Richard Mawrey's Consumer Credit Column January

Sale of goods – an MGM Production?

One of the great aphorists of the twentieth century was Samuel Goldwyn (1879-1974), the founder of Metro-Goldwyn-Mayer and one of the original 'movie moguls'. His sayings were a curious cross between Groucho Marx and Mrs Malaprop. One of his more famous aperçus was 'A verbal contract isn't worth the paper it's written on'. Though instantly risible, this comment does tap into a deep sub-conscious folk feeling that contracts are not (or should not be) binding unless they are contained in a written document, preferably signed by all parties. At the conscious level, of course, we all know this is rubbish. Most of the contracts we make in our daily lives are not documented in any way but we still expect them to be legally enforceable on both sides.

The attitude of the law towards compulsory formalities as a condition of contractual enforceability is constantly fluctuating, being the product of a tension between two conflicting principles. The first is the desirability of certainty. If the enforceability of a contract depends on prescribed formalities, then the existence or otherwise of that contract can be quickly ascertained by seeing whether the formalities have been complied with. If yes, there's an enforceable contract; if no, not. Also, with a written contract, while the words themselves may be obscure or ambiguous and need careful construction, the base text from which the lawyers work is ascertainable and available for scrutiny. The other, and contrary, principle is the determination of the law to ensure that those who voluntarily enter into commitments which are intended to be legally binding should not be able to wriggle out of those commitments by taking technical points about the absence of formalities. A good example of the latter is the marked reluctance of the judiciary in recent years to accede to artificial arguments based on the Consumer Credit (Agreements) Regulations 1983 put forward by claims farmers trying to get their customers off credit-card debts.

This tension is reflected in the attitude of legislators. When the freedom of contract principle is in the ascendant there are few pieces of legislation prescribing formalities for contracts: when the consumerist lobby is in the ascendant, the position is reversed. Legislation is, after all, like the economy, cyclical.

The main precursor of today's obsession with formalities dates from a similar era of spendthrift hedonism. One would not suspect the court of the Merry Monarch, Charles II, to be a hotbed of consumerism: hot beds in the literal sense, *bien sûr*: likewise consumption – indeed conspicuous consumption – but consumerism? None the less, the so-called Cavalier Parliament was responsible for one of the seminal statutes of English law: 'An Act for prevention of Frauds and Perjuryes', better known as the Statute of Frauds 1677. Like all the best Acts of Parliament (such as the Sale of Goods Act) it was the work of a single draughtsman, in this case Sir Leoline Jenkins, a Welsh law don at Oxford who later rose to be a Secretary of State.

The Act was concerned to ensure that the more important land and commercial transactions were properly documented, and most of its provisions are still in force, albeit re-enacted into

more modern statutes. The principal provisions still with us are the rules requiring transfers of land and creation of leases to be contained in or evidenced by a signed document and the rule whereby a guarantee of an obligation must be in writing signed by or on behalf of the guarantor.

Section 16 of the Statute of Frauds, however, did cause problems. Headed 'In what Cases only Contracts for Sales of Goods for £10 or more to be binding', its text read:

'And bee it further enacted by the authority aforesaid That from and after the said fower and twentyeth day of June [1677] noe Contract for the Sale of any Goods Wares or Merchandises for the price of ten pounds Sterling or upwards shall be allowed to be good except the Buyer shall accept part of the Goods soe sold and actually receive the same or give some thing in earnest to bind the bargaine or in part of payment, or that some Note or Memorandum in writeing of the said bargaine be made and signed by the partyes to be charged by such Contract or their Agents thereunto lawfully authorized.'

Of course 'ten pounds Sterling' was worth a bit in 1677. Why, you could buy a (minor) politician for that sum. What the Statute was concerned with, therefore, was serious commercial transactions. £10 would buy you 4 quarters (roughly a ton) of wheat as at Lady Day 1677. But, as so often in history, the value of the pound slumped and the practical effects of the section widened accordingly. By 1893 it had become clear that the provision was actually aiding fraud by allowing unscrupulous parties to rely on the technicalities of the Act to renege on contracts of sale. The Sale of Goods Act of that year consequently repealed it.

Theoretically, therefore, an agreement for the sale of goods became free from any statutory requirement for a signed document. Pace Mr Goldwyn, an oral agreement *was* fully binding. But legislators, like Nature, abhor a vacuum, and, bit by bit, the need for documents has crept back into the law of sale of goods. The first to go were hire-purchase and conditional sale, for which a signed written agreement has been obligatory since at least 1938. This in turn led to the enormous complications of the Consumer Credit Act 1974 and its attendant regulations. The outright sale of goods, however, remained free from the need for paperwork.

But not for long. Came the Millennium and came the Consumer Protection (Distance Selling) Regulations 2000, which required the seller to provide the buyer in advance of making the contract (or, if the contract is oral on the telephone, immediately afterwards) with some eleven or twelve pieces of information 'in writing or some other durable medium which is available and accessible to the consumer'.

Next the doorstep selling regulations, the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008, at whose expense I had a little gentle fun in my November column. These, while not requiring the agreement itself to be in writing, did require a written notice of cancellation rights to be supplied together with a written cancellation form for use by the consumer.

Now those awfully nice people in Brussels have come up with still more bright ideas for complicating consumer contracts. No matter what troubles may beset the European Union or the Euro, the EU bureaucracy, like Ol' Man River, 'just keeps on rollin' along'. Autumn 2011 therefore saw yet another consumer directive – the Consumer Rights Directive (Directive 2011/83/EU). Directives must be implemented by Member States within two years of being made: the date for this one is 13 December 2013. On past form (see, of course, the Consumer Credit Directive 2008), the policy of the BIS will be as follows. One, do nothing whatsoever for 18-21 months: two, then 'go out to consultation' for several months: three, realise the deadline is fast approaching and panic: four, hastily produce botched regulations which are published ten days before coming into force: five, repent at leisure and carry out drastic amendments some months later. It would be a mistake, however, for the rest of us to hide under the bedclothes and hope it will go away. Come it will for a' that.

The Directive covers contracts both for sale of goods and for the provision of services but excludes financial services. It applies to contracts for the supply of water, gas, electricity or district heating but excludes a number of contracts including land contracts, building contracts, gambling and various holiday contracts covered by other Directives. Food and drink supplied by roundsmen are excluded, as are passenger transport services and sales by vending machines. Importantly, Member States are given the discretion to exclude some provisions in the case of 'day-to-day transactions … which are performed immediately at the time of their conclusion.' But will the UK exclude them? Come on, we all know and love the BIS. Dream on, sunshine.

Though the Directive is mainly aimed at distance contracts and what it calls 'off-premises contracts' (for which the definition is much wider than its equivalent in the Doorstep Selling Regulations), it also covers ordinary contracts for goods and services. Even for these, the trader will have to provide the customer in advance with eight obligatory pieces of information unless that information 'is not already apparent from the context' and Member States can, if they wish, add to that list (any bets as to what BIS will do?) Although the Directive does not make it compulsory to provide it in writing, it must be provided in a 'clear and comprehensible manner'. Given the complexity of the information required (eg the trader's complaints handling policy and the conditions applicable to after-sales service), it is difficult to see how purely oral communication will meet the requirement.

The requirements for distance and 'off-premises' contracts are even more horrendous. Here the information has got to be provided 'in writing or other durable medium' and the list of pieces of information runs to no fewer than 20 separate items including codes of conduct and 'the interoperability of digital content with hardware and software that the trade is aware of or can reasonably be expected to have been aware of'. There will be requirements for the trader to provide the consumer with 'a copy of the signed contract' or written confirmation of the consumer's consent and there will now be even longer rights of withdrawal (14 days).

Let's return to the everyday transaction. You pop into the pub for a pint, you drop into Comet to replace your iron, you arrive at the supermarket checkout with a full trolley – are you going to be handed a printed sheet with a mass of interesting facts about 'the interoperability

of digital content'? As they would surely say in the Berlaymont, '*pourquoi pas?*' After all, you *are* a consumer. You have Rights. Generations of consumerists have *fought* for those Rights. So stop whingeing.

Well, the wheel turns. Who is this Restoration figure at my shoulder whispering into my ear: 'told you so, boyo – get it in writing'? Will it be back to 1677? To end, as we started, with the great Sam Goldwyn: 'include me out'.

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