

The Credit Contracts and Consumer Finance Act

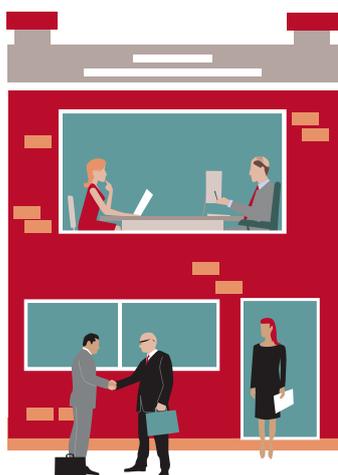
Oppressive contracts – protections for borrowers



This fact sheet explains what oppression is and how the courts can deal with oppressive contracts or oppressive conduct by lenders.

The Credit Contracts and Consumer Finance Act 2003 (**CCCF Act**)¹ includes a number of specific protections for borrowers, such as limiting the fees that lenders can charge, and requiring that lenders disclose key information to borrowers. It also protects borrowers and guarantors from what is called “oppressive” contracts and from “oppressive” conduct by lenders.

The CCCF Act defines “oppressive” as “harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice.”² In layman’s terms, this means that the contract or lender’s conduct is extremely unfair or unreasonable. It is a court that determines if a contract or a lender’s conduct is oppressive.



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What do we mean by a “loan” in this guidance?

Most credit transactions entered into by consumers are called “**consumer credit contracts**” under the Act. These are credit contracts where:

- the borrower uses or intends to use the credit wholly or predominantly for personal, domestic or household purposes; and
- the lender is in the business of, or makes a practice of, providing credit; and
- the lender charges interest and/or fees; and/or
- the lender takes or may take a security interest³ under the contract.

This guidance uses the term **loan** to cover these kinds of transactions.⁴

1. All references in this guidance are to the CCCF Act as amended in 2014.
2. Section 118 definition.
3. “Security interest” is defined in s 5 and essentially means an interest in property that is taken to secure payment of a debt. For more on security interest and a lender’s exercise of their rights under a security interest, see our Repossession guidelines. <http://www.comcom.govt.nz/consumer-credit/guidelines-post/repossession-guidelines/>
4. Section 11 fully defines a consumer credit contract.

How are borrowers and guarantors protected?

Under the CCCF Act, a borrower or guarantor⁵ who thinks that the loan or guarantee terms they have agreed to are oppressive, or that the lender has acted oppressively, can seek help:

- First, lenders must comply with the **lender responsibility principles**, which include the lender responsibility to avoid oppressive contract terms and oppressive conduct.⁶ The lender responsibilities apply to loans entered into after 6 June 2015.
- Second, borrowers can go to court to **reopen a credit contract** and fix any oppressive elements of the transaction.⁷ When a court ‘reopens’ a contract, in effect the court is free to make alterations to it and to rewrite any parts it thinks require fixing. The court’s reopening powers apply to loans entered into at any time.⁸

In this fact sheet we describe the lender responsibility principles and reopening powers in more detail. But first, we discuss what the CCCF Act means by “oppression.”

What is oppression?

Generally, borrowers and lenders enter into loan agreements that suit both of their needs. Borrowers make many choices when taking out a loan. They choose to borrow, who to borrow from, how much to borrow, and what type of loan to get. Lenders have commercial decisions to make. Courts recognise a need to balance the interests of both parties and will not want to change those agreements unless there are very good reasons to do so.

However, the CCCF Act allows the courts to intervene if the terms of the loan are oppressive or the lender has acted in an oppressive way when entering into the loan or when exercising their rights or powers under it.

Oppressive contract terms or conduct must be more than just unfair terms or conduct. “Oppression” is defined as conduct or terms that are “harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice.”⁹

The definitions are abstract, but the idea is that in order to assess whether something is harsh or burdensome, the court will look at what reasonable standards of commercial practice would involve.¹⁰

The court will compare:

- what is expected or acceptable commercial practice, and
- what oppressive terms or conduct are alleged against a lender in each particular case.

The court must look at all the circumstances relating to the particular lender, borrower and contract. These include how the contract was made and how the lender used their rights and powers under the contract.

Not all factors will be relevant in every case, and a court can consider any matter that it thinks fit. However, if a court is asked to reopen a loan contract because it is oppressive, there is a list of factors that the court must consider if they are relevant in the circumstances. The same factors are likely to be relevant when the court considers whether a lender has breached the lender responsibility principles relevant to oppression.



5. A “guarantor” is someone who agrees to repay the borrower’s loan or perform the borrower’s obligations under the loan, if the borrower stops paying the loan or performing their obligations.
6. Sections 9C(3)(e), 9C(4)(d).
7. Section 120.
8. These powers were not changed when the CCCF Act was amended, but the list of factors for courts to consider when deciding whether to reopen a contract were extended: section 124.
9. Section 118 definition.
10. See for example *Greenbank New Zealand Ltd v Haas* [2000] 3 NZLR 341 (CA) at [24]; *Bartle v GE Custodians* [2010] 3 NZLR 601 at [177]. Endorsed by the Supreme Court as an objective standard [2011] 2 NZLR 31 (SC) at [46].

Factors the court will consider

At the end of this fact sheet, we have included some examples that show how the courts have interpreted or dealt with aspects of the law on oppression

But the **factors that must be taken into account** in assessing oppression, if relevant in the circumstances, are:¹¹

- How the contract was made or induced or how the lender has exercised their rights or powers under the contract.
 - Whether the lender has complied with the lender responsibility principles.
 - The relative bargaining power of the parties. For example, were the lender and borrower on an unequal footing when they made the agreement? If so, did the inequality mean that the lender should have taken extra care in dealing with the borrower?
 - Whether the borrower (or their representative) was reasonably able to protect their own interests, taking into account matters like the borrower's age, physical or mental condition and whether the lender took advantage of the borrower in some way.
 - Whether the contract is a consumer credit contract (rather than, for example, a business loan).
 - Whether the borrower took independent professional advice about the contract, such as legal advice.
 - Whether the lender, or anyone else, used unfair pressure or tactics or some other kind of unfair influence to encourage the borrower to enter into the contract and, if so, the nature and extent of any unfair conduct.
 - How the lender's contract and costs of borrowing compare with other lenders' contracts or costs of borrowing for similar finance products, and whether the contract under consideration has significantly more onerous terms.
- The amount the borrower has to pay under the loan.
 - Whether the borrower has to pay the lender any extra amount if they pay back the loan early. This is known as full prepayment. If the court looks at this, it must also look at the lender's likely costs and losses from prepayment and try to fairly balance the lender's and borrower's interests. For example, the court will ask whether the lender could reinvest the amount repaid by the borrower on terms similar to those provided to the borrower.
 - The form of the contract including the clarity and plainness of the language used in the contract.
 - Whether the terms of the loan or guarantee are reasonably necessary to protect the lender's interests, and whether they allow the borrower a reasonable opportunity to comply with the loan.
 - If the borrower is in default, whether the lender has given the borrower a reasonable amount of time to pay back the money. The court will try to fairly balance the lender's interests and the borrower's ability to repay within the time specified.
 - Whether the lender is refusing to release a security interest or wanting to put conditions on releasing a security interest. If this is the case, the court will look at the obligations secured by the security interest and what security would remain after the release, to determine whether the lender's conduct is oppressive.
 - Whether the lender's efforts to enforce the contract break any law. For example, whether actions taken to repossess secured items comply with the rules relating to repossession that are contained in the CCCF Act.
 - Any other matters that the court thinks are appropriate to consider.



11. Section 124. The list of factors was expanded when the CCCF Act was amended with effect from 6 June 2015.

Lenders have a responsibility to avoid oppressive terms and conduct

The **lender responsibility principles**, introduced with effect from June 2015, require lenders to avoid oppressive loan terms or oppressive conduct when entering into a contract or when exercising the lender's rights or powers under a contract.¹²

This duty applies to lenders who enter into:

- consumer credit contracts
- credit contracts secured over consumer goods
- guarantees of these credit contracts
- buy-back transactions

but **not** to:

- consumer leases, or
- business loans that are not secured over consumer goods.

Court action for breach of lender responsibility principles

A borrower or the Commission has up to three years to apply to the Court alleging a breach of the lender responsibility principles.¹³ The three year window begins on the date that the loss or damage arising from the alleged breach was discovered or could reasonably have been discovered.

If the court finds that a lender has breached the responsibility to avoid oppressive contract terms or conduct, the Court has a general power to make orders or provide a remedy.¹⁴ These include requiring the lender to provide refunds, credits, or compensation to the borrower, as well as stopping a lender from behaving in a particular way.¹⁵

The Court can also order a person not to be involved in lending in the future if that person has failed more than once to comply with the lender responsibility principles.¹⁶

The Responsible Lending Code provides guidance as to how lenders can comply with the principles. Useful guidance on the lender responsibility to avoid oppressive contracts and oppressive conduct is set out in section 14 of the Code.¹⁷

Oppressive contracts can be reopened by the court

The court can reopen a credit contract¹⁸ if it considers that:

- The contract is oppressive.
- A lender used oppressive means to persuade a borrower to sign up to the loan.
- A lender has used or intends to use their rights or powers under the loan in an oppressive way.

Where oppression is found, the Court can make any orders that it considers are necessary to remedy the situation, including:¹⁹

- cancelling all or parts of the contract
- changing parts of the contract
- ordering one party to pay the other party a sum of money
- transferring goods or property between the lender and the borrower
- ordering a lender to stop behaving in a particular way.

The court can also make orders against people who are not parties to the loan, but who have an interest in the loan or have shared in the profits of the loan.

The court can also order a person not to be involved in lending if that person has had a loan reopened by the court.²⁰



12. Sections 9C(3)(e), 9C(4)(d).

13. Section 95.

14. Sections 93 and 94.

15. Section 96.

16. Section 108(1).

17. Responsible Lending Code (March 2015) available online at <http://www.consumeraffairs.govt.nz/legislation-policy/policy-development/credit-review/responsible-lending-code>

18. The re-opening remedy is available for:

- any credit contracts (including consumer credit contracts and credit contracts for business loans)
- consumer leases
- buy-back transactions
- guarantees
- any security agreement (such as a mortgage of land or a security interest in other property): ss 117-120.

The Lender Responsibility Principles also apply to all these kinds of transactions with the exception of consumer leases.

19. Section 127.

20. Section 108(1)(a)(ii).

A borrower or the Commission can at any time during the course of the loan ask the Court to reopen a contract on the grounds that it is oppressive.²¹ The court assesses whether the lender's exercise of a contractual right was oppressive at the time it was exercised, not at the time the loan was entered into.²²

After the loan has ended, a borrower can still ask the court to reopen a contract on the grounds that it was oppressive. Different time limits apply:²³

- For a **credit contract or consumer lease**, a borrower has one year from when:
 - the contract is terminated by either the lender or the borrower, or
 - the last obligation under the contract was due to be performed (such as the borrower making a final payment or the lender discharging the mortgage.)
- For a **buy-back transaction**, the occupier has three years from the time the last obligation under the contract was due to be performed.²⁴

What can a borrower do if they think an agreement is oppressive?

A borrower who thinks an agreement is oppressive, or that the lender has acted in an oppressive manner, can:

- Complain to the lender. Responsible lenders will take such complaints seriously and may agree to adjust the loan terms or their conduct.
- Complain to the lender's Dispute Resolution Scheme, if a complaint to the lender has failed to resolve the situation.²⁵
- Complain to us.²⁶ The Commerce Commission can commence court proceedings to reopen a contract,²⁷ or to establish that a lender has breached the lender responsibility principles.²⁸
- Lodge a claim at the local Disputes Tribunal.²⁹ The Disputes Tribunal is a relatively quick, inexpensive and informal way to resolve commercial disputes. Lawyers are rarely allowed to participate.
- File court proceedings.³⁰



21. Section 125(5).

22. Section 123.

23. Section 125.

24. Section 125.

25. The Financial Service Providers (Registration and Dispute Resolution) Act 2008 requires all lenders of consumer credit to be a member of a financial services dispute resolution scheme. The name of the lender's dispute resolution scheme must be included in the initial loan documents.

26. See the Commission's published *Enforcement Response Guidelines* for information about how we respond to possible breaches of the law: available online at www.comcom.govt.nz.

27. Section 125(5).

28. Section 93(aa). In urgent situations the Court may also make an injunction restraining a lender from conduct that would breach the principles: section 96(1)(aa). In a case brought to reopen a credit contract, it is a relevant consideration if the Court believes that the lender may have breached the lender responsibility principles: section 124(1)(b).

29. Information about making a claim, including how to make an on-line application, is available on the website <http://www.justice.govt.nz/tribunals/disputes-tribunal>. The Tribunal can only hear claims concerning amounts of up to \$15,000, or \$20,000 by agreement of the parties.

30. Proceedings may be filed at the District Court providing the value of the relief claimed does not exceed \$200,000, or if the parties agree that the District Court (rather than the High Court) can hear the case; see section 86(2)(ba).

Examples of how the courts have dealt with some cases of oppression

Every case in which oppression is alleged will depend heavily on its own unique facts and context.

Nevertheless, some general concepts and examples can be provided from the case law:

- Any oppression that is alleged to arise must result from the lender's actions, not some other cause.³¹ There is unlikely to be oppression just because the borrower's circumstances have changed (such as unemployment or illness), although the borrower has in certain circumstances the right under a separate part of the CCCF Act to seek relief for unforeseen hardship.³²
- Oppression in exercising a contractual right is assessed at the time of that conduct, not at the time the contract was entered into.³³
- If the borrower is desperate and needs to borrow funds this can be relevant to the parties' relative bargaining power. An unscrupulous lender has more ability to dictate unfavourable terms in such cases.³⁴ Signs of a lender dictating terms can include unusually high credit fees or interest rates.
- Simplicity and naïveté by the borrower can also give rise to an imbalance in bargaining power.³⁵
- Giving a borrower an extremely short time to repay the loan can be oppressive, where the borrower was unaware of this possibility.³⁶
- When a borrower is in arrears it can be oppressive for a lender to demand payment of the wrong amounts.³⁷
- Mortgagee sales take place under a specific process,³⁸ but can still be conducted oppressively if, for example, the borrower has managed to refinance or raise funds to pay the mortgage debt.³⁹

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31. *Bartle v GE Custodians* [2010] 3 NZLR 601 at [176]. The Court noted that it was "hard" to make the payments, but said "the Act is not concerned with misfortune or even with hardship. Its emphasis is not so much on the consequences to the debtor as on the quality of the conduct of the creditor" (*National Westminster Finance Ltd v Boyd* HC Christchurch A337/84, 29 October 1986 per Hardie Boys J.).
 32. See section 55. The lender is not bound to change the contract, but must give the application proper consideration: sections 57A and 9C (Lender Responsibility Principles).
 33. See for example *Greenhithe Cove Subdivision Ltd v Westpac Banking Corp Ltd* HC Auckland M1971/90, 7 December 1992.
 34. See for example *Raptorial Holdings Ltd (in rec) v Elders Pastoral Holdings Ltd* [2001] 1 NZLR 178 (CA).
 35. See for example *Elia v Commercial & Mortgage Nominees Ltd* (1988) 2 NZBLC 103,296.
 36. *Colley v Westpac New Zealand Ltd* [2013] NZCA 57.
 37. See for example *O'Keefe v Mairangi Properties Ltd* [2013] NZHC 411.
 38. Governed by the Property Law Act 2007.
 39. See for example *Savill v NZI Finance Ltd* HC Christchurch CP489/87, 18 December 1987.

ISBN 978-1-869454-98-2

This fact sheet provides guidance only. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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