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Response to the Law Commission's Consultation Paper No. 188 "Consumer Remedies for Faulty Goods"

ABOUT THE CITY OF LONDON LAW SOCIETY

The City of London Law Society ("CLLS") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the Law Commission's Consultation Paper No. 188 "Consumer Remedies for Faulty Goods" has been prepared by the CLLS Commercial Law Committee, and is based on written responses and two meetings of members. The Committee is made up of a number of solicitors from City of London firms who specialise in commercial and consumer law. The Committee's purpose is to represent the interests of those members of the CLLS involved in this area of law.

INTRODUCTION

We are pleased to have the opportunity to respond to the Law Commission's consultation on consumer law and remedies for faulty goods. This is an issue on which many solicitors in the city provide advice and we are very interested in the views taken by the Law Commission during this process. We were grateful for the opportunity to meet with David Hertzell and Donna Birthwright on 3 December 2008; the discussions at that meeting have guided us in forming the views set out in this response. This response is structured to be read alongside Part 10 of the Consultation Paper.

GENERAL

While we are limiting our response to the issues raised by the Law Commissions, we are, of course, mindful of the wider issues involved in the proposed EU Directive on Consumer Rights (2008/0196) (the "Draft Directive") and discussed in the BERR Consultation Paper of November 2008. (We are also mindful of some issues which were not addressed by either consultation and would have welcomed, for example, a move to extend the definition of "goods" to include non tangible goods such as software or music downloads.)

We have a number of general concerns.

The Draft Directive is structured as a maximum harmonisation measure which would leave no scope for individual Member States to maintain what may, in many cases,

be higher levels of protection. While maximum harmonisation may be justified in relation to those areas of the law which have a clear and immediate bearing on inter–state trade, and this is clearly arguable in the case of distance selling, the section on remedies will apply to face to face sales, the vast majority of which will be purely domestic. We would question the justification for maximum harmonisation in this case, particularly as this may result in a weakening of existing consumer rights. We would urge BERR to resist this.

It should also be borne in mind that legislation to implement the proposals is likely to be by way of amendments to the Sale of Goods Act which lies at the heart of wider contract law. There will inevitably be a "drag" factor which will impact on business to business sales, whether this is intended or not, and care needs to be taken properly to differentiate the special consumer remedies.

THE RESPONSE

1. The right to reject should be retained as a short-term remedy of first instance for consumers

1.1 The CLLS agrees with the Law Commission that, contrary to the Draft Directive, the right to reject faulty goods should be retained as a short-term remedy of first instance for consumers under English law. Its abolition, when combined with the proposal to transfer the choice of first tier remedy to the trader, seems to be a recipe for increased consumer unhappiness.

1.2 The CLLS notes in particular that removing the right to reject goods would create an inconsistency with distance and doorstep selling, where the right to reject would still exist (NB the 'cooling-off' period for distance and doorstep sales). In our view it seems strange that the European Commission is happy to support a first instance right to reject for distance and doorstep sales, but has a contrary view on face to face sales. Given extensive research about consumers' lack of knowledge regarding consumer rights, we believe that simplicity and consistency is important.

1.3 We also note that removing the right to reject goods could undermine the widespread retail practice of offering "no quibble" guarantees. As noted by the Law Commission, this would create a mismatch as between consumer expectations and the law. This inconsistency is clearly undesirable. The right to reject is an important element in consumer behaviour and many retailers use their returns policy as a marketing tool. In most cases, the remedy would seem to be regarded as a quick and effective way to deal with a problem and to offer the best chance of retaining the customer's goodwill. While the right may seem draconian in the case of higher value products, such as motor vehicles, where the trader is likely to face a severe financial loss in taking back the product, case law has demonstrated that the courts are capable of dealing with any element of unfairness. This would be lessened if the law became too prescriptive.

1.4 The CLLS is of the view that the proposal in the Draft Directive for 'tiered' remedies – with rescission at a second stage – does not take into account the view that consumers may well lose faith in faulty products thus making the remedies of repair and replacement suspect in many instances. The second stage remedy would take longer and generate more consumer ill will than the current relatively clean retailer practice based on the existing right to reject. We agree with the Law Commission that the proposals in the Draft Directive will open up a vast range of fresh unanswered/unanswerable questions.

2. The right to reject should not be extended to cover defects which appear only after a prolonged period of use

2.1 The CLLS agrees with the provisional proposals of the Law Commission not to extend the right to reject. The advantage of the remedy is that, while providing a quick and clean remedy where there is a problem, it provides retailers certainty after a relatively short period of time to close their books on a sale. Where a problem appears after prolonged use, the customer will have enjoyed some benefit from the product – opening up the possibility of opportunistic abuses – and the tiered remedies of repair, or if this is not possible, rescission, would be more appropriate

3. 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

3.1 The CLLS would argue, on this issue, that the simplicity of having a "normal" time period of 30 days should be weighed against the flexibility that the Law Commission itself recognises is vital in order to apply the right to reject to a vast range of products justly. We are of the view that some degree of prescription in the time limits would be a positive move, but these should be framed as rebuttable presumptions that incorporate the flexibility that is currently evident in the "reasonable period" of time in the current law. We believe that this balances the need for flexibility and for certainty. We would suggest the following rebuttable presumptions of time periods following delivery after which the right to reject is lost, and the consumer must instead move to the "tier one" remedies suggested in the Draft Directive:

(a) Perishable Goods – 5 days (or until the "use by" date if shorter)

(b) Normal Goods – 30 days

(c) Complex Goods – 90 days

3.2 Clearly the definition of these classes of goods would be vital in achieving the objective of certainty. We believe that consolidated guidance should be issued by BERR to deal with these eventualities together with the other issues that arise throughout this response. We envisage that "Perishable Goods" will include predominantly items of groceries that would reasonably be expected to last for a week but not further beyond. We envisage that "Complex Goods" will include white goods and other items where it is reasonable to suspect that a fault will take time to materialise (albeit not a long period of time). "Normal Goods" is a residual category.

3.3 It should be possible for traders and consumers to agree longer periods to cover "special cases", e.g. items bought expressly as gifts and/or out of season. The law need not attempt to prescribe the arrangements here, but guidance notes might deal with these situations helpfully.

3.4 We believe that specific free-standing guidance should be published by BERR in consultation with the Motor Industry to deal with the exceptional case of cars. For most faults on cars, we believe that repair will be the most appropriate and proportional remedy (given the substantial reduction in the value of a car on registration) and so it would be unreasonable for a consumer to be able to reject lightly. However, the car also presents the real

problem in that it is probably the single, most safety critical consumer purchase. Where there are good grounds for a breakdown in confidence in the safety of the car, the consumer should be entitled to reject.

3.5 In addition to the rebuttable presumptions, we believe that in order to achieve further certainty of consumer rights in this area, retailers should continue to provide policies that comply with the rebuttable presumptions, but which take into account the special characteristics of the products they sell. We believe that for many retailers, the right to reject is already extended more generously than the law requires, governed by internal policies, dictated by market practice.

Specific responses:

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

We see the merits in the Law Commissions proposing a 'normal period' of 30 days, in the sense that this period corresponds with consumer expectations; however, for the reasons given above, the CLLS believes that further prescriptions can be given to cater for different types of goods to further the objective of certainty, whilst retaining flexibility.

3.7 **Should the retailer be able to argue for a shorter period where the goods are perishable (that is they are by their nature expected to perish within 30 days)?**

Yes. As set out above, we believe that perishable goods provide an example of a category of goods to which it would be wholly wrong to apply the same set of principles to as, say, a motor vehicle. This is why we suggest separating perishable goods from other types of goods. Clearly problems arise when it comes to defining "perishable goods" and we believe BERR guidelines should be issued to aid consumers and retailers in making their determinations.

3.8 **Should the retailer be able to argue for a shorter period where the consumer should have discovered the fault before carrying out an act inconsistent with returning goods?**

Yes, the CLLS agrees with the examples set out in paragraphs 8.56-8.58 of the Consultation Paper and is of the view that these highlight the need for flexibility, albeit within the framework of rebuttable presumptions. It should not be open to the Retailer to reduce the period of the presumption unilaterally in any terms of sale, however.

3.9 **Should the consumer be able to argue for a longer period where it was reasonably foreseeable at the time of sale that a longer period would be needed?**

Yes. This is why the presumptions prescribing time limits should be rebuttable. We believe that the burden of proof for such an extension should rest with the consumer and not be watered down so such occasions would be rare. However, without specific agreement between the parties, the right to reject should not extend beyond a long-stop date of - say - 6 months from the date of sale.

3.10 **Should the consumer be able to argue for a longer period where the parties agreed to extend the period?**

Yes. Where the parties are in agreement, or where a generous 'rejection policy' is publicised by a retailer (as is market practice, in many cases), this should be respected. While there are clear social reasons why "contracting out" of consumer law should not be permitted where this seeks to restrict consumer rights, there is no good reason to restrict the addition of wider rights by consent of both parties.

3.11 **Should the consumer be able to argue for a longer period where 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?**

This could lead to injustice. There is no reason why the customer's personal circumstances should increase the objective liability on the retailer. We believe that an extension should only apply in circumstances where paragraphs 3.8 or 3.9 above are relevant.

3.12 **Should the consumer be able to argue for a longer period where there were fundamental defects which took time to be discovered?**

As stated above, in general, we believe that rejection should be a "short sharp" remedy. Where the goods have been in use for some considerable time before any claimed defect arose, the tiered remedies are more appropriate.

3.13 **Are there other reasons to justify a shorter or longer period?**

Yes. The CLLS believes there are a whole range of other reasons that would come to light, which shows the need for continued flexibility, albeit within the framework of rebuttable presumptions.

4. 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.

4.1 This right already exists – and would remain – for the tiered remedies which are less stringent for the trader. Our clear view is that the right to reject should be a short term remedy only and we would therefore not support a full six-month reverse burden of proof in the case of rejection. We acknowledge however, that retailers may be in a far better position than consumers to analyse a fault with goods to the extent that the burden of proof can be discharged. For this reason, we could accept that a reverse burden of proof should apply throughout the (flexible) period within which a consumer has the right to reject, as outlined above on condition that the retailer is given a proper opportunity to examine the goods claimed to be defective. The time frames for the reverse burden of proof would therefore depend on the rebuttable presumptions that apply to particular types of goods, as well as the particular circumstances of a case.

5. We provisionally propose that legal protection for consumers who purchase goods with "minor" defects should not be reduced

5.1 In line with our arguments for retaining the right to reject goods, we agree that the law with respect to "minor" defects should remain unchanged. The United Kingdom took the decision, when the law in this area was last amended, not to follow the permitted exception from the right to rescind for "minor" defects. We would agree with the views expressed in the Law Commission's 1987 report that cosmetic issues, such as product finish, are of major importance to consumers. The current law does not require absolute perfection in goods sold by retailers and the 1994 reforms to the Sale of Goods Act 1979 recognise freedom from minor defects as an element of "satisfactory" quality. We are not aware that this has caused major problems in practice.

5.2 Removing the right to reject for "minor" defects would create further uncertainty in the law and would lead to costly disputes – particularly by more unscrupulous traders. Market practice of offering a "no-quibble" right to reject suggests that many retailers would be happy with this as the legal position. This is a further argument against the use of maximum harmonisation in this case as this would remove valuable consumer protections.

6. The right to reject in other supply contracts

6.1 **Works and materials contracts**– We recognise the concern raised by the Law Commission that the law is particularly complex on this issue, especially with regard to the distinction between acceptance and affirmation. However, it is clear that consumer organisations would prefer to maintain the current position – even though difficult – rather than lose the current regime which, in practice, does recognise that there are additional arguments for a longer right to reject in this type of case where the consumer is much more reliant on the trader. We have a degree of sympathy for this view.

6.2 **Hire Contracts** – We agree with the Law Commission that the current law matches consumer expectations in a proportionate manner.

6.3 **Hire Purchase** – We believe that contracts where it is always contemplated that property in goods will pass at the end of the finance arrangement should be treated in the same way as ordinary sale of goods contracts.

7. Reforming the Consumer Sales Directive

7.1 The number of repairs

(a) We leave to one side our clear view that the right to reject should remain as a first instance short-term remedy for consumers. We note that under Directive 1999/44, a consumer can utilise a "tier two" remedy (rescission or a reduction in price) only when the retailer has failed to carry out a "tier one" remedy (repair or replace) within a reasonable time and without significant inconvenience. This approach has presented practical problems as to the threshold for a consumer moving from a "tier one" remedy to a "tier two" remedy.

(b) Both the Draft Directive and the Law Commission have suggested alternative "prescriptive" suggestions – the former that the move to the second tier should be permitted where "the

same" defect has arisen more than once and the latter, that it should be permitted after two attempted repairs, whatever the defect. With respect, both seem to require a range of caveats. Clearly, the exceptions to the default position (of two failed repairs) have the potential to be unwieldy and produce uncertainty.

(c) It is our view that prescriptive legislation would not be appropriate in this instance. Instead, we would propose that simple and concise non-binding codes of practice should be produced by the Law Commission or BERR (in consultation with industry and consumer groups). We note the risk with guidance that it will be respected by the better retailers but ignored by others, but we feel this is the approach that best balances the need for flexibility with a degree of certainty. We are also of the view that specific codes of practices could be produced for specific types of goods for which peculiar considerations are relevant.

7.2 **The process of repairs**

(a) It is the view of the CLLS that retailers would benefit from best practice guidance on the process of repair and replacement. We would prefer that this be developed at national level though consultation rather than as an attempted "one size fits all" approach via maximum harmonisation.

7.3 **Dangerous goods and unreasonable behaviour**

(a) We agree that where there has been a breakdown in the confidence a consumer has in a product, the consumer should be entitled to proceed directly to a "tier two" remedy on the grounds suggested by the Law Commission.

7.4 **Deduction for use**

(a) The Law Commission proposes that the "deduction for use" in the event of rescission under the "tier two" remedy should be abolished. Our clear view is that the right should be maintained as law.

(b) The CLLS recognises the problematic nature of calculating the value of a deduction for use but it is our view that the right should be maintained. It is clear, in practice, that the vast majority of retailers will not attempt to make a deduction for use in all but the very few cases where the consumer is attempting to abuse the law. The Law Commission notes that the consumer may have suffered additional expense because of the fault in the product and we agree that where this is the case, the retailer should be required to set off this amount against the amount deducted for use.

(c) Whilst the right is (rightly) seldom used, it is virtually the only mechanism retailers have to prevent a particular kind of abuse. To take an example used by the Law Commission; a wedding dress is purchased and used for its intended purpose. A minor

defect is found which would allow the consumer to reject the product both at law and in line with the retailer's returns policy. This amounts to a "free hire" of the product for which the retailer will suffer tangible loss. In such cases of abuse the retailer may well have an argument that the dress was not returned within a "reasonable time" (see above), but more fruitful will be to cover its loss by making a deduction for use. These are of course exceptional examples.

7.5 **The six-month reverse burden of proof**

(a) We agree with the Law Commission that the reverse burden of proof contained in section 48A(3) of the Sale of Goods Act 1979 should recommence after goods are redelivered following *replacement* of faulty goods. We agree that this must be "consistent with the thrust" of the legislation.

(b) We do not feel, however, that the burden of proof should be reversed following a *repair*. Instead we feel that if a new part is installed in the repair, this part itself should be covered by a 'refreshed' reverse burden of proof, but this should not extend to the product as a whole. We believe that this approach will limit instances of consumer abuse where a minor repair has been made to a product.

(c) This reversal should not, we believe, be extended to the right to reject.

7.6 **Time limit for bringing a claim**

(a) We agree with the Law Commission that the traditional limitation periods for contractual claims should apply. Multiple limitation periods for claims of this nature would add yet another complexity to the law that would confuse consumers further.

(b) We view it as extremely unlikely that a consumer would be able to make a successful case beyond the period of two years. It is for this reason that we do not feel it is necessary to add the extra limitation period into the law, when we feel that the position as it currently stands is adequate to cover instances of customer abuse.

8. Wrong Quantity

8.1 We believe that where a consumer receives a quantity of goods less than he contracted for, he should retain the right to reject currently provided under section 30 of the Sale of Goods Act. The Draft Directive would remove this right and require that the trader be given the opportunity to cure the defect. The rationale for this view is the same as for our view that the right to reject should be retained as a general principle. If the consumer has not received what he had contracted for, he should not have to wait for the retailer to "cure" the defect; he should have an immediate right to reject. Consumers are likely to require goods in quantity for immediate use and may be more severely inconvenienced than businesses that buy in bulk and for whom late tender of the balance of the order would not prevent their use of the goods originally delivered.

8.2 Where a consumer receives a quantity of goods larger than he contracted for, he should have a right to reject the excess, but no more than that.

8.3 We believe that the current position under section 30 is more favourable to the consumer and should be maintained. Again, this shows the drawbacks of maximum harmonisation.

9. Late Delivery

9.1 Our view is that a default or "back-stop" position that goods must be delivered within 30 days is sensible. This gives consumers comfort that they have a clear remedy in law where a retailer persistently delays delivery. Clearly, "where parties have agreed otherwise", be it for a longer period for delivery, or a shorter period, this should be respected. However, this poses difficulties where a particular, speedier delivery is of importance but the trader refuses to agree a shorter period. Leaving aside the obvious course of not entering into the contract on those terms, it should remain possible to make time of the essence unilaterally. Where the consumer made efforts to stress the importance of a delivery time, time should be considered of the essence. Where such an agreed time for delivery is breached by a party, we believe that the consumer should have the right to a refund.

10. Damages

10.1 We agree that common law principles of damages should be retained as English law in this area.

11. Integration of CSD remedies with the right to reject

11.1 The model of integration set out by the Law Commission at paragraphs 8.188-8.192 of the Consultation Paper is in our view, a sensible approach. While the right to reject is available to customers, it might be said that the CSD "tier one remedies" are undermined (why would a customer not just reject and get his money back?). But this has not proved a particular problem in practice. However, we believe that it is important that the rights to "cure" a fault are given equal prominence as a matter of policy.

11.2 We agree with the policy that consumers should be encouraged to attempt to "cure" a fault with goods, but that they should not be penalised for doing so. It is clear to us (given our view that the right to reject should be retained) that a consumer who accepts a repair (during the time period within which the consumer had the option of rejecting the goods), which subsequently fails, should not be forced to attempt a further repair, but should instead be in at least as strong a position as they would have been in had the retailer not attempted the "cure" in the first place (i.e. consumers should then have the option to reject).

12. Consumer education

12.1 We note the clear evidence that consumers (and indeed traders) generally have a lack of awareness as to the legal remedies in these cases, but we are also concerned that retailers are not required to place excessive legal notices too prominently in shops as psychologically this would raise questions as to the quality even of perfectly acceptable goods and sour the buying process.

12.2 We agree with the approach suggested by the Law Commission at paragraph 8.218, that the wording of the existing notices displayed in shops should be clarified, and consumers should be directed to sources of further information if needed (for example, the telephone number of Consumer Direct could be advertised).

12.3 We also agree that a standardised summary sheet setting out in only a few bullet points an accurate statement of consumer rights should be produced. Retailers should be obliged to keep copies of the sheet at the point of sale so that if the consumers request further information, they can easily obtain advice.

13. Assessing the impact of reform

13.1 We believe that creating simple, consistent law should be a crucial approach to law reform in this area. It is clear that already fragile consumer understanding will not be aided by further complications in the law. Clear regulation also reduces the administrative costs of compliance for retailers.

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