

THE IMPLEMENTATION OF DIRECTIVE 1999/44/EC ON CERTAIN ASPECTS OF THE SALE OF CONSUMER GOODS AND ASSOCIATED GUARANTEES INTO ENGLISH LAW. BRIEF CONSIDERATIONS.

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Abstract: *Highlights the key provisions of the Sale and Supply of Goods to Consumers Regulations 2002, implementing European Parliament and Council Directive 1999/44/EC into English Law. Covers measures on: (1) the definition of “satisfactory quality” and liability in respect of public statements; (2) the conformity with the contract; (3) the passing of risk; (4) new remedies for consumers of repair, replacement, reduction in price or rescission of the contract; (5) the status and form of consumer guarantees; and (6) the seller’s right of recourse.*

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JEL Classification: *K 13, K 23.*

Introduction

On March 31, 2003 the Sale and Supply of Goods to Consumers Regulations⁽¹⁾ came into force. These Regulations seek to implement the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees⁽²⁾. The UK failed to meet the deadline for implementing the Consumer Sales Directive, the reason for this delay seemed to be the desire to disturb as little as possible the existing structure of the law which has received general support. The Department of Trade and Industry (DTI) issued two consultation papers as well as publishing a detailed account of responses to the first consultation⁽³⁾. The Regulations mainly amend existing primary legislation in this area, with the exception of a free-standing provision on guarantees (Regulations 15). The

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⁽¹⁾ Statutory Instrument No. 2002/3045, available online at <http://www.opsi.gov.uk/si/si2002/20023045.htm>.

⁽²⁾ Directive 1999/44/EC of the European Parliament and of the Council of May 25, 1999, OJ L171/12, July 7, 1999. On the background and development of the European quality standard, see DAVID OUGHTON and CHRIS WILLETT, *Quality Regulation in European Private Law* (2002), *Journal of Consumer Policy*, vol. 25, pp. 299-328. On the early stages of the Directive, see Commission of the European Communities, Proposal for a European Parliament and Council Associated Guarantees, COM (95) 520 final, June 18, 1996. For an analysis on this, see HUGH BEALE and GERAINT HOWELLS, *EC Harmonisation of Consumer Sales Law--A Missed Opportunity?* (1997), *Journal of Contract Law*, vol. 12, pp. 21-46.

⁽³⁾ Directive 1999/44/EC on Certain Aspects of the sale of Consumer Goods and Associated Guarantees: First Consultation of 2001 and Sale of Consumer Goods Directive: Second Consultation (February 2002). On the second consultation, see CHRISTIAN TWIGG-FLESNER, *New Strings on the bow: consumer guarantees*, *Consumer Policy Review*, vol. 12 (3), pp. 88-93.

Regulations (following the Directive) only apply to consumer sales. In implementing the Directive, the Regulations make important amendments to the concept of satisfactory quality in contracts for the sale and supply of goods to consumers.

The English legislation on the sale of goods dates back to 1893 and this in itself was a codification of the common law. It is now contained in the Sale of Goods Act 1979 (SoGA), as subsequently amended. It was widely criticised for being based on the needs of merchants but being unsuited to consumer needs. Case law has, to some extent, been able to take the needs of consumers into account in interpreting the legislation⁽⁴⁾. The Law Commission had investigated the matter⁽⁵⁾. The statute had been amended to, amongst other things, provide a statutory definition of the implied term of merchantable quality in 1973. Anyway, some pre-modern decisions continued to be handed down as lawyers clung on to the earlier case law⁽⁶⁾. Eventually, in 1994 the law was reformed and the satisfactory quality condition replaced that of merchantable quality. In addition, factors relevant to the assessment of quality were spelt out in detail. Despite a lack of case law offering guidance on the application of these new rules, the general consensus amongst those involved in consumer protection was that English sale of goods law was adequate. Not only must goods be of satisfactory quality, but also they must be fit for particular purposes made known to the seller, and comply with their description. Similar terms were implied into analogous contracts relating to the supply of goods⁽⁷⁾.

Admittedly, the remedies regime did not bear much connection with practice. Repair and replacement were not legally recognized remedies, despite the fact that these are commonly offered to consumers – a fact acknowledged in Section 35 (6) (a) Sale of Goods Act 1979, discussed below. Also, the right to reject goods for failure to comply with the quality requirements can be lost rather easily, *i.e.*, after the lapse of a reasonable period of time⁽⁸⁾. However, this right to reject the goods combined with a claim for damages seemed to work tolerably well as a framework for negotiating settlements. There was no distinct legal regime for consumers' guarantees, but in practice this led to few problems.

The approach of the UK has been to try to implement the Directive in a way which disturbs the existing law the least. For example, the core definition of satisfactory quality is only modified in minor ways and remains common to both commercial and consumer sales, but in the consumer context some additional aspects, notably relating to public statements are added. In assessing whether goods are of satisfactory quality, the legislation now provides *inter alia* that account should be taken of "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"⁽⁹⁾.

The Regulations (again, following the Directive) also provide for new consumer remedies in cases where the goods do not conform with the contract⁽¹⁰⁾. This includes cases in which the goods are of unsatisfactory quality (or are in breach of the other implied terms contained in ss.13-15 of the Sale of Goods Act (SoGA)); and cases where installation forms part of the contract and the goods have been inadequately installed in breach of the implied term as to reasonable care and skill in the Supply of Goods and Services Act (SGSA) 1982, s.13⁽¹¹⁾. It also covers cases where there is a breach of any express term of the contract⁽¹²⁾. The new remedies are repair, replacement, price

⁽⁴⁾ E. g. *Rogers v Parish (Scarborough) Ltd.*, (1987) 2 ALL E.R. 232.

⁽⁵⁾ Sale and Supply of Goods (1987) Law Commission No. 160, (London, Her Majesty's Stationery Office).

⁽⁶⁾ *Aswan Engineering v Lupdine*, (1987) 1 ALL E.R. 135.

⁽⁷⁾ See the Supply of Goods (Implied Terms) Act 1973 and the Supply of Goods and Services Act 1982.

⁽⁸⁾ Statutory Instrument No. 2083 of 1999, available online at <http://www.opsi.gov.uk/si/si1999/19992083.htm>.

⁽⁹⁾ Regulation 3 amending s. 14 of the Sale of Goods Act (SoGA) by the insertion of a new subsection (2D).

⁽¹⁰⁾ Regulation 5 has inserted a new Pt 5A into the SoGA.

⁽¹¹⁾ By the insertion of a new Pt 1B, s. 11S (b) into the SGSA.

⁽¹²⁾ Regulation 5 inserting a new s. 48 (F) into the SoGA.

reduction and rescission. The pre-existing rejection and damages remedies remain in place; and so the new remedies will now co-exist with the rejection and damages remedies. The Regulations (following the Directive) also make provision as to the enforceability and transparency of commercial guarantees given to consumers⁽¹³⁾. However, it remains to be seen what impact these rules will have in practice. The issue of how to enforce such provisions is dealt with by making the guarantee itself enforceable in contract law and also by giving public authorities the right to seek injunctions. However, there is no compulsion to change markedly the content of guarantees and there is little evidence that the existing practices caused problems that would be solved by the limited rules introduced by the directive. Crucially for the UK, extended warranties (for which consumers pay) remain outside the scope of these rules⁽¹⁴⁾.

Another change has been introduced by the Regulations (although this is not a change that was expressly required by the Directive). This change relates to the time when risk passes from the seller to the consumer buyer⁽¹⁵⁾. The Regulations have amended the SoGA so that risk is now divorced from the passage of property. In cases where the goods are dispatched to the buyer by the third party carrier, risk now only passes when the goods are physically delivered to the consumer.

The most notable feature of the UK implementation, however, is that some of the new rules apply to all contracts involving the supply of goods and not just sale contracts, so, contracts of hire-purchase will also be included. Thus, in addition to the Sale of Goods Act 1979 amendments are made to the Supply of Goods (Implies Terms) Act 1973 and the Supply of Goods and Services Act 1982 for other contracts where ownership is transferred or goods are hired out. This approach means that bespoke goods are clearly covered. This is in line with the UK policy of harmonising the conditions of contract for the different categories of contracts. The only major differences concern the condition under which the remedies are available. Admittedly, the remedies regime from the Directive will not be applied in the context of some non-sale transactions.

During the implementation process auctions gave rise to some debate which result was to limit the application of the new rights to exclude situations where second hand goods are sold at public auctions which consumers are able to attend in person.

The pre-existing provisions concerning the sale of goods to consumers.

Let's examine some aspects of the legislation relating to the sale of goods prior to the implementation of the Directive and then explain how the conformity with the contract as mentioned in Article 2 of the Directive is reflected in the amended legislation.

1. Goods must be as described.

The Sale of Goods Act 1979 (SoGA)⁽¹⁶⁾ implies three terms relating to product quality into a contract of sale with a consumer. Section 13 (1) states that: "where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description".

The term will only cover descriptions which influenced the consumer in deciding on a purchase. There must have been reliance by the consumer on a particular description⁽¹⁷⁾. The description must relate to the commercial characteristics of the goods⁽¹⁸⁾ and relate to

⁽¹³⁾ Art. 6 implemented as regulation 15.

⁽¹⁴⁾ For a detailed examination of the legal issues affecting extended warranties, see CHRISTIAN TWIGG-FLESNER, *Dissatisfaction Guaranteed? The legal issues of extended warranties explored*, *Web Journal of Current Legal Issues*, 2002, <http://webjcli.ncl.ac.uk/2002/issue4/twigg-flesner4.html>.

⁽¹⁵⁾ Regulation 4(2), (3) amending ss. 20 and 32 of the SoGA.

⁽¹⁶⁾ And the corresponding provisions in the Supply of Goods (Implied Terms) Act 1973 and the Supply of Goods and Services Act 1982, which deal with transaction which are not sales, but are equivalent to sales.

⁽¹⁷⁾ *Harlingdon & Leinster Ltd. v Christopher Hull Fine Art Ltd*, (1990) 3 WLR 13, CA.

⁽¹⁸⁾ *Ashington Piggeries Ltd. v Christopher Hill Ltd.*, (1972) AC 441, HL.

an essential aspect of the goods⁽¹⁹⁾. The purchase of goods in a shop is a sale by description⁽²⁰⁾, even where the consumer selects the goods himself⁽²¹⁾.

2. Goods must be of “satisfactory quality”.

Section 14 (2) SoGA states that: “Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality”.

In contrast to Section 13, this term is only implied if the seller is selling in the course of a business. However, it has been held that any sale by business is done in the course of that business, even if the sale is irregular or an isolated transaction⁽²²⁾.

Section 14 (2A) explains that: “...goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking into account of any description of the goods, the price (if relevant) and all the other relevant circumstances”.

This is a flexible test, and it is applied objectively. In application, it is first considered how the goods are described. Goods sold as “shop-soiled” or “second-hand” will result in lower expectations of quality than goods described as “new”. Moreover, luxury brands will give rise to higher expectations of quality than similar goods from more “ordinary” brands⁽²³⁾.

The price of the goods may also be relevant. Second-hand or shop-soiled goods are usually sold at a lower price than new goods. In contrast, a higher price may reflect a higher standard of quality. The price is probably not relevant during a sale period⁽²⁴⁾.

Section 14 (2B) states that a further aspect of quality is the state and condition of the goods. A new television set which is badly scratched would not be in a satisfactory condition, even if its functionality was not impaired. A number of factors which may be taken into account in determining whether goods are of satisfactory quality are then listed. This is not an exhaustive list, and other factors may be relevant. Equally, it is not necessary for goods to meet all these criteria to be treated as satisfactory.

a) *fitness for all the purposes for which goods of the kind in question are commonly supplied.*

This is a factor to be taken into account in assessing whether the goods are of satisfactory quality, so, the consumer can expect a product to be fit for all its common purposes⁽²⁵⁾. However, it may have to be established on a case-by-case basis for which purposes a product is commonly supplied. Consumers may differ in their opinion regarding such purposes from the seller or manufacturer, which makes it difficult to apply this criterion. It may have a subjective element.

b) *appearance and finish.*

This acknowledges that consumers look for more than mere functionality in the goods they buy. A consumer who bought a new sofa and discovered that it had a stain that cannot be removed could argue that it is not of satisfactory quality, even though its functionality is not significantly impaired.

c) *freedom from minor defects.*

Many products have minor problems when first used, and most can be repaired relatively easily. However, taking into account other factors such as price and the type of

⁽¹⁹⁾ *Reardon Smith Line Ltd. v Yngvar Hansen – Tangen*, (1976) 1 WLR 989.

⁽²⁰⁾ *Grant v Australian Knitting Mills Ltd*, (1936) AC 85, PC.

⁽²¹⁾ S. 13 (3) SoGA.

⁽²²⁾ *Stevenson v Rogers*, (1999) 1 ALL ER 613, CA: This case does not explain when something is a business.

⁽²³⁾ *Rogers v Parish* (n. 4) – a “Range Rover” could be expected to be of a higher standard of quality.

⁽²⁴⁾ DAVID OUGHTON and JOHN LOWRY, *Textbook on Consumer Law*, Blackstone Press, London, 2000, p.

⁽²⁵⁾ Prior to the reform which led to the introduction of the satisfactory quality test, goods were deemed to have met the requisite quality standard (“merchantable quality”) if they were fit for at least one of the purposes for which they were commonly supplied (see *Aswan Engineering Co. v Lupdine Ltd.* (1987) 1 ALL E.R. 135).

product in question, even a minor problem could mean that a product is not of satisfactory quality.

Conversely, even if a product has some minor defects, the product may still be satisfactory. This may be where the defect in question can easily be remedied by the consumer himself, e.g., by tightening the nuts and bolts on self-assembly furniture.

The position under the Directive seems to be different. In principle, the Directive makes available a remedy for all minor lacks of conformity, the only reservation being that rescission is not available for such minor lacks. However, a consumer would still be entitled to ask for repair, replacement or price reduction for a single minor lack of conformity. Under the SoGA, a single minor defect is unlikely to render a product unsatisfactory; it is normally the accumulation of several minor defects that has this effect.

d) *safety*

The fact that a product is not safe may also make it unsatisfactory. This may include a failure by goods to comply with relevant product safety standards.

e) *Durability*

In some circumstances, a lack of durability may therefore make a product unsatisfactory. However, this does not constitute a specific durability period. The criterion will be relevant if a product deteriorates more quickly than expected. This may be difficult to establish, although in *Thain v Anniesland Trade Centre*⁽²⁶⁾, the court suggested that a new car could be expected to work trouble-free at least for the duration of the manufacturer's guarantee.

The assessment of product quality under the SoGA thus depends on the factual circumstances of each particular case. Indeed, the court in *Thain v Anniesland Trade Centre* noted as much in saying that "cases relating to quality tend (...) to turn on their own facts". This flexibility can make it difficult to define how a particular product should perform in order to be of satisfactory quality.

3. *Goods must be fit for a particular purpose.*

Finally, section 14 (3) implies a term into the contract of sale that if a consumer makes known to the seller a particular purpose for which goods are required, the goods must be fit for that purpose. However, the consumer must have relied on the seller's skill and judgement, and it must have been reasonable for him to have done so. It may be unreasonable for a consumer to rely on the seller's opinion where the latter disclaims any expertise in relation to the consumer's request.

4. *Informing consumers about existing defects.*

An important limitation of the scope of the "satisfactory quality" test can be found in Section 14 (2C). This states that the implied term does not cover matters which would make goods unsatisfactory where: a) these have been drawn to the consumer's attention before the contract is made; b) where the consumer examines the goods before sale and this examination ought to have revealed the particular matters⁽²⁷⁾.

This provision provides an indirect incentive for a seller to disclose any known defects to a consumer. If this is done, a seller will not be liable, whereas if such information is withheld, the seller may be liable for a breach of the "satisfactory quality" term.

Implementation of article 2 of the Directive

As indicated above it is apparent that existing English law already covers much of what Article 2 of the Directive requires. The DTI has therefore chosen not to replicate in the Regulations a number of elements of the conformity concept contained in Article 2 of

⁽²⁶⁾ *Scottish Law Times* (Sheriff's Court), 1997, p. 102.

⁽²⁷⁾ DAVID OUGHTON AND JOHN LOWRY. *Consumer Law*, Blackstone Press, London, 1997, pp. 140-142.

the Directive⁽²⁸⁾. Clearly, the existing rules contain many more factors than the Directive that could be referred to in assessing quality, notably the list of factors in Section 14 (2B) and the reference to price in section 14 (2A). The Directive, is of course, only a minimum harmonisation measure, and Article 8 makes it clear that a higher level of protection can be retained.

Article 2(2) (a) refers to whether the goods "comply with the description given by the seller". Of course, s.13 of the SoGA already provides that where there is a sale of goods by description, there is an implied condition that the goods will correspond with the description. If there is a breach of this implied condition, there is a right to reject the goods, terminate the contract and claim damages. In addition, the Regulations now provide that the new remedies from the Directive will be available⁽²⁹⁾.

No amendments have been made to s.13 in order to reflect para.2(2)(a). In fact para.2(2)(a) may be slightly broader in scope than s.13. Section 13 only applies to descriptions identifying the goods as being of a certain type⁽³⁰⁾. There also appears to be a requirement that the buyer has relied on the description⁽³¹⁾. However, there are no such limits in Art.2(2)(a). It is therefore possible that there could be nonconformity within the meaning of Art.2(2)(a) in cases where there would be no liability under s.13. However, if the descriptive statement in question is an express term of the contract then (even if it falls outwith s.13) the remedies from the Directive will apply⁽³²⁾. An implementation problem will therefore only arise if Art.2(2)(a) is intended to cover not only contractual terms but also mere representations. (The remedies from the Directive have not been made available in cases of misrepresentation)⁽³³⁾.

Article (2) (2) (c) refers to whether the goods "are fit for the purposes for which goods of the same type are normally used". The DTI had questioned whether fitness for "normal use" was already covered by the pre-existing satisfactory quality obligation⁽³⁴⁾. However, the final Regulations make no reference to "normal use". Certainly, "fitness for all the purposes for which goods of the kind in question are commonly supplied" is a factor to be taken into account in assessing whether the goods are of satisfactory quality (see above)⁽³⁵⁾. However, it has been argued that many products are "normally used" for purposes for which they are not "commonly supplied"⁽³⁶⁾. Section 14(2) (A) does of course say that in assessing whether goods are of satisfactory quality, account should be taken of "all the ... relevant circumstances". Whether the goods are fit for their "normal uses" can certainly be taken into account under the heading of "relevant circumstances".

⁽²⁸⁾ *Second Consultation on EC Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* (DTI, London, 2002), pp.54-55, point 3. Available online at www.dti.gov.uk/ccp/archive/consultations.htm.

⁽²⁹⁾ Regulation 5 inserting s. 48A and F into the SoGA.

⁽³⁰⁾ *Ashington Piggeries v Christopher Hill* (1972) A.C. 441 at 489 per Lord Wilberforce; and see CHRIS WILLETT, *The Role of Contract Law in Product Liability in The Law of Product Liability*, Howells ed., Butterworth's, 2000, pp.63-64.

⁽³¹⁾ *Harlingdon v Christopher Hull* (1991) 1 Q.B. 564.

⁽³²⁾ Regulation 5 inserting new s. 48A and F into the SoGA.

⁽³³⁾ For more details see: CHRIS WILLETT, MARTIN MORGAN-TAYLOR, ANDRE NAIDOO. *The sale and supply of goods to consumers regulations*, *Journal of Business Law*, 2004, pp. 94-107.

⁽³⁴⁾ It had taken the view that "slight differences in these definitions" existed and, as a result, suggested modification: DTI, First Consultation of 2001, URN 00/1471 (DTI, London, 2001), p.9, question 4. The earlier Draft Regulations were to amend the satisfactory quality obligation so as to insert a reference to fitness for normal use (see Draft Regulations, reg.3(4), contained in the Second Consultation on EC Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees).

⁽³⁵⁾ S. 14 (2B) (a) of the SoGA. The pre-existing fitness for all common purposes may be more restricting than Art.2(2)(b) as it is unclear whether the goods must be fit for all or most normal uses (STEPHEN WATTERSON, *Consumer Sales Directive 1999/44/EC--The Impact on English Law*, *European Review of Private Law*, 2001, vol. 9 pp.197-207).

⁽³⁶⁾ GERAINT HOWELLS and CHRISTIAN TWIGG-FLESNER, *Much Ado about Nothing? The Implementation of Directive 99/44/EC into English Law*, in *Verbraucherkauf in Europa--Altes Gewährleistungsrecht und die Umsetzung der Richtlinie 1999/44/EG*, Schermaier ed., Sellier European Law Publishers, 2003, pp.310-311.

In addition, s.14 does at least follow Art.2 (2) (c) by referring to the issue of "purpose". It could be contended that the failure of s.14 to refer to the purpose for which goods are normally used will not prevent consumers from ascertaining the full extent of their rights under the Directive. Goods will normally be used for the purposes for which they are supplied. So the reference to the purposes for which goods are supplied should typically be enough to direct the attention of the consumer (or his adviser) to the fact that he may have a claim if the goods are not fit for normal use⁽³⁷⁾. It had been proposed to add the words "or normally used" to the first factor in section 14(2B), probably with a view to reducing the likelihood of non-implementation proceedings. Ultimately, it was decided to leave this unamended, and consequently, there is no express reference to fitness for the purposes for which goods are "normally used".

As regarding to the Article 2 (2) (d) of the Directive it is necessary to say that the satisfactory quality standard requires goods to meet the "standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances"⁽³⁸⁾. In addition to these guidelines, quality is also to be determined by reference to the state and condition of the goods, fitness for all the purposes for which goods of that kind are commonly supplied, appearance and finish, freedom from minor defects, safety, and durability⁽³⁹⁾. The Regulations amend the satisfactory quality obligation. It is now provided that where the buyer deals as a consumer, the "relevant circumstances" mentioned above "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 in labelling"⁽⁴⁰⁾.

The statements must be as to the "specific characteristics" of the goods. This would seem to exclude what lawyers in the UK would describe as "sales puffs", i.e. statements that are not objectively verifiable⁽⁴¹⁾. However, it would seem to include both statements that describe the basic identity of the goods and statements that describe other characteristics, e.g. statements as to particular inspections that have been carried out, durability, fitness for different purposes and general performance capabilities.

It is also important to note that the statement in question will be relevant as long as it is made prior to the sale of the goods to the consumer. A statement may have been made by the producer after he has sold the goods to the seller. However, there is nothing in the legislation to prevent such a statement being relevant to the obligation owed by the seller to the consumer⁽⁴²⁾.

No steps were taken to impelment Article 2 (3). This states that there will not be lack of conformity if the consumer "was aware or could not have reasonably been unaware" of the lack of conformity. Arguably, this corresponds in substance to Section 14 (2C). One difficulty may be to establish when exactly a consumer "could not reasonably have been unaware" of lack of conformity.

One aspect of Article 2 (3) is not covered by Section 14 (2C), however. The Article also states that there will be no lack of conformity if this has its origins in the materials supplied by the consumer. It is not entirely clear if this exclusion is acceptable because it

⁽³⁷⁾ See CHRIS WILLETT, MARTIN MORGAN-TAYLOR, ANDRE NAIDOO. *The sale and supply of goods to consumers regulations*, *Journal of Business Law*, 2004, p. 101.

⁽³⁸⁾ S. 14 (2A) of the SoGA.

⁽³⁹⁾ S. 14 (2B) of the SoGA.

⁽⁴⁰⁾ Regulation 3 amending s.14 of the SoGA by the insertion of a new subsection (2D). This provision comes of course from the Directive (Art.2 (2) (d)), which says that one of the criteria relevant to determining conformity is whether the goods show the quality and performance which is normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account public statements of the type mentioned.

⁽⁴¹⁾ For example, *Dimmock v Hallett* (1927) A.C. 177, PC and *Hummingbird Motors v Hobbs* (1986) R.T.R. 278, CA.

⁽⁴²⁾ See CHRIS WILLETT, MARTIN MORGAN-TAYLOR, ANDRE NAIDOO. *The sale and supply of goods to consumers regulations*. cit., p. 97.

maintains existing higher levels of consumer protection, or whether this should have been implemented.

There is another aspect of Article 2 (2) (d) regarding the “performance” of products in assessing conformity which has not been implemented. The pre-existing s.14 did not contain any reference to “normal” quality or performance, and it has not been amended in the light of para. (d)⁽⁴³⁾.

One important aspect is the Article 2 (5) of the Directive which states that if the product is intended to be installed by the consumer, and incorrect installation is due to a shortcoming in the installation instructions, this shall be deemed to amount to a lack of conformity. The Regulations are silent on this point as the DTI has taken the view that instructions are already relevant in assessing whether or not the goods are of satisfactory quality⁽⁴⁴⁾.

In principle, this view that installation instructions can be a relevant factor is correct, although not immediately clear. It would therefore be of considerable benefit to consumers, and also to sellers, if an express mention of installation instructions were made in Section 14.

As to Article 2 (5) we can see that it simply cover the situation where the incorrect installation causes the goods themselves to be defective (i.e. non-conformant)⁽⁴⁵⁾. The Regulations make the remedies from the Directive available in cases where installation is in breach of the implied term requiring that a service be carried out with reasonable care and skill⁽⁴⁶⁾. This provision is criticable because in order to establish whether this term has been breached, a negligence standard is applied, rather than the contractual standard⁽⁴⁷⁾. However, the directive is firmly based in contract law and equates inadequate installation with lack of conformity. Probably the best way to properly implement Art.2 (5) therefore is simply to provide that if the goods are inadequately installed then (irrespective of their condition) they are deemed to be in breach of the implied term as to satisfactory quality⁽⁴⁸⁾.

Also we have to mention that Section 14 (3) of SGSA 1982 currently requires that it must have been reasonable for a consumer who makes a particular purpose known to the seller to have relied on the seller’s skill and judgment in selecting a suitable product. Article 2 (2) (b) adopts a lower standard of protection, simply requiring the seller to “accept” the consumer’s purpose. Although it remains unclear as to what is required to “accept” a purpose, it seems that the mere fact that the seller has proceeded with a sale, fully aware of the consumer’s purpose, should be treated as acceptance. It is then irrelevant whether the consumer could reasonably have relied on the seller’s skill and judgment⁽⁴⁹⁾. Existing levels of protection may be reduced if “acceptance” requires an

⁽⁴³⁾ The DTI said that “Article 2.2(d) makes a reference to the ‘performance’ of goods, in addition to quality, which is not found in the 1979 Act. We propose to rely on the reference in s. 14(2A) to ‘all the other relevant circumstances’ to take account of this”: *Second Consultation on EC Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* (DTI, London, 2002), p.9. Available online at www.dti.gov.uk/ccp/archive/consultations.htm.

⁽⁴⁴⁾ “A shortcoming in installation instructions (Art.2(5)) is covered by s.14 of the SoGA concerning quality and fitness”: *Second Consultation on EC Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees* (DTI, London, 2002), p.55. Available online at www.dti.gov.uk/ccp/archive/consultations.htm.

⁽⁴⁵⁾ Such goods will be covered by the implied term as to satisfactory quality. If the contract is defined as a sale (on the basis that the transfer of goods predominates over the service element), the implied term will be that contained in s.14 of the SoGA. See DAVID OUGHTON and JOHN LOWRY, *Consumer Law*, cit., pp.146-148, and CHRIS WILLETT, *The Role of Contract Law in Product Liability* in *The Law of Product Liability*, Howells ed., Butterworths, 2000, pp.45-47. If the contract is one for work and materials (on the basis that the service element is more dominant), the implied term will be that contained in s.4 of the SGSA 1982.

⁽⁴⁶⁾ Regulation 9, inserting a new Pt 1B and s.11M-S into the SGSA 1982. See in particular s. 11S (1) (b).

⁽⁴⁷⁾ GERAINT HOWELLS and CHRISTIAN TWIGG-FLESNER, *Much Ado about Nothing? The Implementation of Directive 99/44/EC into English Law*, cit., p. 314.

⁽⁴⁸⁾ CHRIS WILLETT, *Implementation of the Consumer Sales Directive*, paper delivered to Northern Ireland Board of Judicial Studies, June 2002, p.16.

⁽⁴⁹⁾ GERAINT HOWELLS and CHRISTIAN TWIGG-FLESNER, *Much Ado about Nothing? The Implementation of Directive 99/44/EC into English Law*, cit., pp. 314-315.

express positive step by the seller. Under the existing law, the consumer must have made known the purpose to the seller, and provided that the seller does not expressly reject the purpose and it is reasonable for the consumer to rely on the seller's skill and judgment, the term applies.

The passing of risk

The traditional rule under the SoGA was that (in the absence of contrary agreement) the "risk" would pass when the property passes⁽⁵⁰⁾. Although the Directive itself makes it clear that it is not necessary to change the rules on the passing risk⁽⁵¹⁾, two significant changes have been made in this respect. First, under the new Regulations, in consume sales risk does not now follow property, but follows delivery⁽⁵²⁾. Secondly, when goods are passed to a carrier the pre-existing position was that this amounted to delivery⁽⁵³⁾. This has now been repealed for consume sales and it now provides that delivery to a carrier is not delivery to the buyer⁽⁵⁴⁾. The result is that in such cases delivery will not take place (and so risk will not pass) until physical delivery. This will mean that the seller will be strictly liable for non-delivery if the goods are lost; and he will be strictly liable for breach of the satisfactory obligation if the goods are damaged in such a way as to make them unsatisfactory. As to property it would still pass at the time of contracting, or once the goods had become ascertained, to maximize consumer protection in the event of the seller's insolvency. In consumer transactions, therefore, the established presumption that the risk passes with property no longer applies.

Remedies

The pre-existing remedies under the SoGA consist of the right to claim damages⁽⁵⁵⁾, and a right to reject the goods and terminate the contract where there is a breach of a condition⁽⁵⁶⁾ or for a sufficiently serious breach of an innominate term⁽⁵⁷⁾. The right to reject the goods and terminate the contract will be lost where the consumer is deemed to have "accepted" the goods. The buyer accepts the goods where he intimates acceptance, does an act inconsistent with the ownership of the seller or retains the goods after the lapse of a reasonable period of time⁽⁵⁸⁾. This latter "reasonable time" rule means that the right to reject goods may be lost fairly quickly⁽⁵⁹⁾. What is a reasonable period of time is a question of fact⁽⁶⁰⁾ and will vary depending upon the type of goods, the type of defect and all the circumstances of the case. It is difficult to draw guidance from the case law, but suffice to

⁽⁵⁰⁾ Under the default rule (i.e. in the absence of contrary intention) in s. 20 (1), risk passes with property, and under s.17, property passes when the parties intend it to pass. In the absence of express intention, s.18 provides rules on ascertaining an intention, and under s.18, r.1, property will pass when the contract is made where there is a sale of specific goods in a deliverable state (under s.61, these are goods identified and agreed upon at the time of the contract). Where there is the sale of unascertained goods, property passes when the goods are unconditionally appropriated to the contract with the buyers assent, i.e. when the goods are delivered to a third-party carrier (s.18, r.5), see MARTIN MORGAN-TAYLOR and ANDRE NAIDOO, *The Draft Regulations to Adopt the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees--Problems of the Time of Conformity for the Quality Obligation*, 2002, 3 Web Journal of Current Legal Issues, <http://webjcli.ncl.ac.uk/2002/issue3/taylor3.html>.

⁽⁵¹⁾ Recital 14 of the Directive.

⁽⁵²⁾ Regulation 4(2) amending s. 20 of the SoGA.

⁽⁵³⁾ S. 32(1).

⁽⁵⁴⁾ Regulation 4(2), amending s. 32, by creation of a new s. 32 (4).

⁽⁵⁵⁾ Pt VI, ss. 51 and 53 provide rules for the assessment of damages for the buyer in contracts for the sale of goods; these rules are broadly reflective of the general common law principles.

⁽⁵⁶⁾ This includes cases where there is a breach of the implied terms in ss.13-15 of the SoGA (which implied terms are preordained to be conditions) and cases where there is a breach of an express condition.

⁽⁵⁷⁾ *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* (1962) 2 Q.B. 26; *Cehave NV v Bremer Handelsgesellschaft mbH* (The Hansa Nord) (1976) Q.B. 44; and *Bunge Corporation v Tradax Export SA* (1981) 2 ALL E.R. 513.

⁽⁵⁸⁾ S. 35 (4), (5) of the SoGA.

⁽⁵⁹⁾ *Bernstein v Pamson Motors* (1987) 2 All E.R. 220 (three weeks for a new car was too long to be able to reject).

⁽⁶⁰⁾ S. 59 of the SoGA.

say that the period will usually be quite short, a matter of a few weeks or months⁽⁶¹⁾. For other contracts the right to reject is not lost until the buyer knows of the breach of contract and has affirmed the contract. In any event damages are available. Once a consumer has lost his right to reject and terminate, he can still bring a claim for damages. The sum awarded will, as rule, cover the cost of repair or replacement, but will also cover incidental and consequential losses (e.g. hiring a replacement), subject to the normal contract test of remoteness of loss.

The remedial regime is therefore very much compensatory, and does not seek to ensure performance of the seller's contractual obligations. The equitable remedy of specific performance is only made available in exceptional circumstances and where no more appropriate remedy is available. Generally speaking, damages will be more appropriate and will usually be awarded⁽⁶²⁾. Section 52 SoGA provides that specific performance may be awarded if the goods in question are specific or ascertained, but this will not apply for ordinary articles of commerce⁽⁶³⁾. The goods will have to be unique before a court would consider exercising its discretion under Section 52.

To enable a consumer to ask for repair or replacement is effectively introducing a more wide-spread entitlement to specific performance, because the objective is to maintain the contractual relationship and to give the consumer what he has asked for. The challenge has therefore been to combine a remedial system which is compensatory with one that is performance oriented. This has been done retaining the existing remedies regime. In order to implement Article 3 of the Directive, the additional remedies are made available through the addition of a new Part 5A to the SoGA. This applies to consumer transactions only⁽⁶⁴⁾. The repair and replacement were not express rights under the old law; however they were often done in practice. An effective right to replacement exists because a consumer who rejects does not have to treat the contract as terminated. Also, the seller could have been pressured to provide repair under the threat of the consumer having repairs done elsewhere and recovering the costs in damages from the seller⁽⁶⁵⁾.

There was much discussion of whether damages could be an adequate substitute for these remedies. Although this seemed outside the spirit of the Directive it did appear that this was the approach of several continental countries that already had provision for these remedies. Specific performance has always been available at the courts' discretion in an action for non-delivery of specific or ascertained goods⁽⁶⁶⁾. However, the traditional approach of English law would be only to award specific performance where damages are regarded as an inadequate remedy. Damages would generally only be regarded as inadequate where the goods are unique, or where the seller is the only reasonably available party who is in a position to repair or replace⁽⁶⁷⁾. If neither of these conditions applies, the buyer would typically be expected to have the repair done elsewhere or obtain

⁽⁶¹⁾ *Bernstein v Pamson Motors* (1987) 2 All E.R. 220 (three weeks for a new car was too long to be able to reject); *Peakman v Express Circuits*, unreported, 1998, CA (four weeks was not too long in which to reject); *Truk (UK) Ltd v Tokmakidis GmbH* (2000) 1 Lloyd's Rep. 143 (six months between delivery and rejection of a vehicle for resale was not too long); *Clegg v Andersson* (2003) 1 All E.R. (Comm) 721, CA (seven months was not too long to be able to reject a yacht. Here the court stopped the clock to account for the time taken to negotiate what modifications were required)

⁽⁶²⁾ *Co-operative Insurance Society v Argyll Stores (Holdings) Ltd* (1998) A. C. 1.

⁽⁶³⁾ *Cohen v Roche* (1927) 1 KB 169.

⁽⁶⁴⁾ This new regime covers both Sale of Goods Act 1979 and the Supply of Goods Services Act 1982 in so far as it involves a transfer of ownership. The remedies regime for hire under the 1982 Act and hire purchase under the Supply of Goods (Implied Terms) Act 1973 remain unchanged.

⁽⁶⁵⁾ *Minster Trust Ltd v Traps Tractors Ltd* (1954) 3 All E.R. 136 at 156; *Mondel v Steel* (1841) 8 M. & W. 858 at 872.

⁽⁶⁶⁾ S. 52(1) of the SoGA.

⁽⁶⁷⁾ *Thorn v Public Works Commissioners* (1863) 32 Beav. 490; *Sky Petroleum Ltd v VIP Petroleum Ltd* (1974) 1 W.L.R. 576.

a replacement elsewhere and recover any losses by way of a damages claim from the seller⁽⁶⁸⁾.

The Regulations do provide for orders of specific performance for repair and replacement, although the court may make an alternative order if another remedy appears appropriate. Despite the fact that there is a notable dearth of case law on consumer sales it will be interesting to see how this regime works out in practice.

The Regulations make provision for the interaction between the pre-existing right to reject and terminate and the new remedies of repair and replacement. Essentially, if the consumer asks for repair or replacement, he cannot reject the goods and terminate the contract until he has given the seller a reasonable time to repair or replace as the case may be⁽⁶⁹⁾. This modifies the existing provision which allows a consumer to reject even where he has asked the seller to repair the goods.

The new regime of remedies also introduces an important reversal of the burden of proof in case of non-conformity. It is said that if goods do not conform to the contract at any time within the period of six months from the date of delivery, they are to be taken not to have conformed at the date of delivery⁽⁷⁰⁾. Although it was not required by the Directive, it seems unfortunate that this six-month presumption was not applied to the pre-existing remedies, i.e. the short-term right to reject and the right to claim damages.

English law knows of no obligation to inform the seller of any potential claim, and so the two month notification period was not introduced. There was never any debate as to the overall limitation period. This is currently six years and the Government indicated at an early stage that it did not intend to reduce this period⁽⁷¹⁾. It was decided that the normal limitation period of six years will apply to the new remedies.

Guarantees

There were few provisions and rules on guarantees in the existing English Law. The Consumer Transactions (Restrictions on Statements) Order 1976⁽⁷²⁾ makes it a criminal offence to try to restrict consumers' statutory rights (i.e. under the Sale of Goods Act 1979 and equivalent provisions) through a guarantee. This Order has resulted in the inclusion of the phrase "This does not affect your statutory rights" in most guarantee documents. In addition, Section 5 of the Unfair Contract Terms Act 1977 renders ineffective a term in a guarantee by which the guarantor seeks to exclude his liability for death, personal injury or property damage caused by faulty products (i. e. Both tortious and strict liability). Also the Unfair Terms in Consumer Contracts Regulations 1999 can be applied to control the substance of guarantees. This means that terms which are unfair within the meaning of the Regulations (and therefore of Directive 93/13/EEC) will not be effective as against the consumer.

In the existing law on guarantees the most significant problem was the general uncertainty with regard to their enforceability. For guarantees to be legally binding, they would have to be a contractual obligation between guarantor (usually the manufacturer) and consumer. English contract law requires offer, acceptance, consideration and an intention to create legal relations for the valid formation of a contract. In many situations,

⁽⁶⁸⁾ *Minster Trust Ltd v Traps Tractors Ltd* (1954) 3 All E.R. 136 at 156; *Mondel v Steel* (1841) 8 M. & W. 858 at 872.

⁽⁶⁹⁾ Regulation 5, inserting s. 48D into the SoGA.

⁽⁷⁰⁾ New s. 48 A (3) of the SoGA.

⁽⁷¹⁾ No mention is made of a limitation period in the Regulations. The Regulations add to the SoGA and therefore the normal limitation period applicable to actions under the SoGA will continue to apply. These are the limitation periods set down in the Limitation Act 1980. Section 5 of this Act sets the time limit for contracts of sale of goods at six years. However, the Law Commission has recommended a reduced limit of three years in their recent report on limitation periods. See <http://www.lawcom.gov.uk/library/lib-com.html#libc270>.

⁽⁷²⁾ Adopted under Part II of the Fair Trading Act. When the Enterprise Act 2002 is brought into force in the summer of 2003, it will repeal Part II, but will preserve the 1976 Order.

the fact that a consumer has purchased the product and thereby contributed to an increase in the overall sales of the guarantor's products may have been enough to constitute consideration for the guarantee. However, it is necessary that the consumer was aware of the guarantee before purchase. Frequently, the guarantee card will have been inside the product packaging and the consumer will not have seen it until after purchase. In such case, the mere fact of buying the product cannot be consideration, because the consumer will have been unaware of the guarantee when concluding the contract of sale. If the consumer has to return a registration card or similar, then the fact that he does so could be sufficient consideration. This brief analysis demonstrates that there was some uncertainty in English Law, although in practice, this will have made very little difference.

In implementing the Article 6 of the Directive there were no difficulties and the Regulations 15 (1) SSGCR states that guarantees will become enforceable as a contractual obligation on the guarantor. These will be subject to the conditions in the guarantee document, which seems to cover both conditions precedent (such as the return of a registration card) and the conditions of coverage⁽⁷³⁾.

The Regulations (following the Directive) also contain helpful rules on transparency, scope, duration and the procedure for making a claim⁽⁷⁴⁾. In addition, the guarantor must ensure, where the guarantee is offered within the UK, that the guarantee is written in English⁽⁷⁵⁾. These transparency provisions are enforceable by means of an injunction which can be sought by an "enforcement authority"⁽⁷⁶⁾.

A subject with real interest is the so-called "extended guarantees", which are not subject to the Directive⁽⁷⁷⁾. These are often (but not always) breakdown insurance policies purchased by the consumer and paid for separately. There is some concern that the cost of some of these policies bears no relation to the likely cost of providing a repair or replacement, should the product break down. Moreover, some retailers have been accused of adopting "pressure selling" techniques when trying to persuade consumers to take out such an extended warranty. Finally, recent business failures have illustrated a further danger to consumers: thousands of consumers have been left with worthless extended warranties when the retailers who sold went into liquidation without having put into place a trust fund for the warranties.

There are clearly some advantages to extended warranties, primarily because these offer coverage against defects which were not present at the time of purchase (unlike the statutory rules and voluntary guarantees), and may also cover accidental damage. The Office of Fair Trading completed an enquiry into the extended warranty market in July 2002 and has now referred the matter to the UK's Competition Commission for further investigation⁽⁷⁸⁾.

The seller's right of recourse.

At present, it is possible for the seller to claim against his immediate contractual supplier. It is then possible for that supplier to claim against the person above him in the distribution chain and so on. Generally speaking, the seller's claim would be for breach of

⁽⁷³⁾ See CHRISTIAN TWIGG-FLESNER, *The EC Consumer Sales Directive: A Lot Still to Do*, 2001, vol. 8 *Canterbury Law Review*, p. 113; CHRISTIAN TWIGG-FLESNER, *New rules for Guarantees: for better or worse?* 2000, vol. 10 (3), *Consumer Policy Review*, p. 100.

⁽⁷⁴⁾ Regulation 15(3), (4).

⁽⁷⁵⁾ Regulation 15(5).

⁽⁷⁶⁾ Regulation 15(6). This means the Director General of Fair Trading, Local Weights and Measures Authorities, and the Department of Enterprise, Trade and Investment for Northern Ireland.

⁽⁷⁷⁾ See CHRISTIAN TWIGG-FLESNER, *Dissatisfaction Guaranteed? The legal issues of extended warranties explored*, cit., See also CHRISTIAN TWIGG-FLESNER. HUGH BOHLING, *When a Warranty is not Guarantee*, 1999, vol. 9, *Consumer Policy Review*, p. 193.

⁽⁷⁸⁾ Office of Fair Trading, *OFT 387 – Extended Warranties on Domestic Electrical Goods – A report on an OFT investigation*, London: OFT, 2002. See CHRISTIAN TWIGG-FLESNER, *Dissatisfaction Guaranteed? The legal issues of extended warranties explored*, cit.

the terms implied by Section 13, 14 (2) and 14 (3) in much the same way as the consumer's claim. The SoGA implies terms into all contracts of sale, not just consumer contracts. However, in con-consumer contracts, it is possible for the supplier to use an exclusion or limitation clause to restrict the seller's claim for breach of the implied terms. Such a clause has to satisfy the requirement of reasonableness under Section 6 of the Unfair Contract Terms Act 1977 (it is not possible to exclude or limit the rights in consumer transactions). Case-law suggests that it is unlikely that a total exclusion would be reasonable, but limitation clauses have been upheld by the courts in the past⁽⁷⁹⁾.

The DTI has taken the view that Article 4 does not require implementation because English Law already allows the seller to bring a claim against his contractual supplier⁽⁸⁰⁾. Moreover, the Directive does not disallow exclusion and limitation clauses. If this interpretation of Article 4 is correct, then the general view taken by DTI is acceptable. However there is a problem: the seller's claim is contractual for a breach of the implied terms. In their present form, at least on aspect of satisfactory quality (public statements) is only relevant in consumer transactions, but not in a non-consumer transaction. Suppose a seller has had to provide a remedy because a product has failed to live up to quality expectations created in advertising. It's clear the seller is liable to the consumer because the product was not of satisfactory quality. However, it would be difficult for the seller to show in his claim against the retailer that the product was not of satisfactory quality, because he cannot rely on the public statement – this is only a relevant factor for the consumer transaction. In this respect, the DTI's intentions fall short of what required by the Directive. It was expressed by some authors that the decision not to alter the rights of a seller as against a contractual supplier may result as a non correct implementation of the Directive⁽⁸¹⁾.

⁽⁷⁹⁾ See ROBERT BRADGATE, *Unreasonable Standard Terms*, 1997, vol. 60, *Modern Law Review*, p. 582.

⁽⁸⁰⁾ The DTI said that the existing possibility of a s.14 action by the seller satisfied Art.4 despite the fact that the producer's liability under s. 14 can be excluded or restricted subject to the reasonableness test. See DTI, *Second Consultation on EC Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees*, DTI, London, 2002, n.18, p.11.

⁽⁸¹⁾ GERAINT HOWELLS and CHRISTIAN TWIGG-FLESNER, *Much Ado about Nothing? The Implementation of Directive 99/44/EC into English Law*, cit., p. 319.