GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: APRIL 2019

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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 2019 column, Ruth Bala considers the level of interest rates in consumer credit agreements in the context of the unfair relationship provisions in the Consumer Credit Act 1974 (CCA).

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ATTACKS ON LEVEL OF INTEREST RATE

The "unfair relationship" provisions of the Consumer Credit Act 1974 (CCA) are considerably wider than the predecessor "extortionate credit bargain" provisions. The most obvious route to prove that a bargain was "extortionate" was an attack on the level of interest rate, whereas "unfairness" may be arrived at from multiple directions. Nonetheless, attacks on the level of interest rate persist. One of the gateways to relief under section 140B is unfairness "because of ... any of the terms of the agreement" (*section 140A(1)(a), CCA*), and this will include the term providing for the rate of interest.

Identifying the comparator

Where the interest rate is attacked, the first step is to identify the appropriate comparator product. Under the extortionate credit bargain provisions, the courts generally used as a benchmark the market rate for similar loan products available at the relevant time to borrowers of a similar calibre. This approach has been followed under the unfair relationship provisions (as noted by the editors of Guest, *Encyclopaedia of Consumer Credit Law* at page 2222/80).

For instance, in two "logbook loan" cases (S*haw v Nine Regions Ltd [2009] EWHC 3514 (QB)* and *Nine Regions (t/a Logbook Loans) v Sadeer [2008] GCCR 8501*), APRs of 341% and 384.4% respectively were held not to generate unfair relationships, as they were not out of kilter with rates charged by other logbook lenders at the relevant time.

In *Consolidated Finance v Hunter (unreported), 1 July 2010 (Macclesfield County Court)*, cited by the editors of Guest at page 2222/80, the court considered a three-month bridging loan with a compound interest rate of 2% per month and found that there was no unfair relationship, as this "represented the market rate for similar short-term bridging loans". Similarly, in *Chubb and Bruce v Dean and another [2013] EWHC 1282 (Ch)*, the High Court rejected a complaint in respect of a short-term bridging loan with a compound interest rate of 1.85% per month (or 3.1% per month when combined with a monthly "facility fee"). HHJ Cooke, sitting as a High Court judge, expressed the obiter view at [26] that an unfair relationship would "require a very much higher interest rate" than that combined rate.

Further, in *McMullon v Secure the Bridge Ltd [2015] EWCA Civ 884*, the Court of Appeal considered a bridging loan where the interest rate was 4% per month after expiry of the primary term. Although the court found that the increase in the interest rate after default was impermissible (a separate issue), it dismissed the borrower's appeal against the finding that there was no unfair relationship arising from the terms of the loan.

Proper role of the court

The role of the court under section 140B of the CCA should not be to revise the interest rate downwards with the aim of bringing the product in line with its competitors. As Lady Hale said In *OFT v Abbey National plc [2009] 3 WLR 1215* (at [93]):

> "As a very general proposition, consumer law in this country aims to give the consumer an informed choice rather than to protect the consumer from making an unwise choice."

Although the unfair relationship provisions make some inroads into this general stance, the issue is not what a reasonable interest rate would have been (so as to rewrite the bargain), but whether the level of the interest rate is so high as to generate an unfair relationship. The rate must be so much higher than that under rival products that intervention by the court is warranted.

In *Chubb v Dean*, HHJ Cooke, sitting as a High Court judge, commented at [26]:

> "There may, of course, be such cases [*where the interest rate gives rise to an unfair relationship*] but it seems to me that that would require a very much higher interest rate … What the defendants signed up to was a stiff commercial bargain, no doubt but it was not in my judgment an unfair one …"

When to adduce expert evidence

Where there is a genuine challenge to the level of interest rate, the court will usually be unable to resolve this without expert evidence. The court cannot take judicial notice of interest rates charged under particular types of products at a particular time, unless this happens to be recorded in a document within the public domain (for example, a report by a regulator on a particular market).

Instructing an expert to report on comparable interest rates may be time-consuming and disproportionate to the amount in dispute. It may not be justified where a complaint about the interest rate is simply itemised as one of a litany of grievances in the borrower's statement of case. The difficulty is that the creditor bears the reverse burden of proof (*section 140B(9), CCA*). If the creditor does not propose instruction of an expert, it takes the risk of the trial judge finding that it has failed to discharge the burden of proof on what was a pleaded issue.

Upon receipt of a statement of case by the borrower that makes passing reference to the level of interest rate in connection with section 140A, it is therefore prudent to write to the borrower's legal representatives prior to any case management conference, enquiring whether this will be a real issue at trial justifying instruction of an expert.

There have been two recent High Court cases on point. The first is *Greenlands Trading Ltd v Girolama Pontearso [2019] EWHC 278 (Ch)*, which concerned a default interest rate of 3% per month under a bridging loan. Neither side had proposed that expert evidence should be adduced at trial and there was no evidence on why the rate was set at that level in witness statements served on behalf of the creditor. During the trial, the judge gave permission for a representative of the broker (who was acting as witness for the creditor) to answer supplemental questions in examination-in-chief. In the course of this exchange, which was not objected to, the broker gave unchallenged evidence that the default interest rate of 3% per month followed the industry standard. The trial judge relied on this "self-serving" evidence in finding that there was no unfair relationship and Nugee J in the High Court dismissed the borrower's appeal from what was a case management decision accompanied by a finding of primary fact. Since the creditor was very fortunate that (i) the trial judge permitted such evidence to be adduced in chief, and (ii) the evidence was not objected to and no adjournment was sought, this is not a prudent alternative strategy to adducing expert evidence.

Secondly, in *Pilgrim Rock Ltd v Iwaniuk [2019] EWHC 203 (Ch)*, the High Court refused to interfere with the trial judge's finding that quarterly compounding of interest was "out of the ordinary in the market". Neither side had adduced expert evidence and there was no witness evidence from the creditor on point. Fancourt J emphasised (at [11]), that in light of subsection 140B(9), "once the challenge to the interest provisions had been raised by the defendant, it was for *Pilgrim* to prove that the terms were not unfair because they were in line with market terms, or for other reasons".

In general, the only way to safely discharge this burden will be to adduce expert evidence.

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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.*