

Consumer Sales Contracts: Transfer of Ownership

Law Commission – Consultation Paper 246

This response has been written by Dr Alisdair MacPherson, Donna McKenzie Skene and Dr Euan West, acting as a working group of the Centre for Scots Law at the University of Aberdeen.

General

We note that the intention of the Consultation Paper is to test whether the draft Bill successfully implements the recommendations you made in your 2016 Report and whether they are accessible and appropriately structured. We also note that the Consultation Paper does not ask questions on the underlying policy in your 2016 Report. Nevertheless, there are some policy issues which we think are worthwhile raising here and which should be given further consideration (in the context of this project and future projects relating to consumer protection).

Of course, recent decades have witnessed the development and expansion of consumer law. In many instances, consumers are treated differently in comparison to other parties. There is some merit in this, particularly in the context of scenarios involving a consumer and a business, as the former is ordinarily at an appreciable power, knowledge and economic disadvantage compared to the latter. Where, however, additional parties are involved, the position is more complicated and the extent to which consumers should be given special treatment is more questionable. This is especially true in the context of insolvency, where the interests of a range of different parties need to be balanced. The proposed changes effectively give priority status to consumers in the insolvency of a retailer by bringing forward the point at which ownership of goods transfers to consumers, in comparison to other creditors. This is a special form of priority, which means the property does not fall into the insolvent estate at all and is stronger protection than a consumer being merely a preferred creditor in an insolvency process. (We note that the earlier proposal to give consumers the status of preferred creditors in insolvency is not mentioned in the Consultation Paper. We would generally be unsupportive of making consumers preferred creditors as it would further complicate insolvency processes and disadvantage other creditors who may be considered as equally deserving.)

By allowing consumers to obtain ownership of goods earlier, this removes assets from the insolvent estate and means that other parties, such as floating charge holders and unsecured creditors including trade creditors and tort/delict claimants may suffer as a result. The approach taken is a functional means of giving preference to consumers ahead of other voluntary creditors and involuntary creditors. Some of these other creditors may be less able to bear losses than consumers, who may have often purchased items using excess income and who also have other mechanisms to recover losses (including using s 75 of the Consumer Credit Act 1974). The suggested changes will give rise to a more fragmented regime of law in this area, as consumer law will differ more markedly from non-consumer law.

On the other hand, we do appreciate that there is political motivation for wishing to protect consumers and the proposed reforms will do that to some extent. Bringing forward the transfer of ownership in the limited way sought is a relatively simple means of protecting consumers. In addition, consumers purchasing goods can be distinguished from other creditors, including other consumers, by virtue of the fact that they are in the process of obtaining ownership and the reforms merely help facilitate this. Giving priority to creditors who are not due to receive ownership of a particular item of property, such as tort claimants or trade creditors, is far more difficult to achieve (and would require the giving of preferential treatment in insolvency). Nevertheless, the changes proposed would generally have not protected consumers in cases such as Farepak (which we understand were a motivating factor for the Law Commission examining this area of law). This is because in such cases particular goods would not have been allocated to specific consumers until a relatively late stage and some time after most pre-payments were made. As such, this

supports the view that the proposed changes will not be considerable and suggests that not all of the issues affecting consumers in the insolvency of retailers will be addressed by the reforms, despite the possible expectations of some parties.

We note the value of having relevant rules in one place for consumers, rather than being split across the Sale of Goods Act 1979 and the Consumer Rights Act 2015. And clarifying and modernising the law regarding the transfer of ownership of goods is desirable. However, this is also desirable in the non-consumer context, and the Law Commission may wish to also examine expanding some of the changes, including the modernisation of language, to other sale of goods transactions in future (albeit with such rules not being mandatory in non-consumer contexts, to facilitate retention of title and other commercial arrangements). One complication would be the fact that, unlike in a consumer context, changes to the rules regulating transfer of ownership of goods in business-to-business sales and sales between private persons would have a direct bearing on the transfer of risk from seller to buyer *as per* section 20 of the Sale of Goods Act 1979.

The Consultation Paper states that the Law Commission can only make recommendations for England and Wales (para 1.16). However, it is also noted that the Consumer Rights Act 2015 applies to the whole of the UK, that consumer law is a reserved matter and that there is a hope that the UK Government will consider implementing the proposed rules throughout the UK, after engagement with devolved administrations. While we agree that the law in this area should be applied UK-wide as far as possible, it would have been advisable and preferable to have engaged with the Scottish Law Commission and the Northern Ireland Law Commission prior to producing this Consultation Paper. There are specific issues with respect to Scots law in particular that should be considered before enacting reforms in this area. This raises questions as to whether there ought to be more formal mechanisms for engagement across the law commissions if proposed reforms are likely to be introduced on a UK-wide basis.

Finally, we spotted a typographical error in s 18B(1)(b) of the draft Bill. The reference to “the contre act” should be a reference to “the contract”.

Consultation Question 1.

Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been “identified for fulfilment of the contract” are drafted sufficiently clearly?

We generally support the different events and circumstances specified and it is useful to have a “mop-up” provision to cover scenarios that are not currently foreseen.

We do, however, have some issues with the terminology “intended by the trader to be permanent” and similar wording (see s 18B(4)(a), (b) and (h)). There are likely to be evidential difficulties in proving the intention of a retailer and there may be problems for insolvency practitioners and consumers, on whom the onus of proof would generally lie, seeking to identify and show what the trader’s intention was. There could also be issues if a retailer initially has an intention to permanently allocate an item to a particular consumer contract and then, for whatever reason, this item is de-allocated and is or is not replaced with another item. This is perhaps not uncommon in business practice, if an item intended for one consumer (consumer 1) is instead re-directed to another consumer (consumer 2) who requires, or is to otherwise receive, quicker delivery. In such circumstances, the property will already be owned by consumer 1 when it is delivered to consumer 2 and could lead to problems if the retailer (or consumer 1) subsequently enters insolvency (albeit that the “seller in possession” provision in s 24 of the Sale of Goods Act 1979 could resolve some of the difficulties in this type of scenario). The other side of this particular coin is that if the retailer regards the allocation of an item to a particular consumer as subject to reversal in certain circumstances, then it would be at least arguable that the intention would not be for the allocation to be “permanent”.

The relevant wording in the provisions is especially important as these rules are mandatory and will apply in lots of cases. Attention should therefore be given as to whether the term “intended” should be removed (so that there is perhaps just a reference to “permanent allocation”). It is also worthwhile to consider whether the term “permanent” should be replaced with another term, e.g. the allocation of a good to a particular contract is to be “unequivocal” or some other suitable term (rather than permanent).

With all of this in mind, attention needs to be paid as to how the proposed wording will accommodate a range of business practices, in relation to how goods are allocated to particular contracts.

Consultation Question 2.

Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 could have unexpected consequences for when ownership transfers? If so, please explain your concerns.

See our answer to question 1 above.

Consultation Question 3.

Do you think that there any other events or circumstances which should result in ownership of the goods transferring to the consumer?

We have not been able to identify any. The “mop-up” provision will cover particular events and circumstances not currently foreseen.

Consultation Question 4.

Is it common for goods to be held as part of a bulk until delivery or shortly before delivery in the consumer context?

If possible please provide:

(1) details about the circumstances in which goods are held as part of a bulk until delivery or shortly before delivery (for example, types of retailer/goods);

and

(2) details of your own experiences.

As academic lawyers, we do not have particular knowledge of this.

Consultation Question 5.

Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above?

It is unclear how many cases there are likely to be involving this. As such, it may be questioned whether it is worth changing the law on this point. We do not, however, have any strong views on the point and we can see some value in providing more clarity in the consumer context. Nevertheless, it may be questioned why consumers should be treated differently regarding the owning of a bulk in common.

Consultation Question 6.

Could the amendments described above to the conditions in subsection 20A(1) of the Sale of Goods Act 1979 have unexpected consequences for when coownership of a bulk transfers in a consumer context? If so, please explain your concerns.

This is unknown to us. But we note at para 3.50(2)(d) the use of the terminology “intended by the trader to be permanent” – for this, please see the points we made above regarding such terminology.

Consultation Question 7.

Do you think that there are any other events or circumstances which should be listed in subsection 20A(1) in order to identify the bulk to a consumer contract?

No and there is a mop-up provision in any event.

Consultation Question 8.

Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers?

Making the rules mandatory shifts the balance in favour of consumers, which is obviously intentional. Mandatory rules are more straightforward for a retailer, the consumer and insolvency practitioners. However, a result of the change is that there will be less freedom among the contracting parties regarding when ownership should transfer.

There are certain issues with removing the possibility of retention of title arrangements where there is e.g. non-payment by a consumer. Retailers will have to be particularly careful about delivering goods to consumers where full payment has not been made, as their lien right is lost upon the loss of possession and consumers will have ownership of the property. As such, if the consumer became insolvent the retailer would only have an unsecured claim. More broadly, it is unclear to what extent the change will affect the practices and procedures of retailers.

Consultation Question 9.

Do you agree that the rules on transfer of ownership in the draft Bill should not apply to conditional sales contracts and hire-purchase agreements?

We agree that the rules are not appropriate for such agreements. The nature of those transactions means that the property is not to transfer until later (if at all).

Consultation Question 10.

Do you have experience of contracts for the transfer of goods or are you aware of them having been used?

If so:

(1) what was the purpose of the contract?

(2) what transfer of ownership provisions (if any) did the contract contain?

No.

Consultation Question 11.

Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods?

It would be useful to have clarity as to whether the provisions would apply (there is a lack of clarity under the current law regarding the application of the rules to such transactions). If the rules are considered to apply in the same way to transfer of goods contracts already, then perhaps this should continue to be the case. An alternative approach would be to consider that these contracts are less commonplace and parties should have more freedom to enter into the form of contract that they wish.

Consultation Question 12.

On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them?

Clarity is necessary regarding the status of the ownership of the property. If there is a chargeback refund does ownership of the property revert to the retailer and, if so, when? If it does not, there could be problems if, for example, the consumer became insolvent. The retailer may have a lien right (if they have retained possession) but the position is messy (especially if another party has obtained possession) and ownership should be dealt with directly.

Consultation Question 13.

If a consumer chooses to take possession of goods on a retailer's insolvency, do consultees agree that:

(1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under section 75?

(2) these fees could not be claimed under chargeback rules?

Insolvency is about allocating losses and risks. It could be argued that consumers should not be protected from all risks that may arise. Protecting consumers leads to other parties having to bear more loss and risk.

Consultation Question 14.

Do consultees agree with our analysis of how retention of title clauses will interact with the rules in the draft Bill?

In the Consultation Paper there is a lot of focus on suppliers providing goods on retention of title allowing for transfer in the ordinary course of business. Some attention should also be given to situations in which there are restrictions on such transfers. In light of the proposed changes, suppliers may make retention of title arrangements more stringent or could impose other contractual conditions. Suppliers could change practices by, for example, not supplying goods until payment is made due to retention of title being compromised. The changes may therefore affect retailers' supply chains, leading to possible knock-on implications regarding the provision of goods to consumers and cashflow for retailers.

Consumers can obtain ownership if the retailer is in possession, but if the supplier or another party is in possession, then the position could be different. The proposed change simply involves a shifting of the time when ownership transfers but the consequences of that are a matter for debate and are not wholly certain.

Consultation Question 15.

Do consultees agree with our analysis of how warehouse and deliverers' liens will interact with the rules in the draft Bill?

Yes. The same general approach applies in Scotland regarding how liens would operate in relation to consumers. For the Scots law position, see A J M Steven, *Pledge and Lien* (2008), especially paras 13-35ff.

We note that the Consultation Paper does not specifically pick up on the landlord's hypothec in Scotland (a tacit security interest that a landlord has in the tenant's moveable property held on the landlord's premises). This is understandable as the Law Commission is making recommendations for England and Wales. However, if changes will be UK-wide, then this needs to be considered as it will have an impact in Scotland. If consumers acquire ownership before the landlord's hypothec arises then the hypothec will not affect the consumers or their property. If consumers acquire ownership after the landlord's hypothec arises, then they are also unlikely to be affected as they will be protected as good faith acquirers: the property "ceases to be subject to the hypothec upon acquisition" by the acquirers (Bankruptcy and Diligence etc (Scotland) Act 2007, s 208(5)). Yet if we take a broader view, it is possible that the changes will have an impact on the conditions that landlords seek to impose upon their tenants regarding business practices (due to the diminishing of the protection provided by the landlord's hypothec).

Consultation Question 16.

Do consultees agree that the draft Bill should come into force two months after it is passed into law?

Two months is very quick, especially in the current circumstances. In addition, although the proposed change may appear small it will probably require various parties to review and change their practices and procedures, as well as forms and template contracts.

A period of at least six months would be preferable.

Consultation Question 17.

How common it is for retailers to use terms and conditions which delay the formation of the sales contract?

In particular:

- (1) Are they more common among online retailers?**
- (2) Are they used when goods are ordered in-store for later pick-up or delivery?**
- (3) Are they more common among retailers who sell certain types of goods?**

We do not know.

Consultation Question 18.

Where terms and conditions delay the formation of the sales contract until dispatch, is “dispatch” intended to mean dispatch to the consumer or dispatch by the retailer to a third party such as a logistics provider?

We do not know.

Consultation Question 19.

We welcome consultees’ views on the reasons why retailers use terms and conditions which delay formation of the sales contract and whether these reasons could be addressed by alternative means (such as conditional contracts or some other alternative).

We do not have practical knowledge of this.

If the proposals in the Consultation Paper are brought into force, and delay of formation of contract is permissible, then one result may be that parties seek to delay the formation of contract to stop ownership transferring to the consumer at an early stage (either on retailers’ own initiative or due to pressure from others who may be affected).

Consultation Question 20.

We have been told by some retailers that terms and conditions delaying formation of the sales contract are used to mitigate certain risks, including the risk of insufficient stock and pricing errors. Do you consider that retailers can achieve the same objective through the use of conditional contracts?

According to what has been set out in the Consultation Paper, it seems so. Compelling parties to use e.g. conditional contracts instead may be questionable and a step too far. It would be better to just make clear that doing this is possible.

Consultation Question 21.

Is it common for retailers to take steps to draw the consumer’s attention specifically to terms and conditions delaying formation of the sales contract?

We do not know. From personal experience, we do not recall ever having a term brought to our attention. However, it is unclear whether such terms and conditions were present or whether they were absent.

Consultation Question 22.

Do you consider that consumers are generally aware of terms and conditions delaying formation of the sales contract?

No, we very much doubt it. And see our previous answer above.

Consultation Question 23.

Are you aware of situations where retailers have relied on terms delaying formation of the sales contract to justify delivery times outside the scope of section 28 of the Consumer Rights Act 2015?

No.

Consultation Question 24.

Are you aware of situations where card issuers have relied on terms delaying formation of the sales contract to reject claims made by consumers under section 75 of the Consumer Credit Act 1974? Are card issuers likely to take this point in future?

We do not know on either count.

Consultation Question 25.

Are you aware of any other detriment caused to consumers as a result of terms delaying formation of the sales contract?

No. But it may become a more common practice due to the changes proposed. This may, in fact, harm the interests of consumers.

Consultation Question 26.

Do you agree that firms providing insolvency services would incur only minimal familiarisation costs as a result of the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

It is perhaps overly optimistic to consider that familiarisation costs will be minimal. There are various costs involved such as training of staff, changes to systems and documents and the costs related to working out the interaction of the new rules with e.g. retention of title and the landlord's hypothec.

There is value in the legal clarity that the change will bring. However, the novel, different rules for consumers will potentially cause some consternation for insolvency practitioners in the insolvency process, who will usually be seeking to reach a pragmatic outcome. In addition, removing goods from the insolvent estate or potentially extending the time involved in determining the exact composition of the insolvent estate (as to which see the comments in our answer to question 32 below) makes achieving the objectives of the "rescue culture" inherent in UK insolvency law more difficult.

Consultation Question 27.

Do you agree that retailers would incur, at most, only a small one-off increase in legal costs as a result of the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

This may be true initially but if there are disputes and debates later there may be more costs. With any new law there is likely to be some litigation to resolve disputed meaning with respect to the wording of provisions. To suggest that there will only be a small one-off increase in legal costs is perhaps over-optimistic in the short-to-medium term. However, the clarity may be beneficial in the longer term.

Consultation Question 28.

In addition to familiarisation costs and legal advice, are there any other transitional costs that would arise from the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

Various parties, such as landlords, suppliers and other creditors may make changes to practices, processes, systems and agreements etc. There are (unknown) costs involved in such steps.

Consultation Question 29.

We estimate that, in most cases, the proposed rules in the draft Bill would only affect a small proportion of goods in the retailer's possession and so ownership of the vast majority of those goods would not have transferred to consumers. Do you agree?

Please provide qualitative and quantitative evidence where possible.

We do not know the answer to this.

Consultation Question 30.

What impact (if any) would the proposed rules in the draft Bill have upon a retailer's ability to borrow money against the value of their stock? Could different types of retailers be affected differently?

Please provide qualitative and quantitative evidence where possible.

Floating charge holders are most obviously affected here. It is their security that will usually cover the goods that the consumer is acquiring. (However, it should be noted that, at least in some circumstances, a floating charge would encompass the retailer's lien right over goods that have been sold.) There are also other recent and upcoming changes negatively affecting floating charge holders, namely the increase in the maximum limit of the prescribed part from £600,000 to £800,000 (since 6 April 2020) and the partial reintroduction of Crown preference (from 1 December 2020). These changes (especially cumulatively) may impact upon the willingness of lenders to provide finance and may affect the terms upon which they are willing to provide it e.g. it may cause them to include more stringent terms and conditions relating to the provision of finance (relating to, for example, monitoring, covenants and/or business practices, which will push up the borrowing costs to be borne by the retailer). This is especially true where changes will have a significant effect for a particular retailer or industry (e.g. see para 5.22). As such, different types of retailers are likely to be affected in different ways.

Under Scots law, it is generally not possible to create non-possessory fixed security. In order for a secured creditor of the retailer to have priority over a consumer acquiring goods, there would need to be a pre-existing fixed security over the property (in English law, if this was an equitable security, the consumer would only have priority if they were a good faith acquirer for value). However, such security will usually not be available to a creditor in Scots law. This is true not only for the goods being transferred (for which it may be unusual but not unheard of to be covered by fixed security in English law) but also for alternative items of property over which the retailer may grant fixed security. Consequently, retailers in Scotland may suffer from the changes more than retailers in England with respect to the raising of finance. This further incentivises the need for the Scottish Government to press forward as soon as possible with reforms to the law of moveable transactions to, inter alia, enable non-possessory fixed security.

Consultation Question 31.

What financial impact (if any) would the proposed rules in the draft Bill have upon suppliers, logistics companies and secured creditors?

Please provide qualitative and quantitative evidence where possible.

See our answers to the points above. Attention should also be given to unsecured creditors in Scotland who seek to do diligence (this is the equivalent of execution and distress in England). By carrying out diligence, the relevant creditor obtains an interest in property. The diligence to be used for goods would be attachment or arrestment, depending upon who holds the property at the relevant time. If, however, the consumer owns the property, the retailer's creditors will be unable to successfully do diligence. If the consumer only acquires ownership after the diligence is done, then the consumer will be subject to this security interest. Consideration will need to be given as to whether this is the intended approach. Diligence creditors can often be vulnerable creditors and may deserve protection as much as consumers. Furthermore, creditors who might seek to do diligence (e.g. trade creditors) may wish to review their practices as well, which could lead to increased transaction costs (at least for a time).

Consultation Question 32.

We estimate that the proposed rules in the draft Bill would result in only a minimal increase in time spent by insolvency practitioners in determining whether ownership of goods has transferred to a consumer in the event of insolvency. Do you agree?

Please provide qualitative and quantitative evidence where possible.

The greater clarity could save some time; however, given the responses to the original consultation from e.g. R3 and PWC, and as a result of the points we note above, there are likely to be some negative time implications too. There will be more need to consider individual goods, in comparison to the current position, where property will generally be part of the insolvent estate and can be dealt with in a more collective way. To some extent, the consequences will depend on the type of business involved.

Consultation Question 33.

In addition to the impact upon security interests, access to/cost of finance and costs of determining ownership of goods on insolvency, are there any other ongoing costs that would arise from the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

The only ongoing costs we can think of are those we have already referred to, such as costs for dealing with disputes and litigation etc.

Consultation Question 34.

Do consultees agree with our assessment of consumer benefits and are there any other benefits which could result from the proposed rules in the draft Bill?

Please provide qualitative and quantitative evidence where possible.

We cannot think of any others. If there is increased clarity, not only will consumers benefit but a range of other parties will too.

Consultation Question 35.

Do consultees agree that the proposed rules in the draft Bill would increase consumer confidence in online sales?

Please provide qualitative and quantitative evidence where possible.

We are unsure of what the effect will be. In many instances it will have no impact unless and until something goes wrong.