

GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: NOVEMBER 2015

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In the November column, Lee Finch considers the impact of the Consumer Rights Act 2015 for creditors.

Lee Finch, Gough Square Chambers

IMPACT OF THE CONSUMER RIGHTS ACT 2015 FOR CREDITORS

The Consumer Rights Act 2015 (CRA) largely came into force on 1 October 2015. The CRA was promoted by the government as the “biggest overhaul of consumer rights in a generation” and a development that would “boost the economy by £4 billion over the next decade”. Although these claims should be treated with some scepticism, especially as the CRA largely consolidates existing legislation, the impact of the CRA should not be underestimated.

Somewhat confusingly, the CRA does not implement the Consumer Rights Directive (2011/83/EU) (Directive) and, in contrast to the Directive, the CRA does not include a financial services exemption. Accordingly, the CRA applies to consumer credit lending.

This column focuses on some of the specific issues that the CRA raises for those providing credit and does not seek to provide a general overview of the new CRA. General guidance on the CRA has been published by both the Department for Business, Innovation and Skills (BIS) and the Competition and Markets Authority (CMA).

For an overview of the CRA, see *Practice note, Consumer Rights Act 2015: overview* (www.practicallaw.com/3-531-6248).

INFORMATION PROVIDED AND RELIED ON FORMS A TERM OF THE CONTRACT

Given that there is currently no financial services exemption in the CRA, the provision of credit services is a “service” to which Chapter 4 of the CRA applies, including section 50.

Under section 50(1) of the CRA, anything said or written to the consumer that is taken into account by the consumer when purchasing a service (including credit services) or making a decision about the service, is to be treated as a term of the contract. Accordingly, statements made in marketing and promotional material and oral statements made by sales staff could now form terms of a credit agreement. Further, section 50 applies to things said or written by the creditor or “on behalf of” the creditor. This raises the prospect of third party brokers and sales agents making unapproved statements that contractually bind the creditor.

It may be possible to argue that certain statements were not made on the creditor’s behalf (see *Paragon v Plevin* [2014] 1 WLR 4222 for a decision on the scope of “on behalf of” in the context of section 140A of the Consumer Credit Act 1974 (CCA)), but this will depend on the specific facts of the case and will not be successful in all instances. In addition, such an argument may be undermined by the deemed agency provisions within the CCA (section 56, CCA). It is therefore important to mitigate the risks insofar as possible.

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Steps that can be taken to minimise these risks include reviewing all promotional material with section 50 of the CRA in mind, introducing more stringent training for sales staff, more tightly scripting the sales process and more closely monitoring third parties involved in the process. Creditors should also consider introducing clear qualifications which can limit the effect of any statements made (*section 50(2), CRA*).

ASSET FINANCE

When a creditor also provides goods to the consumer, for example under hire and hire-purchase agreements (*sections 6 and 7, CRA*), the consumer will also benefit from the enhanced goods rights in Chapter 2 of the CRA. These new rights include tiered remedies including a 30 day “short term right to reject” (*section 22, CRA*), a right to a repair or replacement (*section 23, CRA*) and a “final right to reject” or right to a price reduction (*section 24, CRA*).

In the event that the consumer exercises his final right to reject, the creditor must refund sums paid by the consumer but, if the goods are rejected outside of the first six months, the creditor can make a deduction to take into account the use the consumer has had of the goods. This is an important concession granted to traders that should alleviate the financial consequences to the creditor of “late” rejection by the consumer. Further, in the case of motor vehicles, a reduction can be made even within the first six months (*section 24(10)(a), CRA*). This exemption is of obvious importance to the asset finance and motor industries as many vehicles lose a significant proportion of their value as soon as they are driven off the forecourt.

The new rights in respect of digital content (see *Digital content* below) may also have a significant impact on asset finance business.

SECTION 75, CCA

In certain situations, section 75 of the CCA imposes liability on creditors for breaches of contract and misrepresentations by suppliers in respect of transactions financed by the creditor. Section 75 has not been amended in light of the CRA coming into force and, accordingly, if suppliers breach any of the terms imposed by the CRA, the consumer will have a “like claim” against the creditor.

To the extent that the consumer has greater rights against the supplier under the new CRA, they will have equivalent greater rights against the section 75 creditor. This will include the new tiered remedies in respect of goods (although the creditor will rarely be able to provide anything but a financial remedy), rights in respect of terms included in the contract as a result of oral or written statements to the consumer (*section 50, CRA*) and rights under the new digital content regime (Chapter 3). The new CRA may also expose creditors to greater liability under section 75 of the CCA because consumers have a greater awareness of their rights and are more willing to make a claim.

DIGITAL CONTENT

The new digital content rights are unlikely to affect consumer credit providers save in three material respects:

- Firstly, under section 75 of the CCA, creditors may have connected lender liability for a supplier’s breach of the digital content provisions.
- Secondly, goods that include digital content are automatically considered defective if the digital content is defective (*section 16, CRA*). This will be especially relevant in the asset finance sphere as most (if not all) new cars are equipped with a computerised system and if that system is defective, the consumer will be able to reject the vehicle.
- Thirdly, while mobile banking apps and other digital content provided by consumer credit providers will usually be excluded from most of the digital content rights because they are generally provided free of charge (*section 33(1), CRA*), creditors will be liable for damage to consumers’ devices or other digital content that the free content caused (*section 46, CRA*).

UNFAIR TERMS

The unfair terms provisions of the CRA largely repeat and replace the provisions previously contained within the Unfair Terms in Consumer Contracts Regulations 1999 (*SI 1999/2083*) (UTCCRs). However, the CRA introduced a number of new terms which may be unfair (expanding the “grey list”) that may be of interest to consumer credit providers, including:

- Terms that require the consumer to pay a disproportionately high sum on early termination (this will need to be considered in conjunction with sections 94, 95 and 95A of the CCA and the Consumer Credit (Early Settlement) Regulations 2004 (*SI 2004/1483*)).
- Terms that permit the trader to determine the subject matter of the contract after the consumer has become bound.
- Terms that permit the trader to determine the price payable under the contract after the consumer has become bound.

ENHANCED CONSUMER MEASURES

The CRA introduced additional enhanced consumer measures under the Enterprise Act 2002 (EA).

Under the new provisions, a creditor facing proceedings under Part 8 of the Enterprise Act 2002 in respect of breaches of consumer protection legislation (including the new CRA), could be ordered to provide redress to affected consumers or for the interests of consumers generally (such as a payment to the Citizens Advice Bureaux) or ordered to permit consumers to terminate their contracts (*section 219A(2), EA*). The court can also order the creditor to take steps to increase compliance such as develop or update a complaints procedure or hire a compliance manager (*section 219A(3), EA*), and can even order a creditor to advertise its breach of the law to provide consumers more information and choice (*section 219A(4), EA*).

If a credit service provider finds itself facing enforcement proceedings then it should take into account these enhanced consumer measures, which may be imposed when it is deciding its tactics in how to deal with the case.

COMPETITION

Finally, it should be noted that the CRA makes a number of amendments to Schedule 8 of the Competition Act 1998, which makes it easier for consumers to bring damages claims for losses arising out of anti-competitive behaviour in the Competition Appeals Tribunal (CAT). It also makes it possible for the CAT to hear collective actions brought on an “opt-out” basis. This could expose creditors to financially significant claims even in cases where the losses suffered by each individual consumer are relatively minor.