



Richard Mawrey QC's consumer credit column: APRIL 2012

Resource type: Article: other

Status: Published on 02-Apr-2012

Jurisdiction: United Kingdom

This document is published by Practical Law Company.
This document can be found at:
www.practicallaw.com/0-518-3513. Request a free trial and
demonstration at: www.practicallaw.com/about/plc

Richard Mawrey QC is a consumer credit expert practising at *Henderson Chambers*. 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 tenth consumer credit column, Richard considers recent criticisms of businesses providing credit to the non-creditworthy.

Richard Mawrey QC, Henderson Chambers

WAIFS AND STRAYS

Dr Thomas John Barnardo (1845-1905), the Irish surgeon and missionary, is justly famous as the founder of the organisation that bears his name, which was set up to provide homes for abandoned and destitute children. He opened his first home in 1870 in Stepney and, although he wasn't really a "doctor" – it is said that he was prosecuted for calling himself one when only a surgeon – his assumed title remained part of the brand for decades. Barnardo's is still going strong and doing great work with children. Its logo of a cute waif is universally recognised. What Barnardo's is not, however, is a consumer credit watchdog.

Thus it was somewhat surprising when in December 2011 the organisation published a report entitled *A Vicious Cycle* laying roundly into payday loans, pawnbrokers, home credit and what was described as "sub-prime retail credit". Representatives toured the studios, particularly those of the BBC which can be relied on to support any creditor-bashing exercise, retailing horror stories of poor people caught in "the debt trap". No doubt Barnardo's would justify its sortie into credit territory by saying that its general brief was child poverty and that children were being prejudiced by the credit debts of their parents. This did not prevent older (and more traditionally educated listeners) from muttering: "ne sutor ultra crepidam" (go on – look it up!).

The BBC interviews homed in on what the report and the spokesmen for Barnardo's winsomely referred to as "rent-to-own" credit. This must have baffled ordinary listeners. What on earth could "rent-to-own" credit be when it was at home? Presumably those in the lofty heights of running large charities and the even loftier heights of the BBC have never heard of hire-purchase but this seems to be what Barnardo's had in mind.

Nobody can surely object to well-heeled liberals indulging themselves with highly public hand-wringing over the tribulations of the lower orders but it would be nice if they troubled to acquaint themselves with the basic facts of the institution they are lambasting before putting in the steel-capped boot. Some of the criticisms of stores that deal in "sub-prime retail credit" are not without substance. Goods are sometimes priced at a level which is higher than to be found in a High Street store – *a fortiori* higher than those on the internet. Rates of interest are also high. It is easy to forget, however, that for those patronising these outlets, it is all they have. This is credit for the non-creditworthy. The alternative would be to go without.

- What did stick in the craw, however, was a series of blatantly incorrect statements about how this credit worked or was documented, accompanied by much sympathetic clucking by the interviewer. The interviewee stated with great conviction and greater moral indignation that the customer was given no information. He was not told what the cash price of the goods was nor what the rate of interest charged on the credit and he was certainly not told the “bottom line”, namely the total sum he would have to pay over the currency of the agreement. He was truly buying the proverbial pig-in-a-poke.

Now at this point it should be stressed that, neither in the report nor in the interviews was it being suggested that these “rent-to-own” stores were operating outside the law. They are all creditors licensed by the OFT and subject to the Consumer Credit Act 1974 (CCA). None the less what was being suggested was, quite openly, that they were seriously in breach of their statutory and licensing obligations.

Had anybody bothered to demean himself by ascertaining the facts, he would have discovered that “rent-to-own” (aka hire-purchase) was – and had been since well before the last War – one of the most highly regulated forms of credit known to the law. Though it would doubtless come as a surprise to the presenters of, say, the *Today programme*, whose understanding of the lives of ordinary citizens would appear sparse even to an eighteenth century Duke, hire-purchase has been with us for a very long time. For good or ill it has been a major stimulator of the British economy for the best part of a century. Hire-purchase – the “never-never” – fuelled the recovery in the retail sector following the Great Depression in the 1930s and helped to rebuild it in the 1950s and 1960s (in the teeth of attempts by the Governments of the day to emasculate it by the “Control Orders” to which I alluded a while back (see [Article, Richard Mawrey QC's consumer credit column: October 2011](#)).

Let us start, then from the premise that those providing “rent-to-own” credit to the less well-off are properly licensed under the CCA. Pausing there, any suggestion to the contrary would probably have been defamatory. Let us also assume that they are abiding by the terms of the CCA and its regulations. To what extent is the downtrodden debtor being kept in the dark as to the incidents of his hire-purchase agreement?

Stage One: the debtor will have been given the Standard European Consumer Credit Information sheet – the famous SECCI. This will have told him in Janet-and-John terms:

- (a) the cash price of the goods;
- (b) the rate of interest and the APR; and
- (c) the total amount payable.

Stage Two: the creditor will have been under a statutory obligation under CCA section 55A to explain the features of the agreement and any adverse elements and to stress the consequences of default. Stage Three: the creditor will also have been under a statutory obligation under section 55B to check the potential debtor's credit-worthiness. If the debtor asked for one, the creditor will also have had to provide a copy of the proposed agreement under section 55C. All this is before the debtor is asked to put his signature to anything.

Eventually we come to Stage Four, the actual production of the agreement for signature. Unsurprisingly, CCA section 61 and the Consumer Credit (Agreements) Regulations 2010 (*SI 2010/1014*) make it obligatory for the agreement to be filled in with all the relevant (and, it has to be said, a vast amount of wholly irrelevant) information before it is presented to the customer for signature. Thus any debtor who claims to have entered into a “rent-to-own” agreement unaware of the cash price of the goods, the rate of interest and the total amount payable would have to be blind or illiterate or a non-English speaker or a moron – or lying. Of course, none of this makes credit for the non-creditworthy any less harsh or easier to bear but it is a world away from the picture of debtors being conned into undertaking commitments without any information as to what those commitments are.

As mentioned above, among Barnardo's other targets were home credit and “pay-day loans”. In this the charity was merely jumping on a bandwagon already overloaded with politicians and other commentators. “Pay-day loans” were high on the indignation stakes just before Christmas 2011, though it was reluctantly conceded that they were helping the cash-strapped to fund their seasonal purchases and to keep the High Street (just about) afloat.

It is, of course, very easy to produce shock-horror figures about loans to those with poor credit-ratings. Short-term loans will frequently produce what would appear to be monstrous rates of interest when extrapolated over a year or turned into an APR. But this is a wholly unrealistic exercise. Furthermore it is an exercise which time and again courts confronted with unconscionable bargain claims under CCA sections 137 to 140 or, as now, unfair relationship claims under sections 140A to 140C have simply refused to indulge in. Courts have been very hard-headed in recognising that a short-term loan to a poor credit risk can, quite reasonably, bear a rate of interest which would appear very high if made over a longer term or made to a better credit risk. As even consumerists acknowledge, bad risk debtors frequently default. That is why they find it more difficult to get credit and their credit costs more. It is simply a question of apportioning risk. Few people consider it unreasonable that an unemployed 19 year old youth who has just passed his test should pay more to ensure a sports car than a 60 year old lady schoolteacher with a 40 year unblemished driving record and a Fiat 600.

And what do these doughty fighters for the Common Man propose as solutions? As you might expect, solutions which are either impossible or would produce a cure much worse than the disease. Perhaps the most cloud-cuckoo solution (not, I hasten to add, in the Barnardo's report itself) was that the Government should provide the poor with soft credit to go shopping with. One would have paid good money to see Mr Osborne's face when that wafted over the airwaves. The solution that credit advertisements should be more

“transparent” would appear to be made in ignorance of the fact that such advertisements have been heavily regulated since at least 1985 and that the present regulations, the Consumer Credit (Advertisements) Regulations 2010 (*SI 2010/1970*), establish the European standards laid down by the Consumer Credit Directive (*2008/48/EC*) (CCD).

Compelling hire-purchase providers (indeed any retailer) by law to inform the customer of the average High Street and internet prices for each item or the rates of interest available on the internet to creditworthy customers would be as pointless as it would be unworkable. Those who use the kind of “rent-to-own” outlets stigmatised by Barnardo’s know very well that they are paying over the odds for the goods and the credit. They may be poor but it is a mistake to assume they are completely stupid.

More sinister is the suggestion by Barnardo’s that “The OFT should revisit whether home credit providers are making excessive profits and it should reach firmer conclusions.” What conclusions might those be? Placing a cap on interest? Putting the home credit providers out of business by using the CCA licensing mechanisms in the way that the “logbook loan” lenders were destroyed?

I have great admiration for Barnardo’s as a charity: it does vital work and does it very well. To some extent I have used its report as a whipping-boy for a whole slew of well-meaning consumerists who moan about the cost of credit for the non-creditworthy. In an ideal world, everybody would have the same access to credit but this is not an ideal world.

Whatever may be said about the present system, it works. Any alternative would not. Refusing to licence those who lend to the poor would simply cause the unlicensed credit business to mushroom. It is better to have, as now, the “sub-prime” creditors inside the fold (and regulated) rather than outside the fold as criminal loan sharks. Attempting to regulate the price at which goods are supplied on hire-purchase will simply cause the market for the non-creditworthy to dry up. The suppliers will not find it financially viable and will cease trading in that field.

Interest rate caps are a very good recipe for disaster. If they work, they cause legitimate credit to disappear for all but the better-off middle classes and thus rip the heart out of Britain’s retail sector. It would not stop the high-interest unlicensed loan sharks: for them interest rate caps are Christmas come again.

As the great Roger McGough puts it in *The way things are* “Moonbeams, sadly, will not survive in a jar, I am your father and that is the way things are.” In credit, as in so much else, indignation is hugely enjoyable but it is no substitute for common sense.