THOMSON REUTERS
PRACTICAL LAW™

Gough Square Chambers' consumer credit column: April 2022

by Ruth Bala, Gough Square Chambers

Status: **Published on 29-Apr-2022** | Jurisdiction: **United Kingdom**

This document is published by Practical Law and can be found at: **uk.practicallaw.tr.com/w-035-4153**
Request a free trial and demonstration at: **uk.practicallaw.tr.com/about/freetrial**

Ruth Bala, Lee Finch, Sabrina Goodchild and George Spence-Jones 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 2022 column, Ruth Bala considers the application of the "business purposes" test in the regulated lending sphere following the High Court judgment in *Campbell v Tyrrell and Others [2022] EWHC 423 (Ch)*.

Business purposes: *Campbell v Tyrrell*

This column considers the application of the "business purposes" test in the regulated lending sphere following the judgment of the High Court in *Campbell v Tyrrell and Others [2022] EWHC 423 (Ch)*.

When test falls to be applied

One must determine whether a loan has been entered into "wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the borrower" in the following situations:

- When assessing whether a loan is exempt from being a regulated credit agreement under the exemption for business purposes loans exceeding £25,000 (article 60C(3) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) (RAO), or for loans pre-dating 1 April 2014, section 16B of the Consumer Credit Act 1974 (CCA)).
- When assessing whether a loan is exempt from being a regulated mortgage contract under the exemption for second charge business purposes loans (*article 61A(1)(c), RAO*).
- When assessing whether a loan is exempt from being a regulated mortgage contract under the exemption for investment property loans (*article 61A(1)(d), RAO*).
- When assessing whether carrying on certain activities in relation to a regulated mortgage contract is excluded from being a regulated activity because the mortgage is a "consumer buy-to-let mortgage" (article 4 of the Mortgage Credit Directive Order 2015 (*SI 2015/910*) (MCD Order)).

Business purposes declaration

In all four situations, where the credit agreement includes the prescribed business purposes declaration, there is a statutory presumption that the business purposes test is satisfied (*articles 60C(5) and 61A(3), RAO; article 4(2), MCD Order*), unless the creditor or anyone acting on their behalf has reasonable cause to suspect otherwise (*articles 60C(6) and 61A(4), RAO; article 4(3), MCD Order*).

The level of prescription about the content of the declaration varies depending upon which of the four situations above obtains. There is a lower level of prescription in the exemption from being a regulated mortgage contract and in the definition of consumer buy-to-let mortgages, where article 61A(3)(b)(ii) of the RAO and article 4(2)(b) of the MCD Order oblige the declaration to include "a statement that" the borrower enters into the agreement wholly or predominantly for business purposes, "a statement that" the borrower understands that they will not have the benefit of the statutory protection and remedies and "a statement that" if they are in any doubt as to the consequences, they should seek independent legal advice.

There is a higher level of prescription in the exemption from being a regulated credit agreement, where creditors are supplied with a statutory form of wording to insert into the credit agreement. For loans pre-dating 1 April 2014, this can be found in article 6 and Schedule 3 to the Consumer Credit (Exempt Agreements) Order 2007 (*SI 2007/1168*) (2007 Order). For loans post-dating April 2014, the statutory form is contained in the Appendix to the Consumer Credit sourcebook (CONC) in the FCA's Handbook at CONC App 1.4.8R.

A defective declaration by no means precludes the application of the exemption; it is just that the creditor cannot rely upon the statutory "presumption" that the exemption applies. Even without the benefit of the presumption, it would still be open to the creditor to prove, on the balance of probabilities, that the loan was entered into wholly or predominantly for business purposes. However, if the declaration is defective, the burden of proving business purposes falls back upon the creditor (*Wood v Capital Bridging Finance Ltd [2015] EWCA Civ 451*, at [26]).

Business is that of one joint borrower

In *Campbell v Tyrrell*, the creditor, Goldcrest Finance Ltd, advanced a £250,000 secured loan to the claimant and her ex-husband as joint borrowers. The purpose of the loan was to redeem a previous loan with HSBC plc. The purpose of the HSBC loan had been to finance a business carried on by the claimant's ex-husband, in partnership with a third party.

HHJ Hodge QC, sitting as a High Court judge, found that the Goldcrest loan was not for the purposes of a business carried on "by the borrower", within the meaning of the exemption. The Goldcrest loan was only for the purposes of the business carried on by one of the two joint borrowers. The creditor conceded that for an agreement to have been entered into wholly or predominantly for the purposes of a business carried on "by the borrower", the relevant business must have been carried on by both joint borrowers (at [25]).

Errors in text of business purposes declaration

In *Campbell v Tyrrell,* the declaration in the facility letter omitted the words "or predominantly" after "wholly" (that is, it said "I am/We are entering this agreement wholly for the purposes of a business…").

Campbell v Tyrrell was concerned with the exemption from being a regulated credit agreement, which is subject to the highest level of prescription. However, it is important to note that the Court was considering the old regime, for loans pre-dating 1 April 2014. Section 16B(2) of the CCA provided that the presumption arose if the credit agreement included a declaration "to the effect that" it was entered into wholly or predominantly for business purposes. The legislative words "to the effect that" grant some latitude. Conversely, the wording of the 2007 Order was mandatory: article 6 provided the declaration "shall: (a) comply with Schedule 3…" and Schedule 3 stated that it "must have" the form and content therein set out.

The judge considered (at [49]) that the caselaw in other contexts demonstrated that statutory requirements about the form of documents must be clearly and unequivocally expressed before strict compliance is required. In his view, the appropriate test was whether the declaration "substantially complied" (at [50]).

Applying this test to the facts, the loan was entered into "wholly" for business purposes (albeit not the business purposes of both joint borrowers). As such, there was substantial compliance – the words "or predominantly" would have been redundant anyway (at [47] and [56]). The declaration was compliant.

Application to post-April 2014 loans

One should hesitate before applying this aspect of the decision to cases concerning post-April 2014 loans.

It is true that the wording in the rules made pursuant to the relevant statutes (the 2007 Order and CONC App 1.4.5R and 1.4.8R) is materially identical; both are expressed in mandatory terms. However, there is a significant difference in the wording of the primary legislation. As set out above, section 16B of the CCA uses the generous words "to the effect that". By contrast, article 60C(5) of the RAO provides:

> "if an agreement includes a declaration which … (c) complies with rules" made by the FCA for the purposes of this article, the agreement is to be presumed to have been entered into wholly or predominantly for the purposes specified…".

Thus, it is a pre-condition to the application of the statutory presumption that the declaration complies with the rules in CONC App 1.4.

Consequences of borrower signing false declaration

In the earlier case of *Wood v Capital*, the borrower had told the creditor's agents that she required the funds for the business of a relative (rather than for her own business). The Court of Appeal rejected the creditor's submission that, having signed the declaration, the borrower was "estopped" from denying that she required the funds for business purposes (at [30]-[33]). A contractual estoppel would fall foul of the CCA prohibition on contracting out. As for an estoppel by representation or an estoppel by convention, neither of these could arise where the creditor knew the truth (that is, that the agreement was not for business purposes), since there would be no reliance upon the representation, or action upon a mistaken assumption.

This passage in *Wood* was followed in *Campbell*, where the claimant had not only signed the declaration in the facility letter, but had also signed the application form verifying that the purpose of the loan was "capital raising to pay outstanding business debts". HHJ Hodge QC added (at

[37]-[38]) that it is not necessarily "fraud" for a borrower to sign a false declaration. The claimant knew that the creditor was aware of the true purpose of the loan and she considered the declaration was "a pure matter of form". She was doing what she understood was required of her to ensure her ex-husband received finance.

Reasonable cause to suspect

Even where the declaration is compliant, the statutory presumption will not arise if the creditor or anyone acting on their behalf has reasonable cause to suspect otherwise (*articles 60C(6) and 61A(4), RAO; article 4(3), MCD Order*).

In *Campbell,* the Court found that although the declaration was compliant, the presumption did not arise for this reason (at [72]).

Consequences of inapplicability of exemption

The consequences in *Campbell* of the business purposes exemption being inapplicable were that the loan was CCA regulated and improperly executed. The claimant was granted a declaration that the loan and charge were unenforceable, subject to service of a default notice and any claim for enforcement orders under sections126 and 127 of the CCA.

The judge refused permission for a stay to enable the creditor to serve a default notice and apply for enforcement orders (at [13]). This was for case management reasons, without reference to *Doyle v PRA Group (UK) Ltd [2019] EWCA Civ 12*, where the Court of Appeal has recently held that service of a default notice is a pre-condition to the cause of action arising (see Article, Gough Square Chambers' consumer credit column: February 2019).

Gough Square Chambers' consumer credit columns

For previous consumer credit columns written by barristers at Gough Square Chambers, see Practice note, Gough Square Chambers' consumer credit column.