

GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: NOVEMBER 2016

This document is published by Practical Law and can be found at: uk.practicallaw.com/w-004-4116
Request a free trial and demonstration at: uk.practicallaw.com/about/freetrial

In the November column, Lee Finch considers some commonly asked questions relating to regulated consumer hire agreements. Such agreements are within scope of the consumer credit regime.

Lee Finch, Gough Square Chambers

REGULATED CONSUMER HIRE AGREEMENTS: Q&A

Introduction

Regulated consumer hire agreements are often the lowly forgotten relative of the consumer credit regime, with the consequence that much less is written about and there is more confusion surrounding regulated consumer hire agreements. This month's column draws together and answers some common questions about regulated consumer hire agreements; accordingly, the topics covered are varied and there is no unifying theme (other than they all concern regulated consumer hire agreements and are, with a bit of luck, informative and useful).

Before answering the specific questions, it is worth defining "regulated consumer hire agreement". A consumer hire agreement is an agreement under which goods are hired by an individual (that is, as defined in section 189 of the Consumer Credit Act 1974 (CCA), natural persons, small partnerships and unincorporated bodies) for a period which is capable of subsisting for more than three months and is not a hire-purchase agreement (as defined in section 15 of the CCA). Consumer hire agreements entered into on or after 1 April 2014 are regulated consumer hire agreements if they are not exempt under articles 60O to 60Q of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) (RAO) (*article 60N, RAO*).

For more information on regulated activity and exemptions, see *Practice note, Regulated activities: entering into a regulated consumer hire agreement as owner*.

Does a regulated consumer hire agreement need to be physically signed by both parties?

Regulated consumer hire agreements need to be signed by both parties but there is no requirement for this to be a physical or "wet" signature.

By virtue of section 61(1)(a) of the CCA, regulated agreements, including regulated consumer hire agreements, are not properly executed unless they are signed *by* the hirer and *by or on behalf of* the owner (this wording suggests that the hirer cannot authorise a third party to sign on their behalf).

What constitutes a valid signature is a question that has been troubling English judges for centuries, with the approach taken depending very much on the particular context. However, perhaps the "normal" meaning is best expressed by Evershed M.R. in *Goodman v J Eban Ltd [1954] 1 QB 550*: the affixing of a name (or mark representing a name) in order to authenticate or verify a document. Adopting this approach to the question of a "valid signature" is what makes it possible in English law to "sign with an X".

The technological changes that have occurred over the past few decades, in particular the ability to conclude contracts online, has added an additional complexity to the question of valid signatures: what constitutes a valid electronic signature? In its 2001 advice paper, *Electronic Commerce: Formal Requirements on Commercial*

RESOURCE INFORMATION

RESOURCE ID

w-004-4116

RESOURCE TYPE

Article

PUBLISHED DATE

7 November 2016

JURISDICTION

United Kingdom



Transactions, the Law Commission concluded that digital signatures (involving verification via an encryption key), the affixing of scanned manuscript signatures, the typing of a name or initials, or clicking on a website, were all capable of satisfying statutory signature requirements. The legislation that followed the Law Commission's paper did not establish a definition of electronic signature or take the debate any further. Nevertheless, the Law Commission's conclusion gradually became the generally accepted view and in *Bassano v Toft [2014] EWHC 377 (QB)* Popplewell J held, on the facts of the case, the action of clicking "I accept" fulfilled the "signature requirement" in section 61(1) of the CCA.

So, while the hirer and the owner (or someone on behalf of the owner) must sign the regulated consumer hire agreement, this requirement can be satisfied, in the correct circumstances, by the clicking of a button that indicates consent to be bound to the agreement.

What are the effects of non-compliance with the requirements of the consumer hire agreement exemptions?

If a consumer hire agreement does not fall within one of the exemptions contained in articles 600 to 60Q of the RAO, it will be a regulated consumer hire agreement. This includes if the agreement in question is intended to fall within one of the exemptions but fails to comply with the requirements. This can have especially serious consequences when the owner intended to rely on the exemptions.

In the first instance, it is unlikely that a regulated process will have been followed and, accordingly, the statutory requirements (including those as to information, form and content) will not have been fulfilled; as a result of these breaches, the agreement will be unenforceable without a court order.

Secondly, and perhaps most importantly, many owners seek to use the exemptions to avoid the need to obtain FCA authorisation, which would otherwise be required, as entry into regulated consumer hire agreements by way of business is a regulated activity. If this is the case and the owner did not have FCA authorisation when they entered into the regulated consumer hire agreement, they will have contravened the "general prohibition" under section 19 of the Financial Services and Markets Act 2000 (FSMA). This means that they will be guilty of a criminal offence (*section 23, FSMA*). In addition, the agreement will be unenforceable under section 26 of FSMA (although the courts have the power to permit it to be enforced) and the FCA could apply to court for an injunction (*section 380, FSMA*) or a restitution order (*section 382, FSMA*).

For more information on the general prohibition, see [Practice note, Section 19 of FSMA: the general prohibition](#).

If the equipment, which is the subject of a regulated hire agreement is substituted, does this fall within the definition of a modifying agreement?

The goods that form the subject matter of a regulated consumer hire agreement are a core element of that bargain and must be specified in that agreement (paragraph 3 of Schedule 3 to the Consumer Credit (Agreements) Regulations 1983 (*SI 1983/1553*)). Accordingly, when those goods are substituted by mutual agreement (whether for goods of equivalent value or otherwise), the original agreement has been varied and the mutual agreement substituting the goods amounts to a modifying agreement within the definition of section 82(2) of the CCA.

Modifying agreements are especially complicated (even within the generally complicated consumer credit sphere) and trying to properly document such agreements can cause both businesses and lawyers to break out in cold sweats. Consequently, rather than using a modifying agreement, it is often preferable to cancel the original agreement and enter into a new free-standing agreement, irrespective of the consequences in respect of the hirer's cancellation rights.

Do the Consumer Credit (Disclosure of Information) Regulations 2010 apply to regulated consumer hire agreements?

The Consumer Credit (Disclosure of Information) Regulations 2010 (*SI 2010/1013*) (2010 Regulations) do not apply to regulated consumer hire agreements.

The 2010 Regulations were introduced to align the domestic law with the Consumer Credit Directive (2008/48/EC), which did not cover consumer hire agreements. Accordingly, the Consumer Credit (Disclosure of Information) Regulations 2004 (SI 2004/1481) continue to apply to regulated consumer hire agreements.

Do the Consumer Protection (Distance Selling) Regulations 2000 apply to regulated consumer hire agreements?

The Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) (Distance Selling Regulations) apply to contracts, other than excepted contracts, concluded between the business and the consumer through the exclusive use of one or more means of distance communication (regulations 3 and 4).

Excepted contracts are set out in regulation 5 and include contracts relating to “financial services”, which are defined as any service of “a banking, credit, insurance, personal pension, investment or payment nature” (regulation 3). Accordingly, while regulated consumer credit agreements would be excluded from the scope of the Distance Selling Regulations, regulated consumer hire agreements are not. Consequently, to the extent that a regulated consumer hire agreement is also a distance contract (entered into before 13 June 2014), the Distance Selling Regulations will apply.

Do the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 apply to regulated consumer hire agreements?

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) (Consumer Contracts Regulations) supersede the Distance Selling Regulations for agreements entered into on or after 13 June 2014 and, for present purposes, apply to the same type of contracts. Accordingly, the reasoning set out above is equally applicable with the result that the Consumer Contracts Regulations apply to regulated consumer hire agreements that are also distance contracts (regulation 6(1)(b)).