

GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: MARCH 2016

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In the March column, Lee Finch considers connected lender liability under section 75 of the Consumer Credit Act 1974 (CCA).

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CONNECTED LENDER LIABILITY UNDER SECTION 75 OF THE CCA

Introduction

In the late 1960's, the Crowther Committee was established to conduct a comprehensive review of the UK's regulation of consumer credit. The Crowther Committee published its report in 1971 and made numerous recommendations that were enacted in the Consumer Credit Act 1974 (CCA). The recommendations adopted included the Committee's suggestion that creditors should be jointly and severally liable with suppliers for goods and services purchased on credit. This recommendation became section 75 of the CCA (see [Section 75 \(Liability of creditor for breaches by supplier\)](#) below).

The Crowther Committee's rationale for extending liability to the creditor was based on the characteristics of the market at the time, particularly the credit card market. In the early 1970s, there were only two types of credit card available in the UK and the issuers had a close relationship with the merchants who would accept their cards. In short, by allowing a merchant to accept their credit cards, the issuers were giving their stamp of approval to the merchant and implicitly representing that the merchant would perform as promised.

The credit market of 2016 is wholly different to that which existed in the 1970s and the rationale for connected lender liability is arguably inapplicable to the modern market. Nevertheless, section 75 of the CCA remains and there is little political appetite to repeal what is considered a strong piece of consumer protection (one can imagine the media backlash and the view of consumer rights organisations).

Section 75 (Liability of creditor for breaches by supplier)

(1) If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor.

(2) Subject to any agreement between them, the creditor shall be entitled to be indemnified by the supplier for loss suffered by the creditor in satisfying his liability under subsection (1), including costs reasonably incurred by him in defending proceedings instituted by the debtor.



(3) Subsection (1) does not apply to a claim:

(a) under a non-commercial agreement;

(b) so far as the claim relates to any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000;

(c) under a debtor-creditor-supplier agreement for running-account credit:

(i) which provides for the making of payments by the debtor in relation to specified periods which, in the case of an agreement which is not secured on land, do not exceed three months, and

(ii) which requires that the number of payments to be made by the debtor in repayments of the whole amount of the credit provided in each such period shall not exceed one.

(4) This section applies notwithstanding that the debtor, in entering into the transaction, exceeded the credit limit or otherwise contravened any term of the agreement.

(5) In an action brought against the creditor under subsection (1) he shall be entitled, in accordance with rules of court, to have the supplier made a party to the proceedings.

This article sets out when section 75 of the CCA applies and discusses some of the more interesting areas of debate and complexity surrounding the creditor's potential liability. However, it is not intended to provide a comprehensive guide to all issues involving section 75 of the CCA.

Extent of liability

Section 75 of the CCA applies to debtor-creditor-supplier agreements (agreements falling within sections 12(b) and 12(c) of the CCA), including credit card agreements and loan agreements entered into to fund a purchase under existing or contemplated arrangements between the creditor and the supplier. Note that in the credit card sphere, liability extends to the now commonplace four party structure where, through the introduction of a merchant acquirer, there is no direct contractual link between the credit card issuer and the supplier (*Office of Fair Trading v Lloyds TSB plc and others* [2007] QB 1).

Conversely, section 75 liability does not extend to debtor-creditor agreements (agreements within section 12(a) of the CCA) or consumer hire agreements. Further, liability does not apply to exempt agreements, charge card agreements (section 75(3)(c), CCA) or systems for the electronic transfer of funds from a customer's current account (section 187(3A), CCA).

Modern methods of purchasing goods using PayPal or some similar payment method raise interesting questions, but the best view is that section 75 does not apply to the end purchase. The transaction financed by the creditor is that between the debtor and PayPal (that is, for the provision of payment services). Accordingly, the creditor could be liable for breaches of contract or misrepresentations by PayPal who is the "supplier" for the purposes of section 75 of the CCA, but not for breaches of contract or misrepresentations by the end merchant.

If the agreement in question is one to which section 75 applies, the number of situations that can trigger the liability are quite extensive: the creditor can be liable when only part of the purchase price is funded by the credit agreement (see definition of "finance" in section 189(1) of the CCA) and even where the purchase was made in a foreign jurisdiction (*Office of Fair Trading v Lloyds TSB and others* [2008] 1 AC 316). Further, the debtor can pursue the creditor without first having to pursue the supplier.

There are, nevertheless, a number of important limitations. The creditor is only liable for breaches of contract or misrepresentations of the supplier. It therefore follows that if the debtor's only claim against the supplier is

found on some other cause of action, the creditor will not be liable (for example, claims under the Consumer Protection Act 1987). In addition, the creditor is not liable for misrepresentations made by third parties. This is often a complication that arises in cases involving timeshare agreements where the party who made the alleged misrepresentations is not the same party who processed the transaction and/or supplied the product.

Furthermore, section 75 liability does not apply to purchases where the “single item cash price” does not exceed £100 or is for more than £30,000. Accordingly, many everyday purchases will be excluded as well as purchases for high value items such as luxury vehicles or plots of land. It should be noted that even if the creditor is not liable under section 75 of the CCA, liability may still be imposed by virtue of section 56 of the CCA (where the creditor can be liable for misrepresentations made by the supplier, as negotiator, in antecedent negotiations).

Like claim

Section 75 of the CCA provides the debtor with a “like claim” against the creditor; that is to say any claim that the debtor would have against the supplier, for breach of contract or misrepresentation, he will also have against the creditor. This is wider than the recommendation of the Crowther Committee, which was limited to “monetary claims against the creditor”. Obviously, the debtor can pursue the creditor for any monetary claim that he has against the supplier, but what of claims for non-monetary remedies such as rescission and specific performance?

Given that the remedy of specific performance is only available in limited situations where it is possible and desirable for the party to be forced to perform the contract, it would rarely, if ever, be available against the creditor as the creditor is highly unlikely to ever be in a position to perform the contract. Part of the Supreme Court’s reasoning regarding rescission in *Durkin v DSG Retail Ltd [2014] UKSC 21* could also be applied to preclude claims for specific performance and other non-monetary remedies under section 75 of the CCA.

The question of rescission historically caused more difficulty. If the debtor rescinded the supply contract, did he have a “like claim” which allowed him to rescind the credit agreement? This question was dealt with in *Durkin v DSG Retail Ltd [2014] UKSC 21*, where it was held that section 75 of the CCA did not provide the debtor with a right to rescind the credit agreement, but a term was implied into the credit agreement that it was conditional on the survival of the supply agreement. Accordingly, while the debtor did not have the right to rescind the credit agreement under section 75, they did have the right to rescind the credit agreement as he had rescinded the supply agreement.

Indemnity against supplier

While the debtor may pursue the creditor without first pursuing the supplier, the creditor does have a right of indemnity against the supplier (*section 75(2), CCA*). To claim on the indemnity, the creditor must show that he is liable to the debtor and has suffered a loss in satisfying that liability. To satisfy the conditions and claim under the indemnity, the creditor does not need judgment against it and the creditor does not need to have added the supplier into proceedings (under the procedure in Part 20 of the Civil Procedure Rules (CPR)). However, creditors should exercise care when settling claims pre-litigation or continuing litigation without the involvement (either formally or informally) of the supplier as, after settlement or judgment, the supplier may dispute the creditor’s liability to the debtor and challenge the creditor’s right to an indemnity.

Section 75(2) of the CCA obviously provides the creditor with important protection but, in many cases, the reason for the debtor using their rights under section 75 is that the supplier is not solvent, which renders the section 75(2) right to indemnity rather toothless.