KEY POINTS

- The Consumer Rights Act 2015 and the Consumer Credit Act 1974 mean that courts are familiar in the context of contractual relationships with the concepts of fairness and good faith found in the FCA's new Consumer Duty, but these are of limited application.
- Implied incorporation into a contract of the relevant FCA rules is unlikely and the clearest language would be needed for express incorporation.
- The Duty will however inform the standard to be expected under the implied term of care and skill in a contract for financial services.

Feature

Author William Hibbert

The new FCA Consumer Duty: the interrelationship with common law contractual obligations

The new Consumer Duty is not actionable under s 138D Financial Services and Markets Act 2000. While some existing legislation affecting contracts address the concepts of fairness and good faith similar to those in the Duty, such legislation is of limited application. Might it be possible to use contractual obligations in order to give a right of action? The case law suggests that only the clearest language of incorporation would incorporate the rules underlying the Duty. The Duty will however inform the standards expected under the implied term of care and skill in contracts for financial services.

THE NEW CONSUMER DUTY

Readers may now be familiar with the FCA's new Consumer Duty: its new Principle 12 ("A firm must act to deliver good outcomes for retail customers"), the three supporting Cross-cutting Rules (firms must "act in good faith" towards and "avoid foreseeable harm" to retail customers and "enable and support [them] to pursue their financial objectives") and the four good Outcomes to be achieved ("product and services", "price and value", "consumer understanding" and "consumer support").

The rules that constitute the Consumer Duty sit within PRIN in the FCA Handbook and therefore carry no right to bring an action for damages under s 138D Financial Services and Markets Act 2000 (see PRIN 3.4.4R). The possibility of a tortious duty of care has been considered in the March 2022 issue of JIBFL (*The new FCA consumer duty: the interrelationship with regulatory and common law obligations* (2022) 3 JIBFL 179); might it be possible to use common law contractual obligations in order to give a right of action?

- Can the FCA rules that constitute the Duty be incorporated into the contract as terms, either expressly or by implication?
- Will the Duty inform contractual obligations already implied?

CONCEPTS OF UNFAIRNESS IN RELATION TO CONTRACTS INTRODUCED BY LEGISLATION

The concept of unfairness in relation to contracts is familiar where consumers are concerned, having been introduced by legislation and the Duty will be relevant in these contexts.

- The Consumer Rights Act 2015 makes terms found to be unfair not binding on the consumer, the test for unfairness being in s 62(4): "A term is unfair if contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer". As Lord Bingham said in relation to the test of unfairness (in the Unfair Terms in Consumer Contracts Regulations 1994 which preceded the Act): "The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice" (*Director General of Fair Trading v First National Bank plc* [2001] UKHL 52 at [17]). The protection in the 2015 Act is however limited by its application to the fairness of contract terms only and by the definition of consumer in s 2(3): "an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession".
- Sections 140A-140C Consumer Credit Act 1974 give borrowers a cause of action which is closer to the Consumer Duty. The court has power to provide redress if the relationship between a creditor and debtor is unfair because of contract terms, the exercise and enforcement of contract rights or "any other thing done (or not done) by or on behalf of the creditor either before or after the making of the agreement …". However, while this protection applies also to business borrowers, it essentially applies only to agreements for unsecured credit with individuals, small partnerships and unincorporated bodies. The Consumer Duty is of much wider application, applying across the board to regulated activities and, where the relevant sourcebook allows, to SMEs.

Feature

Biog box
William Hibbert is a barrister at Henderson Chambers, London, specialising in financial services and consumer law. Website: https://www.hendersonchambers.co.uk

EXPRESS INCORPORATION OF THE CONSUMER DUTY

Express incorporation is a matter of construction of the contract. However, the courts have been reluctant to incorporate regulatory rules as terms of the contract. In *Grant Estates Ltd v The Royal Bank of Scotland plc* [2012] CSOH 133 at [67], Lord Hodge rejected the argument that various rules in COBS were incorporated by the words:

> "Where these Terms conflict with Applicable Regulations, the latter shall prevail."

He held that the words merely stated the obvious: that the terms of business could not qualify or exclude duties imposed under COBS; had it been intended to incorporate obligations under COBS, the contract would have stated that clearly. In *Bailey v Barclays Bank plc* [2014] EWHC 2882 (QB) and *Thornbridge Ltd v Barclays Bank plc* [2015] EWHC 3430 (QB), the relevant contractual clause said:

> "This Agreement and all Transactions are subject to Applicable Regulations. If there is any conflict between this Agreement and any Applicable Regulations, the latter will prevail."

The clause was held merely to be addressing possible conflicts between the contract terms and the separate regulatory rules in COBS, without incorporating them as terms of the contract. In *Flex-E-Vouchers Ltd v The Royal Bank of Scotland plc* [2016] EWHC 2604 (QB), the wording was similar to that in *Grant Estates Ltd* and there were other references in the contract to COBS; none amounted to sufficient language to incorporate the rules. Similarly, in *Target Rich International Ltd v Forex Capital Markets Ltd* [2020] EWHC 1544 (Comm), although there were many references to the rules in COBS, it was held that mere reference was insufficient and the lack of clear language of incorporation was indicative that there was no contractual intention to incorporate.

Naturally, different wording can make a difference. In *Larussa-Chigi v CS First Boston Ltd* [1998] CLC 277, the transaction was said to be "governed by" the Bank of England's non-statutory London Code of Conduct and these regulations were incorporated. In *Brandeis Brokers Ltd v Black* [2001] 2 All ER (Comm) 980, the contract stated that the terms of the contract (in relation to dealings on the London Metal Exchange) were "subject to" the rules of the Securities and Futures Authority (SFA) and then set out all the services which would be provided and that would be bound by the SFA rules. It was held that the SFA rules were incorporated. However, unless the clearest language is used, it is unlikely that the Consumer Duty, or any of its constituent rules, will be incorporated into a financial services contract.

INCORPORATION OF THE CONSUMER DUTY BY IMPLICATION

As for incorporation by implication of a term based on rules in the FCA Handbook, the standard test for implying a contract term would have to be satisfied: is such a term so obvious that it goes without saying and/or is it necessary, in the sense that the contract is not commercially coherent without it? It was held in *Flex-E-Vouchers* at [53]-[65] that the implication of a term based on the rules in the FCA Handbook was not "obvious", as limits to actionability have been clearly set in what is a separate regulatory set of rules and implication would cut across that regulatory regime (and indeed would be of such width as to be unworkable); nor was it "necessary", as the contract was commercially coherent without implying a term incorporating rules that already applied under a separate regulatory regime and where in any event there is a term requiring the firm to exercise reasonable skill and care (as to which see below). As Rimer J said in *Clarion Ltd v National Provident Institution* [2000] 1 WLR 1888, 1896:

> "… if the officious bystander had been aware that Clarion and NPI were already subject to the SIB principles it would not have occured to him to suggest that they should incorporate them … and, if he had suggested it … their probable response would have been to suppress him testily with a common 'Oh, of course not …'."

In *Green and Rowley v Royal Bank of Scotland* [2013] EWCA Civ 1197, it was argued that there was a discrete duty of care at common law to the effect that the bank should observe its COB duties. The Court of Appeal rejected the argument, Gloster LJ saying that the submission was: "an invitation to the court to drive a coach and horses through the intention of Parliament to confer a private law cause of action upon a limited class". Although concerned with a tortious duty, the reasoning is equally applicable in a contractual context.

IMPACT ON THE IMPLIED TERM OF CARE AND SKILL

Where the Duty will have effect is in relation to implied terms of care and skill, implied into contracts for services by virtue of the common law and by s 13 Supply of Goods and Services Act 1982 for business customers and by s 49 Consumer Rights Act 2015 for consumers.

> "Whilst the ambit of the duty of care owed by a financial adviser at common law is not necessarily co-extensive with the duties owed by that adviser under the applicable regulatory regime, the regulations afford strong evidence as to what is expected of a competent adviser in most situations." (*Seymour v Caroline Ockwell & Co* [2005] EWHC 1137 at [77])

The rules and guidance that constitute the Consumer Duty will therefore be a guide as to whether the obligation of care and skill has been complied with by a provider of financial services. ■

Further Reading:

- The new FCA Consumer Duty: the interrelationship with regulatory and common law obligations (2022) 3 JIBFL 179.
- A new Consumer Duty in financial services: A significant change or more of the same? (2021) 8 JIBFL 552.
- LexisPSL: Financial Services: Practice Note: The FCA's Consumer Duty.