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Gough Square Chambers' consumer credit column: September 2021

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

In the September 2021 column, Thomas Samuels considers the judgment in *Goodinson v PRA Group (UK) Ltd [2021] EWCA Civ 957* (25 June 2021). The case concerns whether a deputy district judge was entitled to find that a creditor had served a valid default notice under the Consumer Credit Act 1974 (CCA) where only a reconstitution of the relevant notice had been provided.

Evidential value of reconstituted documents in CCA case

Introduction

Once again the Court of Appeal has been recently troubled with arguments concerning the use of "reconstituted" documentation by a claimant creditor when proving a right to monies owed under a regulated credit agreement.

In *Goodinson v PRA Group (UK) Ltd [2021] EWCA Civ 957*, the issue was whether the deputy district judge had been entitled to find that the creditor had served a valid default notice where only a reconstitution of the relevant notice had been provided.

On appeal by the debtor, the Court of Appeal concluded that the deputy district judge was entitled to reach the conclusion he had on the evidence before him and therefore dismissed the appeal.

The claim

Mr Goodinson had had a credit card, subject to a running account credit agreement regulated by the Consumer Credit Act 1974 (CCA), with MBNA International Bank Ltd (MBNA). Following his default under the credit agreement, MBNA assigned the debt to PRA Group (UK) Ltd (PRA), which commenced an action against him in the County Court for the outstanding sum of £18,415.66.

As part that claim, in the usual way PRA was obliged to prove that a default notice had been served on Mr Goodinson in accordance with the requirements of sections 87 and 88 of the CCA. It chose to do so by way of a "reconstitution" rather than a facsimile of the notice in fact served.

That the default notice relied upon by PRA was a reconstitution was not specifically identified within its Particulars of Claim. In turn, Mr Goodinson's Defence simply included a bare denial of compliance with the statutory requirements and of receipt of any such notice. Likewise, the default notice was not specifically identified as a reconstitution in PRA's list of documents for trial.

It appears that the first time it was expressly explained as such was in a witness statement submitted on PRA's behalf for trial. In providing such explanation, the statement referred to the default notice as a "reprint of the document... electronically stored by MBNA", noting that it therefore contained certain features that would not have been present on the original sent by MBNA. For example, an updated company name and a reference to regulation by the FCA. The explanation for these discrepancies was that the original data had been printed on an up-to-date form of MBNA-headed paper.

At the hearing before the deputy district judge, it was agreed that two preliminary issues should be dealt with on the papers:

- Whether the default notice produced complied with the statutory requirements.
- Whether it was served on Mr Goodinson.

If PRA failed on either point, it was common ground that the claim must fail. In considering those points,

counsel for Mr Goodinson sought to argue that the PRA could not prove its case because there was no "copy" of the default notice. Further, by reference to certain contemporaneous records, that there was positive evidence that no such default notice had been sent.

Using the same documents, however, with particular reliance on an entry in the "archive comment log" before the court, the deputy district judge concluded that there was evidence before the court to show what information would have appeared in the default notice sent to Mr Goodinson. He noted that the issue was whether there was evidence, direct or indirect, as to the creation of a valid default notice.

The deputy district judge concluded that it was unlikely that the MBNA would have recreated the contemporaneous records to shore-up deficiencies in its other documentation and that, therefore, the relevant logs could be treated as reliable contemporaneous records. Accordingly, despite certain de minimis other errors in the content of the notice, he was satisfied that a compliant default notice had been sent.

On Mr Goodinson's appeal, HHJ Clark concluded that the deputy district judge had been entitled to reach the conclusions he did on the evidence available to him. Accordingly, the appeal was dismissed.

Proceedings before the Court of Appeal

Before the Court of Appeal, Mr Goodinson's counsel focussed on the first of his arguments below. Namely, that in the absence of a copy of the actual default notice, PRA could not prove its case as to service of a valid default notice.

Permission to appeal was granted on that issue by Arnold LJ, with the order apparently inviting the parties to consider the "best evidence rule" if and to the extent that it survived. In the light of that invitation, Mr Goodinson's legal team sought to admit further evidence including a lengthy witness statement from his solicitors purporting to give "a transparent snapshot of the state of the consumer credit industry, insofar as the reliability of the evidence produced by debt purchasers when seeking to invite courts to infer service of statutory notices…". Thus, it would appear that his solicitors sought to use it as an opportunity to make a far more wide-ranging attack on the litigation practices of debt-purchasing industry.

That application was refused and the appeal continued in relation to the single issue set out in the Grounds of Appeal, although the court noted that the absence of such evidence did not change the "potentially important ramifications" of the arguments raised on Mr Goodinson's behalf.

The Court of Appeal's analysis of the substantive issue begins with the general observation that the so-called "best evidence rule" is no longer a part of English law. Rather, a party is entitled to produce secondary evidence with the only question being what, if any, weight should be attached it: *Masquerade Music Ltd v Springsteen [2001] EWCA Civ 563*. It noted that that much was common ground between the parties.

Nonetheless, counsel for Mr Goodinson sought to argue that the deputy district judge had not been entitled to reach the conclusion he had on the basis of secondary evidence, relying upon a comment in *Springsteen* that where a party has the original document available to it, secondary evidence of its contents should be given no weight. Warby LJ, giving the lead judgment of the court, rejected that submission "without hesitation". Although PRA's list of documents had not referred to the default notice as a reconstitution, it had been clear for a number of years during the course of the litigation that PRA did not have a complete copy of the original in its possession (at [36]).

Perhaps most fundamentally, the court rejected the suggestion that there was or ought to be a rule of law that a creditor could only prove compliance with sections 87 and 88 of the CCA "by production of the original notice" (at [38]). In effect, to require such a rule of law or best practice would be to fundamentally undermine the analysis in *Springsteen* that the "best evidence rule" was no longer a part of English law. Indeed, the approach advocated for on Mr Goodinson's behalf "would reintroduce and go beyond the rigidity of the best evidence rule" (at [39]). The court's concern with such an approach went further however: the "debtor would escape in every case where the original was not produced, no matter how good the explanation for failure to produce it…" (for example, at [40] to [42]).

Ultimately, therefore, the deputy district judge's approach could not properly be criticised. He approached the issues "in a rational manner, having regard to the evidence as a whole. His conclusion differed from that which was urged upon him by Mr Goodinson. But he did not make any error of principle" (at [45]). Accordingly, the court dismissed the appeal.

However, perhaps of particular significance for parties in future claims involving similar evidential issues, Warby LJ concluded with this warning (at [47]): "I am far from saying that district judges should always find secondary evidence sufficient to establish the creation and service of a compliant statutory notice. Nor would I suggest that, as a rule, it is acceptable for creditors suing under regulated agreements to rely upon secondary evidence… No doubt district judges who deal with cases of this kind every day in courts across the land, will demonstrate

a healthy common-sense approach to the specific evidence adduced by the party bearing the burden of proof…".

Analysis

To a large extent, the outcome of Mr Goodinson's appeal is unsurprising and entirely conventional. Its primary focus is not on the context of the CCA and its technical requirements but broader questions of evidence and proof. Thus, in rejecting his arguments, the court was simply applying those general principles in a consumer credit context.

It may nonetheless come as a happy relief to many consumer credit lenders who, in recent years, have come to view the Court of Appeal as a somewhat unfriendly arena. For example, other decisions during the course of this year (notably, *Wood v Commercial First Business [2021] EWCA Civ 471* and *Potter v Canada Square Holdings Ltd [2021] EWCA Civ 339*) have – at least on one view – accepted arguments on behalf of consumers with potentially far-reaching ramifications for lenders.

The arguments advanced on behalf of the consumer here, however, proved a step too far. The evidence which Mr Goodinson sought to adduce on appeal perhaps suggest that there was a healthy dose of activism at work by his legal team. Indeed, it would have been a significant victory for debtors under consumer credit agreements if the only way in which creditors could provide proof of service of valid statutory notices was by production of a copy of the original. However, without expressly stating as much, the Court of Appeal appears to have been astute to this risk. In that regard, Warby LJ's use of the word "escape" at [40] is perhaps telling – the arguments put forward on Mr Goodinson's behalf would, if successful, have provided a significant and unjustified windfall for debtors facing debt-recovery claims.

That said, the closing remarks of Warby LJ's judgment make clear that reliance on secondary evidence of this type should not become a habit for claimants in consumer credit debt-recovery claims. While there is no longer any rule of "best evidence", there can be no doubt that it is always best practice to adduce the best quality evidence available. Thus, even if there is no choice but to rely upon lines of code in contemporaneous log entries, an accompanying explanation of its meaning will always assist. Asking a district judge to, in effect, use best endeavours to interpret such information and/or to make assumptions in a creditor's favour without a clear basis for doing so unnecessarily risks an adverse result.

Ultimately, therefore, although secondary evidence is permissible, in most cases, a little careful thought at the outset as to the appropriate evidential approach will avoid the need for the parties to become waylaid in procedural burden of proof arguments at trial.

Gough Square Chambers' consumer credit columns

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