GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: APRIL 2018

James Ross, Ruth Bala, Thomas Samuels and Lee Finch are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they will share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the April column, Lee Finch considers developments in unfair relationship claims under the Consumer Credit Act 1974 (CCA).

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DEVELOPMENTS IN UNFAIR RELATIONSHIP CLAIMS

Introduction

We have considered the unfair relationship provisions in these columns before, see *Articles, Gough Square Chambers' consumer credit column: July 2015* and *Gough Square Chambers' consumer credit column: August 2016*. However, three recent cases call for the topic to be revisited: *Holyoake v Candy [2017] EWHC 3397 (Ch), [2018] CCLR 7, Santander UK plc v Well [2017] EWHC 2413 (Ch), [2018] CCLR 5* and *Clydesdale Bank plc v Gough (t/a JC Gough & Sons) [2017] EWHC 2230 (Ch), [2018] CCLR 2*. They will be dealt with in turn.

Holyoake v Candy

The recent litigation between the Candy brothers, Mark Holyoake and their respective companies is well known for a variety of reasons but, leaving aside the aspects which got the media excited, Mr Justice Nugee's decision deals with some important issues in unfair relationship claims.

The impact of a settlement

The case arose out of a £12 million commercial loan from Christian Candy's company, CPC Group Ltd, to Mr Holyoake personally, for the purposes of financing a property development. Numerous unforgiving terms were attached to the loan which Mr Holyoake argued made the relationship unfair under section 140A of the Consumer Credit Act 1974 (CCA). However, a settlement deed had been entered into on 15 October 2013 which, it was accepted by counsel for Mr Holyoake, was wide enough to include settlement of any claims which he may have under the CCA, including unfair relationship claims.

The question then became whether the court could set aside the settlement deed or examine its fairness on the basis that it was itself a credit agreement. Mr Justice Nugee considered the terms of the settlement agreement. He found that because one of the terms of the settlement involved CPC agreeing to enter into a further credit agreement with Mr Holyoake (referred to as the Second Supplemental Extension Agreement), that was a financial accommodation which rendered the settlement deed a credit agreement. In the alternative, Mr Justice Nugee held that even if he was wrong to find that the settlement agreement was itself a credit agreement it would, in any event, have been a related agreement under section 140A(4) of the CCA and, therefore, relevant to a section 140A claim. Referring back to the definition of "linked transaction" in section 19 of the CCA, Mr Justice Nugee held that the settlement agreement was initiated by CPC and was entered into by Mr Holyoake for a purpose related to the Second Supplemental Extension Agreement (the principal agreement).

It was argued on behalf of the defendants that as a bona fide settlement had been reached, the legislature cannot have intended the unfair relationship provisions to allow the "unpicking" of that compromise, otherwise it would be impossible to ever settle consumer credit claims. The judge considered this submission but acknowledged the danger in finding that a settlement was effective to oust the court's power to review the fairness of credit relationships under sections 140A to140C of the CCA (as it could lead to lenders regularly requiring borrowers to sign over their rights to bring claims in relation to their credit agreements). Ultimately, Mr Justice Nugee held that the settlement deed did not act as a jurisdictional bar to a section 140A claim, placing some reliance on the basis that it was not a compromise of genuine dispute of fact about the applicability of the CCA, but rather any claims Mr Holyoake may have under the CCA (distinguishing the case from *Binder v Alachouzos [1972] 2 QB 151*).

Nevertheless, Mr Justice Nugee held that the settlement deed could not be ignored and it was, in fact, highly relevant that the parties had reached a compromise. Looking at the factors identified in *Binder*, Mr Justice Nugee noted that:

- There was a genuine dispute as to whether Mr Holyoake had any viable CCA claims.
- There was a fair arguable case on each side.
- The compromise was bona fide and its terms were not colourable.
- Mr Holyoake entered into the settlement deed after receiving legal advice.

Consequently, the judge decided that the settlement deed should not be disturbed. Further, Mr Justice Nugee held that it was academic whether he found that the relationship was not unfair because the parties had reached a compromise, or whether he found that even if unfair, he would decline to exercise his discretion under section 140B in the light of the compromise.

Given this decision, it is important when settling a consumer credit dispute, to consider whether any compromise involves, or is "linked" to an agreement that involves, further financial accommodation: if so, the compromise may not be as final as the creditor hopes. Nevertheless, as shown in *Holyoake v Candy*, courts will likely be reluctant to interfere with genuine bona fide settlements reached with the benefit of legal advice.

Large extension fees

The forgoing only dealt with issues preceding 15 October 2013 (when the settlement deed was entered). Mr Holyoake also raised allegations of unfairness in relation to a number of matters which post-dated the compromise, most notably an allegation that one month extension fees of £1 million and £1.5 million made the relationship unfair.

The defendants argued that it was not the role of the courts to regulate high returns, relying on *Khodari v Tamimi [2009] EWCA Civ 1109*. However, this was dismissed by Mr Justice Nugee. He did not accept that Khodari was authority for that proposition and noted that Lord Justice Wilson had found the fact that a 10% fee was not unusual given the facts of that case weighed against the relationship being unfair suggesting that fees out of the ordinary could give rise to an unfair relationship.

Mr Justice Nugee considered that the mere size of the extension fees could give rise to an unfair relationship but, on the facts of the case, found that no unfairness in fact arose. Most relevant to this finding was the fact that Mr Holyoake was not a naïve consumer but a sophisticated borrower who had sought credit to try and achieve a profit from a business venture and that, in purchasing the extensions he was not really buying credit but the opportunity to achieve a sale at a significantly higher price than already agreed. Ultimately, Mr Justice Nugee did not consider the CCA intended to allow the courts to intervene in commercial negotiations between parties who are well able to look after themselves.

Santander UK plc v Wells

In *Santander UK plc v Wells*, Santander had entered into a loan agreement with Graham Wells and Clive Wells (the Wells brothers) secured on their property. The Wells brothers subsequently defaulted and Santander obtained a possession order and sold the property. After satisfying the Santander debt, there remained a surplus but, in the light of a dispute as to who was entitled to the surplus, Santander paid the monies into court.

Hertford Solutions LLP (Hertford) claimed that it was entitled to the funds as a result of a loan it had entered into with the Wells brothers in February 2014 and a charging order it had obtained in July 2014, whilst Mr Phillip Chave argued that he was entitled to the funds after obtaining a judgment against the Wells brothers and a charging order against the property on 28 April 2015. Mr Chave argued that Hertford's charge was unenforceable and his charge should take priority.

The remaining procedural history is complex but is irrelevant for present purposes; what matters is that from 2014 to June 2017, the Wells brothers did not allege that the relationship between themselves and Hertford was unfair within the meaning of section 140A of the CCA. Graham Wells appeared to support Mr Chave in his claim but did not take any action himself.

On 24 July 2017, Graham Wells sent an application notice to the court which, for the first time, sought to raise an unfair relationship claim against Hertford.

Counsel for Mr Wells argued, inter alia, that:

- Mr Wells could make an application for relief under the unfair relationship provisions of the CCA at any time and the application could be considered without consideration of any other requirements.
- Section 140A(4) of the CCA (which provides that an unfair relationship determination can be made not withstanding that the relationship had ended) supports the position that a failure to raise the complaint earlier was beside the point.
- Under section 140B(9) of the CCA, once the debtor has made an allegation of unfairness, it is for the creditor to prove to the contrary.

Mr John Baldwin QC, sitting as a deputy High Court judge, considered these arguments but determined that the application was an abuse of process. The judge held that Mr Wells had had plenty of opportunity to bring his complaints, about the 2014 loan agreement, at a time when they could have been adjudicated upon but had chosen or neglected to do so and has given no adequate explanation therefore. If the application was allowed and the unfair relationship claim successful, it would have the effect of interfering with the possession order obtained by Hertford in 2014 and meddling with the court's decision in the dispute between Mr Chave and Hertford over the entitlement to the funds.

This decision makes clear that despite the generous limitation periods, the reverse burden and the ongoing nature of unfair relationship disputes, it can be abusive to delay in bringing an unfair relationship claim: it is a warning to debtors with potential claims and provides encouragement to creditors faced with claims which should properly have been brought much sooner.

Clydesdale Bank plc v Gough (t/a JC Gough & Sons)

The case of *Clydesdale Bank plc v Gough* can be dealt with more shortly. Clydesdale Bank had brought a possession claim against Mr and Mrs Gough (and their two sons) in relation to security provided under a loan agreement to Mr Gough and a personal guarantee provided by Mrs Gough. Mr Gough defended the claim on a number of grounds that do not concern us for present purposes. What is notable is that Mrs Gough defended the claim on the grounds that the guarantee she entered was a "related agreement" and created an unfair relationship between herself and Clydesdale Bank. However, what Mrs Gough had not appreciated was that whilst the guarantee could be relevant to whether an unfair relationship existed between the bank and her husband, the fairness of the guarantee and her relationship with the bank was not relevant in isolation.

Mr Lance Ashworth QC, sitting as a Deputy High Court judge, considered the statutory framework and held:

> "...before I would have power to do any of the things in section 140B, I would have to determine that the relationship between the Bank and Mr Gough arising out of the financing agreements or those agreements taken with the personal guarantee of Mrs Gough is unfair. There is no power in the court to interfere were I to come to the conclusion that the relationship between the Bank and Mrs Gough (rather than Mr Gough) is unfair. What is determinative is the relationship between the Bank and Mr Gough.
>
> Mrs Gough's pleaded case is that the relationship between the Bank and her is unfair, not that the relationship between the Bank and Mr Gough is unfair. Accordingly, her defence on this basis must fail, even if I were satisfied that the relationship between her and the Bank was or is unfair."

This case provides confirmation, if it was needed, that the unfair relationship provisions do not empower courts to consider the fairness of related agreements separate from the relationship between the creditor and the debtor.

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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.*