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Gough Square Chambers' consumer credit column: July 2022

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

In the July 2022 column, George Spence-Jones considers paragraph 55 of Part IV of the Schedule to the Financial Services and Markets Act 2000 (Exemption) Order 2001 (*SI 2001/1201*) in the regulated lending sphere and the issue of who can commence court proceedings to recover assigned debts - the assignee and/or the servicer of the assignee?. This is in the light of the County Court appeal decision of HHJ Robinson in *Intrum UK Finance Ltd v Baldwin (unreported), 8 June 2022*.

Debt purchasers and the paragraph 55 exemption: who brings the claim?

This column considers paragraph 55 of Part IV of the Schedule to the Financial Services and Markets Act 2000 (Exemption) Order 2001 (*SI 2001/1201*) (FSMA Exemption Order) in the regulated lending sphere and the issue of who can commence court proceedings to recover assigned debts - the assignee and/or the servicer of the assignee?. This is in the light of the County Court appeal decision of HHJ Robinson in *Intrum UK Finance Ltd v Baldwin (unreported), 8 June 2022*.

Background

In 2006, Mr Baldwin (the Defendant) entered into a credit card agreement with a third-party bank, Halifax plc.

In 2017, a debt of £10,233.85 owing under that credit agreement was assigned to Intrum UK Finance Ltd (the Claimant).

In 2018, the Claimant entered into a servicing agreement with a company within the Intrum group, Intrum UK Ltd (the Servicer), to cover a portfolio of the Claimant that included the credit agreement.

In 2019, a claim form bearing the Claimant's name was issued against the Defendant to recover the debt.

In response, the Defendant applied for strike out/summary judgment on the grounds that the Claimant lacked the relevant authorisation from the FCA to bring the claim. The application was granted at first instance and the Claimant appealed.

The appeal

The Claimant's position was that the Servicer brought the claim, the Servicer was authorised and the Claimant was exempt under paragraph 55 of Part IV of the Schedule to the FSMA Exemption Order. Therefore the regulatory regime was satisfied and the claim should continue.

The Defendant's position was that, as a matter of evidence and admitted fact by the Claimant's counsel at the application hearing, the Claimant brought the claim, not the Servicer, and the Claimant was not permitted to resile from that position. Therefore, the claim was impermissibly brought by the unauthorised Claimant.

The key issues on appeal included:

- Can a Servicer bring a claim?
- If yes, did the Servicer in reality bring the claim through the Claimant?
- If the Servicer did not bring the claim, could the position be rectified under the CPR?

The decision of HHJ Robinson

At [13] – [15], HHJ Robinson noted that recovery of a debt in these circumstances was enforcement for the

purposes of section 26A(4) of FSMA. The Claimant was clearly standing in the shoes of the original lender to exercise the rights of recovery. Therefore, the Claimant needed to be authorised or an exempt person.

Although the judge took an arguably unnecessary detour in the decision to consider two earlier County Court appeal decisions on a different issue, when revisiting these elements later in the decision ([51] – [56]), the judge swiftly found that they were established such that the Claimant was exempt "for the relevant purposes" ([18] – [19]). The relevant service agreement between the Claimant and the Servicer was in place and was compliant.

Can a Servicer bring a claim?

With the Claimant's exempt status in mind, the judge turned to the first question of whether a person such as the Servicer could initiate the claim in the name of the assignee of the debt.

The Claimant relied on the earlier County Court appeal decision of HHJ Walden-Smith in *MFS Portfolio Ltd v Phelan & West [2019] GCCR 17149*. That case had similar facts. MFS was assigned a debt. MFS brought a claim in its own name. MFS had appointed an FCA authorised entity as the servicer, and so, MFS was entitled to rely on the exemption in paragraph 55 of the Schedule to the FSMA Exemption Order. At [49] in *MFS Portfolio,* HHJ Walden-Smith held:

> "[49] As a consequence, I am satisfied that MFS is an exempt person in relation to issuing proceedings for the purpose of recovering an outstanding balance under the overdraft and the MFS did not require that authorisation of the FCA in order to be a claimant within these proceedings."

HHJ Robinson contrasted this with the County Court appeal decision of HHJ Sykes in *Idem Capital Securities Ltd v Webster (unreported), 24 April 2019*. That case also had a similar factual background. HHJ Sykes initially held that ICSL could rely on the exemption in paragraph 55 of the Schedule to the FSMA Exemption Order. However, HHJ Sykes then held:

> "... once it is established that by suing on the agreement [ISCL] was undertaking a section 22 regulated activity, then by section 19 there was a general prohibition on such activity unless authorised or exempt. By section 26A(4) FSMA there are prohibitions on enforcement of a regulated agreement unless certain criteria are met. Working through those which are relevant, [ISCL] did not have Part4A permission, [ISCL] was not an authorised representative, and was not exempt."

The Claimant submitted that HHJ Sykes' holding was wrong. If the Claimant first satisfied the paragraph 55 exemption, then they were exempt for the purposes of wording "*any activity*" within paragraph 55(1): "... exempt from the general prohibition is respect of any activity of the kind specified by article 60B(2) of the Regulated Activities Order". That included issuing proceedings.

The Defendant opposed and relied on the basic principle of law that the Claimant could not delegate to an agent (the Servicer) an activity that only the principal could conduct.

HHJ Robinson agreed with the Claimant's interpretation. The phrase "any activity of the kind specified by article 60B(2) of the Regulated Activities Order" was wide enough to cover the issue of proceedings to recover a credit card debt. If the Claimant first satisfied the requirements of paragraph 55 of Part IV of the Schedule to the FSMA Exemption Order, then the Claimant was exempt from the general prohibition: see [47] – [48]. That conclusion did not result in any lack of protection for a debtor. The Servicer was answerable to the FCA, and as for the Claimant, proceedings for debt recovery were regulated by the County Court administering the CPR.

Therefore, and with the servicing agreement in mind, HHJ Robinson held that the Servicer was permitted to bring a claim to recover a debt through the Claimant assignee.

Who actually brought the claim?

HHJ Robinson then went on to consider whether as a matter of fact the Servicer did bring the claim through the Claimant.

Firstly, the letter before action noted that solicitors were "instructed on behalf of [the Claimant]". There was no mention of them being instructed on behalf of or in relation to the Servicer to act through the Claimant. In fact, there was no mention of the Servicer.

Secondly, a witness statement authored by General Counsel of the Servicer acknowledged that "The Claimant issued proceedings on 21 May 2018 ...". There was no indication that the Servicer had anything to do with the issuing of proceedings.

Finally, at the summary judgment application hearing, it was seemingly accepted between the parties through Counsel that the Claimant could not issue proceedings in its own right but that it had, in fact, issued in its own right.

With these in mind, HHJ Robinson had little difficulty in concluding that the Claimant alone had issued proceedings.

Comment

Based on the evidence, this conclusion was unsurprising. However, if this is the critical aspect of the case that undermined the claim for the recovery of the debt, it would appear that this matter can likely be guarded against in future for debt purchasers in similar positions.

On the face of it, suitable wording in a letter before claim and claim form, while deploying HHJ Robinson's decision, would likely assist in avoiding this apparent pitfall.

Could the position be rectified under the CPR?

Given that it was not the Servicer who issued the claim, and the seemingly accepted position that the Claimant could not itself issue the claim, the Court considered its case management powers to rectify the "improperly constituted proceedings", as "the Claimant lacked authorisation to commence proceedings itself": see [69].

To HHJ Robinson's mind, there was no specific CPR provision for the Claimant to pray in aid of, unlike CPR 21 which permits retrospective validation of litigation steps where litigation capacity is subsequently an issue. There was no procedural deficiency that could be remedied. On the face of it, the case would have been doomed from the date of issue. Therefore, notwithstanding the finding that the Claimant was exempt, the appeal was dismissed, and the claim remained struck out.

Comment

In truth, this final issue presents an apparent inconsistency in the decision. Earlier in the decision, HHJ Robinson seemingly found the Claimant exempt for the purposes of issuing a claim to recover a debt for the purposes of section 26A of FSMA: [47] – [48]. It is therefore odd that the judge later noted that the Claimant needed authorisation to commence proceedings itself: [68] – [69]. This arguably appears to have been an error or oversight such that the claim should have continued.

However, even if the Claimant apparently needed authorisation, there does not appear to have been a rigorous explanation provided as to why the proceedings were irredeemable, and arguably, they were not so doomed.

As far as the CPR and the identity of the Claimant is concerned, one would have thought that the proceedings were properly constituted. The correct legal entity had brought the claim in accordance with section 141 of the Consumer Credit Act 1974 (CCA) and the definition of "creditor" in the CCA. There was no suggestion that the Servicer needed to be substituted for the Claimant as a party.

It is also odd in that if the correct legal entity were the Claimant and that there simply needed to be specific wording on the claim form to clarify the position, one might have thought that a simple CPR 17 amendment to the claim form to clarify the position arguably could have sufficed. That arguably would be more just and proportionate than requiring fresh proceedings.

If the concern were the scope of the retainer for the Claimant (in that its solicitors were not also instructed by the Servicer), the court routinely deals with similar situations where solicitors are acting for a Claimant who is just one of two joint debtors under a credit agreement. In those cases, where both debtors must be joined (see section 141(5) of the CCA), the proceedings often continue provided relevant steps are taken: see CPR 19.3. One might have thought that the court could deal with the present situation similarly.

Alternatively, if the Claimant/Servicer were acting outside of the scope of the service agreement, arguably that is not for the court to be concerned with but rather an issue for the Claimant/Servicer and/or the FCA. In fact, if the service agreement was seemingly compliant for the purposes of the litany of conditions set out in the paragraph 55 exemption, it seems odd that the same legislation would then prevent such a Claimant assignee from issuing a claim. Surely the FSMA Exemption Order would specify such a restriction. This was an oddity in the law that Counsel for the Claimant at the summary judgment application alighted on, but it was to no avail at either stage.

Arguably, what the court should only really be concerned with is the statutory bar on enforcement set out in section 26A(4) of FSMA. To that end, if the court is concerned with whether there has been "enforcement", there is no definition of enforcement in FSMA, and merely issuing proceedings has been held to not be enforcement for the purposes of the CCA: see *McGuffick v The Royal Bank of Scotland plc [2009] EWHC 2386 (Comm)* at [81]. Arguably, given the interplay of FSMA and the CCA for regulated lending, one would expect a similar conclusion to apply in this case.

Can the Claimant issue proceedings in their own right?

Although not dealt with by HHJ Robinson and seemingly not advanced by the Claimant, it is important to consider whether the Claimant itself could have issued proceedings in its own name.

As noted above, it would initially appear from the decision of HHJ Robinson in *Intrum v Baldwin* that an assignee who nonetheless enters into a service

agreement in respect of the debt can later bring a claim in their own name:

> "47. It seems to me that the critical question is whether the phrase "any activity of the kind specified by article 60B(2) of the Regulated Activities Order" covers the issue of proceedings to recover a credit card debt.
>
> 48. Contrary to the determination of Her Honour Judge Sykes, in my judgment the phrase is wide enough to cover such as activity. Accordingly, if the Claimant satisfies the requirements of paragraph 55 of Part IV of the Schedule to the Activities Order, then in my judgment the Claimant is exempt from the general prohibition."

The logical corollary from the above two paragraphs is that if the Claimant is exempt from the general prohibition then the Claimant is consequently at liberty to issue proceedings in its own name.

This was also the position in *MFS Portfolio v Phelan [2019] GCCR 17149*, which was even referred to by HHJ Robinson at [36]. The position of the debt purchaser in *MFS Portfolio v Phelan* was not disputed in that case. Both Counsel seemingly accepted that MFS Portfolio could issue the claim in its own name.

This position was not, however, an argument advanced by the Claimant in *Intrum v Baldwin*. It is not immediately clear why not. Perhaps it was not an option available, as the service agreement detailed that the Claimant "will not engage in any collection activity other than to commission the Servicer to act on its behalf or as permitted by Article 55 of the Exemption Order". Therefore, the parties potentially agreed that "collection activity" included issuing proceedings such that the Claimant restricted themselves.

In any event, for present purposes, this issue was not explicitly opined on by HHJ Robinson, and so the possibility of a debt purchaser issuing a claim in their own name and not having to consider doing so with the servicer remains open.

Conclusion

Notwithstanding some oddities in the decision, the judgment is helpful for debt purchasers that rely on the paragraph 55 exemption and wish to issue proceedings to recover a debt:

- If the debt-purchaser/assignee is paragraph 55 exempt, the servicer acting through the debt purchaser/assignee can bring proceedings to recover a debt.
- The previous County Court appeal decision of *Idem v Webster* was wrongly decided in relation to distinguishing between being paragraph 55 exempt and then needing some other exemption or authorisation to bring a claim to recover a debt.
- Relying on this recent decision of *Intrum v Baldwin*, including wording in the letter before action and claim form to the effect that the servicer is bringing the claim through the debt purchaser/assignee will assist in validating proceedings.
- Arguably, the debt purchaser/assignee can also issue proceeding in its own name, although this will require challenging the latter part of *Intrum v Baldwin*.
- Further, and in any event, issuing proceedings is arguably not "enforcement" for the purposes of the prohibition in section 26A(4) of FSMA such that the final conclusion in *Intrum v Baldwin* to dismiss the appeal and keep the claim struck out was in error.

Gough Square Chambers' consumer credit columns

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