



Sale of Goods

the new consumer rights

The Sale and Supply of Goods to Consumers Regulations 2002 [SI 2002/3845] came into force on 31st March 2003. In certain respects they revolutionise the remedies available to purchasers of defective products. The changes apply only to natural persons acting as a "consumer" however - in other words not to companies, and not to transactions in the course of a trade, business, or profession.

NEW REMEDIES

A raft of measures put the consumer in a far stronger position when defective goods have been sold:

- ❖ There is a reversed burden of proof. Goods which do not conform to the contract of sale at any time within six months of their delivery are taken not to have conformed on delivery. To rebut the presumption the seller must show that they did conform. The reversed burden will not apply if its application is incompatible with the nature of the goods or the nature of the lack of conformity.
- ❖ If goods do not conform to the contract of sale the buyer now has 2 new remedies. He can require the seller to repair the goods or to replace the goods. If the buyer opts for one of these remedies the seller must repair or replace the goods within a reasonable time without causing significant inconvenience to the buyer and bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).
- ❖ Any question as to what is a reasonable time or significant inconvenience will be determined by reference to the nature of the goods and the purpose for which they were acquired.

- ❖ The seller can avoid repair or replacement if the remedy opted for is impossible or disproportionate in comparison with some other package remedy such as price reduction or rescission (see below).
- ❖ A remedy is disproportionate if it imposes costs on the seller which in comparison with some other remedy are unreasonable taking into account the value which the goods would have if they conformed, the significance of the lack of conformity and whether the other remedy could be effected without significant inconvenience to the buyer.
- ❖ If the buyer does opt for repair or replacement certain other remedies are suspended to give the seller a chance. The buyer cannot reject the goods and terminate the contract for breach of condition until he has given the seller reasonable time in which to repair or replace.
- ❖ There are other remedies if repair or replacement are not an option due to impossibility of disproportionality, or if the buyer has opted for repair or replacement but the seller has failed to act within a reasonable time and without significant inconvenience to the buyer. If the foregoing applies, the buyer can require the seller to reduce the purchase price of the goods by an appropriate amount or he can rescind the contract.
- ❖ If the buyer does rescind the contract on the foregoing basis, any reimbursement may be reduced to take account of the use he has had of the goods since they were delivered to him.
- ❖ The Court, as one would expect, has supervisory powers. If applied for by the buyer it can order specific performance of the right to repair or replacement. If the buyer has required the seller to give effect to a particular package remedy but the Court decides that another package remedy is appropriate, the Court may proceed as if the buyer had sought the other remedy in the first place. In relation to rescission, the Court can determine to what extent reimbursement should be reduced to take account of use of the goods. Any order the

Continued on page 2...

In this
Issue:

- ❖ **Sale of Goods**
The new consumer rights p1
- ❖ **A Stop On Estoppel** p3

- ❖ **Limits to the law of restitution**
How To Have Your Cake And Eat It p2
- ❖ **Buyer's Right To Reject...** p4



How To Have Your Cake And Eat It:

limits to the law of restitution

In 1994 Michael Clarke-Jervoise, the Claimant in this tale, had a landscape painting by the Dutch master Aelbert Cuyp on the wall of his home above his fireplace. It had been in his family for generations, but one night it was stolen in a burglary. He now has the painting back, as well as the damages paid to him for its loss. How this has come about is a demonstration of the sanctity of settlements entered into in good faith, and the limits of the law of restitution.

Knowing that his house contained valuables, Mr Clarke-Jervoise took the precaution of having an alarm fitted. Indeed it was a condition of his insurance that the alarm was not only fitted but operating when the house was empty. At the time of the burglary the house ought to have been protected by the alarm system but a maintenance engineer had disconnected an essential part. So when the burglars broke in, the alarm system did not work and the house insurers repudiated cover. As a result the Claimant sued the alarm company. In 1995, at the door of the court, the Claimant settled his claim for the loss of the painting, and other items, for about 80% of the full amount claimed.

In 2001 the painting was put up for auction at Sotheby's. As a result the police recovered the painting for the Claimant. The Claimant paid off the finder of the painting and wanted to take his painting home. The alarm company, who had settled the claim for the loss of the stolen items including the expensive painting,

felt aggrieved and laid claim to the painting, or to repayment of the settlement monies. To resolve the matter the Claimant issued proceedings for a declaration as to his title.

The alarm company claimed the painting, or the money, by way of restitution under the equitable principle of unjust enrichment, or by way of a right of subrogation or trust. Alternatively they claimed that under a term that they alleged should be implied into the settlement they should get the painting or its value if it was found. As the alarm company was not the insurer of the lost goods, and had not paid out as indemnifier of the Claimant, there was no right of subrogation. Public policy supported the upholding of a settlement entered into in good faith and the Court held that that prevented the law of restitution coming to the alarm company's aid. What they had paid for with their settlement was to be released from the claim. They had not paid for the painting, so they were not entitled to it when it appeared.

That left the claim for a term to be implied that if the painting was recovered then the painting or the monies would be accounted for to the company. At trial in the Queen's Bench Division in November 2002, the Trial Judge was attracted to the idea of an implied term in all fairness to the company but found, as the Claimant alleged, that he could not imply a term to unpick a global settlement where just one of the elements, albeit a significant one, had changed. Thus the Claimant got his Cuyp back, but also kept the money he had received for its loss. If the alarm company thought that was unfair, then they should have offered to indemnify him properly rather than settle at the door of the court to buy off the claim at the last minute. The Cuyp is back above the fireplace. It just goes to show; you can have your Cuyp and heat it.

✦ Grahame Aldous¹

¹Counsel for the Claimant in *Clarke-Jervoise v Chubb Electronic Security Ltd.* in both the 1995 and 2002 QBD actions.



...Continued from page 1

Court makes can be made unconditionally or on such terms and conditions as to damages, payment of the price or otherwise as it thinks just.

✦ There are parallel amendments to the Supply of Goods and Services Act 1982 to cover goods transferred.

GUARANTEES

Goods sold or supplied often come with a guarantee, which may well be provided by a third party other than the seller e.g. the manufacturer. Under the Regulations a "consumer guarantee" is

any undertaking to a consumer by a person acting in the course of his business, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising. In relation to such guarantees the Regulations provide as follows:

✦ The guarantor will now be directly liable to the consumer on the conditions set out in the guarantee statement and the associated advertising, which will operate as contractual obligations. It will not matter if there is no consideration or privity between the guarantor and the consumer.

✦ The guarantor has to set out in plain intelligible language the guarantee's contents and the essential particulars necessary for making claims under the guarantee.

✦ In particular the guarantor must ensure that the guarantee sets out plainly the duration and territorial scope of the guarantee as well as the name and address of the guarantor.

Continued on page 3...

A Stop On Estoppel

Estoppel comes in many guises. In one or other of its forms it is often brought into play to do justice between the parties when more conventional legal remedies fail. Lord Denning considered the doctrine of estoppel "one of the most flexible and useful in the armoury of the law".

Flexible it may be, but the House of Lords recently served a useful reminder that one cannot achieve just anything by pleading estoppel by representation. In *Actionstrength Ltd v International Glass Engineering SpA* [2003] 2 WLR 1060 it was held that the doctrine cannot be used to evade the provisions of the Statute of Frauds 1677 that require guarantees to be in writing.

THE FACTS

St-Gobian, the glassmakers, contracted with IGE for the construction of a new factory. Actionstrength agreed to supply construction workers to IGE under a separate sub-contract.

When IGE fell behind in its payments to Actionstrength for the labour, Actionstrength complained to St-Gobian. Actionstrength contended that St-Gobian had orally agreed to ensure that Actionstrength received all monies due from IGE, if necessary by withholding monies St-Gobian owed IGE and instead paying Actionstrength directly. In reliance on that promise Actionstrength kept its workers on site for a further month when it would otherwise have withdrawn them. The issue for the House of Lords was whether or not the claim should be struck out because the alleged agreement amounted to a guarantee which was, in the

absence of any written note or memorandum, unenforceable by reason of section 4 of the Statute of Frauds 1677.

Actionstrength's case was that St-Gobian was estopped from relying on the Statute, having by its promise encouraged Actionstrength to remain on site to its detriment.

THE DECISION

There seems little doubt that the House of Lords had some sympathy for Actionstrength's position. This was not an agreement between small and vulnerable entities. The appeal proceeded on the basis that there was no clear public policy consideration that prevented an estoppel arising.

The House of Lords nonetheless held unanimously that Actionstrength's claim had to fail. The extending of credit on the faith of a promise made by a guarantor in the knowledge that the creditor would suffer loss if the agreement was not honoured, was a normal feature of a contract of guarantee. If the court were to admit an estoppel solely on the ground that a creditor had acted to his detriment on the faith of a guarantor's oral promise, section 4 of the Statute of Frauds would be rendered nugatory.

Actionstrength's problem was that it could show nothing beyond the bare oral agreement to found an estoppel. There was no representation by St-Gobian that it would honour the agreement despite the absence of writing, no representation that the agreement was not a contract of guarantee, no explicit assurance not to plead or seek to rely upon the Statute of Frauds. In the absence of any such additional element a claim founded on estoppel had to fail as being simply inconsistent with the Statute.

...✦ Philip Jones

...Continued from page 2

...✦ These provisions are enforceable by the Director General of Fair Trading and the trading standard departments of local authorities by way of injunction.

OTHER CHANGES

The new Regulations effect a number of other changes to sale of goods law to strengthen the consumer's position:

...✦ Under section 14 of the Sale of Goods Act goods are of a satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of them, the price and all other relevant circumstances. Those circumstances will now include "public statements" on the specific characteristics of the goods made by the seller, or by the producer or his representative. The producer is the manufacturer, importer or any person purporting to be producer by placing his name or trademark on the goods. Statements in advertising or on labelling are particularly targeted.

...✦ There is a let out if the seller can show that he was not and could not reasonably have been aware of the relevant public statement. The seller is also off the hook if, before the contract is made, the statement has been withdrawn or corrected in public to the extent that it contained anything misleading, or if the decision to buy could not have been influenced by the statement.

...✦ There is a technical change as to the rules on passing of risk. In essence when a buyer deals as consumer section 20 of the Sale of Goods Act 1979 is altered so that goods will remain at the seller's risk until they are delivered, irrespective of when title passes.

Whilst it is still early days this new raft of measures will put consumers in a far stronger position when landed with defective goods. The six month reverse burden of proof will be of particular significance for litigators.

...✦ Daniel Lawson





Buyer's Right To Reject Is Set Afloat Once More

INTRODUCTION

The Court of Appeal have revisited, in *Clegg v. Olle Andersson* (t/a Nordic Marine) [2003] EWCA Civ 320, the decision of Rougier J in *Bernstein v. Pamson Motors (Golders Green) Ltd* [1987] 2 All ER 220 and come to the unanimous conclusion that the case no longer represents the law after the Sale and Supply of Goods Act 1994 ('the 1994 Act').

By way of background, in *Bernstein*, the claimant purchased a car from the defendant and drove it for a period of three weeks before discovering that it broke down on the motorway. It later transpired that a piece of sealant had entered the lubrication system and cut off the oil supply to the camshaft which then seized up. It was held in that case that the claimant had had a reasonable time to examine and try out the car and had therefore lost his right to reject, even though he had been completely ignorant of any defect with the car until it had broken down.

The motor trade and other sellers of goods championed the Decision of Rougier J as a vindication of their stance on a buyer's right to reject. The decision had made life hard for buyers everywhere who had effectively lost their right to reject no matter how difficult to detect or technical the defect in the goods supplied.

THE FACTS IN CLEGG

By a written agreement in December 1998, the Claimant had agreed to buy a new yacht with a shoal draught keel 'in accordance with the manufacturer's standard specification' from the Defendant for £236, 000. The yacht was delivered by Malo (the manufacturer) to the Defendant on 25th July 2000 and then by the latter to the Claimant on 12th August 2000. In between this period, the Defendant had realised that the yacht had a keel that was substantially heavier than the manufacturer's specification. This information was passed on to the Claimant when the yacht was delivered to him. Thereafter negotiations ensued about the various options whereby the keel could be modified. In the meantime, the Claimant had taken the yacht out to sea for a period of approximately nine days and was said to have been happy with it, notwithstanding the overweight keel.

Nevertheless, the Claimant's solicitors wrote to the Defendant on 6th March 2001 (some 7 months after the yacht had been delivered but only 3 weeks after information about the possibility of the manufacturer's appraisal had been given) asserting that the Claimant was rejecting the yacht and set out a number of options for settlement. The Defendant rejected the Claimant's proposals for settlement and furthermore disputed his entitlement to reject the

yacht after the time which had elapsed since delivery of the yacht. The Claimant therefore brought an action against the Defendant for the purchase price of the yacht and damages for breach of contract.

THE DECISION

At first instance it was held that there had been no breach of condition under either s.13(1) or s.14(2) of the Sale of Goods Act 1979 ("the 1979 Act") and that even if there had been such a breach, the Claimant had lost the right to reject the yacht before 6th March 2001.

The Court of Appeal overturned this. It held that it had been established beyond doubt by the evidence before the Judge at first instance that the effect of the overweight keel on the safety of the rig was both adverse and unacceptable to the manufacturers of the rig. The Court of Appeal felt that on the basis of all the evidence, a reasonable person would have considered that the yacht as delivered had not been of satisfactory quality because of the overweight keel, the adverse effect it would have had on rig safety and the need for more than minimal remedial work on it. Therefore the Claimant had established a breach of condition under s.14(2) and was entitled, initially, to reject the yacht. Given that the Court of Appeal felt there was a breach of s.14(2) it was unnecessary to consider a breach of s.13(1).

Notwithstanding the fact that the Claimant had sailed the yacht, insured it, attempted to register it and had refused consent for the Defendant and Malo to carry out remedial works to the yacht without his approval, the Court of Appeal felt that he had not intimated his acceptance of the yacht or done any act which would have been inconsistent with the Defendant's ownership of it.

The Court of Appeal went further and held that the decision in *Bernstein* no longer represented the law after the 1994 Act. In particular, it was held that the time taken to ascertain what would be required to effect modification or repair was to be taken into account in resolving the question of fact which had arisen under s.35(4) of the 1979 Act. Furthermore, it was said that the three-week period, which had elapsed after the Claimant had received the relevant information about repair, had not exceeded a reasonable time for the purpose of s.35(4) and therefore the Claimant was entitled to reject the yacht on 6th March 2001.

The Court of Appeal in *Clegg* ruled s.35(5) provided that whether or not the buyer has had a reasonable opportunity to inspect the goods is only one of the questions to be answered in ascertaining whether there has been acceptance. Hale LJ stated that if a buyer is seeking information which the seller has agreed to supply which will enable the buyer to make a properly informed choice between acceptance, rejection or cure, he cannot be taken to have lost his right to reject. The appeal was therefore allowed and the assessment of damages was referred to a Master.

...✦ **Shahram Sharghy**

Commercial Team at 9 Gough Square:

Grahame Aldous (1979)	Philip Jones (1990)	Laura Elfield (1996)
Christopher Wilson (1980)	Clare Padley (1991)	Perrin Gibbons (1998)
Gaurang Naik (1985)	Laura Begley (1993)	Shahram Sharghy (2000)
Mark Whalan (1988)	Daniel Lawson (1994)	