Review of Consumer Credit Act and Regulations...From Consumers' Perspective

A CONSUMER COUNCIL OF FIJI REPORT

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Review of Consumer Credit Act and Regulations…From Consumers' Perspective

A Report

by

Professor Ram Karan

July 2012

CONSUMER COUNCIL OF FIJI

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The views expressed in this report is not necessarily those of the Australian Government or the Australian Agency for International Development (AusAID).

Responsibility for any errors or omissions remains solely mine.

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Terms of Reference for the Review

This report has been prepared for the Consumer Council of Fiji in accordance with the following Terms of Reference:

Review the Consumer Credit Act 1999, Consumer Credit (Amendment) Act 2006 and Regulations 2009

- Analyse and simplify the Consumer Credit Act, Consumer Credit (Amendment) Act 2006 and Regulation, under separate headings, into non technical language which is easily understood by ordinary consumers and credit providers.
- Establish whether calculations and formula are easy to understand. Show an example of calculation using a case study. Provide any materials that can be used to educate consumers to calculate interest.
- Highlight deficiencies in the laws based on consumer complaints that need to be better addressed to better protect consumers accessing financial services on credit.

Develop Resource materials on Consumer Credit Act

- Develop resource materials in simple language to empower ordinary consumers including the credit providers on the rights and responsibilities of a consumer and the credit provider; and
- Develop case studies (using consumer complaints) under separate headings (insurance, mortgage, Bill of Sales, Hire Purchase etc) to highlight systemic problems and unethical practices consumers faced and the remedy available under Consumer Credit Act, Consumer Credit (Amendment) Act 2006 and Regulations.

Executive Summary

While credit plays a very important role in the functioning of the economy, generally there is imbalance in the knowledge and bargaining powers of consumers and credit providers. Many consumers do not know how to use credit wisely and many credit providers are so highly knowledgeable that they use credit to their advantage, often unfairly. Consequently, credit providers often exploit the consumers.

Credit contracts come in various forms, such as hire purchase agreements, loan and mortgage documents, consumer leases, guarantees and bills of sale, which are normally technical and legally binding documents. Such documents are often drafted in fine print with various terms and conditions that purport to give consumers rights and responsibilities. However, in reality, consumers do not fully comprehend the complex legalities within the documents that can be confusing and contradictory, particularly to the average consumer who lacks legal knowledge and understanding. Consequently, consumers fail to realize the serious implications and treat these agreements as mere paperwork to be completed for the transaction. Often bad or unfair market practices are encountered where certain terms and conditions in the credit contracts are drafted in such a manner that it dilutes the consumers' right to remedy, causing immense ambiguities and lack of protection in instances where there is a breach of contract by the credit provider.

Prior to the Consumer Credit Act 1999, there was no legal safeguard for consumers. Credit transactions occurred mainly by contractual agreements prepared by credit providers. Consumers had no option but to accept the terms and conditions imposed by the credit providers. The Consumer Credit Act 1999, Consumer Credit (Amendment) Act 2006 and Regulations 2009 were enacted to remedy this imbalance in power of the two parties.

However, this study finds that the Act and the Regulations have made little difference. They largely serve to legitimize the practices that existed prior to the enactment of these legislations. In some instances the law expressly allows credit providers to exploit the consumers. For example, interest charge in all cases is to be determined by applying the daily percentage rate to the unpaid daily balances except for a hire purchase agreement where Rule of 78 will apply. Rule of 78 imposes the highest interest charge in the earliest part of the credit term, then diminishes and charges the lowest amount in the last period of the credit term. This unfairly allows credit providers to take the bulk of the interest in the early part of the credit term, and penalises the consumers if they pay the debt off early.

Consumers, therefore, continue to be exploited by credit providers. The real problem seems to be that consumers are not motivated to protect their own interests until such time that they find themselves in trouble. In addition, the legislation is fraught with complicated finance terms, legal jargon and complex mathematical formulae. All these are apparently intended to enlighten, educate and empower the consumers. This research, however, has revealed that comprehending these is beyond the ability of average consumers, let alone using the legislation for the purpose of negotiating contracts with credit providers. In reality, consumers are normally given 'standard' contracts to sign, perhaps not much different from the practice that existed prior to the enactment of the Consumer Credit Act in 1999, Consumer Credit (Amendment) Act 2006 and Regulations in 2009.

Therefore, just as consumers had no option but to accept the terms and conditions imposed by the credit providers before the enactment of the legislations, they have no option but to do the same today. The new pieces of legislation have apparently not only served to legitimise the usual practice of the credit providers, but the complexity of the legislation also enables the credit providers to sneak in terms and conditions in credit contracts that unfairly favour them to the detriment of consumers' interests.

With the deregulation of the financial markets and free international trade with ensuing cut-throat competition among credit providers, the consumer credit market has changed dramatically. The use of credit in retail stores is now far more prevalent, particularly to pay for white goods, furniture and electronic equipment. There has also been a spectacular growth in 'plastic money' (credit and charge cards) leading to a radical change in attitude to credit, from focusing on debt as a last resort to regarding credit as part of a suite of financial services to be routinely used. Luckily, this problem has not become as chronic in Fiji as it is in most developed nations.

Nevertheless, the imbalance in power between the two parties that the legislation in Fiji attempted to correct has apparently become worse. By evaluating these pieces of legislation from consumers' perspectives, this study has identified numerous problem areas and made recommendations to correct this imbalance.

The provisions of the Consumer Credit Act 1999, Consumer Credit (Amendment) Act 2006 and Regulations 2009 have been analysed and written in non-technical language under major headings such as Hire Purchase, Mortgages, Consumer Leases, Pre-contractual Disclosure, Guarantees and Guarantors, Linked Credit Provider, Insurance and Advertising. The formulae in the law are simplified and explained with examples that are easy to understand. Problems faced by consumers are highlighted by including actual cases wherever possible.

Introduction

Need and Purpose of Review

Consumer credit has become so popular today that economies of most developed nations revolve around credit. Credit allows consumers to spend more which propels the economy. Hence, credit drives consumer spending and consumer spending drives the economy.

So consumer credit has a very big influence on keeping the economy lively. To encourage production of goods and services, our economy needs consumers to spend. Credit gives both the producers and the consumers the ability to do just that. The problem, however, is that generally there is imbalance in knowledge and bargaining power between the two parties. Many consumers do not know how to use credit wisely and many credit providers are highly knowledgeable as to how to use credit to their advantage, often unfairly. This calls for ways to protect the consumers.

No official data seems to be available on consumer indebtedness in Fiji. However, the frequency of complaints regarding repossession of hire purchase goods lodged with the Consumer Council of Fiji and mortgagee sales of family homes advertised in newspapers indicate that many consumers in Fiji might also be caught up in a never-ending debt cycle which has devastating effects on the well-being of many individuals and families. This is not only a personal problem or even a national problem; it is a global problem that can have very serious social and economic consequences. To combat this escalating problem a review of the consumer protection regulations of Fiji has become crucial.

Consumer Credit Act 1999, Consumer Credit (Amendment) Act 2006 and Regulations 2009

Prior to the Consumer Credit Act 1999, credit transactions occurred mainly by contractual agreements prepared by credit providers. Consumers had no option but to accept the terms and conditions imposed by the credit providers. They had no legal safeguard. The Consumer Credit Act 1999, Consumer Credit (Amendment) Act 2006 and Regulations 2009 were enacted to remedy this imbalance in power between the two parties.

These pieces of legislation set down minimum compliance requirements for the drafting and executing of credit documents, as well as requirements for full and clear disclosure of terms and conditions to the consumer at the time of signing and execution (s12-s15). In addition, hardship clauses of the Act (s65-s74) also provide for the right to adequate remedy, which consumers can access and utilize for their benefit, particularly during adverse economic times when there is greater tendency for credit facilities to be abused. More detailed information relating to specific aspects of the credit contract are provided by the regulations.

Despite this new legislation, the consumers continue to complain about unfair practices by credit providers. Of particular concern to the Consumer Council for many years has been hire purchase which has consistently featured in the top ten most recurring complaints registered with the Council annually. In the last four years, the Consumer Council of Fiji received 225 complaints from hire purchase customers alone. The number of such complaints lodged with other authorities, complaints about other credit providers and those complaints not officially lodged at all are not known **(Consumer Council of Fiji, Terms of Reference).**

One reason that has generally been attributed to this observation is the lack of consumer credit education. It is argued that for consumers to have access to just, fair and competitive financial services, it is essential that consumers are educated to allow them to make informed choices in the marketplace. This will empower consumers to borrow wisely and force credit providers to offer fairer terms and conditions to the consumers. Any consumer education should definitely help to correct the imbalance in the bargaining power of the two parties. However, can consumer education serve as adequate protection for all consumers?

Protecting the Vulnerable Consumer Group

The behavioural concepts of bounded rationality, bounded willpower and bounded self-interest at least partially explain why consumers generally are poor protectors of their own interests. This is perhaps one reason why the Consumer Council's 'research and complaints data reveal that almost 96%, if not all the cases, is due to lack of understanding of the terms and conditions of the credit facility'.

The Council's finding that 'consumers don't ask the right questions to understand the risk associated with the credit and what protection measures are in place to safeguard their interests' only further confirms that consumer behavior is characterised by traits as bounded rationality, bounded self interest and the 'impulsive self'. For these reasons they not only don't ask questions, but they probably don't want to ask such questions. Consequently, these are some reasons why some consumers lightly take and sign credit contracts which are normally technical and legally binding and do not realise the full implications until they actually get into problems.

To make matters worse, contract documents are often drafted in fine print with legal terms which average consumers find confusing, contradictory and difficult to comprehend. Often these are considered mere paperwork comprising 'standard' documents that have to be signed with any credit provider. This is thus generally seen as unavoidable requirement, irrespective of which credit provider the consumer goes to. So if you want the credit, you just sign it. Reading and analysing legal documents serves no useful purpose. These are some reasons why some consumers get into credit contracts that are drafted in such a manner that they dilute the consumer's right to remedy, causing immense ambiguities and lack of protection where there is breach of contract by the credit provider. It is therefore not surprising that some consumers are 'caught in a never-ending debt cycle' as found by the Consumer Council of Fiji.

Assumptions for Analysis of Consumer Credit Act 1999 from the perspective of consumers

Consistent with research findings of consumer behaviour outlined above, this analysis is based on the following assumptions:

- Most consumers have bounded rationality, bounded willpower and bounded self-interest
- Most consumers are overly optimistic about their future financial security
- Most consumers are unable to shop around and compare products before buying
- Most consumers place trust in credit providers and do not suspect that they will engage in unconscionable practice
- Most consumers do not read consumer protection legislation
- Most consumers cannot understand consumer protection legislation
- Most consumers treat contract documents as "standard" and do not read them
- Most consumers lack resources to seek legal advice before signing contracts nor seek redress in the event of disputes
- Most, if not all transactions occur between parties of unequal strength. Individual consumers with limited resources are faced with corporate credit providers with disproportionately superior expertise and resources

Do Existing Laws Protect The Consumers?

The Consumer Credit Act 1999, Consumer Credit (Amendment) Act 2006 and Consumer Credit Regulations 2009 provide for the rights and responsibilities of both the consumers and credit providers. It would therefore appear that both parties have equal rights and responsibilities and both have equal resources and equal expertise to exercise their rights and honour their responsibilities. In reality, however, the situation seems to be very different. While the credit providers are normally very large corporations with resources to employ experts in finance and legal matters to deal with credit transactions, the average consumers have no such luxury.

Nevertheless, before signing any contract the consumer is reminded that if he/she has any concerns he/she has the right to seek information from the Commerce Commission (which absorbed the then Department of Fair Trading and Consumer Affairs in October 2010) or get legal advice (Consumer Credit Act 1999 s14; Consumer Credit Regulations 2009 - Form 2). The consumer is further reminded that if he/she still has any doubts after reading the contract documents, he/she must again contact the Department of Fair Trading and Consumer Affairs (which has now been absorbed into the Commerce Commission) or get legal advice (Form 2, cl.25). According to the Commerce Commission Decree 2010, however, the major function of the Commerce Commission is to do with regulation of the market, not dealing with individual consumer problems. Hence, the consumer has to rely only on the Consumer Council of Fiji or on paid private legal service for advice.

All these reminders to seek more information from consumer protection authorities and legal advice give the impression that the legislation empowers the consumers with their rights. In reality, however, most consumers do not have the time to go to consumer protection authorities or have the money to get legal advice. If they had the money they probably wouldn't buy on credit anyway. In addition, if a consumer, for example, is buying a fridge for $1000, he or she is not likely to spend another $500 to get legal advice even if he or she can afford it.

As can be seen, the requirement for consumers to seek information from consumer protection authorities and get legal advice serves not only to give a false sense of protection, but it can actually work against the interest of the consumers. In the event of a dispute the credit provider can point to the written warning on the contract documents where the consumer was reminded of his/her right to seek further information and get legal advice. If the consumer did not exercise this right then only the consumer is to be blamed. If the matter goes to court, the consumer might not get the sympathy of the court either.

Can A Consumer Succeed In A Legal Battle?

See for example:

Court may re-open unjust transactions

Section 70(1) provides that a court may, if satisfied on the application of a debtor, mortgagor or guarantor that, in the circumstances relating to the relevant credit contract, mortgage or guarantee at the time it was entered into or changed (whether or not by agreement), the contract, mortgage, guarantee or change was unjust, re-open the transaction that gave rise to the contract, mortgage, guarantee or change.

What this means is that a borrower or guarantor can apply to the court and claim that the credit contract or mortgage that he/she entered into or a change to the contract that was subsequently made was unjust. According to sub section (7), 'unjust' includes unconscionable, harsh or oppressive conduct.

If the court is satisfied with the claim, then it may re-open the alleged unjust transaction and hear both sides of the story. As subsection (2) provides, however, this is not going to be an easy matter to resolve. Before making a decision the court must take into account all the circumstances of the case as well as 'public interest' which can mean different things to different people.

Subsection (2) In determining whether a term of a particular credit contract, mortgage or guarantee is unjust in the circumstances relating to it at the time it was entered into or changed, a court must have regard to the public interest and to all the circumstances of the case and may have regard to the following-

(h) whether, and if so when, independent legal or other expert advice was obtained by the debtor, mortgagor or guarantor;

(i) the extent to which the provisions of the contract, mortgage or guarantee (before and after any change) and their legal and practical effect were accurately explained to the debtor, mortgagor or guarantor and whether or not the debtor, mortgagor or guarantor understood the provisions and their effect;

Section 72(1) tries to explain what would constitute unconscionable conduct with respect to annual interest rate, changes in interest rate e.g. after defaults in payment, establishment fee, fees or charges for prepayments (i.e. making payments in advance) and fees or charges for termination of a credit contract.

Subsection (2) states that the annual percentage rate or rates is unconscionable if and only if it appears to the court that -

(a) it changes the annual percentage rate or rates in a manner that is unreasonable, having regard to any advertised rate or other representations made by the credit provider before or at the time the contract was entered into, the period of time since the contract was entered into and any other consideration the court thinks relevant; or

(b) the change is a measure that discriminates unjustifiably against the debtor when the debtor is compared to other debtors of the credit provider under similar contracts.

Subsection (3) states that to determine whether an establishment fee or charge is unconscionable a court must compare it with the total cost of processing an application for credit or compare it with average cost of processing that class of contracts.

Subsection (4) states that a fee or charge payable on early termination of the contract or a prepayment of an amount under the credit contract would be unconscionable if and only if it appears to the court that it exceeds a reasonable estimate of the credit provider's loss arising from the early termination or prepayment, including the credit provider's average reasonable administrative costs in respect of such a termination or prepayment.

As these requirements of the law show, determining what constitutes unconscionable conduct is not easy. Rates and costs need to be compared with other rates, and fees and charges to be compared with average fees and charges or compared with estimated loss suffered by a credit provider. Regardless of how these amounts are calculated, they will always remain debatable. In addition, the law does not even attempt to define what constitutes 'harsh' and "oppressive" conduct.

Of course the court may take all the circumstances of the case as well as public interest into account before making a decision. However, as the law also says that the court may have regard to whether legal or expert advice was obtained by the borrower or guarantor and whether the provisions of the contract were accurately explained to him/her, there is a possibility that the court might find that if only the consumer had sought legal advice the alleged unjust contract, mortgage, guarantee or change could have been avoided, and the court may find the consumer at fault. Hence, the very provisions that appear to protect the consumers can actually work against them. How the major parts of the Acts and the Regulations protect or fail to protect the consumers or give only a false sense of protection are addressed in the analysis that follows.

Pre-Contractual Disclosure

The law requires the credit provider to give to the debtor a pre-contractual statement containing financial information specified by the regulations in the form prescribed by the regulations. The financial information to be provided includes:

(a) amount of credit

(b) annual percentage rate or rates

(c) calculation of interest charges

(d) total amount of interest charges payable

(e) repayments, and

(f) credit fees and charges

Most of this information is provided in the contract document but consumers might still not be aware because they often don't read the contract documents carefully.

What A Pre-Contractual Statement Should Contain

A pre-contractual statement must contain the following:

(A) Credit provider's name

For example, a bank, finance company or hire purchase retailer.

(B) Amount of credit

- As a general rule, the exact amount of credit (in dollars and cents) is to be stated.
- However in cases where the exact amount cannot be ascertained, then the maximum amount of credit agreed to be provided must be stated. An example of this would be the cost of construction of a building where the exact cost would be known only after the construction is complete.
- Where credit is provided for sale of land or goods by instalments, a description of the land and its price or description of goods and their cash price must be stated.

(C) Annual percentage rate or rates

- The rate of interest per annum for the credit must be stated
- If there is more than one interest rate, it must state how each rate applies e.g. 7% fixed for first 3 years and variable thereafter.
- If the interest rate is determined by referring to a reference rate, then the contract must state:

  (i) the name of the rate or a description of it

  (ii) the margin or margins (if any) above or below the reference rate to be applied to determine the annual percentage rate or rates

  (iii) where and when the reference rate is published or, if it is not published, how the debtor may ascertain the rate

  (iv) the current annual percentage rate or rates.

(D) Calculation of interest charges

The method of calculation of the interest charges payable under the contract and the frequency with which interest charges are to be debited under the contract.

(E) Total amount of interest charges payable

The total amount of interest charges payable under the contract, if ascertainable (but only if the contract would, on the assumptions in sections 158 and 160, be paid out within 7 years of the date on which credit is first provided under the contract).

Like all formal credit contracts, the assumption in Section 158 is that the hire purchase agreement in respect of the goods is in writing otherwise the agreement will be void. Unless the agreement is in writing and it has the date the agreement was entered into, it will be very difficult to determine the period for which interest charges are to be calculated. The assumption in Section 160 is that the hire purchase agreement is in accordance with Schedule 1 as applicable to hire purchase agreements. This is to ensure that all details such as amount of credit, annual percentage rate and methods of calculating interest are available in writing. Without all these in writing there can be endless arguments among the parties involved.

(F) Repayments

Where there is more than one repayment to be made, the contract must state the amounts of the repayments or the method of calculating the amounts, the number of repayments, the period over which they are to be paid, the total amount of the repayments, when the first repayment is to be paid and the frequency of making the repayments.

Also, if the contract provides for a minimum repayment, the amount of that repayment must be stated, if ascertainable. But if not ascertainable, then the method of calculating the minimum repayment must be stated.

(G) Credit fees and charges

The contract must include:

(a) A statement of the credit fees and charges that are, or may become, payable under the contract, and when each such fee or charge is payable, if ascertainable.

(b) The amount of any such fee or charge, if ascertainable, but if not, the method of calculation of the fee or charge, if ascertainable.

(c) The total amount of credit fees and charges payable under the contract to the extent that they are ascertainable.

In the event of a default in repayments, for example, some credit providers allegedly not only charge $2 per phone call for calling to remind the debtors but they also call them as frequently as possible. This is completely illegal. Junior members of staff have allegedly even been instructed to make frequent calls. Consequently, this has become an additional source of revenue for the credit providers. This is also illegal.

Recommendation

To protect the consumers from possible unconscionable practices the law needs to be amended to specify in the contents of contract documents shown in Schedule 1 the types of fees and charges and maximum amounts or the bases for determining maximum amounts that can be imposed by the credit providers.

(H) Changes affecting interest and credit fees and charges

This part of the law requires that if the annual percentage rate or rates or the amount or frequency of payment of a credit fee or charge or instalment payable under the contract may be changed, or a new credit fee or charge may be imposed, a statement or statements to that effect and a statement of how the debtor will be informed of the change or the new fee or charge must be included in the contract.

As in (G) above, this also provides too much freedom for the credit providers to change interest rates and impose new fees and charges as well as default interest rates at unspecified rates and amounts. All that the law requires credit providers to do is to state in the contract how they will inform the debtors of the change or new fees or charges. This law is apparently trying to provide for circumstances where changes, for example to the interest rate, may become necessary due to factors beyond the control of the credit providers e.g. when the Reserve Bank announces a change in the official interest rate. This, however, cannot be used as sufficient justification for keeping the credit consumers (borrowers) completely in the dark of possible changes and possible new fees and charges.

Recommendation

The law relating to disclosure of interest rates should be amended to specify the circumstances that will warrant possible changes to interest rates, whether they can be expected to go up or down, as well as new fees and charges together with maximum amounts or bases for determining maximum amounts that can be imposed.

(I) Statements of account

The frequency with which statements of account are to be provided to the debtor, except in the case of a credit contract for which the annual percentage rate is fixed for the whole term of the contract and under which there is no provision for varying the rate.

Recommendation

The exemption from providing periodic statements of account is apparently based on the assumption that where the interest rate does not change the statements of account will not contain new information that the borrower needs to know. Statements of account, however, typically contain not only interest charges, but also include fees and charges. These may be new or unusual fees and charges such as a penalty for dishonoured cheques and charges for phone calls and letters written to defaulting borrowers. To keep the consumers informed about the activities on their accounts, periodic (e.g. monthly) statements of account must therefore be mandatory.

(J) Default rate

(a) If the contract is a contract under which a default rate of interest may be charged when payments are in default – the contract must include a statement to that effect and the default rate and how it is to be applied.

(b) If the default rate under the contract is determined by referring to a reference rate – the contract must include

(i) the name of the rate or a description of it;

(ii) the margin or margins (if any) above or below the reference rate to be applied to determine the default rate;

(iii) when and where the reference rate is published or, if it is not published, how the debtor can ascertain the rate; and

(iv) the current default rate.

The disclosures required here can be very useful to a prospective borrower or hire purchase customer. These can forewarn the consumer of the likely consequences in the event he/she is unable to repay the debt. If there is any doubt about his/her ability to repay the consumer gets a chance to reconsider whether or not to sign the contract.

(K) Enforcement expenses

A statement that enforcement expenses may become payable under the credit contract or mortgage (if any) in the event of a breach.

Recommendation

The statement of enforcement expenses (Schedule 1) should specify the types and amounts or bases for calculating enforcement expenses that a credit provider can claim.

(L) Mortgage or guarantee

The contract should include a statement showing

(a) any mortgage or guarantee that is to be or has been taken by the credit provider, and

(b) in the case of a mortgage, a description of the property subject to, or proposed to be subject to, the mortgage, to the extent that it is ascertainable.

This information is equally important for protecting the interest of both parties.

(M) Commission

If a commission is to be paid by or to the credit provider for the introduction of credit business or business financed by the contract, the contract must include

(a) a statement of that fact; and

(b) particulars of the person by whom the commission is payable;

(c) particulars of the person to whom the commission is payable; and

(d) the amount, if ascertainable.

Note: Commission does not include fees payable by a supplier under a merchant service agreement with a credit provider, an amount payable in connection with a credit related insurance contract or commission paid to employees of the credit provider. Here a supplier would be the seller of the goods like Carpenters Motors (selling cars) and the credit provider would be the finance company like Carpenters Finance. The agreement between the supplier and the finance company is the 'merchant service agreement'.

(N) Insurance financed by contract

If the credit provider knows that the debtor is to enter into a credit-related insurance contract and that the insurance is to be financed under the credit contract – the contract must include

(a) the name of the insurer

(b) the amount payable to the insurer or, if it is not ascertainable, how it is calculated

(c) the kind of insurance and any other particulars prescribed by the regulations

(d) if the credit provider knows of any commission to be paid by the insurer for the introduction of the insurance business - a statement that it is to be paid and, if ascertainable, the amount of the commission expressed either as a monetary amount or as a proportion of the premium.

The particulars required to be disclosed by the above law are important. However, the critical information not required to be disclosed is 'who pays the insurance premium and whose interest the insurance protects'. It is probably for this reason that some credit providers are able to include insurance premiums in the cost of goods sold on hire purchase to be paid by consumers but which protects the interest of the credit providers only. As the debtors don't get a copy of the insurance policy, they are kept completely in the dark.

One credit provider, for example, includes insurance by increasing the interest from 15.9% to 20.9% i.e. by 5%. If the relevant goods are damaged or destroyed by acts such as fire or flood, the credit provider claims the unpaid balance from the insurance company. The debtor who pays the insurance gets nothing other than being relieved from paying the balance of the debt.

Recommendation

If there is credit-related insurance, the credit contract (Schedule 1) must clearly state who pays the insurance premiums and whose interest the insurance cover will protect. If the cost of the insurance is borne by the debtor, then the credit provider should be required to provide a copy of the insurance policy to the debtor.

Unwritten Contracts

The law also permits ways of making a credit contract that do not involve a written document, if authorised by the regulations. The regulations, however are silent on this, although unwritten contracts are quite common. A home owner, for example, might hire a tradesman to renovate his/her kitchen, they agree on a price, the home owner gives a deposit and they make a verbal contract for the home owner topay the balance on completion of the job. Similarly, when a passenger gets into a taxi and asks the driver to take him/her to a particular destination they enter into an unwritten contract. In situations such as these written contracts will be impractical.

Complexities In Credit Documents

Although the law requires almost all the relevant information to be disclosed in the credit documents, there is no guarantee that an average consumer will be able to understand them. In addition, credit providers might use a variety of terms for 'credit fees and charges' which may not only confuse the consumers but which may also make the real cost of the loan significantly different from the advertised interest rate. The annual percentage rate, reference rate and comparison rate are just some terms that a consumer might have difficulty understanding. These are explained below.

What Is Annual Percentage Rate?

The Annual Percentage Rate (APR) is the interest rate charged on a loan on a yearly basis. It is calculated on the amount of loan outstanding. When a borrower repays the loan in installments, part of the installment goes towards paying the interest and the remainder goes towards repaying the amount borrowed (principal). As the borrower pays the loan back on a regular basis, both the principal and the interest payment he/she makes reduce.

To understand how to calculate these, assume you had a loan of $10,000 at 10% interest per annum (year). Interest for one year will be $1000 (10000x10%) which is equal to $83.33 (1000/12) per month. If the loan was to be repaid in monthly installments and your repayment was $150 per month, then the amount of loan repaid in the first month will be $66.67 (150-83.33) and the balance (amount still owing) will be $9933.33 ($10000-66.67) .

Interest for the second month will be $82.77 (9933.33x10%)/12 and the amount of loan repaid will be $67.23 (150-82.77) and the amount owing at the end of the second month will be $9866.10. Calculations for the third and subsequent months will be done in a similar way. As these calculations are very tedious, they are normally done by computers.

What Is A Reference Rate?

Originally, the term reference rate was referred to as the Prime Rate, which indicated the rate of interest at which banks lent to favored customers, i.e., those with high credibility, though this is no longer always the case. Hence, a reference rate can also be some variable interest rate expressed as a percentage above or below the prime rate or some other benchmark rate that banks commonly use like interbank lending rate e.g. LIBOR - London Interbank Offered Rate or Reserve Bank of Fiji's Overnight Policy Rate (OPR) at which commercial banks lend to each other in the interbank market. In May 2011 the OPR was 1.5 per cent.

A reference rate can also be any publicly available quoted number or value that is used by the parties to a financial contract such as a consumer price index, house prices or unemployment rate. The difference between the annual percentage rate and the reference rate, called the margin, could be either more or less.

In addition, if the comparison rate is given then the credit provider must give a warning to the potential debtor. What the comparison rate means and how useful it might be is explained below.

If legislation required standard terms to be used, this information would be more useful to the consumers.

What Is A Comparison Rate?

When we borrow money from a bank or any other financial institution, they charge not only interest but also impose several other fees and charges which make the cost of borrowing higher than the interest. In addition, these fees and charges differ from bank to bank both in terms of number of fees and charges as well as amounts charged. Therefore, although a number of banks might offer loans at the same interest rate, the true cost of borrowing from them will be different. Interest rates alone are therefore not a very good basis for comparing the cost of borrowing from different banks.

To make the consumer aware of this, the pre-contractual statement may also include the 'comparison rate' calculated as prescribed by the regulations and accompanied by the warnings set out in the regulations in the following form:

"Care should be taken in using this comparison rate. Differences between contracts, and variations permitted during the period of a contract can detract from its usefulness or even lead to a false impression".

The law also says that if an advertisement includes a comparison rate it must also include a warning that the comparison rate is accurate only for the example given.

The formula for calculating the comparison rate, however, is so complex that most consumers are unlikely to understand how it is calculated and what it means.

A comparison rate is basically the effective rate. It is a rate which includes both the interest rate and fees and charges relating to a loan, reduced to a single percentage figure. For example, a bank's advertised interest rate may be 7.12% and its comparison rate 7.45%.

How do we calculate the comparison rate?

The comparison rate is calculated in accordance with a standard formula, specified by the regulations. The calculation according to this formula is normally done by computers. Basically, this formula takes into account:

- The amount borrowed
- The term of the loan
- The frequency of repayments
- The interest rate
- Ascertainable fees and charges connected with the loan except for government charges

What does that mean in simple terms?

The easiest way to explain comparison rates is to give an example:

Loan Amount	Interest Rate	Fees/Yr	Cost of Borrowing (Interest + Fees & Charges)
$10,000	10%	nil	$1,000
$10,000	11%	nil	$1,100
$10,000	10%	$100	$1,100

In the third example above the quoted interest rate is 10% which attracts $1,000 in interest per year (10,000 x 10%). The fees are $100 per year. This means a total payment of interest and fees of $1,100 per year, which is the equivalent of paying 11% interest (1,100/10,000).

Therefore, in the third example above, the interest rate is 10% while the comparison rate is 11%.

Can Comparison rates be misleading?

A Comparison Rate can be useful in determining if one loan has more fees and charges than a similar loan. However, the issue with Comparison Rates is that they assume that the loan will run for its full term.

Take the following example:

Application Fee	Yearly Fee	Total Fees - 30 years
$600	nil	$600
nil	$100	$3,000

Assuming Interest Rates are the same, the first loan looks more attractive as it has less fees over the life of the loan. However, most loans don't last the full 30 years. In the above example, if a consumer kept the loan for less than six years the second loan would look more attractive than the first loan because the total fees will be less than $600.

Comparison Rates do not include early termination fees that may be included with the loan as it is assumed a consumer will be keeping the loan for the full 30 years.

Why a loan amount is always quoted with a comparison rate?

A Comparison Rate is only valid for the loan amount quoted. The higher the loan amount the less significant the fees and charges become.

Take the following example:

Loan Amount	Rate	Fees/ Yr	Cost of Borrowing (Interest + Fees + Charges)	Comparison Rate
$10,000	10%	$100	$1,000 + $100 = $1,100	11%
$100,000	10%	$100	$10,000 + $100 = $10,100	10.1%

Note: The examples above are very simple, just to help understand how the comparison rate is calculated and why it is normally different from the interest rate. In practice there will be numerous loan amounts, numerous fees and charges and varying terms of loans, which make it virtually impossible for a consumer to calculate the comparison rate. For this reason comparison rates are calculated by computers and the law requires the lenders to provide them to prospective borrowers.

What costs does the comparison rate include?

- Nominal interest rate
- Loan approval and any other up front fees
- Known ongoing fees

What does the comparison rate exclude?

- Government and statutory fees (e.g. mortgage registration, stamp duty and value added tax) as these are standard regardless of lender or loan type
- Insurance products such as comprehensive car insurance premiums.
- Fees and charges that are event-based and may or may not apply throughout the life of your loan e.g. statement fees or early repayment fees.

Are comparison rates useful?

Comparison rates can be useful in determining which loan is better, provided the loan amounts, length of time for which money is borrowed (term of the loan), and other terms and conditions of the loans are very similar. If any of these, for example the loan amount is different as shown above, the comparison rates will also be different, although the interest rate and fees are identical. Also, the comparison rate will change if the borrower pays off the loan earlier than the full term of the loan.

Warning on comparison rates

It is for reasons such as those given above that the law requires a lender to include a warning immediately after the comparison rates are given.

WARNING: Care should be taken in using this comparison rate. Differences between contracts, and variations permitted during the period of the contract, can detract from its usefulness or even lead to a false impression.

Lenders in Fiji do not seem to provide comparison rates and therefore the need for warning doesn't even arise. For example, ANZ and Westpac provide only the following information:

With an ANZ Residential Investment Property Loan, you can:

- borrow up to 80% of the value of the property
- enjoy a low competitive interest rate.

Schedule of interest rates released by Westpac Fiji are as follows:

- Business Lending Rate - 9.99%;
- Residential Property Loan : Variable Rate – 7.75%, 1 year Fixed Rate – 7.25%;
- Investment Loan : Variable Rate - 8.25%, 1 year Fixed Rate - 7.25%;

Comparison Rate Schedule

What is a comparison rate schedule?

A comparison rate schedule details the various rates that apply to the lenders' products at various loan terms and various loan amounts.

Example: Car loan comparison rate schedule

When choosing a car loan, for example, there is a wide variety of different factors that should be considered to ensure you choose the right loan. Besides interest rates, you need to consider other costs such as ongoing fees and up-front charges which add to the cost of your loan over the loan term. These costs can vary between lenders and loans, so how do you make sure you are comparing "apples with apples". You can do this by using the comparison rates provided by the lender.

Loan Amount	Loan Term	Variable Rate Personal Loan (AAPR less 2%)	Variable Rate Personal Loan (AAPR less 1%)	Variable Rate Personal Loan (AAPR)	Variable Rate Personal Loan (AAPR plus 1%)	Variable Rate Personal Loan (AAPR plus 2%)
ANNUAL PERCENTAGE RATE						
		14.00%	15.00%	16.00%	17.00%	18.00%
COMPARISON RATE						
$5,000	2 Years	21.03%	22.02%	23.01%	24.00%	24.99%
$10,000	3 Years	17.01%	18.00%	18.99%	19.98%	20.97%
$15,000	4 Years	15.82%	16.81%	17.80%	18.79%	19.78%
$20,000	4 Years	15.36%	16.36%	17.35%	18.34%	19.34%
$25,000	5 Years	15.01%	16.01%	17.00%	17.99%	18.99%
$30,000	5 Years	14.84%	15.84%	16.83%	17.83%	18.82%
$50,000	7 Years	14.45%	15.45%	16.45%	17.44%	18.44%

How to use the comparison rate schedule

Say a consumer applies for a loan for $20,000 to be paid over 4 years. After checking his/her credit rating and ability to pay, the lender offers the consumer the loan at 16% interest p.a. for 4 years, which equates to a comparison rate of 17.35%. If a consumer goes loan shopping to another lender, the lender might offer the consumer the same amount of loan at the same interest rate but the comparison rate might be either higher or lower than 17.35%. The consumer will then need to look at the reasons for the difference and any other factors before deciding on which loan to take and from which lender. It is important to always remember the warning about relying on comparison rates.

WARNING: Care should be taken in using this comparison rate. Differences between contracts, and variations permitted during the period of the contract, can detract from its usefulness or even lead to a false impression.

Rights And Responsibilities of Consumers and Credit Providers

The complexities described above illustrate the need for consumers to read and understand all the pre-contractual disclosures before signing the contract. In many cases a pre-contractual disclosure (statement) may be the proposed contract document or a separate document or a number of documents. Consumers have the right to take these documents away to study them in detail and seek legal advice. They must ask questions and clarify any matter they don't understand and sign the contract only after they have fully understood all the rights and responsibilities under the contract.

To avoid getting a shock after getting into a contract it is important to clarify the meanings of legal terms used in contracts. For example, under a hire purchase contract, the buyer is leasing the goods and does not obtain ownership until the full amount of the contract is paid. However, under a bill of sale the title of the property is transferred from the seller to the buyer. A bill of sale is a legal document made by a 'seller' to a purchaser, which evidences the transfer of title to personal property from the vendor (seller) to the vendee (buyer). A debtor may, by written notice to the credit provider, terminate the contract unless the debtor has already obtained any credit or attempted to obtain credit under the contract. The credit provider, however, is entitled to retain any fees and charges already paid and demand any fees and charges incurred but not yet paid.

A credit provider, however, cannot impose fees and charges that are prohibited by the Consumer Credit Act nor impose amounts of fees and charges and interest that exceed the amount that may be charged consistently within this Act.

This might appear to be simple. However, from a consumer's perspective, it can be quite problematic. Prohibited fees and charges are not clearly stated in the Act or the Regulations and the maximum fees, charges and interest are not specified either. A credit fee or charge cannot be charged in respect of a credit contract unless the contract authorises it to be charged. The law provides for offences for imposing a monetary liabilities on debtors that are prohibited.

The consumer must therefore read the contract very carefully to see what fees and charges are authorised by the contract and he/she has to be very vigilant in order to find out if the credit provider has charged prohibited fees and charges and whether the amounts of authorised fees and charges have exceeded the maximum allowed. It is due to such vulnerability of consumers that credit providers can impose new fees and charges at unreasonable rates like $2 per phone call and get away with them.

The law prohibits a credit provider from entering into a credit contract that contravenes these requirements and makes it an offence if he/she contravenes any of these requirements.

Penalties for contravention

(1) A person who commits an offence under this Act and is convicted is liable to a fine of $5,000 for a first offence and $10,000 for a second or subsequent offence. This means that if a person is found guilty of committing the offence for the first time, he or she can be fined $5,000. For second and subsequent offences the fine will be $10,000.

(2) If a natural person is convicted of any offence against this Act and the court in which the person is convicted is of the opinion that the offence was committed with intent to defraud, the person is liable, in addition to or instead of any other penalty, to imprisonment for 3 years. A natural person is a real human being, as distinguished from a company which in law is treated as a legal entity like a person. This simply means that only a real human being can be sent to jail; a company can't be sent to jail.

(3) The maximum penalty for an offence under this Act committed by a body corporate is a fine that is 5 times the fine provided for in subsection (1). This means that since a company cannot be jailed, it should be punished by imposing a fine that is five times as much as the fine imposed on a real human being.

If a person suffered loss as a result of the contravention, the court may order the offender to pay a specified amount as compensation for the loss.

Loan to be in money or equivalent

A loan must be in cash or money's worth and is made in full without deducting an amount for interest charges under the contract. This is to prohibit a practice where a credit provider might want to deduct the interest from the loan amount (i.e. taking interest in advance), giving the remainder as a loan and requiring the debtor to repay the full loan amount.

Early payments and crediting of payments

A credit provider must accept any payment under a credit contract that is made before it is payable under the contract, unless the contract prohibits its early payment. Sometimes there might be a penalty for early payment. From a consumer's point of view this is certainly not fair. But this seems to be a common feature of consumer credit law in many countries e.g. Australia, New Zealand, UK, Canada and USA.

The main reason for the prohibition or the penalty given by the lenders is that to lend a certain amount of money to a borrower at a fixed interest rate for a fixed period, a lender (bank) often has to borrow from another bank on similar terms. If the borrower repays his or her loan early, the bank still has to honour that contract with another lender and pay the fixed interest rate on the money it has borrowed. So it has to prohibit early repayments or impose a penalty for early repayment.

If the banks operated on 100% borrowed money, then this explanation would make sense. However, the banks also get money from deposits on which they normally pay very low interest compared with the interest they charge on their lending – often the interest on deposits is less than half the lending rate. In many instances the banks might actually borrow to lend. However, they never reveal the interest rate at which they borrow. So the consumer has no way of verifying this claim.

The truth seems to be that the banks use this as an excuse to justify the early payment prohibition that ensures continued interest income for the whole term of the loan and the penalty to make up for any loss of interest income resulting from early repayment. Another point to consider is that everyone who takes a loan is not likely to repay the loan earlier than its full term. Only a very small percentage of the borrowers might be able to do this. Early repayment by such a small percentage is unlikely to break the back of the banks.

Also according to the law, a credit contract may not prohibit the paying out of the contract at any time and a debtor or guarantor under a credit contract is entitled to pay out the credit contract at any time. But if the contract prohibits early repayment, then this provision of the law becomes meaningless.

All this might show why it is so important for borrowers not only to read the contract documents very carefully but also to ensure they are amended as necessary before signing them. However, a consumer often has no power to amend the contract. Every credit provider that he or she goes to might have the same terms and conditions. So the only choice he or she might have is 'take it or leave it'. This law ensures that once a person gets into debt he or she remains in debt for the full duration of the contract period – hence the saying "once in debt always in debt". It is therefore grossly unfair to the borrowers.

Recommendation

The existing law relating to prohibition on early repayments and penalty on early repayments greatly favours the credit providers at the expense of the borrowers. To make the law fair to both lenders and borrowers the prohibition on early repayments and penalty for early repayments should be abolished forthwith.

Definitions relating to interest

'Annual percentage rate' under a credit contract means a rate specified in the contract as an annual percentage rate e.g. 15% per annum;

'Daily percentage rate' means the rate determined by dividing the annual percentage rate by 365 e.g. 0.041% (15/365);

'Default rate' means a higher annual percentage rate permitted by section 28.

Default interest

While the Act says that the annual percentage interest rate should remain unchanged, it permits a credit contract to provide for a differential rate if the higher rate is imposed only in the event of default in payment, in respect of the amount in default and while the default continues. This means that the higher rate of interest would be charged only on the amount that was in arrears and only for the period it remains unpaid.

The consumer must therefore read the contract and be aware of this before signing the contract.

Limit on interest charges

Where there is one interest rate the maximum amount of an interest charge that may be imposed is the amount determined by applying the daily percentage rate to the unpaid daily balances.

An interest charge under a credit contract for a month, a quarter or half a year may be determined by applying the annual percentage rate or rates, divided by 12 (for a month), by 4 (for a quarter) or by 2 (for half a year), to the whole or that part of the average unpaid daily balances to which it applies, except for a hire purchase agreement where Rule of 78 will apply.

A credit provider must not demand payment of the interest charge at any time before the end of the day to which the interest charge applies. For example, if the daily interest on a loan is $2.00 and a statement commencing from the beginning of the month is given on the 15th of the month, the interest charged will be $28 (14x$2) – not $30 (15x$2).

Cooling Off Period

It is probably because of the complex nature of contract documents and legal consequences of entering a contract that many countries have a mandatory cooling off period before the contract becomes binding. For example, when a person buys a residential property in NSW (Australia) there is a five business day cooling off period after the exchange of sale contracts.

There are two copies of the sale contract: one for the buyer and one for the vendor (seller). They sign one copy each before they are swapped or 'exchanged'. During the five business days cooling off period, the buyer has the option to get out of the contract as long as he/she gives a written notice. The cooling-off period starts as soon as the contracts are exchanged and ends at 5pm on the fifth business day. A cooling-off period, however, does not apply if a person buys a property at an auction.

Recommendation

For sale and purchase of real estate, the Consumer Credit Act 1999 should be amended to include a provision for a five business day cooling off period within which the buyer has the option to get out of the contract by giving a written notice.

Guarantees and Guarantors

What is a Guarantee?

A guarantee is a commitment (promise) by a third party to make good in the event of a default by a party to a contract, by paying the money or providing the paymentdue from the defaulting party. A third party is someone other than a credit provider or a borrower who promises to pay the debt if the borrower is unable to.

The law requires a guarantee to be in writing and obligations must be read and understood by the prospective guarantor for the future security on the identified property.

Who is a Guarantor?

A guarantor is a person who makes a promise in writing to pay the debt of a borrower in the event the borrower is unable to repay the debt. He has to be stronger financially than the borrower (mortgagor) because he/she promises to carry the entire debt should the mortgagor default. As a result, guarantors are carefully scrutinised and they undergo a credit check and must also disclose assets, liabilities and income.

It's a huge responsibility. Also, guarantors have less control and fewer rights than the mortgagors (borrowers). Their obligation is the same as the mortgagors, but they don't have the luxury of being on the title. So they don't have any claim to the property.

As a result, it is very important for guarantors to know all of the circumstances of the person they are acting for and be confident the applicant for the loan will make the payments. Before signing, all guarantors should seek advice from a lawyer who is independent of the credit transaction.

It is smart to secure credit insurance in case things go wrong. The guarantor and the applicant should also arrange other assets (collateral) or come up with a repayment plan, should the guarantor be called upon to repay the debt.

What is a Guarantor Liable For?

The law further prohibits a credit provider to get a guarantor to guarantee an amount that exceeds the sum of the amount of the liabilities of the debtor under the credit contract and the reasonable enforcement expenses for enforcing the guarantee. For example, if a debtor borrows $50,000 the lender can only ask the guarantor to guarantee this amount plus estimated enforcement expenses. If the amount of the guarantee exceeds the amount the debtor owes, the guarantee will be unenforceable.

A guarantee provided by a person under18 years of age cannot be enforced against the guarantor unless the guarantee document contains a clear statement to the effect that the guarantor is liable for the debt and is not entitled to an indemnity (legal protection) against the debtor.

In the case of a continuing credit contract, a guarantor may, by notice to the credit provider, limit the guarantee so that it applies only to liabilities related to credit previously provided to the debtor and exclude guarantee of any additional debt.

Also, the law does not allow the liability of a guarantor to be increased without the written consent of the guarantor.

These provisions put brakes on the credit provider's ability to extract from the guarantor any more than the amount of debt he/she has guaranteed. However, the credit provider may still have other grounds to enforce the guarantee.

Protection Under Hardships

The Consumer Credit Act 1999 provides some protection to consumers who face hardships due to unforeseen circumstances and the credit provider wants to repossess the goods. As a guarantor will have to pay the debt in the event the borrower defaults, any protection this law gives to the borrower will also protect the guarantor associated with the debt.

The law does not relieve the debtor from his/her debt but only makes it harder for the credit providers to repossess the goods or take other harsh actions to recover their debts. By imposing a number of requirements on the part of both the credit providers and the debtors, the law attempts to achieve an orderly resolution of the problem. This might also give more time to the debtors to find means of getting out of hardships that would save the guarantor from having to pay the debt.

The law prohibits a credit provider from beginning enforcement proceedings against a debtor or a mortgagor in relation to a credit contract unless the debtor is in default under the credit contract and the credit provider has given the debtor, and any guarantor, a default notice, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default.

However, a credit provider is not required to give default notice or wait for at least 30 days if he believes on reasonable grounds that it was induced by fraud on the part of the debtor or mortgagor to enter into the credit contract or mortgage.

If a credit provider in a default notice intends to take action because the debtor or mortgagor is in default under the credit contract or mortgage, the debtor, mortgagor or guarantor may remedy the default (pay the amount in arrears) within the period specified in the notice, and the contract or mortgage is then reinstated and any acceleration clause will become unenforceable – Section 81 (1). This gives the debtor additional time to pay the amount in arrears.

Before a credit provider can enforce a judgment against a guarantor he/she must obtain a judgment against the debtor for payment of the guaranteed liability. Also, he/she can do this only if the 30 days written notice of demand for the payment is not met. This gives time to the guarantor to remedy the default.

The law prohibits a credit provider from taking possession, without the consent of the court, of mortgaged goods if the amount currently owing under the credit contract is less than 25% of the amount of credit provided or $2,000, whichever is the lesser. This is apparently designed to deter credit providers from repossessing goods where most of the debt has been paid.

Assume a borrower initially borrowed $100,000 and after making regular repayments for 10 years the balance owing on his account is $15,000. This is equal to 15% of the credit provided (15000/100000x100). But because this is greater than $2,000, the lender can repossess the property.

In another example assume a borrower initially borrowed $5,000 and after making regular repayments over a period of time his account balance is $1,150. This is equal to 23% of the credit provided (1150/5000x100). Since this amount is under 25% of the credit provided as well as under $2,000, the lender cannot repossess the property.

A debtor, mortgagor or guarantor who has been given a default notice or a demand for payment any time before the end of specified period can negotiate with the credit provider for a postponement of enforcing payment or any action taken under such proceedings.

When a postponement is negotiated with a credit provider after the credit provider has taken possession of property subject to a mortgage, the mortgagor has to pay the reasonable costs of the credit provider in taking possession of the property.

A debtor, mortgagor or guarantor may apply to the court for a postponement and the court may order or refuse to order the postponement.

If a mortgagor nominates a buyer for the goods the credit provider must offer to sell the goods to that person for the estimated value or, if there is a written offer to buy the goods for a greater amount, then at that amount.

The credit provider must sell the goods repossessed for the best price reasonably obtainable and credit a mortgagor with a payment equivalent to the proceeds of a sale less any amounts which the credit provider is entitled to deduct from those proceeds.

A credit provider that sells mortgaged goods can deduct from the proceeds of the sale only the

(a) amount currently secured by the mortgage, not any more than the amount required to discharge the contract

(b) amount payable to discharge any prior mortgage to which the goods were subject

(c) amounts payable in successive discharge of any subsequent mortgages to which the goods were subject and of which the credit provider had notice

(d) credit provider's reasonable enforcement expenses.

If the court is satisfied that the goods were not sold for the best price reasonably obtainable, then it may order the credit provider to compensate the mortgagor or the relevant mortgagee for any loss suffered as a result.

A credit provider must not recover or seek to recover enforcement expenses from a debtor, mortgagor or guarantor in excess of those reasonably incurred by the credit provider and if he does then the excess must be returned to the debtor, mortgagor or guarantor.

The above provisions of the law provide some protection to the debtors and guarantors. However, the law also makes provisions for credit providers to recover their debt. To minimise the chances of getting into hardship, consumers need to make a realistic assessment of the security of their jobs, reliability of any additional income and the necessity of the goods they want to buy on credit. Credit enables consumers to enjoy the benefits of goods without paying for them up front, but if not carefully controlled, it can be immensely destructive.

Insurance

What is Insurance?

Insurance is a way of protecting against the risk of loss as a result of some unforeseen event like cyclone, flood, fire or theft. It transfers the risk of a loss from one entity to another, in exchange for payment. A company that sells the insurance is called the insurer and the person or entity that buys the insurance policy is called the insured or policyholder. The amount to be charged for a certain amount of insurance coverage is called the premium.

Basically, insurance is the insurer's promise to compensate the insured in the case of a financial (personal) loss. The insurance policy is the contract between the insurer and the insured which details the conditions and circumstances under which the insured will be financially compensated.

What is Credit Insurance?

Credit insurance is a term used to describe both business credit insurance (a.k.a. trade credit insurance) and consumer credit insurance, e.g., credit life insurance, credit disability insurance (a.k.a. credit accident and health insurance), and credit unemployment insurance.

An easy way to differentiate between these two types of insurance is:

- Business credit insurance is credit insurance that businesses purchase to insure payment of credit extended by the business (their accounts receivable).
- Consumer credit insurance is credit insurance that consumers purchase to insure payment of credit extended to the consumers (insurance pays lender or finance company).

Consumer credit insurance is a way for consumers to insure repayment of loans even if the borrower dies, becomes disabled, or loses a job. Consumer credit insurance can be purchased to insure all kinds of consumer loans including auto loans, credit card debt, loans from finance companies, and home mortgage borrowing. Although purchased by the consumer/borrower, the benefit payment goes to the company financing the purchase for extending the credit to the consumer.

In some countries, credit insurance also is sold as a type of life insurance policy to a borrower that pays off one or more existing debts in the event of a death, disability, or in rare cases, unemployment. Credit insurance is marketed most often as a credit card feature, with the monthly cost charging a low percentage of the card's unpaid balance.

According to the Consumer Credit Act a credit provider or a supplier must not require a debtor or guarantor to take out insurance or to pay the cost of insurance taken out or arranged by the credit provider or supplier or represent to a debtor or guarantor that the debtor or guarantor is required to pay the cost of any such insurance, unless the insurance is compulsory insurance, mortgage indemnity insurance, insurance over mortgaged property or insurance of a nature and extent approved for these purposes by the regulations.

Conditions of Credit Insurance

A credit provider must not knowingly provide credit to the debtor to pay the premium or finance the premium on insurance taken out by the debtor over mortgaged property for a period of insurance exceeding 1 year, but may provide credit for or finance successive premiums for periods of 1 year or less. This means that a credit provider can provide credit to a debtor to take out insurance for 1 year or less and also give additional loan to pay the premiums as they fall due.

Commission accepted by a credit provider, supplier or agent must not exceed, in amount or value, 20% of the premium (excluding government charges such as stamp duty and value added tax).

The insurer must give a copy of the insurance policy to the debtor within 14 days after acceptance of the insurance proposal by the insurer.

If a credit provider proposes to finance the amount payable by the debtor under or in connection with a credit-related insurance contract and the proposal for insurance is rejected by an insurer, the insurer must inform the debtor and the credit provider of its rejection. On termination of a credit contract, any related consumer credit insurance in force is also terminated.

If a contract is terminated earlier than the full term of the contract, the debtor is entitled to terminate the insurance contract and recover from the insurer a proportionate rebate of premium paid under the insurance contract.

Does Credit Insurance Protect the Consumer?

Credit insurance can appear to protect the interest of the debtor but can be deceptive e.g. mortgage indemnity insurance. This has been described as 'one of those sneaky mortgage fees that goes by a whole raft of names'. You may hear it referred to as a mortgage indemnity guarantee (MIG), higher-lending fee or charge (HLC), additional security fee or mortgage advance premium. In a nutshell, it's a form of insurance that you pay for but that actually benefits your lender. It is designed to reimburse the lender if you borrow a high proportion of your property's value, typically 90 per cent or more and can't keep up the repayments. Roughly two-thirds of mortgage lenders will charge a mortgage indemnity premium for borrowing at this level.

How it works

If you fall badly behind with your repayments, your lender is perfectly entitled to evict you from your home and sell it. Depending on the condition of the property or the prevailing market, it may end up selling for less than you owe on your mortgage. It will then use the mortgage indemnity policy to make up the difference. But that doesn't mean you're off the hook. Chances are your lender will still come after you not only for the shortfall but also for the interest that continues to accrue on the amount still owing.

How to avoid it

The simplest way to avoid paying this charge is to go to a lender that doesn't apply it. In a small country like Fiji with only a few insurance companies this, however, might not be possible.

Preliminary research has revealed that some credit providers in Fiji might be arranging credit insurance that benefits them but ispaid by debtors only. One credit provider, for example, includes insurance by increasing the interest from 15.9% to 20.9% i.e. by 5%. Whether this is the real cost of the insurance is not revealed to the debtor. It could well be that the credit provider earns additional revenue in the name of insurance.

If the goods covered by insurance are damaged or destroyed by acts such as fire or flood, the credit provider claims the unpaid balance from the insurance company. The debtor who pays the insurance gets nothing other than being relieved of paying the balance of the debt. As all these arrangements are legal, the law clearly fails to protect the interest of the consumers.

Recommendation

Credit insurance can appear to protect the interests of the debtor but can be very deceptive e.g. mortgage indemnity insurance. This has been described as 'one of those sneaky mortgage fees that goes by a whole raft of names'. In a nutshell, it's a form of insurance that the debtor pays for but that actually benefits his lender. To minimise exploitation of consumers, laws relating to credit insurance must be reviewed and amended to get a better balance between the interest of credit providers and consumers. Providing a copy of the credit insurance policy to the debtors must be mandatory.

Case Study:1

Mrs. D bought some furniture from Subrail's Furniture Centre on Hire Purchase in 2008. A year later, Mrs. D passed away when she had just started making her repayments. Not knowing what to do, Mrs. D's husband informed Subrail's Furniture that his wife had passed away and enquired what he would do with the. Subrail's Furniture informed him that he would have to continue with the payments. Mr. D replied that he did not sign any agreement with Subrail's Furniture and queried why should he be penalised. He was ready to return the items but would not make any payments. Still Subrail's Furniture insisted that he continue with his late wife's payments.

Case Study:1 continued

Feeling very frustrated and disturbed, Mr. D lodged a formal complaint with the Consumer Council. The Finance Manager of Subrail's Furniture was consulted and the Council told that it was stated in the Consumer Credit Act that should an account holder pass away while making payments, the next of kin must continue payments until the account is paid off. After thoroughly going through the Act, the Council again consulted Subrail's Furniture on the issue. This time the Finance Manager had asked the Council to speak to the Director about the complaint.

After a good discussion with the Director, he then confirmed that Mr. D would not have to continue with any payments at all as this should all be covered by Subrail's insurance company. He added that the Finance Manager had misinformed Mr. D for reasons he did not understand and because of this he intended to will conduct a one day training session with all his managers to ensure that such complaints would not happen again. Mr. D was elated when the Council informed him that he would not have to make any payments and could keep the items.

NOTE: Subrail's insurance protects the interest of the debtors. It is an example for others to follow.

Hire Purchase – White Goods

What is Hire Purchase?

Hire Purchase (HP) is a method of buying goods in which the buyer hires (takes) and uses the merchandise on payment of a deposit and completes the purchase by making a series of regular installments. The seller retains ownership (title) until the final installment is paid. Goods that consumers most commonly buy on hire purchase include white goods such as televisions, fridges, stoves and washing machines as well as furniture like sofas, cabinets and beds.

Pre–Contractual Disclosure

The Consumer Credit Act 1999 makes it compulsory for credit providers to give specific information to consumers before a contract is made. The purpose of this provision is to ensure consumers are fully informed before entering into a contract. Seeking information before the actual purchase is what pre-contractual disclosure is all about. Pre-contractual disclosure assists consumers to compare the cost of credit from different sources of credit. Pre-contractual disclosure also gives the consumer an opportunity if he/she is financially innocent to discuss pre-contractual disclosure information in order to understand the potential risks of taking credit.

By virtue of the Consumer Credit Act, a hire purchase company must provide the intending hirer with a written summary of hirer's financial obligations in accordance with Schedule 4 of the Regulations 2009. The pre-contractual disclosure needs to take into consideration the following information:

- Particulars of goods
- New or old
- Address where goods will be kept
- Particulars relating to financial obligation
- Cash price
- Deposit
- Balance
- Freight charges
- Insurance
- Total amount of term charges
- Balance payable under the agreement
- Duration of the payment
- Number of installments
- Amount of each installment

Case Study: 2

Mrs S Koroi, an educationist, owes thousands of dollars to a financial institution for a home loan. Her life is not plain sailing, given the increasing cost of living. What is breaking her back more than anything else is the high interest rates and the payment of insurance premiums that she is making to the financial institution.

She says when she applied for the loan, it was not explained to her about the interest rate, such as the total amount she would be paying and how it would be calculated. She was not informed what her insurance cover was.

Mrs Koroi believed that the financial institution should have given a detailed advice for her to understand her financial obligations that would allow her to make informed decisions.

Formation of Hire Purchase Contract

A Summary of Financial Obligation can be varied before the Hire Purchase contract is signed. These contracts or agreements must be in writing or otherwise they cannot be legally enforced and must be signed by all parties. Any amendments or alteration to a contract has to be initialed or signed by the debtor in the margin opposite the alteration. A signed copy of the document must be given to the buyer no later than 14 days after the agreement is reached. The buyer can, through a written notice terminate the contract provided no credit has been obtained. The credit provider can demand any fees and charges which were incurred before the termination of the agreement. All HP agreements must be in accordance with Schedule 1 of the Consumer Credit Act 1999 and consist of the following information:

- Amount of credit
- APR
- Calculation of interest charges
- Total amount of interest charges payable
- Credit fees and charges
- Changes affecting interest and credit fees and charges
- Default rate
- Insurance financed by contract

Warranties

Warranties are used in a variety of commercial situations. In many instances a business may voluntarily make a warranty. In this situation it is a written guarantee (promise) given to the purchaser of a new appliance, the manufacturer or dealer, usually specifying that the manufacturer will make any repairs or replace defective parts free of charge for a stated period of time.

In other situations the law implies a warranty where no express warranty was made.

Most new consumer products today are covered by a warranty. A warranty (also called a guarantee) is an assurance or promise about the quality of goods or services you buy. Its purpose is to give consumer recourse if something you purchase fails to live up to what a consumer was promised. A warranty describes the product: its quality, performance, standard etc. If an appliance does not work or develops any problem within the specified warranty period, the manufacturer or the seller will rectify it without charging a consumer anything. A consumer can also ask the manufacturer /seller to replace it.

Case Study: 3

Mr Narain, a carpenter by profession, had managed to save some money to buy a blender for his wife to make things easier

Case Study: 3 continued

for her in the kitchen. He went to a hire purchase company where he was shown different brands. The attendant spoke good words about the machine he wanted to buy. He also offered a year's warranty. In case anything went wrong, the hire-purchase company would repair or replace it. These words gave Mr Narain the assurance he needed and he was convinced to buy the product. He was given a paper with the conditions of the warranty, written in such fine print that was difficult to read. It was absurd on the part of the hire purchase company to think a poor man like Mr Narain would be able to read such a document. No explanation was given to him about the conditions of the warranty. It was not explained to him what specific parts of the blender were covered under the warranty and what were not. After six months, the blender started giving problems. Mr Narain went to the hire purchase company for assistance and was told that the part damaged was not covered under the warranty he had purchased. This left a hole in Mr Narain's pocket and he was disappointed that he had not been told what was covered or what was not covered under the warranty at the time of purchase.

Implied Conditions and Warranties

In any Hire Purchase Agreement, conditions and warranties are implied. They imply that the goods are free from any charge or encumbrance in favour of the third party. In these agreements, there is condition that the goods are of merchantable quality except

- If the hirer or consumer examined the goods and saw defects
- In case of second hand goods, if the agreement contained a statement to the effect that
    - The goods are second hand
    - All conditions and warranties as to qual-

ity are expressly negative, and the owner proves that the hirer has acknowledged in writing that the statement was brought to the hirer's notice.

If the hirer implied or made it known to the agent or owner purpose for which the goods were required then it is implied in the HP agreement that the goods will be reasonably fit for that purpose.

Things implied in every hire purchase agreement are

(a) a condition that the owner has a right to sell the goods at the time when the ownership (title) is to pass to him/her

(b) a warranty (assurance) that the hirer will have and enjoy quiet possession of the goods

(c) a warranty (assurance) that the goods will be free from any claims by any other party at the time when the property is to pass from the seller to the buyer. This means that the goods mustn't have any debt or financing owed on them, i.e. the consumer will have free title to the goods.

Difference between Condition and Warranty

A condition is a term or requirement stated in a contract which must be met for the other party to have the duty to fulfill his/her obligations. It goes directly 'to the root of the contract', or is so essential to its very nature that if it is broken the innocent party can treat the contract as discharged (ended). That party will not therefore be bound to do anything further under that contract. For example, in contract law, if an agreement is signed by one party and sent to a second party with the intention that it will not become enforceable until the second party signs it, the second party's signature would be a condition for the contract to become enforceable.

A warranty is a term of the contract which is secondary to the main purpose of the contract. It is therefore not so vital as to make the contract invalid. A breach of warranty only entitles the innocent party to an action for damages; he or she cannot treat the contract as ended.

Merchantable Quality

Also, in every hire purchase agreement there is a condition that the goods are of merchantable quality, except

(a) if the hirer has examined the goods or a sample of them and has been made aware of any defects

(b) if the goods are second-hand and the agreement states that

(i) the goods are second-hand

(ii) there is no assurance given about the quality and the hirer has acknowledged this in writing.

Period of Merchantable Quality

Examination of 225 complaints received by the Consumer Council reveals that there is virtually no problem in relation to the implied conditions and warranties. The major problem appears to be in relation to the warranty 'that the goods are of merchantable quality' i.e. the product does what the manufacturer and seller claim it is supposed to do and for a period normally expected of that kind of products. A fridge, for example, should last a lot longer than 12 months. Of the 225 complaints recorded, 156 (70%) were in relation to warranties and conditions. Some examples are:

Complainant's LPG stove burner melted and he was told to pay $20 for repairs.

Complainant's washing machine is faulty and has not been repaired.

Complainant purchased a washing machine and had given it for repairs but was told to pay for the repairs.

Complaint about a settee which had broken due to cheap material used to make it..

Complainant bought radio on hire purchase with a one year warranty. The radio was given for repairs and hasn't been returned to date.

In all these cases the goods were apparently of merchantable quality at the time of sale. However, they did not last as long as the consumers expected them to last. This raises the question of the period over which the goods should remain of merchantable quality. The law does not specify any such period for any type of goods. So, can it be assumed that goods can no longer be repaired or replaced at the seller's cost after the initial warranty period is over? The seller will, of course, say yes. But this cannot happen always.

Some courts have defined **"merchantable quality"** to mean that "the goods must be as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect, having regards to any description applied to them, the price (if relevant) and all other circumstances."

The requirement of fitness for purpose implies that the goods must also be capable of enduring for a reasonable period and must not deteriorate seriously or break down. This means that goods must not unduly break down during their normal lifespan and that if they do, the breakdown is often a clear symptom of their inappropriate quality.

One would therefore expect a new washing machine, for example, to last a lot longer than 12 months. However, if a consumer paid $50 for it then one could say fair enough - he/she got what he/she paid for. That is, if somebody gets a washing machine for $50 he/she shouldn't expect it to last just as long as the one that somebody paid $500 for. But a consumer should expect to get 4-5 years out of a decent washing machine.

In Singapore's Sale of Goods Act the term 'merchantable quality' has been replaced by the term 'satisfactory quality' by amendment in 1996. 'Satisfactory quality' is defined as 'meeting the standard that a reasonable person would regard as satisfactory, taking account any description of the goods, the price (if relevant) and all the other relevant circumstances'. This means that the goods must also be of reasonable durability.

Apparently, many retailers not only sell poor quality products but they don't even honour the written warranties either. These products are both imported and locally made and they should ideally be required to go through quality control tests before becoming available to the consumers. In the absence of national products standards, there is a high probability that poor quality products are entering Fiji. A major problem here is that given that there is now increasing free international trade leading to stiff competition both locally and internationally, ensuring that only high quality products enter the market can be very difficult, if not impossible.

Recommendation

To provide some protection to consumers from poor quality products being sold in the country, the term "merchantable quality" should be defined to include the requirement that the goods must also be of reasonable durability. This means that goods must not deteriorate seriously or unduly break down during their normal life span.

Extended Warranty

An extended warranty prolongs the standard warranty period offered to consumers by the manufacturers or retailers. Extended warranties cost extra, normally a percentage of the item's retail price. Occasionally, some extended warranties that are purchased for multiple years state in writing that during the first year, the consumer must deal with the manufacturer if malfunctions occur. Thus what is often promoted as a five year extended warranty is actually only a four year warranty.

Often extended warranties are used to guarantee additional revenue for the business but have no real benefit to the customer. Selling of extended warranties is one example where salespersons are known to try to persuade the customers to pay additional $100 or so for a 2 to 3 year extended warranty just because they get 10% - 15% of this amount as commission in addition to their normal pay.

Extended warranties generally do not cover everything that the standard manufacturers' warranties cover. For example, some parts of products are often expressly excluded but written in fine print which is not easily seen by the consumer. Extended warranties have their own terms and conditions which are often not properly disclosed to consumers and lead to disputes later, as shown in the case below.

Case Study: 4

Mr. Y bought a twin tub washing machine with 1 year warranty provided expressly by the manufacturer.

In addition, Mr. Y bought an extended warranty for two years, which means that the product had a total of three years protection, for which he had paid. After lapse of a year, Mr. Y discovered that his washer tub was not spinning or operating as it used to. When he took the product back to the supplier, he was informed that they would not be able to repair it because his one year warranty had already expired and under his extended warranty for a further two years, such parts were not covered. This was the first time Mr. Y learnt that extended warranties have limitations that were never disclosed at the time of purchasing the product. With much dissatisfaction, Mr. Y lodged his complaint with the Consumer Council of Fiji. The Council discovered that the complainant was not given a proper extended warranty docket and the docket did not state which parts were covered and which were not. After vigorous discussion on the issue, the supplier agreed to repair Mr. Y's washing machine and was given another three months warranty which covered everything, including the parts.

The respondent was advised to specify clearly in their documents what parts were covered under extended warranty and which parts were not, as consumers deserve to know such information.

Frequency of Complaints	Washing Machines Brand Name	Nature of Complaints
No Complaints	ABC	
	DEF	
Few Complaints	GHI	
	JKL	
Many Com-plaints	MNO	
	PQR	

Recommendation

The law (Schedule 1) requires retailers to disclose to consumers full details of which parts are covered and which parts are not covered under extended warranties. Payment of commission to employees of credit providers for selling extended warranties must also be disclosed clearly in the contract.

Quality Control and National Standards

One way to create consumer awareness about substandard products would be by lising products and categorising them according to the frequency of complaints received about them and publicising it widely.

Lists can be prepared and publicised for as many products as necessary. This should encourage consumers to buy better quality products which in turn would force sellers to buy and sell better quality products as well. Those sellers who still sell sub-standard products will be forced, at least, to honour their warranties. This may significantly minimise disputes relating to warranties and terms and conditions and the interests of consumers will be better protected.

Recommendation

To create consumer awareness about substandard products, lists of products should be made and categorised according to the frequency of complaints received about them and publicised widely.

A better solution would be to develop national standards for products which importers and local manufacturers have to adhere to. In the absence of national standards it can only be expected that low quality products will enter the market and be sold at premium prices. Currently, a number of unknown brand names created by importers are sold in Fiji. If there were national standards a good number of these products would not be able to enter the country.

Recommendation

To minimise poor quality products from entering the market, national standards for both imported and locally manufactured products need to be developed and importers and manufacturers placed under legal obligation to comply with them.

$$C_x = \frac{\sum_{i=1} i \quad - \quad \sum_{i=1}^{n} i}{\sum_{i=1}^{n} \mathrm{i}} \times T$$

Interest on Hire Purchase

All credit documents should:

- state the rate of interest per annum for the credit
- if there is more than one interest rate, also state how each rate applies e.g. 7% fixed for first 3 years and variable thereafter.

When a debtor or guarantor requests a statement then the credit provider is required to provide:

(a) the current balance of the debtor's account

(b) any amounts credited or debited during a period specified in the request

(c) any amounts overdue and when each such amount became due

(d) any amount payable and the date it became due.

The law provides the methods for calculating the interest charge. "An interest charge under a credit contract for a month, a quarter or half a year may be determined by applying the annual percentage rate or rates, divided by 12 (for a month), by 4 (for a quarter) or by 2 (for half a year), to the whole or that part of the average unpaid daily balances to which it applies, except for a hire purchase agreement where Rule of 78 will apply".

Rule of 78

The formula for Rule of 78 given in Schedule 3 of the Act is:

Where

C - is the interest charge calculated for the required months completed, under the agreement.

x - the number of completed months under the agreement; month partially complete is taken as a whole or completed month.

n - the total number of whole months under the agreement.

i - months in whole numbers.

T - is the total interest charges for the whole agreement period.

Worked Example:

Assume:

That total interest under an agreement which is calculated at the outset is \$100.00 (T). The total agreement is for 12 months (n). The credit provider intends to determine the interest charge for the 2 months (x) completed under the agreement.

Using the formula,

C= ((1+2+.......+12) - (1+2+......+10)) / (1+2+......+12) * 100

C= (78 – 55) / 78 * 100

C= \$29.49 Rounded to nearest cents.

The interest charge for 2 months is \$29.49.

The formula is certainly expressed as it would normally be written in mathematics. But an average consumer might find it beyond his or her ability to understand, let alone apply it in a real scenario.

As seen above, the 'Rule of 78' is based on the sum of the numbers assigned to twelve months (or installment periods) e.g. 1+2+3+ ....10+11+12 = 78. The amount of interest charge for required months is derived by subtracting the sum of all whole numbers from one to the number of incomplete months under the agreement (both inclusive) (e.g. 1+2+3+ .... +10 = 55) from the sum of all the whole numbers from one to the number of total months in the agreement (both inclusive), (e.g. 1+2+3+ ....10+11+12 = 78) then divided by the sum of all the whole numbers from one to the number of total months in the agreement (both inclusive) (i.e. 1+2+3+ ....10+11+12 = 78) and multiplied by the total interest charge under the agreement.

As shown in the above example, the Rule of 78 is a formula to calculate the interest charges on a hire purchase transaction for the number of months completed under the agreement.

In the above example:

Interest charge for two completed months is $29.49.

Interest for remaining 10 months is: $100 – $29.49 = $70.51

If the debtor pays off the debt after 2 months he/she gets interest rebate (refund) of:

$100 - $29.49 = $70.51

Interest charge for 4 months

(1+2+3+ ......+11+12) – (1+2+3+.... +8)/(1+2+3+... +11+12)

(78 - 36)/78 x 100

42/78 x 100 = $53.85

Interest rebate after 4 months:

$100 - $53.85 = $46.15

Does this Formula have to be so Complicated?

No. Only a part of this formula will give exactly the same results. This is generally known as the inverted "sum of the periods' digits method". Periods can be any payment interval such as months or years.

Sum of the digits for 12 months (periods)

(1+2+3+ ......+11+12) = 78

Interest charge for 1 month:

12/78 x 100 = 15.38

Interest rebate after 1 month:

$100 – 15.38 = 84.62

Interest charge for 2 months:

Sum of the last two digits (i.e. inverted) divided by sum of the digits for 12 months:

12+11/78

23/78 x 100 = 29.49

Exactly as in the worked example above

Interest rebate after 2 months:

$100 - $29.49 = $70.51

Exactly as above

Interest charge for 4 months:

12+11+10+9/78

42/78 x 100 = 53.85
Exactly as above

Interest rebate after 4 months:

$100 - $53.85 = $46.15

Exactly as above

Calculating interest according to general rule in sub section (2):

Interest for 1 month:

$100/12 = $8.33

Extra interest charged by rule of 78:

$15.38 - $8.33 = $7.05 i.e. 84.63% (7.05/8.33x100) more.

\Interest charge for 2 months:

$100/12 x 2= $16.67

Extra interest charged by rule of 78:

$29.49 - $16.67 = $12.82 i.e. 76.9% (12.82/16.67x100) more.

Interest charge for 4 months:

$100/12 x 4 = $33.33

Extra interest charged by rule of 78:

$53.85 - $33.33 = $20.52 i.e. 61.6% (20.52/33.33x100) more.

Why does the General Rule apply in All Cases Except for a Hire Purchase Agreement Where only the Rule of 78 Applies?

The Rule of 78 is clearly inconsistent with the general rule in the law. Its application results in very significant advantage to the credit providers and a very significant disadvantage to the consumers. As shown in the example above, if a debt is paid at the end of the first month, the credit provider gets 84.63% more interest than they would get if the general rule for calculating interest charge was used. This percentage drops as time passes.

Because the rule of 78 allocates higher interest in earlier periods, it unfairly penalizes the hire purchase customer if he/she pays the debt any earlier than the full term of the credit contract - and the earlier the debt is paid the heavier the penalty. The unnecessarily complex Rule of 78 apparently serves as a mathematical illusion to confuse and deceive the consumers. As higher interest charges are imposed in the early part of the contract by this rule, a debtor who pays off the debt before the end of the contract term is unfairly penalised and the credit provider generously rewarded. If the consumer is clever enough to know this, he/she has no incentive to pay the debt early.

Additionally, to keep the consumers hooked to their business, the credit providers are known to offer more credit to the debtors before they pay the first debt off. This rule therefore acts as an incentive to consumers to remain in a never ending debt cycle and for credit providers to perpetuate it. Remarkably, the Act does not explain why the rule of 78 can be used at all, and why only in the case of hire purchase agreements. Generally, it is the most vulnerable consumers who buy goods on hire purchase. And sadly, by the rule of 78, the Act allows credit providers to legally exploit their vulnerability.

While the credit providers will have no problem calculating the interest by the rule of 78 or using any method, most consumers on the other hand will be unable to do the calculations or unwilling to spend time on something that they might see as a futile exercise. Consumers therefore do not know the exact amount of the interest component of the debt either before they sign the contract or after. All that they are told are the amount of regular payment and the period over which the payments are to be made.

Recommendation

By allocating a very high proportion of the interest in the earlier period of the debt, the rule of 78 allows credit providers to extract most of the interest on the debt from those debtors who pay off the whole amount before the end of the credit term period. It is a very heavy penalty on debtors for early repayment of debt and an unjustifiable benefit to the credit providers. This is grossly unfair and should be abolished forthwith. The same methods of calculating interest as for other credit transactions and loans should be used for hire purchase transactions as well. Interest may be charged up front or on a reducing balance and a schedule of repayments showing separate principal and interest components should be provided.

Transparent and Fairer Methods of Disclosing Debt And Interest on Hire Purchase

Consumers can make more informed decisions if credit providers disclose the interest as shown in examples below. The schedules of payments show the principal and interest components separately and the balance owing after each payment. It is common practice now that if a debtor wants to pay the debt off at any time, all that he/she needs to do to find the amount to pay is to add up the unpaid principal components. In the suggested alternative case in which interest is charged on a reducing balance, the debtor has to do no calculations. The payout amount is the balance owing shown after each payment. The complex rule of 78 is not necessary.

Product: Cabinet					
Cost Price (Principal)		$999	Customer is told:		
Add Documentation costs		30	Monthly payment		
		1029	(24 payments)		$59.87
Less Deposit		10			
Principal for 2 years		1019	Interest monthly		
Add Interest @ 20.5% p.a. (2 yrs)		417.79	(417.79/24)		$17.41
Total Costs to be paid		1436.79			
			Payment Principal		42.46
ACTUAL CASE		INTEREST CHARGED UP FRONT			
Date	Particulars	Principal	Interest	Payment	Balance
1-Jan-10	Balance b/f				1436.79
31-Jan-10	Payment	$42.56	$17.41	$59.97	$1,376.82
28-Feb-10	Payment	$42.56	$17.41	$59.97	$1,316.85
31-Mar-10	Payment	$42.56	$17.41	$59.97	$1,256.88
30-Apr-10	Payment	$42.56	$17.41	$59.97	$1,196.91
31-May-10	Payment	$42.56	$17.41	$59.97	$1,136.94
30-Jun-10	Payment	$42.56	$17.41	$59.97	$1,076.97
0-Jan-00	Payment	$42.56	$17.41	$59.97	$1,017.00
31-Aug-10	Payment	$42.56	$17.41	$59.97	$957.03
30-Sep-10	Payment	$42.56	$17.41	$59.97	$897.06
31-Oct-10	Payment	$42.56	$17.41	$59.97	$837.09
30-Nov-10	Payment	$42.56	$17.41	$59.97	$777.12
31-Dec-10	Payment	$42.56	$17.41	$59.97	$717.15
31-Jan-11	Payment	$42.56	$17.41	$59.97	$657.18
28-Feb-11	Payment	$42.56	$17.41	$59.97	$597.21
31-Mar-11	Payment	$42.56	$17.41	$59.97	$537.24
30-Apr-11	Payment	$42.56	$17.41	$59.97	$477.27
31-May-11	Payment	$42.56	$17.41	$59.97	$417.30
30-Jun-11	Payment	$42.56	$17.41	$59.97	$357.33
30-Jul-11	Payment	$42.56	$17.41	$59.97	$297.36
31-Aug-11	Payment	$42.56	$17.41	$59.97	$237.39
30-Sep-11	Payment	$42.56	$17.41	$59.97	$177.42
31-Oct-11	Payment	$42.56	$17.41	$59.97	$117.45
30-Nov-11	Payment	$42.56	$17.41	$59.97	$57.48

31-Dec-11	Payment	$42.56	$17.41	$57.48	($0.00)
	Totals:	$1,021.44	$417.84	$1,436.79	
		(Principal)	Interest	Total Payment	
ALTERNATIVE METHOD		INTEREST ON REDUCING BALANCE			
Date	Particulars	Principal	Interest	Total Payment	Balance
1-Jan-10	Balance b/f				1029
1-Jan-10	Deposit	10			1019
31-Jan-10	Payment	$42.90	$17.41	$60.31	$976.10
28-Feb-10	Payment	$42.90	$17.40	$60.30	$933.20
31-Mar-10	Payment	$42.90	$17.39	$60.29	$890.30
30-Apr-10	Payment	$42.90	$17.38	$60.28	$847.40
31-May-10	Payment	$42.90	$17.37	$60.27	$804.50
30-Jun-10	Payment	$42.90	$17.36	$60.26	$761.60
30-Jul-10	Payment	$42.90	$17.35	$60.25	$718.70
31-Aug-10	Payment	$42.90	$17.33	$60.23	$675.80
30-Sep-10	Payment	$42.90	$17.32	$60.22	$632.90
31-Oct-10	Payment	$42.90	$17.30	$60.20	$590.00
30-Nov-10	Payment	$42.90	$17.28	$60.18	$547.10
31-Dec-10	Payment	$42.90	$17.25	$60.15	$504.20
31-Jan-11	Payment	$42.90	$17.23	$60.13	$461.30
28-Feb-11	Payment	$42.90	$17.19	$60.09	$418.40
31-Mar-11	Payment	$42.90	$17.15	$60.05	$375.50
30-Apr-11	Payment	$42.90	$17.11	$60.01	$332.60
31-May-11	Payment	$42.90	$17.05	$59.95	$289.70
30-Jun-11	Payment	$42.90	$16.97	$59.87	$246.80
30-Jul-11	Payment	$42.90	$16.86	$59.76	$203.90
31-Aug-11	Payment	$42.90	$16.72	$59.62	$161.00
30-Sep-11	Payment	$42.90	$16.50	$59.40	$118.10
31-Oct-11	Payment	$42.90	$16.14	$59.04	$75.20
30-Nov-11	Payment	$42.90	$15.42	$58.32	$32.30
31-Dec-11	Payment	$32.30	$13.24	$45.54	$0.00
	Totals:	1029	$405.73	$1,424.73	
		(Principal)	(Interest)	Total payment	

Surrender of Goods

The hirer or consumer may terminate his/her agreement by returning the goods to the hire purchase company or a place specified in the agreement, or to a mutually agreed place. If the parties fail to agree, the hirer/consumer can apply to court for an order that will fix a place for the goods to be returned. The hirer may require the owner to sell the goods to a person introduced by the hirer who is willing to buy in cash for a price agreeable to the owner. After the goods have been sold to the person introduced by the hirer, the hirer is entitled to the difference if the price that person paid for the goods is more than the outstanding balance the hirer/consumer owed. The owner can recover the balance if the price paid/value of goods is lower than the outstanding balance owed. The law allows a debtor or mortgagor to surrender the goods by written notice under credit contract. It requires a credit provider to give written valuation of the goods and specifies the rights and responsibilities of the credit provider and the debtor or mortgagor so that the goods are sold as soon as reasonably practicable and for the best price reasonably obtainable.

If the goods are not sold as soon as reasonably practicable, or at the time the credit provider and debtor or mortgagor agreed on, or for the best price reasonably obtainable, the court may order the credit provider to credit the debtor or mortgagor with an amount, fixed by the court, exceeding the net proceeds of sale. This sounds like a good protection to the credit consumer. However, it might be very difficult to enforce in practice. The credit provider can always say that he sold the mortgaged property as soon as it was "reasonably practicable" and for the best price "reasonably obtainable". As what is "reasonable" cannot be objectively defined, it will be very difficult for the debtor to prove the credit provider wrong. Besides, many debtors will not have the money to hire lawyers and take the case to the court.

A fairer and more transparent method to sell repossessed property would be by public auction, with strict mandatory provisions to govern the auction process as happens in Australia. Unlike mortgagee sales, auctions can reveal the true market value of a property. Auctions are conducted in an open forum where all bids are known and participants are given immediate feedback on the property's value. This process will eliminate long negotiation periods where interests on mortgagors' accounts pile up and buyers know they are competing fairly and on the same terms as all other buyers. Needless to say they will receive comprehensive information on property via a due diligence packet. Any consumer taking part in an auction can easily and quickly make market comparisons when they see bidding at the same place and at the same time.

Recommendation

The law should be amended to abolish the existing practice of allowing credit providers to sell repossessed property through tender and negotiations and replaced with a mandatory requirement to sell by public auction.

Repossession

The Hire Purchase Company cannot exercise their right to repossession unless:

- There have been 2 successive defaults of payments or a default in respect of the last payment.

30 days default notice given.

- A 21 days notice served by the owner to the hirer expires.
- If the hirer is dead, the HP company cannot repossess items unless 4 successive defaults of payments have been made.
- If the owner believes the hirer will remove or conceal the goods. The burden of proof of this will lie with the owner of the hire purchase company.

Case Study: 5

Mrs. Duvu bought some furniture on hire purchase. A year later, Mrs. Duvu passed away while she was making payments to the hire purchase company. Not knowing what to do, Mrs. Duvu's husband informed the hire purchase company enquired what

Case Study: 5 continued

he could do with the furniture his late wife had just purchased from them. The company told him that he would have to continue with the payments. Mr. Duvu replied that he did not sign any agreement with the company and that he was not going to do the payments. Mr. Duvu was ready to return the items but the company insisted that he continue with the payments. Mr. Duvu lodged a formal complaint with the Consumer Council. Upon the council's intervention, Mr. Duvu no longer had to make the payments on the furniture which he could not afford and the items were given back to the hire purchase company.

This was a case where the consumer could no longer pay for the goods and wanted to return them. The company did not initially cooperate on accepting the returned goods. However a hire purchase company cannot force consumers to keep items which they cannot afford to pay for.

The law requires the mortgagor to inform the credit provider within 7 days about where the mortgaged goods are and, if the mortgaged goods are not in the mortgagor's possession, to give the credit provider all information the mortgagor's has that might assist the credit provider to trace the goods.

The law prohibits a credit provider or his agent from entering residential premises for the purpose of taking possession of mortgaged goods unless a court has authorised the entry or the occupier of the premises has consented in writing.

If premises are entered in contravention of this section by a credit provider or an agent of a credit provider, the credit provider commits an offence.

Court may order entry and take possession of mortgaged goods.

This happens mainly in cases where the mortgaged property is not easily accessible, such as plant and equipment in enclosed areas or at mining or drilling sites in the bush or in the ocean.

After Repossession

If goods have been repossessed, within 14 days the credit provider must give the mortgagor the estimated value of the goods, enforcement expenses, and debtor's rights and responsibilities. Within 21 days after repossession of goods, the owner must serve the hirer or guarantor with a written notice setting out the cost of repossession and amount to be paid under the agreement, specifying the time within which the amount must be paid. The hire purchase company must write to the hirer acknowledging receipt of the goods, giving a description of the goods, and date, time and place where the owner took possession of goods.

The law prohibits the credit provider from disposing off the goods within 21 days from the date of notice given to the debtor or where stay of enforcement proceedings is in force under this Act, or an application where a court may re-open unjust transactions.

Case Study: 6

Ms Deo purchased a 4 burner gas stove from a company on credit terms last year. Due to non-payment of timely installments, the company repossessed the stove on the condition that if Mrs

Deo cleared all the arrears within 21 days, she would get her stove back. Ms Deo borrowed money from her relatives to have her arrears cleared within the 21-day limit. But the company would not accept her payment because they had sold the stove to another customer. Ms Deo lodged a complaint with the Consumer Council regarding a breach of the terms and conditions of the hire purchase agreement. Upon the council's intervention, Ms Deo was given a brand new stove as a replacement, to which she was entitled.

A credit provider must return any goods under a mortgage if the amount in arrears (less any accelerated amount) and the credit provider's reasonable enforcement expenses are paid within the 21 day period prescribed in the subsection and the debtor has not committed a further default of the same kind under the credit contract; or the credit contract is paid out.

If a mortgagor nominates a buyer for the goods, the credit provider must offer to sell the goods to that person for the estimated value or, if there is a written offer to buy the goods for a greater amount, then for that amount.

The credit provider must sell the goods repossessed for the best price reasonably obtainable and credit a mortgagor with a payment equivalent to the proceeds of a sale less any amounts which the credit provider is entitled to deduct from those proceeds. Disputes most often arise with the "best price reasonably obtainable". Mortgagors often claim that the mortgagees did not get the best price that was possible and mortgagees claim they did.

A best price reasonably obtainable is normally a price reached jointly between a buyer and seller, reflecting a judgment influenced by the economic realities of the marketplace and the relative bargaining powers of the parties. Generally it is high enough to cover the seller's costs and a reasonable margin, but not high enough for the seller to realise a monopolistic profit. It is a price that provides the best total value comprising of availability, delivery time, fitness for purpose, payment terms, quality, quantity, and service. As will be clear, this can still be debated.

A credit provider that sells mortgaged goods can deduct from the proceeds of the sale only

(a) the amount currently secured by the mortgage, not more than the amount required to discharge the contract;

(b) the amount payable to discharge any prior mortgage to which the goods were subject;

(c) the amounts payable in successive discharge of any subsequent mortgages to which the goods were subject and of which the credit provider had notice; and

(d) the credit provider's reasonable enforcement expenses .

If the court is satisfied that the goods were not sold for the best price reasonably obtainable, then it may order the credit provider to compensate the mortgagor or the relevant mortgagee for any loss suffered as a result.

A credit provider must not recover or seek to recover enforcement expenses from a debtor, mortgagor or guarantor in excess of those reasonably incurred by the credit provider.If he does then the excess must be returned to the debtor, mortgagor or guarantor.

The above provisions of the law attempt to balance the interest of the debtors against the interest of the credit providers. To minimise the chances of getting into hardship, consumers need to make a realistic assessment of the security of their jobs, reliability of any additional income and the necessity of the goods they want to buy on credit. Credit enables consumers to enjoy the benefits of goods without paying for them up front, but if not carefully controlled, it can be immensely destructive.

How a consumer can be caught up by this kind of situation is illustrated in the case below.

Case Study: 7

Ms A purchased a 4 burner gas stove from a company on credit terms last year. Due to nonpayment of timely installments, the company moved in to repossess the stove under the terms and conditions of the hire purchase agreement. The company's bailiff repossessed the gas stove on the condition that if Ms A cleared all the arrears within 21 days, she would get her stove back. Ms A then arranged to have her arrears cleared within the 21 day limit but the company would not accept her payment because they had resold the stove to another customer. Ms A then lodged a complaint with the Consumer Council regarding the breach of her terms and conditions in the hire purchase agreement. Upon the Council's intervention, Ms A was able to get areplacement stove to which she was entitled by clearing her arrears.

Protection under Hardships

The Consumer Credit Act 1999 provides some protection to consumers who face hardships due to unforeseen circumstances and from the credit provider who repossesses the goods as a result of non-payment of installments.

The law does not relieve the debtor from his/her debt but only makes it harder for the credit providers to repossess the goods or take other harsh actions to recover their debts. By imposing a number of requirements on the parts of both the credit providers and the debtors, the law attempts to achieve an orderly resolution of the problem. This might also give more time to the debtors to find means of getting out of hardship.

Under the Act, if the hirer is ill, unemployed or has any other reasonable cause not to meet the obligations under the contract, he or she can apply to the credit provider for the following methods of restructuring his/her account:

- Requesting a change in the terms without changing the APR
- Extending the period of contract and reducing the amount of payment
- Postponing for a specified period the date on which payment is due.
- Extending the period of contract and postponing for a specified period the date of payment.

If doing a restructure, the credit provider may charge reasonable finance fees or penalty interest for changes. If the credit provider does not agree to the change the terms of the agreement or contract, the debtor can apply to a court to change the terms of the contract.

Unjust Transactions

Unjust transactions are where terms and conditions are unconscionable, harsh or oppressive. The hirer can seek a court's help if he/she finds the agreement to be unjust. The court will consider the following factors prior to opening any unjust transaction:

- Compliance or non compliance provisions of the agreement
- Bargaining power of the parties
- Whether the disputed provision was under negotiation initially
- Was it practically possible for the hirer to seek alteration or to reject any of the provisions
- Are the conditions unreasonable and difficult to comply with
- Any ambiguity of language in the contract
- Was any independent legal or other expert advice sought
- Were the legal and practical effects accurately explained so the hirer understood the provisions and their effects
- Did the owner use or exert unfair pressure or undue influence or unfair tactics on the hirer
- Did the owner take measures to ensure the hirer understood the implications of the transactions
- Whether at the time the agreement was entered into or changed the owner knew, or could have ascertained by reasonable inquiry of the hirer at the time, that the hirer could not pay in accordance with its terms or not without substantial hardship
- Whether the terms of the transaction or the conduct of the owner were justified in the light of the risks undertaken by the owner
- The terms of other comparable transactions involving other owners and if the injustice is alleged to result from excessive interest charges, the APR or rates payable in comparable cases.

Return of Goods by the Hirer

A hirer who returns the goods purchased on hire purchase within 21 days after receipt of the default notice is not liable to pay the following costs:

- Cost of repossession
- Incidental costs to taking possession
- Cost of storage

Early Payments

The credit provider is required to accept any payment under the agreement unless the contract prohibits it, but the hirer must be informed of any such prohibition. The credit provider must credit any payment as soon as practicable if allowed in the hire purchase agreement. The Rule of 78 will apply to calculate rebate on interest when payments are made early before the duration allowed in the contract. The credit provider should not ask for payment of interest charges before the end of the day and default interest is to apply only on amount in default rather the full contracted amount.

Statement of Account

The credit provider is required by law to provide statements of account every 6 months or 3 months as agreed with the debtor or hirer. Schedule 2 of the Act describes the contents of a statement of account as follows:

- Statement period
- Balances
- Credit provided
- Identity of supplier
- Interest charges
- Fees and charges
- Payments to or from account
- Amounts payable by debtor
- Insurance payments
- Alterations
- Other

The credit provider is under no obligation to provide a statement of account if the:

- APR or interest rate is fixed and there are no provision to vary the rate
- Account is not in use
- Amount is written off
- Hirer is in default and enforcement proceedings in process
- Hirer is insolvent
- Hirer is dead

Notices and Other Documents

A credit provider is relieved from the obligation to give a notice or other document to a person if:

- The credit provider made a reasonable attempt to give notice or other documents
- The credit provider has reasonable grounds for believing that the person can no longer be contacted
- In case of joint debtors, mortgagors or guarantors a notice must be given to each unless there is an exception such as
- when a single person is nominated by joint debtors, mortgagors etc
- a single copy given if they reside at the same address if each of them consented to a single copy addressed jointly
- an external person nominated by the group, such as lawyer.

Linked Credit Provider

When a consumer buys goods on credit from a supplier they often have no idea of the network of business relationships that enable the sellers to sell goods on credit and the buyers to buy goods on credit.

Who is a Linked Credit Provider?

It is very common these days to have linked relationships among three or more parties to a credit transaction. These include the customer, retailer who sells the product to the customer (supplier) and the wholesaler who sells the product to the retailer or a bank or finance company that provides the loan to the buyer to buy the product (linked credit provider).

The supplier has a contract, arrangement or understanding with the linked credit provider relating to the supplier of goods in which the supplier deals or to whom the supplier regularly refers persons for the purpose of obtaining credit. One example is a motor vehicle dealer (supplier) who imports motor vehicles bought on credit from his supplier or whose sales are financed by a finance company (linked credit provider).

So a linked credit provider is normally a finance company or a bank that gives a loan to the buyer on behalf of the seller. In this way the buyer gets the goods without having to pay the full price in cash and the seller gets the money without having to wait for the buyer to pay over a period of time. Some examples of linked credit providers in Fiji are finance companies such as Carpenters Finance. For example Carpenters Finance is a linked credit provider to MH Homemaker that sells white goods.

How and Why Should You know if there is a Linked Credit Provider?

Normally suppliers do not provide details of linked credit providers to consumers and consumers just sign contract documents without reading them. The following arrangements and practices will indicate the existence of a linked credit provider.

(a) There is contract, arrangement or understanding between the supplier and a finance company or a bank in relation to the sale of goods and services by the supplier.

(b) The supplier regularly refers potential buyers to a particular finance company or a bank to obtain loan.

(c) The supplier gives the loan application forms and contract documents of a finance company or bank to its customers.

(d) The supplier gets customers to sign loan application forms and contract documents of the finance company or bank at its premises.

Where this link is established:

(a) The linked credit provider (the lender) will be liable for any misrepresentation made by the supplier about the credit contract

(b) In certain circumstances the liability for damages arising out of the sale contract can be extended to the linked credit provider. This means that if you have a right to damages against a supplier, you will be able to claim those damages jointly and severally from the linked credit provider

(c) If the sale contract is terminated, the loan contract may also be terminated and vice versa. This means that if you have a right to get out of a sale contract, you will also have a right to get out of a tied loan contract with a linked credit provider.

All this may not be as simple as it sounds. In many cases it is the supplier, such as a car dealer or door-to-door sales person who misrepresents the contents of an agreement or pressures someone, usually in an effort to close a sale that relies upon finance. For example, the supplier may tell the debtor that the interest rate is lower than it actually is, or that the debtor has an unconditional right to cancel the credit contract at a later stage.

However, because the misrepresentation was not made by the lender or its agent, the debtor generally would not have a right to rescind (cancel) the credit contract. For example, a customer who bought a fridge financed by a linked credit provider may find himself/herself in a ridiculous situation, where he/she can return the fridge but still have the loan to repay. This can lead to serious disputes and long and expensive legal battles which most consumers cannot afford.

What is a Tied Loan Contract?

A "tied loan contract" is a credit contract entered into between a credit provider and a debtor where

(a) the credit provider knows or ought reasonably to know that the debtor enters into the credit contract wholly or partly for the purposes of payment for the goods or services supplied by a supplier

(b) at the time the credit contract is entered into the credit provider is a linked credit provider of the supplier.

This means that there are three parties to the contract – the buyer, the seller and the credit provider (finance company). Many consumers, however, may not fully understand the complex nature of such contracts and what their rights and responsibilities are under such contracts.

Rights and Responsibilities under Tied Loan Contracts

If a debtor suffers loss or damage because he/she was misled by the supplier or because the supplier or linked credit provider fail to honour their part of the contract, the supplier and the linked credit provider are jointly (together) and severally (individually) liable to the debtor for the amount of the loss or damage. The debtor may recover that amount by action in a court of competent jurisdiction.

Sometimes a supplier may mislead a debtor/buyer about the nature or terms of a credit contract, usually in an effort to close a sale that relies upon finance. For example, the supplier may tell the debtor that the interest rate is lower than it actually is, or that the debtor has an unconditional right to cancel the credit contract at a later stage. Any representation made by a supplier to the debtor in relation to a tied loan contract gives the debtor the same rights against the lender as the debtor would have had if it had been made by the lender. Thus, the debtor/borrower can claim damages for misleading and deceptive conduct against the lender arising out of the representation of the supplier.

The lender will not be liable if:

- The borrower approached the lender and it was not induced by the supplier
- The lender can show that prior to entering into a linked credit arrangement with the supplier, it undertook a due diligence process regarding the financial standing and business conduct of the supplier
- The lender had no cause to suspect that the debtor might be able to make claim under s118 or the supplier might be unable to meet the suppliers' liabilities.

If the supplier is insolvent, cannot be located after reasonable enquiry and/or has died or the business been dissolved, the borrower's right of action against the linked lender may be limited. The supplier will be liable to the linked lender for any loss suffered by the linked lender.

This law provides protection to the consumer in theory. In practice not many consumers will have the ability or the resources to engage in long and expensive legal battles.

If a buyer of goods or services tells the supplier that he/she will need a loan in order to pay for the goods or services but, after making reasonable endeavours to do so, fails to obtain the loan on reasonable terms, the buyer is entitled to terminate the sale contract.

If a buyer terminates a contract the supplier is entitled to reasonable compensation for any damage or deterioration of the goods supplied under the sale contract (other than fair wear and tear) up to the date of their return to the supplier. If the goods are not returned, then the buyer must pay the cash price of the goods to the seller together with the reasonable value of services supplied under the sale contract up to the date of termination. If the buyer had already paid more than the entitlement of the seller, then the excess must be returned to the buyer.

A borrower/buyer is entitled to terminate a credit contract where a sale contract is terminated and to be credited with the amount of credit plus interest to that amount. The credit provider is entitled to recover from the buyer/borrower any part of the amount of credit that has not been paid to the supplier or the amount of any loss suffered by the credit provider. The buyer or borrower can also terminate a supply maintenance service linked to the sale contract and recover rebate.

Before exercising a right to terminate, the buyer/borrower must have already rescinded the sale contract. This needs to be done by writing a letter to the supplier setting out the basis upon which the buyer/borrower rescinds the contract. It is not necessary that the supplier accept the rescinding. During this, the payments must continue. The credit provider is obliged to inform the buyer/borrower of his/her rights in writing.

These provisions seem to give adequate protection to the consumers. However, the story in the real world can be very different. In the event of a dispute the seller can serve demand notices for payment, send bailiffs, give personal details of the buyer to Data Bureau and commence legal proceedings. By contrast, the buyer is often powerless to do anything.

Hire Purchase – Motor Vehicles

Motor vehicles may also be bought on hire purchase. The vehicle is sold to the finance company and the buyer hires it after putting down a deposit and pays monthly installments for two or three years before having the option to buy the vehicle outright. This is like a lease with an option to buy. It is more common for vehicles to be bought with a loan secured by the vehicle.

Consumers experience two problems when trying to purchase a used car from a motor car trader:

- a high pressure selling environment which can result in a consumer failing to make a careful and informed decision when purchasing a car
- motor cars are complex items and most consumers do not know how to assess the value and quality of a used car.

Pre – Contractual Disclosure

Before any hire purchase agreement is entered into, the credit provider must inform the intending hirer of his/her financial obligations in a written summary, in the form set out in Schedule 4 shown below. As the law requires it to be a written summary, it can be given to the intending hirer in person or delivered to him or her by any reliable mail service.

SCHEDULE 4

(Section 157)

HIRE PURCHASE AGREEMENTS

SUMMARY OF FINANCIAL OBLIGATIONS

UNDER A PROPOSED HIRE PURCHASE AGREEMENT

1.	Particulars of goods		
2.	If motor vehicle, state registration number:		
3.	State whether new or second-hand:		
4.	Address where goods will be kept:		
5.	Particulars relating to Financial Obligations:		
6.	Cash price for goods	*$....................[*Price stated will be valid for a period of 7 days]	
7.	Amount to be paid before entering into hire - purchase agreement (hereinafter referred to as the deposit)	*$....................	
8.	Cash price less deposit	*$....................	$......................
9.	Freight charges, if any		$........................
10.	Vehicle registration fee, if any		$........................
11.	Insurance for the goods under the hire - purchase agreement		$........................
12.	Total amount of term charges		$........................
13.	Balance payable under the agreement		$........................
14.	Particulars Relating to Payment		
15.	Duration of Hire Purchase Agreement		
16.	Number of instalments		
17.	Amount of each instalment $		

Pre- contractual disclosure is a consumer right. A hirer has a right to demand details of a vehicle prior to the purchase and before making any deposit. A pre-contractual disclosure document will not only give the hirer specific information on the condition and nature of the vehicle but also about the cost of the loan he or she needs to borrow to buy the vehicle. Pre-contractual disclosure will assist the hirer in making an informed decision on whether he or she can afford to buy the vehicle or whether the condition of the vehicle is acceptable to the hirer.

Case Study: 8

Mr Pratap, a farmer, was in need of his own transport. With his hard earned money from the farm, he decided to buy a suitable second-hand vehicle on credit for his runs to the market. Mr Pratap did not know that he had rights to know the particulars of the vehicle before the purchase, which was bought for $8000. The sales representative of the hire purchase company convinced Mr Pratap that the vehicle was in top condition. Two weeks after purchase, the car started giving problems with frequent breakdowns. Mr Pratap was worried as he was running at a loss doing the necessary maintenance work. He was later informed by a colleague that he had purchased an "accident" vehicle. After contacting the relevant authority, he found the information to be true.

Mr Pratap should have demanded background details of the vehicle issued by the LTA from the seller before transfer of the vehicle to his name. The particulars of the vehicle including the background check on accidents should have been released to Mr Pratap as part of the pre-contractual disclosure.

Like Mr Pratap, there are many buyers of second-hand vehicles who have suffered losses and are being duped into buying faulty vehicles. This can be avoided if consumers are alert and exercise their rights. Consumers can also have the vehicle checked at LTA for a fee of $21.50 before buying the vehicle.

Formation of Hire Purchase Contract

A Summary of Financial Obligation can be varied before the hire purchase contract is signed. These contracts or agreements must be in writing and must be signed by all parties or otherwise they cannot be legally enforced. Any amendments or alterations of contract have to be initialed or signed by the debtor in the margin opposite alteration. A signed copy of the document must be given to the buyer no later than 14 days after the agreement is reached. The buyer can, through a written notice, terminate the contract provided no credit has been obtained. The credit provider can demand any fees and charges incurred before the termination of the agreement. All HP agreements must be in accordance to Schedule 1 of the Consumer Credit Act 1999 and consist of the following information:

- Amount of credit
- APR
- Calculation of interest charges
- Total amount of interest charges payable
- Credit fees and charges
- Changes affecting interest and credit fees and charges
- Default rate
- Insurance financed by contract

Warranties

Conditions and warranties are implied in an HP Agreement. The agreement will contain an implied warranty that the goods are free from any problem or encumbrance in favor of the third party. In HP agreements there is a condition that the goods are of merchantable quality except if:

- the debtor examined the goods and saw defects
- in the case of second hand goods if the agreement contains a statement to the effect that
    - the goods are second hand
    - all conditions and warranties as to quality are expressly negative, and the car dealer proves that the debtor has acknowledged in writing that the statement was brought to his or her notice.

If the debtor made it known to the car dealer the purpose for which the goods are required then it is implied in the HP agreement that the goods will be reasonably fit for the purpose.

Early Payments

The car dealer must accept any payment under the agreement unless the contract prohibits it but the debtor must be informed. All payments must be credited as soon as practicable if allowed in the agreement. Rule 78 will apply to calculate rebate on interest when payments are made early before the duration in the contract. The car dealer must not ask for payment of interest charges before the end of the day. Default interest will apply only on the amount that is in default.

Power to Terminate

The debtor may terminate an agreement by returning the goods to the car dealer or a place specified in the agreement or to a mutually agreed place. If the parties fail to agree, the debtor can apply to court for an order that can fix a place. The debtor may require the car dealer to sell the goods to a person introduced by the debtor who is willing to buy in cash at a price agreeable to the car dealer. The hirer or debtor is entitled to the difference if the value of goods is more than the outstanding balance. The car dealer can recover the balance if the value of goods is lower than the outstanding balance.

Repossession

The car dealer cannot exercise his/her right to repossession unless:

- There have been 2 successive defaults of payments or a default in respect of the last payment. 30 days default notice must be given.
- A 21 days notice served by the owner to the hirer expires.
- If the hirer is dead, the car dealer cannot repossess items unless 4 successive defaults on payments have been made.
- If car dealer believes the hirer will remove or conceal the goods. The burden of proof on this will lie with the car dealer.

The law prohibits a car dealer or his agent from entering residential premises for the purpose of taking possession of mortgaged goods under a goods mortgage unless a court has authorised the entry or the occupier of the premises has consented in writing. If premises are entered in contravention of this section by a car dealer or an agent of a credit provider, the credit provider commits an offence. The court may order entry and repossession of mortgaged goods.

Notices

A car dealer is relieved from the obligation to give a notice or other document to a person if the

- car dealer made a reasonable attempt to give notice or other documents
- car dealer has reasonable grounds for believing that the person can no longer be contacted
- car dealer believes the hirer will remove or conceal the goods. In this instance the burden of proof lies with the car dealer.

After Repossession

Within 21 days after repossession of goods, the car dealer must serve the hirer or his guarantor a written notice setting out:

- Cost of repossession
- Amount to be paid under the agreement
- Specified time within which the amount must be paid.

The car dealer must acknowledge in writing to the hirer acknowledging receipt of goods, stating a description of the goods, place, date and time where the car dealer took possession of the vehicle.

If the hirer returns the vehicle within 21 days after receipt of the notice, he or she is not liable to pay -

- cost of repossession
- incidental cost to taking possession
- cost of storage

A car dealer that has taken possession of any goods after 21 days notice cannot without the hirer's written consent sell, dispose or part with the goods unless:

- the 21 days has expired
- time for payment in the repossession notice has expired.

The car dealer can sell repossessed goods after the expiration of 21 days as stipulated in the repossession notice.

Nevertheless, a car dealer must return the goods to the hirer if the hirer:

- pays the car dealer any amount due as per the agreement. Th car dealer cannot demand full and final payment.
- remedy any breach in the agreement including any cost incurred by the car dealer in taking possession and returning goods.

Hardship Clause

Under the Act, if the hirer is ill, unemployed or has any other reasonable cause not to meet the obligations under the contract, he or she can apply to the car dealer for the following methods of restructuring his/her account:

- requesting a change in the terms without changing the APR
- extending the period of contract and reducing the amount of payment
- postponing for a specified period the date on which payment is due
- extending the period of contract and postponing for a specified period the date of payment.

Upon the restructure the car dealer may charge reasonable finance fees or penalty interest for changes. If the credit provider does not agree to change the terms of the agreement or contract, the hirer can apply to a court to change the terms of the contract.

Unjust Transactions

Unjust transaction is where the terms and conditions are unconscionable, harsh or oppressive. The hirer can seek the court's help if he/she finds the agreement to be unjust. The court will consider the following factors prior to opening any unjust transaction:

- Compliance or non compliance provision of the agreement
- Bargaining power of the parties
- Whether disputed provision was under negotiation initially
- If it was it practically possible for the hirer to seek alteration or to reject any of the provisions
- If the conditions are unreasonable and difficult to comply with
- Any ambiguity of language in the contract
- If there was any independent legal or other expert advice sought
- If legal and practical effects were accurately explained and the hirer understood the provisions and their effects.
- If the owner used or exerted unfair pressure or undue influence or unfair tactics on the hirer
- If the owner took measures to ensure the hirer understood the implications of the transactions.
- Whether at the time the agreement was entered into or changed the owner knew, or could have ascertained by reasonable inquiry of the hirer at the time, that the hirer could not pay in accordance with its terms or not without substantial hardship
- Whether the terms of the transaction or the conduct of the owner were justified in the light of the risks undertaken by owner
- If the terms of other comparable transactions involving other owners and if the injustice is alleged to result from excessive interest charges, the APR or rates payable in comparable cases.

Return of Vehicle by the Hirer

A hirer who returns the vehicle purchased on hire purchase within 21 days after receipt of the default notice is not liable to pay the following costs:

- Cost of repossession
- Incidental costs of taking possession
- Cost of storage

Early Payments

The car dealer is required to accept any payment under the Agreement unless the contract prohibits but the hirer must be informed. The dealer must credit any payment as soon as practicable if allowed in the hire purchase agreement. The Rule of 78 will apply to calculate rebate on interest when payments are made early before the duration in the contract. The car dealer should not ask for payment of interest charged before the end of the day and default interest is to apply only on amount in default rather the full contracted amount.

Statement of Account

The car dealer is required by law to provide statements of account every 6 months or 3 months as agreed with the hirer. Schedule 2 of the Act describes the contents of a statement of account as follows:

- Statement period
- Balances
- Credit provided
- Identity of supplier
- Interest charges
- Fees and charges
- Payments to or from account
- Amounts payable by debtor
- Insurance payments
- Alterations
- Other

The car dealer is under no obligation to provide a statement of account if the:

- APR or interest rate is fixed and there are no provision to vary the rate
- Account is not in use
- Amount is written off
- Hirer is in default and enforcement proceedings are in process
- Hirer is insolvent
- Hirer is dead

Linked Credit Provider

A linked credit provider is where a hirer purchases a car on credit and the finance is arranged by the car dealer who sold him or her the car. Example:

- Autoworld is the supplier of the car while the financier is Merchant Finance
- Pala Motors is the supplier of the car which is financed by Dominion Finance.

Liability of Credit Provider or Lender

The lender or financier will be liable for any misrepresentation made by the supplier or car dealer about the credit contract. In certain circumstances the liability for damages arising out of the sale contract is extended to the lender or financier. Termination of either the sale contract or loan contract may give rise to a right to terminate the related contract.

Liability of Financier for Car Dealer's Misrepresentation

A supplier or car dealer may mislead a hirer on the terms of a credit contract, usually in an effort to close a sale that relies upon finance. A representation made by a supplier or car dealer to the hirer in relation to a tied loan contract gives the hirer the same rights against the lender as the hirer would have had if it had been made by the lender. The hirer can claim damages for misleading/deceptive conduct against the financier or lender arising out of the representation of the supplier or car dealer.

Liability of Financier in Relation to Motor Vehicle

A hirer can sue the supplier or car dealer and the lender jointly if he or she suffers loss or damage as a result of:

- misrepresentation
- breach of contract
- failure of consideration in relation to the sale contract.

A financier is not liable if:

- the hirer approached lender or financier and it was not induced by the supplier or car dealer

- the financier can show that prior to entering into a linked credit arrangement with the supplier or car dealer, it undertook a due diligence process regarding the financial standing and business conduct of the supplier
- the lender had no cause to suspect that hirer might be able to make claim and supplier/car dealer might be unable to meet supplier's liabilities.

Limits to Hirer's Right of Action Against Linked Lender

If a car dealer is bankrupt, cannot be located after reasonable enquiry or has died, the hirer cannot make a claim against the linked lender. A car dealer will be liable to the linked lender for the loss suffered by the linked lender.

Right to Terminate Linked Sale Contract

If a hirer had made it known to the car dealer that credit was needed to buy the vehicle but fails to obtain credit on reasonable terms, the hirer is entitled to terminate the sale contract even if goods or services have been supplied. If a sale contract is terminated, the car dealer is entitled to reasonable compensation for damage or deterioration of goods supplied or value of services supplied. The hirer will be entitled to receive money or a deposit paid under the sale contract.

Right to Terminate Linked Credit Contract

Where a sale contract is terminated, a hirer will be entitled to terminate the credit contract and to be credited with the amount of credit plus interest to that amount. The financier is entitled to recover from the hirer any part of the amount of credit that has not been paid to the car dealer or the amount of any loss suffered by the financier. The hirer can also terminate the supply of maintenance service linked to the sale contract and recover the rebate.

Termination of Contract in Writing

A sale contract must be cancelled by writing a letter to the car dealer. It is not necessary that the supplier accept the cancellation. The hirer must continue making payments while making the request for cancellation.

Mortgages

What is a mortgage?

A mortgage is a legal document by which the owner (i.e. the buyer or borrower) transfers to the lender an interest in real estate to secure the repayment of a debt. Mortgages are used by individuals and businesses to make large purchases of real estate without paying the entire value of the purchase up front. In a residential mortgage, a home buyer pledges his or her house to the bank or finance company. The bank has a claim on the house should the home buyer default on paying the mortgage. In the event the mortgagor is unable to repay the loan, the bank may evict the home owner, sell the house and use the proceeds to clear the mortgage debt. A goods mortgage (also called chattels mortgage) is a loan to buy some movable property like motor vehicles and machinery where the item is security for the loan.

Mortgage to be in Writing

A mortgage must be in the form of a written mortgage document signed by the mortgagor. A goods mortgage, however, need not be in the form of a written document if the credit provider had acquired lawful possession of the goods before the mortgage was entered into. If a mortgage is in the form of a written mortgage document and is not part of a credit contract, the credit provider must give the mortgagor a copy to keep, in the form in which it was made, within 14 days after it is made.

It is extremely important for mortgagors or borrowers to read through their credit agreements before they sign. They must read through each and every paragraph in the agreement and understand what they are agreeing to. In the event the borrowers do not understand certain clauses in the agreement, it is in their interest to seek independent financial and legal advice before signing the agreement.

Case Study: 9

Mrs Fong purchased a home loan from a bank. She signed the home loan agreement and started making her payments. Soon after, she found herself in financial

Case Study: 9 continued

difficulties where she could not pay her monthly payments. As such, her credit provider issued her default notices reminding her that her account was in arrears and that she needed to pay her arrears. Mrs Fong also learnt that she would have to pay for all the notices that were sent to her which amounted to over $1000. Mrs Fong disputed paying this amount and said that she was not informed that she would have to pay all the notices which were issued to her when her account was in default. Mrs Fong then lodged a complaint with the Consumer Council of Fiji. Upon the council's intervention, it was found that Mrs Fong failed to read the section in her contract which stated that in the event of any default notice sent to her by the bank, the customer (Mrs Fong) would have to pay for all cost pertaining to those notices. Thus, she had no choice but to pay those costs. However, the bank must indicate during pre-contractual disclosure precisely how much the charges would be for sending such notices.

Case Study: 10

Mr Richards took a home loan from a bank. However he did not read and analyse the terms and conditions of the insurance policy he bought for fire and cyclone. This was bought separately from an insurance company. Soon after, Mr Richards was a victim of a tropical cyclone and sustained damage to his water tank that was attached to the housing infrastructure, damage to paint on the railings and roof. He claimed for the damage from the insurance company but was denied. Mr Richards failed to understand why his claims were denied and lodged a complaint with the Consumer Council. After clarifying the situation with the insurance company and going through the insurance policy, it was found that the three claims were not covered under the cyclone insurance policy. The terms and conditions of the policy were not in favour of Mr Richards. If he had taken out time to read and question the insurance company, he would have understood what was not covered in his contract.

In both case studies, the mortgagors were not vigilant enough and failed to read, analyse and understand their credit contracts, which resulted in financial loss for both.

When is a Mortgage Unenforceable?

A mortgage that does not describe or identify the property which is subject to the mortgage is void (not enforceable). Also a provision in a mortgage that charges all the property of the mortgagor renders the mortgage void as well. The law prohibits a mortgagor from creating or agreeing to create a mortgage over or in respect of property or a class of property that is to be, or may be, acquired by the mortgagor after the mortgage is entered into.

A mortgage will be void if it contains a provision that goods supplied from time to time under continuing credit contract are subject to the mortgage.

A mortgage that contains a provision that secures credit provided under another future credit contract or future related guarantee is normally unenforceable in relation to the future credit contract or future related guarantee.

If a credit provider includes a person other than a borrower or guarantor in a mortgage to secure his interest under a credit contract, then the mortgage will be unenforceable. This means that a person who has nothing to do with a credit contract cannot be roped in to provide additional security to the lender or credit provider.

A mortgage is void to the extent that it secures an amount, in relation to any credit contract which it secures, that exceeds the sum of the amount of the liabilities of the debtor under the credit contract; and the reasonable enforcement expenses of enforcing the mortgage. This means that a borrower cannot take a mortgage on a property for more than the property is valued.

These provisions put brakes on the credit provider's ability to coerce persons other than the debtor and guarantor to be a party to the mortgage or to force the borrower to mortgage more properties than what would serve as adequate security for the amount lent. Hence, in the event the borrower is unable to repay the loan, he/she would lose only the property that is mortgaged, not everything that he/she owns. Further, anybody other than the debtor and the guarantor will not be implicated.

However, where more than one property is mortgaged, and the borrower defaults on his/her payments, the Act does not specify whether the credit provider can repossess only those properties that would be adequate to pay the amount in arrears or all properties under mortgage. According to a complaint received by the Consumer Council, the credit provider repossessed all three mortgaged properties with a total value of about $590,000 when the borrower had only $59,763.21 in default payments. To make matters worse, the bank received tenders that totaled about $300,000 only i.e. only about half the value of the three properties (Banking Services in Fiji: From Consumers' Perspective, Consumer Council of Fiji Report, March 2011, p. 15).

Case Study: 11

Mr. K's 3 properties were mortgaged by Bank X through the bank's lawyers. Mr. K owned a construction company but the company was not doing well due to downturn in the construction business. He owed $59,763.21 in default payments. His three properties were valued at $285,000, $240,000 and $67,000 by the bank's recommended lawyer. The bank received tenders for $140,000, $120,000 (offered by a bank officer of another bank) and $43,000 (by a law firm that initially acted for Mr. K) respectively.

Questions that arise are:

- Why did the bank not sell one property to recover the debt owed by Mr. K? Selling one property would have paid

Case Study: 11 continued

off the arrears amount owed and the rest of the money could have been used to reduce the principal sum.

- Why was Mr. K not called when tenders were opened, for his peace of mind? This indicates lack of transparency.
- Why didn't real estate agents conduct the mortgagee sale as they are professionals who likely could have got better market rate?

To protect a person's source of livelihood, the act prohibits a mortgage being created over employees' wages or salary, or employment benefits or benefits under a superannuation scheme unless the regulations permit it to do so. The regulations currently do not permit this and to safeguard the interest of borrowers and their families it should remain prohibited. A mortgagor is further prohibited from assigning or disposing of property that is subject to a mortgage without the credit provider's consent or the authority of a court. However, a court may allow a mortgagor to dispose of the property provided certain conditions are satisfied.

For example

- a credit provider must not unreasonably withhold consent or attach unreasonable conditions to consent
- if a credit provider fails within a reasonable time to reply to a request for consent to do so by the mortgagor
- consent is unreasonably withheld or unreasonable conditions are attached to the consent.

Disposing and Discharging of Mortgaged Property

A borrower cannot dispose of property without the credit provider's consent but the credit provider should not be unreasonable. The court can authorise a borrower to dispose of property if the credit provider fails to provide timely response or its consent is unreasonable. A mortgagor or borrower is at a liberty to find another person who can take over payments.

If a mortgage is not discharged by the credit provider, the mortgagor/borrower can make an application to the court and the court may make orders to discharge the mortgage. It is significant to note that a borrower can only mortgage his/her own property.

Pre–Contractual Disclosure for Mortgages

The credit provider is required to provide pre-contractual disclosure to consumers prior to entering into mortgage. The pre-contractual disclosure is the giving of all the information that allows consumers to make an informed choice. The law requires the disclosure statement to show the following information:

- Amount of credit
- APR (Annual percentage rate or annual interest rate)
- Calculation of interest charges
- Amount of repayments
- Total amount of interest charges payable
- Credit fees and charges
- Changes affecting interest and credit fees and charges
- Statement of account
- Default rate
- Enforcement expenses
- Commission
- Insurance financed by contract

Guarantees

If a person gives a guarantee under mortgage contract, he/she is agreeing to pay the debt if the borrower fails to do so. Before signing a guarantee, a guarantor must receive a copy of the contract and a document explaining the rights and obligations of a guarantor. After signing within 14 days a copy of the guarantee/credit contract must be given to the guarantor. A guarantor can withdraw from the guarantee before credit is provided or if the credit contract differs from the proposed credit contract. A guarantee is void if the credit provider exceeds the amount of liabilities of the debtor. A guarantee cannot be enforced if a borrower dies, becomes insolvent or incapacitated. A guarantee is unenforceable if it limits the guarantor's right to indemnity or limits a guarantor's right to enforce indemnity. An increase in a guarantor's liabilities is only possible through written consent and disclosure with credit provider. It is vital that a guarantor under any mortgage contract is over 18 years of age.

Unilateral Changes by Credit Provider

If the mortgage contract permits, the credit provider can vary the mortgage contract as follows:

- Interest rate changes: Written notice is required to be given on new rates in the newspapers. The credit provider must provide a notice on how interest is calculated and other information at least 20 days before changing the rate.
- Repayment changes: Written notice must be given on the change in amount, frequency or time for payment and minimum repayments at least 20 days before the change.
- Credit fees and charges: Written notice on new fees and charges must be provided at least 20 days before the changes. Notice must also be published in the newspapers.
- Other changes: The credit provide is required to give 20 days written notice before any terms of the contract are changed without reducing the rights of the borrower.

Changes to Mortgage Contract by Agreement

The legislation allows the borrower and credit provider to mutually agree to change the credit contract. The credit provider must give 30 days written notice outlining what will change in the terms or conditions of the agreement.

Changes on Grounds of Hardship

If the borrower is ill, unemployed or has other reasonable cause not to meet his or her obligation under the contract, the borrow can apply to the credit provider to do the following to the terms and conditions of the mortgage contract:

- make a change in the terms without changing the APR
- extend the period of contract and reduce the amount of payment
- postpone for a specified period the date on which payment is due
- extend the period of contract and postpone for a specified period the date of payment.

The credit provider may charge reasonable finance fees or penalty interest for the changes. If the credit provider does not agree to the change, the debtor can apply to a court to change the terms of the contract.

Unjust Transaction

The law allows a mortgagor or borrower to open an unjust transaction if the he or she has reasonable grounds to believe that the mortgage contract is unconscionable, harsh or oppressive. The mortgagor or borrower can seek the court's help if he/she finds the contract to be unjust. The court will consider the following factors prior to giving orders to open the unjust transaction:

- Compliance or non compliance provision of the contract
- Bargaining power of the parties
- Whether the disputed provision was under negotiation initially
- Whether it was practically possible for the debtor to seek alteration or to reject any of the provisions
- Whether the conditions are unreasonable and difficult to comply with
- Any ambiguity of language in the contract
- Whether any independent legal or other expert advice was sought
- Whether legal and practical effects were accurately explained and the debtor understood the provisions and their effects
- Whether the credit provider used or exerted unfair pressure or undue influence or unfair tactics on the debtor

- Whether the credit provider took measures to ensure the debtor understood the implications of the transactions
- Whether at the time the contract, mortgage or guarantee was entered into or changed the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship
- Whether the terms of the transaction or the conduct of the credit provider was justified in light of the risks undertaken by the institution
- The terms of other comparable transactions involving other credit providers and if the injustice is alleged to result from excessive interest charges, the APR or rates payable in comparable cases.

Unconscionable Interest and Other Charges

The court may review unconscionable interest and other charges, if:

- Notice is not given to the mortgagor or borrower on the changes in fees and charges
- Establishment fee or charges are imposed on the mortgagor
- A fee or charge is payable on early termination of a credit contract
- A fee or charge is payable for an amount under a credit contract

The court will give consideration whether the fees and charges are unreasonable and whether they exceed a reasonable estimate of the credit provider's loss arising from early termination, including the credit provider's average reasonable administrative costs. Unconscionable interest and other charges have a time limit under the law and cannot be taken to court more than two years after the credit contract is rescinded.

Ending of Mortgages and Guarantees

A mortgagor or borrower can end the mortgage by paying out the mortgaged sum at any time. The borrower can make a written request to a bank for the payout figure, which must be provided within 7 days. If the credit provider fails to give the statement of the payout figure, the court can make appropriate orders for the credit provider to do so should the borrower make application to the court.

Surrender of Mortgages

The law provides leeway to mortgagors/borrowers to surrender or give up the property that has been mortgaged. Upon the surrender of the mortgagor's rights and interests, the credit provider can sell the mortgaged property. The credit provider is under an obligation to inform the mortgagor/borrower of the amount for which his/her property has been sold. If the property has been sold for a lesser amount than what the borrower owes, the credit provider can demand the difference from the borrower. If the property has been sold for an amount more than what the borrower owes the credit provider, the credit provider should refund the balance to the borrower. If the credit provider fails to sell the property in reasonable time or at a reasonable price then the court may make its judgment by compensating for any loss.

Enforcement of Mortgages and Guarantees

As discussed under 'Hire Purchase', the Consumer Credit Act 1999 provides some protection to consumers who face hardships due to unforeseen circumstances. The law prohibits a credit provider from starting enforcement proceedings against a debtor or a mortgagor in relation to a credit contract unless the debtor is in default under the credit contract and the credit provider has given the debtor, and any guarantor, a default notice, that allows the debtor a period of at least 30 days from the date of the notice to remedy the default. The default notice issued to the mortgagor must specify the default and the action necessary. Any subsequent default of the same kind during the 30 day period may be subject to enforcement proceedings without further notice.

However a credit provider is not required to give default notice or wait for at least 30 days if he/she believes on reasonable grounds that he/she was induced by fraud on the part of the debtor or mortgagor to enter into the credit contract or mortgage.

When Default Notice May Not be Issued by the Credit Provider

The credit provider is not required to issue a default notice if:

- Fraud is involved
- Reasonable attempts to locate the debtor or mortgagor or borrower have been made and the mortgagor cannot be located
- Court authority is given
- The debtor or mortgagor or borrower has removed or disposed of mortgaged property or intends to remove or dispose the mortgaged property
- Urgent action is necessary to protect the mortgaged property.

Mortgagor can Remedy the Default

If a credit provider in a default notice intends to take action because the debtor or mortgagor is in default under the credit contract or mortgage, the debtor, mortgagor or guarantor may remedy the default within the period specified in the notice, and the contract or mortgage is then reinstated and any acceleration clause cannot operate. This gives the debtor additional time to remedy the default.

A credit provider must not enforce a judgment against a guarantor unless the credit provider has obtained judgment against the debtor for payment of the guaranteed liability and also if the 30 days written notice of demand for the payment is not met. A judgment is a determination of a court of law creating or affirming an obligation, such as a debt. This gives time to the guarantor to remedy the default and the "acceleration clause" is not put into effect.

Acceleration Clause and "On Demand Facility"

An acceleration clause is a provision in the mortgage loan contract that provides the lender with the legal right to 'accelerate' (bring forward) the date on which the entire loan becomes due and payable, and if the debt is not then repaid in full, he may take steps to foreclose the mortgage or exercise his power of sale. This can happen under certain circumstances, usually when a contractual obligation is violated.

Typically, the circumstances that will trigger the acceleration clause are specifically spelled out in the mortgage document. Such circumstances may include failure to pay scheduled loan installments, sale of the house and title transfer. In the case of default, the contract usually allows for a grace period before the lender can call the loan and begin the foreclosure process.

The mortgage acceleration clause falls under the general term of 'demand features' that may be included in a mortgage document. The use of mortgage financing is necessary in many cases, especially for buying real estate. However consumers using mortgage financing need to examine carefully and understand very well any 'demand features' that may be included in the mortgage document. How a consumer can be caught up by this kind of demand feature is illustrated in the case study 11 above.

Consumers need to be on the lookout for a demand clause that may give the lender the right to demand full repayment of the loan at any time for any reason. If such a clause exists, it makes the loan extremely risky for the buyer and should not be accepted. This is an unreasonable clause and if a credit provider exercises his rights under this clause at any time, it will impose an unbearable burden on the borrower.

As stated in the Consumer Credit Act 1999, an 'acceleration clause' is a term of a credit contract or mortgage that states that –

(a) on the occurrence or non-occurrence of a particular event, the credit provider becomes entitled to immediate payment of all, or a part, of an amount under the contract that would not otherwise have been immediately payable; or

(b) whether or not on the occurrence or non-occurrence of a particular event, the credit provider has a discretion to require repayment of the amount of credit otherwise than by repayments fixed, or determined on a basis stated, in the contract but does not include any such term in a credit contract or mortgage that is an on demand facility.

An 'on demand facility' is a credit contract or mortgage under which -

(a) the total amount outstanding under the contract or mortgage is repayable at any time on demand by the credit provider; and

(b) there is no agreement, arrangement or understanding between the credit provider and the debtor or mortgagor that repayment will only be demanded on the occurrence or non-occurrence of a particular event .

Consumers must take extra precaution with this 'on demand facility' permitted by the law. It gives the credit provider unlimited powers to require the debtor to pay the whole debt in full at any time he/she likes. This clause can be hidden somewhere in the credit contract or mortgage documents – possibly in fine print. If it is there and a consumer signs the contract or mortgage, whether knowingly or unknowingly, he/she will be legally bound by it. Even if this is not in the credit contract, the law gives the upper hand to credit providers.

Recommendation

• As 'on demand facility' gives the credit provider unlimited powers to require the debtor to pay the whole debt in full at any time he/she likes, it is extremely hazardous to consumers. This clause can be hidden somewhere in the credit contract or mortgage documents – possibly in fine print. If it is there and a consumer signs the contract or mortgage, whether knowingly or unknowingly, he/she will be legally bound by it. As it is virtually impossible for an average consumer to identify and understand the very serious implications of 'on demand facility' this provision in the law should be repealed and its use expressly prohibited in any credit contract or mortgage.

• The provisions of acceleration clause in the event of default on mortgage repayments currently do not place any limits on what

Recommendation: continued

the credit provider can repossess and sell to recover his/her debt. In this respect the consumers are completely unprotected. To provide reasonable protection to the consumers, the Act must be amended to specify that the credit provider can repossess and sell only the property or properties of which the proceeds would be sufficient to clear the payments in arrears. In addition, the credit provider must be required to seek court order to enforce the acceleration clause.

Requirements to be met before an Acceleration Clause can be enforced

Before the acceleration clause in a mortgage document can be enforced, the credit provider has to ensure the following requirements are met:

- The borrower has been in default and a 30 day default notice was issued
- The default notice contained an additional statement outlining how the liabilities of the borrower will be affected by the operation of the acceleration clause and the amount required to pay off the contract
- The default has not been remedied with in the period specified in the default notice.

Prohibition on Repossession

The law prohibits a credit provider from taking possession, without the consent of the court, of mortgaged goods if the amount currently owing under the credit contract is less than 25% of the amount of credit provided or $2,000, whichever is the lesser. This is apparently designed to deter credit providers from repossessing goods where most of the debt has been paid.

A debtor, mortgagor or guarantor who has been given a default notice or a demand for payment any time before the end of specified period can negotiate with the credit provider for a postponement of the enforcement or any action taken under such proceedings.

Postponement of Enforcement Proceedings

When a postponement is negotiated with a credit provider after the credit provider has taken possession of property subject to a mortgage, the mortgagor has to pay the reasonable costs of the credit provider in taking possession of the property. The credit provider needs to give a written notice of the conditions of a postponement no later than 30 days after the agreement is reached between the borrower and the credit provider.

A debtor, mortgagor or guarantor may apply to the court for a postponement and the court may order or refuse to order the postponement. A credit provider has the right to apply to the court for variation of the order and the court may vary the order as it thinks fit or may refuse to vary the order or may revoke the order.

While these appear to be fair provisions in the law, in reality an average debtor, mortgagor or guarantor is unlikely to have the necessary resources and expertise to engage in a legal battle, especially when the law also gives credit providers the right to apply to the court for variation of the order. It would be cheaper and easier for a consumer to get remedy if such matters are handled by a tribunal system rather than the judiciary.

Recommendation

To make it easier and affordable to consumers to get remedy in the event of disputes, a tribunal system needs to be established.

Mortgagor May Nominate Purchaser

A mortgagor or borrower can nominate in writing within 21 days a person who is prepared to purchase the goods from the credit provider. The credit provider is required to sell goods to the nominated person. If there is no nominated buyer and payment is not made within 21 days the credit provider can sell the property at the best price reasonably obtainable. The credit provider must credit the proceeds of sale against the debtors account plus deduct any expenses. It is important that the credit provider takes only what is owed and other enforcement expenses. A mortgagor or borrower can make application to the court if he or she is not satisfied that a reasonable price was obtained for the property or if the property was not sold as soon as reasonably practical.

Right of Redemption

Right of redemption can be seen as the mortgagor's last chance to save his or her property before or even after it is announced for mortgagee sale. After the property has been advertised for mortgagee sale and tenders have been received by the credit provider from potential purchasers, the mortgagor can still save his or her home if he or she manages to arrange for payments for the mortgage amount in default. The mortgagor/borrower can redeem or pay off the defaulted mortgage, usually up until the time of the mortgagee sale, and keep the property. The mortgagor's repayment record and aging arrears are the deciding factors for the credit provider to consider this.

Case Study: 12

Mr Singh took a home loan from a bank and got the house his family had always dreamed of. Mr Singh was running a timber business and was efficient with his monthly repayments. However after a year, his timber business was not doing well and as a result he had to close the business. Mr Singh started defaulting on his monthly repayment as the timber business had been his only source of income. He received a default notice from the bank on his failure to meet his financial obligations. Being the sole breadwinner in the family, Mr Singh spent his savings to accommodate his family's needs and was not in a position to apply for restructure. He owed $85,000 to the bank. His house was advertised for mortgagee sale in the newspapers and Mr Singh was helpless, not knowing what to do next. Luckily a friend offered to lend him the defaulted amount to help him save his house. Mr Singh then contacted the bank to clear his default. The bank agreed to accept Mr Singh's default payment as his past payment records were good, and Mr Singh managed to redeem his property.

Insurance

Insurance is taken on a mortgaged property mainly to protect the mortgagor/borrower. All insurance payments should be met by the mortgagor and should not be included as part of the loan facility. The credit provider cannot require the mortgagor or his/her guarantor to take out insurance on the mortgaged property, except for the type of insurance which is applicable to a property e.g. fire and cyclone insurance. Compulsory insurance is normally for fire and natural disasters such as cyclone or earthquake and is usually referred to as property or house insurance. Any other types of insurance such as mortgage protection insurance and contractors all risk cover insurance are not compulsory. Under mortgage protection insurance, the home loan or mortgage is paid off by the insurance company in the event of the borrower/mortgagor's death or disability. Contractors all risk cover insurance protects the owner who decides to build a home.

The credit provider must not insist that insurance be taken out with a particular insurer and make any unreasonable requirement in the terms on which the mortgagor or guarantor is to take out insurance.

Within 14 days after signing the insurance document, the credit provider must give the mortgagor a copy of the insurance policy. If the proposal for insurance is rejected, the insurer must inform the mortgagor and the credit provider. The credit provider must ensure that any amount paid by the mortgagor for insurance is refunded in full. The credit provider may recover any amount paid from the mortgagor.

Termination of Insurance

If a mortgage contract is terminated before the end of the full term of the mortgage insurance contract, a mortgagor is entitled to terminate the insurance contract and get a rebate. Upon termination of the mortgage contract, the credit provider is required inform the mortgagor of his/her rights.

Lessons from Repossession Laws in New Zealand and UK

The consumer credit laws in New Zealand, UK and Fiji are very similar. However, there are a few significant provisions not present in the Consumer Credit Act of Fiji. These are:

1. The creditor has to give a pre-possession notice to the debtor in writing on a standard form (NZ).
2. The creditor has to give post possession notice and send a 'statement of account' on a standard form to the debtor within 10 days after selling the goods (NZ); within 30 days in Fiji. See standard form below.
3. A debtor can apply for a Time Order Form which will allow him to find the money to meet the repayments (UK).
4. If the debtor has paid one third or more of the amount borrowed then the good is protected and can only be repossessed with an order from the court (UK). A court order is not required in Fiji.

Statement of account after sale of repossessed goods (example)

FROM:	Beds and Beds
Branch Address	140-146 Lyon Street, Nightcap
Agreement No.	4700316
Date of Agreement	1/4/2010
Description of Goods	Big Bed, Super Soft Queen, XOOQ1
TO:	
Full Name	Anthony James D'Van & Tina Marie D'Van

Address	24 Sunset Terrace, Nightcap
Phone	03) 555-5555
Proceeds of the Sale:	
(1) The goods were sold for	$1200.00
(2) Less the cost of expenses of and incidental to the sale	$ 290.26
(3) The net proceeds of the sale $ 909.74	
The amount required to settle the agreement as at the date of sale:	
Total amount payable under agreement	$1801.30
Less deposits and instalments paid	$ 690.32
Balance due under the agreement	$1110.98
Less statutory rebates	$ 35.01
Total:	$1075.97
Add	
Costs of repossession	$ 120.00
Costs of storage, repairs, or maintenance	$ -
Overdue charges	$ -
Costs of valuing and preparing for sale	$50.00
Costs of remedying breaches of the agreement	$ -
Amounts required to settle the agreement	$1245.97
Less proceeds of sale	$ 909.74
The balance owing under the agreement (by you to us) is	$ 336.23

Payment of the amount is due by ....20..... to avoid legal action against you to recover the debt.
Dated this .... day of .... 20.......

Recommendation

To provide greater protection against repossession to consumers in Fiji, the Consumer Credit Act must be amended to include provisions requiring pre-possession notice, post-possession notice, statement of account, Time Order Form and court order to repossess where one third or more of the debt has already been paid.

Auction as an Option

Public auctions would be a fairer and more transparent way of selling mortgaged properties in Fiji. Auctions can be guided by the regulations to control the bidding process so that everyone knows their rights and obligations. This would avoid discrepancies in the system. Unlike mortgagee sales, auctions can reveal the true market value of a property and are conducted in an open forum where all bids are known and participants are given immediate feedback on the property's value. Auctions eliminate long negotiation periods where interest keeps on accumulating. Buyers would know they are competing fairly and on the same terms as all other buyers and receive comprehensive information on property via a due diligence packet. Any consumer taking part in an auction can easily and quickly make market comparisons when they see biddings at the same place and at the same time.

Consumer Leases

What is a Consumer Lease?

A consumer lease is a form of finance (loan) provided by retail outlets. They tend to be offered by stores selling more expensive consumer goods such as furniture, TVs, computers and white goods. This type of finance allows a consumer to lease the items over time rather than buying them outright.

With a consumer lease, the lessee or debtor (person who hires a product) hires an item over a period of time. The lessee will make regular rental payments (usually monthly) until the term of the contract finishes but does not have a right or obligation to purchase the goods. Despite the large amount of money the lessee pays out, he or she does not automatically own the item at the end of the lease period. The item he or she will lease will remain the property of the company the lessee has the lease agreement with.

These leases last for a fixed period (usually two years or more), during which a lessee makes regular payments to the retailer. At the end of the period, the lessee will usually have a number of options:

- Buy the item outright at its market value or an agreed value
- Buy a similar model to the item they have been leasing for a nominal fee
- Upgrade to a new lease contract featuring a newer model.

What makes Consumer Leases Attractive?

- A consumer lease allows you to take the item home straight away without having to pay the full price up front.
- When the time comes to buy the item outright, you have the option of taking out a new lease on a newer model instead.

What are the Potential Traps?

If you're thinking about taking out a consumer lease, proceed with caution. When it comes to dealing with any financial product, the golden rule is always to read the fine print. The devil is often in the detail, and that detail can be very hard to come by. The catches can be numerous, and depending on the circumstances and how the lease is managed, they may far outweigh any potential benefits. In particular, look out for these potential pitfalls:

Ownership

Many consumers falsely believe that once they start making repayments, or at least when the repayment period ends, that technically they own the product. But this is not the case with a lease. Even when the repayment period is over, the consumer is still required to then buy the item for an agreed price. Then, and only then, do you own the product that you've been leasing all this time. In some cases for example, you may only be entitled to 'buy' the product after two successive leases have been taken out.

Once you sign, you're locked in

A lease locks you in for a set period of time, regardless of whether you change your mind in the meantime. If you are allowed to break the contract early, you may still be required to pay out the full lease anyway, and you'll often be required to pay hefty exit fees for leaving early. This essentially means that once you sign, you're locked in.

An expensive way to purchase

The overall cost of leasing is usually higher than if you paid for the item upfront, or if you used an alternative method like lay-by. It has been found that some lease payments can accumulate to between 50 and 100 per cent above the original cash price.

Conditions and true costs are not always made clear

Some companies offering lease products may not advertise what the true cost of the lease is – i.e. what the total lease payments plus any ongoing fees will add up to over time. Instead, they only indicate what the regular repayment amount will be. In addition, they may not indicate what the item's cash price is – which means you can't compare what you'll pay if you buy the item up front versus what you'll pay overall if you take out the lease.

Not always a fair deal

Some lease contracts require that you pay an on-going amount to insure the item – even though you don't technically own the item. Also, if the item is defective or stolen, you may still have to pay out the full requirements of the lease.

Defaulting can be disastrous

Under the terms of many lease contracts, if you miss a lease repayment, the item you are paying for may be taken away, but you'll still be left with the lease, and possibly additional penalties for having missed a payment. You may even be asked to pay out the entire contract immediately.

10.4 Consumer lease as defined by the Consumer Credit Act 1999

- A 'consumer lease' is a contract for the hire of goods by a natural person ordinarily resident in the Fiji Islands, or is a body corporate where the hirer (lessee) does not have a right or obligation to purchase the goods
- The goods are hired wholly or predominantly for personal, domestic or household purposes
- A charge is made for hiring the goods (lease payments) together with any other amount payable under the consumer lease exceeds the cash price of the goods
- The amount payable under a consumer lease includes any agreed or residual value of the goods at the end of the lease or on termination of the lease by the lessor (supplier) or lessee (hirer)
- The law does not apply to a consumer lease for a fixed period of 4 months or less or for an indefinite period
- The law does not apply to a consumer lease under which goods are hired by an employee in connection with the employee's remuneration or other employment benefits.

Information Required to be Disclosed in Consumer Leases

A consumer lease must be in the form of a written lease document signed by the lessee and containing the following information:

(a) a description or identification of the goods hired under the lease;

(b) the amount of payment to be made by the lessee before the goods are delivered;

(c) the amount of any stamp duty or other government charge payable by the lessee;

(d) the amount of any other charges not included in the rental payable under the lease, and a description of those charges;

(e) the amount of each rental payment to be made by the lessee under the lease;

(f) the date on which the first rental payment is due and either the dates on which subsequent rental payments are due or the interval between rental payments;

(g) a statement of the conditions on which the lessee may terminate the lease;

(h) a statement of the liabilities (if any) of the lessee on the termination of the lease.

A lessor (the person or company from whom the property is hired) must give to the lessee a copy of the consumer lease, together with a statement explaining the rights and obligations of a lessee within 14 days after entering into a consumer lease.

Information to be Provided in the Statement of Rights and Responsibilities

The statement consists mainly of frequently asked questions and answers relating to consumer leases. Examples stated in Form 11 of the Regulations are:

1. How can I get details of my lease?

Your lessor (supplier of the property) must give you a copy of your consumer lease with this statement. Both documents must be given within 14 days of signing the lease. If you want another copy of the lease write to the lessor and ask for it. Your lessor has to give a copy and may charge a fee.

2. What should my lease tell me?

You should read your lease carefully. Your lease should tell you about your obligations and other relevant information e.g. details of goods, amount to be paid before goods are delivered, stamp duty, other charges, amount of rental payments, number of rental payments, when the lease can be ended and obligations when your lease ends.

3. Can I end my lease early?

Yes. Simply return the goods to your lessor. The goods may be returned in ordinary business hours or any other time you and the lessor agree on or the court decides.

4. What will I have to pay if I end my lease early?

The amount the lease says you have to pay.

5. Can my lease be changed by my lessor?

Yes, but only if your lease says so.

6. Is there anything I can do if I think that my lease is unjust?

Yes. You can apply to the court, contact the Consumer Council of Fiji or get legal advice on how to go about this.

7. If my lessor writes asking me where the goods are, do I have to say where they are?

Yes. You must do this within seven days. If you do not have the goods you must give your lessor all the information you have so they can be traced.

8. When can my lessor or its agent come into a residence to take possession of goods?

Your lessor can only do so if it has the court's approval or the written consent of the occupier which is given after the occupier is informed in writing of the relevant section in the Consumer Credit Act.

9. What do I do if I cannot make a rental payment?

Get in touch with your lessor immediately. Discuss the matter and see if you can come to some arrangement.

10. What if my lessor and I cannot agree on a suitable arrangement?

You can apply to the court, contact Consumer Council of Fiji or get legal advice on how to go about this.

11. Can my lessor take action against me?

Yes, if you are in default under your lease. But the law says that you cannot be unduly harassed or threatened for rental payments. If you think you are being unduly harassed or threatened contact Consumer Council of Fiji or Ministry of Industry and Trade or get legal advice.

12. Do I have any other rights and obligations?

Yes. The law will give you other rights and obligations. You should also READ YOUR LEASE carefully.

Consumer Leases: Beware the Devil in the Details!

While the law requires disclosure of information in the lease document as well as providing a statement of rights and responsibilities of a lessee, there is no guarantee that the consumer's interest will be protected by this type of disclosure. For example, the amount of the initial payment, amount of other charges and the amount of rental payments can be excessive and unfairly benefit the lessor. Also, the terms and conditions under which the lease can be terminated might be too harsh to the lessee.

One of the disadvantages of taking goods on consumer lease for a long period is that the charge made for hiring the goods (lease payments) together with any other amount payable under the consumer lease may exceed the cash price of the goods.

Case Study: 13

Mr Damu engages in handicraft work in his leisure time and was in great need of a chainsaw for some of his big plans for his house. Mr Damu could not afford the machine outright and did not wish to buy it on hire-purchase either. The cash price for the cheapest one was $800. He decided to lease it from a big timber company with a deposit of $50 and he had to pay $80 monthly. He took it on one year's term. At the end of the year, he was amazed to see other later models and brands available that did the job much easier and faster. Since he

Case Study: 13 continued

was still engaged in the handicraft work, Mr Damu decided to take another year's term on lease but with a different brand and model of chainsaw. But his monthly repayment increased to $88.

The statement of rights and responsibilities merely reiterated the matters stated in the lease documents and reminded the lessee of his/her responsibilities. In the event of a dispute, the only rights that a lessee seems to have are to apply to the court, contact the Consumer Council of Fiji or Ministry of Industry and Trade or get legal advice, all of which might involve time and costs that an average consumer might not be able to afford.

The consumer must therefore study the lease documents very carefully to make sure exactly what they are getting into. For example, they may be charged account-keeping fees as well as penalties if they miss repayments, break the agreement or pay it off early. Often the penalty for breaking a lease is that the lessor still has to repay an amount equal to the rental payments for the full term of the lease, even though they have given back the goods they were renting.

Consumers must take the time to explore all their purchasing options first. They may be better off waiting a while and saving up for the item. If they still want to go ahead with leasing, they should shop around for the best price on the goods and the best terms on the lease agreement. But before entering into any consumer lease agreement they should READ THEIR LEASE carefully.

Changes on Grounds of Hardship

Most of the law relating to changes on grounds of hardship in the case of other credit contracts also applies to consumer leases. Changes may be made to a consumer lease due to unforeseen circumstances such as illness, unemployment and other reasonable unpredictable circumstances which make a lessee unable to make payments as required by the consumer lease.

If the lessee is ill, unemployed or has other reasonable cause not to meet the obligations under the consumer lease, he or she can apply to the lessor:

- for a change in the terms without changing the APR
- extend the period of lease and reduce the amount of payment
- postpone for a specified period the date on which payment is due
- extend the period of lease and postpone for a specified period the date of payment.

Case Study: 14

Mr Chand, a carpenter by profession, took a chainsaw on lease as he planned to extend another bedroom to his house. His lease was for a year with a monthly payment of $100. After making two months of regular payments, Mr Chand started facing difficulty in meeting his monthly repayments as most of his money was spent on labour costs that turned out to be more than he had expected. He then requested his lessor to reduce his monthly payment to $60 and extend his lease contract term by six months. Mr Chand's lessor agreed to the request and also charged a small administrative fee for the changes made to the contract.

A lessor that enters into an agreement with a lessee to make such changes must, within 30 days after the date of the agreement, give to the lessee and to any guarantor under a guarantee related to the consumer lease, a written notice setting out particulars of the change in the terms of the consumer lease and any information required by the regulations.

If a lessor does not change a consumer lease in response to an application (i.e. on grounds of hardship such as illness, unemployment or other reasonable cause), the lessee may apply to a court to change the terms of the consumer lease. After allowing the applicant and the lessor reasonable opportunity to be heard, the court may change a consumer lease, may make such other orders as it thinks fit, or may refuse to change the consumer lease.

Unjust Transaction

The law allows a lessee to open an unjust transaction if the mortgager has reasonable grounds to believe that his or her mortgage contract is unconscionable, harsh or oppressive. The lessee can make an application to the court to reopen a transaction in his or her consumer lease, if he/she finds the contract to be unjust. The court will consider the following factors prior to giving orders to open the unjust transaction:

- Compliance or non compliance provision of the contract
- Bargaining power of the parties
- Whether the disputed provision was under negotiation initially
- Whether it w it practically possible for the debtor to seek alteration or to reject any of the provisions
- Whether the conditions are unreasonable and difficult to comply with
- Any ambiguity of language in the contract
- Whether any independent legal or other expert advice was sought
- Whether legal and practical effects were accurately explained and the debtor understood the provisions and their effects
- If the credit provider used or exerted unfair pressure or undue influence or unfair tactics on the debtor
- If the credit provider took measures to ensure the debtor understood the implications of the transactions
- Whether at the time the contract, mortgage or guarantee was entered into or changed the credit provider knew, or could have ascertained by reasonable inquiry of the debtor at the time, that the debtor could not pay in accordance with its terms or not without substantial hardship
- Whether the terms of the transaction or the conduct of the credit provider were justified in the light of the risks undertaken by the institution
- The terms of other comparable transactions involving other Credit Provider and if the injustice is alleged to result from excessive interest charges, the APR or rates payable in comparable cases.

Entry to Residential Property

A lessee does not have a right to enter the lessee's premises to take possession of leased goods unless the court has authorised the entry or the lessee has consented in writing to enter the premises and take possession of the goods. The court can make appropriate orders for the lessor to enter the residential premises for the purpose of taking possession of the leased goods. Moreover, the court can also, on application by the lessor, order the lessee to deliver the goods at a specified time or place or within a specified time. The lessor can make an application to the court to vary the place at which or time within which the leased goods should be delivered to the lessor.

Repossession of Goods under Consumer Lease

Most of the law relating to repossession in the case of other credit contracts also applies to consumer leases. A lessor must not exercise any right under a consumer lease to take possession of goods under lease unless the lessor has given the lessee 30 days' written notice of the lessor's intention to do so, except if:

(a) the lessor repossesses the good at the end of the lease term

(b) the lessor believes on reasonable grounds that the lessee has disposed of goods hired under the lease, or intends to dispose off such goods

(c) the lessor has made reasonable attempts to locate the lessee but without success

(d) the lessee is insolvent (does not have money)

(e) a court authorises the lessor to repossess the good.

Termination of Consumer Lease

A lessee can end the lease anytime by returning the goods hired during ordinary business hours or as agreed with lessor. The lessee is required to pay the amount payable on the termination of any consumer lease.

Advertising

Conditions for Advertising Availability of Credit

The law does not permit a person to publish, or allow another person publish, an advertisement that states or implies that credit is available unless the advertisement complies with several conditions. Some of these are:

1. The advertisement need not contain an annual percentage rate, but must do so if the advertisement states the amount of any repayment.
2. If the advertisement contains an annual percentage rate and credit fees and charges are payable, the advertisement must:
   (a) state that fees and charges are payable or
   (b) specify the amount of the fees and charges payable or
   (c) specify the amount of some of the fees and charges payable and state that other fees and charges are payable.
3. A person who suffers loss as a result of contravening advertisement requirement may recover the amount.
4. The advertisement may contain the comparison rate calculated as prescribed by the regulations and, if it does so, it must be accompanied by the warnings set out in the regulations.
5. A person must not make a false or misleading representation to induce another person to enter into a credit contract or related transaction.
6. The interest rate must not be disclosed
   - in an advertisement that states or implies that credit is available or
   - to a debtor before the debtor enters into a credit contract unless the interest rate is expressed as a nominal percentage rate per annum
7. A credit provider or supplier must not harass a person in attempting to get that person to apply for credit or to enter into a credit contract or a related transaction.
8. A credit provider must not personally visit a place of residence or send an employee or agent for the purpose of inducing a person who resides there to apply for or obtain credit, except by prior arrangement by the credit provider with the person.

A person who contravenes any of these conditions commits an offence.

A person who suffers loss as a result of a contravention by another person may recover the amount of the loss against that other person or any other person involved in the contravention.

Persons Liable for Non-Compliance with Conditions of Advertising

In the absence of proof to the contrary, a person will be taken to have allowed an advertisement to be published if -

(a) the person provides credit, owns or has an interest in any goods, or supplies or has an interest in the supply of any goods or services, which the advertisement promotes; and

(b) the advertisement specifies the name, business name, address, telephone number, facsimile number or post-office box number of the person or the person's agent.

A person who is a printer, publisher or proprietor of a newspaper, a licensee of a commercial broadcasting or television station, an exhibitor of a film or a person acting with the authority of any of them, is not guilty of an offence unless the person suspected, or had reason to suspect, that publishing the advertisement would constitute an offence.

For example, assume The Fiji Times publishes a misleading advertisement placed by a finance company to induce people to enter into credit contracts with it. The Fiji Times will not be guilty of an offence unless it suspected, or had reason to suspect that publishing the advertisement would constitute an offence. Given that Fiji Times publishes hundreds of advertisements every day, it will be unreasonable to expect Fiji Times to suspect or have reason to suspect that publishing the advertisement would constitute an offence.

It will also be a defence if the person charged proves that the person could not, by the exercise of reasonable care, have prevented the non-compliance to which the offence relates.

Findings And Recommendations

Prior to the Consumer Credit Act 1999, there was no legal safeguard for consumers. Credit transactions occurred mainly by contractual agreements prepared by credit providers where consumers had no option but to accept the terms and conditions imposed by the credit providers. The Consumer Credit Act 1999, Consumer Credit (Amendment) Act 2006 and Regulations 2009 were enacted to remedy this imbalance in power of the two parties.

Findings

1. This study finds that the Consumer Credit Act 1999, Consumer Credit (Amendment) Act 2006 and Regulations 2009 largely serve to legitimise the practices that existed prior to the enactment of these legislations.

2. In some instances the law expressly allows credit providers to exploit the consumers. For example, interest charge in all cases is to be determined by applying the daily percentage rate to the unpaid daily balances except for a hire purchase agreement where Rule of 78 applies. Rule of 78 imposes the highest amount of interest charged in the earliest part of the credit term, then diminishes and charges the lowest amount in the last period of the credit term. This unfairly allows credit providers to take bulk of the interest in the early part of the credit term and penalises consumers if they pay off the debt early.

3. One reason why consumers continue to be exploited by credit providers seems to be that consumers are not motivated to protect their own interests until such time as they find themselves in trouble. This is probably due to lack of consumer education.

4. A very large percentage of consumer complaints relate to merchantability of products and warranties that suppliers fail to honour.

5. Extended warranty appears to have become more of an additional source of revenue rather than an insurance protecting the interest of the consumers. This warranty does not cover the whole product but consumers often assume that it covers everything just like the standard warranty and sales persons who get commission for selling extended warranties often do not tell the consumers about this.

6. Poor quality local as well as imported products are able to enter the market because there are no national standards on products.

7. The legislation is fraught with complicated finance terms, legal jargon and complex mathematical formulae. These were apparently intended to enlighten, educate and empower the consumers. This research, however, has revealed that comprehending them is beyond the ability of the average consumers, let alone using the legislation and the formulae for the purpose of negotiating contracts with credit providers.

8. The law provides protection to consumers largely in theory only. In practice the situation is not much different from the practice that existed prior to the enactment of the Consumer Credit Act in 1999, Consumer Credit (Amendment) Act 2006 and Regulations in 2009. For example, despite all the legal requirements for pre-contractual disclosure, consumers are made to believe that contract documents are 'standard' and they have no option but to sign them if they want the goods. Likewise, most consumers treat contract documents as 'standard' and do not read them.

9. However, just as consumers had no option but to accept the terms and conditions imposed by the credit providers prior to the enactment of the new legislation, in reality they have no option but to do the same today.

10. Most consumers are overwhelmed by the complexity of the legislation and formulae and hence make little effort to read and understand contract documents.

11. Unlike the practice in many other countries, there is no mandatory cooling off period required in Fiji. Consequently, if a consumer realises that he/she made a mistake or understands that a salesperson made a misrepresentation after he/she signed the contract, he/she has no opportunity to get out of the contract.

12. Most consumers lack resources to seek legal advice before signing contracts or seek redress in the event of disputes. The Consumer Council of Fiji seems to be the only organisation that provides assistance to consumers in trouble.

13. Most, if not all transactions occur between parties of unequal strengths. Although individual consumers with limited resources are faced with corporate credit providers with disproportionately superior expertise and resources, they have no affordable avenues for seeking redress in the event of disputes other than long and expensive battles through the courts of law.

14. Contrary to the common understanding that credit insurance protects the interest of the debtor, in fact it is a form of insurance that the debtor pays for but that actually benefits his lender.

15. The law requires a credit provider to accept any payment under a credit contract that is made before it is payable under the contract, unless the contract prohibits its early payment. This sounds fair. But in practice this allows the credit providers to include prohibition on early repayments in the contracts and legally penalise the borrowers. This ensures that the lenders continue to earn interest on the loans given for the maximum period possible. From the borrowers' point of view, however, this is grossly unfair. It keeps the borrowers locked in the loan and allows the lenders to exploit them.

16. The law requires a credit provider to sell repossessed goods for the best price reasonably obtainable and credit the mortgagor with a payment equivalent to the proceeds of the sale less any amounts which the credit provider is entitled to deduct. Disputes often arise, mainly with 'best price reasonably obtainable'. Mortgagors often claim that the mortgagees did not get the best price that was possible and mortgagees claim they did.

17. It is important to include responsible lending in the Consumer Credit Act. All business engaged in credit business except authorised deposit-taking institutions and registered finance corporations must be registered.

    In the hire purchase sector the rate of repossession is extremely high, which indicates improper assessment of a persons' capacity to repay the amount borrowed. The provision on responsible lending will assist consumers to more confidently borrow money while limiting the risk of being saddled with unmanageable debts.

    All forms of consumer credit should be captured and it will become an offence to supply credit irresponsibly. There will be two elements for assessing whether credit is being extended responsibly. These are: assessing the unsuitability of a credit product for an individual and assessing a persons' capacity to repay the proposed credit debt.

17. The Consumer Credit Act currently does not provide for rights and obligations of the credit provider and consumers in the case of multiple borrowers. It is very common in Fiji to have multiple borrowers in a credit transaction such as three or four members of a family. When one or more members leave home e.g. migrate to other countries, the remaining members are left with the entire debt burden and often cannot repay. This causes a lot of hardship to the remaining members. To address the problem of rights and responsibilities in the case of multiple borrowers, the law needs to make provision for fractional assignment of the debt to individuals and their rights and obligations in the event of any member leaving the syndicate. Regular statements should be provided to multiple borrowers and in a case where, due to one member the property goes on mortgagee sale or repossession, then this must be done through a court order. The legislation must clearly state the rights and responsibilities of the credit provider in the case of multiple borrowers.

18. Most borrowers receive very little information on relief available during financial hardship. Lender should ensure that information about options and assistance in the event of financial hardship is accessible and available to all borrowers.

Recommendations

1. To address the most common complaints relating to warranties and provide better protection to consumers from poor quality products being sold in the country, the term 'merchantable quality' should be redefined to include the requirement that the goods must also be of reasonable durability. This means that goods must not deteriorate seriously or unduly break down during their normal life span.

2. Extended warranty appears to have become more of an additional source of revenue for sellers rather than an insurance protecting the interest of the consumers. This warranty does not cover the whole product and often consumers are not told about this. To minimise this practice, the law (Schedule 1) must be amended to require retailers to disclose to consumers full details of which parts of a product are covered and which parts are not covered under extended warranties. As payment of commission to employees may be an incentive to sell extended warranties where they might serve no useful purpose to the consumers, it must also be disclosed clearly in the contract.

3. To create consumer awareness about substandard products, lists of products should be made and categorised according to the frequency of complaints received about them and publicised widely.

4. To minimise the entry of poor quality products into the market, national standards for both imported and locally manufactured products should be developed and importers and manufacturers to be under legal obligation to comply with them.

5. By allocating very high proportion of the interest in the earlier periods of repayment, the rule of 78 allows credit providers to extract most of the interest on the debt from debtors who pay their debt any time before the end of the credit term. It is a very heavy penalty to debtors for early repayment of debt and an unjustifiable benefit to the credit providers. This is a penalty that keeps the debtors trapped in the debt to the end of the credit period so they cannot become debt free if they want to. This is grossly unfair and should be abolished forthwith. The same methods of calculating interest as for other credit transactions and loans should be required for hire purchase transactions as well.

6. Credit providers generally do not provide to debtors a detailed statement of account showing principal and interest components of a debt separately. Whether interest is charged up front or on a reducing balance, a schedule of repayments showing separate principal and interest components should be provided at the time the hire purchase agreement is signed. This will show the debtor what he/she has already paid and what is still owing that he/she can pay off at any time in the credit period.

7. The law should be amended to abolish the existing practice of allowing credit providers to sell repossessed property through tender and negotiations and replaced it with a mandatory requirement to sell by public auction.

8. The current provisions of the acceleration clause in the event of default on mortgage repayments do not place any limits on what the credit provider can repossess and sell to recover his/her debt. In this respect the consumers are completely unprotected. To provide reasonable protection to the consumers, the Act must be amended to specify that the credit provider can repossess and sell only the property or properties from which the proceeds would be sufficient to clear the payments in arrears. In addition, to enforce the acceleration clause the credit provider must be required to seek a court order.

9. As the 'on demand facility' gives the credit provider unlimited powers to require the debtor to pay the whole debt in full at any time he/she likes, it is extremely hazardous to consumers. This clause can be hidden somewhere in the credit contract or mortgage documents – possibly in fine print. If it is there and a consumer signs the contract or mortgage, whether knowingly or unknowingly, he/she will be legally bound by it. As it is virtually impossible for an average consumer to identify and understand the very serious implications of 'an on demand facility' this provision in the law should be repealed and its use expressly prohibited in any credit contract or mortgage.

10. To make it easier and affordable to consumers to get remedy in the event of disputes, a tribunal system needs to be established.

11. To provide greater protection against repossession to consumers in Fiji, the Consumer Credit Act 1999 must be amended to include provisions requiring a pre-possession notice, post-possession notice, statement of account, Time Order Form and court order to repossess where one third or more of the debt has already been paid.

12. To protect the consumers from possible unconscionable practices the law needs to be amended to specify in the contents of contract documents shown in Schedule 1 the types of fees and charges and maximum amounts or the bases for determining maximum amounts that can be imposed by the credit providers.

13. The law relating to disclosure of interest rates should be amended to specify the circumstances that will warrant possible changes to interest rates, whether they can be expected to go up or down, as well as new fees and charges together with maximum amounts or bases for determining maximum amounts that can be imposed.

14. The exemption from providing periodic statements of account by credit providers is apparently based on the assumption that where the interest rate does not change the statements of account will not contain new information that the borrower needs to know. Statements of account, however, typically contain not only interest charges, but also include fees and charges as well as unusual charges such as penalty for dishonoured cheques and charges for phone calls and letters written to defaulting borrowers. To keep the consumers informed about the activities on their accounts, periodic (e.g. monthly) statements of account must therefore be mandatory.

15. The statement of enforcement expenses (Schedule 1) should specify the types and amounts or bases for calculating enforcement expenses that a credit provider can claim.

16. Credit insurance can appear to protect the interest of the debtor but can be very deceptive e.g. mortgage indemnity insurance. This has been described as 'one of those sneaky mortgage fees that goes by a whole raft of names'. In a nutshell, it's a form of insurance that the debtor pays for but that actually benefits his lender. If there is credit-related insurance, the credit contract must clearly state who pays the insurance premiums and whose interest the insurance cover will protect. If the cost of the insurance is borne by the debtor, then the requirement for the credit provider to provide a copy of the insurance policy to the debtor should be mandatory.

17. The existing law relating to prohibition on early repayments and penalty on early repayments (e.g. in the case of mortgages) allows credit providers who normally draw up the contract to include the penalty in the contract and legally impose the penalty on the borrowers. Any justifications for the prohibition and the penalty only serve to protect the revenue stream of the lenders at the expense of the borrowers. To make the law fairer to both lenders and borrowers the prohibition on early repayments and penalty for early repayments should be abolished forthwith.

18. As in some countries e.g. Australia (NSW), for sale and purchase of real estate in particular, the Consumer Credit Act 1999 should be amended to include a provision for a five business day cooling off period within which the buyer has the option to get out of the contract by giving a written notice.

19. An independent Financial Commission needs to be established which will be responsible for enforcing and implementing this legislation and regulating the financial institution currently not under RBF radar. Currently under the CCA, an application for breach of the act has to be instituted in the normal courts which are expensive and time consuming.

20. It is important to include responsible lending in the Consumer Credit Act. All businesses engaged in credit business except authorised deposit-taking institutions and registered finance corporations must be registered. The provision on responsible lending will assist consumers to more confidently borrow money while limiting the risk of being saddled with unmanageable debts.

21. Default notice sent to borrowers must include clear information on options and assistance available in the event of financial hardship.

22. Act to be amended to ensure home owner is present during the opening and awarding of tender called for mortgagee sale.

23. Law on multiple borrowers needs to make provisions for fractional assignment of the debt to individuals and their rights and obligations in the event of any member leaving the group, as well as the rights and responsibilities of the credit provider who provides credit to multiple borrowers.

24. The Consumer Credit Act 1999, Consumer Credit (Amendment) Act 2006 and Consumer Credit Regulations 2009 should be repealed and replaced by a legistlation which can create a fair market place where consumers can be financially protected.

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