

The amount of the deposit may be not only greater than the seller's actual loss but than any loss to the seller greater than was reasonably foreseeable at the time of the contract. In such a case, it might plausibly be argued that the deposit is in fact a penalty. In practice, however, courts have tended to keep the rules about penalties and deposits in watertight compartments. A marked change of attitude was revealed in the recent case of *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* (1993),³² where the Privy Council was prepared to treat a deposit in a contract for the sale of land as penal where it exceeded the going rate (10%) (of course even a deposit of 10% might exceed any likely loss but it was effectively held that it was too late to question the taking of deposits at the going rate).

SELLERS' REMEDIES AGAINST THE GOODS

The seller's principal concern is to ensure that he or she is paid for the goods. The most effective and common way of doing this is for the seller to retain ownership of the goods as long as possible. We have already discussed this in Chapter 6. The Act does, however, give the unpaid seller further rights in relation to the goods as well as his or her right to sue the buyer for the price or damages. The provisions which are contained in ss 38–48 of the Act are complex but do not appear to be of much practical importance in modern situations. The central provision is s 39 which says:

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- (1) Subject to this and any other Act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law:
 - (a) a lien on the goods or right to retain them for the price while he is in possession of them;
 - (b) in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them;
 - (c) a right of resale as limited by this Act.
- (2) Where the property in goods has not passed to the buyer, the unpaid seller has (in addition to his other remedies) a right of withholding delivery similar to and co-extensive with his rights of lien or retention and stoppage in transit where the property has passed to the buyer.

32 [1933] 2 All ER 370.

It will be seen that, subject to the conditions set out in the other relevant sections, the seller has the possibility of exercising a lien on the goods, that is of retaining possession of them until he or she is paid, of reselling them or of stopping them in transit, that is, by giving notice to the carrier not to deliver to an insolvent buyer.

APPENDIX I

THE SALE AND SUPPLY OF GOODS ACT 1994

The Sale and Supply of Goods Act 1994 substitutes a new s 14(2) for the existing s 14(2) of the Act. The 1979 and 1994 versions of s 14(2) are set out below:

[New words in the 1994 version are underlined. Deletions are indicated by striking through.]

SALE OF GOODS ACT 1979

- 14 Implied terms about quality or fitness
- (2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition:
- (a) as regards defects specifically drawn to the buyer's attention before the contract is made; or
- (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

SALE AND SUPPLY OF GOODS ACT 1994

- 14 Implied terms about quality or fitness
- (2) 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. ~~merchantable quality, except that there is no such condition~~
- (A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances. ~~as regards defects specifically drawn to the buyer's attention before the contract is made; or~~
- (B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among other things) are in appropriate cases aspects of the quality of goods: if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

- (a) fitness for all the purposes for which goods of the kind in question are commonly supplied:
- (b) appearance and finish:
- (c) freedom from minor defects;
- (d) safety; and
- (e) durability.
- (C) The term implied by sub-s (2) above does not extend to any matter making the quality of goods unsatisfactory:
 - (a) which is specifically drawn to the buyer's attention before the contract is made;
 - (b) where the buyer examines the goods before the contract is made, which that examination ought to reveal; or
 - (c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1999

SI 1999/2083*

1 These Regulations may be cited as the Unfair Terms in Consumer Contracts Regulations 1999 and shall come into force on 1 October 1999.

Revocation

2 The Unfair Terms in Consumer Contracts Regulations 1994[3] are hereby revoked.

Interpretation

3(1) In these Regulations:

“the Community” means the European Community;

“consumer” means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession;

“court” in relation to England and Wales and Northern Ireland means a county court or the High Court, and in relation to Scotland, the Sheriff or the Court of Session;

“Director” means the Director General of Fair Trading;

“EEA Agreement” means the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the protocol signed at Brussels on 17th March 1993[4];

“Member State” means a State which is a contracting party to the EEA Agreement;

“notified” means notified in writing;

“qualifying body” means a person specified in Sched 1;

“seller or supplier” means any natural or legal person who, in contracts covered by these Regulations, is acting for purposes

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relating to his trade, business or profession, whether publicly owned or privately owned;

“unfair terms” means the contractual terms referred to in reg 5.

(2) In the application of these Regulations to Scotland for references to an “injunction” or an “interim injunction”, there shall be substituted references to an “interdict” or “interim interdict” respectively.

Terms to which these Regulations apply

4(1) These Regulations apply in relation to unfair terms in contracts concluded between a seller or a supplier and a consumer.

(2) These Regulations do not apply to contractual terms which reflect:

- (a) mandatory statutory or regulatory provisions (including such provisions under the law of any Member State or in Community legislation having effect in the United Kingdom without further enactment);
- (b) the provisions or principles of international conventions to which the Member States or the Community are party.

Unfair terms

5(1) A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.

(3) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of it indicates that it is a pre-formulated standard contract.

(4) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

(5) Schedule 2 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Assessment of unfair terms

6(1) Without prejudice to reg 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

(2) In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate:

- (a) to the definition of the main subject matter of the contract; or
- (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.

Written contracts

7(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

(2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail but this rule shall not apply in proceedings brought under reg 12.

Effect of unfair term

8(1) An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

(2) The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.

Choice of law clauses

9 These Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a non-Member State, if the contract has a close connection with the territory of the Member States.

Complaints—consideration by Director

10(1) It shall be the duty of the Director to consider any complaint made to him that any contract term drawn up for general use is unfair, unless:

- (a) the complaint appears to the Director to be frivolous or vexatious; or

(b) a qualifying body has notified the Director that it agrees to consider the complaint.

(2) The Director shall give reasons for his decision to apply or not to apply, as the case may be, for an injunction under reg 12 in relation to any complaint which these Regulations require him to consider.

(3) In deciding whether or not to apply for an injunction in respect of a term which the Director considers to be unfair, he may, if he considers it appropriate to do so, have regard to any undertakings given to him by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers.

Complaints—consideration by qualifying bodies

11(1) If a qualifying body specified in Pt One of Sched 1 notifies the Director that it agrees to consider a complaint that any contract term drawn up for general use is unfair, it shall be under a duty to consider that complaint.

(2) Regulation 10(2) and (3) shall apply to a qualifying body which is under a duty to consider a complaint as they apply to the Director.

Injunctions to prevent continued use of unfair terms

12(1) The Director or, subject to para (2), any qualifying body may apply for an injunction (including an interim injunction) against any person appearing to the Director or that body to be using, or recommending use of, an unfair term drawn up for general use in contracts concluded with consumers.

(2) A qualifying body may apply for an injunction only where:

- (a) it has notified the Director of its intention to apply at least 14 days before the date on which the application is made, beginning with the date on which the notification was given; or
- (b) the Director consents to the application being made within a shorter period.

(3) The court on an application under this regulation may grant an injunction on such terms as it thinks fit.

(4) An injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any person.

Powers of the Director and qualifying bodies to obtain documents and information

13(1) The Director may exercise the power conferred by this regulation for the purpose of:

- (a) facilitating his consideration of a complaint that a contract term drawn up for general use is unfair; or
- (b) ascertaining whether a person has complied with an undertaking or court order as to the continued use, or recommendation for use, of a term in contracts concluded with consumers.

(2) A qualifying body specified in Pt One of Sched 1 may exercise the power conferred by this regulation for the purpose of:

- (a) facilitating its consideration of a complaint that a contract term drawn up for general use is unfair; or
- (b) ascertaining whether a person has complied with:
 - (i) an undertaking given to it or to the court following an application by that body; or
 - (ii) a court order made on an application by that body, as to the continued use, or recommendation for use, of a term in contracts concluded with consumers.

(3) The Director may require any person to supply to him, and a qualifying body specified in Pt One of Sched 1 may require any person to supply to it:

- (a) a copy of any document which that person has used or recommended for use, at the time the notice referred to in para (4) below is given, as a pre-formulated standard contract in dealings with consumers;
- (b) information about the use, or recommendation for use, by that person of that document or any other such document in dealings with consumers.

(4) The power conferred by this regulation is to be exercised by a notice in writing which may:

- (a) specify the way in which and the time within which it is to be complied with; and
- (b) be varied or revoked by a subsequent notice.

(5) Nothing in this regulation compels a person to supply any document or information which he would be entitled to refuse to produce or give in civil proceedings before the court.

(6) If a person makes default in complying with a notice under this regulation, the court may, on the application of the Director or of the qualifying body, make such order as the court thinks fit for requiring the default to be made good, and any such order may provide that all the costs or expenses of and incidental to the application shall be borne by the person in default or by any officers of a company or other association who are responsible for its default.

Notification of undertakings and orders to Director

14 A qualifying body shall notify the Director:

- (a) of any undertaking given to it by or on behalf of any person as to the continued use of a term which that body considers to be unfair in contracts concluded with consumers;
- (b) of the outcome of any application made by it under reg 12, and of the terms of any undertaking given to, or order made by, the court;
- (c) of the outcome of any application made by it to enforce a previous order of the court.

Publication, information and advice

15(1) The Director shall arrange for the publication in such form and manner as he considers appropriate, of:

- (a) details of any undertaking or order notified to him under reg 14;
- (b) details of any undertaking given to him by or on behalf of any person as to the continued use of a term which the Director considers to be unfair in contracts concluded with consumers;
- (c) details of any application made by him under reg 12, and of the terms of any undertaking given to, or order made by, the court;
- (d) details of any application made by the Director to enforce a previous order of the court.

(2) The Director shall inform any person on request whether a particular term to which these Regulations apply has been:

- (a) the subject of an undertaking given to the Director or notified to him by a qualifying body; or
 - (b) the subject of an order of the court made upon application by him or notified to him by a qualifying body; and shall give that person details of the undertaking or a copy of the order, as the case may be, together with a copy of any amendments which the person giving the undertaking has agreed to make to the term in question.
- (3) The Director may arrange for the dissemination in such form and manner as he considers appropriate of such information and advice concerning the operation of these Regulations as may appear to him to be expedient to give to the public and to all persons likely to be affected by these Regulations.

SCHEDULE 1

Regulation 3

QUALIFYING BODIES

PART ONE

- 1 The Data Protection Registrar.
- 2 The Director General of Electricity Supply.
- 3 The Director General of Gas Supply.
- 4 The Director General of Electricity Supply for Northern Ireland.
- 5 The Director General of Gas for Northern Ireland.
- 6 The Director General of Telecommunications.
- 7 The Director General of Water Services.
- 8 The Rail Regulator.
- 9 Every weights and measures authority in Great Britain.
- 10 The Department of Economic Development in Northern Ireland.