

CONSUMER SALES CONTRACTS: TRANSFER OF OWNERSHIP

BRIEFING NOTE

Introduction

1. The Scottish Law Commission (SLC) held an online workshop on 8 October 2020 to discuss the potential impact of the Law Commission of England and Wales' (LCEW) draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill¹ in a Scottish context. The SLC would like to thank the speakers, Lorna Richardson,² Scott Wortley,³ and Alisdair MacPherson,⁴ and all those who attended and contributed to the workshop. This briefing note incorporates contributions made by the speakers and other participants in the discussion, and has been prepared to facilitate responses to the LCEW's consultation on the draft Bill,⁵ which closes on **31 October 2020**.⁶

Overview of the Bill

2. The Bill relates to the point at which ownership of goods transfers from seller to buyer in a contract between a "trader"⁷ and a "consumer".⁸ The current law is contained in the Sale of Goods Act 1979 (SGA). Goods must be "specific"⁹ or "ascertained"¹⁰ and in a "deliverable state"¹¹ in order for ownership to transfer. Where that is the case, ownership transfers when parties intend it to transfer,¹² with rules set out as to how that intention should be ascertained in different circumstances.¹³ The Bill revises the position in relation to consumer contracts by inserting new sections into the Consumer Rights Act 2015 (CRA), removing the need to cross-refer to the SGA for the rules on transfer as at present. Under these new sections, where the goods are "identified and agreed on", ownership will transfer when the contract is made.¹⁴ For goods that are not identified and agreed on at the time of formation of the contract, ownership will transfer when they become so identified, and the Bill provides a list of circumstances in which this will be considered to have occurred.¹⁵ Under the Bill, contract terms which provide for ownership to transfer at a later time will be of no effect, making the rules mandatory.¹⁶ It will no longer be possible for a trader to retain title until payment is made as it can do under the SGA, s 19. The consultation paper accompanying the Bill also asks whether changes should be made to the SGA provisions on bulk goods in relation to consumer contracts, and

¹ The draft Bill is available at: <<https://www.law.com.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/>>.

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⁵ Law Commission, *Consumer Sales Contracts: Transfer of Ownership* (Law Com CP No 246, 2020) available at: <<https://consult.justice.gov.uk/law-commission/consumer-sales-contracts-transfer-of-ownership/>>.

⁶ Responses to the Consultation Paper can be submitted via an online form available at: <<https://consult.justice.gov.uk/law-commission/consumer-sales-contracts-transfer-of-ownership/>>.

⁷ As defined in the Consumer Rights Act 2015, s 2(2).

⁸ As defined in the CRA 2015, s 2(3).

⁹ As defined in SGA 1979, s 61(1).

¹⁰ SGA 1979, s 16.

¹¹ SGA 1979, s 18.

¹² SGA 1979, s 17.

¹³ SGA 1979, s 18.

¹⁴ Draft Bill, s 1(3), inserting s 18A into the CRA 2015.

¹⁵ Draft Bill, s 1(3), inserting s 18B into the CRA 2015.

¹⁶ Proposed new ss 18A(4) and 18B(5) of the CRA 2015.

whether the provisions of the Bill should apply to contracts of exchange (excambion) as well as contracts of sale.

3. The Bill seeks to address the situation whereby a consumer pays for goods from a retailer and the retailer enters insolvency prior to delivery. Under the current law, the consumer may not be the owner of the paid-for goods and has little prospect of either receiving the goods or recovering their payment in the insolvency. Bringing forward the point at which ownership transfers should make it less likely that the consumer will find themselves in this position. The consultation paper accompanying the Bill notes, however, that there may be a growing practice amongst retailers of delaying formation of the contract until the point of delivery, and seeks further evidence from consultees on how frequently this occurs and why traders adopt this approach.

Policy rationale

4. The policy objectives of the draft Bill relate to the bilateral relationship between retailers and consumers, and can be justified on the basis of the unequal bargaining power between these parties. However, improving the position for consumers has an effect on the position of other creditors in an insolvency. Perhaps more consideration is needed of these effects on different types of creditor to ensure there is full justification for the Bill from a policy perspective.

5. The current proposals do not expressly give consumers priority over other unsecured creditors on retailer insolvency.¹⁷ However, they have the practical effect of doing so for consumers who are in the process of buying goods from retailers, by removing these goods from the assets available to meet the claims of other unsecured creditors at an earlier stage. Participants questioned the rationale for this, particularly regarding giving consumers preference over employees and delictual claimants. However, it was noted that even at present, unsecured creditors are unlikely to receive much, if anything, upon retailer insolvency, so the impact on them may be minimal.

6. It was noted that the new proposals would be the latest, but likely not the most significant, in a range of legislative changes weakening the position of floating charge holders. These include an increase in the prescribed part for unsecured creditors,¹⁸ the reintroduction of Crown preference¹⁹ and provisions allowing eligible companies²⁰ to obtain a moratorium restricting enforcement of a floating charge for a period of time.²¹ The proposals, in context with these other provisions, might result in lenders being more reluctant to lend or doing so on less favourable terms, with a knock-on negative effect on retailers seeking finance. Lenders may impose conditions on how retailers engage with consumers, for example through delaying formation of sales contracts, particularly where transactions concern valuable goods.

7. In terms of the policy balance in Scots law specifically, it was noted that Scottish businesses are more likely to be negatively affected by the proposals than their English

¹⁷ This was one of the options suggested in the LCEW's 2016 Report on Consumer Prepayments on Retailer Insolvency, available at: <https://s3-eu-west-2.amazonaws.com/law-com-prod-storage-11jsxou24uy7q/uploads/2016/07/56284-Law-Comm-HC-543-Web-pdf.pdf>.

¹⁸ The Insolvency Act 1986 (Prescribed Part) (Amendment) Order 2020.

¹⁹ Finance Act 2020, ss.98 and 99.

²⁰ 'Eligible companies' defined in Insolvency Act 1986, Sch. ZA1, inserted by Corporate Insolvency and Governance Act, Sch.1.

²¹ Insolvency Act 1986, s.1A, inserted by Corporate Insolvency and Governance Act 2020, s.1.

counterparts because of the different forms of fixed security in moveable assets available in the two jurisdictions. The new security of statutory pledge proposed in the Scottish Law Commission's Report on Moveable Transactions may help to strengthen the position of Scottish retailers and their creditors in this respect if and when it is introduced by Parliament.²²

8. Scottish landlords who lease property to retailers might also be specifically affected. The proposals could diminish the value of the landlord's hypothec, a security available under Scots law but not in other UK jurisdictions, by transferring ownership of goods that would currently be covered by the hypothec to consumers at an earlier stage. Some participants suggested, however, that the landlord's hypothec is not used as often as it used to be, and that it is typically the property's fixtures and fittings that are sold to satisfy landlords rather than the goods contained in the property, unless the goods are of significant value. Accordingly, the consequences for landlords here might be relatively minor in practical terms.

Terminology in the draft Bill

9. Participants in the workshop welcomed the updated terminology used in the draft Bill. There was a general consensus that the proposed terminology would be more accessible to consumers, and was aligned with modern terms used in Scots law. There were minor issues expressed regarding the potential for litigation if the language used produces ambiguity, although it was noted that despite the perception that the language of the SGA was confusing, there had been little litigation in this regard.²³ The requirement that terminology balances certainty with malleability to allow insolvency practitioners to carry out their function with confidence was also discussed.

Transfer of ownership under the proposed rules

10. There were concerns that the provisions in the draft Bill bringing forward the time of transfer of ownership could have the unintended consequence of limiting consumer choice. Retailers, either on their own initiative or due to pressure from creditors, may be reluctant to allow credit terms whereby payment for goods is postponed. This could disproportionately affect financially vulnerable consumers who are unable to pay for necessary goods immediately, and who usually benefit from credit provisions. Instead, retailers may require full payment for constitution of the contract, delay the formation of the contract via terms and conditions, or use conditional sales contracts.²⁴

11. As under the current law, insolvency practitioners will still need to assess whether goods are within the insolvent retailer's patrimony to allow them to be used to repay creditors. The proposed changes, entailing mandatory rules and clearer, modern terminology, might ultimately decrease the time spent making these determinations. It was noted, however, that insolvency practitioners cautiously exercise their function due to the potential for litigation if done incorrectly. They would therefore require training on the interaction between the new law and existing law, which would necessitate extending the two-month period between enactment and the new rules coming into force. Questions of proof were also raised in relation to some

²² *Protecting Scotland, Renewing Scotland: The Government's Programme for Scotland 2020-2021*, p 23 sets out an ambition to introduce a Moveable Transactions Bill early in the new Parliament.

²³ It was also suggested that the litigation may not be economically worthwhile for consumers.

²⁴ Conditional sales contracts (as defined in the CRA 2015, s.5(3)) are excluded from the proposed rules.

of the proposed circumstances in which goods may be considered to have been “identified” - the ascertainment of intention required by the current law is perhaps easier to evidence than the permanence of labelling by a trader, for example.

12. Concern was expressed about the position of retailers. If there is a gap between ownership of goods being transferred and payment being received, this may decrease the amount of working capital a retailer has access to and affect their access to funding.

13. As under the current law, retailers would have a right of lien provided that they retain possession of the goods, but will no longer be able to rely on retention of ownership clauses. Retailers will still be permitted to engage in hire purchase contracts and conditional sales contracts, but may be reluctant to do this because these types of agreement will trigger provisions of the Consumer Credit Act 1974.

Other contracts under which ownership of goods can transfer

14. The consultation asks whether the proposed rules should apply to contracts of exchange. Under Scots law, such contracts are currently regulated by common law rather than under the SGA and/or CRA. Consideration should be given to whether it is desirable to bring this type of contract within the scope of the statutes.

Commencement

15. Concern was expressed that the proposal to bring the new rules into force two months after the introduction of the legislation would not leave sufficient time for retailers and insolvency practitioners to familiarise themselves with the operation of the rules in practice.

The timing of contract formation

16. The draft Bill does not stipulate when contracts are formed. If retailers delay contract formation until the goods are dispatched, consumers in this situation would not benefit from the requirement of delivery within a reasonable time²⁵ or the statutory protections against misrepresentation or breach of contract.²⁶

17. It was suggested that the risk of delaying the formation of contracts may only affect consumers in relation to sales by large retailers, as small retailers may not have access to the legal infrastructure to delay formation in this way nor engage with the 1974 Act. However, it was noted that smaller retailers could have access to the information required via the internet and therefore be able to engage in similar practices.

Miscellaneous issues

18. Participants questioned the compliance of the proposed rules with the Late Payments Directive²⁷ and Article 1, Protocol 1 of the European Convention on Human Rights, neither of which are explicitly discussed in the consultation paper.

²⁵ CRA 2015, s 28.

²⁶ Consumer Credit Act 1974, s 75.

²⁷ Directive 2011/7/EU

Next steps

19. Responses to the consultation must be submitted to the LCEW by 31st October 2020.²⁸ The responses will be analysed by the LCEW with input from the SLC. A final version of the draft Bill and accompanying Report will be submitted by the LCEW to the Department of Business, Energy and Industrial Strategy. The UK Government will decide whether to bring forward legislation in due course.

Scottish Law Commission
12th October 2020

²⁸ As noted above, responses to the Consultation Paper can be submitted via an online form available at: <https://consult.justice.gov.uk/law-commission/consumer-sales-contracts-transfer-of-ownership/>.