GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: JULY 2019

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In the July 2019 column, James Ross considers the meaning of "credit" under the Consumer Credit Act 1974 (CCA) in the context of recent case law.

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I CAN'T BELIEVE IT'S NOT CREDIT

Section 9(1) of the Consumer Credit Act 1974 (CCA) defines credit as follows: "In this Act "credit" includes a cash loan, and any other form of financial accommodation". The same definition appears in article 60L of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*). It is fairly obvious that "credit" should include a cash loan, but what is the scope of the expression "financial accommodation", which is otherwise undefined and does not appear elsewhere in the CCA?

The key authority on this point is probably still *Dimond v Lovell [2002] 1 AC 384*, where it was held that one person (the creditor) will be taken to provide credit to another (the debtor) if he grants to the debtor the contractual right to defer payment of an existing debt, or to incur a debt and defer its payment. In that case, it was stated, "if payment for goods or services or land is deferred after the time when, if nothing about the time of payment had been agreed, the payment would be due, the payer is being given credit".

This column considers the meaning of credit under the CCA in the context of recent cases.

Recent cases where the concept of credit was considered

Most of the typical scenarios where it could be argued that credit is being provided have already been tested in the courts. For example, a dispute arose between the OFT and firms as to whether minimum-term gym membership contracts that allowed for payment by instalments as an alternative to upfront payment amounted to "credit agreements". The High Court, in *OFT v Ashbourne Management Services Ltd [2011] EWHC 1237 (Ch)*, ultimately rejected the OFT's argument that such arrangements constituted the provision of credit, but nevertheless concluded that certain terms of the gym membership contracts were unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) (UTCCR). In that case, the decisive reasoning was that the minimum term did not alter the fact that the customer was paying for an ongoing monthly service by way of monthly fees, which did not involve any credit.

Similarly, it was held in *Burrell and others v Helical (Bramshott Place) Ltd [2015] EWHC 3727 (Ch)* that no credit was involved in relation to alleged "deferred" fees under lease agreements: on a proper interpretation of the terms of the relevant leases, the disputed transfer fees were actually payable by the assignees rather than the original tenants and there was no relevant contractual "deferment" of any payment due under the leases.

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Credit in the context of settlement agreements

One scenario, which arguably involves the provision of credit, has not received much judicial scrutiny until recently. In *CFL Finance Ltd v Bass and others [2019] EWHC 1839 (Ch)*, the court was asked, in the context of complex insolvency proceedings, to determine whether credit was provided under a settlement agreement. In that case, a finance company (CFL) entered into a settlement agreement with a guarantor (MG) dated 26 September 2011, the terms of which permitted MG to pay the acknowledged debt of £2 million by way of instalments culminating in a final payment on 26 September 2013.

The court considered the relevant authorities and referred in particular to *Grant v Watton [1999] STC 330*, which defined credit as "the deferral of payment of a sum which, absent agreement, would be immediately payable". The court's conclusion in relation to credit was as follows:

> "The question asked of this court is whether credit or a financial accommodation as defined by the CCA was provided by the contract. The operative clauses of the contract provided that the payment of £2,000,000 would be due on 26 September 2013. That was the agreement. It was not due immediately as submitted by Mr Kirk. There was no absence of agreement as to when the debt was due. In my judgment a reasonable person having regard to all the background available to the parties would have understood the parties to mean, using the language in the contract, and focusing on the meaning of relevant words in their documentary, factual and commercial context, that no credit was extended beyond the due date for payment." (*At paragraph 32.*)

The court's reasoning appears to be that since there was no "absence of agreement" with regard to the timing of payment, the court should look at the agreed date of payment (26 September 2013) and conclude that no credit was provided because there was no agreement for payment to be deferred after that date. This seems to be the wrong approach. The authorities suggest that the correct approach is to consider when payment would have been due absent express agreement between the parties (a hypothetical exercise) and to consider whether the actual agreement extended time for payment beyond that date.

In this case, it seems that absent express agreement the debt under the settlement agreement would have been due immediately because:

- The underlying acknowledged debt under the guarantee was due immediately.
- At common law, where no time for repayment of a loan is specified in a contract, the lender's cause of action in general accrues when the loan was made and time begins to run from that moment for limitation purposes.

Even if the court were to find that, absent express agreement, the debt would have been payable by MG within a "reasonable period", it seems highly unlikely that the court would have determined that two years was a reasonable period to make payment in all the circumstances.

For a case report on CFL Finance, see *Legal update, Tomlin Order does not constitute regulated credit agreement; refusal of application to adjourn bankruptcy petition hearing to allow IVA proposal (High Court).*

Holyoake v Candy

The main consequence of the court's finding in *CFL Finance* that credit was not provided under the settlement agreement was that the CCA did not apply. There was therefore no need to consider the further arguments raised by MG that there was an unfair relationship between the parties pursuant to section 140A of the CCA, and/or that the settlement agreement was unenforceable because CFL had failed to provide the relevant statutory periodic statements under section 77A. However, in the light of the points raised above, practitioners advising on settlement agreements should not take too much comfort from the judgment and should remain alert to the risk that any settlement agreement giving the defendant time to pay might constitute a credit agreement under the CCA.

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Indeed, that was the conclusion of the court in *Holyoake v Candy [2017] EWHC 3397 (Ch)*. In *Holyoake*, the underlying claim related to an earlier credit agreement rather than a guarantee, but the relevant principles with regard to the provision of credit under the settlement agreement were the same. Although the court in that case went on to find that there was no unfair relationship between the parties under section 140A of the CCA, the decision in *Holyoake* underlines the dangers of relying on *CFL Finance* to argue that the CCA does not apply to settlement agreements where individuals or small partnerships are given time to pay.

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 columns.*

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