

Consumer Law  
Rights and Regulation

Mary Donnelly and  
Fidelma White

ROUND HALL

# CONSUMER LAW RIGHTS AND REGULATION

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CONSUMER LAW  
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## FOREWORD

If, as the authors observe, consumer law in these islands may be said to have really commenced with the great decision of the House of Lords in *Donoghue v Stevenson* [1932] A.C. 562, it should equally be said that consumer law has, up to relatively recent times, remained stubbornly under-developed in this jurisdiction. Perhaps in view of the industrial policy which was actively pursued in the pre-Whitaker era, neither the legal nor the economic historian would be altogether surprised by this. After all, the Control of Manufactures Act 1932 was enacted within a few months of *Donoghue v Stevenson*.

One of the by-products of that policy of protectionism was that domestic manufacturers could exploit a domestic audience and that the civil service apparatus was geared to supporting producer, rather than consumer, interests. Certainly, by the early 1950s, the Department of Industry and Commerce was flooded with complaints from consumers regarding sub-standard products and exploitative trade practices. This led to what was one of the first autochthonous items of consumer legislation enacted by the Oireachtas, the Restrictive Practices Act 1953. (The Hire-Purchase Act 1946 was perhaps the first such item of legislation.) It is true that the results of that legislation were probably somewhat ineffectual and disappointing, but it was at least a start.

As the authors so helpfully chronicle in this comprehensive study, the current background is completely changed. Specifically, the creation of the single market and the vesting of the European Union with an express competence in consumer matters were huge steps by the Maastricht Treaty, even if many of the subsequent changes were prompted by a concern to foster market integration rather than consumer welfare per se. The innovative provisions of the Sale of Goods and Supply of Services Act 1980 were in turn supplemented by critical consumer protections, not least the Unfair Terms in Consumer Contracts Directive.

The greatest domestic innovation has, of course, been the establishment of the Financial Services Ombudsman (FSO). The FSO has been required to handle a huge volume of complaints, many of them as a result of practices which prevailed in the banking world prior to the on-set of the economic collapse of late 2008. This, in turn, has given rise to a series of statutory appeals to the High Court. Perhaps the largest issue confronting the FSO is, as one of the authors has already put it, an existential one (Donnelly, "The Financial Services Ombudsman: Asking the Existential Question" (2012) 35 D.U.L.J. 229). To what extent should the FSO replicate the tasks of the ordinary courts? Where does the FSO's application of contract law begin and end, and where are the limits of the FSO's special statutory powers to apply quasi-public law powers (such as a consideration of whether terms in a financial service contract are discriminatory, unjust, unreasonable, etc.)? What are the implications for the FSO's functions of the decision of this Court in *O'Hara v ACC Bank Ltd* [2011] IEHC 367 to the effect that decisions of the FSO can create a *res judicata*? Much by way of development may be anticipated in respect of these difficult questions in the coming years.

Part of the reason, however, for the fact that Irish consumer law was not fully developed was the absence of a comprehensive text dealing exclusively with the topic, and not just simply as an adjunct to contract law or financial services law. This is one of the many reasons why the publication of this scintillating and authoritative text by our two greatest consumer law scholars, Mary Donnelly and Fidelma White, is so welcome. It addresses a major gap in Irish legal scholarship, and I have no doubt but that the publication of this major work will prove to be influential with legislators, judges, lawyers, consumer groups and, not least, the ordinary consumer.

Gerard Hogan  
The High Court,  
Four Courts,  
Dublin 7  
October 23, 2014

## PREFACE

Irish consumer law is coming of age. For a variety of reasons, Ireland was slow in developing an endogenous consumer law framework. These reasons include the delayed growth of a consumer society and, beginning in the 1980s, the dominant influence of the European Community in setting the consumer protection agenda. Accordingly, many of the legal protections afforded to Irish consumers derived from European legislation, transposed with limited domestic input. Fortunately, this minimalist approach has begun to change. Over the last decade or so, policy, legislative, and structural developments have laid the foundation for a sound domestic framework which is capable of asserting itself and addressing the specific needs of Irish consumers. Moreover, Irish policy makers and legislators are engaging more critically with the European law-making process. This is essential if the unique interests of the Irish consumer are to be defended.

While the basis for a study of Irish consumer law must be the body of legislation and case law (Irish and European), such a study cannot be a doctrinal exercise alone. It must also analyse the law in its social and economic context. We have observed the development of Irish consumer law over the last decade. From our earliest engagement, we have recognised that policy and law making in this field must be grounded in a “real world” understanding of Irish consumers which can only be obtained through empirical studies. We welcome the published research by the National Consumer Agency and the Central Bank, as well as the extensive Eurobarometer studies. Ongoing empirical engagement of this kind is crucial to the appropriate development of the law in this area.

This book recognises that the delivery of consumer rights requires the effective regulation of suppliers. This dual approach underscores the title of the book: *Consumer Law: Rights and Regulation*. An effective regulatory framework must perform several different tasks. It must inform consumers and empower them to assert their rights. At the same time, it must raise awareness of consumer law issues among suppliers and facilitate compliance with legal requirements and the development of best practice. However, these steps will not always be sufficient and, therefore, appropriate mechanisms for the enforcement of consumer law are essential. In order to ensure that these tasks are performed, the proper resourcing of relevant agencies is essential.

This is the first book-length analysis of Irish consumer law. It is aimed at legal practitioners advising both business and consumer clients; policy and law makers; regulators; consumer organisations; and students and scholars in the consumer law field. The book comes at a crucial juncture in the development of this field. Consumer law issues, especially in the context of decisions of the Financial Services Ombudsman, are receiving increased judicial attention. The Competition and Consumer Protection Commission has been established and enhanced enforcement mechanisms have been brought into force by the Competition and Consumer Protection Act 2014. Consultation has commenced in respect of a Consumer Rights Act which, we hope, will provide a comprehensive reform of Irish law in relation to the sale of goods and services and unfair terms

in consumer contracts. At the same time, the stream of European measures continues unabated. Since 2013 alone, we have seen the adoption of Directive 2013/11 on alternative dispute resolution; Directive 2014/17 on credit agreements for consumers relating to residential immovable property; Directive 2014/65 on markets in financial instruments; and Directive 2014/92 on the comparability of fees relating to payment accounts, payment account switching, and access to payment accounts. Over the next months, these measures must be transposed into Irish law and they will make a significant impact on the shape of Irish consumer law. All of these developments are analysed in this book.

Inevitably, given the breadth of the subject matter of contemporary consumer law, choices have had to be made about what to include in this book. In addition to key topics such as sale of goods, product liability and unfair terms and practices, we have addressed the topics of financial services and consumer credit which are of particular significance for consumers in the wake of the financial crisis. We also considered it necessary to explore in depth broader aspects of consumer law, including enforcement and redress.

We would like to acknowledge the considerable contribution of the many people who have assisted us in completing this book. Our empirical consumer law work has benefitted from funding from the Irish Research Council for the Humanities and Social Sciences (now the Irish Research Council) and the Law Department University College Cork Strategic Research Fund. We are also grateful to the many able research assistants who carried out important field work as part of various projects. Our colleagues in the Law School at University College Cork have been, as always, extremely helpful in responding to numerous queries and in developing our understanding of consumer law within a broader context. In particular, we thank Dr Darius Whelan for help with deciphering statistics software, and Dr Conor O'Mahony for assistance with constitutional law matters. We are also grateful for the helpful and professional staff in the Law Library at UCC, as well as the excellent online resources provided by the Irish Research eLibrary (IREL).

We have benefitted enormously from our ongoing involvement with the National Consumer Agency and the Department of Jobs, Enterprise and Innovation, and we gratefully acknowledge the assistance of officials from both in the course of our research and the writing this book.

We are grateful for the professionalism of the staff at Round Hall; in particular, Frieda Donohue, who commissioned this book, Adam Brophy, who supported it throughout its development, and Pamela Moran, who handled the production phase with great efficiency and courtesy.

We are greatly honoured that Mr Justice Gerard Hogan agreed to write the Foreword for this book and we are most grateful for his considered and erudite Foreword.

Lastly, we are ever grateful to our respective families for their ongoing support and patience.

We have endeavoured to state the law as of August 1, 2014, although it has been possible to include some updates at proofing stage, up to November 1, 2014. Any errors and omissions are the authors' responsibility alone. This is a legal text and not a substitute for legal advice.

*Mary Donnelly and Fidelma White*  
October 2014



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