THE GREEN DEAL: A GREAT DEAL FOR CONSUMERS?

By Rachel Tandy

On 1 October 2012, the major provisions of the Green Deal (Disclosure, Acknowledgment, Redress etc) Regulations 2012 ("the Regulations") come into force. The Regulations set out a legislative framework enabling householders to make energy-efficient improvements to their homes, without having to meet the cost of those improvements up-front. The scheme will have an impact in professional negligence disputes, property law and, in particular, in the field of consumer credit.

BACKGROUND

Under the Climate Change Act 2008, the UK must reduce its carbon emissions. That Act set legally-binding carbon targets, with the first target "milestone" due in 2020. By then, the UK must have reduced its carbon emissions by 34% against 1990 levels. The Secretary of State is legally obliged to prepare proposals for achieving those targets.

The Green Deal is one such proposal. Its aim is to enable (and encourage) homeowners to make energy-efficient improvements to their homes. It works by allowing Green Deal Providers to arrange and carry out the necessary carbon reducing improvement work without charging homeowners the full cost up-front. Instead, homeowners will pay for the work via a regular charge on their energy bills.

THE GREEN DEAL PROCESS STEP-BY-STEP

If a person wishes to take advantage of the Green Deal scheme, his or her property must first be inspected by an accredited Green Deal Assessor. The Assessor will compile a Green Deal Advice Report ("GDAR") recommending which energy improvement measures – such as cavity wall insulation, loft insulation, and flue gas heat recovery systems – are appropriate for that property.

The homeowner or occupier can choose whether to undertake those measures, and how to finance them. If they wish to take advantage of the Green Deal scheme and avoid having to pay up-front for the work, they can take the GDAR to an accredited Green Deal Provider. The Provider will then arrange for the relevant improvements to be carried out, and put in place a finance agreement, called the Green Deal Plan.

The Green Deal Plan sets out the total cost of the scheme (which can include not only the cost of the work, but also VAT on that cost, and a charge for providing credit). That cost is then broken down into regular instalments, which are added to the energy bills for the property. The instalments are paid by the bill-payer to the energy supplier, essentially as part of their energy bill. The energy supplier passes on the money to the Green Deal Provider.

Underpinning the scheme are two core principles:

(i) **The Golden Rule**. The regular charge added to the energy bills must not exceed the total amount it is estimated that the bill-payer will save on his or her energy bills during a specified period. So, for example, if it is expected that the energy-saving measures will result in a saving of £50 per quarter, the regular charge added to the energy bills must not exceed £50 per quarter.

(ii) **The Green Deal attaches to the property**. The bill-payer *of the relevant bills at the property* is responsible for paying the charge to the Green Deal Provider. Therefore, if the bill-payer moves house, he or she does not retain that obligation. Instead, it is taken on by any new tenant or homeowner when they become the subsequent bill-payer. For that reason, the existence of the Green Deal Plan must be disclosed to any potential new tenant or buyer.

IMPACT OF THE CONSUMER CREDIT ACT

In the domestic context, a Green Deal Plan will be a consumer credit agreement with the Green Deal Provider and the requirements of the Consumer Credit Act ("CCA") 1974 will apply. As a result, in accordance with that Act, Green Deal Providers in consumer cases will need to:

(i) Hold a valid Consumer Credit Licence;

(ii) Ensure that any Green Deal Plan is properly executed and contains all the information required by the Consumer Credit (Agreements) Regulations 1983;

(iii) Provide the appropriate pre-contract information to the consumer and provide copies of the unexecuted and executed Agreement;

(iv) Provide copies of the agreement, settlement statements, and any other relevant information requested by the consumer under, for example, s77 or s103 CCA 1974;

(v) Provide annual statements of account, whether requested or not, which comply with the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007;

(vi) Issue default notices and notices of default sums, where a debtor has failed to make payments and the Provider wishes to enforce the agreement; and

(vii) Ensure credit is offered responsibly and repayments are affordable.

Many of the Green Deal Providers will already hold relevant Consumer Credit licences and therefore will be familiar with these requirements. However, those who do not will need to get to grips with the list of obligations, and with the scope of regulation in the Consumer Credit sector. This is particularly relevant for energy companies; under the new s21(4) CCA 1974, they will not need a licence if they are merely collecting the money from consumers (as those activities can be regulated by Ofgem), but if they wish themselves to become Green Deal Providers, they will need to be licenced and to comply with all of the relevant statutory requirements.

In addition, there will be a new Code of Practice imposing other obligations, such as obtaining a minimum of 3 quotes for any Green Deal Plan worth over £10,000, reporting annually to the oversight body, and providing a minimum 5 year warranty for all work done. The Provider must provide advice to the consumer about notifying their insurer, obtaining consent, potential maintenance and/or service charges associated with the improvements to the property, the need to change electricity suppliers to a Green Deal Supplier, and so on. Any Green Deal Provider will, of course, have to comply with these requirements as well as those imposed by the legislation. Failure to do so is likely to open the door to a flood of potential claims, alleging that Green Deal Plans have been mis-sold.

TOO MANY COOKS?

In addition to the bill-payer, the energy supplier, the Green deal Assessor and the Green Deal Provider, there are numerous other potential participants in the scheme. Top of the list is the owner of the property, the value of whose freehold interest would be affected (positively or negatively) by the

existence of the Green Deal Plan and the quality of work done. Any subsequent bill-payer will also be affected, as will a subsequent energy supplier (Regulation 34 protects a bill-payer's right to change supplier at any time). The Green Deal Assessor provides the GDAR which underpins the calculation of any Green Deal Plan, and therefore would presumably be answerable to a negligence claim if the relevant GDAR was wildly inaccurate or inappropriate. And many Green Deal Providers will not undertake the actual improvement work themselves but will engage independent specialist contractors to do the job (although Green deal Providers will remain liable for any defects under Regulation 35 and Schedule 3).

In practice therefore, if a dispute arises between two parties, it is not hard to imagine matters spiralling into a complex web of allegations and counter-allegations based on multiple causes of action. In part, the problem also lies with the huge volume of litigation potentially engaged by a Green Deal Plan.[1] Although the new scheme does provide for disputes to be resolved by the Ombudsman service, there is no obligation on consumers to do so, and in any event certain complaints (such as those worth over £100,000) will fall outside of that jurisdiction.

In addition, Providers should be alive to ancillary problems arising from the relationships between the various parties involved. A Landlord, for example, will need to obtain the consent of his tenant – and vice versa – in order to enter into a Green Deal Plan. The Code of Practice requires the Provider to obtain copies of the relevant consents. Under Regulation 65, the Secretary of State *must* impose cancellation of a Green Deal Plan (unless the improvement works have already been removed from the property) if the relevant consents have not been obtained. There is no express provision allowing the improver to obtain retrospective consent. Once cancellation has been imposed, the Code of Practice stipulates that the Provider must *only* seek costs or compensation from the improver and not from any other party. There is significant scope here for Providers to find themselves substantially out of pocket, faced with recovering significant costs from individuals who will, in all likelihood, be unable to pay. Landlords, too, should be aware of the consent provisions – particularly as, from 2016, it is envisaged that they will not be entitled to unreasonably refuse a tenant's request to enter into a Green Deal Plan.

[1] In addition to the Consumer Credit Act, potential claims might lie under, for example, the Supply of Goods and Services Act 1982, the Unfair Terms in Consumer Contracts Regulations 1999, the consumer protection regulations on Distance Selling and Doorstep Selling, and the Unfair Contract Terms Act 1977.

“ *The draft Green Deal Code of Practice released by the Department for Energy and Climate Change in June 2012 contains the stipulation that* “a Green Deal Provider must not seek to influence a Green Deal Assessor in any way in the Assessor’s provision of a Green Deal qualifying assessment.” ”

Another obvious example of ancillary problems is a situation where one party (for example, the Green Deal Assessor) recommends another (for example, the Provider) to the consumer, and receives a commission that is not disclosed for that recommendation. Although in the case of *Harrison v Black Horse* [2011] EWCA Civ 1128, secret commission was not found to amount to an unfair relationship in the context of Payment Protection Insurance, that case was decided on the basis that the FSA’s Insurance Conduct of Business rules had been complied with. The draft Green Deal Code of Practice released by the Department for Energy and Climate Change in June 2012 contains the stipulation that *“a Green Deal Provider must not seek to influence a Green Deal Assessor in any way in the Assessor’s provision of a Green Deal qualifying assessment.”* It will be interesting to see how this is interpreted by the courts in due course. In the meantime, Providers, Assessors, and other parties whose relationships with one another, viewed objectively, may offer cause for concern, are advised to tread carefully.

THE PROBLEM OF SUBSEQUENT BILL-PAYERS

Whilst the Green Deal is said to attach to the property rather than to the person, the legal mechanism for the transfer from one bill-payer to the next is not very clear. It is submitted that it is more likely to amount to a novation of the contract, rather than a simple assignment of rights by the previous bill-payer. The person selling the property must disclose the existence of a Green Deal Plan to the buyer, and the buyer must expressly consent to it in writing. The Regulations also stipulate clearly that a bill-payer’s obligations are engaged *“only whilst [he] is the bill payer”* (Regulation 40(6)). Therefore it seems the Green Deal Provider must, implicitly at least, consent to the purchaser becoming the new bill-payer. The same disclosure and acknowledgment provisions apply where there is a new bill-payer for any reason (e.g. where there is a change of tenant in a rented property).

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However, there are several potential problems that could arise as a result of this arrangement. Although the Regulations are strict from a consumer protection point of view, setting out what must be disclosed to the buyer, it does not appear that the same consideration has been given to the impact of a change of bill-payer on the Provider. What if the new proposed bill-payer has a poor credit rating, a County Court Judgment, or an extremely low income? The Provider will be taking on a much greater risk, but apparently has no say in the change. Equally, the new bill-payer could well be bound to pay a charge which he or she finds unaffordable. Under the new scheme, low-income families who cannot afford a Green Deal Plan are eligible for alternative sources of funding, such as the Energy Company Obligation. However, if a low-income family moves into a property where a Plan has already been put in place, are they bound by the obligations arising under that plan?

The short answer appears to be yes. The purpose of the acknowledgement provisions is to ensure that the new bill-payer expressly accepts the terms of the Green Deal Plan.[2] If the new bill-payer has done that, it would seem his only options are to apply for a time order under s129 CCA 1974, or to argue that the relationship is unfair and seek one of the orders listed under s140B CCA 1974. Arguably either of these might prove successful, but it is worrying that consumers may have to take such actions to protect themselves. Indeed, there appears to be no express obligation on Green Deal Providers to reconsider the affordability of the Plan for a new bill-payer, other than under the broad duty to treat customers fairly.

THE GOLDEN RULE UNDER THE SPOTLIGHT

The same concerns could be levelled at the reliance on the Provider's *estimate* of how much money could be saved on the bill-payer's energy bills. The Provider must estimate the potential savings to be achieved by the Plan, and that estimate is what underpins the affordability of the plan and its

[2] Although it is a matter of some concern that disclosure can be made as little as 7 days *"before the transaction or arrangement is to be entered into."* (Regulations 44, 46 and 50) - and in fact, those Regulations envisage that there might be circumstances where disclosure is made even later. In a situation involving the sale of a house, for example, presumably the transaction is only "entered into" when contracts are exchanged. Disclosure just 7 days prior to that would still, in all likelihood, post-date any building surveys, mortgage agreements and other formalities necessarily arranged.

adherence to the Golden Rule. The Provider is obliged under Regulation 28 to consider variables such as possible increases in fuel prices, and reasonable wear and tear of improvements, in order to come up with a *"reasonable"* estimate. However, one factor it is not obliged to consider is the affordability of the Plan for any subsequent bill-payers. Of course, there is no way of knowing what kinds of people are likely to take on the payment obligations at a later date, but there appears to be no requirement anywhere for the Providers to even consider re-evaluating the arrangements in light of any subsequent information. So, for example, if a tenant leaves a property, but there is a delay before a new tenant moves in, the landlord becomes the "bill-payer" in the interim. The landlord is therefore saddled with making payments which are labelled as fair because they are less than the predicted savings to be made. However, during the untenanted period, those savings simply cannot be achieved, because no energy is being consumed at all.

> *The Provider must estimate the potential savings to be achieved by the Plan, and that estimate is what underpins the affordability of the Plan and its adherence to the Golden Rule.*

The draft Code of Practice stipulates that the Provider must emphasise that the figure is an estimate only, suggesting that there will not be scope for bill-payers to challenge the agreement later on the basis that the predictions were wrong. This does seem to undermine the much-publicised Golden Rule on which the entire Green Deal concept has been sold. The obvious aim of that rule is to ensure affordability and to support the "everyone's a winner" rhetoric accompanying the promotion of the deal, by indicating that consumers essentially have nothing to lose by signing up. The possibility that consumers could still end up paying more has, in large part, been glossed over. On the other hand, a scheme which guaranteed the savings to be made would be practically unworkable. It is clear that the Regulations do intend consumers are fully informed about the nature of the estimates, and the associated risks of signing up to the scheme. However, again, it is a point of some concern that there is apparently no formal mechanism requiring those estimates to be revisited, and again the only probable source of relief for a consumer is likely to be a time order or an unfair relationships claim.

CONCLUSION

The Green Deal is, in principle, a simple idea. However, the machinery required to operate it in practice could engage a huge amount of legislation, and invite some unwieldy litigation. There are also a number of ambiguities, the most concerning of which are the legal method by which the repayment obligations transfer from bill-payer to bill-payer, and the apparent lack of any mechanism by which a Green Deal Provider can be called upon to revisit any relevant payment arrangements.

Previous cases decided under the Consumer Credit Act, such as the ***Harrison*** case on secret commission, will be of some assistance when it comes to interpreting the framework. However, in many ways the Regulations sit uncomfortably within the ambit of the CCA, falling within its reach but exceeding its grasp. In that sense, it will be largely up to the courts themselves to iron out any kinks in the new Green Deal framework. It would be right to expect rapid development over the next decade, as the scheme finds its feet and the courts decide on its limits. Providers and participants would be wise to ensure that they stay informed and in-touch during this period of change.

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