

# Peter Cane Prize in Legal Reasoning

## 9. - Goods to be of satisfactory quality

- (1) Every contract to supply goods is to be treated as including a term that the quality of the goods is satisfactory.
- (2) The quality of goods is satisfactory if they meet the standard that a reasonable person would consider satisfactory, taking account of—
  - a. any description of the goods,
  - b. the price or other consideration for the goods (if relevant), and
  - c. all the other relevant circumstances.
- (3) The quality of goods includes their state and condition; and the following aspects (among others) are in appropriate cases aspects of the quality of goods—
  - a. fitness for all the purposes for which goods of that kind are usually supplied;
  - b. appearance and finish;
  - c. freedom from minor defects;
  - d. safety;
  - e. durability.
- (4) The term mentioned in subsection (1) does not cover anything which makes the quality of the goods unsatisfactory—
  - a. which is specifically drawn to the consumer's attention before the contract is made,
  - b. where the consumer examines the goods before the contract is made, which that examination ought to reveal, or
  - c. in the case of a contract to supply goods by sample, which would have been apparent on a reasonable examination of the sample.

**Explain what this provision means for sellers, considering generally the extent of their duty, and specifically the four following issues:**

- 1) What does 'satisfactory' mean?**
- 2) Can you provide some examples of "other relevant considerations" in subsection 2(c)?**
- 3) What does "fitness for all the purposes for which goods of that kind are usually supplied" in subsection 3(a) mean? Can you provide some examples of when this section would and would not apply?**
- 4) In what circumstances would the exception in subsection 4(b) apply?**

*Note this answer has been put together by a law academic with no expertise on the topic, and besides the reference to a dictionary, only using material freely available on the internet.*

## **The Consumer Rights Act 2015**

In thinking about what section 9 of the Consumer Rights Act 2015 (CRA) means for sellers, perhaps the most important thing to understand immediately is that the focus of the Act is not

sellers but consumers. This is because the title of the Act (the CRA), and its long title ('An Act to amend the law relating to the rights of consumers and protection of their interests') make clear the Act is about consumer protection. Thus, in thinking about the duty on a seller it's the duty they owe to consumers, specifically in relation to issues of consumer protection.

Consumer protection is not a new idea. As the Explanatory Memorandum to the Act makes clear, the EU and UK have passed many pieces of consumer legislation over many decades.<sup>1</sup> The end result is law that many think is 'unnecessarily complex'.<sup>2</sup> This is problematic because it undercuts the purpose of the legislation. The Act was preceded by a Law Commission report, that recommended legal reform particularly to deal with problems of misleading and aggressive practices.<sup>3</sup> Much of the Law Commission report focused on remedies because the complexity of law causing problems for those seeking redress. The report also highlighted areas where there are particular problems, such as aggressive selling of products to older people.

Consumer protection is needed because there is unequal bargaining power between consumers and sellers because sellers have more information about their products and expertise in relation to them. That inequality is reflected in the CRA definitions of 'trader' (the type of seller the Act applies to) and 'consumer'.<sup>4</sup> A 'trader' is someone who is a 'person acting for purposes relating to that person's trade, business, craft or profession' and a consumer "means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'. In other words, a trader sells as part of their job, but a consumer does not buy as part of theirs.

While the CRA is meant to be a less complex piece of legislation, it is not an easy read. Even figuring out what section 9 applies to (see below) takes patience and a careful eye for different words. Many people would struggle to understand their rights.

There is also a question about the general approach to interpreting the Act as different interpretative approaches might result in words having divergent definitions. In English law, there are three approaches to interpretation – the literal approach, the golden rule approach and the mischief approach. In EU law, there is a more purposive approach to interpretation. Many of the measures in the CRA reflect legal obligations that come from EU law, and so there is an argument that a more purposive approach should be taken (but Brexit might change this).

## **Section 9**

---

<sup>1</sup> Paras [8]-[11].

<sup>2</sup> Para [5] of the Explanatory Memorandum. See also para [15].

<sup>3</sup> Law Commission and Scottish Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Law Comm No 332 2012).

<sup>4</sup> Section 2.

Section 9 means that the seller of goods need to ensure their goods are of a certain quality. The government describes this as a duty that products are 'not faulty'<sup>5</sup> and the consumer group Which? stated that the Act means that 'Goods shouldn't be faulty or damaged when you receive them'.<sup>6</sup> The test in Section 9 is not that. These generalist descriptions of the Act are interesting examples of the difference between what the law is and how it is described by non-lawyers.

Whether a product is of satisfactory quality (or faulty for that matter) is difficult to define. Section 9 provides a set of standards that flesh out what is meant by satisfactory. As this a new Act, there are no cases yet that discuss what Section 9 means.<sup>7</sup> Section 9 does echo existing laws including EU law,<sup>8</sup> so a question does arise about whether case law in relation to those other laws is relevant. It might be (although again Brexit might make a difference), but it should be noted the CRA has a more consumer protection focus compared to the Sale of Goods Act 1979. To put the matter another way, in thinking about section 9 means for a seller, consumer protection should always be kept in mind (although the literal approach to statutory interpretation is also important).

The consumer protection focus explains the fact that Section 9 only applies to certain types of commercial transactions – where there is a 'contract to supply goods' and Section 3 defines this category as including four different types of contracts including a sales contract, a contract for the hire of goods; a hire-purchase agreement; a contract for transfer of goods. Sections 5-7 define these different types of contract. In all cases the contract needs to be between a 'trader' and a 'consumer' and this we return to the unequal relationship described above. Section 9 would thus not apply if I sold my old bike to a friend down the street, although the Act makes clear if called upon, I would need to prove it wasn't part of my 'trade, craft or profession'.<sup>9</sup>

### **Definition of 'Satisfactory'**

There are three things to note about the definition of 'satisfactory' in s 9. First, the OED definition of 'satisfactory' is 'Sufficient for the needs of the case, adequate'. In other words, the seller is not under a duty to provide products of superior quality. The seller merely has to provide products that are adequate.

Second, the definition of 'satisfactory' is multi-faceted. Section 9 provides a series of tests to help determine whether products are of 'satisfactory' quality. Some of those criteria relate to easily observable aspects of the products ('state and condition', 'appearance and finish'), some to less visible features ('durability', 'safety'), and others to the context that the product was bought in ('description of the goods', 'price or other consideration of the goods'). The less visible features

---

<sup>5</sup> <https://www.gov.uk/government/publications/consumer-rights-act-2015/consumer-rights-act-2015> describing one of the purposes of the Act.

<sup>6</sup> <http://www.which.co.uk/consumer-rights/regulation/consumer-rights-act>

<sup>7</sup> Search done of <http://www.bailii.org> 16 Feb 2017.

<sup>8</sup> Section 14(2B), Sale of Goods Act 1979,

<sup>9</sup> Section 2(3) CRA.

are particularly interesting to note because they are things that the seller is likely to know about, but the consumer will not. The unequal knowledge relationship (and often, power relationship) between seller and buyer is foundational to consumer protection and clearly has effects in many concrete areas of the law.

Third, section 9(2) fleshes out what is meant by 'satisfactory' by stating it includes what a 'reasonable person would consider satisfactory'. Satisfactory is not what any individual person thinks as satisfactory, and this is important because different people may have very different assumptions about what makes a product 'adequate'. The test in s 9(2) can be thought about as an 'objective test'. It is a test that means that the seller only needs to ensure that the goods are satisfactory from the perspective of a reasonable individual.

There is a question about what type of person such a reasonable person would be.<sup>10</sup> Tests of the reasonable and average consumer have existed in other parts of consumer protection law, particularly EU law. Thus for example, the Law Commission note:

The concept of the average consumer is used widely across European Union law. The European Court of Justice (ECJ) has set a robust standard: one must judge the practice from the viewpoint of a hypothetical consumer who is "reasonably well informed, reasonably observant and circumspect".<sup>38</sup> The ECJ has emphasized that national courts should exercise their own judgment: the test does not depend on statistical evidence of how consumers actually behave.<sup>11</sup>

As the Law Commission note, this test has been criticized as being too stringent and has been relaxed in certain circumstances.<sup>12</sup> The Law Commission also note that the test of the average consumer is a test that enforcement agencies know and understand.<sup>13</sup> One thing to note is the test applies in different contexts and so while the Law Commission recommend an 'average consumer' test (with a vulnerable consumer exception) they are mainly talking about it in relation to misleading and aggressive practices in relation to a range of contexts (including Ch 4 of the CRA that relates to services).<sup>14</sup> A 'reasonable person' is also not necessarily an 'average consumer'.

There is thus some uncertainty about what a 'reasonable person' is. Over time the courts will, it is to be hoped, develop a body of case law interpreting this term in light of specific facts.

### **'Other relevant considerations'**

---

<sup>10</sup> Law Commission, [[7.91-7.92].

<sup>11</sup> *ibid*, [2.31].

<sup>12</sup> *ibid*, [2.32].

<sup>13</sup> *ibid*, S.10

<sup>14</sup> *ibid*, S.35

As noted above, the definition of 'satisfactory' is multi-faceted. 'Other relevant considerations' gives further opportunity to encompass factors that may not be listed. Section 9(5) suggests this includes a 'public statement about the specific characteristics of the goods'. But Section 9(5) does not limit this definition. Section 9(2) relates to ways in which the goods were sold and thus other relevant factors might relate to other aspects of the selling context. Thus for example, if you bought something in a street market, you might expect a different 'satisfactory quality' than if you bought it in Harrods. Other ways in which the product is marketed might be relevant. So in advertising they might not make a statement but they may strongly allude to something about the quality of the product. Section 2(c) could be used to take into account evolving marketing innovations – for example the use of Facebook. The open-ended nature of Section 2(c) should be interpreted in line with the Act.

### **Fitness for Purpose**

Consumer protection has limits. Sometimes goods are bought for purposes that the seller never intended the goods to be put. If an artist buys elephant dung (which is being sold as fertilizer) for an art work he cannot expect that it will be of 'satisfactory' quality for use in art.<sup>15</sup> This is because a *problematic* unequal relationship between seller and buyer does not really exist in such a situation. A seller of elephant dung for fertilizer should not be expected to know whether it is of 'satisfactory' quality for use in art.

That said, a seller could not unduly restrict the purpose a good was going to be put as otherwise the consumer protection purposes of the Act would be undercut. So a kitchen knife seller couldn't say that the knives she sold were only fit for cutting bananas and nothing else.

Most examples of fitness for purpose are likely to be more nuanced than these two extremes. For example, trainers sold for use in indoor football should be fit for that purpose, but need not be fit for playing football on muddy ground. A seller should thus make very clear the uses to which the product is fit to be put. Fitness for purpose was also part of the less extensive consumer protection rules before 2015 so there is a question of whether that previous case law is relevant.<sup>16</sup>

### **Section 4(b)**

Section 4(b) is another example of the Act primarily focusing on the unequal relationship between trader and consumer. Thus, it makes clear that it does not apply where 'where the consumer examines the goods before the contract is made, which that examination ought to reveal'. In other words, Section 9 does not apply where there is no (or less of a) information asymmetry. Moreover, it makes clear that there are limits to consumer protection. Giving consumers rights, does not discharge them from looking after their own interests.

---

<sup>15</sup> See the art work of Chris Ofili.

<sup>16</sup> See for example, *Jewson Ltd. v Boyhan* [2003] EWCA Civ 1030 (28 July 2003)

## **Conclusion**

Section 9 means that sellers should have a good understanding of the people buying their product, ensure that their products are of adequate quality, and are marketed in a way that accurately reflects the uses to what the product is going to be put. Another way to put this, is they need to keep consumer protection in mind, when selling their products.