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Richard Mawrey QC is a consumer credit expert practising at *Henderson Chambers*. He has been a specialist editor of *Goode: Consumer Credit Law and Practice* for 30 years and is co-author of *Blackstone's Guide to the Consumer Credit Act 2006* and *Butterworths Commercial* and *Consumer Law Handbook*.

In his twelfth consumer credit column, Richard considers when a party to a transaction is acting "in the course of a business".

PLC Financial Services

WHEN IS A BUSINESS NOT A BUSINESS?

In my undergraduate days, like a myriad of students since universities first emerged from the primeval swamp of the Dark Ages, I used to think it smart to include in my weekly essay (if remotely practicable) citations from the published works of the tutor to whom the essay was to be read in tutorial. Surely there could be no greater wisdom, in his eyes, than his own *ipsissima verba*. One of my tutors, (later Professor Sir) Guenther Treitel, knew well of the wiles of undergraduates and was wholly without vanity as to his own writings (*O si sic omnes!*) He would gently counter with the words of Kipling "the Dog returns to his Vomit and the Sow returns to her Mire".

At the risk, therefore, of being accused of returning to my canine barf or my porcine ordure, in my piece last July "Was the Artful Dodger a consumer?" (see *Article, Richard Mawrey QC's consumer credit column: July 2011*) (answer still "No"), I produced my apothegm that "being a consumer is not a status: it is a function." I went on to point out that it is a function created by legislation, the "status" of consumer being unknown to the Common Law. I drew attention to the fact that there was no universal definition of "consumer" and that some legislation moved the definition well away from the individual. The Unfair Contract Terms Act 1977 (UCTA), for instance, contemplated that a partnership or a body corporate might be a "consumer" and the definition of "individual" in the original Consumer Credit Act 1974 (CCA) encompassed partnerships of any size, meaning that (in those days) Slaughter & May or Price Waterhouse might be a "consumer" for the purposes of the CCA.

One of the reasons for the Protean nature of "consumers" is that being a consumer is not simply a function; it is a *relative* function. Just as it takes two to tango, it takes two to create a relationship in which one is a consumer. The function of consumer is not absolute: it depends on the function of the other party. Although it is usually the case, a consumer does not necessarily have to be someone who is buying goods or services, still less "consuming" them. Take Mr Jones who buys a new car from a garage and trades in his own car in part-exchange. There is a single transaction, comprising two elements: in one Jones is buying the new car and in the other he is selling the old car. For consumer law purposes Jones is usually treated as a "consumer" throughout. If (before 2011) the acquisition of the new car was by means of hire-purchase and Jones exercised his statutory right to cancel the hire-purchase agreement, his part-exchange sale of the old car to the dealer would be automatically set aside with it (CCA section 73).

Jones is not treated as a dealer in relation to the old car: he is for all purposes a consumer. Note, sadly, as I pointed out in my very first column "Kamikaze justice" (see *Article, Richard Mawrey QC's consumer credit column: May 2011)*, the BIS made such a horlicks of implementing the EU Consumer Credit Directive (*2008/48/EC*) (CCD) that the new right of withdrawal under section 66A does not unscramble the part-exchange transaction but that doesn't affect Jones's consumer function.

What, however, of the other party to the transaction? Is his status (or function) irrelevant so long as he is supplying goods or services to the "consumer"? Far from it. In almost all instances where a party is defined as a consumer to a transaction, it is essential that the other party should be "acting in the course of a business". In other words it is the function of the other party that creates the function of the consumer.

To give an obvious example, if I, tired of my next-door neighbour borrowing my lawnmower, agree to sell it to him for £50, both of us contract as private individuals. I am not acting in the course of a business and my neighbour is not a consumer.

This distinction has been with us for a very long time, indeed for much longer than the concept of a "consumer" as a species deserving privileged treatment by the law. Consider that most fundamental series of legal rules, the principles laid down for implying terms into contracts for the sale of goods. First codified as the Sale of Goods Act 1893 (now the Sale of Goods Act 1979) sections 12 to 15, these rules were designed to regulate commercial transactions.

Section 14(1) of the 1893 Act read:

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, **and the goods are of a description which it is in the course of the seller's business to supply** (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose …' (emphasis supplied).

Section 14(2) which implied a condition of merchantable quality (now satisfactory quality), insisted that the seller must be someone "who deals in goods of that description". The current version of section 14 has watered these requirements down to the seller selling the goods merely "in the course of a business".

The Unfair Terms in Consumer Contracts Regulations 1999 (*SI 1999/2083*) (UTCCRs) insist that, for the other party to be a consumer, the seller or supplier must be a "natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession …"

The CCA distinguishes between commercial agreements (which are, in general, fully regulated) and "non-commercial" agreements (which are only minimally regulated). A non-commercial agreement is one which is "not made by the creditor or owner in the course of a business carried on by him".

So far, so good. In 99% of cases, it is quite obvious whether or not one party to a transaction is acting in the course of his business. In my lawnmower example, patently, neither I nor my neighbour could be said to be acting in the course of a business. The remaining 1% of cases do, however, present a conundrum. What is the position where one party is undoubtedly a commercial entity but the transaction is outside its normal course of business? Is it none the less acting "in the course of a business", so as to make the other party a "consumer"?

We have met the problem already in the guise of a company acting outside the course of its usual business being held entitled to claim the status of "consumer" in *Feldarol Foundry plc v Hermes Leasing (London) Ltd [2004] EWCA Civ 747*. In acquiring a luxury car for its chairman, the Foundry was held not to be acting in the course of its business because its business was that of a steel foundry and not that of a car dealer. Though obviously a bizarre decision on the facts, it does indicate that the courts will distinguish between a transaction in the course of a company's *usual* business and one peripheral to it.

The approach of the courts has, to say the least, been inconsistent. Start with *Davies v Sumner [1984] 3 AER 831*. This was a prosecution under the Trade Descriptions Act 1968. Mr Davies was a self-employed courier who used his car to make deliveries to and from a television company. He decided to trade in the car for a new one and sold the old car in part exchange to the motor dealer. But naughty Mr Davies had represented that the odometer reading of 18,000 was genuine when he knew jolly well that the odometer had gone completely round the clock and the true reading was 118,000. Mr Sumner of the local consumer protection office prosecuted him. The Act required that an offence should be committed by someone acting "in the course of a trade or business". The House of Lords surprisingly held that, when selling the old car (even though it was the essential tool of his trade as a courier) Mr Davies was not acing in the course of his trade or business. Lord Keith said "The expression 'in the course of a trade or business' in the context of an Act having consumer protection as its primary purpose conveys the concept of some degree of regularity …"

Contrast this with *Stevenson v Rogers [1998] EWCA Civ 1931*. Mr Rogers was a fisherman who owned his own boat, the Jelle. It was his only vessel and he sold it to Mr Stevenson. The latter alleged that the boat was not of merchantable quality and thus contrary to the term implied by section 14(2) of the Sale of Goods Act 1979 in its then form. Mr Rogers argued that the sale was not "in the course of a business" and thus section 14(2) did not apply. The Court of Appeal seemed to have no difficulty in distinguishing *Davies v Sumner* (otherwise binding on them) and relied heavily on the change from the 1893 Act (which required the seller's business to be that of dealing in the type of goods sold) to the 1979 Act which merely required him to act in the course of a business.

- The Court thus held that Mr Rogers *was* acting in the course of a business and section 14(2) implied the condition of satisfactory quality into the sale agreement.

Feldaroll, which followed a very similar decision in *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd [1988] 1 WLR 321*, took the *Davies* line that, as the foundry was not dealing in cars as its business, it was not acting in the course of a business when it acquired the Lamborghini and was thus a consumer.

Of course, the Trade Descriptions Act and the Sale of Goods Act are different statutes, but they are both designed to protect those who purchase goods (and, in the former case, services). Despite the ingenuity of the appellate judges in *Stevenson*, it would be quite impossible to explain to the man in the street any logical or practical difference between the facts of *Davies* and *Stevenson*.

What we get from these cases is this. To be a consumer in a transaction, the other party has to be acting in the course of a business. If the transaction is outside the normal course of business of that other party, a court may, in some circumstances, be persuaded that, for the purposes of the relevant legislation, he has not been "acting in the course of a business", thus depriving the counterparty of the considerable forensic advantages of being a consumer. Accordingly, if you are a commercial entity and you feel that a transaction is sufficiently off piste to enable you to argue that you were not acting in the course of a business, then you may escape the consequences of having contracted with a "consumer" and you may be able to exclude what would otherwise be your liabilities.

So, don't take it for granted that any purchaser of goods or services is necessarily a consumer. Look first at the functions of the seller.