

# GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: OCTOBER 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 October 2019 column, Thomas Samuels reviews the law on the reverse burden of proof in relation to unfair relationship claims under the Consumer Credit Act 1974 (CCA) and considers the impact of the recent decision in *Promontoria (Henrico) Ltd v Samra* [2019] EWHC 2327 (Ch).

by *Thomas Samuels, Gough Square Chambers*

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## THE REVERSE BURDEN IN UNFAIR RELATIONSHIP CLAIMS: A REVIEW

### Introduction

One of the unusual features of an unfair relationship (UR) claim brought under section 140A to 140C of the Consumer Credit Act 1974 (CCA) is the so-called "reverse burden of proof" provided for by section 140B(9).

In combination with the broad range of factors which can be taken into consideration as part of a UR claim, it has proved a useful tactical weapon for claimants and, on occasion, an insurmountable hurdle for defendants. However, the recent decision in *Promontoria (Henrico) Ltd v Samra* [2019] EWHC 2327 (Ch) goes some way to clarify the meaning of the provision to and redress the balance.

This column reviews the law on the "reverse burden" and considers the impact of the Samra decision.

### Background to the provision

Section 140B(9) of the CCA provides that where "the debtor or a surety alleges that the relationship between the debtor and creditor is unfair to the debtor, then it is for the creditor to prove to the contrary". Its effect, therefore, is to reverse the usual rule that "he who asserts must prove".

However, the concept of such a reverse burden in a consumer credit context is far older than the UR provisions, which were introduced with the Consumer Credit Act 2006. Section 10(1) of the Moneylenders Act 1927 provided that where interest on a loan exceeded 48% per annum, it was presumed to be excessive and harsh and unconscionable "unless the contrary is proved".

A similar provision was then incorporated into the CCA (as originally enacted) in relation to the old "extortionate credit bargain" test. Section 171(7) provided that if "the debtor or any surety alleges that the credit bargain is extortionate it is for the creditor to prove the contrary".

### Rival interpretations

The language of section 171(7) is obviously reminiscent of the current wording under section 140B(9). Given the ambiguity of the language, the obvious difficulty with both provisions has been the scope of the obligation placed



upon the creditor. Do they bear both a legal and factual burden, or must a debtor establish their factual case before the creditor is tasked with a legal burden of establishing there is no consequent unfairness?

The distinction was arguably less significant in relation to extortionate credit bargains since the court's primary considerations were narrower questions of the debtor's payment obligations and the cost of the credit. However, the rival interpretations have become considerably more significant under the UR regime, which was introduced specifically as "a wider concept to encapsulate unfair practices" (per DTI's 2003 consultation paper "Tackling loan sharks – and more").

In the first place, if a creditor has to discharge the factual and legal burden, it adds considerably to the complexity of disclosure and evidence in the lead-up to trial. Moreover, it potentially encourages the unscrupulous debtors to assert unfairness on questionable factual bases, knowing the creditor is charged with disproving them. Procedurally-speaking, an obligation on a creditor to disprove a factual case effectively removes the possibility of summary judgment in all but the most exceptional cases.

### Academic and judicial analysis

In relation to the old section 171(7), it was generally considered that the evidential burden on an extortionate credit bargain fell upon the debtor, that is, if they failed to produce adequate evidence in support of the allegation the court need not consider it.

That was the view of the editors of the *Encyclopaedia of Consumer Credit Law* on the basis that section 138(2) stated that, considering an extortionate credit bargain allegation, the court should have regard "to such evidence as is adduced...". Moreover, an analogy was drawn with the burdens of proof in criminal proceedings: although the legal burden rests throughout on the prosecution, any particular issue (for example, provocation) need not be put to a jury unless the defendant has adduced sufficient evidence to support it.

The more restrictive reading of section 171(7) contended for in the academic commentary was supported to some extent by the Court of Appeal's comments in *Coldunell Ltd v Gallon* [1986] QB 1184. There Oliver LJ commented that the creditor's burden under section 171(7) would be "sufficiently discharged by showing that the bargain was on its face proper and not an extortionate commercial bargain and that the [creditor] acted in a way that an ordinary commercial lender would be expected to act".

Upon the introduction of the UR provisions, it was broadly assumed by most practitioners that the same analysis applied to section 140B(9), that is, the burden of disproving unfairness only switched to the creditor once the debtor had established their factual case. For example, in *Carey v HSBC plc* [2009] EWHC 3417 (QB), the court rejected a series of UR claims based exclusively on creditors' failures to fully comply with information requests made by the debtors under section 78 of the CCA. However, as a potential warning shot of what was to come, the judge noted that a debtor alleging an unfair relationship "does not have to plead specific facts", the implication being that a creditor was charged with unpicking the entire relationship between the parties so as to establish it was fair.

From the hint in *Carey*, a sea change followed from the conclusions of the court in *Bevin v Datum Finance Ltd* [2011] EWHC 3542 (Ch). In the context of an appeal from a decision setting aside a statutory demand on the basis of a purported UR, he stated:

"[55]... it is not, in my judgment, incumbent on Mr. Bevin to show a prima facie case as to unfairness or any case as to unfairness. As the section says, all he has to do is to make an allegation of unfairness. If he makes that allegation, the legal burden is on the creditor to prove that the arrangement was not unfair. The creditor in this case, Datum, has not adduced any evidence on unfairness whatsoever.

[56] I do not, therefore, accept that Mr. Bevin has a burden at this stage, in effect, to reverse that burden by putting a showing on first..."

On that basis, for the last few years section 140B(9) has been widely interpreted as meaning that a debtor need do no more than make a bare assertion. From that point forward, it is entirely for the creditor to disprove unfairness,

both in fact and law. That is a task made all the more difficult by virtue of the breadth of possible circumstances which the trial judge might consider take into account under section 140A(2) of the CCA.

### Effect of *Samra*

No doubt to the relief of creditors facing UR allegations, however, the court in *Samra* rowed back from that interpretation of the “reverse burden” under section 140B(9).

Before going on to consider the particular allegations in the case, the judge reminded himself of the burden of proof:

“[26]... the onus is on the [creditor] to show, to the normal civil standard, that the relationship is not unfair because of any of the reasons set out in s 140A(1)(a)-(c). Whether it is so unfair is a matter for the court’s overall judgment having regard to all the relevant circumstances and matters, including matters relating (ie personal) to the creditor and debtor. This onus on the [creditor] does not however mean, in my judgment... that where [the debtor] makes allegations of fact on which he relies he does not have the burden of proving them to the normal civil standard. The onus placed on the creditor is as to the relationship between it and the debtor, and does not have the effect that factual allegations made by [the debtor] must be accepted unless they can be positively disproved by contrary evidence.”

Arguably, this analysis does much to return the “reverse burden” to what it had always been considered to be, that is, a legal or persuasive burden following satisfactory proof of the debtor’s factual allegations. As such, it may be a cause of some celebration for creditors.

However, for County Court judges, who hear the vast majority of such allegations, the analysis in *Samra* may present more of a challenge. They are now faced with two conflicting High Court judgments on the point and must decide which approach is to be preferred.

### The likely approach

On the assumption that the Court of Appeal is unlikely to break the tie in the near future, which approach is more likely to be accepted as correct?

Although *Bevin* is (in one sense) a pleasingly literal interpretation of section 140B(9), there are a number of potential objections to it:

- First, in some cases it has the effect of making a creditor’s task almost impossible. If a debtor simply asserted an UR without more, the defendant creditor would then be faced with the unwieldy task of reciting the entirety history of the parties’ dealings to prove that there has never been anything which might cause unfairness. To have to do so would potentially result in disproportionately long and complex hearings.
- Secondly, the attitude of most busy district judges is likely to be that neither the court nor the defendant should be tasked with a guess exercise. If the debtor asserts unfairness, he or she must have some basis for doing so. If so, it should be properly particularised and supported by evidence.
- Thirdly, and perhaps most compellingly, the analysis in *Bevin* arguably misreads section 140B(9). It simply refers to what happens if a debtor alleges the relationship is unfair. It makes no reference to what evidence must first be mustered to justify such an allegation. As such, it is suggested that the usual rules of pleading and evidence apply. The debtor must plead the facts on which he or she relies and produce evidence to prove them. Once that has been achieved, it is for the creditor to explain why those established facts have not resulted in an UR between the parties.

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