Richard Mawrey's Consumer Credit Column November 2011

Doorstep selling: Pooh and the Heffalump

Consumerists, like all those who fight wars for a living, tend to be heavily prepared to fight the last war rather than the next. As pointed out in earlier columns, the Consumer Credit Act 1974 and its myriad attendant regulations are carefully designed to address the problems of the consumer credit world of the 1960s and, however much tinkering is carried out, that is how it remains. Its patron saint is André Maginot. But the CCA is not alone.

The door-to-door salesman is a recognizable historical character, like Chaucer's Pardoner or Dickens's chirpy hostlers. He thrived, in the main, for about half a century. In the 1920s, the salesman, often a desperate unemployed Great War veteran, sold brushes and other cleaning materials; in the 1930's smooth young men sold vacuum cleaners and the like; in the 1940s, spivs in kipper ties flogged dubious black-market nylons; the 1950s and 1960s saw the encyclopaedists and the 1970s and 1980, the vendors of double-glazing. Like all historical personages, they had their own *personae*: either the pushy, foot-in-the-door, smoothie, conning gullible housewives into imprudent extravagences (witness *Punch* passim) or the cheeky Jack-the-lad seducer, as played by Cherie Blair's father, in movies which both tried desperately to live down.

Where are they all now? With O'Leary in the grave. Today, if there is a ring on the doorbell, it is going to be a candidate at election time or Jehovah's Witnesses: both are selling salvation (in this world and the next respectively – Instant Salvation, just add credulity), but neither is selling goods. Be honest, dear reader, when did you last experience a door-to-door salesman of goods or services? And in the unlikely event that you did, ten gets you five that he was a criminal offering to re-tarmac your driveway with bitumen, he 'just happened to have left over from a contract down the road'.

The last Government, however, was persuaded by earnest consumerists that, even today, the door-to-door salesman, as a roaring Lion, walketh about, seeking whom he may devour. The result was the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (SI 2008/1816). Catchy title, that – one to whistle on the way home. And don't you just *love* the 'etc.' One can envisage the draftsman, in a dreary office in the BIS, on a wet Thursday in February, churning out these regulations and suddenly saying to himself: 'Why am I doing all this? There must be more to life. I really can't be bothered to produce a proper title. I'll just put in "etc" and let the idiots work it out for themselves.' They are now universally known as 'the Doorstep Selling Regulations'.

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' – ah, there's a retro touch. Pure thirties. Puts one in mind of the Champagne titles of south Essex. In the days before Basildon was a gleam in the planner's eye, land in south Essex was both very cheap and (as some of it is still) unregistered. Enterprising

entrepreneurs would buy acres of waste land and divide them into plots allegedly suitable for putting up holiday chalets with easy access to the beach. Gullible Eastenders were rounded up and taken by charabanc out to the wilds of Essex, where they were lushed up with cheap fizzy wine and induced to buy these plots. But excursions ? Nowadays ? Pull, as they say, the other one, Guvn'r.

The Doorstep Selling Regulations do not apply to all contracts made in these situations. There is a long list of exceptions. They cover consumer credit contracts but not cancellable agreements nor other regulated agreements if made on a 'solicited visit'. Contracts for the sale of land are excluded (so the Champagne title salesmen are in the clear), though not contracts to build on or repair immovable property, including 'extensions, patios, conservatories or driveways' (so the driveway cowboys are caught). Also excluded are contracts 'for the supply of foodstuffs or beverages or other goods intended for current consumption in the household and supplied by a regular roundsman' (so, sadly, excluding the amorous milkman – back to Tony Booth films). Some catalogue sales are excluded as are contracts of insurance, contracts under £35 and sales of 'investments'. The thought of a door-to-door futures salesman ('futures' is on the list of investments) does cause the mind to boggle somewhat.

The main thrust of the Regulations is to give the consumer a right of cancellation within a given period. The trader must give the consumer written notice of his right to cancel at the time the agreement is made and, if the contract is made in writing, it must be 'incorporated in the same document'. It must be in the form prescribed in Schedule 4 to the Regulations and must include 'a detachable slip' completed by the trader with the relevant details which the consumer can tear or snip off and use to cancel the contract. The consumer does not have to use this slip but he does have to communicate his cancellation to the person or address specified in the trader's notice of cancellation rights. The time for cancellation is within seven days of the consumer's receipt of the notice of his right to cancel.

The Regulations are sufficiently worldly to recognize that a canny trader might not want to deliver his goods or services in advance of the expiry of the right of cancellation so they provide that for 'specified contracts' the consumer may request in writing for the goods or services to be supplied before expiry, but the *quid pro quo* is that, if the consumer then cancels, he has to pay for any goods or services of which he has had the benefit in the meantime. The list of 'specified contracts' includes, as one would expect, contracts for consumables (food, newspapers etc), advertisements, perishable goods, goods to meet an emergency and so forth and all contracts for services. There is provision for cancellation of a contract financed by credit to effect automatic cancellation of any related credit agreement and provision for repayment of money paid by the consumer and return of goods supplied to him.

The sanctions are, as usual, wholly disproportionate. If there is no notice of cancellation rights or the notice is in an incorrect form, then, not only is the entire agreement unenforceable but the trader commits a criminal offence!

What an elaborate scheme to deal with an almost non-existent problem. Which seminal work of English Literature does it call to mind? Of course – *Winnie-the-Pooh*. You may recall the episode where Pooh becomes convinced that he is menaced by a heffalump – clearly, from the E H Shepard illustration, a woolly mammoth. So he and Piglet dig and bait a

heffalump trap. At the end of the tale, the kindly Christopher Robin, who, as a well-educated lad, knows very well that woolly mammoths are extinct, explains to Pooh that the heffalump is a figment of his imagination.

But, as aficionados of the Master Work will know, the heffalump trap, while failing to catch any heffalumps, does catch something for which it was not intended – in this case poor Pooh himself. So it is with the Doorstep Selling Regulations. Into the heffalump trap blundered a creature as far removed from the Fuller Brush Man as one might imagine.

Credit-hire is an institution with two basic purposes. The first, ostensible, purpose is to provide motorists, whose own vehicles have been damaged in road accidents for which someone else is to blame, with replacement vehicles while their own are being repaired or replaced. Though nominally a contract of hire, the contract is in fact a contract where the hire is supplied on credit and the objective is for the hire costs to be passed on to the guilty motorist's insurers when the damage claim is finalised. The second, and unintended, purpose is to provide oodles of work for deserving lawyers because those who insure motorists do not like credit-hire. They regard it as an infernal device for ripping them off, which is by no means universally the case. Consequently when a road traffic claimant presents a claim including credit-hire for an alternative vehicle, the insurers fight it tooth and nail (often quite oblivious of the fact that the cost of fighting it may well exceed the amount at stake).

The insurers' first line of attack was that the credit-hire agreements were credit agreements regulated by the CCA and were unenforceable for want of the necessary formalities. As appellate courts despise consumer credit and never put their minds to any credit problem, instead of simply ruling that enforceability was a matter between the creditor and the debtor and that to a third party such as an insurer it was *res alios acta*, the House of Lords, principally in *Dimond v Lovell* [2000] UKHL 27, held that the insurer could rely on the unenforceability of the agreement to evade payment of the hire charges. This led the credit-hire suppliers to change their agreements so as to be exempt from the CCA. But then came along the Doorstep Selling Regulations.

It did not cross the minds of most credit-hire suppliers that the Regulations could apply to them but, in practice, most credit-hire agreements were actually *made* when the company delivered the replacement vehicle to the customer and the customer signed the agreement and a receipt for the vehicle. So the game began again, with insurers alleging that the credit-hire agreements were unenforceable for want of the notice of cancellation rights and then, when the credit-hire providers realised that they were caught by the Regulations, the insurers then arguing that the providers had still not got the notice right. You can just imagine what ingenious counsel can do with the phrase 'incorporated in the same document'.

The problems are being gradually sorted out and the poor credit-hire providers are hauling themselves painfully out of the heffalump trap. It is of very little consequence to them that they are not heffalumps and that the trap itself has not caught and is unlikely ever to catch a genuine heffalump. Still, the lawyers cried all the way to the bank.

To be fair to Pooh, he does learn his lesson and builds no more heffalump traps. Unlike legislators, he can recognise his own limitations. "I see now," said Winnie-the-Pooh. "I have been Foolish and Deluded," said he, "and I am a Bear of No Brain at All."

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 thirty years and is co-author of *Blackstone's Guide to the Consumer Credit Act 2006* and *Butterworths Consumer and Commercial Law Handbook*.