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He has been a specialist editor of *Goode: Consumer Credit Law and Practice* for 30 years and is co-author of *Blackstone's Guide to the Consumer Credit Act 2006* and *Butterworths Commercial and Consumer Law Handbook*.

In his eighteenth column, Richard considers changes to consumer law since 2004.

Richard Mawrey QC, Henderson Chambers

WELL MAY HERACLITUS WEEP

The ancient Persians have had somewhat of a raw deal from history. Though, at its height, their empire stretched from Greece to Pakistan and encompassed virtually all the Near and Middle East, they have come down to us as cowardly, effeminate, treacherous and much given to ostentatious luxury. A thoroughly bad lot. This is, of course, because most of that history was written by the Greeks, and the Persians made the mistake of invading Greece and getting walloped for their pains. Twice. Later Alexander of Macedon (aka "The Great") overwhelmed them and added Persia to an even larger empire of his own.

The Persians, and their fellow citizens of what is now called Iranshahr, the Medes, have, however, a special call on the affection of lawyers. A saying has come down to us from the ***Book of Daniel***. Pausing there, even for the irreligious, Daniel makes a thundering good read. In addition to the hero and his trademark lions, the Book of Daniel contains the world's first "locked room" detective story – Bel and the Dragon. Mais revenons à nos moutons. The lead-in to the lion episode is King Darius being asked to make the law that condemned anyone who prayed to someone other than the King to be thrown to the lions. "Now, O king," said his advisers "establish the decree, and sign the writing, that it be not changed, according to the law of the Medes and Persians, which altereth not." The author of Daniel was very struck with this and tells us no fewer than three times in the course of the story that the law of the Medes and the Persians "altereth not".

You can sense that the Jewish chronicler of Daniel is reluctantly impressed with this firmness of purpose. After all, the Jews themselves had a monumental corpus of law which "altereth not" (though it did permit millennia of enjoyable exegesis). The Greeks, one may confidently assert, would simply have considered this to be yet another charge to be added to the lengthy indictment against the Persians.

Except for the Spartans (whose conservatism would have made the Spanish Hapsburgs look flighty), the Greeks were gung-ho for change. Heraclitus (c.535–c.475 BC) the Weeping Philosopher (not to be confused, of course, with Democritus, the Laughing Philosopher – the pair being much featured in 17th century art) famously proclaimed Πάντα ῥεῖ - "everything is in a state of flux". "No man steps twice into the same river". Heraclitus also took the view that "strife is justice and all things have to be created by strife".

Callimachus' verse on Heraclitus, movingly translated by William Johnson Cory (1823-1892) begins:

> "They told me, Heraclitus, they told me you were dead,
> They brought me bitter news to hear and bitter tears to shed."

Sadly, Heraclitus is *not* dead. His spirit moves amongst us. If a Greek philosopher can be a patron saint, Heraclitus is the patron saint of consumer law. If our legislators and bureaucrats were literate, their office walls would display as a motto (a sampler, perhaps, or tasteful poker work) the words Πάντα ῥεῖ, possibly surmounting a picture of the great man from, say, Raphael's *School of Athens* (said to be a portrait of Michelangelo) or Cornelis van Haarlem's *Demokriet en Herakliet*. Flux has been the name of the game for the past decade and more.

One wonders why. At the turn of the Millennium, consumer law was working pretty well. The Consumer Credit Act 1974 (CCA) had bedded down and, despite its manifest and manifold inconveniences, both the suppliers and the consumers of credit knew how it operated and had established a *modus vivendi*. Other aspects of consumer law were also in pretty good shape. The Unfair Contract Terms Act 1977 had been supplemented by (eventually) the Unfair Terms in Consumer Contract Regulations 1999 (*SI 1999/2083*) (UTCCRs). Of course there was always skirmishing round the periphery with crafty lawyers trying to argue that terms their clients didn't like were unfair and void and equally crafty lawyers arguing that terms clearly designed to stuff the customer every which way were perfectly reasonable. Nothing new there. After all, lawyers have to make a living (and the man at the back who called out "why?" can leave now).

Then all went horribly wrong. Part of the trouble was that the Blair government had been in power too long. By 2003 it was well into its second term and therein lay the trouble. All governments come into power with a whoop and a holler and buckle down to bring about all the reforms they have dreamed of for years in opposition and a great time is had by all. But, after a while, all governments run out of steam. They stop and scratch their heads and say "we have created the New Jerusalem – so what do we do now to justify our existence?" At that time they are at their most vulnerable to pressure groups. Pressure groups always know what governments can do and they home in on bored or dithering governments with a cunning plan for promoting their own agenda.

Thus it was that in 2003 the Government published a white paper ***Fair, Clear and Competitive - The Consumer Credit Market in the 21st Century***. Though cheap and available credit had been fuelling the economic boom upon which the Government was relying to fund a ramping up of public services, the consumerists convinced the Government that this was, as *1066* and *All That* would put it, a Bad Thing. The spendthrift habits of the proletariat had to be curbed. And, as they say, it all went downhill from there.

Since the emergence of the White Paper, consumer law has been subject to the Maoist theory of permanent revolution. First to be attacked was the set of regulations dependent on the CCA. In particular, the Consumer Credit (Agreements) Regulations 1983 (*SI 1983/1553*), always a horrendously complicated piece of legislation, was suddenly rendered ludicrously Byzantine. Although the Court of Appeal nobly attempted to strike down the provisions of CCA section 127(3) which rendered certain non-compliant agreements permanently unenforceable – perhaps the only sensible use of the Human Rights Act 1998 so far recorded – the House of Lords would have none of it and restored the status quo in *Wilson v First County Trust (No 2) [2003] UKHL 40, [2004] 1 AC 816*. This in turn spawned the vile tribe of consumer claims farmers who have clogged up the courts ever since with fatuous and usually futile attempts to use the arcana of the Agreements Regulations to get undeserving debtors off their debts.

The re-writing of the Regulations in 2004 (in force 31 May 2005) had scarcely time to be noticed before the Government (by then in power 8 years) embarked on what became the Consumer Credit Act 2006. Mr Blair's desire to have an election in May 2005 scuppered the first attempt at the Act, but the Bill was re-introduced in the following session and passed into law, sort of, in March 2006. "Sort of" because the Business Department then took thirty months to bring the Act into force in eight or nine tranches, including a risible and botched job of amending the Act by a Parliamentary Order which could not meet its dates because the legislators were off on their holidays. The Department itself was not immune to the virus of meaningless change. In rapid succession it changed from the Department for Trade and Industry, to the Department for Business, Enterprise and Regulatory Reform and then to the Department for Business, Innovation and Skills. The driver seems to have been nothing more serious than ministerial vanity. "I'm now in charge: I'll change the name: that'll make people sit up."

The 2006 Act turned the old CCA on its head. Licensing became a nightmare with dictatorial powers being given to the Office of Fair Trading (OFT) including the power to levy its own fines (coyly called "civil penalties") without recourse to the courts. The credit industry had to re-adjust its business processes for the second time in three years.

While the changes wrought by the 2006 Act were working their glacier-like way into the system, in a moment of sheer folly, the Government blithely signed up to the EU Consumer Credit Directive (*2008/48/EC*) (CCD). This reduced consumer credit law to a complete dog's breakfast, exacerbated by the failure of the BIS to implement the Directive (a) intelligibly or (b) intelligently or (c) in time.

But this was not the end of the Brussels legislative mania (another sclerotic organisation thrashing about looking for something to do). We have had the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 (*SI 2008/1816*) - our old friend the Doorstep Selling Regulations – and the Consumer Protection from Unfair Trading Regulations 2008 (*SI 2008/1277*) (CPRs). The British Government simply signs everything put in front of it. Ironic, when you come to think about it, when the humble consumer credit agreement was long subject to compulsory boxes telling the customer to read the agreement before signing it and the terrible things that would happen to him if he did. If only Directives had a box saying "do not sign this unless you mean to be bound by its terms".

- Inevitably, therefore, the UK put its moniker on the Consumer Rights Directive (Directive 2011/83/EU) on which I commented, none too favourably, in my ***January 2012 column.*** Directives must be implemented by Member States within two years of being made: the date for this one is 13 December 2013 – anyone out there seen draft regulations yet?

  Meanwhile the entire regulatory structure of the UK is in the process of transformation with the OFT and the Financial Services Agency (FSA) involved in a giant re-organisation which will cost billions and achieve nothing. Chairman Mao would be waving his Little Red Book in the air in joy.

  And who has benefitted from all this change? Regulators, *bien sûr* – they are now as numerous as autumn leaves in Vallombrosa. Consumerists, possibly, but, as they are always looking for new ways of kicking the retail and credit industries, they will never be satisfied. Consumer lawyers – well, what do you think? But the credit industry and above all the consumers themselves – they have not benefitted. The financial crisis and the credit crunch were bad enough but the constant and pointless change to the sector have made bad worse.

  Change and decay in all around I see. So, as you hunker down for Christmas and max on your credit cards, spare a thought for the Medes and the Persians. Maybe they had something after all.