Consuming Passions

Random thoughts on consumer matters by Richard B Mawrey QC

1. All the fun of the unfair!

Belief in the free market has waxed and waned over the last two centuries but, even at the height of such belief, governments have always been uneasy when it comes to credit. Perhaps it is a long-buried feeling, dating back to the Middle Ages, that usury really is a sin and that, if a compromise has to be made with Mammon, it must be on strict terms. Even the Victorians, those High Priests of Free Trade, saw the need to regulate lending in the presumed interests of the borrowers. The Bills of Sale Acts placed restrictions on chattel mortgages and the Moneylenders Acts 1900 and 1927 actually empowered the courts to intervene in the case of harsh or unconscionable transactions.

When the Consumer Credit Act 1974 (CCA) was passed, therefore, it continued the policy of allowing courts to re-open transactions if oppressive to the debtor. Sections 137-140 empowered the courts to act in the case of 'extortionate credit bargains' and to re-write the agreement where appropriate. Given that these provisions applied to all credit agreements – even business agreements - where the debtor was an 'individual' (a category which then included any partnership however large), one would have thought that there would be regular recourse to the courts by those feeling hard done by. When, however, the Department for Trade and Industry published its White Paper *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century* in December 2003, it noted that only some 30 cases appeared to have come to court in the nearly three decades since the CCA was passed.

In the Consumer Credit Act 2006, therefore, ss 137-140 were phased out and replaced by a new concept of 'unfair relationships' between creditor and debtor set out in new sections, CCA ss 140A-140D. These sections were deliberately drawn much wider than the extortionate credit bargain provisions they replaced. The court is entitled to look at all aspects of the relationship, including enforcement and other events after the making of the agreement, and to have regard to 'related agreements' which include not only linked transactions but also previous agreements between the parties re-financed by the agreement under challenge. As before, the court could open *any* credit agreement (other than an FSA regulated mortgage) where the debtor was an individual, though the definition of 'individual' cut partnerships down to those of no more than three partners. Business agreements were not exempt. The courts were being positively encouraged to roll their sleeves up and start re-writing agreements left, right and centre.

But, as with extortionate credit bargains, the courts were, and remain, wary. Although the Human Rights Act 1998 has changed it in some respects, the basic attitude of judges is that social engineering is not really their proper function. Where there is an area of social or economic life which is already the subject of heavy official regulation, further interference by the courts appears both unnecessary and inappropriate. Judges are not economists or financiers. If, albeit within the framework of a regulated industry, there is a free and highly

competitive market, most judges feel they are not the right people to start imposing an additional layer of regulation on top of the existing layers

Thus the judicial conservatism that led to what the DTI saw as excessive caution when dealing with extortionate credit bargains has not entirely evaporated when dealing with unfair relationships. Courts have, for example, recognised that those who are not creditworthy will find it more difficult to obtain credit and, when they do, will pay more for it that those who are creditworthy. They have also recognised that rates of interest which may appear monstrous when extrapolated over a year, or turned into an APR, may well be reasonable when making very short term loans to high-risk debtors. In short, judges have acknowledged the real world and realised they are not going to change it overnight.

This conservatism has received a boost in the recent case of *Harrison v Black Horse Limited* [2011] EWCA Civ 1128. The unfair relationship in that case turned (as do so many) on the now-outlawed practice of creditors selling single-premium PPI policies to debtors and adding the premium to the loan. The substance of the Harrisons' complaint was that the creditor had not disclosed to them the fact that, out of the very steep premium paid for the insurance, a 'commission' amounting to 87% of the total was paid to the creditor. This fact, coupled with the unsuitable nature of the policy itself, formed the basis of the unfair relationship argument.

Though initially successful before the District Judge, the Harrisons failed before the formidable Judge Waksman QC and failed again in a strong Court of Appeal (Lord Neuberger MR, Patten and Tomlinson LJJ). What did for the Harrisons was this. The selling of insurance is heavily regulated by the FSA under the Financial Services and Markets Act 2000. It is also subject to EU-wide legislation. Consequently, at the time of the Harrisons' agreement in 2006, insurance selling was governed by ICOB, the Insurance Conduct of Business Rules, now replaced by Insurance: Conduct of Business Sourcebook ('ICOBS'). ICOB, framed after careful consideration of the issue, did not make it compulsory for those selling insurance on behalf of the insurers to disclose the commission they would receive. Thus, although it was argued strenuously that Black Horse had not complied with ICOB, both appellate courts held that it had, and that this was determinative of the issue of unfair relationships. In para 58 of the judgment it was said: 'It would be an anomalous result if a lender was obliged to disclose receipt of a commission in order to escape a finding of unfairness under s 140A of the [CCA] but yet not obliged to disclose it pursuant to the statutory imposed regulatory framework under which it operates.'

So the good news for lenders is that the courts are not going to second-guess the regulators. We may see whether the Supreme Court disagrees.

2. And never darken my doorstep again!

One of the reasons why consumer lawyers tend to be fat and fubsy fellows with a twinkle in the eye is that theirs is a field where the old maxim applies 'as one door closes, another door opens'. Indeed in many cases the second door opens well before the first one has properly shut. Repeal of the Consumer Credit Act 1974 (CCA) s 127(3) to (5) which provided that seriously non-compliant agreements were permanently unenforceable and a series of tough decisions by the courts have stemmed the flow of litigation generated by the claims farmers with their mantra of 'we can get you off your credit card debts' (they couldn't). That door is beginning to creak shut.

At the same time a rather unlikely door is beginning to swing open, thanks to the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (SI 2008/1816) (the Doorstep Selling Regulations). Doorstep selling in the accepted sense of the term is, of course, nowadays very rare. In any event, the Regulations themselves exempt a wide range of contracts that might take place on the doorstep, such as supply of milk and other foodstuffs. None the less, the Regulations have brought forth a joyful harvest of litigation arising out of road traffic accident cases. Many vehicle insurers consider that credit-hire arrangements, whereby the innocent party to an accident enters into an agreement to hire a replacement vehicle on terms that the hire is only paid for when the guilty party's insurers pay over the damages, are being used to inflate damages in respect of such vehicle hire. Consequently they have sought to exploit firstly the CCA and latterly the Doorstep Selling Regulations to argue that the credit-hire agreement is non-compliant with the relevant legislation and thus unenforceable.

Unfortunately, the House of Lords made the very foolish and short-sighted decision that an insurer was permitted to rely on the unenforceability of the credit-hire arrangement to escape paying that element of the damages, principally in *Dimond v Lovell* [2000] UKHL 27. If, as both common sense and legal precedent might have suggested, the House had held that, for a third party insurer, this was *res inter alios acta* and only the parties to the agreement could assert unenforceability, then all the later problems could have been avoided (though the lawyers would have been the poorer).

The Regulations apply to a contract between a consumer and a trader which is made

'(a) during a visit by the trader to the consumer's home or place of work, or to the home of another individual;

(b) during an excursion organised by the trader away from business premises; or

(c) after an offer made by the consumer during such a visit or excursion.'

Excursions can be ignored, but the visit by the trader to the home etc is important. Where the Regulations apply, the agreement is subject to a seven day right of cancellation. The trader must give the consumer a notice of his right to cancel in what is, to all intents and purposes, a statutorily prescribed form and there must be a 'detachable slip' containing a cancellation form (also in prescribed wording and completed in advance by the trader). If these

requirements are not met, the agreement is unenforceable. Reg 7(4) provides ‘Where the contract is wholly or partly in writing the notice must be incorporated in the same document.’ If incorporated in the contract or another document, the notice must be contained in its own box.

These rules cause two main areas of difficulty. The first is whether the contract is ‘made’ during the trader’s visit to the consumer and the second is what amounts to ‘incorporation’ in the contract.

The norm of credit-hire used to be that the consumer would contact the credit-hirer provider, by telephone or internet, discuss the problem and, if eligible, would be accepted by the provider as a customer. The provider would draw up an agreement and send the vehicle to the consumer’s home or place or work. The delivery driver would hand over the vehicle, the consumer would sign the agreement and the driver would take it away with him. That was all. Quite clearly such a contract was ‘made’ at the time of delivery and, as this was at the consumer’s home or place of work, the regulations applied. Now for a long time the credit-hire providers did not know about the Doorstep Selling Regulations, believing, not unreasonably, that the Regulations could not apply to them. Their contracts did not contain the notice of cancellation rights. Accordingly, when insurers started taking unenforceability points, the providers strove to construct arguments for saying that the contract was not ‘made’ during the visit to the consumer’s home but at some other time. In most cases the arguments failed on the facts. In *Chen Wei v Cambridge Power and Light Limited* (Judge Moloney QC at Norwich County Court on 10 September 2010) the argument that the agreement had been ‘made’ over the telephone was rejected on the obvious ground that the deliveryman had presented the consumer with a written agreement which he had signed. Similarly where the customer sees the agreement for the first time on delivery and signs it, even if the agreement is not ‘made’ then, his signature amounts to an offer to contract which the provider accepts by later countersigning the agreement.

Incorporation, however, does not mean that the notice of cancellation rights has to be on the same piece of paper as the contract or stapled to it. It is sufficient if the contract refers to and ‘incorporates’ the notice. If it does not, then a cross-reference to the contract in the notice itself will not achieve incorporation. See *Guerrero v Nykoo* (Swansea County Court 25 October 2010).

Thus the safest course for the credit-hire provider is to bite the bullet and ensure that his contract incorporates the notice of cancellation rights in the prescribed form with the detachable slip. Or conclude the whole contract on the internet before the vehicle is delivered – but that creates a whole different range of problems, outside the scope of this column.

3. Substance and shadow

As one who comments from time to time on the vagaries of consumer law, I am conscious that we commentators are often less than kind towards the appellate courts who are charged with deciding knotty problems in the field, particularly problems arising under the Consumer Credit Act 1974 (CCA). It is true that even their warmest admirers (perhaps *second*-warmest admirers - their warmest admirers being themselves) would admit that the judges of the Court Formerly Known as the House of Lords often give the impression that consumer credit matters are well beneath their lofty concern and are wholly unworthy of their mighty legal talents. It is nice, therefore, to be able to give the appellate courts somewhat of a collective pat on the back.

One of the strengths of the common law systems is that (in general) their judiciaries are appointed from senior practitioners in the private sector – judges are, in effect, poachers turned gamekeepers. This means that they come to the bench fully aware of the tricks of the trade and the devices that clever lawyers will employ to try and circumvent provisions of the law which their clients might find irksome. Code-based civil law systems, on the other hand, which generally have career judiciaries with judges who have not practised in the private sector, tend to be excessively respectful of documents and much less willing to accept that a document may have been crafted to achieve a legal result markedly different from that which might appear on its face.

Common law courts, therefore, have long adopted the rule that, with any document and, in particular, any written contract, the court will have regard to the substance of the transaction and not to its outward form. This rule was honed to perfection in the dear dead days of the Rent Acts. Such were the horrendous consequences of creating a residential tenancy in the private sector that both landlords and tenants were happy to connive at what computer geeks call a ‘work-around’. Residents went into occupation as mere ‘licensees’ under a document drafted as a contractual licence to occupy. The courts, however, were not fooled. In *Street v Mountford* [1985] AC 809, the House of Lords said, in essence, ‘if it looks like a tenancy and if it works like a tenancy, it is a tenancy. Forget the label – it’s what’s in the tin that matters’.

This pragmatic approach has recently been adopted in a series of cases where more or less deserving (usually, it has to be said, less deserving) litigants have tried to invoke the protection of the CCA for contracts for which the CCA was never designed. Perhaps the high point of chutzpah was reached by Mr Nejad, in *Nejad v City Index Ltd* [2001] GCCR 2461. A spread-betting gambler operated an account (called a ‘credit account), with City Index which allowed him, in effect, to bet from time to time on ‘credit’. This was a running account which would be in surplus when he won and in debit when he lost. Once the debit exceeded his credit limit, Mr Nejad had to pay the excess. On being sued by City Index he attempted to argue that the agreement was a consumer credit agreement in that he was being afforded (at the very least) a ‘financial accommodation’ thus bringing the agreement within the definition of a credit agreement regulated by the CCA. City Index being, unsurprisingly, not the holder of a CCA credit licence, he said the agreement was unenforceable. The Court of Appeal had no hesitation in running Mr Nejad out of town on a rail, holding that the arrangement did not

approach the sort of ‘financial accommodation’ which constitutes ‘credit’ for the purposes of CCA s 9.

A more sympathetic litigant was Ms Sarah Range, the defendant in *McMillan Williams v Range* [2004] EWCA Civ 294. Ms Range, a solicitor, took employment with a firm on the basis that she would be remunerated by payment of a commission calculated as a percentage of the fees ‘billed and paid’ for the work she did. Recognizing that this commission would take some time to come through, the firm agreed to pay her a ‘salary’, which was treated as an advance on commission, with accounts to be taken at specified points. If, on taking the account, Ms Range had been underpaid, the firm would pay the balance: if overpaid, Ms Range would reimburse the overpayment. Ms Range left the firm before the first accounting point would ordinarily have been reached and, when the leaving account was taken, she was in deficit. The firm sued and Ms Range contended that the agreement was a regulated consumer credit agreement, unenforceable for lack of the prescribed formalities. Again the Court of Appeal had regard to the substance – the commercial reality – of the transaction and held that it had not involved credit, even in the wider sense of ‘financial accommodation’. It was an advance on commission which might or might not prove to be exceeded when the final account was taken.

Consumer hire was the issue in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] UKHL 35. That case concerned a supply of photocopiers by the claimants to retail premises on terms whereby they received a sum for each copy made and the owner of the premises was paid a commission (deductible from the copier income) for permitting the equipment to be situated and used on his premises. An issue in the case was whether this constituted a consumer hire agreement, the consequence being, if it was, that it had been made by an unlicensed trader and was thus unenforceable. The House of Lords rejected the suggestion that this was any kind of hire agreement, let alone a consumer hire agreement. The leading speech was that of Lord Hope who made two crucial points. First, a court must have regard to the ‘commercial reality of the transaction seen as a whole’ and secondly the ‘most obvious badge of an agreement for hire’ is ‘an obligation to pay [something] in cash or in kind for the hire…’ (which was clearly absent in that case).

What these cases show is that the courts are fed up with bogus arguments designed to show that agreements way outside what any rational person would consider to be consumer credit or consumer hire agreements are in some way regulated by the CCA and thus unenforceable. The CCA is no longer a universal ‘Get out of Jail Free’ card for anyone who has a debt they can’t – or won’t – pay.