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CONSUMER CREDIT RELATIONSHIPS: PROTECTION, SELF INTEREST/RELIANCE AND DILEMMAS IN THE FIGHT AGAINST UNFAIRNESS: THE UNFAIR CREDIT RELATIONSHIP TEST AND THE UNDERLYING RATIONALE OF CONSUMER CREDIT LAW

ABSTRACT

The new UK regulatory structure for financial services is now firmly in place. This brings with it changes to the consumer credit regime, both in terms of regulation and supervision. The unfair credit relationship is a sanction contained in the Consumer Credit Act, and its future may well be subject to review as further reform to the UK regulation is actioned. This article provides a fresh examination of the test's developing role in relation to protecting borrowers against unfairness and its application by the courts. The question is then posed as to whether evidence of underlying 'competing' ethics in both case law and statutory policy suggests the test will no longer be appropriate in the control of unfairness in relation to the credit consumer, when changes to the legislation and regulatory framework are concluded.

1. Introduction

The regulation of consumer credit is a subject that at regular intervals finds its way to the forefront of UK Government policy. Of particular concern is the fair treatment of consumer borrowers, and their potential vulnerability, recently highlighted by the problems in the 'payday' lending market. Credit is linked to

both the financial and social well being of individuals, and over-indebtedness is a real danger, that can result in exclusion, both financial and social. Where borrowing may well arise on the basis of an unequal relationship between lender and consumer, it is imperative that there are protections in place, particularly against potential exploitation. To be effective, however, such mechanisms must be carefully measured in terms of their wider impact, both on the parties and in terms of other regulation.

The Financial Services Act 2012, implementing planned overhaul of the financial regulatory system in the UK, has established a change in responsibility for consumer credit regulation, this now resting with the Financial Conduct Authority ('FCA').¹ This has brought a reappraisal of the consumer credit legislation, including (for the moment) a partial replacement of the Consumer Credit Act 1974 ('CCA'), with a regulatory regime underpinned by the Financial Services and Markets Act 2000 ('FSMA').² The result is that a number of requirements³ are now contained in the Consumer Credit Sourcebook (a rulebook entitled 'CONC').⁴ Whilst CONC is not designed, at this stage, to completely replace the CCA, but rather augment the controls contained therein,⁵ this is being taken as an opportunity to revisit current rules, and re-assess the amendments made by the

¹ From April 2014, so replacing the Office of Fair Trading. The new institutional framework for the regulation and supervision of the financial services market, consists of the Financial Policy Committee, the Prudential Regulation Authority, (both part of the Bank of England) and the Financial Conduct Authority. The Financial Services Act was brought into force in April 2013.

² HM Treasury 'A New Approach to Financial Regulation: Consultation on reforming the consumer credit regime' (December, 2010) ch 2.

³ For example those relating to advertising, pre-contract information, and the assessment of borrower credit-worthiness.

⁴ S Brown 'EU and UK consumer credit regulation: principles, conduct and consumer protection: divergence or convergence of approach?' (2015) 26 EBLR 555, p 571-573.

⁵ 'The purpose of CONC is to set out the detailed obligations that are specific to credit-related regulated activities and activities connected to those activities carried on by firms. These build on and add to the high-level obligations, for example, in PRIN, GEN and SYSC, and the requirements in or under the CCA.' CONC 1.1.2 G.

Consumer Credit Act 2006, ('2006 Act').⁶ For whilst a number of the procedural and informational requirements originally seated in the CCA have now been transferred to CONC, some controls and sanctions have been left for review at a later stage.⁷

One such sanction is the unfair credit relationship test, provided by ss 140A-C.⁸ S 140B gives extensive powers to revise a credit agreement,⁹ by allowing the court to revisit terms or indeed set the agreement aside in its entirety. A claim based on this test is now a familiar sight where a borrower wishes to escape a credit agreement. However, ss 140A-C will soon be under review as part of the reform process, and inevitably the effectiveness of the test will be raised. This will be more particularly in the context of whether the test is appropriate in the new regulatory framework, as this involves more than simple transfer of statutory provision; the two current regimes have differing structures, and consumer remedy, as highlighted by Lomnicka,¹⁰ is also approached differently. This prompts two questions. The first is whether the unfair credit relationship test has, in reality, the potential to deliver on its objectives, more specifically protection of the vulnerable and the assurance of fair treatment for the consumer; if not then there is little reason to retain it. The second is, even if it can be shown the test has the ability be effective as a protection against unfairness in consumer credit contracts, what place, if any the test should have in the final legal regime; i.e.

⁶ To the extent, of course, this is compatible with the Consumer Credit Directive 2008, HM Treasury 'A New Approach to Financial Regulation: transferring consumer credit regulation to the Financial Conduct Authority' (March 2013) at [2.8]; HM Treasury, above n 2, [2.11].

⁷ HM Treasury, above n 6, [2.9].

⁸ Inserted into the CCA by ss 19-22 2006 Act. The test was heralded as the answer to the seeming inefficiency of the extortionate credit test- DTI 'Fair Clear and Competitive: A Consumer Credit Market for the 21st Century' (Cm 6030, 2003) [3.31].

⁹ Or any agreement related to it.

¹⁰ E Lomnicka 'The future of consumer credit regulation: a chance to rationalise sanctions for breaches of financial services regulator regimes?' (2013) 34(1) Comp Law 13; Brown, above n 4.

whether its potential incompatibility will require its removal.

The purpose of this article is to consider these issues of effectiveness and compatibility. In order to do so, there naturally needs to be consideration of the rationale that underlies legal protection provided for the credit consumer. This requires not only an examination of legislative policy, but also interpretation of the law as evidenced by judicial decision. Here, the protective and self-interest/reliance ethics outlined by Willett as observable in EU consumer protection law¹¹ provide a useful means of measurement. Although set in a different context, these ethics seem particularly appropriate to the unfair credit relationship test, as they are presented as integral to contextualising general fairness, or ‘open-textured’¹² clauses.¹³ The unfair credit relationship test seems to have much in common with these clauses. Whilst only applicable to consumer credit contracts, or agreements associated with such contracts, there is no doubt the test allows for a wide range of possible responses by the court, and stretches further than simply affecting creditor and debtor,¹⁴ including consideration of not only substantive unfairness, but unfair practices as well.¹⁵

The article will therefore first discuss the direction of recent case-law applying ss 140A-C, the extent to which this reflects an underlying ‘ethic’ and to what extent this demonstrates achievement of the policy aims of the unfair credit relationship

¹¹ C Willett ‘General Clauses and the Competing Ethics of European Consumer Law in the UK’ (2012) 71 CLJ (2), 412.

¹² Ibid.

¹³ By ‘general/open-textured’ is meant flexibility and breadth in terms of applicability and interpretation, for example as demonstrated by Article 3(1) of the Unfair Terms in Consumer Contracts Directive, transposed into UK law by the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, reg 5(1), Willett, above n 11, p 412.

¹⁴ By allowing the actions of third parties and agreements connected with the credit arrangement to be subject to review by the court under s 140B.

¹⁵ Willett expressly refers to the potential for these ethics to apply to general clauses relating to unfair practices as well as terms, above n 11, pp 423-436. See H Collins for a discussion of ‘open textured’ rules and unfairness Regulating Contracts (OUP, Oxford, 1999) ch 11.

test. It will then give consideration to the appropriateness of the roles of protection and self/interest reliance in controlling consumer credit transactions and the extent to which the unfair credit relationship test is compatible with current regulatory developments. By adopting Willett's ethics, within the context of current academic discussion of consumer credit policy,¹⁶ it will be argued that the underlying rationale of recent consumer credit legislation, with an emphasis of protection for the vulnerable, seems to indicate a preference for the protective ethic. This, it will be argued, has not, until the recent decision by the Supreme Court in *Plevin v Paragon Personal Finance Ltd*¹⁷ been so clearly mirrored in judicial interpretation of what constitutes an unfair credit relationship, or in the approach of FSMA and the FCA. It will then be argued that although the direction of consumer protection employed by FSMA and the regulator is, to some extent different to that demonstrated by the CCA, this does not necessarily mean the provisions of ss 140A-C should be excluded. Whilst there may be tensions between underlying rationale, adherence to one 'ethic' alone is not the answer. Protection of the consumer at all costs may not always be appropriate as the sole basis of framing regulation of consumer credit, so allowing self- interest/reliance a part to play.

¹⁶ In particular Professor Iain Ramsay, who has written extensively on this issue, whose work in this area, the author has found helpful. See references below. See also for example I Ramsay, 'Wannabe WAGS' and 'credit binges' : the constructions of over-indebtedness in the UK' in J Niemi, I Ramsay, and W Whitford, eds *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives*. (Hart Publishing, Oxford (2009)), I Ramsay *Consumer Law and Policy, Text and Materials on Regulating Consumer Markets* (Hart Publishing, Oxford, 2012), 'Changing Policy Paradigms of EU Consumer Credit and Debt Regulation' in S Weatherill, D Leczykiewicz *The Images of the Consumer in EU Law* (Hart Publishing, Oxford) forthcoming (2015).

¹⁷ [2014] UKSC 61.

2. Challenging consumer credit agreements and evidence of the ethics of protection and self-interest/reliance

a) Mechanics of ss 140A-C

Most credit agreements, as long as entered into by an individual,¹⁸ will be subject to ss 140A-C. The only agreements that will not be caught are regulated mortgage contracts,¹⁹ (essentially first mortgages on the home) and any type of credit agreement to an incorporated borrower.²⁰ Leaving aside potential injustice to small business,²¹ this ‘gap’ is filled to some extent by the FCA MCOB rule-book,²² informed in part by the forthcoming implementation of the Mortgage Credit Directive (‘MCD’).²³ MCOB imposes detailed obligations on mortgage providers, for example in relation to disclosure, responsible lending and action on borrower default.²⁴ In response to the MCD and existing UK government policy,²⁵

¹⁸ This includes a business if sole trader or partnership of two or three (unless all the partners are bodies corporate- or unincorporated bodies -as long as not entirely consisting of bodies corporate s 189(1) CCA. Those provisions that have been transferred to CONC have retained this scope of debtor protection.

¹⁹ As defined in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, S1 2001/544, Reg 61; CCA, s 140A(5)).

²⁰ As such a borrower is not an ‘individual’ for the purposes of the Act see n 18 above.

²¹ For a discussion of small business protection under the CCA see S Brown ‘Protection of the small business as a credit consumer: paying lip service to protection of the vulnerable or providing a real service to the struggling entrepreneur?’ C.L.W.R. 2012, 41(1), 59-96.

²² In force from April 2014. This was the result of a detailed review of the market conducted by the FSA over a number of years (2009-2012), as a result of the financial crisis. Policy papers can be accessed at <http://www.fca.org.uk/firms/firm-types/mortgage-brokers-and-home-finance-lenders/mortgage-market-review>. See also FSA ‘DP09/3 Mortgage Market Review’ (2009) <http://www.fca.org.uk/your-fca/documents/discussion-papers/fsa-dp09-3-mortgage-market-review> (last accessed Dec 2014).

²³ FCA ‘Implementation of the Mortgage Credit Directive and the new regime for second charge mortgages’ CP14/20 (Sept 2014) [1.7]. The rule-book will also be subject to further amendment as a result of this Directive, Ibid [1.8]. The Directive was also prompted by the financial crisis, irresponsible lending being a particular target. Commission Staff Working Paper ‘Summary of the Impact Assessment accompanying document to the proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on credit agreements relating to residential property’ (SEC 2011) 355 final, (Brussels, 31.3.2011) p 5. For a discussion of the comparison between EU and UK regulation in light of these latest developments, see Brown above n 4.

²⁴ Disclosure: MCOB 4-7, Responsible lending: MCOB 11, Action on default: MCOB 13.

MCOB will extend to second charge lending, currently under the umbrella of the CCA and CONC, from March 2016. Any new lending requiring a second charge on residential property from this date will, therefore, also be outside the ambit of ss 140 A-C.²⁶ For all other credit agreements, s 140A allows the court to consider the terms of the agreement, and the behaviour of both the creditor and those who act on its behalf.²⁷ In addition, the test centres on the finding of an unfair relationship between creditor and debtor, rather than an unfair agreement,²⁸ (although unfair terms may, of course, indicate the presence of such a relationship).²⁹ S 140A(1) describes the relationship as one ‘arising out of the [credit] agreement (or the agreement taken with any related agreement)’.³⁰ Therefore whilst the main credit agreement is pivotal, essentially the test relates to the relationship between two parties as a result of a credit arrangement rather than one specific contract: other resultant agreements are also of relevance, and the whole transactional history between parties may be subject to scrutiny.³¹ This gives the court a wide set of relational circumstances from which to draw,

²⁵ HM Treasury Implementation of the EU Mortgage Credit Directive (26 Jan 2015) [2.2] <https://www.gov.uk/government/consultations/implementation-of-the-eu-mortgage-credit-directive/implementation-of-the-eu-mortgage-credit-directive>.

²⁶ Brown, above n 4, p 574. Transitional provisions will be put in place for those agreements entered into before this date, *ibid* [2.3].

²⁷ S 140A(1)(c).

²⁸ As recognised by Mr G. Leggatt QC in *Patel v Patel* [2009] CTL 249 (QB) at [63]. The section therefore casts the net wider than the protection provided by the Unfair Terms in Consumer Contracts Regulations 1999- for further discussion see text to nn 195-204 below.

²⁹ G Howells ‘The consumer credit litigation explosion’ (2010) 126 LQR 617 at p 638; for a discussion of the wide ambit and nature of the relationship see S Brown ‘The unfair relationship test, consumer credit transactions and the long arm of the law’ LMCLQ (2009), 1(Feb), 90-112 pp 95-97.

³⁰ S 140C defines related agreement as including consolidated agreements, linked transactions or security.

³¹ Brown, above n 29, p 96. The section’s provisions, for instance, cover both the original agreement and subsequent agreements within re-financing arrangements. R Goode (ed) *Consumer Credit Law and Practice* (1999, looseleaf) [47.128]. *Patel* (above n 27) and *Barnes v Black Horse Ltd* [2011] EWHC 1416 (QB) are good examples of cases where there were a number of credit agreements with the same creditor, later agreements refinancing earlier ones, all of which were potentially subject to the sections’ provisions. In *Patel*, it was the relationship, which arose out of the consolidating agreement, which fell foul of the test. In *Barnes* the contentious issues primarily arose from the PPI premium charged on the original and two subsequent roll-over loans.

including third party behaviour, and the ability to examine the relationship retrospectively.³²

The broad approach of the test also extends to available sanctions. One remedy is that the court can set aside an offending term. Alternatively there is the ability to interfere with the contract in some other way, for example by inserting or amending obligations or other requirements. Beyond this, other sanctions might involve anything from obliging the creditor to perform some relatively small act, such as reimbursement of excessive interest deemed to be unfair or completing relevant documentation, to total reimbursement of the borrower. Ultimately, the most powerful weapon is the ability of the court to set aside the contract, any related contract, or the arrangement, in its entirety. The court's powers are incredibly far-reaching, and with little statutory guidance as to what may constitute unfairness in a relationship, the court is, in effect, given free rein.³³ The test's greatest assets (or dangers depending on your viewpoint) lie in this flexibility and scope.

b) Context of recent challenges to consumer credit agreements

In the recent cases there have been four main heads of challenge to the validity of a credit agreement: breach of consumer credit regulation (primarily ss 77-78 of the CCA which concern information provision), breach of fiduciary duty and/or a duty of care and the existence of an unfair credit relationship. Some of these cases have centred on the blatant breach of ss 77-78, whilst others have addressed the

³² Brown, above n 29, pp 96-97.

³³ For further discussions of the test's ambit see eg Howells, above n 29; D Collins 'Payday loans: why one shouldn't ask for more...' (2013) JIBLR 28(2), 55-60; E Lomnicka 'Unfair credit relationships: five years on' (2012) JBL 8, 713-730; L McMurtry 'Consumer Credit Act mortgages: unfair terms, time orders and judicial discretion' (2010) JBL 2, 107-125; S Gerlis 'Credit where it is due' (2010) LSG 107(33), 18.

issue of sales practice and the extent to which transparency is required in order for the contract to escape scrutiny by the court. In terms of discrete statutory information requirements, it has been made clear breach of such would only trigger the specific sanctions available, namely temporary unenforceability.³⁴ It does not, however, without more, constitute an unfair credit relationship.³⁵ In respect of breach of the duty of care and/or the existence of a fiduciary duty between creditor and debtor, the courts have been deeply reluctant to interfere.³⁶

Most claims of an unfair credit relationship, have had a particular issue in common, namely payment protection insurance,³⁷ with ‘automatic’ provision of cover and large premiums, with high percentage undisclosed commission,³⁸ being the basis for complaint.³⁹ One typical example is *MBNA Europe Bank Ltd v Thorius*,⁴⁰ where ‘surreptitious’ insurance featured as a contested issue. Whilst on the facts it was held the creditor did not have any contractual entitlement to the insurance premiums in any event,⁴¹ *DDJ Smart* did consider the operation of s 140A and whether it would have entitled the debtor to relief if necessary. He came

³⁴ The sections forbid enforcement of the agreement whilst the breach continues ss 77(4)(a), 78(6)(a).

³⁵ *Carey v HSBC Bank* [2010] Bus LR 1142 ; *Lomnicka*, above n 33, pp 724.

³⁶ In *Yates v Nemo Personal Finance (Unrep)* Manchester County Court (4 May 2010) it was found that there was not only no fiduciary relationship between the claimants and their broker, but that the creditor did not procure any breach of such a relationship. Similar conclusions about the lack of a fiduciary relationship of this kind between creditor and debtor, were also reached in *Khodari v Tamimi* [2009] CTL 288, *Lawson v Black Horse Ltd*, (Unrep) Newcastle-upon-Tyne County Court (15 April 2011) *Carson & Hazell v Black Horse Ltd*, (Unrep) Cambridge County Court (18 April 2011) and *Barnes v Black Horse Ltd* see n 30 above although *HHJ Waksman QC* left it open as to whether, even if no breach of such duty, there may be an unfair credit relationship- *Lomnicka*, above n 33, p 720

³⁷ *Howells*, above n 29, at p 617; *Lomnicka*, above n 33, at p 726.

³⁸ Particularly the single premiums payable for fixed sum loans, where the borrower would often end up taking out further credit to pay for the premium. For a more detailed discussion, including FSA and FOS involvement in policing of PPI, see *Howells*, above n 29, pp 631-635.

³⁹ Many borrowers took out this insurance either unwittingly or when they did not really need it or understand its terms.

⁴⁰ [2010] ECC 8.

⁴¹ And therefore recoverable by the borrower, as not only had the debtor never agreed to take out the insurance in the first place, she had then paid for it on the basis of mis-information [2010] ECC 8 at [19].

to the conclusion that whilst the credit agreement itself would have been in no danger, the related PPI was a different matter. The essential problem for the creditor was the lack of transparency, in relation to the commission the creditor would receive if the insurance were taken up, and the lack of any indication the debtor could look elsewhere for cover.⁴² The judgment in *Yates v Nemo Personal Finance*⁴³ followed a similar line, finding an unfair relationship arose from the non-disclosure of the commission, as with knowledge of its amount, the borrower may have acted differently.⁴⁴

c) The Harrison decision and a change of direction

One of the most important cases to date, however, being the first to reach the Court of Appeal, is *Harrison v Black Horse Ltd.*⁴⁵ Again the arguments centred on the non-disclosure of commission payable for PPI connected to a loan agreement and whether this amounted to an unfair credit relationship. Here however there was a marked move away from earlier decisions. Tomlinson LJ disagreed with HHJ Platts' approach in *Yates*, taking the view that the unfair credit relationship test was not as open-ended as the judge had suggested in that case,⁴⁶ so concluding there was no unfairness in the relationship before him. To a large extent the reasoning behind the denial of relief relied on the fact that disclosure of commission was not required by rules currently in place. These were not, however, rules present in the consumer credit legislation, but the then FSA

⁴² cf the approach in *Harrison v Black Horse Ltd*, below n 45, where an intermediary represents him/herself as only selling one product.

⁴³ See above n 36.

⁴⁴ It should be noted however, that transparency has not just been an issue in relation to PPI. In *Patel* which did not involve PPI at all, the relationship was found to be unfair, due, in part, to the scant information given to the debtor, even though disclosure was not legally required, as the agreement was not regulated *Lomnicka*, above n 33, p 725.

⁴⁵ [2011] EWCA Civ 1128.

⁴⁶ *Ibid* at [30]-[31].

rules, contained in the Insurance Conduct of Business Sourcebook ('ICOB'). The view of the court was that as disclosure of the payment was not required by ICOB,⁴⁷ and the OFT Guidance viewed the FSA rules as a valid consideration,⁴⁸ it would be contradictory to then find the non-disclosure resulted in unfairness.⁴⁹

There is no doubt there is an abundance of primary legislation, secondary regulation and 'official' guidance as to how consumers should be treated.⁵⁰ Nevertheless, whilst it is accepted it may be appropriate to take into account compliance with specific requirements already in place, putting too great an emphasis on this does not allow for the differing contexts in which these various rules have been introduced and are intended to operate. Furthermore, using other rules as a litmus test as to whether a credit relationship is unfair seems to go against the intention of creating a flexible and free-standing sanction, evidenced by the wide discretion afforded to the court under s 140A. This flexibility was certainly recognised by HHJ Platts in Yates

it is clear that Parliament intended there to be a very wide discretion in the court and it seems that what I must do is look at all the circumstances of the

⁴⁷ An associate's commission must be disclosed to commercial customers upon request (ICOBS R.4.4.1). From 31 December 2012, the fact a firm will receive commission must be disclosed to all retail customers where a pure protection contract is sold with a retail investment product- ICOBS R4.6

⁴⁸ Tomlinson LJ regarded as significant the fact that the OFT Guidance on unfair credit relationships regarded relevant FSA rules as a valid consideration, above n 21, [40]-[41].

⁴⁹ Harrison at [58]. Furthermore non-disclosure of commission was not identified as one of the common failings in relation to the sale of PPI policies identified in the FSA's policy statement of August 2010- Ibid at [62].

⁵⁰ Recent case law has indeed gone as far as referring to the OFT Guidance and its importance in this respect. Whilst for instance in Barnes it was rejected as irrelevant because the guidance related to a different type of borrower and a different type of lending, the principle of having regard to the Guidance itself was not expressly dismissed, Barnes at [23], [32].

case and ask myself is the relationship between this debtor and creditor unfair to the debtor?⁵¹

A non-presumptive approach, clearly supported by the Government at the time of drafting ss 140A-C, seems to have some support from the European Court in the context of the Unfair Contract Terms Directive ('UCTD') and the Unfair Commercial Practices Directive ('UCPD'). In *Perenicova v SOS Financ Spol s ro*⁵² the European Court was not prepared to accept that just because the misstating of the APR in a credit agreement constituted an unfair commercial practice within the UCPD, this automatically meant the contract term itself was unfair under the provisions of the UCTD. It was necessary to take all the circumstances of the case into account, the contravention of the UCPD being simply 'one element to consider'.⁵³ Whilst here the question was whether non-compliance (as opposed to compliance) with other legislation would provide an automatic answer to whether the UCTD was engaged, the underlying principle supports the view that application of other regulation should not provide a ready-made answer. The court in *Harrison* however, took a different view, clearly taking the approach that application of rules across different regulatory contexts was valid. The Rules were purposively framed to regulate conduct in insurance business. On that basis compliance was what was required- finding obligations beyond such requirement would be inconsistent.⁵⁴

⁵¹ Yates at [17].

⁵² Case C-453/10, *Perenicova v SOS Financ Spol s ro* [2012] 2 CMLR 28.

⁵³ *Ibid* at [47]. D Collins 'Misleading APRs in Consumer Credit Agreements: a new influence?' (2012) 7 JBL 629. For a brief summary of the case see Case Comment (2012) 295 EU Focus 13.

⁵⁴ *Harrison* at [58]. The borrower was given leave to appeal but in the event the case was settled out of court. For commentary on this and the decision see R Kelsall 'End of the road for PPI claims? Borrower's appeal withdrawn' (2012) BJB & FL 27(9) 587.

d) Evidence of competing ethics in legislative and judicial approaches at this point

One of the aims of this article is to measure the potential ability of the unfair credit relationship test to realise its underlying objectives, and whether policy behind the legislation is reflected in judicial interpretation of the sections.

Willett's presentation of the competing ethics of protection and self-interest/reliance provide appropriate benchmarks, dealing as they do with protection of the vulnerable, as against trader interests and consumer self-help, all integral issues to borrower protection. These ethics, as defined, are concerned with the extent to which substance of agreements should be controlled, dependant upon the extent to which any given procedure should be seen as adequate, and the importance or otherwise of the impact of terms and practices upon consumers. Transparency has a large part to play. Whilst the protective ethic concerns itself with protecting the vulnerable, regardless of information given, by controlling not only harsh practices, but also the substance of agreements and therefore the consequences of unfair terms, the self-interest/ reliance ethic relies on information as the basis of protection, so encouraging consumer self-help.⁵⁵ This has resonance with the identification of a 'decentralisation' of consumer regulation, which, as discussed by Ramsay, 'responsibilises' the consumer,⁵⁶ information being the primary means of pursuing and protecting his/her interests. However the self-interest/reliance ethic goes beyond this: here, it is also the trader's interest that is promoted, in that as long as required information is given about terms,

⁵⁵ Reflecting to some degree Adam Smith's assumption that 'homo economicus' will pursue self-interest- information, if adequate, will allow the consumer to do this U Reifner J Niemi-Kiesilainen, N Huls, H Springeneer Over-indebtedness in European Consumer Law: Principles from 15 European States (Norderstedt: Books on Demand GmbH, 2010) pp 55-56.

⁵⁶ I Ramsay 'Consumer Law, Regulatory Capitalism and the 'New Learning' in Regulation' (2006) 28 Sydney L Rev 9 at pp 12-13. Ramsay discusses the decentralisation agenda identified by scholars such as David Levi-Faur and Julia Black, in the context of consumer policy.

further interference on the part of the law is not forthcoming.⁵⁷ The consumer must use the information to protect him/herself, and will not be shielded from consequences that follow from entering into the agreement.⁵⁸

Examining the law at this point, with the competing ethics of Willett in mind, an initial observation can be made about the consumer credit legislation, and judicial reaction to it. The statutory provisions that deal specifically with information provision suggest the self-interest/self reliance ethic. The trader must provide the relevant information- only if he does not do so, is the agreement under threat. Control over the substance of agreements is eschewed in favour of efficient⁵⁹ information provision; it is for the consumer to make use of this information to protect his/her interests. It also allows promotion of the trader's own interests, as there is a greater freedom in relation to terms, as long as procedural fairness is observed.⁶⁰ In other words, as long as the trader ticks the prescribed procedural boxes in relation to information, he can maximise his interest at the expense of the consumer. Judicial attitude to these transparency legislative provisions reflects this ethos, emphasising the transient nature of any non-enforceability and a practical approach to the question of what constitutes a copy, as required by ss 77 and 78.⁶¹

In contrast, ss140A-C suggest the protective ethic, with the much wider ability to examine substance and procedure where unfairness may be evident.

Particular procedural requirements are not relied on as the basis of protection. So,

⁵⁷ Willett, above n 11, at pp 412-415, 423.

⁵⁸ Arguably reflecting a neo-liberalist approach with its emphasis on individual responsibility and expansion of markets. For a detailed discussion of neo-liberalism and recent problems in relation to financial services and consumer credit, see I Ramsay, T Williams, 'The crash that launched a thousand fixes: Regulation of consumer credit after the lending revolution and the credit crunch' in A Kern, N. Moloney (eds) *Law Reform and Financial Markets* (Cheltenham: Edward Elgar, 2011).

⁵⁹ In terms of facilitating real consumer choice.

⁶⁰ Willett, above n 11, p 414.

⁶¹ By allowing as sufficient the reconstitution of the copy from a number of sources, rather than from the original agreement itself, see the decision in *Carey*.

in accordance with the underlying ethic, here protective, the decisions in *Thorius* and *Yates*, in considering ss 140A-C, seem to illustrate that any lack of transparency, regardless of required procedure will be fatal to an agreement, if there is clear detriment to the consumer.⁶² They suggest vulnerability is to be shielded from any shade of exploitation, at the expense of enforceability of the agreement even though there is no breach of transparency rules as such. The decisions focused on the impact of creditor practice (here non-disclosure) on the consumer, with the creditor's self-interest in not providing the information being sacrificed in favour of protecting the consumer from consequences of entering the agreement.⁶³ By the same token, in the earlier case of *Patel v Patel*,⁶⁴ the lack of information given by the creditor was seen as contributing to the exploitation of the borrower, although here the circumstances of the relationship clearly led to the borrower putting trust and confidence in the creditor, to such an extent that it constituted undue influence. In the words of Willett (discussing undue influence and general clauses in relation to unfair practices) any information that was given was 'unlikely to overturn the psychological commitment to the transaction'.⁶⁵

The Court of Appeal decision in *Harrison* however, exhibited a very different approach. Here there was a demonstration of the self reliance/interest ethic at play; it was clearly felt that consumers had some responsibility in protecting themselves and that traders must be allowed to some extent to act in their own interests. As Tomlinson LJ states

⁶² Here the detriment was uninformed choice: the decision was biased due to imperfect knowledge of cost and alternatives. *Yates* at [40]-[41].

⁶³ See Willett, above n 11, p 420.

⁶⁴ Above n 28.

⁶⁵ Above n 11, p 436.

A seller is not ordinarily obliged to warn his buyer that his product is expensive when compared to other similar products and in my judgement it is telling that in this heavily regulated market no such obligation has been imposed... [T]he absence of shopping around was the result of a perception amongst borrowers, shared by the Harrisons, that the PPI offered was a condition of the loan....In this case that belief was self-induced. It is not suggested that it gave rise to an unfairness in the relationship.⁶⁶

In other words here the consumers only had themselves to blame. The creditor could not be expected to pay for the outcome of the borrowers 'not doing their homework' or making a potentially misguided choice. Indeed, this seems to take Willett's self-interest/self-reliance ethic one step further. Here there is no 'reliance' on information by the consumer, which justifies the creditor's position. Rather, as long as rules are complied with, (which here they were) this of itself is enough to allow the trader's self-interest to prevail, even though the borrower has little in the way of informational tools to draw on.

The decision in Harrison demonstrates that market-individualistic judicial decisions in consumer cases are still very much a possibility⁶⁷ and seems at odds with the underlying protective ethic of ss 140A-C. This highlights an inconsistency between legislative policy and judicial interpretation in this respect, when it is considered that the test was regarded as providing a shield against lawful but questionable behaviour and terms.⁶⁸ The decision should not, perhaps,

⁶⁶ Harrison at [59]- [60].

⁶⁷ See Willett, above n 11, p 431 in relation to the Supreme Court's approach to European fairness provisions.

⁶⁸ DTI above n 8, [3.32]-[3.37].

have come as a surprise, as preference for the self-interest/reliance ethic has been observed by Willett in relation to other UK decisions concerning general unfairness clauses.⁶⁹ He argues this development is a threat to consumer protection⁷⁰ and his concern translates to the observations made here. Harrison arguably calls into question the ability of ss 140A-C to achieve their aim, which includes giving the court the ability to assess ‘all circumstances affecting the use of credit’⁷¹ and consideration of ‘any other relevant considerations that may have led to unfairness’⁷² when judging the nature of a relationship. The section specifically includes creditor omission(s) as a potential factor,⁷³ (although of course here the conclusion was that the omission itself did not offend any regulatory requirement, ergo it was fair).⁷⁴ Whilst the sections may give the impression of a bias towards procedural matters⁷⁵ the White Paper in 2003 made it clear a wide range of circumstances were relevant,⁷⁶ and the Government made clear, at the time the 2006 Act was being considered in Parliament, that there should be no presumption compliance or non-compliance with other rules would be conclusive

Lenders do not need another list of specific practices as those are already made clear in other legislation, although complying with all of them will not necessarily mean that a relationship is fair.⁷⁷ (emphasis added)

⁶⁹ Willett, above, n 11 pp 430-431. A case in point is the decision of the Supreme Court in *OFT v Abbey National* [2010] 1 AC 696 where the self-interest/reliance ethic was clearly in evidence in the judicial decision making process.

⁷⁰ Willett, above, n 11 p 436.

⁷¹ DTI above n 8 [3.33].

⁷² *Ibid* [3.37].

⁷³ s 140A(1)(b).

⁷⁴ As pointed out by Briggs LJ in *Plevin* [2013] EWCA Civ 1658 at [58].

⁷⁵ Brown, above n 29, p 97.

⁷⁶ DTI, above n 8, [3.33], [3.37].

⁷⁷ HL Deb. Grand Committee Vol 675 col GC160 (8 Nov 2005) per Lord Sainsbury of Turville

Certainly when the legislation was drafted, it seems reliance on flexibility extended to discouraging any forgone conclusions.⁷⁸

e) The Supreme Court's approach to unfair credit relationships

Although the opportunity for further appeal was not taken in *Harrison*, ss 140A-C have now been considered by the Supreme Court in *Plevin v Paragon Personal Finance Ltd*.⁷⁹ The case consisted of conjoined appeals of *Plevin v Paragon Personal Finance Ltd* and *Conlon v Black Horse Ltd*⁸⁰ and concerned the non-disclosure of commission for PPI. In the Court of Appeal, all three of Briggs, Beatson and Moses LJ expressed discomfort in the constraints of the *Harrison* decision,⁸¹ making clear their view that the deliberate non-disclosure of commission, should allow the PPI to be open to review.⁸² However in Mrs Conlon's case, as the court considered (although with reservations on behalf of Moses LJ)⁸³ that the judgment of the lower court in the case was based on the non-disclosure of commission alone, the decision in *Harrison* had to be followed. This however was not the position in relation to Mrs Plevin. Whilst the issue in relation to the non-disclosure of commission clearly came within *Harrison*, there was a separate argument as to whether the intermediary, LLP,⁸⁴ had fulfilled its obligations in relation to assessing Mrs Plevin's needs,⁸⁵ and if it had not, whether

⁷⁸ DTI, above n 8, [3.37].

⁷⁹ [2013] EWCA Civ 1658. This is the first to reach the Supreme Court

⁸⁰ [2012] CTL 193.

⁸¹ *Plevin*, above n 79, at [80] [81]-[82].

⁸² *Ibid* at [26], [80], [82].

⁸³ *Ibid* at [83]. Aside from potential evidential differences, the essential question- whether an unfair credit relationship could be found where there was no breach of regulations- was the same.

⁸⁴ LLP was an independent finance broker which arranged Mrs Plevin's loan (a consolidation of existing debt together with new borrowing) together with 5 years of PPI cover. Both it and Paragon were intermediaries for the purposes of ICOB, although in this instance, in relation to the sale of the insurance, the ICOB Rules only applied to LLP- see n 85 below.

⁸⁵ As required by ICOB, and the FISA and FLA regulatory codes. The ICOB requirement only applied to LLP, as it was the intermediary in direct contact with the customer in relation to the sale

this could be seen as something done, or not done, by or on behalf of the creditor for the purpose of ss 140 A-C. Here the court did not feel constrained by the Harrison decision, as the question centred on responsibility for alleged breach of obligations, rather than whether the test could still apply even where there had been no breach.⁸⁶ It allowed Mrs Plevin's appeal, finding that the creditor could indeed be found liable for LLP's misconduct, if proved.⁸⁷

On appeal, the Supreme Court disagreed.⁸⁸ In their view, only agency-type relationships with the creditor would be caught;⁸⁹ the creditor's responsibility was not expected to extend beyond this.⁹⁰ However, in relation to the wider issue of what might constitute an unfair relationship, the court overruled Harrison, finding that the fairness/unfairness of a relationship could not simply be measured by compliance, or indeed non-compliance, with legal obligation(s),⁹¹ following a similar line to Briggs LJ's analysis in the Court of Appeal judgment.⁹² Lord Sumption, in considering the nature of s 140A, concluded that the intended flexibility was very different from the nature of the ICOB Rules, which were framed in terms of defined duties. Whilst the Rules were concerned with compliance with stated standards, the unfair credit relationship test required a much broader enquiry.⁹³ Ignorance of the amount of the commission in this case, due to its size, created such an inequality in knowledge that this resulted in

of the insurance, and was the one that had made the personal recommendation ICOB 4.3.1 R. The FISA and FLA codes are broader in that they do not seem to provide a hard allocation of responsibility and impose monitoring obligations on the lender in relation to their intermediaries. For the courts' detailed discussion of these issues see Plevin, above n 79, at [68]-[77] per Briggs LJ and in the Supreme Court [2014] UKSC 61 per Lord Sumption at [35]-[39].

⁸⁶ Plevin, above n 79, at [63] per Briggs LJ.

⁸⁷ Ibid at [64]

⁸⁸ Plevin v Paragon Personal Finance and another [2014] UKSC 61.

⁸⁹ Ibid at [32]-[34] per Lord Sumption.

⁹⁰ Ibid at [34].

⁹¹ Ibid at [17].

⁹² Plevin, above n 79, at [53]-[54].

⁹³ Plevin, above, n 88 at [17].

unfairness, regardless of whether disclosure was required or not. As his Lordship pointed out

at some point commission may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance. At what point this is difficult to say, but wherever the tipping point may lie the commissions paid in this case are a long way beyond it⁹⁴

The basis of unfairness therefore was regarded as any imbalance which severely restricts choice otherwise available to the borrower, and includes omission of the creditor to take reasonable steps to guard against such unfairness. It could be argued the decision on its facts, still hints at an essential role for transparency, as it was the ignorance of salient facts that was seen as the cause of unfairness here. However the court made very clear any number of factors, involving circumstances, borrower characteristics and questions of degree are all potentially relevant. These go beyond simply having the opportunity to make an informed choice and reflect the primary goal of protecting the consumer. Nevertheless, although the protective ethic seems to inform the court's approach, it was emphasised creditors' interests would not automatically be sacrificed at every incident of borrower detriment.⁹⁵ The Supreme Court viewed a creditor's underlying desire to protect its own interests as not fatal to the fairness of the creditor/borrower relationship. This is of course does not automatically mean creditor's motives are irrelevant to a finding of unfairness,⁹⁶ but rather any motivation should be seen within the context of reasonable or expected

⁹⁴ Ibid at [18].

⁹⁵ Ibid at [34].

⁹⁶ Although interestingly Briggs L.J. suggests the ICOB Rules operate without reference to motivation-Plevin above n 79, at [24].

commercial behaviour.⁹⁷ It is not what the creditor does, or why, of itself, but rather whether the behaviour/terms have caused an unfairness in the relationship to arise; causation not motivation is the determining factor. Whilst the decision therefore, removes, beyond exploitation, any kind of presumptive approach, whether in favour of creditor or borrower, there is once more a clear recognition of the protective ethic, in the wide parameters set out as relevant in assessing unfairness. It can be said, then, that the Plevin decision redresses the imbalance between statute rationale and judicial decision with regard to the test itself. However it still leaves us with the question as to what extent the protective ethic can be effective as a basis for protecting credit consumers.

3. Protection and self-interest/reliance in controlling unfairness in consumer credit transactions

There is a wealth of literature, which discusses the concept of contractual fairness⁹⁸ and its role in consumer contracting. Unfairness by its very nature is a fluid concept, judged, whether objectively or subjectively, on the situation in which it arises; this can lead to difficulty in interpretation.⁹⁹ Those who frame the law must decide what they want to achieve and refine the law's target if it is to

⁹⁷ Plevin, above n 88, at [10], [17]. In the CA Briggs LJ put this in terms of blameworthiness Plevin above n 79, at [53].

⁹⁸ See for example SN Thal 'The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness' (1988) 8 OJLS 17; S Smith 'In Defence of Substantive Fairness' (1996) 112(Jan) LQR 138; H Collins, above n 30, particularly ch 11; R Bigwood 'Contracts by unfair advantage: from exploitation to transactional neglect' (2005) OJLS, 25(1), 65-96; C Thomas 'What role should substantive fairness have in the English law of contract? An overview of the Law' (2010) CSLR 177; in terms of regulation see eg S Bright 'Winning the Battle against Unfair Contract Terms' (2000) LS 20(3); T Wilhelmsson, C Willett, 'Unfair terms and standard form contracts' in G Howells, I Ramsay, T Wilhelmsson et al, Handbook of Research on International Consumer Law (Cheltenham (2010) ch 7, and more specifically from a European perspective see eg M Schillig 'Inequality of Bargaining Power versus markets for lemons: legal paradigm change and the Court of Justice's jurisprudence on Directive 93/13 on unfair contract terms' (2008) EL Rev. 33(3) 336-358; C Pavillon 'Private Standards of Fairness in European Contract Law' (2014) ERCL 10(1) 85-117

⁹⁹ T Wilhelmsson, C Willett, above n 98.

have success. More generally, it has been argued there may be a number of incentives for regulating on the basis of fairness, for example eliminating substantive unfairness or the achievement of a ‘public good’ or ‘social market’.¹⁰⁰ There may be distributive, or procedural aims at play, or the desire to ensure free choice with equal opportunity. Policy behind the 2006 amendments to the consumer credit legislation touches many of these themes, with the desire for promotion of financial inclusion, tackling over-indebtedness, protection of the vulnerable and an efficient fair and free market. Certainly the unfair credit relationship test, with the protective ethic at its heart, and wide parameters, has the potential to achieve at least some of these aims; but to what extent, if at all, should this ethic prevail?

Consumer credit can be an emotive subject, tinged with moral outrage about the ‘exploitation’ by certain types of creditor, for example payday lenders and those that offer short term, high cost credit. In effect, the provision of certain types of credit to particular groups of the community can offend our sense of justice. A reason for this may be the terms or styles of selling. Naturally, various practices within the sales environment ought to be controlled, such as high pressure selling,¹⁰¹ targeting of vulnerable consumers or cynical exploitation of a known weakness of a prospective customer. This however comes with a caveat; it is arguable there is a balance to be observed, if markets are to thrive. As Howells, Micklitz and Wilhelmsson point out, there can be a fine line between a hard sell

¹⁰⁰ H Collins ‘Good faith in European Contract Law’(1994) OJLS 14(2) 229-254 at p 246. For a detailed discussion of the development of consumer credit and questions of distribution see I Ramsay Consumer credit Law, Distributive Justice and the Welfare State’ (1995) OJLS 15 (2) 177-197.

¹⁰¹ This was specifically mentioned as a reason for replacing the extortionate credit bargain test, DTI above n 8, [3.31].

(to be expected in the normal market place) and an aggressive sell¹⁰² (undesirable in any consumer transaction). Here one might say the self-reliance ethic is better equipped to deal with this balance: it would allow the former, as long as adequate information was given but not the latter.¹⁰³

However, even if there has been evidence of pressure on the borrower, it is unclear to what extent the court would consider this as a basis for a successful argument as to unfairness.¹⁰⁴ Persistence on behalf of the salesperson, it seems, will not be enough.¹⁰⁵ The argument goes that there is always the opportunity to say no. In *Harrison*, and indeed in earlier cases such as *Patel* the suggestion seemed to be nothing short of a significant imbalance of bargaining power between the parties, bordering on undue influence, (this latter factor being couched in terms of ‘trust and confidence’ being reposed in the stronger party)¹⁰⁶ is likely to suffice.¹⁰⁷ This is necessarily a stringent test, where there is the possibility of contracts being set aside, but is unfortunate for the vulnerable consumer who by his/her very nature may be disproportionately disadvantaged by

¹⁰² G Howells, H-W Micklitz, T Wilhelmsson ‘Towards a better understanding of unfair commercial practices’ (2009) *International Journal of Law and Management* 51(2) 69-90, at p 69.

¹⁰³ But therefore necessarily less protective- Willett, above n 11, p 436.

¹⁰⁴ Pressurised selling was referred to in *Harrison*, on the initial appeal from the Worcester County Court, only in terms of its absence. There had been no pressure to accept the PPI; this together with the fact the cost and extent of cover had been known underlined the failure to successfully claim the relationship was unfair [2010] EWHC 3152(QB) at [53]- [54] per HHJ Waksman QC. See Willett’s discussion of pressurised and aggressive selling in the context of the Unfair Commercial Practices Directive, above n 11, pp 433-436.

¹⁰⁵ An example being *Thorius*, where the customer was pursued around the store by a persistent sales person- this of itself was not enough to establish behaviour, such that an unfair relationship would arise. Pressured selling was however identified as a ‘substantial flaw’ by the FSA -FSA ‘Policy Statement 10/12 ‘The Assessment and Redress of Payment Protection Insurance Complaints’ (August 2010).

¹⁰⁶ *Patel* at [75].

¹⁰⁷ For a comparison of the equitable remedy of setting aside a mortgage for undue influence and s. 140A see S Brown ‘The Consumer Credit Act 2006; real additional mortgagor protection?’ (2007) *Jul/Aug Conv* 316.

pressurised sales techniques, for example because of language¹⁰⁸ or intellectual difficulties. Unlike the average consumer, such a person does not recognise or cannot take advantage of the opportunity to say no.¹⁰⁹ Here it is not so much misplaced trust and confidence that is the problem, but lack of capability. In these situations it is the protective ethic that presents as most appropriate. The decision in Plevin, pulling back from *Harrison's* position, recognises this; the characteristics of the borrower, including vulnerability and lack of sophistication are factors that should be considered, and the effect of inequality between the parties is a matter of degree,¹¹⁰ although not of itself automatically indicative of unfairness.¹¹¹

A closer examination suggests it is the effect of the sales practice on the customer that is at issue, not the practice itself, and the decision in Plevin rightly reflects this, giving some emphasis to the necessary causative nature of the creditor's behaviour.¹¹² However it is also the nature of the consequences of entering into a consumer credit agreement that prompts concern. The operation and/ or enforcement of credit terms can lead to consequences, which range from the unfortunate and expensive, to the devastating. There are benefits of course, namely the pecuniary advantages brought by having money, such as the ability to acquire goods and services, but it is the potential for negative costs, not only

¹⁰⁸ This dilemma has been labelled as 'acoustic segregation' by P S Abril. For a discussion of this, with particular reference to the Australian small business individual, see E Webb 'Unconscionable conduct in Australian Competition and Consumer Commission v Dukemaster Pty Ltd- a recognition of 'acoustic segregation' in retail leasing transactions?' (2010) 18 APLJ 48

¹⁰⁹ For a discussion of consumers vulnerability from a situational perspective see T Wilhelmsson 'The Informed Consumer v the Vulnerable Consumer in European Unfair Commercial Practices Law-A Comment' G Howells, A. Nordhausen, D. Parry, C. Twigg-Flesner (eds) Yearbook of Consumer Law (Aldershot, 2007) ch 8.

¹¹⁰ Plevin, above n 88, at [17]-[18] per Lord Sumption.

¹¹¹ Ibid at [10].

¹¹² Although Briggs LJ suggests the creditor need not be 'blameworthy' as such Plevin, above n 79, at [53]; see also T Wilson 'The Responsible Lending Regime' in T Wilson (ed) International Responses to issues of credit and over-indebtedness in the wake of crisis (Farnham: Ashgate, 2013), p 123 who discusses blame in the context of irresponsible lending.

financial, that attract attention. These consequences may well arise because the consumer has been exploited, because their circumstances have changed or because, quite simply, they have entered into a bad bargain. One might argue this, with nothing more, gives rise to unfairness, as any advantage to be had from entering the agreement is destroyed. On this basis all consumers are potentially vulnerable: they may not fully understand or sensibly engage with consideration of all potential outcomes, and indeed behavioural economics tells us this is the case.¹¹³ If it is envisaged legal intervention should then take place, clearly this is a protective approach.¹¹⁴

Yet whilst the protective ethic may seem appropriate where vulnerability is present, that is not to say all vulnerability necessarily merits legal protection against unfairness, or certainly to the extent contracts should be dismantled. For instance, whilst outrage may well be justified in relation to some circumstances surrounding credit provision, arguably it is also observable even without evidence of calculated deleterious creditor behaviour. The only way to completely protect in this situation would be to ban ‘objectionable’ products or control contract terms. This however is a dangerous strategy: interest rate caps, now being imposed on the payday lending market, are a good example of this. As the often advocated arguments set out, such measures open the possibility of driving the problem underground, and ‘good’ suppliers will leave the market as it is no longer in their interests to remain.¹¹⁵ The provision of consumer credit is a business like

¹¹³ Bounded rationality, heuristics and biases, eg information overload selective optimism and mental shortcuts (‘availability heuristic’). For a discussion of the extent to which behavioural law and economics should inform policy see M Laure, H Luth ‘Behavioural Economics in Unfair Contract Terms Cautions and Considerations’ J Consum Policy (2011) 34, 337–358

¹¹⁴ Willett above n 11 at p 420

¹¹⁵ For the FCA consultation on interest rate controls, to be introduced in January 2015 see FCA ‘Proposals for a price cap on high-cost short-term credit’ CP14/10 (July 2014). The imposition of these rates is required by s 137(1A) FSMA 2000

any other, and if returns are continuously reduced and compliance is ever more costly, competition will be reduced and regulatory arbitrage may increase. This then relinquishes any meaningful control over credit provision and, potentially seriously, restricts consumer choice and harms market efficiency.¹¹⁶ Yet whilst market forces can assist with basic protection for most consumers through healthy competition, expecting consumers to play some part in their own protection where they are able, not all consumers have this ability. This leads to tensions, highlighted for example by Ramsay and Reifner, between consumer protection and choice, 'liberal model' versus 'social model' approaches to policy,¹¹⁷ and wider questions of the place of paternalism and behavioural economics policy in framing regulation.¹¹⁸

The underlying issue is at what point creditors in effect cross the line from positive exploitation of a market to negative exploitation of consumer vulnerabilities. There are a number of issues here: choice, knowledge (both debtor and creditor) and responsibility for consequences. Ensuring informed choice is relatively easy for the law; this underlies the importance of transparency, which can be addressed by standard rules. It adequately protects those consumers who are able to access and understand the information. The responsibility for consequences should then rest on their shoulders, and the contract terms respected. This however, does not allow for those consumers who regardless of

¹¹⁶ In the sense that lack of competition is a market failure, which, in neo-liberal terms, justifies regulation J Black 'Seeing Knowing and Regulating Financial Markets: moving the Economic to the Social LSE Legal Studies Working Paper No. 24/2013 at p 9

¹¹⁷ U Reifner J Niemi-Kiesilainen, N Huls, H Springeneer Over-indebtedness in European Consumer Law: Principles from 15 European States (Norderstedt, Books on Demand GmbH, 2010) pp55-57

¹¹⁸ I Ramsay 'Consumer Credit regulation as 'The third way?' Keynote Address Australian Credit at the crossroads conference, Melbourne 2004, pp 3-4, 10. As Hugh Collins points out, reasons for regulating contracts more generally in the name of fairness are not necessarily harmonious- Collins, above n 100, p 246. For a discussion of the appropriate role of legal paternalism see A Ogus 'The paradoxes of legal paternalism and how to resolve them.' (2010) LS 30(1), 61-73.

their understanding have no choice, for example because of their circumstances. Here there is little point in, for example, using behavioural assumptions as to how the decision to borrow is reached- externalities (for example poverty) force the consumer's decision. Who should have the responsibility for consequences then? This is when the creditor's knowledge becomes relevant. For whilst life events, which lead to inability to pay back debt may be unforeseen, it is possible to forecast the likely effect of certain events (for example a period of unemployment) on a particular borrower's ability to pay; if credit is offered in the knowledge the borrower would struggle to pay in this situation, then this is in effect irresponsible lending and a form of exploitation beyond, it is argued, what is acceptable. However whilst the concept of responsible lending is now receiving some emphasis in terms of current policy, it is not without difficulty. Criticisms centre on the limited nature of responsible lending measures, being based in the neo-liberal approach of reaction to market failure,¹¹⁹ which has resulted in 'responsibilisation' not only of the lender but of the consumer.¹²⁰ The problem here is that this presumes transactions take place in the context of a basic level of sophistication, or average set of circumstances in relation to the consumer, which as discussed above can be problematic for the vulnerable.¹²¹

Getting the balance right in terms of consumer versus creditor interests, and how far and in what respect the law should impose responsibility, whether on the consumer in terms of borrowing or the creditor in terms of lending, creates a dilemma for reform. Whilst the responsible lending agenda may be seen as a 'cop out', for its emphasis on consumer self-help, if too much responsibility is placed

¹¹⁹ Wilson, above n 111, p 109.

¹²⁰ I Ramsay 'Consumer Law, Regulatory Capitalism and the 'New Learning' in Regulation'(2006) 28 Sydney L. Rev. 9, 13.

¹²¹ Ibid at p 13.

on the creditor, this can have equally detrimental effects. Current concerns raised over availability of mortgages for ‘non-standard’ home buyers¹²² demonstrate this, where new rules contained in MCOB¹²³ impose full responsibility on lenders in assessing affordability of loans for their potential customers.¹²⁴ This raises the spectre of financial exclusion spreading to sectors of the market not traditionally recognised as generating such problems, which is a predicted negative consequence of badly drafted responsible lending regimes.¹²⁵ It also illustrates that in the quest for ultimate consumer protection, policy must not lose sight of consumer credit as a vehicle for mutually beneficial exchange.

4. Current legislative policy and reform, competing ethics and the future of the unfair credit relationship test

a) Current policy, reform and the role of contrasting ethics

Consumer protection, rather than simple preservation of the market, has been a keystone of consumer credit law since the Crowther Report¹²⁶ first reviewed the state of the law in the late 1960s. In the debate leading up to the drafting of the CCA, informed choice for the consumer, equality of bargaining power and the

¹²² This has been highlighted by one of the trade associations, the Intermediary Mortgage Lenders Association <http://www.imla.org.uk> It has been claimed by some in the industry, that as a result of this, certain borrowers, such as those over the age of 40, and the self-employed are now being ‘frozen’ out of the market <http://www.imla.org.uk/news/post.php?s=2014-11-24-fears-of-future-mis-selling-scandal-leave-older-mortgage-borrowers-out-in-the-cold-new-imla-report---the-changing-face-of-non-standard-mortgage-lending> (last accessed 2 December 2014).

¹²³ As a result of the Mortgage Market Review. This was an initiative of the Financial Services Authority, as a result of concern over the state of the market in 2009.

¹²⁴ MCOB 11.6 R; see also FSA CP10/16: Mortgage Market Review - Responsible Lending (July 2010) <http://www.fca.org.uk/your-fca/documents/consultation-papers/fca-cp10-16> and FSA PS12/16: Mortgage Market Review: Feedback on CP11/31 and final rules (October 2012) <http://www.fca.org.uk/your-fca/documents/fca-ps-12-16-mortgage-market-review> (both last accessed 2 December 2014).

¹²⁵ Wilson, above n 111, p 131.

¹²⁶ Committee on Consumer Credit ‘Consumer Credit : Report of the Committee’ (Cmnd 4596, 1971) In the White Paper published in 1973 ‘Reform of the Law on Consumer Credit’ (Cmnd 5427, 1973) it was made clear the ensuing legislation had dual purpose: comprehensive protection for the consumer and the fostering of competition at [6].

prevention of exploitation of the vulnerable were seen as the most important issues¹²⁷ with promotion of consumer welfare in essence, dominating the underlying policy, but still with a competitive market in mind.¹²⁸ This approach continued.¹²⁹ However, now the concept of over-indebtedness had a part to play in the emerging law, specifically in relation to its link to the vulnerable consumer.¹³⁰ During the reforms in 2006, whilst most initiatives relating to over-indebtedness were either non-legislative or related to regulation of loan default, at this point, the consumer credit legislation was seen as relevant to the elimination of unfair practices, (part of the reasoning behind introducing the unfair credit relationship test),¹³¹ promotion of financial awareness,¹³² and responsible lending all of which were linked to the prevention of over-indebtedness.¹³³

Government reform of consumer credit regulation, presents the certainty of yet more changes for what surely must be a compliance weary industry. With oversight of the industry transferred to the FCA,¹³⁴ planned overhaul of the consumer credit legislation is now being realised, with replacement of much of the CCA with a rule-book style regime, as is currently in place in relation to other financial services. Any inclusion/exclusion of rules in the new regulatory regime

¹²⁷ Vulnerability now seeming to encompass not only those who were destitute or under-privileged but the general persona of the consumer when in a position of inequality. S Brown 'European Regulation of consumer credit: enhancing consumer confidence from a UK perspective?' in J Devenney, M Kenny Consumer Credit Debt and Investment in Europe (Cambridge: CUP, 2012) p 63.

¹²⁸ S Brown 'Consumer Credit and Over-indebtedness: The Parliamentary Response: Past present and Future' (PhD Leeds 2006) p 204.

¹²⁹ See DTI, above n 8. This states that the major objective of proposed change to the law is 'an efficient, fair and free market where consumers are empowered to make fully informed decisions' p 4

¹³⁰ Brown, above n 29, p 64.

¹³¹ Acknowledging there was a need for a more focused control of unfairness per se. DTI, above, n 8 at [3.28]-[3.31] Wilson, above n 111, p 110.

¹³² DTI, above n 8, pp 4-5.

¹³³ Brown, above n 29, p 216.

¹³⁴ generally met with approbation HM Treasury 'A new approach to Financial Regulation: securing stability, protecting consumers' (Cm 8268 2012) [4.19].

will be influenced by the FCA, both in terms of content and how rules are enforced,¹³⁵ and of course there must be compliance with the Consumer Credit Directive ('CCD') and in relation to secured lending, the MCD, where applicable.¹³⁶ The FSMA regulatory framework operates on the basis that providers of financial services are required to observe rules of conduct contained in source books, tailored to the particular market (for example ICOBS, which details Rules for the insurance market). Whilst the CCA controls are prescriptively framed in statutory provisions with incorporated parameters, the principles-based approach of FSMA provides High Level Principles that outline expected behaviour of financial services providers, supported by rules and guidance. CONC therefore also details, more generally, conduct of business standards which creditors, and others engaging in 'credit related activities',¹³⁷ must adhere to, both pre and post contract. It also provides guidance on compliance with those aspects of the CCA still in force.¹³⁸

Whilst some of the CCA provisions translate relatively easily into the FSMA regime,¹³⁹ this presents more of a challenge for ss 140A-C, as unenforceability of agreements is not generally allowed for under FSMA where Rules have been breached.¹⁴⁰ As Lomnicka points out, the sanctions provided by both sets of

¹³⁵ See FCA 'Detailed Proposals for the FCA regime for consumer credit' CP 13/10 <http://www.fac.org.uk/views/cp13-10-consumer-credit-detailed-proposals>.

¹³⁶ The MCD governs all secured lending to consumers where the security is in residential property, or where the credit is given to facilitate the acquisition of rights in an 'existing project or building' Art 3 (1).

¹³⁷ Eg credit-broking and debt counselling.

¹³⁸ For example ss 77-79 CCA which deal with provision of copy agreements and statements.

¹³⁹ Lomnicka, above n 10, p 15.

¹⁴⁰ There are some exceptions- FSMA provisions allow unenforceability in respect of agreements/arrangements entered into as a result of very specific instances- for example contravention of specific rules relating to credit charges and roll-over loans s 137C or agreements entered into by unauthorised persons. FSMA 2000, s 137C.

legislation are not ‘easy to rationalise’.¹⁴¹ FSMA primarily follows breach of statutory duty via s150,¹⁴² where there is non-compliance with rules set out by the FCA.¹⁴³ However, unlike the unfair credit relationship test, this does not require a consideration of the wider effect of such breach on the relationship between the parties, and any breach has a prescribed effect: damages for loss.¹⁴⁴ The problem however is not just one of the approach to remedies. Aside from questions of rules-based versus principles based regulation, which will not be discussed here, the basis of the unfair credit relationship test highlights potential further conflict between the two sets of regulation. Whilst Government accepts there needs to be a ‘tailored’ approach to the consumer credit market,¹⁴⁵ the extent to which these two regimes are really compatible requires examination.

The approach of FSMA and the regulator suggests adoption of the self-interest/reliance ethic, with an expectation that consumers will protect themselves appropriately, if given the right informational tools.¹⁴⁶ Transparency provisions are key to the regulatory framework, and in this respect reflect the approach of the CCD, which relied heavily on information disclosure,¹⁴⁷ and the MCD, although the latter does refer to creditors acting ‘fairly’.¹⁴⁸ This, arguably, is in contrast to the development of specific modern UK consumer credit policy, primarily in

¹⁴¹ Lomnicka, above n 10, p 20.

¹⁴² Lomnicka above n 10, p17. This is available where the creditor is an authorised person: if unauthorised the creditor will commit a criminal offence and the agreement will be void. Ss 26-27, 30 FSMA.

¹⁴³ NB this does not include breach of the High Level Principles, although breach of these can attract disciplinary sanctions – *R. (on the application of British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin). Whilst not available to the consumer as a ‘remedy’, the FCA can also impose disciplinary action (eg fines) and criminal sanctions for unauthorised activity. For a comparison of the CCA and FSA in relation to sanctions see generally Lomnicka, above n 10.

¹⁴⁴ Lomnicka, above n10, pp19-20.

¹⁴⁵ HM Treasury, above n 6, [1.18].

¹⁴⁶ Willett, above n 11, p 414.

¹⁴⁷ Brown, above n 29, p 92.

¹⁴⁸ Art 7.

relation to the 2006 reforms, which has shown clear evidence of a move towards the protective ethic. Whilst many of the regulatory controls rely on the provision of information, and policy still advocated a ‘free and competitive market’, the unfair credit relationship test by its very nature moves away from reliance on information as a protective tool, and clearly focuses on borrower detriment. Having said that, in truth, some ambiguity can also be observed in more recent current policy statements. In the Consumer Credit and Personal Insolvency Review in 2010-2011, the Government’s stated vision was empowerment of consumers through ‘tools... to make informed decisions’ with ‘a safe and fair regulatory framework for both credit and personal insolvency...[which] must protect vulnerable consumers, particularly those at risk of falling into or those already in financial difficulty...’¹⁴⁹ The first aim ‘informed decisions’ is unlikely to deliver the second - ‘protection of vulnerable consumers’; transparent charges on a high cost loan is of little assistance to the customer who does not understand the charges, or, because of his/her financial situation, is deemed high risk and has no prospect of obtaining a cheaper loan. It is certainly interesting that when the proposals are examined in more detail, with the exception of the resurrected imposition of an interest rate cap, in terms of payday lending,¹⁵⁰ the initiatives that have really spoken to protecting the vulnerable are non-regulatory, soft law options, in the sense they concentrate on codes of practice¹⁵¹ and ‘agreed’

¹⁴⁹ BIS ‘Consumer Credit and Personal Insolvency Review Formal Response on Consumer Credit’ (November 2011) Ministerial Foreword. Ramsay also discusses this statement identifying it as reminiscent of the Crowther approach- I Ramsay ‘Culture or Politics? Models of Consumer Credit Regulations in France and the UK’ in T Wilson (ed) *International Responses to issues of credit and over-indebtedness in the wake of crisis* (Farnham: Ashgate, 2013) p 87.

¹⁵⁰ The FCA recently consulted on this and a cap was introduced on 15 January 2015 ‘Proposals for a price cap on high-cost short-term credit’ CP 14/10 15 July 2014. <http://www.fca.org.uk/news/cp14-10-proposals-for-a-price-cap-on-high-cost-short-term-credit> (accessed 12th December 2014).

¹⁵¹ Eg In relation to home credit and pay day industry -BIS, above n 149, p13.

actions.¹⁵² At a more general level recent policy in relation to protecting the credit consumer also seems uncertain. In the consultation paper on reforming the consumer credit regime, published at the end of 2010,¹⁵³ focus on vulnerability does not feature in the reform objectives. The emphasis is on simplification, coherence, and ‘effective and appropriate’ consumer protection, with consumer responsibility having a role to play.¹⁵⁴ This is more reflective of FSMA language, grafting onto consumer credit the approach taken to other financial services, with greater emphasis being placed on balancing interests of all market participants.

This is not to say of course that protecting consumers more generally against unfairness is now ignored and protection of the vulnerable is also more in evidence in more recent consultations.¹⁵⁵ There is the proposed retention of some criminal offences,¹⁵⁶ and now market intervention via ‘charge’ caps and ability to ban products.¹⁵⁷ These latter initiatives may be unsophisticated tools, which can bring their own problems, but demonstrate a move away from earlier political ideology in the UK observed by Ramsay as, to some extent, favouring choice and inclusion rather than protection from the market.¹⁵⁸ The Principles of Business, which set out how the FCA expects firms to conduct their business, allude to

¹⁵² Eg the banning of sales commission and retail incentives at the point of sale for store cards *ibid* at p 4

¹⁵³ HM Treasury above n 2.

¹⁵⁴ *Ibid* at [1.18].

¹⁵⁵ HM Treasury, above n 6. There is a stated recognition of the particular detriments suffered by vulnerable consumers in the Impact Assessment Annex D.

¹⁵⁶ *Ibid* at [5.11].

¹⁵⁷ Prompted by concerns over payday lending, currently in the spotlight -*ibid* at [2.4]. Controls include giving the FCA powers of market intervention, with the ability to cap interest rates or ban individual products *Ibid*, [2.22]-[2.23]. See also the Financial Services (Banking Reform) Act 2013.

¹⁵⁸ Compared to the position in France- I Ramsay ‘To heap distress upon distress? Comparative reflections on interest-rate ceilings’ (2010) *UTLJ*, 60 (2), 707-730 at p 714. Ramsay’s article gives insight into UK policy approach to interest rate caps discussing the role of culture and political interests.

treating customers fairly¹⁵⁹ and providing information in a fair way,¹⁶⁰ and the Conduct of Business Rules reflect these general requirements to act fairly honestly and professionally. Fairness to customers, in principle, was a matter the former FSA clearly did take seriously;¹⁶¹ the commitment is illustrated by the ‘Treating Customers Fairly’ (‘TCF’) initiative,¹⁶² which continues to be espoused by the FCA,¹⁶³ and there was recognition of issues of vulnerability and the need for financial inclusion.¹⁶⁴ CONC, takes this forward, replicating Principle 6, requiring creditors to have due regard to their customers and to treat them fairly: guidance on what might constitute unfair treatment includes ‘targeting’ vulnerable consumers, high pressure/oppressive behaviour and not allowing defaulting customers a reasonable time to pay.¹⁶⁵ Interlinked with this is the requirement for ‘responsible lending’ through assessment of creditworthiness and affordability, where creditors must consider a number of factors on a proportionate basis when offering credit. However, like other CCA provisions that easily translate, these protections are offered within detailed guidelines as to the basis of assessment,¹⁶⁶ and many of the protections still demonstrate adherence to transparency

¹⁵⁹ Principle 6.

¹⁶⁰ Principle 7.

¹⁶¹ Through for example expectation of firms to demonstrate fair treatment of customers and embedding TCF into their core supervisory work. FSA ‘Update on Treating Customers Fairly Initiative and the December Deadline’ http://www.fsa.gov.uk/pubs/other/tcf_deadline.pdf (accessed 12th December 2014).

¹⁶² Although not entirely successful in achieving its aims D Campbell & J Loughrey ‘The regulation of Self-interest in Financial Markets’ in J. O’Brien and G. Gilligan (eds) *Integrity, Risk and Accountability in Capital Markets* (Oxford 2013) pp 71-73.

¹⁶³ FSA ‘Journey to the FCA’ <http://www.fsa.gov.uk/pubs/other/journey-to-the-fca-standard.pdf> at p 8; www.fca.org.uk/firms/being-regulated/meeting-your-obligations/fair-treatment-of-customers.

¹⁶⁴ In the Discussion Paper, ‘Treating Customers Fairly after the point of Sale’ (June 2001) exploitation of customers and taking advantage of the ‘poor, needy and ignorant’ are recognised as unfair behaviour [3.4] Annex A [A.12]. Lack of financial capability is also recognised as a potential problem- FSA ‘Treating Customers Fairly- Towards Fair Outcomes for Consumers’ (July 2006). However, TCF ‘outcomes’ refer to products being designed and targeted according to customers needs, and that advice should take account of consumer’s circumstances. This seems to be more about appropriate tailored behaviour than active protection for the vulnerable see also [1.2].

¹⁶⁵ CONC 2.2.2 G.

¹⁶⁶ CONC 5.2.3.G-something missing from the original requirements in the CCD, and provided with little more in the way of guidance in the MCD, see Art 18.

requirements, the lynchpin of the self reliance ethic. There is also some lack of clarity in policy statements in relation to the acceptable extent of consumer responsibility; for example, limited understanding is recognised as a problem, yet it seems there will simply be reliance on greater transparency.¹⁶⁷ The problem is that greater transparency does not necessarily translate into greater understanding.¹⁶⁸

Nevertheless responsible lending demonstrates the aims of consumer credit and financial services regulation do have some similarity. In the CCA regime, irresponsible lending was subtly introduced as potentially amounting to deceitful, oppressive unfair or improper practices for the purposes of the regulator's¹⁶⁹ decision on the creditor's fitness to hold a consumer credit licence.¹⁷⁰ This illustrates Ramsay's point that the concept of responsible lending addresses more than exploitation of the consumer, but also contextualises unfairness around consumer credit transactions within wider market issues of, inter alia, corporate culture, and 'economic, social and legal pressures'.¹⁷¹ There is certainly evidence of this in the FCA approach to regulating financial services where there is emphasis on trust, accountability and responsible culture;¹⁷² integral to this is

¹⁶⁷ See FSA, above n 164, pp 8-9 and HM Treasury's consultation paper, above n 6, [1.17]

¹⁶⁸ A view underpinned by behavioural economics, Willett, above n 11, p 414. There are a number of biases that can affect consumer decisions, such as short termism, heuristics or emotional factors, J Minor 'Consumer Protection in the EU: searching for the real consumer' (2012) 13 EBOLR (2) 163, 164. Transparency struggles to address these issues-Ramsay, Williams, above n 58, p 237. Indeed it appears the role of information as a protective tool is beginning to be questioned in European policy in terms of the investor, N Moloney 'The Investor Model underlying the EU's Investor Protection Regime: Consumers or Investors?' (2012) 13 EBOLR (2) 169, 184. See also C Porras & W Van Boom 'Information Disclosure in the EU Consumer credit directive: Opportunities and Limitations' in J Devenney & M Kenny (eds) *Consumer Credit Debt and Investment in Europe* (Cambridge 2012) pp 21-55.

¹⁶⁹ At this point the OFT.

¹⁷⁰ s 25 2(B) CCA. This has now been replaced with the requirement for authorisation by the FCA under FSMA.

¹⁷¹ Ramsay, above n 118, at p 16.

¹⁷² <http://www.fca.org.uk/about/what/enhancing-market-integrity>. FCA Business Plan 2014-15 <http://www.fca.org.uk/news/business-plan-2014-15> pp12, 17; FCA Business Plan 2015, ch 3,

ensuring appropriate products for consumers and over-indebtedness, a recognised social pressure, is seen as a threat to achievement of FCA objectives.¹⁷³

Beyond responsible lending the objective of creating informed consumers able to act within a fair and open market seems key to both sets of regulation. The aim of the FSMA framework, and current FCA Rules is to provide a form of check and balance exercise to a number of aspects to the financial services market,¹⁷⁴ and the FCA has indicated its approach to its regulatory objectives is that a balance has to be made between supporting an innovative industry and ensuring consumers needs are met.¹⁷⁵ The current FCA rules are designed as a result of these objectives, which inform its activity; ‘the appropriate degree of protection for consumers’ is one.¹⁷⁶ However, the consumer protection objective is qualified by general principles such as emphasis on consumer responsibility and ‘appropriate’ levels of care.¹⁷⁷ This is due to further definitions, set down in statute, which concentrate on information provision, risks, and consumer expertise,¹⁷⁸ all of which come back to the idea of self-reliance. There is recognition, of course, that consumers may have weaknesses, particularly in relation to adequate understanding; there is certainly emphasis on ‘good conduct’ on behalf of financial services providers, and the FCA has ‘hit the ground running’ in taking on its role in relation to the consumer credit industry. However,

<http://www.fca.org.uk/static/channel-page/business-plan/business-plan-2015-16.html> (last accessed 22 April 2015.

¹⁷³ Ibid at p 36.

¹⁷⁴ Evidenced for example by the proportionality principle FSMA 2000 s. 3B(b).

¹⁷⁵ FSA above n 163, Foreword, 8.

¹⁷⁶ FSMA s 1C(1).

¹⁷⁷ S 1C(2).

¹⁷⁸ Ibid and illustrates what Ramsay terms the ‘responsibilisation of the consumer’ see above text to n120.

there is no doubt an appropriate balance will be difficult to achieve,¹⁷⁹ and this is demonstrated both in the language of the FSA paper, ‘Journey to the FCA’,¹⁸⁰ and in recent FCA activity, in relation to high cost short term credit and the newly announced cap on the costs of pay day lending.¹⁸¹

b) The future of the unfair relationship test as a means of ‘bridging the gap’

Interpretation, through these ethics of protection and self-interest/reliance of current approaches to financial services, more particularly consumer credit, demonstrates the problems that arise in relation to levels of consumer protection against unfairness, which like vulnerability is a fluid concept. Policy in relation to retail financial services, other than consumer credit, has been shown to promote consumer responsibility as part and parcel of consumer protection, and in its general approach has reflected a bias towards the self-interest/self-reliance ethic. Yet, this of itself is not undesirable; as Campbell and Loughrey point out, it is not ‘legitimate’ self interest of providers that has been the problem, but its metamorphosis into greed, engendered by market culture, that needs addressing.¹⁸²

Nevertheless, such self –interest, whilst consistent in its goals, can lead to

¹⁷⁹ Certainly a tension is recognised between the objectives of consumer protection and competition, but there is no real indication yet of how this will be resolved- ‘both competition and consumer outcomes can be at odds with one another’, but at this stage no further clarification is given: FSA above n 164 at p 11; the FCA do not go much further stating this will be approached on ‘a case by case basis’ FCA ‘The FCA’s Approach to advancing its objectives’ (July 2013) p 10; see also Ramsay, above n 149, pp 88-89.

¹⁸⁰ <https://www.fca.org.uk/static/documents/fsa-journey-to-the-fca.pdf>

¹⁸¹ Whilst the FCA have robustly defended their approach to setting the price cap on pay day lending a being compatible with their objectives, some respondents to the consultation were less convinced FCA ‘Detailed Rules for the price cap on high cost-short term credit’ Policy Statement PS14/16, pp 19-20, 158-160 <http://www.fca.org.uk/static/documents/policy-statements/ps14-16.pdf> (accessed 12th December 2014).

¹⁸² For ‘rational economic action’ (desirable) is grounded in self interest. What is not desirable is blatant advocacy of the pursuit of self-interest by the financial services providers. The employment of principles-based regulation was seen as a means of controlling such behaviour- Campbell & Loughrey, above n 163.

undesirable consequences for those unable to protect themselves. Here action based in protection may be appropriate, but it should be framed in a way that will be responsive to all consumers' needs, and flexibility is the most effective tool. With the Supreme Court decision in Plevin demonstrating a more balanced, non-presumptive approach to the application of ss 140A-C, the unfair credit relationship provides this. One of the test's greatest assets (or dangers depending on your viewpoint) lies in this flexibility. It allows any action or term to be judged unfair in a given context, and in effect allows the protection to 'adapt' to the consumer's particular vulnerability. Effectiveness, however, does not necessarily guarantee compatibility, and retention of the test may seem an untidy solution.

Whilst, arguably, the position may now seem less polarised as FCA Rules develop, the underlying basis of the unfair credit relationship test demonstrates a differing ethic to that of the FCA regulatory framework. It could be argued there is an observable influence of the protective ethic in the new FCA rules that control certain aspects of consumer credit, with specific reference to vulnerability and unfair behaviour. Yet, in the FCA regime, reliance on transparency,¹⁸³ proportionality,¹⁸⁴ and a risk based approach to supervision,¹⁸⁵ remains. Protection against unfairness in effect remains in statements of conduct, rather than protection of the vulnerable whatever the procedural nature or substance of the agreement; this approach was seen as inappropriate by the Supreme Court in

¹⁸³ 'The high level principle to be clear, fair and not misleading in financial promotions is the backbone to our approach' FCA 'Detailed Proposals for the FCA Regime for Consumer Credit' CP 13/ 10 [1.12] <http://www.fca.org.uk/news/cp13-10-consumer-credit-detailed-proposals> (accessed 12th December 2014).

¹⁸⁴ FCA 'Business Plan' above n 150 at p5; FCA 'Detailed Rules for the FCA Regime for Consumer Credit including feedback on CP 14/10 and final rules' PS14/3 see eg pp 34, 69, 134 <http://www.fca.org.uk/your-fca/documents/policy-statements/ps14-03>.

¹⁸⁵ FCA above, n 185 at p 31; FCA Detailed Rules, above, n 185 at p 7 Rules only refer to for example targeting customers who may be vulnerable and specifically refers only to high pressure selling, or aggressive/oppressive behaviour or unfair coercion.

Plevin. Furthermore, even where demonstrably protective tools go beyond the focused use of transparency requirements, such as recently introduced control of charges, their inherently rigid nature has revealed the continuing influence of trader interest, and the corresponding goal of market preservation, through compromise on the extent of control.¹⁸⁶ Should the test be abandoned, the FCA will of course have disciplinary sanctions upon breach of Rules.¹⁸⁷ Yet, this relies on efficient drafting, reactive regulator action¹⁸⁸ and potentially runs the danger of pressure from political interest groups.¹⁸⁹ Unenforceability of agreements may be available where specific Rules are contravened, and there would also be a breach of statutory duty action. However this latter sanction would only bite upon proof of breach of a relevant Rule and subsequent damage. This potentially represents a reduction in consumer protection.¹⁹⁰ Finally of course there are the ex ante controls provided through the permission requirements and on-going reporting stipulations- again however this relies on efficient supervisory control and robust enforcement by the regulator.

There are of course other forms of consumer protection regulation that apply to credit agreements. Whilst it is not proposed to discuss these at length here, they do have relevance. The Consumer Rights Act 2015 (CRA), which will, inter alia, replace the Unfair Terms in Consumer Contract Regulations 1999

¹⁸⁶ Demonstrated in the consultation and subsequent rules on price caps for high cost short-term credit, FCA above n 184. It confirms how its proposals were amended to reflect creditor's concerns, in its statement on the new rules.

¹⁸⁷ Which as shown by *R. (on the application of British Bankers Association) v Financial Services Authority* [2011] EWHC 999 (Admin) will extend to the Principles themselves.

¹⁸⁸ Wilson, above n 111, p 111.

¹⁸⁹ In terms of how the FCA uses its powers. Ramsay explores how such groups have influenced the contrasting direction of regulation of consumer credit in the UK and France in Ramsay above n 149

¹⁹⁰ Although Lomnicka argues this may not be significant, above, n 10 at p 21

(‘UTCCR’)¹⁹¹ is relevant where it is the terms that are the subject of complaint. If it is the creditor’s procedure that is at issue, the Consumer Protection from Unfair Trading Regulations 2008 (‘CPUTR’)¹⁹² may help.¹⁹³ However, there are substantive differences in approach between these regulations and ss 140A-C. First, the CRA¹⁹⁴ only applies to consumers acting other than for business purposes¹⁹⁵ - the unfair credit relationship test applies to business borrowing covered by the CCA. Second, an assessment of terms,¹⁹⁶ if relating to the main subject matter of the contract or the appropriateness of the price,¹⁹⁷ is not allowed (as long as the term is ‘transparent and prominent’¹⁹⁸ and/or does not come within a specific list).¹⁹⁹ Third, the CRA contains measurements of unfairness-good faith, significant imbalance and consumer detriment- and employs indicative and blacklisting of terms.²⁰⁰ Whilst the basis of assessment required by the CRA is still relatively wide, taking into account the nature of the contract and surrounding circumstances, the protection here, reflecting that contained in the UTCCR, does not generally look to rescue a consumer from an entire contract,²⁰¹ but rather to

¹⁹¹ The Act received Royal Assent in March 2015. Some of its provision are already in force, the remainder, including those relating to unfair terms are timetabled for implementation in October 2015.

¹⁹² The CPUTR transpose into UK law the Unfair Commercial Practices Directive, and relate to practices in relation to all consumers, rather than an individual consumer. The OFT have acknowledged the potential overlap between the CPUTR and the unfair credit relationship test-BERR ‘OFT Guidance on the UK Regulations (May 2008) implementing the Unfair Commercial Practices Directive’ (2008) [11.21].

¹⁹³ Although see Willett’s argument as to possible interpretations of the general clauses in the Unfair Commercial Practices Directive, above n 11, pp 432-436.

¹⁹⁴ And UTCCR.

¹⁹⁵ S 2(3). The CRA applies to an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession, the UTCCR to any natural person who, in contracts covered by these Regulations, is acting for purposes that are outside his trade, business or profession.

¹⁹⁶ The provisions now apply to negotiated as well as non-negotiated terms unlike the UTCCR which only applies to standard terms.

¹⁹⁷ In comparison to the goods/services being supplied.

¹⁹⁸ S 64 CRA, adopting the UTCCR’s definition of plain and intelligible language under Reg 6(2).

¹⁹⁹ This is a list of terms contained in Sch 2 of the CRA, which may be regarded as unfair.

²⁰⁰ Continuing the approach of the UTCCR and the Unfair Contract Terms Act 1977, which the CRA also amends.

²⁰¹ The contract will continue if practicable, s 67 CRA.

assess whether individual terms imposed were unfair.²⁰² This is in contrast to ss 140A-C, which allows the court to look beyond individual terms, to the relationship behind the agreement,²⁰³ and in effect to the bargain as a whole. It provides, in essence, a more holistic approach. Furthermore it allows an examination of behaviour whenever it has occurred, unlike the CRA and UTCCR, which concentrate on terms present at the time the contract is made.²⁰⁴ For different reasons, in relation to behaviour, the CPUTR may be a poor substitute; these regulations are problematic in that, apart from the amendments in relation to misleading and aggressive commercial practices, there is no avenue of personal redress,²⁰⁵ and the basis of complaint is based in how an ‘average consumer’ would have been affected by the practice, reducing the scope for subjectivity and protection for the vulnerable.²⁰⁶ This then is unlikely to provide a suitably flexible alternative to the unfair credit relationship.

²⁰² Where a term is found to be unfair the CRA envisages the remainder of the contract will continue if practicable- i.e. the whole contract being set aside is not a purpose of the protection.

²⁰³ Lomnicka, above n 33, p 718.

²⁰⁴ Ibid, although Lomnicka has explained behaviour pre-contract may be relevant to the issue of whether the term is contrary to good faith, as required by reg 5(1) of the UTCCR. This requirement is continued in the CRA, which also makes it clear circumstances at the time the offending term is agreed are relevant.

²⁰⁵ The regulations provide for civil enforcement by the regulator and criminal sanctions- Lomnicka, above n 33, p 728. Private redress for aggressive and commercial practices has been allowed since October 2014 as a result of the Consumer Protection (Amendment) Regulations 2014 SI 2014/870. The issue of private redress is something that has been examined by the Law Commission, ‘Law Com Report: Consumer redress for misleading and aggressive practices’ (March, 2012, Cm 8323). For comment see C Ervine ‘Consumer Redress for Misleading and Aggressive Practices’ (2011) Edin. L.R. 15(3), 448.

²⁰⁶ Whilst the regulations do provide for the more vulnerable consumer this is restricted to the average consumer within a vulnerable group- the problem with this is that vulnerability is based on fairly restrictive concepts (infirmity /age/ credulity) Brown, above n 127, p 71. For a discussion of the meaning of vulnerability and the consumer, and the dangers of ‘grouping’ vulnerability – T Wilhelmsson, above n 109.

So where does this leave ss 140A-C in any future regime? At a practical level, many consumers may wish to shun court action,²⁰⁷ and it is unlikely to be the choice of a truly vulnerable individual, unless lucky enough to have access to proper advice or funding. However it should be remembered that the test can be a shield as well as a sword, in that it can be invoked by the borrower, if proceedings are brought against him/her. It could also be argued that providing a cause of individual action is not an effective way of itself, to more broadly protect consumers against unfairness.²⁰⁸ Yet, the test can still be to consumers' advantage more generally, where the court has wide enough powers that will grab creditors' attention if invoked.²⁰⁹ However this of course depends upon the basis upon which the court uses such powers, so demonstrating the importance of the ethics underlying court decision. This does not however mean only one set of ethics, whether self-interest/reliance or protective is appropriate. It is arguable these differing approaches are simply the positive and negative of dealing with unfairness. The unfair credit relationship test bridges the gap between these approaches. For whilst the Principles and Rules in CONC provide parameters for acting fairly, in effect creating obligations to behave in a certain way,²¹⁰ the ability to set the agreement aside for unfairness provides an underlying negative control – i.e. to not act unfairly in a given circumstance, so creating a safety net for individual situations. Vulnerability can be protected, but as appropriate. The danger of course is uncertainty, which inevitably has a negative impact on credit

²⁰⁷ Although interestingly, there has been success in sanctioning creditor behaviour via the Protection from Harrassment Act 1997, *Roberts v Bank of Scotland plc* [2013] EWCA Civ 882 demonstrating borrowers are willing to use court process rather than rely on the regulator.

²⁰⁸ Ramsay argues that business is able to use private law to better effect than consumers, in that case-law can inform business future procedures or approach eg to contract terms. Ramsay, above n 56, p 33.

²⁰⁹ And, as Ramsay also argues, private law can influence 'values and ideologies' (*ibid*) and the direction of both consumer credit law and public perception, above n 149, p 92-93.

²¹⁰ Plevin, above n 88, at [17].

providers. Conversely, according to Willett, open-textured clauses can present a danger to consumer protection, when interpreted through the self-interest/reliance lens, and it has been argued the use of such clauses is open to criticism of cynical political expediency.²¹¹ But what is the alternative? The way forward might be for a more prescriptive approach to the test, guidelines for unfairness being included in new regulation. This however would rob the test of its flexibility, and would still not guarantee protective outcomes, potentially leading to other forms of detriment. Another argument might be that there is an unnecessary burden on creditors, who cannot rely on an agreement being enforceable or even recognised by the law even when they have observed stated rules within the regulation. Yet, creditors may take some comfort from the clear recognition by the Supreme Court both of the legitimacy of creditors' interests and the reality of the relationship between consumer borrower and creditor as 'inherently unequal' yet not by that token inherently unfair such that it should automatically be subject to review.²¹²

5. Conclusion

Until the Supreme Court decision in Plevin, as the ss140A-C case law has developed and reached the higher level courts, judicial approach has looked creditor friendly. This is not necessarily surprising. As Willett notes, the judicial bias towards self-interest/ reliance has been evidenced in the past by the Supreme

²¹¹ In that for example in relation to interest rate controls, the decision to implement such controls is side stepped by leaving it to the courts to decide a price is unfair, something which is unlikely to happen. Ramsay above n 149, p 92.

²¹² Plevin, above n 88, at [10] per Lord Sumption.

Court's own approach to unfair terms,²¹³ and to that extent Harrison continued this trend; this is potentially dangerous for the vulnerable consumer.²¹⁴ However, one might argue cases such as Harrison are peculiar to their context. Some were seen as unmeritorious and/or speculative,²¹⁵ and to that extent, one wonders whether the court would use any means possible to deny the claims.²¹⁶ In any event, in relation to PPI, there were and are other avenues of redress available, where it can be shown the insurance had/has been mis-sold,²¹⁷ and there was perhaps an underlying sense that the court was not the best place for this to be resolved. Furthermore, when referring to the FSA's policy statement about the mis-selling of PPI, Tomlinson LJ in Harrison set store by the fact non-disclosure had not been identified as a factor leading to consumer detriment. This suggests the outcome of the case may have been different had the complaint been about behaviour that had indeed been identified as detrimental.²¹⁸

The Supreme Court in Plevin, however has exhibited a more consumer friendly approach. It has been clear in its support of a wider interpretation of ss 140A-C, so re-asserting the test's independence from other regulatory obligations and sanctions already in place. Quite rightly, where a creditor does not comply with the relevant practice, he will find it more difficult to justify his behaviour. Nevertheless, it has confirmed the test is about the state of the relationship between creditor and debtor, not about compliance with procedural rules²¹⁹ when

²¹³ Willett, above n 11, p 430.

²¹⁴ And adds weight to Willett's prediction that such an approach has the potential to be a 'huge threat' to consumer protection- *ibid*, at p 415.

²¹⁵ Howells, above n 29, p 618; Lomnicka, above n 10, p 19.

²¹⁶ *cf* Willett, above n 11, at pp 430-431.

²¹⁷ Eg the Financial Ombudsman Service and ability to make claims direct to the provider.

²¹⁸ Where, in the lower courts, behaviour/terms have clearly led to detriment there has been no appeal. Eg *Morrison v Betterpace* (unrep) Sept 2009 (Lowestoft County Court); *Barons Finance v Olubusi* (unrep) 26 April 2010 (Mayor's and City of London Court).

²¹⁹ Plevin, above n 88, at [17] per Lord Sumption.

measuring fairness or otherwise, particularly where there has been cynical exploitation of such Rules. But to what extent can or should the law protect against unfairness in credit transactions? There is a truly difficult balance to be made between protecting all consumers and protecting those most in need. For by being too 'protective' in terms of the consumer community as a whole, the result might actually result in increase in detriment for those who need protection the most, and constriction of choice for those who can protect themselves.

There seems to be a tension between the underlying ethos of ss 140A-C and the objectives of the FCA, which, whilst making reference to the diverse nature of the consumer community, are geared towards risk, responsibility, competition and enabling innovative markets. It is true that the recent consultation papers demonstrate evidence of a move towards regulating unfairness more directly and ensuring fairness certainly has a role within the new rules on consumer credit transactions, with more detailed provision in relation to assessing affordability etc.²²⁰ The issue of vulnerability now plays some part, with detailed guidance on behaviour that is likely to be seen as not in a client's interests.²²¹ However all this is still influenced by concerns for the market, which illustrates the problem with any kind of regulation or decision making process in this area. The danger is resultant regulation that 'falls between two stools'. Striking the right balance will prove difficult. Ironically perhaps, the most recent activities of the FCA, seen by some as over-zealous, demonstrate how easily, if the FCA get it

²²⁰ Also reflected in the new rules on mortgage transactions.

²²¹ The supplier having to act with these in mind -See CONC 2.2.2 G.

wrong, markets can be adversely affected in the short term, and reputationally, the harm may be more far reaching.²²²

Application of the ‘competing’ ethics of protection versus self-interest/reliance in analysing the basis of the CCA and FSMA approach illustrates the potential incompatibility between ss 140A-C, devised as the ultimate protection for the vulnerable credit consumer, and the FSMA regime. But in fact does this matter? There is an argument for accepting that both ethics have a part to play in consumer protection, allowing them to complement rather than compete with each other. Whilst an untidy solution, fairness, and, by correlation unfairness, are untidy concepts; measurement of them is necessarily an inexact science. Self-interest/reliance provides an element of certainty but cannot provide a complete answer to consumer protection, and does not allow for individuality of consumers. Consumer protection is essential but as the exclusive ultimate goal of regulation it brings a danger of being the victim of its own success, with unwanted side effects. It is submitted the unfair credit relationship test’s flexibility allows both set of ethics to play a part, acting as a balance between self-reliance and protection, by providing a means of individual redress, which allows individual circumstances to be taken into account. This allows negative exploitation of consumers, perhaps the most unpalatable element of unfairness, to be prioritised and tackled in the most effective way.

²²² P Jenkins ‘Regulators in dock as mood on banking turns full circle’ 7 April 2014 Financial Times <http://www.ft.com/cms/s/0/a1bf7db8-bc12-11e3-a31c-00144feabdc0.html#axzz2yqoOmrNe> (accessed April 14 2014); M. Arnold, S. Fleming “Lloyds investors threaten to boycott offerings over FCA’s bungled briefing” (12 April 2014) FT Weekend.