GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: MARCH 2018

James Ross, Ruth Bala, Thomas Samuels and Lee Finch 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 March column, James Ross considers the assignment of consumer credit debts.by *James Ross, Gough Square Chambers*

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ASSIGNMENT OF CONSUMER CREDIT DEBTS

Banks and finance companies often assign consumer credit agreements, or their rights under such agreements, when selling part of their business or simply when selling a tranche of debts to raise funds. Other methods of raising funds include more complex arrangements under securitisation or block discounting agreements. As commonplace as these transactions are in the world of finance, they have nevertheless given rise to various challenges by debtors and other parties acting on their behalf, who seek to argue that such arrangements adversely affect the enforceability of the underlying debts. This column considers some of the issues that have arisen in this context, including a recent High Court decision on whether an assignee is required to allow inspection of a (commercially sensitive) unredacted purchase agreement in order to succeed on a debt claim.

SECURITISATION

Securitisation arrangements typically involve the transfer by way of sale of a portfolio of mortgages to a special purpose vehicle (SPV) in consideration of a sum, which is funded by the issue by the SPV of listed bonds carrying an entitlement to interest at a floating rate. Interest payable on the bonds is in turn funded from the income generated by the mortgages transferred. The transfer of the mortgages may or may not involve the vesting of legal title in the SPV. Such a securitisation transaction had occurred in the case of *Paragon Finance plc v Pender [2005] 1 WLR 3412* and the debtor argued that the original creditor no longer had the right to sue for possession by reason of the securitisation arrangements. The Court of Appeal dismissed this argument on the basis that the original creditor remained the registered legal owner of the mortgage and therefore must have title to sue for possession as a necessary incident of that ownership.

In *Santander UK plc v Harrison [2013] EWHC199 (QB)*, the debtors tried a more nuanced approach to this argument after they had obtained documents that strongly suggested their mortgage account had been "securitised". However, even on the assumption that there was an assignment of the bank's rights under the loan agreement, the judge was not persuaded that information which was only discovered pursuant to a data protection request was capable of constituting notice of an assignment for the purpose of section 136 of the Law of Property Act 1925 (LPA 1925). The judge also dismissed the debtors' appeal against the lower court's decision to strike out their allegation that the securitisation had somehow given rise to an unfair relationship under section 140A of the Consumer Credit Act 1974 (CCA).

These decisions suggest that mere reference to the fact that an account has been "securitised" will rarely give rise to an arguable defence: the fact that the lender remains the registered legal owner of the mortgage will be sufficient evidence of the right to sue for most county court judges, and the lender's background financial arrangements (however complex) are unlikely to have caused any real prejudice or unfairness to the debtor.

TECHNICAL ARGUMENTS UNDER THE CCA

Similarly, it appears that technical consumer credit arguments raised by debtors in relation to assigned accounts have fallen out of fashion in recent years. The judge in the above *Harrison* case agreed with the decision of *Hamblen J in Link Financial Ltd v Jones [2013] 1 WLR 693* that when notice of a legal assignment has been given, it is the assignee to whom the debtor is then liable for the debt and that the assignee can only enforce the debt if the applicable statutory duties under the CCA have been discharged. These decisions effectively put an end to arguments that had sometimes been run by debtors along the lines that after an assignment, there was no longer any "creditor" entitled to enforce the agreement under the CCA.

Nevertheless, it remains the case that any technical defence under the CCA that could have been raised against the original creditor could equally be raised against any assignee (probably including any set off or counterclaim under sections 56, 75 or 140B of the CCA). This is effectively equivalent to the position at common law (preserved by section 136 of the LPA 1925) that any assignment takes effect "subject to equities". The basic position is that the assignee cannot be put in a better position than the original creditor with regard to enforceability of the debt. Indeed, an assignee is usually in a worse position than the creditor in practical terms because it will be more difficult to respond to any technical CCA challenges raised by the debtor with regard to alleged improper execution of the credit agreement or historic failures to serve statutory statements and notices. It is for this reason that assignees are well advised to ensure that any purchase agreement includes adequate recourse to the original creditor in respect of such matters, or at least that they are reflected in the price paid (in so far as such issues are ever quantifiable).

DISCLOSURE AND INSPECTION OF THE PURCHASE AGREEMENT OR ASSIGNMENT

One final practical matter deserves consideration in relation to debt claims brought by assignees: it is obviously incumbent upon an assignee to prove that it has taken an assignment of the debt in question, but is it necessary for an assignee to allow inspection of the full purchase agreement in order to succeed on such a debt claim? This issue was recently considered in *Ennis Property Finance Ltd v Thompson [2017] EHWC 3263 (Ch)*. The judge observed that the amount involved in such a claim is often huge to the defendants but the purchase of the right to sue on that debt is a tiny part of a complex transaction as far as the claimant is concerned. It would be disproportionate and commercially dangerous for the assignee to have to disclose sensitive material contained in the purchase agreement without any possibility of redaction on the terms set out in CPR 31.6. Although CPR 31.22 provides certain safeguards, they are not absolute and they might well not provide sufficient comfort to the claimant. The court's order might be disregarded and irreparable commercial damage done before it could be enforced.

There was surprisingly little authority on the question of whether redaction of disclosed documents was permitted under the CPR. However, the court ruled that the long-standing practice of redaction of irrelevant material survived the introduction of the CPR and applies equally to the right to inspect set out in CPR 31.14 and to the requirements of standard disclosure in CPR 31.6, including any requirement made by a practice direction. The claimant therefore was not required to allow inspection of the unredacted purchase agreement.

This decision is to be welcomed as clarifying an important point of practice that was being raised with increasing frequency in debt claims brought by assignees. Whilst assignees can take a degree of comfort from the decision, they should also take note of the judge's final warning that any inadequacy in the documents is the assignee's problem:

> "It has chosen to disclose incomplete copies. It must prove its title to sue on the loan and guarantee agreements using those incomplete copies."

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