

Richard Mawrey QC's consumer credit column: August 2011

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In his fourth consumer credit column, Richard considers the OFT's proposed revisions to its guidance on debt collection.

Richard Mawrey QC, Henderson Chambers

Should debt be voluntary?

Does anybody now remember the Rule of Law? No, it's not the name of a 1970s pop group, though it might well have been. The Rule of Law was an odd quirk of British life that survived for the odd few hundred years but was rightly abandoned in the liberal, caring touchy-feely modern world. For those whose memories don't go back that far, the essence of the Rule of Law was the quaint notion that the citizen was possessed of rights and obligations, established and guaranteed by law, and that the state would provide an impartial and independent judiciary to enforce them. The idea was that if citizen A had a legal right which imposed a corresponding obligation on citizen B, A could go along to a court and ask the court to enforce his right against B. The fact that B rather wished he didn't have the obligation or would find it irksome (or even disastrous) to perform the obligation was not a matter the court could or would take into account.

Indeed the whole concept of the Rule of Law was that, if someone failed or refused to perform a legal obligation, the state, through the legal system, would compel him to do so. The courts were not there to provide a mediation service, seeking to reach a consensus between claimant and defendant, so that every dispute ended in agreement and handshakes all round. If the dispute was taken to court, then the court would resolve it, whether the parties agreed to the decision or not. Justice was essentially coercive.

Nowhere was the Rule of Law more crucial than in the enforcement of contracts. Contracts are consensual: the parties voluntarily accept and assume legally binding obligations, in return for receiving legally enforceable rights. These rights and obligations are not imposed on them from On High: they are consciously willed by the parties.

Lord Melbourne is not now much remembered as a Prime Minister but he was a man who believed firmly in what we would now call small government. He memorably said: "the whole duty of government is to prevent crime and to preserve contracts." For him, these were the irreducible minimum functions of the state. Well, we gave up on prevention of crime some time ago. One had hoped that at least contracts would be preserved. Dream on.

In Samuel Butler's *Erewhon* the main (indeed the only) running joke is that in the mythical country Erewhon crime is treated as a disease but illness itself is criminal. Made the Victorians chuckle, I shouldn't wonder. But perhaps we have created a modern Erewhon in which debt is treated as a disease. Debt has ceased to be a legal obligation, voluntarily undertaken by the debtor of his own free will and judgment. It has apparently become an illness, striking the unfortunate debtor like a bacillus or a virus. It is as if the debtor has no more personal responsibility for incurring the debt than he has personal responsibility for going down with 'flu or contracting E-coli poisoning from incautious lurching in a German fast-food joint. The debtor is no longer someone who has borrowed money and ought to pay it back. He has become "vulnerable": maybe he has even attained the highest status awarded to the citizen in contemporary Britain, that of being a "Victim".

What has brought this thought to mind is the fact that the OFT has taken strongly against debt enforcement. The OFT doesn't like enforcement and proposes to do something about it. And it now has the power to make its views bite. Under the [Consumer Credit Act 1974 \(CCA\) section 25\(2A\)\(e\)](#) when deciding whether to grant a licence or to impose "requirements" on an applicant, the OFT must assess whether the applicant has "engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not)." This in turn is defined by [section 25\(2B\)](#) whereby "business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending."

The OFT has made it clear that "business practices" include enforcement. Those who do not follow the OFT's "guidance" on enforcement are in for a rough time. The OFT has always had guidance on debt collection: the current document is [OFT 664](#). Earlier this year, however, it embarked on a [consultation](#) on its proposals for new and strengthened guidance. Although the consultation period ended in June 2011, the consultation document is worth looking at because what is "consulted upon" may be expected to be adopted, whatever the result of the consultation. Like most consultation exercises, it sets out the proposed course of action and then (in reality) asks "Do you consider this to be: (a) a good idea; (b) a very good idea; or (c) an exceedingly good idea?".

The OFT proposes what it calls "overarching principles of consumer protection and fair business practice" in the matter of debt collection. After extolling transparency, the principles go on: the creditor is to "exercise forbearance and consideration towards debtors experiencing difficulty. We would expect businesses to work with such debtors with a view to providing them with reasonable time and opportunity to repay debts." He is also to "act proportionately when seeking to recover debts, taking into account debtors' circumstances. Actions taken in respect of arrears or default should give proper consideration to available options and the likely effect of such action on the debtor."

As Wodehouse might have said, a young man standing at Life's Crossroads can choose to go into moneylending or into social work. Having taken the moneylending road, it's a bit tough to discover years later that you are required to do both. After all, nobody makes social workers lend money.

The long list of do's and don'ts requires businesses (*inter alia*):

- Never to exert physical or psychological pressure on debtors or third parties;
- To be truthful and fair in their practices and dealings with debtors or their third party representatives;
- Not to act in an unclear or threatening manner when visiting debtors;
- Not to use unfair methods if seeking to collect statute barred debt,

and so forth.

All mum-and-apple-pie stuff no doubt but the devil is in the detail. Take, for example, what the guidance calls "physical/psychological harassment". Now, clearly, nobody is going to cheer on the school of debt collection that employs large men with cauliflower ears and Doberman dogs, and the OFT is on pretty uncontroversial ground in condemning that. But psychological harassment? That list makes interesting reading. "Contacting debtors at unreasonable times". Query: has anyone out there ever come across a debtor who accepted that any demand for repayment was made at a reasonable time? For the kind of debtor the OFT has in mind, a "reasonable time" is "never". Persuading (in OFT-speak this is "pressurising") the debtor to sell property or extend borrowing – that's harassment too.

If a creditor fails to accept debt repayment proposals put forward by the debtor or a debt advisor, he may be guilty of harassment, as he may if he fails "to suspend the active pursuit of recovery of a debt for a reasonable period under circumstances in which it can be evidenced that the debtor is developing a repayment plan on his own account, or with the assistance of a debt advisor". I particularly like "disclosing or threatening to disclose debt details to third parties unless legally entitled to do so." Surely you do not yet require a permit to tell a third party that somebody owes you money. Patently, if there were circumstances where you were forbidden by law to inform a third party of a debt, breach of that legal duty might well be harassment, but the idea that you can only disclose a debt where you have some sort of permission from the OFT to do so is very strange.

But it gets better. "Acting in a way likely to be publicly embarrassing to the debtor, either deliberately or through lack of care" is provided with examples. These include sending debt reminders on a postcard (the postman might read it), asking others to pass on messages to debtors (thus revealing that the debtor owes money) and posting messages on social networking sites (so no debt collecting on Facebook). And there is "failing to suspend the pursuit of recovery of a debt under circumstances under which notification has been given – and/or it is reasonably believed – that the debtor lacks the mental capacity to make relevant financial decisions regarding the management of the debt at that time". Worth a thought. You are a creditor pursuing a legally recoverable debt. The debtor writes – or more likely gets someone else to write – "Mr X is very stressed by financial worries and can't face dealing with any of his debts". If you fail to call a halt there and then to the debt collection

process, then the OFT will come down on you like a ton of bricks and you can kiss your licence goodbye.

Naturally, threatening to sue someone for a debt when he is in financial difficulties is very naughty and don't even think of taking any steps to repossess the debtor's home. Nor are "deceptive and/or unfair methods" to be countenanced. These include refusing to negotiate with the Citizens Advice Bureau (CAB) and requiring someone who says "I am not the debtor" actually to produce evidence that this is the case. So, if the debtor, when confronted, has the presence of mind to say "Not me, guv – I'm Joe Bloggs, just visiting the debtor's home to watch the football", your only course is to say "Sorry you've been troubled" and slink away.

While it's enjoyable to poke gentle fun at the OFT, the reality is very serious. If the OFT persists in regarding all debtors as vulnerable victims and makes enforcement of legally enforceable debts unreasonably onerous, then debt default will rise dramatically. We have seen the damage brought about by the "claims management" firms who claim to be able to exploit loopholes in the CCA and its regulations to "get you off your debts". If we then create a culture where "won't pay" is equated with "can't pay", then debtors won't pay. Instead of regarding creditors as bloodsucking capitalists whose discomfiture should be welcomed, we should reflect that, at the end of the day, the cost of the bad debtor is passed on to the good debtor. Ask yourself: "Do I really want higher interest charges?"

Even if the OFT does see itself as working towards a Utopia (or an Erewhon) where all debt is voluntary, the rest of us should resist it, because we would all be the losers in the end.