

CONSUMER PROTECTION AND THE LAW OF CONTRACT

INTRODUCTION

1. The topic is an exceptionally broad one, which could easily be the subject of an entire paper at law school. To cover the whole topic in 50 minutes is clearly impossible. A selection of interesting aspects is all that is possible.
2. Consumer protection is a topic to be kept in balance. There will always be defective products. There will always be rogue vendors. I think most people would accept it is a legitimate objective for Parliament to assist consumers experiencing one or both of these problems. Equally, there will always be troublesome customers who may have totally unrealistic expectations for the product they purchase; or who may simply be difficult people to deal with. All people in businesses, dealing with the public (including lawyers) know that you can't please all of the customers all of the time. Again, a vast majority of consumers, when faced with the choice between competing products and suppliers, are unlikely to pay more for a quality product from a well recognised business that has been around for a long time. Most consumers, at the outset, buy the cheapest product. Then, when the product fails, they certainly complain and seek full legal protection. While the introduction to this session in the seminar flyer may suggest otherwise, I do not see a more extensive role for contract in protecting consumers than the law presently offers. The balance between supplier / manufacturer on the one hand and consumer on the other in the Consumer Guarantees Act (and in the other applicable legislation) in my view is more than adequate to protect the consumer; and in some respects pushes the envelope even possibly too far in the consumer's direction.
3. Two issues, which are outside the scope of this paper, but which in my view would do far more to protect consumers, than tinkering with the present legislation are:
 - (a) An effective disputes procedure. The Consumer Guarantees Act introduced major and detailed changes in support of consumers. Nevertheless, almost 12 years after its introduction, there has been relatively limited litigation. The Act has only been interpreted significantly by the Court of Appeal in one case. The fact is that the purchase price of many cars, boats etc are presently in a range which is outside the Disputes Tribunal; and yet realistically does not merit significant litigation in the District Court. Disputes Tribunals arguably do not achieve a high legal standard and possibly do not merit any significant increase in their jurisdiction. The greatest assistance for consumers would be an effective and cheap forum where disputes over consumer issues could be resolved within a time frame and at a cost, which ends up being commensurate with the sums in dispute.
 - (b) The other issue of consumer protection, which is assuming major significance, is limitation of corporate liability. Consumers are being short-changed by companies being liquidated with the object of

cancelling out the existing legal obligations, which that company may owe. This is particularly prevalent in the building industry but is not confined to it. Consumer protection would be enhanced by some limitations (probably by statutory amendment to Companies Law) to restrict this widely employed device used to avoid what are often otherwise clear legal obligations to consumers.

4. There is also a significant by-product of consumer protection legislation, which needs to be borne in mind. Some of the legislation (for example, the Fair Trading Act and the Commerce Act) give rights to rival traders as well as to consumers. Very often, rival traders seek to use those rights to protect their own position and to put legal obstacles in front of a competitor and “slow that competitor down a bit”. Many complaints, for example, to the fair trading authorities have nothing to do with consumer protection and everything to do with trying to get a Government department on the back of a competitor. The reality is that when Parliament creates new rights, they can often be used for unintended purposes. Excessive zeal in the consumer protection areas certainly has a risk of achieving unintended outcomes.

COMMON LAW PROTECTIONS

5. Consumer protection legislation sometimes expressly and always impliedly suggests that the common law was not up to the task. Consumers could not be protected under common law because judges were “shackled by precedent”. Suggestions are made that the concept of caveat emptor applies sensibly only where there is relatively equal bargaining power. It is said this is no longer the case with vast and powerful multinationals in one corner and little vulnerable Joe consumer in the other. In defence of the common law, it is worth observing that it evolved as the rules of the game, without any attempt to influence who would ultimately end up the winner and the loser. The concept of tilting the playing field, to achieve a more equal contest, is a relatively recent development, which was outside of the fundamental conception of the common law for most of its evolutionary period.
6. In fact, the Courts did evolve a significant measure of consumer protection. Examples are strict interpretation of exception clauses; the Contracts Enforcement Act (imposing a need for writing in the case of a number of important types of contracts). Again the principle that contracts in restraint of trade are presumptively void (but can be upheld where the restraining party can show they are reasonable) is a significant consumer protection. The Sale of Goods Act may offer limited consumer protection – but the common law was certainly not totally ineffective. The acknowledged need for consumer protection law today, should not (in my view) be seen as a seriously implied criticism of the common law.

CONSUMER GUARANTEES ACT 1993

7. This is undoubtedly the key piece of consumer protection legislation of relevance to the law of contract. A text on the Act issued soon after it was passed,

- (Skinnon and Sligo) quotes the Consumer's Institute as saying the Act is "great news for consumers". The authors say the Act has "emerged in more radical form than many expected at various stages of its long and careful gestation". With the enacting of the legislation, the authors suggest "New Zealand consumer law has come of age". They predicted the Act's "future looks set to be long and interesting".
8. The reality is, 12 years later, the Act has not assumed the prominent place in our law that those comments anticipated. There have been limited cases on the Act. I have suggested the possible reasons for this in paragraph 3 (a) above. Despite its unanticipated lack of impact, it is fair to say, that the Act is detailed, addresses and solves in favour of consumers many legal issues and hurdles; and represents a major legal shift in favour of consumers (despite not being relied on more in Courts).
 9. A brief summary of the Consumer Guarantees Act ("CGA") is that:
 - (a) The Act only applies to **consumers**. A "consumer" is one of the Act's central concepts. If you are not a consumer, the Act does not apply. A consumer is a person (and a body corporate can be a person) who acquires goods "of a kind ordinarily acquired for personal, domestic, or household use or consumption" – Section 2(1)(a). The obvious object of this definition is to separate persons who are to gain the protection of the Act from all others. If a person is buying goods that are ordinarily used for commercial purposes presumably the draftsman assumed that a supplier would know they were not consumers and thereby were outside the protections of the Act. The obvious difficulty with this threshold test is that many goods have both domestic and commercial uses. Significantly, comparable Australian legislation had a limit on the value of goods and services covered by comparable legislation to AU\$40,000. Our Act omitted any monetary limit. The purchaser who buys a maxi super yacht for their pleasure has thereby been brought within the definition of consumer and given the significant protections in the Act without the boat builder having the opportunity to contract out of them.
 - (b) Having bought domestic goods, a person qualifies as a consumer and is covered by the Act, unless they are ruled out in one of two ways. In the first place, they are ruled out if they have acquired the goods for the purpose of re-supplying them in trade or consuming them in the course of production or manufacture - Section 2(1)(b). Secondly, a consumer who falls outside this Section 2(1)(b) but who has nevertheless acquired the goods for the purposes of a business, will not be covered if the supplier has contracted out of the Act in accordance with Section 43(2). If the goods have not been acquired for a business then the supplier is prevented from contracting out of the provisions of the Act by Section 43 (1).
 10. Put another way, the test whether the Act applies, is generally determined by the following three questions:

- (a) Were the goods or services “of a kind ordinarily acquired for personal, domestic or household use or consumption? (Section 2(1)(a). If yes, the Act will apply unless ruled out by questions (b) and (c).
 - (b) If yes, were the goods acquired for re-supply or consumption in a business? If yes, the Act does not apply.
 - (c) Were the goods in fact acquired for the purposes of a business (although not for re-supply or consumption in that business). The Act will apply unless the supplier has contracted out of the Act.
11. Once a consumer has safely come within the CGA, the Act makes clear that the widest possible categories of goods are included. “Goods” includes goods attached to or incorporated in any real or personal property; includes ships, aircraft and vehicles; and includes animals, minerals, trees and crops, whether on, under or attached to land. The one exclusion from the category of goods is “a whole building attached to land, unless the building is a structure that is easily removable and is not designed for residential accommodation”.

CHANGES MADE BY THE ACT

12. If a case comes within the Act, major change was made to the existing law:
- (a) Parties can't contract out of the Act.
 - (b) The Act applies to services, as well as goods.
 - (c) A lengthy list of guarantees apply to goods – guarantees as to title; as to quality; as to fitness for purpose; that the goods comply with the description and with any sample; that adequate spare parts will be available; and that the price if not specified will be reasonable.
 - (d) In relation to services, there are guarantees imposed as to reasonable care and skill; as to fitness for purpose; as to time of completion; and as to the imposition of a reasonable price, where this is not defined in the contract. The CGA steps outside the boundaries of Tort. A good or a service falls in or outside an applicable guarantee, irrespective that the supplier has not been negligent or at fault in any way.
 - (e) Major change is made to the common law position in relation to enforcement of the guarantees. These not only bind the vendor but also the manufacturer as well (assuming vendor and manufacturer are separate entities). "Manufacturer" includes the importer or distributor of foreign goods. Not only is the initial consumer who purchased the goods entitled to sue – donees from the initial consumer and, in some cases on-purchasers from the initial consumer are also entitled to enforce the guarantees. As Cheshire and Fifoot observe "the Consumer Guarantees Act has important privity implications. In its area of operation, it goes much further than the Contracts (Privity) Act, for it allows the owner of the property the subject of the guarantee to claim irrespective of any question of designation or of the contracting parties intentions".
 - (f) As to remedies, the consumer has a remedy in damages. These may include consequential loss where this was "reasonably foreseeable as liable to result" from the failure to comply with the guarantee (Section 18(4)). There is also a right to reject the goods, where the failure of the goods to comply with the guarantee "cannot be remedied or is of a substantial character (Section 18(3)). The right to reject must be exercised within a reasonable time (Section 20). If the right of rejection is exercised, the decision to reject must not only be notified within a reasonable time, but must also set out the ground or grounds for rejection (Sections 20 and 22).

AUTHORITIES

13. Possibly for the reasons given above, there has been less litigation on the Act than might be expected. *Nesbit v Porter* (2000) 2NZLR 465 Court of Appeal is the leading authority. In that case, Nesbit purchased a double cab 4x4 vehicle from Porter. Whether it had an outside tray on the back, is not clear. The Court

dealt with the issue of whether the vehicle was “of a kind ordinarily acquired for personal / domestic or household use” at page 473 as follows:

[26] It is clear from the definition of “consumer” that Parliament contemplated that goods can have several uses; that some buyers might acquire them exclusively for a business use, some exclusively for a private use and some might intend to use them for both...

[27] Mr Keall accepted that whether a person is a consumer is not simply a matter of determining a majority or dominant ordinary purpose of acquisition of the particular kind of goods. If more purchases are for a commercial use it does not follow that the goods in question cannot also be said to be ordinarily acquired for private use by the minority of buyers. Take the example of ballpoint pens. They are frequently acquired for private use but it seems probable that much greater numbers are bought by businesses. It is a matter of fact and degree whether goods can be said to be ordinarily acquired for private use when only a proportionately small number of sales is for that purpose.

[29] We consider that “ordinarily” is used in the Act’s definition of “consumer” in the sense of “as a matter of regular practice or occurrence” or “In the ordinary or usual course of events or state of things”. According to Mr Farmer’s evidence, about 20 per cent of buyers of Navaras acquire them exclusively for private use. There were 189 instances in the buyer profile. There is therefore a regular practice or occurrence of such vehicles being purchased for private use. It is in the ordinary or usual course of things. It is not to be overlooked that Mr Porter said that in many years of trading he personally had never sold a vehicle of this type for private use only, but that may possibly have been because his dealership held itself out as specialising in commercial vehicles and so perhaps did not attract many private customers. Mr Farmer’s Nissan dealership and his prior experience as a divisional general manager for Nissan seems to provide a better guide. On the basis of that experience, Mr and Mrs Nesbit’s purchase was not an unusual or uncommon event. The evidence of Mr Farmer shows that they did not make an idiosyncratic choice, buying for private use a vehicle like a Mack truck, which it would presumably be unusual to devote to that purpose.”

14. It is fair to say with this interpretation, that a supplier can only safely assume that goods are outside the CGA, if they are basically never used for private use. Put another way, if it would be an “idiosyncratic choice” to use those goods for a domestic purpose, the Act will not apply. Otherwise there is a significant chance that it will. Certainly Nesbit v Porter is a strong authority in favour of consumers, and widens the opportunity for goods potentially to come within the Consumer Guarantee Act.

15. The Court of Appeal in *Nesbit v Porter* then turned to consider what was a reasonable time to exercise the right of rejection. The Court decided that the defects with rust and the other problems with the vehicle should have been picked up earlier than 9 months. It found the reasonable period for rejection expired one month after the warrant of fitness check (six months after purchase) had detected them.

"[34] The period runs from the date of supply (here 14 July 1995), not from the date on which any defect was, or ought to have been, detected. The Nesbits did not reject the vehicle until nine months had elapsed.

[35] Section 20(2) speaks of the defect, meaning the defect actually encountered by the consumer whose right of rejection is under consideration. The period must be reasonable in relation to the particular defect or combination of defects causing the buyer to reject the goods. Within what time would it be reasonable to expect such defect(s) to become apparent? The actual experience of the particular consumer is obviously relevant but the section requires that reasonableness is to be tested against certain objective criteria...

[36] In many, if not most, cases the period will be longer for new goods, which a buyer is entitled to expect to be defect-free when first used, than it will be for second-hand goods of the same type. As a general rule, the older the goods, the shorter is likely to be the reasonable time. The period may also be longer if the goods are likely to be used infrequently or only at a particular time of year. For example, one would not expect any defect in skis purchased during summer to become apparent until the next winter.

[37] Another factor which will influence the period to be allowed for exercise of the right of rejection is whether regular inspections of the goods for defects are customary or, as in the case of motor vehicles, required by law. But for defects which cannot be expected to be revealed by such inspections the reasonable time may be longer."

16. The Court of Appeal, in *Nesbit v Porter*, imposed a low standard in terms of the reasons for rejection, which had to be given to achieve a valid rejection notice (paragraph 51). In paragraph 52, the Court made the following observation:

"[52] There is a significant difference between the tests of merchantable quality in s 16 (b) of the Sale of Goods Act 1908 and acceptable quality in s 7 of the Consumer Guarantees Act. Goods are of merchantable quality if of use for any purpose for which goods which complied with the description under which they were sold would normally be used; if fit for any such purpose they are regarded a saleable under that description (*Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 at p 77). In contrast, as Mr Collis pointed out, goods are of acceptable quality only if fit for all purposes for which goods of the type in question are commonly used and they meet the other standards referred to in s 7(1), including being free of minor defects, with all of these matters being tested against the opinion of a reasonable and fully-acquainted consumer having regard to the matters in paras (f) and (j) of that subsection. This test is quite dissimilar to the test in s 16(b) of the Sale of Goods Act, and it therefore does not follow from the Judge's finding of merchantable quality that there was no breach of the warranty of acceptable quality."

17. The result of the case was that because *Nesbit* had tried to reject the goods too late, the case was remitted to the District Court for damages to be calculated.

OTHER DECISIONS

18. *Jackson v McClintock*. An enterprising plaintiff focused on the exclusion from the definition of goods of "a whole building attached to land". In that case, the house was unfinished and the plaintiff alleged it was not "a whole building" and therefore was covered by the Act. The Court held that although the building was not complete, it came within the definition of a "whole building" and was outside the Consumer Guarantees Act.
19. *Hoskings v The Warehouse*. The plaintiff was awarded damages for stress when their electric blanket caught fire. The consumer, in that case, recovered more under the CGA than just their money-back guarantee.
20. *Barter v Transmission and Diesels Limited (2001)* DCR 412 shows the far-reaching possibilities of the Consumer Guarantees Act. In that case the Court found that the defendants had given Barter a guarantee that the combination of engine and stern drive supplied would propel Barter's catamaran launch at a maximum speed of 27 knots. Subsequently it became apparent this configuration could never achieve 27 knots. The Court found the only possible way of achieving this speed, (and therefore satisfying the guarantee), was to convert the boat to a conventional straight drive configuration. Hubble DCJ addressed the quantum of damages at page 415 as follows:

"[7] I agree with Mr Commons that in general terms the appropriate measure of damages is similar for breach of contract and for breach of the Consumer Guarantees Act. If there is a breach of contract, the plaintiff is to be placed, so far as money can do, in the same position as he would be in had the contract been performed (*Robinson v Harman* (1848) 1 Exch 850 at 855 and *Bloxham v Robinson* (1996) 7 TCLR 122 at 133 (CA)). Under the Consumer Guarantees Act the plaintiff should as far as money can do it, place the plaintiff in the same position as if the terms of the guarantee had been complied with.

[8] This general principle in my judgment is the focus of s18 of the Act wherein the consumer is clearly given the option of requiring the supplier to repair where there is a defect (s18(2)(a)) (in which case s19 does apply), or of remedying "the failure" (where the goods themselves are not defective or the defendant refused to repair) and obtaining from the supplier "all reasonable costs incurred in having the failure remedied" (18(1), (2)(b)(I)). It appears that this statutory right of election may entitle an injured party to greater damages than would be appropriate at common law. This is considered further below.

[9] Section 18(4) places beyond doubt the right of the consumer to claim "in addition" all reasonably foreseeable losses, other than a reduction in value. This must mean reasonably foreseeable losses incurred in achieving compliance with the guarantee.

[10] Although this may be a case in which the "defect" cannot be remedied because there is no defect in the machinery provided, it is not a case in which the "failure" cannot be remedied, because according to expert evidence the failure can be remedied by inserting a different drive system in the vessel."

21. His Honour then referred to *Ruxley Electronics* (1996) 1AC 344. In that case the swimming pool only had a diving depth of six feet, instead of the contracted 7, but was otherwise perfectly usable. The Court ordered £2,000 damages for loss of amenity and declined to award the cost of taking out the pool and rebuilding it so that it complied exactly with the specification (cost of £21,000). Hubble DCJ then went on:

"[16] Mr Commons submitted in effect that there was no requirement of reasonableness in assessing damages under the Consumer Guarantees Act. The plaintiffs have the right to apply the provisions of the Act in accordance with their clear meaning. Unlike the Contractual Remedies Act s9, there is no wide general discretion to assess appropriate damages. Under both the Consumer Guarantees Act and the Contractual Remedies Act it is possible that the assessment of damages based on restitution interest, reliance interest and expectation interest could produce an award considerably greater than that achievable at common

law (*Newmans Tours Lt v Ranier Investments Ltd* [1992] 2 NZLr 68 at 89).

[17] The plaintiffs in this case are entitled to damages pursuant to the remedy they elect under the Consumer Guarantees Act."

22. The Judge awarded \$185,000 plus GST damages to cover the cost of rebuilding the boat with a conventional drive shaft. *Barton v Transmissions and Diesels Limited* has again provided a generous judicial interpretation in favour of consumers in fixing damages in the same way that *Nisbet and Porter* provided a generous interpretation in favour of consumers as to when goods are used for domestic purposes.

SUMMARY

23. The Consumer Guarantees Act has not yet realised the potential, which was seen for it at the time of its enactment. This is despite the fact it has so far been generously interpreted in favour of consumers.

CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2003

24. It is worth observing that the Consumer Guarantees Act applies to "services". These include, in the definition "any contract for, or in relation to, the lending of money or granting of credit...". Certainly some aspects of credit contracts come within the services covered by the Consumer Guarantees Act, as well as being covered by the new Credit Contracts and Consumer Finance Act 2003 ("CCCFA"). The new CCCFA retains many aspects of the previous Credit Contracts Act. The main changes are as follows:
- (a) The CCCFA primarily applies to "consumer credit contracts". That means, the borrower must be a natural person, who enters into the contract primarily for personal, domestic or household purposes. It is unfortunate that the wording in the Consumer Guarantees Act (that it applies to goods "of a kind ordinarily acquired for domestic purposes") and the wording in the CCCFA (that it applies to contracts entered into "primarily for personal, domestic ... etc") could not have been standardised. If you are not a natural person (eg. a family trust) the CCCFA does not apply to your borrowing. If you are a natural person borrowing primarily for domestic purposes, then the CCCFA applies regardless of the amount of credit provided. The \$250,000 limit in the Credit Contracts Act has not been carried forward.
 - (b) Consumers are protected by new disclosure provisions; and by provisions which regulate in some detail the calculation of interest, fees, payments and the quantum of early repayments.
 - (c) Borrowers are given the right to seek hardship relief if they are not in default, and where they face illness, injury, loss of employment or other reasonable cause.

- (d) The oppressive contract provisions apply to all credit contracts (including credit contracts for business or investment purposes) as well as consumer credit contracts. These are essentially carried forward provisions from the Credit Contracts Act so that the Court will be able to re-open a credit contract where it is oppressive or where circumstances of entry into or the exercise of rights under the contract are oppressive.
25. Perhaps the most significant change in the new CCCFA is to recognise the costs and difficulty of enforcement of consumer rights through the Courts as noted in para 3(a) of this paper. The CCCFA provides a new role and powers for the Commerce Commission. It will have authority to prosecute lenders for breaches of the CCCFA and to take proceedings on behalf of debtors. If the Commerce Commission takes proceedings, it can ask for an order that the offending lender pay statutory damages. Where these are ordered under section 88, they are paid to the debtor / borrower (or guarantor or lessee etc). As the authors of a recent Law Society seminar on the new Act note "this will be an important mechanism ... given that in the past many borrowers have been reluctant to pursue legal action against lenders because of economic or personal reasons".
26. In summary, the CCCFA represents some "tweaking" of the law in favour of consumers who enter credit contracts. It is not a radical departure from the Credit Contracts Act, which superceded it.

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