Security bills of sale and logbook loans: a tolerated eccentricity

Daniel M Collins*

"The civility which money will purchase, is rarely extended to those who have none" [1]

The works of Dickens are replete with tales of moneylenders displaying a malevolence and implacability in their dealings with those individuals who, through sheer desperation, became their debtors. Indeed, the real-life versions of Scrooge, Quilp and Heep were freely able to exercise their rapacity at a time when poverty in Victorian England was rife- the Poor Law was the social security of its day and the workhouses were in full swing. Moreover, there was little by way of legislative protection for the debtor, and debtors' prison was often the consequence of non-payment of debt.[2] Whilst these institutions have long since disappeared, and a plethora of consumer credit legislation [3] enacted to obviate the worst excesses of Victorian usury, there still exists a compendium of questionable lending practices. This was recognised by Lord Scott in *Wilson* [4]; he commented that consumer credit controls "recognise the vulnerability of those members of the public who resort to pawnbrokers and moneylenders when in dire need of funds to make ends meet...They need protection".[5] H. H. Judge

[1]* Senior Lecturer in Law, Manchester Metropolitan University.

C. Dickens, *Sketches by Boz. Illustrative of Everyday Life and Everyday People (London: John Macrone, 1836).*

[2] Surprisingly, these were intended to be a means of protecting debtors from angry creditors. The rationale for their use gradually changed to one of punishment for financial misconduct, especially where the debtor had contracted fraudulently, as evidenced by the Small Debts Acts of 1845 and 1846, See, e.g. *M Finn, The Character of Credit: Personal Debt in English Culture, 1740-1914 (Cambridge: Cambridge University Press 2009).*

[3] For example, the Pawnbrokers Acts 1872 and 1960 and the Moneylenders Acts 1900 and 1927 possessed significant caveats and were therefore generally inadequate. Indeed, the extent of any consumer protection varied according to the legal form of the transaction. The Consumer Credit Act 1974 (as amended) is described in its Long Title as existing 'for the protection of consumers'. However, its complexity has often undermined a consistent application and has led to amendments by way of the Consumer Credit Act 2006 and the implementation of Directive 2008/48 on credit agreements for consumers and repealing Council Directive 87/102 [2008] OJ L133/68 (effective for consumer credit agreements made on or after 1/2/2011).

[4] *Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816; [2003] H.R.L.R. 33.*

[5] *Wilson [2003] UKHL 40* at [169].

Simon Brown QC made a similar observation in *Rankine*,[6] when commenting on the need to "protect the individual unsophisticated in financial affairs in contracts with unscrupulous and sophisticated financial institutions".[7] To this end, and following several revealing investigations into the payday loan sector[8], the Financial Conduct Authority (FCA) has recently shifted its attention to the evolving, yet equally contentious, logbook loan[9]- a business model predicated upon individuals offering their vehicles as security for a loan.

The operational reality

Essentially, the logbook loan is created by way of a security bill of sale, a document that transfers ownership of specific "personal chattels"[10] already owned by the borrower[11] to the lender, in circumstances where the borrower retains possession of the goods.[12] The attractiveness of such an arrangement is clear to see. In times of economic emaciation, borrowers are often seduced by the availability of quick money for minimal travail- the narrative formulated by the logbook lenders tends to emphasize the ability of the borrower to obtain funds whilst being able to continue to use the security (the vehicle). Yet, securing such sojourn tends to come at a price: high APRs[13] and a failure to meet the set instalments could have internecine consequences, notably the repossession of the vehicle with little or no notice. Indeed, whilst it may be true

[6] *Rankine v American Express Services Europe Ltd (2008) C.T.L.C .195*.

[7] *Rankine (2008) C.T.L.C. 195* at [9].

[8] Most recently, *FCA, "TR15/3: Arrears and Forbearance in High-Cost Short-term Credit" (2015)*.

[9] *FCA, "FCA Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services" (2014) (supplemented by "FCA says logbook lenders must raise standards" (2015); and "Is the logbook loans market working for consumers?" (2015)).*

[10] Defined by the Bills of Sale Act 1878 s.4 as "goods, furniture and other articles capable of complete transfer by delivery" and is not limited to vehicles. This should be compared to an absolute bill of sale, which merely evidences a transfer or assignment without creating a security.

[11] The Bills of Sale legislation applies to individuals and not corporations. See, e.g. *Slavenburg's Bank NV v Intercontinental National Resources [1980] 1 W.L.R. 1076* at 1098; (1980) 124 S.J. 374 per Lloyd J.

[12] In its recent consultation paper, Law Commission, "Bills of Sale" (Consultation Paper No.225, 2015), paras 2.4–2.9, it was estimated that there were 47,723 logbook loans issued during 2014 out of 52,580 bills of sale registered at the High Court, with an average loan amount of £844. Other bills of sale were used for the purchase of vehicles and the general assignment of book debts. The logbook loan sector remains small when compared to the payday loan market where 8.1 million loans were granted in 2014 with a total value of £2,145 million.

to say that such facilities serve to alleviate immediate and short-lived cash-flow problems and, in certain limited circumstances, may avoid considerable unauthorised overdraft charges[14], the dangers inherent in such a facility are disturbing. Whilst there will undoubtedly be those who do have cheaper borrowing options and use these (and possibly payday loans) as a short-term expedient without being overly concerned about high levels of interest, such loans are predominantly used by low-income, non-status individuals (or those without access to more “conventional” forms of bank finance). The vulnerability of these debtors is of particular concern to the FCA and the Law Commission.

In assessing this sector, the FCA[15] has identified a range of failings by the logbook loan providers to include inadequate or no affordability checks[16] with some applicants encouraged to manipulate details of their income on application forms[17]. It also found that many applicants were unaware of the statutory cooling-off period[18], unclear about key aspects of the agreements, for example, the APR and total amount to be paid[19], or the potential consequences – including vehicle repossession in the event of default. There was further evidence of

[13] Law Commission, "Bills of Sale" (Consultation Paper No.225, 2015), para 2.9 identified APRs as varying between 60 and 443%. However, these are considerably lower than the vertiginous APRs often charged by payday loan lenders. The FCA has recently capped the interest and fees payable on "high-cost short term credit" such as payday loans to 0.8% per day of the amount borrowed (*FCA Policy Statement, "PS14/16: Detailed rules for the price cap on high-cost short-term credit" (2015)*). This category does not cover logbook loans or pawn-broking services which are therefore unaffected by this cap.

[14] As considered by the Office of Fair Trading, see "*Review of High Cost Credit*" *(2010).* Such charges have themselves been subject to an unsuccessful legal challenge *in Office of Fair Trading v Abbey National Plc [2009] UKSC 6; [2010] 1 A.C. 696; [2010] 1 C.M.L.R. 44.*

[15] *FCA, "FCA Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services" (2014).*

[16] Contrary to the stringent "*Responsible Lending*" *requirements (CONC 5.2.1R)*, and *OFT, "Irresponsible Lending Guidance" (2010), paras 4.1 and 4.3*. The significance the courts place upon the need for rigorous affordability checks in logbook loan cases may be limited, see, e.g. *Nine Regions (t/a Logbook Loans) v Sadeer 14 November 2008 (Bromley County Court).*

[17] Contrary to CONC 5.3.5R.

[18] Consumer Credit Act 1974 s. 66A.

[19] CONC 3.5.3R and 3.5.5R stipulate the pre-contract disclosure requirements (pursuant to Consumer Credit (Advertisements) Regulations 2010 (SI 2010/1970) regs 4 and 5) to include the provision of a "Representative Example", which must stipulate the rate of interest, representative APR, the total amount of credit, any charges, contract duration and the total amount payable. The credit agreement must comply with Consumer Credit Act 1974 s.60 and the Consumer Credit (Agreements) Regulations 2010 (SI 2010/1014) as to content.

administrative errors and disparities between oral representations and the contents of written documentation. Significantly, it indicated that many borrowers viewed this form of finance as a last resort, were often vulnerable and, in some cases, felt pressurized into making such agreements.[20]

Lamentably, the construction of security bills of sale presents additional concerns. Logbook loans must comply with consumer credit law and it therefore standard practice to execute both a credit agreement and a security bill of sale, the latter having to comply with the elliptical Bills of Sale Act 1878 and the Bills of Sale (Amendment) Act 1882, in order to offer the lender security for a loan.[21] This legislation is notoriously vague and not without its critics, having been described as "beset with difficulties" by Lord Macnaghten in *Thomas*[22] and criticised for its "technical pitfalls" by the Report of the Committee on Consumer Credit,[23] with its repeal having been recommended by the Diamond Report[24]. With this in mind, it is unfortunate that, in the context of logbook loans, the Department for Business, Innovation and Skills (BIS) seemingly missed an opportunity to reform the law in this area when opting for a voluntary code of practice instead of legislation,[25] especially as security bills of sale manifest a range of highly contentious issues- conceptual and substantive.

[20] Such conduct does in part highlight a failure on the part of logbook lenders to comply with all aspects of the Code of Practice issued by the Consumer Credit Trade Association (CCTA). This is the trade body which covers most logbook lenders—*Consumer Credit Trade Association, "Bills of sale for consumer lending regulated under the Consumer Credit Act 1974" (2011, updated October 2012)*. The FCA has considerable powers to supervise and sanction lenders who breach consumer credit legislation and FCA rules, thereby obviating any ongoing risk to consumers. These include banning or suspending firms or individuals from carrying out regulated activities and imposing fines for breaching rules or committing market abuse.

[21] This legislation is of narrow application, and is not applicable where, e.g. the security is land. The Land Registration Act 2002 s. 27(2) governs the registration and protection of legal charges over land. Different rules apply to aircraft, ships and agricultural equipment.

[22] *Thomas v Kelly (1888) 13 App. Cas. 506 HL* at 517.

[23] *Crowther Committee, Report of the Committee on Consumer Credit, Cmnd.4596 (1971), p.179 (Crowther Committee)*.

[24] *A.L. Diamond, "A Review of Security Interests in Property" (HMSO, 1989), p.92 para.18.1.8*.

[25] *BIS, "Government response to the consultation on proposals to ban the use of bills of sale for consumer lending" (2011), p.11 para.39*.

As already indicated, “a valid security bill of sale, duly registered, operates to transfer legal title to the goods comprised in the bill”[26]- in this case a car, to the lender as security for the loan, thereby creating a mortgage as “the general title is transferred to the mortgagee, subject to be revested by performance of the condition”.[27] The nature of the standard form security bill of sale is that it will enable repossession of the car in the event that the borrower is in default:

> “[I]n payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security.” [28]

Essentially, the lender is simply re-taking control of his property. This would clearly be compatible with contractual rights, but creates an evident conceptual anomaly that is highlighted by contrasting the rights of a mortgagee in possession of residential land, whose power of sale where “the mortgage is in arrears and unpaid for two months after becoming due”[29] would generally become *exercisable* only following a court order of repossession. No such court order is required with a bill of sale, under which the lender can seize goods subject to the bill of sale when the debtor defaults on repayment and without notice of such.[30] Furthermore, following repossession of land, the mortgagee in possession is subject to an objective duty *in equity* to take reasonable care to obtain the true market value of the property;[31] there is no evidence or suggestion of a logbook loan lender being under a comparable duty. Furthermore, whilst the mortgagee in possession of residential land must account to the borrower for any sums in excess of those required to redeem his

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[26] *The Right Honourable Lord MacKay of Clashfern (ed.), Halsbury’s Laws, 5th edn (London: LexisNexis Butterworths, 2008), Vol.50, para.1683*.

[27] *L. A. Jones, A Treatise on the Law of Mortgages, 5th edn (Indianapolis: Bobbs Merrill Company, 1908), pp.5–6*.

[28] Bills of Sale Act (1878) Amendment Act 1882 s.7.

[29] Law of Property Act 1925 s.103(ii).

[30] Bills of Sale Act (1878) Amendment Act 1882 s 7(1). Historically, notice of repossession has been a feature of statute, e.g. the Conveyancing and Law of Property Act 1881 s.14; Law of Property Act 1925 s.146; Hire Purchase Act 1965 s.25(3); as well as the hire purchase provisions of the Consumer Credit Act 1974.

[31] *Cuckmere Brick Co v Mutual Finance [1971] Ch. 949; [1971] 2 W.L.R. 1207; (1971) 22 P. & C.R. 624 CA (Civ Div); Raja v Lloyds TSB Bank Plc [2001] EWCA Civ 210; [2001] Lloyd’s Rep. Bank. 113; (2001) 82 P. & C.R. 16; Silven Properties Ltd v Royal Bank of Scotland Plc [2003] EWCA Civ 1409; [2004] 1 W.L.R. 997; [2004] 1 P. & C.R.DG6; and Alpstream AG v PK Airfinance Sarl [2015] EWCA Civ 1318.*

mortgage (when exercising its power of sale),[32] evidence indicates that the logbook lender can simply keep any balance.[33]

Therefore, the construct of the security bill of sale together with the powers accruing to the lender, would appear to create an imbalance in the nature of the financial relationship with the borrower. There is, however, a modicum of protection for the borrower, as the lender, having seized the secured goods, must wait five clear days before sale.[34] During this period, the borrower may apply to the High Court for relief or an 'order as may seem just' within 5 days of "the seizure of taking possession of any chattels".[35] This would be subject to payment of outstanding sums and court fees, however, and may represent too great an obstacle for the borrower, thus enabling the lender to sell the asset at the expiry of this period.

Other protection

The amendment introduced into the Bills of Sale Act (1878) Amendment Act 1882 by the Consumer Credit Act 1974 provides that:

> "S7A...Paragraph (1) of section 7 of this Act does not apply to a default relating to a bill of sale given by way of security for the payment of money under a regulated agreement to which section 87(1) of the Consumer Credit Act 1974 applies."

This means that the logbook lender must issue the borrower with a default notice before taking any enforcement action, which includes any entitlement "to terminate the agreement, or...to recover possession of any goods".[36] The borrower will have 14 days to remedy the default following the service of the default notice. Essentially, the obligation to serve this notice arises upon breach

[32] Law of Property Act 1925 s. 105.

[33] *BIS, "Better Deal for Consumers: Consultation on Proposal to Ban the Use of Bills of Sale for Consumer Lending" (London: Department for Business, Innovation and Skills, 2009), para.33*.

[34] Bills of Sale Act (1878) Amendment Act 1882 s. 13.

[35] Bills of Sale Act (1878) Amendment Act 1882 s. 7(5).

[36] Consumer Credit Act 1974 s. 87(1)(a) and (c).

of a regulated credit agreement by a debtor and, even where validly served, the creditor may only seek the aforementioned remedies where these have incorporated into the credit agreement. Furthermore, the default notice must include a copy of a current default information sheet,[37] which provides information on where the debtor could receive advice and assistance. It also forms part of a package of enhanced informational requirements imposed on lenders by the Consumer Credit Act 2006 to include the provision of notices of arrears in fixed-sum and running account credit agreements.[38] A failure to adhere to these requirements renders the agreement unenforceable during the period of non-compliance.[39] Such a suspension of strict contractual rights ends upon satisfying this provision.[40] Where the default notice is valid, the penurious borrower has few options, with the Time Order[41] being the most apparent. This empowers the court to reduce the rate of interest and, consequently, the APR, thereby affording the applicant considerable latitude and economic respite and may ultimately lead to a judicial rescheduling of the entire outstanding indebtedness and not simply the amount due at the date of the order.[42] It is, however, somewhat anomalous that greater protection is offered in hire purchase or conditional sale agreements, where the court can effectively re-write the entire agreement[43] although, in reality, seeking a Time Order will often be impracticable for a variety of reasons, notably the cost and limited knowledge of the requisite formalities necessary to secure this remedy.[44]

With this in mind, it may be that the locus of control in such cases is the unfair relationship provisions of s 140A Consumer Credit Act:

> "(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—

[37] Consumer Credit Act 1974 s. 88(4A).

[38] Consumer Credit Act 1974 s. 86B, C and D.

[39] Consumer Credit Act 1974 s. 86D.

[40] See, e.g. *McGuffick v Royal Bank of Scotland Plc [2009] EWHC 2386 (Comm); [2010] Bus. L.R. 1108; [2010] E.C.C. 11* per Flaux J.

[41] Consumer Credit Act 1974 s. 129(1).

[42] Consumer Credit Act s.136. See, e.g. *First National Bank Plc v Syed [1991] 2 All E.R. 250; (1991) 10 Tr. L.R. 154; [1991] C.C.L.R. 37; Southern & District Finance Plc v Barnes [1996] 1 F.C.R. 679; (1995) 27 H.L.R. 691; [1995] C.C.L.R. 62 CA (Civ Div);* and *Director General of Fair Trading v First National Bank Plc [2001] UKHL 52; [2002] 1 A.C. 481; [2002] E.C.C. 22* at [29] per Lord Bingham.

[43] Consumer Credit Act 1974 s. 130(2).

[44] *Law Commission, "Bills of Sale" (Consultation Paper No.225, 2015), para.4.58*.

(a) any of the terms of the agreement or of any related agreement;

(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)."

This replaced the now defunct "extortionate credit bargain" provisions under which the courts could reopen a credit agreement (regulated or otherwise) only where it included 'grossly exorbitant' payments or 'otherwise grossly contravene[d] ordinary principles of fair dealing'.

Under this provision (described as complex and in "urgent need for simplification…so that lenders and borrowers alike can readily understand what each should expect of the other"[45]), the threshold was high and few cases succeeded, largely because punitive interest rates were considered justifiable where the lender was taking considerable risk in providing finance to high-risk consumers.[46] In reality, application of these tests required the court to balance the degree of risk accruing to the lender with "the value of the security, age, experience, business capacity and state of health" of the borrower,[47] and the courts would grant relief in only the most deplorable of cases.[48] Essentially, the need for payments to be "grossly" exorbitant tended to be an insuperable obstacle,[49] and despite the new unfair relationship provisions being predicated on the more malleable test of whether the "relationship" between the parties is

[45] *Broadwick Financial Services Ltd v Spencer [2002] EWCA Civ 35; [2002] 1 All E.R. (Comm) 446; (2002) 99(11) L.S.G. 36* at [90] per Auld LJ.

[46] *Ketley v Scott [1981] I.C.R. 241; Petrou v Woodstead Finance [1986] F.L.R. 158; (1985) 136 N.L.J. 188 CA (Civ Div); Times,* 23 January 1986.

[47] Consumer Credit Act 1974 s. 138(3).

[48] For example, *Falco Finance Ltd v Gough (1999) 17 Tr. L.R. 526; [1999] C.C.L.R. 16 CC*, where the agreement provided for dual-rate interest; and *London North Securities Ltd v Meadows [2005] 1 P. & C.R. DG16 CC*, where a loan of £5,750 had increased to £145,000 as a consequence of compounded costs and interest. In *Barcabe v Edwards [1983] C.C.L.R. 11 CC*, the court took the view that a loan charged at the flat rate of 100% (381% APR) was "prima facie" extortionate, when considering that the lender had taken no significant risk and the borrowers were illiterate.

[49] *G. Woodruffe and R. Lowe, Consumer Law and Practice, 8th edn (London: Sweet and Maxwell, 2010), p.367*. In *Paragon Finance Plc (formerly National Home Loans Corp) v Nash [2001] EWCA Civ 1466; [2002] 1 W.L.R. 685; [2002] 2 P. & C.R. 20*, Dyson LJ commented (at [69]) that unreasonably high interest rates would not necessarily be grossly exorbitant.

"unfair to the debtor", a more interventionist approach is not a formality despite the absence of any need for "grossly exorbitant payments". Indeed, in *Harrison*,[50] Tomlinson LJ, in addressing this ostensible uncertainty, opined that the nascent s140A "offers no guidance in respect of the factors which either may or must be regarded as rendering the relationship unfair".[51] This is lamentable, and Parliament may well have been dilatory in its failure to provide clear and substantive direction, with the likelihood being that the courts will continue to apply those factors relevant to the old Consumer Credit Act s 138, with the deep-rooted and ideological link between risk and interest rates remaining central. Significantly, even where there would appear to be minimal risk to the lender, there are indications of judicial reticence in finding an unfair relationship under the new s 140A regime, even in the context of logbook loans.[52] This represents something of an anomaly: loans secured on a vehicle will rarely exceed 50% of its value, meaning that the lender should still be able to recoup monies advanced in the event of having to sell the vehicle upon default. Such negligible risk would appear to be a be a compelling factor in favour of an unfair relationship, although the courts appear to have displayed a greater level of concern with avoiding the stigmatization of logbook lenders than protecting the borrower, especially where their interest rates are comparable with other providers.[53]

With this mind, the unfair terms provisions of the Consumer Rights Act 2015[54] may offer a more productive avenue of redress for the embattled borrower on the basis that a term contained in a consumer contract is "unfair". Such will arise where 'contrary to the requirement of good faith, a term causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'.[55] This is assessed by considering "the nature of the subject matter of the contract, and by reference to all the circumstances existing

[50] *Harrison v Black Horse Ltd [2011] EWCA Civ 1128; [2012] E.C.C. 7; [2012] Lloyd's Rep I.R. 521*.

[51] *Harrison [2011] EWCA Civ 1128* at [38].

[52] For example*, Nine Regions 14 November 2008 (Bromley County Court)*, where an APR of 384.4% was found to be reasonable as the loan had been secured on a depreciating asset and the borrower had a poor credit history. A similar view was taken in *Morrison v Betterpace Ltd (t/a Logbook Loans) 1 September 2009 (Lowestoft County Court)*, where an original APR of 343.4% increased to 485.3% upon it being rolled over. More generally, see *Shaw v Nine Regions Ltd [2009] EWHC 3514 (QB); [2010] C.T.L.C. 1*, where despite a short-term £3,000 loan creating an amount payable of £13,724.88, the court concluded that the existence of a considerable statutory rebate prevented an unfair relationship arising (Roderick Evans J at [38]).

[53] See, e.g. *Mannion v Nine Regions Ltd 18 May 2010 (Oxford County Court).*

[54] Consumer Rights Act 2015 Pt 2 revokes the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) (Directive 93/13 on unfair terms in consumer contracts [1993] OJ L95/29).

[55] Consumer Rights Act 2015 s. 62(4).

when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends."[56]

Accordingly, the first consideration would appear to be whether a term creates a "significant imbalance". Lord Bingham, in *Fair Trading*, [57] stated:

> "[T]he requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the…imposing on the consumer of a disadvantageous burden or risk or duty… whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole."[58]

This test is clearly concerned with the overall impact of the contentious term on the substance or *substantive fairness* of the contract. In the context of bills of sale creating logbook loans, it is at least possible that such an imbalance exists due to the availability of a range of penal remedies upon breach. Furthermore, the requirement of *procedural* fairness or "good faith" dealing will not be fulfilled where the lender or creditor fails to express terms:

> "[F]ully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position."[59]

This is more concerned with the making of the agreement or the procedural propriety involved in its creation. However, whilst the extent of any putative convergence between "significant imbalance" and "good faith" (or substantive and procedural fairness) is difficult to ascertain,[60] there will be examples of procedural unfairness that obviate fair and open dealing, and would almost certainly cause a significant imbalance in the parties' rights and obligation.[61] The

[56] Consumer Rights Act 2015 s. 62(5).

[57] *Fair Trading [2001] UKHL 52*. Much of the significant jurisprudence on this provision was created when it was part of the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).

[58] *Fair Trading [2001] UKHL 52* at [17].

[59] *Fair Trading [2001] UKHL 52* at [17]. Recital 16 to Directive 93/13 on unfair terms in consumer contracts [1993] OJ L95/29 refers to the need to deal "fairly and equitably with the other party".

[60] There was clearly disagreement between Lords Bingham and Steyn on this point, with the latter favouring a degree of overlap between the concepts (at *Fair Trading [2001] UKHL 52* at [36]–[37]).

[61] Consumer Rights Act 2015 s.68 imposes a distinct requirement of "transparency", wherein any term or notice is "expressed in plain and intelligible language and it is legible".

notoriously convoluted and vague nature of bills of sale is one such example, and any offending term (and remedy therein) would not be binding on the consumer.[62]

Possible reform

There is a significant restriction on a lender's right to recover possession of goods subject to hire purchase or conditional sale agreements, where the debtor has paid one-third or more of the total price of the goods. In such a case, the lender (or hirer) must obtain a court order sanctioning repossession of these "Protected Goods".[63] If the goods are recovered without such an order, the borrower may secure the return of all of the money paid to the lender, regardless of how long he has had the goods.[64] Further, a court order is required to enter onto premises to secure the recovery of goods subject to hire purchase or conditional sale,[65] with the consequences of non-compliance being potentially punitive, more so if such actions constitute a trespass. The Law Commission has proposed that such protections be available for logbook loan agreements, largely on the premise that "a hirer who has paid one third of the hire purchase price has demonstrated a willingness to pay and so should be given some protection".[66] This forms part of a broader suggestion under which it suggests, as a possibility, the repeal of the bills of sale legislation and its replacement with a "goods mortgage" system to include "vehicle mortgages" where a car is used as security for a regulated consumer credit agreement,[67] of which the

[62] Consumer Rights Act 2015 s. 62(1). Significantly, pursuant to s.67 the remaining terms will remain in force "so far as practicable". *In Perenicova v SOS Financ Spol s ro(C-463/10) [2012] 2 All E.R. (Comm) 907; [2012] 2 C.M.L.R. 28*, Advocate General Trstenjakin suggested (at [63]), that the aim of Directive 93/13 on unfair terms in consumer contracts [1993] OJ L95/29 was "not that contracts as a whole should be declared invalid because they contain an unfair term. The legislature's sole objective is to ensure a balance, not to do away with the contract altogether".

[63] Consumer Credit Act 1974 s. 90.

[64] Consumer Credit Act 1974 s. 91; *Capital Finance Co Ltd v Bray [1964] 1 W.L.R. 323; (1964) 108 S.J. 95 CA*.

[65] Consumer Credit Act 1974 s.92. This is subject to exceptions, e.g. recovery will be permissible where the debtor has disposed of the goods to a third party: *Helby v Matthews [1895] A.C. 471*. Clearly, recalcitrance on the part of this third party could lead to a claim in conversion.

[66] *Law Commission,* "*Bills of Sale*" *(Consultation Paper No.225, 2015), para.11.8*. "Price" is defined as "the total sum payable by the hirer if the hire purchase agreement runs its natural course. This includes the principal sum, interest and additional charges, but excludes penalties payable on default" (para.11.9).

[67] *Law Commission,* "*Bills of Sale*" *(Consultation Paper No.225, 2015), paras 1.42 and 8.13*. It is recommended (paras 10.38–10.39) that these so-called vehicle mortgages need not be registered with the High Court (unlike their bills of sale forebears), but with a designated asset finance registry and more simplified forms of documentation, although, for consumer protection purposes, they recommend that such contains prominent warnings about the consequences of default (para.7.25). Interestingly, private buyers

aforementioned protected goods regime would be an integral part. This appears sensible and addresses the manifest unfairness of the current system, where despite hire purchase and security bills of sale bearing a considerable resemblance in that the borrower does not own the vehicle under either arrangement, hire purchase debtors are afforded far greater protection by way of the Protected Goods regime.

A further suggestion is that of voluntary termination, whereby the impecunious borrower, who has no realistic prospect of paying off the loan, simply returns the mortgaged goods to the logbook lender, with no further liability.[68] Again, this is reflective of the position under a hire purchase agreement, where a hirer who has paid half the hire purchase price may simply return the vehicle and walk away from the agreement.[69] The Law Commission goes considerably further and advocates a right of voluntary termination *from the outset*, where a car stands as security for a regulated credit agreement. This would be in full and final settlement of all outstanding amounts, and would be the case irrespective of the condition of the goods[70] and provided the lender has not yet incurred any costs in seeking to repossess the goods subject to the vehicle mortgage. Such generosity does not constitute a repudiation of the more limited hire purchase provisions, but seeks to secure a fairer balance between the lender and borrower where the former receives generous returns of interest and takes only limited risk. Moreover, the loan is secured by way of vehicle mortgage and any depreciation of their security will be considerably more limited than with new vehicles.[71] There is, however, a stentorian counterweight, in that any right of voluntary termination will not be available where the vehicle has suffered malicious damage and/or where the resale value of the vehicle has been

who act in good faith and without actual notice of the security would take free of the mortgage. This reflects the protections currently existent under the Hire Purchase Act 1964 s.27, although the Law Commission clearly envisages the extent of such protection being amended in the event of there being "readily available vehicle provenance checks" (paras 12.44–12.46).

[68] *Law Commission, "Bills of Sale" (Consultation Paper No.225, 2015), paras 7.42, 11.3 and 11.46*.

[69] Consumer Credit Act 1974 s. 100.

[70] *Law Commission, "Bills of Sale" (Consultation Paper No.225, 2015), para.11.74*, in adopting the voluntary termination provisions in the *Consumer Credit Trade Association Code of Practice, Consumer Credit Trade Association, "Bills of sale for consumer lending regulated under the Consumer Credit Act 1974" (2011, updated October 2012)*.

[71] Rights of voluntary termination are not universally welcomed. See, e.g. *DTI, "Consumer credit law: a consultation on voluntary termination of hire purchase and conditional sale agreements under the Consumer Credit Act 1974" (2004), p.8*.

adversely affected by the customer's failure to take reasonable care of it.[72] What will constitute a failure to comply with this duty is unclear.

Essentially, therefore, the Law Commission has identified a range of palliative measures to combat the unsatisfactory nature of security bills of sales and their modern incarnation, the logbook loan. Whilst difficult to distinguish borrower exploitation from merely seeking a fair return on investment, it is apparent that the nature of the logbook loan currently creates an imbalance in favour of the lender, who is free to exploit a range of punitive sanctions against the borrower. The arrangement is anomalous and anachronistic- an eccentricity evocative of Victorian money lending, and in stark contrast to the modern hire purchase, an arrangement displaying many of the structural traits of the logbook loan but without such penal remedies accruing upon breach. Whether the Law Commission consultation progresses to full-scale legislative change is unclear but, notwithstanding this, the Financial Conduct Authority, having shown an enthusiasm for curbing the worst excesses of the payday loan sector, should arguably endeavour to reform this equally controversial form of lending.

[72] *Law Commission, "Bills of Sale" (Consultation Paper No.225, 2015), para.11.72*. The Law Commission sought views on whether the former caveat should apply only where the borrower has caused malicious damage.