

Gough Square Chambers' consumer credit column: January 2023

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Status: **Published on 31-Jan-2023** | Jurisdiction: **United Kingdom**

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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 share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the January 2023 column, Lee Finch considers the definition of “debtor” in section 75 of the Consumer Credit Act 1974 (CCA) in the light of the recent judgment in *Cooper v Freedom Travel Group Ltd and another* [2022] EWCA Civ 1557.

Definition of “debtor” and *Cooper v Freedom Travel Group*

Introduction

The Consumer Credit Act 1974 (CCA) has been on the statute books for nearly 50 years; consequently, one might have thought that the definition of “debtor” would be well settled by now. Indeed, it might well be thought that the word has a plain and unambiguous meaning and, if any further guidance was required, one only needed to look to section 189(1) of the CCA which states:

“debtor’ means ... the individual receiving credit under a consumer credit agreement or the person to whom his rights and duties under the agreement have passed by assignment or operation of law ...”

However, in the context of connected-lender liability claims under section 75 of the CCA, there is a potential problem for would be claimants with this definition. On its face, section 75 of the CCA would only provide the contractual debtor with a right of action against the creditor if the contractual debtor had a breach of contract or misrepresentation claim against the supplier. This presents difficulties if it is someone other than the contractual debtor who has a breach of contract or misrepresentation claim against the supplier. For example, if an additional cardholder uses the contractual debtor’s credit card to buy a TV which is later defective, it will prima facie be the additional cardholder rather than the contractual debtor with a breach of contract claim and, consequently, no section 75 claim could be made.

A number of years ago, the Financial Ombudsman Service (FOS) removed this difficulty for certain would be claimants by coining the notion of a “single economic unit” (note: the author does not know if the FOS still adopts this approach). However, this concept is unknown to law and was not adopted by the courts. Consequently, many - including the author - assumed that it was universally accepted that the courts would maintain a strict approach to section 75 liability. Then came the novel arguments in *Cooper v Freedom Travel Group Ltd and another (t/a Halifax)* [2022] EWCA Civ 1557 (25 November 2022), arguments that made their way all the way to the Court of Appeal.

Background

Mr Cooper purchased a package holiday from Freedom Travel Group Ltd (Freedom Travel). As part of the transaction, he paid the deposit using his Halifax credit card. Mrs Cooper was not a party to either the package travel contract or the credit card contract. Whilst on holiday, Mrs Cooper fell and fractured her left leg. Upon her return to the UK, Mrs Cooper brought a personal injury claim against Freedom Travel under the statutory cause of action provided by regulation 15(2) of the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288) (Package Travel Regulations).

Under regulation 15(2), the package holiday provider is liable for the failure to perform the contract or the improper performance of the contract to both the principal contractor (Mr Cooper) and any person on whose behalf the principal contractor agrees to purchase the holiday (Mrs Cooper).

Mrs Cooper and Freedom Travel agreed a liability compromise and a quantum only trial was due to take place in November 2019. In September 2019, Thomas Cook Ltd entered into liquidation; Freedom Travel was a wholly owned subsidiary of Thomas Cook and also entered liquidation. Consequently, Mrs Cooper's claim against Freedom Travel was stayed.

Shortly thereafter, in January 2020, Mrs Cooper applied to add Bank of Scotland plc (trading as Halifax) (Halifax) as a defendant to proceedings under CPR 19.5. Mrs Cooper argued that Halifax was jointly and severally liable with Freedom Travel by virtue of section 75 of the CCA.

Lower court decisions

On 21 April 2020, a deputy district judge dismissed Mrs Cooper's application holding that she could not bring a claim under section 75 of the CCA as she was not a debtor within the meaning of section 75 of the CCA. The deputy district judge also refused to extend the limitation period such that the claim remained time barred and, whilst this finding also formed the basis of the subsequent appeals, it was not addressed by either appellate court.

On 1 September 2021, HHJ Simpkins dismissed the first appeal. The judge held that "there is a plain and unambiguous meaning to the word 'debtor' and it means a party who receives credit and would be liable to repay the debt if the credit had not been contractually extended to him". He noted that Mr Cooper was liable to repay Halifax, whereas Mrs Cooper was not liable to repay anything and was never in any contractual relationship with the credit card company. The judge concluded "I cannot see how it can be said that she had 'received credit' in these circumstances". Notwithstanding HHJ Simpkins' finding that the definition of debtor was plain and unambiguous, permission was obtained for a second appeal to the Court of Appeal.

Arguments in the Court of Appeal

In the Court of Appeal, Mrs Cooper argued that she was a "debtor" within the natural meaning of the words in section 189 of the CCA but, failing that, she was a "debtor" within the meaning of section 75 of the CCA when that provision was construed purposively and consistently with EU law (in line with the Marleasing principle derived from *Marleasing SA v LA Comercial Internacional de Alimentacion SA (1990) C-106/89*). Further, Mrs Cooper maintained that her claim under regulation 15(2) of the Package Travel Regulations was contractual such that it could form the basis of a section 75 claim.

Court of Appeal decision

In the words of Davies LJ, the issue in the appeal was "the interpretation of the word 'debtor' in section 75 of the CCA. Should 'debtor' be interpreted as referring only to contractual parties to a credit agreement or should it include third party beneficiaries of such an agreement?". In answering that question, Davies LJ (with whom Macur LJ and Carr LJ agreed), noted the attention to detail exhibited by the late Francis Bennion, who drafted the CCA, and the well-known presumption that where the same words are used more than once in a statute, they have the same meaning (see further Bennion, Bailey and Norbury on Statutory Interpretation (7th Edition) and the judgment of Leggatt LJ in *R (Good Law Project) v Electoral Commission [2018] ECHC 2414*).

In that context, the court pointed out that:

- "Debtor" was expressly defined in section 189 of the CCA.
- Save for limited exceptions, the word is used consistently throughout the CCA.
- A narrow definition of debtor is consistent with the other statutory definitions in the CCA, including "credit" and "consumer credit agreement".
- Where a more expansive definition of "debtor" is intended in the CCA it is expressly stated.
- No such expansion is contained in section 75 of the CCA.
- An individual cannot have a contractual right to defer payment of a debt if they are not a party to the agreement from which the debt originates.
- The credit provided under the Halifax credit card agreement was provided solely to Mr Cooper.

Perhaps, unsurprisingly, Davies LJ concluded "the word 'debtor' in section 75 has a plain and unambiguous meaning, namely the contractual debtor". Given the conclusion that the definition was unambiguous, there was no need to engage in a purposive construction (see *Duport Steels v Sirs [1980] 1 WLR 142*, Lord Diplock at 157).

Consequently, the remaining issues related to EU law. The court analysed regulation 15 of the Package Travel Regulations and held that it provides for a statutory claim for a non-contracting party in the event of improper performance of a contract, but that is not the same as a contractual claim. Consequently, no section 75 claim could be based on a claim solely brought under regulation 15 of the Package Travel Regulations. Further, Davies LJ considered Mrs Cooper's argument that section 75 needed to be read consistently with the Package Travel Directive (90/314/EEC) pursuant to the Marleasing principle and held:

"In my view there is a fundamental difference between the Directive and the CCA 1974. The Directive provided a targeted scheme to protect package holiday makers, the purpose of the CCA 1974 is to regulate consumer credit and hire. The CCA 1974 is not implementing legislation. Each piece of legislation provides different measures in order to address different policy objectives. It follows and I so find, that an interpretation of section 75(1) of the CCA 1974 which prohibits the appellant, who was not a party to the Credit Agreement, from bringing a personal injury claim is not contrary to the aims of the Directive such that the Marleasing principle could apply."

Conclusion

There are a number of points worthy of note:

- First and somewhat reassuringly, those of us who thought the meaning of "debtor" was plain and unambiguous were correct.
- Second, whilst Mrs Cooper was not an additional cardholder under Mr Cooper's credit card agreement, none of the Court of Appeal's analysis turned on this fact; an additional cardholder is not a party to the credit card agreement and has no contractual rights

or obligations thereunder - their position would be no different to Mrs Cooper's.

- Third, the court's finding that regulation 15 does not provide a contractual claim may have been different under the Package Travel and Linked Travel Arrangements Regulations 2018 (*SI 2018/634*) as the equivalent provisions operate by implying terms into the package travel contract (in much the same way as the Consumer Rights Act 2015 implies terms into consumer contracts).
- Fourth and finally, one has to hope that the Court of Appeal's definitive conclusion on the scope of "debtor" will be adopted outside of civil litigation. The court was clear that creditors are entitled to certainty and would be exposed to legal and practical difficulties without it. It is difficult to see how, for example, the FOS could justify ignoring the plain and unambiguous meaning of "debtor" to allow claims that would otherwise be baseless: to do so would not be fair or reasonable.

Gough Square Chambers' consumer credit columns

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