GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: JULY 2015

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In the July column, Lee Finch considers the issue of summary judgments and the unfair relationship provisions in the Consumer Credit Act 1974 (CCA).

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SUMMARY JUDGMENTS AND UNFAIR RELATIONSHIP PROVISIONS IN THE CONSUMER CREDIT ACT 1974

Background

As many readers will be aware, one of the reforms introduced by the Consumer Credit Act 2006 was the replacement of the old extortionate credit bargain regime with a new concept of "unfair relationships". The unfair relationship provisions are found at sections 140A to 140D of the Consumer Credit Act 1974 (CCA).

Under the old extortionate credit bargain regime, a court could take action when, under the terms of a credit agreement, a debtor was required to make payments that were "grossly exorbitant" or otherwise "grossly contravened principles of fair dealing". In contrast, the court's powers under the unfair relationships regime are less well defined and extremely wide ranging; to put it simply, a court can now intervene if it forms the view that the relationship between the debtor and the creditor is "unfair".

Fairness is a nebulous concept and is not defined in the CCA. As a result it is very difficult to advise clients as to the prospects of success in these cases and much will turn on judicial discretion.

One further distinction between the old and new regimes was the introduction of a reverse burden (section 140B(9), CCA).

These changes have obviously shifted the balance of power in favour of the debtor but the question is "how far?". This is especially relevant in the context of summary judgment: given the wide judicial discretion and reverse burden, is it difficult to persuade a court to summarily dispose of an unmeritorious unfair relationship claim or is it (virtually) impossible?

Summary judgment test

The circumstances in which summary judgment can be ordered are set out in Civil Procedure Rule 24.2. In respect of an application made by the defendant, the court must find that the claimant has "no real prospect of succeeding on the claim" and "there is no other compelling reason why the case should be disposed of at trial". There is a breadth of case law concerning what amounts to a "real prospect" but it is now generally accepted that the respondent need not establish that is likely to win but must simply show some prospect that must be "real" in the sense that it is not false or fanciful.

Bevin v Datum Finance Ltd

The more senior courts first grappled with the question of summary judgment in unfair relationship claims in *Bevin v Datum Finance Ltd [2011] EWHC 3542 (Ch)*. In *Bevin*, Peter Smith J was invited to overturn the decision of DDJ Freeman granting summary judgment in favour of Datum. The facts and history of the case are relatively complicated, but for present purposes it is sufficient to note that Datum had provided Mr Bevin with a significant loan on which interest was to be charged at the rate of 1.25% monthly and on which penalty interest would be charged at the rate of 3% monthly. Mr Bevin failed to repay the loan and

Datum served a statutory demand. Mr Bevin sought to set aside the statutory demand on the basis that his relationship with Datum was unfair as a result of the interest rates and the effect of compounding. Mr Bevin claimed that the interest rate should be reduced to zero.

DDJ Freeman held that, even if a judge hearing the issue found that the 3% interest rate was a penalty, it is highly unlikely that he would direct that no interest at all would be payable. DDJ Freeman therefore applied what he considered to be the lowest interest rate Mr Bevin could persuade a court was fair (5% per annum); applying that interest rate, the sum owed still exceeded the security and, accordingly, the judge refused to set aside the statutory demand.

On appeal, Peter Smith J held that DDJ Freeman had not been entitled to come to the conclusion that he had. Peter Smith J noted that, as a result of section 140B(9) CCA, once Mr Bevin had alleged that the relationship was unfair, the burden of proof fell on Datum to prove that it was not. In this case, Datum had not provided any evidence and, accordingly, it was held that "as there is no material to challenge the assertion that the arrangement was unfair, this is an issue which must go to trial."

This conclusion is uncontroversial: it is the inevitable result of the reverse burden of proof and the creditor failing to adduce any evidence to discharge that burden. However, Peter Smith J went further and continued:

> "It would not be enough, of course, for the creditor to produce evidence and expect Mr Bevin to reply, because that would be a mini trial. It would only be possible if the creditor produced evidence and persuaded the tribunal at this summary stage that, in the light of that evidence, there is nothing that Mr Bevin can say to lead to the conclusion that the provisions are fair. That, in my view, is a virtually impossible exercise at this summary stage, when all material has not been deployed."

Since 2011, this passage has often been successfully used by debtors and their legal representatives as authority for their proposition that unfair relationship claims are inherently unfit for summary disposal.

Taking into account all the circumstances, including the unfavourable dicta in Bevin, the fact sensitive nature of many of these cases and the wide judicial discretion afforded on the question of fairness, it has long been advisable to exercise caution before seeking summary dismissal of an unfair relationship claim. Accordingly, very few defendants sought summary judgment in claims of this type.

Axton v GE Money Mortgages Ltd

One case in which the creditor did apply for summary judgment was *Axton v GE Money Mortgages Ltd [2015] EWHC 1343 (QB)* (for more information, see *Legal update, High Court considers application of CCA unfair relationships test in PPI misselling case (www.practicallaw.com/3-615-6545)*).

Axton was a payment protection insurance (PPI) case in which the debtors alleged that the relationship between them and GE was unfair on the basis of the grossly exorbitant cost of the PPI, the failure to properly inform and advise in relation to the PPI and commission payments. Unlike many PPI claims, GE had done no more than "promote" PPI in its application form, the PPI was then sold and arranged by a third party; further, GE did not provide any additional sums for the PPI or receive any commission from the sale of PPI. GE produced compelling evidence to prove these facts and they were not challenged by the debtors.

At first instance, HHJ Armitage held that the actions of GE were insufficient to cause an unfair relationship (it was also held that the actions of the third party could not render the relationship unfair as the third party had not been "acting on behalf" of GE (see *Plevin v Paragon Personal Finance Ltd and another [2014] UKSC 61* (for more information, see *Legal update, Supreme Court hands down judgment on PPI misselling and unfair relationships under the CCA (www.practicallaw.com/5-587-9925)*)). Accordingly, the claim was dismissed.

On appeal, Swift J DBE, considered the legislative provisions, counsel's submissions and the case law (including Bevin) and held:

> "It cannot be that the burden of proof imposed by section 140B(9) of the [CCA] was intended to mean that, in a case where an unfair relationship is alleged, no summary judgment should ever take place."

After reviewing the uncontroversial facts of the case, Swift J DBE observed that a court would be unlikely to find that an unfair relationship could have resulted from GE's limited involvement in the transaction. Swift J DBE concluded, in the circumstances, that HHJ Armitage had been entitled to give summary judgment in GE's favour.

Comment

The High Court's decision in Axton should be welcomed; it makes it clear that arguments to the effect that summary judgment is never available in unfair relationship cases must be dismissed. Bevin was never truly authority for such a proposition but it will now be easier to persuade judges in the county court that, despite Peter Smith J's reservations, summary judgment may be appropriate.

Nevertheless, it must be borne in mind that *Bevin* and *Axton* represent the two extreme types of case. In *Bevin*, the burden had been shifted to the creditor and the creditor had taken no steps to discharge that burden; in contrast, in *Axton*, the creditor had submitted compelling evidence and the court was able to find in the creditors favour on the basis of incontrovertible facts, assumptions made in the debtor's favour and principles of law: there was no need for a mini-trial. If the case you are concerned with falls into one of these two extreme categories then the decision on summary judgment will be straightforward. However, for cases that fall somewhere else on the scale things can be much more difficult and uncertain.

Unfair relationship claims will almost inevitably turn on their own facts, and there will always be risks associated with summary judgment applications. Nevertheless, Axton makes it clear that summary judgment can be granted and in appropriate cases should be granted. Despite Peter Smith J's reservations, it appears that it is not "virtually impossible" after all.