Chapter 8

The FCA: Protecting Consumers of the Consumer Credit Market in the wake of the Global Financial Crisis.

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Introduction

Over the last fifty years, the western world has seen a dramatic change in how goods are purchased. Gone are the days of arduous saving in order to purchase the family car, television or living room suite. Society now depends much more on the 'buy now - pay later' schemes that are frequently waived before consumers to attract their business.[1] Whether in the form of payment breaks,[2] interest free credit,[3] hire-purchase agreements,[4] credit cards[5] or store cards,[6] a consumer can forgo the wait

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[1] Gordon Borrie 'The credit society: its benefits and burdens' [1986] May Journal if Business Law 181 at 189. A modern example of this is BrightHouse. See BrightHouse 'Buy-now-pay-later electricals' <http://www.brighthouse.co.uk/buy-now-pay-later-electricals/> accessed 23 March 2016; these are also known as rent-to-own schemes: Helen Clifton 'Drowning in debt: how irresponsible lenders are cresting a tidal wave of misery' <http://www.church-poverty.org.uk/drowningindebt/report/drowningindebt/drowningindebtpdf> accessed 23rd March 2016, 5.

[2] For example DFS allow a payment break of up to one year followed by four years interest free credit. See: DFS 'Your guide to interest free credit' <http://www.dfs.co.uk/content/inspiration-and-help/finance> accessed 23rd March 2016.

[3] *Ibid*.

[4] For an overview in relation to the purchase of vehicles in this manner see: Lisa Bachelor 'New car finance means you can drive a really hard bargain' *The Observer* (17th February 2013, London) <http://www.theguardian.com/money/2013/feb/17/motoring-consumer-affairs> accessed 23rd March 2016.

[5] Barclays Bank 'Credit Cards' <http://www.barclays.co.uk/Creditcards/P1242557963445> accessed 23rd March 2016.

[6] Interestingly, clothing retailer 'Next' uses a high interest credit account as the default option if a customer's card is declined when making purchases online. See further: Matt Clear 'Surprise! You just opened a Next Credit Account' <http://conversation.which.co.uk/money/next-account-card-interest-rate-directory/> accessed 23rd March 2016.

until they can afford the goods that they want, purchase such goods and mitigate the worry arising from having to pay for these products with the enjoyment of using them.[7] It is not denied that, even before the introduction of the first Barclaycard in 1966,[8] products were purchased on a post-pay basis. For example, it was common practice to have a weekly visit from the 'Tallyman', coming to collect the instalment due for products purchased in this manner.[9] Whilst on its face this appears a seemingly fair and friendly way of purchasing products on credit, the contrary appears to be true. The Tallyman was often feared,[10] and falling behind on payments had the potential to leave families in ruin.[11]

In more recent times, the Tallyman has arguably been replaced as the consumers' lender of last resort[12] by shop-based alternatives; where consumers can purchase goods and pay for them through 'seductively affordable … weekly instalments'.[13] This means that customers can purchase many products at the same time, without stretching too far beyond their means. However, akin to the Tallyman, such

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[7] Christine Ironfield-Smith, Kevin Keasey, Barbara Summers, Darren Duxbury, Robert Hudson 'Consumer debt in the UK: attitudes and implications' (2005) 13(2) Journal of Financial Regulation & Compliance 132, 133. Indeed, the purchase of goods on credit has been described as a good form of 'forced saving' See: Scott, C. and Black, J. *Cranston's consumers and the law* (Butterworths: London, 2000) at 231, as cited by Nicholas Ryder, Margaret Griffiths and Lachmi Singh *Commercial Law: Principles and Policy* (Cambridge University Press: Cambridge, 2012) 499.

[8] Barclays Bank 'Barclaycard marks 45 years of credit cards in the UK' <http://www.newsroom.barclays.co.uk/Press-releases/Barclaycard-marks-45-years-of-credit-cards-in-the-UK-7e0.aspx> accessed 23rd March 2016)

[9] ID Fenton 'The Tallyman' 1869 (May) The Quiver 521-523.

[10] Laura Marcus 'We Had To Hide From the Tally Man' (3rd November 2012, *Guardian*) <http://www.theguardian.com/lifeandstyle/2012/nov/03/laura-marcus-parents-hidden-poverty>, accessed 23rd March 2016.

[11] An interesting example of this is outlined by I.D. Fenton (n 9).

[12] As described by: Howard Johnston 'Fair Credit' (1991) 10(6) IBFL 94, 94.

[13] For example, a washing machine can be purchased for £10 per week. See: Amelia Gentleman 'Buy now regret later? The secret of BrightHouse's success' *The Guardian* (4th October 2013, London) <http://www.theguardian.com/society/2013/oct/04/brighthouse-consumer-poverty-high-street> accessed 23rd March 2016.

'seductively affordable' payment methods can lead to the devastation of a family's finances.[14]

As early as 2003, the Department for Trade and Industry[15] noted a vast growth in the number of different methods that could be employed to obtain credit products.[16] Beyond knocking on a bank manager's door during business hours,[17] credit can be obtained through the use of Internet banking or even an app on a mobile telephone,[18] where it is promised that four hundred pounds can be sent within five minutes of approval, available twenty four hours a day, seven days a week.[19] With such easy access to credit products, it comes as little surprise that consumers have made the most of their ability to access 'convenient credit'.[20] The most recent estimate suggests that the average household owes over six thousand pounds on loans and credit cards.[21] If mortgages are included, the average adult is owes nearly twenty nine thousand pounds.[22] This massive black hole in household finances could arguably be linked to

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[14] Impact 'One Hundred Million Pounds Being Sucked Out of Our Poorest Communities' <http://www.impactsheffield.plus.com/WATCHDOG.HTM> accessed 23rd March 2016.

[15] Hereafter DTI.

[16] Department for Trade and Industry, *Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century,* (Cmd 6040, 2003) paras 1.8 & 1.12 – 1.27.

[17] Ryder, Griffiths and Singh (n 7) 498.

[18] Wonga.com 'Choose Wonga over a typical fast cash advance' < https://www.wonga.com/money/fast-cash-advance-alternative/> accessed 23rd March 2016. Jayne Atherton 'The iPhone app that gives you a 3000% loan' <http://metro.co.uk/2010/01/15/wonga-iphone-app-gives-you-a-3000-loan-32289/> accessed 23rd March 2016. See further: Daniel M. Collins 'Payday loans: why one shouldn't ask for more…' (2013) (28)(2) Journal of International Business Law and Regulation 55, 55

[19] Ibid.

[20] Convenient Credit is defined as 'credit that is granted to the creditor with very little reference to the credit worthiness of the debtor'. See: Nicholas Ryder, Rachel Thomas 'Convenient Credit and consumer protection – a critical review of the responses of the Labour and Coalition governments' (2011) 33(1) Journal Social Welfare and Family Law 85, 85.

[21] The Money Charity 'Debt Statistics June 2014' <http://themoneycharity.org.uk/debt-statistics/> accessed 23rd March 2016.

[22] Ibid.

the rise in house prices in the last twenty years,[23] but it can also be attributed to a change in consumer spending habits,[24] coupled with the increased availability of the products, both in type and method, as outlined above.[25] What is clear is that in modern society many cannot resist the temptation to live beyond their means. Buffet noted that 'it is only when the economic tide goes out that you learn who's been swimming naked'.[25a] Indeed, the wake of the 2008 financial crisis revealed just how many people were swimming without swim-suits in the context of their personal finances, revealing that many were borrowing money that they simply could not afford to repay.

By giving into temptation, consumers have fuelled a multi-billion pound [26] industry benefiting those clever enough to fund debt living. The biggest concern, however, is not the merely level of debt that families are finding themselves in, but the ever-increasing trend towards relying on borrowed money to purchase the necessities of everyday life.[27] Indeed, whilst the increased availability of credit was initially

[23] Due to people borrowing more to purchase their houses. For a discussion of this argument see: Stephanie Flanders 'The Truth About UK Debt' < http://www.bbc.co.uk/news/business-17398014> accessed 23 March 2016.

[24] Financial Conduct Authority 'Consumer Credit Countdown – Review into debt collection practices of payday lenders starts on day one of FCA regulation. Note 3 <http://www.fca.org.uk/news/consumer-credit-countdown-review-into-debt-collection-practices-of-payday-lenders-starts-on-day-one-of-fca-regulation> accessed 23rd March 2016.

[25] Ryder and Thomas (n 20) 85 – 90. See also: Collins (n 18) 55 -56.

[25a] As cited by Roman Tomasic and Folarin Akinbami 'Towards a new corporate governance after the global financial crisis' (2011) 22(8) Intentional Company Commercial Law Review 237 at 247

[26] Financial Conduct Authority 'Consumer Credit Countdown – Review into debt collection practices of payday lenders starts on day one of FCA regulation. Note 3 <http://www.fca.org.uk/news/consumer-credit-countdown-review-into-debt-collection-practices-of-payday-lenders-starts-on-day-one-of-fca-regulation> accessed 23 March 2016.

[27] For example, it has been cited that one in five people have gone into debt to pay for everyday essentials, such as food. See: Nikki Whiteman 'Going into debt for food – how has the recession affected you?' <http://conversation.which.co.uk/money/how-has-the-recession-affected-your-spending-habits/> accessed 23rd March 2016

considered to have raised the living standards of many,[28] it is clear that many now rely upon credit to make ends meet.

The wide range of credit products allows even the least favourable of potential debtors to obtain credit, giving rise to the emergence of a high-cost credit as a consequence of lenders reflecting the risk of lending to an individual in the interest they charge.[29] In his 1974 article, Goode discussed the fact that the increase in banks providing credit products, would lead to this high risk high cost lending.[30] However, he went on to state, that 'the implications for the bottom rung of borrowers [was] yet to be determined'.[31] Forty years later, these implications are now more visible than ever. Indeed, the dangerous combination of money lenders, hungry to make a 'quick buck' by lending their capital to a vulnerable prey who are seeing their monthly earnings stretched further and further, has given rise to the emergence of the pay-day loan, in the UK.[32]

A payday loan can be defined as a 'small [high cost] loan taken over a short period … to balance household finances or to cover emergency domestic or personal '.[33] Akin to the new age Tallyman (BrightHouse), loans have the potential to cause a great deal of damage to the financial well-being of already financially vulnerable families.[34]

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[28] Roy Goode 'A Credit Law for Europe?' (1974) 23 International and Competition Law Quarterly 227, 231.

[29] Roy Goode 'Introductory Survey' in Roy Goode (ed) *Consumer Credit*, (United Kingdom Comparative Law Series Sijthoff , 1978) 14. See also: Borrie (n 1)186.

[30] Goode (n 28) 232. A similar point can be made in relation to the emergence of the sub-prime mortgage market in the United States. For an interesting overview of the development of the sub-prime market and its catalytic impact on the on the credit crisis see: Jonathan Jarvis 'The Credit Crisis Explained' < http://www.youtube.com/watch?v=bx_LWm6_6tA> accessed 23rd March 2016.

[31] Goode (n 28) 232.

[32] Indeed, it has been noted that payday loans are often used, even with the availability of other options, due to their convenience. See: Collins (n 18) 55 – 56.

[33] Collins (n 18) 55.

[34] Simon Read 'Disastrous impact of payday loans laid bare with 82 per cent increase in people seeking help in just one year' *The Independent* (27th February 2014, London) <http://www.independent.co.uk/money/loans-credit/disastrous-impact-of-payday-loans-laid-bare-with-

Indeed, a Payday loan is aimed at consumers who require the monies because they are unable to meet their outgoings for the month.[35] Noted as a 'quick fix' as opposed to a long-term debt solution,[36] such loans have been described as a shortcut to the gutter.[37]

It is due to the clear exploitation of the poor that a rigorous consumer protection regime is needed to prevent more and more families being sucked into the 'seductively affordable' and 'quick fix' credit products that are available to them. It is these new products, along with the already established main stream loans and credit card market that highlighted the deficiencies[38] in the regulatory regime that has governed the consumer credit market, albeit with some amendments, over the previous forty years.[39]

On the 1st April 2014, the new Financial Conduct Authority[40] took over the regulation of the Consumer Credit Market.[41] This new Authority encompasses much of the conduct-based regulatory responsibility of the Financial Services Authority,[42] coupled with the responsibility for both the prudence and conduct of twenty three thousand

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82-per-cent-increase-in-people-seeking-help-in-just-one-year-9155415.html> accessed 23rd March 2016.

[35] Cannon Finance 'How does Cannon Finance Work?' < http://www.cannonfinance.co.uk/how-it-works> accessed 23rd March 2016.

[36] Gavin Newsham 'The Hard Sell: QuickQuid' *The Guardian* (29th May 2010, London) <http://www.theguardian.com/tv-and-radio/2010/may/29/the-hard-sell-quickquid> accessed 23rd March 2016.

[37] Ibid

[38] Discussed further below.

[39] The Consumer Credit Act 1974 was enacted following 1971 Crowther Committee on Consumer Credit. For further discussion see: Ryder, Griffiths and Singh (n 7) 522-523.

[40] Hereafter FCA.

[41] Andrew Barber, Emma Radmore and Juan Jose Manchado 'Taking the credit – the transfer of consumer credit regulation' <http://www.compliancemonitor.com/uk-regulation/regulatory-structure/taking-the-credit--the-transfer-of-consumer-credit-regulation-64192.htm> accessed 23rd March 2016.

[42] Hereafter FSA. See generally James Perry, Rob Moulton, Glyn Barwick, Richard Small, Jake Green and Nicola Kay 'The New UK regulatory landscape [2011] 84 Compliance Officer Bulletin 1, 4.

financial services providers.[43] In the context of the consumer credit market, and from the perspective of consumer protection, the FCA faces a difficult challenge. Not only does it have to deal with the increasing variety of methods with which a consumer can obtain credit, but also ruthless providers willing to lend to anyone, with little concern as to whether or not that person can repay their loan.[44] The Authority must ensure that moneylenders provide credit in a manner that is not socially harmful,[45] and punish effectively those lenders who are guilty of irresponsible lending.[46] This task, however, is made increasingly difficult by the potential consequences faced through 'over-regulation'. Indeed, Borrie[47] provides the example that an inability to enforce credit agreements in court could reduce the willingness of moneylenders to lend to higher-risk consumers, pushing those consumers into the hands of lenders who use the 'strong-arm methods of debt collection' [48] in order to recover monies owed. Furthermore, the costs of over-burdensome regulation will merely be passed on to borrowers,[49] increasing the cost of credit and possibly pricing some out of the market. Essentially, the FCA has the task of ensuring that consumers who need credit are not unable to secure it due to their regulatory practices. As such, the potential issues caused by over-regulation are, by enlarge, borne in mind throughout this chapter.

The purpose of this chapter is to analyse the FCA's approach to regulating the market from a consumer protection perspective. In order to do this, the remainder of the discussion is split into five further sections. Section two provides an analysis of the Consumer Credit Act 1974 (as amended), in particular the elements that can be

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[43] Financial Conduct Authority 'Business Plan 2014/2015' <http://www.fca.org.uk/static/documents/corporate/business-plan-2014-2015-interactive.pdf> accessed 23rd March 2016.

[44] Indeed, Payday lenders have been cited as lending to people with just twelve pounds per day to live on. See the comments of Neera Sharma, the Assistant Director of Barnardo's in: Simon Read 'Payday lenders target vulnerable over Christmas' *The Independent* (23rd November 2012, London) <http://www.independent.co.uk/news/uk/home-news/payday-lenders-target-vulnerable-over-christmas-8307387.html> accessed 23rd March 2016.

[45] Anon 'A little more, a little less' [1992] (Jul/Aug) Conveyancer and Property Lawyer 231, 233.

[46] Ryder and Thomas (n 20) 87 – 89.

[47] Borrie (n 1) 189-190.

[48] Ibid.

[49] Arthur Rogerson 'The Consumer Credit Act 1974' (1975) 38 Modern Law Review 435, 436.

invoked by consumers in order to seek redress for harm caused to them by financial institutions.[50] Section three reflects on the powers and performance of the Office of Fair Trading,[51] with particular reference to the comparable elements of the FSMA[52] regime, enforced by the FSA. Section four considers the approach of the FCA and Section five consists of an analysis of the approach to the regulation of consumer credit market by the United States. Finally, Section six provides conclusions and recommendations based on the discussion throughout this chapter.

The Consumer Protection Provisions under the Consumer Credit Act 1974: Consumer Led Redress Mechanisms

This section analyses the main consumer protection provisions that are invoked by consumers against creditors contained within the original Consumer Credit Act 1974,[53] in addition to the amendments made by the Consumer Credit Act 2006.[54] Ryder *et al* outline that there are five key elements to the consumer protection provisions under the original CCA74.[55] The analysis of the 1974 statutory provisions is centred on one of these elements, namely the protection afforded to consumers if they were considered to be party to an extortionate credit bargain.[56] The further consumer protection provisions that are assessed arise mainly from the amendments made by the CCA06. Specifically, the removal of the extortionate credit bargain provisions, and replacing them with a new test for 'fairness',[57] in addition to the

[50] The Consumer Credit act 1974 was amended by the Consumer Credit Act 2006. Hereafter, the amended version will be referred to as the CCA74. Where the original provisions are considered, this will be made clear. Where the Consumer Credit Act 2006 is specifically referred to, this will be cited as CCA06.

[51] Hereafter OFT.

[52] Financial Services and Markets Act 2000.

[53] The Consumer Credit Act 2006 amended the Consumer Credit Act 1974. Hereafter, the amended version will be referred to as the CCA74. Where the original provisions are considered, this will be made clear. Where the Consumer Credit Act 2006 is specifically referred to, this will be cited as CCA06.

[54] Hereafter CCA06.

[55] See Ryder, Griffiths and Singh (n7), 524.

[56] Consumer Credit Act 1974(Un-amended) s137-140.

[57] Consumer Credit Act 1974 ss140A-140D (Inserted by the Consumer Credit Act 2006 Ss 19-22).

provision of jurisdiction to the Financial Ombudsman Service[58] in consumer credit matters. The reason for considering merely three out of the seven[59] key elements is that these are the three *main* areas with which the Financial Conduct Authority[60] appears to be concerned. Namely, that tackling the unfair treatment of debtors will help reduce irresponsible lending and assist the FCA in protecting vulnerable customers against greedy lenders.[61]

In order to analyse the aforementioned consumer protection provisions, this section is split into three further sections. Section two analyses the effectiveness of the 'extortionate credit bargain' test in greater detail. Following this, the amendments to the 1974 Act by the 2006 Act are considered. Therefore, section three discusses the impact of the 'unfair relationships test', considering cases where the court both has, and has not been willing to intervene with a credit relationship under these rules. Finally, section four examines the impact of the FOS on the level of protection afforded to consumers under the CCA74 (as amended).

Extortionate Credit Bargain

In a similar vein to that of the Moneylenders Acts 1900-1927, the Consumer Credit Act 1974 granted to the court,[62] the discretionary[63] power to adjust any credit agreement[64] which it considered by the court to be extortionate.[65] A credit agreement is extortionate when:

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[58] Hereafter FOS**.**

[59] Despite the fact that the extortionate credit relationships provisions were replaced by unfair credit relationships test, for a full analysis of these elements it is sensible to consider them separately.

[60] Hereafter FCA.

[61] See further: DWF 'The clock is ticking …. and now is a good time to review your treating customers fairly (TCF) policies' <http://fcaconsumercredit.info/the-clock-is-ticking-and-now-is-a-good-time-to-review-your-treating-customer-fairly-tcf-policies/> accessed 23rd March 2016.

[62] Consumer Credit Act 1974 (un-amended) s139.

[63] Geraint Howells, Lionel Bently 'Judicial treatment of extortionate credit bargains: Part 1' [1989] (May-Jun) Conveyencer and Property Lawyer 164, 173.

[64] Whether or not the agreement was a regulated agreement for the purposes of the act: Consumer Credit Act 1974 (un-amended) s137(1) and confirmed by the wording in s139(5).
See further Ryder, Griffiths and Singh (n 7) 544.

- 'it requires the debtor … to make payments … which are *grossly exorbitant*; or
- otherwise grossly contravenes ordinary principles of fair dealing.'[66]

When establishing whether or not a credit bargain is extortionate, the court was able to consider a wide range of factors.[67] These factors included the prevailing interest rate at the time the bargain was made,[68] the characteristics of the borrower[69] and the risk taken by the creditor in providing the credit.[70] It is arguable that the purpose of these provisions was to both discourage creditors from entering into extortionate credit bargains and to afford a mechanism of redress to consumers who were subject to such bargains.[71] In pursuit of these objectives, whilst the provisions have been described as both 'wide ranging'[72] and 'far reaching',[73] they are largely considered to have been 'ineffective',[74] 'innocuous'[75] and 'primitive'.[76] Howells and Bently highlighted three key reasons for the ineffectiveness of the extortionate credit bargain test. These were: that it was down to the debtor to enforce the extortionate bargain provisions against the lender, that judges were seemingly cautious when it came to interfering with contractual relationships entered into by private individuals and a lack

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[64] Consumer Credit Act 1974(Unamended) s137-140.

[65] The previous legal regime allowed the courts to intervene in transactions 'on the ground that interest was excessive … or otherwise harsh and unconscionable' See: Roy Goode 'Introductory Survey' in Roy Goode (ed) *Consumer Credit*, (United Kingdom Comparative Law Series Sijthoff , 1978) 14.

[66] Consumer Credit Act 1974 (Un-amended) s138(1). Emphasis added.

[67] Ibid s138(2) – (5).

[68] Ibid s138(2)(a).

[69] Ibid s138(3).

[70] Ibid s138(4).

[71] Richard Mawrey and Tobias Riley-Smith, *Blackstones Guide to The Consumer Credit Act 2006* (Oxford University Press, 2006).

[72] Dennis Rosenthal, *Guide to: Consumer Credit Law and Practice,* (2nd edn. Butterworth LexisNexis, 2002) 255.

[73] Ryder, Griffiths and Singh (n 7) 545.

[74] Ibid 544.

[75] Dennis Rosenthal (n 72) 255.

[76] Eva Lomnicka 'The reform of consumer credit in the UK' [2004] (Jan) Journal of Business Law 129, 137.

of any real definition of what constituted an extortionate credit bargain.[77] In order to provide a structure to the analysis of the extortionate credit bargain provisions, these issues are now considered in greater depth.

Extortionate credit bargains before the courts: Lack of cases and lack of judicial action

The extortionate credit bargain provisions were long criticised for the low yield of cases in which the test was invoked, successfully or otherwise.[78] Shockingly, the DTI stated that a mere thirty cases were known to have been brought before the courts in nearly thirty years.[79] In their 1999 review of extortionate credit for the UK DTI, Kempson and Whyley highlight many reasons for this being so.[80] In particular, the fact that many debtors are unlikely to be in a position to pay lawyers to represent them in court, in addition to the fact that undesirable borrowers may have been reluctant to take action against a lender which may be their only source of credit in a future time of need.[81] Further, as demonstrated by the case *Director General of Fair Trading v First National Bank,*[82] the fact that there was no obligation to provide consumers with information regarding the forms redress available to them, directly results in consumers having a lack of awareness of their own rights.[83]

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[77] Geraint Howells and Lionel Bently 'Loansharks and extortionate credit bargains part 2' [1987] (Jul-Aug) Convancer and Property Lawyer 234, 234 – 235.

[78] Ibid at 235

Elaine Kempson, Claire Whyley 'Extortionate Credit in the UK: A report to the DTI' <http://www.bris.ac.uk/geography/research/pfrc/themes/credit-debt/pfrc9903.pdf> accessed 23rd March 2016.

[79] Department for Trade and Industry *Fair Clear and Competitive: Consumer Credit in the 21st Century* (White Paper Cm 6040, 2003) para 3.29.

[80] Kempson and Whyley (n78) 31-32

[81] Kempson and Whyley (n78) 31-32.

[82] [2001] UKHL 52, albeit with regard to Ss 129 and 136 Consumer Credit Act 1974 (un-amended) in this case, the same can be said for the extortionate credit bargain provisions. See: Kempson and Whyley (n78) 31-32.31.

[83] *Director General of Fair Trading v First National Bank* [2001] UKHL 52. Albeit with regard to Ss 129 and 137 Consumer Credit Act 1974 in this case.

Of the thirty or so cases that made it to court, a mere ten are cited to have been successful.[84] Whilst it is clear that these legislative provisions had the potential to be far-reaching, the fact these provisions have been relied upon, in only a very few cases, let alone successfully, clearly undermines these provisions as an effective legislative tool for protecting consumers.

When is a credit bargain extortionate?

One of the key criticisms of the extortionate credit bargain test relates to the ambiguity with which the term extortionate is defined, making it 'difficult for district judges to use the act effectively'.[85] Indeed, the multitude of factors that could be taken into consideration in determining whether payments are grossly exorbitant, or contrary to the ordinary principles of fair dealings, arguably led to each case turning on its facts, not least because a wide range of factors could be used to mitigate one another.[86] For example, in *Ketley v Scott*[87] the risk adopted by the creditor was successfully used to mitigate an interest rate of forty eight per cent in a short-term loan.[88] This ambiguity in the wording has been attributed to the low number of cases involving the provisions, as outlined above.[89] The apparent lack of clarity in the wording of the provisions, in conjunction with the differing approaches that were taken in order to establish whether credit bargains were extortionate,[90] would have clearly made it challenging for lawyers to advise clients in relation to whether their credit bargain would be considered extortionate by the court.[91]

Largely due to the reasons outlined above, the extortionate credit provisions were considered to provide 'little protection to the most vulnerable people in society … on

[84] Department for Trade and Industry (n 79) para 3.29.

[85] Kempson and Whyley (n 78) 32.

[86] Ryder, Griffiths and Singh (n 7) 545-6.

[87] *Ketley Ltd v Scott* [1981] ICR 241.

[88] Ibid 247.

[89] Kempson and Whyley (n 78) 31

[90] Howells and Bently (n 63) 169.

[91] Citizens Advice Bureau 'Daylight Robbery' <www.citizensadvice.org.uk/pdf_drob.pdf> accessed 21st June 2014, 30.

low incomes who are most likely to fall prey to … lenders on the margins of the market'.[92] In the context of today's credit market, the lack of accessibility to redress, the clear reluctance of judges to use the powers conferred upon them and the absence of a definitive list of situations in which a credit bargain would be considered extortionate, would leave desperate debtors without any real hope of redress, in particular the vulnerable prey of high-cost lenders.

Unfair Credit Relationships

Following a detailed review of the original CCA74,[93] the Government introduced the CCA2006.[94] Whilst this change of law has been deemed to lack the 'root-and-branch reform',[95] it has led to a dramatic adjustment to the circumstances in which consumers can seek redress in relation to an unsatisfactory credit bargain. The reforms have been described as increasingly consumer focussed, particularly in relation to the protection of the 'vulnerable consumer [from] … unfair creditor behaviour'.[96] This has been achieved, in part, through the replacement of the extortionate credit bargain provisions with the unfair credit relationships test.[97] This test remains in force today as the FCA has decided to take a 'lift and shift' approach, and retain much of the CCA74, for the time being at least.[98] It is therefore necessary to analyse the unfair relationships test in greater detail.

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[92] Mawrey and Riley-Smith (n 71) 90.

[93] See: Department for Trade and Industry (n 79) particularly section 3.
See also: Kempson and Whyley (n 78).

[94] Hereafter CCA06.

[95] Mawrey and Riley-Smith (n 71) 90.9.

[96] Sarah Brown 'The unfair relationship test, consumer credit transactions and the long arm of the law' [2009] (1) Lloyds Maritime and Commercial Law Quarterly 90, 90.

[97] Consumer Credit Act 1974 (as amended) Ss 140A-140C, Inserted by Consumer Credit Act 2006 ss19-20.

[98] Eva Lomnicka 'The Future of Consumer Credit Regulation: a chance to rationalise sanctions for breaches of financial services regulatory regimes?' (2013) 34(1) Company Lawyer 13, 20.
In particular Consumer Credit Act 1974 (as amended) s140B is discussed in the new Consumer Credit Sourcebook. See Financial Conduct Authority, *Consumer Credit Source Book* at App. 1.4.6.

The unfair relationships test operates in a similar way to the extortionate credit bargain provisions. It provides the court with the jurisdiction to intervene with a credit agreement,[99] should the court deem that agreement to be unfair.[100] The similarities continue, as the current test remains reliant on the consumer to invoke the provisions during litigation,[101] whether relied on as a cause of action,[102] or utilised as a defence to enforcement action by a creditor.[103] Should a debtor set forth the argument that their credit relationship is unfair, it is for the creditor to rebut this by showing that the relationship was, in fact, fair.[104] This 'reverse' burden of proof arguably highlights the consumer-focussed nature of this provision.

Unlike the extortionate credit bargain provisions, an unfair relationship can be considered to have arisen from a multitude of factors and related transactions.[105] These factors may have arisen before, during and after the making of the credit agreement,[106] and it is very much down to the court to decide which factors to take into consideration.[107] Indeed, 'what the court has to determine under s.140A is not whether the relevant credit agreement is unfair, but whether the relationship arriving out of the agreement is unfair'.[108] A noteworthy example of this occurred in the case of *Patel v Patel*, where the failure of a creditor to actively pursue repayment of a loan was deemed to contribute an original loan of £56,450 rising to an outstanding debt of

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[99] Consumer Credit Act 1974 (as amended) s140B.

[100] Ibid.

[101] See further: Paul Dobson and Rob Stokes, *Commercial Law*, (Sweet and Maxwell, 2012) 447.

[102] See for example *Scotland v British Credit Trust* [2014] EWCA Civ 790 and *Robert Shaw v Nine Regions Loans Ltd* [2009] EWHC 3514 (QB).

[103] Such as in the case of *Patel v Patel* [2009] EWHC 3264 (QB) and
Swift Advances Plc v Okokenu [2015] CTLC 302.

[104] Consumer Credit Act 1974 (as amended) s140B(9);
Scotland v British Credit Trust [2014] EWCA Civ 790 [26].

[105] For an interesting overview of this see: Brown (n44) 95 - 108.

[106] See further: Mawrey and Riley-Smith (n 71) 90.95.

[107] Consumer Credit Act 1974 (as amended) s140A(2). See further: John Bruce 'The Consumer Credit Act – unfairness as justice?' <http://www.kennedys-law.com/article/consumercreditact1974/> accessed 30th June 2014, citing Lord Tomlinson in *Harrison v Black Horse Ltd* [2011] EWCA (Civ) 1128, para 37.

[108] *Patel v Patel* [2009] EWHC 3264 (QB) [63].

over £6 million.[109] The now Mr Justice George Leggatt saw fit to re-open the credit agreement and reduce the amount owed from the £4,556,181 sought by the claimant, to just £207,565.[110] In reaching his conclusion, Sir George considered many factors. This included the fact that by not pursuing re-payment of the loan, the creditor had caused the relationship to become increasingly profitable for himself, and therefore increasingly unfair,[111] clearly highlighting that it is the ensuing relationship, not merely the agreement(s) that matter. In addition, it is noteworthy that the Judge also considered the value of the benefits obtained by the debtor as a result of having the loan made available to him, including the fact that it was unlikely that he would have been provided credit by another source, preventing him from building two successful businesses.[112] This highlights that deducing the fairness of a credit relationship is a balancing exercise, considering the benefits and burdens of the relationship to both parties.

Additionally, the broad range of factors that can be taken into consideration by the courts when deducing the fairness of a credit bargain are complemented by a far-reaching discretion in relation to the remedies that can be provided to consumers who are deemed to have been treated unfairly during the course of a credit relationship.[113] This can range from the reduction of the amount payable by the debtor under the agreement or any related agreement,[114] to an Order for the return of monies paid by a debtor pursuant to an unfair credit relationship.[115]

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[109] Indeed, Mr Justice Leggatt stated that the claimant, by allowing the defendant to not regularly make payments, influenced way in which the debt snowballed, ultimately for his own benefit. This action was deemed to contribute to the unfairness of the relationship. See: *Patel v Patel* [2009] EWHC 3264 (QB) 250 and 271 -272.

[110] *Patel v Patel* [2009] EWHC 3264 (QB) [83].

[111] Ibid [73].

[112] See further Henderson Chambers 'Unfair Relationships' <http://www.hendersonchambers.co.uk/resources/articles/unfair-relationships> accessed 23rd March 2016.

[113] Consumer Credit Act 1974 (as amended) s140B.

[114] Ibid s140B(1)(f).

See for example: *Patel v Patel* [2009] EWHC 3264 (QB) 275.

[115] Consumer Credit Act 1974 (as amended) s140B(1)(a). See for example: *Scotland v British Credit Trust* [2014] EWCA Civ 790 [4], [14], where a creditor was ordered to repay the value of a PPI

Initially, it was felt that the unfair credit relationships would lead to a large number of consumers relying on the amended CCA74, with wider powers encouraging the courts to more readily intervene.[116] However, whilst it is accepted that the provisions have provided an avenue for redress for some consumers,[117] the protective impact of the provisions remains limited. The reasons for this will now be considered in greater detail.

The unfair relationships test: Certain Uncertainty

An often-stated characteristic of the unfair relationships provisions is the fact that the term 'unfair' is not defined within the Consumer Credit Act.[118] It is noteworthy that governments and legislators are seemingly reluctant to define what is meant by the word 'unfair', highlighting that this would 'impede the courts' ability to justice in every case',[119] as fairness should be judged 'according to the facts of each case'.[120] Indeed, Dobson and Stokes highlight that the evaluation of the fairness of a credit

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premium, in addition the interest paid by the debtor pursuant to that premium, on the basis that the credit relationship was unfair due to the debtor being told that PPI was necessary in order to secure credit.

[116] Mawrey and Riley-Smith (n 71) 96.

[117] Such as *Scotland v British Credit Trust* [2014] EWCA Civ 790 (above); *Patel v Patel* [2009] EWHC 3264 (QB) (above) and *Melbourne Mortgages v Berry* [2013] NI Master, 3, in which a repossession order was set aside.

[118] See, for example, Nicola Hoskins 'Unfair Relationships in the Consumer Credit Acts' <https://360.optimalegal.co.uk/2011/unfair-relationships-in-the-consumer-credit-acts/> accessed 23rd March 2016.

Ross Fentam and Lucy Walker 'Crunching Credit Agreements: Forms, Formalities and Reformation in Consumer Credit Practice' <http://www.guildhallchambers.co.uk/files/theConsumerCreditActThePitfallsPracticalitiesLWRF.pdf> accessed 23rd March 2016, 40.

See also: Dobson and Stokes, (n 101) 449.

[119]Julie Patient 'The Consumer Credit Act 2006' [2006] 21(6) Journal of International Banking Law and Regulation 309, 312- 313.

[120]Ibid, citing a speech in the House of Commons by Gerry Sutcliffe MP: HC Deb 9th June 2005, vol 434, cols 1411.

relationship will depend greatly on the facts of each individual case.[121] According to Patient,[122] this presents a problem for creditors due to the lack of a benchmark against which to set their practices, to ensure that they are treating consumers fairly.[123] There is much guidance in relation to the meaning of unfair in the context of unfair relationships.[124] However, such guidance is usually accompanied by the caveat that the courts need not follow the guidance, if referring to it at all.[125] Indeed, it is arguable that, as with the extortionate credit bargain provisions, the unfair relationships test presents issues for lawyers when providing advice to their consumer clients, with the wide range of potential outcomes due to the wide range of remedies available to the courts, and the lack of direction provided to the courts, [126] rendering cases unpredictable.

Unfair relationships test and Payment Protection Insurance

It could be argued that the unfair credit relationships test may have suffered the same lack of use as the extortionate credit bargain provisions outlined above. However, it is arguable the mis-selling of Payment Protection Insurance has contributed to the amended provisions being more widely used.[127] Indeed, the broadness of the unfair relationships test has allowed mis-selling of Payment Protection Insurance PPI [128]to

[121] Dobson and Stokes, (n 101), (Sweet and Maxwell, 2012) 450.

[122] Patient (n 119) 312.

[123] Ibid, 312 – 314.

[124] For example from the Office of Fair Trading: Office of Fair Trading, *Enforcement Actions under Part 8 of the Enterprise Act 2002*, (OFT854Rev, Updated August 2011).

[125] Office of Fair Trading, *Enforcement Actions under Part 8 of the Enterprise Act 2002*, (OFT854Rev, Updated August 2011), 7.

[126] Brown (n 96) 91.

[127] It has been noted that a large amount of the litigation centred around the unfair credit provisions is due to the PPI mis-selling scandal. See: Eversheds 'Unfair relationships – what does the future hold' <http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Financial_institutions/Unfair_relationships_what_does_the_future_hold> accessed 23rd March 2016.
See further: *Scotland v British Credit Trust* [2014] EWCA Civ 790 (above).

[128] Hereafter PPI

be fall within the remit of the unfair relationships test as a linked transaction.[129] However, despite this flexibility, Lomincka notes that the provisions 'have not proved a significant … avenue for redress'[130] in PPI cases. Such cases have been more successfully pursued through the banks internal complaints procedures, and the FOS.[131]

Some cases brought before the courts in this regard have been unsuccessful. Most noteworthy is the recent disclosure of the levels of commission being paid by insurers to creditors for the sale of PPI. For example, in *Harrison v Black Horse Ltd*,[132] the debtors sought to rely on the fact that the credit agreement was unfair on the basis that the amount of commission to be paid to the creditor was not disclosed to them.[133] Tomlinson LJ described the level of commission paid to Black Horse as 'startling'[134] and admitted that 'there would be many who would regard it as unacceptable'.[135] Despite this, the court held that, due to there being no statutory requirement of the creditor to disclose the level of commission to be paid to the lender by the insurer following the sale of a PPI policy,[136] the relationship was not unfair to the debtor.[137]

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[129] John Briggs and James Boddy 'Payment Protection Insurance Claims and Insolvency' (2013) 26(5) Insolvency Intelligence 65, 65.

This is mentioned in the case of as *Scotland v British Credit Trust* [2014] EWCA Civ 790 [68], but deemed not to be relevant due to the specific facts of that case.

See also Eva Lomnicka 'Unfair Credit Relationships: five years on' [2008] 8 Journal of Business Law 713, 717.

[130] Ibid, 726.

[131] This is Money 'Your PPI claim success stories' available at < http://www.thisismoney.co.uk/money/cardsloans/article-1615484/Your-PPI-claim-success-stories.html> accessed 23rd March 2016.

Although there have been reports that banks are not complying with awards sanctioned by the FOS. See, for example Miles Brignall 'Can I bank on Barclays to pay my PPI refund' *The Guardian*, (24th August 2014, London) < http://www.theguardian.com/money/2013/aug/26/barclays-pay-ppi-refund> accessed 23rd March 2016.

[132] [2011] EWCA (Civ) 1128.

[133] Ibid [48].

[134] Ibid [58].

[135] Ibid

[136] Reference was made to the Financial Services Authority's Insurers Conduct of Business Rules (ICOB) rules. Reference to such measures in these cases arguably exemplifies the broadness of

This arguably illustrates that lenders were able to profit from 'startling' and 'unacceptable' through linked transactions in the credit context. This fact was underpinned in the case of *Conlon v Black Horse Ltd*[138] in which the debtor argued that that she would have sought a better, and arguably fairer, deal had the level of commission been disclosed.[139] It was stated in argument that, not least due to the level of commission received by Black Horse, the price paid for the policy was three times that of stand-alone cover.[140] However, in the face of this, it was held that the failure to disclose the commission to be received, even if it 'would have caused to a borrower to do anything different, does not create unfairness in a relationship'.[141] It seemed, therefore that, once again, the unfair credit relationships provisions would not provide a suitable avenue of redress for those who feel wronged by lenders.

However, the Supreme Court has recently shown a marked change in this view. Indeed, in *Plevin v Paragon Personal Finance Ltd*[89a] Lord Sumption concluded that 'the non-disclosure of the amount of commissions made Paragon's relationship with Mrs Plevin unfair … enough to justify the reopening of the transaction under section 140A' CCA74.[89b] This groundbreaking judgment sparked such interest; the Regulator has included it in a key part of its review of the handling of PPI complaints.[89c] At the

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materials that can be taken into account when seeking to enforce, or indeed refute, the unfair credit relationship provisions.

[137] *Harrison v Black Horse Ltd* [2011] EWCA (Civ) 1128 [58] – [63].

For further discussion see: Kennedys Law 'The Consumer Credit Act 1974 – unfairness as justice?' <http://www.kennedys-law.com/article/consumercreditact1974/> accessed 23rd March 2016.

[138] [2012] CTLC 193.

[139] *Conlon v Black Horse Ltd* [2012} CTLC 193 [24].

[140] Ibid [23] citing the Judgment of Mr Recorder Atherton following the County Court hearing.

[141] Russel Kelsall and Stephanie Clarke 'Appeal Judge Makes first decision reversing "unfair relationship" finding: Conlon v Black Horse Limited' <http://www.lexology.com/library/detail.aspx?g=6b71bd43-2020-468c-8deb-964765d310ce> accessed 23rd March 2016.

[89a] [2014] UKSC 61.

[89b] *Ibid* at 41.

[89c] Financial Conduct Authority, *Consultation Paper: Rules and guidance on payment protection insurance complaints*, (Financial Conduct Authority, CP15/39, November 2015):

time of writing, the response to the FCA's consultation paper has not yet been published.

Unfair relationships in the modern era: Providing high-cost credit to the financially untouchable[142]

Initially, it is somewhat striking that there appears to be no reported case law relating to the unfair relationship provisions and the companies such as BrightHouse and Wonga, outlined in section one. However, after further consideration of this matter, the reasoning becomes clear. One of the key similarities of both business entities is the high-cost of credit products sold by them. For example, the critics of BrightHouse frequently highlight how customers are paying two to three times the price they would for goods, in comparison to the price that would be paid if the products were purchased at an alternative retailer at the cash price.[143] In addition, a well-known fact relating to payday lenders is the four-figure APR levels attached to loan agreements.[144] Additionally, expensive credit products are aimed at consumers who have little, or indeed no, income from employment.[145] It is easy to draw inferences in relation to the characteristics of the commercial relationships that arise in the high-cost/low income market, in particular a high default rate, where the fragile circumstances of their consumers change, rendering them incapable of repaying their

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[142] As described by Dr Stephen Ladyman MP in a Parliamentary debate relating to credit: HC Deb 18th June 2008, vol 477, col 1053.

[143] For an interesting overview of this see: Amelia Gentleman (n 13) A particularly striking example is where a television with a recommended retail price of £1499.99 will cost over £3700 if purchased under the BrightHouse model.

See also: Helen Clifton 'Drowning in debt: how irresponsible lenders are cresting a tidal wave of misery' <http://www.church-poverty.org.uk/drowningindebt/report/drowningindebt/drowningindebtpdf> accessed 23rd March 2016, 7.

[144] For example see: Wonga 'Welcome to Wonga' <https://www.wonga.com> accessed 23rd March 2016, which, at the time of writing was advertising loans with an APR in excess of 5000%. Whilst the calculation of APR in this regard is often criticized, the aforementioned page quotes actual interest at 365%. See: John Moorwood 'Wonga responds to US debt comparison jibes' <http://www.moneysavingexpert.com/news/loans/2011/09/wonga-responds-to-us-debt-comparison-jibes?_ga=1.140454707.1886219551.1401817751> accessed 23rd March 2016.

[145] Kempson and Whyley (n 78) 16.

loan. This, therefore, begs the question: Why are these agreements not regularly challenged under the unfair credit provisions? Such agreements are clearly covered by the broad nature of the provision.

The answer to this is arguably found in case law. The main reason payday loans are targeted as an undesirable form of credit is due to the cost attached to them. However, as noted above, these products are generally provided to high-risk consumers. Indeed, Lomnicka notes, that there remains reluctance by the courts to find unfairness in a relationship, even where the cost of credit is seemingly high.[146] It is clearly accepted that, both in relation to the extortionate credit bargain test,[147] and the unfair relationship test,[148] that a high rate of interest may be charged in order to counteract a high level of risk taken by a lender in providing credit to the financially undesirable borrower,[149] in particular where the interest charged is the same as that to a similar borrower, in similar circumstances, in a similar market.[150]

Furthermore, both the actual amount to be repaid by the debtor, in addition the total cost of the credit for high-cost products is clearly presented to the consumer prior to entering into such agreements. Wonga makes use of 'sliders' to highlight the amount to be re-paid, in addition to providing clearly the representative APR.[151] In addition, BrightHouse utilises clear advertisements to present this information in their stores and online,[152] satisfying requirements of a fair credit relationship in this regard.[153] Aside from the agreement itself, as outlined above, the post-contractual activities of the lender lead to the credit relationship being considered unfair by the court.[154] A

[146] Eva Lomnicka (n 129) 722-723.

[147] See for example: *Ketley Ltd v Scott* [1981] ICR 241

[148] See for example: *Nine Regions (t/a log book loans) v Sadeer* (Official Transcript available on LexisNexis).

[149] See furtherCollins (n 18)58 – 60.

[150] See for example: *Nine Regions (t/a log book loans) v Sadeer* (Official Transcript available on LexisNexis) [41].

[151] Wonga 'Welcome to Wonga' <https://www.wonga.com> accessed 23rd March 2016.

[152] Such as that found at appendix 1.

[153] See further: Collins (n 96) 637.

[154] See discussion regarding *Patel v Patel* [2009] EWHC 3264 (QB).

recent example of this in the context of high-cost credit relates to the treatment of customers in arrears by Wonga, where the lender falsified letters from fake law firms, adding these fabricated legal costs to the accounts of already debt ridden consumers.[155] The FCA imposed redress on behalf of wronged consumers, in a similar manner to those regulated by the FSA under the old FSMA regime,[156] with forty five thousand Wonga customers receiving their share of a compensation pot, possibly in excess of two million and six hundred thousand pounds.[157] However, actions such as this, may arguably, to some extent, dilute further the necessary existence of the unfair relationship provisions, with the regulator taking firm action against creditors, seeking pecuniary redress on behalf of debtors.[158]

Financial Ombudsman Service

A discussion relating to consumer led action in the consumer credit context would not be complete without discussion of the FOS.[159] As with the introduction of the unfair relationship provisions, the CCA06 is responsible for bringing all consumer credit matters within the jurisdiction of the FOS.[160] The FOS can be described as a form of Alternative Dispute Resolution,[161] acting in disputes between consumers and financial institutions.[162] One of the main benefits of utilizing the services of the FOS, rather

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[155] BBC News 'Wonga chased debt using fake law firms, says FCA' <http://www.bbc.co.uk/news/business-28015456> accessed 23rd March 2016.

[156] See, section 3 below.

[157] The Financial Conduct Authority 'Wonga to pay redress for unfair debt collection practices' <http://www.fca.org.uk/news/wonga-redress-unfair-debt-collection-practices> accessed 23rd March 2016.

[158] Such action was beyond the powers of the OFT. This is discussed further in Section 3.

[159] Hereafter FOS.

[160] Consumer Credit Act 2006 s59, amending the Financial Services and Markets Act 2000.

[161] See: Citizens Advice Bureau 'Alternative Dispute Resolution (ADR)' <www.adviceguide.org.uk/wales/c_alternative_dispute_resolution.pdf> accessed 23rd March 2016.

[162] The FOS is also able to handle complaints brought by small businesses. See: Financial Ombudsman Service 'Frequently Asked Questions: complaints from businesses, charities and trusts' <http://www.financial-ombudsman.org.uk/faq/answers/complaints_a9.html> accessed 23rd March 2016.

than litigation, is the fact that the FOS is free to consumers,[163] a feature that makes this avenue to redress more attractive to consumers of the high-cost credit market where the low amounts involved may be outweighed by the fees and costs attached to litigation.[111a] Further, whilst the FOS may look at matters similar to those covered by the unfair credit relationships test, the Ombudsman is not bound to enforce any particular law or legal regime.[164] The FOS has autonomous power to do what it thinks best to resolve a dispute, subject only to the assessment of its decision through complex judicial review proceedings.[165]

Whilst the FOS appears to have a broad jurisdiction to do right in consumer credit agreements, its prerogatives are somewhat limited by a financial ceiling. Indeed, the FSA handbook states that the maximum the FOS can award to a disgruntled consumer is £150,000.[166] This clearly renders the FOS unsuitable for high value credit relationships such as that in *Patel v Patel*,[167] as the debtor in this case was relieved of nearly five million eight hundred thousand pounds worth of debt liability.[168]

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[163] See further: Financial Ombudsman Service 'information for businesses covered by the ombudsman service: why consumers do not pay' <http://www.financial-ombudsman.org.uk/faq/businesses/answers/funding_a9.html> accessed 23rd March 2016.

[111a] Fiona Hayles 'Does Wonga Need a Pay Day Loan?' < https://www.hcrlaw.com/blog/does-wonga-need-a-pay-day-loan/> accessed 25th March 2016

[164] Brown (n 96) 108 -109 citing *R(on the application of IFG Financial Services Ltd) v Financial Ombudsman Service* [2005] EWHC 1153 (Admin).

[165]Brown (n 96) 109.

[166] Financial Conduct Authority *FCA Handbook* (Financial Conduct Authority: London 2013) at DISP 3.7.4.

Although it has been noted that it is possible to take the £150,000 redress offer and then sue for the remainder in court. See: RPC 'FOS respondents still at risk of further action despite *Clark v In Focus* ruling < http://www.rpc.co.uk/components/com_flexicontent/uploads/fos-respondents-still-at-risk.pdf> accessed 23rd March 2016

[167] [2009] EWHC 3264 (QB) (above).

[168] It is duly noted that the debtor in this case was a business user. The case is merely used to highlight the fact that there are some cases above the financial ceiling, and therefore beyond the remit of the FOS as an effective remedy.

In the context of payday loans, the FOS has an ever-growing caseload in this regard,[169] with the year to end April 2013 giving rise to an increase in cases filed of 75%, compared to the previous financial year.[170] More recently, an increase from two hundred and ninety seven (2011-12) to seven hundred and ninety four (2013-2014) was recorded by the FOS.[171] The Service worryingly stated that this is figure 'merely the tip of the iceberg',[172] with the Citizens Advice Bureau stating that three in four payday loans could have a case worthy of intervention by the FOS.[173] This has been realized, with the amount of complaints about payday lenders rising by around 46% year on year in the two years preceding April 2015.[121a] What is evident, is that the FOS is dealing with an increasing number of cases on behalf of consumers who feel unfairly treated by payday lenders. However, there are many consumers who may be entitled to remedy from the Ombudsman that are not forthcoming with their complaint. Indeed, it could be argued that the effectiveness of the FOS as a consumer protection tool is undermined by the fact that consumers are ashamed by their over-indebtedness.[174]

This section set out to analyse the consumer-led consumer protection elements of the previous consumer credit regime, in particular those carried forward into the new era of credit regulation under the FCA. It is clear that, the Unfair Relationships test still has some place in the future of consumer credit regulation, despite the lack of

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[169] Ellis Ferran 'Regulatory lessons form the payment protection mis-selling scandal in the UK' (2012) 12(2) European Business Organisation Review 247, 255.

[170] Financial Ombudsman Service 'Ombudsman news: payday lending' <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/109/109-payday-lending.html> accessed 23rd March 2016.

[171] Andrew Trotman 'Payday lender complaints more than double' *The Telegraph* (8th July 2014, London) <http://www.telegraph.co.uk/finance/personalfinance/borrowing/10952770/Payday-lender-complaints-more-than-double.html> accessed 23rd March 2016.

[172] Ibid

[173] Citizens Advice Bureau '3 in 4 loans could have cause for complaint to the Ombudsman' <http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_office-20130805.htm> accessed 23rd March 2016.

[121a] Financial Ombudsman Service 'annual review 2014/2015: what the complaints were about' < http://www.financial-ombudsman.org.uk/publications/ar15/about.html> accessed 30th March 2016.

[174] Trotman (n 171)

accessibility and aura of uncertainty surrounding the test. Indeed, the ability of the consumer to challenge the fairness of a credit relationship no matter how infrequently it is used is important, particularly as a defence in enforcement proceedings. Furthermore, the FOS provides an invaluable, free, avenue of redress to consumers in credit agreements below the one hundred and fifty thousand pound ceiling. Indeed, the future activity of the FOS will be interesting to follow as an increasing number of disgruntled consumers come forward to challenge their payday loan agreements. However, it is clear that consumers cannot be merely left to their own devices when challenging the unfair practices of lenders. There is also a need for a stringent regulator led enforcement regime, that is capable of seeking redress and actively protect consumers from unscrupulous lenders. Therefore, the following two sections will analyse the performance of the OFT, and provide an overview of the FCA's performance so far, in order to consider whether there will be greater protection for consumers.

The Office of Fair Trading[175] and consumer protection

This section analyses the performance of the OFT in its role as the market regulator for consumer credit. Under the Consumer Credit Act[176] regime, the OFT was the regulator for the majority[177] of consumer credit products until the taking over of market regulation by the FCA, on the 1st April 2014.[178] This move brought the consumer credit market under the auspices of the same conduct watchdog of the wider financial market, for the first time since the beginning of regulation of the market by an independent regulator.[179] Indeed, it has been noted that the fact there was a

[175] Hereafter OFT.

[176] Consumer Credit Act 1974 (as amended). CCA74 hereafter.

[177] There were some exclusions, such as first mortgages regulated under the FSMA regime, regulated by the FSA. Consumer Credit Act 1974 (as amended) s16 .

[178] Ignition Credit 'FCA takes over regulation of consumer credit firms' http://www.ignitioncredit.co.uk/fca-takes-regulation-consumer-credit-firms/ 23rd March 2016.

[179] Indeed, Lomnicka noted that the FSA was to be the new 'super regulator' responsible for the entire financial market, initially overlooking the fact that the consumer credit market was to be left out. See: Eva Z Lomnicka 'Reforming UK Financial Services Regulation: the creation of a single regulator' [1999] (Sept) Journal ofBusiness.Law. 480. However, the fact that the consumer credit market was

separate regulator for consumer credit was a mere 'accident of history'.[180] However, this mere accident has arguably had a dramatic impact on consumer protection, as is explored throughout this section. The section is split into two parts. The first part analyses the performance of the OFT from a control-based perspective, considering the measures taken by the OFT as a regulator under the authority of the CCA74 seeking to protect consumers by preventing their coming to harm. The second part considers the regulator led mechanisms of redress available to the OFT in order to compensate consumers who have lost out at the hands of unscrupulous credit providers. At times, comparisons will be made with the Financial Services Authority,[181] operating under the FSMA regime.[182] This is justified on the grounds that the two regulators were focussed on achieving the same consumer protection goals, most notably ensuring the fair treatment of the consumers by the regulated firms.[183]

Control and guidance over the credit market

This section considers the ways in which the OFT sought to protect consumers by controlling the behaviour of market actors. Specifically, the regulator acted as gatekeeper to the market through solely holding the power to grant licences.[184] In

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separated in a regulatory context became a frequent topic for the commentator. See for example: Eva Lomnicka 'The future of consumer credit regulation. A chance to rationalize sanctions for breaches of the financial services regulatory regimes?' (2013) 34(1) Company Law 13 and Lomnicka (n76).

[180] Lomnicka (n 98) 14.

[181] Hereafter FSA.

[182] Financial Services and Markets Act 2000.

[183] An argument frequently expressed by Professor Lomnicka. See Lomnicka (n 98) 13. See also Lomnicka (2004) (n 76) 130-131.

[184] Credit Today 'OFT to scrutinise 'high risk collectors'' <http://www.credittoday.co.uk/article/6843/online-news/oft-to-scrutinise-high-risk-collectors> accessed 23rd March 2016.

The OFT recognised the importance of their role of granting licenses from a consumer protection perspective. See: Office of Fair Trading 'Consumer Credit Licenses: Guidance for holders and applicants'

addition, the OFT sought, albeit somewhat loosely, to control the actions of licence holders by issuing guidance as to how they should operate within the regulated market. The effectiveness of these two control mechanisms is now considered in greater depth. The OFT operated under the licencing regime of the CCA74,[185] controlling those who have access to the credit market as providers and arguably seeking to ensure that only those who are likely to lend responsibly and treat their customers fairly, are able to legally operate in the consumer credit market.[186] Indeed, prior to the transfer of credit regulation to the FCA, for a business to provide credit it was required to be licensed by the OFT, with the supply of credit without a licence giving rise to criminal liability.[187] In order to gain a licence, the prospective credit provider[188] was assessed by the OFT in order to establish whether or not the business was fit[189] to provide credit.

Whilst assessing the fitness of applicants, the OFT considered a wide range of characteristics, such as the knowledge and skills of an applicant,[190] any previous contravention of the CCA74 regime,[191] evidence that the applicant has acted in a discriminatory manner relating to a protected characteristic in connection with the business of consumer credit,[192] or had previously engaged in practices that appeared to the OFT 'to be deceitful, oppressive or otherwise unfair or improper (whether unlawful or not)'.[193] It is therefore evident that the OFT had a broad range of reasons

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<http://www.norfolk.gov.uk/consumption/groups/public/documents/general_resources/ncc048312.pdf> accessed 23rd March 2016, 3.

[185] Consumer Credit Act 1974 (as amended) Part 3.

[186] Sarah Brown 'Using the law as a usury law: definitions and recent developments in the regulation of unfair charges in consumer credit transactions' [2011] Journal of Business Law 91, 100.

[187] Consumer Credit Act 1974 (as amended) s39.

[188] It is recognised that there are many different types of license available, the type issued being dependent on the nature of the business with which the applicant is engaged within the wider context of credit market. See further: Dobson and Stokes (n 101) 327- 373. For the purposes of this discussion, the distinction between the types of license is moot.

[189] Consumer Credit Act 1974 (as amended) s24A.

[190] Ibid s25(2)(a).

[191] Ibid s25(2A)(b)(i).

[192] Ibid s25(2A)(d).

[193] Ibids25(2A)(e).

that could be employed in order to refuse to grant a credit license, providing a strong basis for ensuring that persons who are likely to cause harm to consumers do not gain access to the market. One would be forgiven for assuming that with such broad and strong powers to do so, a great deal of applications for licences to operate within the credit market would be refused. However, research highlights that powers have not been put to great use. Indeed, in the year to end April 2014, there were in excess of nineteen thousand applications to either obtain a licence, or vary an existing licence,[194] with the OFT only refusing to grant a mere twenty-six licences.[195] Further, despite the fact that the fitness test was supposedly more stringent than the previous regime,[196] in the year prior to the enactment of the CCA2006, the amount of licences refused was more than double than the year 2013-2014.[197]

In addition to the granting of a credit licence, the OFT also had the power to revoke[198] or suspend[199] a credit licence should it deem that a licence holder is no longer fit to operate within the consumer credit market.[200] Interestingly, the wording of s32 directs

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See further: Ryder, Griffiths and Singh (n 7) 541 and Office of Fair Trading, *Consumer credit licencing: General Guidance for licences and applications on fitness and requirements,* (OFT969, Jan 2008), 3;

Kerry Broomfield and Nicholas Ryder 'Payday lending and the Consumer Credit Act' [2013] Feb Financial Regulation International 14.

[194] Office of Fair trading 'Annual Report 2013-14' (HC27) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322820/9988-2901757-TSO-OfT_Annual_Report_Web_ACCESSIBLE.pdf> accessed 23rd March 2016, 29.

[195] Ibid

[196] Prior to the amendment of the licensing provisions of the '74 Act by the 2006 Act it was the ease of obtaining a credit license was a central issue. See: HC Deb 30th October 2002, vol 412, cols 275WH – 297WH.

[197] Office of Fair Trading 'Annual Report 2005-06' (HC1213) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/231729/1213.pdf> accessed 23rd March 2016.

[198] For example see: BBC News 'Credit Broker Yes Loans stripped of license by OFT' http://www.bbc.co.uk/news/business-17298515 accessed 23rd July 2014.

[199] Robert Cooper 'OFT uses new powers to suspend consumer credit license for first time' <http://www.scottrobert.co.uk/oft-uses-new-powers-to-suspend-consumer-credit-licence-for-first-time/> accessed 23rd July 2014.

[200] Consumer Credit Act 1974 (as amended) s32(1).

the OFT to consider whether they would grant the creditor a licence in the current circumstances, and should the Office decide that it would not, action should be taken to revoke or suspend a licence.[201] Once again, this appears to be a very strong power that the OFT held in order ensure that the consumers of the credit market are safe and well protected from unfair treatment. However, the ability to revoke or suspend a licence also rears its head as another underused power vested in the hands of the OFT. Indeed, in the year to end April 2014, the OFT revoked a mere ten licences, in addition to suspending a further four.[202] Further, it was noted that £450m worth of harm caused to consumers has gone without scrutiny due to the inadequacies of the OFT's enforcement of the consumer protection regime under the CCA74.[203]

Furthermore, whereas the revocation of a licence should be a metaphorical death sentence to those operating improperly within the market, the contrary appears to be true as it was noted in a report[204] by the Public Accounts Committee that the process that was required to revoke a licence was cumbersome, [205] and more shockingly that a person who has been deemed unfit to hold a credit licence can easily re-enter the market with a relative or employee heading up their new business entity.[206] This is arguably due to the fact that, as noted in the aforementioned report, the OFT lacked the power to ban a person from operating within the regulated market,[207] undermining the OFT's role as gatekeeper as they are unable to prevent those who have caused harm to consumers from having an active role in the market.

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[201] Ibid

[202] Office of Fair trading (n 21) 29.

[203] National Audit Office, *Office of Fair Trading*, (HC, 2012-13, 685) 8.

[204] Public Accounts Committee, *Regulating Consumer Credit*, (HC, 2012-2013, 165).

[205] Ibid, [10].

[206] Ibid, [5]. See further: Hilary Osborne 'OFT criticized over 'ineffectual' payday loans policing' *The Guardian* (31st May 2013, London) <http://www.theguardian.com/money/2013/may/31/oft-criticised-ineffectual-payday-loans-policing> accessed 23rd March 2016

[207] Public Accounts Committee (n31)[5].

Akin to that of the OFT regime, the FSA had a similar role, acting as gatekeeper for the wider financial services market.[208] Those conducting activities regulated by the FSA, such as banks, independent financial advisors and mortgage brokers, required authorisation by the regulator.[209] Analogous to the OFT's power to revoke credit licences, the FSA could withdraw authorisation should the Authority, for example, deem an authorised person as falling foul of the FSA's rules, or even the failure to comply with an FOS award.[210] However, unlike the OFT, the FSA had the power to ban individual persons from operating within the regulated market in any capacity,[211] meaning that those who had once caused harm to consumers were unable to do so again; a clear solution to the problem outlined above.

Aside from the power to issue and revoke licences, the OFT had the authority to regulate the conduct of operators within the consumer credit market through the imposition of requirements entailing either positive action by a business, or instructing a business to abstain from conduct with which the Office was dissatisfied.[212] For example, the OFT imposed a requirement upon Mackenzie Hall Ltd that the company could not conduct debt collection activities should the debt be disputed.[213] Furthermore, should the business not follow the instructions of the OFT, the Office had the power to impose a penalty on that institution of up to £50,000.[214]

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[208] Stuart Bazely 'The Financial Services Authority, risk based regulation, principles based rules and accountability' (2008) 23(8) Journal of International Business Law and Regulation 422, 434.

[209] See in particular: Financial Services and Markets Act 2000 s22 and
Financial Services and Markets Act 2000 Schedule 2.

[210] Financial Services and Markets Act 2000 s33. See further: Mashood Iqbal 'Interaction between the FSA, FSCS and FOS' <http://www.londonviewchambers.co.uk/Interaction-between-FSA.html> accessed 31st July 2014. For example, Tudor House Financial Services had their authorisation removed for not complying with FOS awards. See further: Money Marketing 'Firms lose authorisation for flouting watchdog' <http://www.moneymarketing.co.uk/firms-lose-authorisation-for-flouting-watchdog/56954.article> accessed 23rd March 2016.

[211] Financial Services and Markets Act 2000 s56.

[212] Consumer Credit Act 1974 (as amended) s33A(2).

[213] Office of Fair Trading 'Requirements relating to Mackenzie Hall Ltd' <http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/business_leaflets/consumer_credit/requirements.pdf> accessed 23rd March 2016.

[214] Consumer Credit Act 1974 (as amended) s39A.

This is arguably similar to the power of the FSA, who could impose unlimited fines for breaches of the FSMA regime,[215] but the OFT were required to take an initial step of instructing each individual licensee with details of the action the Office requires them to take prior to the imposition of the fine. By contrast, the FSA had the power to impose an unlimited penalty payment for any breach of FSMA, or the FSA handbook.[216] Indeed, the CAB make an interesting comparison where they identify that the 'FSA could … fine a credit firm £1m for mis-selling PPI, the OFT [was] limited in its powers to fine the same firm only £50,000 for mis-selling the associated credit'.[217] Clearly, the powers of the FSA to impose financial penalties were far greater than that of the OFT, and may have acted as a greater deterrence to firms mis-treating consumers in the consumer credit market, should the FSA have been the market regulator from the outset.

Finally, it is necessary to consider the mechanisms used by the OFT in order to influence the way in which businesses operated within the consumer credit market. In general, the OFT sought to achieve this through the publication of guidance documents. For example, the OFT published guidance in relation to what the Office considered to constitute irresponsible lending.[218] Whilst such guidance was not considered to be directly enforceable, it was noted in the guidance that irresponsible lending could constitute a reason for the revocation of a Consumer Credit Licence.[219] As such, had the OFT used its powers to revoke licences more readily, the guidance

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Wonga could have faced such action following the imposition by the OFT of requirements to abstain from oppressive debt collection tactics. See: National Forum for Financial Inclusion 'OFT warn Wonga over aggressive debt collection tactics' <http://transact.org.uk/news.aspx?itemid=1360&itemTitle=OFT+warn+Wonga+over+aggressive+debt+collection+tactics&sitesectionid=29&sitesectiontitle=News> accessed 23rd March 2016.
See further: Ryder Griffiths and Singh (n 7) 543.

[215] Financial Services and Markets Act 2000 s206.

[216] See discussion in relation to Willis Ltd below.

[217] Citizens Advice Bureau 'Briefing: The Consumer White Paper – Citizens Advice's ideas for BERR' <http://www.citizensadvice.org.uk/consumer_white_paper_-_citizens_advice_s_ideas_for_berr.web_copy.pdf> accessed 23rd March 2016, 5.

[218] Office of Fair Trading *Irresponsible Lending – guidance for creditors*, (OFT 1107, February 2011).

[219] Ibid para 1.12.

documents had the potential to be very influential on the protection of consumers in the consumer credit market.[220] By contrast, the FSA was granted rule making powers by FSMA,[221] enabling the Authority to create a handbook, the contents of which could be directly enforced against those authorised to operate within the regulated market.[222] For example, in 2011 the FSA fined insurance broker Willis Limited £6.9m as a direct result of the firms breaches of the FSA handbook.[223] More importantly, the FSA has used this power to take action against institutions whose breaches of the handbook have lead the potential to give rise to the unfair treatment of consumers.[224] It is therefore arguable that the FSA through the use of their rule making and enforcement powers, were able to more effectively influence the conduct of authorised entities in the context of consumer protection, than the OFT's published guidance. This is not least due to the fact that there appears to have been no licence revocations by the OFT as a result of irresponsible lending practices, despite being

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[220] See above discussion in relation to the OFT's lack of use of their power to revoke consumer credit licenses.

[221] Financial Services and Markets Act 2000 s138.

[222] Financial Services Authority, *FSA Handbook* (Financial Services Authority: London 2012) 2.1.1.6. For example see: Financial Services Authority 'FSA fines Combined Insurance Company of America £2.8m for putting its customers at risk of being treated unfairly' <http://www.fsa.gov.uk/library/communication/pr/2011/fsa-fines-combined-insurance-company-of-america-28-million-for-putting-its-customers-at-risk-of-being-treated-unfairly> accessed 31st July 2014.

[223] Financial Service Authority 'Willis Ltd – Final Notice' <http://www.fsa.gov.uk/pubs/final/willis_ltd.pdf> accessed 23rd March 2016.
See further: Amy Ellis 'Willis fined record £6.9m for handbook breaches' <http://www.postonline.co.uk/post/news/2095688/willis-fined-gbp69m-fsa-handbook-breaches> accessed 23rd March 2016.

[224] For example see: Financial Services Authority 'FSA fines Combined Insurance Company of America £2.8m for putting its customers at risk of being treated unfairly' <http://www.fsa.gov.uk/library/communication/pr/2011/fsa-fines-combined-insurance-company-of-america-28-million-for-putting-its-customers-at-risk-of-being-treated-unfairly> accessed 31st July 2014. Where CICA were found to be in breach of Principle 6 of the FSA's principles for business, n that they failed to protect the interests of consumers.

clear in its guidance that this would be reason for doing so.[225] Indeed, this is yet another example where the OFT has failed to use its powers to protect consumers from the greedy lenders that were showing little concern for the damage their products caused to vulnerable consumers.

As it is clear that the OFT had wide powers to control who operated within the consumer credit market, but failed to do so, it is necessary to consider the cause for the lack of effectiveness of these seemingly strong enforcement powers. With an estimated budget of £11.5m for consumer credit regulation, [226] the Office has considered itself good value for money, saving the average customer £8.60 for every £1 spent.[227] A similar comparison can be drawn, not with the FSA, but the with Serious Fraud Office, fighting fraud that causes a £52bn loss to the UK economy[228] with only a budget of £37m.[229] Akin to the OFT, the SFO has been described as providing excellent value for money,[230] costing each person in the UK little over sixty pence each year, [231] but also ineffective in the fight against serious fraud.[232] Indeed, value for money does not constitute effective consumer protection, and considering that the consumer credit market was estimated to be worth £176bn,[233] a budget of £11.5m, with a mere £4.5m being spent on enforcement,[234] it is unsurprising that

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[225] Although such revocations were threatened against some payday lenders. See: BBC News 'Payday lenders told to improve by the OFT' <http://www.bbc.co.uk/news/business-21683739> accessed 23rd March 2016.

[226] National Audit Office, *Office of Fair Trading*, (HC, 2012-13, 685), 30.

[227] National Audit Office (n 226) 4.

[228] Estimate in July 2013. See:National Fraud Authority 'Annual Fraud Indicator' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206552/nfa-annual-fraud-indicator-2013.pdf> accessed 23rd March 2016, 56.

[229] The 2012-2013 budget of the SFO. See: Serious Fraud Office, *Annual Reports and Accounts 2012 & 2013*, (HC 9, March 2013), 8.

[230] Rosalind Wright 'Fraud after Roskill: a view from the serious fraud office' (2003) 11(1) Journal of Financial Crime 10, 12.

[231] Serious Fraud Office, *Annual Reports and Accounts 2012 & 2013*, (HC 9, March 2013), 6.

[232] See Generally: Jessica DeGrazia 'Review of the Serious Fraud Office: Final Report' <http://www.sfo.gov.uk/media/99271/jdegrazia_final_review_of_sfo.pdf> accessed 23rd March 2016.

[233] National Audit Office (n 53) 4.

[234] National Audit Office (n 53) 30.

£450m of harm caused to consumers has gone without sanction.[235] Lomnicka noted that the FSA was much better resourced than the OFT in their pursuit to prevent unfit persons from operating within the regulated market.[236] Perhaps this alone could be considered reason enough to bring the consumer credit market within the remit of the then FSA, newly branded as the FCA.

With the FCA bringing the consumer credit market within the remit of a regime based on credible deterrence,[237] it is reasonable to analyse whether the licencing regime under the CCA74, as enforced by the OFT, operated to deter greedy lenders from targeting the most vulnerable of consumers. Indeed, Cartwright highlights that, where proceeds of breaching the regulatory regime exceed the possible punishment for doing so, the 'corporate criminal is likely to take the risk'.[238] With the aforementioned ability to continue trading under different Directorship, in addition to the limited fine that could be imposed, and the infrequency of sanctions and revocations by the OFT, it is clear that the lack of use of their enforcement powers, arguably due to budgetary constraints, has contributed to the continued mis-treatment of consumers by greedy lenders, undermining the licensing and control aspect of the regime as an active, credible deterrent.

Regulator led Redress

Lomnicka notes that one of the key benefits of the CCA74 over the FSMA regime is the fact that consumers have a mechanism with which to take direct action against creditors 'that have no analogies in the present FSMA regime'.[239] However, as noted in section two, this mechanism appears to have achieved very little redress for

[235] National Audit Office (n 53) 7.

[236] Lomnicka (2004) (n 76) 139.

[237] Financial Conduct Authority 'Enforcement' < http://www.fca.org.uk/firms/firm-types/consumer-credit/regulation/enforcement> accessed 23rd March 2016.

[238] Peter Cartwright 'Credible deterrence and consumer protection through the imposition of financial penalties' in Nicholas Ryder, Sabine Hassler and Umut Turksen, *Fighting Financial Crime in the Economic Crisis,* (Routledge, 2015).

[239] Lomnicka (2013) (n 98) 14, referring to the current provisions under Consumer Credit Act 1974 (as amended) s140A.

unfairly treated debtors at the hands of unscrupulous lenders. That aside, a considerable disadvantage to regulation by the OFT is arguably the lack of a regulator led redress regime, where the Regulator is able to order the payment of financial redress to consumers by the lender, a power enjoyed and utilised by the FSA.[240]
For example, the FSA ordered sub-prime lender Swift 1st Ltd to pay £2.4m to consumers where the FSA deemed the lender to have failed to treat consumers fairly.[241] The interesting issue arising here, is that a major contributor to the FSA's decision was the poor treatment and unfair charges imposed upon consumers in arrears.[242] This is similar to the reasons why a licence could be revoked for reasons of irresponsible lending, [243] yet the OFT did not have the ability to seek redress on behalf of consumers in the same manner as the FSA. Indeed, whereas the above discussion relates to strong powers that the OFT did not use, this example highlights an issue where the OFT did not have the power to take action on behalf of consumers.[244]

This section has highlighted key issues, where the Office of Fair Trading has failed to protect consumers for two key reasons. Firstly, despite having strong statutory powers to control those who enter and operate within the consumer credit market, the OFT

[240] It is duly noted that agreements regulated by the OFT can be subject to such redress under the auspices of the FOS, as outlined above. However, this still requires the matter to be brought before the FOS by the consumer, unlike regulator led redress under the FSMA regime, outlined below.

[241] Financial Service Authority 'Swift 1st Ltd – Final Notice' <http://www.fsa.gov.uk/pubs/final/swift_1st.pdf> accessed 23rd March 2016
See further: Mortgage Solutions 'Fifth Mortgage Lender Fined by FSA' <http://www.mortgagesolutions.co.uk/mortgage-solutions/news/2107756/fifth-mortgage-lender-fined-fsa> accessed 23rd March 2016.

[242] Financial Service Authority 'Swift 1st Ltd – Final Notice' <http://www.fsa.gov.uk/pubs/final/swift_1st.pdf > accessed 23rd March 2016, [2.1]-[2.7].
Mortgage Solutions 'Fifth Mortgage Lender Fined by FSA' <http://www.mortgagesolutions.co.uk/mortgage-solutions/news/2107756/fifth-mortgage-lender-fined-fsa> accessed 23rd March 2016.

[243] Specifically in relation to charges see: Office of Fair Trading (n 218) para 7.15.

[244] It is duly noted that under Part 8 of the Enterprise Act 2002, the Oft could take action where it considered a group of consumers to be at risk of harm. However, the powers are limited to use in the public interest context, as opposed to consumer redress. These powers, therefore, add little to the armory of the OFT in this regard. See further: Ryder, Griffiths and Singh (n 7) 541.

did not effectively use its powers to prevent consumers being harmed at the hands of unscrupulous lenders. Although some action has been taken to revoke the licences of payday lenders,[245] there are still many who go without redress. In addition, the OFT lacked the power to secure neither redress on behalf of consumers, nor could they prevent people entering and operating the market in different roles following the revocation of previous licences. Where the OFT have struggled to provide redress to consumers, the FSA had a great deal more success, securing millions of pounds of financial compensation for unfairly treated consumers, with the power to impose requirements on a business to pay consumers they have wronged. This alone arguably supports the idea that the consumer credit market should have been handed over to the FSA from the outset, with stronger action and more direct redress being afforded to vulnerable consumers; the FSA being the more powerful and better-resourced market regulator. Indeed, whilst this 'accident of history' has lead to this disparity in consumer protection and redress, with the ability to reflect upon this difference of regulatory effectiveness it is no accident that the market has been brought under the auspices of the new Financial Conduct Authority. The next section analyses the approach of the FCA and considers whether lessons have been learnt, and the new regime will afford greater protection to consumers.

Consumer Credit Regulation: In the hands of the FCA

The Financial Conduct Authority[246] assumed regulatory control of the consumer credit market on the 1st April 2014. This section analyses the approach of the FSA in the supervision of consumer credit firms from a consumer protection perspective and it is noteworthy that, akin to the FSA, the FCA has a key objective; the protection of consumers.[247] One of the underlying themes of the FCA's approach to this objective

[245] See n 199 above.

[246] Hereafter FCA.

[247] The FCA has this as an 'Operational Objective': Financial Services and Markets Act 2000 as amended by the Financial Services Act 2012, s1B(3)(c).
The FSA had the statutory objective of the protection of consumers by virtue of Financial Services and Markets Act 2000, s5. This has since been repealed.

is that the efforts to protect consumers need to be 'appropriate',[248] in that the Authority 'aims to create a regime that protects consumers and allows businesses to operate'.[249] Throughout this section reference is made to the flaws in the previous regime, in order to establish whether the new regime will offer greater protection to consumers. Indeed, it is not unreasonable to suggest that the FCA will bring some FSA 'style' regulation to actors and products previously regulated under the CCA74 regime, due to the similarities of the powers of the FCA and FSA.[250] This section seeks to discuss the extent to which consumers will be better protected against greedy actors in the consumer credit market under the watchful eye of the Financial Conduct Authority.

The section is split into three further sections. Section two considers the FCA's approach to their gatekeeper role,[251] considering the effectiveness of the authorisation regime in preventing unfit persons operating within the market. Section three analyses the way in which the FCA supervises and takes enforcement action against firms, in

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[248] Financial Conduct Authority 'Business plan 2014/15' <http://www.fca.org.uk/static/documents/corporate/business-plan-2014-2015.pdf> accessed 25th March 2016, 17.

[249] Comments of FCA Director Martin Wheatley: Financial Conduct Authority 'The FCA sets out in detail how it will regulate consumer credit when it over responsibility in April 2014' <http://www.fca.org.uk/news/firms/consumer-credit-detail> accessed 25th March 2016.

[250] Some consider the creation of the FCA to purely a name change. See Anon 'Reform of financial regulation gathers pace with son of FSA' (2011) Company Law Newsletter 1.
Although FCA head Martin Wheatley is adamant that the FCA will be different due to losing some responsibility for the supervision of prudence and an increased focus on conduct. See: Guy Anker 'We will be different to the FSA', says new regulator, the FCA, as regime changes today' <http://www.moneysavingexpert.com/news/banking/2013/04/we-will-be-different-to-the-fsa-says-regulator-as-regime-changes-today> accessed 25th March 2016.
Lomnicka highlights that bringing the consumer credit market under the auspices of the FCA will not merely be a case of making consumer credit business regulated for the purposes of FSMA. See: Lomnicka (n 98)13-14. However, it appears that this will largely be the case, as discussed further below.

[251] As described in the FCA's webinar on consumer credit. See: Financial Conduct Authority 'FCA Consumer Credit Authorisations Webinar' <http://play.buto.tv/JGGrN> accessed 25th March 2016 (Video link).

addition to its ability to secure redress on behalf of consumers. Finally, section four examines the FCA's approach to the regulation of high-cost credit.

The FCA as gatekeeper to the consumer credit market

As noted in the previous section, whilst the OFT appeared to hold strong powers to control who was permitted to enter the market, the underuse of those powers rendered them ineffective.[252] However, following the undertaking of market regulation by the FCA, new entrants[253] to the consumer credit market will be subject to the new FCA authorisation regime, in which the onus is placed on firms[254] to illustrate that they conform to a detailed set of threshold conditions.[255] These conditions are stated as a minimum standard,[256] and circumstances such as the contravention of the current or previous financial services regimes, holding a criminal record, or being subject to enforcement proceedings at the hands of the FCA, or its predecessors, could lead to the Authority's refusal to grant authorisation.[257] The aforementioned circumstances relate to one particular condition, namely whether the firm would be deemed *suitable*,

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[252] As outlined above.

[253] During the transition, those firms who held licences issued by the OFT could apply for interim permission, as opposed to seeking full authorisation from the outset. See: Financial Conduct Authority 'Interim permission' <http://www.fca.org.uk/firms/firm-types/consumer-credit/consumer-credit-interim> accessed 25th March 2016. See further: Simon Lovegrove, Anushka Heathe, Charlotte Henry and Matthew Gregory 'The New FCA consumer credit regime' [2014] (May) Finance and Credit Law 5.

[254] Financial Conduct Authority 'Being regulated by the FCA: Guide for consumer credit firms' <http://www.fca.org.uk/your-fca/documents/consumer-credit-being-regulated> accessed 25th March 2016, 15.

[255]Financial Conduct Authority, *FCA Handbook,* (Financial Conduct Authority, 2014), COND 2. This test is not dis-similar to the old FSA threshold test. See: Financial Services Authority, *FSA Handbook* (Financial Services Authority: London 2012), COND 2. For a brief overview see: British Insurance Brokers Association 'Threshold Conditions (COND)' <http://www.biba.org.uk/pdffiles/condlist.pdf> accessed 25th March 2016.

[256] Financial Conduct Authority 'Preparing For Authorisation' <http://www.fca.org.uk/firms/firm-types/consumer-credit/authorisation/prepare> accessed 25th March 2016.

[257] Financial Conduct Authority, *FCA Handbook* (Financial Conduct Authority: London 2013) COND 2.5.6. Financial Conduct Authority 'FCA Consumer Credit Authorisations Webinar' <http://play.buto.tv/JGGrN> accessed 25th March 2016 (Video link).

and therefore fit and proper to conduct regulated activities within the consumer credit market.[258] In the consumer credit context this is deemed to mean that a firm must 'demonstrate … that [their] affairs are conducted in an appropriate manner regarding the interests of consumers and the integrity of the UK financial system'.[259] It is clear that the FCA regards the protection of consumers as a top priority and that it is prepared to meticulously audit each application to ensure that only those who will treat customers fairly are active in the market.[260]

It is arguable, however, that such a stringent authorisation regime may have a negative impact on consumers. Considering the wider financial services markets, an issue that is already giving rise to criticism of the new regime due to extended authorisation processes, is that new businesses are being prevented from quickly entering the markets across the financial sector, reducing competition and therefore having a negative impact on consumers' choice, and therefore the cost they pay for products.[261] Interestingly, slow authorisation has been attributed to resources being

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[258] Financial Conduct Authority, *FCA Handbook* (Financial Conduct Authority: London 2013) COND 2.5.

[259] Financial Conduct Authority 'Being regulated by the FCA: Guide for consumer credit firms' <http://www.fca.org.uk/your-fca/documents/consumer-credit-being-regulated> accessed 25th March 2016.

[260] See: Financial Conduct Authority 'Treating customers fairly' <http://www.fca.org.uk/firms/being-regulated/meeting-your-obligations/fair-treatment-of-customers> accessed 25th March 2016, in particular Outcome 1 which states that: 'Consumers can be confident that they are dealing with firms where the fair treatment of customers is central to the corporate culture'.
See also: Financial Conduct Authority 'Business plan 2014/15' <http://www.fca.org.uk/static/documents/corporate/business-plan-2014-2015.pdf> accessed 25th March 2016, 17.

[261] This was seen as an issue for the FCA prior to taking on the regulation of the consumer credit market. See: Laura Miller 'FCA drags heels in six month delay to authorize firms' <http://www.professionaladviser.com/ifaonline/news/2297516/fca-drags-its-heels-in-six-month-delays-to-authorise-new-firms> accessed 25th March 2016.
Lomnicka highlights that over-burdensome regulation could cause firms to exit the market, leading to a similar effect. See: Lomnicka (n 98) 14.

exhausted on applications from 'high risk' firms,[262] which are scrutinised more closely during the authorisation process.[263] It is therefore apparent from the outset that, despite having a much bigger budget,[264] the FCA may be plagued by similar resource issues as the OFT. As the discussion in the previous section demonstrates, such lack of resources can render even the strongest of powers ineffective.

Bringing the discussion back to the context of consumer credit, even without such resource issues, it is evident that firms will have to wait much longer for authorisation than they would have for their licence application when regulated by the OFT. Following the completion of a complex form, the FCA has stated that they aim to provide a decision on applications for authorisation within six months of that application being submitted.[265] By contrast, under the OFT, licences were generally granted within twenty-five working days.[266] Interestingly, current reports appear to suggest that the first granting of consumer credit authorisation was on the 12th August 2014, over four months after the FCA had responsibility for controlling new entrants to the market.[267]

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[262] Tessa Norman 'FCA approvals fall for retail firms' <http://www.moneymarketing.co.uk/news-and-analysis/regulation/fca-authorisation-approvals-fall-for-retail-firms/2012908.article> accessed 25th March 2016.

[263] Financial Conduct Authority 'Being regulated by the FCA: Guide for consumer credit firms' <http://www.fca.org.uk/your-fca/documents/consumer-credit-being-regulated> accessed 25th March 2016, 11-12.

[264] For the regulation of consumer credit alone, in 2014/2015 the FCA has a budget of £41m, a £30m increase on the budget of the OFT. See: Financial Conduct Authority 'Business plan 2014/15' <http://www.fca.org.uk/static/documents/corporate/business-plan-2014-2015.pdf> accessed 25th March 2016, 41.

[265] Financial Conduct Authority 'Being regulated by the FCA: Guide for consumer credit firms' <http://www.fca.org.uk/your-fca/documents/consumer-credit-being-regulated> accessed 25th March 2016, 16.

[266]Scott Robert 'Consumer Credit (Category A) Licence' <http://www.scottrobert.co.uk/consumer-credit-category-a-licence/> accessed 25th March 2016.

[267] See: Robyn Hall 'Ingard pips Tenet to the post' <http://www.mortgageintroducer.com/mortgages/250460/5/Industry_in_depth/Ingard_pips_Tenet_to_the_post.htm> accessed 27th August 2014. Initially it was thought that Tenet had been the first Consumer Credit firm to be granted authorisation. See: Peter Walker 'Tenet first network to get full FCA credit licence' <http://www.ftadviser.com/2014/08/21/ifa-industry/companies-and-people/tenet-

Therefore, keeping the words of Martin Wheatley in mind,[268] whilst the close scrutiny of businesses applying for authorisation will arguably reduce the likelihood of firms with the potential to harm consumers from jumping the fence, the consequences of a prolonged authorisation process, not least due to a lack of resources, may itself cause harm to consumers and render the FCA an 'inappropriate' choice to mind the gate to the consumer credit market. Indeed, Mr Wheatley noted that there was a balance to be struck. Whereas the OFT clearly tipped too far towards the freedom of the operator, the FCA is arguably running the risk of being overprotective.

Protecting consumers – post authorisation

This section considers the ways in which the FCA will supervise firms that are authorised to operate within the consumer credit market. In addition, government policy and proposed changes to the law are discussed, due to the fact that policy will influence, and the law will assist, the Authority in the pursuit of its consumer protection objective. In particular, this section analyses the extent to which FSMA style supervision and enforcement will improve the levels of protection afforded to consumers, particularly considering whether or not the FCA's approach to supervision and enforcement will act as a credible deterrent, deterring market actors from mis-treating consumers. In addition, the potential impact of the imminent increase in product regulation is considered.

Supervision and Enforcement

From the outset, it is interesting to note that the OFT considered itself a licensing regime, relying on information from third parties in order to initiate regulatory activity, as opposed to actively supervising those holding a consumer credit licence.[269] By contrast, the FCA is adamant that it will adopt a more supervisory approach,

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first-network-to-get-full-fca-credit-licence-ynL2qyBiVX7nsvXrTia86M/article.html> accessed 25th March 2016.

[268] See above (n 249).

[269] Public Accounts Committee, *Regulating Consumer Credit*, (HC, 2012-2013, 165) [8].

stating: 'Our supervision of firms will be hands on and we will closely monitor how providers treat their customers, in particular those operating in higher risk sectors such as credit cards, debt management and payday [lenders]'.[270] This is arguably a positive move from a consumer protection perspective, as such an approach may lead to the more frequent discovery of malpractice, in addition to deterring firms from harming consumers due to this increased chance of being caught. However, should one delve deeper into the way in which the FCA will conduct such supervision, this assertion could be considered somewhat optimistic. It seems that observations will initially take place via telephone from the comfort of the FCA's offices, with on-site visits only occurring should the Authority consider firms to present a risk to the Authority's objectives, with most consumer credit firms only being subject to inspection every four years.[271] This is due to consumer credit firms, in general, being deemed to pose the lowest risk to the FCA's objectives,[272] and therefore arguably much less risk to consumers.[273] This inference is drawn on the fact that one of the FCA's operational objectives is the protection of consumers and that, as the Authority deems consumer credit firms to be of low risk generally, it is arguable that the FCA deems such firms to be of a lower risk to consumers. Lomnicka goes some way to rationalise this point by stating:

> [M]oney lending has a very different risk profile from … FSMA "regulated activities" (for example, taking deposits, dealing, advising, managing investments). Thus, when lending money, the regulated firms put their money at risk whereas in most FSMA-regulated activities, the consumer normally does.[274]

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[270] Financial Conduct Authority 'FCA confirms tough new rules for £200bn consumer credit market' <http://www.fca.org.uk/news/fca-confirms-tough-new-rules-for-200bn-consumer-credit-market> accessed 25th March 2016.

[271] Financial Conduct Authority 'Being regulated by the FCA: Guide for consumer credit firms' <http://www.fca.org.uk/your-fca/documents/consumer-credit-being-regulated> accessed 25th March 2016, 25.

[272] Ibid

[273] Indeed, when the Authority uses the term risk, it appears to refer to the risk posed to its objectives. See: Ibid 22.

[274] Eva Lomnicka (n 98) 14.

Whilst an interesting argument, it is questionable that this should mean that lending businesses pose less risk to consumer welfare than deposit taking institutions. It is noteworthy that there exists an increased layer of protection for the vast majority[275] of consumers with deposits in FSMA regulated financial institutions by virtue of the Financial Services Compensation Scheme,[276] where deposits of up to £85,000 are protected, should an institution become insolvent.[277] Whilst the near collapse of Northern Rock highlighted both the ineffectiveness of the scheme,[278] in addition to the impact that the demise of a financial institution has on the macro-economic environment,[279] there is still a level of protection that is available to customers in credit but not to those in debt, with the same financial institution.

What's more, the near collapse of Northern Rock also highlighted the fallacies of a risk-based approach to regulating the financial sector.[280] Indeed, even if it is ultimately the lenders' funds that are at risk, it is arguable that effective protection from unscrupulous lenders may not be delivered; such a light-touch, long-distance approach may not reveal malpractice as effectively as previously thought, with reliance on complaints from consumers possibly remaining the key trigger for regulatory enforcement, as it was under the OFT regime.[281] That being said, the way

[275] This assumption is based on the fact that the average person has circa £20,000 in savings. See: Harry Glass 'Cash-strapped Britain puts a little more aside, as savings increase to an average of £90 a month' <http://www.thisismoney.co.uk/money/saving/article-2248215/Savings-levels-increase-people-set-aside-average-90-monthly-income.html> accessed 25th March 2016.

[276] Hereafter FSCS.

[277] Financial Services Compensation Scheme 'Banks/ Building Societies' <http://www.fscs.org.uk/what-we-cover/products/banks-building-societies/> accessed 25th March 2016.

[278] It was noted that the Scheme, following the near collapse of Northern Rock, could not have coped with the failure of a large financial institution. See: Treasury Select Committee, *Run on the Rock*, (HC, 2007-2008, 56-1) 76.

[279] Indeed, Chambers describes the collapse of Northern Rock as a 'catalyst for the banking crisis in the UK': Clare Chambers 'Banking on reform in 2010: is regulatory change ever enough and will the general election hold the answers for the financial services industry' [2010] 44(2) The Law Teacher, 218, 219-220.

[280] See generally: Treasury Select Committee (n 33) 21-34 and Joanna Gray 'Is it time to highlight the limits of risk-based financial regulation?' (2009) 4(1) Capital Markets Law Journal 50.

[281] Public Accounts Committee, (n 24)[8].

in which the Authority polices the market itself, as opposed to the firms directly, may prove a more effective way of protecting consumers. For example, it has been noted that the FCA has recently identified two hundred and twenty seven examples of instances where firms are not complying with the regimes advertising standards.[282] If strong regulatory enforcement action is taken against these firms, this may go some way to mitigate the seemingly relaxed approach taken to the supervision of individual firms.

Whilst concerns can be raised in relation to the supervisory approach of the FCA, consumer protection will almost certainly be improved due to the stronger enforcement powers afforded to the FCA, which can be used against firms who fall foul of their regime. The FCA have created a set of enforceable rules specifically aimed at consumer credit firms within their regulatory handbook, a tool that was effectively used by the FSA in other areas of the financial services market prior to handing over the reigns to the new Conduct Authority.[283] Speaking about the new rules, Martin Wheatley stated: '[The FCA's] new rules will help us protect consumers and give us strong new powers to tackle any firm found to be overstepping the line'.[284] As noted by Patient,[285] the new CONC rules are generated from elements of

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[282] Donia O'Loughlin 'FCA opens 227 investigations over credit promotions' *FT Advisor* (13th August 2014, London)<http://www.ftadviser.com/2014/08/13/regulation/regulators/fca-opens-investigations-over-credit-promotions-A4e3TIB6PYSJ3aBaPbFhEI/article.html> accessed 25th March 2016.

[283] See, for example: Financial Services Authority 'Willis Ltd – Final Notice' <http://www.fsa.gov.uk/pubs/final/willis_ltd.pdf> accessed 25th March 2016. Willis were fined £6.9m for breaching the FSA's Principles for Business and rules relating to Senior Management and control requirements, both of which were contained within the FSA handbook.

The FSA handbook was also used to punish Barclays Bank for their part in the LIBOR and EURIBOR rigging scandal. See: Financial Services Authority 'Barclays Bank Plc – Final Notice' <http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf> accessed 25th March 2016. Where the sanctions were imposed for various breaches of the FSA's Principles for Business, contained within the FSA handbook.

[284] Financial Conduct Authority 'FCA confirms tough new rules for £200bn consumer credit market' <http://www.fca.org.uk/news/fca-confirms-tough-new-rules-for-200bn-consumer-credit-market> accessed 25th March 2016.

[285] Julie Patient 'Consumer Credit: FCA takes over regulation' <http://uk.practicallaw.com/9-561-9266> accessed 25th March 2016

the previous statutory rules,[286] in addition to the guidance provided by the OFT under the CCA74 regime.[287] Essentially, by virtue of s206FSMA, consumer credit firms will feel the wrath of the FCA's power to impose unlimited fines[288] for breaches of the previous OFT regime, where the OFT were limited to the imposition of fines of up to £50,000.[289] Most noteworthy is the fact that the requirement to assess the creditworthiness of a borrower is now easily enforceable by the regulator, with the CONC rules specifically stating that lenders are to '[take] reasonable steps to assess the customer's ability to meet repayments under the a regulated credit agreement',[290] highlighting the importance of the affordability of credit products in the new regime.[291]

In addition, Patient highlights that consumer credit firms will now face such penalties should they fall foul of the FCA's Principles for Business,[292] within which there is the requirement to act in the best interest of consumers,[293] a principle that the FSA at least readily fined authorised firms for breaching.[294] Finally, individual persons within companies can be both fined and banned from taking part in regulated activities for the improper treatment of customers within the consumer credit market.[295] It is

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[286] Under the Consumer Credit Act 1974 (as amended).

[287] Patient (n 285).

[288] Financial Services and Markets Act 2006 s206.

[289] See above

[290] Financial Conduct Authority, *FCA Handbook,* (Financial Conduct Authority, 2014), CONC 5.3.1(2).

[291] Financial Conduct Authority 'FCA confirms tough new rules for £200bn consumer credit market' <http://www.fca.org.uk/news/fca-confirms-tough-new-rules-for-200bn-consumer-credit-market> accessed 25th March 2016

[292] Patient (n 285).

[293]Financial Conduct Authority, *FCA Handbook,* (Financial Conduct Authority, 2014), PRIN 2.1.1.6.

[294] For example, Combined Insurance Company of America were fined £3m, partly due to Principle 6 failings. See: Financial Services Authority 'Combined Insurance Company of America – Final Notice' <http://www.fsa.gov.uk/static/FsaWeb/OCD/cica.pdf> accessed 25th March 2016 [5.2(2)].

[295] For an example of this power being used by the FSA see: Financial Services Authority 'Andrew Lawton – Final Notice' < http://www.fsa.gov.uk/static/pubs/final/andrew-lawton.pdf> accessed 25th March 2016, where Andrew Lawton was fined £13,500 and banned from holding a similar role in the future. See further: Simon Read 'FSA fines lender over poor treatment of consumers' *The Independent*

arguable that these increased enforcement powers of the FCA will act as a deterrent against firms acting against the interests of consumers. The fact that practices such as irresponsible lending and the failure to treat customers fairly will now be punishable through the imposition of an unlimited fine, when weighing up whether breaching the regulatory regime is worth the consequence,[296] these new sanctions will hopefully ensure that businesses think twice.

Redress

One of the key issues outlined in the previous section was the fact that the OFT lacked the power to actively seek redress on behalf of a group of consumers who had suffered harm at the hands of a licensed person. By contrast, following the enactment of the Financial Services Act 2010, the FCA has the power to impose redress requirements on behalf of consumers who have been unfairly treated at the hands of regulated firms.[297] For example, the FSA secured nearly £1.1m of redress for the consumers of Kensington Mortgage Company, who, for example, failed to ensure that customers who were in arrears with their mortgage re-payments had re-payment plans tailored to their circumstances, which was deemed to breach Principle six; the requirement to act in the best interest of the consumer.[298] Whilst this type of enforcement will arguably have a similar deterring effect as the ability of the FCA to

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(11th December 2012, London) <http://www.independent.co.uk/money/mortgages/fsa-fines-lender-12m--over-poor-treatment-of-customers-8399802.html> accessed 25th March 2016.

[296] And, as such identifying whether the FCA's regime acts as a deterrent: See Peter Cartwright 'Credible deterrence and consumer protection through the imposition of financial penalties' in Nicholas Ryder, Sabine Hassler and Umut Turksen, *Fighting Financial Crime in the Economic Crisis,* (Routledge, 2014) 31.

[297] Financial Services and Markets Act 2000 s404 as amended by the Financial Services Act 2010. See further: Pinsent Masons 'Law change lets FSA impose consumer redress schemes' <http://www.out-law.com/page-11445> accessed 25th March 2016. [2.3(3)].

[298] Financial Services Authority 'Kensington Mortgage Company – Final Notice' <http://www.fsa.gov.uk/pubs/final/kensington.pdf > accessed 25th March 2016 [2.3(3)].
See also: Financial Services Authority 'Final Notice - DB mortgages' <http://www.fsa.gov.uk/pubs/final/db_uk.pdf> accessed 25th March 2016. [2.5] – [2.5], where the redress secured was estimated at £60m.

impose unlimited fines, it comes with the added bonus of putting cash back into the pockets of harmed consumers.

Indeed, unlike its powers under s206 FSMA, the FCA has used the power to seek redress on behalf of consumers, upon a payday lender who has mis-treated consumers. As outlined above, the FCA ordered Wonga to pay £2.6m to consumers that the lender sent letters to that were from fake law firms. This is arguably the most powerful message so far from the FCA, to firms, that they are going to take tough action against those who mis-treat consumers, and to consumers, that the FCA will ensure that when they are unfairly treated, money will be put back into their pockets.[299]

However, the FCA were unable fine Wonga under s206 FSMA, which was due to the fact that the misconduct occurred prior to the FCA taking over the regulation of the sector.[300] Indeed, this has been identified as a possible weakness in the FCA's regulation of the payday lending market as it is an escape route from misconduct that occurred prior to the FCA undertaking responsibility for the payday-lending sector.[301] In addition, it has been highlighted that the FCA have not issued a notice in respect of this incident, detailing the specific reasons for the action being taken against Wonga.[302] This has been considered as preventing 'the public from knowing why [the] fakery took place',[303] which is arguably important if consumers are to be fully aware of the businesses that they are trusting with their financial well-being. That being said, the imposition of redress of such magnitude by the Authority, upon a

[299] It is noteworthy that this will apply where a number of consumers have been harmed. Individual consumers still have the option to seek redress in the courts by virtue of the unfair credit relationship provisions, and through the use of the FOS: see section 2 above.

[300] BBC 'Wonga chased debt using fake law firms, says FCA' <http://www.bbc.co.uk/news/business-28015456> accessed 25th March 2016.

[301] Jim Armitage 'Wonga scandal and subsequent let-off calls for full parliamentary inquiry' *The Independent* (26th June 2014, London) <http://www.independent.co.uk/news/business/comment/wonga-scandal-and-subsequent-letoff-calls-for-a-full-parliamentary-inquiry-9563833.html> accessed 25th March 2016.

[302] Ibid.

[303] Ibid.

payday lender, is certainly a positive move by the FCA in pursuit of their objective to protect consumers and should go some way to address the £450m redress-gap identified above.

High cost credit: Are cost caps the answer?

Finally, this section considers the powers of the FCA to regulate the credit products that are offered for sale by market actors to consumers, in particular the FCA's power to regulate the cost of credit.[304] This is important for this section due to the fact much of the discussion relating to the new powers of the FCA, prior to it undertaking regulation of the consumer credit market, related to the ability to impose cost caps on credit products, directly affecting the products that could be offered for sale by payday lenders.[305]

Following the undertaking of responsibility for the regulation of the payday loans market, the FCA proposed a cap on the cost of payday loans,[306] stating that loans should not cost more than 0.8 per cent per day in interest charges, [307] in addition to a cap on the amount a consumer will repay, set at 100 per cent of the original loan amount.[308] This cap is designed to protect consumers of the payday loans market,[309] and is set to have a dramatic impact on the profitability on the payday loans industry,

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[304] Financial Services and Markets Act 2000 s137C, as inserted by Financial Services Act 2012 s24.

[305] See, for example" Denise Roland 'Payday lenders to face interest rate Cap from City regulator' *The Telegraph* (25th November 2013, London) <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/10471982/Payday-lenders-to-face-interest-rate-cap-from-City-regulator.html> accessed 25th March 2016.
See also: Matt West 'Payday lenders face cap on interest charges from next year as City Watchdog takes control of credit industry'< http://www.thisismoney.co.uk/money/bills/article-2578978/Payday-lenders-face-cap-charges-year-City-Watchdog-takes-control-consumer-credit-industry.html> (accessed 25th March 2016.

[306] See generally: Financial Conduct Authority, *Consultation Paper: Proposals for a price cap on high-cost credit*, (Financial Conduct Authority, CP14/10, July 2014).

[307] Which still represents an APR in excess of 1000%: Financial Conduct Authority (n 63).

[308] Financial Conduct Authority 'FCA proposes price cap for payday lenders' < http://www.fca.org.uk/news/fca-proposes-price-cap-for-payday-lenders> accessed 25th March 2016.

[309] Financial Conduct Authority (n 307) para 1.29.

possibly reducing profits for lenders by up to 42 per cent.[310] The cap came into force in January 2015.[67a]

Whilst on its face this appears to be a victory for consumer protection, reducing the opportunity for consumers to suffer the horrifying over-indebtedness due to the defaulting on payday loans, the FCA's seemingly arbitrary approach to product regulation has the potential to cause more harm than good. Indeed, in April 2013, the FCA itself suggested that interest rate caps may not be imposed as it considered some consumers 'might be made worse off by caps on APR', due to this being the only form of loan available to some, particularly in emergencies.[311] Dr Sarah Brown at a symposium at the University of the West of England, made the point that in the absence of high-cost credit products, high-risk borrowers may have to turn to illegal sources of credit, putting them in even greater danger.[312] As with the authorisation and supervision of consumer credit firms, there is certainly a balance to be struck when regulating the cost of consumer credit products.[69a]

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[310] BBC News 'FCA proposes payday loan cap of 0.8% per day' < http://www.bbc.co.uk/news/business-28305886> accessed 25th March 2016.

[67a] Rupert Jones 'Payday loan caps come into force' *The Guardian* (2nd January 2015, London) < http://www.theguardian.com/money/2015/jan/02/payday-loans-caps-fca> accessed 25th March 2016.

[311] Samuel Dale 'FCA says it may stay its hand on payday rate caps' < http://www.mortgagestrategy.co.uk/news-and-features/latest-news/fca-says-it-may-stay-its-hand-on-payday-rate-caps/1069405.article> accessed 25th March 2016.

The consultation paper suggests that around 11% of current payday loans consumers would no-longer be able to access these loans: Financial Conduct Authority (n 63) para 5.15.

[312] Dr Sarah Brown at the symposium on Convenient Credit and Consumer Protection at the University of the West of England, 28th March 2012.

See also See: Damon Gibbons 'Tackling the high cost credit problem: the importance of real-time regulatory databases' <http://www.responsible-credit.org.uk/uimages/File/Tackling%20the%20high%20cost%20credit%20problem,%20importance%20of%20regulatory%20databases%20final.pdf> accessed 25th March 2016) 12 -13.

This is due to the fact that, as noted above, cost is often used to mitigate risk. See further: Collins (n 18) 57.

[69a] See further Paul Ali, Cosima McRae and Ian Ramsay 'Payday lending regulation and borrower vulnerability in the UK and Australia' (2015) 3 Journal of Business Law 223.

It seems that the FCA are not necessarily concerned with the detrimental impact of an arbitrary cost of credit cap, and their approach may cause harm to consumers, as opposed to protecting them. In the wake of the financial crisis, many consumers have needed to rely on payday loans to purchase necessary goods, such as food, or to cover housing costs.[313] In 2013 Daniel Collins suggested that, despite the potential of interest rate caps, 'the future of payday lenders appears bright and profitable'.[314] However, following the FCA's proposals to cap interest rates and the total cost of credit, this no longer appears to be the case. Unfortunately, the same could arguably be said for the high-risk consumer.

Regulating high-cost credit: What about rent-to-own?

The FCA appears to have missed the financial destruction caused by rent-to-own companies such as BrightHouse.[315] For example, customers have been sold more than one rent-to-own scheme simultaneously, which can cause similar devastation when a consumer falls into arrears.[316] The FCA appears to have taken no action to regulate this market. It is arguable that this oversight is due the fact that there is less publicity attached the indebtedness caused by BrightHouse, in comparison to payday lenders.[317] From the outset, the FCA needed to be seen taking tough action against companies that cause consumer harm. It seems that taking action against payday lenders, as opposed to rent-to-own credit providers, gives them this limelight.

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[313] Hilary Osbourne 'Payday loans being used to feed desperate families, charity says', *The Guardian* (1st October 2013, London) < http://www.theguardian.com/money/2013/oct/01/payday-loans-feed-families-report> accessed 25th March 2016.

[314] Collins (n 18) 60.

[315] Even debt charities and campaign groups often consider the two products in conjunction with each other: Helen Clifton 'Drowning in debt: how irresponsible lenders are cresting a tidal wave of misery' <http://www.church-poverty.org.uk/drowningindebt/report/drowningindebt/drowningindebtpdf> accessed 25th March 2016, 8.

[316] Amelia Gentleman 'Buy now regret later? The secret of BrightHouse's success' (4th October 2013, *Guardian*) available at <http://www.theguardian.com/society/2013/oct/04/brighthouse-consumer-poverty-high-street> Last accessed 25th March 2016.

[317] It has been noted that regulators have neglected other credit products due to the focus on payday lending. Damon Gibbons (n 313) 73.

This section has analysed the FCA's approach to the regulation of consumer credit so far. It is clear from the outset that the FCA will take a tougher approach to the regulation of the consumer credit market, through tighter scrutiny of those who the gate keeper allows into the market, in addition to having much tougher enforcement powers than the OFT under the previous regime. However, from a consumer protection perspective some notable concerns have been raised. Firstly, the more stringent authorisation regime is a great deal slower, delaying new firms entering the market, possibly leading to a negative impact on competition, and therefore the consumer. Secondly, the imposition of a price cap, whilst reducing over-indebtedness, may lead to consumers seeking loans from illicit sources, who may use 'strong arm'[318] tactics to recover debts, placing consumers in further danger. By contrast, the FCA's ability to impose redress on behalf of consumers is a definite improvement for the harmed consumer, and by putting cash back into the pockets of wronged consumers, should reduce the amount of people who are treated unfairly by market actors, and go without redress.

The Regulation of Payday Loans: Lessons from the United States?[319]

This section seeks to explore whether lessons can be learnt and implemented from the US approach to the regulation of 'predatory lending', specifically the payday loans market. This section is split into two further sections. Section two discusses payday lending as a form of predatory lending. Sections three considers whether there are US regulatory practices that could benefit the UK borrower in the payday loans market from a consumer protection perspective.

Payday lending as predatory lending

[318] As described by: Gordon Borrie (n 1)189

[319] In carrying out its research into the impact of capping the price of a payday loan, the FCA used the US as one comparison country. See: Financial Conduct Authority, *Consultation Paper: Proposals for a price cap on high-cost credit*, (Financial Conduct Authority, CP14/10, July 2014): Annex 4 paras 39 – 60.

Some commentators note that the term predatory lending lacks definition.[320] However, it is arguable that a 'victim'[321] of predatory lending will have one or more of the following characteristics:

1) Victims of predatory lending commonly find themselves in financial difficulty, not because of changes in their personal circumstances during the course of the credit agreement, but because the products sold to them were not suitable for their financial needs at the outset.[322]
2) Victims are sold products with the lender's profit in mind, with little consideration of consumer affordability and need,[323] and;
3) it is generally accepted that illegal[324] predatory lending is linked to some form of criminal activity on the part of the lender,[325] whether this is the

[320] See for example: Hirsh Ament 'Predatory Lending: What will stop it' [2009] 4 Journal of Business & Technology 371, 371;
John Relman, Fred Rivera, Meera Trehan and Shilpa S. Stoskar 'Designing Federal Legislation that works: legal remedies for Predatory Lending' in Gregory D. Squires (ed), *How to stop predatory lending*' (Prager Publishers 2004) 153;
Kathleen Engel and Patricia McCoy 'A tale of three markets: the law and economics of predatory lending' (2002) 80(6) Texas Law Review 1255, 1259 – 1260.

[321] The term 'victim' is used here to denote a person who has been subject to predatory lending and is not necessarily the victim of a crime.

[322] Nicholas Ryder and Kerry Broomfield 'Predatory lending and white collar crime: A critical reflection' (2014) 25(9) International Company and Commercal Law Review 287, 291 citing: Marita Shelley and Margaret Jackson 'Sub prime lending, it's deficiencies and government responses' (2008) 28(10) Journal of International Banking Law and Regulation 523, 534.

[323] Debt.org 'Predatory lending' < http://www.debt.org/credit/predatory-lending/> accessed 28th March 2016.

[324] US law recognises that not all predatory lending practices are illegal. This has been cited as an issue that inhibits consumers when seeking redress, See: Ament (n 321) 373.

[325] Relman, Rivera, Trehan and Stoskar (n 321) 166;
Nicholas Ryder *The Financial Crisis and White Collar Crime: A perfect Storm?* (Edward Elgar Publishing, 2014) 75.
US General Accounting Office 'Report to the Chairman and Ranking Minority Member, Special Committee on Aging, U.S. Senate: Consumer Protection Federal and Sate Agencies face challenged in combating predatory lending' <http://www.gao.gov/new.items/d04280.pdf> accessed 28th March 2016 33.

> 'fraudulent inducement [of a consumer] to sign a loan document';[326] or encouraging potential debtor to enter false information on their application.[327] Thus, the victim of predatory lending, may also be a victim of crime.

For the purpose of this chapter, it is necessary to consider the term 'predatory lending' in the context of payday lending. It is noteworthy that payday loans in any form are not presently illegal in the UK no matter how high the interest rate, due to their being no cap on the cost of credit;[328] nor is there any law against the provision of short-term loans that are repayable in a single instalment, so long as the business is authorised by the FCA,[329] and is compliant with other regulatory requirements such as cost disclosure rules.[330] However, it is clear that payday loans can fall within the first two of the above three characteristics. Indeed, in September 2013 Helen Clifton noted that 'more than 150 debt advisors … said that the loans were unaffordable from the outset'.[331] Furthermore, it is argued that payday loans are not there to assist consumers, but instead used to exploit the vulnerable, with lenders happy to see loans roll over and generate extra profits.[332] Therefore, whilst the practice of offering payday loans is not illegal, it is clearly predatory, falling into the definition: 'a

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[326] Relman, Rivera, Trehan and Stoskar (n 321) 156.

[327] Engel and McCoy (n 321) 1268.

[328] Indeed, even following the introduction of an interest rate cap (Section 4 above), payday loans will still continue to provide an opportunity for high cost credit products to be sold to vulnerable consumers. In fact, this cap has been considered to condone predatory lending by 'legitimis[ing] … high prices and incentivise irresponsible and extortionate lending'. CCRmagazine.com 'FCA's price cap would only legitimize predatory lending' <http://www.ccrmagazine.com/index.php?option=com_content&task=view&id=11648&Itemid=35> accessed 28th March 2016, citing the Director of the Centre for Responsible Credit, Damon Gibbons.

[329] See above.

[330] Financial Conduct Authority, *FCA Handbook,* (Financial Conduct Authority, 2014), COND 4.2.5(2)

[331] Helen Clifton 'Drowning in debt: how irresponsible lenders are cresting a tidal wave of misery' <http://www.church-poverty.org.uk/drowningindebt/report/drowningindebt/drowningindebtpdf> accessed 28th March 2016, 8.

[332] Debt.org 'Payday Lenders' <http://www.debt.org/credit/payday-lenders/> accessed 28th March 2016.

predatory lender is one who, for personal profit, takes advantage of another by unfair, albeit technically legal, means'.[333]

The regulation of payday lending: lessons from the US?

In the US, there is an abundance of Federal statutes, each aimed at tackling small elements of predatory lending.[334] Much like the consumer protection regime in the UK, there is particular emphasis on the fair treatment of the consumer during the making of the loan agreement,[335] in addition to the protection of consumers who find themselves in arrears.[336] However, due to the fallout of the sub-prime market in the US, much of the focus in relation to predatory lending has been on the sub-prime mortgage market, arguably allowing issues within non-mortgage based credit market to go largely un-noticed.[337] It is therefore arguable that federal law does not effectively tackle payday lending,[338] and states have taken it upon themselves to attempt to deal with the harm caused by high-cost short-term credit.[339]As a result, in

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[333] Creola Johnson 'Payday Loans: Shrewd business or predatory lending' (2002-03) 97(1) Minnesota Law Review 1, 5.

[334]As outlined by Ryder(n 326) 75

For an interesting visual comparison of the different practices that each of the US statutes can be invoked to challenge see: US General Accounting Office 'Report to the Chairman and Ranking Minority Member, Special Committee on Aging, U.S. Senate: Consumer Protection Federal and State Agencies face challenged in combating predatory lending' < http://www.gao.gov/new.items/d04280.pdf> accessed 29th March 2016, 31.

[335] Such as the rules relating to the transparency of the cost of credit under the Truth in Lending Act 15 U.S.C. §§ 1601 – 1693 (2000) as cited by: Pearl Chin 'Payday Loans: The case for federal legislation' [2004] U Ill L Rev 723, 730.

[336] Such as the Fair Debt Collection Practices Act (15 U.S.C. 1629)

[337] As noted, with particular regard to the credit card market, by: William Stadler 'Predatory Lending: Is the Credit CARD Act enough?' (2012) 19(1) Journal of Financial Crime 99, 99.

[338] Indeed, US writers express the need for an effective federal law that specifically regulates payday lending. See: Johnson (n 334) andChin (n 336).

[339] David Dayen 'The loans with 350% interest and a grip on America', *The Guardian* (24th March 2013 London) <http://www.theguardian.com/money/2014/mar/23/payday-lending-interest-banks-advantage-congress> accessed 4th September 2014. Indeed, at the time of writing, a Bill aimed at the limiting the Federal Regulation of Payday loans by the Consumer Financial Protection Bureau where states have measures in place is being considered in the House of Representatives. See further: Barbara

order to identify whether the UK can take lessons from the US in the regulation of payday lending, this discussion will now consider the approach of US states in pursuit of protecting consumers from payday lenders.[340]

It is noteworthy from the outset that states adopt a variety of different approaches to the regulation of payday lending, as illustrated by the PEW Charitable Trusts, who carried out research across the US, and provided information in relation to each state. [341] PEW grouped the states in three categories ranging from so-called 'permissive' states such as South Dakota, where the only restriction placed upon lenders is a limit on the advanced amount of $500;[342] to 'restrictive' states, such as Georgia and North Carolina, which either outlaw payday loans in their entirety, or 'have price caps low enough to eliminate payday lending in the state'.[343] Between the two ends of the spectrum there are a number of 'Hybrid' states which generally have some form of price cap that '[is] lower than most states, but still permit loans to be issued with triple-digit APRs'.[344] As such, when analysing the US approach, it is important to bear in mind that the lessons learned are from a particular state, or group of states, as opposed to the unified US approach to the regulation of payday lending.

S Mishkin 'DNC Chair Supporting Bill to curb CFPB payday loan rulemaking authority' < https://www.cfpbmonitor.com/2016/03/10/dnc-chair-supporting-bill-to-curb-cfpb-payday-loan-rulemaking-authority/> accessed 4th April 2016.

[340] For an interactive state-by-state outline of the position of states in relation to payday loans see: PEW Charitable Trusts 'Data visualisation: State Payday Loan Regulation and Usage Rates' < http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/state-payday-loan-regulation-and-usage-rates> accessed 4th April 2016.

[341] Pew Charitable Trusts 'State Payday Loan Regulation and Usage Rates' < http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/~/media/Data%20Visualizations/Interactives/2014/State%20Payday%20Loan%20Regulation%20and%20Usage%20Rates/Report/State_Payday_Loan_Regulation_and_Usage_Rates.pdf > accessed 4th April 2016.

[342] Ibid

There is no restriction placed on the cost of the payday loan in these states. See: Colin Morgan-Cross and Marieka Klawitter 'Effects of State Payday loans and price caps and regulation' < http://depts.washington.edu/wcpc/sites/default/files/papers/Payday%20Lending%20Brief.pdf> accessed 4th April 2016, 3.

[343] Pew Charitable Trusts (n 341)

[344] Ibid

One common characteristic of nearly all states that allow payday loans is that they place a limit on the maximum value of the payday loan. Some states utilise a cash amount to cap the amount that can be advanced[345] whilst others are limited by way of their monthly income in that a payday lender is only allowed to lend up to a set percentage of that income.[346] The latter approach is preferable, not least due to the fact that it places a positive obligation upon the lender to determine the income of the prospective borrower, promoting the importance of understanding the needs and limits of a consumer, by the lender, in payday loan transactions.

There is currently no cap on the amount that can be advanced in a payday loan transaction in the UK.[347] In fact, the FCA dismissed this idea as a mechanism for circumventing affordability assessments.[348] This argument can be accepted for caps of a specific value as capping a loan at $500 does not identify whether that person can afford to repay the $500. However, by utilising a percentage point of a consumer's income has the potential to form an important criterion within an affordability assessment, better protecting consumers from borrowing more than they can afford to repay.

However, a key flaw with this approach is that, even if the original loan amount is only twenty five per cent of the borrower's income, if the consumer fails to repay the loan fees and charges that are added to the loan as a consequence will raise the amount owed to what may be a less affordable level. Therefore, this salary-linked cap on the value to be advances alone is not an effective method with which to protect the

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[345] These generally range from $500 - $1000. See further National Conference of State Legislatures 'Payday Lending Statutes' < http://www.ncsl.org/research/financial-services-and-commerce/payday-lending-state-statutes.aspx> accessed 4th April 2016.

[346] These are Washington, New Mexico, Illanois and Nevada: National Conference of State Legislatures (n 346).

[347] It is possible to obtain a loan of £2million in a high-cost, short-term loan transaction in the UK. See: Borro 'Personal Asset Loans' < http://www.borro.com/uk/personal-asset-loans> accessed 4th April 2016. Interest rates at Borro can be up to 6.99% per month, an APR of nearly 125%.

[348] Indeed, the cap is used as one criteria that the FCA states Florida uses to protect consumers, rather than impose affordability assessments: Financial Conduct Authority (n 320) para 7.6.

consumers of the market, arguably highlighted by the fact that these four states impose further cost caps.[349]

A further significant issue in relation to the UK payday loans market is the 'all or nothing' approach taken to the repayment of the loan. That is to say that, when coming to the end of the loan period, if the borrower can only afford to repay part of the loan, the full loan will be rolled over. In fact, part of the FCA's proposals to regulate the payday loan market is to prohibit the part-payment of a loan in order 'to ensure that firms only lend to borrowers who can afford it'.[350] By contrast, prior to the prohibition of payday lending in Arkansas, state law allowed the part-payment of a loan, permitting debtors to pay off debts 'bit by bit'.[351] Whilst the part-payment of the loan will clearly involve the re-financing of the remainder, it is arguably preferable to allow this practice, thus extending the repayment period of a high-cost loan, as opposed to pricing consumers out of the regulated market and driving them to illicit sources of finance.

The majority of states that permit the offering of payday loans have some form of restriction on the cost of the loan, similar to the cost cap proposed by the FCA.[352] Research in the US can be used to support the assertion made in section four of this section; that capping the cost of payday loans could cause more harm to consumers than it does protect them. For example, Oregon recently capped interest rates on payday loans at thirty six per cent, with the impact of this appearing negative as more people to failed to make bill payments, and increased the use of credit products that cost more than the fee of a payday loan. [353] As such, a payday loan would have been

[349] National Conference of State Legislatures (n 346).

[350] Financial Conduct Authority, (n 320) para 7.28.

[351] Megan Knize 'Payday Lending in Louisiana, Mississippi and Arkansas: Toward effective protections for borrowers' (2008-09) 69 Louisiana Law Review 317, 341.

[352] See further: National Conference of State Legislatures (n 346) A notable exception to this is South Dakota, which has no such limit.

[353] Jonathan Zinman 'Restricting consumer credit access: Household survey evidence on effects around the Oregon rate cap.' <http://ac.els-cdn.com/S0378426609002283/1-s2.0-S0378426609002283-main.pdf?_tid=394fc36c-37ac-11e4-8bda-00000aacb361&acdnat=1410217536_33b27f7cd83b3fb4969831cc0dc41149> accessed 4th April 2016;

a better, cheaper option for affected consumers. It is noteworthy that the FCA's proposed cap is much higher than the cap in Oregon and, in fact, there is no similar cap in the US nationwide.[354] Indeed, it will be interesting to see whether the FCA's impact assessment is accurate, and whether their interest rate cap will push consumers to using higher priced alternatives.

Whilst, as noted above, there is very little effective legislation at federal level to regulate the payday loans market, under federal law loans with interest rates above 36% may not be provided to members of the military.[355] This is, in part, due to the fact that members of the military who utilised payday loans were deemed to be underperforming when on duty, due to the stress caused by payday loans.[356] Whilst this cap has caused 'the near extinction of any form of payday lending to members of the military,[357] it has also highlighted the importance of more affordable credit products aimed at this particular target audience. Indeed, mygreenloan offers loans ranging from 6% - 35% specifically for military personnel.[358]

Adam Summers 'Payday lending: protecting or harming consumers' < http://reason.org/files/payday_lending_regulation.pdf> accessed 4th April 2016

[354] States with interest rate caps are in hundreds of per-cent, whereas the FCA 's proposed daily rate will give rise to an APR in excess of 1000%. Jennifer Rankin 'Watchdog plans cap on payday loan charges' *The Guardian* (15th July 2014, London) <http://www.theguardian.com/business/2014/jul/15/fca-imposes-cap-on-payday-loans> accessed 4th April 2016.

[355] Colin Morgan-Cross and Marieka Klawitter 'Effects of State Payday loans and price caps and regulation' < http://depts.washington.edu/wcpc/sites/default/files/papers/Payday%20Lending%20Brief.pdf> accessed 4th April 2016, 2.

[356] Scott Carell and Jonathan Zinman 'In Harm's way? Payday Loan Access and Military Personnel Performance' (28th May 2014) <http://rfs.oxfordjournals.org/content/early/2014/05/28/rfs.hhu034.full.pdf>accessed 4th April 2016, 3-4.

[357] Morgan-Cross and Klawitter (n 356) 2.

[358] My Green Loans 'Military Loans' <http://www.mygreenloans.com/military-loans/> accessed 4th April 2016.

The lesson that the UK, and the indeed the FCA, can take from this, is the need to facilitate the expansion of alternatives to payday lending to ensure that the impact of the cost cap is mitigated. This is arguably being achieved through the raising of the interest rate cap from 2% to 3% per month[359] on credit products provided by credit unions, enabling credit unions to 'lend to a wider spectrum of borrowers',[360] including those they consider to pose a higher risk of default.[361] Interestingly, a Bill aimed at the establishment of a credit union specifically for members of the British armed forces recently failed to go through parliament.[362] If re-visited, the formation of the Armed Forces Credit Union, in addition to the ability of that union to charge an interest rate to cover the cost of a higher risk loan, will arguably provide the members of the British military with a more affordable alternative, rather than having to turn to payday lenders in times of need.[363] However, a pilot scheme highlighted that, in order to break even on a payday loan, a credit union would need to charge an APR of 95%.[364] Therefore, it is clear that the raising of the APR cap on credit products offered by credit unions to 42.6% does not go far enough to render the expansion of

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[359] Giving rise to an APR of 42.6%: Adam Uren 'Interest cap for Credit Unions lifted so they can compete with payday lenders for short-term borrowers' < http://www.thisismoney.co.uk/money/cardsloans/article-2340943/Interest-rate-cap-credit-union-raised.html> accessed 4th April 2016.

[360] HM Treasury 'Raising the maximum interest rate cap: response to consultation' available at < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206091/raising_the_maximum_interest_rate_cap_response_to_consultation_110613.pdf > accessed 4th April 2016, para 2.1.

[361] Ibid para 2.2.

[362] This is due to the Bill not being passed with the session See: Parliament UK 'Credit Unions Armed Forces Bill 2013-14 < http://services.parliament.uk/bills/2013-14/creditunionarmedforces.html> accessed 4th April 2016.

[363] It has been noted that payday lenders in the UK also target the British armed forces. See: Rosie Murray-West 'Legal loansharks are targeting the military, warns MP for Walthamstow Stella Creasy' *The Telegraph* (11th November 2011) http://www.telegraph.co.uk/finance/personalfinance/borrowing/8884178/Legal-loansharks-are-targeting-the-military-warns-MP-for-Walthamstow-Stella-Creas.html accessed 4th April 2016.

[364] Damon Gibbons 'Tackling the high cost credit problem: the importance of real-time regulatory databases' <http://www.responsible-credit.org.uk/uimages/File/Tackling%20the%20high%20cost%20credit%20problem,%20importance%20of%20regulatory%20databases%20final.pdf> accessed 4th April 2016, 70.

the credit union market a viable alternative to payday lending for credit unions themselves.

It is interesting to note also the applicability of the criminal law to the payday lending market by states in the US. In a similar vein to those acting outside the old CCA74 licencing regime, there is the possibility of criminal prosecution for acting outside legal lending laws in some states. For example, in Georgia, persons offering loans that are less than $3000 and interest rates in excess of 16%[365] are liable for a $5000 fine and a one-year prison sentence, for every loan agreement made that does not comply with state usury laws.[366] Over and above the infringement of the regulatory regime, there is the possibility that other criminal laws could be used to sanction payday lenders who deceive consumers. Indeed, commentators highlight the role of fraud in predatory lending[367] and that the Federal Trade Commission Act has been utilised 'to address predatory lending abuses when borrowers have been misled or deceived about their loan terms'.[368] Indeed, such deceptive practices have been highlighted in Ohio, where a 'survey revealed … [lenders were] giving consumers false or misleading information about the cost of credit.'[369]

In the UK payday loans market, costs of and terms credit are generally presented to the consumer at the point of sale.[370] However, as noted in previous sections, Wonga have misled consumers during the debt recovery process. Indeed, by sending letters from fake law firms, it has been noted that Wonga are potentially liable for fraud or

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[365] Georgia Code § 16-17-1(a)(1)(G).

[366] Governor's Office of Consumer Protection 'Payday Loans' < http://consumer.georgia.gov/consumer-topics/payday-loans> accessed 4th April 2016.

[367] Ryder (n 326) 75. Ryder further notes that 'the link between predatory lending and fraud has … been recognized by the [US] judiciary';
see also: Hirsh Ament (n 321) 379.

[368] US General Accounting Office 'Report to the Chairman and Ranking Minority Member, Special Committee on Aging, U.S. Senate: Consumer Protection Federal and Sate Agencies face challenged in combating predatory lending' < http://www.gao.gov/new.items/d04280.pdf> accessed 4th April 2016, 33.

[369] Creola Johnson(n 334) 32.

[370] For example see: Wonga 'Welcome to Wonga' available at < https://www.wonga.com> accessed 23rd March 2016.

impersonating a solicitor.[371] It will be interesting to see whether the FCA will be willing to take action in the criminal courts against Wonga. The FSA was renowned for the negligible use its powers to prosecute for offences that did not arise from FSMA.[372] Indeed, such action could be what the FCA needs to take to show the payday loans market that it means business.[373]

Finally, once again the issue of resources raises its head. Indeed, it has been noted that 'many states do not have the resources to regulate and monitor the payday lending industry'.[374] In a similar vein to the OFT, payday lenders appear to be able to harm consumers due to the lack of funds states have to enforce their regimes.[375] This underpins the argument that, in order to have an effective consumer protection regime that actively deters breach of that regime, not only does a regulator need strong powers, but resources to enforce those powers.

This section has considered the approach of the US, predominantly at state level, to the regulation of the payday lending market. It is clear that the approach of some states has been influential to the proposals of the FCA in relation to their approach to

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[371] As outlined by Dan Bunting 'the payday loan firm and the fake law firms – has Wonga committed a criminal offence? < http://www.legalweek.com/legal-week/blog-post/2352556/the-loan-firm-and-the-fake-law-firms-has-wonga-commited-a-criminal-offence> accessed 4th April 2016.

[372] The then Director of Enforcement and Financial Crime at the FSA, Tracey McDermott, suggested that this was not what the FSA was paid to do. Treasury Select Committee 'Fixing LIBOR: some preliminary findings' available at < http://www.publications.parliament.uk/pa/cm201213/cmselect/cmtreasy/481/48109.htm> accessed 4th April 2016) para 201.

The power of the regulator to prosecute offences outside of FSMA was confirmed in: *R v Rollins* [2010] UKSC 39 [20].

[373] This term has been used to describe the civil action taken against Wonga by the FCA. See: Kieran Duignan 'Wonga – A sign that the Financial Conduct Authority Mean Business' < http://www.pannone.com/media-centre/blog/financial-conduct-authority-blog/wonga-–-sign-financial-conduct-authority-mean> accessed 4th April 2016.

[374] Megan Knize (n 352) 330.

[375] Ibid.

the regulation of payday lending. Potential accessibility to credit issues linked to the FCA's cost caps are realised in the US, although the impact in the UK may not be quite as severe as the consequences as the caps have been on the other side of the Atlantic. The possible application of the criminal law presents an interesting opportunity to curtail the deceptive practices of payday lenders. However, given the history of UK regulators' lack of willingness to use their powers of criminal prosecution, it is unlikely that this will present a realistic tool in the pursuit of predatory, payday lender.

Conclusions and Recommendations

This chapter sought to analyse whether customers of the consumer credit market will be better protected under the regulatory eye of the FCA, predominantly enforcing FSMA, than they were under the previous CCA74 backed OFT regime. Section two began by discussing the avenues of redress available to consumers who have been harmed by unscrupulous lenders. It was highlighted that the expense of litigation and the lack of clarity in the legal provisions of the CCA74, both before and after the amendments by the CCA06, acted as a barrier to recovery. With no similar consumer-led redress mechanism under FSMA, as enforced by the FCA, the unfair relationships provisions remain in force to allow consumers to take action against market actors, or be used as a defence when debts are being recovered by lenders through the courts. Therefore, it appears that there will be no significant improvement in the ability for unfairly treated consumers to obtain redress through litigation. On the other hand, the FOS will continue to be a fundamental mechanism for harmed consumers to gain compensation, not least for users of the high cost credit market.

Section three continued with an analysis of the level of protection regime, which highlighted two key issues causing hindrance to the Office's performance as market regulator: Firstly, a stark lack of funding limited the enforcement action that the OFT could take in pursuit of the protection of consumers, leaving many who had suffered unfair treatment at the hands of unscrupulous lenders without redress. Secondly, the OFT did not have legal mechanism to take action on behalf of consumers, that would see money put back into their pockets. As such, the OFT was plagued by both a lack of funding and inadequate legal powers with which to protect consumers. This led to approximately £450m worth of consumer harm going without compensation. By contrast, the FSA, backed by FSMA, had the power to impose redress requirements on authorised financial institutions that failed to treat their customers fairly. This ethos, and indeed legal power, has been brought forward to the FCA's regime, and such action has already been seen in the consumer credit context against Wonga in the 'fake lawyers' incident. This positive action will, arguably, assist the protection of consumers, not least due to the fact that they will not necessarily be required to engage expensive legal services in order to seek redress. Furthermore, the fact that the

FSA can now directly fine those who mis-treat credit market consumers and, are in breach of the handbook, will arguably deter market actors from treating consumers unfairly. There are, however, issues with the stringent nature of the authorisation regime, which appears to be taking too long in enabling new actors into the market, having a negative impact on competition and therefore a negative impact on consumers. Indeed, from an overarching regulatory point of view, there is a need to focus on ensuring that actions that are intended to secure an appropriate level of consumer protection do just that.

Specifically in relation to high-cost short-term lending, the FCA's proposed cost cap on payday lending may drive consumers to higher cost credit products, or even illegitimate sources of credit; the latter coming with the added problem of a lack of any regulatory protection for borrowers. These issues are supported by reference to research into capping the cost of credit in the US and have also been recognised by the FCA. As such, where the FCA is clearly committed to ensuring that credit products offered to consumers are affordable, it is submitted that a cost cap is not the best option. Therefore, there is a need, following the introduction of the cost cap in January 2015, to periodically review the impact of the cap to ensure that it is not having a negative impact on the welfare of consumers. In order to protect consumers of the high-cost short-term credit market, there are three clear alternative options the FCA could pursue:

Firstly, rather than capping the cost of credit, and therefore pricing some consumers out of the, the FCA could limit the amount of credit that can be advanced to a borrower based on a percentage of their income. Whilst this will clearly lead to some borrows reaching this limit, and therefore unable to access credit, this decision is based on the financial situation of the individual borrower, rather than what the FCA believes to be an affordable cost level for all consumers. Secondly, there is a need to ensure that lower cost alternatives to payday loans are available. As noted above, this may be achieved through de-regulation of the credit union market. Although, more action needs to be taken to ensure that credit unions can offer such products in a manner that both benefits the consumer, and is profitable for their business. Thirdly, there is a need to increase flexibility in the payday loans market with regards to the

repayment of loans. The FCA proposes to prevent the re-financing of part of a loan. However, surely it is better to allow a borrower to repay part of the loan and fees, rather than default on the loan altogether. For example, under the FCA's proposed cost cap there will be a limit of £24 per month, per £100 advanced. If a borrower enters into an agreement for £100 for one month, she will repay £124 at the end of that month. Under the proposed rules, should that borrower be unable to repay the loan for two months, she will incur a maximum £15 default charge, in addition to a further £24 in interest. Therefore, this loan would cost a total of £163 by the end of the two-month period.

By contrast if the government implemented legislation which required lenders to accept a minimum of 50% of the loan amount, in addition to the interest charged that month, £74 in this example, with a view to the borrower repaying the other 50% of the loan plus another months' worth of interest on the outstanding amount, the total paid back by the borrower over the two months would be £136; the second month's repayment being £62. This would encourage borrowers, should they only be in a position to repay part of their loan, to take positive action and make the lender aware of this, as opposed to feeling there is no option but to default on the loan. This 'bit by bit' approach arguably facilitates a more co-operative relationship between lender and borrower, in addition to helping a borrower to pay their debts. This is something that will appropriately protect consumers, whilst providing them freedom to engage in credit products and allowing businesses to operate profitably in the provision of such products.

Whilst lenders may despair at offering this level of flexibility, they need to be mindful of the characteristics of the consumer they are dealing with. Indeed, if they want to continue to profit by lending money to consumers who are struggling to make ends meet, lenders need to be prepared to make some sacrifices too. At the beginning of this chapter, reference was made to the new age tallyman, the rent-to-own market, that is causing devastation to family finances due to tying them into multiple 'seductively' affordable repayment plans. Research for this chapter has yielded very little information with regards to how the FCA will tackle this problem. It is recommended that, once the FCA finishes enjoying the publicity of tackling a topical

issue, it must focus on the hard-selling of everyday goods on extortionate finance packages which tie consumers into repayments, often for longer than the product actually lasts. The commission driven sales tactics within this market are arguably as shameful as that of PPI mis-selling scandal, and should be dealt with in a similar manner.

Finally, in section five, there was mention of the applicability of criminal sanctions to those engaged in predatory lending. As noted, the FCA could rely on existing laws to take action against lenders who act in a manner that amounts to the deception of the consumer. In this vein, more needs to be done to protect consumers from instances where the provision of financial products is done in a manner that exploits the consumers' vulnerable position. Therefore, the FCA should consider criminalising the gravest of examples of exploitation, such as where affordability assessments are misrepresented to the consumer by the lender in order to obtain personal commission. This could arguably amount to the offence of fraud by false representation, or obtaining property by deception, but the FCA would need to grow stronger teeth than the FSA, and make use of the powers afforded to it. It is currently too soon to categorically state whether or not the FCA is achieving its objective in securing an appropriate level of protection for consumers. Its bigger teeth are certainly having a deterring effect, causing those who feel they may fall foul of the regime to exit the market. However, whether reduced market actors and more tightly regulated products will, on balance, positively affect customers, remains to be seen.