the Twentieth Century’ para. 6.2, quoted by H.G. Beal, W.D. Bishop & M.P. Furmston *Contract Cases and Materials* (UK: Butterworths, 2001)

²³ C.J Miller & R. S. Goldberg, n 3 above, para 5.19, p. 160

²⁴ W. C. H. Ervine ‘Sale and Supply of Goods to Consumers Regulations 2002’ (2003) 8 Scots Law Times, 67- 71

²⁵ Ibid;

²⁶ Article 2 (3) of the Directive.

²⁷ Article 2 (5) of the Directive

²⁸ Section 14 (2D) of the SoGA, 1979

under section 14(2A) of the SoGA 1979 would now “include any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling”²⁹. If one compares the seemingly lengthy wording of Article 2 with the short and tactful wording of section 14 (2D), one may logically conclude that some part of Article 2 has partially been ignored.

An analysis of Article 2 (1)-(3) of the Directive could reveal that certain elements are to be considered in assessing whether or not goods delivered to the consumer are in conformity with the contract – which elements seem to relate to either description, fitness for purpose or of satisfactory quality; all of which are dealt with by sections 13 and 14 of the SoGA 1979 as well as by the case law. For instance, Article 2(2) (a) of the Directive speaks of the presumed conformity of the goods if they comply with the ‘description given by the seller’ of the goods he ‘has held out to the consumer as a sample or model’. And by section 13 of the SoGA 1979, “in a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description”³⁰. It would appear that both the Directive and the SoGA protect a sale by description, whether made by the consumer or non-consumer buyer. However, it may be accepted that Article 2 (2) (a) could broadly be more protective to the consumer than section 13. This is because, while section 13 of the SoGA seems to cover the cases where the goods are described, Article 2 (2) (a) goes to the extent of protecting consumers on the qualities of the goods that the seller held out to them. Even the new section 14 (2D) of the SoGA speaks of the public statements on the ‘specific characteristics of the goods made about them by the seller’; while Article 2 (2) (a) of the Directive generously covers statements, both made and held out by the seller to the consumer.

Generally speaking, it may be pointed out that the new change brought by the implementation of Article 2 of the Directive has to do with the additional element of satisfactory quality. The traditional standard of satisfactory quality in English law is that “goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant), all other relevant circumstances”³¹. Now in contracts where a buyer deals as a consumer, a new standard of satisfactory quality is added under section 14 (2D) to the effect that “any public statement made by either the seller, the producer or his representative”³² pertaining to “the specific characteristics of the goods”³³ made to the consumer “in advertising or on labelling”³⁴ are to be considered relevant. However, it has been a point of controversy that as between the provisions of Article 2 (2), which bases, among other elements, the standard of quality of consumer goods on “the quality and performance which are *normal in goods of the same type* and which *the consumer can reasonably expect*”³⁵; and section 14 (2) of the SoGA 1979 basing the quality standard on what “*a reasonable person* would regard as satisfactory”³⁶ which of the two could be said to be “sufficiently clear and precise”³⁷ that consumers “can ascertain the full extent of their rights, and where appropriate rely on them before the national courts”³⁸? It may be submitted that taking into consideration the controversial question of ‘who is a reasonable person’, it is pointed out that it may be hard to conclude that section 14 (2A) of the SoGA 1979 is “as protective as para (d) [of the Directive] which focuses solely on the expectations of the consumer”³⁹, rather than what a reasonable person could regard as such. Had Article 2 (2) (d) been expressly implemented in the Regulations, the reasonable expectations of consumers could have been protected.⁴⁰ Nevertheless, it may be interesting to note that the public statement (which is not defined in the Directive or the Regulations) mentioned in section 14 (2D) of the SoGA 1979 must relate to “the characteristics of the goods”.

Nevertheless, an important difference to mention is that the past uncertainty of the legal implications of advertising statements made by the manufacturers, sellers, or retailers on booklets, catalogues, or on labelling of goods has now been settled by the provisions of the Regulations. The position under English law was that depending on who made the statement between the manufacturer and the seller and the nature of the statement; it could amount to a promise forming part of the contract or collateral contract or misrepresentation.⁴¹ However, there was “no clear guidance as to when such statements were to be taken into

²⁹ *ibid*;

³⁰ Section 13 (1) of SoGA 1979

³¹ Section 14 (2A) of the SoGA, 1979.

³² Section 14 (2D) of the SoGA 1979.

³³ *Ibid*,

³⁴ *Ibid*,

³⁵ Article 2 (2) (d) of the Directive; emphasis added.

³⁶ Section 14 (2A) of the SoGA 1979; emphasis added. See Chris Willet, Martin Morgan Taylor and Andre Naidoo, n. 22 above. See also W. C. H. Ervine ‘Satisfactory Quality: What does it Mean? [2004] 13 J.B.L. 684-703.

³⁷ *Commission v Germany* [1991] E. C. R. I- 825 para 6.

³⁸ *ibid*;

³⁹ Chris Willett, Martin Morgan- Taylor and Andre Naidoo, n. 22 above, p. 103

⁴⁰ *ibid*;

⁴¹ G. Applebey, LL.M Lecture Notes, titled ‘Sale and Supply of Goods to Consumers Regulations 2002’ dated March, 2004.

account⁴². Precise guidance is now introduced by the Regulation into the English law to the effect that such statements are considered a condition and relevant when the buyer deals as a consumer. However, there may still be some controversy as to what amounts to a public statement and to whom do they exactly apply. This is because section 14 (2D) is couched in such a way that its "normal grammatical construction"⁴³ seems to indicate that the words 'or his representative' refers to the producer's representative, not the sellers. This could likely lead to some other controversy in the future.

Another interesting difference is that, as opposed to the position under English law, Article 2 of the Directive first of all places the burden of proof on the seller, instead of the consumer, to show that the goods the seller delivered to the consumer conformed to the contract. If the seller discharges this, then the burden "passes to the consumer to rebut the presumption that the goods fail to comply with some other express requirement of the particular contract."⁴⁴ The restrictions under section 14 (2E) (a)-(c) on when public statements can be considered may, on the other hand, be invoked by the seller to show that as at the time the contract was made, he was not, and could not reasonably have been, aware of the statement. Or that before the contract was made, the statement had been withdrawn in public, or to the extent that it contained anything which was incorrect or misleading, it had been publicly corrected; or that the decision to buy the goods could not have been influenced by the statement. A popular example of defence under section 14 (2E) (a)-(c) is, for instance, where a consumer bought the goods in question in the area where the advertising campaigns on such goods did not cover. Another example may be where the seller or the producer, publicly and clearly, making reference to the statement in question, has withdrawn it after finding it to be misleading or incorrect.⁴⁵ Generally speaking, it is pointed out that the burden of proof on the seller, particularly in section 14 (2E) (c), is "a strong one"⁴⁶.

By section 14 (2F) of the SoGA 1979, any statement which is a relevant circumstance could still be considered if it could have been a relevant circumstance apart from the provisions of subsection (2D) and (2E). The implication of this subsection is that it circumstantially "leaves the pre-existing case law on this topic intact"⁴⁷. And a broad interpretation of this subsection may likely cover many instances of public statements to consumers that are not literally mentioned in the Regulations.

1.2 Change in the Rules of Passing Risk and of Acceptance of goods in Consumer Sales:

The general principle in English law is that property in the goods passes from the seller to the buyer when the parties to the contract intend; and in the absence of such intention, the common law rules- now in the SoGA will apply. When the goods that are the subject matter of the contract are lost, destroyed or deteriorated, or damaged, the question of passing risk becomes relevant in determining whose goods are damaged or lost between the seller and the buyer. The rule governing this is expressed in the maxim *les perit domino* – risk passes with the property in the goods. Accordingly, "when you can show that the property passed, the risk of the loss prima facie is in the person in whom the property is"⁴⁸. By section 20 of the SoGA 1979, unless there is a contrary intention between the seller and the buyer, the risk passes with the property in goods.⁴⁹

Applying this anomalous rule to consumer sales means that goods handed over to a carrier to deliver to a consumer are deemed consumers from the time they are handed to the carrier before they are even physically delivered to the consumer. The "unbending rule"⁵⁰ of *les perit domino* is now bend and amended by section 20 (4) of the SoGA 1979, which says:

"In the case where the buyer deals as a consumer or, in Scotland, where there is a consumer contract in which the buyer is a consumer, subsections (1) to (3) above must be ignored, and the goods remain at the seller's risk until they are delivered to the consumer."

To effectively allow the application of the above amendment, it becomes necessary that section 32 of the SoGA is also amended. And therefore, by the new section 32 (4) of the SoGA 1979, now, where the buyer deals as a consumer, delivery to the carrier do not amount to delivery to the buyer (consumer) – unless the carrier physically, actually, and in fact delivers to the consumer. This implies that, as opposed to the past, the seller would be strictly and directly liable to the buyer if the goods which the seller handed

⁴² C. J. Miller (ed), *Benjamin's Sale of Goods: Special Supplement* (London: Sweet & Maxwell, 2003) para. 1-065, p. 26

⁴³ *ibid*; 1-068.

⁴⁴ R. Bradgate and C. Twigg-Flesner, n 15 above para 3.2.3.4 p. 43-44

⁴⁵ Chris Willett, Martin Morgan - Taylor and Andre Naidoo, n. 22 above, p. 99.

⁴⁶ *Benjamin's Sale of Goods: Special Supplement*, n. 43 above, para. 1-070, p. 27.

⁴⁷ G. Applebey, n. 42 above.

⁴⁸ Per Blackburn J., in *Martineau v Kitching* (1872) L. R. 7 Q. B. 436 at 454. See also *Sterns v Vickers* [1923] 1 KB 78 (CA); *Healey v Howlett & Sons* [1917] 1 KB 337 (KBD) and *Marsh & Murrell v Joseph I. Emmanuel Ltd* [1961] 1 All ER 485 (QBD).

⁴⁹ See also sections 17 and 18 of the SoGA 1979.

⁵⁰ Per Lord Norman in *Comptoir D'achat et de vente du Boerenbond Bengel S/A v Luis De Ridder Limitada (Julia)* [1949] AC 293 at 319, quoting Lord Justice Clerk in *Hensen v Craige and Rose* (1859) 21 D. 438, at 438.

to the carrier for delivery to the buyer got lost, damaged, or destroyed in transit. Nevertheless, it may be pointed out that the Directive has not required nor has it mentioned any change to the rules of passing risk. The change to the passing of risk rules in the SoGA 1979 seems to be a matter of 'will' so that effect is given to Article 2 (1) of the Directive, which says that "the seller must deliver goods to the consumer which are in conformity with the contract of sale".

1.3 Additional Rights of the Buyer:

Article 3 (1) – (6) of the Directive provides some remedies to the consumer if the seller delivers goods that are not in conformity with their contract. It may be noted that some of these remedies have expressly been provided for by English law to consumers, and some are being used as a matter of business practice between sellers and consumers. It may be right to say that it is very hard to confidently say that the implementation of the Directive has brought about any unknown remedy to English law with respect to consumer sales. It would appear that the changes brought by the Directive seem to be affecting the operation of the existing remedies rather than bringing any unknown remedy. In order to effectively implement Article 3 of the Directive, a new Part 5A was tactfully inserted into the SoGA 1979 with a new heading: "Additional Rights of Buyer in Consumer Cases".

The traditional remedy to consumers in case of breach of implied conditions by the seller has been (and will always be) rejection of the goods and termination of the contract as a whole. However, this right could be lost if, for instance, there is a lapse of reasonable time or if the buyer did an act inconsistent with the seller's ownership of the goods in question. The question of reasonable time is a question of fact, depending upon the nature of the contract and the circumstance in each case.⁵¹ There is also the remedy of damages where the specific performance of the contract may be inadequate. Informally, one may say that there is also the remedy of negotiating for price reduction between the buyer and the seller; which, because it is neither expressly recognised nor prohibited by statutes, still applies. These remedies will continue to operate hand-in-hand with the remedies added by new Part 5A. However, it is pointed out that "the relationship between the two remedial schemes may give rise to considerable confusion"⁵².

By the new Part 5A of the SoGA 1979, where the buyer deals as a consumer and the goods do not conform to the contract at the time they are delivered, then the buyer can require the seller to repair the goods; or to replace them with the conforming ones; or to reduce the purchase price with an appropriate amount. If all these 'failed,' the buyer could then finally "rescind the contract with regard to the goods in question"⁵³. From the wording of section 48A of the SoGA, it appears that the choice of which remedy is to be invoked is subject to the provision of the section, absolutely in the hands of the consumer. However, he may not skip one remedy over another - except in some exceptional cases, for instance, where the first remedy is not possible or is disproportionate.⁵⁴ For example, it was pointed out that:

"A repair may be impossible when, for example, the goods supplied are of the wrong colour or size or are badly adulterated. Similarly, a replacement may be impossible where the goods are in some way unique- as may be the case with second-hand goods"⁵⁵.

Literally put, for a defect in a wedding dress or electrical kit for surgery, replacement would be given priority over repair. The provision, therefore, implies that "a "cure" must be considered by the buyer before the more drastic remedies"⁵⁶ are sought. However, whether the chosen remedy is impossible or disproportionate would depend on the extent that the seller goes to prove that such chosen remedy is either impossible or disproportionate. It may be noted that a very significant difference between rescission under the traditional system and under the provision of Part 5A is that "the common law right to reject requires no preliminaries and hence is more effective if exercised quickly."⁵⁷

A very important and interesting introduction not expressly required by the Directive is the *presumption of non-conformity* under section 48A (3) which reversely placed the burden of proving conformity on the seller. Accordingly, goods that do not conform to the contract at any time within the period of six months from delivery (including the day of the delivery) are presumed not to have so conformed at that date except if the seller can prove that:

⁵¹ *Clegg v Anderson* [2003] 1 All ER

⁵² C. J. Miller & R. S. Goldberg, n. 3 above, para. 5.20, p. 161.

⁵³ See generally Section 48A (1) and (2) (a) (b) (i) (ii) of the SoGA 1979.

⁵⁴ Section 48B (3)

⁵⁵ C. J. Miller & R. S. Goldberg, n. 3 above, para. 5.22, p. 161

⁵⁶ Benjamin's Sale of Goods: Special Supplement, n. 43 above, para. 1-164, p. 62.

⁵⁷ *Ibid*; para. 1-212, p. 77.

- a) the goods did conform at the date of delivery;
 b) the presumption of non-conformity "is incompatible with the nature of the goods or nature of the lack of conformity"⁵⁸.

Where the buyer chooses either repair or replacement of the goods, then it is mandatory for the seller to either repair or replace the goods within a reasonable time and without causing "significant inconvenience to the buyer"⁵⁹. The seller must also bear the necessary cost of repairing or replacing the goods; "(including, in particular, the cost of any labour, materials or postage)"⁶⁰. What is both reasonable time and significant inconvenience, though not defined by the SoGA, are to be determined by the nature of goods and the type of defect. It is, therefore, a question of fact. For instance, it is pointed out that:

"If the problem is a defective light bulb in a new car, instant repair might reasonably be expected, whereas if the problem was the failure of some more complex mechanical part which might have to be ordered from the manufacturer, a longer time would be reasonable."⁶¹

This also implies that "[presumably], the time frame would be shorter if the goods were perishable or required for immediate use"⁶². Where the chosen remedy is impossible or is disproportionate, the buyer can ask for a reduction of price or alternatively rescind the contract.⁶³ The legal implication of rescission is that "any reimbursement to the buyer may be reduced to take account of the use he has had of the goods since they were delivered to him"⁶⁴.

Section 48D establishes "the relationship between the new remedies of repair and replacement and the existing remedy of rejecting the goods and claiming a refund of the purchase price"⁶⁵. It seems to have given the seller some sense of feeling protected, too, in that if the buyer requires him to repair or replace the goods, then the buyer must give him reasonable time to do that. The buyer must not prematurely rescind the contract while repair or replacement is in the process.⁶⁶ Section 48E gives power to the court to order for the specific performance of the remedy chosen by the buyer. It also empowers the court to 'select' any other remedy if the one chosen by the buyer is not appropriate in the circumstance. The court can also make an order unconditionally or upon such conditions as to payment of damages, price "and otherwise as it thinks just"⁶⁷. It may be noted that the court's discretionary power to choose a more appropriate remedy than the one chosen by the buyer is a new introduction. This is because traditionally, under English law, the buyer could straight ahead reject the goods and claim damages without the court's intervention.⁶⁸ It may also be pointed out that the buyer's new remedy of repair and replacement, although informally practised as a matter of negotiation between the buyer and the seller, was not expressly recognised by statute. However, any negotiation achieved between the buyer and the seller does not make the buyer lose his right to reject the goods if the seller is in breach of the contract.⁶⁹

Article 5 of the Directive provides that the rights under the Directive must be exercised within 2 years from the delivery of non-conforming goods. It also requires Member States to provide that notice of non-conformity be given within two months of detecting the lack of conformity. However, this is not provided for in the Regulations partly because it may "often reduce the overall protection of the buyer under common law and certainly make it more complicated"⁷⁰; and partly because "a single time limit is inappropriate to the many types of goods that may be the subject of sale"⁷¹. The Select Committee on European Communities noted that "the two year period if adopted in our law, could act to the detriment of consumers here and would put consumers in a worse position than other purchasers of goods."⁷² Presumably, this means that the traditional six year limitation in the cause of action of this type would continue to apply. It may be argued that although the differences made by the introduction of the Directive are to go hand-in-hand with the pre-existing remedies to achieve maximum consumer protection, yet the

⁵⁸ Section 48A (4)(b); see generally 48A (4) (a) and (b) of the SoGA 1979.

⁵⁹ Section 48B (2) (a)

⁶⁰ *ibid*; (b)

⁶¹ W. C. H. Ervine, n. 25 above.

⁶² C. J. Miller & R. S. Goldberg, n. 3 above, para. 5.21, p. 161.

⁶³ Section 48C (2) (b)

⁶⁴ Section 48C (3)

⁶⁵ C. J. Miller & R. S. Goldberg, n. 3 above, para. 5.25, p. 163

⁶⁶ Benjamin's Sale of Goods: Special Supplement, n 43 above, para. 1-178, p. 66.

⁶⁷ Section 48E (6) SoGA 1979.

⁶⁸ Benjamin's Sale of Goods: Special Supplement, *supra*; para. 1-160, p. 60.

⁶⁹ Section 35 (6) SoGA 1994.

⁷⁰ Benjamin's Sale of Goods: Special Supplement, *supra*, para. 1-215, p.78.

⁷¹ *ibid*;

⁷² Para 93, the Select Committee on European Communities: Tenth Report. Available on www.publications.parliament.uk/pa/1d1996/97/1dselect/1deucom/o57x/ec1008, accessed on: 3rd May, 2005.

complexity of the new regime of remedies under the Directive “in sharp contrast to the simplicity of the existing regime”⁷³ seems to have made the new remedies highly complicated and “hardly beneficial.”⁷⁴

1.4 Consumer Guarantee voluntarily given

By Regulation 15, any guarantee voluntarily given by the seller with the goods delivered to the consumer shall take effect from the time of delivery “as a contractual obligation owed by the guarantor”⁷⁵. This, in effect, implements Article 6 of the Directive. The overall implication of this Regulation is that it takes away the stringent condition in English law that a person claiming remedy based on a guarantee has to prove that he has furnished consideration. Furthermore, a broad interpretation of this Regulation could mean that advertising pamphlets, leaflets, and brochures elaborating on a particular guarantee voluntarily given form part of the contract, whether or not they are given by the manufacturer himself or on his behalf. To ensure transparency, any guarantee must be “set out in plain, intelligible language”⁷⁶ in relation to its content and “the essential particulars necessary for making claims”⁷⁷; the duration, name, and address of the guarantor as well as the “territorial scope of the guarantee”⁷⁸. Where the goods are offered in the UK, the guarantee must be in the English language. It should be noted that Regulation 15, unlike others discussed above, “is a free-standing provision,”⁷⁹ neither amending nor inserting any new rule to the SoGA or any other legislation.

2. Conclusion:

Could a case be made for extending the changes brought by the Directive into English law to non-consumer contracts?

Non-consumer contracts, as their name connotes, may be such contracts in which the buyer deals in a capacity other than that of a consumer- they may often be called commercial contracts. One of the distinctive features of consumer contracts is that the terms and conditions of the contracts are pre-determined, prepared, and designed by only one party to the contract, which is usually the seller, for the buyer to take them the way they are or leave them. Thus, consumer contracts are standard form in nature. Consumers do not contribute in any way toward determining what would be the terms of the contract. As already pointed out in the introduction of this article, this type of arrangement is likely to create an unjust situation whereby one party to the contract, usually the seller, may take for granted the other party’s lack of experience or bargaining power. It may therefore be argued that the purpose of the implied terms in the SoGA and all the insertions made through the implementation of the Directive is to ensure fairness between two parties to the contract – the experienced and skilful manufacturer or seller who determined the terms of the contract and the vulnerable and inexperienced buyer who has to take the terms as outlined by the seller or leave them. Therefore, the question to logically ask is this: is there this unfairness in non-consumer contracts? Who determines the terms of the contract? This seems to be a controversial question that may attract academic debates. It may indisputably be accepted that in consumer contracts, there is a “lack of information or disparity of knowledge between the contracting parties,”⁸⁰ which may not be there to a certain extent in non-consumer contracts. In non-consumer contracts, both parties have time and resources at their disposal to freely enquire more about what the other party proposes, seek further clarification, make amends, and even get legal advice on the proposals made by the other party. Thus, there is certainty as to what terms are to be incorporated in the contract as the parties are in an equal position. This implies that there is hardly any pressing social need to extend the changes brought by the implementation of the Directive to non-consumer contracts. To do that could further complicate the present complex laws on the sale of goods and on consumer sales. It may be argued that even the present regime of fragmented remedies under various laws presents to consumers an array of confusing rights and remedies- under the common law, the statutes, and now under the Directive. It was pointed out that under the present regime of law:

“[too] many concepts cover similar but by no-means identical ideas. Few consumers, for example, are likely to understand the distinction made between rescission (as used in section 48C) and rejection (as used, for example, in sections 35 and 35A).”⁸¹

The Sale of Goods Act was particularly criticised as being “excessively endowed with concepts and classifications, contains redundancies, suffers from omissions, is opaque in certain areas and lacks decisiveness in at least one key area.”⁸²

⁷³ W. C. H. Ervine, n 25 above.

⁷⁴ *ibid*;

⁷⁵ Regulation 15 (1)

⁷⁶ *ibid*; 15 (2)

⁷⁷ *ibid*;

⁷⁸ *ibid*;

⁷⁹ Benjamin’s Sale of Goods: Special Supplement, n 43 above, para. 1-261, p. 100.

⁸⁰ *ibid*;

⁸¹ Para. 3.3 “Simplifying Consumer Legislation: A response from the Law Commission to the DTI’s Consultative Document on Consumer Strategy” (29th Oct. 2004) Available on: http://www.lawcom.gov.uk/files/Consumer_Leg.pdf, accessed on: 6th May, 2005.

⁸² *Ibid*; para. 3.1, quoting M. Bridge “Do we need a new Sale of Goods Act”, lecture given on 5 May 2004 at Queen Mary, University of London. See also M. Bridge, “What is to be done about Sale of Goods?” (2003) 119 LQR 173.

For these reasons, among others, it would appear that there seems to be no need to extend the changes brought by the Directive to non-consumer contracts – except to further muddy the waters.

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