

BCCA

british cheque cashers association

newsletter

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The Quarterly Newsletter of the British Cheque Cashers Association

“Sed quis custodiet ipsos Custodes?”

The Answer?

Six months ago, in our Winter issue, we quoted Juvenal, who wrote these words some 1,900 years ago. Juvenal’s dilemma was that, although it was easy enough, and indeed even prudent, to appoint guards to protect your interests, property, wife etc, who would guard you if the guards themselves lost sight of their purpose or even turned against you?

Just to recap briefly, we expressed concern that the growing number of regulatory bodies were becoming more and more autocratic, with “gold plating” of Regulations seemingly becoming the norm. This “regulatory creep”, whereby enforcement agencies and regulatory bodies tend to extend the law of the land to suit their own agendas, is a growth industry. This in itself would be bad enough but who can stop them when they go too far? We have all heard stories of overzealous officials and excessively disproportionate enforcement action. Environmental health officers, for example, seem to have an obsession with multiple sinks, especially in kitchens, when most of us manage perfectly well with just one in our own kitchens at home. Criminal prosecution of greengrocers selling bananas by the pound also springs to mind.

Fortunately, the BCCA’s members seem to rub along pretty well with Customs and Excise when it comes to the Money Laundering Regulations, which cover third party cheque encashment. However, there are occasional issues with local Trading Standards Officers over compliance with the Advertisements Regulations, made under the Consumer Credit Act, which cover delayed presentation of personal cheques (“payday advances”). More on this later.

No-one wants to take on high profile, all-powerful Regulators, especially those which are heralded as the consumers’ champion, protecting the public (all “hard working families”, no doubt) from exploitation by big business. Just imagine the adverse publicity, especially if the Regulator wins. However, there comes a time when something has to give, when the Regulator pushes just too far.

Here, then, is the answer to Juvenal’s question. It is “The Courts”.

Over the last eighteen months, we have seen at least four judgements which have clipped the wings of over enthusiastic regulators.

Firstly, the unlikely hero in the case was the Financial Services Authority, which itself is often perceived as a regulator out of control. The FSA had been investigating a complaint by a Mr Durrant, over a dispute with a bank. Following the FSA’s decision, Mr Durrant applied for a copy of his case file by virtue of Section 7 of the Data Protection Act. The FSA refused, stating that not all the information in the file constituted “personal data” and hence was outside the scope of Section 7. Mr Durrant was not happy and took the FSA to court.

He lost. Not only that, but the court went much further and gave a thorough interpretation of what constituted “personal data” and also what should be considered as a “relevant filing system”, another term pertinent to

disclosure under Section 7. The judgement flew in the face of what had become accepted as the law of the land, due to official interpretation and guidance issued by the Office of the Information Commissioner ("OIC"). The court brought things back to square one and the OIC had to reissue its guidance. In other words, the OIC's interpretation of the law was incorrect. It was guilty of "gold plating", which had become a thicker and thicker layer over the years. As a result of this case, compliance with Section 7 requests for disclosure of personal data is far simpler.

Off now to the Office of Fair Trading. The OFT had, for many years, had a stand-off with credit card issuers over the interpretation of Section 75 of the Consumer Credit Act 1974. This is the section, you may recall, which imposes joint liability on credit card issuers if there is a failure of a contract funded by use of the card. (It's not quite as simple as that, but you get the idea.) The OFT had always insisted that this law covered transactions made overseas, in other words, outside UK jurisdiction. In addition, the Financial Ombudsman Service seemed to agree.

In order to keep the peace, the Banks had reached a voluntary agreement with the OFT to honour such claims, but on an ex gratia basis. When this agreement expired, the Banks refused to renew it so the OFT went to court with a test case. The OFT lost on this point. It was decided that the banks had been right all along.

To be fair to the OFT, the law was not clear cut and something needed to be done to deal with the uncertainty. After all, there are some who consider that the EU is all the same place now, so why shouldn't Section 75 apply at least in member states? In addition, the OFT won on the issue of "four party transactions", although disputing this was really a bit of a try-on by the Banks.

So the OFT had got it wrong but, as far as we are aware, is appealing.

Back again to Docklands, where the Financial Services Authority is now the villain of the piece. There is a common misconception that the FSA is part of the civil Service. It is not. It is, in fact, funded by the financial industries it regulates (it decides on its own level of funding) but is completely independent of them. The FSA was set up under the Financial services and Markets Act 2000 and has four objectives; maintaining market confidence, promoting public understanding of the financial system, securing the appropriate degree of protection for consumers and fighting financial crime.

And it's been very busy, as any business unfortunate enough to have come under the FSA's wing will confirm. One such high profile issue has been the alleged mis-selling of financial products, particularly endowment policies, over which most companies have simply caved in and paid out. However, in January, Legal and General decided that it had had enough and disagreed with the FSA's decision that there had been "significant" mis-selling of the company's Flexible Mortgage Plans to 41,000 consumers.

L&G went to the Financial Services and Markets Tribunal, not actually a court but the next best thing. The Tribunal heard that the FSA had decided that L&G's sales procedures were defective and agreed on this point. 1 - 0 to the FSA. It also heard that 152 policyholders responded from a random sample of 250, of which 60 policies may have been mis-sold. The tribunal interviewed thirteen of these and found there had been mis-selling in just eight cases, with possibly another fourteen in the rest of the 60 cases.

The Tribunal concluded that the FSA was not justified in this case to extrapolate from a sample to reflect a pattern of general mis-selling across the whole of the 41,000 policies. As a result of this 1 -1 draw, the FSA is reviewing its procedures.

And last but not least, we feature the Trading Standards Office of Wokingham District Council in a

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judgement in the Court of Appeal. Briefly, the facts were as follows. Mr Glen Adaway and his wife ran a business called "Quality Direct". They built a conservatory for a customer but failed to include two roof vents and Pilkington K glass to the roof and sides in its construction, as was allegedly contracted. Mr Adaway was prosecuted at Reading Crown Court under the Trade Descriptions Act 1968 and was convicted on the charges relating to the roof and the vents but acquitted on the count relating to the sides.

Mr Adaway appealed against conviction. Of particular interest to BCCA members was the argument advanced that the TSO was in breach of its own published guidelines on prosecution. These stated that prosecution would only take place if the defendant was "engaged in fraudulent activity" or "deliberately or persistently breached legal obligations.". The Appeal Court found that neither of these conditions had been proved and also that the prosecution itself was "oppressive". It quashed the conviction. The Court was also somewhat scathing that a matter such as this, which was in reality a civil law issue, should be taken through the criminal law system.

This is an important case for BCCA members, many of whom are small businesses. In the light of this case, it seems unlikely, but not certain, that a simple mistake will result in a criminal prosecution. However, it does not reduce the need for constant vigilance in order to achieve a high level of compliance.

Juvenal could therefore take heart, if he were here today. Although we moan and groan about our democratic system, it does seem to be alive and well when it come to the crunch and we do indeed have guards to protect us from the guards. Unfortunately, enforcing democratic rights through the courts can be extremely expensive, but that's another story.

CONSUMER CREDIT BILL - RIP

The Consumer Credit Bill failed to make it through the "wash up" process, following the announcement of the general election. It was thought that the rubber stamp would be applied, as there had been no real opposition to it during its passage through Parliament but it was not to be. So all the work done by so many people and the vast amount of money it cost was a complete waste. Or was it? There is a rumour that the Bill will be reintroduced early in the new parliament, especially if Labour win (this newsletter is being written prior to the election). However, there is nothing in the Labour manifesto

and even if it is the case, the whole process will have to start again.

There was one interesting development which may have been a factor on the Bill's demise. The joint House of Lords and House of Commons Committee on Human Rights, which considered the human rights implications of the Consumer Credit Bill, produced a report. The committee concluded that although it was satisfied that most of the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR), it highlights two areas of concern. These relate to the OFT's new power to regulate the conduct of licensees which the Committee considers is too wide and unfettered and risks incompatibility with the ECHR, and also the system of civil penalties which can be imposed by the OFT. The latter may require the application of criminal due process standards to be compatible with Article 6 of the ECHR. These are obviously important findings which will need to be taken into account in the consideration of a new Bill.

Whether the fall of the Bill is a good or bad thing is difficult to decide and depends on your point of view. For example, Claire Whyley, Deputy Director of Policy at the National Consumer Council, was quoted as saying "This is disastrous news for consumers". Hardly "disastrous", Claire. The main problem is the uncertainty. Businesses dislike uncertainty and, although the Bill had major areas for concern, at least we at least would have known where we stood. Now, all the pressure groups will be able to have a second bite of the cherry, so expect capped interest rates to be back on the agenda. In addition, the motor finance specialists are hoping for an amendment to Section 99 of the Consumer Credit Act, following a consultation exercise by the DTI. This is the section which deals with "voluntary termination", or the "50% rule". Another reason or excuse for delay is the proposed EU Consumer Credit Directive, but more of that later.

One camp thinks that the issue will now be put onto the back burner, the other is of the opinion that a new Bill will be even worse. Take your pick.

IMPORTANT! COMPLIANCE ISSUES!

Following the fall of the Bill, it was reported in at least one newspaper that the new Regulations due to come into force on 31st May would also fall. This is NOT the case. The new Regulations, relating to pre-contract information, credit agreements and early

settlement, were made under existing legislation so are not affected. We have heard of businesses, none of them BCCA members, of course, which are apparently still unaware of these important changes. Further information for members is available from our Chester office.

NEWS FROM THE OFT.

Overall, the Office of Fair Trading is well intentioned but one does wonder on occasions. For example, last Autumn we welcomed the Office's guidance on the new Advertisements Regulations in the form of "Frequently Asked Questions", not that anyone had ever asked any of them before the OFT dreamed them up, let alone "frequently". However, the OFT's views and opinions contained therein, although helpful, did seem to be tinged with wishful thinking and had a touch of gold plating about them. Then, earlier this year, came the draft Guidance Notes on the same Regulations, which run alongside the FAQs. The gold plating was thicker, which we pointed out in our response to the consultation, although we also commented that businesses would find them useful and that they were fairly easy to follow.

However, the OFT has stated that the revamped FAQs and the final version of the Guidance Notes will be available shortly, quite possibly before you read this newsletter. We are still supportive of the OFT's initiative but wish that they would stick to interpreting the law as written. We intend to produce our own guidance for BCCA members on advertising payday advances once the OFT has published theirs on the Regulations generally.

Additionally, OFT guidance on the new Regulations coming into force in May (see above) should be published some time in May. As drafting and printing agreements takes some considerable time, the guidance is really too late and we all hope that there are no significant differences in the OFT's interpretation and that of the industry. We will see.

YOU HAVE BEEN WARNED!

In reality, the BCCA does have positive relationships going back a long time with Regulators and central government departments, in particular the OFT, DTI and the Customs and Excise. It is due to this spirit of co-operation that the OFT wrote to us about a BCCA member who had unwittingly published an advertisement for "payday advances" which failed to comply with the Advertisements Regulations. The matter was sorted out quickly, without having to resort to any formal action.

However, we agreed that we would draw members' attention to the need for strict compliance with the Regulations and in particular to the notorious Regulation 8. This is the Regulation which triggers the need to include an APR in advertisements. Unfortunately, it is highly ambiguous and, if interpreted strictly, means that if you state anything remotely favourable about the service you offer, you will need to include an APR.

As we mention above, we will have to wait for the OFT's final guidance but it does not look positive. In the meantime, we suggest that you should contact your local Trading Standards Office for assistance on compliance, as these are the people who are likely to pick up any problems. Please contact us at Chester if you encounter problems. There will no doubt be more on this in future editions.

NEW REGULATOR PROPOSED

On Budget day, Philip Hampton published his report entitled "Reducing Administrative Burdens: effective inspection and enforcement". This turned out to be a well-researched document running to 140 pages with 35 wide-reaching recommendations and was immediately accepted by Gordon Brown. The OFT features rather frequently not only in this newsletter but also in Hampton's recommendations. The upshot is that Hampton recommends the creation of a new Consumer and Trading Standards Agency, stripping out the OFT's consumer based functions and combining them with most of the duties performed by over 200 Local authority Trading Standards Departments, plus a few other bits and pieces. However, although this appears to be Hampton's preferred option, he has left open the option of such a function to be based within the OFT itself.

This came as rather a shock to the OFT, where there is no doubt a campaign plan being drafted as we write. However, putting this aside, BCCA members should, at least in principle, benefit from various other Hampton proposals, including the streamlining of environmental health and health and safety inspections.

Overall, we welcome the proposals in the Hampton report. Philip Hampton is also the Chairman of J Sainsbury plc, a company whose own internal restructurings under previous regimes have been a disaster, reducing the supermarket group from number one to fighting it out with Morrison's for the number three slot. Sainsburys now appears to be on

the way up again, following Mr Hampton's appointment in July last year. Let us hope that this bodes well for the future of regulation in the UK.

IDENTITY THEFT - KEEP ON SHREDDING!

There is little doubt that identity theft is a growing problem. Having said that, no-one seems to know how bad the problem is, although CIFAS, (the Credit Industry Fraud Avoidance Scheme), quotes 120,000 reported identity thefts in 2004 but does not break these figures down. The media reports tend to quote percentage increases, which exaggerate the perception. After all, the result of a big percentage increase in a small number is still a small number but eye-catching headlines must come first.

For example, we saw a headline recently in an internet newsletter, which screamed "Identity Theft Affecting One in Four UK Adults." Reading on, it became clear that an investigation by *Which?*, the renamed Consumers' Association, had found that a quarter of adults had been the victim of identity theft or knew someone who had. Hardly what the headline implied.

This is an important matter for BCCA members, who must be sure of a customer's identity and address before any transaction can be agreed, so it is important that we monitor developments. For example, most of us will have received "phishing"

e-mails from authentic looking Bank websites, urging us to confirm our bank account details and security codes. Apparently, some people do fall victim to this type of scam but the vast majority are not fooled.

Of more concern is the accidental loss of personal data or unauthorised access to databases. In the USA, a laptop stolen from a university admissions office contained the personal data of 98,000 graduates, students and applicants going back for up to thirty years, including information such as social security numbers. On another recent occasion, again in the USA, Reed Elsevier confirmed that up to 310,000 people may have had their files illegally accessed. The information held included names, addresses, and driving licence and social security numbers.

However, none of the victims had actually experienced any form of identity theft but this is not as strange as it may seem. Identity thieves tend to be very patient and wait for the right opportunity before going for the big sting.

What does not help is secrecy. The latest "419 fraud" coming out of Nigeria is a letter purporting to be from the Inland Revenue, in the form of a bogus IR form P86. This has been sent to persons "not ordinarily resident in the UK" and, as usual, asks for written confirmation of personal details and bank accounts.

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Unfortunately, the Inland Revenue appears to have been rather slow off the mark in publicising this scam, although it is making amends now.

So the message to BCCA members, and indeed all readers, is to remain vigilant and, as "Which?" advises, get shredding. We'd be interested in receiving members' experiences of identity theft so that we can keep up to date on what's really happening. Please send any details to us at Chester.

MORE ON THIEVES

Michael Hart worked for Norwich-based Lucas Fettes Group as a financial adviser. Like many of us, Mr Hart took work home with him but unlike us, it was in the form of other people's cheques that he should not have had. Quite simply, Hart took clients' cheques made payable to, for example, Abbey National, and paid them into his own Abbey National account.

Although no third party cheque cashing business was involved, the problem for the BCCA and its members is that this type of crime places suspicions on cheque transactions as a whole. Judge Peter Jacobs told the

court "In all of the thirty years I have been sitting in these courts, the lack of regulation exercised by the banks and regulatory authorities never ceases to amaze me. It is something that, as a member of the public, I would be concerned about."

Although members may not agree with the Judge over lax regulation, it is nevertheless of vital importance that members continue to ensure that they comply fully with the law and the BCCA Code of Practice and report any suspicious activities to NCIS.

Hart, by the way, stole £1.8 million from clients and, at the time of conviction, still owed £1.5 million to his victims. He was jailed for six years and the judge ordered that his assets should be confiscated and the proceeds shared amongst the victims.

CONSUMER CREDIT DIRECTIVE

This is almost a standing item in the BCCA's newsletters. Unfortunately, this is likely to be the case for some considerable time. The good news is that the DTI published a consultation document on the proposed directive. We were favourably impressed

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TRANSAX

with the document so our congratulations to the DTI on this occasion. That is not to say that we agree with all their opinions and recommendations but at least the DTI's staff has attempted to pull together the dog's breakfast that comprises the latest EU proposals.

In addition, the DTI has taken into account the input from interested parties, or "stakeholders", as we must now call them, which include the BCCA. We have submitted a response to the DTI giving our views on those issues within the BCCA's remit. For example, the proposed Article 18 would, in its current wording, outlaw delayed presentation of personal cheques ("payday advances"), as it would prevent the holding of cheques for the purpose of discharging a loan. The DTI's proposed approach is to oppose this and to support the status quo in the UK, a policy which we wholeheartedly support.

However, we oppose the continuing exemption from existing and proposed regulation of overdrafts on bank current accounts. Exactly why the big banks continue to get away with this under the current UK regulatory regime is a complete mystery. Although they can quote an interest rate, banks are exempt from the requirements of the Total Charge for Credit Regulations, with the result that they do not have to quote an APR. The effect of this is that they can pile

on arrangement fees, monthly fees, transaction fees and anything else they can think of and still quote a low rate of interest.

Exactly when the actual Directive will be agreed is a complete unknown, let alone the implementation date. It should be noted that all this is coming from the Competition authorities within the EU and has nothing to do with consumer protection. Indeed, it is very difficult to find anyone who supports the EU on this matter. The major barrier to cross border credit agreements is legal enforceability of the contract in instances of default, which this proposed directive does not address. In any event, UK based companies can indeed trade within the EU by setting up operations in the state of their choice. MBNA and Barclays spring to mind in Spain and Provident Financial Group have successful operations in several eastern European states.

No doubt this long running saga will continue to feature it these pages. Who knows, there may even be a happy ending.

IMPORTANT ANNOUNCEMENT BCCA ANNUAL CONFERENCE!!

Following last year's highly successful event, we have again booked the excellent Forest of Arden Hotel and conference centre for this year's conference.

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That equates to £175 every 15 minutes, which is exactly what BCCA Members and their Franchisees can earn courtesy of the new facility available from Ingrams Solicitors.

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The date is WEDNESDAY 16th NOVEMBER 2005 so please put this in your diary.

The theme for this year will centre around compliance and regulation (there's a lot of it about) and, although we do not yet have a title, we have already reached agreement with a senior OFT figure to speak at the conference.

The Forest of Arden is a high class venue and is very conveniently situated close to the NEC in Warwickshire, yet is in a countryside setting with two excellent golf courses and a health spa. Because of fire regulations, numbers are limited to just over 120, which happens to be the number of attendees at the last conference. Again, we will be subsidising the cost to delegates, which will be about £40 and we are able to do this is thanks to the generosity of those companies which sponsor the event and have displays in the exhibition area.

We are keen to hear from any organisation interested in sponsoring the conference or booking space in the exhibition area. If you're one of them, please contact us at Chester. More details in the next issue.

HER MAJESTY'S REVENUE AND CUSTOMS

Many people were no doubt delighted to learn that the Government had abolished not only the Inland Revenue but also the Customs and Excise. However, this turned out not to be a crowd pleasing measure in the run up to the general election and the joy was short lived. It was, in fact, another reorganisation. These two Departments, with centuries of tradition and history behind them, have been combined with effect from Monday 18th January 2005 to form Her Majesty's Revenue and Customs.

It remains to be seen as to how the two get on with each other, with their very different cultures. In fact, you probably won't notice a lot of difference for a while

as even the existing logos will remain for some time.

One of the new Department's aims is to "improve customer focus", whatever that means, although it could be a warning of things to come. In fact, we recently heard of an official referring to the Inland Revenue's "customer base", as if it was some sort of competitor of Tesco. We at the BCCA never did want to become part of the Inland Revenue's "customer base" so perhaps we can take our business elsewhere once "customer focus" has been improved.



More details, including those on the new Large Business Service and the Small Business Unit, on the spanking new website, www.hmrc.gov.uk.

BCCA RELOCATION TO CHESTER

There still seem to be members out there who, despite the publicity, are unaware that the BCCA's office has been relocated to Chester with effect from 1st April. However, it is a fact and we are still unpacking boxes and trying to maintain normal service. Please make a note of our new contact details, given below.

2005

summer



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