



Consumer Rights: A changing landscape. Part II – Fifty shades of Fairness

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Why shades of fairness?

- ▶ CPRs are all about correcting unfairness
 - Clue is in the name
 - Also in the UCPD
- ▶ But do we really have a handle on what unfairness is?
 - Look at the definitions
 - Look at other examples
 - But does it really help?
 - Does it just depend on:
 - who is asking the question
 - how the question is asked
 - and, who is actually answering it?



Fairness throughout consumer law

- ▶ Unfair Contract Terms Act 1977
- ▶ Unfair Terms in Consumer Contracts Regulations 1994 and 1999
- ▶ Unfair relationships in s.140A of the Consumer Credit Act 1974
- ▶ Treating Customers Fairly – FSA Principle 6



Two cautionary tales

- ▶ *OFT v. First National Bank* – “interest after judgment” clauses under the UTCCRs in the House of Lords
- ▶ *Harrison v. Black Horse* – PPI mis-selling and unfair relationships in the Court of Appeal (and soon the Supreme Court?)



The First National case

- ▶ The OFT case:
 - A borrower agrees to a judgment by instalments to pay off his debt. Unknown to him, the lender is still charging interest on that judgment, so when he thinks he's paid it off he still has a large chunk of interest to pay. Isn't that unfair!!!
- ▶ Yes, say the Court of Appeal
- ▶ No, says the House of Lords:
 - All the borrower is being asked to do is pay interest on the money he has borrowed until he has paid it back. What is unfair about that?
- ▶ So – it depends who's asking, how they ask and who they are asking.



The Harrison case

- ▶ The borrowers say:
 - I had no idea you were trousering 87% (or 667%) of the (whopping) PPI premium as a “commission” from the insurer
 - That makes our relationship unfair!!!
- ▶ Oh no it doesn't, say the District Judge, High Court Judge and Court of Appeal
 - The ICOB Rules did not require the lender to disclose that commission
 - If the Rules didn't require it, it can't be unfair
- ▶ Court of Appeal say unfairness is not about “*a visceral instinct that the relevant conduct is beyond the Pale*”
- ▶ Isn't it? Maybe the Supreme Court won't agree



Where do we find fairness in the CPRs?

- ▶ Reg 3(1): unfair commercial practices are prohibited
- ▶ A commercial practice is unfair if:
 - It contravenes professional diligence
 - It is a misleading action
 - It is a misleading omission
 - It is an aggressive practice, or
 - It is listed in Schedule 1



Professional diligence

- ▶ Reg 2(1) – professional diligence means the standard of special skill and care with a trader may reasonably be expected to exercise towards consumers which is commensurate with either
 - Honest market practice in the trader’s field of activity, or
 - The general principle of good faith in the trader’s field of activity
- ▶ So fairness equates to “honesty and good faith”?



Fairness and good faith

▶ Back to the UTCCRs

- A contract term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the rights and obligations of the parties to the detriment of the consumer
- Lord Bingham in the First National case – “*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.*”
- And how precisely does that help us?



Is all of Schedule 1 really unfair?

- ▶ Para 10 – presenting rights given to consumers in law as a distinctive feature of the trader’s offer?
 - What about s.75 CCA protection on your connected loan?
- ▶ Para 16 – claiming that products are able to facilitate winning in games of chance
 - What about a book telling you how to play roulette better?
- ▶ Even para 30 – can’t a desperate seller tell the customer his kids won’t eat unless he makes a sale?



Why is any of this a problem?

- ▶ A marriage of two incompatible concepts
 - Civil law – broad rules, flexible interpretation
 - The great clunking fist of the UK criminal justice system
- ▶ The real difficulty with all of this:
 - Criminal liability
 - For just about everybody involved with the sale of any product
 - On the basis of highly subjective ideas of fairness



A cautionary tale from the CPRs

- ▶ The SSE case (aka the tale of Crispin Simon Pollak)
- ▶ The unfairness here:
 - A two minute unsuccessful doorstep sale
 - Or a two year unsuccessful criminal investigation and prosecution?
- ▶ Misleading actions, misleading omissions and aggressive commercial practices, all in a day's work
- ▶ Should he have been prosecuted, as an employee of the trader concerned?
- ▶ It depends who is asking, how you ask, and who is answering the question!



PS: Life is not fair