

## COMMERCE

# Implementing the Consumer Credit Act—I

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AN important stage in the implementation of the Consumer Credit Act 1974 has been reached with the making of eight sets of regulations and orders and the publication by Her Majesty's Stationery Office of the Consumer Credit Tables in 15 volumes. The result is to set dates during the course of the present year for the coming into operation of certain important controls and to add considerable detail to provisions contained in the Act itself. The topics mainly dealt with are the de-limitation of regulated and exempt agreements, the imposition of 'connected-lender liability' under s 75, the reopening of extortionate credit agreements, the control of credit status enquiries, and the method of calculating the amount and rate of the total charge for credit. 1 October 1977 is confirmed as the date by which most credit granting and hire businesses must apply for licences, the only exception being businesses (other than corporate businesses) where credit granted does not exceed £30 (Consumer Credit Act 1974 (Commencement no 2) Order 1977, art 2(3)).

### Regulated and exempt agreements

The Act describes a credit or hire agreement which is subject to its general system of control as a 'regulated agreement'. The definition of this term in s 189(1) describes it as a consumer credit agreement or consumer hire agreement other than an 'exempt agreement'. Paragraph 1 of sched 3 provides that an agreement made before the appointed day is not a regulated agreement. The appointed day is now declared to be 1 April 1977 (Consumer Credit Act 1974 (Commencement no 2) Order 1977, art 2(1)).

It will be seen that in order to know whether an agreement is subject to the statutory controls it is necessary to know whether it is an 'exempt agreement'. The meaning of this phrase is now spelt out by the Consumer Credit (Exempt Agreements) Order 1977, which expands s 16 of the Act. The result is to exempt certain credit agreements which are secured on land, or where only a small number of payments are to be made by the debtor or the charge for credit is low. Where under an agreement with a foreign connection credit is provided to a *trader* the agreement is exempt. Hire agreements with public utilities covering electricity, gas or water meters or metering equipment are exempt, as also are agreements for hire of telecommunications equipment (other than internal telephones) from the Post Office.

The order exempting credit agreements is exceedingly complex, and only a bare outline can be given here. It is necessary to bear in mind the distinction between debtor-creditor-supplier agreements (ie what the Crowther Committee referred to as 'purchase-money loans', where either the creditor and supplier are the same person or there is a business connection between them) and debtor-creditor agreements (where no supplier is involved).

### Credit agreements secured on land (Section 16(1))

For the purpose of delimiting these exemptions, credit grantors are divided into three categories. The first category comprises all local authorities and all building societies. If the creditor is in this category all its debtor-creditor agreements secured on land are exempt and its debtor-creditor-supplier agreements so secured are exempt if they finance the purchase of the land used as security, or the provision of dwellings on that land.

The second category of creditor in exempt credit agreements secured on land comprises named insurance companies, friendly societies and ecclesiastical charities. Here the scope of exemption is slightly narrower than with the first category. Instead of *all* debtor-creditor agreements secured on land being exempt, only those financing or refinancing the purchase of land or the provision or improvement of a dwelling or business premises are covered (though the practical difference is likely to be small). On the other hand the exemption for debtor-creditor-supplier agreements is precisely the same.

The third category concerns specified statutory corporations advancing money on land mortgage under their statutory powers. In many cases the exemptions are limited to staff loans, but for development corporations the exemption corresponds to that conferred on local authorities.

### **Credit agreements with few repayments (Section 16(5)(a))**

Again this type of exempt agreement falls into three categories. First there is the debtor-creditor-supplier agreement financing the purchase of land (whether secured or not) where the number of payments of any kind to be made by the debtor (excluding any deposit) does not exceed four. Next there is the debtor-creditor-supplier agreement *not* financing land purchase, under which credit repayments by the debtor do not exceed four. Hire purchase, conditional sale and pledges are excluded from this exemption, which gives effect to the Crowther Committee's proposal to confine protection to the 'instalment borrower'. They excluded from this description those required to discharge the advance by fewer than three instalments, but the Government have widened the exclusion to fewer than five. The final category is the important one of weekly or monthly trade credit, or indeed any running account credit by debtor-creditor-supplier agreement where one repayment by the debtor is due for each regular period (pawnbroking excepted). This means that many credit card agreements gain exemption from the Consumer Credit Act and its connected-lender liability (see below). This includes Diners Club and American Express, the leading cards where long term credit is not offered and the total amount outstanding each month is to be paid in one sum.

### **Debtor-creditor agreements with low charge for credit (Section 16(5)(b))**

If the rate of the total charge for credit (see below) under a debtor-creditor agreement does not exceed the higher of 13 per cent per annum and 1 per cent above the Bank of England minimum lending rate prevailing 28 days before the agreement is made, the agreement is exempt. This does not apply where capital repayment is index-linked. Nor does it apply to debtor-creditor-supplier agreements.

### **Credit agreements with foreign connection (Section 16(5)(c))**

Where any credit agreement is made in the course of the *debtor's* business it will be exempt if made in connection with trade in goods or services outside the United Kingdom, or between the United Kingdom and any other country. Surprisingly, the Act makes no corresponding exemption for *hire* agreements. However, it seems that in accordance with well recognised rules of private international law the Act would not be held to regulate any agreement of which the proper law was the law of a country outside the United

Kingdom. Accordingly it can be taken that any consumer credit or consumer hire agreement is a 'regulated agreement' if it is neither an exempt agreement within one of the four classes just described nor one whose proper law is that of another country.

## **Connected-lender liability**

The important and far reaching connected-lender liability imposed by s 75 of the Consumer Credit Act 1974 has now been brought into force (Consumer Credit Act 1974 (Commencement no 3) Order 1977, art 2(2)). The justification for it is spelled out in the Crowther Report as follows:

'There are many reasons why in practice a legal right which the buyer may have against his seller is not sufficient protection. Where the seller is reputable he will usually be prepared to deal with justified complaints and rectify the matters complained of. The majority of the cases in which the buyer is likely to suffer are those where a seller is of doubtful repute and is able to continue in business only because of the financial support he receives from the lender. The buyer supplied with defective goods may find that to secure redress from such a seller he has to incur the worry and expense of litigation, in which the burden of taking the initiative lies on him; and that in some cases the seller's financial position is so poor that it is doubtful whether he will be able to meet the judgment even if the buyer is successful. The buyer's difficulties of pursuing a claim against the seller are enhanced if, whilst wrestling with the financial problems of litigation, he has to go on paying the lender under the loan agreement. Problems of this kind are particularly prevalent in relation to agreements for the installation of central heating. There have been many cases where the supplier has either not delivered at all or has provided an ineffective heating system, and has then gone into liquidation before the consumer has been able to obtain redress, so that the consumer is left to meet a liability on a loan contract entered into with a third party. Especial hardship is caused where the buyer was induced to take the goods because they were represented as capable of producing income—eg knitting machines—which would enable the buyer to maintain payment of the instalments due under the loan agreement. If the machine is found to be inoperable, the whole basis of the buyer's financial calculation falls to the ground': para 6.6.25.

By virtue of art 3 (b) of the Consumer Credit Act 1974 (Commencement no 3) Order 1977, connected-lender liability applies to any debtor-creditor-supplier agreement made after 30 June 1977 (other than a non-commercial agreement) where creditor and supplier are different persons. If the debtor has any claim against the supplier for misrepresentation or breach of contract then, with two exceptions, s 75 gives him a like claim against the creditor. This has important consequences for holders of Barclaycards and Access cards—indeed any credit card which is not exempt from the Act. Provided the credit-card agreement with the consumer was made after 30 June 1977 the consumer can claim against the credit card company for misrepresentation or breach of contract by any trader from whom he obtains goods or services using the credit card. The two exceptions relate to cases where the cash price is £30 or less or is more than £10,000. The £30 limit embodies the figure used generally to relieve small agreements from the full force of the Act. In particular it is designed to exclude the common case where, although a credit card is used, it is essentially a cash transaction since the credit card is used only for convenience and not to obtain any significant period of credit. The upper limit of £10,000 excludes cases where one half or more of the finance is provided in cash so that the debtor is of some financial substance (the credit must not exceed £5,000 if the agreement is to be a 'regulated agreement').

The debtor is given a 'like claim' against the creditor but this does not of course mean that he is entitled to recover twice over. There is no limit on the amount of the claim, the argument that it should not exceed the credit provided having been rejected by the Government. The liability is joint and several, so that if he wishes the debtor can proceed against the creditor alone, taking against him any incidental steps required to pursue his remedy (eg service of a notice of rescission or a notice stating that he is treating the contract with the supplier as repudiated). If the debtor obtains judgment against one party but the judgment is unsatisfied

he can still proceed against the other (*Blyth v Fladgate* [1891] 1 Ch 337). The creditor is entitled to be indemnified by the supplier and to join him in the action.

### **Agency**

Also brought into force are agency provisions in pt V of the Consumer Credit Act 1974, some of which overlap with connected-lender liability. A statutory agency is created on the part of a credit-broker or supplier who conducts antecedent negotiations. A negotiator is prevented from being treated as agent of the consumer. The creditor or owner is prevented from evading responsibility for acts or omissions of a negotiator. None of these provisions can be disapplied by the parties contractually.

The statutory agency is created by s 56(2), and applies where the antecedent negotiations began after 16 May 1977. The typical credit-broker case is where a dealer or retailer makes representations about goods which are then sold to a finance house before becoming the subject matter of a hire purchase agreement (the usual 'tripartite' hire purchase transaction). Here the Act calls the trader a 'credit-broker' and deems the representations to be made by him in the capacity of agent of the creditor (the finance house) as well as in his actual capacity. The creditor in this case is also the supplier, since it is the finance house and not the trader who enters into the hire purchase agreement with the consumer. Where the creditor and supplier are different, and it is a 'connected-lender' situation (eg where a credit card is used), s 56(2) deems representations made to the consumer by the supplier to be made in the capacity of agent of the creditor, thus duplicating the remedies given by s 75. These cases of statutory agency can impose liability on the creditor in tort as well as contract, eg for negligent misstatements under the rule in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, or for personal injury where possession of a defective vehicle is transferred before a hire purchase agreement is concluded.

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*To be continued*