Risk Management Briefing

Consumer Rights Act 2015

Revised – April 2017

Introduction

This Act, which came into force on 1st October 2015, consolidates much of the pre-existing legislation on consumer protection, and introduces some significant new provisions. It replaces the sections of the Unfair Contract Terms Act that relate to consumers, and repeals The Unfair Terms in Consumer Contracts Regulations 1999. The key aspects that are relevant to construction professionals are outlined below, and relate to Part 1 Chapter 4 'Services' and Part 2 'Unfair terms'.

Application

The Consumer Rights Act applies to contracts and notices between a 'trader' and a 'consumer'. A 'consumer' is defined as 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession' (Section 2(3)). This definition is narrower than that under the Unfair Contracts Terms Act 1979, whereby a consumer might in some circumstances have included a firm. However it should be noted that it is wide enough to include individuals who enter into contracts for a mixture of business and personal reasons.

It also covers a wider range of contracts than other legislation commonly encountered by construction professionals. For example, under the Housing Grants, Construction and Regeneration Act 1996 (as amended) only contracts with a residential occupier are excluded is

therefore quite possible that the Consumer Rights Act will apply to a contract that is excluded from the Housing Grants Act 1996 (for example, where an individual undertakes work to a domestic property that is not the individual's main residence).

Implied terms

The Act states that any contract for services is to be treated as including a term that the trader must perform the service with reasonable care and skill (Section 49 (1)). In addition, if the contract does not provided for a price or timescale, it is taken to include a term that the services will be provided for a reasonable price (Section 51), and within a reasonable timescale (Section 52), with what is reasonable being a question of fact in each case. These provisions do not alter the position as it was under previous legislation.

However Section 50 introduces a significant change. It states:

> **Information about the trader or service to be binding**
> (1) Every contract to supply a service is to be treated as including as a term of the contract anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service, if
> (a) it is taken into account by the consumer when deciding to enter into the contract, or
> (b) it is taken into account by the consumer when making any decision about the service after entering into the contract.
> (2) Anything taken into account by the consumer as mentioned in subsection (1)(a) or (b) is subject to—
> (a) anything that qualified it and was said or written to the consumer by the trader on the same occasion, and
> (b) any change to it that has been expressly agreed between the consumer and the trader (before entering into the contract or later).

In relation to this section, the consultant should note that statements made about the services to be provided, either orally or in writing, may become a binding term of their appointment. This may be particularly relevant to early discussions about the feasibility of a project or service, for example an undertaking that a project can be achieved for a given budget or timescale may become a binding term, even though intended only as outline guidance or 'ball park' advice. It appears that any assurances given or statements made cannot be modified or qualified by other statements unless these are made 'at the same time' as the original statements, or the modification/qualification is agreed in writing with the consumer.

This is a significant change in the law as, subject to the normal implied obligation to use reasonable skill and care, the written terms of engagement with a consumer could be assumed to represent the full extent of the obligations. In order to prove otherwise, the consumer would have needed to bring a case on the basis of a term implied *in fact*, which would only succeed if stringent criteria were met. Now it appears the consumer need only prove that a statement was made and that it relied on that statement, a lesser burden to discharge.

Overall this suggests that consultants must take special care during all pre-contract negotiations not to give any promises or undertakings unless they are confident that they would be happy to be held to them.

Remedies

The Act introduces some new remedies in cases where the consultant has not complied with express or implied terms. Section 54 states:

> **Consumer's rights to enforce terms about services**
> (3) If the service does not conform to the contract, the consumer's rights (and the provisions about them and when they are available) are—
> (a) the right to require repeat performance (see section 55);
> (b) the right to a price reduction (see section 56).

The right to require repeat performance entitles the consumer to require a consultant to perform a service again, within a reasonable time and without any cost or significant inconvenience to the consumer, to the extent necessary to complete its performance in conformity with the contract (Section 55). The only exception would be if completing performance of the service is impossible.

There are many situations in construction where repeating a service may be technically possible, but extremely inefficient and impractical. In addition, it appears as if there is no limit to the number of times the consumer may require repeat performance. It remains to be seen how the courts will apply this provision in the context of construction projects, and whether any principles of common law will be used to temper its effect.

Unfair terms

Part 2 sets out the law regarding unfair terms in relation to consumers. Section 62 (1) states that an unfair term of a consumer contract is not binding on the consumer. The test for 'unfair terms' in the Act is the same as that in the 1977 Unfair Contract Terms Act: it provides that a 'term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer' (Section 61(4)). An 'indicative and non-exhaustive list' of examples of what might be considered unfair terms is set out in Schedule 2 to the Act. This includes, for example, any term which has the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, which would include an arbitration agreement.

The most significant change relates to terms specifying the main subject matter of the contract or setting the price. These terms are *not* subject to the 'fairness' test provided that they are both transparent and prominent (Section 64 (1) and (2)). 'Transparent' is defined as being 'in plain and intelligible language and (in the case of a written term) legible' (Section 64 (3)) and 'prominent' as 'brought to the consumer's attention in such a way that an average consumer [who is reasonably well-informed, observant and circumspect] would be aware of the term' (Section 64 (4), (5)). The new Act no longer makes an exception for terms that have been 'individually negotiated' as had been the case in The Unfair Terms in Consumer Contracts Regulations 1999.

Consultants are therefore advised to check that any bespoke or standard terms that they are

considering putting forward to their clients have been drafted with the new Act's provisions in mind.

Cancellation of services contracts

It should be noted that the Consumer Rights Act 2015 has not repealed the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, therefore provisions that relate to cancellation remain in force. These give consumers the right to cancel a contract made 'off-premises' or by 'distance' within 14 days of its conclusion. The Regulations should be consulted for the exact definition of these types of contract, but in brief:
Distance contract: means a contract concluded between a trader and a consumer without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded. Appointments for the provision of services negotiated and concluded entirely by email would fall into this category.

Off-premises contract: means a contract concluded (or for which an offer was made by the consumer) in the simultaneous physical presence of the trader and the consumer, in a place that is not the business premises of the trader. It also covers situations in which 'the consumer was addressed by the trader in a place which is not the business premises of the trader', and a contract is concluded immediately after either on the business premises of the trader, or through distance communication. So appointments agreed at a consumer's house, or where a meeting is held at a consumer's house and proposed terms are left with the consumer, and the consumer immediately confirms agreement by email, would fall under this definition.

In these situations the consumer will have the right to cancel within 14 days. However the regulations are lengthy and complex with many exceptions, so these need to be studied carefully before applying the 14-day rule.

This *Risk Management Briefing* is for general guidance only and legal advice should be sought to cover any particular situation.

This briefing was drafted by Professor Sarah Lupton, Lupton Stellakis in conjunction with the CIC Liability Panel.
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