

**LAW COMMISSION AND SCOTTISH LAW COMMISSION - JOINT
CONSULTATION PAPER ON CONSUMER REMEDIES FOR FAULTY
GOODS**

Consumer Focus Response

Submitted 2nd February 2009

About Consumer Focus

1. Consumer Focus is the new statutory organisation campaigning for a fair deal for consumers in England, Wales, Scotland, and, for postal services, Northern Ireland. We are the voice of the consumer and work to secure a fair deal on their behalf. We were created through the merger of three consumer organisations – energywatch, Postwatch and the National Consumer Council (including the Welsh and Scottish Consumer Councils). The new approach allows for more joined-up consumer advocacy, with a single organisation speaking with a powerful voice and able to more readily bring cross-sector expertise to consumer concerns. This is a joint response from Consumer Focus, Consumer Focus Scotland and Consumer Focus Wales.

Introduction

2. Consumer Focus welcomes the opportunity to comment on this important consultation paper. It deals with an area of law of everyday importance to consumers. As the statistical information in the paper demonstrates, millions of transactions are potentially affected by it. We agree that there is an urgent need to reform the law in this area for the reasons so clearly articulated in Part 7 of the consultation paper.
3. We note that the consultation does not cover computer software but that BERR has the matter in hand. This is an increasingly important field and one where there is a difference between English and Scots law on the categorisation of software. We hope that recommendations can be made as soon as possible.
4. Before commenting on the detailed proposals of the Commissions we think it important to make some general points about the area covered as these have implications for the remedies that are appropriate.
5. We need to be aware that this consultation is taking place in parallel with the BERR consultation on the EU's Consumer Rights Draft Directive on which we are submitting a separate response. A copy of that response will be forwarded in due course. The Directive's proposals on sale remedies would seriously undermine the level of protection that UK consumers currently enjoy. It is difficult to see that it provides harmonisation at the "high level of consumer protection" referred to in Article 153(1) of the Treaty of Rome. The Law Commissions' conclusions on our domestic remedies will be an important indication of the level of protection that we expect in the UK and that we consider should be afforded to all consumers in Europe.
6. It is of cardinal importance that the scheme of remedies devised for consumers who find themselves with faulty goods on their hands is as simple and straightforward as possible. Few consumers will have any familiarity with the

law let alone legal training so their rights need to be as simple as possible to understand and operate. Over sophistication of remedies, however well meant, will be the enemy of an effective remedial system.

7. It is important to bear in mind that consumers purchase goods for use not, as commercial purchasers may often do, for resale. In doing so they are entitled to receive products that will meet their expectations. These expectations will vary with the nature of the goods but in the case of consumer durables will include efficient, safe operation for a lengthy period. If there is a problem, the remedies available to consumers are in practice more limited than those of traders who, for example, may be able to pass on the product in its faulty state through trade channels.
8. Consumer purchasers are usually in a weaker position than businesses when it comes to dealing with problems concerning faulty goods. They are less likely to be well informed about the technical details of the product and their legal rights. The research carried out for the Commissions demonstrates the latter point, as does research carried out by the Scottish Consumer Council, one of our predecessor organisations, (see *Knowledge of Consumer Rights in Scotland*, 2003) and the Office of Fair Trading (*Competition Act and Consumer Rights*, May 2006). These limitations may be exacerbated by lack of education which may inhibit some consumers from pursuing a resolution of a problem. It should also be noted that dealing with faulty goods is, for consumers, in addition to their everyday concerns, not part of their professional life as it is for the trader involved. There are practical difficulties as mundane as finding the time to return to the shop or be available when a repairer or a representative of the seller comes to inspect the faulty goods.
9. It should also be noted that the consumer who finds that he or she has purchased a faulty product may face a large financial burden. For the trader, on the other hand, the faulty product is probably just one from a very large stock. The overall loss may not be particularly significant for the business: for the consumer resolving the problem may involve financial hardship. Where high value goods are concerned few consumers can, for example, purchase a replacement while resolving a problem with a defective purchase.
10. The ultimate procedures for resolving disputes about faulty goods should not be overlooked. Research has shown that consumer problems are the most likely of all civil justice problem types to be handled directly by people without advice, and that most manage to resolve the problem themselves, usually by dealing directly with the retailer. (Genn, *Paths to Justice*; Genn and Paterson, *Paths to Justice Scotland*; *Knowledge of Consumer Rights in Scotland*, SCC (2003). However, such disputes cannot always be resolved in this way, and some consumers may be faced with taking formal legal action against a retailer.

Despite improvements in court procedures designed to make it easier for consumers (and others) to use them, both in England and Wales and Scotland, they are still perceived as somewhat daunting and are little used by consumers with problems over faulty goods. In any event, the financial limits (especially in Scotland, despite last year's increase to £3000) mean that the most straightforward procedure, that for small claims, will not cover the more expensive purchases such as cars and home improvements.

11. The reluctance of consumers to use the courts is clearly established by research carried out in both jurisdictions showing that in relation to the scale of problems that go unresolved the number of cases dealt with by the courts is extremely small. In *Paths to Justice*, (Hart Publishing, 1999) Genn observes at p. 156 that "Courts and Ombudsmen seemed to play a minimal role in the resolution of consumer disputes. Among all consumer cases, less than 1% ended in any kind of court hearing." In the Scottish equivalent (Genn and Paterson, *Paths to Justice Scotland*, 2001, p.163) it is noted that "Courts and ombudsmen seemed to play virtually no role at all in the resolution of consumer disputes" The importance of this in the present context is that for many consumers the courts are not perceived as realistic means of dispute resolution. This weighs the scales in favour of traders and at least some may well take this into account in their approach to dealing with faulty goods.
12. The following sections of this response follow the list of proposals and questions set out in Part 10 of the Consultation Paper. We then raise some other issues which are not covered in the Consultation Paper.

THE RIGHT TO REJECT IN SALES CONTRACTS

10.1 We provisionally propose that:

the right to reject should be retained as a short-term remedy of first instance for consumers. (8.31)

the right to reject should not be extended to cover latent defects which appear only after a prolonged period of use. (8.41)

the legislation should set out a normal 30-day period during which consumers should exercise their right to reject which would run from the date of purchase, delivery or completion of contract, whichever is later. (8.75)

The normal period of 30 days

10.2 Do consultees agree that 30 days is an appropriate period? We would be interested in receiving arguments for either a shorter or longer period.

10.3 We ask consultees whether it should be open to

- (1) the retailer to argue for a shorter period where**
 - (a) the goods are perishable (that is they are by their nature expected to perish within 30 days)?**
 - (b) the consumer should have discovered the fault before carrying out an act inconsistent with returning goods?**
- (2) the consumer to argue for a longer period where**
 - (a) it was reasonably foreseeable at the time of sale that a longer period would be needed (“objective circumstances”)?**
 - (b) the parties agreed to extend the period?**
 - (c) the consumer’s personal circumstances made it impossible to examine the goods within the 30 day period? If so, should this justify only a short extension, such as an additional 30 days, or a longer extension of six months or more?**
 - (d) there were fundamental defects which took time to be discovered?**

10.4 Are there are other reasons to justify a shorter or longer period? (8.76 to 8.77)

Other issues

10.5 We provisionally propose that a consumer who exercises a right to reject should be entitled to a reverse burden of proof that the fault was present when the goods were delivered. (8.81)

10.6 We provisionally propose that legal protection for consumers who purchase goods with “minor” defects should not be reduced. (8.91)

13. We strongly support the proposal that rejection should be the primary remedy. We cannot, however, agree that it should remain a short term remedy in all circumstances. It follows that we do not support the idea of a 30-day period during which consumers should exercise their right to reject. We will,

nevertheless, deal below with this proposal as a separate issue as we have other reservations about it.

The Importance of Rejection as the Primary Consumer Remedy

14. The right of rejection is central to ensuring that consumers have adequate protection. As the consultation paper, like the Commissions' 1987 report on *Sale and Supply of Goods*, points out, this remedy is easy for consumers to understand and places them in a strong bargaining position. As we have pointed out above, this is important given the inherently weak position of consumers. The right to reject helps to redress the imbalance of power between the bargaining positioning of buyers and sellers, and empowers them to make claims for remedy or enforce the implied terms of quality under a sales contract; namely that goods are fit for purpose, of satisfactory quality and meet their description.

The buyer's 'right to reject' thus acts an essential check on product quality which:

- Inspires confidence among consumers
- Drives up industry standards
- Encourages retailers to innovate around the needs of the consumer
- Acts as a cost effective way of resolving disputes quickly
- Prevents consumers getting trapped into a cycle of repairs
- Mitigates against unreasonable seller behaviour which undermines the trust between the parties

15. We believe that the existence of the right to reject is key to the confidence which UK consumers generally have in asserting their consumer rights. As noted above, people are often able to deal with consumer problems by themselves without advice. Consumer confidence in the UK is such that the generous refund and exchange policies adopted by some retailers seem to have resulted in consumers thinking that they have greater legal consumer rights than they actually do. (SCC, *Knowledge of Consumer Rights in Scotland*, 2003) The fact that retailers have put such policies in place reflects the high expectations that such consumers now have, and is key to driving up standards in the retail sector.

16. The right to reject allows consumers to achieve the result that they perceive to be in their best interests. This will often be repair or replacement which can be more easily achieved if traders know that refusal will lead to having to refund the purchase price and take back faulty goods. Indeed, as is clear from the research undertaken on behalf of the Commissions, it is a satisfactory product that consumers wish to have not their money back. The threat of rejection is important in attaining that aim. It also, indirectly, is conducive to an important subsidiary aim, which the Commissions highlight, of avoiding waste and reducing the problems of disposing of unusable goods. As the consultation paper points out, the possibility of rejection is a spur to the production of goods of high quality which are less likely to prove to be faulty and have to be scrapped.
17. While we accept that it is often desirable and appropriate that consumers resort to repair or replacement of faulty goods, we would also point out that there are circumstances where these are not acceptable remedies. There will be circumstances where the consumer has lost confidence in the product or the seller. There may be a loss of confidence in the product where the fault has involved the possibility of physical injury. This was the position of Mr. Bernstein, immortalised in *Bernstein v Pamsons Motors (Golders Green) Ltd* [1987] 2 All E.R. 220, who realised that he had narrowly avoided death or serious injury when the fault in his car manifested itself on the M25. One can understand that he had no interest in a repair or replacement in the circumstances. The loss of confidence may stem from the seller's conduct in dealing with the problem. A good example from the case law is the recent Scottish case of *J & H Ritchie Ltd v Lloyd Limited* 2007 SC (HL) 89 where the seller's evasive attitude raised the purchaser's suspicions. In these situations it is important and fair that consumers should not be forced to accept repairs or replacements.
18. We note that the FDS research showed that consumers "feel strongly that they should have a right to reject faulty goods ..." (*Consultation Paper para. 8.14*) It is also significant that the Commissions' discussions with retailers did not find any strong desire to abolish the right to reject.
19. Rejection is a remedy which is common in other EU states and, as the Consultation paper observes in referring to the draft Consumer Rights Directive, "... there is a strong argument that the harmonised regime should incorporate a right to reject." (*para. 8.26*) This would be in line with the attainment of a high level of consumer protection which is the level which Article 153 of the Treaty of Rome advocates for harmonisation measures.

An extended right to reject

20. We cannot agree with the Commissions' view that there should not be a long term right to reject. Such a right is necessary to make fully effective the durability aspect of the implied term of satisfactory quality. It is true that there

is always the remedy of damages where goods prove not to be durable but this will not necessarily be an adequate remedy. Without the possibility of a long term right of rejection consumers may find themselves with seriously defective products. The introduction of a long term right to reject would also have the merit of aligning the position in relation to other contracts for the supply of goods. As pointed out in the Consultation Paper, there is, in effect, such a right in contracts of hire-purchase, exchange and work and materials. In these cases, the concept of affirmation in English law and that of personal bar in Scots law permit consumers to reject goods within a reasonable time of discovering the defect. In pursuit of the desirable objective of uniformity of treatment of contracts for the supply of goods there is a good argument for introducing a long term right to reject and thus removing an anomaly. This objective could, of course, be achieved by altering the law relating to non-sale contracts and applying the current sale rule to them, but this would be to reduce consumer protection over a wide range of transactions and is undesirable on that ground.

21. None of the arguments against such a right stand up to scrutiny. Much is made of the problems of providing an allowance for use where goods are rejected after more than the sort of short period envisaged in the Consultation Paper. There is a simple solution to this problem: do not permit any allowance. This can be seen as a fair solution in that it will often be the case that there will have been a history of problems with the product before it is eventually rejected. The purchaser will not have had what a Canadian judge referred to as “serene possession” (see *Gibbons v Trapp Motors* (1970) 9DLR (3d) 742); and not allowing a deduction for such use as has been obtained will be some compensation for this. In any event the consumer will not have had the use of his or her money while in possession of the product and for this reason, too, there are grounds for not giving any deduction for use.
22. It is also argued in paras. 8.34 and 8.39 of the Consultation Paper that there is a danger of abuse by consumers. One cannot discount this possibility, but it could also occur under the existing right to reject, the wedding outfit example referred to in para. 8.39 being a possible example. It is not argued that for this reason there should not be a short term right to reject. It should also be remembered that to exercise a long term right to reject the consumer would have to demonstrate a defect. Merely changing one’s mind is not enough.
23. It is also suggested that the introduction of a long term right to reject would increase costs for retailers. This echoes arguments made when product liability legislation was proposed. The serious effects predicted by some do not seem to have materialised and there is even less likelihood of material increases in costs in this case. The number of cases of long term rejection is not likely to be large and, unlike product liability cases, it is only economic loss that is likely to be in issue. In any event, claims long after purchase will be fairly rare as there will be

considerable hurdles to overcome. The longer the period before rejection the more difficult it will be to demonstrate that the product was faulty on delivery and that the problem was not the result of misuse or failure to maintain.

24. It is interesting to note that section 20 of the Irish Sale of Goods and Supply of Services Act 1980 provides a long term right to reject. So far as is known, in almost thirty years of operation this does not appear to have had any of the detrimental effects that are said to flow from the change.
25. Our proposal to permit a long term right to reject has to be fitted into the scheme for integrating the right to reject with the remedies in the Consumer Sales Directive. We deal with this below at para. 64.

Our Conclusion on the Right to Reject

26. We do not support the proposal for a fixed period for rejection as outlined in the Consultation Paper. We consider that any period will be arbitrary and will not be suitable for the wide range of goods that consumers purchase. Thirty days might, for example, be rather long for many simple products but, in our view nowhere near long enough for more complex products such as electronic goods and cars. We appreciate that the Commissions' proposals do provide for qualifications to the 30 day period but we foresee that these could be invoked on a large number of occasions leading to uncertainty.
27. We would advocate that rejection should be possible for a reasonable period which takes into account the nature of the goods. This ought to be applied to all types of contract for the supply of goods, except pure hire. We recognise the problems with the concept of reasonableness but the wide range of situations in which the right to reject could apply makes some degree of uncertainty inevitable. The challenge then becomes how best to overcome this problem.
28. The current approach in the Sale of Goods Act, under which rejection is possible for a reasonable period after purchase, could be retained but supplemented by further explanation in the legislation. The judicial comments on the current form of section 35 of the Sale of Goods Act 1979 suggest considerable flexibility. The problem is that consumers and retailers are not aware of this, so this would need to be better promoted. Further refinement could overcome this difficulty. We note in passing that this underlines our argument later in this paper that a separate Consumer Sales Act is needed as these changes might not be appropriate for commercial contracts.
29. There are also other more radical methods that might achieve our objective. Refining the concept of reasonableness in this context may be thought difficult in conventional legislation. Another way to overcome the problem is to adopt the

approach of the US Uniform Commercial Code which includes commentary which can include non exhaustive examples. The objective and subjective factors referred to in the Consultation Paper, which we agree should be taken into account in determining a reasonable time, could be included in such commentary.

30. Another approach would be to abolish the reasonable time provision as it appears in the Sale of Goods Act and adopt the approach of the other supply of goods contracts. In other words, the right to reject could not be lost until the buyer became aware of the defect. It would only be lost where, in England and Wales, the buyer had affirmed the contract or in, Scotland, was personally barred. This has the merit of aligning the remedies on the basis of the regime most favourable to consumers. The clock does not begin to run until the buyer becomes aware of the remedy. The seller would have to be informed of rejection within a reasonable time but as this would be a reasonable time after discovering the defect there should be no difficulty in agreeing on a fairly short time limit which could be common to all goods.
31. Another possibility is to rely entirely on the Consumer Sales Directive remedies, suitably reformed as we discuss below, but, in addition, giving the consumer a free right to choose between the remedies. No matter when a defect occurred rejection would be an option. This has the further merit of aligning the remedies for the various supply contracts.

The 30-Day Period

32. Although we do not support the introduction of a fixed period, the Commissions propose a 30 day rejection period and we acknowledge that it warrants serious discussion. As it may be pursued by the Commissions, we must consider it in detail as an alternative to our own preferred reforms and this we do in this section. The Consultation Paper assumes that there should not be a long term right to reject but we would observe that the two ideas are not necessarily mutually exclusive. It would be possible to have a specific period within which rejection should occur but still permit a long term right to reject in certain circumstances. In effect, there would be the possibility of the right to reject reviving.
33. There is clearly merit in the idea of a fixed period as the concept of a reasonable time is inevitably bound to be difficult to apply. It would be very much easier for consumers, their advisers and retailers if there were normally to be a fixed rejection period. As the consultation paper suggests, such a proposal does need to be qualified both to allow the period to be shortened and to be lengthened. There is a danger that this list of qualifications will diminish the advantages of a specific time limit by introducing scope for argument about whether the right to

reject has been lost. One way of reducing the scope for argument would be to have a longer fixed period. We would, in any event, argue strongly for this as we consider that the 30-day period is too short as the basic period.

34. We should point out in passing that the argument in favour of the 30-day rule based on the views of participants in the consumer research is flawed. It is inappropriate to base policy on the largely mistaken responses to a question about what the period of rejection is, as it is likely that many respondents will have confused the periods set out in some retailer's voluntary return policies with their legal rights. Had the question been what the period *should* be the responses would have been of use but in the circumstances they are valueless.
35. One of our criticisms of the proposed 30-day period is that, arguably, it is a reduction of consumer protection even in relation to current sale law. The *Bernstein* case seems to have given this period a degree of credence as a period of close to that length, though considered to be too long in the circumstances, was thought to be close to the upper limit. However, there are two comments to be made about this case. There were doubts about the correctness of the decision, as the Consultation Paper notes, even when it was decided. It was thought that the Court of Appeal might well have come to a different decision though this was not tested as an out of court settlement removed the necessity for proceeding with an appeal. Since then the relevant parts of the Sale of Goods Act 1979 have been amended and in *Clegg v Andersson* Sir Andrew Morritt VC in the Court of Appeal stated that "In my view it does not represent the law now".
36. It should also be noted that there are other sale of goods cases under the old law which permitted longer periods for rejection. Some of these are referred to in an article by Mr. W.H. Thomas (see *Cars and the Law*, 1989 NLJ 1188). Under the current law there are examples of lengthy periods not preventing rejection. The *Truk* and *Clegg* cases are English examples referred in the Consultation Paper. In *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002 an expensive new car had been rejected after 80 days but the point was not taken by counsel for the trader. Similarly, in *Thain v Anniesland Trade Centre* 1997 SLT (Sh Ct) 102 a second hand car was rejected after eight or nine weeks. In *Cruickshank v Specialists Cars (Aberdeen) Ltd* (2002) 25 GWD 858 the purchaser did not lose the right to reject although he did not discover the defect until four months after he had bought the car. *Fiat Auto Financial Services v Connelly* 2007 S.L.T. (Sh Ct) 111 is another recent Scottish example. In the circumstances of that case a period of eight months was not considered to be too long.
37. So, it can be argued that the proposed 30-day rule would reduce the current level of consumer protection in relation to sale. As it is likely that all contracts for the supply of goods, except hire, will be treated alike under a reformed

regime the 30-day rule will apply to contracts to which the reasonable time rule did not apply. At present, the purchaser who acquires a product under one of these contracts enjoys a longer period in which to reject. The result will be a reduction in protection for a significant number of transactions.

38. As a practical matter, while 30 days is more than adequate for many products, particularly less complex products where faults can be expected to be noticed at an early stage, it is rather short for many consumer durables. If one takes the example of a washing machine, even a family using it fairly heavily might not within 30 days have occasion to try out some programmes and for less heavy users, such as a retired couple, 30 days would probably prove to be much too short to try out all the programmes. In the case of cars which have on average about 14,000 parts, 30 days seems particularly short.
39. A partial solution to the difficulty is to choose a longer rejection period. In our view this must be substantially longer than 30 days. We would welcome further discussion with the Commissions on what might constitute an appropriate time frame.
40. We agree that whatever period is chosen it will be necessary to permit the purchaser to argue for a longer period. This has the capacity to diminish the utility of the fixed period rule. One can foresee disputes especially over the circumstances of the proposed extension for reasons personal to the purchaser. One merit of a longer period that we propose is that it would reduce the number of occasions on which it would be necessary to argue for an extension to the fixed period. It would, for example, overcome the Christmas present problem cited in the consultation paper. It would also help to cope with the issue of extending the rejection period to take account of circumstances personal to the buyer. This clearly is a difficult area and it might be best to deal with it by providing for a longer rejection period which is generous enough to avoid the necessity for extended time for this purpose in many cases. The longer period which we favour would be one long enough to accommodate the situation of someone who goes on holiday for three weeks immediately after taking delivery of a product or falls ill for two weeks at that time. The Commissions' proposed 30 day period would probably not do so in those cases where more complex products are involved.
41. A substantially longer period would also deal with many of the "objective circumstances" referred to in the consultation paper. It ought to be long enough to cover the example of the November purchase of a lawnmower, for example, though not that of the skis. Because of the variety of circumstances that might arise we would also favour the proposal that it should be open to the consumer to argue for a longer rejection period where it was reasonably foreseeable at the time of sale that such a longer period would be needed.

42. The situation where there is what the Consultation Paper calls a “fundamental defect” would be dealt with if our preferred solution of a long term right to reject were accepted. Failing that, a rejection period substantially longer than 30 days would go some way to dealing such problems. However, it may be that there would cases where defects would not come to light within that period and it would be useful to be able to extend the period for this reason.
43. In addition to arguing for a longer period, it is obvious that there will be some circumstances where it should be open to a trader to argue for a shorter period. The most obvious one would be fresh food, where it would be ridiculous to argue for a 30-day period let alone some longer period.

Reverse Burden of Proof

44. We agree that the reverse burden of proof should be applied to domestic remedies. As the Consultation Paper points out, this would remove an anomaly. It is absurd that consumers choosing the Consumer Sales Directive remedies should have the benefit of this rule but not if they choose the domestic remedies. Apart from this argument, the extension of the rule to domestic remedies is also important in going some way to alleviate the weaker position of the consumer. Most consumers will not have the information or knowledge necessary to prove that there is a defect, especially where complex products are involved.

Minor Defects

45. We strongly support the proposal that the legal protection for consumers who purchase goods with “minor” defects should not be reduced. To introduce such an exception would be a damaging reduction in the protection of consumers. The case for including minor defects in the definition of the quality standard was cogently made in the Law Commissions report on *Sale and Supply of Goods*. To remove a breach of this aspect of satisfactory quality from the grounds justifying rejection would be a serious erosion of consumer rights. As the Consultation Paper says at para 8.87, “In 2008 it is evident that the appearance of goods is as important (if not more important) to consumers”. It would also introduce an element of uncertainty into the law. There would be scope for considerable debate about what constituted a “minor” defect. This would have the undesirable consequence not only of weakening consumer protection but also of increasing unnecessary disputes. We would add that the minor defects problem caused particular difficulty in Scotland as demonstrated by *Millars of Falkirk Ltd v Turpie* 1976 S.L.T. (Notes) 66. Indeed, it will be recalled that it had much to do with the reference to the Law Commissions that led to the *Sale and Supply of Goods* report. It is highly undesirable that there should be the possibility of the difficulties that the case revealed returning.

THE RIGHT TO REJECT IN OTHER SUPPLY CONTRACTS

10.7 We ask consultees whether the normal 30-day period for rejecting goods should also apply to other contracts for the supply of goods in which property is transferred, or whether the current law should be retained. (8.104)

46. In principle, it is our view that the regime of remedies should be the same for all contracts for the supply of goods in which property is to be transferred. This would have the considerable advantage of achieving greater simplicity in the law, thus making it easier for consumers to understand and advisers to provide assistance to them. It is undesirable that the rights of consumers should depend on the type of contract involved. Our difficulty in advocating the alignment of remedies is that we do not, as we have argued above, consider 30 days to be an appropriate rejection period. One of our reasons is that it would represent a reduction in the protection of consumers purchasing by means of these non-sale contracts.
47. We would also point out that there is a particular problem in relation to one of these non-sale contracts which underlines the benefits of a harmonised regime of remedies. In neither England and Wales nor Scotland is it entirely clear what the nature of the common “trading-in” transactions is. Especially in the motor trade, it is common for consumers to acquire a car in exchange for their existing car and a sum of money. Despite the frequency of such transactions, it cannot be said with certainty in either jurisdiction which type of contract is involved. Indeed, it may turn on the ratio of cash to the value ascribed to the vehicle traded in. In the Scottish case of *Sneddon v Durrant* 1982 SLT (Sh. Ct.) 39 the sheriff went so far as to say that the transaction would be one of sale if cash was involved. However, as Prof. Forte has shown in “A Civilian Approach to the Contract of Exchange in Modern Scots Law” (1984) 101 SALJ 691, this is an oversimplification. This no longer poses a problem as far as the quality standard is concerned, but it does in relation to remedies. If trading-in is sale then the rules about acceptance apply whereas, if it is not, the remedies are those set out in the Supply of Goods and Services Act 1982 (Part 1 for England and Wales and Part 1A for Scotland). These are not subject to the sale rules on acceptance. Instead, in England and Wales the right to reject will only be lost when the consumer has affirmed the contract and in Scotland when he or she is personally barred.

10.8 We provisionally propose that in hire contracts, the current law should be preserved. When goods develop a fault, the consumer should be entitled to terminate the contract, paying for past hire but not future hire. (8.108)

48. We agree that contracts of hire ought to be treated differently from the other supply contracts discussed. The differences between them are sufficient to

justify different treatment. The consumer does not acquire ownership and the current law implies an obligation on the trader to ensure that the goods are of satisfactory quality for the duration of the contract is satisfactory. If this is breached the consumer can terminate the contract and pay for hire up to that point but not beyond.

10.9 We welcome views on the issues raised by hire purchase contracts, and whether they cause any problems in practice. In particular should hire purchase be treated as a supply contract to transfer property in goods, or as analogous to a hire contract? (8.112)

49. In principle, we would favour treating hire purchase contracts like other contracts for the supply of goods other than pure hire, as we have argued above in response to Q.10.7. However, for the same reasons that prevented us from endorsing the proposal there we feel unable to do so in relation to hire purchase contracts. Were a more satisfactory rejection period to be chosen we would see merit in applying it to hire purchase contracts. We do not consider that the unusual situation referred to in Para 8.110 where the option to purchase at the end of the hire purchase contract is rarely exercised should affect this decision. Our own enquiries suggest that this is a fairly rare situation. Our view would be that if traders choose to adopt this form of transaction they should have to accept the legal consequences that flow from it.

REFORMING THE CONSUMER SALES DIRECTIVE

Clarifying when consumers may proceed to a second tier remedy

The number of repairs

10.10 We provisionally propose that the directive which replaces the CSD should state that after two failed repairs, or one failed replacement, the consumer is entitled to proceed to a second tier remedy. (8.135)

10.11 We provisionally propose that further guidance should be provided stating that the consumer should be entitled to rescind the contract:

where the product is in daily use, after one failed repair;

where the product is essential, immediately;

unless the retailer has reduced the inconvenience to the consumer by, for example, offering a temporary replacement. (8.136)

10.12 We welcome views on the form such guidance should take. (8.137)

The process of repairs

10.13 We provisionally propose that there should be best practice guidance on the process of repairing and replacing goods under the CSD (or any replacement to the CSD). (8.141)

10.14 We ask consultees what form that guidance should take. In particular, should it be issued at EU or national level? (8.142)

Dangerous goods and unreasonable behaviour

10.15 We provisionally propose that the CSD should be reformed to allow a consumer to proceed to a second tier remedy when a product has proved to be dangerous or where the retailer has behaved so unreasonably as to undermine trust between the parties. (8.146)

50. Here we comment on the content of the Consumer Sales Directive (CSD) remedies. We discuss below the related issue of integrating these remedies with the right to reject.

51. We agree that there is need for greater clarity in the operation of the CSD remedies. Lack of clarity on such matters as the number of attempts at repair that must be permitted and the meaning of “reasonable time” and “significant inconvenience” work against the interests of consumers. The proposals to improve the situation are a welcome step in this direction. We would observe that in some situations our proposal for a longer period of rejection than the 30-day period advocated in the Consultation Paper would avoid the practical problems that arise. For example, the Consultation Paper proposes that there should be a right to rescind where the product is essential, has proved to be dangerous or the consumer has lost trust in the seller. Where the right to reject is still available the consumer will avoid the difficulties currently inherent in the CSD remedies by choosing to reject or, at least, threatening to do so unless a satisfactory solution is offered. It will only be necessary to resort to the CSD remedies where the right to reject has been lost. The longer this period is the fewer problems will arise from the CSD remedies.

52. On the detail of the proposals, we are not clear what form the reforms proposed in para 10.11 are to take. There is reference to “further guidance”. We assume that this means an expansion of the provisions of the directive which would then be implemented in UK legislation. The proposals appear to be sufficiently precise to merit inclusion in legislation and not merely in some non-statutory source.

53. On the other hand, in the case of further clarity on the repair and replacement process it would be difficult to include this in the legislation. Some other form of guidance will probably have to be resorted to. We consider that it will probably

have to be issued at national level rather than EU level. This is because practice will vary widely between Member States and it is difficult to see how one set of guidelines could work in all. National guidance might be drawn up by the Department of Business Enterprise a Regulatory Reform and/or the Office of Fair Trading. These bodies often provide such guidance. For example, on the implementation of the Unfair Consumer Practices Directive in the UK by means of the Consumer Protection from Unfair Trading Regulations 2008, BERR and the OFT published guidance – see

http://www.offt.gov.uk/shared_offt/business_leaflets/Consultation_Paperregs/oft1008.pdf

Rescission: the deduction for use

10.16 We ask consultees whether they agree that the “deduction for use” in the event of rescission should be abolished. (8.157)

54. We agree that the “deduction for use” ought to be abolished. The directive provides no method for calculating it which introduces an element of uncertainty into the law. We have argued above against such a deduction were there to be a long term right to reject. We said there that it would be unfair in that consumers who have ultimately had to reject goods will probably have had a good deal of trouble with them. The same argument applies with greater force in this context. In such circumstances to allow a reduction for use would be adding insult to injury.

The six-month reverse burden of proof

10.17 We provisionally propose that the six-month reverse burden of proof should recommence after goods are redelivered following repair or replacement. (8.163)

55. We agree with this proposal for the reasons given in the Consultation Paper. It would be unfair if the period did not begin to run again following repair or replacement.

Time limit for bringing a claim

10.18 We provisionally propose that the time limits for bringing a claim should continue to be those applying to general contractual claims within England, Wales and Scotland. (8.170)

56. We agree with this proposal. We cannot see why the long-standing limitation rules should be altered.

10.19 We welcome views on whether there is a need to prevent consumers from pursuing remedies where faults come to light more than two years after delivery. We welcome views on whether this might cause problems in particular cases. (8.171)

57. It is very difficult to understand the reason for this proposal and we are firmly opposed to it. In practice, it is not likely that consumers will pursue such claims as, in most cases, faults will have appeared much earlier. However, there will be cases with more complex products such as cars and consumer durables with long life spans where faults will not manifest themselves for some time. To prevent consumers asserting their rights after two years would be most unfair. It would diminish the importance of the durability aspect of the satisfactory quality standard and would provide no incentive to manufacturers to improve the quality of their products.

WRONG QUANTITY

10.20 We welcome views on whether there are reasons to retain section 30 of SoGA for consumer sales, or whether cases where the wrong quantity is delivered can be dealt with through the application of general principles. (8.174)

58. We think that it would be better to deal with wrong quantity as it is in the Sale of Goods Act. Our one caveat would be that there should be a common rule for the whole of the UK in the interests of uniformity and making it easier to educate consumers and traders. The arguments for the two approaches are finely balanced and we express no view on which should be chosen.

LATE DELIVERY

10.21 We seek consultees' views on whether consumers should be entitled to a full refund whenever the trader fails to meet an agreed delivery date, or whether the current law should be retained. (8.179)

59. The proposal in the draft Consumer Rights Directive has some merit in that it imposes a time limit for delivery of thirty days where some other limit has not been specified. As currently drafted it could work rather oddly in entitling a consumer to a refund of payments when delivery was made but was just marginally late. This proposal needs to be clarified.

DAMAGES

10.22 We provisionally propose that the right to damages should be retained in UK law. (8.186)

10.23 We seek views on whether the issue of damages should be left to the common law or whether guidance would be helpful on the circumstances in which damages should be payable to consumers. In particular, should damages be available for loss of earnings, distress, disappointment, loss of amenity and inconvenience? If so, for which types of goods, and in which circumstances? (8.187)

60. We endorse the proposal that the right to damages ought to be retained in UK law. This is most important as there may well be consequential loss flowing from a defect in a product. A dramatic and unfortunate example is the well-known English case of *Godley v Perry* [1960] 1 W.L.R. 9 where the substantial damages awarded were for personal injuries flowing from a defect in a catapult worth a few pence. The failure of a product to conform to the contractual standard may cause other kinds of loss such as damage to other property of the consumer and it is important that damages can be recovered in these situations. An example would be the situation where a washing machine malfunctions damaging the load of clothes or flooding the room in which it is installed and damaging flooring.
61. We consider that the issue of damages is best left to UK law. The current law appears to deal adequately with the issues. This is, perhaps, truer of Scots law than English Law. In the Court of Session decision in *Webster v Cramond Iron Co* (1875) 2 R 752 it was held that damages may be awarded for the trouble and inconvenience arising from the breach. This was a commercial case but the principle has also been applied to non-commercial contracts in *Mack v Glasgow City Council* 2006 SC 543 and *Smith v Park* 1980 SLT (Sh. Ct) 62. In the latter case the sheriff observed that “Such an award need not be insubstantial” echoing the comments of the Lord President in *Webster v Cramond Iron Co*. Even in England the courts do seem to be willing to award damages to consumers on a somewhat similar basis. In the much maligned *Bernstein* case it should be remembered that the judge did award damages for the spoilt day occasioned by the breach of contract.
62. The difficulty is that even in Scotland, where the principle of damages for trouble and inconvenience is more clearly settled, it seems not to be one that is well-known to consumers and their advisers. This raises wider issues about informing consumers of their rights and is best dealt with in discussing that problem.

INTEGRATION OF CSD REMEDIES WITH THE RIGHT TO REJECT

10.24 We provisionally propose that SoGA and the CSD remedies should be better integrated in a single instrument, by use of the concept of *rejection*. (8.193)

10.25 We provisionally propose that once a consumer has accepted a repair, their right to reject ceases. If the repair fails, the consumer should proceed to a second tier remedy along the lines we have proposed in relation to the reform of the CSD. (8.202)

63. The current situation with the consumer remedies in the UK is unsatisfactory because of the way in which the EU’s Consumer Sales Directive has been implemented. The primary difficulty lies in the fact that the Sale of Goods Act

and other relevant legislation provide two sets of remedies. This is confusing for consumers, their advisers and traders. Consumers are unlikely to be aware of the consequences of certain choices. For example, if a consumer permits a repair to be attempted is this an assertion of the domestic remedies with the possibility of rejection still in the background should the repair fail? Or is it an election to use the “Additional Rights” set out in Part 5A of the Sale of Goods Act 1979 and related legislation?

64. We therefore welcome the proposals in the Consultation Paper to integrate the SoGA and CSD remedies in a single instrument. We do have one reservation. This relates to our desire for a long term right to reject for which we argued above. This would have to be integrated with the CSD remedies. The way to do this would be to adopt the approach found in the US Uniform Commercial Code where in Article 2.608 there is the possibility of what is known as revocation of acceptance. This should only apply where a serious defect comes to light which could not have been discovered earlier. Where this results in the product being dangerous the proposal in para. 8.146 would allow the consumer to go straight to the second tier remedies. However, there could be very serious faults which were not dangerous. In these cases we think that there should be a right to go directly to the second tier remedy of rescission.

CONSUMER EDUCATION

10.26 We ask consultees to comment upon how the aim of increasing awareness of consumer legal rights for faulty goods might be achieved. (8.216)

65. The issue of increasing awareness is a complex one which goes beyond simply providing information. The starting point is the legislation. The aim of the consultation Paper to simplify and clarify consumer rights is most important as it is easier to advise consumers about less complex rules. This means, to quote a distinguished commentator, that “The time has come to separate consumer and non-consumer sales. A consumer sales statute is imperatively needed.” (Prof. Bridge, *What is to be done about sale of goods?* 119 (2003) L.Q.R. 173 at 176. The current Act is the result of much amendment and is now difficult even for lawyers to cope with. We endorse the Law Commission’s suggestions in Chapter 3 of its *Simplifying Consumer Law* about a feasibility study on a consumer sales Act which should be done in collaboration with the Scottish Law Commission. The traditional method of legislative drafting in the UK does not make it easy to understand legislation and, as the Law Commission observed in *Simplifying Consumer Law*, a new style of drafting is necessary. An example already exists in the Law Commissions’ draft bill attached to their report, *Unfair Terms in Contracts*, (Law Com No 292) (Scot Law Com No 199) which is presented in a way which is much easier to follow than conventional Acts.

66. Few consumers are likely to consult the legislation itself, and many will not have the skills to understand even the simplified form of legislation that we hope will emerge. However, there are consumer advisers with some legal training who will use it and will benefit from these improvements. Nevertheless, it is necessary to go beyond improving the legislation. Here again, we think that the Law Commission's ideas in *Simplifying Consumer Law* about a commentary are worth serious consideration.
67. It is also important that information is available to consumers and that they have opportunities to learn about their rights. Consumer education was defined by the National Consumer Council, one of our predecessor organisations, as being concerned with the skills, knowledge and understanding necessary to be an effective consumer. We would refer to Chapter 9 of the Scottish Consumer Council's 2003 report *Knowledge of Consumer Rights in Scotland*, the findings of which are summarised in the consultation paper. This contains a number of recommendations which could apply throughout the UK. We would also draw attention to the work of the Office of Fair Trading on consumer education, details of which can be found on its website. The OFT recently published an evaluation of its 'Skilled to Go' consumer education toolkit, which showed that those who participated in a pilot scheme were much more confident both about knowing their consumer rights and knowing where to go for advice than they were previously. Almost half of further education colleges in the UK have now signed up to use 'Skilled to Go' on the OFT website, and the toolkit is also being used in secondary schools in Scotland.
68. The availability of advice for individual consumers with problems is most important. Here the work of Consumer Direct is very valuable in giving access to telephone advice, and the work of local trading standards advisers and the Citizens' Advice Bureaux is also important.

10.27 In particular, should there be a summary of consumer legal rights for faulty goods available at point of sale? If so, which form should it take? (8.217)

69. While this may be of limited usefulness, as even a reformed set of rights and remedies would involve a fairly detailed summary, such a summary may be helpful to some consumers. Perhaps more importantly, such a summary may help to raise awareness of consumer rights among staff who work in retailers. Research by the OFT (see *Competition Act and Consumer Rights*, May 2006 para. 5.24) noted that "consumer facing businesses also lacked knowledge of consumer rights...". This demonstrates that it is not only consumers who are in need of education. It is also a responsibility of retailers to ensure that their staff are properly trained. We are also attracted to the idea of a 'shoppers' rights card- a credit card-sized summary of the main SOGA rights, which shoppers can keep in their purse or wallet, such as that produced by the General Consumer

Council for Northern Ireland. Initiatives such as this, however, are certainly not a panacea though they may be helpful.

70. In devising methods of providing information for consumers we would draw attention to the report of our predecessor organisation, the National Consumer Council, and the Better Regulation Executive's report, *Warning! Too Much Information Can Harm* (2007). This contains five tests for policy makers to use to help decide if information remedies are suitable and suggestions on how best to present information.

10.28 We ask consultees whether they agree that notices displayed in shops should:

- (i) use the expression "This does not reduce your legal rights" rather than "This does not affect your statutory rights".**

71. The FSD research seems to show that the new formulation would be more effective, and it does seem to us that this phrase is likely to be more meaningful to consumers. However, that was not intended to be a thorough piece of market research. Perhaps, before a change is made BERR should carry out more detailed research to establish the best formula.

(2) say how a consumer could obtain further information about their legal rights. (8.218)

72. While we are not convinced that this would be hugely useful, this may assist some consumers in alerting them to where they can obtain advice locally if necessary.

ASSESSING THE IMPACT OF REFORM

10.29 We welcome comments and information about the costs and benefits of our proposals. (9.68)

10.30 Do consultees agree that:

(1) keeping the current law ("doing nothing") would retain the avoidable administrative burden on retailers and would continue to produce unnecessary disputes?

(2) abolishing the right to reject would damage consumer confidence?

(3) extending the right to reject would increase costs to business and might lead to increased landfill?

(4) the greatest benefits stem from retaining the right to reject but providing appropriate clarification about how it operates? (9.69)

73. We agree that “doing nothing” is not a sensible idea. The lack of clarity in the remedies is in the interests of neither consumers nor traders. It makes it difficult for consumers to understand their rights and to obtain redress and may lead to unnecessary disputes. To abolish the right to reject would undoubtedly damage consumer confidence. It would send entirely the wrong signals to business and consumers. To business it suggests that high quality is not all that important and that less care need be taken of customers. Consumers would lose an important and easily understood remedy. They would also be more reluctant to try the products of less well known sellers whose remedial policies they were unfamiliar with.
74. It is difficult to know what the effect on business costs would be of extending the right to reject. However, it should be noted that the Consultation Paper proposals are not necessarily a significant extension of the right to reject, as we have argued above. In addition, it must be remembered that there will be greater clarity in the operation of rejection and the other remedial measures. This should lead to a decrease in uncertainty and therefore of disputes which should reduce costs. We also wonder why the dishonest consumer figures several times in this section of the paper. It seems unlikely that this is such a common occurrence that it should be taken into account in trying to assess the impact of the proposals.

Other issues

75. There are some other issues not discussed in the Consultation Paper which we think merit consideration. A frequent source of consumer disputes is the car because of its high value. Even under an integrated system of remedies as proposed in the Consultation Paper there are likely to be problems in this area. It may be worth considering the introduction of a separate regime for this product by way of the introduction a “lemon law” like those in force for some years in the US. Lemon laws are law found in all fifty states of the USA, though in slightly different forms in different states. They provide that if a new (and sometimes a used) car during its first year develops four faults which have not been satisfactorily repaired or is in the repair shop for a minimum number of days, typically 30, the buyer is entitled to a refund of the purchase price or a replacement car.
76. There is reference in the Consultation Paper to the problem of third parties who acquire goods, for example, the recipient of a Christmas present. In practice, this is circumvented by the goodwill of some stores. However, not all do and there may be other situations where a similar problem arises. This raises what is

sometimes known as the problem of “horizontal privity”. Recipients of presents have no contractual rights. It is suggested that a Consumer Sales Act ought to confer such rights on them. It can be argued that in English law the Contracts (Rights of Third Parties) Act 1999 and in Scotland the *ius quaesitum tertio* doctrine may suffice. Nether, however, is particularly satisfactory if only because they are not well known by consumers or their lay advisers. There is also uncertainty about their scope especially in the case of the *ius quaesitum tertio*.