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ARE LOANS INVOLVING FAMILY MEMBERS, FRIENDS OR TRUSTS CAUGHT BY THE CONSUMER CREDIT REGIME?

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The UK consumer credit regime is complex and it is possible that informal lending, such as that between family members, friends, trustees, beneficiaries and settlors, is covered by the Consumer Credit Act 1974 (CCA) and the FCA's Consumer Credit sourcebook (CONC). This note provides an overview of the issues those considering entering into such arrangements need to take into account.

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SCOPE OF THIS NOTE

Aside from the traditional banker/customer situation, lending as between family members, friends, trustees, beneficiaries and settlors are all common. Although the party lending the money may not consider the regulatory position, in any case where lending is made to an individual, small partnership or unincorporated association, it is possible that the loan may be "regulated" for the purposes of the Consumer Credit Act 1974 (CCA) and the FCA's Consumer Credit sourcebook (CONC).

The purpose of this note is to enable those considering making such informal loans to determine whether the agreement may in fact fall within the scope of the FCA's consumer credit regime.

A different set of regulation applies to lending secured on land that is considerably more complex. In depth consideration of the regime relating to secured lending is beyond the scope of this note, but for a brief overview, see *Agreements secured by first or subsequent charges on land* below.

KEY QUESTIONS TO CONSIDER

In considering whether a "private" or "informal" loan might be caught by the FCA's regulatory regime, there are three questions to ask:

- Is the agreement itself regulated or exempt under the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) (RAO) (see Is the loan agreement regulated?)? If the answer is exempt then no further considerations arise.
- However, if the answer is regulated, the lender needs to consider whether or not they may require FCA authorisation which, in turn, gives rise to a two stage enquiry:

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  - might the lender come within the exclusions to the authorisation regime under the RAO?
  - if not, is the loan being made "by way of business"?

  See *Does the lender require FCA authorisation?* below.

- Separate to the question of authorisation is the need for a regulated loan agreement to comply with the majority of the technical obligations under the CCA. In that regard, the question is whether the agreement itself is "non-commercial" under section 189(1) of the CCA (see *Non-commercial agreements* below)?. If so, a light-touch regime applies with a much reduced risk of unenforceability.

IS THE LOAN AGREEMENT REGULATED?

Consequences of a loan agreement being regulated

The CCA covers all "consumer credit" lending, which is defined as that made to an individual (the debtor) by any other person (the creditor) (*section 8(1), CCA*). An "individual" includes small partnerships of not more than three persons and unincorporated associations. Therefore, any lending to a non-commercial entity will come within the scope of the CCA. Consumer credit agreements can then be sub-divided into those which are regulated and exempt as defined by article 60B of the RAO.

A regulated agreement is defined as any that is not categorised as exempt under articles 60C to 60H of the RAO (*article 60B(3), RAO*). The key exemptions likely to be relevant are set out in Regulated versus exempt agreements below.

The categorisation of an agreement as regulated for the purposes of the CCA has two main consequences:

- The lender must have authorisation from the FCA to enter into the arrangement. Under section 19(1) of the Financial Services and Markets Act 2000 (FSMA), no person may undertake a regulated activity without FCA authorisation. In turn, a regulated activity is any activity of a specified kind that is carried on by way of business (*section 22, FSMA*). Article 60B(1) of the RAO then provides that "[e] ntering into a regulated credit agreement as lender is a specified kind of activity". (See *Does the lender require FCA authorisation?* below.)

  Lending under a regulated consumer credit agreement without authorisation results in the commission of a criminal offence, triable either way, subject to a due diligence defence that all reasonable steps were taken by the lender (*section 23(1), FSMA*).

- Regulated agreements must comply with the obligations laid down by the CCA and its secondary legislation. Failure to do so will often lead to the sanction of unenforceability so that the lender will be unable to sue under the loan agreement unless and until they either remedy the error or, in some instances, obtain an enforcement order from the court. Of particular importance are the drafting requirements under Part V of the CCA (*sections 55 to 74*) and the various post-contractual obligations to send statements and notices (for example, sections 77A and 86B to E).

In making a loan, even if it might otherwise be considered a one-off or relatively informal agreement, both of these potential consequences should be borne in mind.

Regulated versus exempt agreements

Whether an agreement is regulated for the purposes of the CCA must be the first consideration when thinking of entering into a loan. As set out in *Consequences of a loan agreement being regulated* above, under article 60B the default position is that any consumer credit agreement will be regulated unless it falls within an exemption at articles 60C to 60H of the RAO. For information on exempt agreements, see *Practice note, What is a regulated credit agreement?: Is the credit agreement an exempt agreement? (www.practicallaw.com/2-598-3626)*.

Generally, the various exemptions in the RAO can be divided into those pertaining to the parties to the agreement and those pertaining to the terms or structure of the arrangement itself. It is worth highlighting two key exemptions that may be of particular use in the context of private or informal loans, both of which were transcribed across to the RAO from the CCA:

- The business purposes exemption in article 60C(3) of the RAO (see *Business purposes exemption* below).

- The high-net worth (HNW) exemption in article 60H of the RAO (see *High-net worth exemption* below).

Business purposes exemption

The business purposes exemption provides that the FCA does not regulate loans of over £25,000 if "the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower" (*article 60C(3), RAO*).

If the relevant declaration is signed by the borrower agreeing the purpose of the loan, "the agreement is presumed to have been entered into wholly or predominantly for the purposes specified..." (*article 60C(5), RAO*). The effect of the declaration is simply to shift the burden of proof by creating an evidential presumption. The statutory wording for the business purposes declaration is set out at CONC App 1.4.8R.

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Many applications of this exemption will be obvious. For example, if a father lent his son £30,000 to fund the son's business venture, whether or not the statutory declaration was signed, the deal will clearly be exempt under article 60C(3) of the RAO. Equally, if the amount of the loan was only £15,000 the agreement would clearly not come within the exemption.

However, the application is not always straightforward. Whether the loan is wholly or predominantly for business purposes will depend on all the circumstances of the transaction. Two examples are set out below:

- In *Wood v Capital Bridging Finance Ltd [2015] CTLC 155*, a 75 year old woman took a secured bridging loan to assist her son-in-law with the financing of his business. The lender was made aware of this arrangement and it requested that she sign a statutory declaration that the agreement was not CCA-regulated pursuant to the business purposes exemption. However, the Court of Appeal concluded that the burden of showing the agreement to be exempt fell on the lender and that the declaration signed by the borrower was invalid since the monies were not to fund her business pursuits.

- In *Woolsey v Payne [2015] EWHC 168*, the lender was a property developer and a friend of the borrowers, a husband and wife, who had signed a business purposes declaration. During the course of insolvency proceedings, they alleged that the agreement should have been treated as regulated under the CCA since the majority of the sums lent were used to repay personal debts and, in any event, any business purposes were those of a company run by the husband rather than of the husband and wife in a personal capacity. On appeal from a summary finding in the borrowers' favour, the latter argument was held to be too narrow an interpretation of the words "...carried on, or intended to be carried on, by the borrower" and, since the first argument gave rise to a substantive dispute of fact, it was remitted for trial.

Of particular interest in a private client context are loans to unincorporated associations by members or interested third parties. An unincorporated association comes within the definition of an individual for the purposes of the CCA so that loans to them are consumer credit agreements. However, since they are inherently not-for-profit organisations it is highly unlikely that any loan will be furthering a business purpose so as to fall within article 60B(3) of the RAO.

High-net worth exemption

The HNW exemption is set out at article 60H of the RAO. This essentially re-enacts the exemption as it previously existed under the CCA. There are three broad requirements:

- The borrower is an individual.

- The agreement either:

  - is secured on land; or

  - provides credit of over £60,260 for purposes other than the "renovation of a residential property" or "to obtain or acquire property rights in land or in an existing or projected building".

- The borrower has signed the relevant statutory declaration agreeing to forego the protection of the CCA and a statement has been made about their income or assets.

The relevant declarations relating to the HNW exemption are set out at CONC 1.4.7R. Unlike the business purposes declaration, for the HNW exemption to apply the declaration must be completed. Even if the loan otherwise meets all other criteria for its application, the agreement will be classified as regulated without it.

As indicated by the requirements above, there are two parts to the declaration:

- The first is an acknowledgement that the CCA will not apply to the agreement.

- The second is as to the borrower's net wealth measured either by reference to their income or assets:

  - the income requirement is that they "received during the previous financial year net income totalling an amount of not less than £150,000"; and

  - the asset requirement is that they "had throughout that year net assets with a total value of not less than £500,000".

The prescribed wording for the HNW statement also includes various definitions of the terms used to ensure that the borrower understands what they are declaring. Of particular note is that, "net assets" do not include

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the borrower's "primary residence or any loan secured on that residence; any rights...under a qualifying contract of insurance...; and any benefits (in the form of pensions or otherwise) which are payable on the termination of the service of the borrower... or on his retirement...".

Insofar as the borrower is relying on assets to fall within it, the exemption is therefore aimed at investment portfolios, second properties or extensive valuable physical assets (for example, cars or art).

For more information on the business use and HNW statements and declarations, see *Practice note, Consumer credit high net worth and business use exemptions: drafting statements and declarations (www.practicallaw.com/9-601-0965)*.

DOES THE LENDER REQUIRE FCA AUTHORISATION?

Once it is determined that the loan agreement is regulated for the purposes of the CCA, the next question is whether the lender may need FCA authorisation to undertake the lending (or in the case of a loan entered into before 1 April 2014, whether the lender required a consumer credit licence from the OFT).

For consideration in this context, there are two relevant questions:

- Whether the lender itself is "excluded" from the regime under the RAO (see *Is the lender excluded under the RAO?* below).
- Whether the lending is "carried on by way of business" for the purposes of section 22(1) of FSMA (see *Is the lending carried on by way of business?* below).

Authorisation is not required if the answer to the first bullet point is yes or, if the answer to the second bullet point is no.

For information on the FCA's authorisation regime for consumer credit firms, see *Practice note, FCA authorisation regime for consumer credit firms (www.practicallaw.com/4-545-3386)*.

Is the lender excluded under the RAO?

Much as certain agreements are exempt from regulation pursuant to articles 60C to 60H of the RAO, some defined categories of lender are excluded from needing to obtain authorisation from the FCA before undertaking regulated activities.

The exclusions relevant to regulated lending are set out in the RAO at articles 60I to 60K. These relate primarily to lending via authorised intermediaries (article 60I and article 60J) or institutions authorised in the EEA which are exercising "passported" rights in the UK (article 60JA and article 60JB). In addition, under article 60K of the RAO, authorisation for regulated lending is subject to two general exclusions for information society services (*article 72A, RAO*) and local authorities (*article 72G, RAO*).

For obvious reasons it is unlikely that any of those exclusions will apply to a would-be lender under a private or informal regulated credit agreement.

For more information on the exclusions, see *Practice note, Regulated activities: entering into a regulated credit agreement as lender: Does an exclusion apply? (www.practicallaw.com/1-540-1662)*.

Is the lending carried on by way of business?

On the assumption that there is no relevant exclusion under articles 60I to 60K of the RAO, the primary question is whether the lending is "carried on by way of business" for the purposes of section 22(1) of FSMA. If it is not, then the lender does not need to be authorised to make loans.

The wording of section 22(1) indicates that the activity itself must at least have the characteristics of a business. However, in the case of regulated lending, it need not go so far as to constitute a business activity in its own right. The position is different to that relating to advising on regulated mortgage contracts. There, a person is only carrying on that activity by way of business under section 22(1) if they "carry on the business of engaging in that activity" (*article 3A, Financial Services and Markets Act 2000 (Carried on By Way of Business) Order* (*2007/1177*)) (Business Order). In effect, this means that they must be a professional mortgage adviser. However, for regulated lending, a person can be engaged in a different business (for example, property development), but still fall within section 22(1) if they make regulated loans so as to do so by way of business.

The phrasing of section 22(1) is also distinct from that used elsewhere in FSMA, for example section 21(1) of FSMA refers to "in the course of business", which suggests that the party need merely undertake the activity while engaged in some other

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profession. In a somewhat different context, this distinction was recognised in *Bassano v Toft [2014] EWHC 377 (QB)* where it was held that a dealer in rare musical instruments, who had made a loan secured against a valuable viola, had not done so "in the course of a consumer credit business" since his business did "not ordinarily involve his making loans".

Therefore, the considerations relevant to authorisation for regulated lending occupy a middle-ground between the narrow position for certain activities set out in the Business Order and the broader wording used in different contexts elsewhere in FSMA.

Helden v Strathmore Ltd

Whether or not a party lends by way of business is always a question of fact to determine in all the circumstances. The regularity of the lending may be relevant to whether or not a business is carried on, it is not determinative. In the right circumstances a one-off transaction could be determined to have been made by way of business so as to require FCA authorisation, although such circumstances will probably be exceptional.

The section 22 provision was considered by the Court of Appeal in *Helden v Strathmore Ltd [2011] Bus LR 1592*. There, the parties had entered into a number of what were described as "informal" loan agreements, the first of which was for £1,000,000 and secured over the borrower's residential property by a legal charge. The charge stipulated that the debt was to be secured and repaid "in accordance with the offer letter" which was never in fact produced. In considering whether the lender had been carrying on the relevant activity by way of business, the Court of Appeal concluded that:

- The question of whether an activity was carried on by way of business was one of secondary fact or influence, to be determined by the court according to an assessment of all the relevant facts.
- The judge at first instance was right (or at least entitled) to conclude that the lending had been by way of business on the basis of eight factors:
    - the lender made a number of substantial loans;
    - the loans were made over a period of years with some regularity;
    - substantial sums were lent;
    - the loans were made with a view to profit;
    - the friendship between the lender's directors and the borrower grew out of their professional relationship, rather than vice versa;
    - the loan arrangements were often relatively formal – solicitors were often instructed and the loans were secured;
    - the loans were part of a chain of similar transactions by the lender although the only ones of that specified activity under the RAO; and
    - the lender was a limited company with presumably commercial objects.

Position before transfer of consumer credit regulation to FCA

It must be noted that the position is different when considering historic loans taken out before 1 April 2014 (the date on which the regulation of consumer credit was transferred to the FCA) and section 22(1) of FSMA became the correct statutory provision for considering whether authorisation was necessary.

Under the former provisions of the CCA, in particular sections 21 and 40, the relevant words were that the activity had to be undertaken "in the course of a consumer credit business". A gloss on that phrase was given by section 189(1) of the CCA, which provided that merely because an activity is undertaken occasionally it is not to be regarded as constituting a business of that type. That sub-section remains relevant to the question of whether the loan is "non-commercial" under the CCA (see *Non-commercial agreements* below). However, it is no longer appropriate in relation to the question of FCA authorisation.

Therefore, in *Bassano v Toft* the instrument dealer was said not to have fallen within the licensing regime because to do so required "some degree of regularity" such that the activity of making loans forms "part of the normal practice of the business." In reaching that conclusion, Popplewell J relied on the decisions of the House of Lords in *Davies v Sumner [1984] 1 WLR 1301*, and the Court of Appeal in *Hare v Schurek [1993] CCLR 47.*

Bassano v Toft was itself considered and applied in relation to the provisions of the CCA for pre-1 April 2014 lending in *Woolsey v Payne*.

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Because section 22(1) of FSMA is phrased differently and, in particular because section 189(2) is not available to provide an interpretive gloss, the FCA's authorisation regime is more restrictive than the old licensing provisions under the CCA. Therefore, care must be taken when considering older non-FSMA case law.

Factors to consider in private client lending

In many cases, the position relating to private loans will be obvious. For example, lending between family members, almost inherently because of the nature of the parties' pre-existing relationship, will clearly not be by way of business. That will probably be the case even where a commercial rate of interest is levied or security is taken by the lender, since the inherent purpose of an agreement in that context can be reasonably presumed to be out of love and affection rather than with any commercial intent.

In *Khodari v Tamimi [2009] EWCA Civ 1109*, loans between family members were considered as an abstract example; the Court of Appeal considered that such lending would not constitute "a business activity merely by reason of its frequency, because the loans are explicable by the familial relationship".

The circumstances where lending occurs between friends may be more complicated. *Helden v Strathmore Ltd (www.practicallaw.com/7-506-1867)* is informative: although the lender sought to argue that the parties were friends such that it was not lending by way of business, the trial judge and the Court of Appeal both noted that the borrower had initially approached the lender for a line of credit; the friendship between the borrower and the directors of the lender company had developed as a result of their professional dealings. Further, that the lender is primarily in a different line of business (Strathmore Ltd was a property development company) will not be conclusive of the issue.

Even in the case of lending between close friends, if there are regular loans subject to commercial terms, the lender is at risk of falling foul of section 21(1) of FSMA. A lender's initial motivations for entering into the agreement will only be of limited relevance if, viewed objectively, the transactions otherwise have a commercial flavour to them. Although not a case in which the issue of licensing/authorisation was raised on behalf of the borrower, the factual background to *Patel v Patel [2009] EWHC 3264 (QB)* is informative: the judge noted that "...the closeness of the parties' relationship made it easier, as it so often does, for expectations to become blurred...".

Finally, there are a variety of other scenarios in which private or informal lending may take place, where particular caution must be taken. For example, lending to unincorporated associations by its members or from trustees to beneficiaries. Often the answer is far from obvious and the position may change from the point at which the initial lending is undertaken to the time when an unenforceability challenge is raised during the course of court proceedings. The most that can be done is to take a reasoned view at the point in time at which the agreement is entered into.

The approach of the courts in difficult cases seems to have been to simply make a list of factors for and against the conclusion that the lending was carried on by way of business, which may lead to surprising results. For example, in *Khodari v Tamimi*, personal loans from the borrower's bank manager to fund the borrower's gambling habit were held not to come within the CCA licensing regime (pre-1 April 2014). That was apparently because the list of factors contra-indicative of a business carried on by the lender was longer than that going in the other direction. The fact there were regular loans totalling over £700,000 and subject to a commercial rate of interest of 10% per annum was outweighed by various other factors suggesting the informal, non-business nature of the transactions.

NON-COMMERCIAL AGREEMENTS

Relevance of categorisation as a non-commercial agreement

The final consideration for a would-be private lender is whether the agreement might fall within the definition of a "non-commercial agreement" under the CCA. This is a separate (although similar) question to that relating to authorisation by the lender, relating to compliance of the agreement itself with the technical requirements of the CCA.

It is possible in certain circumstances, for example where the lender comes within an exclusion under the RAO (see *Is the lender excluded under the RAO?* above), that, although the lender will not require FCA authorisation, the agreement will still be regulated for the purposes of the CCA. This means it will have to be drafted in compliance with its strict requirements and comply with the post-contractual procedural obligations as to, for example, statements and notices. More detail on the drafting requirements is given in *Practice note, Drafting consumer credit agreements: key issues (www.practicallaw.com/6-202-4421)*, although

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expert advice on CCA-compliance is advisable for the newcomer.

In effect, the CCA imposes a light-touch regime for non-commercial (regulated) agreements, as detailed in *Obligations for non-commercial agreements* below.

What is a non-commercial agreement?

A non-commercial agreement is defined in section 189(1) of the CCA as:

> "A consumer credit agreement... not made by the creditor... in the course of a business carried on by him".

The definition is therefore very similar to that in relation to the authorisation regime. All the authorities considered above in relation to pre-1 April 2014 agreements will be relevant since, unlike section 21(1) of FSMA, section 189(2) of the CCA is relevant:

> "A person is not to be treated as carrying on a particular type of business merely because occasionally he enters into transactions belonging to a business of that type".

The definition of a non-commercial agreement under the CCA has been variously considered and applied as follows:

- *Shahabinia v Giyahchi (unreported), 16 June 1988, (QBD)*. Lending on four occasions over a 12 month period at "rapacious" rates of interest did not constitute carrying on a consumer credit business for the purposes of the CCA.
- *R v Marshall (1990) Cr App R 73*. In the context of a criminal prosecution for failure to hold a consumer credit licence, whether lending was merely occasional was a question of fact and degree for a jury to decide.
- *Hare v Schurek*. A car salesman, not licensed to lend under consumer credit agreements, sold a car under and entered into a "one-off" hire-purchase agreement in conjunction with the sale. As a matter of principle: "if the agreement between the parties was either private or was unique or was a manifestation of occasional transactions then it was a non-commercial agreement...".
- *Khodari v Tamimi*. The effect of section 189(2) of the CCA is that regularity of lending is a necessary but not sufficient element for the conclusion that there is consumer credit lending in the course of a business. There, although the lender regularly gave credit to the borrower, various other factors (including the relative informality of the arrangements, lack of security and lack of business premises) led to the conclusion that the lender did not do so in the course of a business.
- *Bassano v Toft*. To be in the course of a business there must be "some degree of regularity such that they [the loans] form part of the normal practice of the business". Since the rare instrument dealer had made the loan on an entirely one-off basis it was to be properly considered as a non-commercial agreement.

On the basis of section 189(2) of the CCA and the authorities above, the vast majority of loans made between private persons or in an informal setting will constitute non-commercial agreements. The only circumstances in which that might not be the case is if a lender makes loans with sufficient regularity and, in the light of Khodari, formality to disapply the definition. Certainly, the mere fact that it is a loan between family members or friends is not necessarily enough to establish the agreement as non-commercial for the purposes of the CCA. For example, someone who lends regularly to friends, relatives and acquaintances and has a formal system set up for repayment terms would probably fall outside the definition (as well as very probably requiring FCA authorisation).

Obligations for non-commercial agreements

Given the above, it is probably a safe starting position to assume that only a light-touch regime will apply to any regulated lending undertaken in a private or informal capacity. The scope of obligations under that regime, for non-commercial agreements, is set out below.

CCA Part V: drafting and creating agreements

Part V of the CCA does not apply to non-commercial agreements (*section 74(1), CCA*). Accordingly, there are no formal drafting requirements, as would usually be required by section 61 of the CCA and the Consumer Credit (Agreements) Regulations 1983 (*SI 1983/1553*) or the Consumer Credit (Agreements) Regulations 2010 (*SI 2010/1014*). Moreover, the standard obligations under the CCA as to provision of pre- and post-execution copies of the agreement (*sections 61A to 64, CCA*), unenforceability in the event of improper execution (*section 65, CCA*), rights of withdrawal (*section 66A, CCA*) and cancellation (*sections 67 to 73, CCA*) are irrelevant.

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As such, non-commercial agreements can be drawn up in any format the parties' wish, so long as the document complies with general consumer law obligations as to fair terms (set out in Part 2 of the Consumer Rights Act 2015).

The only section in Part V of the CCA that continues to apply to non-commercial agreements is *section 56 (www.practicallaw.com/2-518-5605)* (*section 74(1A), CCA*). That provision creates a statutory agency between the lender and any supplier or broker who conducts negotiations with the borrower before entering into the loan agreement. However, it relates only to "debtor-creditor-supplier" agreements, which those made in the context of private lending are unlikely to be.

CCA Part VI: matters arising during the currency of the agreement

The vast majority of Part VI of the CCA, which deals with the borrower's rights during the term of the loan, is also disapplied to non-commercial agreements. For example:

- The rights of a borrower under a debtor-creditor-supplier agreement against the lender in the event of a breach of contract or misrepresentation by the supplier, do not apply (*section 75(3), CCA*).
- Borrowers under non-commercial agreements have none of the usual rights to request information about agreements or goods under sections 77 to 80 of the CCA (*section 77(5), section 77A(8), section 78(7), section 79(4) and section 80(1), CCA*).
- The usual rules as to variation of agreements and "modifying agreements" do not apply (*section 82(7), CCA*).
- Borrowers under non-commercial agreements do not enjoy the usual protection against misuse of their credit facility by unauthorised third parties (*section 83(2), CCA*).

The remaining obligations on lenders are as follows:

- Where a regulated agreement is secured on land, the lender must comply with section 76 of the CCA to provide notice to the borrower in the prescribed form, before enforcing the term of a regulated agreement by demanding earlier repayment of any sum, recovering possession of goods/land or treating any deferred right as terminated. The relevant form of notice is set out in regulation 2(1) of the Consumer Credit (Enforcement Default and Termination Notices) Regulations 1983 (*SI 1983/1561*) (Enforcement Default and Termination Notices Regulations).
- To provide a statement of account "as soon as reasonably practicable" on request by the borrower under a regulated agreement including various information on the instalments paid, due and interest rate (*section 77B, CCA*).
- To give written notice of any variations in the interest rate under a regulated agreement including details of the new rate and how it will affect the borrower's repayment obligations (*section 78A, CCA*).

Statements supplied under both of the latter two obligations must comply with the requirements of the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 (*SI 2007/1167*).

CCA Part VII: default and termination

Only some of Part VII of the CCA is disapplied to non-commercial agreements. For example, lenders under non-commercial agreements have no obligation to provide annual statements or notices of sums in arrears, either in the prescribed form or at all (*sections 86B(12)(b), 86C(7)(b) and 86E(8), CCA*).

However, the following obligations remain under Part VII:

- Where the agreement is secured on land, to supply a default notice in the prescribed form pursuant to regulation 2(2) of the Enforcement Default and Termination Notices Regulations before enforcing the agreement (*sections 87 and 88, CCA*).
- To obtain a court order before retaking any goods under a regulated hire-purchase agreement if the borrower has repaid "one-third or more of the total price of the goods" (*section 90, CCA*). Breach of this obligation entitles the borrower to repayment of all sums paid under the agreement to-date (*section 91, CCA*).
- Not to increase interest on default by the borrower (*section 93, CCA*). This will obviously also be relevant to the drafting of the agreement (see above).
- To provide the borrower with the right to repay all or part of the agreement ahead of the contractually

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scheduled time for payment and to provide statements in relation to such requests (*sections 94, 95, 95A, 95B, 97 and 97A, CCA*). Various statutory rebates must be applied in such cases to take account of the early payment that should be calculated in accordance with the Consumer Credit (Early Settlement) Regulations 2004 (*SI 2004/1483*).

- Where the agreement is secured on land, to give notice in the prescribed form before terminating in non-default cases. Such notices must comply with the requirements of regulation 2(3) of the Enforcement Default and Termination Notices Regulations.

CCA Part VIII: security

Part VIII is only relevant to non-commercial agreements if security is to be taken in relation to the agreement. Security is defined as:

> "A mortgage, charge, pledge, bond, debenture, indemnity, guarantee, bill, note or other right provided by the debtor or hirer, or at his request (express or implied), to secure the carrying out of the obligations of the debtor or hirer under the agreement" (*section 189(1), CCA*).

Accordingly, almost any sort of collateral obligation to secure the lending is likely to fall within the definition.

Again, much of Part VIII is not relevant (*sections 107(5), 108(5), 109(4), 110(2)(a), 114(3)(b) and 123(5), CCA*). However, non-commercial agreements are not exempt from the obligations under section 105 and section 106 to ensure that any security provided in relation to a regulated agreement is in writing and in the prescribed form. Failure to do so renders the security unenforceable save on order of the court (*section 105(7), CCA*).

By and large, the obligation is to ensure that the security is in legible writing, is signed in the prescribed manner, embodies all the terms of the security and is sent or given to the surety following signature. However, in relation to guarantees and indemnities, a very specific form and content is dictated by the Consumer Credit (Guarantees and Indemnities) Regulations 1983 (*SI 1983/1556*).

CCA Part IX: judicial control

Again, much of this part of the CCA is not relevant to non-commercial agreements because it is co-dependent on other provisions that are disapplied. However, nothing expressly removes non-commercial agreements from its scope. Therefore borrowers under non-commercial agreements retain the right to apply to the court for protection under the two primary sections:

- Time orders (*section 129, CCA*).
- Unfair relationships (*sections 140A, 140B and 140C, CCA*).

A time order can be made by a borrower in relation to a regulated agreement at, or shortly before, enforcement by the lender. Section 129(2) of the CCA empowers the court to vary the amount or timing of payments due "as the court, having regard to the means of the debtor... considers reasonable" or to allow the remedy of breach "within such period as the court may specify". Therefore, if an agreement is to be enforced and a borrower has fallen behind because of financial hardship, a court may reduce the amount of the payments and extend the term under section 129 to prevent enforcement to the borrower's detriment.

Section 140A is far more wide ranging. It provides that an unfair relationship finding can be made on the basis of the parties' relationship arising from the agreement by virtue of any of:

- The terms of the agreement or any related agreement.
- The way in which the creditor has enforced his rights.
- Any other thing done or not done by or on behalf of the creditor.

Under section 140B(9) of the CCA, it is for the lender to disprove the existence of such a relationship once asserted by the borrower (*Bevin v Datum Finance Ltd [2011] EWHC 3542 (Ch)*). If an unfair relationship is found to exist the court has very broad powers to remedy it as it sees fit (*section 140B(1), CCA*).

AGREEMENTS SECURED BY FIRST OR SUBSEQUENT CHARGES ON LAND

The position is different for the vast majority of agreements secured by a charge over land, which fall outside of the scope of the CCA following the UK implementation of the Mortgage Credit Directive (*2014/17/EU*) (MCD) on 21 March 2016. Such

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agreements will either fall within the remit of the FCA's Mortgages and Home Finance Conduct of Business sourcebook (MCOB) or, otherwise, are likely to be entirely unregulated.

For information on regulated mortgage contracts and second charge mortgages, see:

- *Practice note, FCA second charge mortgage regime (www.practicallaw.com/6-575-0677).*
- *Practice note, Regulated activities: mortgage-related activities (www.practicallaw.com/7-202-4053).*
- *Practice note, What is a regulated mortgage contract? (www.practicallaw.com/9-620-7410)*.

Regulated mortgage contracts (post-21 March 2016)

The majority of lending secured on land falls within the definition of a "regulated mortgage contract" (RMC) under article 61 of the RAO, which (since 21 March 2016) includes both first and subsequent charge mortgages. In particular, those made to a "consumer" will fall within the scope of the MCD regime.

A "consumer" under the FCA Handbook has a more narrow definition that an "individual" under the CCA: "any natural person acting for purposes outside his trade, business or profession". Therefore, lending to small partnerships and unincorporated associations (which would have previously fallen within the CCA) are outside the scope of the MCD, but still within the remit of MCOB.

The relevant questions for the majority of RMCs for would-be lenders are initially the same as those above. Namely:

- Whether the proposed mortgage contract is regulated or exempt (although the only exemptions are those in article 61A of the RAO).
- If regulated, in relation to whether FCA authorisation is required:
  - whether the lender is excluded from the requirement for authorisation (per articles 62, 63 and 63A of the RAO); and, if not
  - whether the activity "is carried on by way of business" for the purposes of section 22(1) of FSMA.

Thereafter, the consumer credit and MCOB regimes diverge. RMCs are subject to an entirely separate set of documentation and procedural obligations as set out in MCOB.

For an overview of MCOB, see *Practice note, Mortgage conduct of business regulation: MCOB overview (www.practicallaw.com/5-527-2917).*

Other agreements secured on land

If an agreement does not constitute an RMC so as to fall within the MCOB regime, it is very likely to be because it is either exempt under article 61A of the RAO (and therefore unregulated), or falls outside the definitional requirement that at least 40% of the land be used as a dwelling. In the latter case, it will also be exempt from regulation under the CCA pursuant to article 60D of the RAO ("...exemption relating to the purchase of land for non-residential purposes").

Therefore, there are very few agreements that might be secured on land and remain within the CCA regime.

One possible example of an agreement secured on land that remains within the scope of the CCA (albeit a fairly esoteric one), is where the agreement relates to the purchase of land for non-residential purposes but is outside the scope of the article 60D exemption by virtue of article 60D(4). That sub-paragraph provides that the article 60D exemption does not apply to "an agreement of a type described in Article 3(1)(b)..." of the MCD, which in turn refers to "credit agreements the purpose of which is to acquire or retain property rights in land or in an existing or projected building".

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