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Section 50 of the Consumer Rights Act 2015: should lenders be worried?

KEY POINTS

- Section 50 of the Consumer Rights Act 2015 (the CRA) introduced what has been described as "a new, significant and quite complex provision". It effectively makes anything that is said or written to a consumer and certain categories of information supplied by a trader to the consumer binding on the trader by the creation of new statutory terms of contract.
- However, the scope for s 50 CRA to cause difficulties for lenders is limited by the definition of a "consumer", which excludes corporate entities and persons acting wholly or mainly within their trade, business, craft or profession.
- Lenders (in particular, their compliance teams) will have to ensure that they take practical steps, by training their staff and improving their internal recordkeeping, to ensure that unwanted and unexpected statutory terms are not incorporated into their agreements.

Section 50 of the Consumer Rights Act 2015 effectively gives contractual force to anything written or said by traders to consumers where the consumer takes that representation into account in making decisions about the contract. This article considers how this new provision fits into the landscape of consumer protection in the financial sector and considers how lenders can manage its effect on their businesses.

SECTION 50 CRA

Section 50 CRA is found in Chapter 4 (Services) of the Consumer Rights Act 2015 (CRA). Chitty has described it as a 'new, significant and complex provision'¹ It came into force for most contracts on 1 October 2015 and applies to contracts entered into on or after that date.²

As of yet, there is very little by way of reported cases providing guidance as to how Chapter 4 is to be interpreted and applied. Section 50 provides as follows:

'50 Information about the trader or service to be binding

(1) Every contract to supply a service is to be treated as including as a term of the contract anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service, if-

- (a) it is taken into account by the consumer when deciding to enter into the contract, or
- (b) it is taken into account by the consumer

when making any decision about the service after entering into the contract.

(2) Anything taken into account by the consumer as mentioned in subsection (1)(a) or (b) is subject to-

- (a) anything that qualified it and was said or written to the consumer by the trader on the same occasion, and
- (b) any change to it that has been expressly agreed between the consumer and the trader (before entering into the contract or later).

(5) See section 54 for a consumer's rights if the trader is in breach of a term that this section requires to be treated as included in a contract.'

Sections 50(3) and (4) (omitted above) deal with information that is provided by the trader in accordance with the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.³ However, regulation 6(1)(b) of those regulations provides

that they do not apply to a contract to the extent that it is for services of a banking, credit, insurance, personal pension, investment or payment nature. Those provisions are therefore not considered here.

Chapter 4 of the CRA was introduced to address long-standing concerns that existing law on service contracts, then primarily found in the Supply of Goods and Services Act 1982, was piecemeal and incomplete. To a large extent, Chapter 4 reflects the provisions of the 1982 Act but goes further and provides for the new special remedies of the right to repeat performance and the right to a price reduction.

In July 2012, the Department for Business, Innovation and Skills (BIS) published a consultation paper entitled *Consultation on Enhancing Consumer Confidence by Clarifying Consumer Law*. It described what would become s 50 as 'a statutory guarantee that a service will meet the description given pre-contractually'. BIS did not expect such a statutory guarantee to change the substance of the law (§6.83). Rather, it was considered that the guarantee would make the law 'clearer and more accessible for both consumers and traders' (§6.83).

TO WHICH CONTRACTS DOES SECTION 50 APPLY?

Section 48(1) CRA provides that Chapter 4 applies to 'a contract for a trader to supply a service to a consumer'. Section 2(2) CRA defines a "trader" as a 'a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf'. It is clear that a professional lender would fall within the definition of "trader" when conducting its business with its customers. It is important to note the agency provisions contained within that definition: reference to the trader also includes reference to a third party acting on the trader's behalf. I will refer below to a hypothetical lender, which

falls within the CRA definition of “trader” as “L”.

Section 2(3) CRA defines a “consumer” as an ‘individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession’. For the sake of simplicity, I will refer to “trade, business, craft or profession” simply as “business” below. While much academic commentary stresses the breadth of this new definition of consumer and how it is broader than its counterpart in European legislation, the definition will no doubt exclude a vast swathe of borrowers. I will refer below to an individual borrower who falls within the CRA definition of “consumer” as “B”.

In the first instance, a corporate entity will not fall within the definition of a “consumer”. Second, a person who borrows money mainly for the purposes of her business will be excluded. Whether or not this is the case is of course a question of fact. However, s 2(4) CRA makes it clear that the burden will fall squarely on L if L wishes to assert that B was borrowing for purposes mainly relating to her business.

If B sought a loan to refinance her personal credit card debt, she would clearly be acting as a consumer. However, if she sought finance to purchase a buy-to-let property, the analysis would be more complicated. Unless she was involved in a property business somehow, she again would probably be regarded as a consumer.⁴ For an example of how a court goes about determining whether a borrower was acting as a consumer, as defined in the old law,⁵ see the Court of Appeal’s analysis in *Evans v Cherry Tree Finance Limited*.⁶

The phrase “contract to provide a service” is not defined in the CRA. However, s 48 CRA does provide that the definition does not include a contract of employment or apprenticeship (or in Scotland, a gratuitous contract). Section 48(5) empowers the Secretary of State by order made by statutory instrument to provide that a provision of Chapter 4 does not apply in relation to a service of a description specified in the order. No such order has been made or proposed.

In summary, it is likely that s 50 will be triggered when lenders, such as a banks, are dealing with their private clients. If the lender has any doubts as to whether a person

is acting for business purposes, it would be sensible to ask the borrower at the outset of the transaction and obtain details as to the purpose of the transaction. No doubt lenders already take such steps as the nature of the loan is relevant to all sorts of other issues that could arise (under other legislation like that discussed below). There is now an additional reason to ascertain the purpose of the transaction at its outset and document it carefully accordingly.

TO WHICH STATEMENTS DOES SECTION 50 APPLY?

Section 50 only applies to anything that is “written or said” to the consumer by or on behalf of the trader. It follows therefore that a consumer will not be able, for the purposes of s 50 CRA, to rely on the past *conduct* of a trader. In that limited sense, the provision is narrower than the common law. However, it is broader than the common law in the following more significant way. Section 50 arguably covers what the common law would treat as a representation of opinion (a “mere puff”) or a representation as to a future fact. The traditional common law rule is that a misrepresentation must be a false statement of fact, past or present, as distinct from a statement of opinion, a statement of intention or a mere commendatory statement. However, under s 50 CRA, if L claimed to be the most customer-friendly lender in a particular industry sector, that representation could give rise to liability if untrue.

Section 50 only applies to anything written or said *about* the trader or about the service to be provided. This limitation is particularly helpful for lenders. This is because, in selling particular financial products, lenders often get themselves into trouble by making representations about the future state of the markets. However, s 50 will not apply, for example, if L, in trying to sell a hedging product to B, asserts that interest rates are likely to rise imminently as this statement is not about it nor about the service that it is selling. However, if L stated that there were minimal costs to exiting the hedging product when this was untrue in that those costs varied depending on extraneous factors and could be substantial, such a statement would become

a statutory term of the contract provided one further condition is met: reliance, as discussed below.

THE REQUIREMENT OF RELIANCE

In its consultation paper, BIS suggested that only ‘important statements of the characteristics of the services, including the price and time for performance ... would fall within this statutory guarantee’. No such definition made it into the CRA. However, this intention is partly reflected in s 50 CRA in that only those matters written or said that the consumer ‘takes into account, in other words, relies upon, in making a decision concerning the contract will become terms of it. It will be noticed that s 50 avoids the common law distinction between terms which are warranties (breach of which only gives rise to an action to claim damages) and terms which are conditions (where the innocent party can elect to rescind the contract).

Invariably the question of whether a borrower takes a particular statement into account will unavoidably be a difficult question of fact. Hence, a court will have to make an assessment of all the evidence before it, most importantly evidence from the borrower. It is important to note, however, that s 50 does not require that any reliance has to be reasonable. B might quite foolishly rely on an outlandish statement from L and nonetheless receive the protection of s 50.

The s 50 CRA test for incorporation of pre-contractual statements does seem to some extent to clarify the pre-existing common law. It has always been the case that if a misrepresentation is to be actionable in the contractual context, it must have been a factor inducing the claimant to enter into the contract, although it need not be the sole factor (*Edgington v Fitzmaurice*).⁷

Under the common law, which will of course apply where the CRA does not, one has to distinguish between statements which had become incorporated into the contract or constituted a collateral contract and those statements which were considered to be mere representations. The test to be applied to determine whether a particular matter written or said prior to entering the contract was binding was to consider whether or not it was the intention of the parties, viewed objectively, that

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one party should be under contractual liability in respect of the truth of the statement (*Heilbut Symons & Co. v Buckleton*).⁸

In applying that common law test, the court would take into account matters such as the importance of the statement, the time which elapsed between the making of the statement and the conclusion of the contract, whether the party making the statement was in a better position to ascertain the truth than the party to whom the statement was made and whether the statement was omitted from a subsequent more formal contract in writing.

At first sight, this appears to be a far more difficult and cumbersome exercise than simply to ask whether a consumer took the matter into account in making certain decisions about the contract. However, in reality, in determining whether B is being truthful in claiming to have taken a representation into account, a court is likely to have the very same factors in mind. Hence, the CRA test probably will not avoid a detailed inquiry into the facts in cases where reliance is disputed. However, L and B are more likely to understand the test that will be applied in such circumstances. Further, it might be thought that the substance of the law has changed marginally in that it is perhaps easier for B to turn something said or written prior to the contact into an actionable representation as she only needs to show some minor form of reliance upon it. Lenders beware!

QUALIFYING REPRESENTATIONS/ PREVENTING RELIANCE

It is abundantly clear that lenders have to be very careful in what they say to borrowers about themselves or their services prior to entering a transaction. However, s 50(2) does afford lenders some protection. While s 50(2) allows lenders to qualify their pre-contractual representations, it seems, strictly speaking, from the wording of s 50(2)(a), that if L wants to qualify some representation that it makes to B, it has to do so on the “same occasion”. This is somewhat strange in that it seems that a qualification introduced by L, say the day after the representation was made, but weeks before B enters into the contract or it is performed, would not be effective for the purposes of s 50(2) CRA. Given that there is yet to be any authority on s 50 CRA, lenders ought to be particularly wary at this stage and

ensure that any qualifications are made in the same conversation or correspondence as the representation so qualified.

Lenders, along with most sensible contracting parties, tend to include “entire agreement” clauses in their agreements, which provide that the written terms constitute the entire agreement and expressly exclude any representation made prior to the agreement from being incorporated. It is far from clear how effective such a clause would be in the face of s 50 CRA. In many cases, the written agreement would be presented to the borrower after some key representations have already been made to the borrower. Indeed, statements about the nature of the lender and the service that it provides are by their very nature likely to be made at the outset of the relationship. Hence, the “entire agreement” clause would not qualify the offending representation as it was not made on the same occasion (s 50(2)(a) does not apply). A lender would have to argue that such a clause is ‘a change to it that has been expressly agreed between the consumer and the trader’ (s 50(2)(b)). However, does the inclusion of a boilerplate clause in an agreement that a borrower probably will not read in full result in “express agreement” for the purposes of s 50?

It remains to be seen whether such an argument would work. However, it does seem to circumvent the operation of s 50 in a way which runs counter to the policy of the CRA. Section 57 CRA is entitled ‘Liability that cannot be excluded or restricted’. Section 57(2) provides: ‘subject to section 50(2), a term of a contract to supply services is not binding on the consumer to the extent that it would exclude the trader’s liability arising under section 50’. Section 57(3) provides that consumers are not bound by any term seeking to restrict the trader’s liability if it prevents the consumer from claiming the contract price or other consideration paid by the consumer under any aspect of s 50. One would think that this anti-avoidance measure might feature in a court’s approach to s 50(2)(b), moving it towards a strict approach under which boilerplate entire agreement clauses are nullified.

THE NEW WEAPON: RIGHT TO A PRICE REDUCTION

Section 50(5) refers to the remedies set out in s 54. Section 54, which is entitled ‘Consumer’s rights to enforce terms about services’, makes clear that the

rights under ss 54 to 56 ‘do not affect any rights that the contract provides for, if those are not inconsistent’ (s 54(1)). Further, it is clear that ss 54 to 56 do not prevent a consumer from seeking remedies outside the CRA instead of or in addition to CRA remedies provided that there is no double recovery (s 54(6)). The non-CRA remedies which s 54(7) expressly preserves are: claiming damages; repayment where consideration has (partly) failed; specific performance; an order for “specific implement”; relying on the breach against a claim by the trader under the contract; and exercising a right to treat the contract as at an end.

If L makes a representation about the service that it is to be providing which is incorporated by virtue of s 50 and that representation is untrue (L somehow breaches that term), s 54(3) affords B two potential remedies: a right to require repeat performance and the right to a price reduction. However, if the representation B relied upon was about L and it was untrue, the only remedy available to B under s 54 is a price reduction.

Neither of the two remedies provided by s 54 CRA sit particularly comfortably within the financial services sector. It is difficult to see when it would be of much use to require a lender to repeat its performance. Indeed, talk of repeating performance does not make much sense when it comes to loans, and where repeat performance is not possible, it is not required (s 55(3)). The remedy of a price reduction seems to be of greater relevance and value.

Section 56 explains that the right to a price reduction is the right to require the trader to reduce the price to the consumer by an “appropriate amount” including the right to receive a refund for anything already paid above the reduced amount (s 56(1)). Further, the amount of the reduction may, where appropriate, be the full amount of the price (s 56(2)). The CRA does not give any guidance as to how the “appropriate amount” is to be determined. This is no doubt because it would be difficult to establish general principles that are equally applicable to a wide variety of services.

A right to a price reduction might arise in the following situation. Suppose that, in order to win B’s business, L tells her that its approval of loans is faster than other lenders. This is not actually true. L goes on to take quite some time to approve the loan but B nonetheless goes ahead with it and draws down upon it. Even if

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this delay has not caused B any financial loss because she did not actually need the money very urgently, she nonetheless has a new remedy under the CRA if she took this representation into account (despite not requiring any particular speed of approval) in taking out the loan: the right to a price reduction. B would probably have paid some sort of fees, such as a facility fee, to take out the loan. While it might once have only been a matter of good customer care to offer a reduction in fees due to the making of an untrue statement which caused no financial loss (but perhaps some inconvenience and anxiety), lenders now ought to be aware that borrowers might well be legally entitled to such a reduction depending on the circumstances.

WHAT DOES SECTION 50 REALLY ADD IN THE CONTEXT OF A FINANCIAL TRANSACTION?

Section 53(1) provides that nothing in Chapter 4 affects any enactment or rule of law that imposes a stricter duty on the trader. Rather, Chapter 4 is subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description (s 53(2)). These provisions are particularly important in the context of financial services, which have been regulated with increasing vigour since at least the introduction of the Consumer Credit Act 1974 (the 1974 Act).

The 1974 Act introduced a number of remedies and tools to assist borrowers in respect of loans regulated by that Act. Indeed, s 56 put in place a deeming provision whereby, when a representation is made by a credit broker or supplier in “antecedent negotiations” leading to the conclusion of a regulated agreement, that representation is deemed to be made in the capacity of agent for the creditor, rendering the creditor liable for it. Clearly this deeming provision is driven by similar policy considerations to s 50 CRA. Borrowers now have access to a wide variety of remedies under s 140B of the 1974 Act where they can establish that any element of their relationship with the lender was “unfair” within the meaning of s 140A.

Since 1 October 2014, a consumer may also have a right to a financial remedy for untrue statements in accordance with Part 4A of the Consumer Protection from Unfair

Trading Regulations 2008 (as amended),⁹ Indeed, lenders are very tightly regulated by the Financial Conduct Authority (FCA) under the Financial Services and Markets Act 2000 and regulations made thereunder as well as by the FCA's various handbooks (notably COBS, ICOBS and CONC). Section 50 CRA does nonetheless make its own contribution in that it might well apply in some circumstances where loans are not otherwise regulated and provides a new remedy (price reduction).

CONCLUSION

While it seems that the introduction of s 50 CRA is unlikely to have any significant impact on lending businesses, lenders ought nonetheless to take steps to ensure that their staff are well trained as to the consequence of pre-contractual representations that they make to customers. There is now a heightened risk that “sales talk” might have become actionable in a way that it previously was not: the right to a price reduction. Further, even once the contract is in force, representations can lead to liability if relied upon by the borrower in making any decisions under the contract.

It has for a number of years been the practice of financial institutions to record most telephone calls with customers. In mis-selling claims (such as for mis-sold hedging products), they have often had to obtain transcripts of sales calls to determine what was actually said. This practice will clearly become all the more important now. Further, many financial institutions such as banks have their own internal electronic noting systems in which conversations with customers and internal communications are recorded, usually by the customer relationship manager, in summary form. Again, this practice will take on a heightened importance going forward. Transcripts and internal records of conversations are likely to be the most valuable evidence in establishing what was said to a borrower, when it was said and importantly, whether it was qualified in any way to prevent the customer relying upon it. Hence, compliance teams will need to ensure that staff are trained to keep sufficiently detailed internal notes of conversations.

It will be less easy for lenders to protect themselves in circumstances where borrowers deal with suppliers who make representations

about the lender. Where a lender has an ongoing relationship with a particular supplier or third party who introduces customers to it, it will perhaps be necessary to obtain some sort of contractual indemnity from the supplier for losses arising out of any inaccurate representations made by the supplier to the borrower about the lender or its services.

In the first few years of the operation of Chapter 4 of the CRA, while its boundaries are still being established by the courts, some litigants might try to take advantage of these provisions by claiming minimal reliance on mere puffs about a lender or its services and demanding a large price reduction. A lender would be well advised to be in a position to produce to a customer immediately upon receipt of such a complaint, clear internal notes of any discussions that might have taken place to nip any such threats in the bud. ■

- 1 *Chitty on Contracts*, 32nd edn, paragraph 38-532.
- 2 Art 3(c) of the Consumer Rights Act 2015 (Commencement No 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 2015/1630). Art 6(1) provides that it does not apply to any contract entered into before 1 October 2015 which would otherwise be covered by Pt 1 or 2 of the Act. The section came into force for consumer *transport service* contracts on 1 October 2016.
3. SI 2013/3134.
- 4 This particular example is made all the more complex by operation of the Mortgage Credit Directive Order (SI 2015/910).
- 5 The now revoked Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).
- 6 [2008] EWCA Civ 331.
- 7 [1885] 29 Ch. D. 459.
- 8 [1913] AC 30.
- 9 SI 2008/1277.

Further Reading:

- How fair are bank charges? [2008] 6 JIBFL 282.
- Rethinking conduct regulation [2015] 7 JIBFL 413.
- The Consumer Rights Act 2015: clarity and confidence for consumers and traders? [2016] 8 JIBFL 504.