GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: JANUARY 2016

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In the January column, James Ross considers the boundaries of the consumer credit perimeter.

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PUSHING THE BOUNDARIES OF CONSUMER CREDIT

In most consumer credit disputes, it is obvious whether or not "credit" has been provided such that the relevant FCA regulatory regime governed by the Financial Services and Markets Act 2000 (FSMA) and the Consumer Credit Act 1974 (CCA) applies. However, cases occasionally arise that test the "perimeter" of the consumer credit regime. In the case of consumer hire, many of the difficult issues were resolved in the leading case of *TRM Copy Centres UK Ltd v Lanwall Services Ltd [2009] UKHL 35*.

The scope of the consumer credit perimeter is more difficult to define and disputes often arise in relation to markets or products that are perceived to be unfair for reasons other than the alleged credit aspect of the relationship. For example, a dispute arose between the OFT and firms as to whether minimum-term gym membership contracts that allowed for payment by instalments as an alternative to upfront payment amounted to "credit agreements". The High Court ultimately rejected the OFT's argument that such arrangements constituted the provision of credit, but nevertheless concluded that certain terms of the gym membership contracts were unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (*SI 1999/2083*) (UTCCR): see *OFT v Ashbourne Management Services Ltd [2011] CTLC 237*.

Similarly, the Law Commission is currently undertaking a consultation relating to terms in residential leases that impose fees on transfer of title, change of occupancy and other events (see *Legal update, Law Commission launches consultation on making event fees in retirement housing leases more transparent (www.practicallaw.com/9-619-8608)*). High Court litigation is ongoing as to the fairness and enforceability of such fees under the UTCCR, but a more speculative claim was also made that the provisions of leases providing for these fees amounted to credit agreements, which were unenforceable under the CCA and FSMA (see *Burrell and others v Helical (Bramshott Place) Ltd [2015] EWHC 3727 (Ch)* below).

Burrell and others v Helical (Bramshott Place) Ltd [2015] EWHC 3727 (Ch)

Helical carries on a business in the development of real property and owns the freehold to a retirement village consisting of numerous separate dwellings as well as a range of central facilities and amenities, including a clubhouse. The claimants were either current or former residents at the retirement village, all of whom were granted a long lease of a dwelling on materially identical terms.

The claimants challenged terms of the lease that imposed certain fees in various circumstances, such as on the assignment of the leases to third parties (Transfer Fee provisions). The claimants challenged the Transfer Fee provisions under the UTCCR. However, when Helical contended that the provisions related to the price payable under the leases (such that they could not be assessed for fairness under regulation 6(2) of the UTCCR), the claimants also sought to argue that the Transfer Fee provisions amounted to "deferred consideration" and were therefore unenforceable credit agreements.

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Helical applied for summary judgment on the "credit" claim on the grounds that on their proper interpretation, the Transfer Fee provisions did not amount to the provision of credit.

The meaning of credit

Credit was historically defined in section 9 of the CCA and the definition remains the same today, notwithstanding that there is now a cross-reference to article 60L of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) (RAO). This states that credit "includes a cash loan and any other form of financial accommodation".

The meaning of credit was considered by the Court of Appeal in *Dimond v Lovell [2000] QB 216* at paragraphs 56 and 57, where Sir Richard Scott held for the court as follows:

- "56. In Goode Consumer Credit Legislation 1999 vol 1, para 437, p205 contains a discussion of "The ingredients of credit." Credit involves, in the view of the editor, Profession Goode:
  - "...(a) the supply of a benefit; (b) attracting a contractual duty of payment; (c) in money; (d) the duty to pay being contractually deferred; (e) for a significant period of time after payment has been earned; (f) such deferment being granted by way of financial accommodation."

    Each of these elements is present under the agreement between Mrs Dimond and 1st Automotive. In para 443 the following general principle is expressed:
  - "...debt is deferred, and credit extended, whenever the contract provides for the debtor to pay, or gives him the option to pay, later than the time at which payment would otherwise have been earned under the express or implied terms of the contract.'"
- 57. This principle, in my judgment correctly expresses the test for identifying "credit" for the purposes of the 1974 Act."

There was no dissent from that view of the law when the case went to the House of Lords, although Lord Hobhouse observed that Professor Goode's test might be unduly generous to those seeking to establish that credit is provided since frequently there will be reasons for postponing the time for payment under a contract other than the provision of credit: *Dimond v Lovell [2002] 1 AC* at p.405D. The key question therefore arises in each case of whether there is a contractual postponement of a relevant payment obligation.

Transfer Fee provisions did not constitute credit

In the *Helical* case, the court concluded in a reserved judgment handed down on 18 December 2015, that the Transfer Fee provisions did not constitute credit and summary judgment was therefore entered for Helical on this issue.

On a proper interpretation of the terms of the relevant leases, the Transfer Fees were actually payable by the assignees rather than the original tenants and there was no relevant contractual "deferment" of any payment due under the leases. Nevertheless, the case serves as a useful reminder to practitioners advising on novel business structures involving consumers that consideration should always be given as to whether the consumer credit regime could potentially apply, even to apparently unrelated forms of agreement such as residential leases.

The decision in the Helical case perhaps also provides a further useful lesson in indicating to practitioners that the court is likely to be reluctant to apply the consumer credit regime to novel situations that, at first glance, do not "feel" like credit. As was noted in the *September 2015 (www.practicallaw.com/8-618-5164)* column, the consumer credit regime under the CCA and the FSMA can impose harsh automatic sanctions on creditors who do not comply with the relevant regulatory requirements. A firm that unwittingly enters into a regulated consumer credit agreement without the relevant FCA permission or CCA documentation in place is likely to find that the agreements are unenforceable and that any attempt to enforce will be a very lengthy and costly process.

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It can be tempting for consumers and their advisers to raise consumer credit points in the light of the regulatory sanctions that will apply to the creditor if the claim is successful. However, the court will also be mindful of the serious consequences of finding that an arrangement unexpectedly falls within the consumer credit regime. Unless the relevant arrangement falls into an established "credit" scenario, such litigants might be better advised to avoid a costly dispute as to the consumer credit perimeter (which will naturally be strongly contested by the firm, as in the *Ashbourne Management* and *Helical* cases) and instead focus on better arguments that may be available under the UTCCR or the Consumer Rights Act 2015.

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