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In his fourteenth consumer credit column, Richard considers the concept of irresponsible lending.

Richard Mawrey QC, Henderson Chambers

"RESPONSIBLE LENDING" OR "SHOULD CREDIT BE CONFINED TO THE MIDDLE CLASSES ?"

"When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things". Ah, Saint Paul, *nous avons changé tout cela*. Given that the Corinthians are, like ourselves, citizens of the European Union, the letter should now read: "when I became a man, the EU treated me as a child just the same". There used to be – perhaps there still is – a translation of Holy Writ known as *The Good News Bible:* well, our new version of Paul's letter definitely comes from *The Bad News Bible*.

For the EU and, indeed, for the British Government off its own bat, the citizen is as a little child, and, to be frank, not a very gifted child at that. No more so than when he borrows money. When entering into any form of credit transaction, the citizen is no longer to be regarded as a grown up, of full age and capacity: he is to be taken by the hand and told in Janet-and-John terms what it means and, above all, how very dangerous it is.

How did we get there? The answer is by two giant steps. The first step was entirely home-produced. The Consumer Credit Act 2006 (CCA 2006) conferred wide new licensing powers on the OFT from 6 April 2008. In the past, the licensing function was simply a mechanism to allow the OFT to keep rogues out of the consumer credit business. From 2008, however, the OFT was given the task of micro-managing the credit industry and of doing so on what its friends would surely call "social criteria" and what those less well disposed would call "political criteria". It was not unknown under the recent Government for the functions of regulators to become politicised – the failures of the FSA properly to regulate the banks were the result of Government pressure for "light-touch regulation".

Until 2008, the power of the OFT in considering whether to grant a licence amounted in reality to saying "yes" or "no" and, if the licensee subsequently misbehaved, his licence could be suspended or revoked. Blunt instruments, to be sure, but then so is the power of the umpire to say "out" or "not out". Since April 2008, however, the OFT has the power to limit the licence to a particular "description" of business – cleverly the Consumer Credit Act 1974 (CCA 1974) does not define "description" - and the power to impose "requirements" on the licence. Although the criterion for being granted a licence is still that the applicant must be a "fit person to carry on" the type of business to which the licence relates, the definition of fitness has been greatly expanded. The OFT has to take into account the "skills knowledge and experience" of the applicant and his actual or proposed practices and procedures.

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Under section 25(2A)(e) of the CCA the OFT must assess whether the applicant has "engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not)." This in turn is defined by section 25(2B) whereby "business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending."

Irresponsible lending - pause there – savour it. Can one envisage this concept being applied to other commercial activities? Should we be contemplating irresponsible selling by motor dealers – after all, many young tearaways are able to buy cars far too powerful for their own good? Should clothes shops "responsibly" refuse to sell tight jeans to fat people? Ought the Royal Opera House box office "responsibly" to remind me that the Ring contains explicit instances of incest?

So what is irresponsible lending? Actually the true answer is: lending to – well, not to put too fine an edge on it – proles. But let us see what the OFT itself says. You will find it in the OFT's ***Irresponsible lending guidance for creditors*** (OFT 1107) (Guidance).

This concentrates on two aspects of lending. The first is to try and ensure that nobody is sold credit that is unsuitable for him or which he may not be able to afford if he falls on hard times. The points to be considered are, according to the Guidance:

- The type of credit product.
- The amount of credit to be provided and the associated cost and risk to the borrower.
- The borrower's financial situation at the time the credit is sought.
- The borrower's credit history.
- The borrower's existing and future financial commitments.
- The impact of a known or likely future change in the borrower's personal circumstances.
- The vulnerability of the borrower: for example, whether the borrower is known to lack - or is reasonably believed to lack - the mental capacity to be able to understand information and explanations provided to him and make informed borrowing decisions based on his understanding of such information and explanations at the time they are provided.

The second aspect of lending covered by the Guidance is also the second giant step towards the Nanny State and this one is the result of EU intervention. The Consumer Credit Directive (*2008/48/EC*) (CCD) imposed wide duties on creditors, implemented by inserting sections 55A and 55B inserted into the CCA 1974. The Consumer Credit (Disclosure of Information) Regulations 2010 (*SI 2010/1013*) made pre-contract disclosure very onerous by introducing the Standard European Consumer Credit Information form (SECCI) but this was only the beginning.

I have discussed these sections in another context (Fangs ain't what they used to be - February 2012 (see Article, ***Richard Mawrey QC's consumer credit column: February 2012***)) but for new readers it may be a help to remind ourselves of what they say.

Under section 55A(1), the creditor must—

- "(a) provide the debtor with an adequate explanation of the matters referred to in subsection (2) in order to place him in a position enabling him to assess whether the agreement is adapted to his needs and his financial situation;
- (b) advise the debtor … to consider the information [in the SECCI];
- (c) provide the debtor with an opportunity to ask questions about the agreement; and
- (d) advise the debtor how to ask the creditor for further information and explanation".

The matters in section 55A(2) include:

- "(a) the features of the agreement which may make the credit to be provided under the agreement unsuitable for particular types of use …
- (c) the features of the agreement which may operate in a manner which would have a significant adverse effect on the debtor in a way which the debtor is unlikely to foresee.
- (d) the principal consequences for the debtor arising from a failure to make payments under the agreement …
- (e) the effect of the exercise of any right to withdraw from the agreement."

Under section 55B, the creditor must "undertake an assessment of the creditworthiness of the debtor".

The beauty of the OFT approach is that these obligations must be performed by the creditor *whether the debtor wants it or not*. The Guidance makes this clear: "The fact that a borrower might state or imply that he does not require an explanation of the credit product does not absolve the creditor from the legal responsibility of providing an adequate explanation. The creditor should not encourage the borrower to waive his right to a full explanation." Furthermore, as with enforcement, the OFT is very hot on "Physical/psychological harassment" – so, no hard sell permitted here. And "assessment of creditworthiness"? The OFT approach is uncompromising:

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- "'Assessing affordability', in the context of this guidance, is a 'borrower-focussed test' which involves a creditor assessing a borrower's ability to undertake a specific credit commitment, or specific additional credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences."

The OFT continues: "creditors should take reasonable steps to assess a borrower's likely ability to be able to meet repayments under the credit agreement in a sustainable manner." "Sustainable" means that repayments can be made "without undue difficulty – in particular without incurring or increasing problem indebtedness - over the life of the credit agreement out of income and/or available savings". In other words, the creditor has to conduct a minute examination of the debtor's assets, liabilities, income, prospects and family circumstances and only grant credit if satisfied that the debtor will find repayments nice and easy for the entire length of the agreement. Although the Guidance doesn't say so in terms, the creditor must surely be expected to conduct an assessment of the prospective debtor's state of health. After all, it can scarcely be "responsible" to lend money to a debtor who might fall off his perch at any moment. "Sorry, Mr Jones, but you are looking a bit peaky and you are already a gross lardbutt: no loan for you".

In the real world, who is likely to meet these stringent credit criteria – after all a credit agreement might last for years? The answer is: comfortably-off middle class people whose assets exceed their liabilities, have a stable income and a settled lifestyle. In short, dear reader, you and I (Oh, and the regulators). And the rest? Well, listen up you proles, if the OFT ever gets round to applying its own philosophy *au pied de la lettre*, you can whistle for your credit. And serves you jolly well right. You should save up before buying anything and certainly not aspire to acquiring goods and services above your station. Thrift – that's the watchword. Live within your means and don't envy your betters.

I accept that I do tend to bang on a bit (well, perhaps a lot) about how restricting credit damages the economy. To the intelligent and well-informed reader of this column, this must seem to be on a level with saying "if you walk in a storm with your head held high, you will still get soaked to the skin". Politicians, the media and, natch, the regulators, however, do not accept this self-evident fact. When retail sales fall dramatically and household-name suppliers go out of business, they ask in a bewildered fashion: "How can this be?"

But who used to buy all these goods and services in the High Street? Why, we did, *all of us* – bourgeois and prole alike. And how did we pay? Did we buy our £900 tele by bringing out a wad of greasy non-consecutive tenners and slapping them on the counter, with a cheery "here you are, guv"? Er, no. What we actually did was to produce a piece of plastic – a *credit* card.

Without cheap and, above all, easy credit, people simply do not buy and, if they do not buy, the economy suffers. You do not need to be John Maynard Keynes to work that one out. But please don't tell the OFT: they would be very upset to learn that all their hard work designed to keep credit in responsible hands might actually be sabotaging the economy.

So, dear reader, if, as I am sure is the case, you do happen to be "in possession of a good fortune" (though not necessarily single and "in want of a wife"), then you may soak up credit till your eyebrows bubble, saying to the less-fortunate proles that surround you: "Regardless of your predicament, Jack, I'm all right".

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