



Scottish Law Commission

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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION

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BEFORE 0001 HOURS 7 AUGUST 2002

Simplify laws on consumer small print say Law Commissions

The Law Commission and the Scottish Law Commission today join forces to publish a Consultation Paper that proposes a simpler law of unfair contract terms, so that consumers and business people know better where they stand; and a rationalisation of the controls over non-negotiated terms in business-to-business contracts.¹

Professor Hugh Beale QC, Law Commissioner and Professor Joe Thomson, Scottish Law Commissioner, said today:

"The law on unfair contract terms is a vital consumer protection, to prevent consumers from being caught out by small print. It is also important in contracts between businesses. However the law is horrendously complicated. It is contained in two quite separate pieces of legislation – the Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999. Both are difficult documents to understand and when you put them together, the result is confusion. The two laws differ in their scope, they overlap, they apply in different ways and they have different effects."

¹ Unfair Terms in Contracts: A Joint Consultation Paper (2002) Law Commission Consultation Paper No 166, Scottish Law Commission Discussion Paper No 119. The paper is available on the Law Commission's website at <http://www.lawcom.gov.uk> (via the link to the Library) and on the Scottish Law Commission's website at <http://www.scotlawcom.gov.uk>. It is also available from TSO (The Stationery Office), price £24.50.

The Consultation Paper provisionally proposes:

- replacing the 1977 Act and 1999 Regulations with a single piece of legislation, which will provide both the protection required by European Community Legislation and the additional protection given to consumers by the 1977 Act;
- rationalising the controls over non-negotiated terms in business-to-business contracts, so that these apply not only to clauses that exclude or limit liability but also to other unfair terms that have not been negotiated between the parties; and
- re-writing the legislation in a way that is clearer and more accessible to consumer and business advisers.

Replacing the 1977 Act and 1999 Regulations with a single piece of legislation

The differences between the Unfair Contracts Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 (which implement a European Community Directive of 1993) can be very confusing for both businesses that are trying to comply with the legislation and consumers or their advisors. For example:

- A car repair firm might be drafting a standard contract for repairs. It might wish to add a clause stating that the repairer will be responsible for defects in parts supplied only so far as the defect is covered by the manufacturer's warranty. The two pieces of legislation deal with the issue in different ways. Under the 1999 Regulations, the term would be invalid only if it was unfair. So the firm might think that the clause would be valid provided it was fair; and that it would be fair if the firm explained the clause carefully to its customers, and passed on all the information about the warranty. However, under the 1977 Act the clause would be invalid, whatever steps the repairer had taken.

The Consultation Paper proposes bringing all the controls into a single piece of legislation, structured in a way that is easy to follow.

- The Regulations affect most terms that have not been 'individually negotiated'. The Act applies to only a limited range of terms in consumer contracts, but affects them whether or not they were negotiated. So a clause in a package holiday contract allowing the company to move the holiday-maker to another hotel has to be 'fair' under the Regulations only if it was not individually negotiated. Under the Act it must be 'fair and reasonable' whether it was negotiated with the consumer or not.

The Consultation Paper provisionally proposes that unfair terms should be invalid whether or not they were individually negotiated. Consumers are unlikely fully to understand terms of this kind, even if there was some element of 'negotiation'.

- In the holiday example, the Regulations say the clause must not be unfair; the Act that it must be fair and reasonable. It is not clear what differences there are between the two tests.

The Paper proposes a single test.

Extending protection in business-to-business contracts

Under the 1977 Act, businesses are only partially protected against unfair contract terms. The Regulations do not apply at all. So for example:

- the 'small print' in a business sales contract might state that the seller will not be responsible for losses caused to the buyer through late delivery. Under the 1977 Act, this clause is valid only if it is fair and reasonable. However, a clause that allowed the seller to increase its prices between the date of order and the date of actual delivery would not be subject to the 1977 Act. A business buyer would have no remedy, even though a consumer would be covered by the 1999 Regulations.
- A business finds that hidden in the small print of a contract to rent a photocopier is a term that locks it into the contract for a lengthy period at escalating prices. The law does not presently provide a remedy. (It would in a consumer contract.)

The Paper provisionally proposes to extend protection to most types of term that have not been negotiated between the parties, so that a wider range of terms will be valid only if they can be shown to be 'fair and reasonable'.

Making the legislation clearer and more accessible to consumers

The current legislation is concise but complex and hard to follow. The Consultation Paper includes new draft legislation to show how we think that it could be simplified. For example:

- Section 6 of the 1977 Act applies to consumer sales, contracts, business-to-business sales contracts and even some sales contracts between purely 'private' parties. Thus consumers have to work out which parts of the section apply to them, and may find that much of it is not relevant. The new draft deals with each type of contract separately.

In some cases the language can also be shortened and simplified. For example:

- In the 1999 Regulations, the most important regulation is currently forty-three words long. It states that:

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The 1999 Regulations then go on to explain that:

An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.

- The Paper argues that the central idea can be put much more simply. It suggests the following phrase, using only twenty-six words:

Where a term of a consumer contract is detrimental to the consumer, the business cannot rely on the term unless the term is fair and reasonable.

NOTES FOR EDITORS

1. In January 2001, the Law Commission and the Scottish Law Commission received a joint reference from the Parliamentary Under Secretary for Consumers and Corporate Affairs to consider the desirability and feasibility of:
 - a) Replacing the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 with a unified regime which would be consistent with the Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts;
 - b) Extending the scope of the Unfair Terms in Consumer Contracts Regulations (or their equivalent) to protect businesses, in particular small enterprises; and
 - c) Making any replacement legislation clearer and more accessible to the reader, so far as is possible without making the law significantly less certain – by using language which is non-technical with simple sentences, by setting out the law in a simple structure following a clear logic and by using a presentation that is easy to follow.
2. The Law Commissions were set up by the Law Commissions Act 1965 to promote reform of the law.

THE LAW COMMISSIONERS

The Hon Mr Justice Toulson,² *Chairman*
Professor Hugh Beale QC
Mr Stuart Bridge
Professor Martin Partington CBE
Judge Alan Wilkie QC

THE SCOTTISH LAW COMMISSIONERS

The Hon Lord Eassie, *Chairman*
Mr Patrick S Hodge QC
Professor Gerard Maher
Professor Kenneth G C Reid
Professor Joseph M Thomson

3. The full text of this joint consultation paper can be found on the Internet at:

<http://www.scotlawcom.gov.uk> and
<http://www.lawcom.gov.uk>

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² At the time the joint consultation paper was completed, the Chairman of the Law Commission was the Rt Hon Lord Justice Carnwath CVO.