

# GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: JULY 2016

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In the July column, Lee Finch considers three types of asset finance agreement that are regulated by the Consumer Credit Act 1974 (CCA).

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## ASSET FINANCE: UNIQUE CONSIDERATIONS

### Introduction

Three types of asset finance agreement are regulated by the Consumer Credit Act 1974 (CCA):

- **Conditional sale agreements.** A conditional sale agreement is an agreement for the sale of land or goods under which the purchase price, or part thereof, is payable by instalments and the property in the goods or land remains with the seller until the instalments are paid, or other requirements specified in the agreement are fulfilled (*section 189, CCA*).
- **Hire-purchase agreements.** A hire-purchase agreement is an agreement, other than a conditional sale agreement, under which goods are hired in return for periodic payments, and the property in the goods will pass to the hirer if the terms of the agreement are complied with and the hirer exercises an option to purchase, or another specified act or event occurs (*section 189, CCA*).
- **Regulated hire agreements.** A regulated hire agreement is an agreement under which goods are hired for a period that is capable of subsisting for more than three months and is not a hire-purchase agreement (*section 15, CCA*). For more information on regulated hire agreements, see *Practice note, Regulated activities: entering into a regulated consumer hire agreement as owner* (<http://uk.practicallaw.com/7-540-2041>).

Asset finance agreements, as the name indicates (and the definitions above confirm), involve an asset of some description and, accordingly, are fundamentally different to other regulated credit agreements. Consequently, a number of unique considerations apply. However, asset finance agreements are subject to many of the rules and regulations that apply to consumer credit agreements more widely (for example, the form and content requirements relating to regulated agreements). It is important to note that regulated hire-agreements are outside the scope of the Consumer Credit Directive (*2008/48/EC*) (CCD) and, accordingly, many of the changes introduced in 2011 do not apply to regulated hire agreements.

This month's column will focus on the provisions that are unique to asset finance agreements and not consider the more general requirements. It is not possible to give a comprehensive account of each provision within this column but the following will provide a useful starting point. For ease of reference, this article uses the terminology "hirer" and "owner" throughout even where it would be technically correct to refer to "creditor" and "debtor" (that is, in the case of hire-purchase and conditional sale agreements).



### Information about the location of the goods (section 80, CCA)

As with other regulated agreements, hirers under asset finance agreements are entitled to certain information on request (see, for example, sections 77 and 79 of the CCA). However, due to the specific nature of asset finance agreements the owner also has a right to certain information on request.

In the case of asset finance agreements where the hirer is required to keep the goods in his possession or control, the owner may make a written request for the hirer to inform him as to the whereabouts of the goods and the hirer has seven working days in which to respond. If the hirer fails to respond, and such default continues for 14 days, the hirer commits a criminal offence. This section is rarely used but it can be a useful tool for the owner to employ in attempts to trace goods (especially when the hirer is informed of the consequences of failing to comply with a request).

Obtaining the location of the goods is an important part of protecting the asset. Another way to protect the asset is to apply for a protection order.

### Protection orders (section 131, CCA)

When a hirer breaches an asset finance agreement, the goods act as a form of security for the owner: while it may be difficult to extract further sums from the hirer the owner can, subject to compliance with the relevant provisions, recover the goods (which remain his property) and avoid or minimise any loss. However, as it is not always possible to quickly recover the goods, the security is often left at the mercy of the hirer - it is not unheard of for disgruntled hirers to deliberately damage or destroy goods. In such situations, the owner should consider making an application for a protection order under section 131 of the CCA. Under this section, the court has the power to make such orders as it thinks just for protecting any property of the owner pending the determination of proceedings.

Goods can also become "protected" to the benefit of the hirer once they have made sufficient payments.

### Protected goods (sections 90-91, CCA)

Once the hirer has paid one third of the total price of the goods under a hire-purchase or conditional sale agreement, the owner is not entitled to recover possession of the goods from the hirer without a court order (section 90, CCA). Goods that fall within this section are called "protected goods".

It should be noted that section 90 of the CCA only prohibits recovery of goods from the hirer and the owner is not prevented from recovering the goods from third parties. Further, there are two notable exceptions to the restriction imposed by section 90:

- Firstly, protected goods can be recovered without a court order if the hirer consents (see *Hunter v Lex Vehicle Finance Ltd* [2005] EWHC 223).
- Secondly, protected goods can be recovered without a court order if they have been abandoned by the debtor (see *Bentnick Ltd v Cromwell Engineering Co* [1971] 1 QB 324).

If an owner breaches section 90 of the CCA, the consequences are severe. Section 91 of the CCA provides that on breach of section 90, the regulated agreement shall terminate, the hirer shall be released from all liability under the agreement and the hirer shall be entitled to recover from the owner all sums paid under the agreement. Given these draconian sanctions, if there is any risk that the owner may breach section 90 of the CCA by recovering the goods without a court order (for example, there is some uncertainty as to whether goods have been abandoned), it is prudent to apply to the court for the order.

There are similar consequences if goods subject to a regulated hire agreement are recovered otherwise than by bringing a legal claim (section 132, CCA). However, unlike in the case of hire-purchase and conditional sale agreements, the court has a discretion as to whether to order such consequences in full or in part, having had regard to the extent of the enjoyment of the goods by the hirer.

### **Order to enter premises (section 92, CCA)**

In addition to obtaining an order for the recovery of goods in appropriate situations, an owner will (irrespective of whether goods are protected or not) require a court order to enter onto any premises (including the hirer's property) to recover any goods (*section 92, CCA*). Entering premises without first obtaining such an order is actionable as a breach of statutory duty (*section 92(3), CCA*).

### **Voluntary termination by the hirer (sections 99-101, CCA)**

Another important consumer protection is the hirer's right to voluntarily terminate asset finance agreements.

Under section 99 of the CCA, a hirer can voluntarily terminate a hire-purchase agreement or conditional sale agreement at any time before the final payment falls due. On termination, unless the agreement provides for a lesser sum or no sum, the hirer is required to pay the owner any sums already owing and the amount by which half of the total amount payable exceeds the sums paid and overdue at the date of termination. This can be especially useful for hirers who do not wish to exercise the option to purchase under a hire-purchase agreement as it can allow them to avoid liability for large final payments (balloon payments) by voluntarily terminating the agreement shortly before the final payment falls due.

Hirers under regulated hire agreements also have the right to terminate the agreement (*section 101, CCA*) but such notice will not be effective during the first 18 months of the agreement.

### **Other provisions to consider**

Within the context of this column, it is not possible to address all of the unique considerations that apply to asset finance agreements. The key issues have been addressed above but it is also worth considering the following CCA provisions:

- The rules surrounding the return of goods on termination (*section 72, CCA*).
- The rules on the return of part exchanged goods on termination (*section 73, CCA*).
- The operation of connected lender liability in relation to asset finance agreements (*section 75, CCA*).
- The specific considerations that might apply to asset finance agreements in unfair relationship claims (*section 140A, CCA*).
- The additional powers granted to the court in respect of asset finance agreements (*section 133, CCA*).