



## **Bar Council response to the Law Commission consultation paper on Consumer Sales Contracts: Transfer of Ownership**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation on Consumer Sales Contracts: Transfer of Ownership.<sup>1</sup>
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talent from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).
4. We set out below our responses to the consultation questions on which the Bar Council is able to comment.

### **CHAPTER 3: THE PROPOSED RULES IN PRACTICE**

**Consultation Question 1 (Paragraphs 3.39): 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?**

5. We think that the drafting is clear, subject to the following observations:

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<sup>1</sup> [Consultation](#)

- a. We wonder whether consideration has been given to whether it is possible to align the language in the proposed section 18B(3) more closely with regulation 28(b) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. This subsection excludes the right of cancellation in relation to contracts for the supply of goods that are made to the consumer's specifications or are clearly personalised. Whilst we think it is likely that goods which are "clearly personalised" are covered by the proposed section 18B(4)(c), it might improve clarity if the same language could be adopted across these pieces of legislation.
- b. The phrase "intended by the trader to be permanent", which appears in proposed sections 18B(4)(a), (b) and (h) makes the transfer of ownership dependent upon the trader's subjective intention. A consumer is unlikely to have sufficient knowledge of the supplier's practices to ascertain this intention (other than in simple cases) and the extent to which an insolvency practitioner will be in a better position may depend on the nature of the business and the extent to which its insolvency is orderly or chaotic. We recognise that this is a difficult issue and we address the point further in our response to Question 2 below.
- c. It appears to be intended that section 18B(4)(b) will cover situations beyond the physical setting aside of goods (such as the example in paragraph 3.27 of the Consultation Paper). We wonder whether this should be made explicit, perhaps by the inclusion of a phrase such as "whether physically or otherwise".

**Consultation Question 2 (Paragraphs 3.40): 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.**

6. We wonder whether further consideration should be given to sections 18B(4)(a), (b) and (h). A trader may intend labelling, setting aside or some other action to be permanent but, due to unforeseen circumstances (such as the example given in paragraph 3.25 of the Consultation Paper), may then need to reverse this action and use the goods for fulfilment of another customer's order.

7. If ownership has transferred, this simple action would potentially amount to conversion of the original customer's goods, creating an actionable wrong in circumstances where (absent an insolvency situation) it would not seem to be

warranted.. On the other hand, if the drafting was changed such that the labelling, setting aside or other action must, in fact, be permanent *and irreversible*, it is unlikely to provide much additional consumer protection - the situation would be as set out in Carlos Federspiel & Co v Charles Twigg & Co [1957] Lloyd's Rep 240.

8. It is not easy to reconcile these issues and protect a trader's legitimate interest in flexibility whilst also protecting consumers upon insolvency. However, we wonder whether it is possible to consider a form of drafting which ties the transfer of ownership in the scenarios envisaged in sections 18B(4)(a), (b) and (h) to a trader's insolvency. If this could be achieved, it would allow traders to retain flexibility in practice but would transfer ownership of goods labelled or set aside for a specific consumer to that consumer should the trader become insolvent.

**Consultation Question 3 (Paragraphs 3.41): Do you think that there any other events or circumstances which should result in ownership of the goods transferring to the consumer?**

9. No. We consider the Commission has identified the appropriate events and circumstances and note that section 18B(4)(h) should cover unforeseen circumstances.

**Consultation Question 5 (Paragraphs 3.54): 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?**

10. We agree in principle with the proposals, subject to our responses to Question 2 above and Question 6 below.

**Consultation Question 6 (Paragraphs 3.55): Could the amendments described above to the conditions in subsection 20A(1) of the Sale of Goods Act 1979 have unexpected consequences for when co-ownership of a bulk transfers in a consumer context? If so, please explain your concerns.**

11. The proposed expansion of the situations which would vest co-ownership in a consumer could give rise to some interference with a trader's ability to assign and re-assign goods. Although, as the Report comments, this is not likely to be an area where consumers are substantially affected, we can envisage that, for traders, the logistics of fulfilling a variety of orders from different bulks could see frequent but unanticipated re-assigning. See further our answer to Question 2.

**Consultation Question 7 (Paragraphs 3.56): 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?**

12. No.

**Consultation Question 8 (Paragraphs 3.61): 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?**

13. Subject to the comments above, we consider the proposed rules strike a reasonable balance between the interests of the consumers and the retailers. However, the operation of the rules in practice may discriminate between consumers on the basis of factors which are outside their control and which might appear to them to have little logical rationale. It may be that explanation of the rules will alleviate any difficulties this will create.

**Consultation Question 9 (Paragraphs 3.75): 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?**

14. Yes, for the reasons given by the Commission at paragraph 3.73 of the Consultation.

**Consultation Question 11 (Paragraphs 3.84): 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?**

15. We think there are important conceptual differences between contracts for sale and contracts for the transfer of goods. Once the Commission has considered the responses received to Question 10 above, important consideration will need to be given to the appropriateness of applying the rules in proposed sections 18A and 18B to the transfer of goods.

16. Our tentative, preliminary, view is that it would not be appropriate to apply the rules proposed in sections 18A and 18B to contracts for the transfer of goods. It seems to us that, without significant modification, the application of those rules could frequently result in the consumer simultaneously being the legal owner of both the goods they are due to provide and the legal owner of the goods they are due to receive; we do not believe this would accord with the intention or expectation of consumers or traders. Further, should the transfer contract not be completed, these rules could result in significant legal complexity.

**Consultation Question 12 (Paragraphs 3.109): 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?**

17. Yes, we agree for the reasons given by the Commission. The consumer's rights would be subject to the usual limitations on section 75 and chargeback claims. Further, in the case of section 75 claims, the consumer would usually need to formally reject the goods, cancel the contract or treat it as at an end in order to trigger an obligation for the trader to reimburse the prepayment; the breach of this reimbursement obligation *may* then be actionable in contract and under section 75, allowing the consumer to reclaim their prepayment from their credit provider

**However, we note that section 28(9) of the Consumer Rights Act 2015 does not specifically make a trader's failure to honour its reimbursement obligations actionable as a breach of contract (c.f. regulation 34(13) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. Further, we are not confident that the initial delivery breach is sufficient to enable a consumer to claim a reimbursement due under section 28(9) in a section 75 claim; it is at least arguable that the reimbursement is a statutory remedy which is distinct from any contractual claim and therefore falls outside the ambit of section 75. If the Commission's intention is that consumers should be able to claim under section 75 if a trader fails to comply with its reimbursement obligation under section 28(9), we wonder whether section 28(9) ought to be amended to make it clear that breach of the reimbursement obligation is actionable as a breach of the contract.**

**Consultation Question 13 (Paragraphs 3.110): 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?**

18. Yes, we agree for the reasons given by the Commission.

**Consultation Question 14 (Paragraphs 3.122): Do consultees agree with our analysis of how retention of title clauses will interact with the rules in the draft Bill?**

19. Yes, we agree with the Commission's analysis. Further, if the concerns we raise in response to Questions 2 and 6 can be addressed, we think the concerns raised by previous consultees on the impact of these changes may be, at least partially, addressed.

**Consultation Question 15 (Paragraphs 3.127): Do consultees agree with our analysis of how warehouse and deliverers' liens will interact with the rules in the draft Bill?**

20. Yes, we agree with the Commission's analysis.

**Consultation Question 20 (Paragraphs 4.39): 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?**

21. We are not confident that conditional contracts could be successfully used as the Law Commission suggests. We are not convinced that section 28(2) of the Consumer Rights Act 2015 necessarily permits the imposition of conditions precedent or subsequent as envisaged in the consultation. In our view, it is at the very least arguable that section 28(2) enables the parties to agree, for example, that the consumer will collect the goods or for some other means of physical transport of the goods but does not permit the parties to agree that the trader may never have to provide the goods in certain circumstances.

22. It is arguable that the legislative structure permits the trader to use conditional contracts as suggested. However, this is far from certain and the trader would be exposed to a degree of legal uncertainty in not knowing whether any condition precedent or subsequent would be struck down by either section 31 or Part 2 of the Consumer Rights Act 2015.

23. Unless and until the Commission receives evidence of significant consumer detriment caused by terms delaying contract formation, we consider it may be better to retain the status quo, which permits terms delaying contract formation provided they satisfy the requirement of fairness in Part 2 of the Consumer Rights Act 2015.

**Consultation Question 34 (Paragraphs 5.39): 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.**

24. We agree with the Commission's assessment. We agree that there will not be a significant impact in the overall level of consumer detriment if the proposed changes are introduced but some customers will benefit significantly.

25. We also agree that the proposed changes are more accessible and easier to understand than the current law. However, whether an average consumer will easily

understand the legal position will largely depend on the guidance provided to explain these changes and how these changes are publicised to consumers more widely.

**Bar Council<sup>2</sup>**  
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*For further information please contact*  
*Eleanore Hughes, Policy Manager, Regulatory Issues, Law Reform and Ethics*  
*The General Council of the Bar of England and Wales*  
*289-293 High Holborn, London WC1V 7HZ*  
*Direct line: 020 7611 1316*

*Email: [EHughes@BarCouncil.org.uk](mailto:EHughes@BarCouncil.org.uk)*

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<sup>2</sup> Prepared by the Law Reform Committee