Trading standards

Chris Pamplin looks at how greater exposure to litigants in person is also exposing expert witnesses to consumer law

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Until recently, it was rare for an expert witness to contract direct with a litigant. Indeed, having a lawyer as a buffer between you and the litigant is generally a very good thing, not least when your independence leads you to express opinions the litigant doesn't like. However, the savage cuts in public funding and restrictions on cost recovery mean that courts are seeing a massive increase in the number of litigants in person. As a consequence, more experts are being asked to work direct with "consumers", and it opens a whole new can of worms.

Consumer law landscape

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) (CCR 2013) and the Consumer Rights Act 2015 (CRA 2015) have ushered in some significant changes to the law in relation to consumer contracts for the supply of goods and services. Experts who are instructed by litigants in person, and create contracts with them, need to be aware of the new consumer law landscape. For the avoidance of doubt, when contracting with a law firm in the course of its business, consumer regulations will have no application.

Definition of consumer

CRA 2015 defines "consumer" as: "[A]n individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession."

It will be apparent from the word "individual" that a legal entity, such as a company or a limited liability partnership, cannot be a consumer, although a sole trader or individual partner can contract as a consumer.

The second limb of the definition stipulates that the contract must be "wholly or mainly" outside the individual's trade, business, craft or profession. It means that an individual can act as a consumer if the purpose is mainly for consumer use, even if it includes some element of business use. This creates a somewhat grey area because the extent to which consumer and business can be mixed is by no means certain. It is clear, however, that the overwhelming balance of the purpose must fall outside the individual's trade or business.

Most experts will fall clearly into the "trader" category when offering expert witness services, and in contracts entered into in England and Wales, it should be reasonably apparent whether you are contracting with a "consumer".

Contracts for services

Expert contracts will, of course, relate almost exclusively to the supply of professional services. Accordingly, those provisions of CCR 2013 and CRA 2015 that apply to contracts for the sale or supply of goods will not be relevant. Contracts for services are not defined specifically under the legislation, but it should be self-evident in most cases whether provision is for services or goods under the contract.

Experts who contract with consumers

Experts who contract directly with an individual litigant (or a group of litigants) will bring themselves within the ambit of the consumer legislation and will need to comply with the provisions. Where applicable, the main provisions are as set out below. In the following, under the regulations the term "expert" should be read to have the meaning of "trader", and "litigant" the meaning of "consumer".

Statutory rights under CRA 2015

Every contract to supply a service is to be treated as including an implied term that:

- the expert must perform the service with reasonable care and skill (s 49);
- if it is taken into account by the litigant, anything said or written to the litigant by the expert about the expert, or the service, will be treated as included as a term of the contract (s 50). This presumption is subject to any qualification communicated by the expert to the litigant on the same occasion, and/or any changes that have been agreed expressly between the litigant and the expert. Note that this will include any professional CV, website, LinkedIn profile or advertising material that the consumer employs in his decision to contract with you;
- a reasonable price will be paid for the service (s 51). This section applies in contracts where the litigant has not paid upfront for the service and the contract does not expressly fix a price or other consideration, and does not say how it is to be fixed. In this case, the contract is to be treated as including a term that the litigant must pay a reasonable price for the service, and no more. Exactly what is a reasonable price is a question of fact. However, this is clearly not an area in which an expert will want to get involved, so it is sensible to set out explicitly the fee for the work to be done;
- the service will be provided within a reasonable time (s 52). If the contract does not expressly fix the time for performance and does not say how it is to be fixed, this section will apply. As with price, "reasonable time" will be determined as a question of fact.

In the event of a breach by the expert of any of these terms, the litigant is entitled to seek a remedy under s 54 according to the nature of the breach or the circumstances. This includes:

- the right to require repeat performance; and
- the right to a price reduction.

The litigant may also pursue one of the common law remedies, either in addition or as an alternative, provided that it does not lead to a situation where the consumer recovers twice for the same loss. The common law remedies include:

- a claim for damages;
- recovery of money paid where consideration has failed;
- specific performance;
- an order for specific implementation;
- relying on the breach in defence of a claim by the expert or by way of counterclaim; and
- rescission of the contract.

To summarise, then, when contracting with "consumer" litigants, experts should be aware that any statements made, whether verbal or written, can be incorporated into the agreement by implication unless they are expressly excluded. The expert should also avoid the application of s 50 and s 51 by having clear terms in the agreement relating to price and time for performance. If it is not possible to fix an exact price or time, then the terms should identify clearly how these are to be calculated. Hourly rates, etc., should, of course, be specified. Furthermore, if there are likely to be additional charges or expenses and they cannot be reasonably calculated in advance, the terms should, at least, record the fact that such additional charges may be payable. In the case of a contract of indeterminate duration, the terms should set out the total costs per billing period or (where such contracts are charged at a fixed rate) the total monthly costs, if applicable.

Statutory rights under CCR 2013

The main provisions of CCR 2013 with application to consumer contracts entered into by experts will be those relating to:

- off-premises contracts—selling your service face to face but away from your business premises, eg contracts made in the litigant's home or workplace;
- distance selling—sales of your services without face-to-face contact with the litigant, eg online or by telephone through an organised distance sales system);
- on-premises contracts—any contract that is not off-premises or distance selling; and
- cancellation.

While it may seem likely that an expert who receives an e-mail asking for help in some litigation will fall into the distance selling category, the lack of an "organised" distance selling scheme may well be sufficient to convince a court that this most common scenario for experts will set up an on-premises contract, despite the lack of face-to-face dealings.

The CCR make provision for certain categories of information that must be supplied dependent on whether the contract is made on-premises, off-premises or at distance.

A trader contracting for the supply of goods is obliged to remind consumers of the legal duty to supply goods that are in conformity with the contract. However, experts contracting for the supply of *services* will not have to meet this demand because there is no equivalent requirement in respect of services.

For on-premises contracts the expert must state:

- the main characteristics of the goods or services. The description should be sufficient to enable the litigant to understand the nature of the service and to ensure that they are in a position to make informed decisions about their matter;
- the expert's identity, including any trading name, address and telephone number;
- the total price of the goods or services, including all taxes (but where this cannot be calculated reasonably in advance, at least the basis for the charge);
- the arrangements for payment, delivery or performance and the time you will take to deliver the goods or perform the services, where applicable;
- his complaint handling policy;
- information on any after sales services, guarantees and conditions, if applicable; and
- the length of the contract, if fixed, or, if the contract is of indeterminate duration, the conditions for cancelling the contract.

For off-premises and distance contracts the expert must *also* specify:

- a telephone number, fax number and e-mail address, where applicable;
- the address to which complaints should be sent;
- if the contract is of an indeterminate length, the monthly costs (where the contract is charged at a fixed rate) or billing period costs. For ongoing contracts, estimates should be given at each stage;
- the costs associated with using distance communication to conclude the contract if they are above basic rate, eg where the contract is concluded via a telephone number charged at a premium rate;
- the conditions, time limits and procedure for exercising a right to cancel and a notification that if the litigant expressly requests work to be started within the cancellation period, they will be responsible for paying the reasonable costs of the service;
- a notification if there are no cancellation rights for specific services, or if there are circumstances in which litigants will lose their right to cancel. For instance, this would be required if the litigant asks the expert to start work in the cancellation period and the expert starts and completes the work;
- the identification of any deposit or other financial guarantee the litigant is required to pay and any applicable conditions.

The required information must be given on paper or, if the litigant agrees, on another durable medium (such as e-mail). Failure to provide this information is an offence and will render it likely that the expert will not be able to recover, for example, any charges or expenses incurred after the contract is made but prior to any cancellation.

Off-premises confirmation requirements

The regulations require that the litigant must be provided with a signed copy of the contract, or confirmation of the contract, on paper or, with the litigant's agreement, some other durable medium. This is to be provided within a reasonable time after the contract has been concluded and before any service is supplied under the contract. This copy must include all the information required under the regulations unless it has already been provided prior to conclusion of the contract.

Cancellation rights under CCR 2013

There are, of course, common law rights to termination of a contract by a consumer in cases where, for example, a party has not performed the contract properly. Under CCR 2013, however, litigants can cancel contracts simply because they have had a change of mind. This provision applies where the litigant has entered into a distance or off-premises contract. In such circumstances, the litigant will have a right to a change of mind at any time from making the offer to up to 14 days from conclusion of the contract.

CCR 2013 do contain provisions protecting the expert where the litigant's mind changes, eg permitting the expert to make the litigant pay for services provided up to the point of cancellation.

If there is a right to cancellation, in the case of distance contracts it must be given to the consumer in the cancellation form as set out in Pt B of Sch 3 of the regulations. It must also be supplied in a legible form in a durable medium. Pt A of Sch 3 sets out model instructions for cancellation which can be employed if desired, although their use is not mandatory.

As well as being a criminal offence, failure to provide the consumer with the pre-contract information about the right to cancel may result in:

- the consumer bearing no cost for supply, whether in full or in part;
- the right to cancel being extended by up to 12 months, meaning that the consumer could receive services free of charge for this period; or
- an off-premises contract.

Where services are to be provided

immediately following the making of the contract and within the cancellation period, the expert must obtain the litigant's express instructions to commence the work. The expert must inform the litigant pre-contract that payment for services received will be due if agreement to proceed is given during the cancellation period. A failure to inform will result in the litigant bearing no cost for the supply of services, whether in full or in part.

Note that where an expert is instructed to commence work during the cancellation period but fails to obtain the litigant's acknowledgement that the right to cancel will be lost, the litigant's right to cancel is not lost.

Provided the above requirements are met, the expert is entitled to charge for the supply of services provided from the point when supply begins to the time the expert is informed of the litigant's decision to cancel. The amount payable for services supplied up to cancellation must be in proportion to what has been supplied, in comparison with the full coverage of the contract. Of course, if the expert has received payment in advance for the service before starting to provide it, the question of payment up to the time of cancellation becomes more one of reimbursement for the period after cancellation.

Although there is a legal obligation on the litigant to pay for the services received up to cancellation, this is not specifically made an implied term and the expert may wish to include an express term reflecting the rules.

Conclusion

In the case of any contract made with a litigant "consumer", experts must be aware of the requirements relating to the supply of information, confirmation of the contract and the form in which confirmation is to be given. The expert should ensure that the agreement contains clear terms relating to price and time for performance.

Experts should be wary of making any statement in relation to their services, whether verbally or in writing, because these can be relied upon by the litigant and incorporated into the agreement by implication. Where it is not intended that such statements or documents should form part of the agreement, they must be expressly excluded. Indeed, the expert would be wise to obtain the litigant's written consent to this.

It will be apparent from the above that, from the expert's point of view, there are advantages to ensuring that contracts are made on premises. If only the regulations made that easy to achieve! If an on-premises contract is made, the expert is required to provide less information, need not confirm it post contract and need not offer the consumer a right to cancel.

Where there is a right to cancel, experts should bear this clearly in mind and should make sure they have given all the prescribed information and notices. Experts should be particularly wary of commencing any work during the cancellation period without receiving express instructions to do so from the litigant. They should also make sure that, where the work is likely to be completed in its entirety during the cancellation period, the client has been notified that the right to cancellation will thus be lost.

Experts who conduct business through a website without meeting their clients face to face will need to be aware of the requirements of the regulations regarding distance selling. They will also need to make sure that their website is fully compliant with the rules applicable to distance contracts, rather than a site that merely complies with the lesser requirements for on-premises sales. The same is true for all experts who conclude contracts using online service provision platforms provided by third parties or agencies. **NLJ**

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