16 September 2015

The Consumer Rights Act 2015: Unfair Terms

By George Mallet

The Consumer Rights Act 2015 comes into force on 1 October 2015. In anticipation, Henderson Chambers is publishing a series of Alerters reviewing the key provisions. This third article in the series by George Mallet, considers the reforms to unfair terms.

INTRODUCTION

1. Consumers are 'asked' to agree to a deluge of contractual terms on an ever more frequent basis. If they do not agree, they are often told to lump it or leave it. However, consumers have, for some time, been protected against being bound by 'unfair terms' by virtue of the Unfair Contract Terms Act 1977 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR). From 1 October 2015 that statutory protection will change; Part 2 of the Consumer Rights Act (the Act) will replace UCTA (to the extent that it relates to business to consumer contracts) and the UTCCRs (in their entirety) respectively.

2. For the most part, the Act consolidates existing legislation. However, the opportunity to update consumer law has not been entirely overlooked. This Alerter identifies the key terms and scope of application of this legislation. It then sets out the tests for fairness and transparency before identifying the main exemption to the requirement for fairness. Finally, it briefly considers the enforcement provisions.

UNFAIR TERMS

What does Part 2 of the Act cover?

3. The Act concerns contracts made between 'traders' and 'consumers' (save for contracts of employment or apprenticeship), referred to as 'consumer contracts' (s.61). Unlike the UTCCRs, the Act will apply to both negotiated and non-negotiated consumer contracts.

4. A 'trader' is defined as a person acting for purposes relating to his trade, business, craft or profession, whether acting personally or through another person acting in his name or on his behalf (s.2(2)). A 'consumer' is an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession (s.2(3)). The use of 'individual' means that companies cannot be consumers. However, a person acting 'mainly' outside of their business may be classified as a consumer. So a person who buys a kettle for their home, works from home one day a week and uses it on the days when working from home would still be a consumer for the purpose of a claim in respect of the kettle. Where a trader alleges that an individual is not a 'consumer' he will bear the burden of proving the same (s.2(4)).

5. The Act also applies to consumer notices. A consumer notice includes an announcement or other communication which it is reasonable to assume is intended to be read by a consumer. The Act applies to both contractual and non-contractual consumer notices. Non-contractual consumer notices (e.g. a sign in a car park) do not include an exchange of something in return for something else of value (ie. 'consideration').

6. Part 2 also applies to terms included in secondary contracts that have been agreed in addition to the original consumer contract, even where the secondary contract would not otherwise be a consumer contract (s.72).

Fairness and Transparency

7. Part 2's primary purpose is to afford protection to consumers. Accordingly, the Act requires consumer contract terms to be fair (s.62). If they are not, they will not bind the consumer (although the consumer may elect to rely on the term, notwithstanding its unfairness). If a term is found to be unfair (and therefore unenforceable) the contract can continue to have effect in every other respect, in so far as is practical (s.67).

8. A term or notice is deemed to be '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. This is to be determined by taking into account the nature of the subject matter of the contract, and by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends (s.62). Where a term in a consumer contract is ambiguous and capable of being interpreted in different ways, the meaning that is most favourable to the consumer is to prevail (s.69, replicating reg. 7(2) of the UTCCRs).

9. The Act provides that certain terms are automatically unenforceable. A trader cannot, in a consumer contract or consumer notice, limit liability for death or personal injury resulting from negligence (s.65(1), replacing s.2(1) of UCTA). With regard to other loss or damage, traders can limit liability so long as the clause is 'fair'.

10. In addition to being fair, terms in consumer contracts or notices must be transparent, meaning they must be legible and expressed in plain and intelligible language (ss.64 and 68). The obligation to ensure that consumer contract terms and consumer notices are transparent falls on the trader.

The Main Exemption

11. Not all terms may be subjected to the fairness test. Courts will not assess the fairness of terms regarding the price and subject matter of the contract, unless those terms are either not transparent or not prominent (s.64). A term is transparent if it is expressed in plain and intelligible language and (in the case of a written term) is legible. A term is prominent if it is brought to the consumer's attention in such a way that a reasonably well-informed, observant and circumspect consumer would be aware of the term (s.64).

The Grey List

12. In order to assist with determining fairness, the Act contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair (Part I of Schedule 2, introduced by s.63). The list, known as the 'grey list', largely replicates the UTCCRs grey list, with some additions. These are:

    a. Paragraph 5: Terms that require the consumer to pay disproportionate amounts if they do not continue the contract, including where a consumer cancels a contract (a so-called "termination fee").

    b. Paragraph 12: Terms that allow the trader to determine the subject matter of the contract after the contract has been agreed with the consumer (excluding indefinite contracts).

c. Paragraph 14: Terms that allow the trader to set (for the first time) the price under a contract (or the method for calculating the price), after that contract has been agreed with the consumer. This paragraph does not apply to contracts that last indefinitely, contracts for the sale of securities and foreign currency (etc.), and price index clauses.

It is important to remember that the terms on the list are not automatically unfair; the list is to be used to guide the court but the court must still apply the fairness test. The Act also gives the Secretary of State the power to amend the grey list by way of statutory instrument (s.63(5)).

Enforcement

13. Aside from enforcement via private actions brought by consumers, traders may also have their terms scrutinised by regulators (principally the Competition and Markets Authority, see Sch.3, introduced by s.70).

14. Further, the courts must assess the fairness of consumer contract terms, even when not expressly asked to do so by the parties involved (s.71). This may mean that conscientious traders will have to be prepared to meet questions regarding the fairness of their terms, even when fairness has not been pleaded as an issue in the claim. The court will not, however, be expected to consider fairness if it lacks sufficient legal and factual material to do so (s.71(3)).

George Mallet

16 September 2015