# GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: JUNE 2015

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In the first column, Thomas Samuels considers the potential impact of the ongoing appellate litigation in *NRAM plc v McAdam and another [2014] EWHC 4174 (Comm) (10 December 2014)*, in which the Court of Appeal's decision is currently eagerly awaited.

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## POTENTIAL IMPACT OF ONGOING APPELLATE LITIGATION IN NRAM PLC V MCADAM

### Background

For those not familiar with the matter, *NRAM plc v McAdam and another [2014] EWHC 4174 (Comm) (10 December 2014)* was a test case brought by NRAM examining the proper categorisation of part of its portfolio for the purposes of compliance with section 77A of the Consumer Credit Act 1974 (CCA) (see *Legal update, High Court holds that borrowers under wrongly drafted unregulated agreements were entitled to rights and remedies under CCA 1974 ( www.practicallaw.com/5-593-2126)*).

Section 77A of the CCA requires creditors to provide periodic statements to customers under regulated agreements for fixed sum credit.

The agreements under consideration in McAdam (the Agreements) all provided credit exceeding £25,000 and were executed before 6 April 2008 such that the old financial limit under section 8(2) of the CCA applied. Accordingly, they did not fall within the definition of a "regulated agreement" as then provided for by the CCA. However, they had been entered into by NRAM on documentation drafted to comply with requirements of the Consumer Credit (Agreements) Regulations 1983 (*SI 1983/1553*), which applied only in relation to regulated agreements. Consequently, the Agreements included various standard-form wording referring to regulation and setting out rights and protections usually afforded in relation to regulated loans.

Thus, the primary question for consideration was whether NRAM had, as a matter of contract, agreed to provide the rights and protections provided for by the CCA, including to comply with section 77A, and in default to give proper redress to borrowers.

## WHAT HAPPENED AT FIRST INSTANCE?

At first instance, Burton J examined various apparently analogous landlord and tenant authorities and considered the views set out in Guest and Lloyd's Encyclopaedia of Consumer Credit and Goode: Consumer Credit Law and Practice. He concluded that the Agreements did confer certain statutory rights and protections on the borrowers (although the drafting could not import the statutory jurisdiction afforded to the court by Part IX (Judicial control) of the CCA). The judgment reasoned that those rights and obligations were imported to the Agreements because they were drafted as regulated "whether or not" they would, in fact, be defined as such under the statute.

NRAM appealed this conclusion.

## KEY ISSUES FOR NRAM APPEAL

The Court of Appeal (consisting of Longmore, Richards and Gloster LJJ) heard the matter over two days on 28 and 29 April 2015. Their Lordships' decision is expected at some point before the end of term in July 2015.

From the eight grounds of appeal emerged three central issues for consideration:

- Whether the statutory wording had contractual effect.
- If so, its proper meaning and effect.
- If not, whether, in any event, it gave rise to an estoppel.

## COMMENT

There is perhaps little use in speculating about the outcome: the decisions of the senior appellate courts have surprised lawyers in this area before and will do so again. However, it is interesting that the question of how the relevant statutory language would be understood by the customers signing the Agreements appeared to be of importance to the panel. On the one hand it might be said that the wording required by the CCA is very likely to be entirely meaningless to the average consumer (if indeed it is read at all) and so can be ignored when considering the parties' intentions. On the other hand, as apparently suggested by Longmore LJ during the course of submissions, any reasonably well-informed consumer would surely understand that references to regulation by the CCA would import certain special rights and protections.

In either case this context is obviously very different from some of the examples referred to by Burton J where the parties had specifically agreed either to treat "X" as if it were "Y", or "X" as "Y" whether it was or not. In McAdam, neither party had made such an agreement; rather, the contractual documentation had merely held itself out as something it was not as a result of inertia on the part of the creditor. Further, given that estoppel requires "a shared assumption" (at paragraph 29), any conclusion in the debtors' favour on that basis would also be on shaky ground.

Moreover, the conclusions of Burton J are arguably inconsistent with the CCA itself which envisages that, in certain circumstances, an agreement may be drafted as regulated but be treated as unregulated. The most notable example is the "business purposes" exemption, formerly at section 16B of the CCA and now re-enacted at article 60C of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) (RAO). The exemption provides that agreements for credit exceeding £25,000 and entered into for purposes wholly or predominantly for the debtor's business will not be regulated.

In that context, the use of a prescribed "business purposes" declaration on the face of an otherwise regulated agreement creates a rebuttable presumption in favour of the creditor. Such declarations are often included on agreements that are otherwise drafted as regulated so that, in the event that the presumption is successfully rebutted, the entire deal is not rendered unenforceable.

Were the first instance decision in McAdam upheld, such declarations would be nullified by references to regulation elsewhere in the agreement documentation.

## POSSIBLE IMPACT ON CONSUMER CREDIT SECTOR

Generally speaking, to uphold Burton J's decision would have an enormous impact on the consumer credit sector. As was acknowledged in his judgment, NRAM's situation was far from unique: both leading textbooks acknowledged that such drafting is commonplace in the consumer credit lending market to avoid the risk of staff wrongly using non-regulated forms in regulated deals (at paragraph 14(ii)).

Before McAdam, the general view was that such an approach erred on the side of caution and would be unlikely to cause significant difficulties. Either the relevant parts of the agreement documentation referring to the CCA could be ignored where inapplicable, or, at worst, certain rights such as withdrawal would apply since they were expressly referred to in the documentation, with the vast majority of the CCA being inapplicable.

Perhaps the most significant practical difficulty arises from the obligations under sections 77A, 86B and 86D of the CCA, which all relate to the provision of statements and notices and were those under consideration in McAdam. If the Court of Appeal dismiss NRAM's appeal many lenders may find themselves inadvertently in default of their obligations under those sections and, in consequence, facing considerable bills for redress. By way of example, in McAdam the number of borrowers affected would be in the region of 41,000, leading to a compensation bill for NRAM of something in the region of £258 million (at paragraph 8).

Thus, while it is unlikely to be the "next PPI scandal", in the absence of permission to petition the Supreme Court, dismissal of the appeal has the capacity to further knock an already bloodied and bruised consumer credit lending sector.