

Richard Mawrey's Consumer Credit Column for Practical Law Company October 2011

Walking with dinosaurs

When PLC asked me to contribute this column, it was hinted that what the reader would be looking for was intensely topical, hot-off-the-press news and views about consumer credit and consumer law generally. The reader may be somewhat surprised, therefore, to find what at first blush would seem to be a leisurely and nostalgic saunter down Memory Lane. There is a point – but you will have to be patient.

For many years I was cured of the habit of starting a sentence with the words 'When I was young' because my disrespectful (then teenaged) daughter would chime in '... and dinosaurs roamed the earth'. Now the years have rolled by and she has a son of her own to whom, doubtless, she herself will start saying 'When I was young'. So I feel I can safely resume this bad habit. John Aubrey, it will be recalled, would start an anecdote with 'When I was a young man, before the Civil Wars...' Perhaps I should substitute for the Civil Wars, the credit card.

Unless, dear reader, you are, like me, possessed of a Freedom Pass, you will not remember a time without credit cards or, indeed, a time when credit was not easily and widely available. Yet a world without easy credit or ubiquitous credit cards existed as late as the 1970s. One of the reasons for the multifarious problems with the Consumer Credit Act 1974 is that the Act was designed to deal with credit as it existed in that world. Credit has changed beyond recognition in the 37 years since the CCA was passed but the essential nature of the CCA has changed very little. True, a great many bells and whistles have been added to the CCA along the way, but the basic machinery remains the same. One is reminded of the history of the early years of the motor car where the State attempted to regulate motor traffic using statutes designed to regulate the horse-drawn traffic of the Victorian era.

In those days there were finance houses in the land. Of course, they still exist in theory but they are now virtually all owned by the large banks or have become simply the credit arm of those banks. The finance houses were then independent entities, specialising in retail credit. The banks themselves did not like lending to what we would now call consumers. Outside the sphere of house-purchase mortgages, bank credit was almost exclusively confined to the overdraft and overdrafts for the purchase of consumer goods and services were rarer than a hen's teeth. We smile now at the old TSB slogan 'the Bank that likes to say Yes' but at the time what most banks liked to say was 'No', possibly adding (with the great John McEnroe) 'you *cannot* be serious'.

The principal tool of this retail credit was the hire-purchase agreement, one of the great British contributions to financial jurisprudence. I shall use the term 'hire-purchase' to embrace not only hire-purchase but its cognate transaction, conditional sale, and the much less common credit sale (where the property passes on the making of the agreement). Virtually all major consumer items – cars, white goods, large items of furniture – were acquired on hire-purchase. Hire-purchase (though long considered socially down market) had fuelled the consumer boom of the 1930s, providing cars and well-equipped homes to people well down the income scale. So widespread was it that hire-purchase was one of the first aspects of consumer law to be regulated by statute. The Hire-Purchase Act 1937 (which remained in force for 27 years) was the precursor both of the structure and of many of the concepts of the CCA itself.

When the War came in 1939, however, strict controls were imposed on all aspects of the citizen's life and commerce. Legislation – in particular the Defence (General) Regulations 1939 – empowered Government to regulate what we would now call consumer credit. Clearly consumer spending had to be subordinated to the needs of the war economy and there began what became a long series of

Control Orders restricting the ambit of hire-purchase and (because it might become a back door to evasion) of consumer hire as well.

Peace returned but this control (always referred to as 'terms control') remained. The rationale after the War was that terms control would moderate (ie stifle) home consumption and divert productivity to exports. It would also curb inflation.

How did it operate? Essentially the Control Orders, which were being constantly updated and altered, applied to a long list of consumer goods - cars, carpets, cameras, cookers and caravans; beds, bicycles, baths and binoculars; ships and sheds - and much more. Truly it would have required Walt Whitman to do the list real justice. The Orders prescribed a minimum 'deposit' for hire-purchase which would have to be provided by the customer (personally and in cash) before the agreement was entered into and they also prescribed a maximum period for the duration of the agreement. At their height, these were tough restrictions. The norm for a hire-purchase deposit on most consumer durables was one-third and for motor cars it was 40%. The maximum period for a hire-purchase agreement was often as low as 24 months (though for washing machines, cookers and 'water heating appliances' it was longer). With consumer hire, on the other hand, there was a *minimum* hire period (normally 42 weeks).

And the sanctions for non-compliance were equally stringent. Breach of a Control Order was a criminal offence, carrying a potential sentence of imprisonment and, for a body corporate, an unlimited fine. In civil law, any breach made the entire hire-purchase agreement illegal and thus void. Forget the niceties of unenforceable agreements under the CCA. These agreements were utterly void and could not be enforced by anyone. What is more the illegality of the hire-purchase agreement might also avoid the sale by the supplier to the creditor. Loans to the debtor to finance the deposit were equally outlawed. The debtor had to have the deposit in cash and to hand it over before the agreement was signed. Indeed, the supplier's delivery of the goods to the hirer where the deposit had not been paid in full was a criminal offence.

Anyone who has practiced in the field of consumer credit will immediately have predicted the result - widespread evasion. Many and ingenious were the wizard wheezes dreamed up by suppliers, especially of cars, but also of furniture and larger household items such as washing machines and televisions. Any motor dealer who could not fiddle a part-exchange so as to produce apparent compliance with the Control Orders was simply not trying.

Evasion, in its turn, spawned the bogus defence. Long before today's 'claims managers' were a gleam in the milkman's eye, there were dodgy lawyers who would encourage hard-pressed debtors to raise the defence that the deposit had not been paid in full or in cash, with the result that the entire hire-purchase agreement was void. True the finance company might be able to recover the goods, relying on its title (or that of the original supplier) but it could whistle for its financial claims. And, of course, the beauty of it was that, because on paper the debtor had paid (as a deposit) the minimum required for the goods to become protected goods, the creditor could not simply seize the goods. Even, then, if the deposit was, to the knowledge of both parties, a complete sham, the creditor was bound by his own (dishonest) document which said that the minimum had been paid.

Did Control Orders help the economy? The evidence is all one way. It did not. In his master work *Hire Purchase Law and Practice* (which is still widely consulted even though the last edition was published in 1970), Sir Roy Goode said: 'This type of control has been subject to severe criticism by the industries affected - notably the motor car, television and furniture industries - on the ground that it is highly discriminatory, makes long term planning difficult and far from assisting the export drive in fact impedes it, since to incur the risk and expense of opening up markets abroad an exporter needs to be sustained by a buoyant home market ... There is evidence that to some extent the tightening of hire-purchase and rental controls diverts consumer expenditure into other channels,

thus tending to diminish the impact of the controls on overall consumer spending.' Nor did the controls help with inflation which, in the mid 1970s was running at figures well over 20% per annum.

The Control Orders survived the introduction of the CCA and did not disappear until 27 July 1982. There has been no attempt to revive terms control since then.

Fine, you say: all very interesting historically, no doubt, but these dinosaurs have been extinct for nearly 30 years. Why should I care now?

On 16 June 2011, two things happened. First the Government issued a 'consultation document' (CM 8083) *A New Approach to Financial Regulation*. This proposes the creation of a Financial Policy Committee which will be a 'macro-prudential regulator' (their words, not mine). Under this will operate a Prudential Regulation Authority to regulate banks, insurers and 'complex investment firms' and a Financial Conduct Authority to protect consumers and promote competition. The FPC will exist under the aegis of the Bank of England and its remit is summarised as 'identifying and monitoring systemic risks and taking action to remove or reduce them'. The second thing that happened was the first meeting of the (technically) 'interim' FPC itself so its existence (as you might expect) is guaranteed whatever the result of the consultation.

One of the detailed remits of the FPC is to consider credit policy and, in particular, consumer credit policy and it is likely to be given sweeping powers which will include the power to impose terms control. If it is given those powers, ten gets you five that it will use them. Politicians and the media, egged on by the consumerist lobby, are always emoting about the high level of consumer debt, forgetting, of course, that this debt actually funds the retail market without which the entire economy would go belly up.

If the clamour becomes too great and the Committee succumbs by imposing terms control, we can confidently expect that all the harmful effects of the last bunch of controls will recur – only this time, they will be *really* serious. There is no better way to sabotage your economy than by slamming the brakes on credit. Back in 1905, the philosopher George Santayana said: 'Those who cannot remember the past are condemned to repeat it'. So keep your eyes skinned for dinosaurs. Like Mark Twain, the rumours of their death may have been greatly exaggerated.

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