HENDERSON CHAMBERS

Consumer Credit Column May 2011

Richard Mawrey's Consumer Credit Column May 2011

Withdrawal from a regulated consumer credit agreement – Kamikaze justice

Consumers who enter into regulated credit or hire agreements have to sign in a big box urging them to read the agreement before signing it. Isn't it a pity that such a box is omitted from European Directives, because the UK Government almost invariably signs them without reading? The EU Consumer Credit Directive (2008/48/EEC) was an attempt to harmonise the consumer credit law of all 27 Member States. It is interesting to speculate how anyone thought you could harmonise the law of, say, the UK, which has the most developed and sophisticated consumer credit system (conceivably) on the planet, with the law of, say, some of the former Soviet Block countries where credit was a dirty word until 20 years ago. I gather that the driving force behind the drafting of the Directive was Germany, with the UK representatives left bleating on the sidelines.

If that is the case, it must be said that the Directive is not 'Vorsprung durch Technik' because the Germans, and indeed all the Continentals, simply refuse to recognise the concept of hire-purchase and its sister concept conditional sale. This peculiarly English, or perhaps to be fair, Anglo-Saxon, institution is fundamental to our credit system and has been for a hundred years. In Continental Europe it is virtually unknown and certainly not understood.

So we are lumbered, amongst other Directive horrors, with section 66A of the Consumer Credit Act 1974, added by the Consumer Credit (EU Directive Regulations) 2010 (SI 2010/1010) reg 13. This provides a general right of withdrawal from all credit agreements within the scope of the Directive. Why on earth did anyone think this is necessary and why did we agree to it? English law has always recognized that doorstep sales may involve unfair practices and the old CCA had the concept of the cancellable agreement, signed off trade premises after oral representations by the creditor or his agent. Side by side with this we have had for many years separate rules, also EU-driven, to provide for doorstep sales – now the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008 (SI 2008/1816). But does the debtor who has negotiated a large personal loan with every detail poured over by lawyers on both sides really need a right of withdrawal and a fourteen-day right at that?

What happens, then, if you do withdraw from a credit agreement? No problem, said the Continentals, you just pay the money back and that's that. Not so fast, mein freund. What about security for the agreement? What about linked transactions? What about part-exchange transactions? Deafening silence.

Take hire-purchase as a classic example. As Molesworth would say, 'any fule kno' that what happens is that the creditor buys the goods from the supplier under a sale agreement and then lets the goods on hire-purchase to the debtor. In law this is, of course, a contract of hire with an option to purchase on payment of the last instalment, title to the goods remaining until then with the creditor. The 'credit' is 'the total price of the goods less the aggregate of the deposit and the total charge for credit' – CCA s 9(3).

What is the effect of withdrawal? Under s 66A(7), on withdrawal by the debtor, the credit agreement itself (ie the hire-purchase agreement) 'shall be treated as if it had never been entered into' as shall any 'ancillary service agreement' (though the latter is, in practice, confined to an ancillary insurance agreement by s 66A(13)). Section 66A(9) duly provides that 'the debtor must replay to the creditor any credit provided and the interest accrued on it' but is not liable to pay any compensation, fees or charges. So he repays the credit but not the 'charge for credit' beyond accrued interest. He must repay the credit 'without delay' and in any event within 30 days of the notice of withdrawal and he can be sued to judgment if he does not – s 66A(10).

So far so good. With a simple loan – no problem. The creditor has paid you the money: you pay it back with a bit of interest. Job done. With hire-purchase, however, the creditor has not paid the debtor the loan. He has entered into a specialised contract of hire. The amount of the 'credit' is an entirely artificial construct, designed to bring hire-purchase within the concept of a regulated credit agreement. The debtor has not seen a penny of the 'credit'. What he has received is the goods themselves – but on hire. What he has to pay the creditor, however, is the amount of the 'credit', as defined by s 9(3) – in effect the balance of the cash price of the goods (which may be 100% of the cash price). The section does at least recognise that it would be a mite unfair to make the debtor hand the goods back *and* pay the balance of the price so it provides that when he does pay the price in full, he will get title to the goods – s

66A(11).

In short, withdrawal from the hire-purchase operates automatically as a forced sale of the goods to the hirer at the full cash price payable within 30 days or be sued. Withdrawal from a hire-purchase agreement is thus, for the hirer, a Kamikaze operation.

The position is thus the opposite of what happened when a debtor cancels a 'cancellable agreement' under the CCA ss 67-67. The CCA contains a series of provisions which unscramble the whole transaction (ss 69-73, 106 & 110). The hire-purchase agreement goes: the hirer returns the goods to the creditor: the sale transaction between creditor and supplier goes: the creditor returns the goods to the supplier: all security agreements and linked transactions are cancelled: any part-exchange transaction is unwound. Everybody – debtor, creditor and supplier – is returned to Square One. The only real loser is the supplier, who loses his sale.

Hire-purchase is the worst example, but the ill effects of withdrawal under CCA s 66A are more widespread:

- withdrawal cancels the credit agreement and a small category of 'ancillary services' relating to the provision of the credit (mainly insurance) but does not cancel any linked transaction
- s 110 does not apply s 106 to withdrawal under s 66A: consequently any security agreement is not cancelled but remains in force
- the debtor must repay any credit 'without undue delay' and no later than 30 days and must pay interest up to the date of repayment (harsher than ss 70 but this is in the Directive so the UK had no leeway) but there is no obligation on the creditor to repay any money paid by the debtor beyond the vague provision that the agreement is to be treated as if it had never been entered into
- where the transaction is a restricted-use debtor-creditor-supplier agreement or a linked transaction under which the debtor has come into possession of goods, he cannot return the goods but must pay for them in full: similarly, if the linked transaction is a contract for services, it is not cancelled and the debtor must pay the supplier in full
- if the transaction is a hire-purchase, conditional sale or credit sale agreement, withdrawal obliges the debtor to pay in full within 30 days and to take title to the goods
- there is no provision for unscrambling any part-exchange transaction.

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None of this need have happened. All the Directive required us to implement was the bare bones of withdrawal. The Business Department (which drafted the Regulations) could quite easily have brought withdrawal within the same régime as old-style cancellation without offending the Directive but they did not. When I pointed this out in a letter to to the Consumer Minister, Edward Davey, last September and suggested the simple legislative change which would achieve this, my letter was ignored for six months and then elicited a reply that the Regulations should be given time to 'bed down'. Hmmm.

CCA s 55A (also a child of the Directive) obliges the creditor to explain to the debtor in advance (*inter alia*) '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'. So the creditor will have to say: 'you can withdraw from the agreement, Sunshine, but if you do, it may bankrupt you'. Oh dear.

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As first published on www.practicallaw.com

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