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In the September column, Thomas Samuels considers two common types of loan, those between family members and those from employer to employee.

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LOANS BETWEEN FAMILY MEMBERS AND THOSE FROM EMPLOYER TO EMPLOYEE

This column will deal with two common types of loan, those between family members and those from employer to employee. A frequent question in relation to both is whether they are governed by the Consumer Credit Act 1974 (CCA). In fact, that umbrella query must be broken into two distinct considerations:

- Firstly, whether the would-be lender requires authorisation from the FCA to undertake such lending.
- Secondly, whether such loans would be "regulated" under the CCA.

This column aims to provide a summary of the proper approach to both halves of the question.

Authorisation versus regulation by the CCA

Following the handover of consumer credit regulation from the OFT to the FCA in April 2014, the OFT's licensing regime was abolished and Part III of the CCA, which formerly dealt with such matters, was repealed. It was replaced by the FCA's authorisation regime, which is governed by the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) (RAO). That separation of the statutory provisions relating to authorisation from the scheme of the CCA itself has inevitably led to increased complexity.

In the first instance it is important to understand that authorisation and regulation by the CCA relate to two different things; authorisation pertains to the person undertaking the lending, whereas regulation relates to the nature of the transaction. However, there is a strong link between the two concepts. A person wishing to undertake regulated lending by way of business requires FCA authorisation to do so (*articles 4(1) and 60B(1), RAO*). Equally, a person whose lending is entirely exempt from regulation under the CCA need not be authorised.

As a result of that link, the scope of the authorisation regime and the definition of a "regulated" versus "exempt" credit agreement is set out at articles 60B to 60M of the RAO. However, once it has been determined that an agreement is, in fact, regulated it is necessary to then refer back to the CCA, its associated regulations and the FCA's Consumer Credit sourcebook (CONC) to determine the obligations that arise as a result.

To complicate matters further, in some cases authorisation is not required even when regulated lending is undertaken because the would-be lender is categorised as "excluded" under articles 60I to 60K of the RAO. Such

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cases must still comply with all necessary requirements of drafting and procedure. Equally, if monies were advanced other than "by way of business" the loan agreement may still be regulated under the CCA, although it will be excused from many of the obligations.

For more information on the article 60B(1) RAO consumer credit activity referred to above, including the available exclusions, see *Practice note, Regulated activities: entering into a regulated credit agreement as lender (www.practicallaw.com/1-540-1662)*. For an overview of CONC, see P*ractice note, FCA consumer credit regulation: overview of Consumer Credit sourcebook (CONC) (www.practicallaw.com/7-549-4106)*.

Authorisation

Broadly, there are three stages to considering whether a potential lender needs to be authorised:

- (1) Whether the lending is undertaken by way of business (*article 4(1), RAO*).
- (2) If so, whether the proposed lending is regulated or exempt for the purposes of the CCA.
- (3) Even if the lending is regulated, whether, in any event, the person falls within an exclusion.

Steps (2) and (3) are dependent on the application of the various defined exemptions and exclusions within the RAO (at articles 60C to 60HA and 60I to 60K respectively). Thus, the first stage can present the most difficulty since whether the lending is undertaken by way of business is a question of secondary fact to be considered in light of all the circumstances. For example, the regularity with which lending is undertaken may be relevant but, equally, if entered into with the appropriate intention, a single agreement may be made by way of business.

The best example of such an analysis is that approved by the Court of Appeal in *Helden v Strathmore Ltd [2011] CTLC 158 ([41]–[42]*). There, amongst other matters, the size, regularity and formality of the agreements were all relevant to the conclusion that the activity had been carried on by way of business.

In relation to the two examples posited at the beginning of this column, it is likely that a loan between family members will not be made by way of business. Although by no means a certainty, the very nature of the parties' relationship is likely to be indicative that the loan has been made for reasons other than business.

The position in respect of loans made to employees will probably be different. Although the employer in question may not be in the business of lending money per se, he will be doing so for a purpose ancillary to his business. Thus, it is likely that such loans would require authorisation unless they fall within a defined exemption in the RAO (see *Exemptions* below). For example, see *McMillan Williams (a firm) v Range [2004] 1 WLR 1858*.

For an overview of the FCA consumer credit authorisation regime, see *Practice note, FCA authorisation regime for consumer credit firms (www.practicallaw.com/4-545-3386)*.

Exemptions

A regulated agreement for the purposes of the CCA is any that does not fall within the definition of an exempt agreement (*article 60B(3), RAO*). Unfortunately there is no easy way to guarantee that a particular category of loan will do so.

That said, in relation to both loans to family members and from employer to employee, the most likely applicable exemption is that at article 60G(3) of the RAO. That provision exempts an agreement which is repayable at a capped amount of interest and is "offered to a particular class of individual or relevant recipient of credit and not offered to the public generally". Clearly both family members and employees would fall within that restriction.

Further, for loans between family members, the so-called "business purposes exemption" (*article 60C, RAO*) may be a possibility. That requires that credit of more than £25,000 is provided and that it is to be used by the debtor "wholly or predominantly for the purpose of a business carried on, or intended to be carried on…" (*article 60C(2), RAO*).

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In relation to loans for employees, the exemption at article 60F(2) of the RAO could also apply. That relates to "borrower-lender-supplier" agreements (as defined by article 60L of the RAO) which are repayable, interest-free, by not more than 12 payments over not more than a 12 month period. As set out above, if an agreement falls within a defined exemption then – irrespective of the question of whether it was entered into by way of business – the lending does not constitute a specified activity requiring FCA authorisation pursuant to the RAO.

For more information on the RAO exemptions referred to above, see *Practice note, What is a regulated credit agreement?: Is the credit agreement an exempt agreement? (www.practicallaw.com/2-598-3626)*.

NON-COMMERCIAL AGREEMENTS

In any event, if an agreement is not entered into by way of business but is nonetheless regulated, it will also constitute a "non-commercial agreement", defined as a "consumer credit agreement... not made by the creditor... in the course of a business carried on by him" (*section189(1), CCA*).

Non-commercial agreements, even if regulated, are expressly excluded from many of the drafting and procedural requirements under the CCA and its regulations. For example:

- The majority of Part V (Entry into credit or hire agreements) does not apply to such agreements (*section 74(1), CCA*).
- No section 75 liability can arise in relation to a non-commercial agreement (*section 75(3)(a), CCA*).
- There is no obligation to provide information under section 77 or annual statements of account (*subsections 77(5) and 77A(8), CCA*).
- There is no requirement to comply with the usual steps in relation to default and termination (*subsections 86C(12)(b) and 86E(8), CCA and Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 (SI 1983/1561), regulation 2(9)*).

CONCLUSION

It is entirely understandable why those undertaking relatively casual lending between family members and to employees would want to avoid the complications that can arise from regulation by the CCA. However, it is not possible to simply state that all such agreements can be made without authorisation and/or without complying with the requirements of the CCA. All depends on the precise circumstances and terms of the proposed loan. Although it is perhaps a predictable conclusion for a lawyer to reach, the best answer is always to seek advice in the event of uncertainty.

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