



Richard Mawrey QC's consumer credit column: NOVEMBER 2012

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

In his seventeenth column, Richard considers the “Green Deal” finance arrangements under the Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012 (*SI 2012/2079*).

Richard Mawrey QC, Henderson Chambers

THE WEARING OF THE GREEN

To borrow the catchphrase of that stalwart of Dad's Army, Private Frazer, “we're all doooooomed!” Climate Change (used to be Global Warming until a long run of filthy summers and frozen winters caused a quick re-badging exercise) stares us in the face. We must all slash our carbon emissions or face the dreadful prospect of polar bears evicted from the melted North Pole doing battle in the streets of Tunbridge Wells with tigers driven north by the insufferable heat of the Indian jungles. Truly, the sky is falling on all of us.

But help is at hand. Our noble governments are determined (single-handed if necessary) to halt the slide into the burning fiery furnace by turning us all green. In a Quixotic gesture (tilting at wind farms?) the Labour Government passed the Climate Change Act 2008 which obliged the UK to reduce its carbon emissions to levels not seen since I. K. Brunel was a lad. Not being an expert in all forms of the Higher Lunacy (being a consumer credit guru is enough for one elderly practitioner) I have not worked out what happens if we don't reach these targets. Does the UK sue the Government or does the Government sue the UK? Must we say, in the approved 60s liberal manner, “we are all to blame”? Perhaps we shall have to undergo an act of collective penance, our white sheets sadly besmirched by the smuts belching forth from the dark satanic mills which we will have wickedly failed to shut down. Will we each have to adopt a polar bear – surely, by that time, so disoriented by Tunbridge Wells as to be a bipolar bear? As the late departed *News of the World* used to say: “we should be told!”

As readers of this column will be less than gobsmacked to learn, in real life the brunt of saving Planet Earth is going to fall on us. We are going to save the world, not by crying Shazam! and wearing our underpants outside our tights, but by insulating our lofts. Our Government (“we aim to be the greenest Government of all time”) is offering us a Deal – indeed a Green Deal. Now when a Government, like any other wide boy, offers you a deal, you just know that the ugly tearing sound in the background is the sound of you being ripped off. But what, you may fairly ask, is this to do with consumer credit? If we want a critique of global warming mania we can have Christopher Booker who is a much more literate writer.

Be reassured, this is not a rant, as the Chancery lawyers used to say, “in gross”. There is a connection. The planet-saviours *have* parked their (electrically-powered, made-from entirely-sustainable-materials) tanks on my lawn. Readers will know that I have a weakness for statutory instruments with a really punchy title and here's a doozie: The Green Deal Framework (Disclosure, Acknowledgment, Redress etc.) Regulations 2012 - (*SI 2012/2079*). As with our old friends the Doorstep Selling Regulations, the “etc” is part of the title.

- So, as they say, what's the Deal? The objective of the exercise is to persuade us to make our homes energy efficient by loft insulation, cavity insulation, heat recovery systems and so forth. But you can't just go ahead and do it: perish the thought. You will need to call in the professionals. And who are they? They are people who are "accredited" - so, straight away, we have a nice bureaucratic machine for accrediting them. Come back Mr Tite Barnacle, all is forgiven.

Step One: you (the concerned, eco-friendly, householder) call in an accredited Green Deal Assessor. He will examine your property and compile a Green Deal Advice Report ("GDAR"). This will recommend energy improvement measures. Now at this point you are free to decide not to proceed with those measures: we haven't quite yet gone down the path to compulsory loft registration, though no doubt that will come. If you decide to have the work done and pay for it yourself, fine. Your home will be more snug though your bank balance will be lighter. Well, swings and roundabouts.

That, however, is not the essence of the Green Deal. The essence of the Green Deal is that you get your property eco-enhanced on tick. And this is where consumer credit comes in. So – Step Two: you take the GDAR (sounds like a Victorian railway company) to an accredited Green Deal Provider ("GDP", not to be confused with the other GDP which will have the stuffing knocked out of it by all this green nonsense). The works are costed and are carried out by the GDP. The householder who arranges for the works to be done is referred to as "the improver" (possible title for a film starring Bruce Willis or ex-Governor Schwarzenegger?)

Step Three: the cost of the works is financed by a finance agreement – the Green Deal Plan. This is no ordinary finance agreement, as we shall see.

On its face, it is a consumer credit agreement regulated by the Consumer Credit Act 1974 (CCA). This means that the GDP must hold a valid licence and that the agreement must be documented in accordance with the Consumer Credit (Agreements) Regulations 2010 (SI 2010/1014). The agreement will be subject to the normal rules about pre-contract disclosure, supply of statements and so forth.

At this point, however, things become decidedly weird. The debt, which may include charges for credit, is payable by instalments. Fair enough. The instalments, though, are not paid directly by the improver to the GDP. They are collected by his energy supplier through his quarterly energy bill and passed on by the supplier to the GDP. If the improver changes supplier, the collection obligation shifts to the new supplier.

The instalments themselves are governed by the legislation. The GDP must make two assessments. The first is to assess (in effect at current prices) the value of the energy savings in the first year and the second is to assess the period during which the improvements will result in energy savings. The golden rule is that the instalments cannot exceed the amount of the first year savings. Thus if the assessment is that the improvements will reduce your energy bills by £75 per quarter, that is the ceiling for the instalments. The agreement itself cannot last longer than the period of the energy savings.

Now comes the wacky bit. The agreement is not itself secured on the land, so no legal or equitable charge is created. But the agreement passes by operation of law to whoever pays the energy bills on the property. Thus, when the improver sells the property, he must notify the purchaser in advance (not too long in advance, of course – the minimum is seven days before the transaction is entered into). The GDP has no say: his right to payment becomes a right to payment by the new householder. If the property is let and the tenant pays the energy bills, then a change of tenant means a change of payer. If the new payer defaults or is a man of straw, tough. The GDP may have to whistle for his money.

Pausing there, what Mr Davey, in his new role as Baron Frankenstein, seems to have concocted is the first known instance of a personal contract where the *burden* of the contract is assignable without the consent of the other contracting party. It is a charge, yet not a charge: it runs with the land but is not enforceable against the land. Bizarre, hein?

As Boris Karloff lurches down from the Castle to terrorize the peasants in the village below, let us contemplate the joys of the Green Deal Plan. The astute will immediately have noticed that a by-product of this well-intentioned attempt to turn back the tide (at least Canute *knew* that it would not retreat on his command) will be a bonanza for the legal profession. Consider.

First we have the Assessor. Accredited he may be, but what if he is (a) grossly negligent or (b) fraudulent or (c) in league with the Providers? Will he be liable to the householder: will he be liable to the GDP? The GDP is bound to make a reasonable assessment of the energy savings but what happens if these turn out to be way out of line? The GDP says "these improvements will save you £150 a quarter on your energy bills". One year later, the householder finds out, by comparing his new bills with his pre-improvement bills, that the savings are only £50. Can he sue the GDP? Or reduce his instalments?

The improvements contract itself between the GDP and the householder will, of course, be subject to all the usual potential legal money-spinners – claims for delay, claims for bad workmanship, loss of use of premises and so forth. Will the householder – or better still the subsequent energy bill-payer – be able to maintain an action for defective workmanship and, if so, to deduct the cost of remedial work from the instalments? And what if the workmanship is so bad that improvements that would (if properly carried out) have resulted in the savings estimated by the GDP in reality produce much lower savings? The GDP is required to guarantee the works by the Regulations but we all know builders. They go out of business.

What then? So, my friends, it'll be a hot time in the old town tonight – for us consumer lawyers at least. But my advice is that, when having anything insulated that can be insulated, get the workmen to install a few polar bear traps in the garden. After all, the Green Deal Plan might just not work. Oh, and the odd tiger-trap.