GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: NOVEMBER 2018

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In the November 2018 column, James Ross considers the status of a judgment obtained in relation to an unenforceable consumer credit agreement.

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WHAT IS THE STATUS OF A JUDGMENT OBTAINED IN RELATION TO AN UNENFORCEABLE CONSUMER CREDIT AGREEMENT?

The Consumer Credit Act 1974 (CCA) imposes numerous statutory requirements on creditors who enter into regulated credit agreements in the course of business. A key sanction used in the CCA for non-compliance is that the relevant credit agreement may be unenforceable against the debtor. Thus, a creditor who falls to provide a compliant annual statement (section 77A) or notice of sums in arrears (sections 86B–D) cannot enforce the agreement until compliant documents are provided. Similarly, a creditor who fails to provide compliant pre-contract information (section 55) or credit agreement documentation (sections 61–65) cannot enforce the agreement without an order of the court under section127 of the CCA. In respect of some historic agreements made before 6 April 2007, failure to include certain prescribed terms or cancellation notices was fatal and such agreements may be irredeemably unenforceable (see sub-sections127(3) & (4), now repealed for agreements made on or after 6 April 2007).

The term "enforce" is not defined in the CCA: it would include obtaining judgment for the debt owed under an agreement but not merely issuing proceedings (see *McGuffick v The Royal Bank of Scotland plc [2009] EWHC 2386*). If a compliance issue is identified in good time, it can therefore potentially be sorted out before judgment is obtained (either by serving remedial compliant documentation or by applying for an enforcement order). But what is the position when a compliance issue is identified only after judgment has already been entered in respect of what was (or may have been) an unenforceable agreement?

Status of the judgment

There is a strong argument that service of a valid annual statement or arrears notice is not an essential ingredient of a creditor's cause of action but is merely a procedural requirement before judgment may be obtained (see the case of *Rankine v American Express [2009] CCLR 3* by analogy with section 87). Part 3.10 of the Civil Procedure Rules (CPR) provides:

> "General power of the court to rectify matters where there has been an error of procedure
>
> 3.10 Where there has been an error of procedure such as failure to comply with a rule or a practice direction-
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

Similar arguments can be made in respect of other types of technical non-compliance giving rise to unenforceability under the CCA. There is authority for the proposition that where an order is made in relation to an agreement which is unenforceable under the CCA, it cannot be said that the court had no jurisdiction to make the order or that the order is a nullity. Notwithstanding the provisions of CPR 3.10, it has been suggested that the

correct approach for a debtor would be to seek to appeal the order, rather than applying to set it aside (see *iGroup v Bradshaw (Underhill J, Birmingham District Registry, 27th July 2006*). Depending on the procedural history, the creditor could seek to resist such an approach as an abuse of process - there will usually be a strong argument that the debtor should have raised any potential CCA defence before judgment was entered.

Is a creditor required to take action if a compliance issue is belatedly identified?

There appears to be no requirement under the CPR or at common law for a claimant to inform the court of a potential defect in the procedure used to obtain a judgment or of a potential defence which might have been available to a defendant. CPR Part 13 used to impose an obligation on a claimant who realised that it had obtained default judgment improperly to apply to have that judgment set aside but that obligation has since been removed. Furthermore, CPR 3.10 expressly provides that any defect in procedure does not invalidate any step unless the court orders otherwise. Upon judgment being entered, the creditor's cause of action will merge in the judgment and any prior unenforceability of the underlying credit agreement will be largely irrelevant: the creditor would be free to enforce the judgment in the usual way.

However, the uppermost consideration in the creditor's mind is more likely to be its regulatory position with regard to the FCA. Where a compliance issue is identified by a firm, the FCA will generally expect the firm not only to resolve the issue for the future but to remedy the issue retrospectively with regard to all affected customers. Notwithstanding those general considerations, it can be difficult for a firm to decide exactly what steps are necessary to take in the specific scenario where judgment has already been obtained.

Madison CF UK v Various defendants

Some useful guidance is now available from the recent judgment in *Madison CF UK v Various Defendants [2018] EWHC 2786 (Ch)*. In that case, the creditor had obtained money judgments in 371 separate county court claims, but subsequently accepted that the underlying credit agreements were unenforceable (by reason of defective annual statements and pre-contract information documents). The creditor then took the highly unusual step of applying to the High Court for an order that the judgments be set aside in each of the 371 county court claims. The case contains interesting discussion of the court's power to set aside judgment in such circumstances (this was an ex parte application and each judgment was either entered on default or on admission). It also confirms that a High Court judge can sit as a county court judge as necessary for the purposes of resolving knotty procedural issues such as these.

The most useful aspect of the case, however, is perhaps the indication given that the FCA had been informed of the application and approved of the approach to remediation being taken by the creditor - the case might therefore provide a useful steer to other firms who find themselves in a similar position. The judgment also records that the FCA approved of the creditor's intention to refund any money received under attachment of earnings orders made following the county court judgments, together with additional 8% interest and fixed payments towards each debtor's costs. Given that these were payments made in respect of undisputed overdue debts, the return of the payments together with 8% interest seems like something of a windfall for the relevant debtors. Nevertheless, in situations where compliance issues such as this have come to the attention of the FCA, it is often in the firm's best interests to be seen to take every possible step to remedy any potential customer detriment.

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