

Annexe D

The UK Legal Framework and significant stakeholders
for consumer credit

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1 INTRODUCTION

- 1.1 This annexe gives a summary of the principal legislation and some of the case law governing the consumer credit sector in the UK.
- 1.2 The provision of credit and the supply of goods and services on credit, and hire or hire-purchase to individuals¹ is predominantly regulated by the Consumer Credit Act 1974 (CCA 1974) as amended by the Consumer Credit Act 2006 (CCA 2006) and the regulations that stem from it. This area is subject to reform, as evidenced by the new Consumer Credit Directive² due to be implemented in 2010.

¹ Consumer Credit Act 1974, section 189.

² Council Directive 2008/48/EEC.

2 CONSUMER CREDIT ACT 1974

- 2.1 As stated above, the CCA 1974 is the primary UK legislation regulating consumer credit, hire purchase and consumer hire agreements as defined by the Act.³ Such agreements are called regulated agreements. Together with the regulations that stem from it, CCA 1974 aims to establish a system of protection for consumers.
- 2.2 Before the changes made by CCA 2006, the Act regulated credit agreements, of no more than £25,000 between traders and individuals, as defined in the CCA. This included some types of business – such as sole traders, partnerships and unincorporated associations. There is no longer a financial limit⁴ following amendments made by CCA 2006 and the definition of an individual has changed so that partnerships of more than three persons are outside the scope of the Act.
- 2.3 The essence of the licensing system is that consumer credit, hire purchase and consumer hire businesses and any ancillary credit businesses must be licensed under CCA 1974 by the Office of Fair Trading (OFT).⁵ It is a criminal offence to engage in unlicensed trading.
- 2.4 The CCA 1974 protects consumers who enter into regulated agreements by a variety of means, including:
- regulating the form and content of agreements
 - controlling credit advertising
 - requiring detailed information to be given by creditors to consumers
 - providing relief from unfair relationships.

³ Section 8 and section 15.

⁴ CCA 1974, section 2.

⁵ See paragraph 8.6 for a full list of categories of licensable business.

2.5 Section 16 CCA 1974 provides a number of exemptions from the scope of consumer credit regulation. Further details can be found in the Consumer Credit (Exempt Agreements) Order 1989.

3 CONSUMER CREDIT REGULATIONS

- 3.1 There are many regulations which stem from CCA 1974 and which provide further detail on the regulatory regime which governs consumer credit, including details such as what form regulated agreements must take, and what must appear in a consumer credit advertisement. These regulations expand on the CCA 1974 and provide clarity for consumer credit businesses as to what their obligations are in the running of their business. There are often sanctions for failures to comply with these regulations, although the nature of the sanction varies.
- 3.2 A sample of these regulations is below, although this is not a comprehensive list.

Consumer Credit (Agreements) Regulations 1983

- 3.3 The Consumer Credit (Agreements) Regulations 1983 (the Agreements Regulations) regulate the content of consumer credit agreements and their most recent significant revision occurred in 2004 with the Consumer Credit (Agreements) (Amendment) Regulations 2004.
- 3.4 The Agreements Regulations apply to all regulated agreements. They specify the order in which all information in agreements should be presented, and the nature of the information that must be provided.
- 3.5 All regulated agreements must be divided into three main sections. The sections are as follows:
- Key Financial Information
 - Other Financial Information
 - Key Information.
- 3.6 Further information is prescribed that must be contained within each section and there are rules about the presentation and location of this information within a regulated agreement.

- 3.7 Failure to comply with the Agreements Regulations has implications for the enforceability of a regulated agreement. In some cases, agreements made before 6 April 2007 which do not comply are irredeemably unenforceable. This is no longer the case, and all non-compliant agreements made after this date can be enforced with a court order.

Consumer Credit (Advertisements) Regulations 2004

- 3.8 The Consumer Credit (Advertisements) Regulations (Advertisements Regulations) came into force on 31 October 2004.
- 3.9 The Advertisements Regulations set out a new system to control the form and content of advertisements relating to consumer credit and consumer hire products. The Regulations extend to all forms of credit advertising.
- 3.10 The Advertisement Regulations require, if certain conditions are met, that credit advertisements must include a typical annual percentage rate (APR). A typical APR is a rate at or below that which will be provided to at least 66 per cent of agreements resulting from the advertisement. A typical APR must be more prominent than all other information, at least 1.5 times the size of other financial information.
- 3.11 The Advertising Regulations also require specify particular written warnings that must be given to consumers where certain types of product (such as secured loans) are advertised.
- 3.12 Where particular financial information is given in an advertisement, the Advertisement Regulations require that the advertisement must include a list of other prescribed financial information which must all be presented in the advertisement as a whole and given equal prominence. All credit advertisements must use clear and plain language, be easily legible (or audible as the case may be), specify the name of the advertiser⁶ and be

⁶ Advertisements Regulations 2004, regulation 3.

given equal prominence to all other information apart from the typical APR.

Consumer Credit (Disclosure of Information) Regulations 2004

- 3.13 The Consumer Credit (Disclosure of Information) Regulations 2004 (Disclosure of Information Regulations) came into force on 31 May 2005. They seek to ensure that consumers have enough information to make informed and intelligent decisions about entering into a consumer credit or consumer hire agreement.
- 3.14 The Disclosure of Information Regulations create an obligation for creditors to provide a potential debtor or hirer with prescribed information, to be entered into a separate pre-contract disclosure document before an agreement is signed. The requirements for the manner in which the information in the disclosure document should be presented include that they should be:
- headed as 'Pre-contract Information'
 - easily legible
 - of equal prominence
 - contained in a separate document to the agreement that can be taken away by the consumer.
- 3.15 The information to be disclosed is based upon the information which the Agreement Regulations require to be contained within a regulated agreement.
- 3.16 However the Disclosure of Information Regulations do not specify a minimum time period between the disclosure of information and the entry into a regulated agreement.

Consumer Credit (Early Settlement) Regulations 2004

- 3.17 The Consumer Credit (Early Settlement) Regulations 2004 (Early Settlement Regulations 2004) came into force on 31 May 2005,

amending the Consumer Credit (Settlement Information) Regulations 1983 and replacing the Consumer Credit (Rebate on Early Settlement) Regulations 1983. They apply to all regulated fixed sum agreements with exceptions. They also do not apply when the consumer terminates a hire-purchase or conditional sale agreement.

- 3.18 The Early Settlement Regulations 2004 entitle consumers to a rebate for early settlement under the credit agreement and they introduce a new formula for the calculation of a rebate. The lender can give a greater, but not lesser, rebate than the amount due according to the statutory calculation.
- 3.19 There is a settlement date of 28 days for the purposes of calculating the rebate after the consumer has notified the lender of his intention to settle early. Where agreements last for more than one year, this may be deferred by a further month.

Financial Services (Distance Marketing) Regulations 2004

- 3.20 The Financial Services (Distance Marketing) Regulations 2004 (the Distance Marketing Regulations) which implement the Distance Marketing of Financial Services Directive (Distance Marketing Directive) came into force on 31 October 2004. They apply to all manner of financial services, including those of a credit nature. They complement the existing consumer credit regime.
- 3.21 The Distance Marketing Regulations do not extend to sole traders, partnerships or unincorporated associations, only to natural persons acting outside any business they may carry on. The Distance Marketing Regulations follow the Distance Marketing Directive.⁷
- 3.22 Where the Distance Marketing Regulations apply, Disclosure of Information Regulations do not. There is no duplication of pre-contract disclosure regimes, as the Distance Marketing Regulations require pre-

⁷ Council Directive 2002/65/EC.

contract information for all distance sale consumer credit contracts except in very limited circumstances. The information can be incorporated into the credit agreement as long as it is given to the consumer in good time before the contract is concluded.

- 3.23 The Distance Marketing Regulations provide, with exceptions, that all consumer credit agreements concluded at a distance from 31 October 2004 will be subject to cancellation period of 14 days from the date the agreement was concluded.

Consumer Credit (Total Charge for Credit) Regulations 1980

- 3.24 The Consumer Credit (Total Charge for Credit) Regulations (TCC Regulations 1980), as amended, set out the rules for the calculation of the total charge of credit and APR. The total charge of credit is expressed in the form of the APR.⁸
- 3.25 APR includes interest, other charges payable under the transaction by or on behalf of the debtor and where insurance is required under a transaction, any premium under the insurance contract.

⁸ TCC Regulations 1980, regulation 7.

4 CONSUMER CREDIT ACT 2006

4.1 The CCA 2006 was implemented in stages but is now fully in force. The purpose of CCA 2006 was to reform the 1974 Act. It considerably amended CCA 1974 with the aim of establishing a fairer, clearer and more competitive consumer credit market.

4.2 The changes introduced by CCA 2006 include:

- **New terminology** – A change in the terminology and definitions used in the Consumer Credit Act 1974. This includes an amended definition of ‘individual’.⁹
- **Removal of the £25,000 financial limit** – The CCA 1974 now applies to consumer credit and hire agreements of any amount. However, the limit remains for lending for business purposes.
- **Unfair relationships test**¹⁰ - This test replaces the extortionate credit bargains provisions which provided little practical protection. It applies to consumer credit agreements. The unfair relationships test is wider and focuses on the relationship between the consumer and lender. A wider range of remedies is now available for the court to use in addressing unfairness.¹¹
- **Financial Ombudsman Service** – The jurisdiction of the FOS has been extended by allowing consumers to now refer complaints about licensed creditors.
- **Reform of licensing system** - The OFT has been given enhanced powers, including the ability to impose requirements on licensees,

⁹ CCA 1974, section 189.

¹⁰ CCA 1974, section 140A.

¹¹ CCA 1974, section 140B.

breach of which can lead to imposition of fines of up to £50,000.
The fitness test as part of the licensing process has been expanded.

- **First-Tier Tribunal (Consumer Credit)** – This Tribunal has been established as a point of appeal against decisions of the OFT.
- **New categories of licensed business** - Debt administrators and credit information services now require licences.
- **New post contract transparency provisions** - This includes periodic statements for fixed sum credit, periodic information on statements for running account credit, arrears notices and default notices.
- **Abolition of automatic unenforceability** - All agreements are now enforceable with a court order, even those which previously would have been irredeemably unenforceable.
- **High net worth exemption** - This exemption enables wealthy individuals, those with an income of over £150,000 or net assets of over £500,000, to opt out of regulation. New business related exemptions have also been introduced.

5 CONSUMER CREDIT DIRECTIVE

- 5.1 The Consumer Credit Directive (the Directive),¹² which must be implemented into UK law by June 2010, introduces more change to consumer credit laws in the UK. It is a maximum harmonisation directive and aims to harmonise key aspects of consumer credit laws within Europe. It replaces the 1987 Consumer Credit Directive.¹³
- 5.2 The Directive will be implemented via regulations amending the UK CCA regime. It imposes new requirements on lenders and intermediaries as well as making changes to some existing requirements. Draft regulations were published by the Department for Business Innovation and Skills (BIS) in October 2009 but remain subject to change.
- 5.3 The scope of the Directive is narrower than the current UK CCA regime, but BIS intend to apply the new provisions (with some modifications) to all consumer credit agreements regulated under the CCA. These include:
- credit agreements below €200 or above € 75,000
 - loans to sole traders, small partnerships and unincorporated bodies
 - second charge mortgages
 - credit with no interest and other charges.
- 5.4 The Directive introduces changes in the following areas:
- advertising¹⁴
 - pre-contractual information¹⁵

¹² Council Directive 2008/48/EEC

¹³ Council Directive 87/102/EEC.

¹⁴ Council Directive 2008/48/EEC, Article 4.

- adequate explanations¹⁶
- consumer creditworthiness assessment¹⁷
- contractual information¹⁸
- right of withdrawal¹⁹
- early repayment²⁰
- assignment of rights²¹
- calculation of APR²²
- credit intermediaries²³
- overdrafts.

Advertising

5.5 The Directive introduces significant changes to the advertising requirements in the Advertising Regulations, as amended. Where an

¹⁵ Council Directive 2008/48/EEC, Article 5.

¹⁶ Council Directive 2008/48/EEC, Article 5.6.

¹⁷ Council Directive 2008/48/EEC, Article 8.

¹⁸ Council Directive 2008/48/EEC, Article 10.

¹⁹ Council Directive 2008/48/EEC, Article 14.

²⁰ Council Directive 2008/48/EEC, Article 16.

²¹ Council Directive 2008/48/EEC, Article 17.

²² Council Directive 2008/48/EEC, Article 19.

²³ Council Directive 2008/48/EEC, Article 21.

advertisement includes an interest rate or figures relating to the cost of credit, the Directive requires standard financial information to be included in the advertisement in a clear, concise and prominent way by means of a representative example. The information to be included relates to the interest rate, charges, the total amount of credit and the APR. If relevant, the duration of the agreement, the cash price and any advance payment for goods/services, the total amount payable and the amount of instalments must also be included.

Pre-contractual information

- 5.6 The Directive introduces a major change to credit agreements through the Standard European Consumer Credit Information form (SECCI). The SECCI provides a new format for pre-contractual information to be disclosed in good time before the borrower becomes bound by the agreement. Although the content is broadly similar to current CCA requirements, the format will be prescribed with no scope for lenders to depart from this.

Adequate explanations

- 5.7 A significant change to be introduced by the Directive is the requirement that lenders, or where applicable intermediaries, provide an adequate explanation of key aspects of credit agreements to borrowers prior to the conclusion of the agreement. Explanations should cover pre-contractual information, the main features of the credit product, as well as the specific effects it may have on the borrower including the consequences of default. They should enable the borrower to assess whether the agreement is suited to his needs and financial situation. Member states can require aspects of the explanation to be disclosed orally in appropriate circumstances.

Consumer creditworthiness

- 5.8 The Directive imposes a new obligation on lenders to assess the creditworthiness of the borrower on the basis of sufficient information, where appropriate obtained from the borrower and where necessary on

the basis of consultation with a credit reference agency. The assessment should take place before a credit agreement is concluded or before a significant increase in the total credit amount under an existing agreement. The aim of the assessment is to ensure responsible lending.

Contractual information

- 5.9 The Agreements Regulations, as amended, currently prescribe information to be included in credit agreements. The Regulations will be updated in accordance with the Consumer Credit Directive as they introduce some additional information requirements.
- 5.10 The Directive requirements are similar to the pre-contractual requirements under the SECCI but are less prescriptive as to form in that lenders are only required to set out information in a clear and concise manner. There will also be changes to the rules on signature and copy documents.

Right of Withdrawal

- 5.11 The Directive provides for a right of withdrawal within 14 days of all credit agreements within its scope. Capital and accrued interest must be repaid by the borrower no later than 30 days after giving notice. Currently, the borrower has a right to cancel within five days of receiving a copy of the executed credit agreement. This right to cancel only applies currently to credit agreements where representations have been made to the borrower during face-to-face negotiations and the agreement is signed by the borrower away from the lender's premises. Unlike the UK CCA regime, the right of withdrawal does not automatically cancel any linked transaction (such as for the supply of goods or services), and the borrower has to pay interest for the period of the credit.

Early Repayment

- 5.12 In contrast to the UK regime, where there is only a right to repay in full, the Directive provides borrowers with the right to make full or partial

early repayment of the loan at any time. This includes a right to a reduction of interest and charges for the remainder of the agreement. The Directive provides that lenders are entitled to fair and objectively justified compensation for the costs directly linked to early repayment if the repayment falls within the period of a fixed borrowing rate. Compensation cannot exceed one per cent of the capital repaid (or 0.5 per cent where the outstanding period of the agreement is less than a year) and may be limited by member states to repayments exceeding €10,000.

Assignment of rights

- 5.13 The creditor will be obliged to inform the borrower where there is an assignment of the creditor's rights unless the arrangements for servicing the debt remain unchanged. This applies irrespective of whether the debt is equitably or legally assigned.

Calculation of APR

- 5.14 The Directive will introduce a new method of calculation of APR to be used by lenders, replacing the UK formula, although the results will be broadly the same. The new formula is prescribed in Part 1 Annex 1 of the Directive. It has a mathematical effect identical to the current UK formula. A number of the APR assumptions will also be changing.

Credit intermediaries

- 5.15 The Directive imposes new disclosure requirements on credit intermediaries. This is a newly defined activity and overlaps significantly (but not entirely) with the definition of credit brokerage under the CCA regime.
- 5.16 The disclosure requirements for credit intermediaries are as follows:
- They must disclose the extent of their powers in advertising and other documentation intended for consumers and whether they act independently or exclusively for one or more creditors.

- They must agree with the consumer any brokerage fee that will be charged to the consumer and disclose this information in writing before the conclusion of the credit agreement.
- They must communicate to the lender any brokerage fee payable to enable the lender to take this into account when calculating the APR.

Overdrafts

5.17 The Consumer Credit Directive provides light touch requirements for both authorised and unauthorised overdrafts (overrunning).

Authorised Overdrafts

5.18 The Directive prescribes pre-contractual, contractual and post-contractual information requirements for authorised overdrafts repayable within three months or on demand. Pre-contractual information must be provided in writing before the borrower is bound by the agreement, but does not have to be in the form of the SECCI. If the borrower makes an overdraft request over the phone to take immediate effect, the lender can provide limited disclosure orally and confirm the required information in writing immediately after the agreement is concluded.

5.19 Contractual information requirements are similar with the added requirement that they must show an assumed total cost of credit (but not an APR).

5.20 Post contractual information requires the lender to provide regular statements of account. The Directive requires that the statements should include the applied interest rate.

Unauthorised Overdrafts

5.21 Lenders will have new obligations in relation to unauthorised overdrafts.²⁴ The current account agreement will need to include the interest rate and charges, and these must also be notified to the borrower in writing on a regular basis. In the event of a significant overrunning exceeding one month, the borrower must be informed of the amount of the overrunning, the interest rate and any penalties, charges or interest or arrears.

Exemptions

5.22 The Directive will lead to a number of changes to existing CCA exemptions. In particular, the high net worth exemption will be limited to loans above £60,260, and the existing exemption for short-term loans, to be repaid with 12 months in no more than four instalments, will be limited (in line with the Directive) to loans which are free of interest and other charges. In addition, there will be changes to the exemption for loans offered to a restricted public at rates lower than those prevailing on the market.

²⁴ Council Directive 2008/48/EEC, Article 18.

6 CHEQUE ACT 1992

- 6.1 The Cheque Act 1992 came into force on 16 March 1992 to amend the law in the UK relating to cheques, particularly the Bills of Exchange Act 1882 and the Cheques Act 1957.
- 6.2 The Act was introduced to prevent cheque fraud by making cheques crossed 'Account Payee' only payable into the account of the named payee. Although the Act succeeded in reducing cheque fraud, people without a bank account were prevented from cashing cheques. As a result, third party cheque encashment emerged as a growth business after provisions were made for certain businesses to provide a cheques cashing facility for those without a bank account.
- 6.3 Since cheque cashing does not provide a loan, it is not covered by the CCA 1974, as amended. Third party cheque cashers however have to be registered as Money Service Businesses (MSBs) with HM Revenue & Customs (HMRC)²⁵ and must comply with Money Laundering Regulations.²⁶

²⁵ See paragraph 9.30.

²⁶ See paragraph 7.

7 MONEY LAUNDERING REGULATIONS 2007

- 7.1 The Money Laundering Regulations 2007 (MLR 2007) came into force on 15 December 2007 and replaced the Money Laundering Regulations 2003. By reducing the possibility of legitimate businesses being used for money laundering, MLR 2007 aims to detect, deter and disrupt financial crime and terrorist financing.
- 7.2 The MLR 2007 apply to a number of businesses including Money Service Businesses (MSBs). MSBs are businesses which exchange currency, transmit money or cash third party cheques.²⁷ The MLR 2007 require that all businesses within its scope be supervised. MSBs not supervised by the Financial Services Authority must be registered with HMRC under MLR 2007.
- 7.3 The OFT has been given the role of supervising estate agents and consumer credit financial institutions (CCFIs) under MLR 2007. CCFIs are consumer credit lenders who are not authorised by the Financial Services Authority or supervised by the HMRC as MSBs. Examples of the lenders the OFT supervises are home retail collected credit, on-line pay day loans and pawnbrokers.
- 7.4 MLR 2007 stipulates that the relevant supervisory authority should maintain a register of those supervised where the risks are greatest. The OFT requires that all supervised businesses must be registered to comply with the Regulations by January 2010 or face a civil penalty or prosecution.

²⁷ See paragraph 6.

8 CONSUMER CREDIT CASE LAW

Extortionate Credit Bargains and Unfair Relationships

8.1 The extortionate credit bargains test contained in sections 137-140 of the CCA 1974, was not in practice a significant tool to protect consumers. The statutory test was considered to be too narrow and too high a hurdle²⁸ because it focused primarily on the cost of credit, including the interest imposed at the time the credit agreement was taken out. The DTI²⁹ White Paper³⁰ noted that, 'Only about 30 extortionate credit cases are known to have reached the courts and of those only 10 were proven'.³¹ Judges mainly interfered in credit bargains in outrageous circumstances. The White Paper also mentioned regarding the extortionate credit bargains provisions that:

'the Government believes that these provisions have not operated effectively...The existing law has not been effective in dealing with the margins of the market, in particular, regarding credit to consumers on low incomes. The existing definition should be replaced with a test that would agreements easier to challenge...there are up to a few hundred thousand people (often the most vulnerable in society) who have loans with costs , terms and conditions that could be considered extortionate'.³²

8.2 The extortionate credit bargains test was replaced on 6 April 2007 with the unfair relationships test under the CCA 2006. The unfair relationships test applies to all new credit agreements made on or after 6

²⁸ *Broadwick Financial Services Ltd v Spencer* [2002] EWCA CIV 35 at 80.

²⁹ The Department for Trade and Industry, now BIS.

³⁰ DTI White Paper December 2003: *Fair Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040.

³¹ White Paper, paragraph 3.27.

³² White Paper, paragraph 3.30.

April 2007 and to all existing agreements from 6 April 2008, except agreements exempt under section 16(6C) of CCA 1974. The old test continues to apply to agreements which ended before the end of the transitional period.

- 8.3 The new concept of unfair relationships is wider in its scope and provides the court with more discretion to intervene in relation to credit agreements not only concerning the cost of credit but also where it considers that the credit relationship is unfair. The new test enables consumers to challenge a credit bargain in more ways than before.

Extortionate Credit Bargains: The Old Test

- 8.4 Under the extortionate credit bargains provision an agreement could be reopened by the court, so as to do justice between the parties. The court had a variety of powers available to it where it had found an extortionate credit bargain to subsist.

The Test

- 8.5 A credit bargain was found to be extortionate where the terms required the debtor to make payments which were grossly exorbitant or where the credit bargain 'otherwise grossly contravenes ordinary principles of fair dealing'.³³ Although section 138(1)(a) suggested that the court was principally concerned with whether financial obligations were grossly exorbitant, section 138(1)(b) enables the court to examine whether unfairness in other respects may have made a credit bargain extortionate. The test looked at the credit bargain under a wide definition, including the items in the total charge for credit and any linked transactions. The relevant time to evaluate whether the credit bargain was extortionate was at the time the agreement was made. The test does not consider the subsequent relationship of the parties.

³³ CCA 1974, sections 137 -140.

8.6 Cases have tended to express different views on what is meant by 'extortionate' but an indicative opinion was given by Sir John Donaldson in *Wills v Wood*,³⁴ which said that an extortionate credit bargain would include at least a scenario in which there was a substantial imbalance of bargaining power, where one party has taken advantage of the other.

8.7 Sections 138(2)-(5) of CCA 1974 set out external factors or evidence which the court was required to consider in determining whether a credit bargain is extortionate. The evidence adduced in determining an extortionate credit bargain included:

- prevailing interest rates
- the debtor's age, experience, business capacity and state of health
- the degree of risk accepted by the creditor at the time the credit agreement was made having regard to the value of any security provided.

The APR calculated under the TCC Regulations 1980 was said to be an appropriate measure in determining prevailing interest rates.³⁵

8.8 If the debtor in a credit bargain alleged or raised the issue that the credit bargain was extortionate under section 139(1) of CCA 1974, the onus was on the creditor to prove otherwise.³⁶

³⁴[1984] CCLR 7. Referred to by Dyson LJ in *Paragon Finance Plc v Nash* [2001] EWCA Civ 1466 at 67.

³⁵ *Broadwick Financial Services Ltd v Spencer* [2002] EWCA Civ 35 at 33-34, *Davies v Direct Loans* [1986] 1 WLR 823 at 835.

³⁶ CCA 1974, section 171(7).

Case Law on Extortionate Bargains

8.9 Whether or not the interest rate or other amounts payable, which fall into the total charge for credit, was excessive was an important question to be considered in determining whether the payments to be made under the credit agreement were 'grossly exorbitant'. Although there are cases to suggest that a credit agreement with a very high interest or APR would fall within the extortionate credit bargains test or was vulnerable to being reopened,³⁷ there are also cases which suggest that a credit agreement with a seemingly high APR or interest rate was not always exorbitant or expensive. Some cases suggest that it depends on other factors that existed at the time the agreement was made such as the product type³⁸ or even whether security was provided.

Davies v Directloans Ltd³⁹

8.10 The claimants Mr and Mrs Davies, in 1979 wanted to buy a house. They were unable to obtain a mortgage because they were both self-employed and had irregular incomes. They entered into a deferred sale arrangement with the defendant, Directloans Ltd. For a consideration of £50, the defendant gave them an option to purchase property from a company within the same group. The agreement also provided the claimants with a 12-month delay in purchasing the property to enable them to find a mortgage. During this time the claimants were entitled to occupation and there would be payment of interest on the balance of the purchase price.

³⁷ *Barcabe Ltd V Edwards* [1983] C.C.L.R.11. The lender charged a 100 per cent flat rate per annum, equivalent to 381 per cent APR on an unsecured loan of £400 to be repaid over a year. The lender did not take exceptional risk and the debtors were ignorant and illiterate. It was held that the credit bargain was prima facie extortionate because other finance companies were making comparable loans at rates between 18-20 per cent. The rate was substituted to a flat rate of 40 per cent, equivalent to 92 per cent APR.

³⁸ *Woodstead Finance Ltd v Petrou* [1986] 1 F.L.R 158. The court accepted evidence that a relatively high interest rate is normal for a short term loan.

³⁹ [1986] 1 WLR 823.

- 8.11 The claimants fell behind on their interest payments, but completed the purchase of the property and executed a legal charge on 2 September 1980 over the property. They covenanted to pay the defendant the principal sum of £17,450 plus interest at a rate of 21.436 per cent per annum over 10 years. Before executing the charge, the claimants consulted their solicitors and were aware that under the loan they were obtaining from the defendant, they would be obliged to pay higher than usual interest rates. After the claimants missed instalments they eventually sold the house and redeemed the mortgage.
- 8.12 In May 1984, the claimants brought proceedings against the defendant on the ground that the loan and the terms of the agreement amounted to an extortionate credit bargain within the meaning of section 138 of CCA 1974. They argued that the rate of interest was grossly exorbitant, and the circumstance surrounding the loan and the charge contravened the ordinary principles of fair dealing. They sought an order to ensure that the interest rate under the legal charge should be reduced to a proper rate.

Key Points

- Whether the creditor took advantage of an imbalance of bargaining power was important.
- Financial pressure under section 138(b) was said to be only relevant in determining whether a credit bargain was extortionate if the creditor took advantage of the debtor's financial pressure.
- The degree of risk accepted by the creditor was important in considering the appropriate level of interest rates.
- It was important to consider the value of the security and how much it would realise.

Judgment

- 8.13 It was held by the court that the agreement between the claimants and the defendant was not an extortionate bargain. This was because the claimants had received independent advice from their solicitor so they could not put reliance on their lack of business experience. They were under no more financial pressure than any purchaser who borrows money to complete a purchase. The court said financial pressure was only relevant in considering whether or not a loan was extortionate if the lender took advantage of the pressure that the borrower was under. The court concluded that there was no financial pressure when the claimants agreed to buy.
- 8.14 The defendant accepted a significant degree of risk because the amount advanced to the claimants amounted to 83.43 per cent of the purchase price of the property. The claimants also did not satisfy the normal requirements of a building society for a first-time borrower and by the date of the legal charge, they had shown that they were unable to make regular payments and they were short of the amount they need to complete the purchase of the property. In addition, if the claimants had defaulted and the property had been subject to a forced sale, the defendant would not have realised the full amount of the loan. The court believed that the degree of risk taken by the defendant justified a higher rate of interest than a building society. The terms of the contract were deemed to be entirely reasonable and generous, particularly in permitting the claimants to occupy the property in consideration for payment which amounted to 12 per cent of the balance of the purchase price.
- 8.15 The court was satisfied that the payment the defendant required the claimants to make fell short of rendering the credit bargain extortionate within the meaning of s138 of CCA 1974. The defendant did not increase the interest the claimants were required to pay, even when rates of interest in general rose substantially between the date of the contract and the date of the legal charge. The court concluded that the rate of 21.436 per cent was not large enough to be grossly exorbitant and nothing in the terms of agreement contravened the ordinary

principles of fair dealing. The defendant had not taken advantage of an imbalance in bargaining power.

A Ketley Ltd v Scott⁴⁰

8.16 The claimant, A Ketley Ltd, provided a bridging loan of £20,500 to the defendants, Mr and Mrs Scott on 6 November 1978. This was to enable them to pay the balance to purchase a house in which they were tenants. The amount the claimant loaned to the defendants increased from £18,000 because they were unable to borrow from the bank. The husband failed to tell the claimant that he had signed a legal charge over the house to cover a £2,000 overdraft he had obtained from his bank. He failed to disclose the value of the house in the application form for the loan and he did not disclose his other commitments in relation to company guarantees. The loan was for three months at 12 per cent interest or a nominal rate of 48 per cent per annum. The defendants agreed to the terms of the loan and signed all the relevant documentation, including a legal charge on the house. The defendants did not pay back the loan on the due date and the loan accrued interest. As a result the claimant claimed the sums due and possession of the property by summons dated 26 March 1979. The claimant received judgment on 31 July 1979, but the order required an inquiry into the sum, by way of interest, that the defendants ought to pay under the legal charge with regard to CCA 1974.

Key Points

- In considering prevailing interest rates, regard was given to the nature of the agreement and type of transaction.
- Whether or not another lender would have made the loan under the same terms was considered.

⁴⁰ [1981] ICR 241.

- Whether or not the defendant was deceitful in relation to obtaining the credit bargain was considered in determining if the credit bargain should be reopened.

Judgment

- 8.17 It was held that the interest charged by the claimant was not extortionate within the meaning of section 138 of CCA 1974. The court considered all the limbs of section 138 individually and decided that section 138(1)(a), whether or not payments made by the defendant was grossly exorbitant, was the most applicable in the case. The question to ask concerning prevailing interest rates was what interest rates were prevailing in respect of the type of transaction. The claimant was the only company who would have made a loan for three months without the chance of a permanent mortgage at the end of the duration.
- 8.18 In light of section 138(2)(c), the court took into consideration the fact that the defendant knew that the interest was equivalent to 48 per cent per annum, although this was denied. The speed with which the claimant provided the money to the defendants in order for them to complete was also important. It was impossible for the claimant to have made the necessary inquiries concerning the defendant's financial situation. It was noted that the claimant would not have made the loan if there was time to make the relevant inquiries.
- 8.19 The court did not believe section 138(3)(a) was applicable because the husband was experienced in business and legally advised. The fact that he would have lost the deposit on the house did not put him under any real financial pressure. He was under a protected tenancy and would not have lost his home. The degree of risk accepted by the claimant under section 138(4)(a) was also considered by the court. The claimant had accepted considerable risk because there was no time to check the defendant's financial situation and the claimant lent the defendants 82 per cent of the value of the £25,000 property which would have been worth less in a forced sale. This was highly speculative. The claimant also paid all the costs in the transaction.

8.20 Finally, even if there was an extortionate credit bargain, the court said due to the deceitful acts of the defendant, it would not have reopened the bargain because it would not have been just to do so under section 139. The interest rate was allowed to stand.

Castle Phillips & Co Ltd v Wilkinson⁴¹

8.21 Castle Phillips & Co Ltd, a finance company and the claimant in this case provided a £21,000 bridging loan to the defendants through a broker. The loan was for a period of four to six months at a rate of four per cent per month. The defendants' home was provided as security. The defendants were also required to pay an insurance premium, the broker's fee as a precondition and part payment of interest in advance. When the defendants defaulted on the loan agreement, the claimant sought to obtain possession of their property. As a result, the defendants wanted to have the credit bargain reopened.

Key Points

- That the rate of interest charged was three and a half times the rate charged by a building society was evidence of an extortionate bargain.
- The value of the security was important in determining an extortionate credit bargain.
- The financial understanding of the debtor was important to the question of extortionate credit bargains.

Judgement

8.22 The court granted the defendants' application and held that the credit bargain was extortionate. This was on the basis that the interest rate was over three and a half times the rate charged by a building society,

⁴¹ [1992] C.C.L.R. 83.

the security for the loan exceeded the nominal amount advanced to the defendants and the defendants were of limited financial understanding. They were also persuaded to enter into a credit bargain they would not have otherwise entered into. The agreement was reopened and the interest rate was reduced to 20 per cent per annum (around 1.7 per cent per month), which was a building society rate plus one third to reflect the short term nature of the loan.

Paragon Finance v Nash, Staunton⁴²

- 8.23 The claimant, Paragon Finance, claimed possession against the defendants after they had been in arrears in respect of the loans made to them. The loans contained a variable interest rate clause.
- 8.24 Although the defendants admitted that they were in arrears of £5000, they argued that the loan agreement was an extortionate credit bargain and submitted a counterclaim requiring that the loans be reopened in accordance with section 139 of CCA 1974. They also argued that the agreement did not fall within section 138 of CCA 1974 as an extortionate bargain from the outset, but it came within it when the interest rate was increased far beyond Bank of England rates or prevailing market rates, making the rates exorbitant. After the claimant made an application, the defendants' defences and counterclaims were struck out.

Key Points

- Variations in interest rates were not relevant in determining whether a credit bargain was extortionate.
- The relevant time to determine whether or not a credit bargain was extortionate in accordance with section 138 of CCA 1979 was at the time the credit bargain was made.

⁴² [2001] EWCA Civ 1466.

- It was not enough for the interest rate to be exorbitant or even unreasonably high. It had to be grossly exorbitant.

Judgment

- 8.25 A key issue was whether the respondent had breached an implied term to exercise its judgment to vary interest rates fairly, honestly, and in good faith and not arbitrarily, capriciously or unreasonably. The court held that the respondent had not. The court said a lender in financial difficulty as a result of increased interest rates on the money market was likely to pass its costs on to the borrower. It would be impossible to say that the lender had exercised its ability to vary interest rates for an ‘improper purpose, capriciously, arbitrarily or in a way in which no reasonable lender would reasonably do’. The credit bargain could not be extortionate as long as the lender did not exercise the variation dishonestly, for an improper purpose, capriciously or arbitrarily.
- 8.26 The court held that a subsequent interest rate variation, after the credit bargain was made, was irrelevant to the question of whether it was extortionate. Variations were excluded from the calculation of the total charge for credit and as a result from becoming part of a credit bargain. Only credit bargains can be opened under section 137(1) of CCA 1974. In addition, based on the wording of section 138 of CCA 1974, the relevant time to consider whether a credit bargain is extortionate, including all the factors that can be taken into account in determining this, is at the time the credit bargain was made.
- 8.27 The allegation that the rate of interest was grossly exorbitant did not succeed. The court held that it was not enough for the interest rate to be merely exorbitant. The rate must be shown to be grossly exorbitant. The rate the respondent was charging was not grossly exorbitant looking at the disparity between its rate and that of Halifax. Although the rate may have been high or even unreasonably high, it was not enough to make the credit bargain grossly exorbitant. Thus, even if the rate variation could be taken into account the court maintained it could not be persuaded to believe that the disparity that existed between

comparable rates was enough to make the credit bargain extortionate. The appeal was dismissed.

Broadwick Financial Services Ltd v Spencer and Another⁴³

8.28 Mr and Mrs Spencer, the appellants, appealed against a decision taken at Truro County Court granting Broadwick Financial Services, the respondent, a possession order for their home. The order was made pursuant to the legal charge against the appellants' property in October 1991, for a loan of £7,700 that the respondents had advanced to the appellants. The appellants appealed on the ground that the credit agreement was not properly executed as it had not complied with provisions in CCA 1974. They also sought to reopen the agreement and the legal charge as extortionate credit bargains under sections 137-140 of CCA 1974 due to the respondent's failure to use the interest rate variation clause in the agreement to reduce the rate of interest. Building society rates had fallen to 7.25 per cent, while the respondent's rates remained at 29.6 per cent.

Key Points

- A distinction was made between primary, secondary and tertiary or non-status lenders. The primary lender's market was said to be different from the non-status lenders market. A comparison of both was therefore of no relevance.
- Whether or not the lender provided information to the borrower on how the interest rate variation clause was usually operated may be a factor to be taken into account in determining whether there was a gross contravention of the principles of fair dealing.

⁴³ [2002] EWCA Civ 35.

Judgment

- 8.29 The court held that the agreement between the appellants and the respondent was not an extortionate credit bargain. The court said that the judge at the county court was right to find that the agreement was not extortionate. The correct comparison for APRs prevailing at the time the credit bargain was made should have been between that of the respondent's and other non-status lenders. The flat rate of interest charged by the respondent was lower than some other non-status lenders. The court acknowledged that the test was a high one. Paragraph 27.96 of Professor Goode's Consumer Credit Law and Practice was quoted to emphasise that the terms of the bargain must be 'so unfair as to be oppressive' and that extortionate 'carries the notion of morally reprehensible conduct on the part of the creditor in taking unfair advantage of the debtor's circumstances'.
- 8.30 Dyson LJ, who was also a judge in *Paragon Finance v Nash*, Staunton, clarified the position regarding the relevance of interest rate variations in determining whether a credit bargain was extortionate. Dyson LJ maintained his view in *Paragon Finance* that the way in which an interest rate variation is operated is not a factor to be taken into account in determining an extortionate bargain. However, he also mentioned that he did not mean that the existence of such a clause could never be relevant to the question of whether the credit bargain is extortionate because such a clause had the potential to make a credit bargain extremely burdensome. It was also said that the failure of the lender to inform the borrower of the way the interest rate variation clause is operated is a factor to be taken into account in determining whether there had been a gross contravention of the ordinary principles of fair dealing. The appeal was dismissed.

Batooneh v Asombang⁴⁴

- 8.31 Mr Asombang, the defendant in the first action in this case, was a businessman who obtained loans through informal dealings from Liberty Finance Company Limited.⁴⁵ Liberty was a company in which Mrs Batooneh, the claimant, was an assignee and Mr Ravanshad, Mrs Batooneh's son, was the director and manager. The defendant was in the property business and the four loans he obtained from Liberty together with interest amounted to £1million.
- 8.32 The loans were short term loans and no security was provided. Mrs Batooneh and Mr Ravanshad's claims against the defendant were joined by the court as they arose out of the same sequence of events. Both parties agreed that the court had jurisdiction to reopen the agreement pursuant to CCA 1974, if the court considered it be an extortionate credit bargain.

Key Points

- Loans of a very high interest were reopened even where there was no inequality in bargaining power between creditor and debtor.
- Whether the default rate as an ongoing rate was grossly exorbitant depended on the steps taken by the creditor to recover the loan and the time in which those steps were taken.

Judgment

- 8.33 Based on the evidence submitted, the court found that the loans were agreed subject to an interest rate of 100 per cent per annum. As the loans were short term, made without security and there was no evidence of unfairness and undue pressure, it was held that the 100 per cent rate

⁴⁴ [2003] EWHC 2111.

⁴⁵ Henceforth, Liberty.

agreed up to the date of repayment could not be regarded as grossly exorbitant. It paid the defendant to do business that way.

- 8.34 The court decided that the main issue was whether the ongoing rate of 100 per cent per annum after the repayment date was grossly exorbitant. In making this decision, the court took into account the fact that once the repayment date had passed, it was open to Mr Ravanshad to call in the loan and commence proceedings to recover it. By the time he commenced proceedings, the interest had formed a major part of the loan.
- 8.35 The court exercised its power to reopen an agreement and the default rate of 100 per cent per annum was reduced to 25 per cent because the circumstances could not justify such a rate. Although 25 per cent was above ordinary bank rates or a rate likely to be allowed by a court, it was held that 25 per cent per annum was a rate that would do justice between the parties. 100 per cent per annum as the on going default rate was therefore held to be grossly exorbitant.

London North Securities Ltd v Meadows⁴⁶

- 8.36 In 1989, Mr & Mrs Meadows, the defendants, wanted to take out a home improvement loan. They already had two mortgages on their house and were unable to borrow money from a bank or building society. After the defendants responded to an advert for non-status lending and approaching a broker, they obtained a loan of £2,000 from the claimant, London North Securities.
- 8.37 The defendants were sent an agreement for a secured loan of £5,750 at an APR of 34.9 per cent. The loan included an insurance premium of £750 and £3,000 to pay off the arrears on their existing mortgages. Both existing mortgages were on a lower rate of annual interest. After a telephone conversation with the broker, who explained that the additional sums were required to take out the loan, Mr Meadows signed

⁴⁶ [2005] 1 P. & C.R. DG16.

the agreement. Subsequently, the defendants went into arrears and defaulted on the loan. The amount owed increased because the arrears carried compounded interest at the contract rate on a monthly basis. Additional fees were added to the balance for arrears letters. The claimant sought possession of the defendants' property in 1990 and obtained a suspended possession order, which was later set aside in 2004.

- 8.38 As at October 2004, the sum owed was £144,760. Of this figure, the interest in arrears amounted to £104,708. This was calculated on a concessionary interest rate of 27 per cent. If the contract rate was applied, the amount owed would have exceeded £300,000. The defendants as part of their case argued that the agreement was an extortionate bargain in accordance with the meaning in sections 138 and 139 of CCA 1974.

Key Points

- All factors relating to payment conditions were considered in determining whether or not a credit bargain was extortionate.

Judgement

- 8.39 In relation to the extortionate bargain issue, although expert evidence showed that the annual rate of 34.9 per cent in the non-status market was not by itself exorbitant or extortionate, the county court held that the agreement was grossly exorbitant and contravened the ordinary principles of fair dealing because of the combination of the interest and the provision allowing the lender to apply compound interest at the rate of 34.9 per cent to the arrears, cost and charges that resulted from the default in payment. In the Court of Appeal the issue was not decided upon as the creditor's appeal failed for other reasons.

Unfair Relationships: The New Test

- 8.40 Sections 19-22 of CCA 2006 introduced the unfair relationships provisions set out in sections 140A – 140D of CCA 1974. These

sections in CCA 1974 allow the court to reopen credit agreements where there has been an allegation by the debtor that the creditor and debtor relationship has been 'unfair' and the court believes it is 'just' to reopen the credit agreement. The DTI in the White Paper intended that unfair practices, unfair credit costs, responsible lending and other relevant circumstances, such as the borrowers circumstances, including his/her age, experience and business capacity, would be taken into account by the courts.⁴⁷

- 8.41 The unfair relationships test contrasts with the extortionate credit bargains test in that the former considers all aspects of the relationship, not just the transaction costs, whereas the latter focused on the terms of the agreement itself, particularly the financial terms. Although under the old test, even if the financial obligation were not 'grossly exorbitant, an agreement could be struck down if it 'grossly contravened the principles of fair dealing' as in *London North Securities v Meadows*. The old test considered the relevant factors, such as the age, health, capacity and business experience of the debtor at the time the agreement was made to determine if the agreement was extortionate. The new test allows the court to consider all matters at any stage of the debtor and creditor relationship.

The Test

- 8.42 The court has wide discretion to make an order⁴⁸ if it finds that the relationship between the debtor and creditor is unfair because of one or more of the following:
- the terms of the agreement or related agreement
 - the way the creditor has enforced its rights under the credit agreement or related agreements

⁴⁷ The White Paper, paragraph 3.37.

⁴⁸ CCA 1974, section 140A.

- anything done, or not done, by or on behalf of the creditor, either before or after the making of the agreement or any related agreement.

8.43 In determining whether there is an unfair relationship between creditor and debtor, the court should have regard to all matters it thinks relevant.⁴⁹ This includes all matters relating to the debtor and creditor. The ambit is further widened as the court can also have regard to the conduct of an associate or former associate of the creditor and attribute them to the creditor himself.⁵⁰ Moreover, section 140A(4) adds an element of retrospective consideration to the new test as the court can exercise its powers even if the relationship between the debtor and creditor has ended.

8.44 The court has wide powers in relation to unfair relationships.⁵¹ Such powers include the ability to make an order requiring the creditor, or any associate of his, to repay (in whole or in part) any sum paid by the debtor by virtue of the agreement or any related agreement. The court can also set aside an obligation imposed on the debtor and reduce or discharge any sum payable by the debtor. The onus is on the creditor to prove that an unfair relationship does not exist once an allegation has been made.

Case Law on Unfair Relationships

8.45 Although the White Paper provided factors the DTI intended that the court would take into account, no criterion or guidance has been provided for determining the exact meaning of unfairness in a credit relationship. Even with recent cases in which unfair relationships have

⁴⁹ CCA 1974, section 140A(2).

⁵⁰ CCA 1974, section 140A(3).

⁵¹ CCA 1974, section 140B.

been established, *Nine Regions (T/A Logbook Loans) v Sadeer*⁵² demonstrates that there is still some uncertainty in this area in relation to the level of interest rates or APRs that would give rise to an unfair relationship.

Nine Regions (T/A Logbook Loans) v Sadeer

- 8.46 The claimant, Nine Regions, issued a claim against the defendant, Mr Sadeer concerning a defaulted loan agreement completed on 28 November 2006. The amount loaned to the defendant was £880.00, payable in 55 weekly instalments of £32.77. The loan was secured using a Bill of Sale against the defendant's car, allowing the claimant to keep the log book until the end of the agreement. The claim was for the amount of £2378. After the defendant had missed the first and subsequent payments, the claimant made numerous reminder attempts through overdue letters and telephone calls, all of which were charged to the defendant. The claimant also made offers to reduce the repayment amount, but the defendant was only willing to repay less than he had borrowed.
- 8.47 The defendant, in response to the claim issued by the claimant, argued under the unfair relationships test that the amount being claimed was unfair because the rate of 384.4 per cent APR was too high. Unreasonable charges had also been added to the account. The defendant argued overall that the terms and circumstances of the loan breached section of 140 CCA 1974.

Key Points

- Last resort loans were said to be of higher risk for the lender and would therefore attract a higher interest rate. Such loans may not give rise to an unfair relationship.

⁵² Bromley County Court, 14 January 2009.

- Where the lender had not taken proper steps to make enquiries to ensure that the sale of the security brings good return, failure to make such enquiries were counted against him.

Judgment

- 8.48 The court held that the relationship between the claimant and the defendant was not unfair although there was a high interest rate. The court believed that the high interest under the agreement reflected the high risk undertaken by the claimant. The type of loan made to the defendant was a last resort loan, usually made to borrowers with poor credit records. No credit checks were made and the only security available for the claimant was a second hand car that depreciated in value over time.
- 8.49 The loan was also a relatively short term loan of just over one year and the claimant's interest rate was apparently competitive with others in the same business. The rate was set out in the agreement and the defendant confirmed that he understood them.
- 8.50 The court said that although the terms of the default agreement allowing the claimant to seize the car were harsh, the borrowers were told in advance and only about 3-4 per cent of default notices ended in a sale of the borrower's car. The procedures the claimant employed in dealing with borrowers were also deemed to be reasonable due to the last resort nature of the loan. It was acknowledged that the claimant did not pressurise borrowers into taking a loan. When a loan was taken out, the claimant expended a lot of effort to encourage the borrower to make payment rather than lose their car.
- 8.51 The court found in favour of the claimant but reduced the sum claimed because of the failure on the part of the claimant and its agents to make enquiries of the defendant for items such as the logbook and the keys for the car. Failure to do this reduced the value of the car when sold at auction and also caused the car to be towed, with a fee due to the defendant when the car was recovered.

Recent Unfair Relationship Cases

MBNA Europe Bank Ltd v Thorius⁵³

- 8.52 This is a recent successful decision at South Shields county court under the unfair relationships test that provides further guidance as to the type of circumstance that would give rise to an unfair relationship. This case seems to be the first case in which and an unfair relationship has been established.
- 8.53 The claimant, MBNA, sought to recover a credit card debt from the defendant. The debt included credit advance, contractual interest, default charges and sums for a PPI policy. The claimant issued the credit card to the defendant in 2002, and the defendant had indicated on the application form that she did not want to take out a PPI policy. The claimant always recommended that its customers take out the PPI policy but did not disclose that it was in receipt of commission from the PPI policy provider. After a few years, the defendant fell into arrears and a default notice was served on her and the claimant issued proceedings for the outstanding sum of £8,000. One of the defendant's arguments was that an unfair relationship had arisen.

Key Points

- The existence of a secret commission in a payment protection insurance (PPI) policy and the way such a policy is sold could give rise to an unfair relationship within the meaning in section 140A of CCA 1974.

Judgment

- 8.54 The court held that the standard advice to the defendant to take out the PPI policy, together with the secret commission, gave rise to an unfair

⁵³ South Shields County Court, 21 September 2009.

relationship in breach of CCA 1974. The debt under the credit card in this case was also deemed unenforceable because the lender failed to provide the court with the original loan agreement, a requirement of section 78(1) of CCA 1974.

- 8.55 As lenders have sold PPI with loans, including car finance loans, personal loans and mortgages, this decision is significant and could potentially open a number of claims under the new unfair relationships test.

Blemain Finance v Bentley⁵⁴

- 8.56 This High Court case resulted in the first legally binding arrears deal of its kind in the UK. The claimant, Blemain Finance sought to a repossession order from the court against the defendant, Mr Bentley in relation to arrears that had accrued on a £40,000 secured loan. In response, the defendant issued a counterclaim arguing that the contract with the claimant was an unfair one within the meaning of section 140A of CCA 1974.
- 8.57 The claimant agreed, in a settlement, not to enforce payment repayment via repossession for at least six years. Under the agreement, the claimant will cease to charge interest on the loan amount and will reduce the defendant's repayment sum from £550 to £150 a month. The Judge also prevented the lender from levying any charges or legal costs.

⁵⁴ High Court of Justice (Chancery Division), Cardiff District.

Summary

8.58 Case law under the old and the new test demonstrate that the existence of a significantly high cost credit agreement or the existence of high interest rates and costly payment provisions within a credit agreement do not automatically give rise to an extortionate credit bargain or an unfair relationship between a lender and a borrower.⁵⁵ Often other factors are considered in making the decision on whether there was an extortionate bargain under the old test or an unfair relationship under the new test, particularly the short term nature of the loan and the risk undertaken by the lender in making a loan to a non-status or sub-prime borrower. These factors, among others, often justify the commonly high cost nature of such loans. However, there are clearly cases which suggest that there are limits to terms the lender can impose and the new test suggests there may now be greater protection for the consumer because they can challenge any of the terms of their credit agreement as unfair.

⁵⁵ Paragraph 3.37 of the White Paper regarding unfair credit costs states that 'it is important to note that high cost alone would not necessarily render the agreement unfair. Transaction costs are not 'high' or 'low' in abstract, but must be considered in light of the nature and type of the agreement and circumstances in which it was made or how the lender has acted subsequently'.

9 THE REGULATORY STRUCTURE

Office of Fair Trading

9.1 The OFT is the government body responsible for regulating the consumer credit industry in accordance with the powers granted under CCA 1974, as amended. The functions of the OFT under CCA 1974 are to:⁵⁶

- administer the licensing system set up by the act
- exercise the adjudicating functions in relation to the issue, renewal, variation and revocation of licences
- monitor businesses carried on under the licences
- superintend the working and enforcement of the act and regulations made under it
- take steps to enforce the act and regulations under it.

The Licensing System

9.2 The CCA 1974 requires consumer credit and consumer hire businesses⁵⁷ as well as ancillary credit businesses⁵⁸ to be licensed by the OFT. The licensing system has been strengthened due to the amendments made by CCA 2006.

9.3 Under CCA 1974, trading without a licence is a criminal offence⁵⁹ which can result in a fine and/or imprisonment. The OFT is under a duty to protect the interest of consumers and monitors the fitness of those holding or applying for a licence. An applicant for a licence must satisfy

⁵⁶ CCA 1974, section 1

⁵⁷ CCA 1974, section 21.

⁵⁸ CCA 1974, section 145.

⁵⁹ CCA 1974 1974, section 39.

the OFT that 'he is a fit person'⁶⁰ and that his trading name is not misleading or undesirable.⁶¹ Sections 25(2) and (2A) cover what the OFT considers in determining whether the applicant for the licence is a fit person. Factors taken into account include whether the applicant (or any of his associates) has committed any offence of or conviction for violence or dishonesty, failed to comply with the provisions of the CCA 1974 and of consumer protection legislation generally and whether he has practiced discrimination in connection with the carrying on of the business. The fitness requirement is kept under constant review and the OFT can revoke a licence it decides a trader is not fit to hold one.

9.4 Standard or group licences⁶² can be issued by the OFT, either indefinitely or for a limited period⁶³ for standard licences, or for a limited period for group licences, subject to an initial charges and periodic charges. Charges for licences are as the OFT specifies by general notice. Different charges may be specified for different classes of persons, including no charge at all.

9.5 A business is only authorised to carry on activities for which it is licensed and only in the name appearing on the licence. Where a regulated agreement is made with an unlicensed creditor, it is unenforceable against the debtor unless an order is made by the OFT on application of the creditor.⁶⁴ If an unlicensed person has made an agreement without being licensed, that person can apply to the OFT for an order to treat him as if he had been licensed to make the agreement.

⁶⁰ CCA 1974, section 25(b).

⁶¹ CCA 1974, section 25(1AD).

⁶² CCA 1974, section 22.

⁶³ CCA 1974, section 22(1A).

⁶⁴ CCA 1974, section 40(1) and (2).

9.6 When an application for a standard licence is made, it must state whether it is to apply without limitation or whether it is to cover the business in relation to one or more of the categories of business described in the application.⁶⁵ This is a new requirement under CCA 2006. There are nine categories of business:

- consumer credit
- consumer hire
- credit brokerage
- debt adjusting
- debt collecting
- debt counselling
- debt administration
- provision of credit information services
- operation of credit reference agency.

9.7 Licences can be varied upon the request⁶⁶ of the licensee to the OFT, or they can be compulsorily varied by the OFT⁶⁷ under its powers. A compulsory variation can be made by the OFT during the currency of the licence where it is of the opinion that if the licence were to expire it would seek to reissue a new one on different terms. Any aspect of the licence can be varied, from licensed trading names to categories of licensed business.

⁶⁵ CCA 1974, section 24(A).

⁶⁶ CCA 1974, section 30.

⁶⁷ CCA 1974, section 31.

9.8 In the event that a licensee’s business is being transferred or wound up, the OFT has wide powers.⁶⁸ The OFT can authorise certain activities to continue that would otherwise be prohibited by its decision to refuse to renew a licence or to impose a variation, suspension, or revocation of the licence.

9.9 A Consumer Credit Public Register is maintained by the OFT. The register records traders who hold licences and any actions against them and also details traders who have applied for a licence.

Powers of the OFT

9.10 The CCA 2006 provided the OFT with additional powers.⁶⁹ As of the date of this report, the powers of the OFT now include the power to:

- suspend or revoke licences by notice⁷⁰
- charge different licence fees⁷¹ and issue limited licences⁷²
- issue a notice to the licensee requiring him to do or cease from doing something⁷³ where the OFT is dissatisfied with the conduct or the business of the licensee
- impose additional requirements on a licence once issued where it forms an adverse opinion during the licence process⁷⁴

⁶⁸ CCA 1974, section 34A.

⁶⁹ CCA 1974, sections 33A to 33E.

⁷⁰ CCA 1974, section 32.

⁷¹ CCA 1974, section 6A(2) – (3).

⁷² Ibid 86.

⁷³ CCA 1974, section 33A.

⁷⁴ CCA 1974, section 33A(6).

- issue notices requiring information and documentation from licensees⁷⁵
- serve a notice on any person to require information generally⁷⁶
- require access to the premises by notice to a licensee in order to observe the carrying on of a business or to inspect documents⁷⁷
- request a justice of the peace to issue a warrant to enter a licensee's premises⁷⁸
- impose civil penalties of up to £50,000 for each breach of an OFT imposed requirement by a licensee.⁷⁹

Suspension and revocation of licences

9.11 The OFT can revoke or suspend a licence where during the currency of a licence the OFT is of the opinion that if the licence were to expire it would not renew it.⁸⁰ A licence can be revoked where the OFT decides that a trader is no longer fit to hold one. This means that a trader can no longer continue a business regulated by CCA 1974. If this decision is taken, the OFT must inform the licensee providing reasons for its decision. The OFT must invite the licensee to submit representations in accordance with section 34.⁸¹ A trader usually has 21 days after the notice containing an invitation to make representations, or longer if the

⁷⁵ CCA 1974, section 6(3) and section 36(A).

⁷⁶ CCA 1974, section 36(B).

⁷⁷ CCA 1974, section 36(C).

⁷⁸ CCA 1974, section 36(D).

⁷⁹ CCA 1974, section 39(A).

⁸⁰ CCA 1974, section 32.

⁸¹ CCA 1974, section 32(3)(b).

OFT allows.⁸² A revocation or suspension of a licence will not take effect until after the end of the appeal period.⁸³

- 9.12 There is a right of appeal against any determination to suspend or revoke a licence. At the time of writing, such appeals can be made to the First Tier Tribunal (Consumer Credit). Such an appeal is a complete rehearing of the issues.

Imposition of requirements

- 9.13 The CCA 2006 inserted new provisions in CCA 1974 regarding the powers of the OFT to regulate licensees. Where the OFT is dissatisfied with any matter relating to a business being carried out by the licensee or an associate or former associate of a licensee it may, by notice to the licensee, require him to do or cease from doing anything specified in the licence. This power can also be used to secure that matters which have caused dissatisfaction do not arise again in the future. The OFT also has similar powers to impose requirements on supervisory bodies in relation to group licences.
- 9.14 Before the OFT decides to impose a requirement on a licensee, it must give notice to every relevant person informing him of its intentions, with reasons, and inviting him to make representations.⁸⁴ There is also an appeal to the First Tier Tribunal (Consumer Credit) in relation to requirements imposed upon a licensee.

⁸² CCA 1974, section 34(1).

⁸³ CCA 1974, section 32(7).

⁸⁴ CCA 1974, section 33(D).

Information Requests

- 9.15 The OFT can issue general notices prior to or subsequent to the issue of a standard licence specifying the necessary information and documents to support an application.⁸⁵
- 9.16 New obligations introduced by CCA 2006, require that if between an application and issue of a licence a new general notice comes into effect, the applicant must provide the OFT with additional information or documents required by this notice within the period specified.⁸⁶ Existing licence holders are also required to supply the information or document required in the general notice.⁸⁷ The applicant is under a duty to notify the OFT within 28 days if any information or document has been suspended or has been affected by a change in circumstances or if the applicant becomes aware of an error or omission.⁸⁸
- 9.17 A licensee must notify the OFT of any change that takes place in any documents entered in the Consumer Credit Public Register within 21 working days of that change.⁸⁹
- 9.18 The OFT has sweeping powers under section 36B to require information generally. A licensee or non-licensee may be served with a notice, with reasons, to provide information or produce documents. In relation to a standard licence holder or a group licence applicant, the requirement for information or documents can only be issued if it is reasonably required for purposes connected with OFT's function under CCA 1974.⁹⁰ Where

⁸⁵ CCA 1974, section 6(2) and section 36A.

⁸⁶ CCA 1974, section 6(5) and (6).

⁸⁷ CCA 1974, section 36A.

⁸⁸ CCA 1974, section 6 (7) and (8).

⁸⁹ CCA 1974, section 36.

⁹⁰ CCA 1974, section 36B(4).

non-licensees are concerned, the requirement for information may only be issued in specific situations, for example when an 'act or omission' has occurred.⁹¹

- 9.19 A new power introduced by CCA 2006 is the power of the OFT to serve a notice requiring access to the premises of a licensee in order to observe the carrying on of the business or to inspect documents specified in the notice.⁹² The notice must provide reasons. In the case of a non-licensee, the OFT can request access to the premises only where there is an 'act or omission' mentioned in section 36B(6) and the observation or inspection of the premises is required.⁹³
- 9.20 The OFT can apply for a warrant from a justice of the peace for an officer of an enforcement authority to enter and search the premises and to preserve and seize material, with reasonable force where necessary, where it believes if a requirement were to be issued, the required material would be 'tampered with'.⁹⁴ The OFT can also apply to the court for an order compelling compliance where a person fails to comply with sections 36B or 36C.

Civil Penalties

- 9.21 The CCA 2006 added new civil penalties capable of being imposed by the OFT. Before a penalty can be levied a requirement under section 33A, 33B or 36A of CCA 1974 must have been imposed on the business. Where the OFT is satisfied that a that a person (the defaulter) has failed to comply with such a requirement it can impose penalties a penalty of an amount it thinks fit up to a limit of £50,000 for every

⁹¹ CCA 1974, section 36B(5).

⁹² CCA 1974, section 36C

⁹³ CCA 1974, 36C(9).

⁹⁴ CCA 1974, section 36D.

breach of a requirement.⁹⁵ Notice must be provided to the defaulter of the intention to impose a penalty, including the proposed amount, the reasons for the penalty and information regarding representations.⁹⁶

- 9.22 There is a right of appeal to the First-Tier Tribunal (Consumer Credit) exists, both in respect of amount and in respect of the imposition of a penalty generally.⁹⁷ If an appeal fails, the penalty can be recovered as a civil debt and will incur interest at the judgment rate.

The First-Tier Tribunal (Consumer Credit)

- 9.23 The CCA 1974 grants a right to appeal⁹⁸ the decisions of the OFT. Under CCA 2006 the Consumer Credit Appeals Tribunal (CCAT) was established. It replaced the Secretary of State for Trade and Industry. However, the functions of the CCAT were transferred to the First-tier Tribunal(Consumer Credit) (FTT(CC))⁹⁹ from 1 September 2009 and the CCAT was abolished. The FTT(CC) forms part of the General Regulatory Chamber of the First-tier Tribunal, established under Part 1 of the Tribunals, Courts and Enforcement Act 2007. The Principal Judge of the FTT(CC) is His Honour Judge Peter Wulwik.

- 9.24 Appeals regarding the OFT's decisions can now be made to the FTT(CC). The FTT(CC)'s role is to hear and decide appeals against the decisions of the OFT relating to:

⁹⁵ CCA 1974, section 39A.

⁹⁶ CCA 1974, section 39B.

⁹⁷ CCA 1974, section 41.

⁹⁸ Ibid 96.

⁹⁹ The functions of the CCAT were transferred under The Transfer of Functions of the Consumer Credit Appeals Tribunal Order 2009. The Order was made under the Tribunal, Courts and Enforcement Act 2007, which also created the Upper Tribunal.

- consumer credit licensing decisions made under CCA 1974
- the imposition of requirements or a civil penalty under CCA 1974
- the refusal to register, cancellation of registration, or imposition of a penalty under MLR 2007.

9.25 The FTT(CC) has the power to suspend the determinations of the OFT.¹⁰⁰ It also has the power to dispose of an appeal by confirming, varying, quashing or remitting the OFT's determinations and can give the OFT directions.¹⁰¹ Where an appeal in against the determination of the OFT to impose a penalty, the FTT(CC) can not increase the penalties imposed, but may extend the period within which the penalty is to be paid.¹⁰²

9.26 An appeal on a point of law can be made from the FTT(CC) to the Upper Tribunal.

Financial Ombudsman Service

9.27 The Financial Ombudsman Service (FOS) is an independent and impartial organisation created under the Financial Services and Markets Act 2000 (FSMA).¹⁰³ It deals with complaints made by consumers about financial products and services. The FOS's role is to settle disputes between consumers and financial service businesses.

9.28 The CCA 2006 extended the jurisdiction¹⁰⁴ of the FOS to cover consumer credit. The consumer credit jurisdiction was established as a means of

¹⁰⁰ CCA 1974, section 41ZA.

¹⁰¹ CCA 1974, section 41ZB(2).

¹⁰² CCA 1974, section 41ZB(3).

¹⁰³ FSMA Part 16.

¹⁰⁴ CCA 2006, section 5 and FSMA, section 226A.

alternative dispute resolution for consumers to cover complaints involving licensed persons under CCA regime. A complaint to the FOS is determined based on what is fair and reasonable in all the circumstances.

- 9.29 Consumers must raise their dispute with the licensee and give them an opportunity to resolve the dispute, usually eight weeks, before referring a complaint to the FOS. Where a licensee fails to send a final decision to the consumer by the end of the eight weeks (or makes a final decision within eight weeks), the FOS can consider the complaint.¹⁰⁵ Section 226A of FSMA provides information regarding when the FOS has jurisdiction to hear a complaint.
- 9.30 The FOS can make a money award to compensate for financial loss and any other loss or damage suffered by the consumer. The level of compensation awarded aims to put the consumer back in the position they would have been in had the event complained about not happened. However, there is a monetary limit of £100,000. A directions award can also be issued by the FOS to the business telling them what actions need to be taken to put things right for the consumer.
- 9.31 There is no opportunity of appeal from the review and decision of the Ombudsman at the FOS. Although respondents to a consumer complaint have to accept the FOS's decisions, the consumer can go to court at any stage. Once the complainant accepts the determination of the FOS, the determination is binding and final on both the complainant and the respondent.
- 9.32 Where a respondent does not comply with the determination of the FOS, the complainant can seek to enforce the direction or award in court. Failure of a licensee to abide by the decision of the FOS will be taken into account by the OFT when assessing fitness of the licensee to hold a licence.

¹⁰⁵ Consumer Credit Rules, section 16B(1).

HM Revenue & Customs

- 9.33 HM Revenue & Customs (HMRC) is a non-ministerial government department formed in April 2005 through a merger of the Inland Revenue and HM Customs and Excise. It is primarily responsible for the administration and collection of taxes, as well as the payment of some state support.
- 9.34 HMRC supervises most MSBs under MLR 2007. MSBs, unless supervised by the Financial Services Authority under MRL 2007, must register with HMRC. These include cheque cashers and pawnbrokers who also act as MSBs. Where pawnbrokers also act as MBSs, HMRC with supervise both aspects of their business.
- 9.35 As part of the registration of MSBs with HMRC, the person seeking to register the business or anyone who controls the business must apply for a 'fit and proper' test. The purpose of the test is to ensure that those running the business are suitable and meet the requirement of MLR 2007. If any of the applicants fail to pass the test, the business will not be registered and it will be unable to trade even while the HMRC's decision is being reviewed.

10 RELEVANT STAKEHOLDERS

Trade Associations

- 10.1 A trade association is an industry trade group founded and funded by businesses that operate in a specific industry. It serves as a focal point for issues that are common to a particular industry and provides services to its members such as public relations, lobbying, publishing and conferences.
- 10.2 There are trade associations which represent providers of consumer credit. They often provide a code of practice to ensure good practice and a high standard of service to consumers. Their members usually have to subscribe and adhere to existing codes of practice.

Finance & Leasing Association

- 10.3 The Finance & Leasing Association (FLA)¹⁰⁶ is the main trade association for the asset, consumer and motor finance industries in the UK. It seeks to promote and enforce high standards in the industries it represents.
- 10.4 FLA campaigns on key industry issues and aims to shape the development of government policy and regulation. An aspect of this involves lobbying decision-makers in the UK and Europe and developing public policy areas across a wide range of industry issues. FLA also campaigns for open, competitive and fair legislation and regulation.
- 10.5 Members of FLA provide services such as finance leasing, operating leasing, hire purchase, personal contract purchase plans, secured and unsecured personal loans, credit cards and store card facilities. Members of FLA include banks and their subsidiaries, building societies, the finance arm of retailers and manufacturing companies as well as independent firms. They also represent 75 per cent of second charge lenders.

¹⁰⁶ www.fla.org.uk/fla

- 10.6 To further its mission to 'promote an innovative, responsible and proportionately regulated market place',¹⁰⁷ FLA sets out standards of good practice for its members in the consumer finance industry through the Lending Code 2006.¹⁰⁸ This is to reassure consumers that do business with its members that they are dealing with reputable companies. All Full members must comply with the relevant FLA Code of Practice.
- 10.7 Compliance of the Code is monitored by an independent group.¹⁰⁹ Each member of FLA has a code compliance officer and internal auditing procedures to ensure compliance with the Code.
- 10.8 FLA provides a free conciliation and arbitration service for consumers.

Consumer Credit Trade Association

- 10.9 Founded in 1891, The Consumer Credit Trade Association (CCTA)¹¹⁰ is one of the oldest credit trade associations in the UK looking after the interests of consumer credit businesses, particularly in relation to regulatory change.
- 10.10 Members of CCTA include start up businesses to large blue chip companies, providers of all types of credit products and well as service providers that support the industry, such as finance houses, brokers, solicitors, retailers and debt collectors.
- 10.11 CCTA provides a code of practice for its members to ensure their responsibility, credibility and reliability amongst consumers and other

¹⁰⁷ www.fla.org.uk/fla/info/aboutus.riv

¹⁰⁸ www.fla.org.uk/fla/consumerfinance/FLALendingcode.riv

¹⁰⁹ FLA Lending Code Group.

¹¹⁰ www.ccta.co.uk

businesses. The code is usually amended to take into account changes in law, practice and procedure.

10.12 One of the main considerations of CCTA is to ensure that new legislation works practically. As a result, CCTA is governed by a council made up of representatives of members that meet regularly to discuss the progress of CCTA and implications of its lobbying activities, the most important of CCTA's activities. CCTA seeks to assemble a legal and technical committee in 2009.

10.13 CCTA also provides the Consumer Credit Trade Association's Conciliation Service¹¹¹ as a forum for its members who are credit businesses. CCTA attempts to settle disputes between the consumer and any of its members through the Conciliation Service as a form of alternative dispute resolution.

Consumer Credit Association

10.14 Formed in 1978, the Consumer Credit Association (CCAUK)¹¹² represents a majority of home credit firms. It is the central contact for contact by the government and other groups and individuals with an interest in the industry.

10.15 CCAUK has around 500 members who are subjected to training and induction to establish their competence before membership. A prospective member must satisfy CCAUK as to its conduct and competence before their membership is confirmed through a process of induction and training. Members are also required to comply with CCAUK's Code of Practice and Business Conduct Pledge. Compliance training is also provided by the association for its members.

¹¹¹ Henceforth, Conciliation Service.

¹¹² www.ccauk.org

10.16 CCAUK is often used by consumers as source of advice on credit matters.

Association of British Credit Unions Limited

10.17 The Association of British Credit Unions Limited (ABCUL) is the main trade association for credit unions in the UK. It aims to make credit unions the first-choice for low cost, high quality and ethical financial services.¹¹³

10.18 ABCUL is heavily involved in bringing about changes to legislation that affect credit unions such as the Credit Unions Act 1979 and the Consumer Credit Act 1974.

10.19 ABCUL provides services such as information, representation and training to its members. It is the point of contact for information regarding credit unions such as statistics, news, and case studies of its members.

British Cheque & Credit Association

10.20 The British Cheque & Credit Association (BCCA)¹¹⁴ was established in 1994. It initially represented the interests of businesses that cashed third party cheques. Products it now covers include third party cheque cashing, pay day loans and other short term loan products with a repayment period of six months or less.

10.21 BCCA is the focal point of contact in the industry for the UK Government, local authorities, finance sector representative bodies and consumer organisations. It is involved in lobbying all relevant organisations regarding issues that affect its members.

¹¹³ www.abc.ul.org/page/about/services.cfm

¹¹⁴ www.bcca.co.uk/index.asp

- 10.22 BCCA has around 850 members ranging from UK and international public companies to sole traders, and includes businesses not operating from retail premises. Home credit and pawn broking businesses are excluded from membership.
- 10.23 BCCA operates a thorough application process. Where applicants have not complied with UK law in any area, BCCA provides advice and guidance free of charge to ensure compliance. All BCCA members must operate to a high level of compliance and treat their customers fairly.
- 10.24 There is a Consumer Code of Practice, to establish standards of care for the industry, and an Operational Code to which all BCCA members must adhere to. A Customer Complaints Procedure has been incorporated into the Code of Practice.

National Pawnbrokers Association

- 10.25 The National Pawnbrokers Association (NPA)¹¹⁵ was established in 1892. It seeks to promote and maintain high standards of business conduct and professional competence amongst its members.
- 10.26 NPA has membership of an excess of 900 outlets. It produces an operations manual, lays down a code of conduct for its members and provides general advice to its members in a range of areas.
- 10.27 NPA's National Council formulates policies to develop and grow the pawn broking industry. It represents its members' interests and views in front of government departments such as the OFT, BIS and the Financial Ombudsman Service.

¹¹⁵ www.thenpa.com

Consumer Finance Association

10.28 The Consumer Finance Association (CFA)¹¹⁶ represents businesses that offer short term unsecured personal loans, also known as pay day loans. It encourages high standards among its members in terms of transparency, customer service and responsible lending and aims to keep its members up to date with changing legislation, to build relationships with consumer groups, government departments and other financial services organisations as well as promoting responsible lending and borrowing.

British Bankers' Association

10.29 The British Bankers' Association (BBA)¹¹⁷ was established in 1919. It is the voice of the banking industry for banks that operate in the UK. It initially worked with the Committee of London Clearing Banks before it was wound up in 1991.

10.30 BBA aims to promote healthy competition that will benefit both its members and consumers. It works with the Government, Financial Services Authority and the Bank of England communicating the industry's views. By influencing the shape of the regulatory and legislative framework through dialogue and partnership, BBA seeks to encourage development of an environment in which financial services can prosper.

10.31 BBA speaks on behalf of 223 banking members from 60 countries on a range of UK or international banking issues that affect the industry. Its members together provide a full range of banking services, and make up the world's largest international banking centre.

¹¹⁶ www.cfa-uk.co.uk/index.html

¹¹⁷ www.bba.org.uk/bba/jsp/polopoly.jsp?d=103

10.32 The activities of BBA include the continued revision of the Banking Code, market pricing benchmarks such as LIBOR rates and providing regulators with evidence based arguments for change.

10.33 BBA provides industry training, publications and conference through BBA Enterprises. It helps the industry keep abreast of regulatory and industry changes

Consumer Bodies

10.34 Consumer Bodies seek to protect the interest of consumers, amongst other things, by ensuring they have enough information to make well informed decisions. They generally represent consumers via protests, campaigning or lobbying and provide advice on consumer issues.

Citizens Advice Bureau

10.35 The Citizens Advice Bureau (CAB)¹¹⁸ consists of a network of independent charities throughout the UK giving free, confidential information and advice to help people with consumer as well as money, legal and other problems. It seeks to improve policies and principles that have an affect on people's lives. CAB's services date back to 1939.

10.36 CAB's aims are as follows:

- To ensure that individuals do not suffer due to a lack of knowledge of their rights, responsibilities and the services available to them or by being unable to effectively express their needs.
- To influence the development of social policies both locally and nationally.

10.37 There are 426 CABs in England and Wales and a further 22 in Northern Ireland. All advice centres must demonstrate that they adhere to

¹¹⁸ www.citizensadvice.org.uk/index.htm

principles of providing a free, confidential, impartial and independent service to the public.

- 10.38 CAB's policy and campaign work covers a number of issues including consumer and debt issues. CAB plays a key role for its clients, including raising consumer issues brought to the bureaux, as well as contributing to debate, influencing policy and decision makers and informing legislation. CAB is often consulted for its views on consumer credit issues. It provided its views to the Department of Business Enterprise and Skills¹¹⁹, now BIS, for the White Paper,¹²⁰ expressing its belief that there is a need for effective consumer protection especially in the current economic downturn. Consumer and debt problems are now the largest area of problems dealt with by CAB.
- 10.39 CAB plays an active role in the Consumer Service Network (CSN) initiative which was launched in October 2000 by the Minister for Consumer and Corporate Affairs. The initiative is intended to enable consumer advice agencies such as CAB and local Trading Standards to work together. CSN aims to create a trading environment that allows consumers to be knowledgeable and confident and traders to be better informed on their legal obligations and good practice.

Consumer Focus

- 10.40 Consumer Focus¹²¹ is a statutory organisation that campaigns for a fair deal for consumers in England, Wales and Scotland. Consumer organisations, Energy Watch, Postwatch and the National Consumer Council were merged to create Consumer Focus in October 2008, a stronger, more integrated consumer advocacy unit. It acts as a voice for

¹¹⁹ BERR.

¹²⁰ DTI White Paper December 2003: *Fair Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040.

¹²¹ www.consumerfocus.org.uk

consumers in dialogues with companies and the Government and works to achieve a fair deal on their behalf. Its wide remit covers the whole economy.

10.41 Consumer Focus's vision is for the most vulnerable consumers in particular to have a voice in relation to the goods and services they receive. It has strong legislative powers, including the right to investigate any consumer complaint of wider interest, powers to conduct research and an ability to make an official super-complaint about failing services.

10.42 The mission of Consumer Focus outlines four strategic goals for its campaigns. These are:

- **Value:** help people receive better value by raising the influence they have over the goods and services they receive.
- **Service:** improve customer service and remove unnecessary problems that generate complaints from consumers.
- **Access:** create an economy in which everyone can access the essential services they need and where the poor no longer pay more or get less for their money.
- **Sustainability:** harness the appetite of consumers to move to more sustainable lifestyles.

10.43 One of the teams operated by Consumer Focus is Fair Markets. The Fair Markets team's work on economic markets includes advocacy to improve the legal rights of consumers, tackling failing markets and promoting consumer-focused regulation. The team's work also seeks to allow consumers to make informed choices that support sustainable consumption.

Consumer Direct

- 10.44 Consumer Direct¹²² is funded by the OFT and works in partnership with local Trading Standards Services. It a telephone and online service that provides information and clear, practical and impartial advice to consumers about their rights.
- 10.45 Consumer Direct advises consumers where they have a problem with a trader and helps them make complaints. It explains consumer related issues, such as buying on credit, directs consumers to a regulator where necessary and refers cases to local Trading Standards Services.

Which?

- 10.46 Which?,¹²³ formally known as the Consumers' Association, is a registered UK charity that operates as a consumer rights organisation and a watchdog for consumer issues. It was founded in 1957.
- 10.47 Which? is an independent organisation that is funded by subscription. It publishes magazines which focus on consumer issues and seeks to ensures that consumers have enough information to the make appropriate choices. The magazine raises awareness of trading it believes goes against the interest of the consumer. It offers advice on the legal rights of consumers and reports on legal cases it has fought for Which? members.
- 10.48 Which? has statutory powers to seek an injunction under the Unfair Terms in Consumer Contracts Regulations 1999 in order to restrain the use of an unfair contract term by a trader against customers. Which? also has powers under the Enterprise Act 2002 to investigate and make a super complaint to the OFT. A super complaint can be made about a market that is not working properly for consumers. The OFT then has 90

¹²² www.consumerdirect.gov.uk

¹²³ www.which.co.uk

days to assess a complaint, reject it in whole or part, launch a market investigation, take action under competition or consumer law or refer the market to the Competition Commission for further investigation. The Enterprise Act also provides powers, under part 8, allowing bodies such as Which? to investigate bad behaviour by a firm and ask them to stop bad practices after negotiations.

10.49 Which? as a 'specified body' under the Enterprise and Competition Acts may bring proceedings for damages before the Competition Appeals Tribunal once the Competition Appeals Tribunal or the European Commission has concluded that either an infringement of UK or EU competition law has taken place.