



**Law
Commission**
Reforming the law

Consumer sales contracts: transfer of ownership

A consultation paper



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Law Commission

Consultation Paper No 246

Consumer sales contracts: transfer of ownership

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27 July 2020



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THE LAW COMMISSION – HOW WE CONSULT

Topic of this consultation: We are consulting on a draft Bill to reform the rules on the transfer of ownership of goods as they apply to consumers. The draft Bill seeks to implement recommendations we made in July 2016 in our report *Consumer prepayments on retailer insolvency*. We are seeking views on whether the draft Bill successfully implements the recommendations we made in our 2016 Report, and the impact of the draft Bill.

Duration of the consultation: We invite responses from 27 July 2020 to 31 October 2020.

Responses to the consultation may be submitted using an online form at:

<https://consult.justice.gov.uk/law-commission/consumer-sales-contracts-transfer-of-ownership>

By email to Ownership@lawcommission.gov.uk

OR

By post to Transfer of ownership project, Commercial and Common Law Team, Law Commission, 1st Floor, Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

Availability of materials: The consultation paper is available on our websites at <https://www.lawcom.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/>.

We are committed to providing accessible publications. If you require this consultation paper to be made available in a different format please email Ownership@lawcommission.gov.uk or call 020 3334 0200.

After the consultation: We will decide on the final text of the draft Bill, which we will publish in a report. It will be for the Department for Business, Energy and Industrial Strategy to decide whether to implement the draft Bill.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: <https://www.gov.uk/government/publications/consultation-principles-guidance>.

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Glossary

1993 Report: Sale of goods forming part of a bulk (1993), Law Com No 215; Scot Law Com No. 145, <https://www.lawcom.gov.uk/project/sale-of-goods-forming-part-of-a-bulk/>

2015 Consultation: Consumer Prepayments on Retailer Insolvency – A consultation paper, CP No 221, (2015), <https://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency/>.

2016 Recommendations: The recommendations on transfer of ownership made by the Law Commission in the 2016 Report.

2016 Report: Consumer Prepayments on Retailer Insolvency (2016), Law Com No 368, <https://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency/>.

Administration: A rescue mechanism for insolvent companies, which allows them to continue their business temporarily.

Card issuer: An entity which issues credit or debit cards, such as a high street bank.

Card scheme: Payment networks, such as Visa and MasterCard, which facilitate card payment transactions.

Chargeback: The reversal of a card transaction which the consumer may ask their card issuer to request.

Consumer: An individual acting for purposes that are wholly or mainly outside their trade, business, craft or profession, as defined in section 2(3) of the Consumer Rights Act 2015.

Creditor: An entity to which a person or company owes money or its equivalent.

Draft Bill: Draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill. The full draft Bill is included in Appendix 2 of this consultation paper.

Fixed charge: A mortgage or a security over a specific asset to secure the repayment of a loan.

Floating charge: A security over a class of a company's assets or, more usually, over all of a company's assets, both present and future (for example, stock and money in bank accounts). On insolvency, the floating charge "crystallises" over the assets a company owns at that moment.

Future goods: Goods which have not yet been made at the time a contract for the sale of goods is made.

Insolvency practitioner: A third party who steps in to see if an insolvent company can be saved, or at least sold as a going concern, rather than simply wound up. On an insolvency, the insolvency practitioner will assess the assets of the insolvent company.

Insolvency: The status of a company when the value of its assets is less than the amount of its debts (“balance sheet insolvency”) or it cannot pay its debts as they fall due (“cash flow insolvency”).

Lien: A right to hold property belonging to another until a debt owed by them is paid.

Liquidation: A process through which a company is brought to an end. Its assets are sold and the proceeds distributed to the various creditors in accordance with the hierarchy set out in legislation.

Prepayment: Money, or goods for money’s worth, provided to a person or company in advance of receiving goods or services. A prepayment could be for the entire balance, or just a proportion of the total price.

Proposed rules: the proposed rules on transfer of ownership of goods in the draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill (the “draft Bill”).

Section 75 claim: A claim by a consumer under section 75 of the Consumer Credit Act 1974 in relation to a breach of contract / misrepresentation.

Secured creditor: A creditor which has a security interest, such as a fixed charge or floating charge, over all or some of the assets of the person or entity which owes it money.

Specific goods: Goods identified and agreed upon by a retailer and consumer at the time a contract for the sale of goods is made.

Unascertained goods: Goods which have not been identified and agreed upon by a retailer and consumer at the time a contract for the sale of goods is made. For example, where a consumer buys goods online, the retailer has the freedom to select which item from its general stock will be used to fulfil the contract.

Unsecured creditor: A creditor which is owed money but does not have the benefit of a security interest in the assets of the person or entity which owes it, or any degree of preference among fellow creditors.

List of Abbreviations

CCA 1974: Consumer Credit Act 1974

CCRs 2013: Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013

CRA 2015: Consumer Rights Act 2015

SGA 1979: Sale of Goods Act 1979

WEBSITES

All websites referenced in this document were last visited on 8 July 2020.

Chapter 1: Introduction

- 1.1 Consumers frequently pay for goods in advance of receiving them. This happens where, for example, a consumer orders and prepays for furniture which has to be made to order, or where they select and pay for a specific item in-store but leave it with the retailer to be altered in some way. It also happens by default in purchases made online, where the retailer often takes payment immediately and dispatches the items hours, days or even weeks later depending on the circumstances. Internet sales have grown steadily over the last few years, with a sharp increase in recent months amid the closure of non-essential retail outlets in response to the COVID-19 emergency. The last few months have seen internet sales jump from 19.9% of all retail sales in January 2020 to 32.8% in May 2020.¹
- 1.2 The result of this upward trend in online shopping is that more and more consumers are paying for goods before receiving them. However, in recent years the number of retailer insolvencies has also been increasing. Last year saw the highest number of retailer insolvencies in five years,² and the Centre for Retail Research forecasts that store closures will increase by 25% in 2020 over 2019 levels.³
- 1.3 So if a consumer has ordered and paid for goods which are still in the retailer's possession when the retailer enters insolvency, who owns the goods? In practice, this is something the insolvency practitioner will have to determine, applying the rules on the passing of property. The current rules on this issue are obscure, and have barely changed since 1893. In most cases, ownership of the goods will not yet have passed from the retailer to the consumer. Instead, the goods will be the retailer's property on insolvency and the consumer will become an unsecured creditor of the insolvent retailer, making it unlikely that they will get their prepayment back.
- 1.4 In the worst cases, the consumer may be left with neither the goods they have paid for nor any real prospect of getting their money back. The situation may be less bleak if the consumer has paid by credit or debit card, as they may be able to claim the money back from their card issuer. However, particularly if the goods are unique in some way, or have been made to order, the consumer may still prefer to have the goods themselves rather than a refund.
- 1.5 In this consultation paper, we describe our proposed changes to the rules on transfer of ownership, and consult on a draft Bill which would implement those changes.⁴ We

¹ Office for National Statistics, 'Internet sales as a percentage of total retail sales' (June 2020), <https://www.ons.gov.uk/businessindustryandtrade/retailindustry/timeseries/j4mc/drsi>.

² Insolvency Service, 'Company Insolvency Statistics July to September 2019' (October 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856060/Company_Insolvencies_-_Commentary_-_Q3_2019.pdf.

³ Centre for Retail Research, 'Coronavirus and Consumers' (April 2020), <https://www.retailresearch.org/blog/coronavirus-and-consumers-updated-20-april-2020-vii>.

⁴ The draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill (the "draft Bill") is at Appendix 2 of this consultation paper.

also discuss a related issue which has arisen, concerning when the contract between the consumer and the retailer is formed, and ask questions about its impact.

BACKGROUND TO THIS WORK

- 1.6 In July 2016, the Law Commission published its report *Consumer Prepayments on Retailer Insolvency*.⁵ This looked at the existing protections given to prepaying consumers on a retailer's insolvency and considered whether such protections should be strengthened. We made a range of recommendations designed to improve the position of consumers in different circumstances, including regulating industries which pose particular harm to vulnerable consumers and improving consumer awareness of the protections available through credit and debit card providers.⁶
- 1.7 As part of this work, we looked at the existing law about transfer of ownership of goods. The current rules are contained in the Sale of Goods Act 1979 and apply to all contracts for the sale of goods, regardless of whether the purchaser is a consumer or a business. We recommended that the rules for consumer contracts should be updated and moved into the Consumer Rights Act 2015.
- 1.8 We recognised that the effect of the changes would be relatively limited and would not usually be the primary protection for consumers when a retailer becomes insolvent.⁷ However, we also noted that:⁸

the Law Commission has long argued that the law on consumer sales should be rewritten in plain language and brought together in one place, so that it is readily accessible to both consumers and retailers. The Consumer Rights Act 2015 has gone a long way to achieve this objective, but it does not include updated rules on when ownership is transferred. Instead, section 4 of the [Consumer Rights Act 2015] imports the rules from the [Sale of Goods Act 1979], which were written in nineteenth century language for commercial contracts.

- 1.9 We argued that there would be a benefit in having a clear statement of the law in modern terms. We said that clearer, updated statutory rules would benefit consumers, administrators and shop staff who have to apply them. These would apply generally and not only on insolvency.

THIS CONSULTATION

- 1.10 We are now consulting on a draft Bill to implement our recommendations on transfer of ownership, though in some cases we have developed our thinking in light of further discussions with stakeholders.
- 1.11 This limited consultation is designed to test whether the draft Bill successfully implements the recommendations we made in our 2016 Report, and whether they are accessible and

⁵ Consumer Prepayments on Retailer Insolvency (2016) Law Com No 368 (the "2016 Report"), <https://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency/>.

⁶ 2016 Report, Chapter 10.

⁷ 2016 Report, para 9.51.

⁸ 2016 Report, para 9.52.

appropriately structured. Where we have modified our policy we ask specific questions about those changes, and we ask about the impact of the draft legislation.

1.12 The current law, and the recommendations we made in the 2016 Report, are predicated on there being a contract of sale in place. During the course of our work on this paper, we have learned that, particularly in the context of online sales, retailers commonly seek to delay formation of the contract until the goods are dispatched, or in some cases delivered, to the consumer. As this will affect the impact of our recommendations, we explore this issue in some detail and ask consultees about its impact on consumer protection more generally.

1.13 Other than in relation to these discrete areas, we do not ask questions on the underlying policy in our 2016 Report, which has already been the subject of consultation.⁹

TERMS OF REFERENCE

1.14 In September 2019, the Department for Business, Energy & Industrial Strategy (BEIS) asked the Law Commission to prepare draft legislation to implement its 2016 recommendations on transfer of ownership.

1.15 Our terms of reference are as follows:

The Law Commission has agreed with the Department for Business, Energy & Industrial Strategy to prepare, with Parliamentary Counsel, draft legislation to implement the Commission's recommendations on transfer of ownership contained in its report Consumer Prepayments on Retailer Insolvency, Law Com No 368 (July 2016).

In particular, the Law Commission will:

- consult stakeholders with a view to understanding their concerns about the recommended changes.
- produce and consult on draft legislation.
- work with economists within the Department and the Insolvency Service to prepare an impact assessment to accompany the draft legislation.
- publish draft legislation with explanatory notes.

TERRITORIAL EXTENT

1.16 The Law Commission can make recommendations only for England and Wales. However, the CRA 2015, which our draft Bill seeks to amend, applies to the whole of the United Kingdom. Consumer law is reserved: it is a matter on which only the United Kingdom Parliament can legislate. We hope that the Government will consider implementing our proposed rules throughout the United Kingdom, after appropriate engagement with the devolved administrations. Large retailers operating in England and Wales tend to have stores in Scotland and Northern Ireland, and we think that

⁹ Consumer Prepayments on Retailer Insolvency (2015) Law Commission Consultation Paper No 221, (the "2015 Consultation"), <https://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency/>.

consumers would expect their rights to be consistent across the United Kingdom. It would therefore be difficult to have differing levels of protection in each jurisdiction.

STRUCTURE OF THIS CONSULTATION PAPER

- 1.17 Chapter 2 begins by setting out the current law on transfer of ownership as it applies to consumers. It also sets out the rationale for our 2016 Recommendations on transfer of ownership.
- 1.18 Chapter 3 explains how the proposed rules would operate in practice, with reference to the draft Bill. It also considers legal issues raised by stakeholders. We ask consultees about the effect of the legislative drafting, and about when the draft Bill should apply.
- 1.19 Chapter 4 sets out the issue of the timing of contract formation in different circumstances, noting its impact on our proposed rules. We ask consultees about its effect on consumers more generally.
- 1.20 Chapter 5 assesses the impact of the draft Bill and asks consultees for their views.
- 1.21 Additional detail is included in the appendices:
 - (1) Appendix 1 contains a list of those stakeholders whom we have met or corresponded with.
 - (2) Appendix 2 contains the draft Bill in full.

ACKNOWLEDGEMENTS AND THANKS

- 1.22 In preparing this consultation paper, we have met or corresponded with the individuals and organisations listed in Appendix 1. We are grateful to them all for allowing us to draw on their experience and expertise.

THE TEAM WORKING ON THE PROJECT

- 1.23 The following members of the Commercial and Common Law team have contributed to this consultation paper: Laura Burgoyne (team manager); Teresa Trepak (team lawyer) and Matthew Barry (research assistant).

Chapter 2: Current law and need for reform

- 2.1 In this chapter we begin by setting out the current law on transfer of ownership. We then consider the need for reform and explain the recommendations made by the Law Commission in 2016.

CURRENT LAW

- 2.2 The current law on the sale of goods is contained in the Sale of Goods Act 1979 (SGA 1979) and the Consumer Rights Act 2015 (CRA 2015). The SGA 1979 applies to all contracts for the sale of goods,¹ whereas the CRA 2015 applies to sales contracts specifically between a consumer and a trader. The CRA 2015 replaces much, but not all, of the SGA 1979 insofar as it applies to business to consumer contracts. The SGA 1979 still applies to business to business contracts and to consumer to consumer contracts.
- 2.3 Some provisions of the SGA 1979 still apply to business to consumer contracts for the sale of goods. These include the provisions on transfer of ownership, which were not changed by the CRA 2015. Instead, section 4 of the CRA 2015 (headed “Ownership of goods”) refers the reader back to the relevant provisions in the SGA 1979. These are substantially the same as those in the original Sale of Goods Act 1893.
- 2.4 The current rules on transfer of ownership are complex. Different rules apply for “specific goods”, “unascertained or future goods” and “goods forming part of a bulk”. The relevant sections of the SGA 1979 to which the CRA 2015 cross-refers are as follows:
- section 16: goods must be ascertained
 - section 17: property passes when intended to pass
 - section 18: rules for ascertaining intention
 - section 19: reservation of right of disposal
 - section 20A: undivided shares in goods forming part of a bulk
 - section 20B: deemed consent by co-owner to dealings in bulk goods
- 2.5 The rules also use the somewhat old-fashioned terminology of “property passing”. We prefer to use the terminology of “ownership transferring” from seller to buyer.

Specific goods

- 2.6 Specific goods are goods “identified and agreed upon at the time a contract of sale is made”.² That is, goods are “specific” when the exact item or items being purchased have been identified. A consumer who goes into a retailer’s physical shop and selects a red wool jumper and takes it to the till to pay is buying specific goods. A consumer who goes onto the website of that same retailer and selects the same jumper in the same size is not buying specific goods. This is because the retailer is free to provide

¹ The Sale of Goods Act 1979 does not apply to all contracts which can effect a transfer of ownership of goods. It does not apply to hire-purchase agreements and contracts for the transfer of goods (for example, barter agreements and contracts for services where goods are incidental).

² Sale of Goods Act 1979, s 61(1).

the consumer with any one of the jumpers from its stock which matches the description of the jumper the consumer has ordered. It is possible to purchase specific goods online, particularly where an item is a “one off” such as an antique.

2.7 Section 17(1) of the SGA 1979 provides the general rule that where there is a contract for the sale of specific or ascertained goods, property in the goods is transferred to the buyer when the parties to the contract intend it to pass. To understand the intention of the parties it is necessary to consider the terms of the contract, the conduct of the parties and the circumstances of the case.³ Unless a different intention appears, the rules in section 18 will apply. These rules therefore operate as a set of rebuttable presumptions.

2.8 All of the rules relating to specific goods require the goods to be in a “deliverable state”. Goods are in a deliverable state within the meaning of the SGA 1979 when they are in such a state that the buyer would under the contract be bound to take delivery of them.⁴

2.9 Rule 1 of section 18 states:

Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

2.10 Rule 2 states:

Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done.

2.11 Rule 3 states:

Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done.

2.12 Rule 4 states:

When goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods passes to the buyer:

- (a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
- (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed

³ Sale of Goods Act 1979, s 17(2).

⁴ Sale of Goods Act 1979, s 61(5).

for the return of the goods, on the expiration of that time, and, if no time has been fixed, on the expiration of a reasonable time.

- 2.13 A contract for the sale of a share (a fraction or a percentage) of specific goods is itself a contract for specific goods.⁵ An example is a contract to buy a half share or a 25% share of grain in a silo. Ownership in that undivided share passes, under section 17 of the SGA 1979, when the parties intend it to pass and the buyer becomes an owner in common with the other owner or owners.⁶

Specific goods: applying the rules in practice

- 2.14 Under the rebuttable presumptions in the rules in section 18, ownership of specific goods cannot transfer unless the goods are in a “deliverable state”. Goods are in a deliverable state when they are in such a state that the buyer would under the contract be bound to take delivery of them.⁷

- 2.15 However, the meaning of “deliverable state” is a matter of construction of the particular contract⁸ and can be unclear or seem to operate unfairly on an insolvency. For example, a consumer might choose and pay for a specific diamond ring and leave it with the retailer to be inscribed. If the retailer becomes insolvent before the inscription is made, who owns the ring? Is the ring absent the inscription in a “deliverable state”?

- 2.16 Where the intention of the parties is not clear,⁹ it could be argued – applying Rule 2 – that the consumer does not own the ring, because the inscription is required to put it into a deliverable state. On an insolvency, this would leave a prepaying consumer with an unsecured claim rather than ownership of a valuable ring.

- 2.17 On the other hand, it could be argued that the inscription is merely a supplemental obligation and not a condition of the sale contract. It could even be a separate contract altogether, particularly if there is a separate charge for the inscription service. If this is the case, Rule 1 means that ownership would have passed when the consumer paid for the ring and the contract of sale was formed. The consumer would be entitled to claim the ring from the insolvency practitioner.

- 2.18 Little guidance is provided by the case law on when goods are in a “deliverable state”, as much of it is concerned with when risk passes in commercial contracts and is difficult to apply in a consumer context.¹⁰ We think it is undesirable that the ownership

⁵ Sale of Goods Act 1979, s 61(1): Definition of “goods” and “specific goods”.

⁶ Sale of Goods Forming Part of a Bulk (1993) Law Com No 215; Scot Law Com No 145 (“1993 Report”), para 5.6, <https://www.lawcom.gov.uk/project/sale-of-goods-forming-part-of-a-bulk/>. The Law Commission and the Scottish Law Commission noted that the rules for ascertaining the intention of the parties about transfer of ownership in s 18 of the Sale of Goods Act 1979 do not apply to an undivided share of a bulk. This is because an undivided share is never in a deliverable state and cannot be delivered. This means that in the case of a sale of an undivided share, “everything depends on the intention of the parties”.

⁷ Sale of Goods Act 1979, s 17(5).

⁸ Benjamin, *Sale of Goods* (9th ed 2014) para 5-032 and fn 181 and 182.

⁹ This could occur where the parties’ intention on transfer of ownership is not expressed in the sales contract or discernible from the conduct of the parties or the circumstances of the case.

¹⁰ *Underwood Ltd v Burgh Castle Brick & Cement Syndicate* [1922] 1 KB 343 concerned heavy industrial equipment which was bolted to and embedded in concrete, which was held not to be in a deliverable state

of specific goods should be so unclear. While the courts might construe the law to benefit a consumer, in practice it is usually the insolvency practitioner who is interpreting the rules. As insolvency practitioners owe duties to all creditors they may be inclined to err on the side of caution and instruct shop or warehouse staff not to release such property to prepaying consumers.

Unascertained and future goods

2.19 In many cases, a contract will include a description of goods but the exact goods the consumer is buying will not have been identified. For example, and as we touched on above, where a consumer buys goods online, the retailer has the freedom to select which item among the many in the warehouse will be used to fulfil the contract. This is a contract for “unascertained goods”. Alternatively, the goods may not yet have been made (“future goods”).

Goods must be ascertained

2.20 Property in goods cannot be transferred to the buyer unless and until the goods have been “ascertained”.¹¹ It is not possible for the parties to a contract to agree otherwise.

2.21 The SGA 1979 does not state what amounts to ascertainment. The courts have found that goods become ascertained once they have become identified to the contract in accordance with the agreement of the parties. For goods which are unascertained at the time a contract for sale is entered into, ascertainment necessarily occurs at a later point. Examples include identification of goods by labelling or packaging.¹² Ascertainment can also occur as a result of separation of goods from a bulk, exhaustion (when the bulk is reduced to the amount of goods subject to the contract) or by unconditional appropriation (discussed further below).¹³

Unconditional appropriation and deliverable state

2.22 Once ascertained, ownership of the goods will transfer at such time as the parties intend it to be transferred.¹⁴ To establish the intention of the parties it is necessary to consider the terms of the contract, the conduct of the parties and the circumstances of the case.¹⁵ Unless a different intention appears, Rule 5 of section 18 will apply. As discussed above, these rules therefore operate as a set of rebuttable presumptions.

until it was extracted and dismantled. *Rohit Kulkarni v Manor Credit (Davenham) Ltd* [2010] EWCA Civ 69 is a consumer case: a car was held not to be in a deliverable state because its registration plates were not attached. However, in that case the seller had obtained the car on hire-purchase terms and was not authorised to sell.

¹¹ Sale of Goods Act 1979, s 16. This requirement is modified in relation to goods forming part of a bulk as provided for under ss 20A and 20B. These are discussed in more detail in this chapter from para 2.35.

¹² Benjamin, *Sale of Goods* (9th ed 2014) paras 5-060 and 5-066.

¹³ Benjamin, *Sale of Goods* (9th ed 2014) para 5-061.

¹⁴ Sale of Goods Act 1979, s 17.

¹⁵ Sale of Goods Act 1979, s 17(2).

2.23 The rebuttable presumptions in Rule 5 of section 18 provide that, in the absence of any contrary intention, property passes in a contract for the sale of unascertained or future goods when they are in a deliverable state and unconditionally appropriated to the contract.

2.24 Rule 5(1) states:

Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.

2.25 Therefore, under Rule 5(1), the goods must be in a deliverable state before ownership can transfer. Goods are in a deliverable state within the meaning of the SGA 1979 when they are in such a state that the buyer would under the contract be bound to take delivery of them.¹⁶ The goods must also be unconditionally appropriated to the contract and the appropriation must be irrevocable. That is, the person making the appropriation intends it to be final. The appropriation must also be assented to by the other party, although this can be express or implied and either before or after the appropriation. For example, it could be that, by purchasing goods by description, the buyer has impliedly authorised the seller to select goods matching that description from their general stock and appropriate them to the contract. Alternatively, where goods are sold by sample, the seller may not be taken to have authority to pass the property by appropriation, for the parties may have intended that the buyer should have the right to compare the goods with the sample.¹⁷

2.26 “Unconditional appropriation” is not defined in the SGA 1979. Rule 5(2) provides that unconditional appropriation occurs when the seller delivers the goods to the buyer or carrier and does not “reserve the right of disposal”. This reflects the common law before the Sale of Goods Act 1893 that unconditional appropriation occurs upon delivery to the carrier if it has not already happened.¹⁸ It does not preclude the possibility that an unconditional appropriation may previously have taken place and that other actions may constitute unconditional appropriation of goods to a contract.

2.27 Difficulties have arisen in practice when trying to establish whether unconditional appropriation has occurred, such as in situations where a seller has selected particular goods to be sold but questions have arisen as to whether the seller’s actions are sufficient to amount to unconditional appropriation.¹⁹

¹⁶ Sale of Goods Act 1979, s 61(5). We discuss this further at para 2.14.

¹⁷ Benjamin, *Sale of Goods* (9th ed 2014) para 5-078.

¹⁸ Benjamin, *Sale of Goods* (9th ed 2014) para 5-096.

¹⁹ Benjamin, *Sale of Goods* (9th ed 2014) para 5-079.

2.28 Since 1893, the meaning of unconditional appropriation has been considered in several cases.²⁰ The courts have been asked to consider whether certain acts by a seller have been sufficient to indicate unconditional appropriation with the assent of the buyer. However, the decisions do not provide a simple definition of “unconditional appropriation”. They can also seem hard to reconcile when cases with seemingly very similar facts are decided in different ways.

2.29 Perhaps the most prominent case is *Carlos Federspiel & Co v Charles Twigg & Co*.²¹ In that case the sellers manufactured bicycles to the buyer’s order and packed them in containers labelled with the buyer’s name and address. Before the goods could be shipped, the sellers became insolvent. It was held that the goods had not been unconditionally appropriated to the contract. Mr Justice Pearson said:²²

A mere setting apart or selection by the seller of the goods which he expects to use in performance of the contract is not enough. If that is all, he can change his mind and use those goods in performance of some other contract and use some other goods in performance of this contract. To constitute an appropriation of the goods to the contract, the parties must have had, or be reasonably supposed to have had, an intention to attach the contract irrevocably to those goods so that those goods and no others are the subject of the sale and become the property of the buyer.

2.30 The facts of the *Carlos Federspiel* case can be compared with the facts of the earlier case of *Aldridge v Johnson* in which property was found to have passed to the buyer.²³ In that case, the buyer agreed to send 200 empty sacks to the seller, which the seller agreed to fill with barley and send to the buyer. The seller filled 155 sacks but, on the eve of his bankruptcy, emptied the sacks into his general stock. It was held that property in the barley in the 155 sacks had passed. Mr Justice Pearson discusses this case in *Carlos Federspiel*. He begins by noting the statement in Chalmers’ *Sale of Goods Act 1893* (12th ed 1945) at page 75, that:

If the decisions be carefully examined, it will be found in every case where the property has been held to pass, there has been an actual or constructive delivery of the goods to the buyer.

2.31 Mr Justice Pearson then identified *Aldridge v Johnson* as a case in which such constructive delivery had occurred and therefore, at least impliedly, distinguished the case on that basis.²⁴

²⁰ For example, *Healy v Howlett & Sons* [1917] 1 KB 337 and *Laurie & Morewood v John Dudin & Sons* [1926] 1 KB 223.

²¹ [1957] Lloyd’s Rep 240.

²² [1957] Lloyd’s Rep 240 at 255.

²³ (1857) 7 E&B 885, 119 ER 1476.

²⁴ [1957] Lloyd’s Rep 240 at 255; In *Langton v Higgins* (1859) 4 H&N 402, the claimants contracted to buy from a farmer all the oil of peppermint to be distilled from the crop of peppermint which might be grown on his farm in a certain year. The farmer requested the claimants to send bottles for the oil and, when these were received, he filled them with oil, labelled them with the weight, and made out invoices for the oil. Before the oil was delivered to the carrier for conveyance to the claimants, the farmer sold some of the filled bottles to the defendant. It was held that the property in the oil in the bottles had passed to the claimants.

Unascertained goods: applying the rules in practice

2.32 In the 2016 Report, we discussed the question of what acts might amount to unconditional appropriation. We quoted Professors Howells and Twigg-Flesner:²⁵

The generally accepted position is that such setting aside, labelling, packing etc for the buyer by the seller is insufficient; and that the goods have not been irrevocably committed to the contract until the seller does the last act they must do before surrendering control over the goods. This last act might be, for example, handing them to a courier for delivery to the customer or sending an invoice detailing the specific goods to be supplied under the contract.

2.33 However, we noted that Professor Michael Bridge was of the view that sending an invoice specifying goods is not sufficient for an unconditional appropriation. Rather, he said, “in practical terms, it means delivery”.

2.34 Unless a different intention appears, Rule 5 of section 18 will apply. We said that the uncertainty surrounding the meaning of “unconditional appropriation” in this rule makes the law difficult for consumers to understand and for insolvency practitioners to apply. We think that “unconditional appropriation” should be replaced with a clearer test for determining when ownership transfers in a consumer context.

Goods forming part of a bulk

2.35 In some cases, the goods to which a contract relates will form part of a bulk of goods which are interchangeable. An example is a contract for the sale of grain from a silo. It is commonplace for commodities contracts to relate to quantities out of a bulk.²⁶ The goods being purchased would be identified as a fraction or percentage of a bulk or a specified quantity of a bulk (which would either be identified in the contract or subject to subsequent agreement between the parties). A bulk could be identified subsequently rather than in the contract if the sale was of future goods.²⁷

2.36 Where there is a contract for the sale of a share (a fraction or a percentage) of an identified bulk, this is a contract for the sale of specific goods. Ownership in the undivided share passes, under section 17 of the SGA 1979, when the parties intend it to pass and the buyer becomes an owner in common with the other owner or owners.²⁸

²⁵ Department for Business, Innovation and Skills, *Consolidation and Simplification of UK Consumer Law* (November 2010), para 8.19, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31838/10-1255-consolidation-simplification-uk-consumer-law.pdf.

²⁶ Sale of goods forming part of a bulk (1993) Law Com No 215; Scot Law Com No 145 (“1993 Report”), para 3.2, <https://www.lawcom.gov.uk/project/sale-of-goods-forming-part-of-a-bulk/>.

²⁷ 1993 Report, para 4.5.

²⁸ This is discussed at para 2.13.

2.37 Where there is a contract for the sale of a quantity of goods from an identified bulk, these goods are not specific goods²⁹ and are therefore unascertained goods under the SGA 1979. Under the current rules in the SGA 1979, there is something akin to a two-stage transfer of ownership process for unascertained goods which form part of a bulk:

- (1) *First stage:* A buyer can become an owner in common of a bulk³⁰ before the goods have been separated (if the contract of sale is for a specific quantity of goods in the bulk, the bulk is identified in the contract or subsequently, and the buyer has pre-paid for some or all of the goods). This transfer happens as a result of the operation of section 20A of the SGA 1979. Section 20B of the SGA 1979 provides that all co-owners are deemed to have consented to dealings in the bulk, including delivery to any other owner in common. This first stage is discussed in more detail from para 2.38. These rules will not apply to all sales out of a bulk and where they do not, this first stage of ownership in common does not arise.
- (2) *Second stage:* The first stage of ownership is merely an interim stage of ownership in common with any other owners of the bulk. The second stage is where the buyer becomes the owner of the specific quantity of goods which it has contracted to buy. Transfer of ownership of the specific quantity of goods occurs in accordance with the rules for transfer of ownership in sections 16, 17 and 18 of the SGA 1979. These rules are discussed in more detail from para 2.20. In summary, the goods must be ascertained³¹ and ownership transfers when the parties intend it to transfer.³² Unless a different intention appears, the presumptions in section 18 of the SGA 1979 will apply and ownership will transfer when the goods are in a deliverable state and unconditionally appropriated to the contract of sale.³³ In the context of bulk goods, goods are ascertained for the purposes of a contract of sale when they are separated from the bulk or through exhaustion (when the bulk is reduced to the amount of goods subject to the contract).³⁴ They are then only unconditionally appropriated to the contract of sale when some further step or act occurs which means that the contract is irrevocably attached to those goods so that those goods and no others are the subject of the sale. They are in a deliverable state when they are in such a state that the buyer would under the contract be bound to take delivery of them.³⁵

²⁹ Sale of Goods Act 1979, s 61(1): "Specific goods" means goods identified and agreed on at the time a contract of sale is made and includes an undivided share, specified as a fraction or percentage, of goods identified and agreed on as aforesaid".

³⁰ Sale of Goods Act, s 61(1): "Bulk" means a mass or collection of goods which are interchangeable with each other and contained in a defined space or area.

³¹ Sale of Goods Act 1979, s 16.

³² Sale of Goods Act 1979, s 17.

³³ Sale of Goods Act 1979, ss 17 and 18.

³⁴ Benjamin, *Sale of Goods* (9th ed 2014) para 5-061. "Ascertainment" is not defined in the Sale of Goods Act 1979.

³⁵ Sale of Goods Act 1979, s 61(5).

Sections 20A and 20B of the Sale of Goods Act 1979

- 2.38 Section 20A of the SGA 1979 provides a mechanism whereby ownership in an undivided share (described as a specific quantity) of the bulk passes to the buyer before ascertainment of the actual goods covered by the contract.³⁶ The undivided share is transferred to the buyer and the buyer becomes an owner in common of the bulk.³⁷
- 2.39 An “undivided share” is the proportion of goods in the bulk for which the buyer has paid. So, if a buyer pays for one tonne of grain out of an identified bulk containing 10 tonnes, the buyer becomes the owner of an undivided share of one tenth. The buyer does not own any particular grains in the silo, but instead owns a proportion of the total grain in the silo. If the seller goes insolvent while the grain is still in the silo, the buyer can claim ownership of one tenth of the grain.
- 2.40 Sub-sections 20A(3) to (6) provide a mechanism for calculating the quantity of the goods due to each buyer who is a co-owner of a bulk. This may, at first, appear unnecessary because each buyer will have contracted for a specific quantity of goods out of the bulk. However, it is required because a bulk could be co-owned by multiple buyers and the specific quantities purchased by individual buyers could exceed the bulk if it fluctuates in size. In contrast, where a buyer has contracted to buy a fraction or percentage of a bulk (as opposed to a specific quantity out of a bulk), such complicated mechanisms are not required. This is because the share due to the buyer will always be that fraction or percentage of whatever the bulk is at that time.
- 2.41 Section 20B of the SGA 1979 also contains provisions which provide for deemed consent by co-owners to dealings in bulk goods.³⁸ These are intended to facilitate normal trading of goods so that delivery of goods which are contractually due can be made out of the bulk to any of the co-owners, even if delivery would bring about or increase a shortfall.³⁹
- 2.42 Section 20A only applies where the bulk is identified in the contract or subsequently by agreement between the parties and the buyer has paid the price for some or all of the goods.⁴⁰ As a result, property in an undivided share in the bulk will pass when the buyer pays for the goods or some of them.⁴¹ Where only part payment has been made, co-ownership only applies to the share of the goods which have been paid for, not all the goods which are the subject of the contract.⁴²
- 2.43 As discussed above, the rules in sections 20A and 20B only apply if the contract of sale is for a specific quantity of goods in a bulk, the bulk is identified in the contract or subsequently, and the buyer has pre-paid for some or all of the goods sales out of a

³⁶ 1993 Report, para 4.1.

³⁷ Sale of Goods Act 1979, s 20A(2).

³⁸ Sale of Goods Act 1979, s 20B.

³⁹ 1993 Report, paras 4.17 to 4.18.

⁴⁰ Sale of Goods Act 1979, s 20A(1).

⁴¹ 1993 Report, p 39, Explanatory Notes s 20A(2).

⁴² Sale of Goods Act 1979, s 20A(6).

bulk.⁴³ If these conditions are not met, the normal rules in sections 16, 17 and 18 of the SGA 1979 will apply and buyers will not have the benefit of co-ownership of a bulk under section 20A.

Goods forming part of a bulk: application in practice

2.44 The protection of co-ownership of goods provided by the SGA 1979 is unlikely to be of much practical assistance to consumers. This is because it is likely to be relatively rare for consumers to purchase goods which form part of a bulk, be that a share (a fraction or percentage) of specific goods⁴⁴ or a specific quantity of goods in an identified bulk.⁴⁵ However, examples could include a contract for a specified number of bottles of wine stated in the contract to form part of an identified bin containing identical bottles, or a contract for a length of carpet forming part of a roll identified in the contract or by the parties in a physical shop.

THE NEED FOR REFORM

Clearer rules

2.45 The current provisions on transfer of ownership of goods contained in the SGA 1979 are substantially the same as those in the original Sale of Goods Act 1893. They were written in nineteenth century language for commercial contracts. As a result, some of the terminology is old-fashioned and unclear, and the rules have been criticised for being complex.

2.46 The Law Commission has previously argued that the law on consumer sales should be rewritten in plain language and brought together in one place, so that it is readily accessible to both consumers and retailers.⁴⁶ The CRA 2015 has gone a long way towards achieving this objective, but it does not include updated rules on when ownership is transferred under sale of goods contracts. There are therefore benefits to incorporating clear rules on transfer of ownership in the CRA 2015, which contains other rules concerning the retailer/consumer relationship.

2.47 The rules on timing of transfer of ownership of goods are particularly relevant for consumers where a retailer becomes insolvent because they may have ordered and paid for goods which they have not yet received. On an insolvency it will be up to insolvency practitioners to identify which goods are held by the retailer and whether ownership of any of these goods has transferred to consumers. If ownership has transferred to a consumer then the insolvency practitioner will have to make the goods available to the consumer. If ownership has not transferred then the consumer will simply become one of a number of unsecured creditors of the insolvent retailer and will be at risk of losing the money they have prepaid for the goods.

2.48 The case histories we received from Citizens Advice in response to the 2015 Consultation showed that issues of ownership are sometimes a real concern to

⁴³ Sale of Goods Act 1979, s 20A(1).

⁴⁴ To which the rules in ss 17 and 18 of the Sale of Goods Act 1979 will apply.

⁴⁵ To which the rules in ss 20A and 20B of the Sale of Goods Act 1979 will apply.

⁴⁶ Law Commission, *Simplifying Consumer Law: A response from the Law Commission to the DTI's Consultative Document on Consumer Strategy* (October 2004).

consumers. We think that consumers deserve a clear statement of the law in modern terms about when they do (or do not) own goods left with an insolvent retailer. Clearer and updated statutory rules would also benefit insolvency practitioners and shop staff.

2.49 In the 2016 Report, we made the following recommendations:

- (1) section 4 of the CRA 2015 should be amended to include new rules about when a buyer acquires ownership of goods in a contract for the sale of goods from a business to a consumer.
- (2) these rules should be mandatory: that is, any term in the contract which would put the consumer in a worse position should be of no effect.

Rules for the 21st century

2.50 We received responses to our 2015 Consultation which suggested some possible misunderstandings or disagreements about the effect of the current law. The current rules appear inconsistent with consumers' reasonable expectations of when they will become the owners of goods they have paid for.

2.51 In 2016, we made recommendations to update these laws for consumer contracts. The operation of both the existing rules and our recommendations depends on there being a contract between the consumer and the retailer. When a consumer purchases goods in a shop and the goods are immediately available to be taken away (whether or not the consumer does in fact take them at that point), it is likely that the contract is formed immediately. However, the situation may be quite different when goods are purchased online. We discuss this in more detail in Chapter 4.

Specific goods

2.52 The rules relating to specific goods are most likely to apply to consumers who have made purchases in-store rather than online. This is because the goods will be physically in store and will be identified and agreed upon at the time a contract is made.⁴⁷

2.53 The case histories provided to us by Citizens Advice during our 2015 Consultation show the impact of the current rules on prepaying consumers who have left goods with retailers for alteration:

We ordered some curtains, paid for them and had them shortened by the shop... . We called in today to collect them and were told that the shop had gone into receivership as of 12 noon yesterday and that we couldn't have the curtains as they were assets of the company and the assets were frozen. Surely if we have paid for them, they are no longer the company's assets but they are our assets and we should have been able to pick them up?

2.54 In the 2016 Report we recommended that for specific goods, ownership should be transferred at the time the contract is made. This should apply even if the retailer has agreed to alter the goods in some way before the consumer takes possession, that is, even if the goods are not in a "deliverable state". Examples include a ring which has

⁴⁷ Where goods are not physically in store, for example a contract for the sale of large furniture which is in a retailer's warehouse, the rules for unascertained goods will apply.

not yet been inscribed, curtains which have not yet been shortened or a display kitchen which has not yet been dismantled in preparation for removal from a shop or showroom. We acknowledged that if an additional step is required before the goods can be removed from a shop or showroom (as in the example of a display kitchen), the burden of taking this step is likely to fall on the consumer in an insolvency situation so that that they can take possession of the goods.⁴⁸

- 2.55 Removing the requirement that goods be in a deliverable state would provide clarity and make it easier for insolvency practitioners to release stock to prepaying consumers where appropriate. This would also address the perception of the law as unjust. It would be fairer to consumers and more aligned to common expectations.

Unascertained goods

2.56 As discussed in Chapter 1, internet sales have grown markedly in recent decades, increasing from 2.7% as a proportion of total retail sales in January 2007 to 19.9% in January 2020.⁴⁹ The closure of non-essential retail outlets in response to the COVID-19 emergency saw that figure rise to 32.8% in May 2020.⁵⁰ These sales often require full prepayment for goods and will usually involve unascertained goods coming from a retailer's general stock. The scale at which consumers are purchasing and prepaying for unascertained goods from online retailers has therefore increased dramatically. Consumers deserve to have a set of clear rules which reflect the reality of how they buy goods in the 21st century so that they can make online purchases with confidence.

2.57 In the 2016 Report we recommended that, for future and unascertained goods which are not identified at the time of the contract, ownership should transfer when goods are identified for fulfilment of the contract. We recommended that legislation should include the following non-exhaustive list of events and circumstances which would be sufficient to identify goods to the contract:

- (a) the goods have been altered to the consumer's own specifications;
- (b) the goods have been labelled with the consumer's name or set aside for the consumer in a way which is intended to be permanent;
- (c) the consumer is told that goods bearing a unique identifier will be used to fulfil the contract;
- (d) the consumer has physically examined and accepted the goods;
- (e) the goods are handed to a courier to be delivered to the consumer; or
- (f) the goods are delivered to the consumer.

⁴⁸ In Chapter 3, we discuss the consumer's right to withdraw from the contract in various circumstances. See from para 3.93.

⁴⁹ Office for National Statistics, "Internet sales as a percentage of total retail sales" (June 2020), <https://www.ons.gov.uk/businessindustryandtrade/retailindustry/timeseries/j4mc/drsi>.

⁵⁰ Office for National Statistics, "Internet sales as a percentage of total retail sales" (June 2020), <https://www.ons.gov.uk/businessindustryandtrade/retailindustry/timeseries/j4mc/drsi>.

Goods forming part of a bulk

- 2.58 We did not make recommendations about transfer of ownership of bulk goods for consumer contracts in the 2016 Report. However, we believe that updating the co-ownership rules may be sensible as part of a package to update the law for consumers on transfer of ownership of goods.
- 2.59 The law could provide more comprehensive protection to consumers so that they are not disadvantaged on an insolvency compared to other prepaying consumers, just because a retailer has held their goods as part of a bulk until delivery or very shortly before delivery. For example, where a consumer orders a specific amount of gravel which is held in a bulk in a truck until delivery to the consumer.
- 2.60 Our proposals in this area are discussed further in Chapter 3 where we consider the provisions of the draft Bill.⁵¹

⁵¹ The draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill (the “draft Bill”) is at Appendix 2 of this consultation paper.

Chapter 3: The proposed rules in practice

- 3.1 In this chapter we consider the provisions of the draft Bill and how the rules would operate in practice.¹
- 3.2 We begin by describing our proposed rules generally, with reference to the wording of the draft Bill. We then consider whether the rules should apply to contracts beyond contracts of sale, including conditional contracts and contracts for the transfer of goods, and whether the rules should be capable of being varied by the terms of the contract. We then discuss how the draft Bill would operate alongside the protections for consumers who have paid for goods by credit or debit card.

SCOPE OF THE PROPOSED RULES

- 3.3 The draft Bill seeks to introduce new rules into the Consumer Rights Act 2015 (“CRA 2015”) about the transfer of ownership under contracts for the sale of goods between a “trader”² and a “consumer”.³
- 3.4 Under the current law, the same rules on transfer of ownership apply to sales contracts, regardless of whether one of the parties is a consumer. As discussed in Chapter 2, the CRA 2015 does not contain rules on transfer of ownership. Instead, section 4(2) cross-refers to the transfer of ownership provisions in the Sale of Goods Act 1979 (“SGA 1979”).
- 3.5 The draft Bill replaces section 4(2) and inserts new transfer of ownership rules into sections 18A and 18B of the CRA 2015. The proposed section 4(2) provides that where section 18A or 18B applies to a sales contract, the timing of the transfer of ownership under that contract is determined by those sections.⁴ In any other case, the transfer of ownership is determined by the provisions of the SGA 1979.⁵
- 3.6 The proposed rules in sections 18A and 18B will apply only to a “sales contract”, as defined in the CRA 2015. A sales contract is a contract under which a trader agrees to

¹ The draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill (“draft Bill”) is at Appendix 2 of this consultation paper.

² “Trader” means a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf: Consumer Rights Act 2015, s 2(2).

³ “Consumer” means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession: Consumer Rights Act 2015, s 2(3).

⁴ Relevant provisions in the Sale of Goods Act 1979 are also disapplied for these contracts: draft Bill, cl 2.

⁵ Draft Bill, proposed s 4(2)(a) of the Consumer Rights Act 2015. Where a sales contract is for goods that are contained in a bulk, rules in the Consumer Rights Act 2015 and Sale of Goods Act 1979 apply to transfer ownership. This is provided for in proposed s 4(3) of the draft Bill and is discussed in this chapter from para 3.42.

transfer ownership of goods⁶ to a consumer in exchange for the price.⁷ A sales contract may be entered into between one part-owner and another and can provide for the transfer of an undivided share in goods.⁸

- 3.7 Sales contracts can be absolute or conditional.⁹ The proposed rules will apply to sales contracts which are conditional but not “conditional sales contracts” as defined in the CRA 2015. These are sales contracts under which the price for the goods, or part of it, is payable by instalments and the trader retains ownership of the goods until the conditions specified in the contract (for the payment of instalments or otherwise) are met.¹⁰ The rationale for excluding conditional sales contracts from the scope of the draft Bill is discussed from paragraph 3.70.
- 3.8 The proposed rules will apply only to contracts governed by the law in England and Wales.¹¹ There may be situations where consumers in the UK enter into a sales contract to buy goods from retailers which is governed by the law of another jurisdiction. This may occur, for example, with online purchases. In those situations, the proposed rules will not apply.
- 3.9 Under the CRA 2015, the goods remain at the trader’s risk until they come into the physical possession of the consumer or a person identified by the consumer to take possession of the goods.¹² We do not propose any change to this rule.

TRANSFER OF OWNERSHIP UNDER THE PROPOSED RULES

Modernised language

- 3.10 The current provisions on transfer of ownership of goods, contained in the SGA 1979, are substantially the same as those in the original Sale of Goods Act 1893. As a result, some of the terminology is old-fashioned and unclear.
- 3.11 The proposed rules in the draft Bill use the more modern language of the CRA 2015. For example, they refer to “trader” and “consumer” (rather than “buyer” and “seller”) and “transfer of ownership” (rather than “passing of property”).
- 3.12 The current rules in the SGA 1979 distinguish between “specific goods” and “unascertained and future goods”. The proposed rules in the draft Bill distinguish between “goods identified and agreed on” and “goods not identified and agreed on” when the sales contract is made. The draft Bill sets out separate transfer of ownership rules for each type of goods.

⁶ These could be either existing goods or goods yet to be manufactured or produced.

⁷ Consumer Rights Act 2015, ss 5(1) and (2).

⁸ Consumer Rights Act 2015, s 3(5)(a) and (b).

⁹ Consumer Rights Act 2015, s 3(5)(c).

¹⁰ Consumer Rights Act 2015, s 5(3).

¹¹ Draft Bill, cl 3(1). In Chapter 1 we explain that we hope that the Government will consider implementing our proposed rules throughout the United Kingdom, after appropriate engagement with the devolved administrations: see para 1.16.

¹² Consumer Rights Act 2015, s 29.

3.13 The proposed rules focus on “identification” of the goods and use clear and simple language. The terms “deliverable state”, “ascertainment” and “unconditional appropriation”, which are open to interpretation under the current law, do not feature in the proposed rules. We set out the detail of the changes below.

Goods identified and agreed on

3.14 The draft Bill provides for new rules on transfer of ownership to be inserted into section 18A of the CRA 2015 which set out when ownership transfers in goods which are identified and agreed on when a sales contract is made. The proposed rules would apply where a sales contract is for such goods or an undivided share of such goods, specified as a fraction or percentage.¹³ The proposed rules would replace the existing rules on transfer of ownership of specific goods in sections 17 and 18 (Rules 1 to 4) of the SGA 1979.¹⁴

3.15 These provisions will most often apply to items which a consumer has selected in a retailer’s physical shop. However, they could be goods which are purchased at a distance (for example, online) if they are sufficiently well identified when the contract is made: for example, a “one-off” such as an antique.

3.16 Under the proposed rules, transfer of ownership of goods identified and agreed on occurs when the contract is entered into. It is not a requirement (in contrast to the current rules) that the goods must be in a “deliverable state” for ownership to transfer. The result is that ownership transfers on conclusion of the contract, even where the seller has agreed to do something further to the goods (for example, adapt the goods to the consumer’s specifications or dismantle a display item ahead of delivery).¹⁵

3.17 In the previous chapter, we gave the example of a diamond ring which was left with a retailer to be inscribed.¹⁶ We explained that the requirement under the existing rules for goods to be in a “deliverable state” meant that it may not always be clear on an insolvency whether ownership of the ring had transferred to the buyer if the inscription had not been completed. Under the proposed rules, if the retailer becomes insolvent between the contract forming and the inscription being completed, the ring will be owned by the consumer. The insolvency practitioner will then have to make the ring available to the consumer. The retailer will still be bound under the contract to complete the inscription; however, if the retailer is insolvent this is unlikely to happen and the consumer may have a claim for breach of contract against the retailer. If they paid using a credit or debit card they may be able to recoup some money from their card issuer under section 75 of the Consumer Credit Act 1974 or the card issuer’s chargeback rules.¹⁷

¹³ Draft Bill, proposed s 18A(1) of the Consumer Rights Act 2015. We discuss undivided shares of goods further in para 3.20.

¹⁴ Draft Bill, clls 1(2), 1(3), 2(4) and 2(5).

¹⁵ These rules apply to goods which already exist, but to which the retailer has agreed to do something further. The rules do not apply where a consumer is purchasing goods which are yet to be made or generic goods from a retailer’s general stock which are then to be altered. In that case, the rules in proposed s 18B of the Consumer Rights Act 2015 will apply. These are discussed from para 3.18.

¹⁶ Chapter 2, from para 2.15.

¹⁷ We discuss s 75 of the Consumer Credit Act 1974 and chargeback further from para 3.85.

Goods not identified and agreed on

- 3.18 The draft Bill provides for new rules on transfer of ownership of goods which are not identified and agreed on when the contract is made. The proposed rules will be inserted into section 18B of the CRA 2015 and replace the existing rules on unascertained goods in sections 16, 17 and 18 (Rule 5) of the SGA 1979.¹⁸
- 3.19 The proposed rules will apply most often where a consumer places an order for goods out of a retailer's general stock. For example, where a consumer has ordered online or where the consumer has made a purchase in a physical store but has not seen the actual item they are buying. This could happen where the consumer has inspected a display item of furniture but the actual item that they will receive under the sales contract will be dispatched from the retailer's warehouse. The proposed rules will also apply where a consumer orders an item which has yet to be manufactured ("future goods" in the language of the SGA 1979).
- 3.20 The proposed rules apply where a sales contract is for goods or an undivided share of goods.¹⁹ The CRA 2015 already provides that sales contracts can be entered into between one part owner and another²⁰ and for the transfer of an undivided share in goods.²¹ However, for the avoidance of doubt we have provided in paragraphs 18A(1)(b) and 18B(1)(b) that the rules apply when the sales contract is for an undivided share of goods. This is distinct from a situation in which a sales contract is for a specific quantity of goods and those goods form part of a bulk. In that scenario the sales contract is not for an undivided share of goods as the goods which are subject to the contract are intended to be separated from the bulk. The treatment of bulk goods in the draft Bill is discussed further from paragraph 3.42 below.

The proposed rules

- 3.21 Proposed section 18B(3) of the CRA 2015 deals with sales contracts for goods which are to be manufactured for a consumer to a specification agreed between the consumer and the trader. For example, where a consumer selects the style and fabric of a sofa which is then made to order, ownership of the goods will transfer when the manufacture is completed. This means that on an insolvency, the consumer will not obtain ownership of the component parts of their goods (for example, in the case of a sofa: cloth, foam and wood). In most cases, we do not think a customer would want ownership over component parts, but we accept that there may be exceptions, such as where the component parts are inherently valuable.
- 3.22 Proposed section 18B(3) only applies where goods are to be manufactured according to a specification agreed between the consumer and the trader. In any other case, including where a consumer enters into a sales contract for generic goods which are yet to be manufactured, ownership transfers under proposed section 18B(4).

¹⁸ Draft Bill clls 1(2), 1(3), 2(3), 2(4) and 2(5).

¹⁹ Draft Bill, proposed s 18B(1) of the Consumer Rights Act 2015.

²⁰ Consumer Rights Act 2015, s 3(5)(a).

²¹ Consumer Rights Act 2015, s 3(5)(b).

3.23 Proposed section 18B(4) provides that, in any other case, ownership of goods transfers when the first of the following events or circumstances occurs:

- (1) the goods are labelled with the consumer's name in a way that is intended by the trader to be permanent;
- (2) the goods are set aside for the consumer in a way that is intended by the trader to be permanent;
- (3) the alteration of the goods to a specification agreed between the trader and the consumer is completed;
- (4) the consumer is told by the trader that goods bearing a unique identifier will be used to fulfil the contract;
- (5) on examining the goods the consumer agrees that they are to be used to fulfil the contract;
- (6) the goods are delivered to a carrier for delivery to the consumer;
- (7) the goods are delivered to the consumer; or
- (8) the goods that are to be used to fulfil the contract are identified by the trader in some other way, and the trader intends the identification to be permanent.

3.24 We make additional points in relation to each of these below.

(1) Goods are labelled in a way intended by the trader to be permanent

3.25 We have been told by stakeholders that the process of labelling goods may not always be intended by the trader to be permanent. For example, a retailer (or their third-party warehouse contractor) may label items with a consumer's name and address in anticipation of delivery but find that the consumer is unavailable on the proposed delivery date. The label may then be removed and a new label with a different customer's details attached to that item.

3.26 This practice may occur in the interests of efficiency for the retailer's business where there is a high turnover of goods. In an insolvency situation, the retailer's practices in relation to labelling will be relevant when considering whether goods have been labelled in a way that is intended to be permanent.

(2) Goods are set aside for the consumer in a way intended by the trader to be permanent

3.27 This does not necessarily mean that the goods which are to be used to fulfil the contract are physically set aside in a warehouse and left untouched until delivery to a consumer. It could include situations where it is clear that an item is intended for a specific consumer, for example because the retailer has ordered it from a supplier specifically to satisfy that consumer's order.

(3) Alteration of goods to an agreed specification

3.28 Where a consumer has contracted to buy an item from the retailer's general stock which is to be altered to a specification agreed between the consumer and the trader, ownership will not transfer under this rule until that alteration is complete. For example, where the consumer has bought a diamond ring online with a bespoke inscription, ownership of the ring will not transfer to the consumer under this rule until the inscription is complete. However, ownership might have passed under another rule in proposed section 18B(4), for example if the goods have been set aside or labelled for the consumer in a way that was intended by the trader to be permanent.

(4) Consumer is told that goods bearing a unique identifier will fulfil the contract

3.29 We do not think that this situation will arise regularly in a consumer context, but we include it because where it does happen it might relate to high-value goods where the consumer may have a particular interest in obtaining ownership. For example, where a consumer has entered into a contract for the sale of a new smartphone from a retailer's general stock and the retailer emails the consumer with the International Mobile Equipment Identity (IMEI) number before the smartphone is dispatched.

(5) Consumer examines and agrees goods to be used to fulfil the contract

3.30 This provision is not intended to impact upon the requirement that goods be of satisfactory quality under section 9 of the CRA 2015, and a consumer's right to reject goods under sections 20 to 24, and those provisions will continue to apply. For example, if it emerges that the goods do not conform to the contract only after the consumer has taken delivery of the goods, the consumer will still have 30 days to return them if they turn out to be faulty. Under section 9, if the consumer examined the goods before making the contract then a defect which should have been revealed by the examination will not be grounds for finding the goods to be unsatisfactory.

(6) Goods are delivered to a carrier for delivery to the consumer

3.31 We have been told by a stakeholder that goods may be released by a retailer to a carrier in anticipation of delivery to the consumer but on the instruction that they should not be delivered until further notice. This could occur where a consumer has paid a deposit on goods and the retailer does not intend to deliver the goods until full payment has been received. We think that in this situation, ownership of the goods will transfer on delivery to the carrier, albeit that the exact timing of delivery has not yet been confirmed. The consumer may be required to pay the outstanding balance before the goods will be released to them.²²

3.32 It should be noted that ownership may already have transferred under another limb of the non-exhaustive list prior to release by the retailer to the carrier. However, as we discuss in Chapter 4 it appears that, at least in the context of online sales, the point of dispatch may be the point at which the contract is formed. If this is the case, this is the earliest point at which ownership could transfer.

²² Sale of Goods Act 1979, s 39. An unpaid seller's rights are discussed in further detail from para 3.64.

(7) Goods are delivered to the consumer

3.33 If goods are delivered to the consumer, we consider that ownership should transfer even if the consumer has not paid any or all of the purchase price. The retailer (or the insolvency practitioner) would then have a debt claim against the consumer for payment.

(8) Goods that are to be used to fulfil the contract are identified by the trader in some other way and the trader intends the identification to be permanent

3.34 The list is non-exhaustive and events (1) to (7) attempt to reflect common practices whereby retailers identify goods to fulfil consumer orders. Event (8) is a sweep-up limb which seeks to capture analogous events and circumstances.

Operation of the proposed rules

3.35 The list is easier to understand than the existing rules in the SGA 1979 which require goods to be “ascertained” and also “unconditionally appropriated” before ownership can transfer. There is also no requirement under the proposed rules for goods to be in a “deliverable state”.²³

3.36 The operation of the proposed rules on an insolvency strikes a balance between prepaying consumers and other creditors. Under the existing law, ownership is unlikely to transfer until the goods have been dispatched, regardless of the fact that the retailer will have earmarked those goods for a consumer before that point. The proposed rules formalise this “earmarking” process so that transfer of ownership is linked to the identification of goods to the contract (notwithstanding any purported attempt by traders to delay such a transfer). This is less obviously unfair to consumers on an insolvency than the position under existing law. Ownership of goods may also transfer earlier in some situations than under existing law, so more consumers will have the protection of ownership rights if a retailer becomes insolvent before they receive their goods.

3.37 However, the impact of the proposed rules should not be overstated and it should be noted that they will not apply where a consumer has made payment (in full or in part) but the goods to fulfil the order have not yet been identified. As we discuss in Chapter 5, whether a retailer will be holding substantial numbers of goods which have been identified for fulfilment of particular contracts but which have not yet been dispatched will depend on the retailer’s operational model and the type of goods that they sell.

3.38 In the 2016 Report we considered and rejected a more radical proposal which would give consumers an ownership right in unascertained goods (goods not identified and agreed on at the time the contract is made) as soon as the contract was made.²⁴ We thought that a wider rule may be difficult to apply in practice. Furthermore, it could result in a large proportion of the retailer’s stock belonging to consumers, significantly diminishing the assets available to other creditors.

²³ The meaning of “deliverable state” is discussed in Chapter 2 from para 2.14.

²⁴ Consumer Prepayments on Retailer Insolvency (2016) Law Com No 368, paras 9.76 to 9.79.

Consultation Question 1.

- 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?

Consultation Question 2.

- 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.

Consultation Question 3.

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

Goods forming part of a bulk

The draft Bill

- 3.42 As explained in Chapter 2, section 20A of the SGA 1979 sets out rules on transfer of ownership of goods forming part of a bulk.²⁵ It provides for a buyer to become a co-owner of a bulk when certain conditions are met. The normal rules for transfer of ownership in sections 16, 17 and 18 of the SGA 1979 then apply to transfer ownership of the specific quantity of goods which the buyer has contracted to buy.²⁶
- 3.43 The current rules in sections 20A and 20B of the SGA 1979 were introduced as a result of recommendations by the Law Commission and the Scottish Law Commission. They sought to address a perceived unfairness in the operation of the SGA 1979 which arose in relation to commodity trading where it is commonplace for sale of goods contracts to relate to quantities out of a bulk.²⁷ In commodity trading the goods being purchased would be identified as a fraction or percentage of a bulk or a specified quantity of a bulk. The bulk itself would be identified either in the contract or subject to subsequent agreement between the parties.

²⁵ Sale of Goods Act 1979, s 61(1): “Bulk” means a mass or collection of goods which are interchangeable with each other and contained in a defined space or area.

²⁶ These provisions are discussed in Chapter 2 from para 2.35.

²⁷ Sale of goods forming part of a bulk (1993) Law Com No 215; Scot Law Com No 145 (“1993 Report”), para 3.2, <https://www.lawcom.gov.uk/project/sale-of-goods-forming-part-of-a-bulk/>.

- 3.44 Our 2016 Recommendations did not propose any changes to the rules around co-ownership of bulk goods. The draft Bill therefore does not seek to change how sections 20A and 20B of the SGA 1979 apply to consumer sales contracts.
- 3.45 Sections 20A and 20B of the SGA 1979 will continue to apply to sales contracts between a trader and consumer.²⁸ If the relevant conditions in subsection 20A(1) are met, the consumer will become a co-owner of the bulk of goods.²⁹ All co-owners of the bulk (be they consumer or non-consumer owners) will be deemed to have consented to any dealings in the bulk goods, allowing for delivery of the specific quantity of goods which the consumer has contracted to buy.³⁰ The proposed rules inserted into proposed section 18B of the CRA 2015 by the draft Bill will then apply to transfer ownership of the specific quantity of goods which the consumer has contracted to buy.
- 3.46 Proposed subsections 18B(3) and (4) provide a list of events and circumstances upon which ownership of goods will transfer. These events and circumstances relate to the “goods” which are the subject of the sales contract, not the bulk of which those goods may form a part. Therefore, for example, in relation to labelling of goods under paragraph 18B(4)(a), ownership will transfer only when the specific quantity of goods which are the subject of the contract are labelled, not when the bulk is labelled. The effect of this is that the goods will need to be separated from the bulk before ownership can transfer under proposed section 18B.

An alternative approach

- 3.47 Although we did not make recommendations regarding bulk goods in the 2016 Report, we now believe that updating these rules may be worthwhile, as consumers do sometimes enter into contracts for goods forming part of a bulk (for example a contract for the sale of 0.5 tonnes of gravel from a bulk of gravel). We suggest below how new rules could operate and would like to hear from consultees on this issue.
- 3.48 While the current rules in sections 20A and 20B of the SGA 1979 do apply to sales contracts between consumers and retailers, they will rarely assist a consumer as the conditions in section 20A are unlikely to be met. In particular, even where a consumer knows that they are making a purchase out of bulk, it is not common for the bulk to be identified in the consumer contract or by subsequent agreement between the trader and the consumer.
- 3.49 We think that there is an argument that the consumer should get ownership in common of a bulk as long as the retailer has identified that bulk as containing the goods which will be used to fulfil the contract. This approach would better reflect the consumer/retailer relationship than the existing rules in the SGA 1979 and would protect consumers who knowingly enter a contract for the sale of goods out of a bulk and also those consumers who are unaware that the goods they are purchasing will be held in bulk until delivery or very shortly before delivery.

²⁸ Draft Bill, clause 1(2).

²⁹ Sale of Goods Act 1979, s 20A(2).

³⁰ Sale of Goods Act 1979, s 20B.

- 3.50 New rules could amend the conditions in subsection 20A(1) of the SGA 1979 which must be met for co-ownership to arise. New rules could provide that a consumer becomes an owner in common of a bulk³¹ when:
- (1) the consumer has paid the price for some or all of the goods which form part of the bulk;³² and
 - (2) the bulk is identified for the purposes of the contract in one of the following ways:
 - (a) the bulk is identified in the contract;
 - (b) the bulk is identified by subsequent agreement between the trader and the consumer;
 - (c) the trader provides the consumer with information after the contract is entered into which identifies the defined space or area containing the goods forming the bulk;
 - (d) the bulk is labelled with the consumer's name or otherwise allocated to the consumer by the trader in a way that is intended by the trader to be permanent (whether or not it is also labelled with the names of others or otherwise assigned to others by the trader);
 - (e) the consumer has examined the bulk and agreed that the goods that are the subject of the contract form part of it;
 - (f) the bulk is delivered to a carrier for delivery to the consumer (whether or not the carrier is also to deliver some of the goods forming part of the bulk to others); or
 - (g) the bulk is identified for the purposes of the contract in some other way.
- 3.51 The consumer's co-ownership of the bulk would be an interim stage. Ownership of the specific quantity of goods being purchased would only transfer to the consumer when the goods are identified for fulfilment of the contract under the rules in proposed section 18B of the CRA 2015 which apply to goods not identified and agreed on at the time the contract is made.
- 3.52 If such a change were to be implemented, it would only amend section 20A(1) of the SGA 1979. The remainder of sections 20A and 20B would continue to apply to consumer contracts unchanged.

³¹ The definition of "bulk" in s 61(1) of the Sale of Goods Act 1979 could be retained: "Bulk" means a mass or collection of goods which are interchangeable with each other and contained in a defined space or area.

³² This reflects s 20A(1)(b) of the Sale of Goods Act 1979.

Consultation Question 4.

3.53 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.

Consultation Question 5.

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?

Consultation Question 6.

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.

Consultation Question 7.

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?

RULES TO BE MANDATORY

3.57 Under the SGA 1979, ownership of goods transfers when the parties to a contract for sale intend it to transfer. The current rules relating to the passing of property in the SGA 1979 are presumptions which impute an intention to the parties where they have not otherwise evidenced one. These presumptions therefore do not apply where parties have made their intention obvious or explicit. However, in a consumer context, rules such as those governing the transfer of risk in the CRA 2015 are mandatory, meaning that they cannot be varied by contract.³³

³³ Consumer Rights Act 2015, s 29.

- 3.58 Sections 18A(4) and 18B(5) of the proposed rules state that contract terms which provide for ownership to transfer at a later time than under the rules are of no effect. This reflects the recommendation we made in the 2016 Report that any term in the contract which would put the consumer in a worse position should be of no effect.
- 3.59 The proposed rules also disapply section 19 of the SGA 1979 in relation to contracts to which the proposed rules apply.³⁴ This section permits a seller to delay transfer of ownership of goods to a buyer until certain conditions are fulfilled, even if the goods have been delivered to a buyer or a carrier, bailee or custodian for onward delivery to the buyer.³⁵ Section 19 can be used to delay transfer of ownership until full payment is received by the seller.³⁶ Under the proposed rules, this will not be possible and ownership will transfer in accordance with proposed sections 18A and 18B of the CRA 2015.
- 3.60 Some stakeholders have raised concerns that mandatory transfer of ownership rules could cause problems for retailers who sell age-restricted products. We think that the proposed rules will continue to allow retailers to prevent the transfer of ownership of products to consumers who do not meet relevant age requirements. For example, where a consumer buys a bottle of alcohol in a shop, it will continue to be for the retailer to satisfy themselves as to the consumer's age before entering into the sales contract. Where a consumer seeks to buy a bottle of alcohol which is not identified and agreed on at the time the contract is made, for example, by ordering it online, ownership will transfer when the retailer identifies a bottle of alcohol for fulfilment of that contract "in a way that is intended to be permanent". The events and circumstances in proposed section 18B(3) of the CRA 2015 will apply. Part of a retailer's identification process may be that goods are not permanently identified for fulfilment of the contract until the retailer is satisfied that the consumer is the requisite age.

Consultation Question 8.

- 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?

PAYMENT

- 3.62 The current rules on transfer of ownership in sections 16, 17 and 18 of the SGA 1979 do not require goods to be paid for before ownership is transferred. However, as ownership of goods transfers under section 17 when the parties to a contract for sale intend it to, a seller can contract to retain property rights until the full price of goods has been paid. In particular, a seller can rely on section 19 to delay transfer of ownership until full payment is received.

³⁴ Draft Bill, cl 2(6).

³⁵ Sale of Goods Act 1979, s 19.

³⁶ We discuss payment further from para 3.62.

- 3.63 Under the proposed rules, ownership of goods may transfer before full payment is made. As discussed above, the proposed rules on transfer of ownership are mandatory and it is not possible for a seller to delay transfer of ownership until full payment is received.³⁷ This protects consumers on the insolvency of a retailer who have paid substantial deposits.
- 3.64 An unpaid retailer will continue to have rights under section 39 of the SGA 1979. This provides that a seller has a lien or right to retain goods until the whole of the price has been paid. A retailer or insolvency practitioner is therefore not obliged to release the goods until the consumer has paid for them in full. Under section 43 of the SGA 1979, a seller loses the lien if the seller delivers the goods to the buyer, or if the seller delivers the goods to a carrier for onward delivery to the buyer without delaying transfer of ownership using its right in section 19. As the proposed rules disapply section 19, the draft Bill amends section 43 in its application to consumer sales contracts so that the trader will lose their lien not only upon delivery to the consumer, but also upon delivery of the goods to a carrier.³⁸
- 3.65 If a retailer loses its lien or right of retention by delivering the goods before payment either to the consumer or a carrier, other bailee or custodian for the purpose of transmission to the consumer, it will retain its contractual right to payment and will have a debt claim. It can also structure its ordering process so that any offer a consumer makes to purchase goods will not be accepted unless full payment is tendered. This is the case for the majority of purchases made online.

DELIVERY OF GOODS

- 3.66 Where ownership of goods has transferred, an insolvency practitioner must make those goods available to the consumer. While the consumer has a right to delivery of those goods,³⁹ if the retailer is insolvent, they are unlikely to receive such a delivery. In this situation, the consumer will have to make arrangements to take possession of their goods, which will usually involve arranging for the goods to be collected. The cost of this may be borne by the consumer (this is a decision for the insolvency practitioner acting in the interests of all creditors). If an additional step is required (for example, dismantling a display kitchen before it can be removed from a shop or showroom), the burden may also fall on the consumer in an insolvency situation.
- 3.67 If the consumer has paid using a credit or debit card they may be able to recoup some of these costs from their card issuer by making a claim under section 75 of the CCA 1974 or the card issuer's chargeback rules.⁴⁰ We discuss this further below. We also discuss the consumer's right to reject the goods if the trader has breached the contract, including by failing to deliver.

³⁷ This is discussed from para 3.57.

³⁸ Draft Bill cl 2(7).

³⁹ The arrangements for delivery in relation to a particular sales contract will be governed by the sales contract itself and s 28 of the Consumer Rights Act 2015.

⁴⁰ See from para 3.85.

OTHER CONTRACTS UNDER WHICH OWNERSHIP OF GOODS CAN TRANSFER

- 3.68 The proposed rules will apply only to consumer contracts which are “sales contracts”⁴¹ as defined in the CRA 2015 and will exclude “conditional sales contracts”.⁴²
- 3.69 In addition to sales contracts, the CRA 2015 refers to hire-purchase agreements⁴³ and contracts for the transfer of goods.⁴⁴ Ownership of goods can transfer under these contracts but the statute does not contain any detailed rules or presumptions on when ownership transfers. Parties are therefore free to agree when ownership will transfer.

Conditional sales contracts and hire-purchase agreements

- 3.70 Conditional sales contracts and hire-purchase agreements are similar in that transfer of ownership of goods to a consumer will not occur until full payment is made and sometimes until other steps are completed or conditions met.
- 3.71 Under a conditional sales contract, the price for the goods or part of it is payable by instalments and the trader retains ownership of the goods until the conditions specified in the contract (for the payment of instalments or otherwise) are met.⁴⁵ Ownership of goods under these contracts will generally transfer in accordance with the SGA 1979, but other legislation may also be relevant depending on the goods themselves. For example, rules in the CCA 1974⁴⁶ and the Hire-Purchase Act 1964⁴⁷ may apply.
- 3.72 Under a hire-purchase agreement, possession of goods is transferred to the consumer in return for periodical payments and ownership transfers to the consumer if the consumer exercises an option to buy the goods (usually only after full payment has been made).⁴⁸ The transfer of ownership rules in the SGA 1979 do not apply to hire-purchase agreements but certain provisions in the CCA 1974 and the Hire-Purchase Act 1964 (as above) will apply.
- 3.73 Our 2016 Recommendations were not written with conditional sales contracts and hire-purchase agreements in mind. We do not think that the proposed rules are appropriate for the transfer of ownership of goods under these agreements. The transfer of ownership provisions are fundamental to the nature of these agreements and it would therefore not be appropriate to apply rules whereby ownership transfers

⁴¹ Draft Bill, proposed ss 18A(1) and 18B(1) of the Consumer Rights Act 2015.

⁴² Draft Bill, proposed ss 18A(2)(b) and 18B(2)(b) of the Consumer Rights Act 2015.

⁴³ Consumer Rights Act 2015, s 7(3).

⁴⁴ Consumer Rights Act 2015, s 8.

⁴⁵ Consumer Rights Act 2015, s 5(3).

⁴⁶ Including s 66A(11) whereby if the debtor withdraws from the agreement after the credit has been provided but the debtor pays for the goods in full, title to the goods passes on the same terms as if the debtor had not withdrawn from the agreement.

⁴⁷ Part III of the Hire-Purchase Act 1964 makes an exception to the principle *nemo dat quod non habet* (one cannot pass a better title than one has) in favour of a private purchaser of a motor vehicle.

⁴⁸ Consumer Rights Act 2015, s 5(3).

at the point of contract formation or at the point that the goods are identified for fulfilment of the contract.

- 3.74 The draft Bill does not therefore seek to change the law in relation to conditional sales contracts and hire-purchase agreements.

Consultation Question 9.

- 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?

Contracts for the transfer of goods

- 3.76 Section 8 of the CRA 2015 defines contracts for the transfer of goods. Broadly, these are contracts under which a party transfers or agrees to transfer ownership of the goods in exchange for consideration other than payment of money. In addition, a contract may also be a contract for the transfer of goods if it is otherwise not a contract of sale or a hire-purchase agreement.
- 3.77 An example of the first type of contract is an exchange arrangement for goods. Where goods are supplied in exchange for something other than the price (for example in exchange for other goods, for work done, or for board and lodging) this is a barter or exchange. A part exchange arrangement where goods are supplied in exchange for goods plus an amount of money could, on the facts of the case, be interpreted as a contract for the transfer of goods rather than a sale of goods.⁴⁹
- 3.78 An example of the second type of contract is a contract for work and materials, where there is a contract for the performance of work or services to which the supply of goods is incidental. The characterisation of a contract in this way, as opposed to a sale of goods, will turn on the substance of the contract. The courts have been asked to consider contracts for the printing of a book, painting of a portrait and the supply and laying of a fitted carpet.⁵⁰
- 3.79 The current rules on transfer of ownership in the SGA 1979 apply to contracts of sale of goods, which are defined as “a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price”.⁵¹ The SGA 1979 therefore does not apply to contracts for the transfer of goods and so parties are free to agree when ownership will transfer under those contracts.

⁴⁹ Implied Terms in Contracts for the Supply of Goods (1979) Law Com No 95, para 48; Michael Bridge (ed), *Benjamin's Sale of Goods* (10th ed 2019) para 1-039; Examples where courts have considered such arrangements include: *Clarke v Reilly & Sons* [1962] 96 ILTR 96 (where the agreement appears to have been to exchange a new car for a new car plus £192, neither vehicle being valued); *Flynn v Mackin and Mahon* [1974] IR 101 (where the Supreme Court of Ireland held that the case before it was a barter); and *Hearns v Rizzolo* [2012] NSSC 256 (where an exchange of vehicles with no reference to monetary value was held to be a barter).

⁵⁰ Michael Bridge, Louise Gullifer, Kelvin Low and Gerard McMeel (eds), *Law of Personal Property* (2nd ed 2018) para 18-033.

⁵¹ Sale of Goods Act 1979, s 2(1).

We note that there is an argument that the rules in the SGA 1979 may apply to these contracts by analogy.⁵²

- 3.80 We can see that there is a rationale for clarifying the law around transfer of ownership under these contracts in order to provide clarity to consumers, especially on the insolvency of a retailer. The example of a contract for part exchange of a car illustrates that the outcome for a consumer will depend on the way that the contract is drafted. Given that consumers may not fully understand the implications of a particular drafting approach and will rarely be in a position to negotiate a retailer's standard terms and conditions, this is not an entirely satisfactory position for consumers.
- 3.81 However, our 2016 Recommendations were not written with contracts for the transfer of goods in mind. It may therefore not be appropriate to extend the rules in the draft Bill to cover these contracts. In particular, the definition of these contracts and the freedom available to the parties to agree when ownership transfers mean that there may be a multitude of different arrangements which fall into this category.
- 3.82 We would like to hear from consultees with experience of contracts for the transfer of goods better to understand how common they are and what the transfer of ownership arrangements are under them.

Consultation Question 10.

- 3.83 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?

Consultation Question 11.

- 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?

⁵² Michael Bridge et al suggest that "it would seem sensible that similar rules apply to other contracts where property in goods passes for good consideration, such as contracts of barter and exchange": Michael Bridge, Louise Gullifer, Kelvin Low and Gerard McMeel (eds), *Law of Personal Property* (2nd ed 2018) para 18-032. There is some support for this in the case law: see *Koppel v Koppel* [1966] 1 WLR 802 (where the Court of Appeal appeared to assume that property under a contract of barter passed under s 18 of the Sale of Goods Act 1893) and *Aldridge v Johnson* (1957) 119 ER 1476 (QB) (where the court appeared to proceed on the basis that the passing of property under a contract for the exchange of barley for bullocks was to be determined by reference to the rules that applied to a sale of goods).

INTERACTION WITH SECTION 75 AND CHARGEBACK

Summary of section 75 and chargeback

3.85 When a consumer pays with their credit or debit card for goods, they may claim a refund from their card issuer if those goods are not delivered.⁵³ As we explained in our 2016 Report, this is a major source of protection for prepaying consumers.⁵⁴

3.86 The consumer may obtain a refund in two ways.

- (1) For credit card transactions where the goods cost between £100 and £30,000, section 75 of the CCA 1974 makes the card issuer jointly and severally liable for the retailer's breach of contract or misrepresentation.
- (2) For all card transactions (debit or credit cards), card schemes provide a system of "chargeback", which allows the consumer to claim the amount they paid on their card. Unlike the section 75 protection for credit card transactions, this is not a statutory right for consumers. However, as we noted in our 2016 Report, it has proved a very valuable mechanism for consumers to recoup money which they would otherwise lose in the event of retailer insolvency. Importantly, it is not restricted to payments over £100.

3.87 In the 2016 Report we made recommendations intended to improve consumer awareness of and access to chargeback.⁵⁵ In response to our recommendations, the Government worked with stakeholders to publish best practice guidance for insolvency practitioners in June 2017.⁵⁶ The UK Cards Association (now part of UK Finance) also produced an industry code of best practice, which it hosts on its website.⁵⁷ It also put our recommendations into practice in several insolvency events, which increased consumer awareness about the availability of the chargeback procedure and section 75 rights.

3.88 The key features of section 75 and chargeback are summarised in table 1 on the next page.

⁵³ In Chapter 4 we consider the potential impact upon s 75 claims in the event that a sales contract has not formed.

⁵⁴ Full descriptions of s 75 rights and the chargeback scheme are set out in Consumer Prepayments on Retailer Insolvency (2015) Law Commission Consultation Paper No 221, ch 5.

⁵⁵ 2016 Report, Recommendations 3a, 3b, 3c and 3d.

⁵⁶ Dear Insolvency Practitioner, Chapter 13, para 93:
<https://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/dearip/dearipmill/chapter13-2.htm>.

⁵⁷ <https://www.ukfinance.org.uk/area-of-expertise/cards/chargeback-and-section-75>.

Table 1: Summary of section 75 and chargeback

	Section 75 of the CCA 1974	Chargeback
Nature of protection	Statutory right.	Contained in card scheme rules issued by Visa and MasterCard, to which the consumer is not party.
Type of card	Credit cards only.	Credit and debit cards.
Value of prepayment	Cash price of goods or services must be over £100 and less than £30,000, though the amount paid on card may be less.	No minimum or maximum limits.
Amount which can be recovered	Total value of prepayment, irrespective of how much was paid by credit card. Any consequential loss may also be claimed as damages.	Amount paid by card.
Claim to be made to	Card issuer.	Card issuer.
Time limit for making a claim	Statutory limitation rules apply. Six years from the non-delivery of goods or service (five years in Scotland).	The time limits are set out in the scheme rules. Generally the card issuer must raise a claim within 120 days of the date on which delivery of the goods or services was expected.
Where retailer is insolvent, who bears the loss	Card issuer (unless offset by chargeback claim against merchant acquirer).	Merchant acquirer.

Effect of the draft Bill on section 75 and chargeback claims

Outside insolvency

3.89 Outside insolvency, a consumer may still wish to rely on their section 75 rights or a chargeback claim in certain circumstances. If the retailer fails to deliver goods which have been ordered, or delivers incorrect or defective goods, the consumer's first avenue of recourse is likely to be with the retailer themselves, who will provide replacement goods or a refund. If the consumer does not get the appropriate remedy from the retailer, they may then seek to make a section 75 or chargeback claim. We do not think that the draft Bill will have any impact on section 75 or chargeback claims in a non-insolvency situation.

On retailer insolvency: section 75

3.90 In an insolvency situation, a consumer may not receive their goods because:

- (1) the insolvency practitioner does not release the goods to the consumer because it considers that ownership of the goods has not transferred to the consumer or the goods have not yet been manufactured;
- (2) although ownership of the goods has transferred to the consumer, the goods are being held by a warehouse or delivery company (which has a lien over the goods) which will not release them until the retailer's outstanding storage or delivery charges have been paid; or
- (3) although ownership of the goods has transferred and the insolvency practitioner has made the goods available to the consumer, it has not arranged for delivery to the consumer as agreed between the parties, for example, by courier to the consumer's address.

3.91 Regardless of whether ownership has transferred, a consumer may have a section 75 claim if they have prepaid for goods and they have not been delivered in the way described in the contract. If the goods are not delivered to the consumer as agreed, either within the time period for delivery agreed between the consumer and retailer in the contract, or in line with the statutorily implied timeframe,⁵⁸ the retailer will be in breach of contract, and the consumer may have a claim under section 75. This requires, of course, the consumer to have made a payment on a credit (not debit) card where the cash price of the goods is between £100 and £30,000. Such a consumer could have a claim whether or not ownership of the goods has transferred to the consumer (provided that there is a concluded contract).

The consumer seeks reimbursement of prepayment instead of seeking to take possession of the goods

3.92 On an insolvency, a consumer may prefer to receive a refund of prepayments rather than the goods themselves, even where ownership of goods has already transferred to them. This could be the case where the consumer does not want the goods if they cannot rely on a guarantee or after-purchase servicing, which an insolvent retailer will not be able to honour. It could also be the case where a consumer finds that they will need to incur additional costs in order to take possession of the goods (for example, by paying outstanding storage or delivery costs or as a result of arranging delivery or pick up of the goods).

3.93 If the consumer does not want to arrange for collection themselves and/or pay charges or simply does not want the goods, can the consumer claim reimbursement from their card issuer of any prepayments made to the retailer even if ownership of the goods has already transferred to them?

⁵⁸ Consumer Rights Act 2015, s 28(3), inserts an implied term into business to consumer sales contracts that the retailer must deliver the goods to the consumer without "undue delay", and "in any event not more than 30 days after the day on which the contract is entered into". "Delivery" means voluntary transfer of possession from one person to another: Consumer Rights Act 2015, s 59(1).

3.94 Consumers have various rights to cancel an order or a sales contract.

- (1) the consumer has a right under the CRA 2015 to treat a sales contract as at an end for the retailer's refusal to deliver the goods.⁵⁹ If a retailer (or insolvency practitioner) tells the consumer that it will not deliver the goods unless the consumer pays additional storage and/or delivery costs, it is arguable that the retailer has "refused" to deliver the goods to the consumer for the purposes of the CRA 2015.⁶⁰
- (2) the consumer has a right under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("CCRs 2013") to cancel a distance or off-premises contract from the date of entry into the contract to 14 days after receiving the goods.⁶¹
- (3) the consumer has a right under the CCRs 2013 to withdraw an offer to enter into a distance or off-premises contract.⁶² If the contract has not yet been formed (as we discuss in more detail in Chapter 4), the consumer could use this right to withdraw their order if they did not wish to transact with an insolvent company.

3.95 A consumer who exercises any of the above rights has a reimbursement claim against the retailer for payments made under the contract.⁶³ However, the consumer is unlikely to recover any money from the insolvent retailer. Can the reimbursement claim instead be brought against the card issuer under section 75 of the CCA 1974?

3.96 A section 75 claim can only be made against the card issuer when the consumer has a claim against the retailer "in respect of a misrepresentation or breach of contract". Where the consumer has chosen to treat the sales contract as at an end under the CRA 2015 because of the retailer's refusal to deliver the goods, and the consumer then claims reimbursement, there is a strong argument that the claim for reimbursement is "in respect of a breach of contract". This is because the consumer's right to terminate and seek reimbursement under the CRA 2015 is premised on the retailer being in breach of the statutory implied terms (or the parties' agreed terms) regarding delivery. A section 75 claim should therefore be possible in this situation.⁶⁴

⁵⁹ Consumer Rights Act 2015, s 28(9).

⁶⁰ A retailer in insolvent administration falls within the definition of "trader", which is defined in s 2(2) of the Consumer Rights Act 2015 as: "a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or *through another person acting in the trader's name or on the trader's behalf*."

⁶¹ Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013 No 3134, regs 29(1), 29(2) and 30(3). Note that the right to cancel does not apply to contracts for the supply of goods which are made to the consumer's specifications: reg 28(1)(b).

⁶² Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013 No 3134, reg 29(3).

⁶³ Consumer Rights Act 2015, s 28(9); Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013 No 3134, reg 34(1).

⁶⁴ Although s 28 of the Consumer Rights Act 2015 gives a consumer the right to treat the contract as at an end, s 28(13) also provides that s 28 does not prevent the consumer seeking other remedies where it is open to them.

- 3.97 Where the consumer cancels a distance or off-premises contract in accordance with their rights under the CCRs 2013, failure by the retailer to provide the reimbursement due will be a breach of contract. This is because the regulations provide that the contract is to be treated as including the statutory provisions as to reimbursement on cancellation.⁶⁵ We think the consumer could cancel the contract (and refuse delivery of the goods, if this was proffered) and seek reimbursement from the retailer. Any failure to reimburse would be actionable by the consumer as a breach of contract with a potential claim against their card issuer under section 75, even if ownership in the goods had already transferred.
- 3.98 Where a distance or off-premises contract has not yet formed and the consumer instead withdraws an offer under the CCRs 2013, they have a statutory right to reimbursement under regulation 34. However, unlike the right to reimbursement when a consumer cancels a contract, it may be more difficult to say that the consumer's entitlement to reimbursement on withdrawal of an offer is "in respect of a breach of contract" because there is no contract in existence. A section 75 claim would therefore not be possible in this situation. In Chapter 4 we discuss what impact the lack of a contract could have on consumers.

The consumer who arranges for pick up or delivery of the goods and seeks reimbursement of these costs

- 3.99 An insolvency practitioner may make goods available for the consumer to collect rather than arranging delivery to the consumer as provided by the sales contract. Under the CRA 2015, delivery requires a transfer of actual physical custody of the goods to the consumer.⁶⁶ The onus is on the trader to deliver the goods, not on the consumer to take steps to secure possession of them. Therefore, simply making the goods available to the consumer is unlikely to satisfy the obligation to deliver the goods under section 28 of the CRA 2015.⁶⁷
- 3.100 If the consumer decides they want the goods and arranges for pick up or delivery of them, we think that the consumer could recover these costs (where they are reasonable costs) under section 75. This is because the consumer is entitled to a sum of damages which will put the consumer in the position they would have been in had the retailer performed the sales contract (that is, delivered the goods). The card issuer will therefore be liable for the costs incurred by the consumer in arranging pick up or delivery of the goods.

The consumer pays outstanding storage/delivery charges to release the goods and seeks reimbursement of these costs

- 3.101 An insolvency practitioner may tell the consumer that they will only release and/or deliver the goods if the consumer agrees to pay outstanding storage and/or delivery

⁶⁵ Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013 No 3134, reg 34(13).

⁶⁶ "Delivery" is defined in s 59 of the Consumer Rights Act 2015 as the "voluntary transfer of possession from one person to another". It does not require a transfer of actual physical custody of the goods to the consumer. However, it is understood to do so because the Consumer Rights Act 2015 implements the EU Consumer Rights Directive, which in Art 18 defines delivery as the transfer of "physical possession or control of the goods". See Michael Bridge (ed), *Benjamin's Sale of Goods* (10th ed 2019) para 14-107.

⁶⁷ Michael Bridge (ed), *Benjamin's Sale of Goods* (10th ed 2019) para 14-107.

charges in respect of the consumer's goods. These are charges which are owed by the insolvent retailer to a third party which is holding the goods.

3.102 We think that if the consumer decides to pay the reasonable storage and/or delivery charges so that the goods can be released, these costs would be recoverable against the card issuer under section 75. These costs are necessary to put the consumer in the position they would have been in had the retailer delivered the goods. They are therefore recoverable as damages for the retailer's breach of contract.

On retailer insolvency: chargeback

3.103 Chargeback allows card transactions to be reversed under specified circumstances set out in the card scheme rules. According to the MasterCard Chargeback Guide, the card issuer may initiate a chargeback when the circumstances of the transaction fall within a "chargeback reason code".⁶⁸ "Goods or services not provided" is the most relevant reason code for our purposes.

3.104 The consumer has 120 days from the latest expected delivery date of the goods or services to request their card issuer to raise a chargeback.

3.105 The MasterCard Chargeback Guide states that a chargeback can be claimed for "goods or services not provided" in various circumstances, including:

- (1) when the determination has been made that the merchant will not provide the goods or services because, for example, the merchant is no longer in business;
- (2) when the cardholder cancelled the order for goods or services, the goods or services were not provided, and the cardholder did not receive a credit.⁶⁹

3.106 The former of these already gives consumers an important protection in the event of insolvency. The latter would assist consumers to whom ownership has transferred but who do not wish to take possession of the goods. It indicates that cancellation by the consumer provides a basis for claiming chargeback, provided the consumer has not received a "credit" from the retailer (including presumably a store credit).

3.107 Accordingly, if a consumer decides not to pay the additional charges to the retailer and cancels the contract under the CRA 2015 or the CCRs 2013, then they are entitled under the scheme rules to raise a chargeback.

Availability of chargeback for payment of additional delivery/storage charges

3.108 If the consumer decides to pay any additional delivery/storage charges by using their card, it seems unlikely that the consumer can claim a chargeback under the card scheme rules.

⁶⁸ *MasterCard Chargeback Guide* (December 2018), <https://www.mastercard.us/content/dam/mccom/en-us/documents/rules/chargeback-guide.pdf>.

⁶⁹ *MasterCard Chargeback Guide* (December 2018), p 222, <https://www.mastercard.us/content/dam/mccom/en-us/documents/rules/chargeback-guide.pdf>.

3.109 None of the “reason codes” in the MasterCard Chargeback Guide, for example, would seem to entitle the consumer to claim a chargeback in respect of payment of the additional charges.

Consultation Question 12.

3.110 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?

Consultation Question 13.

3.111 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?

COMPETING CLAIMS

Role of the insolvency practitioner

3.112 An insolvency practitioner is an outsider who steps in to see if the insolvent company can be saved, or at least sold as a going concern, rather than simply wound up. The insolvency practitioner will assess the assets of the insolvent company. On a liquidation, the insolvency practitioner will look to sell the company’s assets in order to obtain a return for the company’s creditors. On an administration, the assets may be sold for the purposes of trying to save the company, or for achieving a sale of the company as a going concern. In both cases, the insolvency practitioner will need to know which goods still belong to the retailer and which belong to the consumer.

3.113 It is rare for an insolvency practitioner to rescue the company; more often they seek to secure a better result for creditors by selling the business. To that end, the insolvency practitioner may decide to continue trading in administration.

3.114 During the period of trading in administration, the insolvency practitioner will identify goods in stock for which consumers have prepaid and decide whether to fulfil those orders. As we explained in the 2016 Report, the decision is a commercial one, guided by the best interests of creditors as a whole. If the consumer’s prepayment is a small proportion of the purchase price, then it may be beneficial to creditors as a whole for the insolvency practitioner to deliver the goods and recover the balance of the purchase price from the consumer. Doing so extinguishes the consumer’s unsecured

claim while swelling the assets available to creditors. In contrast, if the consumer has fully paid for the goods, then fulfilling the order may not provide any benefit to creditors as a whole, unless the insolvency practitioner is hoping to sell the business and wants to preserve consumer goodwill.

3.115 Some consultees said that our proposals would increase the complexity and cost of trading in administration. For example, R3 Scottish Technical Committee said:

On insolvency, the decision on whether trading should continue post insolvency and on which orders may be capable of being fulfilled, depends usually on our stated objectives. Adding complexity to the trading environment would inevitably lead to added cost, and potentially lower funds available for distribution to creditors. Every situation is different and it is the economic and commercial outcome that will dictate the insolvency practitioner's strategy and actions; the contractual situation would then be considered in light of our objectives.

3.116 Similarly, PWC said:

It is the commerciality of each situation that the insolvency practitioner assesses, bringing [their] experience, the objectives of the insolvency and the strategy adopted together to make those decisions in the best interests of creditors. Any change of this sort would only serve to increase complexity in the competing claims of different stakeholders to the same goods – adding consumers to a list that could include some or all of: Retention of Title claims, general or special liens, resellers, and in Scotland, landlords under hypothec.

3.117 We think the rules in our draft Bill will not materially increase the cost and complexity of administration. The rules define in clear and simple terms the circumstances in which ownership of goods transfers to the consumer. Although the insolvency practitioner will have to identify which, if any, of the goods held by or on behalf of the retailer in fact belong to it, the rules do not effect an immediate transfer of ownership of goods in the retailer's general stock, based on when the consumer prepaid. In the 2016 Report, we acknowledged that such a proposal would cause difficulties for insolvency practitioners in practice. We think that the rules in our draft Bill provide a balanced and measured solution to the problems faced by prepaying consumers.

3.118 Below we consider how our proposed rules interact with the interests of other creditors, including suppliers claiming under retention of title clauses and warehouses claiming a lien over the goods.

Retention of title clauses

3.119 A retention of title clause prevents ownership from transferring to the buyer until certain conditions imposed by the seller are fulfilled. These clauses are permitted by section 19 of the SGA 1979.⁷⁰ Typically, the retention of title clause will state that ownership will not transfer until the buyer pays for the goods in full. In retail supply chains, retention of title clauses provide security to suppliers who deliver goods to

⁷⁰ As discussed at para 3.59, the draft Bill provides that s 19 of the Sale of Goods Act 1979 will not apply to a contract to which proposed s 18A or s 18B of the Consumer Rights Act 2015 applies. However, s 19 will still apply to contracts for sale governed by the Sale of Goods Act 1979, including those between suppliers and retailers. Retention of title clauses will therefore still be permitted under those contracts.

retailers without taking payment. If the retailer enters insolvency before paying for the goods, the supplier will be able to claim those goods in the retailer's insolvency.

3.120 Our proposals do not complicate the law on retention of title clauses. Under the current law, if a retailer sells goods subject to retention of title, the consumer will generally take free of the supplier's title to the goods. This is because almost all retention of title clauses empower the retailer to on-sell the goods in the ordinary course of business. Our proposals only change the time at which this transfer of ownership from the retailer to the consumer can occur. The legal consequences for retention of title arrangements remain the same as under the current law.

3.121 Some consultees commented that our proposed rules would complicate retention of title arrangements in practice. For example, R3 said:

[The proposal] appears to have the potential to upset retention of title arrangements between supplier and retailer... . At what point will ownership change as the goods move through the chain from supplier(s) to retailer to purchaser? Transferring title at such an early stage in the transaction would cause problems in the supply chain [and] affect working capital requirements, which ultimately would do nothing to protect consumers.

3.122 We understand that the rules in our draft Bill mean that, in certain circumstances, ownership will transfer to the consumer at an earlier point in time than under the current rules. This has the potential to diminish the security afforded to suppliers by retention of title clauses. We consider the impact of this in Chapter 5. However, the circumstances in which ownership will transfer to the consumer are limited. There is no immediate transfer of ownership upon prepayment. We do not think our proposals will affect the vast majority of goods subject to retention of title at any one time.

Consultation Question 14.

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

Warehouse and deliverers' liens

3.124 Retailers often engage third-party warehouses and delivery companies to store and deliver goods to consumers. Where the warehouse or delivery company has not been paid for its services, they may claim a lien over the goods. This allows them to retain possession of the goods until they have been paid. The lien arises from the contract between the retailer and the warehouse or delivery company. Not all such contracts contain liens. However, where they do, the relevant clause may be drafted very broadly so that the warehouse or delivery company has a lien over all goods in their possession, as security for all sums owed by the retailer.

3.125 The question arises whether a consumer would be bound by a warehouse or deliverers' lien if their goods were in the possession of that warehouse or deliverer when the retailer becomes insolvent. If the consumer is bound, then they can be kept out of possession of the goods until the warehouse or delivery company is paid. If the

consumer is not bound, then they can take possession of the goods from the warehouse or delivery company.

3.126 We think the consumer will be bound by the lien in most cases. This is because the lien will almost always be in existence before the transfer of ownership occurs. As the retailer cannot transfer a better title than it has (the 'nemo dat' principle), it follows that the consumer will necessarily acquire ownership of the goods subject to the lien.

3.127 In some cases, the lien will arise after the transfer of ownership. For example, the goods might be stored at the retailer's premises when the transfer of ownership occurs. The retailer might then give the consumer's goods to a logistics company for delivery to the consumer. If the retailer becomes insolvent, we think the consumer is unlikely to be bound by any lien asserted by the logistics company, unless the logistics company can prove that the consumer consented to the lien.⁷¹

Consultation Question 15.

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

COMMENCEMENT

3.129 The draft Bill provides that the proposed rules will come into force two months after the Bill is passed into law.⁷² The proposed rules will not apply to contracts made before the Act comes into force.⁷³

3.130 We do not expect that the majority of retailers or other businesses will need to change the way they operate as a result of the draft Bill coming into force. While insolvency practitioners will need to familiarise themselves with the new rules, we think that this can be achieved within the proposed two month timescale.

Consultation Question 16.

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

⁷¹ *Singer Manufacturing Company v The London & South Western Railway Co* [1894] 1 QB 833; *Tappenden v Artus* [1963] 2 QB 185; *Jarl Tra AB v Convoys Ltd* [2003] EWHC 1488 (Comm).

⁷² Draft Bill, cl 3(2).

⁷³ Draft Bill, cl 3(3).

Chapter 4: The timing of contract formation

- 4.1 The law surrounding the sale of goods is, for the most part, predicated on a contract being in place between the buyer and seller. The characteristic feature of a sale of goods contract is the transfer of property in the goods in exchange for money. Our proposals suggested changes to the current rules on transfer of property from traders to consumers. For example, the current law refers to property passing in specific goods when the contract is made, and in unascertained goods when goods are unconditionally appropriated to the contract. In the 2016 Report we recommended that ownership of specific goods should transfer at the time the contract is made, and ownership of unascertained goods should transfer when goods are identified for fulfilment of the contract.¹
- 4.2 Most of the available commentary appears to assume that the contract is formed at an early stage, such as when the retailer takes payment. However, we have become aware that, at least in the case of online sales, it is a common practice among retailers to seek to delay the formation of the sales contract until the “dispatch” of the goods to the consumer.
- 4.3 This practice may have significant implications for the transfer of ownership and potentially consumer rights more generally. In this chapter, we set out our understanding of the law and of this practice. We ask consultees about their knowledge of or experience with this practice, and its impact.

HOW DOES A SALES CONTRACT FORM?

- 4.4 The formation of a sales contract, like any other contract, requires an agreement comprising an offer and acceptance. Offer and acceptance is a question of the parties’ intentions, objectively ascertained.
- 4.5 English courts have held that the display of goods in a shop is not intended as an offer, but as an “invitation to treat”, that is, an invitation to consumers to make an offer.² When the consumer selects an item from the shelf and presents the item to the shopkeeper, the consumer makes an offer to purchase the goods. The retailer accepts the offer, and the contract forms, when the retailer takes payment from the consumer.³
- 4.6 We think that a similar analysis applies when goods are purchased online.⁴ The display of goods online is an invitation to treat. When a consumer adds an item to their “basket” and clicks the button to place their order, the consumer makes an offer to the retailer to buy the goods. The question, then, is when the offer is accepted? This is where the terms and conditions of retailers come in.

¹ Consumer Prepayments on Retailer Insolvency (2016) Law Com No 368, (the “2016 Report”), <https://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency/>.

² *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 QB 795 at 802; *Esso Petroleum v Customs & Excise* [1976] 1 WLR 1 at 11.

³ *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 QB 795 at 802.

⁴ This also appears to be the view of the authors of *Benjamin’s Sale of Goods* (10th ed 2019) para 2-002.

HOW DO TERMS AND CONDITIONS PURPORT TO DELAY FORMATION?

- 4.7 In an online sales transaction, the retailer typically asks the consumer to agree to a set of terms and conditions before the consumer places their order. The consumer might be asked to tick a box to indicate their agreement to the terms and conditions. Alternatively, a statement such as the following may appear next to the “place order” button: “By placing your order you agree to our terms and conditions of sale”. The words “terms and conditions” will typically be hyperlinked to a separate webpage containing the full text of the terms and conditions.
- 4.8 The terms and conditions often contain statements regarding the formation of the sales contract. These statements purport to prescribe the time at which the retailer will accept the consumer’s offer. Typically, the terms and conditions state that the consumer’s offer is not accepted by the retailer until the goods are dispatched. For example, one major retailer’s terms and conditions state:
- We only accept your offer, and conclude the contract of sale for a product ordered by you, when we dispatch the product to you and send e-mail confirmation to you that we’ve dispatched the product to you.
- 4.9 If these terms and conditions delaying formation are legally effective, the contract will not form between the consumer and the retailer until dispatch of the goods, even if the consumer has paid for the goods. Although in some cases payment is not taken until dispatch, we are aware of at least one major retailer whose practice is to charge the consumer’s card immediately when the consumer places their order, but whose terms and conditions state that no contract forms until dispatch of the goods. It may be the case that this is common practice among retailers who manufacture or procure goods to order, as is often the case for furniture, for example. The payment will provide working capital to fund the manufacture or purchase.
- 4.10 If there is a long lead time between order and dispatch, the contract will form weeks or potentially months after the consumer has paid for the goods. During that period, the consumer will not have the benefit of certain consumer rights or protections which depend on there being a contract in place. We discuss these potential detriments to the consumer in more detail below.

WHEN WOULD THE CONTRACT FORM WITHOUT THE TERMS AND CONDITIONS?

- 4.11 Without the terms and conditions, we think that the sales contract would form, at the latest, when the retailer takes payment from the consumer. The taking of payment by the retailer would amount to an acceptance by the retailer of the consumer’s offer to purchase the goods.⁵
- 4.12 As we said above, we think that a similar analysis applies when goods are purchased online as when they are purchased in store. The display of goods on the retailer’s website is not an offer but an invitation to treat. When a consumer adds an item to their “basket” and clicks on the button to place their order, the consumer makes an offer to the retailer to buy the goods. We think that if the retailer charges the consumer’s card, that would amount to an acceptance of the consumer’s offer. We

⁵ *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 QB 795 at 802.

see no reason why the taking of payment would amount to an acceptance when goods are purchased in a physical store, but not when goods are purchased online.

- 4.13 Accordingly, absent terms and conditions delaying formation, we think that the contract would form on payment by the consumer. This would precede dispatch in all cases where the retailer takes payment from the consumer at an earlier point.

WHY DO RETAILERS USE THESE TERMS AND CONDITIONS?

- 4.14 When the sales contract forms, the trader comes under an obligation to deliver the goods to the consumer.⁶ Under section 28 of the Consumer Rights Act 2015 (“CRA 2015”), the trader must deliver the goods without “undue delay” and in any event not more than 30 days after the day the sales contract is entered into.⁷

- 4.15 We have been told that retailers would face practical problems if the sales contract formed (and the obligation to deliver arose) prior to dispatch of the goods. These problems include the following:

- (1) *insufficient stock*: the retailer may not know whether they have the goods in stock at the point when the consumer makes the order. If the contract forms prior to dispatch, the retailer may be obliged to deliver goods which it does not have in stock. If it cannot do so and is in breach of contract, the retailer may be liable not just to return the money paid but also for any consequential losses suffered by the consumer as a result of the breach.⁸
- (2) *pricing errors*: goods on a retailer’s website may be mispriced. For example, a fridge may be mistakenly priced at £2.99, instead of £299. If the contract forms before the pricing error is discovered, the retailer may be obliged to deliver the goods at the mistaken price, causing loss to the retailer. The retailer may have an argument under the law of mistake that no binding contract forms in these circumstances, because the retailer did not intend to contract at the advertised price and the consumer knew this. However, this argument would only succeed if the retailer could prove that the consumer knew of its mistake.⁹

- 4.16 Delaying the contract until dispatch means that the retailer avoids these problems. However, as discussed below, we would like to hear from consultees about whether retailers could address these problems by alternative means, for example by drafting conditional contracts.

⁶ Consumer Rights Act 2015, s 28(2).

⁷ Consumer Rights Act 2015, s 28(3).

⁸ Although these would be subject to the (now fairly strict) remoteness rules in contract, which means that consequential losses will not be recoverable unless they are within the reasonable contemplation of the parties, and the seller had special knowledge of the particular loss in question that might result from a failure to deliver. Such losses will also be subject to mitigation, so a consumer will probably find it hard in most cases to recover these.

⁹ See *Hartog v Colin & Shields* [1939] 3 All ER 566 at 568.

HOW MIGHT CONSUMERS BE AFFECTED?

4.17 The majority of the sale of goods provisions in the CRA 2015 are only relevant after the consumer has actually received the goods; for example, that goods are to be of satisfactory quality¹⁰ and the consumer's right to reject.¹¹ These consumer protections are not affected by the contract being formed at dispatch rather than at the time of payment.

Right to delivery of the goods

4.18 As discussed above, under section 28 of the CRA 2015 it is an implied term of the contract that the retailer will deliver the goods to the consumer without undue delay, or within 30 days of the contract being formed. However, if the contract does not form until dispatch, section 28 is of minimal value to the consumer. The retailer's obligation to deliver the goods will not arise until the retailer has, in effect, sent the goods out for delivery.

4.19 If the consumer pays for goods which are never delivered, the absence of the contract does not leave the consumer with no remedy. For online sales, the consumer can withdraw their offer to enter into the contract under regulation 32(1) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, in which case the trader must reimburse all payments received from the consumer.¹² In addition, the consumer may have a claim for restitution under the law of unjust enrichment. However, neither avenue would allow the consumer to recover consequential losses, whereas a contract claim may allow for this.¹³

Section 75 of the Consumer Credit Act 1974

4.20 A further potential detriment concerns the ability of consumers to make claims under section 75 of the Consumer Credit Act 1974 ("CCA 1974"). Under section 75, a consumer who has a "misrepresentation or breach of contract" claim against a retailer can bring a like claim against their credit card issuer, provided they have paid between £100 and £30,000 on the credit card.

4.21 As we discussed in the 2016 Report, section 75 is an important source of protection for prepaying consumers. However, terms and conditions delaying formation mean that there may be no contract between the retailer and consumer where goods have not been delivered. We are not aware of card issuers refusing claims on the basis that the contract of sale has not yet been entered into. Below, we ask whether consultees are aware of any attempts to do so.

¹⁰ Consumer Rights Act 2015, s 9.

¹¹ Consumer Rights Act 2015, s 20.

¹² Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013 No 3134, reg 34(1).

¹³ *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29; [2018] 1 AC 275 at [45], [60].

RELEVANCE TO OUR WORK ON TRANSFER OF OWNERSHIP

- 4.22 Terms and conditions delaying formation of the sales contract have important implications for the transfer of ownership. This is because both the current transfer of ownership rules and our proposed rules in the draft Bill¹⁴ are premised on the existence of a contract. If the contract does not come into existence until dispatch, then there can be no transfer of ownership until dispatch. We understand “dispatch” to be the point where the goods are handed to a carrier for delivery to the consumer. These terms and conditions potentially undermine our proposed rules, which seek to enable the transfer of ownership to occur at an earlier point in time.
- 4.23 Consider a scenario where a consumer places an order for goods and the retailer takes payment immediately, on terms and conditions which delay formation of the contract until dispatch. If the retailer goes insolvent before dispatch, the sales contract does not form. Without a sales contract, there can be no transfer of ownership to the consumer. Our proposed rules, which are triggered by events and circumstances occurring before dispatch, would be of no assistance to the prepaying consumer under these terms and conditions.
- 4.24 In contrast, without these terms and conditions, the sales contract would form before dispatch, at least in some cases. Our proposed rules would then apply, so that ownership would transfer to the consumer if the retailer identified goods for the fulfilment of that contract prior to insolvency. Terms and conditions delaying formation could therefore have a significant impact on the outcomes for consumers in an insolvency situation. We discuss these potential impacts in more detail below.

THE FAIRNESS OF TERMS AND CONDITIONS DELAYING FORMATION

- 4.25 We think there may be an argument that terms and conditions delaying formation are “unfair” contract terms or consumer notices under Part 2 of the CRA 2015. A term is “unfair” if, contrary to good faith, it causes a significant imbalance in the parties’ rights and obligations to the detriment of the consumer.¹⁵
- 4.26 We think terms delaying formation might meet this test. They potentially create an imbalance between retailer and consumer, as the consumer is obliged to pay money to the retailer without the retailer being under a contractual obligation to deliver the goods. This potentially causes detriment to the consumer insofar as the transfer of ownership rules do not apply and the consumer’s right to delivery under section 28 of the CRA 2015, and possibly their section 75 rights, are compromised. Further, as these terms do not appear to be brought specifically to consumers’ attention by retailers, we think that they potentially offend the principle of good faith, which requires disadvantageous terms to be given “appropriate prominence”.¹⁶

¹⁴ The draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill (the “draft Bill”) is at Appendix 2 of this consultation paper.

¹⁵ Consumer Rights Act 2015, s 62(4).

¹⁶ *Director-General Fair Trading v First National Bank* [2001] UKHL 52; [2002] 1 AC 481 at [17] per Lord Bingham.

4.27 In this chapter, we are calling for evidence from consultees about how commonly these terms are used by traders, why these terms are used by traders, and whether these terms cause detriment to consumers in practice.

CALL FOR EVIDENCE

4.28 We would like to hear from consultees on the following issues:

- (1) how common it is for traders to use terms and conditions which delay the formation of the sales contract;
- (2) the reasons why traders use these terms and conditions;
- (3) whether traders use, or could potentially use, conditional contracts (discussed below) to achieve the same outcome as terms and conditions delaying contract formation;
- (4) whether consumers are aware or unaware that terms and conditions delaying formation are used by retailers; and
- (5) whether terms delaying formation of the sales contract are actually causing, or have the potential to cause, detriment to consumers.

The use of terms and conditions delaying formation

4.29 As noted above, we have become aware that terms and conditions delaying formation are used by some major online retailers. However, we would like to obtain a better understanding of how often these terms and conditions are used and by whom.

4.30 We would like to know whether the use of these terms is a general practice among retailers, or confined to a particular group of retailers, for example retailers who sell certain types of goods. We are interested to know whether such terms are used only in online sales, or whether they are also used in shop-based transactions in which the goods are not conveyed to the consumer immediately (such as where furniture is ordered and paid for in store but will not be available for pick up or delivery for several weeks).

Consultation Question 17.

4.31 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?

Consultation Question 18.

- 4.32 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?

The rationale for terms delaying formation

- 4.33 Earlier, we identified reasons why retailers might use terms and conditions delaying formation of the sales contract. These include preventing the retailer from being under an obligation to deliver the goods where the goods are not in stock or where the retailer has mispriced the goods.
- 4.34 We would like to know whether there are any other reasons for the use of these terms and conditions by retailers.

Consultation Question 19.

- 4.35 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).

Alternatives to terms and conditions delaying formation

- 4.36 We understand retailers’ concerns about being bound to supply goods which they do not have in stock or which have been mispriced, and we agree that they should not be bound in this way. However, we consider that retailers might be able to achieve their objectives other than by using terms and conditions which delay the formation of the sales contract.
- 4.37 One option is for the retailer to draft a conditional contract. The contract could say that the retailer’s obligation to deliver the goods is conditional on a specified event occurring. The event could be a “condition precedent”, so that the obligation to deliver does not become binding until the event occurs; or a “condition subsequent”, so that the obligation ceases to be binding when the event occurs. In relation to the problem of insufficient stock, for example, the contract could provide that the retailer is not obliged to deliver the goods unless the goods are in stock (a condition precedent), or that it is entitled to terminate the contract if the goods are not in stock (a condition subsequent). Conditions precedent and subsequent could also be used to deal with the problem of pricing errors. The contract could provide that the retailer is not obliged to deliver the goods if they have been mispriced (a condition precedent), or that it is entitled to terminate the contract if the goods have been mispriced (a condition subsequent).
- 4.38 Imposing conditions on delivery is permitted by the CRA 2015. The obligation to deliver the goods in section 28 does not apply if the parties “have agreed otherwise”. We think that conditional contracts could achieve the same objectives as terms delaying formation of the sales contract.

Consultation Question 20.

- 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?

Consumers' awareness of these terms

- 4.40 As discussed above, in online sales transactions the retailer typically asks the consumer to indicate their agreement to a set of terms and conditions. Our understanding is that terms and conditions delaying formation are not specifically drawn to the consumer's attention at the time they place their order. Instead, the consumer can access the text of the terms and conditions, including the terms and conditions delaying formation of the sales contract, by clicking on a hyperlink.
- 4.41 We would like to know whether retailers take steps to bring terms and conditions delaying formation specifically to the consumer's attention. We would also like to know whether consumers are generally aware or unaware that these terms are used by retailers.

Consultation Question 21.

- 4.42 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?

Consultation Question 22.

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

Detriment to consumers

- 4.44 We are concerned that terms and conditions delaying formation may cause detriment to consumers in practice. Above, we discussed that the following two consumer rights might be compromised:
- (1) the consumer's right to delivery of the goods under section 28 of the CRA 2015; and
 - (2) the rights of a consumer under section 75 of the CCA 1974.
- 4.45 We ask consultees whether they are aware of problems in practice in these, or other, scenarios.

Consultation Question 23.

- 4.46 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?

Consultation Question 24.

- 4.47 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?

Consultation Question 25.

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

Chapter 5: Assessing the impact

- 5.1 The draft Bill¹ seeks to make some relatively limited changes to the rules on transfer of ownership to improve certainty for consumers, insolvency practitioners and shop staff. Although the proposed rules would apply in all circumstances and not just on insolvency, in practice it is on insolvency where consumers are most vulnerable and where the timing of transfer of ownership may be of most importance. This is because, in most other situations, the important issue is whether the goods are at the seller's or the buyer's risk (in the case of loss or damage, for example), rather than where ownership lies. In consumer cases, risk does not pass to the consumer until delivery (regardless of when ownership transfers).²
- 5.2 In this chapter we summarise where we think the main impacts of our draft Bill would be felt if our proposed rules were to be introduced into law. Despite our discussions with stakeholders, it has been difficult to put a figure on the benefits or costs associated with our draft Bill. Therefore, we ask consultees for quantitative and qualitative evidence as to what they believe to be the consequences of our draft Bill. We ask consultees to provide estimated figures where possible. The information which we receive from consultees in response to the questions below will form the basis of an impact assessment to be published with our final draft Bill.

THE CONTEXT: RETAILER INSOLVENCIES AND ONLINE SALES ON THE INCREASE

- 5.3 In recent years, the number of retailer insolvencies has been increasing. In October 2019, the Insolvency Service reported 1,252 insolvencies in the retail sector over the previous year.³ This was the highest number of retailer insolvencies in five years. Retailers operating from physical stores on the high street have been especially affected, due to falling consumer demand as consumers increasingly purchase goods online. According to data from the Office of National Statistics (ONS), internet sales as a percentage of total retail sales increased from 2.7% in January 2007 to 19.9% in January 2020.⁴
- 5.4 The COVID-19 emergency, which saw the forced closure of non-essential retail outlets, is likely to exacerbate these trends in the retail industry. The Centre for Retail Research forecasts that store closures will increase by 25% in 2020 over 2019 levels as a result of retailers entering insolvent administration.⁵ ONS data shows that, in May

¹ The draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill (the "draft Bill") is at Appendix 2 of this consultation paper.

² Consumer Rights Act 2015, s 29.

³ Insolvency Service, 'Company Insolvency Statistics July to September 2019' (October 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856060/Company_Insolvencies_-_Commentary_-_Q3_2019.pdf.

⁴ Office for National Statistics, 'Internet sales as a percentage of total retail sales' (May 2020), <https://www.ons.gov.uk/businessindustryandtrade/retailindustry/timeseries/j4mc/drsi>.

⁵ Centre for Retail Research, 'Coronavirus and Consumers' (April 2020), <https://www.retailresearch.org/blog/coronavirus-and-consumers-updated-20-april-2020-vii>.

2020 during the COVID-19 emergency, the share of online sales in total sales jumped to 32.8%.⁶

- 5.5 These trends underline the importance of having clear rules for the transfer of ownership. On the one hand, the increase in retailer insolvencies means that consumers are more likely to find themselves in the position where they have prepaid for goods that have not been delivered. On the other hand, the growth of online retail means that consumers are increasingly paying for goods in advance of delivery. If, before delivery, the retailer goes insolvent, it is important that the transfer of ownership rules are clear and provide appropriate protection to the prepaying consumer.

COSTS TO BUSINESS

- 5.6 The costs to business which could arise on the introduction of the proposed rules in the draft Bill potentially include:
- (1) transition costs including:
 - (a) familiarisation costs; and
 - (b) one-off legal costs;
 - (2) ongoing costs including:
 - (a) impact upon security interests and access to/cost of finance; and
 - (b) increased cost of determining ownership of goods on insolvency.

Transition costs

Familiarisation costs

- 5.7 We anticipate that firms providing insolvency services may incur familiarisation costs if the proposed rules in the draft Bill are introduced into law. In particular, insolvency practitioners and insolvency lawyers would need to receive training on the new rules. However, we do not expect that any training would be time-consuming or at additional cost. Implementation of the proposed rules in the draft Bill would effect a relatively small change to the existing law. We expect that the necessary training would be incorporated into insolvency practitioners' regular ongoing training on legislative and regulatory developments. Accordingly, we think that businesses would incur only minimal familiarisation costs on the introduction of the proposed rules in the draft Bill.
- 5.8 Because, as discussed above, we consider that the draft Bill is predominantly relevant in insolvency situations, we do not consider that retail staff would be required to understand or be trained on the changes.

⁶ Office for National Statistics, 'Internet sales as a percentage of total retail sales' (June 2020), <https://www.ons.gov.uk/businessindustryandtrade/retailindustry/timeseries/j4mc/drsi>.

Consultation Question 26.

- 5.9 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.

One-off legal costs

- 5.10 We anticipate that the introduction of the proposed rules in the draft Bill may lead some retailers to seek additional external legal advice to determine whether the proposed rules would change anything for their business. As the proposed rules in the draft Bill are not extensive, do not involve entirely new concepts and are likely to impact only on insolvency, we believe that there would only be a small, one-off increase in legal costs.

Consultation Question 27.

- 5.11 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.

Consultation Question 28.

- 5.12 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.

Ongoing costs

- 5.13 Although the proposed rules in the draft Bill apply generally, and not only in the event of insolvency, it is on insolvency (and in the context of insolvency planning, such as the taking of security) where they would be of most relevance.
- 5.14 We do not consider that there are any ongoing costs associated with our recommendations other than in these cases.
- 5.15 In addition, as discussed in Chapter 4, the impact of our proposed rules in any particular situation would depend on whether or not the contract of sale has been formed. In the case of internet sales, for example, the contract is unlikely to have formed (assuming that terms purporting to delay contract formation are valid and effective). If there is no contract until dispatch then, while the goods are in the possession of the retailer or a warehouse or other third party on their behalf, ownership cannot have transferred to the consumer. In the event of insolvency, these goods would remain part of the insolvent retailer's estate, and would be dealt with in the same way as they are under the current law. There would therefore be no impact

from the proposed rules in these cases. We have asked for consultees' views about how often and in which situations retailers seek to delay contract formation.

- 5.16 Below, we consider the impact where there is a contract in place at the time when the retailer goes insolvent, but the goods are still in the possession of either the retailer or another third party on their behalf.

Impact on certain security arrangements

- 5.17 We anticipate that the proposed rules in the draft Bill may reduce the effectiveness of the security held by the retailers' other creditors. There are three categories of creditor that might be affected in this way: suppliers, logistics companies (such as warehouses and delivery companies) and lenders.
- 5.18 Suppliers often supply goods to retailers on a retention of title basis. Retention of title clauses in contracts of supply allow the supplier to retain ownership of the goods until they have been paid. However, retention of title arrangements do not prevent the retailer from transferring ownership to a consumer.⁷ The proposed rules in the draft Bill make a transfer of ownership to the consumer more likely to occur at an earlier point, in circumstances where there is a contract in place. Therefore, in an insolvency there may be fewer goods over which suppliers can claim retention of title.
- 5.19 Warehouse and logistics companies often provide their services on the basis that they have a lien over goods in their possession. The lien allows them to retain possession of the goods until they are paid for their services.⁸ However, if ownership has already transferred to the consumer when the goods come into the possession of the warehouse or logistics provider, the lien is unlikely to take effect.⁹ The rules in the draft Bill make it more likely that ownership would transfer to the consumer before the warehouse or logistics provider takes possession of the goods.¹⁰ In an insolvency, it may be less likely that these companies would be entitled to hold onto the goods as security for payment for their services.
- 5.20 Lenders often advance credit in return for security in the form of a floating charge over a retailer's assets. When the retailer goes insolvent, the lender can realise the value of those assets to satisfy the retailer's unpaid debts. The proposed rules in the draft Bill make it more likely that ownership of some of the assets would have transferred to consumers before security is enforced. Therefore, in an insolvency the value of the realisable assets may be lower. This may in turn increase the cost of borrowing for retailers or reduce the loan amount that lenders are willing to advance to retailers.

⁷ See paras 3.109 to 3.110 above.

⁸ See paras 3.114 to 3.115 above.

⁹ The lien will only take effect if it can be shown that the consumer consented, expressly or impliedly, to the retailer giving possession of the goods to the logistics company on terms granting the logistics company a lien over the goods: see *Singer Manufacturing Company v The London & South Western Railway Co* [1894] 1 QB 833; *Tappenden v Artus* [1963] 2 QB 185; *Jarl Tra AB v Convoys Ltd* [2003] EWHC 1488 (Comm).

¹⁰ Under the current rules, delivering the goods to a logistics provider for the purpose of transmission to the buyer is an "unconditional appropriation" which causes property to pass to the consumer: Sale of Goods Act 1979, s 18 Rule 5(2). However, the lien also arises at the moment of delivery to the logistics provider. Accordingly, it may be arguable under the current rules that the logistics provider can exercise a lien over the goods against the consumer.

How often would these scenarios arise?

- 5.21 We think that the value of creditors' security would only be affected in relatively rare cases. Where retailers hold significant quantities of goods in warehouses so that they can fulfil orders quickly (as in the case of a retailer like Amazon), most of the items held would not have been identified to any particular contract or for any particular consumer. There might, for example, be one or two days' worth of orders which have been packaged and labelled, but the vast majority of the goods would belong to the retailer and would therefore be available to secured creditors.
- 5.22 This however would differ depending on the nature of the retailer's business. For example, a furniture retailer might make or procure items to order. In this case, it might be that every item in the possession of the retailer is associated with a particular customer.¹¹
- 5.23 In any case, as we have discussed elsewhere, ownership would only transfer earlier if there is a concluded contract of sale, which would depend on the retailer's terms and conditions.

Consultation Question 29.

- 5.24 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.

Consultation Question 30.

- 5.25 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.

Consultation Question 31.

- 5.26 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.

¹¹ As we identified in the 2016 Report, it is where large goods like furniture or bathroom suites have been purchased that consumers are most at risk, particularly consumers who have paid by cash or bank transfer: see para 2.44.

Increase in cost of assessing and validating claims to ownership

- 5.27 We anticipate that introduction of the proposed rules in the draft Bill may require insolvency practitioners to spend a little more time assessing and validating claims to ownership as it would be more likely under the proposed rules that ownership of goods would have transferred to a consumer. The increased time spent by insolvency practitioners assessing ownership of goods in warehouses and with logistics providers means that their expenses may be higher. However, we anticipate that any increase in time spent, and therefore costs, would be minimal.
- 5.28 The insolvency practitioner would have to determine whether a contract is in place (as is the case under the current law) and, if so, whether goods have been identified for fulfilment of the consumer's contract. We anticipate that the assessment of whether ownership has transferred would likely involve a desk-based exercise, including a review of the retailer's records and discussions with employees in the retailer's shops and warehouses as to the status of goods they are holding. For example, whether any goods have been labelled with a consumer's name and address and whether that labelling was intended to be permanent. The list of events and circumstances upon which ownership of goods transfers in the draft Bill are intended to be clearer and easier to understand than the current law.
- 5.29 We therefore do not anticipate that it would take significantly longer for insolvency practitioners and warehouse/shop staff to assess ownership of goods than it does under the existing rules in the Sale of Goods Act 1979. We do not expect that the proposed rules in the draft Bill would require an increase in site visits physically to inspect goods.

Consultation Question 32.

- 5.30 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.

Consultation Question 33.

- 5.31 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.

BENEFITS TO CONSUMERS

- 5.32 Consumers would benefit from the proposed rules in the draft Bill through reduced risk of consumer detriment.
- 5.33 Consumer detriment consists of the financial loss and the personal time and emotional distress suffered by prepaying consumers on retailer insolvency. The introduction of clearer and fairer transfer of ownership rules would reduce the risk of consumers facing this detriment.
- 5.34 The 2016 Consumer Detriment Report prepared by Citizens Advice¹² found that the financial cost of consumer detriment in 2015 was £22.9 billion and that consumers spent 1.2 billion hours of their time dealing with problems in 2015. The report estimated that 14% of the cost of consumer detriment was due to the failure of a business to provide the good or service that the consumer was expecting.
- 5.35 The emotional distress from consumer problems can be as significant as the monetary cost. The Consumer Detriment Report found that a majority of consumers (70%) experienced frustration in incidents involving a substandard quality good purchase. Our consultation revealed that prepaying consumers experience high levels frustration on retailer insolvency when they are told they cannot recover their prepayment or their goods from the insolvent retailer.
- 5.36 The proposed rules in the draft Bill are drafted in simple and clear language which consumers can readily understand. We anticipate that consumers would spend less time on a retailer insolvency investigating whether they are the owners of goods they have paid for, and would have a greater chance of recovering those items in the event of insolvency.
- 5.37 We understand that introducing the proposed rules in the draft Bill would not protect all prepaying consumers on retailer insolvency. Only those consumers whose goods have been identified in accordance with the rules would be able to claim their goods.¹³ It may be a source of frustration for consumers that the transfer of ownership depends on events and circumstances entirely within the retailer's control, such as labelling. Overall, however, more prepaying consumers would be able to recover their goods under the proposed rules in the draft Bill, resulting in less frustration and personal time being spent dealing with the problem.
- 5.38 The changes are specific and targeted at a small consumer group. Therefore, we do not anticipate a significant reduction in the overall level of consumer detriment. However, for some prepaying consumers we anticipate that the level of detriment would be significantly reduced.

¹² Citizens Advice, *Consumer detriment: counting the cost of consumer problems* (September 2016), <https://www.citizensadvice.org.uk/about-us/policy/policy-research-topics/consumer-policy-research/consumer-policy-research/consumer-detriment-counting-the-cost-of-consumer-problems/>.

¹³ In this chapter we consider the impact where there is a contract in place at the time when the retailer goes insolvent. In Chapter 4 we discuss that the impact of our proposed rules in any particular situation will depend on whether or not the contract of sale has been formed.

Consultation Question 34.

- 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.

OTHER BENEFITS

Consumer confidence

- 5.40 As explained at the beginning of this chapter, online retail sales as a share of total sales have increased dramatically over the last decade or so. This trend is set to continue, particularly in light of the COVID-19 emergency, which has seen the closure of physical stores and a significant increase in online shopping.
- 5.41 When consumers purchase goods online, there will usually be a period of time between the time of payment and delivery of the goods. Sometimes this can be a day, sometimes several weeks. We think that the proposed rules in the draft Bill would benefit retail markets as a whole by increasing consumer confidence and providing greater certainty to consumers and businesses about ownership of goods on insolvency.

Consultation Question 35.

- 5.42 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.

Chapter 6: Consultation Questions

Consultation Question 1.

- 6.1 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?

Paragraph 3.39

Consultation Question 2.

- 6.2 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.

Paragraph 3.40

Consultation Question 3.

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

Paragraph 3.41

Consultation Question 4.

- 6.4 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.

Paragraph 3.53

Consultation Question 5.

6.5 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?

Paragraph 3.54

Consultation Question 6.

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

Paragraph 3.55

Consultation Question 7.

6.7 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?

Paragraph 3.56

Consultation Question 8.

6.8 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?

Paragraph 3.61

Consultation Question 9.

6.9 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?

Paragraph 3.75

Consultation Question 10.

6.10 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?

Paragraph 3.83

Consultation Question 11.

6.11 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?

Paragraph 3.84

Consultation Question 12.

6.12 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?

Paragraph 3.109

Consultation Question 13.

6.13 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?

Paragraph 3.110

Consultation Question 14.

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

Paragraph 3.122

Consultation Question 15.

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

Paragraph 3.127

Consultation Question 16.

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

Paragraph 3.130

Consultation Question 17.

6.17 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?

Paragraph 4.31

Consultation Question 18.

6.18 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?

Paragraph 4.32

Consultation Question 19.

6.19 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).

Paragraph 4.35

Consultation Question 20.

6.20 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?

Paragraph 4.39

Consultation Question 21.

6.21 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?

Paragraph 4.42

Consultation Question 22.

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

Paragraph 4.43

Consultation Question 23.

6.23 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?

Paragraph 4.46

Consultation Question 24.

6.24 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?

Paragraph 4.47

Consultation Question 25.

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

Paragraph 4.48

Consultation Question 26.

6.26 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.

Paragraph 5.9

Consultation Question 27.

6.27 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.

Paragraph 5.11

Consultation Question 28.

6.28 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.

Paragraph 5.12

Consultation Question 29.

6.29 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.

Paragraph 5.24

Consultation Question 30.

6.30 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.

Paragraph 5.25

Consultation Question 31.

6.31 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.

Paragraph 5.26

Consultation Question 32.

6.32 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.

Paragraph 5.30

Consultation Question 33.

6.33 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.

Paragraph 5.31

Consultation Question 34.

6.34 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.

Paragraph 5.39

Consultation Question 35.

6.35 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.

Paragraph 5.42

Appendix 1: Acknowledgements

In preparing this consultation paper, the Law Commission met or corresponded with the following individuals and organisations. We are grateful to them all for allowing us to draw on their experience and expertise.

REPRESENTATIVE BODIES AND ASSOCIATIONS

Association of Business Recovery Professionals (R3)¹

British Retail Consortium²

Finance & Leasing Association

Insolvency Lawyers Association³

UK Finance

UK Warehousing Association

INSOLVENCY PRACTITIONERS

Deloitte

Ernst & Young

GOVERNMENT AND PUBLIC BODIES

Competition and Markets Authority

Department for Business, Energy & Industrial Strategy

Financial Conduct Authority

Insolvency Service

ACADEMICS

Professor Christian Twigg-Flesner, University of Warwick

Professor Duncan Sheehan, University of Leeds

Professor Edwin Peel, University of Oxford

¹ Including members from PwC, KPMG, Clifford Chance and Crowell & Moring.

² Including members from a number of retailers.

³ Including members from Ashurst, Linklaters, Kirkland & Ellis, Freshfields Bruckhaus Deringer and Allen & Overy.

Professor Joshua Bamfield, Centre for Retail Research

Professor Michael Bridge, London School of Economics and Political Science

Emeritus Professor Sir Roy Goode QC, University of Oxford

OTHER

Celtheath

Simon Edwards, Aaron & Partners

Appendix 2: Draft Bill

Consumer Rights (Transfer of Ownership under Sales Contracts) Bill

CONTENTS

- 1 Transfer of ownership under a sales contract
- 2 Consequential amendments of the Sale of Goods Act 1979
- 3 Extent, commencement and short title

A

B I L L

TO

Make provision about when ownership of goods is transferred to consumers under sales contracts

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Transfer of ownership under a sales contract

- (1) The Consumer Rights Act 2015 is amended as follows.
- (2) In section 4 (ownership of goods), for subsection (2) substitute—
- “(2) For the time when ownership of goods is transferred—
- (a) under a sales contract to which section 18A or 18B applies, see 5 those sections, and
- (b) in any other case, see in particular the following provisions of the Sale of Goods Act 1979 (which relate to contracts of sale)—

section 16:	goods must be ascertained	
section 17:	property passes when intended to pass	10
section 18:	rules for ascertaining intention	
section 19:	reservation of right of disposal	
section 20A:	undivided shares in goods forming part of a bulk	15
section 20B:	deemed consent by co-owner to dealings in bulk goods	

- (3) Where a sales contract to which section 18B applies is for goods that are contained in a bulk (within the meaning of the Sale of Goods Act 1979),

nothing in this Chapter prevents the consumer from becoming an owner in common of the bulk by virtue of section 20A of that Act.”

(3) After section 18 insert—

“When is ownership transferred under a sales contract?”

- 18A Transfer of ownership: goods identified and agreed on** 5
- (1) This section applies to a sales contract for—
- (a) goods that are identified and agreed on when the contract is made, or
 - (b) an undivided share, specified as a fraction or percentage, of goods that are identified and agreed on when the contract is made. 10
- (2) But it does not apply if the contract is a conditional sales contract.
- (3) The contract is to be treated as including a term that ownership of the goods or share transfers to the consumer when the contract is made.
- (4) Any term of the contract that purports to provide for ownership of the goods or share to transfer to the consumer at a time later than that provided by virtue of this section is to that extent of no effect. 15
- 18B Transfer of ownership: goods not identified and agreed on**
- (1) This section applies to a sales contract for—
- (a) goods that are not identified and agreed on when the contract is made, or 20
 - (b) an undivided share in goods that are not identified and agreed on when the contract is made.
- (2) But it does not apply if the contract is a conditional sales contract.
- (3) If the goods are to be manufactured for the consumer to a specification agreed between the trader and the consumer, the contract is to be treated as including a term that ownership of the goods or share transfers to the consumer when the manufacture is completed. 25
- (4) In any other case, the contract is to be treated as including a term that ownership of the goods or share transfers to the consumer when the first of the following occurs— 30
- (a) the goods are labelled with the consumer’s name in a way that is intended by the trader to be permanent;
 - (b) the goods are set aside for the consumer in a way that is intended by the trader to be permanent; 35
 - (c) the alteration of the goods to a specification agreed between the trader and the consumer is completed;
 - (d) the consumer is told by the trader that goods bearing a unique identifier will be used to fulfil the contract;
 - (e) on examining the goods the consumer agrees that they are to be used to fulfil the contract; 40
 - (f) the goods are delivered to a carrier for delivery to the consumer;
 - (g) the goods are delivered to the consumer;

- (h) the goods that are to be used to fulfil the contract are identified by the trader in some other way, and the trader intends the identification to be permanent.
- (5) Any term of the contract that purports to provide for ownership of the goods to transfer to the consumer at a time later than that provided by virtue of this section is to that extent of no effect.” 5
- 2 Consequential amendments of the Sale of Goods Act 1979**
- (1) The Sale of Goods Act 1979 is amended as follows.
- (2) In section 1 (contracts to which Act applies), for subsection (5) substitute –
- “(5) Certain provisions of this Act do not apply to – 10
- (a) a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies;
- (b) a contract to which section 18A or 18B of that Act applies.”
- (3) In section 16 (goods must be ascertained) –
- (a) at the beginning insert “(1)”, and 15
- (b) at the end insert –
- “(2) This section does not apply to a contract to which section 18B of the Consumer Rights Act 2015 applies.”
- (4) In section 17 (property passes when intended to pass), at the end insert –
- “(3) This section does not apply to a contract to which section 18A or 18B of the Consumer Rights Act 2015 applies.” 20
- (5) In section 18 (rules for ascertaining intention) –
- (a) at the beginning insert “(1)”, and
- (b) at the end insert –
- “(2) This section does not apply to a contract to which section 18A or 18B of the Consumer Rights Act 2015 applies.” 25
- (6) In section 19 (reservation of right of disposal), at the end insert –
- “(4) This section does not apply to a contract to which section 18A or 18B of the Consumer Rights Act 2015 applies.”
- (7) In section 43 (termination of lien), at the end insert – 30
- “(3) In subsection (1)(a), the words “without reserving the right of disposal of the goods” do not apply to a contract to which section 18A or 18B of the Consumer Rights Act 2015 applies.”
- 3 Extent, commencement and short title**
- (1) This Act extends to England and Wales only. 35
- (2) This Act comes into force at the end of the period of two months beginning with the day on which it is passed.
- (3) This Act does not apply to a contract made before the day on which this Act comes into force.

- (4) This Act may be cited as the Consumer Rights (Transfer of Ownership under Sales Contracts) Act 2020.

