

# CONC-ed Out

**The Litigation Impact of the FCA Handbooks**



The Consumer Credit Act 1974 - a discrete,  
self-contained code of black letter law

Prescriptive rules

Consequences of breach spelled out



# The Litigation Impact of the FCA Handbooks

From 1 April 2014

Consumer credit regulation transferred to the  
Financial Conduct Authority (FCA)

Consumer credit brought within the Financial  
Services and Markets Act 2000 (FSMA)

**BUT**

Consumer credit still subject to all the prescriptive  
rules of the CCA

CCA - prescriptive statutory rules

FCA under FSMA – handbooks and  
sourcebooks

- mandatory codes of practice
- no sanction from Parliament or Government
- can be made or amended at a whim and overnight
- in practice, only accessible on the web

# The Litigation Impact of the FCA Handbooks

Traders must now conform to

- All the old CCA requirements **AND**
- All the Rules of the FCA handbooks and in particular
- The statement of principles – PRIN
- The Consumer Credit Sourcebook - CONC

## Pre-contract negotiations

- Before 2005 – minimal
- 2005 – the Disclosure of Information Regulations: customer to get pro forma of the agreement
- 2011 – customer to get the SECCI or the ECCL: lender to comply with new ss 55A and 55B
- 2014 – CONC: ss 55A and 55B replaced by Chapter 4 ‘Pre-contractual requirements’ (27 pages) and Chapter 5 ‘Responsible Lending’ (13 pages)

CONC Rules made under FSMA s 137A ff  
Breach of the Rules is made actionable by s  
138D(2)

***A contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty***

## Who is a ‘private person’?

The Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 (2001/2256). Reg 3(c):

***a relevant recipient of credit (within the meaning of the Regulated Activities Order) who is not an individual and who has suffered the loss in question in connection with an activity of the kind specified by article 36A, 39D, 39E, 39F, 39G, 60B, 60N, 89A or 89B of that Order or article 64 of that Order so far as relevant to any of those activities***



What sort of an action?

Action for breach of statutory duty -  
analogous to an action in tort

Subject to ‘defences and other incidents  
applying to actions for breach of statutory  
duty’

Burden of proof of compliance with the  
rules?

Grey area.

Hesitant dictum of Sir Stanley Burnton [*Saville v Central Capital Ltd* [2014] EWCA Civ 337] to the effect that the onus is on the trader to prove compliance once the issue is raised.

Problem is causation

- *Saville v Central Capital Ltd* [2014] EWCA Civ 337

*Figurasin v Central Capital Ltd* [2014] EWCA Civ 504

- Both involved PPI mis-selling. In *Saville* breach of ICOB was admitted. Question was: did the breach cause loss?

Test stated by Floyd LJ:

***The test to be applied to the issue of causation in an action for breach of statutory duty is to ask whether, if the duty had not been breached, the damage would have occurred. In this case, that question involves asking whether the Savilles would have purchased the PPI policy if Central had not broken the ICOB rules***

## Fine when it was ICOB - but CONC?

- Pre-contract explanations and assessments much more far-ranging than under ss 55A & 55B
- Chapters 4 and 5: primary responsibility is on the lender
- Explanations and assessments by the credit-broker will only get the lender off the hook if they are fully compliant – 4.2.5(5)R
- Lender must make reasonable enquiries to ensure this – 4.2.11

## Two examples of the breadth of CONC

- ***The explanation provided by a lender or a credit broker under CONC 4.2.5 R should enable the customer to make a reasonable assessment as to whether the customer can afford the credit and to understand the key associated risks (4.2.6G)***
- ***Where the regulated credit agreement is high-cost short-term credit, the lender or a credit broker must explain under CONC 4.2.5R (1)(a) that entering into that agreement would be unsuitable to support sustained borrowing over long periods and would be expensive as a means of longer term borrowing (4.2.8R)***

Customer has no choice but to get the explanation:

***Even where a customer states or implies that there is no need for an explanation of the regulated credit agreement, the lender or credit broker must continue to comply with CONC 4.2.5 R (4.2.9R)***

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SO –

- Non-compliance with CONC is not an option for lenders
- Reliance on brokers and other intermediaries is perilous
- Opportunities for crafty debtors or unscrupulous claims managers are legion.



## UNFAIR RELATIONSHIPS

The end of *Harrison* (*Harrison and another v Black Horse Ltd* [2011] EWCA Civ 1128)

*Harrison* definitively over-ruled by the Supreme Court in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61

## The Litigation Impact of the FCA Handbooks

Breach of the FSA/FCA Rules no longer determinative of whether an unfair relationship exists. You can still comply and be unfair if the circumstances warrant it but breach of CONC is likely to be *prima facie* unfair

## Lord Sumption (para 17)

*The view which a court takes of the fairness or unfairness of a debtor-creditor relationship may legitimately be influenced by the standard of commercial conduct reasonably to be expected of the creditor. The ICOB rules are some evidence of what that standard is. But they cannot be determinative of the question posed by section 140A, because they are doing different things. The fundamental difference is that the ICOB rules impose obligations on insurers and insurance intermediaries. Section 140A, by comparison, does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty. There are other differences, which flow from this. The ICOB rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages. Section 140A introduces a broader test of fairness applied to the particular debtor-creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion.*

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*Plevin* also decided that unfair relationships looks at the conduct of the lender and those who are at common law or deemed by the CCA to be his agents

Lender not responsible for defaults of independent brokers unless they are agents

BUT

That was ICOB. CONC places much higher responsibility on the lender as person primarily affected

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MORAL OF THE STORY

ALWAYS HAVE CONC TO HAND

MAKE SURE YOU HAVE THE LATEST ISSUE OF CONC



# The Litigation Impact of the FCA Handbooks

AND, IF IN DOUBT,



CONSULT



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