

Consuming Passions

Random thoughts on consumer matters by Richard B Mawrey QC. In focus: changing fortunes in consumer law.

2. And never darken my doorstep again!

One of the reasons why consumer lawyers tend to be fat and fussy fellows with a twinkle in the eye is that theirs is a field where the old maxim applies 'as one door closes, another door opens'. Indeed in many cases the second door opens well before the first one has properly shut. Repeal of the Consumer Credit Act 1974 (CCA) s 127(3) to (5) which provided that seriously non-compliant agreements were permanently unenforceable and a series of tough decisions by the courts have stemmed the flow of litigation generated by the claims farmers with their mantra of 'we can get you off your credit card debts' (they couldn't). That door is beginning to creak shut.

At the same time a rather unlikely door is beginning to swing open, thanks to the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008 (SI 2008/1816) (the Doorstep Selling Regulations). Doorstep selling in the accepted sense of the term is, of course, nowadays very rare. In any event, the Regulations themselves exempt a wide range of contracts that might take place on the doorstep, such as supply of milk and other foodstuffs. None the less, the Regulations have brought forth a joyful harvest of litigation arising out of road traffic accident cases. Many vehicle insurers consider that credit-hire arrangements, whereby the innocent party to an accident enters into an agreement to hire a replacement vehicle on terms that the hire is only paid for when the guilty party's insurers pay over the damages, are being used to inflate damages in respect of such vehicle hire. Consequently they have sought to exploit firstly the CCA and latterly the Doorstep Selling Regulations to argue that the credit-hire agreement is non-compliant with the relevant legislation and thus unenforceable.

Unfortunately, the House of Lords made the very foolish and short-sighted decision that an insurer was permitted to rely on the unenforceability of the credit-hire arrangement to escape paying that element of the damages, principally in *Dimond v Lovell* [2000] UKHL 27. If, as both common sense and legal precedent might have suggested, the House had held that, for a third party insurer, this was *res inter alios acta* and only the parties to the agreement could assert unenforceability, then all the later problems could have been avoided (though the lawyers would have been the poorer).

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 can be ignored, but the visit by the trader to the home etc is important. Where the Regulations apply, the agreement is subject to a seven day right of cancellation. The trader must give the consumer a notice of his right to cancel in what is, to all intents and purposes, a

statutorily prescribed form and there must be a 'detachable slip' containing a cancellation form (also in prescribed wording and completed in advance by the trader). If these requirements are not met, the agreement is unenforceable. Reg 7(4) provides 'Where the contract is wholly or partly in writing the notice must be incorporated in the same document.' If incorporated in the contract or another document, the notice must be contained in its own box.

These rules cause two main areas of difficulty. The first is whether the contract is 'made' during the trader's visit to the consumer and the second is what amounts to 'incorporation' in the contract.

The norm of credit-hire used to be that the consumer would contact the credit-hirer provider, by telephone or internet, discuss the problem and, if eligible, would be accepted by the provider as a customer. The provider would draw up an agreement and send the vehicle to the consumer's home or place or work. The delivery driver would hand over the vehicle, the consumer would sign the agreement and the driver would take it away with him. That was all. Quite clearly such a contract was 'made' at the time of delivery and, as this was at the consumer's home or place of work, the regulations applied. Now for a long time the credit-hire providers did not know about the Doorstep Selling Regulations, believing, not unreasonably, that the Regulations could not apply to them. Their contracts did not contain the notice of cancellation rights. Accordingly, when insurers started taking unenforceability points, the providers strove to construct arguments for saying that the contract was not 'made' during the visit to the consumer's home but at some other time. In most cases the arguments failed on the facts. In *Chen Wei v Cambridge Power and Light Limited* (Judge Moloney QC at Norwich County Court on 10 September 2010) the argument that the agreement had been 'made' over the telephone was rejected on the obvious ground that the deliveryman had presented the consumer with a written agreement which he had signed. Similarly where the customer sees the agreement for the first time on delivery and signs it, even if the agreement is not 'made' then, his signature amounts to an offer to contract which the provider accepts by later countersigning the agreement.

Incorporation, however, does not mean that the notice of cancellation rights has to be on the same piece of paper as the contract or stapled to it. It is sufficient if the contract refers to and 'incorporates' the notice. If it does not, then a cross-reference to the contract in the notice itself will not achieve incorporation. See *Guerrero v Nykoo* (Swansea County Court 25 October 2010).

Thus the safest course for the credit-hire provider is to bite the bullet and ensure that his contract incorporates the notice of cancellation rights in the prescribed form with the detachable slip. Or conclude the whole contract on the internet before the vehicle is delivered – but that creates a whole different range of problems, outside the scope of this column.