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Retained provisions of the Consumer Credit Act

By Richard Mawrey QC

Mice and Men

Long, long ago, when the world was young and it was always summer, I took A Level Latin and one of our set books was Horace's famous poem, *Ars Poetica*. This poem contains some very good advice on how to write poetry (don't just take my word for it, Byron thought so too, and wrote his own updated version). It contains the memorable line *parturient montes nascetur ridiculus mus* – 'the mountains will go into labour and give birth to a silly little mouse'. Don't start your epic with high flown words as to recounting the fate of Troy because the rest of the poem is unlikely to live up to them – hence the mouse. The *locus classicus* of what happens when you do not follow Horace's advice is to be found in the poetic oeuvres of the great William McGonagall (the Bradman of bathos) with which I am sure readers will be fully familiar.

This particular modern epic starts some 56 years after I sat in my school hall gazing at the examination paper and trying to puzzle Horace's hexameters. Back in 2014, when it assuredly was *not* permanent summer, the Financial Conduct Authority was in its pomp, risen, Phoenix-like, from the smouldering ashes of the Financial Services Authority. A government which had sworn on a stack of bibles (before coming into office, bien sûr) that it would abolish the FSA holus bolus, not only reconstituted it as the FCA but handed the entire regulation of the consumer credit and consumer hire industry to it, blithely

ignoring the fact that its constitution and procedures, while possibly appropriate for the regulation of financial services, were wildly out of kilter with the consumer credit industry.

Prior to 2014, the Consumer Credit Act 1974 (CCA) had regulated the consumer credit and consumer hire businesses entirely by statute. The Act itself and its large body of dependent statutory instruments laid down a whole code of detailed and very prescriptive rules covering every aspect of the industry from authorising lenders to controlling the contractual process - initial marketing, pre-contract dealings, the form of contracts themselves, the provision of information and the procedures for enforcement. Many of the rules were criticised from time to time and there is no doubt that the rules for the form and content of agreements and of statements and notices attained a level of obsessive detail that made lending a very expensive operation for the lenders. But this was black-letter law. Everyone – regulators, lenders and customers – knew exactly where they stood. What is more, the CCA and the regulations spelled out in clear (often Draconian) terms what the sanctions were for failing to comply. The CCA's approach to accessing the interior of a walnut may have been the sledgehammer, and occasionally the bulldozer, but the rules were there and were ascertainable.

Being statutory, the rules were made by Parliament or, at the least, in statutory instruments subject to the scrutiny of Parliament. Even when the European Union took a hand, as when it adopted the Consumer Credit Directive (2008/48/EEC), that Directive had to be translated into black-letter UK statutory law, as duly happened in 2011. Furthermore, being statutory, the ultimate arbiter as to the meaning of the rules was the court. Occasionally courts might come to decisions which surprised long-standing practitioners in the black arts of consumer credit but that was the rub of the green. The rules were there and they could only be changed by a Parliamentary process. This meant that changes in the law were usually (though not always, as with the Directive) signalled in advance and were subject in most cases to consultation exercises. What is more,

changes tended to have a longish lead-in so that the industry could adjust its practices in time. Not perfect, of course, but it worked.

This was not the *modus operandi*, though, of the FSA, now to be the FCA. The FSA had always preferred to work by its own rules, contained in the FCA Handbook, a tome longer than *War and Peace* and *À la Recherche du Temps Perdu* combined. From the point of view of the regulator, this was an ideal system. Rules could be made and changed on whim, with little or no notice to those concerned. Those rules were not subject to the slightest scintilla of Parliamentary or, indeed, ministerial control: they represented a completely unfettered power to govern by decree which would have made Louis XIV or Josef Stalin green with envy. The FCA Handbook is probably the only source of UK law where the relevant website permits one to access the Handbook at any given moment in time on the basis that the contents of the Handbook on, say, 5 June 2019, may be different from those on 4 June or 6 June.

Better still, unlike the CCA and its regulations (which were precise and pernickety to the point of being anal), the rules could be expressed in the widest and vaguest possible terms. Take, for example, the famous principles set out in Principles for Business (PRIN) – one of the shorter sections (say, for example, *Death in Venice* or *Heart of Darkness*). Principle 6 strikingly reads: 'A firm must pay due regard to the interests of its customers and treat them fairly'. Even the Almighty's rules for the conduct of mankind contained in the Ten Commandments did not ascend to this level of generality. What is more these are rules of which, in the final analysis, the regulator is the final arbiter. What is fairness? It's what we say it is. Oh, and we'll only tell you that you have acted unfairly *after* you've done it.

Even for a government as inept as the Coalition, this forced marriage of the precise statutory requirements of consumer credit legislation and the uncontrolled discretion of the unaccountable regulators of financial services was unlikely to prove a success, nor has it. The government had sufficient wit to retain most of the black-letter statute, though

some aspects were abandoned to the Handbook. CCA s 55A (explain to the customer) and s 55B (check the customer's creditworthiness) occupied perhaps half a page of *Goode* and were replaced by the Consumer Credit Sourcebook (CONC) Chapters 4 and 5, which fill no fewer than 61 pages in CONC (to quote Alistair Cooke, 'as at the time of this writing').

This, however, was just the beginning. Flushed with its new-found power, the FCA clearly felt there were new worlds to conquer. Why not replace the whole of the CCA and tis regulations with a myriad of lengthy, ill thought out and waffly rules contained in the Handbook (and add *The Decline and Fall of the Roman Empire* to the overall length)? So the FCA put the arm on the Treasury which has, at least in theory, the oversight of this regulator, and the result was a crafty section slipped into an amending set of regulations, the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014 (SI 2004/366).

Part 5 of these Regulations provided (reg 20):

> *(1) The FCA must arrange for—*
> *(a) a review of the matter specified in paragraph (2);*
> *(b) the review to result in a report.*
> *(2) The matter is whether the repeal (in whole or in part) of provisions of the Consumer Credit Act 1974 would adversely affect the appropriate degree of protection for consumers.*
> *…*
> *(5) The review must in particular consider—*
> *(a) which provisions of the Consumer Credit Act 1974 could be replaced by rules or guidance made by the FCA under the Financial Services and Markets Act 2000;*
> *(b) the principle that a burden or restriction which is imposed on a person in relation to the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction.*

This was pretty wide. The FCA was being given *carte blanche* to replace 40 years' worth of carefully thought out and judicially considered legislation with the fluid and amorphous rules and guidance of the Handbook. There *is* a Santa Claus.

There were those ancient grey-bearded dinosaurs (of whom I was one) who said 'you can't do it'. The essence of the CCA was, they said, that it laid down precise rules and imposed equally precise sanctions for their breach. Those sanctions were, in the last resort, subject to judicial control. You cannot achieve the same result by purely regulatory means. It isn't going to work.

And then there was Europe. Remember that, in 2014, Brexit was barely a gleam in the (somewhat bloodshot) eye of Mr Nigel Farage. In those dear dead days it was assumed that we were going to remain in the European Union for the foreseeable future. By a strange irony of fate, the regulations tasked the FCA with reporting by 1 April 2019 which would have been two days after Britain's triumphal exit from the EU: only that didn't happen either. Be that as it may, whatever may have been the domestic position, we had signed up to the Directive which obliged us to put its provisions into statutory form. As the Directive had been largely pirated from the CCA (though one imagines they failed to offer its draughtsman, Francis Bennion, a royalty), this actually represented very little hardship for the UK. True, some of the more arcane and Byzantine rules for the form and content of regulated agreements had to be reluctantly abandoned for something that actually made sense to the customer, but we could live with that.

The fact remained, however, that, for so long at least as we stayed in the EU, wholesale repeal of provisions which reproduced those of the Directive was not an option. Even if domestically there were good reasons for replacing statute with a regulatory handbook (and these were hard to seek), we were bound to the EU wheel.

Nevertheless the FCA set to work with a will. Consultations were held. Suggestions were mooted and an interim report published. Eventually, in March 2019, after a process barely longer than the Great War, the Final Report hit the bookstands. Ashen-faced consumer lawyers with trembling hands snatched the report off the shelves and anxiously scanned the pages. Was this the end of the CCA as we know it? Had the FCA descended with fire and sword, as Sellar and Yeatman would put it, and slashed and burned it way through the much loved thickets of the Consumer Credit (Agreements) Regulations, 1983 (original version and 2005 version) or the Consumer Credit (Agreements) Regulations 2010? Was the SECCI for the scrapheap?

Er – well, no. Regret and longing permeate this melancholy work but, in the cold light of day, even the most enragés regulators realised that their beloved Handbook, Biblical or even Koranic as it might seem to them, did not cut the mustard. There was, in the end, no regulatory substitute for the pains and penalties visited by the CCA upon errant creditors. You could reproduce the detailed rules of the CCA and its regulations in the Handbook (at ten times the length, naturally) but where would be the teeth?

Lest it be thought that the author is indulging in Stalky-like gloating, let us quote the *ipsissima verba* of the Report's Summary:

> ***Rights and Protections.***
>
> 1.17 **This theme includes credit brokerage fees, connected lender liability, variation of agreements, default and enforcement, credit-tokens, pawnbroking, withdrawal and cancellation, early repayment, termination, time orders and unfair relationships.**
> 1.18 **Our view remains that the protections offered by these provisions continue to be important, and should be retained in some form.**
> …
> 1.20 **However, for most provisions in this theme, our view remains that they could not be repealed without adversely affecting the appropriate degree of consumer protection. This is because it would not be possible to replicate the same level of protection under the FCA's current rule-making powers. As such, we see merit in keeping the provisions in the CCA or other legislation.**

All is not entirely lost, however: small redoubts remain defended. Refunds of credit brokerage fees under CCA s 155 could be transferred to the Handbook (don't sit at the back looking gormless – *of course* you knew about s 155).

But what about information requirements? After all, whole swathes of CONC are already given over to supplying the intended borrower with what unkind persons have described as an 'information overload'? What we are talking about here is set out in 1.22:

> ***Information requirements include pre-contract disclosure, the form and content of agreements and the provision of copy documents. They also include post-contractual requirements like statements and notices. Some of these must be provided periodically, or when triggered, while others apply only upon request.***

Nowhere is regret more apparent than in this section:

> ***1.24** For most of the substantive information disclosure obligations in the CCA and its regulations, we think these could, in principle, be replaced by FCA rules. In some cases, it may be possible to adopt a more principles-based, outcomes focused*
> *approach reflecting the FCA's broader approach to regulation, subject to ensuring that consumers remain appropriately protected.*
> ***1.25** However, the loss of the associated sanctions, including unenforceability, would, we think, adversely affect the appropriate degree of consumer protection. An option would be to replace the information disclosure obligations with FCA rules, with the related provisions that provide for the civil consequence of non-compliance with these obligations being retained in the CCA or other legislation.*
> ***1.26** There would need to be consequential changes to those provisions to apply them to breaches of FCA rules. We recognise that this may require primary legislation if the amendments could not be achieved through the use of the Treasury's order-making power under the Financial Services Act 2012.*
> ***1.27** Our overall view, therefore, remains that we see merit in repealing the relevant information requirements, with a view to their replacement by FCA rules, but only if this does not result in the loss of corresponding sanctions.*

In other words, we would just love to bring all the information requirements in-house but we would have to have primary legislation in order to reproduce all the sanctions which are already there (and, unsaid but implicit, this ain't going to happen).

Sanctions are, it seems, the stumbling block, as Chapter 7 of the Report recognizes.

> *1.29 Our view remains that the 'self-policing' nature of the sanctions of unenforceability and disentitlement to interest and default sums contributes significantly to ensuring key customer information needs are met.*
> *…*
> *1.31 In the context of consumer credit markets, we think a combination of the CCA sanctions, the FCA's regulatory powers and the private right of action under FSMA*
> *is appropriate. We consider that the provisions giving rise to unenforceability and disentitlement could not be repealed without adversely affecting the appropriate degree of consumer protection. As such, our view is that there is merit in retaining*
> *the sanctions in the CCA or other legislation, subject to reviewing the scope of their application.*
> *…*
> *1.34 It would not be possible to replicate or replace these sanctions under the current FCA's general rule-making power…*

So there is to be no bonfire of the CCA. We shall still have to draft our agreements under the relevant Agreements Regulations or face unenforceability. We shall still have to serve NOSIA or face both unenforceability and a compulsory interest holiday. We shall still have to comply with ss 87 and 88 and their attendant regulations if we want to put the boot into defaulting debtors. True, the mountain-born mouse has been able to nibble a little from the edge of the cheese – those brokerage refunds for example – but mouse it remains. All as the weird women promised. Still, it has kept a sizeable number of FCA apparatchiks out of mischief for five years so it's not entirely a loss.

Consumer credit lawyers and, more importantly, the consumer credit industry can breathe again. The sky has not fallen. Perhaps we should leave the final words to the spirit of the Great McGonagall:

So, Alas! for the mighty FCA
That laboured tirelessly for many a day
To bring the Consumer Credit Act entirely in house
But ended by delivering a wee small mouse.
For we all the day shall surely rue
When we bite off more than we can chew.

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