GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: JANUARY 2018

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In the January column, Ruth Bala considers limitation in debt claims.

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LIMITATION IN DEBT CLAIMS

The New Year may prompt a review of outstanding debt, whereupon considerations of limitation arise. Limitation is unaffected by the new pre-action protocol for debt recovery claims (protocol paragraph 17), therefore creditors must remain conscious of limitation if they enter successive payment plans under the protocol (for more information on the pre-action protocol for debt recovery claims, see *Article, Gough Square Chambers' consumer credit column: September 2017*). Limitation in debt claims is not as straightforward as is often supposed. Since limitation is a bar to a remedy, rather than a defence, the creditor bears the burden of proof.

Relevance of security

The source of the ordinary limitation period for recovering debt depends on whether the loan is unsecured or secured. This is because the Limitation Act 1980 (LA 1980) specifies different periods depending on whether the cause of action is in simple contract or to recover money secured by a mortgage.

For unsecured loans, the relevant provision is section 5 of the LA 1980, which provides:

"An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."

Where an unsecured loan is granted on an informal basis, section 6 of the LA 1980 should be checked (this disapplies the section 5 time bar for certain loans which do not specify a fixed or determinable repayment date and are not repayable on demand).

For secured loans, the starting point is section 8 of the LA 1980, which provides a time limit of 12 years for actions on a "specialty", unless a shorter time limit is expressly provided for elsewhere in the LA 1980. Specialties include contracts by way of deed, as well as statutory obligations. Specifically in relation to secured loans, section 20 of the LA 1980 provides:

- (1)No action shall be brought to recover (a) any principal sum of money secured by a mortgage or other charge on property (whether real or personal)... after the expiration of twelve years from the date on which the right to receive the money accrued....
- (5)... no action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or other charge... shall be brought after the expiration of six years from the date on which the interest became due.

In relation to secured debt, section 20 of the LA 1980 stipulates different periods for principal and interest: twelve years for the former and six years for the latter. In general, part of the monthly instalment will be attributable to principal and part to interest. Therefore a lender may find itself out of time in respect of the interest elements of some of the monthly instalments.

When the cause of action accrues

Limitation in respect of unsecured debt starts to run from the date "the cause of action accrued". Limitation in respect of secured debt starts to run from the date "the right to receive the [principal] money accrued" and from the date "the interest became due". All of these turns of phrase equate to the same thing: the date upon which the creditor became entitled to repayment. The creditor becomes entitled to repayment once the contractual and statutory pre-conditions to that entitlement have been satisfied.

Contractual pre-conditions

Contractually, the creditor's right to repayment must be a present, not a deferred right (*Doodes v Gotham [2006] EWCA Civ 1080, at [36]*). Therefore, for fixed term loans, either the term must have expired, or the accelerated payment provisions in the loan must have been triggered, for example, upon default.

The position is more complex for debts that are stated to be repayable on demand, for example, overdrafts or contracts of guarantee. The running of limitation will only be postponed until the date of the demand where the issue of a demand is a formal prerequisite to the creditor's right of action. This will depend on whether, as a matter of contractual construction, the parties intended to make the demand a term of the contract, or whether it is "mere surplusage" in the contract (*N Joachimson v Swiss Bank Corpn [1921] 3 K.B. 110 (CA); Levin v Tannenbaum [2013] EWHC 4457 (Ch)*).

Ordinarily, a demand will be required before limitation starts to run against a guarantor. This is because a guarantor's liability is secondary, arising from a collateral contract, and is by its nature contingent upon the issue of a demand. In contrast, a demand is not usually required before limitation starts to run against a surety under a contract of indemnity, who is liable as primary obligor. Counterintuitively, this is so even if the contract describes the surety's payment obligation as arising "on demand". In such cases the words "on demand" do not import a contingent liability dependent upon the issue of a demand (*Bradford Old Bank Ltd v Sutcliffe [1918] 2 K.B. 833, CA*).

However, the question is always one of contractual construction; even as against a primary obligor, liability may be contingent upon a demand if the contract stipulates precisely that payment is only required within a certain number of days after issue of a demand (*Levin v Tannenbaum [2013] EWHC 4457 (Ch)*: such words cannot be treated as mere surplusage).

Statutory pre-conditions

For unsecured loans regulated by the Consumer Credit Act 1974 (CCA), there is a statutory pre-condition to the creditor's entitlement to early repayment: it must have served a default notice and waited for the 14 day period to expire.

It should be noted that secured loans, which were CCA regulated when entered into, will now be consumer credit back book mortgage contracts (article 2 of the Mortgage Credit Directive Order 2015 (*SI 2015/910*)) (MCD Order). As such, the CCA requirement for default notices will no longer be applicable (section 87 of the CCA is not one of the transitional CCA provisions carried over for consumer credit back book mortgage contracts (*article 29, MCD Order*)).

Once the contractual and statutory pre-conditions to the creditor's entitlement to repayment have been satisfied, limitation starts to run.

Acknowledgments and part payments

Subsections 29(5)-(7) of the LA 1980 provides:

- (5)Subject to subsection (6) below, where any right of action has accrued to recover (a) any debt or other liquidated pecuniary claim… and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.

- (6)A payment of a part of the … interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.

- (7)Subject to subsection (6) above, a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment.

In short, an "acknowledgment" of the claim or part payment shall re-start the limitation period, provided (under section 29(7)) that the limitation period has not already expired before the acknowledgment or part payment.

The wording of subsection (6) is rather opaque: it means that where a payment is made towards interest, time begins to run afresh in respect of the principal only (the original limitation period is unaffected for the remainder of the interest). The rationale appears to be that a payment towards interest is an acknowledgment of liability for the principal.

In order to be effective, an acknowledgment must be in writing signed by the debtor (*section 30, LA 1980*). A typed signature at the foot of an e-mail will probably suffice (see *The Good Challenger Navegante [2003] All E.R. (D) 320 (Nov)* in the context of a fax). Any letter from the debtor referencing the debt must be dated (a) prior to expiry of the primary limitation period and (b) within the six/twelve years prior to issue of the claim.

An acknowledgment must contain a "sufficiently clear admission of the title" of the creditor to the debt (*Ashe v National Westminster Bank plc [2007] EWHC 494 (Ch)*), but there is no longer any requirement that it includes an implied promise to pay. In *Dungate v Dungate [1965] 1 W.L.R. 1447*, the Court of Appeal held that a letter stating "keep a check on totals and amounts I owe you, and we will have account now and then" amounted to an "acknowledgment". Therefore any reference by the debtor to their debt in signed correspondence addressed to the creditor should suffice, unless the letter is expressly stated to be without admission of liability.

Where no acknowledgment or part payment can be identified, all is not lost: a creditor under a statute-barred debt is entitled to retain payments previously made. This is because limitation bars the remedy but does not extinguish the right.

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For previous consumer credit columns written by barristers at Gough Square Chambers, see *Practice note, Gough Square Chambers' consumer credit columns*.