

**King's College London: Strand Campus  
Construction, the consumer & the law: Time for  
change?  
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**Consumers and extensions, renovation and  
maintenance (including the 'owner-builder')**

**Contractual problems when consumers are  
construction employers**

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## **1. Overview**

- 1.1 The general topic of “*Contractual problems when consumers are construction employers*” is a very wide one.
- 1.2 Having consumers as construction employers creates both practical and legal problems which are not present in equivalent commercial projects. Conversely, construction operations are by their very nature more complicated, and more prone to disputes, than most other matters that consumers are likely to contract for.
- 1.3 It is worth emphasising that the majority of construction projects are completed to the satisfaction of both parties. However, when things do go wrong, consumer employers create an unusually, and perhaps unexpectedly, high level of contractual problems. The difficulty arises in trying to limit the risk of disputes and, where you cannot avoid disputes, dealing with them as cost-effectively as possible.
- 1.4 The topics that will be covered in this talk are:
  - 1.4.1 typical consumer projects and comparing these with commercial projects;
  - 1.4.2 the consumer rights regime that applies to contracts between traders and consumers for goods and/or services;
  - 1.4.3 the statutory rights granted to consumers in contracts for goods and/or services;
  - 1.4.4 the legal control of unfair terms in consumer contracts;
  - 1.4.5 the mandatory procedural requirements that apply to certain consumer contracts, including the right to cancel;
  - 1.4.6 the legal regime applicable to construction contracts and the relationship between the definitions of “residential occupier” and “consumer”;
  - 1.4.7 practical issues for agreeing contracts for construction operations with consumer employers;
  - 1.4.8 practical issues for managing consumer construction projects; and
  - 1.4.9 some conclusions and observations for the future of this area.

## **2. Consumer construction projects**

- 2.1 In comparison with other construction operations, for example large scale developments and/or projects, there is a limit on what a consumer employer is likely to contract for. A consumer employer is not, for example, going to undertake a project of the scale of Crossrail or constructing a football stadium. However, this does not mean that consumer employers only deal with “small” projects. A consumer construction project could range from minor repair or maintenance work to a multimillion pound refurbishment, extension (particularly basements) or construction of a new building.
- 2.2 It is therefore instructive to compare a consumer employer construction project with a commercial project of equivalent value and complexity. For example, a large scale residential refurbishment will often be similar in scope to the refurbishment of the

headquarters of a commercial employer. On such a commercial project, you would expect to have a full professional team and properly detailed contractual arrangements in place. This is often not the case in a consumer employer project, which increases the likelihood of disputes and can lead to their escalation.

### **3. Consumer rights regime**

- 3.1 Both consumer contracts and construction operations are considered to be special cases under English law, to which specific regimes apply. The current consumer rights regime was implemented on 1 October 2015 when the main provisions of the Consumer Rights Act 2015 (“**CRA**”) came into force. This regime applies wherever you have a contract for goods and/or services between: a “trader”, a person acting for purposes relating to that person’s trade, business craft or profession; and a “consumer”, an individual acting for purposes that are wholly or mainly outside their trade, business, craft or profession. There is no general exemption for construction contracts, although certain provisions do not apply in relation to contracts for the construction of new buildings.
- 3.2 The key overarching themes for the consumer law regime are fairness and reasonableness. There is a general prohibition on traders engaging in unfair commercial practices under the Consumer Protection from Unfair Trading Regulations 2008, in particular where they are misleading or aggressive. The law does not however impose a general overarching positive duty of good faith,<sup>1</sup> which is a legal concept firmly rooted in European civil codes rather than the common law system of England and Wales. Instead, it operates through targeting areas where consumers are potentially vulnerable and/or in a disadvantaged position. However, the protection given to consumers comes at the potential cost of reducing certainty about the parties’ contractual rights and responsibilities.

### **4. Statutory rights**

- 4.1 Consumers have certain statutory rights in relation to contracts for goods and/or services. As consumer construction contracts will almost always be mixed contracts for goods and services, both sets of rights need to be considered.
- 4.2 In summary, this means that any goods supplied by a contractor must be of satisfactory quality; be fit for a particular purpose; be as described; match a sample/model; and be installed correctly. Where there is a breach, the consumer has potential statutory remedies, including the right to reject the goods, repair or replacement, a price reduction and to treat the contract as at an end, in addition to any other remedies it has under the general common law.
- 4.3 In relation to services, these must be provided with reasonable care and skill; cost only a reasonable price if no price has been agreed; and be provided within a reasonable time of the contract being made if the time for performance has not been agreed. Again, any breaches of these statutory rights give the consumer potential statutory remedies, including the right to ask for repeat performance and the right to a reduction in the price. There is also a statutory right which provides that any information about the trader or the service that the consumer takes into account when deciding to enter into the contract, or making any decision about the service *after* entering into the contract, will be treated as a term of the contract.

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<sup>1</sup> The concept of good faith does however feature in elements of consumer protection legislation. For example, the concept of good faith forms part of the tests for *unfair terms* and *unfair commercial practices*, but is not imposed as a standalone obligation on the part of the trader.

- 4.4 The main effect of this regime is that it will be rare for a consumer construction contract to be contained in a single, comprehensive document. In particular, in addition to the statutory rights, any statements which the consumer can prove were made by the contractor (including certain statements made after the contract was made) have a greater likelihood of being treated as a term of the contract.

## 5. Control of unfair terms

- 5.1 An unfair term in a consumer contract is not binding on the consumer. Under the CRA, a term is considered 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. The concept of "good faith" in the CRA is therefore limited to the narrow concept of balance between the parties' rights and obligations. Whether a term is "fair" is to be determined by taking into account the subject matter of the contract and all the circumstances existing when the term was agreed.
- 5.2 For guidance, the CRA contains an *"indicative and non-exhaustive list"* of terms in consumer contracts that may be regarded as unfair. This includes terms which permit a trader to increase the price of goods or services without giving the consumer the right to cancel the contract if the final price is too high and terms which oblige the consumer to fulfil all of the consumer's obligations where the trader does not perform the trader's obligation. The CRA also prohibits the exclusion or restriction of liability for a number of breaches of the statutory rights.
- 5.3 The control of unfair terms therefore has the opposite effect of the statutory rights. Rather than adding to the contract, it potentially renders parts of it unenforceable. This also increases uncertainty, as it provides a basis on which contractual terms can be challenged in the event of a dispute.

## 6. Mandatory provisions

- 6.1 Finally, there are various procedural requirements that a trader needs to comply with when entering into a contract with a consumer. In particular, the consumer has a right to be provided with other relevant pre-contract information, as prescribed by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("the **CCR**").
- 6.2 The CCR came into force on 13 June 2014. The CCR do not apply to contracts for the construction of new buildings, or the construction of substantially new buildings by the conversion of existing buildings, but do apply to other consumer construction contracts.
- 6.3 For the purposes of the CCR, contracts are divided into three categories: (i) on-premises contracts; (ii) distance contracts; and (iii) off-premises contracts. For all types of contract, there are specified lists of pre-contract information that a contractor must give or make available to a consumer in a clear and comprehensible manner. This information includes: the main characteristics of the goods and services; the identity of the trader; the total price or manner in which the price will be calculated; the arrangements for payment, delivery, performance and time.

- 6.4 Most significantly, the CCR also imposes a cancellation period (sometimes known as a cooling-off period) of 14 days for off-premises contracts.<sup>2</sup> This will most commonly apply where a contract is concluded in (or, in certain cases, following) the simultaneous physical presence of the trader and consumer in a place which is not the business premises of the trader (for example the home of the consumer).
- 6.5 The consumer must be given notice of their right to cancel and a model cancellation form prescribed in the CCR. If notice is not given, the cancellation period is extended by up to a year. The consequences of failing to comply with this requirement are severe. If the consumer utilises their extended right to cancel then the contractor must reimburse all payments received from the consumer. The consumer bears no cost for supply of the service, in full or in part, in the cancellation period, if the contractor has failed to provide the consumer with the information on the right to cancel. The contractor is also potentially guilty of a criminal offence.

## **7. Construction contract regime**

- 7.1 Construction contracts are also recognised as being a special case under English law. The Construction Act regime<sup>3</sup> is geared towards creating a specific contractual framework for construction operations, which includes alteration, repair, maintenance, extension, demolition or dismantling of buildings. Although there is a mutual right to refer disputes to adjudication, the main effect of the Construction Act (and the Scheme for Construction Contracts) is to confer rights on the party carrying out the work. In particular, the contractor is entitled to: periodic payments if the contract is estimated to be over 45 days; to be paid any notified sum (subject to any pay less notices); and suspend performance for non-payment. The whole scheme is geared towards the employer having to “pay now and argue later”.
- 7.2 The Construction Act provisions do not apply to contracts with “residential occupiers”. It is important to remember that this exception only applies to exclude certain types of contracts from the Construction Act, namely those which principally relate to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence. This is entirely separate from the legal regime that affords legal protections to employers where they are “consumers” on certain construction projects.
- 7.3 Although there is significant overlap, the “residential occupier” test is applied to a particular type of construction contract, whereas the “consumer” test is applied to a particular type of contracting party. This means that not all consumers will fall within the residential occupier exception. You can have a consumer employer party to Construction Act contract. For example, a consumer construction contract might relate to a dwelling that the contracting party does not intend to occupy. Alternatively, the building works might not principally relate to a dwelling, for example because they cover a separate building,<sup>4</sup> such as stables or pool houses. Alternatively, the contract might be considered to principally involve a commercial element, for example an old lady converting her house into three small flats, one of

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<sup>2</sup> This also applies to certain distance contracts, but these are unlikely to operate in a construction context.

<sup>3</sup> Under Part II of the Housing Grants, Construction and Regeneration Act 1996.

<sup>4</sup> *Shaw v Massey* [2009] EWHC 493 is a useful example of this, as the Court confirmed that section 106 of the Construction Act requires a party to be a residential occupier of the building that was the subject of the works and that the wider definition of dwelling under section 101, which includes “outbuildings and appurtenances”, is irrelevant to the test under section 106.

which she will live in and the other two to be sold or rented.<sup>5</sup> In any of these scenarios, section 73 of the CRA provides that the statutory controls on unfair terms do not apply to a term of the contract to the extent that it reflects mandatory statutory provisions. This means that the consumer will be bound by Construction Act terms, but otherwise continue to benefit from consumer protections.

- 7.4 Although the scenarios will be less common, it is also worth mentioning that not all residential occupiers will be consumers. For example, an individual<sup>6</sup> property developer could, in the course of his business, contract for works on a dwelling that he intends to live in. In this case you would have a contract that is neither a construction contract nor a consumer contract. We also encountered one novel argument where the contractor in a construction contract with a residential occupier argued that they were not a trader and so the consumer protection legislation did not apply, although this is not something we would hope to encounter on a regular basis.

## **8. The building contract**

- 8.1 When dealing with a consumer employer, you have the potential difficulty of balancing two competing, and conflicting, legal regimes. Where the contract is clearly with a residential occupier, this legal complication is not present. However, you are still dealing with a construction operation, which is something sufficiently complex and difficult that it would otherwise be subject to a specific legal regime.
- 8.2 The ideal way to navigate this difficulty would be to use either a bespoke contract or appropriate standard form contract, for example those produced by the Federation of Master Builders or the JCT Home Owner/Occupier contracts, which incorporate the model cancellation form. In either case, the contract would need to be suitably updated to keep track of any changes in the consumer law regime.
- 8.3 The most common scenario (particularly for smaller projects) is that there is no formal written agreement. Instead, the requirements for a contract to exist (offer, acceptance, consideration and intention to create legal relations) are satisfied through a combination of quotations, exchanges of emails, telephone calls, meetings and invoices. This creates a number of difficulties in establishing what is being done, when it will be done, and how much it will eventually cost and how it will be paid for.
- 8.4 Even for larger projects where some thought will have been given to the contractual arrangements, a little knowledge can prove to be a dangerous thing. For example, we have seen a wide range of surprising contract selections. This includes the standard form partnering contracts typically employed on large scale projects being employed on a residential refurbishment contract. A more common occurrence is the use of an out of date contract that one of the professionals happens to have in its office, for example an old form JCT contract. Where the consumer employer falls within the residential occupier exclusion, we have had the return of withholding notices and other provisions designed to comply with the old Construction Act regime. Even the more current standard forms (for example, the JCT commercial suite) can give a false sense of security. These contracts are geared towards dealing with the legal regime applicable to construction projects, which will often not

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<sup>5</sup> This was an example given by example Mr Justice Coulson in *Shaw v Massey*.

<sup>6</sup> In *Edenbooth Limited v Cre8 Developments Limited* [2008] EWHC 570, Mr Justice Coulson commented that it was difficult to imagine how a company could ever be a *residential* occupier.

apply to a consumer project, and will not address the legal regime applicable to consumers.

## **9. The project**

- 9.1 Disputes are common in construction operations. However, consumer employers tend to be much more personally invested in a project. This will ordinarily mean a much more “hands on” role than a commercial employer. This involvement or, depending upon your view, interference is often at the expense of a professional to act as project manager or even contract administrator. This means a greater risk of a dispute arising and then escalating because of a void in project management.
- 9.2 A key trigger to that dispute is inadequate thought being given to the contractual arrangements that will govern a consumer-employer contract. This will often include no agreement on what could be described as “Construction contract” terms, i.e. the payment and other provisions that would be imposed under the Scheme for Construction Contracts if the contract was not with a residential occupier. This will often overlap with a failure to provide the mandatory information which the trader would be required to provide under the CCR before the contract was made.
- 9.3 Where the core elements of the construction operation are not entirely clear, this will give rise to a mismatch between the parties’ expectations. Two of the most common causes for dispute in any construction project are variations and delay. Failing to reach a clear agreement about what is going to be done and what is covered by the price will often lead to disputes, in particular about the standard of finish and variations. There can also be an issue about the time for the works to be completed and how time and cost risks will be allocated between the parties. There should be a completion date, an understanding of how that might be extended, how the cost might change and what the consequences of delay are. Failing to address this can give rise to real issues for the parties’ planning, in particular about when the property will be occupied.
- 9.4 Finally, you can also have consumers deciding to take on responsibility for some or all of the project themselves, so in effect directly hiring a number of different contractors for different parts of the project, in particular for more “creative” elements of the works. Another common approach is to omit elements of the project as it is progressing and source an alternative “specialist” to carry out that part of the project. This just multiplies the problems above, and can also create causation issues about which of several contractors is responsible for a particular delay or loss.

## **10. Conclusion**

- 10.1 One of the key questions for this conference today is whether it is time for a change. Our view is that it very much is.
- 10.2 The current legal position is unfortunately something of a mishmash of different regimes. There has been an effort to simplify the consumer law regime and bring it in line with consumer protections provided in the rest of Europe, but almost inevitably this has not been entirely successful. There are then the additional specific challenges presented by construction projects.
- 10.3 The main effect of this is to create significant uncertainty when dealing with consumers who have a dispute. Not only are the factual issues in such a dispute challenging, but the legal ones, in particular when you start considering concepts of

fairness and reasonableness, give a range of potential outcomes. However, until there is a single coherent regime for consumers involved in construction projects we will have to do the best we can!

- 10.4 However, there are some key points that can be taken from this to limit the risk of disputes arising (or at least reducing the number of satellite issues that go outside the core dispute). It is important to agree (and be realistic on):
- scope of works;
  - payment terms;
  - timeframes; and
  - variations.
- 10.5 It is also essential to be aware of the key consumer provisions and to avoid agreeing contractual terms which could be considered objectively unfair or unreasonable.
- 10.6 Finally, it is important to stay ahead of disputes, in particular on time and variations. Dispute avoidance and management is a far better outcome for both the contractor and the consumer.