Consuming Passions

Random thoughts on consumer matters by Richard B Mawrey QC

1. All the fun of the unfair!

Belief in the free market has waxed and waned over the last two centuries but, even at the height of such belief, governments have always been uneasy when it comes to credit. Perhaps it is a long-buried feeling, dating back to the Middle Ages, that usury really is a sin and that, if a compromise has to be made with Mammon, it must be on strict terms. Even the Victorians, those High Priests of Free Trade, saw the need to regulate lending in the presumed interests of the borrowers. The Bills of Sale Acts placed restrictions on chattel mortgages and the Moneylenders Acts 1900 and 1927 actually empowered the courts to intervene in the case of harsh or unconscionable transactions.

When the Consumer Credit Act 1974 (CCA) was passed, therefore, it continued the policy of allowing courts to re-open transactions if oppressive to the debtor. Sections 137-140 empowered the courts to act in the case of 'extortionate credit bargains' and to re-write the agreement where appropriate. Given that these provisions applied to all credit agreements – even business agreements - where the debtor was an 'individual' (a category which then included any partnership however large), one would have thought that there would be regular recourse to the courts by those feeling hard done by. When, however, the Department for Trade and Industry published its White Paper *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century* in December 2003, it noted that only some 30 cases appeared to have come to court in the nearly three decades since the CCA was passed.

In the Consumer Credit Act 2006, therefore, ss 137-140 were phased out and replaced by a new concept of 'unfair relationships' between creditor and debtor set out in new sections, CCA ss 140A-140D. These sections were deliberately drawn much wider than the extortionate credit bargain provisions they replaced. The court is entitled to look at all aspects of the relationship, including enforcement and other events after the making of the agreement, and to have regard to 'related agreements' which include not only linked transactions but also previous agreements between the parties re-financed by the agreement under challenge. As before, the court could open *any* credit agreement (other than an FSA regulated mortgage) where the debtor was an individual, though the definition of 'individual' cut partnerships down to those of no more than three partners. Business agreements were not exempt. The courts were being positively encouraged to roll their sleeves up and start re-writing agreements left, right and centre.

But, as with extortionate credit bargains, the courts were, and remain, wary. Although the Human Rights Act 1998 has changed it in some respects, the basic attitude of judges is that social engineering is not really their proper function. Where there is an area of social or economic life which is already the subject of heavy official regulation, further interference by the courts appears both unnecessary and inappropriate. Judges are not economists or financiers. If, albeit within the framework of a regulated industry, there is a free and highly

competitive market, most judges feel they are not the right people to start imposing an additional layer of regulation on top of the existing layers

Thus the judicial conservatism that led to what the DTI saw as excessive caution when dealing with extortionate credit bargains has not entirely evaporated when dealing with unfair relationships. Courts have, for example, recognised that those who are not creditworthy will find it more difficult to obtain credit and, when they do, will pay more for it that those who are creditworthy. They have also recognised that rates of interest which may appear monstrous when extrapolated over a year, or turned into an APR, may well be reasonable when making very short term loans to high-risk debtors. In short, judges have acknowledged the real world and realised they are not going to change it overnight.

This conservatism has received a boost in the recent case of *Harrison v Black Horse Limited* [2011] EWCA Civ 1128. The unfair relationship in that case turned (as do so many) on the now-outlawed practice of creditors selling single-premium PPI policies to debtors and adding the premium to the loan. The substance of the Harrisons' complaint was that the creditor had not disclosed to them the fact that, out of the very steep premium paid for the insurance, a 'commission' amounting to 87% of the total was paid to the creditor. This fact, coupled with the unsuitable nature of the policy itself, formed the basis of the unfair relationship argument.

Though initially successful before the District Judge, the Harrisons failed before the formidable Judge Waksman QC and failed again in a strong Court of Appeal (Lord Neuberger MR, Patten and Tomlinson LJJ). What did for the Harrisons was this. The selling of insurance is heavily regulated by the FSA under the Financial Services and Markets Act 2000. It is also subject to EU-wide legislation. Consequently, at the time of the Harrisons' agreement in 2006, insurance selling was governed by ICOB, the Insurance Conduct of Business Rules, now replaced by Insurance: Conduct of Business Sourcebook ('ICOBS'). ICOB, framed after careful consideration of the issue, did not make it compulsory for those selling insurance on behalf of the insurers to disclose the commission they would receive. Thus, although it was argued strenuously that Black Horse had not complied with ICOB, both appellate courts held that it had, and that this was determinative of the issue of unfair relationships. In para 58 of the judgment it was said: 'It would be an anomalous result if a lender was obliged to disclose receipt of a commission in order to escape a finding of unfairness under s 140A of the [CCA] but yet not obliged to disclose it pursuant to the statutory imposed regulatory framework under which it operates.'

So the good news for lenders is that the courts are not going to second-guess the regulators. We may see whether the Supreme Court disagrees.