

# GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: MAY 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 May 2019 column, Thomas Samuels considers the issues that may arise following the death of the borrower, or hirer, during the term of a regulated consumer credit, or hire, agreement in relation to section 86 of the Consumer Credit Act 1974 (CCA).

by *Thomas Samuels, Gough Square Chambers*

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## ENFORCEMENT FOLLOWING DEATH OF A BORROWER

### Introduction

This column considers the issues which may arise following the death of the borrower or hirer during the term of a regulated consumer credit or hire agreement. The position is not necessarily straightforward. It requires engagement with the comparatively unknown provision at section 86 of the Consumer Credit Act 1974 (CCA) and its interaction with potential alternative remedies at common law.

### Position at common law

At common law, the death of a party to a contract will only be sufficient to bring the agreement to an end as a frustrating event where the contract is for "personal services".

The classic statement of the law is that of Pollock C.B. in *Hall v Wright* [1859] 120 ER 695, 793-4:

"All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and, should he die, his executor is not liable to an action for breach of contract occasioned by his death."

The court gave the examples of a contract for an author to write a book or a painter to create a work within a reasonable period. Upon death, it is plainly not sensible to burden their estate with a claim for breach of contract since it is highly unlikely that an executor would be able to perform the contract in their place. As such, the most sensible analysis is that the contract is frustrated and thereby comes to an end.

More recently, in *Bue v Worcestershire Primary Care Trust* [2010] EWHC 1123 (Admin), it was held that the right of a dentist to convert the type of care offered to his local NHS trust from "personal" to "general" dental services was a personal one. It therefore came to an end upon the dentist's death.

By contrast, in *Phillips v Alhambra Palace Co Ltd* [1901] 1 QB 59 it was held that the death of a booking agent after he had engaged a troupe of performers did not frustrate the contract; his surviving partners were sufficiently able to carry out the contract in his place.



## Section 86 of the CCA

The common law division between personal and non-personal contractual obligations is reflected by section 86 of the CCA. To the surprise of many creditors and owners, a regulated credit or hire agreement does not come to an end merely because of the debtor or hirer's death.

Sub-sections (1) and (2) draw a distinction between agreements which are "fully secured" versus only "partly secured" or "unsecured". Sub-section (1) provides that the creditor or owner "is not entitled, by reason of the death of the debtor or hirer, to do an act specified in paragraphs (a) to (e) of section 87(1) if at the death the agreement is fully secured". By contrast, where the agreement is "*at the death... only partly secured or is unsecured*", the creditor or owner "*is entitled ... to do an act specified in paragraphs (a) to (e) of section 87(1) on an order of the court only*".

The following points should be noted:

- Section 86 applies only where the creditor is attempting to enforce **by reason of the death** of the debtor or hirer. Apparently, it does not apply if the creditor wishes to take the actions listed in section 87(1) for some reason other than the debtor or hirer's death. However, this distinction has the potential for confusion. In the absence of a good reason to the contrary, upon death of the debtor or hirer, it is always safer to assume the applicability of section 86.
- Where there are joint debtors or hirers, the death of one will suffice to engage section 86: section 185(4) of the CCA.
- There is no definition of precisely what is meant by "secured" versus "partly secured" or "unsecured". However, the definition of "security" in section 189(1) of the CCA provides some assistance. It is given a wide meaning, and includes personal as well as real security and any "*other right provided by the debtor or hirer... to secure the carrying out of [his] obligations... under the agreement*". Perhaps most significantly, although a creditor may consider retention of title as a form of security, hire-purchase and conditional sale agreements are likely to be "unsecured" for the purposes of section 86. Further, whether something is wholly or partly secured presumably depends upon whether the value of the security covers the balance outstanding under the agreement.
- The security position under the agreement is to be determined "*at the date of death*" rather than at the date of the making of the agreement or enforcement. For example, although the agreement was fully secured at the outset, the value of the security property may have fallen in the interim such that, by the date of death, the agreement is only "partly secured" for the purpose of section 86(1)-(2).
- Specifically, in relation to termination of a regulated agreement under section 87(1)(a), section 86 applies only if the agreement has "*a period for its duration... specified*" and it has "*not ended*" at the time of the purported termination (section 86(3)). Presumably, therefore, open-ended agreements may be terminated at any time pursuant to section 98A.

Further, it seems likely that section 86 applies whether or not there is a specific term in the agreement which brings it to an end upon the death of the debtor or hirer.

## Applications to the court

The grounds for an application to court under section 86(2) are set out at section 128 of the CCA. The court may only make an order "*if, but only if, the creditor or owner proves that he has been unable to satisfy himself that the present and future obligations of the debtor or hirer under the agreement are likely to be discharged*".

The wording of the provision is somewhat convoluted. However, in effect, a creditor or owner must prove that the estate will be unable to meet the remainder of the debtor or hirer's contractual obligations and, such security as exists, is not sufficient. In so far as that proof cannot be provided, the death of the debtor or hirer, of itself, will not suffice. Arguably, of course, if either the agreement is fully secured or the estate is likely to discharge the remaining obligations under the agreement, the debtor or hirer's death should not matter.

Sections 86 and 128 are not regularly used, so there is no reported case law relating to their scope or application. However, it seems likely that the question is one of objective fact. The emphasis upon the creditor, or owner, proving that he cannot be satisfied of the discharge of present or future obligations implies that he must put forward sufficient evidence to support his belief. If, objectively, the court considers that the evidence does not support the creditor or owner's view, then a section 86(2) application is likely to be refused.

Instances where section 128 would apply might include where the value of the estate is less than the outstanding balance under the agreement or, in relation to a regulated hire-purchase agreement, where goods are likely to be misused or misappropriated by the debtor's estate.

Further, although the rubric to section 128 refers to "*Enforcement orders on the death of debtor or hirer*", in fact an order made pursuant to section 86 is not an "enforcement order" as defined by section 189(1). Accordingly, it appears that the court does not have its usual rights in relation to such applications. For example, to make a time order under section 129 or a declaration as to the parties' rights under section 142 of the CCA.

### Practicalities

On a practical note, an application for an order under section 86(2) of the CCA is a CCA claim for the purposes of CPR Practice Direction 7B. Accordingly, it must be brought in the debtor's local county court and the requirements of that Practice Direction apply.

In particular, the Particulars of Claim must "*state... what the circumstances are that require him to obtain a court order for enforcement*" (paragraph 7.4(2)).

Further, under paragraphs 9.3 to 9.5 of CPR 7BPD, the "*personal representatives of the deceased... must be parties to the proceedings in which the order is sought, unless no grant of representation has been made to the estate*". If there has been no such grant, the claimant "*must*" apply under CPR 23 for directions about the "*persons (if any)... to be made parties to the claim as being affected or likely to be affected by the enforcement of the agreement*". Such an application can be made without notice and should be made **before** the claim form in the main proceedings is issued.

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