

OPERATION OF GENERAL RULES AND THE NOTION OF FAIRNESS IN ENGLISH LAW

EXECUTIVE SUMMARY

1. In October 2001 the European Commission published a Green Paper on EU Consumer Protection¹, seeking views on a proposed radical reform of consumer protection law which would move from a process of harmonisation based on sectoral Directives containing sector-specific rules to harmonisation around a more flexible framework based on a "general duty to trade fairly",

2. A further Communication published in June 2002 indicated the Commission's intention to proceed with the proposal². The Communication indicated the form such a general duty might take, combining a general clause with reference to specific instances of unfair practices, including misleading practices, coercive selling techniques, information requirements and after sales service.

3. The Commission has said that the proposed reform would not affect contract law, and it is conducting a separate consultation on harmonisation of European contract law³

4. The UK government has expressed concern about the Commission's proposals. The UK is sceptical about the ability to produce a definition of "fair" or "unfair" trading practices which would be sufficiently certain to be workable in practice by businesses and enforcement agencies. The government's concern is shared by business organisations but not by organisations representative of consumer interests who have argued that such legislation is necessary to enable "rogue traders", who may evade the sector-specific controls, to be tackled effectively, and who point to the Unfair Terms in Consumer Contracts Regulations as an example of effective control based on a general standard

5. The objective of this report is to examine how such a general fair trading requirement might impact on English law, taking into account how general considerations such as "fairness", "reasonableness" and "good faith" are used in domestic law at present. and in particular how the introduction of a general duty (not) to trade (un)fairly would impact on the law of contract. It also considers how such a general requirement could be transposed into English law given that it is likely that any Directive would be a maximum harmonisation measure. A draft Directive was published in June 2002. This report is not intended to examine the draft in detail but it does contain some general comments on the draft and its likely impact (see section 8).

6. English law tends to prioritise different values to those favoured by other European legal systems. First, as a matter of doctrinal form, English contract law prefers specific provisions to general clauses; and, secondly, as a matter of doctrinal substance, the default values of English contract law are those of self-reliance and individualism rather than mutuality and co-operativism.

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http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/fair_comm_greenpap_en.pdf

2. http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/communication_en.pdf

3. http://europa.eu.int/comm/consumers/policy/developments/contract_law/cont_law_02_en.pdf

7 We can predict with a degree of confidence that the implementation of an EC prescribed general duty of fair trading would have a significant impact on English law. It would not only require English law to adopt a doctrinal form that it does not favour, but would almost certainly be loaded with doctrinal substance that pushed domestic law away from its favoured values.

8 Even though the English law of consumer contracts has moved away from the market-individualist values of classical contract law, it is not clear how far its consumer-welfarist orientation embraces the values of mutuality and co-operativism. Bearing in mind that any fair trading initiative from the EC would also have single market objectives, and thus be concerned that consumers should be confident in all parts of the market, there would be an added pressure to move towards a co-operative default position.

9 A general duty (not) to trade (un)fairly would be expected to cover both procedural and substantive unfairness. English law has gone a long way towards controlling procedural unfairness in consumer contracts. The courts led the way by developing the common law but these measures have been reinforced by Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999.

10 Procedural fairness is concerned with the two questions whether the consumer has made an unforced choice and whether the choice was properly informed. Both these issues invite responses that draw on the underlying values of the legal system running from individualism and self-reliance to mutuality and co-operativism. English law is not strikingly out of line with European law on these issues. The most significant gap between English consumer contract law and its European counterparts is in relation to the provision of information and the absence from English law of any general duty of disclosure between contracting parties.

11 The idea of substantive unfairness is used very loosely in English contract law, often sliding into the idea of substantive unreasonableness. It is used (i) to flag up the need for an inquiry into procedural fair dealing in a particular case; (ii) to create as an irrebuttable presumption of procedural unfairness; and (iii) to regulate wholly unreasonable terms (independent of procedural fairness or unfairness).

12 It is difficult to articulate clearly the idea of substantive unfairness, independent of any question of procedural unfairness. It is not obvious that the introduction of a general duty of fair trading would find English law lacking in relation to its willingness to resort to the idea of substantive unfairness.

13 A claim concerning fairness in contract can arise *ex casu* or by way of pre-emptive challenge. So far as pre-emptive challenge is concerned, enforcers and adjudicators must operate with a model of a representative or average consumer. The English judicial view here seems to be in line with ECJ jurisprudence. This is not a particularly protective position, and there are more protective standards in play elsewhere in Europe. So far as *ex casu* challenges are concerned, the principal area in which English law falls "short" of the European standard is in the absence of a duty of disclosure.

14 Most European legal systems operate with a general requirement of good faith between contractors. English law has no such general standard, although a good faith requirement is now imposed in the context of consumer contract law by the UTCCR, and in other specific areas (eg: commercial agency) normally as a result of the requirements of EC Directives. The experience of good faith in the English law of consumer contracts has so far not been noticeably problematic. Certainly, judges seem perfectly happy about handling the idea and the work of the OFT, albeit largely a paper exercise, has not given rise to great anxiety or concern. Nevertheless, adoption of such general fair dealing principles of this kind

is likely to be problematic until agreement is reached about whose (or which) standards are to serve as the reference point for such doctrines.

15 Broadly speaking there seem to be two options: (i) the standards of fair dealing recognised by the community of which the contractors are most proximately a part (as in a "good faith requirement"); and (ii) the standards of fair dealing and co-operation that would be prescribed by the best (i.e. most defensible) moral theory (as in a "good faith regime"). In the consumer context neither is ideal. Those who participate in consumer transactions in the single market do not form an ideal community for the purposes of a good faith requirement; and the jurisprudence of the EC, even if an expression of best European practice, is not based on any consistent moral theory. If a general duty to trade fairly is adopted, and if it is to have real prospects of acceptance, it must be operationalised in a way that is sensitive to best European co-operative standards as well as local practice and expectation in the consumer marketplace.

16 Viewed in this light, there is no reason to reject out of hand the idea of a general duty to trade fairly. It would introduce a dynamic element into the law coupled with a tendency towards co-operative standards. This might not be where English contract law started but it is in line with the direction in which our consumer contract law has been moving for some considerable time. Domestic consumer protection law now rests on a range of doctrines that give judges substantial discretion in application of the law. The key question then is to strike the right balance between flexibility and fairness, on the one hand, and certainty and predictability on the other. Experience under both UCTA and the UTCCR suggests that domestic courts are able to handle concepts of "reasonableness" or "unfairness" in a flexible manner, ensuring that cases are generally considered on their particular facts, without creating such a degree of uncertainty as to destabilise commercial activity.

17 The courts have sought to introduce a degree of certainty in putting forward criteria, or guidelines, which should be considered by when applying these fairness standards. Although these are not exhaustive, they nevertheless inject a degree of calculability into an otherwise rather uncertain system.

18 This bodes well for the introduction of a wider fairness principle into English law. The courts are willing to recognise that a case might be limited to its particular facts, and that a finding of "unfairness" in the context of one claim will not invariably mean that a similar case will be decided in the same way. However, the courts would undoubtedly seek to provide guiding principles to assist them in applying a broad fairness test.

19 Nevertheless, although there may be little reason to doubt that a broad fair trading standard would be applied to a particular case in an appropriate way, it may be more difficult to generalise from decisions in particular cases in order to determine in advance whether particular conduct (as is the case with particular contract terms) would meet the fairness requirement.

20 We should not be unduly concerned about this. The cornerstones of English consumer law have long been based on broad standards requiring case-by-case application: see for instance the reasonableness test in UCTA, the fairness test in the UTCCR and the broad standards required by the terms implied by Sale of Goods Act 1979 ss 13 - 15 into contracts of sale and the remedies for their breach.

21 A separate issue is whether, notwithstanding the proposal that a general fair trading requirement would be restricted to consumer transactions and would not affect the law of contract, its introduction would nevertheless have an impact on the general contract law and commercial law in particular. Our conclusion is that some impact on non-consumer contract

law is unavoidable. Some leakage into the general law of contract is more likely if a private law remedy is given for breach of the fair trading requirement. Nor do we think it possible to confine any impact on the law of contract to the law of consumer contracts. There is no one consistent definition of "consumer contract", definitions being adopted for specific contexts and purposes. No definition of "consumer" can avoid a degree of uncertainty at the margin, although the European approach which defines consumer in terms of a "natural person" ensures that a limited company cannot be regarded as a consumer.

22 Even if a clear definition of "consumer" can be devised, there is inevitably a tendency for concepts to "leak" from one area of law to another. Thus introduction of a general fair trading requirement would tend to be taken as indicating the sorts of commercial behaviour which are commercially and socially acceptable. In this way it might provide a model for development of the common law by analogy.

23 It is however unlikely that a general fair trading requirement in consumer transactions would be applied wholesale to commercial transactions. Rather it would tend to influence the development of the law by influencing the development of existing fair trading doctrines, especially those concerned with procedural fairness. An obvious area in which such development might be expected would be in relation to a duty of disclosure.

24 Such development is likely to be seen as creating the potential for uncertainty which it is claimed is damaging to commercial law. If, however, the influence of the general duty is on the development of existing discrete doctrines any uncertainty created is likely to be manageable and not significantly greater than that created by the ever present possibility of development of the law⁴.

25 As noted above there is in fact a considerable degree of elasticity in existing English contract law doctrine. Many of the supposed rules of contract law are flexible in their application to particular fact situations. Although therefore we might expect the introduction of a general fair trading requirement to have an impact on English commercial law it is unlikely that it would be dangerously destabilising.

26 The impact of any new measure will depend in part on the form in which it is adopted. The Commission has proposed that a general fair trading requirement should be implemented by a maximum harmonisation measure. If that course is adopted the UK would not be able to deviate from the standard of protection adopted in the directive. In consequence, it would not be permissible to retain existing rules which derogate from the UCPD's general standard, nor would it be possible to introduce new rules which might conflict with the general framework established by the directive.

27 A maximum harmonisation measure would almost certainly make it more difficult to adapt the general clause to changing business practices and consumer expectations, as well as society's conception of what is fair or unfair generally.

28 It would be necessary to establish the precise scope of the UCPD in order to identify domestic measures which would have to be repealed, or amended, in order to comply with the directive. We have identified a number of factors which may be of relevance in setting the scope of the directive, and the potential impact which the directive might have on UK law as a result (see section 8).

⁴ Recent examples of such development might include the adoption of the modern approach to contract interpretation - see *Investors Compensation v West Bromwich BS* [1998] 1 All ER 98 - and the decision in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513 that money paid under a mistake of law is recoverable by a restitutionary claim.

29 The UCPD is at an early stage, and it is impossible to draw any firm conclusions about its potential impact. It constitutes a significant step in the creation of a coherent consumer protection policy for the internal market and it has the potential to raise the overall level of protection. Tentatively we might suggest that if a directive is adopted on the model of the current proposal (to introduce a relatively confined duty not to engage in unfair commercial practices), its impact may be relatively insignificant. In particular, it would have few, if any, immediate consequences for the general law of contract.

30 There are the usual problems regarding the definition of key concepts in the directive, but it is hoped that these can be ironed out as the draft progresses through the legislative process. Perhaps the most important requirement is to amend the definition of “material distortion” to ensure that this is (a) coherent with the overall scheme of the UCPD and (b) an accurate reflection of both dimensions of procedural fairness, i.e., information *and* freedom.

31 Many of the practices caught by the general clause are already covered by specific regulations; the unfairness test itself currently proposed would not be a major innovation for English law and its broad, flexible nature should not be a major problem. However, in order to retain the possibility to respond to problems which may arise in the future, Member States should be given the power where necessary (after notifying and obtaining the consent of the Commission) to introduce regulations to specify that particular practices regarded as unfair in that Member State are caught by the general prohibition.

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