THE LAW OF CONSUMER CREDIT AND HIRE

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PREFACE

31 July 2009 is the 35th anniversary of the Consumer Credit Act 1974. To some extent this book is intended as a stock-taking exercise after over a third of a century of the Act's being in force. It does not seek to provide the comprehensive cover of Guest and Lloyd *Encyclopedia of Consumer Credit*, Goode *Consumer Credit Legislation*, or, although now discontinued, Bennion *Consumer Credit Control*, but we believe that this book will provide those who encounter the law of consumer credit and hire with a detailed commentary, in a single volume, on the most pertinent areas of this complex subject and analysis of the more difficult issues that arise under the legislation, of which, unfortunately, there are many.

The last 35 years can be seen in a number of phases of activity or inactivity on the consumer credit front. Following the passing of the 1974 Act there was little which initially occurred as a result of it. Indeed, with three principal exceptions, the Act did not come into anything like full effect for over 10 years after it received Royal Assent. The three exceptions related to licensing (a role assigned to the Director General of Fair Trading, now the Office of Fair Trading), advertising and extortionate credit bargains. The provisions relating to extortionate credit bargains came into force in 1977, as did those relating to the licensing of credit brokers, and the regulation of advertising started in 1980. However, following the passing of the Act, the statutory control in respect of matters such as documentation remained under the former regimes so that, for example, the Moneylenders Acts 1900 to 1927 continued in force for many years after 1974 and into the 1980s.

It was following the making of the package of eighteen sets of Regulations in 1983, all of which came into operation on 19 May 1985, that it could be said that the Act had been fully implemented. Those Regulations primarily dealt with the form and content of documentation. Even so, following the making of this subordinate legislation, there was little litigation apart from sporadic extortionate credit bargain cases, a number of High Court appeal cases on the Advertisements Regulations and the licensing hearings at the Office of Fair Trading in respect of minded to revoke or minded to refuse notices. Of course, the Regulations involved the expenditure of enormous time and cost for the industry in attempts to comply. It was recognized that the draconian consequences of the total unenforceability of agreements provided for by section 127(3) and (4) of the 1974 Act made compliance of the utmost importance.

It was not until the late 1990s that consumer credit litigation gained significant momentum. This phase occurred in a number of specific areas, some of which had little to do with consumer protection. With credit-hire, insurance companies used the consumer credit legislation in an attempt to undermine the credit-hire industry, some degree of success being achieved with the House of Lords' decision in *Dimond v Lovell* [2002] 1 AC 384. The withdrawal of legal aid from many personal injury cases and the introduction of claims management companies and conditional fee schemes also gave rise to significant litigation on consumer credit issues: where conditional fee schemes have involved the grant to consumers of credit for solicitors' disbursements and insurance, insurers and solicitors involved in the schemes have invoked the consumer credit legislation against the funding banks in order to avoid their own liability (see, for example *Goshawk v Bank of Scotland* [2006] 2 All ER 610, *Bank of Scotland v Euclidian* [2007] CTLC 151 and *Conister Trust v John Hardman & Co* [2008] CTLC 157). Consumers' legal advisors became more sophisticated in the use of extortionate credit bargain arguments in their attacks on agreements, as in *Paragon Finance Plc v Nash* [2001] 1 WLR 685. While there had only been a smattering of attacks on enforceability arising from the calculation of the amount of credit before the new century (as in *Huntpast Limited v Leadbetter* [1992] CCLR 15), debtors and their advisors became more ingenious in their arguments regarding what should and should not be included in the amount of the credit and the correct way to state it (as in *Watchtower Investments Limited v Payne* [2003] CCLR 10). A special mention should be made of Mrs Penelope Wilson, who, in a series of actions against pawnbrokers, single-handedly triggered a series of significant decisions in this area *(Wilson v First County Trust Ltd (No 1)* [2001] QB 407, *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, *Wilson v Howard Pawnbrokers* [2005] CCLR 2, *Wilson v Robertsons (London) Ltd* [2005] CCLR 6, and *Wilson v Robertsons (London) Ltd (No 2)* [2007] CCLR 1). Finally, the Office of Fair Trading has itself been active in the courts. It challenged a term in a credit agreement that interest should be payable on any judgment (in *Director General of Fair Trading v First National Bank Plc* [2002] 1 AC 481) and in *Office of Fair Trading v Lloyds TSB Plc* [2008] 1 AC 316 established that a bank's connected lender liability under section 75 of the Consumer Credit Act 1974 applies even when the transaction in question was entered into out of the jurisdiction.

The rise of internet communications has informed consumers and encouraged them to challenge lenders. The bank overdraft cases (leading to *Office of Fair Trading v Abbey National and others* [2008] CTLC 1), the litigation on secret commissions (following *Hurstanger Limited v Wilson* [2007] 1 WLR 2351) and the claims based upon alleged mis-selling of Payment Protection Insurance are examples of this. This rise in consumer activity is likely to continue as consumers enter a period of harsh economic difficulty.

Given that this book is published at a time of such difficulty, it can be recognized that the freeing up of consumer credit since the 1974 Act has undoubtedly played its part in the current crisis. We can now look back over a period when there has been an unparalleled impetus to lend, but often little care as to the ability to repay, lenders knowing that debts could be securitized, producing further funds to lend even more. The change in the economic climate is well illustrated by the Divisional Court case of *National Westminster Bank Plc v Devon County Council* [1993] CCLR 69. Lord Justice Staughton had to consider the word 'certain' in relation to whether it was 'certain' that the fixed rate of interest of 1% under a mortgage would increase after the low-start period. He said 'There is a rather old-fashioned expression, "it is all Lombard Street to a small china orange" that something will happen, meaning all the wealth of all the bankers against some very cheap object. Is it enough that something is certain for practical purposes?' He answered the question in the affirmative, saying

> Now, it is true that the defendant's witnesses asserted that it was a possibility that the rate would not change. But the stipendiary was, in my judgment, entitled to conclude that the possibility was so remote that it could be ignored. After all, judges and magistrates are supposed to exercise common sense from time to time. We are not expected to be entirely ignorant of everything that happens in the world; at least I hope we are not. We are entitled to have some knowledge of the cost of borrowing money and how it fluctuates from time to time, and of the likelihood of building society rates being 1% or lower in two years' time. Let us remember that out of that 1%, and such other income as they get from insurance policies and the like, they not only have to pay for their offices and staff and all their other expenses, but also something to the lenders of money. The magistrate thought that that was so improbable that it could be left out of account, and so do I.

Consumer credit legislation is perhaps an area of law where there is particular uncertainty, full of 'known unknowns' and 'unknown unknowns', to use the phrases of Donald Rumsfeld, the former US Defence Secretary. We have attempted in this book to address the 'known unknowns' that we know of. In the present uncertain world, we recognize that there may be many 'unknown unknowns' which we have not dealt with and which may yet take us by surprise.

Fred Philpott
Gough Square Chambers
January 2009

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ABBREVIATIONS

Agreements Regulations	The Consumer Credit (Agreements) Regulations 1983, SI 1983/1553
APR	Annual percentage rate of the total charge for credit determined in accordance with the Consumer Credit (Total Charge for Credit) Regulations 1980, SI 1980/51
BERR	Department for Business, Enterprise and Regulatory Reform
BPMR	The Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276
CCA 1974	Consumer Credit Act 1974
CCA 2006	Consumer Credit Act 2006
CCLR	Consumer Credit Law Reports, Guest & Lloyd Encyclopedia of Consumer Credit Pt A
CTLC	Consumer & Trading Law Cases, published by Gough Square Chambers
Early Settlement Regulations 2004	Consumer Credit (Early Settlement) Regulations 2004, SI 2004/1483
FOS	Financial Ombudsman Service
FSA	Financial Services Authority
GCCR	Goode: Consumer Credit Reports
Information Regulations 2007	The Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007, SI 2007/1167
OFT	The Office of Fair Trading
Rebate Regulations 1983	The Consumer Credit (Rebate on Early Settlement) Regulations 1983, SI 1983/1562
Running-Account Credit Information Regulations	The Consumer Credit (Running-Account Credit Information) Regulations 1983, SI 1983/1570
Total Charge for Credit Regulations	The Consumer Credit (Total Charge for Credit) Regulations 1980, SI 1980/51
UTCCR	The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083

1989 Exempt Agreements Order	The Consumer Credit (Exempt Agreements) Order 1989, SI 1989/869
2007 Exempt Agreements Order	The Consumer Credit (Exempt Agreements) Order 2007, SI 2007/1168
2008 Regulations	The Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277

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INTRODUCTION

W J Hibbert

In.01 'The need to control moneylending transactions is as old as our civilisation' observed Lord Scott of Foscote in *Wilson v First County Trust Ltd (No 2)*.[1] Indeed, the condemnation and prohibition of usury (the taking of interest) can be found in Greek philosophy, in the Old Testament, in Roman Catholic canon law, and in the early laws of England. However, as was said in the Crowther Report[2] (the report that led to the passing of the Consumer Credit Act 1974 (the CCA 1974)): 'equally widespread, under the impulse of the trading instinct, have been the legal fictions and the practical devices used to evade the prohibition'.[3] Our modern legislation is founded on this historical experience.

In.02 Consumer credit is narrower than lending and borrowing generally. As an institution of credit, 'consumer credit' began in the late middle ages, emerging from, on the one hand, the business bankers concerned with the finance of trade in Northern Italy, the Rhineland, and the Low Countries, and, on the other, specialist pawnbrokers appearing in urban centres, meeting the needs of 'consumers', both wealthy citizens pledging jewellery and plate, and the poor pledging their clothes and bedding to deal with economic misfortune.

In.03 Both moneylending and pawnbroking were often in the hands of minority groups claiming exemption from the usury laws. As commercial lending at interest became widespread across Europe, interest rates rose, adding to the existing prejudice against such groups. As in present times, attempts were made to restrict the cost of borrowing, which attempts failed in the face of the market.[4]

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[1] [2004] 1 AC 816, at para 169.

[2] *Consumer Credit*; the report of the committee under the chairmanship of Lord Crowther (Cmnd 4596) 1971. Much of this Introduction is derived from the history of credit contained in the report.

[3] Crowther Report, para 2.1.1.

[4] For example, over the course of the 15th century, Florence passed laws restricting interest rates to 15% pa, then 20%, and then 30%, before finally setting up municipal pawnbrokers to try to combat the even higher black market rates. The Catholic Church set up so-called *Montes Pietatis* (institutions whose funds had been created by pious donations, lending at no interest) but in 1515, Pope Leo X, a member of the Medici banking family, authorized even these to make whatever charges were necessary to cover their expenditure.

In.04 England lagged behind in the commercialization of consumer credit. As late as the 17th century, although there were some specialist 'usurers' in urban centres, to a large extent lenders were merely the more prosperous members of the community: farmers, inn-keepers, shopkeepers, even the country parson. In Tudor times, it was said, 'Money lending which concerns nine-tenths of the population is spasmodic, irregular, unorganised, a series of individual, and sometimes surreptitious, transactions between neighbours'.[5]

In.05 For a brief time during the break from Rome under Henry VIII, a 'modern' (or Calvinist) approach prevailed. The Act in Restraint of Usury of 1545 permitted interest for the first time, capped at 10 per cent. However, the previous medieval position prohibiting interest was restored by the Act Against Usury of 1552. But by now the capitalist classes were emerging and, with the restoration of medieval prohibitions, medieval evasions were widely deployed: loans at interest were disguised as payments for fictitious consideration, or as sales of goods priced at double their value, or a share in a trading partnership where the 'borrower' agreed to bear all the losses. The stigma of disreputability attached to moneylending was reinforced by the use of such devices.

In.06 Eventually, in 1572, under Elizabeth 1, the charging of interest was again permitted at 10 per cent. Thereafter, the permitted rate was lowered from time to time, eventually being fixed at 5 per cent in 1713. There it stayed until all restriction was removed by the Usury Laws Repeal Act 1854, ushering in a period of uncontrolled interest rates.

In.07 The legalization of the charging of interest made small scale credit between neighbours, where interest might not otherwise have been charged, come to resemble business credit. The need to control the behaviour of creditors towards their debtors became less a moral issue and more a social issue for the state. Coupled with this development was a rise in the standards of living of the general population, which meant that consumer credit 'moved beyond being predominantly the offsetting of misfortune to being a method of anticipating future income'.[6]

In.08 As for credit given by suppliers, before the second half of the 19th century buying goods on extended credit was common. Prices were inflated to compensate for the risk and if there was a default, enforcement could be severe. While imprisonment for small debts was slowly limited over the 18th century, a debt of £20 could still lead to imprisonment after 1827. A more modern approach to credit for purchases came through slowly during the second half of the 19th century. In 1846, the County Courts were set up, creating an effective system for execution through

[5] RH Tawney in his 1925 introduction to *A Discourse upon Usury* by Thomas Wilson (1572).
[6] Crowther Report, para 2.17.

the courts,[7] and the rise of branch shops and department stores helped the development of shop credit as we know it today, replacing extended credit with payments at most against a weekly or monthly bill.

In.09 One form of consumer credit which caused particular concern was pawnbroking, and this was the first to be subjected to detailed control. Legislation controlling pawnbrokers was first introduced in 1603, primarily to prevent sales of pledges before redemption at a time when pawnbrokers still largely serviced the wealthy. Similar legislation followed during the 18th century, which also controlled rates of interest on small loans (low rates of interest were considered inappropriate for short-term loans on small sums). By the beginning of the 19th century, comprehensive control was introduced, involving detailed regulations for the taking of pledges for loans under £10. The Pawnbrokers Act of 1800 prescribed requirements in relation to records and receipts, the sale of pledges, and the rate of interest. Throughout the 19th century, the poor remained heavily dependant on the pawnbroker, and the law on pawnbroking was subject to repeated amendments leading to comprehensive regulation under the Pawnbrokers Act 1872. This Act introduced a licensing system and set out requirements for loans below £5 and loans between £5 and £50 ('special contracts') where the pawnbroker had not excluded the terms of the Act. Loans over £50 were not covered. This Act, subject to some minor amendments, remained in force until after the coming into force of the CCA 1974, by which time pawnbroking had become a minor source of consumer credit.

In.10 Professional moneylending, however, remained for a long time a service for the upper and middle classes. The late Georgian and early Victorian Parliaments, concerned with the exploitation of the poor, ignored moneylending altogether. The series of Bills of Sale Acts in the 19th century beginning with the Act of 1854 (the same year as the Usury Laws Repeal Act) were introduced to protect not borrowers but those creditors who gave credit on the strength of apparent ownership of goods. It was not until 1882, when it had become apparent that the previous legislation was being exploited as a means of taking security for loans, that detailed formal requirements were introduced to protect the borrower. In fact, the drafting precision required by the Bills of Sale Act (1878) Amendment Act 1882, coupled with the severity of the consequences of non-compliance, effectively reduced the chattel mortgage to a minor source of consumer credit.

In.11 It was only in the 1890s that Parliament turned its attention to the trade of moneylending, expressing concern at high rates of interest, concealed terms, the use of aliases, and ruthless enforcement. This resulted in the Money-lenders Act 1900,

[7] Although it was not until 1869 that the power to imprison on a writ enforced by the sheriff was ended and even then a wilful refusal to pay a court order still led to imprisonment.

to control 'harsh and unconscionable' contracts by moneylenders.[8] The Act allowed such contracts to be re-opened by the courts and required registration of moneylenders. But the Act was not in fact addressed at consumer credit; it concentrated on the nature of the lender and regulated even commercial loans to companies so long as they were lent by a moneylender. Bodies perceived as more respectable, such as banks, insurance companies, friendly societies, and persons whose business's primary object was not lending money, were exempted from its provisions.

In.12 Abuses continued and further legislation was introduced in the form of the Moneylenders Act 1927, imposing many detailed requirements on contracts by moneylenders and on pawnbrokers lending over £50. It introduced a licensing system and provided that, if the rate of interest exceeded 48 per cent per annum, the interest was to be presumed excessive and the transaction harsh and unconscionable. The Act provided for the non-enforceability of the credit agreement unless a memorandum containing all the terms of the contract, and in particular the date, the amount of the loan, and the rate of interest, was signed and a copy delivered to the borrower. Non-compliance with the smallest requirement rendered the agreement and any security given wholly unenforceable. The stringent effect of the section led to adverse judicial comment.[9]

In.13 The immediate effect of the legislation was to encourage the growth of other forms of credit that avoided the controls on moneylending. The sale of goods and services on credit, including instalment credit, did not constitute a loan and was not moneylending, nor was an additional charge imposed interest, merely a higher price imposed for paying at a later date.[10] Further, conditional sale and hire-purchase[11] had come into use in England in the 19th century by manufacturers wishing to supply goods to the middle and working classes, particularly pianos, sewing machines, and furniture.[12] Specialized 'Hire-Purchase Companies' had initially arisen in a commercial context, purchasing railway wagons from the manufacturers to let on hire-purchase to collieries to transport the quantities of coal used in Victorian times. The concept soon spread to consumer goods.

[8] See s 1 of that Act.

[9] *Eldridge and Morris v Taylor* [1931] 2 KB 416, at 418, 420, and 422; *Dunn Trust v Feetham* [1936] 1 KB 22, at 34 and 38; *Askinex v Green* [1969] 1 All ER 65, at 71, 78, and 79. The report of *Directloans Ltd v Cracknell* The Times, 17 April 1975 (Oliver J) reads: 'Now that the Moneylenders Act was under sentence of death [*the CCA having been passed*] it was only respect for the moribund which restrained his Lordship from a more open expression of lack of regret at its passing.'

[10] *Beete v Bidgood* (1827) 7 B &C 453; *Olds Discount v Cohen* [1938] 3 All ER 281n.

[11] The distinction only became significant with the Factors Act 1889, under which a conditional buyer could in certain circumstances pass title to an innocent purchaser, while a person with merely an option to buy could not (*Helby v Mathews* [1895] AC 471).

[12] The reservation of title under such an agreement was not a security for a loan and was outside the Bills of Sale Acts *McEntire v Crossley Bros Ltd* [1895] AC 457.

In the 1920s, cars were added to the typical consumer product bought on the 'never-never', joined by radios, radiograms, vacuum cleaners, and other household consumer durables. Earlier experience in America led to American investment in the British finance house market.

In.14 The growth in abuses in this form of unregulated credit led to legislation. Following the Hire-Purchase and Small Debts (Scotland) Act 1932, the Hire-Purchase Act 1938 was introduced for England and Wales. Amendments to the hire-purchase legislation followed,[13] culminating in the Hire-Purchase Act 1964, which made substantial amendments to the 1938 Act and extended it to Scotland. A consolidating Act, the Hire-Purchase Act 1965, was passed the following year.[14]

In.15 The Hire-Purchase Act 1965 had a different approach to the requirements of formality to the Moneylenders Act 1927. Like the Moneylenders Act 1927, it, too, provided that the creditor under a hire-purchase, conditional sale or credit-sale agreement could not enforce the agreement unless there was a signed document, in this case the agreement itself.[15] Like the 1927 Act, this signed document was required to contain certain details of the agreement: the hire-purchase or purchase price, the cash price, the instalment amounts, the date of each instalment (or the mode of determining the date), and a list of the goods.[16] It also required compliance with regulations made under the 1965 Act as to the layout of the contract and the text of required notices.[17] However, subject to exceptions regarding cancellation notices required for cancellable agreements signed off trade premises, the Hire-Purchase Acts permitted the court to allow enforcement of the agreement even if the document signed omitted any or all of these details so long as the non-compliance had not prejudiced the hirer/buyer and it was just and equitable to dispense with the requirement.[18] The requirements which the court could not dispense with were for a signed agreement, i.e. a document recording the fact that there was a hire-purchase or conditional sale agreement, and the cancellation notices.[19] The Act was to be drawn on as a model for the regulatory regime in the CCA 1974.

[13] Hire-Purchase Act 1954, Credit-sale Agreements (Scotland) Act 1961.

[14] Pt III of the Hire-Purchase Act 1964 (passing of title to innocent purchasers) was preserved and is still in force.

[15] S 10.

[16] S 7(1).

[17] The (detailed) requirements are contained in the Hire-Purchase (Documents) (Legibility and Statutory Statements) Regulations 1965, SI 1965/1646.

[18] S 10.

[19] Ss 5(1)(a) and 10. As to what was a sufficient agreement to bear the signature, see Professor Goode in his leading textbook on the subject, *Hire-Purchase Law and Practice* (2nd edn, 1970) at pp 160–162. The stringent effect of non compliance with such formalities for which no dispensation could be given was commented on adversely by Professor Goode at pp 169–170 and 370.

In.16 During and for a substantial period after the Second World War, Control Orders were introduced controlling the prices and charges in hire-purchase contracts. In the 1950s Control Orders were made prescribing instead minimum deposits and maximum payment periods for hire-purchase, conditional sale, credit sale, and hire contracts. The sanction was unenforceability, and cases on unenforceability under Control Orders remain an important source of authority on the subject. They were an economic, not consumer measure, designed to restrict the availability of 'easy' credit and avoid its perceived inflationary effects.

In.17 The finance houses which had grown up with the rise in hire-purchase also diversified into so-called 'secondary' banking activity, banking companies enjoying the same exemption from the Moneylenders Acts as the clearing banks.[20] Actual banking activity was required, the institutions having the characteristics of a bank laid down in *UDT v Kirkwood*,[21] as well as certain additional characteristics designed to ensure they were reputable.

In.18 British high street banks were hesitant to enter the consumer credit market. Individuals with bank accounts had access to the traditional overdraft and it was not until 1958 that the Midland Bank Ltd launched a Personal Loan Scheme, offering loans of fixed amounts repayable by instalments. British banks generally preferred to enter the market indirectly, acquiring substantial shares in finance houses such as Forward Trust, Lombard, and United Dominion Trust.

In.19 In 1966, Barclays Bank took up a franchise from BankAmericard and introduced the Barclaycard.[22] This was essentially for the use of business individuals and competed with charge cards issued by Diners Club and American Express. Those charge card schemes gave only monthly credit and were only accepted by suppliers who had been recruited by the relevant scheme operator. The Barclaycard was accepted in the UK and abroad wherever cards bearing the blue, white, and gold livery of the BankAmericard franchise were accepted, and allowed credit to be run forward by the debtor from month to month, requiring only a minimum monthly payment (a revolving credit facility).[23]

In.20 By the end of the 1960s, the consumer credit industry was a patchwork of providers of different forms of credit operating under different legislative regimes.

[20] Largely companies certified under s 127 of the Companies Act 1967 as carrying on banking for the purposes of the Moneylenders Acts.

[21] [1966] 2 QB 431.

[22] The high street banks had previously introduced the cheque guarantee card as a way of allowing consumers the facility of cashless purchases, which might be on credit if the customer had an overdraft.

[23] For a description of the introduction into the UK and subsequent development of the credit card industry see the judgment of Gloster J in *Office of Fair Trading v Lloyds TSB* [2005] 1 All ER 843 (the decision on the application of s 75 of the CCA 1974 to foreign transactions was reversed on appeal: see [2007] QB 1; 2008 1 AC 316).

One can add to the those specifically mentioned above, building societies providing long-term secured lending for house purchases, cheque traders selling on instalments vouchers redeemable at shops, and friendly societies providing self-help credit. In 1968, the President of the Board of Trade called on a committee headed by Lord Crowther[24] to carry out a wide-ranging review of consumer credit. The terms of reference involved a comprehensive review of the law and practice of the provision of credit, as well as consideration of the advantages and disadvantages of existing and possible alternative arrangements for providing credit and the making of recommendations.

The Crowther Report

In.21 The Committee took over two years to report and after conducting extensive investigations, documented in four pages of names of witnesses and a 28-page bibliography, produced in 1971 a report running to over 600 pages.[25] The Report contained a stinging critique of the existing law (Part 4 of the Report) and concluded that the existing law was badly in need of reform but could not be reformed piecemeal. Instead the Committee had a grander vision: to create a wholly new legal framework for credit in general. This new legal framework (described in Part 5 of the Report) was intended to replace what were distinct sets of rules with a uniform code. The Committee drew on the experience of the American Uniform Commercial Code and the Uniform Consumer Credit Code to recommend creating a comprehensive and rational structure for regulation which could be kept under review, through statutory instruments, in order to keep it flexible. The role of policing the legislation and keeping it up to date was to be given to an independent Consumer Credit Commissioner (a role in fact performed by the Director General of Fair Trading and now the Office of Fair Trading).

In.22 In proposing a rational basis for its comprehensive code, the Committee examined the distinction historically drawn between different forms of credit. It recognized that historically the law had distinguished between loans of money and 'vendor credit', where payment for goods or services is deferred. However, to the Committee this was not the relevant distinction. Deferred payment and hire-purchase were in reality a loan, distinct from the sale aspect of the transaction. Hire-purchase and conditional sale were perceived as being really a form of secured credit by way of chattel mortgage. Where the Committee did consider there was a relevant distinction was between 'purchase-money credit' (where there is a definite connection between the credit and the purchase of particular goods and

[24] Which included one RM Goode.
[25] *Consumer Credit* Cmnd 4596.

services) and non-purchase money credit, where the use of the credit is not controlled by the lender, a distinction picked up in section 11 of the CCA 1974 which distinguishes between restricted use and unrestricted use credit. The second significant distinction identified by the Committee was credit extended by a supplier or a connected lender and credit extended by an independent lender. In the case of the lender who has a relationship with the supplier, he and the supplier are in a form of 'joint venture' and the lender has a responsibility not merely for the credit element of the transaction but also for the supply transaction. The same applies by definition where the creditor and supplier are the same. This was to lead to the distinction drawn in sections 12 and 13 of the CCA 1974 between 'debtor-creditor-supplier' credit agreements and 'debtor-creditor' agreements.

In.23 Another distinction drawn by the existing law which the Committee considered not wholly justified was the distinction between credit and hire. While recognizing there were relevant differences, it considered that where an item such as a television is rented for a substantial or even the whole of its economic life, the transaction is directly comparable to hire-purchase where credit is clearly involved. The two transactions are simply two routes to the same object and at least some of the protective and regulatory provisions applying to credit should be applied to hire.

In.24 The Committee intended to extend its reform beyond consumer transactions, consumer transactions being defined particularly by reference to their amount and the fact that the contracting party was an individual and not a body corporate. It intended that there be reform to the loan aspects of all loans (other than those secured on land) and particularly to loans secured on goods. It proposed that there be two pieces of legislation, a Lending and Security Act containing provisions applicable to credit transactions generally, and a Consumer Sale and Loan Act, which would be a consumer protection statute. In fact this wider aspect of the Committee's recommendations was not followed, with one result being that the proposed modernization of securities on personal property was not introduced: the Bills of Sales Acts remain in place and govern chattel mortgages,[26] which remain an important though relatively uncommon form of lending.

In.25 The Committee focused particularly on the legislation affecting medium-term credit. Short-term credit was perceived as largely falling within the problem-free areas of general trade credit, repayable in a small number of payments over a short period, while long-term secured borrowing for house purchases was outside the Committee's remit (although that is not to say that the Committee did not address issues arising in short- and long-term credit agreements).

[26] While also in many cases being governed by the CCA 1974.

In.26 Having established a rational analysis of credit transactions, the Committee then sought to impose consumer protection uniformly across those transactions, irrespective of the forms in which they were cast. It identified in Part 6 the factors that affected consumers: lack of knowledge, inertia, recklessness, improvidence, inadequacy of income, the existence of more pressing problems, inequality of bargaining power, and trading malpractices. It recognized that not all of these could be dealt with through legislation, but legislation could address bargaining inequality, control trading malpractices, and regulate remedies for default.

In.27 The protection proposed extended from the period prior to entering into the agreement (controlling advertising, doorstep canvassers, and brokers), at the time of entering into the agreement (through required disclosure of the terms of the agreement through the form of the contract and delivery of copies), and after the agreement was made (through rights of cancellation, rebates for early settlement, restrictions on repossessions, and additional powers given to the court to interfere with the terms of the agreement), together with an overarching licensing regime.

In.28 The Committee's 1971 report ended with a perspicacious prediction of the expansion of credit (Part 9—the Future). It bears repeating in part:[27]

> It is reasonable to suppose that we are at present only in the early stages of revolutionary changes in the whole mechanism of transmitting money and granting credit . . . The impelling force behind this change is the ever increasing cost of clerical hand labour . . . The means of change are the availability of sophisticated data processing machines and the development of methods of instant communication with them from multiple terminals. The first historical change in the development of money was when full-value coins with an intrinsic worth equal to their face value gave way to coins and paper money of attributed value (and therefore capable of unlimited creation). The second historical change came with the shift from cash to cheques—that is, the general acceptance for use as money of the transferable obligations of bankers. The third change, of which we stand at the beginning, will be the development of electronic transference of purchasing power, without the need for documentation. Gold and silver, once the universal and exclusive means of payment, have already disappeared. Cash in any form may be on its way out, and the cheque may, in due course, follow . . . The granting of credit is inextricably tied up with the processes of making payment, and there is no doubt that there will be changes here too . . . What new forms of credit would then come to the fore it is too early to say . . . Competition among the credit granting institutions will, we think, lead to increasing pressure for swift and simple ways of obtaining credit—which is all the more reason for the legal framework to concern itself with general principles rather than with specific forms . . . The more enthusiastic advocates of the credit card see it as not only the universal means of payment but also as a general method of securing credit. This may prove to be so . . . Whatever the eventually accepted means of establishing an individual's creditworthiness—whether it be a card that he carries (and which can be

[27] Paras 9.1.12–9.1.14 of the Report.

stolen or lost) or a means by which he can 'sign' electronically, or in some other way satisfy the distant computer of his identity, so that it can confirm his credit—one consequence is likely to be concentration in the credit-giving industry . . .

Enactment of the 1974 Act

In.29 The recommendations of the report by the Crowther Committee, which had been set up by a Labour Government, were largely accepted by the then Conservative Government in its White Paper *Reform of the Law on Consumer Credit*.[28] The proposed Bill was based on the Committee's approach of establishing a single set of rights and obligations covering all types of consumer credit transactions, with additional provisions for certain transactions as appropriate to their nature: 'The Government want this new legislation to be flexible so that it will remain fully operative right across the credit industry even if new forms of credit transaction are invented.'[29]

In.30 The Bill had been amended in Committee stage when the Conservative Government fell. However, it had enjoyed substantial cross-party support and the incoming Labour Government re-introduced the Bill in a slightly amended form as a House of Lords Bill. The CCA 1974 was passed on 31 July 1974.

In.31 Although the passage of the Bill had been relatively speedy, the implementation of the Act was drawn out. The Act came into force in stages over a period of 11 years, with the licensing and extortionate credit bargains provisions coming into force from 1977, but the majority of sections, in particular those dealing with documentations of agreements, coming into force, together with a package of subordinate legislation, in 1985.[30] Only then was the earlier legislation which the CCA 1974 was intended to replace finally fully repealed.

Subsequent Legislation

In.32 As intended by the Crowther Committee and the 1973 White Paper, the CCA 1974 was designed to provide the underlying long-term structure to legislation, the detail of which would be fleshed out by subordinate legislation. This subordinate

[28] Cmnd 5427, September 1973. However the Committee's recommendations for wider general reform in the field of the lending and security, particularly involving reforms in the law on chattel mortgages, were rejected.

[29] Para 10 of the White Paper.

[30] See the Table of Commencements and Repeals at Div II Pt C of Goode, *Consumer Credit Law and Practice*, where the relevant dates are conveniently set out.

legislation has taken the form of Regulations and Orders,[31] the sponsoring department being the Department of Trade and Industry, now the Department for Business, Enterprise and Regulatory Reform, or of notices and determinations by the Director General of Fair Trading and now the Office of Fair Trading.

In.33 This subordinate legislation has been substantial and detailed. Combined with the difficulties in construction thrown up by the drafting of the CCA 1974 itself,[32] which in seeking to provide a comprehensive code covering all forms of credit was bound to create complexities, it has led the legislation being described by Lord Hoffman as 'statutory thickets'.[33] Others have expressed their opinion more bluntly:

> the Consumer Credit Act 1974 . . . has recently provided so much work for the courts. Like others, this case demonstrates the unsatisfactory state of the law at present. Simplification of a part of the law which is intended to protect consumers is surely long overdue so as to make it comprehensible to layman and lawyer alike. At present it is certainly not comprehensible to the former and is scarcely comprehensible to the latter. (Lord Justice Clarke in *McGinn v Grangewood Securities Ltd*[34]).[35]

In.34 The Crowther Committee had anticipated the legislation being kept continuously under review and up to date to meet developments in the credit market. Over the years there were from time to time significant individual amendments. However, in 2003 the government published a White Paper, *Fair, Clear, and Competitive: The Consumer Credit Market in the 21st Centruy*.[36] Following a series of consultation papers, nearly 20 years after the final implementation of the CCA 1974 and 30 years after the passing of the Act itself, there began wave of reform. From 2004, new regulations were introduced dealing with key provisions[37] and

[31] See s 182 of the CCA 1974 and the definition of the word 'prescribed' in s 189(1) of the CCA 1974.

[32] The draftsman was Mr Francis Bennion, senior Parliamentary Counsel, author of the leading textbook on statutory construction, *Statutory Interpretation* (5th edn, 2008), and author of the *Consumer Credit Control* (now out of print), in which he gave a comprehensive restatement of the legislation.

[33] *Dimond v Lovell* [2002] 1 AC 384, 394.

[34] [2002] EWCA Civ 522; [2003] CCLR 11.

[35] In *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, 846, Lord Nicholls expressed concern about the complexities of the legislation. He considered however that in regard to the aspect he was considering, it did not fail to meet the requirement implied in the concept of 'prescribed by law' in the European Convention on Human Rights (see *Vogt v Germany* (1995) 21 EHRR 205). The degree of uncertainty was not unacceptably high, points of uncertainty were bound to arise given that the legislation has to cope with a wide range of transactions and the courts can clarify issues when they occur. Moreover, at the time of that case, the financial limits under the CCA 1974 defining regulated agreements were still in place and Lord Nicholls took into account that the burden on the creditor in any one case is confined. Whether the position will be the same now the financial limits have been largely removed awaits determination.

[36] Cmnd 6040.

[37] The Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095 gave distance contracts for hire and credit their own cancellation rights and pre-contract disclosure requirements; the Consumer Credit Act 1974 (Electronic Communications) Order 2004, SI 2004/3236 allowed

the Consumer Credit Act 2006 was passed introducing important changes to the CCA 1974.

In.35 The 2006 Act has been brought into effect over the period 16 June 2006 to 1 October 2008. These changes include reform of the licensing system and the creation of the Consumer Credit Appeals Tribunal; removing the previous financial limit (£25,000) for regulation (unless the credit or hire is provided for the individual's business purposes); repeal of the draconian provisions of section 127(3) and (4) (which had rendered certain improperly executed agreements wholly unenforceable); replacing the concept of 'extortionate credit bargains' with that of 'unfair relationships'; and bringing consumer credit within the ambit of the Financial Ombudsman Scheme.

In.36 New criminal offences have been introduced by the Consumer Protection from Unfair Trading Regulations 2008, which apply to 'products', a term widely defined so as to include credit and hire.

In.37 However, change does not stop here. Directive 2008/48/EC on Credit Agreements for Consumers and repealing Council Directive 87/102/EEC[38] was published in the Official Journal in May 2008.[39] It must be implemented by Member States by 12 May 2010. Necessary changes will be wide ranging, including advertising, the giving of explanations to customers, rights of cancellation, termination and early settlement, agreement documentation, overdrafts, and assignments. The detail of the future legislation will now be a matter for consultation.

regulated agreements to be entered into over the internet; the Consumer Credit (Disclosure of Information) Regulations 2004, SI 12004/481 introduced a requirement for pre-contract information; the Consumer Credit (Agreements) (Amendment) Regulations 2004, SI 2004/1482 made wide-ranging changes to the form and content of agreements; the Consumer Credit (Early Settlement) Regulations 2004, SI 2004/1483 changed the calculation of the rebate on early settlement; and the Consumer Credit (Advertisements) Regulations 2004, SI 2004/1484 simplified the rules relating to advertising.

[38] This first Directive on Consumer Credit, 87/102/EEC, was heavily influenced by the UK's own legislation and the UK considered that its legislation did not require amendment as a consequence of the Directive. The Directive was amended in 1990 as regards the rate disclosure requirements (90/88/EEC) and further amended in 1998 (98/7/EEC) to replace the formulae for the calculation of the APR. The new formula was introduced by SI 1999/3177.

[39] OJ L 133, 22/05/2008, p 0066–0092.

1

THE SCOPE OF THE CONSUMER CREDIT ACT 1974

W J Hibbert and J M W Smith

A. Overview of the Consumer Credit Act 1974

(a) Purpose of the Act

1.01 The long title of the Consumer Credit Act (CCA) 1974 states that it is:

> An Act to establish for the protection of consumers a new system administered by the Director General of Fair Trading[1] of licensing and other control of traders concerned with the provision of credit or the supply of goods on hire or hire-purchase, and their transactions, in place of the present enactments regulating moneylenders, pawnbrokers and hire-purchase traders and their transactions: and for related matters.

The Act was of course directed towards the protection of consumers.[2] But it was also aimed at introducing a 'new system' to control the providers of credit and hire and their transactions. The new system was intended to be a uniform but flexible code applicable to all forms of consumer credit and hire products, both existing and future. One of the intended consequences of this reform was to liberate the credit industry from overregulation, an intention that can be overlooked. As the 1973 White Paper, *Reform of the Law on Consumer Credit*[3] stated:

> The twin purposes of the proposals which will be placed before Parliament in the Bill will be *first* to release the credit industry from existing outdated restrictions and to allow it to develop in future within a framework which will encourage competition between different types of activity and the development of new forms of business; and *second,* to provide consistent and adequate protection for the customer across the whole spectrum of credit transactions (emphasis added).

1.02 It is important to a proper understanding of the Act to appreciate its historical context. Although the Act was a radical departure from the previous legislation regulating credit, its roots were firmly embedded in the matrix from which it sprang. The previous legislation was central to the reasoning of the Committee under the chairmanship of Lord Crowther, whose 1971 report, *Consumer Credit*,[4] was to be the basis of the CCA 1974. The CCA 1974, although a major reform, is, together with the subordinate legislation made under it, part of an evolving regime of regulation of the consumer credit and hire industries, and the most recent reforms, including those of the CCA 2006, which amends the CCA 1974, continue that ongoing process. The background to the legislation is set out in the Introduction.

[1] S 2(1) of the Enterprise Act 2002 provided that the functions of the Director General of Fair Trading were transferred to the Office of Fair Trading.

[2] See the frequent comments by the Court of Appeal that this is the proper approach to construction of the CCA 1974, summarized in *McGinn v Grangewood Securities Ltd* [2003] CCLR 11, CA.

[3] Cmnd 5427.

[4] Cmnd 4596.

(b) The three aspects of regulation in the Consumer Credit Act 1974

1.03 The provisions of the CCA 1974 can be said to fall into three areas often referred to as the administrative, the transactional, and the criminal. In so far as the provisions are administrative, not only does the Act provide for the duties and functions of the Office of Fair Trading,[5] but it makes provision for the control (particularly through the licensing system) of those concerned in the consumer credit and consumer hire industry. In so far as they are transactional, the Act governs the rights and obligations of parties under agreements to which the Act relates and makes provisions as to the agreements themselves, particularly as to their form and content. Thirdly, it creates criminal offences.

B. The Territorial Application of the Consumer Credit Act 1974

1.04 The CCA 1974 applies to England, Wales, Scotland, and, by section 193(2), to Northern Ireland. Bearing in mind the so-called 'territoriality principle', the Act can be presumed not to be intended to affect persons or acts done outside the territory of the United Kingdom.[6] Thus, so far as criminal offences are concerned, the Act appears to apply only to offences committed within the UK. However, even such criminal offences may depend on there being an agreement regulated by the Act, in which case a foreign element to the agreement may take that agreement outside the CCA 1974 and therefore remove an activity within the UK from the scope of the Act's criminal offences. Similarly, the regulatory or administrative provisions would appear to apply only to activity within the UK. Again, activity within the UK may not be regulated where the agreements the subject of that activity are not regulated by the CCA 1974 because of a foreign element to them. The focus of the question as to what is the territorial application of the CCA 1974 is therefore on the extent to which agreements with a foreign element are regulated by the CCA 1974.

1.05 In accordance with the ordinary presumptions about the territorial ambit of domestic regulatory legislation, the CCA 1974 applies only to UK credit or hire agreements. Clearly, for example, the paradigm regulated credit agreement would be one made in the UK between a UK citizen living in the UK and a UK creditor operating in the UK, where the credit is provided in the UK in relation to a transaction in the UK. The question is how many and which of these UK elements

[5] Pt 1 of the CCA 1974.

[6] See *Office of Fair Trading v Lloyds TSB Bank plc* [2008] 1 AC 316, HL. The UK does not include the Channel Islands or the Isle of Man.

need to be present in order to bring the agreement (and any related activity) within the scope of the CCA 1974.

1.06 Certain foreign elements are provided for within the provisions of the CCA 1974. By section 9(2), where credit is provided otherwise than in sterling it is to be treated for the purposes of the Act as provided in sterling of an equivalent amount. The Act therefore appears to anticipate credit for use abroad. Section 43 (dealing with advertising) and section 145 (dealing with credit brokerage) contain provisions so that they apply where, had the applicable law of the regulated agreement been UK law, it would have been a regulated agreement. The Act therefore appears to consider that pre-contract activity in the UK will not of itself be sufficient to make the subsequent agreement subject to its provisions. Section 16(5)(c) allows the Secretary of State to exempt agreements with 'a connection with a country outside the UK'.[7] Similar language is used in section 123(6) in relation to removing the prohibition on taking or negotiating negotiable instruments in relation to an agreement. However, none of these textual indications provides a clear answer as to where the line is to be drawn.

1.07 Arguments can be advanced for applying the *lex fori* (the law of the forum in which the action is brought), the proper law of the agreement,[8] or a territorial test based perhaps on where the agreement is made or where the debtor lives. However, the better approach would appear to be to adopt a flexible, purposive approach, namely that the Act applies to credit agreements which have a sufficient nexus with the UK, generally by virtue of having been made in the course of a consumer credit or hire business carried on here. This would implement the policy of the CCA 1974, whose twin purpose is to protect consumers within the UK and to regulate the business of those who operate in the UK in relation to them. Some support for this can be found in the Scottish case of *English v Donnelly*,[9] where a hire-purchase agreement made in a form compliant with the English legislation by an English company which had accepted in England the offer by the customer (so that the agreement was made in England) was held to be unenforceable under the relevant Scottish legislation in a situation where the Scottish customer had for his part entered into the agreement in Scotland through a Scottish dealer.

[7] See below at para 1.48 for the exemptions made.

[8] An express choice of foreign law where otherwise the CCA 1974 would apply would appear to be void under s 173(1), which provides that any term in a regulated agreement or associated transaction is void to the extent that it is 'inconsistent with a provision for the protection of the debtor or hirer or his relative or any surety, contained in this Act or in any regulation made under this Act'.

[9] [1958] SC 494. See also the Australian case of *Kay's Leasing Corporation Pty Ltd v Fletcher* [1964] 116 CLR 124.

1.08 In *Office of Fair Trading v Lloyds TSB Bank plc*,[10] the House of Lords, while referring to but not determining the issue of the territorial ambit of the CCA 1974 generally, made it clear that, in certain respects at least, the Act did not apply to the activities of foreigners abroad. While the creditor's liability under section 75(1) (imposing the so-called connected lender's liability on certain creditors in relation to breaches of contract and misrepresentations by the supplier) did apply even if the credit agreement financed a foreign transaction, in contrast the statutory indemnity provided to such a creditor against the supplier under section 75(2) would not apply.[11]

C. Categorization of Agreements under the Consumer Credit Act 1974

1.09 Although the CCA 1974 seeks to provide a uniform code, the Act and the Regulations made under it make specific provisions in relation to certain agreements as is appropriate to their nature. The extent and terms of any regulation under the Act depend on the category, or sub-category, into which the agreement falls. This legislative approach is described in the judgment of the Court of Appeal in *Office of Fair Trading v Lloyds TSB plc*: 'The Act regulates a wide range of credit, hire and hire-purchase agreements and for that purpose creates different categories and sub-categories of agreements to which different provisions in the Act and Regulations made under it apply.'[12] In any given case, therefore, it is imperative that the correct analysis is undertaken of any particular agreement so that it can be determined which parts of the CCA 1974, and Regulations made thereunder, apply. Many of the categories overlap with each other.

1.10 The CCA 1974 refers to many agreements[13] with differing characteristics and this chapter does not seek to set out an exhaustive list of every agreement mentioned in the Act. Rather it sets out the fundamental categories and the most significant sub-categories, particularly in relation to the transactional provisions (that is, those affecting the form and content of the agreement and the rights and obligations of the parties in relation to it).

[10] [2008] 1 AC 316, HL.

[11] Lord Mance in his speech in *Office of Fair Trading v Lloyds TSB Bank plc* [2008] 1 AC 316 also recognized that the provisions in ss 69–72 of the CCA 1974, which deal with the cancelling of a linked transaction when the principal regulated agreement is cancelled, were problematic and might be ineffective where the linked transaction was a foreign transaction.

[12] [2007] QB 1, CA, para 19.

[13] One estimate puts it in excess of 90.

1.11 The starting point is the categorization of agreements which is to be found in Part II of the CCA 1974 and begins with the central categories of consumer credit agreement (section 8), consumer hire agreement (section 15), and exempt agreement (sections 16, 16A, 16B, 16C). Section 189(1) of the CCA 1974 provides that 'regulated agreement' means a consumer credit agreement or a consumer hire agreement other than an exempt agreement, and regulated and unregulated are to be construed accordingly.[14]

D. Consumer Credit and Consumer Hire Agreements

(a) Consumer

1.12 The CCA 1974 regulates credit and hire agreements with an 'individual' as defined in section 189(1). The use of the word 'consumer' in the title of the CCA 1974 and in relation to consumer credit and consumer hire agreements might be considered misleading, in that the word is commonly used to refer to someone acting for purposes other than business purposes,[15] whereas, in the CCA 1974, the fact that the individual requires the credit or hire for business purposes has only become relevant following the removal (by amendment by the CCA 2006) of the financial limit on regulated agreements and the introduction of an exemption for certain agreements made for business purposes.

1.13 The original financial limit in relation to the amount of credit or credit limit under a regulated consumer credit agreement or amounts payable under a consumer hire agreement was increased from time to time until, before the passing of the CCA 2006, the CCA 1974 regulated only such agreements where the relevant amounts were £25,000 or less. It was irrelevant whether or not the agreement was made for the individual's business purposes. Section 2 of the CCA 2006 removed this financial limit generally for agreements made on or after 6 April 2008 but retained it for credit or hire agreements which are entered into by the debtor or

[14] Where a creditor or owner has incorrectly documented an agreement which is not regulated by the CCA 1974 as a regulated agreement, the creditor or owner may be estopped from depriving the debtor or hirer of apparent rights under the Act which are referred to in the agreement. However, this should not make the agreement regulated for criminal or regulatory purposes, nor mean that the agreement was in fact a regulated agreement (or an agreement within a certain category of regulated agreement) in respect of which the Act legislated. Thus, for example, erroneous drafting would not render such an agreement unenforceable by reason of non-compliance with requirements prescribed for the particular category of agreement which it purported to be, nor would the court have jurisdiction under the Act to make orders which can only be made in respect of regulated agreements. See *Rankine v MBNA Europe* [2007] EWCA Civ 1273, [2007] CTLC 241 (a refusal by Gage LJ of permission to appeal on this issue).

[15] See e.g. the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999.

hirer wholly or predominantly for business purposes. This is now the subject of an exemption provision (section 16B) and is accordingly dealt with below in relation to exempt agreements.

1.14 In relation to agreements made before 6 April 2008, the definition of 'individual' in section 189(1) included any partnership 'or other unincorporated body not consisting entirely of bodies corporate'. The use of the word 'other' indicated that limited liability partnerships[16] did not fall within the ambit of 'partnership', since a limited liability partnership is expressly a body corporate. However, in relation to agreements made on or after 6 April 2008, the definition of 'individual' in section 189(1) has been altered by amendment by section 1 of the CCA 2006 so that it is now expressed as including '(a) a partnership consisting of two or three persons not all of whom are bodies corporate; and (b) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership'. While it may be that it was intended to exclude limited liability partnerships, this is by no means clear from the new wording and it is surprising that no express exclusion was made when amending the section.

(b) Consumer credit agreements

1.15 A consumer credit agreement is an agreement between an individual (the 'debtor') and any other person (the 'creditor') by which a creditor provides the debtor with credit of any amount (section 8(1) of the CCA 1974). Under section 9(1), 'credit' is defined as including 'a cash loan, and any other form of financial accommodation'. This is a very broad definition and credit is wider than either a monetary loan or a deferment of payment. However, if construed literally 'any other form of financial accommodation' is so wide that it could include all kinds of financial arrangements which would not normally be considered credit arrangements. This wide definition should therefore be taken as meaning any other financial accommodation in the nature of credit: 'The meaning of the phrase "financial accommodation" is here coloured by the term it is used to define.'[17]

1.16 In *McMillan Williams v Range*,[18] an employment contract between a solicitors' firm and an assistant solicitor provided for remuneration by way of commission, calculated as a proportion of fee income generated by her. A periodic payment was made on the assumption that certain amounts would be generated. It was provided that, at the end of a two-year period, any excess she earned would be paid to her as a bonus while any shortfall was recoverable from her. In fact the assistant solicitor generated less fee income than had been anticipated. The firm sought to

[16] Under the Limited Liability Partnership Act 2000.
[17] Bennion, *Consumer Credit Control* at 1§720.
[18] [2004] 1 WLR 1858, CA.

recover the sums pre-paid. It was argued by way of defence that the monthly payments were a provision of 'credit' and that, because the documentation was not in the form required by the CCA 1974, the agreement was unenforceable. The Court of Appeal held that no credit was provided for the purposes of the CCA 1974. According to Ward LJ: 'So one asks: is its essential character an arrangement for making loans or for paying remuneration?' He held that the 'essential nature' of the contract was one where payment was made in advance for services rendered, which did not involve 'the notion of giving credit'.

1.17 The definition of credit was considered in *Dimond v Lovell*, a case involving a contract by which a car was hired to the victim of a car accident while her damaged vehicle was off the road, with payment of the hire charges deferred to allow their recovery as damages in a claim against the other driver. In the Court of Appeal,[19] a definition by Professor Goode was approved: 'Credit [is] extended, whenever the contract provides for the debtor to pay, or gives him the option to pay, later than the time on which payment would otherwise have been earned under the express or implied terms of the contract.'[20] In the House of Lords,[21] Lord Hoffman, having referred to that definition and to the fact that the agreement in the case itself used the term 'credit facility', said:

> In my opinion, there was no misuse of language when the contract described Clause 5(i) as a credit facility. The only obligation of 1st Automotive under the agreement was to provide the vehicle. In the absence of credit, it would have been entitled to payment during or at the end of the hire. All the provisions about the pursuit of the claim were express or implied conditions that deferred the right to recover the hire and therefore constituted a grant of credit.[22]

1.18 It is therefore necessary to look at the substance of the particular arrangement under consideration and not just the terms in which it is expressed. If payment for goods or services would otherwise be expected at a particular time, and that time is deferred by the terms of the agreement, it is likely that the court would hold that credit has been granted. The mere fact that the sums become payable, on a contractual basis, at a later date, would not mean that the arrangement was not credit.

[19] [2000] QB 216,CA. See Sir Richard Scott VC at 230.

[20] In the context of s 16 of the Gaming Act 1968, where a claim on a cheque is unenforceable if credit is provided or allowed (whether or not by agreement), Teare J held that 'the ordinary and natural meaning of "credit" . . . is "time to pay" in the sense of deferring or postponing the punter's obligation to pay for the chips he is about to use . . . or has used'. However, he held that a mere forbearance to sue on a right to immediate payment did not amount to the provision of credit even though, as a result, the debtor is provided with time to pay: *Aspinall's Club Ltd v Al-Zayat* [2008] EWHC 2101 (Comm).

[21] [2002] 1 AC 384.

[22] At p 395.

1.19 In *Tilby v Perfect Pizza Ltd*,[23] Senior Costs Judge Hurst held that an 'after-the-event' insurance policy (providing cover for the unrecovered costs of litigation), where the premium was to be paid on the conclusion of the litigation, did not provide credit. The argument and the decision turned upon the question of 'normal business practice' in insurance contracts. The judge accepted that the normal practice in before-the-event insurance, such as household or motor insurance, may be for the premium to be payable when the insurance is taken out, but he considered that 'after-the-event insurance is an entirely new product in respect of which, in my view, there is as yet no established normal business practice'. He therefore held there would be no deferment of the payment of the premium unless it was deferred beyond the conclusion of the case for a significant period.

1.20 Lord Hobhouse in his speech in *Dimond v Lovell*[24] added an important gloss to the above definition of credit:

> The test . . . will not always be a satisfactory one to apply. Many commercial agreements contain provisions which could be said to postpone (or advance) the time at which payment is to be made. Frequently, there will be reasons for this other than the provision of credit. Payment may be postponed as security for the performance of some other obligation by the creditor. Payments may be made in advance of performance in order to tie the paying party into the commercial venture. Payment provisions may, like any other aspect of the transaction, be part of its commercial structure for the division of risk, for the provision of security or simply the distribution of the common interest in the outcome of the transaction.

1.21 Lord Hobhouse in fact decided the issue of whether there was credit in *Dimond v Lovell* as follows: 'Here the terms of the agreement are explicit. The lessor is extending credit to the hirer. It is described as a "credit facility" and the allowance of credit and its termination are specifically referred to. Under these circumstances there can be no escape from the answer which your Lordships have given.'[25] Whilst Lord Hobhouse appears to have based his decision upon the references to credit in the agreement itself, it is well-established that a contract must be construed in accordance with the substance of the agreement made between the parties rather than by accepting at face value any labels that they choose to attach to it.[26] Accordingly Lord Hobhouse's decision should probably be read as meaning that the terminology used in the agreement indicated an acknowledgement or agreement that, in the absence of the express provision deferring payment beyond the end of the period of hire, payment would have fallen due during or at the end of that period.

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[23] [2003] CCLR 9.
[24] [2002] 1 AC 384, HL.
[25] [2002] 1 AC 384, 405.
[26] See e.g. *Antoniades v Villiers* [1990] 1 AC 417, HL: an agreement designed to evade the Rent Acts was not a licence notwithstanding that it was described as a licence and reserved a right of occupation to the landlord, which the landlord did not intend to exercise.

1.22 If it is uncertain whether the agreement between the parties will ever give rise to a debt, it is unlikely that it would be held that credit was provided. In *Nejad v City Index Limited*,[27] the Court of Appeal had to consider the case where customers using a betting index would be allowed to place bets until such time as their potential exposure exceeded the level of their 'credit account', which was based on an assessment of creditworthiness. At that point City Index would be entitled to call for payment ('the margin') by way of security. The question was whether allowing a 'credit account' was the giving of credit. As it was uncertain whether the arrangements between the parties would give rise to a debt at all, it was held there was no credit. The fact that those arrangements postponed any obligation to pay until such time as the future possible indebtedness had crystallized was not sufficient. Rattee J, delivering the leading judgment of the Court of Appeal, said:

> It is simply a contract that, if the relevant Stock Exchange Index is above or below a specified figure on a specified date, or on early closing of the contract in accordance with the City Index's terms and conditions, the customer will pay or receive the appropriate money. There may never be any indebtedness by the customer to City Index; all will depend on the movement of the relevant index . . . At the stage the contract was entered into there might or might not be an indebtedness in the future.[28]

1.23 In *McMillan Williams v Range*,[29] referred to above, in rejecting the argument that there was a provision of credit, the Court of Appeal considered not only that the essential character of the arrangement was for paying remuneration but that it was unclear, at the outset of the arrangement, whether there would be a shortfall or a surplus at the end of the two-year period.

1.24 Section 9(4) of the CCA 1974 provides:

> For the purposes of this Act an item entering into the total charge for credit shall not be treated as credit even though time is allowed for its payment.

It is important to ascertain the amount of the credit so that this can be expressed correctly in the agreement[30] and what items actually enter into the total charge for credit is a complex question, dealt with elsewhere in this work.[31] However, the question arises whether deferring charges itself creates a credit agreement. In *Wilson v First County Trust Ltd*,[32] Sir Andrew Morritt VC suggested that it might

[27] [2000] CCLR 7, CA.

[28] However, Lord Hoffman in *Dimond v Lovell* [2002] 1 AC 384 at 396 perhaps suggested in an obiter comment that a contingent payment might still be credit. He referred to the exemption contained in Article 3(1)(a)(i) of the Consumer Credit (Exempt Agreements) Order 1989 and said '1st Automotive can therefore obtain exemption from the Act if they include a clause that requires that the hire should in any event be paid *(if at all)* within 12 months' (emphasis added).

[29] [2004] 1 WLR 1858, CA.

[30] E.g., see *Wilson v First County Trust Ltd* [2001] QB 407, CA.

[31] Chap 3.

[32] [2001] QB 407, 416.

be a possibility that 'a loan made to pay a charge is itself a separate credit which should be made the subject of a (separate) regulated agreement to which the Act applies, whether as a linked transaction or otherwise'. There would be substantial difficulties in documenting a separate credit agreement for a deferred charge and the wording of section 9(4) ('for the purposes of this Act . . .') would seem to suggest that a deferred sum which enters into the total charge for credit of an agreement is never to be treated under the CCA 1974 as credit within the meaning of the Act.

1.25 The definition of a consumer credit agreement refers to 'an agreement . . . *by which* the creditor *provides* the debtor with credit . . .'[33] (emphasis added). Provision of credit does not mean the financial accommodation must be supplied at the time of the agreement and credit can be provided at a later stage, for example by a number of drawings. Bennion, *Consumer Credit Control* summarizes the point well:

> It is necessary to distinguish between an agreement under which the credit is provided at the outset once and for all, e.g. a cash loan or hire purchase agreement, and one which for its implementation requires the creditor to make advances from time to time, e.g. a running-account agreement. In those cases credit is 'provided' at the outset in that the creditor binds himself to full performance or at any rate agrees to perform. When, in the latter case, drawings are actually made, this is not a 'provision' of credit since once provided it cannot be provided again—it is simply the carrying out of the credit bargain by the creditor.[34]

1.26 Thus drawings under a running-account credit agreement are not themselves individual fixed-sum credit agreements. However, while it is true that credit is 'provided' by a commitment in an agreement to allow the borrower to draw down credit in the future, it would appear that the drawings of the credit itself must also be under that same agreement. If there is merely an agreement that credit will be provided under future separate credit agreements when they are entered into, that is not a credit facility provided by that agreement.[35] In Guest and Lloyd, *Encyclopedia of Consumer Credit Law*,[36] the editors give the example of 'a master stocking plan agreement[37] which constitutes running-account credit . . ., if individual items of stock are financed by means of hire-purchase or conditional sale, these drawings would not be fixed-sum credit agreements attracting the provisions of the Act'. While it is correct that individual orders for stock could not be fixed-sum agreements in the case of a master stocking plan agreement 'which constitutes

[33] CCA 1974, s 8(1).

[34] Bennion, *Consumer Credit Control* at 1§500A.

[35] There is support for this in the provisions of the CCA 1974 which contemplate an actual agreement for a 'prospective credit agreement': see ss 56–59.

[36] At para 2-011.

[37] Under a stocking agreement a retailer to the public agrees with a supplier that it will acquire goods from time to time on account and on credit.

running-account credit', it is possible that a stocking agreement would not constitute a running-account credit facility where individual items of stock were to be separately financed by individual hire-purchase or conditional sale, each having a separate contractual existence, such that there would not be a single, blended facility but a series of individual facilities. In such a case, it could be that the credit would be provided by the individual hire-purchase or conditional sale agreements and these would be the relevant consumer credit agreements.

(c) Hire-purchase

1.27 Under section 9(3) of the CCA 1974, in the case of hire-purchase agreements, the agreement is to be taken to provide the individual with fixed-sum credit to finance the transaction of an amount equal to the total price of the goods, less the aggregate of any deposit and the total charge for credit. Therefore, hire-purchase agreements are treated as credit agreements rather than hire agreements under the CCA 1974, and are expressly excluded from the definition of consumer hire agreements in section 15.

(d) Consumer hire agreements

1.28 Under section 15 of the CCA 1974, a consumer hire agreement is an agreement for the bailment or (in Scotland) the hiring of goods under an agreement which is not a hire-purchase agreement and is capable of subsisting for more than three months. 'Bailment' is confined to an agreement for money or other reward. In *TRM Copy Centres (UK) Limited v Lanwall Services Limited*,[38] it was held that a gratuitous bailment did not fall under the definition of 'hire' under the Act.

1.29 In *Eurocopy (Scotland) Plc v Lothian Health Board*,[39] where an agreement provided 'free' use of a photocopier where the customer was required to pay the suppliers for a minimum number of consumables, this was treated as a contract of hire of the photocopier. The Court of Appeal in *TRM Copy Centres (UK) Limited v Lanwall Services Limited*[40] approved the approach adopted in *Eurocopy* that one should look at the commercial purpose of the agreement and ask whether it is a contract of hire.

1.30 Notwithstanding the words 'an agreement which . . . is capable of subsisting for more than three months' in section 15(1)(b), the Court of Appeal has held that the definition of consumer hire agreement identifies 'the duration of the agreement as it refers to the bailment of the goods' (i.e. the period of the hire) and not the duration of the agreement generally, which might be made before the goods

[38] [2008] EWCA Civ 382, [2008] 4 All ER 608, [2008] CTLC 187, CA.
[39] [1995] SC 564.
[40] [2008] 4 All ER 608, [2008] CTLC 187

are delivered and by which the payment obligations might be deferred beyond the time when the goods are returned.[41]

1.31 If payment of any of the hire charges is not required at the time of, or immediately at the end of hiring, the agreement may also be a credit agreement: credit agreements and hire agreements are not mutually exclusive under the CCA 1974.[42]

E. Exempt Agreements

(a) Introduction

1.32 If an agreement is an 'exempt agreement' by virtue of a provision made in or under sections 16, 16A, 16B, or 16C of the CCA 1974, it does not fall within the definitions of regulated consumer credit agreement[43] and regulated consumer hire agreement[44] and so the form and content,[45] execution,[46] and information[47] requirements of the Act do not apply to it; nor is it necessary to have a licence under the Act to carry on a business as a creditor under exempt agreements.[48] As a general rule, the protections afforded by the Act are afforded in respect of regulated agreements. However, it is important to remember that the categories of 'consumer credit agreement'[49] and 'consumer hire agreement'[50] are subdivided into regulated and exempt agreements since certain businesses which are only concerned with exempt agreements nevertheless do come within controls imposed by the Act on advertising[51] and ancillary debt businesses.[52] Moreover, the unfair relationship provisions under sections 140A to 140C of the Act apply to exempt credit agreements other than those which are secured by mortgages over land and the entry into which by the creditor is a regulated activity for the purposes of the Financial Services and Markets Act 2000.[53]

41 *Burdis v Livsey* [2002] EWCA Civ 510; [2003] QB 36, 66. Sub nom *Clark v Tull* [2002] CCLR 4.

42 *Dimond v Lovell* [2001] QB 216, 232 (CA). In the House of Lords ([2002] 1 AC 384), an argument relying on s 18 of the CCA 1974 that a credit/hire agreement was consequently to be treated as two separate agreements for the purposes of the Act was, however, rejected, Lord Hoffman stating that he feared he might not do justice to the submission as he had not fully understood it.

43 CCA 1974, s 8(3).

44 CCA 1974, s 15(2).

45 CCA 1974, ss 60 and 61 and the Consumer Credit (Agreements) Regulations 1983.

46 CCA 1974, ss 61–64.

47 The information requirements are discussed in Chap 8.

48 CCA 1974, s 21.

49 CCA 1974, s 8(1).

50 CCA 1974, s 15(1).

51 CCA 1974, s 43.

52 CCA 1974, ss 21 and 145.

53 CCA 1974, ss 16(6C) and 140A(5), notwithstanding s 16(7A).

(b) Mortgages with local authorities and other specified bodies

1.33 Under complex provisions, section 16(1) to (4) of the CCA 1974 provides that certain credit agreements secured on land are exempt where the creditor is a local authority or one of certain bodies specified, or of a description specified, in an order made by the Secretary of State. In addition, a mortgage with a housing authority over a dwelling is exempt by section 16(6A).[54] The relevant order made under section 16(1) is the Consumer Credit (Exempt Agreements) Order 1989 (the 1989 Exempt Agreements Order).[55] The bodies whose agreements may be made the subject of the order must be one of the types listed in section 16(1). These are an insurer, a friendly society, an organization of employers or of workers, a charity, a land improvement company, a body corporate named or specifically referred to in any public general Act or under certain housing legislation, a building society, or a deposit taker. To be exempt, the agreement must fall within section 16(2). Three types of agreement are covered by the section. The first is a debtor-creditor-supplier agreement financing the purchase of land, or the provision of dwellings on any land, and secured by a land mortgage on that land (section 16(2)(a)). The second is a debtor-creditor agreement secured by a land mortgage (section 16(2)(b)). The third is a debtor-creditor-supplier agreement financing a transaction which is a linked transaction in relation to agreements which fall within the section (section 16(2)(a) or (b)), so long as, in the case of the debtor-creditor agreement, it is financing the purchase of land, or the provision of dwellings on any land, and so long as the linked transaction is secured by a land mortgage on such land (section 16(2)(c)). Section 16(4) allows for the exemption in relation to bodies other than local authorities to be limited to agreements of a description specified in the order. Article 2 of the 1989 Exempt Agreements Order limits the sort of debtor-creditor agreements that are exempted for those bodies which are listed in Part I of the Schedule to the Order. For those bodies listed in Part II of the Schedule (bodies named or referred to in a public general Act), the exemption relates only to those agreements specified in Schedule II in relation to that body. For those bodies listed in Part III of the Schedule (bodies named or referred to in certain housing legislation), the exemption in relation to debtor-creditor agreements is again subject to specific limitation. The complexities of the legislation are such that reference should be made to the text of section 16 and article 2 of the 1989 Exempt Agreements Order for the full position.

[54] 'Housing authority' is defined for this purpose by the CCA 1974, s 16(6B) as an authority or body within the Housing Act 1985, s 80(1) other than a housing association or a housing trust which is a charity.

[55] SI 1989/869. The order has been amended from time to time.

(c) Number of payments to be made by the debtor

1.34 Article 3(1)(a)(i) of the 1989 Exempt Agreements Order[56] exempts debtor-creditor-supplier agreements for fixed-sum credit 'under which the total number of payments[57] to be made by the debtor does not exceed four, and those payments are required to be made within a period not exceeding 12 months beginning with the date of the agreement'.

1.35 The first condition of the article 3(1)(a)(i) exemption is that the total number of payments *required* to be made under the agreement does not exceed four. In *Burdis v Livsey*,[58] it was held that the agreement in that case satisfied this condition because it provided that when the specified credit period expired 'at that point you will be liable to pay'. This was considered to be a 'one-payment requirement' and the fact that other clauses of the agreement contemplated more than one payment did not 'affect the obligation to make payment'. This is thought to provide good authority for the proposition that it is only the number of payments that the debtor is required to make and not any additional payments that he may make voluntarily that are to be taken into account for the purposes of deciding how many payments are 'to be made' under an agreement.

1.36 The second condition of the article 3(1)(a)(i) exemption is that the payments are made within the specified period of 12 months. In *Zoan v Rouamba*,[59] a hire agreement provided that the hirer 'may . . . allow the Hire Charges to remain outstanding until a date on or before 12 months after the date of this Agreement'. In addition, it provided that the hire charges and interest would become payable by the hirer 'upon the occurrence of the earliest of the following events: the first anniversary of this Agreement . . .'. Chadwick LJ, giving the judgment of the court, distinguished a legislative provision requiring an act to be done within a fixed period 'from' or 'after' a specified day, and a provision (such as article 3(1)(a)(i)) requiring an act to be done within a fixed period 'beginning with' a specified day. In the former case, the courts give an 'exclusive' construction, so that the specified day is excluded from the period. In the latter case, an 'inclusive' construction is appropriate, so that the specified day must be included in the computation of the period. On an inclusive construction of article 3(1)(a)(i), agreements are only exempt if they require payments to be made within a period of 12 months

[56] SI 1989/869, made under the CCA 1974, s 16(5)(a).

[57] For the purposes of art 3(1)(a) 'payment' means a payment comprising an amount in respect of credit with or without any other amount; art 3(1)(a). The debiting of compound interest would probably not be considered payment in any context, but even if it were, it would not be a 'payment' within the definition in art 3(1)(a). Art 3(1)(a)(i) does not appear to restrict the number of and period for payments that consist exclusively of charges for credit.

[58] [2003] QB 36, CA.

[59] [2000] 1 WLR 1509, CA.

beginning with and including the date of the agreement. Accordingly an agreement providing for credit within a period expiring on 'the first anniversary of' the date of the agreement would not be exempt, since that is a period of a year and a day.[60]

1.37 Article 3(1)(a)(ii) exempts a debtor-creditor-supplier agreement for running-account credit which provides for the making of payments by the debtor in relation to specified periods and requires that the number of payments to be made by the debtor in repayment of the whole amount of the credit provided in each such period does not exceed one. For example, this exempts charge cards, such as American Express and Diners Club, where the total cost of any transactions paid for with the card in any month must be repaid by a single payment.

1.38 Article 3(1)(b) exempts debtor-creditor-supplier agreements financing the purchase of land under which the number of payments[61] to be made by the debtor does not exceed four.

1.39 Article 3(1)(c) and (d) exempts debtor-creditor-supplier agreements for fixed-sum credit to finance premiums for certain insurance policies where the number of payments[62] to be made by the debtor does not exceed 12.

(d) Rate of the total charge for credit

1.40 Certain categories of low-cost debtor-creditor agreements are exempt by virtue of article 4 of the Exempt Agreements Order 1989.[63] It is important to note that there is no low-cost exemption for debtor-creditor-supplier agreements.

1.41 The first category of low-cost exemption concerns certain credit union loans. The second and third exempt categories apply to debtor-creditor agreements of a type offered to a particular class of individuals and not offered to the public generally. In order for an agreement to be exempt under the second category, the only charge included in the total charge for credit must be interest, which cannot at any time exceed the sum of 1 per cent and the highest of the base rates published by certain banks listed in article 4(3) and in operation 28 days before such time.[64] The third category exempts agreements where there can be no increase after the relevant date in the amount of any item which is included in the total charge for credit and where the rate of the total charge for credit does not exceed the sum of 1 per cent and the highest of the rates published by the same banks and in operation on the date

[60] See also *Ketley v Gilbert* [2001] 1 WLR 986; *Seddon v Tekin* [2001] GCCR 2865; *Thew v Cole* [2003] EWCA 1828, [2004] RTR 25.

[61] For the purposes of this exemption, 'payment' means a payment comprising or including an amount in respect of credit or the total charge for credit, if any: art 3(1)(b).

[62] For the purposes of these exemptions, 'payment' means a payment comprising an amount in respect of credit with or without any other amount: art 3(1)(a), (c) and (d).

[63] Art 4 is made under the CCA 1974, s 16(5)(b).

[64] Art 4(1)(b).

28 days before the date on which the agreement is made.[65] Neither of these last two exemptions applies to an agreement by which the total amount of credit to be repaid by the debtor may vary according to a formula specified in the agreement and having effect by reference to movements in the level of any index or to any other factor.[66] The most common examples of agreements which are exempt by virtue of these provisions are loans made available by employers to their employees.

1.42 The width of the phrase 'particular class of individuals' is unclear. However, its meaning must be interpreted in the light of the words 'and not offered to the public generally'. These words appear in article 2(2) of the former Consumer Credit Directive,[67] from which these low-cost interest exemptions are derived.[68] Some assistance on the meaning of 'offered to the public generally' is provided by *R v Delmayne*,[69] where it was held that a circular sent to a member of a society was an advertisement 'inviting the public to deposit money'. The fact that the circular was only sent to the recipient once he had become a member of the society with which he was being invited to deposit money did not prevent the circular from being an invitation to the public. The court rejected the argument that the document in question was a confidential communication to the recipient as a member of the society and not as a member of the public. Salmon LJ said:

> Quite obviously, the document by its very terms does not purport to be confined to members of the society: indeed, it is obviously soliciting custom. It is obviously addressed to the public at large pointing out the benefits of membership of the society; not only the benefits of membership of the society, but the benefits of paying money into the society and continuing to pay in as much as possible. This court cannot accept the argument that once Mr Lake joined the society he ceased to be a member of the public, nor that when he received this document he received it solely in his capacity as a member of the society and not as a member of the public.[70]

1.43 It would seem that in order for a type of loan agreement only to be offered to a particular class of people and not to the public generally, it must be offered only to a class whose common characteristics are such as to make the members objectively recognizable as members of that class at the time the offer is made, and the characteristics of the class must be sufficiently restricted so as not to amount to characteristics of the public generally.

1.44 The words 'not offered to the public generally' might be interpreted as a requirement that the availability of the loans should only be made known to a particular

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65 Art 4(1)(c).
66 Art 4(2).
67 87/102/EEC, now repealed.
68 Unfortunately, the UK has not followed art 2(1)(c) of the Directive by exempting any credit that is provided free of charge.
69 [1970] 2 QB 170, CA.
70 At p 174.

class of individuals. However, a public advertisement which makes it plain that it is advertising the availability of loans only to a particular, restricted class would not appear to be offering those loans to the public generally.

1.45 Article 1(2) of the Exempt Agreements Order 1989 provides that references in the Order to the total charge for credit and the rate of the total charge for credit are references to the total charge for credit and the rate thereof calculated in accordance with the Consumer Credit (Total Charge for Credit Regulations) 1980 (the Total Charge for Credit Regulations).[71] The application of the exemptions to an agreement therefore requires a proper analysis of the total charge for credit as it is to be determined under those regulations.

1.46 One particular aspect of the Total Charge for Credit Regulations should be noted in this context. Regulation 2(1)(d) of the Total Charge for Credit Regulations requires that, where an agreement provides for variation of the rate or amount of any item included in the total charge for credit in consequence of the occurrence after the relevant date of any event that is not certain to occur, including an act or omission of the debtor, the total charge for credit is to be calculated upon the assumption that the event will not occur. The charges that are to be excluded by regulation 2(1)(d) would appear to include charges that will only be made when the debtor takes an optional, but reasonably likely, step. It could be argued that the exemptions for low-cost loans offered to a particular class are not intended to apply to agreements where, in the event of the debtor's taking some optional step, he is to incur a charge that would take the rate of the total charge for credit above the relevant limit. However, the express reference in the third of these exemptions[72] to items that would be included in the total charge for credit but for regulation 14 of the Total Charge for Credit Regulations 1980 (the assumption that the credit will be provided for one year where the period is not ascertainable) supports the view that any item that is not to be included in the total charge for credit by reason of the other applicable assumptions under the Total Charge for Credit Regulations, which would include the assumption imposed by regulation 2(1)(d), is not relevant for the purposes of article 4(b) and (c).

1.47 It should also be noted in relation to running-account credit agreements that any assumptions in Part IV of the Total Charge for Credit Regulations 1980 (regulations 13 to 18) that would otherwise apply are largely replaced by the assumptions imposed by paragraph 1 of Schedule 7 to the Consumer Credit (Agreements) Regulations 1983[73] for the purposes of calculating the total charge for credit and the APR that are to be stated in the agreement. The latter assumptions may be broadly,

[71] SI 1980/51.
[72] Art 4(1)(c)(ii) of the 1989 Exempt Agreements Order.
[73] SI 1983/1553.

though not precisely, summarized as assumptions that credit of an amount equal to the credit limit if it is known, or £1,500 if there is to be a credit limit but it is not known at the date of the agreement, will be provided on the date of the agreement and repaid by 12 equal monthly instalments. This may result in an agreement form which shows a rate of total charge for credit that appears to take the agreement outside the third low-cost exemption when, on the application of the assumptions in Part IV of the Total Charge for Credit Regulations that have been displaced for the purpose of completing the agreement form, the exemption does in fact apply.

(e) Connection with a country outside the United Kingdom

1.48 Article 5(a) of the 1989 Exempt Agreements Order[74] makes a consumer credit agreement exempt if it is made 'in connection with trading goods or services between the UK and a country outside the UK being an agreement under which credit is provided to the debtor in the course of a business carried on by him'. Article 5(b) makes a consumer credit agreement with certain listed American bodies exempt if the debtor is a member of armed forces of the United States of America, or an employee not habitually resident in the UK of any of those forces, or a member's wife, husband, or person whom a member maintains and treats as a child of the family.

(f) Hire agreements for meters or metering equipment

1.49 Article 6 of the Consumer Credit (Exempt Agreements) Order 1989,[75] made under the CCA 1974, section 16(6), exempts a consumer hire agreement where the subject of the agreement is a meter or metering equipment and the owner is a body corporate authorized under any enactment to supply electricity, gas, or water. Section 16(6) also allows for exemption to be made for hire agreements with a public electronic communications service provider, but the exemption made under article 6 does not extend to such agreements.

(g) High net worth

1.50 The Consumer Credit (Exempt Agreements) Order 2007 (the 2007 Exempt Agreements Order)[76] provides that a consumer credit agreement or consumer hire agreement will be exempt if the following conditions are met:

(1) the debtor or hirer is a natural person;

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[74] SI 1989/869, made under the CCA 1974, s 16(5)(c).

[75] SI 1989/869.

[76] The Consumer Credit (Exempt Agreements) Order 2007, SI 2007/1168, art 2, made under the CCA 1974, s 16A(1).

(2) the agreement includes a declaration in the prescribed form,[77] that he agrees to forgo the protection and remedies that would be available to him under the CCA 1974 if the agreement were a regulated agreement;
(3) a statement of high net worth in the prescribed form[78] has been made in relation to him;
(4) the statement of high net worth was made during the period of one year ending with the day on which the agreement was made; and
(5) before the agreement was made a copy of the statement of high net worth was provided to the debtor or hirer and, unless made by the creditor or owner, to the creditor or owner.

1.51 The statement of high net worth must be made in relation to the last year to end on 31 March before the statement is made.[79] The 2007 Exempt Agreements Order sets the threshold for high net worth at a net income of at least £150,000 or net assets worth not less than £500,000 throughout the year to which the statement of high net worth relates; income is net of income tax and national insurance contributions and net assets exclude the primary residence of the debtor or hirer, any rights under a qualifying contract of insurance within the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001,[80] and any pension or other rights payable on death or retirement.[81]

1.52 The creditor or owner may make the statement of high net worth if, but only if, it has permission to accept deposits under Part 4 of the Financial Services and Markets Act 2000.[82] Otherwise, the statement must be made by an accountant who is a member of one of the bodies listed in article 4(2) of the 2007 Exempt Agreements Order. The statement cannot be made by an employee or associate[83] of the creditor or owner unless the creditor has permission to accept deposits under Part 4 of the Financial Services and Markets Act 2000.[84] It cannot be made by the debtor or hirer himself.[85]

1.53 It is thought that there is no room for a debtor or hirer who has made the high net worth declaration in the prescribed form in the agreement and in relation to whom a statement of high net worth has been made and provided to the creditor

[77] The form is prescribed by the Consumer Credit (Exempt Agreements) Order 2007, art 3 and Sch 1.
[78] The form of the statement is prescribed by the 2007 Exempt Agreements Order, arts 4 and 5 and Sch 2.
[79] CCA 1974, s 16A (2), (3)(c), (6), and (7).
[80] SI 2001/544.
[81] 2007 Exempt Agreements Order, art 2 and Sch 2.
[82] 2007 Exempt Agreements Order, arts 4(1)(a) and 5.
[83] 'Associate' is defined in the CCA 1974, s 184.
[84] 2007 Exempt Agreements Order, art 5.
[85] CCA 1974, s 16A(3)(a).

or owner by an appropriately qualified accountant to argue that the agreement is not exempt because the statement of high net worth was incorrect. The exemption is drafted so as to depend upon compliance with the technical requirements rather than the actual financial status of the debtor or hirer.

1.54 Provided that the agreement in which the high net worth declaration is included is signed by the debtor, it is not necessary for the debtor also to sign the declaration itself.[86]

(h) Business purposes

1.55 A consumer credit agreement by which the creditor provides the debtor with credit exceeding £25,000 or a consumer hire agreement that requires the hirer to make payments exceeding £25,000[87] will be an exempt agreement if the agreement is entered into by the debtor or hirer wholly or predominantly for the purposes of a business carried on by him or intended to be carried on by him.[88] A presumption arises that the agreement was entered into for such business purposes where it includes a declaration made by the debtor or hirer to that effect in the prescribed form.[89] The form of the declaration is prescribed by article 6 and Schedule 3 to the 2007 Exempt Agreements Order.[90] However, failure to include such a declaration or to comply with the requirements of the 2007 Exempt Agreements Order in relation to its form would not be fatal to the application of the exemption; the exemption arises according to whether the debtor or hirer in fact entered into the agreement for his business purposes, the declaration being of evidential assistance to the creditor or owner. The presumption may be rebutted and will not even arise if the creditor or owner, or its agent, knew or had reasonable cause to suspect that the debtor or hirer was not entering into the agreement wholly or predominantly for his business purposes.[91]

1.56 The definition of 'business' in section 189(1) of the CCA 1974 makes it clear that it is intended to be wide, by including 'profession or trade'. Section 189(2) further provides that: 'A person is not to be treated as carrying on a particular type of business merely because occasionally he enters into transactions belonging to a business of that type.' It might be argued that section 189(2) is directed only to the question of whether a person is carrying on a business of a particular type and that it is only of relevance to the question of whether a person is carrying on a type

[86] 2007 Exempt Agreements Order, art 3(b).
[87] Note that, where VAT is payable, the amount of the payments is inclusive of VAT: *Apollo Leasing Ltd v Scott* [1986] CCLR 1, Sh (a decision under s 15 of the CCA 1974).
[88] CCA 1974, s 16B(1).
[89] CCA 1974, s 16B(2).
[90] SI 2007/1168.
[91] CCA 1974, s 16B(3).

of business for which a consumer credit licence is required.[92] However, the wording of section 16B itself requires a degree of continuity or intended continuity in the activity that is to constitute the business: the debtor must either be carrying it on or intending to carry it on. Moreover, the reference in section 189(1) to the inclusion of 'trade' in 'business' should be read in the context of the use of the words 'business' and 'profession', which suggests that 'trade' is used in the sense of a trade by which a person earns an income over a period of time rather than one-off or occasional transactions.

1.57 The apparent assumption made by the Department of Trade and Industry that what is commonly referred to as 'buy-to-let' lending would fall within the exemption provided for by section 16B and the subsequent decision of the Department for Business, Enterprise and Regulatory Reform (BERR) that not all buy-to-let lending will fall within the exemption[93] illustrates considerable uncertainty about the meaning of 'carry on a business'. Bennion, *Consumer Credit Control* poses the question: 'Can the mere investment of funds amount to the carrying on of a business?' to which he gives the following answer:

> Here it is necessary to distinguish between investment and the use of funds as business capital. The distinction may not always be easy to draw. Relevant factors include the presence of a speculative element and its extent, and the nature of the investment policy employed. A speculative element is not conclusive, or the private investor would be treated as carrying on a business merely because his portfolio included equity shares. A strongly pronounced speculative element, as in the case of unsecured loans at a high rate of interest, may indicate the carrying on of a business where the investment policy is to rely wholly or mainly on such loans . . .[94]

1.58 A number of judicial decisions under various legislative provisions have reflected a general view that 'business' requires an activity to have a degree of continuity with a view to profit.[95] The same approach to the question of what is carrying on a business was adopted by the Court of Appeal in *Hare v Schurek*,[96] where it was held that one-off or occasional loans by a motor trader who is in the business of selling cars and of credit brokerage may be non-commercial agreements for the purposes of the CCA 1974, the definition of 'non-commercial agreement' being 'a consumer credit agreement or a consumer hire agreement not made by the creditor or owner in the course of a business carried on by him'.

1.59 It is possible that a buy-to-let mortgage for the one-off purchase of a property may properly be regarded as entered into for the purposes of a business that the borrower

[92] CCA 1974, ss 21, 24A, and 25.
[93] This resulted in the introduction of a further exemption by the Legislative Reform (Consumer Credit) Order 2008, discussed in paras 1.65–1.69 below.
[94] Bennion, *Consumer Credit Control*, 1 §320.
[95] For a detailed analysis, see Chap 13.
[96] [1993] CCLR 47, [1999] GCCR 1660, CA.

intends to carry on if that property is expected to provide a significant rental income in excess of the mortgage payments. The business will be the letting of the property and that will be the borrower's purpose in entering into the loan agreement. On the other hand, if the rent is simply expected to meet the mortgage repayments and the borrower hopes to make a single profit upon the sale of the property, the single purchase and sale would not appear to have the character of carrying on a business.

(i) Agreements regulated under the Financial Services and Markets Act 2000

1.60 A consumer credit agreement is exempt by virtue of section 16(6C) of the CCA 1974 if it is (a) secured by a land mortgage and entering into the credit agreement as lender is a regulated activity for the purposes of the Financial Services and Markets Act 2000 or (b) it is or forms part of a regulated home purchase plan and entering into the agreement as home purchase provider is a regulated activity for the purposes of that Act.[97] Note, however, that, by section 16(6D), section 126 of the CCA 1974,[98] and any other provision so far as it relates to section 126, apply to a land mortgage which would, but for section 16(6C), be a regulated agreement.

1.61 The majority of agreements to which this exemption applies are agreements secured by first mortgages over owner-occupied properties. A credit agreement which was made on or after 31 October 2004 is an exempt agreement if the agreement provides for:

(1) credit to be provided to an individual or to trustees ('the borrower'); and
(2) the obligation of the borrower to repay is to be secured by a first legal mortgage on land (other than timeshare accommodation) in the UK, at least 40 per cent of which is used, or is intended to be used, as or in connection with a dwelling by the borrower or (in the case of credit provided to trustees) by an individual who is a beneficiary of the trust, or by a related person.[99]

1.62 For this purpose, a 'first legal mortgage' means a legal mortgage ranking in priority ahead of all other mortgages (if any) affecting the land in question, the expression 'mortgage' including a charge and 'related person', in relation to the borrower or (in the case of credit provided to trustees) a beneficiary of the trust, meaning:

(1) that person's spouse;

[97] CCA 1974, s 16(6C), which came into force on 31 October 2004: art 2 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, as amended by art 2 of the Financial Services and Markets Act 2000 (Commencement of Mortgage Regulation) (Amendment) Order 2002, and the London Gazette, 14 July 2003.

[98] CCA 1974, s 126 provides that a land mortgage is only enforceable as security for a consumer credit agreement on an order of the court.

[99] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, art 61, SI 2001/544.

(2) a person (whether or not of the opposite sex) whose relationship with that person has the characteristics of the relationship between husband and wife; or
(3) that person's parent, brother, sister, child, grandparent, or grandchild.[100]

1.63 However, it is necessary to have regard to the power under section 22 of the Financial Services and Markets Act 2000 to specify classes of activity and categories of investment and any order for the time being in force under that section, with Schedule 2 to that Act, in order to keep up to date with any further Financial Services Authority-regulated activities that a lender may be carrying on by entering into other types of agreement secured by a land mortgage.[101]

1.64 An agreement which is exempt by virtue of section 16(6C) of the CCA 1974 is the only type of consumer credit agreement which is not subject to the unfair relationship provisions in s 140A to 140C of the Act.[102]

(j) Other agreements secured by legal charges over land

1.65 A consumer credit agreement is exempt by virtue of section 16C of the CCA 1974[103] if, at the time it is made:

(1) any sums 'due' under it are secured by a land mortgage on land; and
(2) less than 40 per cent of the land is used, or is intended to be used, as or in connection with a dwelling by the debtor or a person connected with the debtor or, in the case of credit provided to trustees, an individual who is the beneficiary of the trust or a person connected with such a beneficiary.[104]

1.66 For the purposes of this exemption, a person is 'connected with' another person if he is the spouse or civil partner, parent, brother, sister, child, grandparent, or grandchild of the other person or a person whose relationship with the other person has the characteristics of the relationship between husband and wife (whether or not of the opposite sex to the other person).[105] The area of any land which comprises a building or other structure containing two or more storeys is to be taken to be the aggregate of the floor areas of each of those storeys.[106]

1.67 It is to be noted that this exemption will not apply to an agreement secured over property if the agreement is made while the borrower is (still) living in 40 per cent

[100] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, art 61(4), SI 2001/544.
[101] CCA 1974, s 16(6E).
[102] CCA 1974, s 140A(5).
[103] Inserted by the Legislative Reform (Consumer Credit) Order 2008, art 3(1).
[104] CCA 1974, s 16C(1) and (2).
[105] CCA 1974, s 16C(4).
[106] CCA 1974, s 16C(3).

or more of the property, even where the purpose of the mortgage is to enable him to move out and let it.

1.68 In order to prevent agreements to which the section 16C exemption was to apply from being regulated between 6 April 2008[107] and the date when section 16C was brought into force, transitional provision was made by the Consumer Credit Act 2006 (Commencement No 4 and Transitional Provisions) Order 2008,[108] which provided that the financial limit of £25,000 was to continue to apply to credit agreements made before 31 October 2008 and secured by a land mortgage on land outside the UK and to credit agreements made before 31 October 2008 and secured by a land mortgage on land inside the UK if less than 40 per cent of the land was used, or was intended to be used, as or in connection with a dwelling by the debtor or a person connected with the debtor or, in the case of credit provided to trustees, an individual who was the beneficiary of the trust or a person connected with such a beneficiary. The distinction retained in this Order between land in the UK and land elsewhere reflects the original draft of article 3 of the Legislative Reform (Consumer Credit) Order 2008.[109]

1.69 From the wording used, the borrower's purpose in entering into the credit agreement would appear to be immaterial for the purposes of the section 16C exemption and for the transitional provisions made by the Consumer Credit Act 2006 (Commencement No 4 and Transitional Provisions) Order 2008.[110] Section 16C is headed 'Exemption for investment properties', but it is by no means clear what is meant by 'investment' and the wording of section 16C itself is so precise as to make it unlikely that such an imprecise heading should be resorted to for clarification. Whenever a property is purchased, or money is expended upon a property, with a view to using that property, or part of it, to produce an income or profit, the money so expended is invested in the property and, to that extent, it is an investment property. The most rational interpretation of the heading may be that the 'investment properties' to which it refers are simply such properties as fall within the exemption as provided for in the substantive wording of section 16C. The consultation paper issued by the Department for Business, Enterprise and Regulatory Reform in December 2007[111] was a consultation on, among other things, 'buy-to-let lending' and made it clear that the purpose of the section 16C exemption is to prevent the

[107] The date when the former financial limit of £25,000 on regulated agreements was removed.

[108] SI 2008/831 as amended by the Consumer Credit Act 2006 (Commencement No 4 and Transitional Provisions) Order 2008, SI 2008/2444.

[109] The wording was amended to remove this distinction when it was questioned during the consultation on the draft Legislative Reform Order whether unqualified exemption of loans secured on overseas properties was consistent with the underlying purpose of s 16C, namely the exemption of buy-to-let mortgages: BERR response to the consultation, URN 08/954 paras 3.36 and 3.37.

[110] SI 2008/831.

[111] URN/1633.

removal of the financial limit on regulated agreements from imposing a regulatory burden on buy-to-let lenders. A significant aspect of the decision to do so was the anticipated impact on the rental market of the regulation of that industry.[112] However, there would appear to be no justification for looking behind the wording of section 16C at the legislative history of the provision in order to ascertain whether or not the property, or any part of it, must be let in order for the exemption to apply. It is only permissible to consider extraneous evidence as to the legislators' intent where a statutory provision is ambiguous or obscure or would lead to absurdity.[113] Moreover, whilst it was suggested in the consultation paper that the absence of risk to the borrower's home was a significant aspect of the rationale for the exemption,[114] it would seem clear that it was intended that the exemption might apply where a part that forms less than 40 per cent of the property is the borrower's home.[115]

F. Categories of Credit Agreements in Part II of the Consumer Credit Act 1974

(a) Running-account credit and fixed-sum credit

1.70 Section 10 of the CCA 1974 defines 'running-account credit' and 'fixed-sum credit'.[116] Credit which is not running-account credit is fixed-sum credit and this is so even if the fixed-sum credit is payable in instalments. The focus is therefore on the definition of running-account credit.

1.71 Under section 10(1)(a), 'running-account credit is a facility under a consumer credit agreement whereby the debtor is enabled to receive from time to time (whether in his own person, or by another person) from the creditor or a third party, cash, goods and services (or any of them) to an amount or value such that, taking into account payments made by or to the credit of the debtor, the credit limit, if any, is not at any time exceeded'. Obvious examples of 'running-account credit' would be bank overdrafts and credit cards, in contrast to 'fixed-sum credit' personal and bank loans, hire-purchase agreements, and conditional sale agreements.

1.72 It will be noted that there may be, but does not need to be, a 'credit limit' in relation to a running-account credit facility. 'Credit limit' is defined under section 10(2)

[112] Discussed at para 3.38 of URN/1633.
[113] *Pepper v Hart* [1993] AC 593.
[114] Para 3.5 of URN/1633.
[115] This appears from the four-storey house illustration at para 3.21 of URN/1633.
[116] The section does not limit the definition to regulated credit agreements.

as meaning, as respects any period, the maximum debit balance which, under the credit agreement, is allowed to stand on the account during that period, disregarding any term of the agreement allowing that maximum to be exceeded merely temporarily. An agreement for an overdraft that itself allows for occasional temporary excesses does not cease to be a running-account facility and in such cases such individual excesses would appear still to be credit provided by the running-account credit agreement.

1.73 The credit limit refers to the maximum debit balance on the account. Although by section 9(4) of the CCA 1974, charges are excluded from the calculation of the amount of the credit, the credit limit may take account of charges applied to the account, so that it is not simply the maximum credit provided by the agreement.

1.74 There is no further definition of running-account credit, but one test often applied is to ask whether the facility allows not merely for future drawings on the account (after all, fixed-sum credit can be received in instalments), but also whether the credit is 'refreshed' or 'topped-up' by repayments, so that credit used by earlier drawings can be re-used following repayment. However, it is to be noted that there is no requirement for periodical payments and the concept of 'refreshment' or 'topping-up' does not appear to be relevant to running-account credit where there is no credit limit. It may be that the definition extends to all accounts where there is an agreement to provide credit to be drawn on from time to time for an amount that is not predetermined and that in fact 'refreshment' is not a necessary element.

1.75 Sometimes the creditor requires the first drawing on a running-account to be used for a specific purpose and for a fixed amount. For example, the terms of an account may require the debtor to discharge earlier borrowings or may provide for the use of part of the credit for a specific purpose. The question arises whether such sums are properly to be seen as a separate fixed-sum facility. This is particularly so where the reality of the agreement between the parties is that the required debit will sit on the account for a substantial period, indeed possibly the whole period of the agreement. Such 'earmarking' of funds drawn on a running-account may be fixed-sum credit where the use to which those funds is to be put is a requirement by the creditor, which means, in the case of standard form agreements from the creditor, a term of the agreement. Thus in *Goshawk Dedicated (No 2) Ltd v The Governor and Company of the Bank of Scotland*[117] Sir Francis Ferris held that where the credit agreement financing a litigation funding scheme did not expressly require part of the funds to be applied for the agreed after-the-event insurance premium, there was no element of fixed-sum credit. However, he did consider that there was room for the 'earmarking' concept where, for example, part of the credit limit is required

[117] [2006] 2 All ER 610.

by the creditor to be used for the discharge of the debtor's liabilities on a separate account.

1.76 Section 10(1)(a) refers to 'a facility' in the singular. It would appear to be an important element of the running account facility that it represents a single account under which payments and drawings are blended. This means that great care needs to be taken in drafting any agreement whereby it is sought to allocate repayments to specific drawings or to treat different drawings or repayments in a different way to others, as there is then a real possibility that such an agreement between the parties will create not a single running-account facility but a series of individual fixed-sum credit agreements.

(b) Restricted-use credit and unrestricted-use credit

1.77 Section 11 of the CCA 1974 provides for and defines 'restricted-use credit' and 'unrestricted-use credit'. These categories apply to regulated credit agreements and what is not a restricted-use credit agreement is an unrestricted-use credit agreement. Under section 11(1), a restricted-use credit agreement is a regulated consumer credit agreement:

(a) to finance a transaction between the debtor and creditor . . ., or
(b) to finance a transaction between the debtor and a person ('the supplier') other than the creditor, or
(c) to refinance any existing indebtedness of the debtor's, whether to the creditor or another person.[118]

Where the supplier and the creditor are one and the same person, the creditor is both creditor and supplier for the purposes of the Act.[119] Examples of this type of arrangement would be hire-purchase, conditional sale, and a sale where the vendor allows time to pay the purchase price (a credit sale agreement).[120]

1.78 Under section 11(2), an unrestricted-use credit agreement is a regulated consumer credit agreement which does not fall under the definition contained in sub-section (1). It should be further noted that, under section 11(3), an agreement does not fall within the definition of restricted-use credit if the credit is in fact provided in such a way as to leave the debtor free to use it as he chooses, even though certain uses would contravene the credit agreement or some other agreement.

[118] Each paragraph could be considered to be a separate category for the purposes of the CCA 1974.

[119] See the definition of 'supplier' in CCA 1974 s 189(1).

[120] 'Credit-sale agreement' is a defined term under s 189 ('an agreement for the sale of goods, under which the purchase price or part of it is payable by instalments, but which is not a conditional sale agreement') and see the example in Sch 2 Example 2. However, this category of agreement is nowhere else referred to in the Act.

The phrase 'free to use it as he chooses' means that any monies go through the debtor's hands, or at least control, so that he can spend them as he chooses, rather than going to the specific supplier directly, bypassing the debtor (see Examples 8 and 12 in Schedule 2 to the CCA 1974 and section 188(1)). The CCA 1974 makes clear that the use of a credit card for paying suppliers is the drawing of restricted-use credit under section 11(1)(b) (see section 188(1) and Example 16 in Schedule 2). The mere fact that a credit card could be used as payment with a very large number of different suppliers, all of whom have agreed to accept the cards of any network member, does not take the credit card agreement out of the definition of restricted-use credit in section 11(1). The credit can be used only with suppliers of a class (either selected by the creditor or by the network's merchant acquirers), rather than generally.[121]

1.79 By subsection 11(4), a 'supplier' within section 11(1)(b) will include a person whose identity is unknown at the time of the credit agreement. This will apply, for example, with credit card agreements, where the network of suppliers willing to accept payment by the card is always changing.

1.80 To illustrate the difference between restricted-use and unrestricted-use credit, credit card agreements also provide for unrestricted-use credit falling within section 11(2), as they allow cash to be drawn out from cash machines, leaving the debtor free to use the credit so provided as he chooses. Other examples of restricted-use credit agreements where the supplier is not the creditor are mortgages[122] and loans for a purchase of goods where the monies are paid directly to the vendor. Examples of unrestricted-use credit agreements are overdrafts and cash loans, the use of which is at the discretion of the borrower.

1.81 The section refers to agreements which 'finance' transactions. Section 189(1), the definition section of the CCA 1974, merely states that finance 'means to finance wholly or in part'. However, it will include providing the customer with the means to pay for the goods or services (for example by providing a plastic card to be used on a running-account credit facility) even if there is no actual payment to the supplier by the creditor; since from the perspective of the customer the transaction is financed by the credit agreement.[123]

[121] See *Office of Fair Trading v Lloyds TSB Plc* [2007] QB 1.

[122] However, it was decided in *National Home Loans Corp Plc v Hannah* [1997] CCLR 7 that the borrower could have obtained alternative funds to pay for the property and then used the loan monies for any purpose that he chose, with the result that the loan was not within the definition of a restricted-use credit agreement.

[123] *Office of Fair Trading v Lloyds TSB Plc* [2007] QB 1.

(c) Debtor-creditor-supplier agreements

1.82 The distinction between 'debtor-creditor-supplier agreements' and 'debtor-creditor agreements' reflects the view of the Crowther Committee in its 1971 report[124] that a creditor who is independent from the supplier should be treated differently from a creditor who has a relationship with a supplier such that they each benefit from the transaction (and differently from a creditor who is himself the supplier).

1.83 Section 12 defines three types of debtor-creditor-supplier agreements.[125] The first is a regulated consumer credit agreement which is a restricted-use credit agreement which falls within section 11(1)(a), i.e. where the creditor is also the supplier (section 12(a)). The simple example would be where the supplier gives time to pay to his customer.[126] Merely because there are only two parties to the transaction, the arrangement does not fall within the category of a debtor-creditor agreement (as to which see below).

1.84 The second type of debtor-creditor-supplier agreement is a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier (section 12(b)).

1.85 What is meant by an agreement entered into under (or in contemplation of) 'arrangements' between a creditor and a supplier is further dealt with by section 187. Section 187(1), taken with section 187(3), states that an agreement shall be treated as entered into under pre-existing arrangements if it is entered into in accordance with, or in furtherance of, arrangements previously made between the supplier and creditor or any of their associates. Similarly, section 187(2) states that an agreement shall be treated as entered into in contemplation of future arrangements if it is entered into in the expectation that arrangements will subsequently be made between the creditor and the supplier or their associates. 'Associates' is exclusively defined by section 184[127] and has a narrow but detailed meaning, limited essentially to certain relatives of an individual, their spouse or civil partner (and their relatives), and bodies corporate where there can be said to be an element of common control.

1.86 There is no clear definition of the word 'arrangements' in the CCA 1974. Section 189(1) provides that 'future arrangements' and 'pre-existing arrangements' are 'to be construed in accordance with section 187', but section 187(1) and section 187(2)

[124] *Consumer Credit*, Cmnd 4596.

[125] Each type could itself be considered a category for the purposes of the CCA 1974.

[126] The creditor may have become the supplier purely for the purposes of the transaction, for example where the creditor has acquired goods from a dealer in order to sell them on conditional sale to the debtor.

[127] *Office of Fair Trading v Lloyds TSB Bank Plc* [2007] QB 1.

do not contain a definition of the word, since the second half of each subsection itself uses the word 'arrangements' as part of the explanation there set out. Further, they use language which extends rather than limits the scope of the expression ('shall be treated as').[128] The meaning of 'arrangements' (a broad word) is apparently deliberately left undefined. It is clearly wider than a contract or even an agreement. The meaning of arrangements in the context of card issuers and suppliers who accept their cards as payment was considered in *Office of Fair Trading v Lloyds TSB Bank Plc.*[129] The issue was whether there were arrangements between card issuers and suppliers where the supplier had been recruited to accept the cards of the particular network to which the card issuer belonged (e.g. Visa or MasterCard) by other card issuers who were also members of the network and not by the card issuer itself.[130] There were held to be arrangements because the supplier and the card issuer had each agreed (albeit separately, and the supplier merely by agreeing to a form of merchant agreement prescribed by the network rather than joining the network itself) to be subject to the rules and settlement provisions which were common to all participants in the credit card network scheme.

1.87 The exception provided for in section 187(3) gives an indication of the width of the concept of arrangements. Apparently the use of a cheque guarantee card, the use of which by the consumer creates an undertaking to pay given by the bank to the supplier (who may be any person willing to accept a cheque supported by a card)[131] would, but for the exception, be considered arrangements between the creditor and the supplier. The exception in section 187(3) provides that arrangements shall be disregarded for the purposes of subsection (1) or (2) if they are arrangements for the making, in specified circumstances, of payments to the supplier by the creditor, and the creditor holds himself out as willing to make, in such circumstances, payments of the kind to suppliers generally.

1.88 Subsection 187(3A) was inserted by the Banking Act 1987 with the purpose of excluding arrangements for debit card transactions. The use of debit cards depends on merchant agreements being entered into by suppliers with members of networks in a similar way to the credit cards networks and can lead to credit when the card is used to draw on an account with an overdraft. However, Parliament did not intend to provide connected lender liability in cases of overdrafts. The subsection

[128] *Office of Fair Trading v Lloyds TSB Bank Plc* [2007] QB 1.

[129] [2007] QB 1, CA, where the Court of Appeal approved Gloster J's judgment on the issue of arrangements, reported at *Office of Fair Trading v Lloyds TSB Bank Plc* [2005] 1 All ER 843. On the word 'arrangements', see also *The Satanita* [1895] P 248; [1897] AC 59; *Re British Slag Ltd's Application* [1963] 1 WLR 727, CA; *Fisher v Director General of Fair Trading* [1982] ICR 71; and *Re Royal Institution of Chartered Surveyors Application* [1986] ICR 550.

[130] Called four-party transactions, the parties are the debtor/cardholder, the creditor/card issuer, the recruiting network member, and the supplier.

[131] *Commissioner of Police v Charles* [1977] AC 177.

provides that arrangements shall be disregarded for the purposes of subsection (1) or (2) if they are arrangements for the electronic transfer of funds from a current account at a bank within the meaning of the Bankers' Books Evidence Act 1879.

1.89 While the full extent of the expression 'arrangements' is unclear, it probably does not extend to communications between the creditor and the supplier after the credit agreement simply regarding the mechanics of transferring monies. This would be far from the 'regular business relationship' or 'joint venture' to which the Crowther Committee's report referred when dealing with the concept of connected lending.[132]

1.90 The third type of debtor-creditor-supplier agreement is a regulated consumer credit agreement which is an unrestricted-use credit agreement made by the creditor under pre-existing arrangements between himself and a person (the 'supplier'), other than the debtor, in the knowledge that the credit is to be used to finance a transaction between the debtor and the supplier (section 12(c)). The subsection carries its own definition of supplier, whose identity must be known.[133] An example of this type of arrangement would be where a creditor has an arrangement with a supplier of goods and services and the borrower is directed to that creditor by the supplier. The creditor will know that the loan will be used to purchase goods from that particular supplier even though, in theory, the money could be used for other purposes. The section appears to be an anti-avoidance provision to deal with creditors who might wish to avoid entering into debtor-creditor-supplier agreements by avoiding the application of section 12(b).

(d) Debtor-creditor agreements

1.91 Debtor-creditor agreements are defined under section 13. There are three types.[134] The first is a regulated consumer credit agreement being a restricted-use credit agreement which falls under section 11(1)(b) but is not made by the creditor under a pre-existing arrangement, or in contemplation of future arrangements, between himself and the supplier (section 13(a)). An example of such an agreement would be a situation where a lender makes a loan to finance the purchase of goods where the money is to be paid direct to the debtor's supplier, but where there are no pre-existing arrangements between the lender and the supplier or it is not contemplated that any such future arrangements would arise. The second type of debtor-creditor agreement is a regulated consumer credit agreement being a restricted-use agreement which falls under section 11(1)(c)[135] (section 13(b)).

[132] Cmnd 4596.
[133] S 11(4) does not apply.
[134] Each type could itself be considered a category for the purposes of the CCA 1974.
[135] A refinancing agreement.

The third type of debtor-creditor agreement is a regulated consumer credit agreement being an unrestricted-use credit agreement which is not made by the creditor under pre-existing arrangements between himself and a person (the 'supplier') other than the debtor in the knowledge that the credit is to be used to finance a transaction between the debtor and the supplier (section 13(c)). An example of such an arrangement would be an overdraft or personal loan where the money is advanced in such a way that the borrower can spend it how he wishes. It would seem that all regulated consumer credit agreements are either a debtor-creditor-supplier agreement or a debtor-creditor agreement.

(e) Credit-token agreements

1.92 Credit token agreements are dealt with by section 14 of the CCA 1974. A credit-token is

> (1) a card, cheque, voucher, coupon, stamp, form, booklet or other document or thing given to an individual by a person carrying on a consumer credit business who undertakes—
> (a) that on production of it (whether or not some other action is also required) he will supply cash, goods and services (or any of them) on credit, or
> (b) that where, on the production of it to a third party (whether or not some other action is also required), the third party supplies cash, goods and services (or any of them), he will pay the third party for them (whether or not deducting any discount or commission), in return for payment to him by the individual.

A credit-token agreement is a regulated agreement for the provision of credit in connection with the use of the credit-token (section 14(2)). By section 14(4), if the token is used to operate a machine provided by the person giving it or by a third party, it shall be treated as the production of the token to him.

1.93 The definition of 'credit-token' and 'credit-token agreement' is much wider than would at first appear. It goes considerably beyond normal credit cards. It also appears that if something is given to an individual which offers credit when it is produced to the issuer or a third party, it can be a credit-token even if the eventual granting of credit facilities is conditional upon some other act, for example the successful completion of a credit application form. In *Elliot v Director General of Fair Trading*,[136] a credit card look-alike was sent for promotional purposes to individuals, with the invitation to take it to a shop and make an application for credit facilities. It was argued that this item, even if produced, would not necessarily guarantee that credit would be provided; there was therefore no 'undertaking' in the form of a contract to provide credit. However, the Divisional Court held that the fact that another act was required (the entering into of a credit agreement)

[136] [1980] 1 WLR 977, DC.

and that credit might not be granted did not stop the document from being a credit-token.

1.94 Problems with the width of the definition arise because section 14(1)(b) (which applies where a token is presented to a third party) makes no reference to there having to be credit. It would seem that the CCA 1974 assumed there would always be credit (perhaps because of the delay between the customer obtaining the cash or goods or services and repaying the issuer of the token). Further, under section 14(3) the token issuer is taken to provide the customer with credit drawn whenever a third party to whom the token is presented makes a supply. The extent of the problems thrown up by these two aspects of the section can be seen from the fact that the definition of credit-token appears to apply to a debit card, which can be used to obtain supplies or cash from a machine, not only where the customer in fact obtains credit by way of overdraft but also where he is deemed to obtain credit by section 14(3). If the latter were a proper application of section 14(3), an agreement to give a customer a debit card would then be a regulated debtor-creditor-supplier agreement for the provision of credit in connection with the use of the credit-token with a supplier even though credit is not in fact provided. It may be argued that section 14(3) does not deem there to be credit where none is in fact provided and refers only to the time when it is provided.[137] It may also be argued that it was never intended that the CCA 1974 should cover what has been described as a mere 'payment mechanism' in relation to a current account[138] or that it is possible to structure the agreements with the customer or the arrangements with the third party so as to avoid the application of the transactional requirements of the CCA 1974 in relation to debtor-creditor-supplier agreements. However, the debate highlights the potential width of the application of section 14 and the difficulties posed by its drafting.

1.95 Cheque cards are not covered by section 14, as the bank's payment is a payment of the cheque not a payment for the goods (see Example 21 in Schedule 2 to the CCA 1974).

1.96 'Charge cards' is the expression commonly used to describe a card issued under a running-account credit agreement where the borrower is required, under the terms of that agreement, to repay the entire debit balance outstanding on the account at the end of each repayment period (which is usually a month). Examples of such cards are American Express charge cards and Diners Club cards. Insofar as such cards are used under debtor-creditor-supplier agreements, it would seem that

[137] It can be argued that the effect of s 14(3) is limited to s 14, and if no credit is in fact provided there will be no regulated credit agreement for the purposes of other transactional provisions of the CCA 1974.

[138] Goode, *Consumer Credit Law and Practice*, Vol 1, Pt C, at para 25.85.

the card agreements are exempt agreements by virtue of article 3(1)(a)(ii) of the Consumer Credit (Exempt Agreements) Order 1989.[139] Provided that the charge card issuer does not otherwise provide credit under regulated consumer credit agreements and therefore is not carrying on a consumer credit business, then the card will not be a credit-token as it is not given by a person carrying on a consumer credit business.[140]

G. Other Categories in Part II of the Consumer Credit Act 1974

(a) Small agreements

1.97 A 'small agreement' is defined by section 17 of the CCA 1974. It is a regulated consumer credit agreement for credit not exceeding £50 (other than a hire-purchase agreement or a conditional sale agreement) or a consumer hire agreement which does not require the hirer to make payments exceeding £50 and which, in either case, is unsecured or secured only by indemnity or guarantee.

1.98 A small agreement is regulated by the CCA 1974, but in the case of a small debtor-creditor-supplier agreement for restricted-use credit, the application of Part V of the Act is limited by section 74(2) of the CCA 1974 so that the cancellation provisions do not apply nor essentially do the provisions as to form and content.[141]

1.99 There are anti-avoidance provisions contained in section 17(3) and (4) in case what would otherwise probably have been a single agreement is divided into two or more small agreements made at or about the same time in a desire to avoid the operation of those provisions of the CCA 1974 which do not apply to small agreements. The provisions of the CCA 1974 apply to such agreements as if they were not small agreements.

(b) Linked transactions

1.100 Section 19 in Part II of the CCA 1974 defines linked transactions. However, this is not a category of credit or hire agreements (although the linked transaction may itself be a credit or hire agreement) but defines other transactions (excluding those for security), entered into by the debtor or hirer (or a relative) with the creditor or owner or other persons in certain circumstances where the Act considers they should be treated as linked to the regulated agreement. The CCA 1974 therefore

[139] See Consumer Credit (Exempt Agreements) Order 1989, SI 1989/869.

[140] However, some charge card issuers offer credit cards as part of their business and some allow cash withdrawals on their charge cards.

[141] Ss 55 and 56 continue to apply. If a term of the agreement is expressed in writing, s 60(1) will apply to that term as if the agreement were not covered by s 74(2).

has an effect beyond the regulated agreement itself and can (for example, as a consequence of cancellation of the principal regulated consumer credit or hire agreement) interfere with rights and obligations under contracts with third parties which are neither credit nor hire agreements. Linked transactions are dealt with in detail in Chapter 7.

H. Categories of Agreements Partially Excluded by Section 74 from the Application of Part V of the Consumer Credit Act 1974

(a) Introduction

1.101 As stated above, section 74 excludes certain small agreements from much of the application of Part V of the CCA 1974. Section 74(1) provides for the exclusion of three other categories of agreement from the application of Part V (except for the application of section 56, which deals with antecedent negotiations). These are non-commercial agreements, overdraft agreements, and debtor-creditor agreements to finance the making of certain payments arising on or in connection with the death of a person. Subject to the terms of the section, these agreements are not required to comply with the provisions as to form and content of agreements nor are they subject to the cancellation provisions. Of these categories, non-commercial agreements and overdrafts are the most significant.

(b) Non-commercial agreements

1.102 A non-commercial agreement is defined by section 189(1) of the CCA 1974 as a consumer credit agreement or a consumer hire agreement not made by the creditor or owner in the course of a business carried on by him. It should be remembered that the fact that a person is not carrying on a consumer credit or consumer hire business does not mean that any credit or hire agreements made by him are unregulated.

1.103 In *Hare v Schurek*,[142] the Court of Appeal held that private or one-off or occasional loans by a motor trader who was in the business of selling cars and of credit brokerage, but who was not generally in the business of providing credit himself, would be non-commercial agreements. Accordingly, even if a one-off loan is made or occasional loans are made in the course of a business, there will be no need to comply with the form and contents requirements imposed by and under

[142] [1993] CCLR 47, CA.

sections 60 and 61 and the agreements will not be cancellable under section 67 of the CCA 1974, provided that the business is not a consumer credit business.

(c) Overdrafts

1.104 Consumer credit legislation has always sought to avoid over-regulating bank overdrafts. Lending by banks to their customers was exempted from the application of the Moneylenders Acts and, when the Consumer Credit Bill was being debated, overdrafts were seen as quick and flexible facilities that should not be overburdened by the requirements of regulation.[143] Further, it was expressly recognized in the debates in Parliament that overdrafts might be 'inadvertent' (what is commonly described as an 'unauthorized' overdraft) and therefore not capable of proper documentation.[144]

1.105 As a consequence of section 74(1)(b), overdrafts on a current account are excluded from the Act's requirements as to documentation and the cooling-off period for cancellable agreements. The application of the exemption from Part V depends on compliance with the relevant Determination provided for under section 74(3), which Determination was provided on 21 December 1989 (signed by the then Director of Fair Trading) with effect from 1 February 1990. It applies to every debtor-creditor agreement enabling the debtor to overdraw on a current account, under which the creditor is a bank. The Determination imposes the following conditions set out under paragraph 2 of the Determination:

A. that the creditor shall have informed the Office of Fair Trading in writing of his general intention to enter into agreements to which the Determination will apply;

B. that where there is an agreement for the granting of credit in the form of an advance on a current account, the debtor shall be informed at the time or before the agreement is concluded of the credit limit (if any), the annual rate of interest and charges applicable from the time the agreement is concluded, the conditions under which these may be amended and the procedure for terminating the agreement (the information to be confirmed in writing);

C. that where the debtor overdraws on his current account with the tacit agreement of the creditor and the account remains overdrawn for more than three months, the creditor must inform the debtor in writing not later than seven days after the end of that three-month period of the annual rate of interest and charges applicable.

[143] Hansard, 17 June 1974, 87–88.
[144] Hansard, 2 May 1974, 240–244.

1.106 The Determination draws a distinction between an agreement between the creditor and the debtor for the granting of credit in the form of an advance on a current account (paragraph 2(b)), and a 'tacit' agreement to overdrawing on a current account (paragraph 2(c)). In *Coutts v Sebestyen* 'tacit' was held to mean 'unexpressed' or 'implied', as where a bank is content to make a payment out of an account notwithstanding that the payment is unauthorized in the sense that it does not fall within any previously agreed credit limit.[145] The provisions under paragraphs (b) and (c) are mutually exclusive and it was said that greater formality 'would be unworkable in practice if applied to unauthorized payments'.

1.107 Given the recent widespread consumer challenges[146] to charges for unauthorized bank overdrafts and the reliance by banks on the exemption from documentation given in respect of overdrafts, the application of the exemption to unauthorized or 'inadvertent' overdrafts warrants further analysis.

1.108 By way of preliminary categorization, the paradigm agreement for an overdraft will be an agreement for a running-account credit facility and for unrestricted-use credit (falling within sections 11(2) and 13(c) of the CCA 1974). Schedule 2 of the CCA 1974 sets out Examples, providing illustrations of the terminology employed in the Act[147] and Examples 17, 21, and 23 give helpful insights into the treatment of unauthorized overdrafts on current accounts by the Act.[148] Example 17 deals with the position where there is no prior overdraft facility and the current account is overdrawn on a one-off occasion without any overdraft having been previously agreed. The analysis given in that Example is that, in drawing the cheque, the debtor by implication requests the bank to grant him an overdraft in the amount of the cheque on its usual terms as to interest and other charges. In deciding to honour the cheque, the bank by implication accepts the offer. This it is said constitutes a regulated consumer credit agreement for unrestricted-use, fixed-sum credit. The analysis states that it is a debtor-creditor agreement, and falls within section 74(1)(b) if covered by a determination under section 74(3). From Example 17, it can be seen that not every overdrawing on a current account will be a running-account facility: the one-off honouring of a cheque in excess of the credit balance where there is no pre-existing overdraft agreement does not allow a debtor to receive credit from time to time up to the limit of that cheque amount (the debtor cannot draw and redraw on that credit but must

[145] [2005] EWCA Civ 473, [2005] CCLR 4, CA.

[146] See *Office of Fair Trading v Abbey National plc* [2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625, [2008] CTLC 1, Andrew Smith J. See also his further judgment in the case at [2008] EWHC 2325.

[147] See s 188.

[148] Example 18 also deals with an overdraft agreement that is part of an agreement for other banking services and therefore forms part of a multiple agreement within s18.

return the account to credit). However, even if it is in the nature of a fixed-sum credit, section 74(1)(b) applies to a 'debtor-creditor agreement' enabling the debtor to overdraw on a current account and this categorization includes both running-account and fixed-sum facilities.

1.109 In contrast to Example 17, Example 23 addresses the situation where there is already an agreement for an overdraft facility, but the credit limit on the overdraft is temporarily exceeded by an order for payment where there are insufficient funds. Schedule 2 to the CCA 1974 provides as follows:

> Example 23
>
> Facts. Under an oral agreement made on 10th January, X (an individual) has an overdraft on his current account at the Y Bank with a credit limit of £100. On 15th February, when his overdraft stands at £90, X draws a cheque for £25. It is the first time that X has exceeded his credit limit, and on 16th February the bank honours the cheque.
>
> Analysis. The agreement of 10th January is a consumer credit agreement for running-account credit. The agreement of 15th–16th February varies the earlier agreement by adding a term allowing the credit limit to be exceeded merely temporarily. By section 82(2) the later agreement is deemed to revoke the earlier agreement and reproduce the combined effect of the two agreements. By section 82(4), Part V of this Act (except section 56) does not apply to the later agreement. By section 18(5), a term allowing a mere temporary excess over the credit limit is not to be treated as a separate agreement, or as providing fixed-sum credit. The whole of the £115 owed to the Bank by X on 16th February is therefore running-account credit.

1.110 Although the facts used have a similarity to Example 17, an unauthorized temporary excess over a pre-agreed overdraft limit is for the purposes of the Act neither a separate agreement nor an agreement for a fixed-sum facility (this being expressly provided by section 18(5)). Although Example 23 does not say so, this is also clearly a debtor-creditor agreement enabling the debtor to overdraw on a current account and would therefore fall within section 74(1)(b).[149] There is no distinction in principle on this issue between this and Example 17.

1.111 Example 21 deals with the situation where a cheque card is issued and used.

> Example 21
>
> Facts. The P Bank decides to issue cheque cards to its customers under a scheme whereby the Bank undertakes to honour cheques of up to £30 in every case where the payee has taken the cheque in reliance on the cheque card, whether the customer has

[149] S 74(1)(b) is dealing with overdrafts, which need not necessarily be temporary, on current accounts and not running-account agreements generally. S 82(4), referred to in Example 23, is dealing with excesses on any form of running-account (which would include overdrafts) and which are temporary only. The Judge at first instance in *Coutts v Sebestyen* (HHJ Michael Dean QC) held that the sections were not mutually exclusive and this seems the better view, but the point was left undecided by the Court of Appeal (see its judgment at [2005] EWCA Civ 473, [2005] CCLR 4).

funds in his account or not. The P Bank writes to the major retailers advising them of this scheme and also publicises it by advertising. The Bank issues a cheque card to Q (an individual), who uses it to pay by cheque for goods costing £20 bought by Q from R, a major retailer. At the time, Q has £500 in his account at the P Bank.

Analysis. The agreement under which the cheque card is issued to Q is a consumer credit agreement even though at all relevant times Q has more than £30 in his account. This is because Q is free to draw out his whole balance and then use the cheque card, in which case the Bank has bound itself to honour the cheque. In other words the cheque card agreement provides Q with credit, whether he avails himself of it or not. Since the amount of the credit is not subject to any express limit, the cheque card can be used any number of times. It may be presumed however that section 10(3)(b)(iii) will apply. The agreement is an unrestricted-use debtor-creditor agreement (by section 13(c)). Although the P Bank wrote to R informing R of the P Bank's willingness to honour any cheque taken by R in reliance on a cheque card, this does not constitute pre-existing arrangements as mentioned in section 13(c) because section 187(3) operates to prevent it. The agreement is not a credit-token agreement within section 14(1)(b) because payment by the P Bank to R would be a payment of the cheque and not a payment for the goods.

Again, although the Example does not say so, as a debtor-creditor agreement enabling the debtor to overdraw on a current account, the agreement falls within section 74(1)(b).

1.112 The question arises as to the proper analysis if the agreement allowing the debtor a cheque guarantee card contains an express contractual prohibition on its use to obtain unauthorized credit. The Act regulates agreements between the debtor and the creditor by which the creditor provides the debtor with credit. However, such a use of the card is outside the terms of the agreement under which the card was given, indeed is a breach of it. Example 21 does not refer to there being any contractual prohibition of the use of the card. On the basis of Examples 17 and 23, it might be thought that there is a credit agreement when the cheque is honoured. In *Office of Fair Trading v Abbey National plc and ors*,[150] Andrew Smith J held that a customer was not prima facie in breach of contract by instructing his bank to make a payment for which he did not have the necessary funds in his account and which was not covered by an arranged facility. He considered that the language of 'requesting' an overdraft reflected the correct legal analysis of what was implicitly done when a customer instructed his bank to make a payment without, or in excess of, an arranged overdraft facility. Further, he stated, at paragraph 66 of his judgment, 'The contractual position between the bank and the customer is not affected by the customer using a cheque guarantee card . . . The effect of its use is simply that the bank, through the agency of the customer, undertakes to the third party (not strictly by way of guarantee) that it will not dishonour the cheque on

[150] [2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625, [2008] CTLC 1.

presentation for want of funds in the account; effectively, that, if need be, it will advance the customer the funds necessary to pay it.' This suggests that there will be an agreement for credit albeit that the customer is in breach of the banking contract and notwithstanding the fact that, while the analysis of request and acceptance is based on the bank having an option to refuse payment, where a cheque guarantee card is used, the bank cannot choose to stop an overdraft being obtained without itself being in breach of its undertaking to a third party.

I. Other Significant Categories of Agreement

(a) Cancellable agreements

1.113 Section 189(1) of the CCA 1974 defines a 'cancellable agreement' as a regulated agreement which by virtue of section 67 may be cancelled by the debtor or hirer. The conditions set out under section 67 for an agreement to be cancellable begin with the requirement that there were antecedent negotiations which included oral representations.[151] Whether there were antecedent negotiations depends upon the application of section 56.[152] There can only be antecedent negotiations in three circumstances:

(1) where they are conducted by the creditor or owner in relation to the making of any regulated agreement;
(2) where they are conducted by a credit-broker in relation to goods sold or proposed to be sold by the credit-broker to the creditor before becoming the subject of a debtor-creditor-supplier agreement under section 12(a) of the CCA 1974;[153]
(3) where they are conducted by the supplier in relation to[154] a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or 12(c).[155]

1.114 The oral representations must be made when an individual who is or who is acting on behalf of the negotiator (the person conducting the antecedent negotiations[156]) is in the presence of the debtor or hirer. These are often referred to as 'face-to-face' oral representations.

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151 See *Moorgate Services Ltd v Kabir* [1995] CCLR 74 as to the meaning of 'oral representations'.
152 'Antecedent negotiations' is a defined term under s 189(1) and s 56(1).
153 This type of antecedent negotiation does not apply to contracts for services, to hire, or to situations where the goods will not be sold to the creditor but to another who independently sells them to the creditor, *Black Horse Ltd v Christopher Langford* [2007] CTLC 75, Gray J.
154 'In relation to' is to be given a wide meaning: *Forthright Finance v Ingate* [1997] 4 All ER 99.
155 Again, this type of antecedent negotiation will not include hire.
156 S 56(1).

1.115 The agreement will not be cancellable if it is secured on land, is a restricted-use credit agreement for the purchase of land, or is an agreement for a bridging loan in connection with the purchase of land. It will further not be cancellable if the un-executed agreement is signed by the debtor or hirer at premises at which any of the following is carrying on business (whether on a temporary or permanent basis): the creditor or owner, any party to a linked transaction (other than the debtor or hirer or his relative) or the person who is the negotiator in any antecedent negoti-ations. It will be noted that the face-to-face oral representations themselves need not take place off trade premises in order for the agreement to be cancellable; it is the place of signing by the debtor that is significant.

1.116 An agreement which is documented as if it were cancellable but which falls outside the agreements to which section 67 applies, is not a cancellable agreement within the meaning of the CCA 1974 and so cannot be cancelled by the debtor or hirer by virtue of section 67.[157]

(b) Modifying agreements

1.117 Where an agreement (a 'modifying agreement') varies or supplements an earlier agreement, the modifying agreement is treated, for the purposes of the CCA 1974, as revoking the earlier agreement and containing provisions reproducing the combined effect of the two agreements, so that obligations outstanding in relation to the earlier agreement are to be treated as outstanding instead in relation to the modifying agreement.[158] The modifying agreement will itself be a regulated agreement if it meets the criteria for a regulated agreement. A modifying agreement that does not meet those criteria is, nonetheless, to be treated as a regulated agreement if the earlier agreement was a regulated agreement, unless the modifying agreement is for running-account credit or an exempt agreement by virtue of sections 16(6C) or 16C of the CCA 1974.[159]

1.118 For the purposes of the modifying agreement provisions, the former financial limit of £25,000 on regulated agreements still applies in relation to an agreement made after 6 April 2008 to vary or supplement a credit agreement which was made before 6 April 2008 where:

(1) the creditor provided credit in excess of £25,000 under the earlier agreement and the agreement to vary or supplement it does not itself make provision for a cash loan; or
(2) the later agreement is an exempt agreement.[160]

[157] *Rankine v MBNA Europe* [2007] EWCA Civ 1273, [2007] CTLC 241 (refusal of permission to appeal on this issue by Gage LJ).
[158] CCA 1974, s 82(2).
[159] CCA 1974, s 82(3).
[160] Consumer Credit Act 2006 (Commencement No 4 and Transitional Provisions) Order 2008, SI 2008/831, art 4(1) and (2).

1.119 An agreement to allow a credit limit under a regulated running-account credit agreement to be temporarily exceeded is a modifying agreement, but Part V of the CCA 1974, which includes the provisions as to the form, content, and execution of documents, does not apply to such a modifying agreement. Agreements to vary or supplement non-commercial agreements are excluded from the provisions relating to modifying agreements.[161]

1.120 The starting point for the treatment of a modifying agreement which is a regulated agreement or is to be treated as a regulated agreement is that it has to comply with the form, content, and execution requirements that are imposed on regulated agreements by and under Part V of the CCA 1974.[162] However, the form and contents requirements are varied in relation to modifying agreements by regulation 7 and Schedule 8 to the Consumer Credit (Agreements) Regulations 1983 (the Agreements Regulations).[163] Although the modifying agreement revokes the earlier agreement, the form and contents requirements for a modifying agreement assume that the document is to be read together with the document containing the earlier agreement. Accordingly, as a general rule, any of the financial and related particulars set out in paragraphs 3 to 19 of Schedule 1 to the Agreements Regulations which is contained in the earlier credit agreement or any of the financial and related particulars set out in paragraphs 3 to 8 of Schedule 3 to the Agreements Regulations which is contained in the earlier hire agreement and which is not supplemented or varied need not be repeated in the modifying agreement.[164] The layout of the information that must be included in a modifying agreement is prescribed by regulation 7(4) of the Agreements Regulations.[165] The agreement must clearly identify the terms and financial and related particulars of the earlier agreement that it is varying or supplementing[166] and it must comply with the detailed requirements of Schedule 8 to the Agreements Regulations, which are sometimes perplexing and may not always achieve a clear identification of the terms and particulars of the earlier agreement that are being modified.

1.121 One cause for confusion is the 'amount of the credit' that is to be stated in certain modifying agreements that vary or supplement the charges payable or the credit to be provided under earlier fixed-sum credit agreements. Where the Consumer Credit (Early Settlement) Regulations 2004 (the Early Settlement Regulations 2004)[167]

[161] CCA 1974, s 82(7).

[162] This is reinforced by reg 7(1) of the Agreements Regulations, which provides that, subject to the remaining provisions of reg 7, the requirements of the Agreements Regulations apply in respect of a modifying agreement that is a regulated agreement or that is to be treated as a regulated agreement.

[163] Consumer Credit (Agreements) Regulations 1983, SI 1983/1553, reg 7 and Sch 8.

[164] Agreements Regulations, reg 7(12).

[165] Agreements Regulations, reg 7(1).

[166] Agreements Regulations, reg 7(13).

[167] SI 2004/1483.

or the Consumer Credit (Rebate on Early Settlement) Regulations 1983[168] apply to the earlier agreement, this 'amount of credit' is the total amount of repayments[169] outstanding under the earlier agreement (whether or not due) as at the date of the modifying agreement,[170] reduced or increased by the amount of any reduction or increase in the amount of credit that is to be effected by the modifying agreement, and less the amount of a notional rebate calculated in accordance with the Early Settlement Regulations 2004.[171] The rebate is to be calculated as if the earlier agreement was to have been settled on the date of the modifying agreement and disregarding any deferment of the settlement date provided for by regulation 6 of the Early Settlement Regulations 2004. Where the debtor would not be entitled to a statutory rebate on early settlement of an earlier fixed-sum credit agreement, a modifying agreement which varies or supplements the amount of credit must state the 'amount of the credit' calculated as the balance of credit outstanding at the date of the modifying agreement plus any charges included in the total charge for credit that are due and unpaid at the date of the modifying agreement and the amount of any additional credit to be provided under the modifying agreement.[172]

1.122 Where that 'amount of the credit' is required to be stated, it must appear in the pre-contract information,[173] the modifying agreement form itself when it is given or sent to the customer for signature, and, where section 58(1) of the CCA 1974 applies, in the advance copy of the agreement that is to be given to the customer. Accordingly, it must take into account any payments that may be received between the date when the documentation is prepared and the date when the modifying agreement is made, and, in the case of an agreement to which the statutory rebate does not apply, it must take into account any charges that may fall due for payment but remain unpaid between those dates.

1.123 This 'amount of the credit' will bear no obvious relationship to the amount of credit that is actually provided, or to be provided, to the debtor under the agreement as modified. Similarly, where a modifying agreement is required to state the 'total cash price',[174] this is not the actual cash price of the goods, services or other things in question; it is the total amount of repayments[175] outstanding under the

168 SI 1983/1562.

169 Consisting of repayments of credit and payments of items entering into the total charge for credit: reg 1(3) of the Agreements Regulations.

170 The relevant date is to be taken to be the date of the modifying agreement: reg 7(7).

171 Agreements Regulations, reg 7(2) and Sch 8, para 5.

172 Agreements Regulations, reg 7(2) and Sch 8, Pt I, para 6.

173 Consumer Credit (Disclosure of Information) Regulations 2004, SI 2004/1481, reg 3(1)(c).

174 Reg 7(2) and para 3(2) of Sch 8 to the Agreements Regulations.

175 Consisting of repayments of credit and payments of items entering into the total charge for credit: reg 1(3) of the Agreements Regulations.

earlier agreement (whether or not due) as at the date of the modifying agreement,[176] plus the cash price of any additional goods, services, land, or other things the acquisition of which is to be financed under the modifying agreement, less the amount of a notional rebate calculated in accordance with the Early Settlement Regulations 2004 as at the date of the modifying agreement.[177]

1.124 Where a modifying agreement modifies an earlier regulated consumer hire agreement so as to provide for the hire of additional goods for a fixed or minimum period or so as to vary the fixed or minimum period of hire under the earlier agreement, a statement of the fixed or minimum period for which goods are to be hired 'under the modified agreement' is required.[178] The period referred to would appear to be the fixed or minimum period of hire inclusive of the period already passed, beginning on the commencement of hire under the earlier agreement, because 'the modified agreement' is defined in regulation 1(2) as 'an earlier agreement as varied or supplemented by a modifying agreement'.

1.125 These and many other complexities of the requirements relating to modifying agreements make one-off variations to regulated agreements an unattractive proposition. Concern often arises in relation to customers who are in financial difficulties and for whom creditors or owners are willing to allow more time to pay. However, authority for the view that a payment holiday or reduction in payments may be arranged without entering into a modifying agreement is provided by *Broadwick Financial Services Ltd v Spencer*.[179] There it was held that a letter, which was clearly expressed to be non-contractual but by which the lender informed the borrowers under a regulated credit agreement that reduced instalments would be accepted by the lender provided that and for so long as the borrowers did not default, was not contractually binding, with the result that the agreement did not contravene the Agreements Regulations by stating the full amount of the instalments and not the reduced amount.[180] In order to avoid a modifying agreement when entering into any arrangement for a customer to have more time to pay, care must be taken to use language that makes it absolutely clear that the arrangement is not contractually binding and the customer should not be required to pay any fee or other consideration.[181]

[176] The relevant date is to be taken to be the date of the modifying agreement: reg 7(7).

[177] Agreements Regulations, reg 7(8).

[178] Agreements Regulations, reg 7(9) and Sch 8, Pt II, para 8.

[179] [2002] EWCA Civ 35, [2002] 1 All ER (Comm) 446, CA.

[180] It was argued that the concession amounted to a prescribed term that was required to be stated in the agreement by the CCA 1974, s 61(1)(a), reg 6(1) and Sch 6, para 5, namely a term stating how the borrowers were to discharge their obligations under the agreement to make repayments. The amount of each repayment is also required to be stated by para 13 of Sch 1.

[181] A mere forbearance to sue on a right to immediate payment does not amount to the provision of credit in the context of the Gaming Act 1968 even though, as a result, the debtor is provided with time to pay: *Aspinall's Club Ltd v Al-Zayat* [2008] EWHC 2101 (Comm) (Teare J).

1.126 Modifying agreements will only be cancellable under section 67 of the CCA 1974 if the original agreement was cancellable and the modifying agreement is made within the cancellation period applying to the original agreement.[182]

J. Multiple Agreements

(a) Introduction

1.127 Section 18(1) of the CCA 1974 establishes the concept of a 'multiple agreement'. An agreement is a multiple agreement if its terms are such as either:

(a) to place a 'part' of the agreement within one 'category' of agreement mentioned in the Act and another part within a 'different category' of agreement mentioned in the Act or within a category of agreement not mentioned in the Act (a section 18(1)(a) multiple agreement); or
(b) to place the agreement, or a part of it, within two or more categories of agreement mentioned in the Act (a section 18(1)(b) multiple agreement).

1.128 Section 18(3) provides, quite straightforwardly, that where an agreement, or part of it, falls into two or more categories of agreement mentioned in the Act, it is to be treated as an agreement in each of those categories. However, section 18(2) provides, more controversially, that any 'part' of an agreement which falls within the definition of 'multiple agreement' in section 18(1) is to 'be treated for the purposes of this Act as a separate agreement'.

1.129 There is considerable uncertainty as to the correct interpretation of section 18. It is not at all clear what is meant in the section by 'part', by 'category', or by 'different category'; nor is it clear to what extent provisions of the CCA 1974, such as the right of a debtor under a hire-purchase or conditional sale agreement to terminate the agreement and pay no more than one-half the total sum payable under the agreement, under sections 99 and 100 of the Act, or requirements imposed upon creditors and owners by regulations made under the Act, such as the form and contents requirements of the Consumer Credit (Agreements) Regulations 1983, are to be applied separately in relation to each part of an agreement that is to be treated as a separate, regulated agreement.

(b) Part

1.130 The first question may be thought to be whether there is a part of an agreement at all for the purposes of section 18(2). The fact that some, but not all, of the agreement falls into a particular category of agreement mentioned in the CCA 1974 may suffice to make so much of the agreement as does fall into that category 'a part'.

[182] CCA 1974, s 82(5) and (6).

This appears to be the view of Francis Bennion, the draftsman of the Act.[183] The Office of Fair Trading has expressed the view[184] that where a credit agreement provides credit for an ancillary purpose, such as payment protection insurance, and the credit for such ancillary purpose falls into a different category from the principal credit, section 18(2) will apply to require treatment of the principal advance and the ancillary credit as separate regulated agreements.[185] However, in reaching this view, no criterion appears to have been applied other than the fact that such an agreement is providing credit for different purposes in such a way as to create elements in different categories of credit. The categorization adopted by the Office of Fair Trading did not appear to depend, for example, upon the inclusion in such agreements of different terms in respect of the credit provided for the main purpose of the loan from the terms in respect of the credit for an ancillary purpose.

1.131 Towards the other end of the spectrum, the editors of Goode, *Consumer Credit Law and Practice* argue that an agreement with elements falling into different categories will rarely contain parts that are to be treated as separate agreements and that the section is only intended to have that effect where two or more 'distinct bargains', such as 'a combined loan and hire-purchase agreement' or 'a combined hire-purchase and hiring agreement' have been 'rolled up into the same contract'. They suggest that an agreement will need to contain different terms, such as different charges or timings of repayments, in relation to each of the elements of the agreement in order for each element to be a part.[186] They express the view that a credit card agreement or a hire-purchase agreement with credit for payment of an insurance premium will not contain parts that are to be treated as separate agreements if it 'is an integrated package which could not be split up without affecting the character of the transaction'.[187]

1.132 The analysis adopted in Goode contradicts Example 16 in Schedule 2 to the CCA 1974, which analyses a credit card agreement as a multiple agreement, the part which provides credit for payments to the suppliers of goods or services and which falls into the section 11(1)(b) definition of restricted-use credit agreement and

[183] See his article 'Multiple Agreements under the CCA 1974' [1999] CICC 1.

[184] In its draft FAQs on the Consumer Credit (Agreements) Regulations 1983, May 2005, which it has since withdrawn.

[185] See the FAQs at Q2.20, 2.22, 2.23, and 2.28.

[186] The Goode analysis was accepted, though it did not need to be relied upon, by His Honour Judge Mellor in *National Home Loans Corporation Plc v Hannah* [1997] CCLR 7. It was rejected by His Honour Judge Holt in *Ocwen v Coxall* [2004] CCLR 7, and again by Mr Recorder Gary Flather OBE in *London North Securities Limited v Williams*, 16 May 2005. It was approved by His Honour Judge Purle QC, sitting as a High Court Judge, in *Heath v Southern Pacific Mortgages Limited* [2009] EWHC 10 (Ch) 29 January 2009, where he held that the fact that a portion of the credit was in fact used to refinance existing indebtedness, with the borrower being free to use the balance as she chose, did not mean that the terms of the agreement were such as to create parts for the purposes of section 18(1)(a).

[187] Goode's *Consumer Credit Law and Practice* at IC [25.106a–107].

the section 12(b) definition of debtor-creditor-supplier agreement being required to be treated as a separate agreement from the part which provides credit for cash loans and which falls into the section 11(2) definition of unrestricted-use credit agreement and the section 13(c) definition of debtor-creditor agreement. Section 188(1) of the Act states that the examples 'shall have effect for illustrating the use of terminology employed in this Act'.

1.133 Francis Bennion plainly considers that a credit card agreement is a multiple agreement, with parts falling into different categories.[188] He also refers to an agreement to let a car on hire-purchase and to provide credit for payment of a premium for payment protection insurance as an example of an agreement with two parts.

1.134 It is often assumed that interdependence of elements of an agreement, each of which elements falls into a different category for the purposes of section 18, prevents any of those elements from being required to be treated as a separate agreement. However, there is, perhaps obvious, room for disagreement as to when, in practice, two or more elements of an agreement are dependent upon one another, as to when each of such elements might reasonably have been expected to form the basis of an agreement without any agreement in relation to the other element, or elements, or as to when all of the elements are essential to the character of the agreement. For example, hire-purchase facilities are commonly made available with the option of credit to pay a premium for payment protection or other insurances. The customer's refusal or acceptance of credit to pay for the insurance will not affect the nature of the hire-purchase agreement, but his decision not to go ahead with the hire-purchase will inevitably mean that the insurance, and therefore the financing for it, will not go ahead. So such insurance finance would appear to be dependent upon the hire-purchase part of the agreement, but the hire-purchase would not be dependent upon the insurance finance.

1.135 If it were correct to treat interdependence of elements of an agreement as the test for whether or not they are parts that are to be treated as separate agreements, the result might be significantly to reduce the protections afforded by the CCA 1974. If a customer who has taken credit to pay for insurance in respect of goods that he is acquiring on hire-purchase decides to return the goods early, in exercise of the right, under sections 99 and 100 of the CCA 1974, to terminate on payment of one half the total sum payable, should the total sum payable include the sums payable in respect of the credit provided for the insurance? If the hire-purchase element is a part to be treated as a separate regulated agreement, the answer is that he need only pay half the total sum payable in respect of the hire-purchase. However, if the dependence of the insurance credit upon the hire-purchase were

[188] See his article 'Multiple Agreements under the 1974 Act' [1999] CICC 1. References to Francis Bennion's commentary in this section are to this article.

to take the agreement outside section 18(2), so removing the requirement for each to be treated as a separate regulated agreement, the customer would have to pay half the total sum payable under the agreement as a whole.

1.136 The only Court of Appeal authority which provides any guidance on the proper approach to multiple agreements is *National Westminster Bank plc v Story*,[189] which decided that in order for a credit agreement to fall into the category of a restricted-use credit agreement, there must be a contractual term, express or implied, which requires the debtor to use the credit for one of the purposes mentioned in section 11(1)(a) to (c) of the CCA 1974.[190] The court held that there was no part of the agreement to which such a term applied and that, accordingly, all the credit under consideration fell into the category of an unrestricted-use credit agreement.[191] Auld LJ expressed the view, which was not necessary to the decision, that in order for an element of an agreement to be a 'part' it was not necessary for different contractual terms to apply to that part from the terms applying to another part of the agreement:

> However, I believe that it would accord with the ordinary and natural use of the word for it to have a broader application so as to include, as here, a separate facility provided with others under an agreement where, even if the facility as a contractual entitlement does not stand on its own, the debtor's use, or non-use, of it does not affect the contractual nature of the agreement as a whole, in particular, his entitlement to use those other facilities.

1.137 The wording of section 18 is to the effect that section 18(2) only requires a part of an agreement to be treated as a separate agreement where the terms of the agreement place part of it in one category and part of it in a different category. The fact that a borrower has, for example, used part of a loan to refinance an existing loan and has received the balance of the loan to spend as he chooses will not necessarily mean that the terms of the credit agreement were such as to place part of the agreement in the category of a restricted-use refinancing agreement and part of it in the category of an unrestricted-use credit agreement. Assuming that restricted-use refinancing is a different category from unrestricted-use credit for the purposes of section 18, the agreement would not contain a restricted-use part that was to be treated as a separate agreement from an unrestricted-use part unless the contractual terms were such as to make part of the agreement restricted-use, by providing that part of the credit was to be used for refinancing and that it was to be advanced in such a way as to prevent the borrower from being free to use it for any other purpose.[192]

189 [1999] Lloyd's Rep Bank 261.
190 Restricted-use credit agreements are discussed in para 1.77 above.
191 CCA 1974, s 11(2). See paras 1.77–1.81 above.
192 See CCA 1974, s 11(1)(c) and (2).

1.138 In *National Westminster Bank plc v Story*,[193] the fact that the parties plainly envisaged that some or all of the total of the two joint loan facilities, amounting to £20,000, would be used to refinance existing borrowing with the same bank did not drive the court to the conclusion that part of the agreement fell into the category of restricted-use refinancing. It would appear to have been assumed that, in order for there to be 'parts' for the purposes of section 18, the agreement must identify those parts in some way other than by identifying different purposes for which the credit is to be provided. The parties had identified two loan facilities. The court considered whether either of those identified facilities fell wholly into the category of restricted-use refinancing, while the other fell into the category of unrestricted-use credit. It did not consider whether the fact that £12,000 of the total new facility of £35,000, consisting of the two joint facilities and a business overdraft of £15,000, had to be used to refinance existing borrowing meant that £12,000 of the overall facility fell into the category of restricted-use credit agreement and was a part that was required to be treated as a separate agreement.

(c) Category

1.139 Auld LJ said in *National Westminster Bank plc v Story*[194] that he was inclined to the view that restricted-use credit within section 11(1) and unrestricted-use credit within section 11(2) were 'separate "categories"' for the purposes of section 18, but that section 18 was only referring to the categories of agreement that are defined in Part II of the CCA 1974. Whilst it would seem inevitable that the reference to 'different' categories of agreement in section 18 is intended to include such disparate categories as restricted-use credit agreement and unrestricted-use credit agreement, there would appear to be no justification for excluding other categories of agreement mentioned in the Act, such as hire-purchase and conditional sale agreements, in relation to which the Act confers particular protection for debtors, from the broad words 'category of agreement mentioned in this Act'. It would be surprising if section 18 failed to prevent a creditor from taking a hire-purchase agreement out of the regulatory scheme by insisting that a customer borrow the premium for payment of, say, GAP insurance, so as to inflate the 'amount of credit' to a greater figure than the financial limit that applied under section 8(2) of the CCA 1974 to agreements made before 6 April 2008 or to a greater figure than the £25,000 threshold for application of the business purpose exemption under section 16B.[195]

[193] [1999] Lloyd's Rep Bank 261.
[194] [1999] Lloyd's Rep Bank 261.
[195] See paras 1.55–1.59 above.

(d) Extent of separate treatment of a part

1.140 Francis Bennion does not express, or expressly acknowledge, a distinction between the required treatment of an agreement which, by its terms, has parts falling into different categories (a section 18(1)(a) multiple agreement) and an agreement which itself falls into different categories or a part of which falls into different categories (section 18(1)(b)). This accords with the fact that the section 18(2) requirement for treatment of part of an agreement as a separate agreement is expressed to apply to any part falling within section 18(1) and not only to a part falling within section 18(1)(a). It may follow that the intention of section 18 is that even a part of an agreement which itself falls into two different categories of credit, such as a fixed-sum credit agreement element of an agreement which is also within the definition of a restricted-use credit agreement, but which does not fall into any different or disparate category from any other part of the agreement, should be 'treated as a separate agreement' and that may be an indicator of a limit on the extent to which the part must be treated as a separate agreement.

1.141 All commentators agree that section 18 is intended to be an anti-avoidance provision, to prevent evasion of the CCA 1974 by the artificial combination of separate bargains. If it were not for anxiety about the impact of section 18 on the form and content requirements for regulated agreements, the very broad interpretation of 'part' that Francis Bennion promotes would achieve the anti-avoidance objective of section 18 without creating any serious difficulty in compliance with the requirements of the CCA 1974. If section 18 were correctly to be interpreted as providing no more than that a customer is to be afforded all the protection provided for in relation to each of the categories that his regulated agreement falls into, so that, for example, the protection of sections 90, 99, and 100 applies in relation to so much of an agreement as falls into the definition of hire-purchase or conditional sale, and that a regulated agreement must comply with each of the form and content requirements that applies to any category of agreement that the agreement falls into, the protections that are intended to be afforded to consumers would not be frustrated but creditors and owners should have no difficulty in meeting those requirements.

(e) Impact on form and content requirements

1.142 Section 61(1)(a) of the CCA 1974 provides that a regulated agreement is not properly executed unless a document in the prescribed form, containing all the prescribed terms and conforming to the form and contents regulations made under section 60(1), is signed in the prescribed manner both by the debtor and on behalf of the creditor. It does not appear to have been suggested by any of the academics or the lawyers who work in this area that this requirement may only be complied with in relation to a section 18(1)(a) multiple agreement (with parts in

different categories) by the parties' signing separate documents for each part that is required to be treated as a separate regulated agreement. However, the question of whether or not the form and contents requirements imposed by the Consumer Credit (Agreements) Regulations 1983 are to be treated as applying separately in relation to each such part has caused troublesome uncertainty as to the correct way to draft an agreement that may contain parts to which section 18(2) applies. In relation to agreements made before 6 April 2007, it has been argued with some success before Circuit Judges[196] that the prescribed terms[197] must be separately stated in relation to each part that is required by section 18(2) to be treated as a separate agreement and that, where there is no document signed by the debtor which contains a separate statement of all the prescribed terms in relation to each such part, the court cannot enforce the agreement.[198]

1.143 In *Ocwen v Coxall*,[199] of a total loan of £17,113.30, £2,112.30 was applied in payment of a payment protection premium, £1,854.30 was paid in the discharge of mortgage arrears owed to an existing mortgagee, and £13,146.70 was received by the borrowers. It was conceded that if there were 'three agreements, each was caught by the Act, and would be irredeemably unenforceable'. His Honour Judge Holt accepted the argument that the advance of the payment protection premium was a restricted-use debtor-creditor-supplier agreement, the advance to clear the arrears was a restricted-use debtor-creditor agreement, and the advance of the balance was an unrestricted-use debtor-creditor agreement. He held that the agreement was in three parts, falling within different categories, and that, as each part was for a loan of less than £15,000 (the limit applying to regulated agreements under section 8 of the CCA 1974 at the date of the agreement), each was a regulated agreement which 'breached the 1983 Regulations and by operation of section 127(3) of the Act each part was irredeemably unenforceable'. The letter of offer in *Coxall* provided that 'Should you have any arrears with your first mortgagees these are to be repaid from the proceeds of this loan in the event of the loan being secured by a second charge', which could reasonably have been interpreted as a term of the agreement that so much of the credit as was required to discharge such arrears should be restricted-use credit.

1.144 In *London North Securities Limited v Williams*,[200] the loan agreement stated the 'amount of credit advanced' as £4,900. Of that sum, £3,397.39 was deducted in

[196] See paras 1.143–1.144 below.

[197] Prescribed by reg 6(1) and Sch 6 to the Consumer Credit (Agreements) Regulations 1983.

[198] An improperly executed agreement cannot be enforced against the debtor without an order of the court: s 65(1). The court cannot make an enforcement order if there is no document signed by the debtor which contains all the prescribed terms: s 127(3) of the CCA 1974. S 127(3) was repealed on 6 April 2007 in relation to agreements made on or after that date: s 15 and Sch 3, para 11 of the CCA 2006.

[199] [2004] CCLR 7.

[200] 16 May 2005.

payment of arrears to the first mortgagee, £602.10 was paid to a second chargee for the release of its charge, £500 was paid to brokers, and £900 to an insurance company. Mr Recorder Flather relied upon *National Westminster Bank plc v Story*[201] as authority that there must be an express or implied term of the agreement which places the credit within the category of restricted-use credit in order for any of the credit to fall within that category. He construed the agreement as placing the refinancing within the category of restricted-use credit, there being an express term to that effect, but as leaving the borrowers free to revoke their authority for the lender to make payments out of the advance directly to the broker and the insurer, with the result that the amounts of those payments fell within the category of unrestricted-use credit agreement. The authority to pay the broker was expressed to be revocable 'at any time before completion'. The instruction to pay the insurance premium was not expressed to be revocable, but the judge held that it was. He concluded that section 18(2) applied to the agreement and he accepted the contention that 'since the formalities of execution apply to each part of the agreement as if each part was a separate agreement then the agreement must state the amount of credit in respect of each part'.

1.145 However, Francis Bennion states that, in addition to being an anti-avoidance provision, section 18(2) is 'a clarifying provision', 'to be looked on as declaratory of the position which the courts ought to arrive at without its benefit'. He states that:

> What needs to be understood (and has been misunderstood by many commentators) is that section 18 has a practical effect only where it needs to have one, and can otherwise be ignored. It is a common technique of the parliamentary drafter to operate in this way (known as weightless drafting).
>
> It will now be clear I hope that a 'part' need not be separately set out as such in the agreement.
>
> The separation into parts will usually be notional, and independent of the actual way the wording of the agreement is arranged . . .
>
> Section 18 does not restrict the parties in the way they set out their document. It is dealing with the substance, rather than the form, of the transaction. References in it to parts of an agreement are references to different aspects or features of the agreement. They do not refer to the layout of the agreement on paper. As Guest and Lloyd say, 'the answer does not depend on whether the parties have literally divided the agreement into parts'. The whole/part differentiation is a notional one. It relates to the legal effect of an agreement. Nevertheless the provisions of section 18 do of course have an impact on the various statutory requirements as to form. So far as these requirements relate to a particular CCA category within which the document or any part of it falls, the document must comply with them. This applies to every relevant CCA category. However the point to grasp is that it does not matter if, from the point of

[201] [1999] Lloyd's Rep Bank 261.

view of a particular CCA category, the document contains irrelevant material (needed to comply with documentation requirements directed to some other category).

1.146 Francis Bennion's observations about the impact of section 18 on the requirements as to form appear to indicate that the requirement of regulation 2(4) of the Agreements Regulations that certain information be set out in the agreement 'together as a whole' and not 'interspersed with any other information or wording', does not apply so as to require that information to be stated separately and together as a whole in relation to each part which is required by section 18(2) to be treated as a separate agreement. If that is correct, there is nothing in the wording of section 18 which directly imposes a requirement to comply with the form and contents requirements imposed under sections 60 and 61 of the CCA 1974 separately in relation to each such part of an agreement.

1.147 There are indications in section 18(4) and the Schedules to the Consumer Credit (Agreements) Regulations 1983 that such of the requirements set out in those Regulations as apply to a multiple agreement are to be met in relation to the multiple agreement as a single agreement and not separately in relation to each part of a multiple agreement that contains parts.

1.148 Section 18(4) provides that:

> Where under subsection (2) a part of a multiple agreement is to be treated as a separate agreement, the multiple agreement shall (with any necessary modifications) be construed accordingly; and any sum payable under the multiple agreement, if not apportioned by the parties, shall for the purposes of proceedings in any court relating to the multiple agreement be apportioned by the court as may be requisite.

This proceeds upon the assumption that the parties may not apportion payments between parts falling into different categories; if it had been the intention that the form and contents requirements should be met separately in relation to each such part, the requirement to state the amounts and timings of repayments in the agreement form would oblige the parties to apportion the payments.[202]

1.149 There are the following indications in the Agreements Regulations that the form and contents requirements which they lay down apply to each multiple agreement as a single agreement and that each part of a multiple agreement falling within section 18(1)(a) is not to be treated as a separate agreement for the purposes of every form and content requirement:

(i) Paragraph 1(3) of Schedule 1 to the Agreements Regulations prior to their amendment in 2005 and paragraph 1(4) of Schedule 1, as amended with

[202] Paras 12 and 13 of Sch 1 to the Consumer Credit (Agreements) Regulations 1983, which were clearly in contemplation when s 18 was enacted, as they were proposed in the Crowther Report and the White Paper.

effect on and from 31 May 2005, indicate that the requirement for a statutory heading that is imposed by regulation 2(1) and paragraph 1 of Schedule 1 applies so as to require a single heading for a multiple agreement within section 18(1)(a). Paragraph 1(3) of Schedule 1 in its unamended form and 1(4) of Schedule 1 as amended provide that:

> Where the document embodies an agreement of which at least one part is a credit agreement not regulated by the Act, the word 'partly' shall be inserted before 'regulated' unless the regulated and unregulated parts of the agreement are clearly separate.

There would be no heading requirement in relation to the unregulated part and so this is not a decisive indication.

(ii) Paragraph 14A of Schedule 1, which provides for the order in which part payments are to be applied or appropriated to different parts of an agreement, 'whether or not the agreement is a multiple agreement', indicates that, where column 1 of Schedule 1 refers to 'the agreement', it is referring to the whole agreement in the case of a multiple agreement and not to each of its constituent parts. Similar provision is made in relation to modifying agreements in paragraph 13A of Schedule 8.

(iii) Paragraphs 12 and 13 of Schedule 2 prior to the 2005 amendments, and paragraphs 14 and 15 of Schedule 2 as now amended identify the types of agreements in which the forms to which they relate are to be contained as including multiple agreements. These are the forms headed 'IMPORTANT— . . .' and it is plain from the wording of each of them that only one statement of protection with that heading is to be included in the document. Form 12 of Schedule 2 prior to the 2005 amendments and Form 15 of Schedule 2 as amended make it plain that the reference to a multiple agreement includes a multiple agreement falling within section 18(1)(a), if debtor-creditor-supplier agreements are a different category from debtor-creditor agreements or if restricted-use credit is a different category from unrestricted-use credit for the purposes of section 18(1)(a), because, in each case, the form is to be included in a multiple agreement of which at least one part is a debtor-creditor-supplier agreement falling within section 12(b) or (c) of the Act and the footnotes require certain wording to be included in the form in any multiple agreement of which at least one part is a debtor-creditor-supplier agreement falling within section 12(b) or (c) and at least one part is a debtor-creditor agreement falling within section 13(c).

(iv) Form 5 of Schedule 5 specifies a form of signature box for a multiple agreement of which at least one part is a credit agreement not regulated by the CCA 1974, the wording of which begins 'This is a Credit Agreement partly regulated . . .'. It does not appear to have been intended that a single agreement document should contain that signature box and also the signature box

that would apply in respect of the regulated part of the agreement if that part was treated as a separate agreement in the sense of being an agreement to which the form and contents requirements are to be separately applied. Moreover, Form 6 is for use in agreements 'not included in paragraphs 1–5 or 7–8' and so to which none of Forms 1 to 5 or 7 to 8 applies.

1.150 It can be argued that regulation 2(9) of the Agreements Regulations[203] indicates that the requirements of the Regulations are to apply separately in respect of each part to which section 18(2) applies. This is a proviso that where a document embodies a debtor-creditor-supplier agreement falling within section 12(a) of the CCA 1974 or a debtor-creditor agreement ('the principal agreement') and also embodies, or contains the option of, a debtor-creditor-supplier agreement falling within section 12(b) ('the subsidiary agreement'), where the subsidiary agreement is to finance a premium under a contract of insurance to provide a sum payable in the event of accident, sickness, unemployment, or death, to defray the sums payable to the creditor, or any other contract in so far as it relates to a guarantee of goods, or shortfall insurance, the document may contain:

> instead of the headings, statements of the protection and remedies available to debtors under the Act and signature boxes that would otherwise apply:
>
> (a) a heading and signature box in so far as they relate to the principal agreement;
> (b) a statement in Form 14 of Part I of Schedule 2 to these Regulations; and
> (c) other statements (other than in Form 16 of Part I of Schedule 2) of the protection and remedies available to debtors under the Act in so far as they relate to the principal agreement.

1.151 However, the proviso is expedient, whether or not there is a general requirement to set out separate financial and related particulars for the principal and subsidiary agreements, for the following reasons:

(i) a document providing for credit for an optional insurance or guarantee[204] would otherwise have to be drafted differently according to whether or not the optional insurance was taken up by the debtor, in particular including the statement of protection in Form 16 where it was not taken up and the statement of protection in Form 14 where it was taken up; and

(ii) where the insurance was taken up and the principal agreement was a hire-purchase or conditional sale agreement, two headings and two signature boxes would have to appear in the agreement.[205]

[203] Regulation 2(9) is in similar form to the proviso previously contained in reg 2(7A) before amendment of the Consumer Credit (Agreements) Regulations 1983 by the Consumer Credit (Agreements) (Amendments) Regulations 2004 and the Consumer Credit (Miscellaneous Amendments) Regulations 2004) in May 2005. The amendment extended the proviso to shortfall insurance.

[204] As credit agreements for the acquisition of vehicles on credit very often do.

[205] See Forms 1, 2, and 6 in Sch 5.

Accordingly, the proviso would not appear to provide an indication that the amount of credit and other financial and related particulars should all be separately stated for the principal agreement and for the subsidiary agreement.

1.152 The Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983 also contain indications that the form and contents requirements are to be applied to a multiple agreement as a single agreement, whether or not one part of it is placed in a different category from another part of it:

(i) Regulation 5(1) stipulates that the copy of a regulated agreement that is served on the debtor under section 62 or section 63(1) must include a box containing only a notice of cancellation rights 'in the Form numbered in Column 1 in Part II of the Schedule to these Regulations and set out in Column 3 appropriate to the type of agreement referred to in Column 2'. Accordingly, the copy must contain only one notice of cancellation rights and it must be in one or other of the forms in Part II of the Schedule, namely Form 3, 4, 5, 6, 7, 8, or 9. Column 2 identifies Form 7 as the correct form of notice for a multiple agreement which places at least one part within one category of agreement to which either Form 4 or Form 5 applies, and at least one part within one category of agreement to which Form 6 applies (other than one to which Form 8 applies). Form 5 is for debtor-creditor-supplier agreements falling within section 12(a) or (b) (which also fall within the section 11(1) definitions of restricted-use credit), and Form 6 is for agreements that are not multiples and which do not fall within the types of agreement for which Forms 3, 4, or 5 are prescribed. Accordingly, Form 7 and no other form of cancellation notice must appear in a multiple agreement of which part falls into the categories of section 11(1)(b) restricted-use credit and section 12(b) debtor-creditor-supplier agreement and part falls into the categories of section 11(2) unrestricted-use credit and section 13(c) debtor-creditor agreement.

(ii) Similarly, regulation 5(2), together with Part III of the Schedule, and regulation 6, together with Part VI, provide for a single form of cancellation notice to be included in the copy to be sent to the debtor under a multiple agreement under section 63(2), and for a specific cancellation notice to be sent under section 64(1)(b) or (2), as applicable.

1.153 However, section 18 of the CCA 1974 does make it clear that creditors and owners are not allowed to limit their compliance with the Act or with the Agreements Regulations 1983 to compliance with those requirements that apply to the principal part of an agreement. Some requirements might only apply to one, relatively insignificant aspect of a regulated agreement, but they must, nonetheless, be met. So, for example, where the agreement consists of a cash loan with credit for payment protection insurance, the description of the insurance and the cash price for

it must be stated,[206] although there will be no cash price or description to be given in relation to the cash loan.

1.154 It is to be noted that there is only one total charge for credit and only one APR in relation to an agreement because each are to be calculated by reference to the charges payable under 'the transaction', which undoubtedly includes any parts of an agreement which are required by section 18(2) to be treated as separate agreements.[207]

1.155 Occasionally, a particular requirement to state the amount of the credit will only apply to one part of an agreement. It may be, for example, that paragraphs 6 and 7 of Schedule 1 to the Agreements Regulations 1983, each of which requires a statement of the amount of the credit in respect of a differently described fixed-sum credit agreement could result in a requirement to include two statements of an amount of credit in an agreement if part of it falls within one of those descriptions and part of it within the other description. However, there would appear to be compelling support for the conclusion that section 18 of the CCA 1974 does not give rise to an obligation to comply with the Regulations made under the Act separately in relation to each part of an agreement which is required to be treated as a separate agreement.

[206] As required by paras 3 and 4 of Sch 1 to the Agreements Regulations 1983.

[207] See reg 4(b) of the Consumer Credit (Total Charge for Credit) Regulations 1980 and the definition of 'transaction' in reg 1(2).