 Website: www.francisbennion.com
Doc. No. 1999.004 Published in *Consumer Credit Control* via Release 49
Any footnotes are shown at the bottom of each page
For full version of abbreviations click 'Abbreviations' on FB's website.

Multiple Agreements Under the Consumer Credit Act 1974 s. 18

Note on Consumer Credit Act 1974 s 18

See also the following, which also relate to the Consumer Credit Act 1974 s 18, 1999.029, 1999.001.NFB and 2006.001.NFB.

I

Multiple Agreements Under the Consumer Credit Act 1974

I have written this article to explain the intended application of section 18 of the Consumer Credit Act 1974, which deals with multiple agreements. It seems desirable to do this in view of the widespread misapprehension concerning section 18.[1]

Purposes of section 18

Section 18 is both an anti-avoidance provision and a clarifying provision. In pursuit of the first purpose, it seeks to prevent credit grantors and hirers from evading the Act by combining in one agreement transactions it intends to regulate with others it does not. In pursuit of the second purpose, it states the consequences of the obvious fact that the whole or parts of a single agreement, even when it is not designed for evasion of the Act, will often fall into more than one category. It spells out what under earlier legislation had been left to the court to divine, and should be taken as declaratory of what the courts might have been expected to lay down even without its guidance.[2]

The expression 'multiple agreement' is defined by section 18(1) as an agreement whose terms are such as-

> '(a) to place a part of it within one category of agreement mentioned in this Act, and another part of it within a different category of agreement so mentioned, or within a category of agreement not so mentioned, or
>
> (b) to place it, or a part of it, within two or more categories of agreement so mentioned.'

The clue to the meaning of this lies in the fact that the Act and its accompanying subordinate legislation make use of a large number of classifications of credit and hire agreements. Section 18(1) refers to each of these as 'a category of agreement mentioned in this Act', a phrase which should also be taken to embrace categories of agreement mentioned in subordinate legislation made under the Act.[3] I will refer to all of these as 'CCA categories'.

[1] I am grateful to Professor Paul Dobson for help in updating an early draft of this article, which I began writing some years ago.
[2] See, e.g., *Mutual Finance Ltd. v Davidson* [1963] 1 WLR 134, discussed below.
[3] Here I have to admit that as well as referring to categories of agreement mentioned (or not mentioned) in the Act, section 18 should also have referred to categories mentioned (or not mentioned) in

Section 18(1) also refers to categories of agreement *not* mentioned in the Act, which I will refer to as 'non-CCA categories'.

The wording of section 18(1) is highly compressed statutory language. It applies cumulatively, that is both paragraph (a) and paragraph (b) can apply to the same agreement. Pulling the language apart, we can say that each of the following is a 'multiple agreement'.

1. An agreement whose terms are such as to place one part of it ('part A') within one CCA category and another part of it ('part B') within a different CCA category.[4]

2. An agreement whose terms are such as to place one part of it ('part C') within a CCA category and another part of it ('part D') within a non-CCA category.[5]

3. An agreement whose terms are such as to place the whole of it within two or more CCA categories.[6]

4. An agreement whose terms are such as to place a part of it ('part E') within two or more CCA categories.[7]

The same agreement can fall into two or more of these four classes. I will refer to agreements falling within them as Class 1, Class 2, Class 3 and Class 4 agreements respectively. It may be wondered why there is not a fifth class, designating an agreement whose terms are such as to place the whole of it within a CCA category and also within a non-CCA category. This is ignored by section 18 because it does not need mentioning. The fact that the whole of an agreement falls within a non-CCA category is ex hypothesi irrelevant to the working of the Act, whether or not the whole of the agreement also falls within one or more CCA categories. There is therefore no need for section 18 to say anything about it.

What is a 'category of agreement'?

Section 18 can be understood only if the nature of a 'category of agreement' is grasped. The expression is not defined in the Act, and has caused difficulty. It was not defined because it is intended to be infinitely flexible: it means whatever the context requires it to mean.

The potential meaning of the phrase can be grasped by supposing that a list were compiled of every type of agreement 'mentioned in the Act', that is every possible 'CCA category'. The Act begins to mention types of agreement in section 8. Starting the list there, one would get the following CCA categories: ***personal credit agreement***, ***consumer credit agreement***, ***regulated agreement*** and ***exempt agreement***. Going on to section 9 one would add ***hire-purchase agreement***. Section 10 refers to 'running-account credit' rather than 'a running-account credit agreement'. This variation in wording does not make any difference to the operation of the principle. A personal credit agreement which provides running-account credit is a distinct 'category of agreement mentioned in this Act' within the meaning of section 18. Wherever the Act says something specific about a certain sort of agreement, in whatever way it says it, that creates a 'CCA category'.

---

subordinate legislation made under the Act. Since however the section is, as explained above, to be looked on as declaratory of the position which the courts ought to arrive at without its benefit, it is submitted that it would be a correct construction to regard the phrase 'mentioned in this Act' as if it read 'mentioned in this Act or in regulations or orders made under this Act'.

[4] Section 18(1)(a), first portion.

[5] Section 18(1)(a), second portion.

[6] Section 18(1)(b), first portion.

[7] Section 18(1)(b), second portion.

This is perfectly plain, so it is puzzling that commentators have had difficulty with it. Professor Goode says that the phrase 'category of agreement mentioned in this Act' is susceptible of two different interpretations, one confined to agreements mentioned in Part II of the Act and the other going wider.[8] This view is untenable under the principles applicable to statutory interpretation, since there is no reason why the plain words 'mentioned in this Act' should be construed as if they read 'mentioned in Part II of this Act'. Professor Goode's suggested alternative meaning, namely a class of agreement 'accorded distinct legal treatment by the Act', is obviously the correct one.

In their note to section 18 Guest and Lloyd also seek to read in words that are not present in the Act. The note says the reference to two or more categories 'must mean disparate categories, otherwise all agreements would be multiple'. They go on to say that even the simplest credit agreement necessarily falls within two or more categories, 'e.g. personal credit agreement, consumer credit agreement, regulated agreement etc'. This is obviously correct, but it does not affect the plain meaning of section 18 or hinder its operation in any way. It provides no justifiable ground for reading in restrictive words not included by the draftsman. Echoing Guest and Lloyd, A. H. Macdonald said-

> 'Every regulated agreement must be either fixed sum or running account: every regulated agreement must be either debtor-creditor or debtor-creditor-supplier. If those are categories, then every regulated agreement falls into two categories and so every regulated agreement must be multiple. The Act can't mean that.'[9]

The Act does mean that. However the effect is not as troublesome as these commentators think. All section 18 says about say a fixed-sum debtor-creditor agreement is that it is to be treated as an agreement in both of those categories. It is a fixed-sum credit agreement, and it is a debtor-creditor agreement. So any provision of the Act expressed in terms of fixed-sum credit applies to it, and any provision expressed in terms of debtor-creditor agreements applies to it. That is only what one would expect. The agreement is a multiple agreement, but this presents no practical problems.

What the Act says about each of the relevant types of agreement has effect in relation to any multiple agreement, and theoretically it (together with the subordinate legislation) has to be considered in relation to each relevant agreement in turn. In practice this is not necessary. The experienced practitioner quickly perceives what is required. If for example one of the relevant types of agreement is 'exempt agreement' nothing more is needed: the Act does not apply. If one of the types is 'regulated agreement', then all that is needed is to comply with the requirements relating to the relevant type of regulated agreement. And so on.

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.[10]

Subsections (2) to (4) of section 18

The sole purpose of mentioning a particular type of agreement in the Act is to lay down rules for an agreement which lies within the category indicated, ***but only so far as it lies within it***. A rule designed for one type of 'consumer credit agreement', for example the rule laid down in section 16(1) (exempt agreements) that in specified circumstances such an agreement is not to be regulated by the Act, is not intended to be applicable to other types of 'consumer credit

[8] *Consumer Credit Legislation*, paragraph 561.
[9] *Credit*, April 1986, page 20.
[10] It is known as weightless drafting: see Bennion, 'Threading the Legislative Maze - 6' 162 JP [1998] 856.

agreement'. So for example if a particular 'consumer credit agreement' is partly of the kind mentioned in section 16(1) and partly of a different kind it is necessary to separate out the two elements in order that the Act can be applied to each correctly. That is done by subsections (2) to (4) of section 18, the relevant portions of which run as follows-

> '(2) Where a part of an agreement falls within subsection (1), that part shall be treated . . . as a separate agreement.
>
> (3) Where an agreement falls within subsection (1)(b), it shall be treated as an agreement in each of the categories in question . . .
>
> (4) 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.'

Let us apply this to what I am calling a Class 1 agreement, that is an agreement whose terms are such as to place one part of it ('part A') within one CCA category (call it 'category X') and another part of it ('part B') within a different CCA category ('category Y'). The effect is that part A is to be treated as a separate agreement, and so is part B. So the reference in section 18(3) to 'an agreement' applies separately to the notional agreement constituted by part A and to the notional agreement constituted by part B. The Act applies as if there were two separate agreements: part A falling within category X and part B falling within category Y. So if a single agreement comprised both a 'consumer credit agreement' and a 'consumer hire agreement', the parts of it relating to the former would be treated by the Act as a separate consumer credit agreement while the parts of it relating to the latter would be treated as a separate consumer hire agreement.[11]. Some parts would doubtless overlap and be included in both.

Now let us take the example of a Class 2 agreement, where the terms are such as to place one part of it ('part C') within a CCA category and another part of it ('part D') within a non-CCA category. Section 18(6) gives us a ready-made case-

> (6) This Act does not apply to a multiple agreement so far as the agreement relates to goods if under the agreement payments are to be made in respect of the goods in the form of rent (other than a rent-charge) issuing out of land.

This is directed to the furnished letting agreement. But for this subsection the part of the rent attributable to the use of the furniture (call it payable under part C of the agreement, with the remainder of the agreement being part D) would have fallen to be treated as a hire payment. The analysis would then have been that we have here a Class 2 agreement where part C falls within the CCA category 'consumer hire agreement' and part D falls within a non-CCA category which we might call a 'tenancy agreement'. (It does not matter what we call it because it is outside the Act.)

[11] So, applying the documentation requirements laid down in the Consumer Credit (Agreements) Regulations 1983, the whole agreement (since the division into separate parts is only a notional division) would need to have two statutory headings: *A Credit Agreement regulated by the Consumer Credit Act 1974* and *A Hire Agreement regulated by the Consumer Credit Act 1974.* If an agreement is both a regulated credit agreement and a regulated hire agreement the customer obviously needs to be told this.

Section 18(4) provides for apportionment of amounts specified in the agreement. The possible need for the apportionment of payments and other amounts specified in the agreement is obvious where the agreement is notionally to be divided into parts, and section 18(4) provides for this. It assumes that no apportionment will be needed in the case of a Class 3 agreement, that is one whose terms are such as to place the whole of it within two or more CCA categories. This would apply for example where the whole agreement was a personal credit agreement and the whole of it was also a consumer credit agreement. No apportionment of amounts would be needed. If at the same time one part was a debtor-creditor agreement and another part a debtor-creditor-supplier agreement some apportionment might be needed, but in the latter respect it would be a Class 1 agreement. This illustrates how, as already explained, the same agreement may fall into two or more of the four classes mentioned above.

The 'parts' of an agreement

This brings us to what section 18 means by 'parts' of an agreement. It will by now be clear I hope that a 'part' need not be separately set out as such in the agreement. To elucidate this further, it may help if we think of the agreement in terms of a document. I will assume the agreement is printed in a single document and refer to the entirety of its terms as 'the document'.[12]Let us for the moment ignore the need to include special features in the document in order to comply with the Act. We must begin by uncovering the reality of the parties' agreement, quite apart from anything the Act may require.

The first point to make is that the document may either consist of what in business terms is truly one agreement only (let us call that a single-agreement document), or it may consist of what business people (and indeed customers also) would regard as two or more agreements rolled up together (a multi-agreement document).

An example of a multi-agreement document would be one that embodied (a) an agreement to take a car on hire-purchase, (b) an agreement to enter into a payments protection insurance policy relating to the hire-purchase agreement, and (c) an agreement for the periodical maintenance of the car. This is in one sense three separate agreements. Yet in another sense it is one agreement only, because the whole arrangement is entered into at the same time, and between the same parties, and is set down (or for our present purposes is deemed to be set down) in one document.

Here the multi-agreement document is one agreement, yet anyone would accept that at the same time it is three agreements rolled into one. Different parts of it constitute what are in substance different contracts. There are likely also to be common parts, such as the names, addresses, and signatures of the parties. We see no difficulty in speaking of a multi-agreement document of this kind as a 'multiple agreement'. It is natural to do this. Section 18 does it, and spells out what that means.

So in a multi-agreement document each part can be looked on, if relevant common parts are each time included, as a separate agreement complete in itself. It may or may not be possible to draw a line round this in the document; but that is immaterial. References in section 18 to a 'part' of an agreement are not confined to a part the wording of which is entirely separate from that of other parts of the agreement. An agreement may have a provision (for example that stating the names of the parties) which is common to two or more 'parts' of the agreement. The separation into parts will usually be notional, and independent of the actual way the wording of the agreement is arranged. Indeed it may be necessary to bring in, as a component of a 'part' of an agreement, terms which are implied rather than expressed.

[12] Even if in fact two or more documents have been used, we can for the purposes of this discussion treat them as combined together to form 'the document'.

Suppose a hire-purchase agreement also includes a provision ('provision P') financing a one-off premium payable by the debtor under a policy of payment protection insurance. Here the agreement comprises two 'parts'. One consists of provision P (including any implied terms relating to it), together with common provisions of the agreement (such as names of parties) applicable to provision P. The other consists of the express and implied provisions of the agreement relating to the hire-purchase transaction, together with other common provisions applicable to it.

The effect of section 18 in this example is to make it clear that the 'total price' for the purposes of section 90 of the Act (which relates to the retaking of protected hire-purchase goods) will not include the one-off premium under provision P. Equally the 'paid-up sum' for the purposes of section 90 is limited to the payments under the part constituting the hire-purchase agreement. This reverses *Mutual Finance Ltd v Davidson* [1963] 1 WLR 134, where an agreement for the hire-purchase of a car, coupled with the advance of credit covering the premium insuring the car, was mistakenly held to be *wholly* a hire-purchase agreement. As I have explained, section 18 was designed to avoid the difficulties caused by erroneous decisions of that sort.

It will be seen that what matters with a multi-agreement document is that it is possible to collect from the document as a whole what amount to the respective terms of two or more separate agreements. When we have done this, we can decide in relation to each set of terms whether or not it constitutes an agreement falling within a category mentioned in the Consumer Credit Act, for example a 'consumer credit agreement' as defined by section 8(2) or a contract which a creditor requires to be made as a condition of making the consumer credit agreement, within the meaning of the definition of 'transaction' in the Consumer Credit (Total Charge for Credit) Regulations 1980, reg. 1(1).

Now let us take a different example, this time a single-agreement document. The document embodies what it would be natural to call one agreement only, say a cash loan of £50 which is of a type offered by the creditor only to the creditor's own employees, and under which the only amount included in the total charge for credit is interest, always at the Bank of England's base rate. It is perhaps not natural to call this a 'multiple agreement', but section 18 does so. Why?

Many sections of the Act make provision in relation to an agreement for 'fixed-sum credit' as defined by section 10(1)(b). This document is an agreement for fixed-sum credit. Other sections make provision about an 'exempt agreement' as defined by section 189(1). This document is an exempt agreement[13]. Yet further sections make provision about a 'small agreement' as defined by section 17(1). This document is a small agreement.

A single agreement which embraces several items (for example a hire or hire-purchase agreement covering two or more articles) is not for that reason a 'multiple agreement'. If all the items are dealt with by the agreement in the same way (for example if they are all hired on common terms) the agreement will be treated in exactly the same way under section 18 as if it dealt with one item only. Even if the terms differ between the items this will not render it a multiple agreement unless the differences in the terms place parts of the agreement in different CCA categories. If the total credit or hire payments under such an agreement are above the statutory limit for a regulated agreement it is not possible to treat it as a regulated agreement by separating out the terms referable to each article under the provisions of section 18.

[13] Within article 4 of the Consumer Credit (Exempt Agreements) Order 1989, as amended by the Consumer Credit (Exempt Agreements)(Amendment) Order 1998 article 2.

So we see that 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'.[14] 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 view of a particular CCA category, the document contains irrelevant material (needed to comply with documentation requirements directed to some other category).

Professor Goode's error

Professor Goode's erroneous position can be described as follows. Basing himself on section 18(1), he coins two terms not found in the Act, namely 'multipart agreement' and 'unitary agreement'. These are rooted in the (mistaken) supposition that an agreement must either be within paragraph (a) of the subsection or paragraph (b), but cannot be within both. According to Professor Goode a 'multipart agreement' is within paragraph (a) and a 'unitary agreement' within paragraph (b). He says that section 18 'draws a clear distinction between an agreement in parts each of which is in a different category and a unitary agreement falling within two or more statutory categories'[15]. He says that a loan agreement is a multipart agreement where the part of the loan which is to be applied for one purpose is repayable on terms or in a manner different from the terms or manner applicable to the part or parts to be applied for other purposes.[16] In other words a loan agreement is a multipart agreement only where it has two or more purposes and the repayment conditions for these differ. It is a unitary agreement, says Professor Goode, if 'the terms of the agreement as to interest and repayment apply to the loan as a whole without differentiation between one component and the other or others . . . By contrast, where the part of the loan which is to be applied for one purpose is repayable on terms or in a manner different from that applicable to the part or parts to be applied for other purposes, the loan agreement will be a multipart agreement and each will be considered a separate agreement'.[17] Professor Goode's Examples 1 and 2 show a £10,000 loan for a non-exempt purpose being tacked on to one of £20,000 for an exempt purpose.[18] According to Professor Goode's analysis the former loan escapes control if the repayment conditions for the two are the same but not if they differ.

Professor Goode's analysis breaks down at the first hurdle. It depends on the proposition that an agreement cannot fall within both section 18(1)(a) and section 18(1)(b), but as explained above this is not so: an agreement may well fall within both paragraphs. A further example may be helpful in demonstrating this. A contract is made between Mr A and Mr B (acting in the course of his business). Under its terms Mr B agrees to lend Mr A £200 and also hire him a car for six months at £100 a month. The moneylending part of the contract is treated by

[14] *Encyclopedia of Consumer Credit Law*, notes to section 18.
[15] *Consumer Credit Legislation*, paragraph 559 - though he accepts that where it is a multipart agreement, one of the parts could then be a unitary agreement falling within one or more categories. In that situation he coins the expression 'mixed multipart agreement' to describe the overall agreement (paragraphs 559 and 571).

[16] *Consumer Credit Legislation*, paragraph 2419.
[17] *Consumer Credit Legislation*, paragraph 2419. The concept of a 'unitary agreement' is also used by Guest and Lloyd, who in their *Encyclopedia of Consumer Credit Law* refer in their notes to section 18 to the case where 'the agreement is a *unitary* agreement, not in parts'.
[18] *Consumer Credit Legislation*, paragraph 2419.

section 18 as a separate consumer credit agreement, while the hiring part is treated by it as a separate consumer hire agreement. On the other hand the entire agreement is a regulated agreement. So from the point of view of the provisions of the Act relating to consumer credit agreements and consumer hire agreements the contract is a multiple agreement, while from the point of view of the provisions relating to regulated agreements it is not.

There are further objections to Professor Goode's thesis. It is inconsistent with Professor Guest's correct statement, quoted above, that the form of the agreement is irrelevant. It is also inconsistent with Professor Goode's own admission that one objective of section 18 is 'to ensure that the Act (and in particular the £25,000 ceiling on its application) is not avoided by artificially combining distinct bargains, one or more of which would be within the statutory ceiling, into a single agreement above the ceiling'.[19] It is an invitation to the sort of avoidance by creating insignificant distinctions that section 18 was obviously designed to prevent. It also ignores the fact that section 18 is concerned with ***different*** CCA categories. If disparate repayment conditions for two parts of a loan both fit within the CCA category occupied by the loan agreement (as they usually would do) it is irrelevant for the purposes of section 18 that repayment conditions are different.[20] Professor Goode's definition of 'multipart agreement' is both too wide and too narrow. It is too wide in making one type of agreement, namely an agreement containing differing repayment conditions but falling within only one CCA category, a multipart agreement when it is not in that respect a multiple agreement at all. It is too narrow in saying that another type of agreement, namely one which has uniform repayment conditions but parts of which fall within different CCA categories, is not a multiple agreement.

By being too wide, Professor Goode's definition could turn some unregulated agreements into apparent regulated agreements. This would do no harm to consumers, but would cause credit or hire traders unnecessarily to complicate their transactions by complying with the Act's documentation requirements when they did not need to. By being too narrow, the definition could cause harm to consumers. This it would do by negating the true effect of section 18 in relation to an agreement which was in fact a 'multipart agreement' but was outside Professor Goode's definition. So a part which should be treated as a separate regulated agreement, and therefore subject to the Act's documentation requirements, would appear to escape regulation. On a correct application of section 18, however, such an agreement does not really escape regulation; so, if the documentation requirements were not complied with the agreement would be improperly executed. Under section 65(1), a court order would be required before the agreement could be enforced by the trader. Under section 127 the court could refuse to make this order, or could reduce the amount otherwise payable by the customer.

A worked example

I conclude with a fully worked example concerning the sort of transaction that readers are likely to encounter in practice. A mortgage company (M) wishes to float a Scheme under which it would offer its existing borrowers a further advance facility combined with refinancing. M wants to call this a 'Topup Loan'. While the loan under the original mortgage would be outside the Act either because its amount exceeded the statutory limit or because it would be an exempt agreement under the combined effect of section 16 and the Consumer Credit (Exempt Agreements) Order 1989, the further advance under the Scheme would in most cases be of an amount below £25,000 and for a non-exempt purpose. Nevertheless M wishes the Act not to apply.

In this connection it is pertinent to note that, by virtue of article 2(2)(c) of the 1989 Order, a debtor-creditor agreement secured by a land mortgage to refinance any existing indebtedness

[19] *Consumer Credit Legislation*, paragraph 558.1.
[20] This is why MIRAS is irrelevant under section 18.

of the debtor, whether to the creditor or another person, under any agreement by which the debtor was provided with credit for the purchase of land (including, by virtue of the Interpretation Act 1978 sections 5 and 23(1) and Schedule 1, buildings on the land) is an exempt agreement. By virtue of the Interpretation Act 1978 section 11 and the definition of 'finance' in section 189(1) of the 1974 Act, the term 'refinance' here means refinance *wholly or partly*.

Within the meaning of the Consumer Credit Act the proposed Topup Loan would *wholly* refinance the outstanding obligations under the existing mortgage, but it would also provide an additional loan by way of further advance which, as stated above, would in many cases be of an amount below £25,000 and for a non-exempt purpose. The borrower would be required by a term of the agreement to use the refinancing element to pay off the earlier mortgage. Therefore that element would be for restricted-use credit within the meaning of section 11. On the other hand the further advance element would be for unrestricted-use credit.

In such a case the agreement for the Topup Loan would be a multiple agreement within the meaning of section 18. It would be partly (so far as it refinanced the original mortgage) either an exempt agreement or outside the monetary limit of £25,000 and partly (so far as it provided a further advance not exceeding £25,000) a regulated agreement subject to the Act's rules as to documentation etc. It would also be partly for restricted-use credit and partly for unrestricted-use credit. By apportionment under section 18(4) the deemed separate refinancing agreement would have the relevant parts of sums specified in the actual agreement, such as the principal and interest payments, allocated to it. The same would apply to the deemed separate further advance agreement.

Thus a Topup Loan would be wholly within (1) the CCA category of 'personal credit agreement', (2) the CCA category of agreement for 'fixed-sum credit' and (3) the CCA category of 'debtor-creditor agreement'. However only the part dealing with refinancing would be within the CCA category of 'exempt agreement'. Again, only this refinancing element would be within the CCA category of 'restricted-use credit agreement'. Only the element relating to the further advance would be within the CCA categories of 'regulated agreement' and 'unrestricted-use credit agreement'. It follows that, no matter how the proposed Topup Loan agreement is worded, it must be a Class 1 agreement. The refinancing part and the further advance part must each be treated for the purposes of the Act as a separate agreement. Making the repayment and interest provisions identical for both types of credit would not, as Professor Goode would have us believe, turn it into a unitary agreement exempt from the Act.

My analysis is confirmed by Example 16 in Schedule 2 to the Act.[21] The example concerns the issue of a credit card for use in obtaining on credit either cash or goods. The analysis attached to this statutory example says that so far as it relates to goods the agreement is to be treated as a separate debtor-creditor-supplier agreement, while so far as it relates to cash it is to be treated as a separate debtor-creditor agreement. In defence of his own analysis, Professor Goode finds himself compelled to say that Example 16 is erroneous.[22] He also says that Example 18 is erroneous! That statutory examples are admitted by him to be inconsistent with Professor Goode's own analysis might rather be thought an indication that it is the latter that is out of keeping with the legal meaning and intention of the Act.

Section 18 has not so far come before the courts at any level higher than a county court. When it does do so they are likely to be asked to decide between Professor Goode's analysis and my own. No one can say which will be found to be correct, but there is a possibility that mine will

[21] It is stated in section 188(1) that these examples 'shall have effect for illustrating the use of terminology employed in this Act'.
[22] *Consumer Credit Legislation*, paragraph 564.

be upheld. This would mean that in cases such as the Topup Loan the further advance element would be held to be a separate regulated agreement that was improperly executed, with the consequences mentioned above.

Could this risk be avoided by amending the proposed Scheme? The element dealing with refinancing is necessarily a restricted-use credit agreement because section 11(1)(c) expressly says so. To prevent the element dealing with the further advance from falling into a different CCA category (namely 'unrestricted-use credit agreement') it would be necessary to ensure that it too provided restricted-use credit. To ensure this, it is not enough merely to include a restrictive term in the agreement. I inserted an anti-avoidance provision (subsection (3)) in section 11. This reads-

> (3) An agreement does not fall within subsection (1) [restricted-use credit] if the credit is provided in such a way as to leave the debtor free to use it as he chooses, even though certain uses would contravene that or any other agreement.

The presence of subsection (3) reinforces the argument that section 18 is an anti-avoidance provision, which the higher courts are likely to take seriously as such when in due course it comes before them. Section 11(3) could be attempted to be got round by including in the Topup Loan agreement a term which restricted the further advance to specified uses (which could be of any nature) and provided for payment of the relevant part of the advance direct to the supplier, rather than to the borrower. This device would be inconvenient commercially. It would also be ineffective. Although the use of it would place the entire Topup Loan agreement within the CCA category of restricted-use credit agreement it would still be a multiple agreement. The refinancing element would fall to be treated either as a separate exempt agreement or as a separate agreement within a non-CCA category. The further advance element would fall to be treated as a separate regulated agreement.

It follows that neither Professor Goode's 'unitary agreement' nor any other drafting device could be effective to prevent the further advance element in the Topup Loan agreement falling within the Act's controls. Nor could this be achieved by abandoning the idea of granting a new mortgage and either treating the loan as a further advance under the original mortgage or entering into a modifying agreement. The reason is that, as I very clearly remember, the Government's intention when the Act was drafted was that a transaction that was in substance a loan within the monetary limit laid down by it should be caught however it was dressed up. I drafted the anti-avoidance provisions accordingly, and in my opinion they are effective for the intended purpose.

The Hannah case

Since the first draft of this article was prepared there has been a relevant county court decision. *The National Home Loans Corporation PLC v Hannah (Aidan Ellis)* [1997] C.C.L.R. 7 concerned a remortgage coupled with a further cash advance of just over £10,000. H.H. Judge Mellor relied upon section 11(3) in finding that the whole of the loan (including that portion which was advanced for the purpose of repaying the existing mortgage) was for unrestricted-use credit. He did this on the basis that the debtor would have been entitled to repay the existing mortgage from any source and, if he did, then he would have been free to use the whole of the new loan for any purpose he wished. However this is a question of evidence. If, as seems to have been the case, the facts were that the debtor lacked the means to repay the existing mortgage loan in any other way then he was not in fact free to use the whole of the new loan for any purpose he wished. A finding to the contrary needs to have been based on evidence that he was free in the actual circumstances of the case, which it was not. On the contrary the jointly-instructed solicitor who received the money advanced from the new lender would not have been entitled to pass to the debtor the portion required to redeem the existing mortgage. So *Hannah* was wrongly decided, as is indicated (at page 14)

in the comment by the learned editor of the textbook in which the report appears, *Consumer Credit Control* by Bennion and Dobson.

Postscript

It may be thought a reproach to the draftsman of the Consumer Credit Act that two learned professors should misunderstand his text in this way. I take comfort from an opinion on the point given by the late Richard Yorke Q.C. that I was shown after the first draft of this article was completed. Apparently even without consulting my looseleaf textbook *Consumer Credit Control* (in which it has been explained on the lines of this article since the book first came out in 1976[23]) he unerringly arrived at the conclusions set out above. It seems that neither Professor Goode nor Professor Guest consulted my book either, since they do not refer to it, much less attempt to refute its arguments.

[Published in *Consumer Credit Control* via Release 49. To be cited as [1999] C.I.C.C.1. This stands for 'Current Issues in Consumer Credit'.]

1999.004
[1999] CICC 1

[23] See the definition of 'multiple agreement' in *Consumer Credit Control*, vol. 1, pages 1116-1120.