Consuming Passions

Random thoughts on consumer matters by Richard B Mawrey QC.

4. ‘Time, Gentlemen, please!’

Life in the consumer world has, of late, become distressingly confrontational, not to say bellicose. Of course, in times of financial depression when the sound of crunching credit is heard in the land, there are bound to be heightened tensions between those who sell or lend and those who buy or borrow. The state of relations between suppliers and customers, however, seems to have reached a state of open warfare reminiscent of some country that has recently enjoyed an Arab Spring. One says with the Psalmist (somewhat testily, it has to be admitted) ‘why do the heathen so furiously rage together and why do the people imagine a vain thing?’

One strand in this furious raging can be traced back to the introduction of the conditional fee arrangement (CFA) or ‘no win, no fee arrangement’. Though there are serious objections, both ethical and moral, to treating litigation as a gambling game or, which comes to the same thing, a mere contest of skill between rival lawyers on a winner-takes-all basis, the CFA is at least popular with the media. But it had consequences: one hopes that the consequences were not intended by those who introduced the CFA, but one cannot be sure. One of those consequences was the appearance and sudden mushrooming of so-called claims managers or, as more accurately described, claims farmers. Originally created to foment and to exploit litigation in the field of personal injury, the spectacular collapse of some of the biggest players in this field led the survivors to diversify. One of the areas into which they diversified was consumer law.

As a fair-minded man, I would be happy to concede that somewhat less than 100% of claims farmers are *pure* shysters, though how much less is anyone’s guess. Nevertheless it came as no surprise to learn that the claims farmers advancing claims based on the mis-selling of Personal Protection Insurance (PPI) were discovered to have racked up the impressive total of (at a conservative estimate) 6,000 PPI claims for compensation on behalf of ‘clients’ who had never had any PPI policy in the first place. The Psalmist and I are somewhat old-fashioned guys and we would call this ‘fraud’.

The claims farmers latched onto the possibilities created by the Consumer Credit Act 1974 and its multifarious regulations. Websites proliferated on which extravagant claims were made that the claims farmers would ‘get you off your credit card debts’. Points of the utmost ingenuity were taken under the Agreements Regulations and under those provisions which require the supply of copies of original agreements on demand, all intended to establish that the credit agreement in question was either permanently unenforceable under CCA 1974 s 127(3)-(5) or temporarily unenforceable under ss 77-78. Patient work by stalwart judges – gold stars to Flaux J and Judges Waksman and Halbert – and the repeal of s 127(3)-(5) on 6 April 2007 have made the claims farmers’ lives more difficult but the problem remains.

The other strand is the abandonment of any pretence of neutrality by bodies designed to help consumers. Disturbingly, Citizens Advice, once the most reliable first resort of the worried consumer, has become aggressively politicised, a stance somewhat at variance with its position as a registered charity. It seems to be increasingly engaged in conducting an all-out war against traders in the private sector. Now it is, of course, entirely open to anyone in a free society to argue the merits and demerits of the capitalist system (though very few non-capitalist systems afford the same freedom of discussion) but one is uneasy when those charged with advising the consumer see this as an opportunity to use the consumer as cannon-fodder in an anti-capitalist battle.

Consequently much of the time of the courts is taken up with ever more desperate attempts to persuade judges that debts voluntarily incurred by citizens of full age and capacity need not be repaid because of some technicality in the law. The net result is a catalogue of failed claims by consumers under the Agreements Regulations, the provisions for copies of agreements and for statements of account, and the 'unfair relationships' provisions of CCA 1974 (ss 140A-140C). Bewildered and vulnerable litigants are learning the hard way that 'no win, no fee' does *not* mean 'no win, no payment of costs to the other side'.

Given that there are so many worried – indeed sometimes desperate – people out there who have credit debts they can't pay, what should those advising them be doing? The answer is not, as the Psalmist says, to 'imagine a vain thing'. For 99% of debtors debt cancellation is a chimera: it aint' gonna happen. The true answer is to look at the CCA itself. The Act has its critics (and few more trenchant than myself) but it has always recognized that debtors will get into difficulties. That is why it contains a whole swathe of sections, CCA ss 129-136, which cater for debtors in trouble.

The provisions for time orders (ss 129-130) are sensible, workable and insufficiently used. And they have been made easier. In the past, a debtor could only apply for a time order if he was either sued by the creditor or served with a default notice or similar. In other words, the debtor had to be actually threatened with a court order before he could apply. The introduction of an obligation on creditors to give notice of sums in arrear under CCA ss 86B and 86C now means that the debtor can pre-empt enforcement by making his own proposal for re-scheduling of the debt to the creditor and applying to the court if agreement cannot be reached – s 129A.

This is buttressed by the power of the court to give financial relief to hirers under consumer hire agreements following repossession of the goods – s 132 – and elaborate powers to make return and transfer orders under hire-purchase agreements – s 133. The court can impose any condition it considers appropriate in relation to a regulated agreement – s 135 - and there is even a power when making an order under the Act to 'include such provision as it considers just for amending any agreement or security in consequence of a term of the order' – s 136. This last power, little known and rarely invoked, is actually quite extensive. It allows a court, for instance, to alter the rate of the charge for credit – *Southern and District Finance plc v Barnes* [1999] GCCR 1935 CA. The point is that the debtor does not *need* to go down the route of trying to establish an extortionate credit bargain (ss 137-140) or an unfair

relationship (ss 140A-140C). Apply for a time order and, if the circumstances merit it, the court will do the business for you.

So the message is: ‘now, you heathens – stop raging this instant!’ Grow up. Capitalism isn’t going away: furl the Red Flag. If the CCA actually helps you, why not use it?