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Richard Mawrey QC's consumer credit column: MARCH 2012

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In his ninth consumer credit column, Richard considers a quirk of the Consumer Credit Directive (*2008/48/EC*) (CCD) that seems to remove of one of the cornerstones of English jurisprudence, the signature.

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SIGNATURE DISH

Devotees of *David Copperfield* will recall the delightful Mr Dick, a harmless eccentric who lodges with and is cared for by David's aunt, Betsey Trotwood. For ten years Mr Dick has been writing a Memorial, possibly to the Lord Chancellor, though what it is about we never learn and Mr Dick himself is somewhat vague. Because he is obsessed with the execution of Charles I, he cannot stop himself from inserting it into his Memorial and, when he does, his only remedy is to use the paper as scrap and turn it into a kite which he then flies on the Common. Mr Dick has unwittingly bequeathed us that very useful phrase a "King Charles's Head" to connote an obsessive theme which keeps cropping up in someone's conversation or writings.

Readers of this column – and PLC assures me that there are some – may begin to fear that the EU Consumer Credit Directive (*2008/48/EC*) (CCD) has become its King Charles's Head. Whenever you begin to think that you may be spared it - bingo! It pops up. No apologies are tendered: damit, the Directive does represent the most significant change in consumer credit law since the Consumer Credit Act 1974 (CCA) was fully implemented in May 1985. But it is possible that this month's column may just fly the odd kite.

Exploring the charming byways of the Directive (as sad consumer credit writers are wont to do), one discovers a number of little quirks whose significance was probably unrealised by the draftsmen of the Directive and were certainly unrealised by their Whitehall counterparts. Nestling amongst those quirks seems to be the removal of one of the cornerstones of English jurisprudence, the signature.

It may be recalled that, a while back, this column introduced readers to the Welsh Wizard, Sir Leoline Jenkins, the author of the Statute of Frauds 1677 (see *Article, Richard Mawrey QC's consumer credit column: January 2012*). His guiding principle was that, where a contract was made in writing, it should be signed, at the very least, by "the person to be charged" with the contract. Thus, to this day, most land contracts and all guarantees, in order to be enforceable, must be signed by the person to be "charged" (i.e. made liable). The reason is obvious. A written document by itself may represent the concluded contract, but it may just as well represent a pre-contract draft or even a document prepared by one party and handed to the other for his comments. Once the parties have added their signatures, however, the law assumes (until the contrary is proved) that the contract has reached its final form and has been assented to by all parties. It is the signature that binds the parties to the contract.

Consequently, when the CCA came to be drafted, it was a given that all regulated agreements were going to have to be signed. This had been the case with previous legislation such as the Hire-Purchase Acts, the Bills of Sales Acts and so forth. Mr Francis Bennion, its draftsman, would have been considered as loopy as Mr Dick had his draft bill not contained provisions for signed agreements. Thus, at the heart of the CCA, we find section 61(1) which reads: A regulated agreement is not properly executed unless:

- (a) a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) is signed in the prescribed manner both by the debtor or hirer and by or on behalf of the creditor or owner, and
- (b) the document embodies all the terms of the agreement, other than implied terms, and
- (c) the document is, when presented or sent to the debtor or hirer for signature, in such a state that all its terms are readily legible.

The first and most surprising thing to note about the Directive, therefore, is that there is no requirement for a consumer credit agreement to be signed at all. Article 10 undoubtedly provides "Credit agreements shall be drawn up on paper or on another durable medium. All the contracting parties shall receive a copy of the credit agreement" and then sets out in very great detail all the pieces of information that must be included in it, but it does not go on to provide for either party's signature to be necessary (or even desirable). This is bizarre. Perhaps the good folk in Brussels were uneasy about imposing a need for literacy on rustic debtors in the fastnesses of the Carpathians but there it is - or rather, there it isn't.

There was, however, a saving clause in Article 10.1: "This Article shall be without prejudice to any national rules regarding the validity of the conclusion of credit agreements which are in conformity with Community Law". On the face of it, therefore, if national rules for the validity of a credit agreement included a rule requiring signature by both parties, such a rule could be preserved in reliance on that saving clause. Accordingly, when implementing the Directive, the UK made no changes to section 61(1).

But the bewilderment with which the BIS draftsmen confronted the Directive began to leach into their souls. Like Waugh's Mr Prendergast, they started to have Doubts. Was a signature vital? Would dispensing with a signature really cause the heavens to fall? Would a little nibble of the forbidden fruit really do any harm?

So an experiment was tried. Obviously it could not be tried on the existing and much-loved regulated consumer credit agreements but the Directive had introduced two new animals into the menagerie, the authorised business overdraft agreement and the authorised non-business overdraft agreement. These were the ideal guinea pigs. They were given their own hutch – Part VA of the CCA – nicely segregated from Part V which contained all the rules for the negotiation and formation of agreements. Of course, they were still a species of credit agreement so they had to be subject to some rules – nobody was going to allow the guinea pigs to roam unsupervised in the wild – but segregation in Part VA allowed the draftsmen to adopt a pick-and-mix approach to which existing rules would and would not apply.

This approach was nothing if not random. CCA section 74 holds the key. A business overdraft is subject to section 55B (assessment of creditworthiness), section 56 (antecedent negotiations), section 60 (form and content of agreements) and section 61B (duty to supply copies). It is not subject to section 55 or any of the Disclosure Regulations so no pre-contract disclosure is needed at all with a business overdraft. A non-business overdraft, on the other hand, in addition to being subject to these four sections is subject to section 55 and the Disclosure Regulations, as well as section 55C (duty to supply draft agreement). As the eagle-eyed reader will have spotted, neither overdraft calls for explanations under section 55A but, more importantly, neither overdraft is subject to section 61. The cornerstone of section 61(1), the signed agreement containing all the terms, has been whisked away. In short, an unsigned overdraft agreement, if "authorised" will be valid and enforceable.

At this point the CCA becomes frankly surreal, because if an agreement would be an authorised non-business overdraft agreement but for the fact that the debt is not repayable on demand or within three months, then it is subject to all the rules in Part V, including the need for an agreement signed by both parties. So some overdrafts are more equal than others.

Thus the CCA itself has now created the first ever signature-free consumer credit agreement. But does it stop there? Kite-flying time, I think. Let's go back to the saving clause in Article 10.1: "… national rules regarding the validity of the conclusion of credit agreements which are in conformity with Community Law". The starting point has to be that those rules are in conformity with the Directive itself. If they are not, then the saving clause does not bite. Next question: does the Directive contemplate a (non-overdraft) contract being concluded orally? The surprising answer is that it does.

Article 5 of the Directive covers pre-contractual information. Article 5.1 sets out the 19 pieces of information to be supplied and makes it obligatory to use the Standard European Consumer Credit Information sheet (SECCI). Articles 5.2 and 5.3 provide:

- 2. However, in the case of voice telephony communications, … the description of the main characteristics of the financial service to be provided … shall include at least the items referred to in points (c), (d), (e), (f) and (h) of paragraph 1 of this Article …
- 3. If the agreement has been concluded at the consumer's request using a means of distance communication which does not enable the information to be provided in accordance with paragraph 1, in particular in the case referred to in paragraph 2, the creditor shall provide the consumer with the full pre-contractual information using the [SECCI] immediately after the conclusion of the credit agreement.

Article 5.3 quite clearly assumes that a consumer credit agreement may be concluded on the telephone, whereupon the obligation arises for the creditor to produce the SECCI "immediately after the conclusion of the credit agreement". Patently an agreement "concluded" on the telephone means an agreement where, the moment the contracting parties express themselves as having reached agreement on all the relevant terms, the agreement is concluded for the purposes of the Directive. Equally obviously there cannot be at that moment a written document signed by the debtor. But if the agreement is not concluded until a document comes into existence (whether on paper or electronically) bearing the signature of (at least) the debtor – which is the clear position of the CCA section 61 – then the kind of oral agreement posited by Article 5.3 is impossible.

The situation seems to be this. The Directive (which has primacy) contemplates in unequivocal terms that an agreement may be "concluded" orally – certainly on the telephone and perhaps more widely: the CCA, by contrast, provides that an agreement will only be properly executed and enforceable when it has been signed by both parties. The Directive, while undoubtedly requiring the agreement to be drawn up on paper or in another durable medium does not require a signature. It goes further, however. The Directive, while requiring the agreement to be drawn up in this way does not require it to be drawn up before the agreement is "concluded". Indeed it expressly contemplates that the written document may be supplied after the agreement is concluded.

Article 14 contains the right of withdrawal within 14 days:

- (a) either from the day of the conclusion of the credit agreement, or
- (b) from the day on which the consumer received the contractual terms and conditions and information in accordance with Article 10, if that day is later than the date referred to in point (a) of this subparagraph.

This makes it clear that there are circumstances where the Directive will regard – and will require the Member States implementing the Directive to regard – an agreement as having been concluded and thus binding and enforceable before a document comes into existence setting out the contractual terms and conditions and a fortiori before any such document is signed. If the CCA's requirements for the validity of an agreement go further than those in the Directive then they are not compatible with the Directive and are not saved by the clause in Article 10.1 preserving national rules.

The startling result of this would be that CCA section 61(1) might be incompatible with the Directive – at least for telephone contracts – and perhaps generally. Consequently, provided all the terms of the agreement are subsequently supplied, the oral agreement would have to be treated as concluded <u>and binding</u> from the moment it was made.

I shall leave it to some braver soul to try this one on the courts (Judge Waksman QC would, I am sure, love to get his teeth into it) but it bears thinking about.

No signature? Poor Sir Leoline must be turning in his grave.