Introductory Note by FB At the invitation of Fred Philpott I wrote the following as the foreword to *The Law of Consumer Credit and Hire* by Fred Philpott, Wiliam Hibbert, Stephen Neville, Simon Popplewell, Bradley Say, Peter Sayer and Julia Smith (Oxford, 2009). For various reasons it was not in the end used in that way. As I took considerable trouble over it, it seems a pity to waste it. I am therefore putting it on my website in an edited version. I have omitted the final part, which gave personal notes on the authors.

Consumer credit: an aborted foreword

As the draftsman (or as most people conscious of the need to be gender-neutral would nowadays say, the drafter) of the Consumer Credit Act 1974 ("the CCA"), and as a long-standing friend and colleague of fellow Old Lyonian Fred Philpott, I am pleased to introduce *The Law of Consumer Credit and Hire*. Its authors, led by Fred, are barrister members of Gough Square Chambers in London with extensive practices in the field about which they write. It is refreshing and useful to have detailed views on the law of consumer credit and hire expressed by professional colleagues who are practitioners in the field.

Time has not allowed me a close study of the contents of the book, though I have taken samples with due appreciation. Nor, now aged eighty-six and settled (though not idle) in idyllic Devon, am I closely familiar with the current state of play in the field. So it seems most useful to take the opportunity in this foreword to give readers some thoughts on the drafting and subsequent forensic progress of the CCA in a way which might be of use and interest to current and future practitioners.

Drafting of the CCA

The supply to individuals, including unincorporated firms, of credit (initially limited to £5,000) is comprehensively regulated throughout the United Kingdom by the CCA. This replaces the previous enactments regulating hire purchase, moneylending and pawnbroking, and imposed a new licensing system on many who, by way of business, grant consumer credit. It thus concerns retail and investment banks (except when exempt), finance houses, mail order firms, retailers, service industries and other businesses providing the citizen with financial accommodation. The CCA also extends to ancillary credit firms such as mortgage brokers, debt collectors and credit reference agencies. It regulates credit in the widest sense, that is any form of financial accommodation. Money loans, credit sales and hire purchase are the main categories. Since the CCA aims to be all-embracing, it also extends to hire transactions, since many of these are equivalent in substance, though not in form, to the giving of credit.

Credit is not sought for its own sake, but for what it will buy - its object. The CCA bases some important distinctions on this obvious fact. The object may be the purchase of land or goods, or the enjoyment of services such as transport or maintenance. Or it may simply be the general one of increasing the debtor's immediate purchasing power without reference to any particular use of it. An object separately recognised by the CCA is that of debtors who refinance their liabilities by an arrangement under which a debt-adjuster pays off the various debts in return for regular payments by the debtor.

The CCA system was not complete without the mass of regulations, orders and other subordinate instruments made under it. Inevitably, the final structure was complex and elaborate. Yet it had to be operated without undue difficulty (and with expert advice when needed) by hundreds of thousands of people forming a wide cross-section of our commercial life. The CCA was drafted with that fact very much in mind. Statutory regulation inevitably adds to the costs of the traders it governs. Such costs are ultimately borne by the consumer

and, since it is pointless to give people financial protection with one hand while dipping heavily into their pocket with the other, every effort was made to keep them to the minimum.

One obvious way of keeping down costs is to make the legislation as comprehensible to the profession as possible, and we tried hard to do this. It was for that reason that I departed from the usual anonymity of the legislative drafter and over the years published a number of explanatory books and articles. Whether this concern was justified is doubtful, having regard to dismissive attitudes of the sort displayed by the acting High Court judge who, having been referred in court to an article I had written explaining s. 18 of the CCA, said that having been the draftsman of the Act 'does not, of course, give his article any particular status'[1].

One contribution was the four-volume looseleaf work *Consumer Credit Control* in which I tried to help the profession by including a composite restatement of the legislation.[2] Through amalgamations the book came in time to be owned by a publisher who also owned another large work on the same subject, so it bit the dust.

The CCA uses a great number of terms for which it was found necessary to give definitions. The drafting of these follows a clear principle. Definitions in Acts of Parliament are of two main kinds: the term which, without the definition, is virtually meaningless, e.g. 'debtor-creditor-supplier agreement', and the term, such as 'advertisement' or 'business', which itself conveys the essential meaning—though for the sake of additional clarity it may be desirable to spell this out.

The CCA deals with expressions of the former kind by defining them in the first place where they are used, and also including the term in the comprehensive definition section (s. 189). Expressions of the latter type are only defined in the definition section, thus avoiding cluttering up the body of the Act with definitions not essential to the basic meaning. It follows that all the terms specifically defined by the CCA are included in s. 189 (which thus forms a comprehensive dictionary to the Act). In the case of definitions in the first category the definition is repeated in s. 189 if it is fairly brief; otherwise the reader is referred back to the section containing it.

It is often difficult to grasp the full meaning of an expression even though it is defined. Accordingly the CCA contains the novel feature of a special schedule of examples (Schedule 2). These illustrate the application of thirty-one of the most important terms used by the Act. In the section introducing this (s. 188) it is made clear that the examples are not exhaustive and that if it were thought that any of them was inconsistent with a provision of the Act that provision would prevail[3]. Power is given to add further examples if thought desirable, but this has not been used. On Schedule 2, the Australian Attorney General, Peter Durack QC, commented: 'The advantages of using such techniques in appropriate cases have perhaps been ignored or undervalued, or both'[4]. The model of Schedule 2 has not been repeated in British legislation.

The CCA creates many new offences, and the penalties for these are set out comprehensively in Schedule 1. This enables the user to see at once the range of activities made subject to criminal sanctions. Another set of grouped provisions is that dealing with the onus of proof in various court proceedings, collected together in s. 171.

Complaint is often made that it is not possible to tell from an Act of Parliament whether conduct regulated by it is by implication subject to unspecified criminal or civil sanctions. To

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[1] See *Heath v Southern Pacific Mortgage Limited* [2009] EWHC 103 (Ch) at 46.

[2] For an explanation of the composite restatement method see F A R Bennion, *Statute Law* (2nd edn, 1983), ch. 27 and App. B, *http://www.francisbennion.com/1983/006/289.htm.*

[3] This expresses the general rule: *Mahomed Syedal Ariffin v Yeoh Ooi Gark* [1916] 2 AC 575 at 581. Section 188 was relied on by the Court of Appeal in *Heath v Southern Pacific Mortgage Limited* [2009] EWCA Civ 1135.

[4] Symposium on Statutory Interpretation, Canberra 1983, para 5.10.

meet this criticism, s. 170 provides that there are to be no civil or criminal sanctions other than those expressly set out in the CCA, a novel feature. Another complaint concerns the question whether contracting out from an Act's provisions is permitted. Section 173 spells out the answer to this. The precise effect of unlicensed trading on the general law of contract is specified in s. 40 (order of the OFT required). Another thing the drafter had to remember to do was authorise changes in monetary limits, so as to allow for inflation. This was done by s. 181.

The commencement and transitional provisions are set out in Schedule 3, which operates on the following principle. Except where otherwise mentioned, the provisions of the CCA came into effect on its passing, 31 July 1974. Provisions which did not come into force then (and that includes nearly all the operative provisions) were brought into force later by commencement orders. As and when these commencement orders were made, they were required by s. 192(2) to amend the relevant provision in Schedule 3 so as to incorporate the commencement date in the Act. This meant that a user with a fully annotated text was able to see from the amended Act itself the date when each provision came into operation, and did not need to search through statutory instruments to find it. This useful feature has not been copied in any other UK legislation, as I hoped it might be.

Unusually, s. 192(4) said that the Secretary of State 'shall' make orders bringing into operation the amendments and repeals set out in Schedules 4 and 5 to the CCA, but it did not say when this must be. No such compulsion was applied to other commencement provisions, and it was eleven years before the CCA had been brought fully into force. This long delay attracted criticism. It is arguable that it was unlawful as being unreasonable.

Litigation under the CCA

The CCA has given rise to some interesting litigation.

Financial institutions struggled against the provisions rendering offending agreements unenforceable. It is implied, unless the contrary appears, that equitable doctrines, like other provisions of the general law, apply in aid of particular statutory provisions where appropriate[5]. Sir Richard Scott V-C[6] refused to apply these doctrines by treating damages awarded where statutory requirements had not been complied with as subject to a trust in favour of the infringer. He said:

> '[The CCA] has enacted that an agreement not "properly executed" is unenforceable. It is not, in my judgment, the function of the courts to remedy that unenforceability by creating a trust in favour of 1st Automotive over damages payable to Mrs Dimond'.[7]

This was followed by the Appellate Committee of the House of Lords, where Lord Nicholls of Birkenhead said:

> 'The message to be gleaned from ss. 65, 106, 113 and 127 of [the CCA] is that where a court dismisses an application for an enforcement order under s. 65 the lender is intended by Parliament to be left without recourse against the borrower in respect of the loan. That being the consequence intended by Parliament, the lender cannot assert at common law that the borrower has been unjustly enriched. That would be inconsistent with the parliamentary intention in rendering the entire agreement unenforceable. True, [the CCA] does not expressly negative any other remedy available to the lender, nor does it render an improperly executed agreement unlawful. But when legislation renders the entire agreement inoperative, to use a neutral word, for failure to comply with prescribed formalities the legislation itself is

[5] See *Bennion on Statutory Interpretation* (5th edn, 2008), s. 330.
[6] As he then was; now Lord Scott of Foscote.
[7] *Dimond v Lovell* [1999] 3 All ER 1 at 18; [2000] Q.B. 216 at 238.

> the primary source of guidance on what are the legal consequences. Here the intention of Parliament is clear.'[8]

Section 127(3) of the CCA prevented the making of an enforcement order if s. 61(1)(a) (signing of agreements) was not complied with unless a document itself containing all the prescribed terms of the agreement was signed by the debtor or hirer. The Court of Appeal held that this provision, which I myself had thought up, thinking it justified[9], was incompatible with the European Convention on Human Rights. They held that s. 3(1) of the Human Rights Act 1998 did not enable s. 127(3) to be read and given effect conformably with these provisions. Accordingly they held that a declaration of incompatibility should be made by the court.[10] This was reversed by the House of Lords.[11] Nevertheless s. 127(3) was repealed by the Consumer Credit Act 2006, presumably as being too draconian. This perhaps shows that drafters should stick to their proper function and not invent policy.

It was over s. 127(3) that the CCA played a part in constitutional history. In the leading case of *Wilson v First County Trust Ltd*[12] Lord Nicholls of Birkenhead said that the Speaker of the House of Commons and the Clerk of the Parliaments had expressed concern to their Lordships at the 'wider significance' of the investigation of House of Commons proceedings undertaken in the case by the Court of Appeal. Lord Nicholls laid down the following important rule:

> 'The courts should not treat speeches made in Parliament, whether by ministers or others, as evidence of the policy considerations which led to legislation taking a particular form. The exercise on which the Court of Appeal engaged is not an appropriate exercise for a court. There are no circumstances in which it is appropriate for a court to refer to the record of parliamentary debates in order to decide whether an enactment is compatible with the Convention.'

Lord Nicholllssaid[13] that that was a different exercise from the one undertaken in *Pepper (Inspector of Taxes) v Hart*[14]. The House of Lords, sitting in its judicial capacity, was keenly aware, as indeed are all courts, of the importance of the legislature and the judiciary discharging their own constitutional roles. He added that this was the first time the authorities of Parliament had sought to be heard on the use of Hansard by the courts.

Until replaced by unfair relationship provisions[15], s. 138 of the CCA allowed relief to be given where a credit bargain was 'grossly exorbitant'. Edward Nugee QC, sitting as a judge, expressed doubt whether the word 'grossly' added anything. He cited the well-known remark of Lord Cranworth (then Rolfe B) that he 'could see no difference between negligence and gross negligence—that was the same thing, with the addition of a vituperative epithet'[16]. However Mr Nugee did not advert to the principle of construction requiring every word of an enactment to be given meaning. Here it is submitted that the addition of 'grossly' is clearly intended to tilt the balance away from any watered-down interpretation of the term 'exorbitant'. In a later case[17] the Court of Appeal insisted that the term 'grossly' in s. 138

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[8] *Wilson & Ors v. Secretary of State for Trade and Industry* [2003] UKHL 40, [2004] 1 AC 816, at 49.
[9] See *http://www.francisbennion.com/2003/061.htm*.
[10] *Wilson v First County Trust Ltd* [2001] EWCA Civ 633, [2001] 3 All ER 229.
[11] *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97.
[12] [2003] UKHL 40, [2003] 4 All ER 97.
[13] At [53].
[14] [1993] AC 593, [1993] 1 All ER 42.
[15] Consumer Credit Act 2006 ss. 19-22.
[16] See *Davies v Directloans Ltd* [1986] 1 WLR 823 at 836–837. Mr Philpott agrees with this in the present book: see 13.90.
[17] *Paragon Finance plc v Staunton, Paragon Finance plc v Nash* [2001] EWCA Civ 1466, [2002] 2 All ER 248, at 82.

must be given full effect. Similar was the ruling by the Administrative Court that 'grossly' in the Communications Act 2003 s 127(1)(a) required 'some added value' to be given.[18]

Here I definitely intended "grossly" to make a difference. This contrasts with s. 25, which requires a licensee to be a 'fit person'. In line with precedent, my instructions asked for 'fit and proper person'. This illustrates a common feature in traditional legal expression, namely a liking for the use of pairs of words, whether in antithesis or apposition. The most common reason for this (often illusory) is the drafter's reluctance to rely on one word, with the comforting feeling that a pair of terms somehow conveys more than the sum of its parts. As a drafter I prefer to add a word only when it adds to meaning.

Section 233 of my textbook on statutory interpretation says somewhat controversially: 'Delegated legislation made under an Act may be taken into account as persuasive authority on the legal meaning of the Act's provisions'. Sir Richard Scott V-C had something to say about this:

> 'I am very doubtful . . . whether it is proper to attempt to construe [the CCA] in the context of the 1983 regulations. It is certainly right to try and construe [the CCA] as a whole. But the 1983 regulations postdated the Act by some nine years and I do not think the content of the regulations can be taken to be a guide to what Parliament intended by the language used in the Act.'

I can confirm that an incorrect result would have ensued if the Court of Appeal had accepted counsel's argument and construed the CCA by reference to the 1983 regulations. This is because the drafter of the regulations misunderstood the Act.

An updating construction was applied to the CCA when Gloster J held that s. 75(1) applied to four-party supply transactions even though in 1974 such transactions involved only three parties[19]. She said that the overwhelming majority of transactions now involve four parties but fall into 'the same genus of facts'[20].

Litigation nearly arose over s. 141(1), but I believe was settled. I intended this to be a helpful provision. Omitting paragraphing, it reads:

> 'In England and Wales the county court shall have jurisdiction to hear and determine any action by the creditor or owner to enforce a regulated agreement or any security relating to it [and] any action to enforce any linked transaction against the debtor or hirer or his relative, *and such an action shall not be brought in any other court*.'

It was the words that I have italicised that caused the trouble. It was argued that they prevented enforcement in insolvency or bankruptcy proceedings. I would argue that such enforcement was saved by the maxim *generalibus specialia derogant* (special provisions override general ones)[21].

A feature of the drafting of the CCA is that it coins many terms, such as 'consumer credit business', 'credit-token', 'debtor-creditor-supplier agreement', 'fixed-sum credit' 'time order' 'credit reference agency' and 'pawn-receipt'. This was necessary for the purposes of the new system, but some people have been uncomfortable with it. Somehow we do not expect our Parliament to add to the already rich English language.

The drafting of the CCA was criticised by Clarke LJ, who started one of his judgments with the following:

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[18] *Director of Public Prosecutions v Collins* [2005] EWHC 1308 (Admin), [2005] 3 All ER 326 at 5.
[19] For updating construction see *Bennion on Statutory Interpretation* (5th edn, 2008), s. 288.
[20] *Office of Fair Trading v Lloyds TSB Bank plc and others* [2004] EWHC (Comm), [2005] 1 All ER 843 at [33]. The decision was reversed in part at [2006] EWCA Civ 268, [2006] 2 All ER 821 but not on this point.
[21] See *Bennion on Statutory Interpretation* (5th edn, 2008), pp. 307, 1164.

> ‘These appeals raise a number of issues under [the CCA] which 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.’[22]

I have spent over sixty years working in the field of statute law in different capacities, beginning with a year as an editorial assistant with Halsbury’s Statutes in 1948-49, so I am very familiar with remarks like that from learned judges. They reveal an unfortunate misapprehension. I have written many books and articles about aspects of statute law, and this is not the place for a full riposte to Clarke LJ. I will content myself with saying that he is demanding the impossible. It simply is not practicable for legislation which is required to do the work that the CCA is required to do to be ‘comprehensible to the layman’. It would be dangerous for lay persons to think they could understand such legislation without skilled help. Law, like medicine, is an expertise. That is why we have trained lawyers and a legal profession.

More understanding of the drafting of the CCA was shown when the Court of Appeal said:

> ‘. . . the draftsman has been careful and precise in his choice of language: for example, where “means” is intended the statute says “means”, and where “includes” is meant it says “includes”’[23].

To similar effect was a dictum by Gloster J:

> ‘There is no definition of the word “arrangements” in s 189(1) of [the CCA] but, in my judgment, in its context it clearly betrays a deliberate intention on the part of the draftsman to use broad, loose language. It is to be contrasted with the far narrower word “agreement”.’[24]

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[22] *McGinn v Grangewood Securities Ltd*. [2002] EWCA Civ 522 at 1.

[23] *Office of Fair Trading v Lloyds TSB Bank Plc & Ors* [2006] EWCA Civ 268; [2006] 3 WLR 452, at [65].

[24] *Office of Fair Trading v Lloyds TSB Bank plc and others* [2004] EWHC (Comm), [2005] 1 All ER 843 at [24]. The decision was reversed in part at [2006] EWCA Civ 268, [2006] 3 WLR 452, but not on this point.