



**Law
Commission**
Reforming the law

Unfair Commercial Practices and Private Redress Feedback from stakeholders

October 2010

In February 2010, the Department for Business, Innovation and Skills asked the Law Commission and Scottish Law Commission to undertake a new project on misrepresentation and unfair commercial practices in consumer transactions.

The project has three aims:

- (1) To simplify the law of misrepresentation;
- (2) To consider whether aggressive commercial practices should be classed as illegitimate pressure under the law of duress; and
- (3) To consider extending rights where there is evidence that consumers have suffered loss as a result of an unfair commercial practice and no private right currently exists.

We are currently drafting a consultation paper, which we aim to publish in spring 2011.

This paper summarises the initial feedback from stakeholders. We are not inviting comments at this stage.

However if, having read this paper, you wish to put additional points or examples to us, please contact us at: commercialandcommon@lawcommission.gsi.gov.uk or by post to: Lorenzo Arditì, Law Commission, Steel House, 11 Tothill Street, London, SW1H 9LJ Tel: 020 3334 0288, Fax: 020 3334 0201.

THE LAW COMMISSION
AND
THE SCOTTISH LAW COMMISSION
**UNFAIR COMMERCIAL PRACTICES AND PRIVATE
REDRESS**

Feedback from stakeholders

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PART 1

INTRODUCTION

BACKGROUND

- 1.1 In February 2010, the Department for Business, Innovation and Skills (BIS) asked the Law Commission and Scottish Law Commission to undertake a new project on misrepresentation and unfair commercial practices in consumer transactions.
- 1.2 The project looks at the wide spectrum of interaction between traders and consumers covered by the Consumer Protection from Unfair Trading Regulations 2008 (the Consumer Protection Regulations).¹ These Regulations came into effect in May 2008, and implemented the Unfair Commercial Practices Directive into UK law.² They are designed to prevent traders from distorting the market through misleading actions, misleading omissions, aggressive practices and some other unfair behaviour. The Regulations also list 31 “banned practices” which are considered unfair in all circumstances.
- 1.3 The Regulations are enforced by the Office of Fair Trading and Trading Standards Departments, which have the power to bring both criminal proceedings and civil enforcement actions.³
- 1.4 However, the Consumer Protection Regulations do not give consumers a private right to redress where they have suffered from an unfair commercial practice. In particular, they do not entitle a consumer to claim compensation for losses caused by a breach. Instead, consumers seeking a personal remedy have to rely on existing private law doctrines, such as the law of misrepresentation, duress, undue influence and harassment. These are often complex and difficult to enforce, and leave gaps in protection.

CALLS FOR REFORM

- 1.5 Over the past four years, consumer groups have advocated a new private right of action for consumers who are victims of unfair commercial practices within the meaning of the Directive.⁴ Conversely, business groups have opposed giving consumers a new private right of action.
- 1.6 In 2006, the Government thought that there might be merit in the consumer groups’ suggestion, but expressed concern that:

¹ 2008 SI 2008 No 1277.

² Directive 2005/29/EC.

³ The Office of Fair Trading and Trading Standards Departments have the power to bring civil proceedings under Part 8 of the Enterprise Act 2002 as well as criminal proceedings under the CPRs. In Scotland, however, criminal proceedings are conducted by the Crown Office and Procurator Fiscal Service on behalf of the Lord Advocate. For a summary of the CPRs, see the joint BERR/OFT Guidance at www.oft.gov.uk/shared_of/business_leaflets/cpregs/oft1008.pdf.

⁴ See *Summary of responses to the consultation on implementing the UCPD*, available at: <http://www.dti.gov.uk/files/file30152.pdf>.

adopting a private right of action for the whole of the Directive might have unintended and adverse consequences by potentially providing consumers with undesirable latitude to sue traders and by impacting on the law of misrepresentation.⁵

- 1.7 In November 2008, the Law Commission published preliminary advice to the Department for Business, Enterprise and Regulatory Reform.⁶ We noted that the Irish legislation to implement the Directive included a private right to damages.⁷ We thought that a private right of redress would bring benefits to consumers. It would clarify the law, fill in gaps and deter unfair behaviour. However, it would have unpredictable consequences, with possible unforeseen costs to traders. It would also be difficult to prescribe suitable remedies with any precision.
- 1.8 We said that introducing a new private right would also raise difficult questions about what should happen to the current law. Simply adding a new right would add one further layer to the existing complexity. However, replacing rights could leave gaps. We thought that a third option could be considered: improving and simplifying the current law, particularly the law of misrepresentation and duress:
- If changes were made within existing structures, it seems less likely that unforeseen consequences would cause significant problems.⁸
- 1.9 On 13 January 2009, the European Parliament passed a resolution calling upon member states “to consider the necessity of giving consumers a direct right of redress in order to ensure that they are sufficiently protected against unfair commercial practices”.⁹
- 1.10 The consumer groups argue that unfair commercial practices are a major problem. Consumer Focus commissioned research which found that almost two-thirds of the population had fallen victim to an unfair commercial practice within the last two years, causing an estimated consumer detriment of £3.3 billion a year.¹⁰ Consumer Focus reported that the OFT and trading standards investigated 224 possible breaches of the Consumer Protection Regulations in the first year or so. They argued that this “pales into insignificance” compared with the extent of the problem. Enforcement would be more effective if public authorities and consumers “worked in tandem”.

⁵ See *Response to the Consultation Paper on Implementing the UCPD* (December 2006), available at <http://www.berr.gov.uk/files/file35750.pdf> at p 7.

⁶ Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to BERR on the issues raised*. Available at <http://www.lawcom.gov.uk/1197.htm>.

⁷ Irish Consumer Protection Act, s 78.

⁸ Above, para 4.19.

⁹ European Parliament Resolution on the Transposition, Implementation and Enforcement of Directive 2005/29/EC and Directive 2006/114/EC.

¹⁰ Consumer Focus, *Waiting to be heard* (August 2009) p 3.

1.11 Although the current laws of misrepresentation, duress, undue influence and harassment provided private remedies in some circumstances, Consumer Focus highlighted gaps in coverage. Furthermore, these causes of action were strongly criticised for being overly complex and seldom used in practice.¹¹ However, others have expressed concern about introducing a new private right of redress. The Confederation of British Industry thought that it might have unintended consequences. Businesses commented that the Regulations were uncertain, and might encourage consumers to bring small and unfounded actions. This would impose litigation costs on traders which would ultimately be passed back to consumers not involved in the litigation. Businesses were also concerned that whilst they could easily agree to amend a practice that regulators consider unfair, it would be more difficult to react to a multitude of varied consumer claims.

THE SCOPE OF REFORM

1.12 This project considers the law as it applies to consumer transactions between businesses and individuals. It has three aims:

- (1) To simplify the law of misrepresentation;
- (2) To consider whether aggressive commercial practices should be classed as illegitimate pressure under the law of duress; and
- (3) To consider extending rights where there is evidence that consumers have suffered loss as a result of an unfair commercial practice and no private right currently exists.

1.13 We have not been asked to look at the law between businesses, or between two private individuals.

¹¹ See Professor Hugh Collins, "A Private Right of Redress of Unfair Commercial Practices: A Report for Consumer Focus", April 2009.

THE AIM OF THIS PAPER

- 1.14 In February 2010, we published an introductory paper for this project, and asked stakeholders to submit evidence of cases where consumers suffer loss due to unfair commercial practices but currently have no effective right of redress.¹² As part of this process, during the period of March to August 2010, we met ten representative groups.¹³ We also received written submissions from nine other stakeholders,¹⁴ and met several academic commentators to discuss the issues.¹⁵ Furthermore, Jane Williams and Caroline Hare of Queen Margaret University provided us with the initial results from their research into Scottish trading standards officers' views of the Regulations. We are very grateful to these groups and individuals for their time and input.
- 1.15 In April 2010, Citizens Advice allowed us to search their Evidence Retrieval Tool looking for examples of unfair commercial practices which had been submitted by bureaux. Cases involving debt collection, utility providers, phone service providers, and vulnerable consumers featured prominently. We also found that pressure selling was one of the most commonly occurring unfair commercial practices involving, for example, orthopaedic beds and training courses. We would like to thank Citizens Advice for allowing us to use this facility.
- 1.16 This paper summarises stakeholders' views on problems with the law relating to unfair commercial practices. As we discuss in Part 2, there was general agreement that the current law of misrepresentation is too complex and should be simplified. In Parts 3 to 7 we give examples of the types of case where consumer groups believe there is a problem for which there is no effective right of redress.
- 1.17 This summary sets out what we have been told, with only a short description of the relevant law to set those comments in context. Now that the Regulations have been in force for more than two years, trading standard officers, businesses and consumer groups are starting to come to grips with how they might apply to current practices. However, at this early stage, there is relatively little in the way of case law or commentary about their effect. We therefore thought it would be useful to provide an account of how stakeholders viewed the Regulations, and what sort of practices they might cover. We hope that these illustrations will help structure a debate on when private redress should (or should not) be available, and what that redress should be.

¹² Law Commission, *Misrepresentation and Unfair Commercial Practices: Some Initial Questions*, available at http://www.lawcom.gov.uk/misrepresentation_commercial.htm.

¹³ Which?, the Citizens Advice Bureau, the Confederation of British Industry, the City of London Law Society, Local Authority Coordinators of Regulatory Services, the Property Ombudsman, the Institute of Consumer Affairs, the National Consumer Federation, Consumer Focus and the British Retail Consortium.

¹⁴ Consumer Focus Scotland, Brian Adam MSP, Dave Thompson MSP, Marilyn Livingstone MSP, McGoogan Solicitors, Richard Baker MSP, Glasgow Caledonian University Department of Law, the Law Society of Scotland, and Derek Payet of Wirral Local Authority.

¹⁵ We are particularly grateful to Professor Christian Twigg-Flesner, Dr James Devenney, Professor Geraint Howells and Professor Hugh Collins.

- 1.18 However, this document is not intended to be a full analysis of applicable law or to represent the views of either Commission. The Law Commissions have not yet formally consulted stakeholders or formulated their proposals. In spring 2011 we are aiming to publish a consultation paper which will provide provisional proposals on the way forward.

EXAMPLES OF UNFAIR COMMERCIAL PRACTICES

- 1.19 Consumer groups have submitted case summaries of unfair commercial practices which are currently providing cause for concern. We have used these, together with newspaper and other reports, to illustrate the types and scope of practices which the Consumer Protection Regulations address, and highlight any perceived needs for simpler or more extensive rights of redress.
- 1.20 All the examples we give are based on actual problems as reported by consumer advisers or the press, though we have sometimes simplified them to assist the illustration. However, we have not attempted to verify whether the case histories are true. The trader will often have a different view of what has taken place. We provide examples simply to illustrate what the law is or might be, on the assumption that the facts are the ones given.

Problem sectors

- 1.21 The examples covered a wide variety of sectors, though some appeared to cause particular problems. Second hand car sales have long dominated the list of consumer problems. However, we were also told about problems with mobile phone contracts; with “switching” between utility providers; with the sale of solar panels; with the way that some disability aids are sold to the elderly; and with the sale of training courses to the jobless.
- 1.22 Many of the problems related to aggressive or misleading ways of obtaining payment. This not only included collecting contract debts but also misleading or aggressive means of threatening “civil recovery” against alleged shoplifting. We were also told of aggressive and misleading practices relating to parking, towing and clamping.
- 1.23 There were some common themes in the types of market likely to lead to problems. One was the presence of layering, where, for example, one organisation sold a product, another provided the service and a third the finance. This was thought to contribute to problems in the mobile phone market. If a phone fails to work, the retailer may blame the network and the network may blame the phone.
- 1.24 Another theme was the over-reliance on commission-driven sales. For example, we were given several case histories where sales people had been overly-keen to switch customers from one utility provider to another, leading to later problems over billing.
- 1.25 A third theme was that some consumers are particularly vulnerable to misleading and aggressive practices. We were told of many problems with doorstep selling to house-bound, elderly or disabled consumers. Similarly, unemployed people may be particularly susceptible to misleading selling of expensive training courses, if salesmen suggest that the course will lead to job opportunities.

- 1.26 Finally, we were told that traders may act more aggressively towards people if those people are stigmatised as “undeserving”. As we discuss in Part 6, consumer groups told us that there were particular problems surrounding “civil recovery”, whereby retailers’ agents demand fixed sums from alleged shoplifters. Consumer groups were concerned that some of the letters sent out by agents were misleading or aggressive, leading consumers to pay, even when the store had no legal right to the money. Where someone had been characterised as a shoplifter, traders argued that they did not deserve protection.

Classifying problems

- 1.27 In Parts 3 to 7 we attempt to classify the many types of unfair commercial practices we have been told about. This is not a straightforward exercise. The Consumer Protection Regulations group unfair practices into five broad areas:

- (1) misleading actions;
- (2) misleading omissions;
- (3) aggressive practices;
- (4) practices contrary to the requirements of due diligence which materially distort the economic behaviour of the average consumer; and
- (5) a blacklist of 31 practices that are in all circumstances considered unfair.

- 1.28 It is also possible to classify unfair practices by what they induce the consumer to do. The Regulations use the concept of a “transactional decision”. The most obvious decision is whether to buy a product, but it is not limited to this. As the European Commission has stressed, “the concept of a transactional decision should cover a wide range of decisions made by the consumer”, from the decision to travel to the shop to the decision whether to sue for an inadequate service.¹⁶

- 1.29 The unfair practices we were told about arose in three broad areas:

- (1) encouraging consumers to buy (or sell) the product;
- (2) encouraging consumers to make a payment; or
- (3) discouraging consumers from exercising a legal right.

- 1.30 Most commonly, unfair commercial practices are part of the sales process – encouraging the consumer to enter into a contract through the use of misleading or aggressive techniques, or using one of the banned practices. We look at these in some detail, starting by looking at misleading actions (Part 3); then at misleading omissions (Part 4); then at aggressive practices (Part 5). Most banned practices are specific examples of practices that are either misleading or aggressive. We draw on them from time to time to illustrate the types of behaviour the Regulations are intended to cover.

¹⁶ Guidance on the Implementation/Application of Directive 2005/29/WECE on Unfair Commercial Practices, 3 December 2009, SEC(2009) 1666, p 22.

- 1.31 Part 6 looks at unfair practices designed to encourage consumers to make payments. Here many of the examples we were told about had elements of both misleading and aggressive practices – most commonly misleading the consumers about their rights and the legal risks they face,¹⁷ and threatening to take legal action which cannot legally be taken.¹⁸ In Part 6 we consider both misleading practices and aggressive practices together.
- 1.32 Finally, practices may be aimed at discouraging people from pursuing their legal rights. We were told about a few examples which we mention briefly in Part 7.
- 1.33 In some cases, problems may occur in all three areas. This was particularly true for complaints about switching utility providers. In several cases, consumers complained that a utility company had encouraged them to switch provider in a misleading or aggressive way; had made mistakes over billing; and had then failed to respond to complaints, continuing to send persistent and unwarranted demands for money. Although each individual unfair practice may have been minor, the cumulative effect could involve considerable distress and inconvenience.

WHERE NEXT?

- 1.34 We are currently drafting a consultation paper on this project, which we are aiming to publish in spring next year.
- 1.35 Whilst we are not inviting comments at this stage if, having read this paper, you wish to put additional points or examples to us, we would be pleased to receive them.
- 1.36 Please contact us at commercialandcommon@lawcommission.gsi.gov.uk, or by post to Commercial and Common Law Team, Law Commission, Steel House, 11 Tothill Street, London, SW1H 9LJ. Tel: 020 3334 0288, Fax: 020 3334 0201.

¹⁷ See CPRs, Reg 5(4)(k).

¹⁸ CPRs, Reg 7(3)(e).

PART 2

PROBLEMS WITH THE CURRENT LAW

- 2.1 Stakeholders acknowledged that the current law provides consumers with a variety of routes for redress for many of the practices mentioned. However, there was general agreement that the current law is too complex and uncertain to be effective. Consumer Focus summarised stakeholders' views as follows:

... most people who are familiar with the common law of contract, tort and restitution understand that rules governing this body of law have developed over several centuries and offer remedies that are uncertain and complex. As it stands, it can be argued that only the most competent of lawyers can offer a satisfactory advice to consumers about their rights in the minefield of common and statute law. In particular, the laws relating to misrepresentation, duress and undue influence are complex.¹

- 2.2 Stakeholders particularly criticised the law of misrepresentation, though they also identified problems with the law of duress, undue influence and harassment.

MISREPRESENTATION

- 2.3 Many lawyers consider the law of misrepresentation to be complex. Consumers and their advisers tend to avoid it.
- 2.4 Consumer advisers told us that they find it difficult to advise consumers on misrepresentation, unless the representation amounts to a contractual term. A breach of contract claim is clearer, simpler to explain to consumers and easier to establish in court.
- 2.5 In both English and Scots law, if the misrepresentation is not a breach of contract, there are three levels of misrepresentations and a variety of remedies, depending on the fault of the trader: fraudulent; negligent under legislation passed in 1967 and 1985;² and innocent. A consumer may also have a claim against a third party with whom the consumer has no contractual relationship but with whom a "special relationship" exists.³
- 2.6 Stakeholders highlighted several problem areas:

¹ Consumer Focus, *Waiting to be heard* (August 2009) p17.

² The Misrepresentation Act 1967 applies in England and Wales and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 10, applies in Scotland.

³ See *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465 and *Caparo Industries plc v Dickman* [1990] 2 AC 605.

- (1) consumers find the four different types of misrepresentation, and the range of potential remedies (including the calculation of potential damages) confusing;⁴
- (2) it is difficult for consumers to establish and prove the elements of fraud or negligence, in particular the state of mind of the trader;
- (3) consumers find the definitions in the law of misrepresentation too complex and ambiguous;
- (4) both the 1967 and 1985 Acts are far from transparent;
- (5) in the law dealing with the liability of third parties for misrepresentation, the definition of “special relationship” should be clarified.

2.7 As LACORS (now known as “Local Government Regulation”) wrote:

The range of types of misrepresentation and damages available often leave advisors struggling to explain the position to a consumer, and the trader unsure of their obligations.

The current *mens rea* element to misrepresentation is largely to blame for its under-use. Removal of this element would allow for greater protection for consumers.

2.8 Professor Hugh Collins wrote: “the measure of damages for misrepresentation is notoriously confusing”.⁵ Citizens Advice added that the 1967 Misrepresentation Act “is not fit for purpose”, and should be reformed so that it is straightforward to use.

2.9 There is a general acceptance that in consumer law the variety of routes and remedies in the law of misrepresentation might need to be reduced in favour of simplicity and certainty.

DURESS,⁶ UNDUE INFLUENCE AND HARASSMENT

2.10 Consumer groups are very concerned about aggressive and pressurised sales techniques.

2.11 Typically, rogue traders call on vulnerable consumers in their homes and pressurise them into buying goods at high prices. We were told that disability aids, orthopaedic beds, vacuum cleaners and home improvements may be sold in this way. Victims are often elderly or have learning difficulties.

⁴ The four different types of actionable misrepresentation, and the difficulty in calculating damages, are discussed more fully in a previous paper by the Law Commission: *A private right of redress for unfair commercial practices? Preliminary advice to BERR on the issues raised*, November 2008, available at www.lawcom.gov.uk. An overview of the Scots law of misrepresentation is available on the project page at www.scotlawcom.gov.uk.

⁵ Professor Hugh Collins, *A private right of redress for unfair commercial practices* (April 2009). The paper is available at <http://www.consumerfocus.org.uk/publications-reports>, 2009, “Waiting to be Heard – Giving Consumers the Right of Redress over Unfair Commercial Practices”.

⁶ Or, in Scots law, “force and fear”.

- 2.12 Vulnerable consumers are generally reluctant to go to court; they do not want to face the perpetrator, or may feel embarrassed that they have been victimised. Sometimes traders intimidate consumers so that they are fearful that the trader will return if they attempt to exercise their right to cancel the contract within seven days.⁷ Clearly, law reform cannot overcome many of the obstacles which consumers face when they attempt to assert their legal rights. However, we were told that these problems were exacerbated by the complexities and uncertainties of the law.

Criticisms of the current law

- 2.13 Although it would appear that aggressive practices might be covered by the laws of duress, undue influence, unjust enrichment, and harassment,⁸ consumer advisers told us that in practice it is extremely difficult for consumers to succeed in these cases. They argued that very high thresholds apply in duress, undue influence and harassment cases, and it is difficult for consumers to provide the requisite proof. In addition, the law of unjust enrichment is complex. For example, Consumer Focus said that the common law principle of restitution presents “considerable technical difficulty” for the consumer.⁹
- 2.14 Duress requires illegitimate pressure. The categories of illegitimate pressure currently recognised by the courts are threats to the person, goods or economic rights.¹⁰ More generally, however, duress has been said to rely on consent procured through pressure that “the law does not regard as legitimate”. Most stakeholders agreed that in a consumer context the law of duress should be amended to include any form of illegitimate pressure. They also agreed that if the conduct breached the Consumer Protection Regulations that should be sufficient to show that illegitimate pressure had been applied.
- 2.15 LACORS suggested that there should be key information requirements for any contract signed in the consumer’s home, so that essential information must be given. Also, that there should be a presumption of undue influence where a salesperson has visited the consumer’s home and a contract is signed. This presumption could be rebutted by the salesperson showing that they had brought the key facts to the attention of the consumer, for example through a key facts document.
- 2.16 Similarly, Which? suggested that there could be a reverse burden of proof of some sort where a sale takes place at a consumer’s home or where the consumer is vulnerable; and that there should be a new right to rescind these contracts.

⁷ The Cancellation of Contracts made in a Consumer’s Home or Place of Work etc Regulations 2008, SI 2008/1816, Reg 7.

⁸ A consumer may have a civil claim under the Protection from Harassment Act 1997.

⁹ Consumer Focus, *Waiting to be heard* (August 2009) p 21. An obligation to make restitution is triggered by unjust enrichment.

¹⁰ See *Chitty on Contracts* (30th ed 2008) from para 7-003. For the Scots law on force and fear, see WW McBryde, *The Law of Contract in Scotland* (3rd ed 2007), paras 17-03 – 17-07.

Gaps in the law

- 2.17 The majority of stakeholders concurred with Consumer Focus' observations that there are "gaps within the current regime". Consumer Focus commented that:

Under the common law, a victim of an aggressive practice may be able to use the doctrines of duress and undue influence to rescind the transaction. Further, intimidation may also fall within the scope of the tort of harassment. However, the important point to note regarding the common law protection is that the scope of the doctrines of duress and undue influence is hard to determine.¹¹

- 2.18 The CAB added that the current law is "all over the place" and that rights are disparate and difficult to identify.

- 2.19 Professor Hugh Collins explained:

The remedies available to the victim in English private law are not co-extensive with the prohibited practices in the Regulations. In particular, there are some unfair commercial practices under the Regulations where there may be no means for the victim to obtain any redress through private law; in other instances, only limited remedies such as a rescission of the contract are available.¹²

- 2.20 Consumer groups commented that even if a cause of action exists in theory, in practice it is useless if it is too difficult for consumers to bring successful actions. There is no *effective* private right. This applies particularly to undue influence and duress.

VIEWS OF THE CONSUMER PROTECTION REGULATIONS

- 2.21 We have been shown some initial research findings by Jane Williams and Caroline Hare, looking at the Scottish trading standards officers' early experience of enforcing the Regulations.¹³ The research found that many officers were having difficulties adapting to the new concepts used in the Regulations. There was particular concern about the requirement that a practice "causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise".¹⁴

- 2.22 However, as officers became more familiar with the Regulations, they could see advantages. They were more comfortable in interpreting them in accordance with "common sense" notions of justice. As one officer put it, if "your gut says it's unfair, then nine times out of ten you can actually fit it into something". The Regulations were thought to be more general and flexible than the old laws they replaced, and officers could see particular advantages in the prohibition on misleading omissions.

¹¹ Consumer Focus, *Waiting to be heard* (August 2009) p 19.

¹² Professor Hugh Collins, *A private right of redress for unfair commercial practices* (April 2009) p 4.

¹³ J Williams & C Hare (forthcoming), "Early Experiences of the Enforcement of the Unfair Commercial Practices Directive in Scotland", *Journal of Consumer Policy*.

¹⁴ See, for example, regs 5(2)(b); 5(3)(b); 6(1); and 7(1)(b).

- 2.23 Consumer groups echoed these views. Several concepts in the Regulations were new and unfamiliar to a UK audience, particularly the concept of an average consumer making a transactional decision. However, consumer organisations are now becoming more familiar with the Regulations, and are more prepared to categorise problems in terms of misleading and aggressive practices.

LAND TRANSACTIONS

- 2.24 In England and Wales, land law is said to be based on the principle of “buyer beware”.¹⁵ Those selling land have no general duty to disclose material information. Instead, the conveyancing system is based round pre-contractual enquiries. Buyers are expected to ask questions and sellers should provide honest and correct answers.¹⁶ If the seller’s answers are false, the buyer will usually have a claim for misrepresentation. Stakeholders thought that that the pre-contract enquiry procedure generally works well for consumers and that the existing protections are adequate.
- 2.25 Estate agents are subject to the Property Misdescriptions Act 1991.¹⁷ The Act does not oblige estate agents to disclose information, but it does require them to take all reasonable steps to ensure that the information they provide is accurate and not misleading. Stakeholders thought that the Act was relatively clear and well-understood, and adequate to control misleading practices by estate agents. Furthermore, estate agents involved in residential sales must now be members of an approved redress scheme.¹⁸ Most consumers are able to complain to the Property Ombudsman, who will award redress in appropriate cases.
- 2.26 A new private right of redress under the Consumer Protection Regulations would not affect individual sellers but it could have a major effect on those selling land in the course of business, such as property companies and estate agents. The duty to disclose material information set out in Regulation 6, would effectively reverse the “buyer beware” principle.

¹⁵ Megarry & Wade, *The Law of Real Property* (2008, 7th ed) para 15-070; K Gray and SF Gray, *Elements of Land Law* (2009, 5th ed) p 1037. However, the principle of buyer beware is qualified in relation to title: see *Doe v Skegg* [2006] All ER 250.

¹⁶ In Scots law, while the seller must provide a good and marketable title, the buyer will generally examine title before transfer. See George L Gretton and Kenneth G C Reid, *Conveyancing* (3rd ed, 2004), Ch 7. The seller does not warrant the physical state of the property. See David A Brand *et al*, *Professor McDonald’s Conveyancing Manual* (7th ed, 2004), para 28.12 (the rule of *caveat emptor*) and R Rennie, “Conveyancing”, *Stair Memorial Encyclopaedia Reissue*, para 100.

¹⁷ This Act applies in Scotland too.

¹⁸ See Consumers, Estate Agents and Redress Act 2007, sched 6, adding s 23A to the Estate Agents Act 1979. The requirement came into effect on 1 October 2008. Note that the 1979 Act does not apply to things done “in the course of his profession by a practising solicitor or a person employed by him; see the 1979 Act, s 1(2)(a).

- 2.27 Stakeholders put arguments against this development. The fact that the Regulations only cover traders means that an estate agent's obligation to disclose information would be greater than an individual seller's, although the seller usually knows more. It would mean that a buyer who was not told about a material fact would have a strong incentive to claim against an estate agent, even though the main fault might lie with the seller. It also puts the estate agent in a difficult position, as their client is the seller, not the buyer, and they would have to make judgments about whether information was material or not.
- 2.28 Stakeholders suggested that the Consumer Protection Regulations were so widely drafted that it would be difficult for estate agents to know what to disclose. For example, it would be material to some buyers (but not all) that the next-door neighbour owned a large dog, that a murder had been committed at the property years before,¹⁹ or that the property for sale was rumoured to be haunted.²⁰ Stakeholders expressed concern that a new right based on the ambiguity within the Regulations would encourage disputes.
- 2.29 We agree that house sales raise difficult issues. Any extension would need to be treated separately, and with care. We did not receive any specific examples concerned with residential sales, and such sales are not included in Parts 3 to 7.
- 2.30 The same considerations do not apply to short-term lettings, as there is no pre-contractual enquiry process and the consumer generally has not engaged a legal adviser. We think lettings could be dealt with alongside other services within the scope of the Consumer Protection Regulations.

ENFORCEMENT PROCEDURES

- 2.31 In discussion, stakeholders raised many problems with court procedures. Consumer groups pointed out how difficult it is for consumers to go to court, even when small claims procedures are available to them. Consumers are frightened of the court process, and often lack the resources and stamina to proceed. Many misrepresentations are oral, which means that consumers may be reluctant to go to court for lack of proof. Rogue traders are difficult to trace and often lack obvious assets, making it extremely difficult to enforce judgments against them. While recognising the difficulties surrounding rogue traders, consumer groups highlighted the need to experiment with alternative enforcement and redress procedures. The Confederation of British Industry also stressed that our project should fit with the Government's policy in favour of restorative justice, and should take account of initiatives such as the civil sanctions pilot.

¹⁹ *Sykes v Taylor-Rose* [2004] EWCA Civ 299.

²⁰ *Stambovsky v Ackley* 169 AD 2d 254 (1991).

- 2.32 In England and Wales, under the civil sanctions pilot, selected trading standards officers will have the power to apply the flexible sanctions available under the Regulatory Enforcement and Sanctions Act 2008.²¹ This follows the Macrory Review, which criticised the over-use of criminal sanctions, and recommended alternatives which emphasise future compliance and reparation.²² Regulators in the pilot will have a range of sanctions available to them, including the possibility of requiring the trader to take steps “to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed”.²³
- 2.33 There is also the possibility of representative actions by a new Consumer Advocate, under which the courts may award a pool of money to be distributed to individual consumers. Which? and Citizens Advice also support the establishment of a Consumer Ombudsman.
- 2.34 Enforcement falls outside our terms of reference, and we will not be making proposals in this area. However, rights have to be suitable for the way they are enforced.
- 2.35 The legal rules on misrepresentation developed by the courts are unsuited to consumers bringing small claims without representation. They are even less suited to restoration orders and representative actions, which need clear, simple rules about how compensation should be calculated across a range of cases.

²¹ See Department for Business Innovation and Skills, *Civil Sanctions Pilot: a Consultation of the Pilot Operation of Civil Sanction Powers for Consumer Law Enforcers* (March 2010).

²² Prof RB Macrory, *Regulatory Justice: Making Sanctions Effective*, Final Report, November 2006. The Law Commission recently considered the problems caused by over reliance on criminal sanctions against businesses in its consultation paper, *Criminal Liability in Regulatory Contexts*, LCCP 195, August 2010.

²³ Regulatory Enforcement and Sanctions Act 2008, s 42(3)(c). Under s 50(3)(b), regulators may also accept enforcement undertakings to the same effect.

PART 3

MISLEADING ACTIONS USED TO SELL PRODUCTS

- 3.1 The most obvious, and common, form of unfair commercial practice is a misleading action to encourage consumers to buy a good or service they would not otherwise have bought. Unlike the Directive, the Consumer Protection Regulations also cover misleading actions to encourage consumers to sell products (such as antiques or gold) to traders.
- 3.2 The Regulations cover both false and deceptive information in relation to 11 separate matters, including the nature of the product, the main characteristics of the product, the nature of the trader, or the nature of the sales process, “the price or the manner in which the price is calculated”, or the “consumer’s rights or the risks he may face”.
- 3.3 We were given many examples of false or misleading actions. Below we start by looking at examples in which consumers were misled about goods or services they were buying: first about the nature of the product; then about the characteristics of the product; or by a false review. We then look at misleading statements about the contract terms, or about the documents consumers were asked to sign. The next section looks at ways in which traders provide a false sense of bargain. Finally, we were told that traders all too frequently lie about their membership of trade bodies.

MISLEADING STATEMENTS ABOUT THE NATURE OF THE PRODUCT

- 3.4 It is generally accepted that traders should not make false claims about their products. A typical example would be where traders falsely claim that products can cure illnesses, or prevent ageing or cause weight loss without the need for a calorie-controlled diet.

Example: diet tea

A trader claims that daily consumption of a therapeutic tea for six weeks will result in weight loss due to the actions of its key ingredients. After week six, the consumer found they had not lost any weight; the product had cost £150.

- 3.5 Before the Regulations, false statements of this type were prosecuted under the Trade Descriptions Act 1968. Since the Regulations have replaced the 1968 Act, the issue is not quite as straightforward.

- 3.6 A false claim that the product can cure illness, dysfunction or malformations is one of the 31 banned practices and is automatically unfair.¹ In other cases it is not sufficient to show that the statement is false. To constitute an offence the claim must also “be likely to cause the average consumer to take a transactional decision he would not have taken otherwise”.² The average consumer is taken to be “reasonably well informed, reasonably observant and circumspect”.³
- 3.7 It could be argued that a reasonably well informed, reasonably observant and circumspect consumer would not believe the diet claims of a therapeutic tea. However, if a particular group of consumers is particularly vulnerable to the claims, then the average consumer test should “be read as referring to the average member of that group”.⁴ Often products may be marketed to particularly vulnerable groups. Those desperate to lose weight may be more vulnerable to miracle diet products.
- 3.8 If the claim involves goods, the civil law remedies are relatively straightforward. If the goods are not of satisfactory quality,⁵ or fit for the purpose for which they are sold,⁶ the consumer may reject the goods (provided they do so in a reasonable time)⁷ or claim damages. However, for services, the law is not quite so straightforward. A consumer who had been lied to about the nature of the service would either have to prove that the promise was an express term of the contract, or that the service was not provided with reasonable care or skill, or use the law of misrepresentation.

MISLEADING STATEMENTS ABOUT CHARACTERISTICS OF THE PRODUCT

- 3.9 It is relatively rare for traders to lie about the essential nature of the product. It is more usual for consumers to feel they were misled about one of the characteristics of the product.

¹ Sched 1, para 17. Note that misleading actions may also amount to fraud under the criminal law. In England and Wales, it is an offence under the Fraud Act 2006, ss 1 & 2, to dishonestly make a representation knowing that it might be false or misleading with intent to gain, cause loss to another or to expose another to risk of loss.

² Reg 5(2)(b).

³ Reg 2(2). See also the earlier case C-201/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, para 31 (where the Court of Justice, when defining the concept of “consumer” to be used as a standard for determining whether a statement was likely to mislead the purchaser, referred to several similar cases in which the court had taken into account the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect).

⁴ Reg 2(5)(b).

⁵ Sale of Goods Act 1979, s 14(2A).

⁶ Sale of Goods Act 1979, s 14(3).

⁷ Sale of Goods Act 1979, s 35.

- 3.10 We were told that it was common for consumers to feel misled about the reception they were likely to receive for a mobile phone in their area, or about the broadband speeds they were likely to get from an internet service provider.⁸

Example: mobile phone reception

A consumer took out a two-year contract with a mobile phone company, after being told that the network and phone had “excellent reception” in her area. This was said both by the sales person in the store, and on the network provider’s website. However the reception turned out to be poor, and she was forced to buy another phone.

- 3.11 Consumers buying cars may also feel misled about claims about fuel economy.

Example: fuel efficiency

When a consumer bought a new car, she was told that it would do 38-45 miles per gallon. This was mentioned in advertising, and reiterated by the salesman. However, in practice, she found that the car only did 28 miles per gallon. When she complained, she was told that the advertised mileage figures were “Government estimates” and could not be relied on as the actual mileage she would achieve.

We were told of similar problems in the sale of solar energy products, where efficiency and energy savings were overstated.

- 3.12 Citizens Advice highlighted many problems where unemployed consumers were sold training courses of doubtful value.

Example: training will lead to a job

When a 58 year old man was made redundant, he was promised that if he retrained as a “home energy assessor” he would easily get a job, given the shortage of qualified people. This was not true: at the time there were around 12,000 qualified people to satisfy an estimated demand of 2,000. He paid a £1,000 deposit, and took a loan to cover the rest of the course for £7,735, which, with credit charges, would amount to £11,936. The course was of poor quality and virtually useless to him.

We were told of similar scenarios concerning courses on IT, plumbing and driving instruction.

- 3.13 In these cases, a consumer may well be able to claim for misrepresentation, giving a right to rescind the contract. However, consumer groups thought that consumers would be put off by the uncertainty and complexity of this area of the law.

⁸ In August 2010, research by Ofcom found that actual broadband speeds were generally well below those advertised: <http://stakeholders.ofcom.org.uk/market-data-research/telecoms-research/broadband-speeds/broadband-speeds-2010/>

SPURIOUS REVIEWS AND “ADVERTORIALS”

- 3.14 Traders often sing the virtues of their product as offering great value for money, excellent service and exceptional quality. Normally, consumers regard these claims as “puff”: they would not be unfair within the meaning of the Regulations if a reasonably circumspect consumer would not put much store on them. However, this changes if the claims appear to come from an independent third party.
- 3.15 Consumers increasingly rely on website reviews when choosing products. This has led some traders to pose as consumers to post positive reviews on websites to promote their business. Examples include theatre reviews, restaurant reviews and hotel reviews. In some cases, the trader may surreptitiously pay for what has been written on the web, or in newspapers or magazines, known as “advertorials”. This is banned practice 11, defined as:

Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer.⁹

- 3.16 Another variation on this theme is where a theatre or publisher misquotes a review. One well-publicised investigation by Westminster Trading Standards concerned a sign outside a west-end theatre. It was alleged that the sign quoted a review as saying “a superbly gripping, genuinely uplifting drama”, when these words described the film of the same name, and the review had gone on to say that “in almost every respect, the stage version is inferior to the movie”.¹⁰
- 3.17 These fake reviews would not be regarded as contract terms. They may amount to misrepresentations, but to found a claim the consumer would need to show that the misrepresentation had a substantial influence on their decision to buy.¹¹ In the case of a sign outside a theatre, for example, the effect of the representation on any individual’s behavior may be unclear and the value of the consumer’s loss difficult to calculate.

MISLEADING CONSUMERS ABOUT THE CONTRACT TERMS

- 3.18 Several examples concerned misleading statements about the nature of the bargain which the consumer was entering. In the most extreme cases, the consumer was misled about the nature of the agreement they were being asked to sign.

⁹ Sched 1, para 11.

¹⁰ <http://www.dailymail.co.uk/news/article-1231059/West-End-Theatre-investigated-using-misleading-reviewers-quote-stage-The-Shawshank-Redemption.html#ixzz0vow8OosI>

¹¹ See *JEB Fasteners Ltd v Marks Bloom* [1983] 1 All ER 583.

Example: “just a quote”

A solar power salesman cold-called at the home of an 89 year old man who lived alone. The salesman measured up, and told the consumer he was signing up for a quote. In fact it was a contract.

Fifteen days later, the consumer’s son found out about the visit, but it was too late to cancel without penalty. The consumer was charged £1,300 to cancel, even though work had not started on producing the solar panels.

Example: “no obligation”

A will writing company salesperson visited an elderly consumer with poor eyesight at home, and asked him to sign a form to allow the salesperson to take away some of the consumer’s papers, on a no obligation basis. The form the consumer signed was actually a contract agreeing to pay for a new will.

- 3.19 In other cases, the consumer was told something about the terms of the contract which was then contradicted by the signed agreement.

Example: old rate of VAT

A consumer purchased a new car. The salesperson said that the consumer would pay VAT at the old rate of 15%. However, the contract said that VAT would be payable at the rate applicable on the date of delivery (which was 17.5%). On delivery, the trader required the full rate of VAT.

- 3.20 In these examples, the consumer may have an action for misrepresentation, but this is a complex cause of action. In the more extreme cases, the deception might negate agreement (known as the doctrine of “non est factum” or “it was not that person’s deed”).¹² Alternatively, the consumer might rely on the doctrine of mistake (or error) to avoid the contract. However, both these doctrines are narrow and difficult to prove.

- 3.21 There were also cases of misleading claims about the price.

Example: no call-out charge

A plumber’s advertisement stated no “call-out charges” (which was true), but when the plumber visited the consumer and examined the boiler, the plumber required payment of a “diagnosis charge”.

¹² See *Saunders v Anglia Building Society* [1971] AC 1004. In Scots law unilateral error in itself is not a ground for reduction. See *Scott v Craig’s Reps* (1827) 24 R 462. In exceptional cases, however, unilateral error as to the nature of a document being signed might be relevant; see the example in *Ellis v Lochgelly Iron and Coal Co Ltd* 1909 SC 1278 at 1282 of a cheque having been signed when it was believed to have been a visitors’ book. See also W W McBryde, *The Law of Contract in Scotland*, (3rd ed 2007) para 15.40.

- 3.22 This case is initially straightforward. The consumer is under no obligation to pay the “diagnosis charge”, for which there is no contractual basis. Unfortunately, consumers may well be intimidated by the demand and pay anyhow. In this case, the payment may be taken to indicate their agreement to the charge.

MISLEADING STATEMENTS WHICH ADD PRESSURE TO BUY

- 3.23 Several banned practices do not mislead the consumer about the product or the contract. Rather they are misleading about “the nature of the sales process”.¹³ They are designed to increase the pressure to buy, either by giving the false impression that the consumer had no time to consider the issue, or by giving a false sense of the bargain.
- 3.24 A classic example is banned practice 7: “falsely stating that a product will only be available for a very limited time... in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice”.

Example: “7 day trial period”

A consumer was approached in the street by a salesperson, who offered her a mobile phone on a seven day trial period. The consumer said she wanted time to think about it, but the salesperson falsely claimed that the offer was only available then and there.

As it happened, the trial period proved to be useless to her. The phone had to be activated within two days, but the consumer could not collect the phone from the sorting office until day three.

- 3.25 An example on the same lines is the false “closing down sale”. This is covered by banned practice 15: “claiming that the trader is about to cease trading or move premises when he is not”.
- 3.26 Consumers may also be more likely to feel that they are getting a bargain if the trader falsely claims to be a consumer (banned practice 22) or if they are told that it is only half a spurious reference price.
- 3.27 Auctions are also prey to “shill bidding” (also known as “white bonneting”), in which the trader masquerades as another buyer and puts in bids to drive up the price. The popularity of eBay had given new life to this old scam, which has led to prosecutions under the Consumer Protection Regulations.¹⁴
- 3.28 Although these practices may distort the market by reducing consumers’ ability to make informed judgments about what they are buying, it is often difficult for an individual consumer to show loss. The product may well be of adequate quality, and it may indeed have been worth what the consumer paid for it. The consumer has been given a false sense of bargain. The false sense of getting something cheap is often an important encouragement to buy. It can cause consumers to buy something they would not have bought at all otherwise, and diverts business away from honest traders.

¹³ Reg 5(4)(e).

- 3.29 Although these types of practice are regularly investigated under the Consumer Protection Regulations, they were not often mentioned by advice centres. Most consumers appear fairly philosophical if the half-price bargain turned out to be not quite the bargain that was promised, provided that they did not suffer any actual loss.

TRADERS PRETENDING TO BE MEMBERS OF A TRADE BODY

- 3.30 Under the Regulations, it is a banned practice for a trader to claim to be a signatory to a code of conduct when the trader is not (banned practice 1) or to display a trust or quality mark without having the necessary authorisation (banned practice 2).¹⁵
- 3.31 *Which?* told us that they dealt with large numbers of consumers who had used traders who held themselves out as being members of trade bodies. When the work proved to be inadequate, the consumer discovered that the claim was untrue. This meant that the consumer could not use the complaints or arbitration scheme. Sometimes they may be left without a guarantee or certificate for the work done. This can cause considerable distress and inconvenience, and may affect the value of the work.
- 3.32 Consumers groups highlighted the practical difficulties the consumer faces in such circumstances. The consumer has the problem of tracing the trader, bringing a court case against them and enforcing the judgment against a party who may be insolvent. These are practical problems and they cannot be resolved by giving the consumer additional legal rights (which would be equally difficult to enforce). However, it was pointed out that even if the consumer succeeds in bringing the court case and enforcing the judgment for the original dispute, it is often difficult to quantify any additional loss and distress caused by having to go to court rather than use the arbitration scheme.

¹⁴ See <http://www.heraldscotland.com/news/home-news/warning-over-ebay-s-shill-bidders-and-fake-scammers-1.1028046>.

¹⁵ Again, this may also amount to criminal fraud. In *R v Gumbrell* [2009] EWCA Crim 590 a builder falsely stated that he had National House Building Council Accreditation and access to their insurance scheme. He was convicted of two counts of obtaining a pecuniary advantage by deception contrary to section 16(1) of the Theft Act 1968. On appeal, the defendant submitted that the prosecution was an abuse of process, as the criminal courts should not get “bogged down” with what were essentially civil disputes. The Court of Appeal said that whether a criminal court should deal with essentially contractual disputes was “a matter of fact and degree”. Here criminal proceedings were justified because the defendant had misled consumers in four separate contracts.

CONCLUSION

- 3.33 Consumers may be misled into buying products in many different ways – and suffer a wide variety of losses as a result. Although consumers are usually entitled to some form of legal remedy, the law in this area is complex, leaving consumers to navigate their way through a variety of possible express terms, implied terms and misrepresentations. It is often difficult for consumers to know how to frame a legal case, or to assess what measure of damages the law provides.

PART 4

MISLEADING OMISSIONS USED TO SELL PRODUCTS

- 4.1 The Consumer Protection from Unfair Trading Regulations 2008 cover not only misleading actions, but also misleading omissions. It is an unfair practice to hide or omit material information, if it is “likely to cause the average consumer to take a transactional decision he would not have taken otherwise”. Material information is widely defined as “the information which the average consumer needs, according to context, to make an informed transactional decision”.¹ This includes the main characteristics of the product, the identity of the trader and the price.²

NO DUTY TO DISCLOSE?

- 4.2 Traditionally, the law of misrepresentation does not include omissions. It is said that in general contract law traders have no positive obligation to disclose information. However, this is subject to several exceptions.
- 4.3 First, under the Sale of Goods Act 1979, consumers have a remedy if traders sell goods that are unfit for purpose or unsatisfactory.³ Thus consumers have a remedy if they are not told about a defect which renders the good unsatisfactory.
- 4.4 Secondly, for services, there is an implied term that the business should act with reasonable skill and care.⁴ Professor Hugh Collins comments that “it is possible that the duty to take reasonable care will include in some circumstances a duty to disclose information”.⁵ He asks, for example, whether a travel agent would be under an obligation to tell a consumer booking a holiday that the destination had recently suffered an outbreak of cholera. He comments that it is arguable that the statutory implied duty of care would require the agent to warn the consumer. He adds that, under the Regulations, however, the omission of such information would be likely to be regarded as material, thus providing a clearer ground for redress.
- 4.5 Thirdly, the distinction between a representation and an omission is a fine one. The courts have been prepared to classify half truths as misrepresentations. An example would be the plumber who advertises “no call-out charge” but does impose a “diagnosis charge”.

¹ Reg 6(3)(a).

² Reg 6(4). This is not the whole list. For example, an invitation to treat should also mention any delivery charges or cancellation rights which apply.

³ Sale of Goods Act 1979 s 14.

⁴ Supply of Goods and Services Act 1982, s 13 (which does not apply in Scotland). For the Scots common law on the degree of care required of a person carrying out services see W W McBryde, *The Law of Contract in Scotland*, (3rd ed, 2007), paras 9-37 to 9-39.

⁵ H Collins, “A Private Right of Redress for Unfair Commercial Practices: a report for Consumer Focus”, April 2009, p 26.

- 4.6 Fourthly, the trader may be aware that the other party is mistaken over an issue, and take advantage of the other party's error. In some cases the consumer may use the doctrine of mistake or error to avoid the contract,⁶ or to enforce it on the terms they had understood.⁷ However, only very serious mistakes will count. In a business context, the courts have been reluctant to look at the statements made in pre-contract negotiations to contradict the words set out in the written contract.⁸
- 4.7 Finally, the law provides consumers with protection against "hidden" contract terms, that is to say, terms with which the consumer had no real opportunity of becoming acquainted before conclusion of the contract. Such terms may be assessed for fairness under the Unfair Terms in Consumer Contracts Regulations 1999. Another possibility is that the consumer might be able to argue that the term was not incorporated into the contract and, therefore, not enforceable.⁹

GAPS IN THE LAW

- 4.8 Despite these exceptions, there may be examples of material information which do not need to be disclosed under contract law. In his paper for Consumer Focus, Professor Hugh Collins gives examples where a consumer buys a motor mower which functions satisfactorily, but is not told that it requires an unusual and hard-to-find fuel. Similarly, a consumer may buy a new boiler, without being told that it uses fuel far less economically than rival brands.
- 4.9 Retailers, however, were concerned about a general duty to disclose everything that an average consumer may need to know to make an informed transactional decision. It was pointed out that in the electronics industry, a consumer may want to know that a piece of equipment has become out-dated, or will soon be replaced by something better. Yet this would be impossible to fulfil: there is always the likelihood of something better on its way.
- 4.10 In practice, most of the examples we were given of misleading omissions were about hidden contract terms.

Example: credit card charges

A consumer was not told that he would be charged if he did not use the credit card.

Example: mobile phone tariffs

A consumer was not told the mobile phone tariff was charged per minute or part minute, rather than per second. This meant that "free" call time was a lot less than expected.

⁶ *Hartog v Colin & Shields* [1939] 3 All ER 566. See also *Angus v Bryden* 1992 SLT 884

⁷ See Chitty on Contract, at 5-068 and 5-080 to 086 and W W McBryde, *The Law of Contract in Scotland*, (3rd ed, 2007) paras 15.30 – 15.33

⁸ See *Chartbrook Ltd v Persimmon Homes* [2009] 1 AC 1101.

⁹ See *Interfoto Picture v Stiletto* [1989] QB 433 and *Montgomery Litho Ltd v Maxwell* 2000 SC 56.

- 4.11 One remedy in these circumstances would be to argue that hidden terms were unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999. However, consumer groups argued that, following a recent Supreme Court judgment, the law on unfair contract terms was too restricted and technical to be useful, especially where the term concerned the price.
- 4.12 In *Abbey National v OFT*,¹⁰ the Supreme Court found that provided a price term was in plain intelligible language, it could not be reviewed for fairness. This exemption included contingent charges which would only be applied in specific circumstances and which the consumer did not see as part of the essential bargain they were entering. Thus the court may not review charges for unauthorised overdrafts, provided they were set out in clear language, even if most consumers taking out a current account were more focused on other aspects of the bargain.
- 4.13 The European Commission has proposed a new Consumer Rights Directive¹¹ to replace four existing Directives including the Unfair Contract Terms Directive. The Department for Business, Innovation and Skills has asked for views to inform its negotiating position on the proposed Directive as to whether contingent or ancillary charges should be assessed for unfairness under the unfair contract terms provisions.¹²

VULNERABLE GROUPS

- 4.14 Consumer groups say that some traders take advantage of consumers when they cannot speak English, cannot read or have a mental impairment. For example, the traders do not explain issues, or give too much information too quickly, or fail to allow the consumer sufficient time to read and understand the issues.
- 4.15 Those with mental disabilities are particularly vulnerable to “unfair” contracts.

Example: locked into gym contract

A consumer with both physical and mental disabilities on income support was sold an expensive gym contract without being told that the price increased after six months or that she had no right to cancel for a year.

- 4.16 Vulnerable individuals are also more likely to fall prey to aggressive practices. For example, a Citizens Advice Bureau was contacted by relatives who discovered that an elderly man living alone had been sold seven separate insurance policies to cover the same TV and satellite dish.

¹⁰ [2009] UKSC 6; [2009] 3 WLR 1215.

¹¹ <http://ec.europa.eu/consumers/rights/docs/Directive> final EN.pdf.

¹² BIS, Call for Evidence: Consumer Rights Directive: Allowing Contingent or Ancillary Charges to be Assessed for Fairness, July 2010, <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1030-contingent-charges-call-for-evidence.pdf>.

- 4.17 Where the consumer has a mental disability, it may be possible to argue that the consumer lacked capacity to contract.¹³ However, claiming incapacity is a serious step for an individual to take, with potentially far reaching consequences. The law therefore sets a high threshold.¹⁴ Furthermore, mental incapacity is not usually a ground for setting aside a contract unless the other party knew about it.
- 4.18 In the example of the insurance policies, the consumer has the right to complain to the Financial Ombudsman Service, on the ground that the insurance company failed to comply with Financial Services Authority rules that an insurance firm “should take reasonable steps to ensure that a customer only buys a policy under which he is eligible to claim benefits”.¹⁵ For the gym contract example, however, the remedy is less clear cut.
- 4.19 One advantage of the Consumer Protection Regulations 2008 is that they make special provision for those with “mental or physical infirmity”. Under Regulation 2(5), if a trader can reasonably be expected to foresee that consumers with a mental impairment would be particularly vulnerable to a practice, and the trader is aware that the consumer has a mental impairment, the trader would be under a duty to provide the information that such an average consumer would need to make an informed choice.

CONCLUSION

- 4.20 Traditionally, the law has distinguished between misleading statements and a failure to provide information. However, the law provides some protection through implied terms that goods should be of satisfactory quality and fit for purpose, and that services should be provided with reasonable skill and care. Furthermore, in practice the boundary between half-truths and omissions is not clear cut.

¹³ In England and Wales, under the Mental Capacity Act 2005, s 2, a person is said to lack capacity “in relation to a matter if at the material time he is unable to make a decision for himself... because of an impairment of, or a disturbance in the function of, the mind or brain”. Although the Act does not replace the common law test for capacity to contract, the statutory definition was intended to reflect the common law. Moreover, the courts can apply the statutory definition when they find it appropriate. See Mental Capacity Act 2005, Code of Practice (2007) para 4.32-4.33. In Scotland see, for example, the Adults with Incapacity (Scotland) Act 2000, s 1(6) generally deeming an individual incapable if they are incapable of acting, making decisions, communicating decisions, understanding decisions or retaining the memory of decisions, either by reason of mental disorder or of inability to communicate because of physical disability.

¹⁴ For example, under Mental Capacity Act 2005, s 1(2), people are assumed to have capacity unless it is established that they do not. Similarly, in general, in Scots law an adult’s lack of capacity must be proved. See W W McBryde, *The Law of Contract in Scotland*, (3rd ed, 2007) para 3-42.

¹⁵ FSA Handbook, ICOBS 5.1.1.

4.21 The case histories we have been given suggest that one of the effects of extending civil remedies for misleading omissions would be to increase the array of possible remedies where consumers were not told about unusual or onerous contract terms. In the consultation paper, we will need to consider how this interacts with the law of unfair contract terms.

PART 5

AGGRESSIVE PRACTICES TO SELL PRODUCTS

- 5.1 An important strand of the Consumer Protection from Unfair Trading Regulations 2008 is the prohibition of aggressive practices. Under Regulation 7, an aggressive practice is one which is likely to impair significantly the average consumer's freedom of choice in relation to the product through the "use of harassment, coercion or undue influence". Again, it must be likely to cause the average consumer "to take a transactional decision he would not have taken otherwise".¹
- 5.2 "Coercion" includes the use of physical force, while "undue influence" means exploiting a position of power even without using or threatening to use physical force.² The Regulations set out five factors to be taken into account, including "the timing, location, nature or persistence" of the practice, "any threat to take action which cannot legally be taken", and whether the trader exploits a specific misfortune which it knows the consumer suffers.³
- 5.3 The list of banned practices provides an indication of the types of practices which may be covered. These include:
- (1) creating the impression that the consumer cannot leave the premises until a contract is formed (banned practice 24);
 - (2) conducting personal visits to the consumer's home and ignoring the consumer's request to leave or not return, except where justified (banned practice 25);
 - (3) making persistent and unwanted solicitations by telephone, fax, email or other remote media, except where justified (banned practice 26);
 - (4) explicitly informing a consumer that the trader's job or livelihood is in jeopardy unless they buy the product (banned practice 30).

HOME-SELLING TO THE ELDERLY

- 5.4 Many of the examples of aggressive practice concern door-to-door selling to elderly consumers.
- 5.5 This is a typical example of the type of criminal practice which the Regulations are intended to cover.

¹ Reg 7(1).

² Reg 7(3).

³ Reg 7(2).

Example: unsolicited building work

Builders offered to resurface an elderly consumer's driveway. The consumer said "no thanks", but the builders started work regardless. They caused so much damage that the consumer had to agree to them completing the work, otherwise the consumer would have had to pay for another trader to repair the damage. When the work was completed, the builders drove the consumer to the cash point to obtain payment.

- 5.6 Many of the cases we were told about concerned door-to-door selling of orthopaedic beds, other disability aids (such as stair-lifts), vacuum cleaners and home improvements.

Example: orthopaedic bed

An elderly house-bound man was sold a £3,000 bed. The salesman stayed for three hours, giving the impression that he would only leave if the consumer agreed to buy.

The trader offered a 14 day cancellation period, but the next day the salesman returned, unpacked the bed and took a cheque for the full amount.

- 5.7 For doorstep selling, the law offers a 7 day cancellation period.⁴ Under the Consumer Rights Directive, it is proposed to extend this period to 14 days. However, consumer advisers told us that this is often not long enough for elderly house-bound consumers who lack regular social contact and who may be reluctant to make a fuss. Consumers may also feel embarrassed about falling prey to the practice. In practice, it was only when relatives or friends intervened that the consumer took action to escape from the contract – and by then the 7 or 14 day period had usually passed.
- 5.8 In English law, delay in taking action will also bar a claim under the law of duress. The doctrine of duress demands that the consumer takes action to rescind the contract as soon as the duress ceases. This means that an elderly consumer is required to take action as soon as the salesman leaves. If they take action a month later, following advice from a relative, the right to rescind for duress will also have been lost.⁵

PRESSURE SELLING IN OTHER CONTEXTS

- 5.9 High pressure selling is not confined to the consumer's home. We were also given examples in showrooms and at sales presentations.

⁴ The Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, reg 7.

⁵ In Scots law, generally speaking, a short period of delay is unlikely to bar the exercise of a right unless there are strong indications of unfairness; but excessive, unexplained delay may form the basis of bar, even if such indications are barely present. The need for prompt action, however, varies from context to context so that there can be situations where the passage of time is regarded as creating unfairness. See Reid and Blackie, *Personal Bar* (2006), para 3-07.

Example: pressure-selling a car

A consumer was subjected to four hours of pressure-selling and felt they could not leave the dealer's showroom. The salesperson added that if the consumer did not buy the car, the salesperson would lose their job. The consumer was worn down and agreed to buy the car.

- 5.10 In this case, there appear to be breaches of the Regulations but no private law rights. As the sale took place in the showroom, the consumer had no cancellation rights. There were no misrepresentations and the salesperson's tactics did not amount to duress.
- 5.11 There continue to be complaints that timeshares and holiday clubs are sold through high-pressure sales techniques.

Example: pressure-selling a holiday club

A couple agreed to attend a two-hour presentation about a holiday club. In fact the presentation lasted six hours and, feeling under considerable pressure, the couple eventually agreed to become club members. The next day they returned to try to cancel the contract. The company threatened to call the police if they did not leave.

CONCLUSION

- 5.12 Consumer groups told us that there was a significant gap in the protection provided to consumers against aggressive practices. It was pointed out that increasing numbers of people over 80 live alone, and are often particularly vulnerable to aggressive sales techniques. We have been asked to consider the law of duress and undue influence and explore ways in which these concepts can be aligned with the definition of aggressive practices under the Consumer Protection Regulations.

PART 6

UNFAIR PRACTICES TO COLLECT PAYMENTS

- 6.1 The Consumer Protection Regulations not only apply to selling products but also to collecting payments. Thus the definition of “transactional decision” includes the decision on “whether, how or on what terms to make a payment in whole or in part”.¹ This means that debt collection should not involve misleading or aggressive practices.
- 6.2 In the course of discussions, there was some debate about whether the Regulations should be interpreted widely or narrowly in their application to payment collection activities. On the wide view, they extend to all commercial services which collect payments from consumers. On the narrow view, they would only include debt collection following a purchase, and would not (for example) extend to civil recovery or wheel clamping charges, where these were carried out in a misleading or aggressive way. We intend to explore this issue further in our consultation paper.

COLLECTING CONSUMER DEBTS

- 6.3 We were given many examples of debt collection where the consumer felt that demands were threatening or misleading.
- 6.4 Citizens advice bureaux complained that the methods used may be inappropriate for vulnerable consumers, such as the elderly or the recently bereaved.

Example: persistent phone calls to recent widow

A retired couple had a bank loan, which the husband was paying back at £243 per month. When the husband died suddenly, a couple of payments were missed. The wife visited a citizens' advice bureau, who agreed with the bank that she would make payments of £100. Although she made the agreed payments, she continued to receive regular and threatening calls, demanding larger payments, sometimes late into the evening.

- 6.5 Another common complaint was that the debt was not owed, but the debt collector continued to issue demands for payment.

¹ Reg 2.

Example: debt over 6 years old

A consumer suddenly started receiving a series of threatening letters from a debt collection agency regarding an alleged debt. The consumer did not have any recollection of the debt, and disputed that it was payable. In any case, the alleged debt was over 6 years old. The consumer paid the debt because they felt intimidated and were afraid of their credit rating being affected.²

Example: debt based on a mistake

A couple in their 80s were invited to sign up with a new utility provider. They refused, but the utility provider acted as though they were customers. Eventually the provider acknowledged the error and said the account would be closed and all debts removed. But for the next three years, the debt was passed from debt collector to debt collector who wrote aggressively to demand payment. When the husband died, the wife continued to receive threatening letters.

- 6.6 Under the Regulations a threat to take the consumer to court for a time-limited debt might be caught within two separate categories. It would be misleading about “the consumer’s rights and the risks he may face” under regulation 5(4)(k). It would also be threatening, because it contained “a threat to take an action which cannot legally be taken”, under regulation 7(2)(e).³

THREATENED CIVIL RECOVERY

- 6.7 Consumer groups are becoming increasingly concerned about the process of civil recovery for alleged shoplifting.

² Clearly, if the debt collector knew that the money was not due but, nevertheless, recovered it by deceit, this would amount to criminal fraud. However, there would need to be proof that the trader had the necessary intention. Note that in Scots law, if a creditor had allowed the prescriptive period of five years to pass without receiving any payment from the debtor, an action of recovery of the debt would be time barred and the debt wholly extinguished. See the Prescription and Limitation (Scotland) Act 1973, s 6.

³ In England and Wales, harassing debtors may also be an offence under the Administration of Justice Act 1970, s 40. This prevents demands which in their frequency or manner are calculated to subject debtors or their families “to alarm, distress or humiliation”.

Example: civil recovery for alleged shoplifting

A young mother with two small children was shopping, when one of the children took a drink from a shelf and opened it. The mother was then detained by the shop's security guard, despite her offer to pay for the drink. The police were not called to attend, and she was allowed to leave.

Two weeks later, she received a letter from a civil recovery company, demanding approximately £90 for staff and management time, administration costs, and security costs. The value of the goods allegedly stolen was listed as "nil". The letter added that the company would accept £70 in settlement if the consumer paid promptly. The consumer paid that amount because she felt threatened.

- 6.8 In these cases, the civil recovery companies allege that the consumer has committed theft from a trader. However, consumer groups submit that the allegedly stolen item often has a low value (a few pounds or even "nil" in some cases), and there is sometimes doubt about whether a criminal act has actually taken place. In most of these cases, there is no criminal prosecution or police action. However, the civil recovery companies threaten civil proceedings against consumers if they do not make prompt payment for "investigation", "security", or "administration" costs.
- 6.9 Consumers may be vulnerable because they are under 18, or mentally or physically disabled. Many recipients of these letters pay because they are intimidated; however, consumer groups say that in the great majority of those cases where consumers do not pay, the claims are eventually dropped. The civil recovery company chasing payment does not fulfil the threat of court action.

PARKING, CLAMPING AND TOWING

- 6.10 At present, wheel clamping on private land in England and Wales⁴ is lawful if certain conditions are met: for example, the charges must be reasonable, and the signs warning of clamping and towing must be clear.⁵ However, the Government has announced that it intends to introduce legislation to prohibit clamping a vehicle or towing it away on private land.⁶
- 6.11 Consumer groups are concerned about the level of unfair practices by private parking companies. Some private companies engage in improper practices, including the use of unclear signs, or non-existent signs, demanding excessive fees and using aggressive and threatening behaviour.

⁴ The law in Scotland is significantly different – clamping on private land in Scotland amounts to extortion and theft, see *Black v Carmichael* 1992 SLT 897.

⁵ *Arthur and another v Anker* [1997] QB 564.

⁶ On 17 August 2010, the Home Office announced that it intends to include provisions within the Freedom Bill, to be introduced into Parliament in Autumn 2010: <http://www.homeoffice.gov.uk/media-centre/press-releases/ban-on-wheel-clamping>. For commentary, see <http://www.bbc.co.uk/news/uk-10993473>.

6.12 Complaints to the citizens advice bureaux about parking rose by more than 50% from 2006 to 2009. Most complaints were about:

- (1) inadequate warning signs;
- (2) unreasonable additional charges;
- (3) the speed between clamping and subsequent towing of the vehicle, and the length of time it takes to obtain the release of a vehicle afterwards;
- (4) failure of the parking companies to acknowledge parking permits or blue disabled badges;
- (5) difficulty in determining the legitimacy of the clampers; and
- (6) the lack of a complaints and appeal process.

6.13 David Harker, Chief Executive of the CAB, said that some private parking companies “treat their business as a licence to print money”, and that these companies should be required to return money to the consumers they have overcharged. He added:

There is a serious imbalance of power between car owners and private parking companies. The objective of those who demand payment seems to be to make money, not to ensure fair parking. Furthermore there is currently no right for consumers to appeal fines or seek redress.⁷

6.14 We were given several examples of problems over car clamping:

Example: car clamping

A consumer found her car being clamped even before she had left the car park. She was immediately charged £250, which also covered towing away. There was no separate charge for clamping without towing away. There were no obvious signs about parking, the clampers did not have any identification, and her receipt did not contain any details of the clampers or private parking company.

6.15 We understand that Trading Standards Officers have successfully used the Consumer Protection Regulations to prosecute wheel clampers who use misleading actions, omissions and aggressive practices.⁸

⁷ *Clamping Down on the Clampers*, see www.citizensadvice.org.uk.

⁸ Wolverhampton City Council report that they successfully prosecuted a wheel clumper “who tried to con Black Country motorists out of more than £32,000 in illegal fines and employed bouncers to intimidate victims”. See: http://www.wolverhampton.gov.uk/business/trading_standards/rogue/clamper_jailed.htm

PRIVATE RIGHTS OF REDRESS FOR UNFAIR DEBT COLLECTION

- 6.16 Where a threat or deception leads to consumers paying money which is not owed, the consumer is entitled to the return of the payment under the law of unjust enrichment.⁹ However, if the same actions lead to a consumer paying money which is owed, the creditor does not appear to be enriched.
- 6.17 There are two statutory provisions which a consumer might use. The Protection from Harassment Act 1997 states that a person must not pursue “a course of conduct” which “amounts to harassment of another” and which “he knows or ought to know amounts to harassment”.¹⁰ Section 3 provides for a possible civil remedy, including damages for (among other things) anxiety and financial loss.¹¹
- 6.18 Although the Act is usually used against “stalkers”, it has also been applied where British Gas sent a consumer a series of threatening letters over an eight month period, even though she did not owe them money. Her various complaints and appeals had no effect.¹² In an appeal against a decision not to strike out the consumer's claim for damages for harassment, the court held that there was an arguable case of conduct amounting to harassment so that the matter should proceed to trial. At that point, British Gas settled. However, the judge commented that the consumer had been brave to take the case:
- Because [the claimant] funds the claim out of her personal resources, she does so at considerable risk: were she ultimately to lose she would probably have to pay British Gas's considerable costs.¹³
- 6.19 Consumer groups argued that clearer, more certain law would reduce the risks a consumer runs in bringing this type of litigation, and then losing the case.

⁹ See, for example, *Kleinwort Benson v Lincoln County Council* [1999] 2 AC 349.

¹⁰ Protection from Harassment Act 1997, s 1 (England and Wales) and s 8 (Scotland).

¹¹ For the equivalent Scottish provision, see Protection from Harassment Act 1997, s 8 (5) and (6). While damages are not normally awarded in respect of anxiety (see JM Thomson, *Delictual Liability* (4th ed, 2009), para 1.11, footnote 1), in *Robertson v Scottish Ministers* [2007] CSOH 186, Lord Eassie held that damages could be awarded under the 1997 Act for both anxiety and distress and more serious psychiatric illness.

¹² *Ferguson v British Gas Trading Ltd* [2010] 1 WLR 785; [2009] EWCA Civ 46. For a discussion, see “Debt Collection and Recent Legal Issues” (April 2009) *Consumer Law Today* 9-10.

¹³ Above, at 787 by Jacob J [2010] 1 WLR 785; [2009] EWCA Civ 46.

6.20 Secondly, since 2006, the court has a broad power to declare a consumer credit relationship to be unfair. The provision, set out in section 140A of the Consumer Credit Act 1974, applies to consumer credit agreements. The relationship may be unfair to the debtor because of the way in which the creditor has exercised or enforced rights under the agreement. If so, the courts have considerable discretion to offer a remedy, including requiring the creditor to repay any sum paid by the debtor, in whole or in part.¹⁴ So far, only limited use has been made of this provision.¹⁵

¹⁴ Consumer Credit Act 1974, s 140B.

¹⁵ For example, *Patel v Patel* [2009] EWHC 3264 concerned a private loan between two friends. The court found that the relationship was unfair because of the high interest rate, the lack of written records, the fact that the outstanding sums were to be repaid only as and when requested by the claimant; and the fact that the defendant (a less educated man) had trusted the claimant. See also *MBNA Europe Bank Ltd v Thorius* [2010] ECC 8 (CC (Newcastle)). The great majority of claims under the provision have, however, failed. See, for example *McGuffick v The Royal Bank of Scotland Plc* [2009] EWHC 2386 (Comm), [2010] 1 All ER (Comm) 48 where it was held that there was no requirement to interpret the Consumer Credit Act 1974 in line with the Consumer Protection Regulations. See also the Scottish case of *Nicol v Nine Regions Ltd (t/a Log Book Loans)* 2008 SLT (Sh Ct) 123.

PART 7

UNFAIR PRACTICES TO DISCOURAGE CONSUMERS FROM LEGAL ACTION

- 7.1 The Consumer Protection Regulations cover commercial practices which use misleading or threatening means to discourage consumers from exercising their contractual rights. This follows from the definition of a “transactional decision”, which includes:

Any decision taken by a consumer, whether it is to act or to refrain from acting, concerning—

.... whether, how and on what terms to exercise a contractual right in relation to a product.¹

- 7.2 Thus if a consumer asks for a refund for faulty goods, the Regulations would prevent the trader from acting in a threatening way, or from giving misleading information about the consumer’s rights.
- 7.3 The following are examples mentioned by consumer groups.

Example: no right to a repair or replacement

A consumer tries to return faulty shoes to a store two months after they were purchased. The store says that as it is outside the store’s 30-day money back guarantee period there is nothing they can do. The consumer has been misled as the retailer is liable under the Sale of Goods Act 1979. The consumer decides to purchase a replacement pair of shoes at their own expense.

Example: credit card company denies responsibility

A consumer purchases a bike for £450 using a credit card, but the retailer fails to deliver it. The credit card company tells the consumer that it has no responsibility, thereby misleading the consumer about its liability under section 75 of the Consumer Credit Act 1974.

- 7.4 In such cases, consumers are required to find out the law for themselves, and then take the appropriate action. The law does not provide any specific remedy for the misleading information.

¹ Consumer Protection from Unfair Trading Regulations, reg 2.

PART 8

NEXT STEPS

- 8.1 The Law Commission and Scottish Law Commission intend to publish a consultation paper in spring 2011. This will consider how the law should be reformed to provide a simpler and clearer private right of redress for consumers who are the victims of misleading or aggressive practices.
- 8.2 The evidence we have been given highlights the variety of problems consumers experience. It is often difficult to state with any precision how these cases would be treated under the current law, or what remedy might be available. We will be considering whether it would be possible to draft a new statute to apply to business to consumer transactions, which would provide simpler and clearer remedies.
- 8.3 The challenge will be to achieve an appropriate balance between protecting consumers from unacceptable malpractices, without encouraging consumers to abdicate responsibility for the bargains they enter.
- 8.4 It is not the role of the law to protect consumers from all the bad bargains they may make. Research in the field of behavioural economics shows that consumers do not necessarily weigh the full costs and benefits of the bargains they enter. Instead, they tend to be “present-oriented” and optimistic in their approach to consumer purchasing. This means that they often under-estimate the likelihood of future problems. They cope with information overload by focusing on a narrow range of factors – often those involving short-term benefits, rather than long-term costs.¹ There is a limit to how far the law can protect consumers against miscalculations of this kind, where they fail to heed information about long-term costs.
- 8.5 In some cases, a statement is clearly misleading or unfair, but leads to little loss. The parent who is pestered to buy a toy advertised directly at children may feel aggrieved, but would not necessarily have suffered a loss, if the toy is worth what is paid. Similarly, consumers might be attracted into a shop by false indications of “a closing down sale”, but may end up buying goods of adequate quality at normal market prices.
- 8.6 However, the evidence we have been given shows that often consumers suffer significant losses as a result of aggressive or misleading practices. The consequences are often felt by the most vulnerable in society, often bereaved or elderly consumers who live alone. Law reform cannot address all the problems consumers face in attempting to gain redress, but it could be part of a strategy to encourage traders to maintain high standards and provide remedies when things go wrong.

¹ See for example Stewart, ‘The psychology of personal current accounts’ (Annex E of OFT Market Study on Current Accounts, 2008).