# SYMPOSIUM ON SECURITY ASPECTS OF CONSUMER CREDIT LEGISLATION

## Questions and Answers

Question - Charles McMillan (Mallesons):

I would like to ask Simon and Dick two questions. What should be included in the "amount financed"? That is the first question. The second question is, can a secured creditor charge, at the end of the road, a discharge of mortgage fee and any legal costs associated with it, because they are not included (in the "amount financed")?

Answer - Simon Begg:

We'll just take the first question - what is included in the "amount financed". You have got at least two possibilities: which kind of credit contract it was - a credit sale or a loan? I am assuming you have excluded the continuing credit contract. In either case you look at the appropriate schedule.

(Could I simplify the question a little bit for your benefit? Does the expression mean the amount lent or the whole of the figures required by the schedule?)

Well, we will start with loans. We have simplified it - at least it is in Schedule 4. The operative section is 36 which says "a loan contract shall include ... a statement of the "amount financed", and a statement of the amount financed shall state, - (a) Schedule 4 begins with the words: "the amount agreed under the contract to be lent" other than para (b) to (f). (b) to (f) are all specific amounts that you must state. If you fall within (b) to (f), it is included and you must state it specifically and if it is not included in (b) to (f), you must include it in (a). There are certain things you must not include, eg certain sorts of insurance premiums. But (a) is predicated by the words "the amount agreed under the contract to be lent", so that if it is not agreed to be lent, you mustn't include it.

(But if you have a look at section 103.)

Well that is the net balance due.

(However if you read it, it also could have a bearing on the amount financed.)

The bearing on the net amount financed isn't apparent to me. Section 103 requires that a statement of the net balance due is

computed with reference to the amount financed and also to the credit charge and also to the fourth Schedule. Section 103 involves partly the amounts that were contemplated at the time the agreement was entered into, and also partly what happens afterwards, namely things like default charges, enforcement expenses, and the like.

But the distinction between the credit charge and the amount financed is clearly that the latter is what you get in the loan, and the other has got to be reflected in the annual percentage rate, and if at the time the contract is entered into, you can't include the amount in the amount financed, it is a credit charge by definition. If it is a credit charge, it must be reflected in the rate.

(Thank you Simon. Does Dick agree?)

Yes.

(In the fourth Schedule, should you include legal costs and stamp duty in connection with the discharge of mortgage, because the mortgage has come to a conclusion?)

I would have said you could.

(Should you or could you?)

Well you can require it to be paid under the credit contract without having to state it either in the amount financed or in the credit charge, I would have thought.

(Yes, I would have thought so too. But do you really reckon that as the contract has come to an end, that you have got a new contract?)

His loan is repaid and he now discharges the mortgage?

(Exactly. And he does it for a customer for a service fee, namely to lodge and to stamp. Is it a new and complete contract or is it part of the original contract?)

Well it could be either. It may not be provided for at all and yet a new bargain may be made. At the end of the contract the banker may say, well look, I'll discharge your mortgage for you, lodge it, stamp it for you, you pay me and I'll debit to your account. Equally, the contract may provide that if that is done, the banker may debit it to the account. I don't know that it would make any difference in either case. There is nothing in the Credit Act (that I know of) that would prevent a banker from requiring the borrower to pay his discharge fees. And if he does pay the discharge fees, there is nothing that would require that to be included in either the amount financed or in the credit charge. The amount isn't lent - but I suppose it might be if it is debited to the account - but then there would need to be an agreement to lend it, wouldn't there? The banker is not bound to pay it.

(I think you can get an agreement or an implied agreement.)

Are you suggesting that it may be defined as a credit charge by reference to any amount payable under the agreement in excess of the amount financed?

(Yes.)

If that provision (section 11) applies and if that were carried to extremes, it would have the consequence that enforcement charges are included in the credit charge as well. I don't think that result was contemplated by the Act.

(It could be very expensive over a period with a number of mortgages.)

I suppose it could. I doubt that that will happen.

Question - Charles McMillan:

My third question is on insurance, and that is, would it be prudent for a banker to in fact take out insurance on his own behalf, in respect of loan contracts, or attempt in some miraculous manner, to get the customer's agreement to the customer paying the amount or in any other way? In other words, should the banker take out his own insurance in respect of repayment of the debt, or should he enter into negotiations with the customer in order to come to some sort of reasonable agreement that the customer should take out the insurance and pay for it separately and apart from the agreement?

(Is this title insurance? What sort of insurance?)

Really it is against default or death of the customer.

(You mean against the customer not paying? Well he can't make the customer take that out, can he?)

He can't make him, but he can negotiate with the customer.

**Answer - Simon Begg:**

Well I can't see myself that there is any greater need to do that under this legislation than there would have been under the Moneylenders Act or the Hire-Purchase Act or whatever preceded this.

Question - Michael Pearce:

I would really just like to make a statement, rather than ask a question. But if people would like to give their reaction, that is fine. It is really just an alternative view of section 13(4), to the one that Simon Begg put a bit earlier on. I must mention that this interpretation owes a lot to my colleague Bruce Whittaker, who is sitting over on my left.

Section 13, to refresh your memory, is the section that deems certain hire-purchase agreements and leases to be credit sales.

Section 13(4) contains some exemptions to that. The first one is where the lessee or hirer is a company, the second one is where the lessee or hirer uses the goods in a business, and where the whole or greater part of the contract payment is or might reasonably be expected to be a business loss or outgoing.

Simon said earlier, that the important thing there was whether those payments were tax deductible, and that in the case of hire-purchase, where only the interest portion is tax deductible, it is likely that that exemption wouldn't apply.

My interpretation of that is, that it is not a question of tax deductibility, but whether the payment is a business loss or outgoing. You can have a business loss or outgoing of a capital nature or of an income nature. If it is of a capital nature, it is not deductible. If it is income, it is deductible. And that the principal element of a hire-purchase payment is a business loss or outgoing of a capital nature and although it is not deductible, it is still nevertheless a business loss or outgoing. And therefore the exemption in that section would apply.

**Answer - Simon Begg:**

You may very well have a point about that. It doesn't say that it has got to be tax deductible. The question is what is meant by loss or outgoing necessarily incurred.