

Gough Square Chambers' consumer credit column: May 2023

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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 May 2023 column, Sabrina Goodchild considers the recent judgment in *R (Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd [2023] EWHC 1069 (Admin) (05 May 2023)*, focusing on the court's decision relating to section 56 of the Consumer Credit Act 1974 (CCA), which concerns antecedent negotiations.

Scope of "deemed agency" in context of CCA unfair relationship claims

Introduction

In quick succession to *Steiner v National Westminster Bank plc [2022] EWHC 2519 (KB)* (see [Gough Square Chambers' consumer credit column: November 2022](#)), the High Court in *R (Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd [2023] EWHC 1069 (Admin)* have again considered the ambit of section 56 of the Consumer Credit Act 1974 (CCA), this time in the context of timeshare misselling litigation.

Although the decision is an important read for those involved in timeshare litigation (it provides useful guidance on the definition of a timeshare contract, the prohibition on marketing/selling timeshares as investments, and the necessity of providing property sales returns information), this column focuses on the court's decision on section 56, which has broader relevance in the context of unfair relationship claims under sections 140A-C of the CCA more generally.

Background to litigation

In an attempt to manage the growing number of misselling claims relating to fractional ownership timeshare products, the Financial Ombudsman Service (FOS) selected two cases for detailed consideration.

A fractional ownership timeshare is similar to more traditional timeshare products. However, consumers

also benefit from a share in the ownership of a single identified property in an accommodation portfolio, with no right to reside in that specific property but rather the prospect that at the end of the timeshare period any proceeds from the specific property's sale will be distributed among fractional owners. The purchase of such products is often financed by credit.

Both Ombudsmen found that the creditors were responsible under the unfair relationship provisions, as deemed agents, for the timeshare suppliers' regulatory breaches, which included:

- Selling the timeshares as investments in breach of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (*SI 2010/2960*).
- Failing to provide sufficient information on the likely value of the property fractionally owned when sold.
- Including unfair terms in the contractual arrangements.

The FOS considered that the appropriate remedy was for the contractual arrangements, including the associated loan agreements, to be unwound. These decisions were subject to judicial review by the creditors.

The creditors argued that the FOS applied too expansive an interpretation of section 56 of the CCA in rendering the creditors responsible for regulatory breaches by the timeshare companies, where the creditors did not and could not owe those regulatory obligations directly themselves. It was argued that it was inappropriate to transfer to creditors primary duties imposed by statute on sellers alone.

High Court's analysis

As readers will know, section 56 of the CCA creates a form of deemed statutory agency such that antecedent negotiations between a supplier and a consumer are deemed to be conducted by the supplier not only in its own capacity, but also in the capacity of an agent of the creditor providing the consumer's loan. It is relevant to unfair relationship claims as a court may make an order under section 140B of the CCA if the relationship is unfair to the debtor because of "any other thing done (or not done) by, or on behalf of, the creditor" (section 140A(1)(c), CCA). By virtue of section 56, this may include acts or omissions of the supplier in "antecedent negotiations" with the consumer.

In reaching the decision that the creditor's pre-existing legal liabilities were largely irrelevant to the application of section 56, Collins Rice J highlighted the difference between section 75 of the CCA (which makes the creditor liable for the supplier's breach of contract or misrepresentations) and sections 140A-C of the CCA. She held that whilst section 75 operates directly on and by the imputation of legal liabilities, sections 140A-C, in contrast, are not so limited. Rather, sections 140A-C apply to "things"; not matters for which the creditor has pre-existing legal liability. She stated:

"[...] I can find no support in the authorities for a proposition that the deemed agency of section 56 is limited in scope to circumstances where there is actual or potential "identity of liability" in relation to the regulatory obligations of lender and seller. On the contrary, I find support for the proposition that, where s.56 applies, the legal liabilities of the lender and seller apart from s.56 are largely irrelevant [151]."

Comment

Although claims brought with reliance on section 56 are likely to remain secondary to direct section 75 CCA claims and unfair relationship claims focusing on the conduct of the creditor (as opposed to the supplier), this decision marks an unwelcome expansion to the "things" done or not done, which may be taken into account by a court when assessing the fairness of a relationship. This is particularly so when unfair relationship claims are not just the flavour of the month, but the flavour of the last few years.

Indeed, where section 75 is unavailable as no breach of contract or misrepresentation claim can be established (as in *R (Shawbrook Bank Ltd) v FOS*), or any underlying substantive claim is statute-barred, section 56 may become the primary gateway through which unfairness is alleged.

This development is therefore likely to increase the importance of creditor assessments of pre-contractual regulatory compliance by suppliers. However, given any allegations of unfairness made with reliance on section 56 will necessarily be pre-contractual, a keen eye should be kept on whether a limitation defence is available that brings forward the accrual of an unfair relationship cause of action from the end of the relevant relationship (for further information, see [Gough Square Chambers' consumer credit column: December 2021](#)).

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 column](#).

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