Consuming Passions

Random thoughts on consumer matters by Richard B Mawrey QC.

6. Business is business

One of the bizarre features of the Consumer Credit Act 1974 (CCA) is that it was conceived from the outset without any reference to what constituted a 'consumer'. Virtually all subsequent UK legislation (bar the Unfair Contract Terms Act 1977) and all Euro-legislation have put the definition of 'consumer' at the heart of any legislation designed to protect the consumer and have defined the consumer as an individual (ie a human being) who is acting outside the course of his business, trade or profession. Well, it could be said that the CCA is a very early version – Consumer V1.0 so to speak – and that subsequent releases have moved on to Consumer V2.0 or even V3.0 but even so, it was strange to find the regulation of credit and hire agreements effected by reference to the sums involved rather than the status of the debtor or hirer. This was compounded by the definition of 'individual' to include partnerships of any size.

Now there are still some (typically Baroness Hale) who believe that the CCA was designed to protect small businesses but even that Lady's powerful intellect might find it difficult to justify affording consumer protection to, say, Clifford Chance or KPMG (entities which, albeit under different names) were partnerships back in the 1970s. One is reminded of the Monty Python sketch of the two Mafiosi trying to sell 'protection' to the commander of an armoured brigade. 'Nice tanks, Brigadier, it would be a pity if anything were to happen to them'.

This blurring of the line between the private consumer and the business customer was much criticised over the years and one would have thought that, when the Consumer Credit Act 2006 was passed, the opportunity would be taken to exclude business agreements once and for all. Given that the Government was already negotiating with the Eurocrats the form of the European Consumer Credit Directive, it knew that the Euro-view was to exclude *all* business agreements from regulation. This indeed happened when the Directive (2008/48/EEC) was adopted in 2008. Nevertheless, the Government decided on a whacky compromise: business agreements under £25,000 would be regulated (the only vestige remaining of regulation by amount) and those over £25,000 would not.

This led to fearful complications when the Directive came to be implemented. The decision of the Government that the Directive would be implemented only so far as was strictly necessary and that every miniscule particle of the original law that could be retained would be retained meant that elaborate provisions had to be made for those business agreements that were still regulated. Instead of (a) simply dropping business agreements from regulation as the EU suggested or (b) simply applying universal rules to all regulated agreements whether those rules emanated from the Directive or otherwise, the Government decided to keep all the old rules (including some of the rules relating to the form and content of agreements) for business agreements while permitting creditors to 'contract into' the new, Euro, rules if they wanted.

When the exemption for business agreements came in, on 6 April 2008, the confusion and general miasma that had affected Government thinking on the subject was continued into the rules for claiming the exemption. The first of the three new exemptions, that for 'high net worth' debtors or hirers, introduced by CCA s 16A, presented no problems. The provisions were mandatory. The debtor or hirer had to obtain a certificate of high net worth and, as a condition of the agreement being exempt, it had to contain a declaration in a prescribed form. The form was laid down by the Consumer Credit (Exempt Agreements) Order 2007 (SI 2007/1168) Sch 1, as was the form of the certificate of high net worth by Sch 2. If the debtor or hirer had the certificate in the prescribed form and executed the declaration in the prescribed form the agreement was exempt and that was that.

The third exemption, created by s 16C, for 'investment' credit (otherwise known as 'buy-to-let credit') did away with any form of declaration or certificate. A declaration was proposed and had got as far as a draft Order when the Government lost interest and said 'what the hell?'

The business exemption in s 16B falls neatly between two stools. It would have been very easy to go down the s 16A route and say that the agreement must contain a prescribed declaration and that, if it does, it is exempt and nobody can go behind the declaration. It could have just as easily gone down the s 16C route and said that whether the agreement does or does not qualify for exemption is a question of fact and no declaration is necessary. What s 16B does, however, is to provide for a declaration that the agreement is a business agreement and the 2007 Order Sch 3 lays down the prescribed form for this declaration but then to provide that this declaration is neither obligatory nor sufficient.

Section 16B(2) provides that the declaration creates a presumption that the agreement has been entered into by the debtor or hirer wholly or predominantly for the purposes of a business carried on or intended to be carried on by him. This presumption can be rebutted, however, under s 16B(3) if the creditor or owner or someone acting on his behalf knows or has reasonable cause to suspect that the agreement is not being entered into for business purposes.

Thus we have the worst of both worlds. Inclusion of the prescribed declaration is not essential. A creditor or owner can prove that the agreement was a business agreement notwithstanding the absence of the declaration and, if he does, the agreement is exempt from regulation. The declaration on the other hand is not conclusive and it is open to a tricky debtor to come along later and claim that he was bamboozled by the wicked creditor into signing the declaration even though everyone knew that the agreement was for his personal purposes. And that's a recipe for litigation if ever I saw one. Ah well.