Richard Mawrey QC's consumer credit column: February 2012

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In his eighth consumer credit column, Richard considers the obligations imposed on creditors under section 55A of the Consumer Credit Act 1974 (CCA) (which relate to pre-contractual explanations), and the fact that this section contains no sanction.

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Fangs ain't what they used to be

"And what is the use of a book," thought Alice "without pictures or conversation?" These words, from the opening sentence of *Alice in Wonderland*, certainly did not apply to Alice herself, whose books were copiously illustrated by one of the greatest graphic artists of the nineteenth century, Sir John Tenniel, and contain some of the most memorable conversations in literature. But it prompts a similar musing in regard to the recent changes to the *Consumer Credit Act 1974* (CCA). What is the use of a statute without teeth?

Recent UK statutes would be unlikely to win many prizes for literacy, brevity, precision of thought or ease of comprehension but the one thing you are normally able to say about them is that, when they tell you to do something, they also tell you what will happen to you if you don't. A provision may make conduct criminal and provide for the appropriate maximum punishment. It may impose civil sanctions either by making certain acts or omissions actionable at law or by providing other unpleasant consequences such as rendering what would otherwise be a valid contract illegal or unenforceable.

In general the CCA is pretty hot on sanctions. The original CCA created no fewer than 35 criminal offences: *the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277)* got rid of 11 of them but the *Financial Services Act 2010* (FS Act) added a new one, so we still have 25. The *Consumer Credit Act 2006* (CCA 2006) added OFT-imposed fines, cutely called "civil penalties". Civil sanctions for breaches of the CCA and its regulations are numerous, although most of them come down in the end to some species of unenforceability by the creditor. Up to 2010, the CCA was as prescriptive as you could hope for: "these are the rules: obey them, you're fine: break

them and this is what will happen to you". Some of the sanctions were (and are) pretty Draconian and provoked the Court of Appeal to say that they offended against the *Human Rights Act 1998* in *Wilson v First County Trust (No 2) [2001] EWCA Civ 633, [2002] QB 74*, albeit reversed by an alarmed House of Lords *[2003] UKHL 40, [2004] 1 AC 816*. At least you knew where you were.

Up to 2008, therefore, the CCA was a nicely prescriptive statute. And then came Brussels. That droll and surreal writer Robert Rankin called one of his novels *The Sprouts of Wrath* – an ideal title, one might think, for a collected edition of EU Directives. If the camel is the proverbial "horse designed by a committee", the EU *Consumer Credit Directive* (*2008/48/EC*) is a weasel designed by a committee actually tasked with designing a giraffe. Its basic premise – harmonization of the consumer credit laws of all 27 Member States – was quixotic. It is as if, following Re-unification, the German government had ordered its car industry to produce a fusion of the Porsche and the Trabant. Given that the UK already had Porsche – or more properly Rolls Royce – consumer credit legislation, one would have thought that the European Commission might just have adopted it with a few Euro-tweaks even if only to save themselves the bother. But no, they had to do it their way.

Still, there's nothing Brussels can produce that well-meaning and determined efforts on the part of Whitehall can't make a great deal worse. Faced with the need to insert new provisions into the CCA, the draughtsmen seem to have given up on trying to make them work. Their attitude seems to have been "if Brussels wants them in, we'll put them in but don't think we approve."

The thinking (I use the word loosely) behind the Directive was that the problem with credit was that the customer was not given sufficient information before signing up. If only it was explained to him just how foolish it is to take out credit, he would desist. Consequently all consumer credit transactions were to be front-loaded with humongous amounts of information, backed up by what amounts to personal counselling.

There was no difficulty with pre-information on paper. We already had the *Consumer Credit (Disclosure of Information) Regulations 2004 (SI 2004/1481)* which obliged the creditor to provide, in essence, a pre-agreement as near identical to the eventual agreement as possible. When Brussels came along with the Standard European Consumer Credit Information sheet or SECCI, all we needed to do was to substitute that for the pre-agreement and Bob's your uncle. The *Disclosure Regulations* of 2010 (*SI 2010/1013*), like their predecessors, were made under section 55 of the CCA and failure to comply means that the agreement is not properly executed under section 65. What is more, as a belt-and-braces, the customer can still have a pre-agreement (section 55C) if he is savvy enough to ask for one.

If it had been left at that, fine, but that would have been too easy. So the draftsman inserted section 55A, sub-sections (1) and (2) of which provide:

"(1) Before a regulated consumer credit agreement, other than an excluded agreement, is made, 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— (i) to consider the information which is required to be disclosed under section 55(1), and (ii) where this information is disclosed in person to the debtor, that the debtor is able to take it away,
- (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.

(2) The matters referred to in subsection (1)(a) are—

- (a) the features of the agreement which may make the credit to be provided under the agreement unsuitable for particular types of use,
- (b) how much the debtor will have to pay periodically and, where the amount can be determined, in total under the agreement,
- (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 at the times required by the agreement including legal proceedings and, where this is a possibility, repossession of the debtor's home, and
- (e) the effect of the exercise of any right to withdraw from the agreement and how and when this right may be exercised"

I have not reproduced the whole section but you can take it from me that the section contains no sanction whatsoever. These are entirely free-standing obligations. In the middle of a statute which is utterly prescriptive, where the precise things to be done or not done by the creditor are spelled out in finicky detail, we find this soggy mush.

What on earth does it all mean? Clearly, all this explanation has to happen **after** the customer has been provided with the "information required to be disclosed under section 55(1)", that is, the SECCI. But the features which must be explained to the customer under section 55A are largely those already set out in the SECCI. Haven't the Wise Men of Brussels read their own SECCI?

Take "how much the debtor will have to pay periodically and, where the amount can be determined, in total under the agreement". Section 2 of the SECCI requires this to be stated in Janet-and-John terms. If the customer still doesn't understand it, how on earth is the creditor to get it into his thick head? "It says here that you have to pay instalment of £100 per month – do

you understand?" "Duh – wot's an instalment?" "It means you pay us £100 every month?" "Why?" and so forth. It's a sort of veterinary process – the poor doggy cannot tell you what is wrong with him.

Likewise the consequences of not paying – this is related in grisly detail in the SECCI. "If you won't pay, nasty men will come and throw you out of your home and you will end up on the Thames Embankment". Does the customer need it all again? The right of withdrawal is also in the SECCI and so forth.

The fun requirements are in section 55A(2)(a) and (c). "Features of the agreement which may make the credit to be provided under the agreement unsuitable for particular types of use" – such as what? Answers welcomed. And which creditor is likely to offer credit unsuitable for a particular type of use? Amazing as it may seem to consumerists, creditors **do** like to get their money back once in a while, preferably with a bit of interest.

And "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"? One springs immediately to mind. As pointed out in my very first column (see *Article, Richard Mawrey QC's consumer credit column: May 2011 (www.practicallaw.com/9-506-0447)*), exercise of the right to withdraw under section 66A of the CCA will have catastrophic consequences in any debtor-creditor-supplier situation. Perhaps this should be pointed out at the time - but why?

What happens if you don't afford the wretched debtor this in-depth counselling session? On the face of it, nothing at all. There is no sanction. What happened to that old maxim "ubi ius, ibi remedium"? A debtor might perhaps use a breach of section 55A to bolster an otherwise weak case of unfair relationships under sections 140A to 140D but there is still no sanction as such.

The reason why there is no sanction is, of course, because section 55A is too vague to be enforced by a sanction. What is an "adequate" explanation? How do you assess it? More importantly how do you define an **in**adequate explanation if you want to impose a sanction for providing it? What constitutes "advice" and how can you tell when the advice has not properly embraced all the features of section 55A(2)? Does the creditor have to carry out an assessment of the IQ of the debtor as well as assessing his creditworthiness under section 55B (incidentally also a statutory duty with no sanction for breach)? How far does the creditor have to go with a Neanderthal debtor or, indeed, one whose English is imperfect? It is as if the Department of Transport scrapped all speed limits and replaced them with a single offence called "driving too fast". How would you police it, particularly if it did not carry a fine or penalty points? Or would "too fast" be left to the judgment of the arresting officer or possibly applied *ex post facto* by a court?

In reality, that is exactly what **will** happen. Into the void created by the lack of a sanction will step the OFT. It will decide *ex post facto* whether the creditor is or is not complying with section 55A and will punish him (by removing his licence or imposing "Requirements") much on the basis of

the police officer substituting his own judgment of what is "too fast" for that of the motorist. The creditor won't know he has broken section 55A until the heavies from the OFT come knocking at his door.

Back to Alice. "When I use a word," Humpty Dumpty said in rather a scornful tone," it means just what I choose it to mean - neither more nor less." Can it be that H.D. became a Parliamentary draftsman? I wonder.