The Consumer Rights Act 2015: Financial Services & Consumer Credit

By Rachel Tandy

The Consumer Rights Act 2015 comes into force on 1 October 2015. In anticipation, Henderson Chambers is publishing a series of Alerters reviewing the key provisions. In this final article in the series, Rachel Tandy considers the impact of the legislation on the financial services sector.

INTRODUCTION

1. With the Consumer Rights Act 2015 ("**The Act**") being billed largely as a consolidation exercise, it would be easy to assume that the impact on financial services will be minimal. After all, concepts such as "grey lists" of unfair terms and rights to reject goods are hardly new.

2. Some of the changes are, admittedly, subtle. But others may well have a substantial impact on the way consumer credit business is run.

3. This note summarises four of the most significant "take-home" points for the financial services industry. Those are:

    a. Pre-contractual information;

    b. Consumer remedies;

    c. Deductions for depreciation; and

    d. Enforcement provisions.

4. It is worth noting that some financial services contracts will be exempt from some parts of the Act. However, the approach is not uniform throughout. For example, Part 1 (Consumer Contracts for Goods, Digital Content and Services), Chapter 4 (Services) of the Act deals with service contracts but, unlike the Consumer Rights Directive, there is no financial services exemption and so those contracts will largely be caught by that part of the Act. Section 50(3), however, which stipulates that certain pre-contractual information will constitute a term of the contract, is intended to enable enforcement of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the "**2013 Regulations**"). It is clear from the text of the Act and the explanatory notes that, where services are excluded from the scope of the 2013 Regulations, they will also be excluded from this provision.

5. Those advising would be wise to check closely which provisions apply. They should also check back for any subordinate legislation tweaking the scope of the Act under the power at ss. 48(5).

6. Finally, s. 53 makes clear that other regimes which impose stricter requirements on a trader will continue to apply alongside the Act. In the case of the Consumer Credit Act 1974 ("**CCA**") – to which no amendments to account for the Act are currently planned – this means that financial services companies may find themselves having to accommodate both sets of rules. It is important to note that two regimes do not quite marry up and therefore compliance with one does not necessarily indicate compliance with the other.

Pre-Contractual Information

7. Under s. 50, anything said or written to the consumer, by or on behalf of the trader, about the trader or the service, constitutes a term of the contract if it is taken into account by the consumer when making decisions about the service, or about entering into the service contract.

8. In the consumer credit context, this is significant where financial products are being sold by a broker or other intermediary. Restricted credit provides an obvious example. If a consumer goes into a shop and wishes to buy a new television, he or she may be offered the chance to purchase it on credit. The sales assistant might explain the credit agreement or make comments about its nature, but the creditor under the agreement is likely to be a third party financial institution, rather than the shop itself. The creditor is then likely to be saddled with anything the sales assistant says about the agreement as an express term of the contract. The only way out for the creditor will be either (i) to argue that the sales assistant was not making representations "on behalf of" the creditor (likely to be an uphill struggle, at best) or (ii) to try to show that the representations did not affect the debtor's decision making.

9. In practice, this is likely to lead to more restrictive sales scripts and closer scrutiny by creditors of their agents and brokers – all of which will come at a cost. Lenders would certainly be well advised to review any sales scripts and to enter into discussions with brokers or sellers where they have an arrangement to provide restricted credit.

10. However, there is a further risk which is harder for the creditor to guard against. Suppose the same consumer wishes to buy a television. This time, the sales assistant makes a number of statements about the television and the consumer buys it, paying with a credit card. The statements about the

television will likely become terms of the contract under s. 50. If those terms are breached, the consumer will have a claim against the credit card provider under s. 75 CCA 1974.

11. In those circumstances, it is harder for a financial services business to exert control over the sales assistant; the shop's sales script or policy in relation to its own goods will be a commercial matter for the shop. However, with s. 50 firming up the position for consumers, there is clear potential for s. 75 claims to increase off the back of ill-judged comments made by traders in circumstances such as these.

Consumer Remedies

12. A key part of the new Act is the establishment of a tiered system of remedies available to consumers. Numerous implied terms as to quality, fitness, correspondence to description and so on are set out at ss. 10-14. In general, where these provisions have been breached, consumers are entitled to various combinations of the remedies set out at ss. 19-24, being (i) a short term right to reject, (ii) a right to a repair or replacement, and (iii) a right to a reduction in price or final right to reject.

13. Save in the case of partial rejection under s. 21, the effect of rejection is to bring the sales contract to an end. Where that leaves a creditor under a regulated debtor-creditor-supplier agreement financing the sales (or supply) transaction depends upon the manner in which (and reason why) the goods are rejected and the nature of the credit agreement under the CCA (be that, for example, withdrawal or cancellation under ss. 66A – 74 CCA, or rescission: see *Durkin v DSG Retail and HFG Bank* [2014] UKSC 21).

14. The position is slightly different in relation to distance or off-premises contracts. Where a consumer has cancelled such a contract within the cancellation period, all ancillary contracts are automatically cancelled (See Regulation 38 of the 2013 Regulations). The fact that financial services agreements are exempt from the 2013 Regulations does not prevent them from being "ancillary contracts" within the scope of Regulation 38 (See Regulation 38(4)).

15. The 2013 Regulations came into force after *Durkin* was decided and do not appear to have been referred to before the Supreme Court. It may be that the introduction of Regulation 38 will now serve to persuade judges that any termination of a sales contract by a consumer for non-conformity under the Act ought to attract a similar automatic cancellation of ancillary agreements. If that is the case, then consumer credit providers may well be hard hit by the new legislation. However, the position as it currently stands remains unclear.

16. It does, however, seem evident from *Durkin* that, where there is a dispute about the validity of any cancellation by the consumer, a creditor has a duty to conduct some investigation into the circumstances rather than simply accept the trader's version of events.

Deductions for Depreciation

17. Where a consumer has terminated a contract under the Act, the trader is entitled to deduct from any refund an amount to take account of the use the consumer has had of the goods in the period since they were delivered (see e.g. s. 24(8)). In principle, this is nothing new; similar provisions were contained in ss. 48C and 48E Sale of Goods Act 1979.

18. What is notable is that the Act stipulates that no such deduction ought to be made if the right to reject is exercised within the first six months after the goods have been delivered, title has passed, and the goods have (where relevant) been installed (ss. 24(10)-(11)). However, motor vehicles are exempted from this initial six month grace period by s. 24(10). This exception is notable given that deprecation in the motor industry tends to be front-loaded, with the majority of new vehicles losing value as soon as they leave the showroom. The impact is likely to be most keenly felt by this industry, which is also a hotbed for restricted credit agreements and hire-purchase or conditional sale agreements.

19. Again, where rejection brings the sales contract to an end, the effect on any related debtor-creditor-supplier agreement is unclear, as set out above.

20. The quantum of any deduction is a matter for evidence (see *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745). Matters likely to weigh on the assessment of any deduction are (i) the nature of the goods (ii) the extent of the consumer's use of them (iii) the remaining functionality of the goods.

Enforcement

21. Where there has been a breach of consumer law, traditionally the sanctions available against financial institutions are limited to criminal prosecution and civil injunctive relief. These measures do not offer remedies to individual consumers; rather, they are concerned with protecting consumers as a whole from future breaches.

22. All that is set to change with the amendments to the Enterprise Act 2002 ("**EA**") introduced by Schedule 7 of the Act. Those amendments

introduce the concept of "enhanced consumer measures." These are defined at s. 219A EA and include the ability to award compensation to individual consumers who have suffered loss as a result of the trader's conduct, or to offer consumers the option to terminate the contract.

23. The civil courts can attach those measures to an enforcement order or undertaking obtained by a public body enforcer (for example, the Competitions and Markets Authority or the Financial Conduct Authority) (see ss. 217(10A) and 217(10B) EA). Where an enforcement order or undertaking has been sought by a private enforcer, enhanced consumer measures can only be attached in the specific circumstances set out in s. 219 EA.

Rachel Tandy

28 September 2015