COMMERCE

Implementing the Consumer Credit Act—II

F. A. R. Bennion

Extortionate credit bargains

THE court's power to reopen extortionate credit agreements (conferred by ss 137 to 140 of the Consumer Credit Act 1974) became operative on 16 May 1977 and applies to agreements and transactions whenever made (Consumer Credit Act 1974, sched 3, para 42; Consumer Credit Act 1974 (Commencement no 2) Order 1977, art 2 (2)). This is subject to limitation restrictions (see below). There is no financial limit on the agreements which may be reopened, but the debtor must be an individual and not an incorporated body. The power extends to hire purchase agreements but not ordinary hire.

In order to determine whether the power to reopen arises it is necessary to look at what the Act calls the 'credit bargain'. This comprises, in addition to the credit agreement itself, any transaction required by that agreement to be entered into or otherwise insisted on by the creditor (whether with the debtor or his relative). The question is twofold. Does the credit bargain require the debtor or his relative to make payments (whether unconditionally, or on certain contingencies) which are grossly exorbitant? Does it otherwise grossly contravene ordinary principles of fair dealing ? If the answer to either question is 'yes', the credit bargain is extortionate and the court's powers arise. To help the court answer these questions the Act lists factors to be taken into account if evidence on them is adduced. These include prevailing interest rates, the debtor's age, experience, business capacity and state of health, the financial pressure he was under, the degree of risk having regard to the value of any security, the relationship of the parties and so on. The listed factors are not exhaustive.

Considerations are to be taken into account which are not mentioned by the Act, eg payments to the creditor by third parties (such as commissions by shopkeepers honouring credit cards or trading checks), high overheads and handling charges (such as those incurred by pawnbrokers), and the length of time for which credit is provided. The Act does not reproduce the rebuttable presumption raised by the Moneylenders Act 1927 that an interest rate above a certain figure (48 per cent) is excessive. If an allegation of extortion is made the onus of disproving it lies on the creditor (s 171 (7)).

Nature of relief

Relief is available to the debtor and any surety, but not to a relative of the debtor who is a party to a transaction comprised in the extortionate 'credit bargain'. The court's powers are sweeping. It may direct accounts to be taken, and may set aside obligations imposed not only by the credit bargain but by 'any related agreement'. It may require the creditor to repay sums received by him and may alter the terms of the credit agreement in any way it considers necessary for doing justice between the parties. The purpose of all this is to relieve the debtor or surety from payment of any sum in excess of that 'fairly due and reasonable'. This phrase requires explanation. It is not intended to limit relief to sums currently owing. In relation to past payments by the debtor the court can order repayment of the excess above the amount which was fairly due and reasonable at the time of payment, it having already been determined that the credit bargain was extortionate. An example may clarify the point.

Facts M Ltd lend Mr B £10,000 on the basis that he will repay £15,000 in 12 months' time. He does so, but later claims repayment of part of this sum on the ground that the agreement

was extortionate. The court finds that a fair and reasonable repayment would have been £12,000.

Analysis The fact that the repayment required by the agreement exceeded the fair and reasonable sum does not mean that the agreement was extortionate. That question is to be decided by asking whether the charge of £5,000 over 12 months was 'grossly exorbitant'. If (but only if) the court finds that it was, the court will order repayment of the excess over what was fairly due and reasonable, ie a repayment of £3,000.

Delay and limitation

It is no bar to relief that the agreement has been fully per-formed, even where time has elapsed. The court must not alter the effect of any previous judgment however (s 139 (4)). Clearly, unreasonable delay in seeking remedies will adversely affect the debtor's chance of persuading the court to use its powers. It is not obliged to use them, even though it does find the credit bargain extortionate. Section 137 (1) says the court 'may' give relief, not that it must. Since the Act uses the imperative case when it wishes to impose a positive duty, it is clear that this is not an instance where 'may' means 'shall'.

An application to recover money must be made within six years from the accrual of the cause of action, ie the date when the money was originally paid by the debtor or surety or, where it was paid before 16 May 1977, the latter date (Limitation Act 1939, s 2 (1) (d)). The same limitation period applies to an order directing accounts to be taken (Limitation

Act 1939, s 2 (2)). For any other remedies the period is 12 years (Limitation Act 1939, s 2 (3)).

Use of the remedy

An application for relief must be made by the debtor or surety; the court cannot act of its own motion. The matter can be raised at any stage of any proceedings where the amount paid or payable under the credit agreement is relevant; or it can be the subject of proceedings begun solely for the purpose of obtaining relief. In view of the very wide range of transactions to which it applies, it may be expected that the extortion remedy will be much used at first and that a body of case law will rapidly accumulate. It is likely, however, that the courts will be sparing with relief. The bargain must after all be grossly exorbitant or unfair.

Credit status enquiries

The provisions regulating credit status enquiries mainly came into operation on 16 May 1977. They fall into two parts: one of very wide application, the other affecting only consumer credit agencies. The first part places duties on credit grantors, hire traders, credit brokers and negotiators to give the names and addresses of credit reference agencies consulted. The duty may arise only where a request is made by the consumer or may in certain cases be general. In view of the widespread and onerous nature of the general duty it is desirable to explain it in some detail.

The general duty is imposed on credit grantors and hire traders. It arises whenever the following conditions apply:

(1) a prospective debtor or hirer is introduced by a credit broker;

(2) during the antecedent negotiations the prospective creditor or owner applies to a credit reference agency for information about the financial standing of the consumer;

(3) the prospective creditor or owner decides not to proceed with the agreement;

(4) the prospective creditor or owner does not inform the consumer of this directly, but instead informs the credit broker.

Whenever these conditions apply the prospective creditor or owner is under a duty to tell the credit broker the name and address of the agency consulted, *regardless of whether any request for this information has been made.*

Where a duty to give information about credit reference agencies consulted arises, the consequences of infringement differ according to the origin of the duty. If it derives from the Act itself, contravention is a criminal offence punishable by a fine not exceeding £200. If (as with the general duty explained above) it derives from the Consumer Credit (Conduct of Business) (Credit References) Regulations 1977, there is no penal sanction, though, as with all contraventions of provisions made by or under the Act, s 25 (2) (b) makes it a ground for refusing or revoking a licence.

The other part of the credit status provisions, derived from ss 158 to 160 of the Consumer Credit Act 1974, places duties only on credit reference agencies. These are defined as businesses whose activities comprise the furnishing of persons with information relevant to the financial standing of individuals, being information collected by the agency for that purpose. The final words exclude operations like the banks' status enquiry systems, where the information is gained from operating customers' accounts. Solicitors who gather information to pass on to their clients (eg about the credit worthiness of prospective tenants of a client's property) are excluded by the fact that the term is clearly inappropriate to describe them, even though their activities might fall within its literal definition.

Whether or not an individual has been informed that a particular credit reference agency keeps a file on him, he has the right to apply to the agency for information. If the agency keeps no file on him it must tell him so. Otherwise its duty depends on whether he is affected by s 160. If he is not so affected the agency must give him a copy of his entire file, reduced where necessary into plain English. Section 160 is designed to save agencies having to give business consumers (it does not apply to private individuals) copies of their entire file where this would reveal sources of information and thus adversely affect the service which the agency is able to provide to its customers. Where the Director General of Fair Trading has directed that s 160 shall apply to the agency and the applicant is a business consumer, his rights are restricted to obtaining such information included in or based on entries in his file as the Director General may direct.

If when he sees the copy of his file (or such more limited information as he has been-given under the s 160 procedure) the consumer considers it to be incorrect to an extent likely to prejudice him he can require correction of the file. There are elaborate provisions to resolve disputes and ensure that customers of the agency who have received incorrect infor-mation are notified of corrections. Breach by an agency of the statutory requirements is punishable by a fine not exceeding £200.

F. A. R. BENNION

To be concluded