Commercial Law Concentrate: Law Revision and Study Guide (6th edn)
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11. Consumer credit

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter discusses some of the key common law and statutory provisions relating to consumer credit agreements and the common issues that arise. It first explains the provisions of the Consumer Credit Act 1974, as amended by the Consumer Credit Act 2006. The chapter then considers the rights of debtors who take credit under a 'regulated agreement', along with the (previous) extortionate credit bargain provisions that have been replaced by a test which considers whether there was an unfair relationship between the debtor and the creditor. It also considers consumer hire agreements, exempt agreements, small agreements, and non-commercial agreements, as well as the liability of the creditor for the seller's misrepresentation or breach of contract, retaking of protected goods, and the debtor's right to complete payments ahead of time.

Keywords: consumer credit, credit agreements, Consumer Credit Act, regulated agreement, debtor, creditor, consumer hire agreements, liability, breach of contract

Key facts

- The principal piece of legislation is the **Consumer Credit Act 1974**.
- This has been amended by the **Consumer Credit Act 2006**, which has made a number of important changes to the legislation.
- The legislation provides rights to borrowers who take credit under a 'regulated agreement'.
- The extortionate credit bargain provisions have been replaced by a test which considers whether there was an unfair relationship between the borrower and the lender.

- There are strict formalities for completing regulated agreements. An improperly executed regulated agreement is enforceable against the borrower or hirer only by order of the court.
- A regulated agreement *may* be a cancellable agreement.
- In certain circumstances, the borrower will have a like claim against the lender for the supplier's misrepresentation or breach of contract.
- Since the closure on 1 April 2014 of the Office of Fair Trading, responsibility for the regulation of consumer credit activities has transferred to the Financial Conduct Authority.
- Although the **Consumer Credit Act 1974** (as amended) remains in force, it no longer provides the statutory framework for the *regulation* of consumer credit. The regulatory regime now falls under the **Financial Services and Markets Act 2000** by virtue of the **Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013**.

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Introduction

Many businesses and individuals require credit. The party providing the credit is known as the lender (**creditor**) and the party who borrows or owes the money is the borrower (**debtor**).

The **Consumer Credit Act (CCA) 1974** was gradually implemented over the course of 11 years until it was fully in force on 19 May 1985. Despite its title, the **CCA 1974** does not just deal with consumer credit; it also deals with parties who are provided with credit in the course of a business.

Until 1 April 2014, the **CCA 1974** required most businesses that lent money to consumers, or offered goods or services on credit terms, or engaged in certain ancillary credit activities, to be licensed by the Office of Fair Trading (OFT). Trading without a licence in such cases amounted to a criminal offence which could, on conviction, result in a fine and/or a term of imprisonment. The OFT closed on 1 April 2014, from which date responsibility for the regulation of consumer credit activities transferred to the Financial Conduct Authority (FCA).

Since 1 April 2014, by virtue of the **Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013 (FSMA RAO 2013)**, entering into consumer credit or consumer hire agreements or carrying on activities including credit brokerage or debt collection have been regulated activities for the purposes of the **Financial Services and Markets Act 2000 (FSMA)**. Any person carrying on credit-related or hire-related activities by way of business is now required to be authorised and regulated by the FCA, or hold 'interim permission' to do so, in order to carry on such activities lawfully and avoid breaching the 'general prohibition' under **s 19 FSMA** which may amount to a criminal offence.

The **CCA 1974** (as amended) gives rights to borrowers who take credit under a regulated agreement.

This chapter explains some of the key common law and statutory provisions relating to consumer credit agreements and the common issues that arise.

Table 11.1 shows which provisions of the new **FSMA RAO** correspond to the provisions of the **CCA**.

Table 11.1 Destination table comparing the CCA 1974 to the new (FSMA RAO 2013) regime provisions

CCA 1974 (SECTION)	FSMA RAO 2013 (ARTICLE)	COMMENTS
8(1) *Consumer credit agreement*	**60B(3)**	Definition of credit agreement has not changed
9(1) *Meaning of credit*	**60L(1)**	See definition
9(3) *Hire purchase agreement treated as* **fixed-sum credit**	**60L(8)**	
10 **Running-account credit** *and* **fixed-sum credit**	**60L(1)**	Minor drafting changes, including use of 'borrower' and 'lender' rather than 'debtor' and 'creditor'
11 *Restricted-use credit and unrestricted-use credit*	**60L(1) and 60L(2)**	
12 Debtor–creditor–supplier agreements	**60L(1)**	'debtor–creditor–supplier' is now 'borrower–lender–supplier'
13 *Debtor–creditor agreements*	**60L(1)**	'debtor–creditor' is now 'borrower–lender'
14 *Credit-token agreements*	Not applicable	Not carried forward as not relevant to **FSMA** provisions
15 *Consumer hire agreements*	**60N**	
16(1)–(4) *Exempt agreements where creditor is specified or of a description specified by Secretary of State*	**60E(1)–(4) and (7)**	FCA (rather than Secretary of State) to maintain list of persons/class of persons to whom exemption applies
16(5)(a) *Exemption by reference to number of payments*	**60F**	
16(5)(b)	**60G**	

CCA 1974 (SECTION)	FSMA RAO 2013 (ARTICLE)	COMMENTS
Exemption by reference to total charge for credit		
16(5)(c) Exemption by reference to a country outside the UK	**60C(8)**	
16(6) *Exemption for consumer hire agreements in relation to electricity, gas, or water linked to metering equipment*	**60P**	
16(6A), (6B) *Exemption for housing authorities*	**60E(5)** and **(7)**	
16(6C)–(6E) *Exemption for regulated mortgage contracts and home purchase plans*	**60C(2)**	
16A *Exemption for high net worth individuals*	**60H** and **60Q**	FCA (rather than Secretary of State) now deals with the declaration and statement for high net worth individuals
16B *Exemption relating to businesses*	**60C(3)–(7)** and **60O**	FCA now deals with exemption for businesses
16C *Exemption relating to investment properties*	**60D**	
20 *Total charge for credit*	**60M**	FCA (rather than Secretary of State) now deals with provision in rules as to the total charge for credit
189(1) *Definitions*	**60L(1)**	'Individual' is now 'relevant recipient of credit'

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Regulated agreements

The **CCA 1974** and **CCA 2006** provide rights to borrowers who have taken credit under a **regulated agreement**. Unless an agreement is a regulated agreement, then, in general terms, the **CCA 1974** will not operate to provide rights to borrowers.

A **regulated agreement** is defined by **s 189(1) CCA 1974** as 'a *consumer credit agreement*, or *consumer hire agreement*, other than an *exempt agreement*'. The words in italics need considering.

In ***Nram plc v McAdam (2016)***, the Court of Appeal held that in the case of a loan agreement which was expressed to be regulated by the **CCA 1974**, despite the £25,000 ceiling under the Act having been exceeded, it could not be said that the lender had agreed, either expressly or impliedly, to incorporate the provisions of the Act into the agreement or to give the borrower the protection afforded by it. Section 77A provided that, with effect from 1 October 2008, if periodic statements in a form prescribed by the **Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007** were not given to the borrower, then the borrower would be under no liability to pay any interest or default sum in respect of the period of non-compliance. Gloster LJ held that the ↵ court had to determine whether or not the borrower and the lender had agreed, either expressly or impliedly, to incorporate the provisions of the Act into their contract or to give the borrower the protection afforded by it. There was no express incorporation of the Act. Moreover, the statements in the loan agreement, on their face, were simply asserting, albeit wrongly, that the agreement was regulated by the Act and that, by reason of the agreement's regulated status, the borrower had certain rights under the Act; they did not reflect any bilateral agreement between the parties that they intended to apply the provisions of the Act by contract to an agreement that lay outside its scope in the event that the representation was untrue.

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Consumer credit agreement

Under **art 60B(3) FSMA RAO**:

- a 'credit agreement' means an agreement between an individual or relevant recipient of credit ('A') and any other person ('B') under which B provides A with credit of any amount;
- an 'exempt agreement' means a credit agreement which is an exempt agreement under **arts 60C–60H**; and
- a 'regulated credit agreement' means any credit agreement which is not an exempt agreement.

Therefore, a **consumer credit agreement** is a **regulated agreement** provided that none of the exemptions apply.

Who is a 'relevant recipient of credit'?

A 'relevant recipient of credit' is defined in **art 60L FSMA RAO** as:

> (a) a partnership consisting of two or three persons not all of whom are bodies corporate, or
>
> (b) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership.

This replaces the previous requirement for the debtor to be 'an individual' within the meaning of **s 189(1) CCA 1974**.

The meaning of '*credit*' is a broad one and includes 'a cash loan and any other form of financial accommodation' under which the borrower is given time to pay (**art 60L(1) FSMA RAO**). A hire purchase agreement falls within the meaning of '*credit*'.

Removal of the £25,000 financial limit

If the agreement was made before 6 April 2008, a **consumer credit agreement** had to be for no more than £25,000 (excluding interest and other charges). This limit was removed by **s 2 CCA 2006** for agreements made after this date and the Act will then apply to lending up to any amount unless exempted from its application.

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Consumer hire agreement

A **consumer hire agreement** is defined in **art 60N(3) FSMA RAO** as:

> an agreement between a person ('the owner') and an individual or relevant recipient of credit ('the hirer') for the bailment or, in Scotland, the hiring, of goods to the hirer which:
>
> (a) is not a hire-purchase agreement, and
>
> (b) is capable of subsisting for more than three months.

This replaces the previous definition in **s 15(1) CCA 1974**.

A consumer hire agreement is a **regulated agreement** provided that none of the exemptions apply.

You will see from the above definition that a **consumer hire agreement** must be *capable* of subsisting for more than three months. There is no requirement that it *must* subsist for more than this period. In ***Dimond v Lovell (2002)***, the hire agreement stated that it could not last for more than 28 days. It was therefore not a consumer hire agreement.

Exempt agreements

Agreements that are exempt used to be found in **s 16 CCA 1974** and the **Consumer Credit (Exempt Agreements) Order 1989**. The meaning of exempt agreements can now be found in the **FSMA**. These can conveniently be grouped as follows:

1. **Exemptions relating to the nature of the agreement**

   A credit agreement is an exempt agreement if:

   - it is a regulated mortgage contract or a regulated home purchase plan (**art 60C(2) FSMA RAO**);
   - the lender provides the borrower with credit exceeding £25,000 *and* the agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower (**art 60C(3) FSMA RAO**);

- the lender provides the borrower with credit of £25,000 or less and the agreement is entered into by the borrower wholly for the purposes of a business carried on, or intended to be carried on, by the borrower, *and* the agreement is a Green Deal plan (within the meaning of **s 1 of the Energy Act 2011**) (**art 60C(4) FSMA RAO**);
- it is made in connection with trade in goods or services between the UK and a country outside the UK, within a country, or between countries outside the UK, and the credit is provided to the borrower in the course of a business carried on by the borrower (**art 60C(8) FSMA RAO**).

2. **Exemptions relating to the purchase of land for non-residential purposes**

A credit agreement is an exempt agreement if:

- at the time it is entered into, any sums due under it are secured by a legal mortgage on land and 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 borrower or a related person of the borrower, or in the case of credit provided to trustees, by an individual who is a beneficiary of the trust or a related person of a beneficiary (**art 60D FSMA RAO**).

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3. **Exemptions relating to the nature of the lender**

A credit agreement is an exempt agreement if:

- it relates to the purchase of land and if the lender is specified, or of a description specified, in rules made by the FCA under **para 3**, or a local authority. The **para 3** rules are that the FCA may make rules specifying any of the following: (a) an authorised person with permission to effect or carry out contracts of insurance; (b) a friendly society; (c) an organisation of employers or organisation of workers; (d) a charity; (e) an improvement company (within the meaning given by **s 7 of the Improvement of Land Act 1899**); (f) a body corporate named or specifically referred to in any public general Act; (g) a body corporate named or specifically referred to in, or in an order made under, a relevant housing provision; (h) a building society (within the meaning of the **Building Societies Act 1986**); (i) an authorised person with permission to accept deposits (**art 60E(1)–(3) FSMA RAO**);
- it is secured by a legal mortgage on land and that land is used or is intended to be used as or in connection with a dwelling, and the lender is a housing authority (**art 60E(5) FSMA RAO**);
- the lender is an investment firm or a credit institution, and the agreement is entered into for the purpose of allowing the borrower to carry out a transaction relating to one or more financial instruments (**art 60E(6) FSMA RAO**).

4. **Exemptions relating to number of repayments to be made**

A credit agreement is an exempt agreement if:

- (with limited exceptions) the agreement is a borrower–lender–supplier agreement for **fixed-sum credit**, and the number of payments to be made by the borrower is not more than four and those payments are required to be made within a period of 12 months or less (beginning on the date of the agreement), and the credit is secured on land or provided without interest or other significant charges (**art 60F(2) FSMA RAO**);

- (with limited exceptions) the agreement is a borrower–lender–supplier agreement for **running-account credit** and the borrower is to make payments in relation to specified periods which must be, unless the agreement is secured on land, of three months or less, and the number of payments to be made by the borrower in repayment of the whole amount of credit provided in each such period is not more than one and where the credit is secured on land, or provided without interest or other significant charges (**art 60F(3) FSMA RAO**);
- the agreement is a borrower–lender–supplier agreement financing the purchase of land, and the number of payments to be made by the borrower is not more than four and where the credit is secured on land or provided without interest or other charges (**art 60F(4) FSMA RAO**);

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- the agreement is a borrower–lender–supplier agreement for **fixed-sum credit**, and the credit is to finance a premium under a contract of insurance relating to land or anything on land, and the lender is the lender under a credit agreement secured by a legal mortgage on that land, and the credit is to be repaid within the period (which must be 12 months or less) to which the premium relates, and in the case of an agreement secured on land there is no charge forming part of the total charge for credit under the agreement other than interest at a rate not exceeding the rate of interest from time to time payable under the agreement, and, in the case of an agreement which is not secured on land, the credit is provided without interest or other charges, and the number of payments to be made by the borrower is not more than 12 (**art 60F(5) FSMA RAO**);
- the agreement is a borrower–lender–supplier agreement for **fixed-sum credit** and the lender is the lender under a credit agreement secured by a legal mortgage on land, and the agreement is to finance a premium under a contract of whole life insurance which provides, in the event of the death of the person on whose life the contract is effected before the credit referred to above has been repaid, and for payment of a sum not exceeding the amount sufficient to meet the amount which, immediately after that credit has been advanced, would be payable to the lender in respect of that credit (including interest from time to time payable under that agreement), and in the case of an agreement secured on land there is no charge forming part of the total charge for credit under the agreement other than interest at a rate not exceeding the rate of interest from time to time payable under the agreement, and in the case of an agreement which is not secured on land, the credit is provided without interest or other charges, and the number of payments to be made by the borrower is not more than 12 (**art 60F(6) FSMA RAO**).

5. **Exemptions relating to the total charge for credit**

A credit agreement is an exempt agreement if:

- it is a borrower–lender agreement and the lender is a credit union and the rate of the total charge for credit does not exceed 42.6 per cent (**art 60G(2) FSMA RAO**);
- (with limited exceptions) it is a borrower–lender agreement and it is an agreement of a kind offered to a particular class of individual or relevant recipient of credit and not offered to the public generally and it provides that the only charge included in the total charge for credit is interest, and interest under the agreement may not at any time be more than the sum of 1 per cent and the highest of the base rates published by the banks specified on the date 28 days before the date on which the interest is charged (**art 60G(3) FSMA RAO**);

- (with limited exceptions) it is a borrower–lender agreement and an agreement of a kind offered to a particular class of individual or relevant recipient of credit and not offered to the public generally and it does not provide for or permit an increase in the rate or amount of any item which is included in the total charge for credit and the total charge for credit under the agreement is not more than the sum of 1 per cent and the highest of the base rates published by the banks specified on the date 28 days before the date on which the charge is imposed (**art 60G(4) FSMA RAO**).

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6. **Exemptions relating to the nature of the borrower**

A credit agreement is an exempt agreement if:

- the borrower is an individual and the agreement is either secured on land or for credit which exceeds £60,260, and the agreement includes a declaration made by the borrower which provides that the borrower agrees to forgo the protection and remedies that would be available to the borrower if the agreement were a regulated credit agreement and which complies with rules made by the FCA for these purposes, and a statement has been made in relation to the income or assets of the borrower which complies with rules made by the FCA for these purposes, and the connection between the statement and the agreement complies with any rules made by the FCA for these purposes (including as to the period of time between the making of the statement and the agreement being entered into), and a copy of the statement was provided to the lender before the agreement was entered into (**art 60H FSMA RAO**).

Unfair relationship between lender and borrower

The concept of the unfair relationship was introduced by the **CCA 2006**, which made amendments to the **CCA 1974**. This was introduced to remedy some of the problems with the now repealed **ss 137–140**, where the court had the power to reopen a credit agreement if it was held to be 'extortionate'. The statutory test of 'extortionate' was a high one: the payments required to be made must have been 'grossly exorbitant'. As a result of this harshness, **ss 137–140** were repealed and replaced by **ss 140A–140D** whereby, on application by the borrower, the court could reopen a credit agreement where there was an 'unfair relationship' between the lender and the borrower.

Revision tip

The new unfair relationship test that replaced the extortionate credit bargain provisions applies to all new consumer lending transactions and not just to agreements regulated by the **CCA**.

By **s 140A(1) CCA 1974**, the court may make an order (under **s 140B**) in connection with a credit agreement if it determines that the relationship between the lender and the borrower arising out of the agreement is unfair to the borrower because of one or more of the following:

- any of the terms of the agreement or of any related agreement;
- the way in which the lender has exercised or enforced any of their rights under the agreement or any related agreement; or
- any other thing done (or not done) by, or on behalf of, the lender either before or after the making of the agreement or any related agreement.

p. 175 ↵ Although the court may take account of any of the matters noted in **s 140A(1)** as well as any other matters it considers to be relevant (**s 140A(2)**), it is important to appreciate that the question for determination is whether or not the *relationship* arising out of the credit agreement between the lender and the borrower is unfair (***Patel v Patel (2009)***). A relationship was not held to be unfair where a bank failed to supply a debtor with the required copy of a loan agreement within the stipulated 12-day period. The debtor claimed that this rendered the relationship unfair but the court disagreed. It was held that although the bank's failure rendered the agreement temporarily unenforceable, it did not mean that the relationship was unfair (***Carey v HSBC Bank plc (2009)***).

Looking for extra marks?

A question in this area might state that the relationship between the lender and the borrower has ended. You should explain that under **s 140A(4)** a court may still make a determination under this section in relation to a relationship, notwithstanding that the relationship may have ended.

Once the borrower (or a surety) alleges that the relationship between the lender and the borrower is unfair to the borrower, **s 140B(9) CCA 1974** states that it is then for the lender to prove that the relationship is not unfair.

As noted earlier, **s 140B** sets out the powers of the court to make an order in relation to an unfair relationship between the lender and the borrower. The powers of the court are wide in this regard. Where the court is satisfied that an unfair relationship has arisen under **s 140A(1)**, it may make an order to:

- require the lender (or any associate or former associate of theirs) to repay, in whole or in part, any sum paid by the borrower or by a surety by virtue of the agreement or any related agreement (whether paid to the lender, the associate, or the former associate, or to any other person);
- require the lender (or any associate or former associate of theirs) to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;
- reduce or discharge any sum payable by the borrower or by a surety by virtue of the agreement or any related agreement;
- direct the return to a surety of any property provided by them for the purposes of a security;
- otherwise set aside, in whole or in part, any duty imposed on the borrower or on a surety by virtue of the agreement or any related agreement;

- alter the terms of the agreement or of any related agreement;
- direct accounts to be taken between any persons.

p. 176 ↵ In ***Scotland v British Credit Trust Ltd (2014)***, the Court of Appeal held that the negotiations and misrepresentation by a double-glazing salesman about the need to purchase payment protection insurance when taking out a loan were deemed to have been conducted by the double-glazing company as agent for the finance company, and their conduct was therefore relevant as 'things done (or not done) by, or on behalf of, the creditor' in determining whether the relationship between the lender and the borrower was unfair for the purposes of **s 140A**. As the borrower would not have purchased the payment protection policy but for the misrepresentation and breaches of the Insurance Conduct of Business rules, these matters created an unfair relationship and the judge properly exercised her discretion under **s 140B** to require the finance company to repay the loan payments referable to the policy and to vary the loan agreement so as to excuse the borrower from repaying the rest of the loan so far as it related to the policy.

Looking for extra marks?

Since the concept of the unfair relationship was introduced by the **CCA 2006**, it is interesting to note that the word 'unfair' remains undefined. Given that the courts adopted rather strict interpretations of 'extortionate' and 'grossly exorbitant' under the old provisions (**ss 137** and **138**), the absence of any definition of unfair will provide them with considerably greater flexibility when determining whether the relationship was unfair.

Having said that, the Supreme Court has now handed down its first judgment on what amounts to an unfair relationship for the purposes of **ss 140A–140D CCA** (***Plevin v Paragon Personal Finance Ltd (2014)***).

Plevin v Paragon Personal Finance Ltd [2014] UKSC 61

In ***Plevin v Paragon Personal Finance Ltd (2014)***, Mrs Plevin took out a personal loan through LLP Processing (UK) Ltd. LLP proposed that she borrow £34,000 from Paragon, repayable in instalments over ten years, and that she take out a payment protection insurance (PPI) policy for five years with Norwich Union, which was Paragon's designated insurer. The PPI premium of £5,780 was payable at the outset and added to the amount of the loan. Commission of 71.8 per cent of the premium was taken: LLP retained £1,870 and Paragon retained £2,280. Although the Financial Industry Standards Association guide which LLP gave to Mrs Plevin told her that 'commission is paid by the lending company', she was not told the amount of the commission or the identity of the recipients. Mrs Plevin argued that the relationship between herself and Paragon was unfair under **s 140A(1)(c)** because of the non-disclosure of the commissions and also because of the failure of anyone involved to advise on

the suitability of the PPI policy for her needs. Insofar as LLP committed these defaults, Mrs Plevin says it did so 'on behalf of' Paragon. The Insurance Conduct of Business Rules (which are the statutory rules regulating the insurance industry) do not require insurance intermediaries to disclose commissions to their customers but do require an insurance intermediary which makes a 'personal recommendation' to a customer to buy an insurance contract to take reasonable steps to ensure that the recommendation is suitable for the customer's demands and needs. Lord Sumption held that

p. 177 ↵ the non-disclosure of the amount of commissions and the identity of the recipients did make Mrs Plevin's relationship with Paragon unfair under **s 140A(1)(c)** but the failure to conduct a needs assessment of Mrs Plevin did not. He stated that at some point the commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance and concluded that Mrs Plevin would have questioned whether the PPI policy represented value for money if she had been aware of the commission amounts and might not have taken out the policy at all. This unfairness was the responsibility of Paragon, the only party which knew the size of both commissions.

The Supreme Court in ***Plevin*** also overruled the Court of Appeal decision in ***Harrison v Black Horse Ltd (2012)***, where the lender was held not to have acted unfairly by complying with the rules laid down by the FSA.

Nelmes v NRAM plc (2016) <https://www.bailii.org/ew/cases/EWCA/Civ/2016/491.html> concerned a claim that the relationship between a borrower and the broker who introduced the lender was unfair within the meaning of the **CCA 1974** on the ground that the broker received a 'procuration fee' from the lender, which was not **disclosed** to the borrower. This court held that, by reason of the undisclosed fee, the relationship was unfair and the borrower was entitled to recover the amount of the fee from the lender. Christopher Clarke LJ stated that 'A relationship between lender and borrower which involves such a payment deprives the borrower of the disinterested advice of his broker and is, for that reason, unfair.'

The documentation and signatures

Section 60(1) CCA 1974 sets out the essential form and content of documents embodying regulated agreements so as to ensure the borrower or hirer is made aware of:

- the rights and duties conferred or imposed on them by the agreement;
- in the case of a **consumer credit agreement**, the amount and rate of the total charge for credit. This includes the annual percentage rate (APR);
- the protection and remedies available to them under the **CCA 1974**; and
- any other matters which it is desirable for them to know about in connection with the agreement.

Section 61(1) goes on to explain that a regulated agreement will not be properly executed unless:

- a document in the prescribed form itself containing all the prescribed terms and conforming to the requirements of **s 60(1)** is signed in the prescribed manner both by the borrower or hirer and by or on behalf of the lender or owner;
- the document embodies all the terms of the agreement (other than implied terms); and
- the document is, when presented or sent to the borrower or hirer for signature, in such a state that all its terms are readily legible.

Furthermore, the **Consumer Credit (Agreements) Regulations 2010** require further information to be contained in the documents embodying a regulated consumer credit agreement. ↵ This further information is set out in **Schedule 1 to the Regulations** and includes, where appropriate:

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- the right to a copy of the agreement in good time to consider whether the borrower wishes to proceed with it. If the lender did not provide a copy, then they can only enforce it with a court order;
- if the agreement is secured on land, then the borrower must be provided with a notice explaining that their home may be repossessed if they fail to maintain repayments on a mortgage or other debt secured on it;
- an explanation of the right to cancel the agreement; and
- an explanation of the right to the repossession of the goods in the event of outstanding repayments.

In cases where the agreement was entered into prior to 6 April 2007, the lender will not be able to enforce it if the strict requirements contained in (the now repealed) **s 127(3)–(5)** were not complied with. The court had no discretion in this regard. These requirements were in relation to the signing of an agreement which failed to contain certain minimum basic terms and to cancellable agreements where certain requirements were not met.

An agreement that has not been properly signed will not be properly executed (**s 61(1) CCA 1974**). An improperly executed regulated agreement is enforceable against the borrower or hirer only by order of the court (**s 65**), although the court does have a general discretion to permit the lender to enforce the agreement. In exercising its discretion, the court will have regard to the following factors noted in **s 127**:

- any prejudice caused to any person by the contravention in question;
- the degree of culpability for the contravention; and
- its power to reduce or discharge any sum payable by the borrower or hirer so as to compensate them for prejudice suffered as a result of the contravention in question.

Looking for extra marks?

Although in certain circumstances an agreement may not be enforceable against the borrower, it is important to appreciate that the borrower should not be penalised for the lender's failure to ensure that the agreement was properly executed. For this reason, therefore, the borrower can, if they wish, enforce such an agreement as against the lender or supplier in the event, for example, that the goods supplied under a **hire purchase** agreement are not of satisfactory quality.

Where the agreement was unenforceable by virtue of the **CCA 1974**, the courts would not enforce it even if this meant that the borrower was, as a result, unjustly enriched. This is because the Act itself contemplated that a borrower might benefit from the improper execution of such an agreement (***Dimond v Lovell (2002)***).

p. 179 Furthermore, in ***Wilson v First County Trust Ltd (No 2) (2004)*** ↵ , the House of Lords held that the unenforceability of a regulated agreement did not breach the lender's rights under the **Human Rights Act 1998**, as that Act had not yet come into force, and that **s 127(3) CCA 1974** did not contravene **Art 6(1)** or **Art 1 of Protocol 1 of the European Convention on Human Rights 1950**.

Looking for extra marks?

The simple technical error that rendered unenforceable the agreement in ***Wilson*** resulted in the loan being unrecoverable. Although the House of Lords in ***Wilson*** correctly applied the law, there was certainly no justice in that case for the lender. To cure such an injustice in future cases, the **CCA 2006** repealed **s 127(3)–(5) CCA 1974**, resulting in the court explicitly having discretion in cases concerning the enforceability of improperly executed agreements. It is likely, therefore, that cases such as ***Dimond*** and ***Wilson*** would now be decided differently, thus depriving borrowers from being unjustly enriched merely as a result of a minor technical infringement of the requirements.

Cancellation rights

A regulated agreement *may* be a cancellable agreement. **Section 67 CCA 1974** provides that a regulated agreement may be cancellable by the borrower or hirer provided that:

- the antecedent negotiations included oral representations made in the presence of the borrower or hirer;
- it was not secured on land; and
- it was signed by the borrower away from the trade premises of the lender or supplier.

Cooling-off period

To provide greater protection to the borrower or hirer, **s 68 CCA 1974** provides for a general 5-day cooling-off period (which in some circumstances is 14 days) starting from when they receive a copy of the signed cancellable agreement.

Small agreements

A small agreement is defined by **s 17(1) CCA 1974** and is either:

- a regulated **consumer credit agreement** for credit not exceeding £50, other than a **hire purchase** or conditional sale agreement; or
- a regulated **consumer hire agreement**, which does not require the hirer to make payments exceeding £50, in either case, being an agreement which is either unsecured or secured by a guarantee or indemnity only (whether or not the guarantee or indemnity is itself secured).

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Revision tip

The main significance of a small agreement is that it is exempt from the majority of the provisions on formalities and cancellation.

Borrower–lender–supplier (B–L–S) and borrower– lender (B–L) agreements (debtor–creditor–supplier (D–C–S) and debtor–creditor (D–C) agreements)

Prior to the amendments made by the **FSMA**, debtor–creditor–supplier (D–C–S) and debtor–creditor (D–C) agreements were defined in **ss 12** and **13 CCA 1974**, respectively. Both were regulated **consumer credit agreements**. The distinction between the two was straightforward. A **D–C–S agreement** was where the **creditor** was also the supplier or had a business connection with the supplier. Here, the agreement was made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between themselves and the supplier, or was financing a transaction between the **debtor** and the creditor. Typical D–C–S agreements were credit sales or where the payment was made by credit card. A **D–C agreement** was where the creditor was not also the supplier and had no business connection with the supplier. The creditor merely provided the credit for the transaction. Here, the agreement was not made under pre-existing arrangements or in contemplation of future arrangements between the creditor and the supplier. The **CCA 1974** does not apply to the agreement between the debtor and the supplier.

Following the implementation of the **FSMA**, a D–C–S agreement is now a borrower–lender–supplier agreement (B–L–S) and a D–C agreement is now a borrower–lender agreement (B–L) under **art 60L(1) FSMA RAO**.

Borrower–lender–supplier agreements and borrower–lender agreements

A B–L–S agreement is defined by **art 60L(1) FSMA RAO** as:

> (a) a credit agreement to finance a transaction between the borrower and the lender, whether forming part of that agreement or not;
>
> (b) a credit agreement:
>
> (i) to finance a transaction between the borrower and a person ('the supplier') other than the lender, and
>
> (ii) which is made by the lender under pre-existing arrangements, or in contemplation of future arrangements, between the lender and the supplier, or

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> (c) a credit agreement which is:
>
> (i) an unrestricted-use credit agreement, and
>
> (ii) made by the lender under pre-existing arrangements between the lender and a person ('the supplier') other than the borrower in the knowledge that the credit is to be used to finance a transaction between the borrower and the supplier.

A B–L agreement is defined by **art 60L(1) FSMA RAO** as:

> (a) a credit agreement:
>
> (i) to finance a transaction between the borrower and a person ('the supplier') other than the lender, and
>
> (ii) which is not made by the lender under pre-existing arrangements, or in contemplation of future arrangements, between the lender and the supplier,
>
> (b) a credit agreement to refinance any existing indebtedness of the borrower, whether to the lender or another person, or
>
> (c) a credit agreement which is:
>
> (i) an unrestricted-use credit agreement, and
>
> (ii) not made by the lender:
>
> (a) under pre-existing arrangements between the lender and a person other than the borrower ('the supplier'), and
>
> (b) in the knowledge that the credit is to be used to finance a transaction between the borrower and the supplier.

Revision tip

The practical difference between a **D–C–S** and a **D–C agreement** is that with a D–C–S agreement both the supplier and the **creditor** are potentially liable to the **debtor** for misrepresentation and breach of contract by the supplier. The same applies to B–L–S and B–L agreements.

Liability of the lender for the seller's misrepresentation or breach of contract

Revision tip

The situation discussed here concerns a customer who has two separate contracts: one with the supplier and the other with the lender who provides credit for the purchase. At common law, only the party with whom the contract is made can be liable for a breach of that contract. **Section 75 CCA**
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1974 is, therefore, a very valuable provision as it explains that where the borrower has any claim against the supplier in respect of a **misrepresentation** or breach of contract, they shall have a like claim against the lender, who, with the supplier, shall be jointly and severally liable to the borrower. The section only applies to **D–C–S** or **B–L–S** agreements. In short, this is where there exists some business connection between the lender and the supplier: it must fall within **s 12(b) CCA 1974**, which means it must be made under pre-existing arrangements or in contemplation of future arrangements between the lender and the supplier.

Where there exists a business connection between a supplier of goods and a lender who provides finance for a commercial transaction to sell a single item costing more than £100 but less than £30,000 (**s 75(3)(b)**), then a borrower who uses such finance under a regulated agreement is protected by **s 75**. Provided the transaction for a single item falls between the above figures, then it does not matter that the borrower only pays for part of it using credit. The borrower will still be protected and the lender's liability will be for the whole amount.

The lender and supplier must be different parties. The protection provided by **s 75** is that the lender is jointly and severally liable for the supplier's:

- misrepresentation; or
- breach of contract.

This liability is known as connected lender liability. Because the lender and supplier are jointly and severally liable, then the borrower is entitled to sue either or both of them.

It is not possible to exclude the provisions of **s 75** (**s 173(1)**).

In ***Durkin v DSG Retail Ltd and HFC Bank plc (2014)***, the Supreme Court had to consider whether the 'like claim' provision in **s 75** entitled a consumer to terminate a credit agreement where the goods purchased were defective or not in accordance with the contract of sale so as to relieve them from the obligation to make any further payments under the credit agreement. The court held that the consumer was entitled to rescind the credit agreement but not as a result of the 'like claim' provision in **s 75(1)**; rather, via an altogether different and less obvious route. Lord Hodge explained (at [26]) that:

> It is inherent in a debtor–creditor–supplier agreement under **section 12(b)** of the **1974 Act**, which is also tied into a specific supply transaction, that if the supply transaction which it financed is in effect brought to an end by the debtor's acceptance of the supplier's repudiatory breach of contract, the debtor must repay the borrowed funds which he recovers from the supplier. In my view, in order to reflect that reality, the law implies a term into such a credit agreement that it is conditional upon the survival of the supply agreement. The debtor on rejecting the goods and thereby rescinding the supply agreement for breach of contract may also rescind the credit agreement by invoking this condition. As the debtor has no right to retain or use for other purposes funds lent for the specific transaction, the creditor also may rescind the credit agreement. It appears to me that similar reasoning would apply to a **section 12(c)** agreement where the credit agreement tied the loan to a particular transaction.

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Second cardholders

The problem with a second cardholder (the authorised user) can be simply stated. Section 75 (and for that matter **s 56**, discussed under 'Misrepresentation', p 184) confer rights only on the *debtor/borrower*. The authorised user (typically the husband or wife of the principal cardholder) is not liable to pay the debts incurred and they are not (in ordinary parlance anyway) the debtor/borrower. However, **s 189** defines 'debtor' rather widely as 'the individual receiving credit under a consumer credit agreement … '. Credit 'includes a cash loan and any other form of financial accommodation' (**s 9(1)**). It could be argued, therefore, that the authorised user is a debtor for the purpose of **s 75** (and **s 56**), although it could also be argued that since it is only the principal cardholder who is liable for the debts incurred, they are the person who receives the financial accommodation. There are as yet no decided cases on the matter and it is therefore uncertain whether or not a second cardholder will receive the same protection under **s 75** as if they were the principal cardholder.

Foreign transactions

After some doubt whether **s 75** provided protection in respect of foreign transactions, it was held by the House of Lords in ***Office of Fair Trading v Lloyds TSB Bank plc (2008)*** that it does, subject to the credit agreement being a UK credit agreement. This decision makes it plain that **s 75** can assist a customer who makes a purchase abroad using their UK credit card.

Looking for extra marks?

You should explain that since **s 75** imposes joint and several liability on both the lender and supplier, **s 75** is especially beneficial to customers where the supplier becomes insolvent, cannot be traced, or otherwise where they consider that a claim against the lender might be more fruitful, for example, in the case of a foreign transaction where the **contract of sale** is governed by the law of another country.

Extent of the lender's liability

The lender's liability under **s 75** is not limited to the amount of the credit. A lender will be liable for all losses provided they are not too remote.

Lender's indemnity

The lender may, if they wish, join the seller as a party into any claim brought by the borrower and to claim an indemnity from them (**s 75(2)** and **(5)**).

p. 184

Misrepresentation

Regulated agreements

Where there exists a business connection between a supplier of goods and a lender who provides finance for the transaction, the supplier is treated as the lender's agent with regard to any antecedent negotiations (**s 56 CCA 1974**). As a result of this statutory agency, the lender will be liable for statements made by the supplier during any antecedent negotiations leading to a regulated agreement. Antecedent negotiations start as soon as the supplier and the customer first start communicating with one another, and this includes communication by advertisement (**s 56(4)**).

Revision tip

There will be a connection between the supplier and the lender in the following situations:

- when the customer uses a credit card to pay for the goods;
- when the customer takes goods on **hire purchase**.

The significance of **s 56** is that any **misrepresentations** made by the supplier about the goods will enable the borrower customer to pursue the lender. Not only will the lender be liable for the supplier's misrepresentations, but also the borrower will be entitled to rescind the regulated agreement. As the supplier is treated as the lender's agent, the borrower may, if they wish, just give notice of such **rescission** to the supplier (**s 102**).

The antecedent negotiations referred to in **s 56** whereby a supplier will be deemed to be the agent of the lender are those 'in relation to' goods sold or proposed to be sold (**s 56(1)(b)**). Therefore, a supplier's promise to settle a buyer's existing debt was an antecedent negotiation 'in relation to' a subsequent purchase, both purchases being treated as one transaction (***Forthright Finance Ltd v Ingate (1997)***).

It is not possible to exclude the provisions of **s 56** (**s 173(1)**).

Unregulated agreements

Where the supplier sells goods to the finance company under an unregulated agreement, they are not generally treated as the finance company's agent unless exceptional circumstances apply (***Branwhite v Worcester Works Finance Ltd (1969)***).

Liability of the creditor in linked credit agreements

Section 75A CCA 1974 applies from 1 February 2011. It supplements **s 75**, although its function is quite different. It only applies to linked credit agreements.

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Revision tip

A linked credit agreement means a regulated **consumer credit agreement** which serves exclusively to finance an agreement for the supply of *specific***goods** or the provision of a *specific* service and where either the lender uses the services of the supplier in connection with the preparation or making of the credit agreement or the *specific* goods or provision of a *specific* service are explicitly specified in the credit agreement itself. Because of this requirement, credit card payments will almost always be excluded from the section because the agreement under which a credit card is provided relates to the payment of goods or services *generally* rather than to the supply of *specific* goods or services.

Section 75A will normally apply where:

- the goods or services were purchased under a linked credit agreement;
- the credit agreement falls *outside* the scope of **s 75** but *within* the scope of the **Consumer Credit Directive**;
- there has been a breach of contract by the supplier in relation to the goods or services. Unlike **s 75**, it does not apply to misrepresentations;

- the borrower has taken all reasonable steps with the supplier to obtain satisfaction before making a claim against the lender under **s 75A**. In other words, s 75A imposes secondary liability on the creditor and not joint liability.

However, the section does not apply where:

- the cash value of the goods or service is £30,000 or less;
- the credit agreement is for credit which exceeds £60,260;
- the credit agreement is entered into by the borrower wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by them.

To pursue a claim directly against the lender under **s 75A**, the following conditions must be met:

- the supplier cannot be traced;
- the borrower has contacted the supplier, but the supplier has not responded;
- the supplier is insolvent;
- the borrower has taken reasonable steps (but not necessarily litigation) to pursue their claim against the supplier but has not obtained satisfaction for their claim. A borrower is to be deemed to have obtained satisfaction where they have accepted a replacement product or service or other compensation from the supplier in settlement of their claim.

Retaking of protected goods

If the borrower is in breach of a regulated **hire purchase** or a regulated conditional sale agreement relating to goods and has already paid to the lender one-third or more of the total price of the goods and the property in the goods remains in the lender, then the lender will not be entitled to recover possession of the goods from the borrower without an order of the court (**s 90(1)**). The phrase 'protected goods' simply refers to the goods under this section. If goods are recovered by the lender in contravention of **s 90**, then the regulated agreement, if not previously terminated, shall terminate, and the borrower shall be released from all liability under the agreement and shall also be entitled to recover from the lender all sums paid by them under the agreement (**s 91**).

The borrower's right to complete payments ahead of time

A borrower under a regulated **consumer credit agreement** is entitled at any time, upon notice to the lender and the payment to them of all sums owing under the agreement, to discharge their indebtedness under the agreement (**s 94(1)**). In order to understand how much remains owing under the agreement, the borrower is entitled to require the lender to set out the amount of the payment required to discharge their indebtedness, together with particulars showing how the amount is arrived at (**s 97(1)**).

Non-commercial agreements

A non-commercial agreement is defined by **s 189(1) 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'. Agreements between family members or friends are usually non-commercial agreements (***Hare v Schurek (1993)***).

The Financial Conduct Authority Consumer Credit Sourcebook (CONC)

The consumer credit chapter of the FCA Consumer Credit Sourcebook (CONC) provides detailed rules and guidance for consumer credit firms on matters such as financial promotion, advising, selling, and debt collection as well as conduct generally. Under the provisions of the **FSMA**, in the event of a breach of the rules set out in CONC, a private person has a statutory right of action in damages where that person can demonstrate loss as a result of the rule breach in question (**s 138D FSMA**). This demonstrates the broader range of remedies afforded to borrowers under the FSMA regime.

Key cases

CASE	FACTS	HELD/PRINCIPLE
p. 187 ↵ ***Dimond v Lovell [2002] 1 AC 384***	D's car was damaged as a result of an accident caused by L. Her insurance company suggested that she hire a car from a company specialising in hiring cars to victims of car accidents. Under this agreement, the company would have conduct of any litigation and the costs of the hire would not be payable until the conclusion of the case on the proviso that she would be under no liability for the hire charges even if they could not be recovered from L. The terms of the hire agreement stated that it could not last for more than 28 days. As **s 15(1) CCA 1974** requires that a consumer hire agreement must be capable of subsisting for more than three months, the agreement was not a consumer hire agreement. L's insurer refused to pay the hire charges, asserting that it was an unenforceable consumer credit agreement.	The House of Lords held that as the terms of the agreement stipulated that the company's right to recover the hire charges was to be deferred, credit had been granted to D with the result that the agreement was a regulated agreement for the purposes of **CCA 1974**. As the agreement had been improperly executed and was therefore unenforceable by the company against D, D had not been unjustly enriched by not having to pay the hire charges since the **CCA** contemplated that a debtor might benefit from the improper execution of an agreement. In the circumstances, D was not entitled to recover damages for the hire as she was not obliged to pay for it.

CASE	FACTS	HELD/PRINCIPLE
Durkin v DSG Retail Ltd and HFC Bank plc [2014] UKSC 21	Durkin visited a PC World store (DSG) in Scotland to purchase a laptop, making clear that he wanted one with an internal modem. A sales assistant identified a laptop but said that he was unsure whether it had an internal modem. He agreed that Durkin could take the laptop home and return it if it did not. Durkin paid a £50 deposit and signed a credit agreement with HFC for the balance of £1,449. The following day he found that the laptop did not have an internal modem so he returned it to the store and asked for his deposit back and for the credit agreement to be cancelled. The store manager refused to accept his rejection of the goods and took no steps to cancel the credit agreement.	For present purposes, three key issues arose which were heard by the Supreme Court: • whether there was a valid loan agreement between Durkin and HFC; • whether the right to rescind the loan agreement was a 'like claim' under **s 75(1) CCA 1974**. If not, whether the loan agreement survived rescission of the supply agreement; • what obligations HFC had to investigate the existence of the debt or dispute. Lord Hodge (who delivered the judgment of the court) held that Durkin was entitled to rescind the credit agreement and validly did so when he gave notice to HFC. His Lordship held, however, that this was not as a result of the 'like claim' provision in **s 75(1)**, as this section conferred no such right, but via an altogether different and less obvious route.
p. 188	↵ Durkin did not pay any money to HFC under the credit agreement, explaining to them that he had rejected the laptop and had rescinded both his contract of sale and the credit agreement. HFC warned him that if he did not make payments he might have difficulty obtaining future credit and threatened to serve a default notice on him under the **CCA 1974**. Without making any enquiries, HFC issued a default notice and intimated to credit reference agencies that he had been in default of his obligations under the credit agreement. Although Durkin recovered his £50 deposit in an out-of-court settlement, he claimed that the adverse credit register entries caused him loss. Durkin sought a **declarator** that he had validly rescinded both the contract of sale and the credit agreement and also claimed damages. The sheriff declared that he had validly rescinded the contract of sale (this was not challenged on appeal). Although his claim succeeded, Durkin appealed the quantum of	Lord Hodge explained (at [26]) that 'It is inherent in a debtor–creditor–supplier agreement under **s 12(b)** of the **1974 Act**, which is also tied into a specific supply transaction, that if the supply transaction which it financed is in effect brought to an end by the debtor's acceptance of the supplier's repudiatory breach of contract, the debtor must repay the borrowed funds which he recovers from the supplier. In my view, in order to reflect that reality, the law implies a term into such a credit agreement that it is conditional upon the survival of the supply agreement. The debtor on rejecting the goods and thereby rescinding the supply agreement for breach of contract may also rescind the credit agreement by invoking this condition. As the debtor has no right to retain or use for other purposes funds lent for the specific transaction, the creditor also may rescind the credit agreement. It appears to me that similar reasoning would apply to a **section 12(c)** agreement where the credit agreement tied the loan to a particular transaction.' As to the conduct of HFC, since it knew of Durkin's assertion that the credit agreement had been rescinded, it was under a duty to investigate that assertion in order reasonably to satisfy itself that the credit agreement remained enforceable before reporting to the credit reference agencies that he was in default. HFC made no such enquiries,

CASE	FACTS	HELD/PRINCIPLE
	damages awarded and HFC cross-appealed against the decree of **declarators**.	accepting without question DSG's position that Durkin had not been entitled to rescind the contract of sale. Lord Hodge held that HFC was under an obligation to investigate whether a debt properly existed prior to making any report to credit reference agencies. In the case of a disputed debt, it should not have made a report to the credit agencies until the existence of the debt was determined. For practical purposes, this means that creditors must not threaten to report bad debts to the credit agencies as a means of forcing payment from consumers until the existence of any such debt has been properly established.
p. 189 ↵ ***Forthright Finance Ltd v Ingate [1997] 4 All ER 99***	The buyer entered into an agreement with a dealer to purchase a car to be financed by F. One year later, he agreed to purchase a newer model from a second dealer. This dealer agreed to take the first car in part-exchange and to discharge the balance that was outstanding to F. A new agreement was made with a second creditor for the second car. The second dealer went into liquidation, having failed to pay F as promised. F sought to recover the money directly from the buyer. The buyer argued that **s 56 CCA 1974** meant that the second creditor was bound by the second dealer's promise to discharge the amount owed to F and therefore he had no liability.	The Court of Appeal held that where goods which would be the subject of a D–C–S agreement were sold or proposed to be sold by a broker, then any negotiations relating to those goods would be deemed to have been made by the negotiator as agent for the creditor. The second creditor was therefore liable.
Hare v Schurek [1993] CCLR 47	C was a car dealer who did not usually extend credit to his customers. He sold a car to his friend and entered into a 'one-off' hire purchase agreement with him. The case concerned whether he needed a consumer credit licence.	The Court of Appeal held that a person who enters into occasional regulated agreements is not carrying on a consumer credit or a consumer hire business by virtue of **s 189(2) CCA 1974**, which provides that a person is not to be treated as carrying on a particular type of business merely because occasionally they enter into transactions belonging to a business of that type. Therefore, as he did not carry on a consumer credit or consumer hire business, he did not need a consumer credit licence.
Office of Fair Trading v	L was an issuer of credit cards. The question for the appeal was whether the protection provided under **s 75 CCA 1974**	The House of Lords held that **s 75**, consistent with the policy behind the Act of protecting consumers, was applicable as much to foreign as to domestic supply

CASE	FACTS	HELD/PRINCIPLE
Lloyds TSB Bank plc [2008] 1 AC 316	applied also to foreign transactions. L argued that if it did apply to foreign transactions, the implication would be that it would make UK credit card issuers the potential guarantors of some 29 million foreign suppliers with whom they would not have any direct contractual relations.	transactions and contained no words of territorial limitation. Therefore, **s 75** governed agreements between UK credit card issuers and their customers without territorial limitation. The sole limitation on the territorial scope of **s 75** was that the credit agreement had to be a UK credit agreement.
p. 190 ↵ ***Plevin v Paragon Personal Finance Ltd [2014] UKSC 61***	Mrs Plevin took out a personal loan through LLP Processing (UK) Ltd. LLP proposed that she borrow £34,000 from Paragon, repayable in instalments over ten years, and that she take out a payment protection insurance policy for five years with Norwich Union, which was Paragon's designated insurer. The PPI premium of £5,780 was payable at the outset and added to the amount of the loan. Commission of 71.8 per cent of the premium was taken: LLP retained £1,870 and Paragon retained £2,280.	The Supreme Court has handed down its first judgment on what amounts to an unfair relationship for the purposes of **ss 140A–140D CCA**. Lord Sumption (who delivered the sole judgment) held that the non-disclosure of the amount of commissions and the identity of the recipients did make Mrs Plevin's relationship with Paragon unfair under **s 140A(1)(c)** but the failure to conduct a needs assessment of Mrs Plevin did not. Lord Sumption stated that the non-disclosure of the commissions did make the relationship between Paragon and Mrs Plevin an unfair one.
	Although the Financial Industry Standards Association guide which LLP gave to Mrs Plevin told her that 'commission is paid by the lending company', she was not told the amount of the commission or the identity of the recipients. Mrs Plevin argued that the relationship between herself and Paragon was unfair under **s 140A(1)(c)** because of the non-disclosure of the commissions and also because of the failure of anyone involved to advise on the suitability of the PPI policy for her needs. Insofar as LLP committed these defaults, Mrs Plevin argued that it did so 'on behalf of' Paragon. The Insurance Conduct of Business Rules, which are the statutory rules regulating the insurance industry, do not require insurance intermediaries to disclose commissions to their customers but do require an insurance intermediary which makes a 'personal recommendation' to a	He stated that at some point the commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance and concluded that Mrs Plevin would have questioned whether the PPI policy represented value for money if she had been aware of the commission amounts and might not have taken out the policy at all. This unfairness was the responsibility of Paragon, the only party which knew the size of both commissions. However, the court held that Paragon's failure to conduct its own needs assessment of Mrs Plevin did not make its relationship with her unfair. The absence of a regulatory duty under the Insurance Conduct of Business Rules was not conclusive, although it was highly relevant: Paragon could not reasonably be expected to perform a duty which the relevant statutory code assigned to someone else, namely, LLP. LLP's failure to conduct a needs assessment of Mrs Plevin could not be treated as something done 'by or on behalf of' Paragon because LLP was not acting as Paragon's agent. The ordinary and natural meaning of the words 'on behalf of' imports agency, and that is how the courts have ordinarily construed them.

CASE	FACTS	HELD/PRINCIPLE
	customer to buy an insurance contract to take reasonable steps to ensure that the recommendation is suitable for the customer's demands and needs.	Nothing in this case demands a broader interpretation. The phrase 'by or on behalf of' suggests that the act or omission must be done by the creditor itself or by someone else whose acts and omissions engage the creditor's responsibility as if the creditor had done or not done it itself. Further, the **CCA 1974** makes extensive use of the technique of imputing responsibility to the creditor for the acts or omissions of other parties who are not (or not necessarily) the creditor's agents, including in **s 140A(3)**, and when it does so, it does so in clear terms. Finally, there would be no coherent criteria for determining what connection other than agency would be required between the creditor and the acts or omissions causing the unfairness. In the result, the case was remitted to the Manchester County Court to decide what, if any, relief under **s 140B** should be ordered.
p. 191 ↵	***Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816***	W borrowed £5,000 from a pawnbroker, using her car as security. The agreement was a regulated agreement and was correctly documented save that a documentation fee of £250 was erroneously entered in the wrong box and thereby noted as part of the loan. This had the effect of misstating the total charge for credit. The Court of Appeal held that as the document fee was not credit within the meaning given in the **CCA 1974**, one of the prescribed terms had been incorrectly stated and, pursuant to **s 127(3)**, the agreement was unenforceable. As a result, W was entitled to keep the loan amount, pay no interest, and also recover her car. The Secretary of State appealed, arguing that the restriction on the enforcement of improperly executed credit agreements given in **s 127(3)** was incompatible with the **Human Rights Act 1998**.	The House of Lords upheld the Court of Appeal's decision. The fact that a regulated agreement was not enforceable unless a document containing all the prescribed terms was signed by the debtor constituted a restriction on the scope of the rights a creditor acquired under a regulated agreement but did not bar access to the court to decide whether the case was caught by the restriction. The inability of the court to make an enforcement order was a limitation on the substantive scope of a creditor's rights but did not offend the rule of law or the separation of powers. The **Human Rights Act 1998** did not apply as it was not in force at the material time and the court's inability to enforce the agreement did not engage **Art 6(1) European Convention on Human Rights**, which guarantees procedural fairness. Further, if the court's inability to enforce the agreement deprived the lender of its rights under **Art 1 of the First Protocol**, then that interference was justified. As Lord Nicholls of Birkenhead explained, 'one would not expect a statute promoting human rights values to render unlawful acts which were lawful when done. That would be to impose liability where none existed at the time the act was done.'

Key debates

TOPIC	**THE CONSUMER CREDIT ACT AND HUMAN RIGHTS ISSUES**
Author/ academic	Andrew Digwood
Viewpoint	Discusses the House of Lords' ruling in ***Office of Fair Trading v Lloyds TSB Bank plc*** on whether, under **s 75 CCA 1974**, consumers may claim refunds from their credit card companies for purchases made abroad as well as in the UK.
Source	(2007) 157 *New Law Journal* 1555
TOPIC	**HOUSE OF LORDS' RULING ENDS SHOPPER UNCERTAINTY**
Author/ academic	Sylvia Elwes
Viewpoint	Examines the House of Lords' ruling in ***Wilson v First County Trust Ltd (No 2)*** concerning the enforceability of a consumer credit agreement which misstated the full amount of credit advanced. Outlines the judicial approaches to whether the **Human Rights Act 1998** had retrospective effect, whether **s 127(3) CCA 1974** contravened the **European Convention on Human Rights 1950**, and whether a lender who lost the right to enforce an agreement could obtain a restitutionary remedy for unjust enrichment.
Source	(2004) 25(2) *Business Law Review* 28

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Exam questions

Problem question

Alf got married two years ago to Veronica. Veronica used to live in France, where she still has family. They now both live in England. For the past ten years, Alf has had a credit card with Eastern Bank plc. He uses it only for convenience and always settles his bill as soon as the monthly statement arrives. Since they married, Alf made Veronica an authorised user on his card. Last Christmas, Veronica visited her family in France. Whilst she was there, she bought eight silver-plated place mats using the credit card. Each mat cost (when converted from euros to sterling) £15. The total charge was therefore £120. She particularly liked the mats because of their unique pattern, in that when placed together they made a picture of the Eiffel Tower although when used separately they didn't look out of place. The shop told Veronica that the mats were dishwasher-proof. However, the first time Veronica washed them in the dishwasher the silver plating came away and she has since learned that they are not suitable for washing in a dishwasher. Unfortunately, the shop has now gone out of business. Advise Veronica of any rights she might have against the credit card company.

Essay question

Section 75 of the Consumer Credit Act 1974 has been applauded by consumers and consumer groups yet criticised severely by the credit industry, arguing that it is unjust and flawed.

Critically evaluate **s 75** in the light of the above.

Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- multiple-choice questions *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-11-multiple-choice-questions?options=showName>*;
- key facts checklists *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-11-key-facts-checklists?options=showName>*;
- interactive flashcards of key cases *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-11-interactive-flashcards-of-key-cases?options=showName>*;
- problem question guidance *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-11-problem-question-guidance?options=showName>*;
- outline answers to essay questions *<https://iws.oupsupport.com/ebook/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-chapter-11-outline-answers-to-essay-questions?options=showName>*.

Related Links

Visit the online resources for this title *<https://learninglink.oup.com/access/baskind-concentrate6e>*

Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/baskind-concentrate6e-student-resources/baskind-concentrate6e-diagnostic-test>*

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