with Robert Rosenberg

CONSUMER CREDIT

Unenforceable credit agreements – set aside judgment – court's powers

Madison CF UK (T/A 118118 Money) v Various (2018)

13th September 2018, Mr Justice Hildyard.

Summary of decision: *The court had the power in exceptional circumstances to set aside judgments improperly obtained in respect of unenforceable credit agreements notwithstanding that the application by the lender had not been made promptly.*

The lender had obtained judgment against 371 borrowers arising out of monies owing under various agreements regulated by the Consumer Credit Act 1974 (CCA). There were, however, various defects with compliance with the CCA such that the agreements were unenforceable at the time at which judgments were entered. The defects included the fact that the lender had failed to provide pre-contract information (the SECCI) in accordance with section 55(1) of the CCA whereby the agreements are only enforceable with a court order. It followed that the judgments, in purported enforcement of the agreements should never have been obtained.

In addition, the lender had not sent compliant statements to the customers under section 77A of the CCA at the time that the judgments had been made (although they had since been properly sent). The lender had also failed to send Notices of Sums in Arrears under section 86B of the CCA.

It was accepted by the lender that the entry of the judgments constitutes "enforcement" within the meaning of the CCA and the lender asserted that the entry of the judgments amounted to invalid enforcement because of the breaches of or defects in compliance with the CCA itself.

The lender sought to set these judgments aside on its own application. The FCA had approved this approach. None of the borrowers appeared or were represented at the hearing.

The issue before the court was whether it had the power to set the judgments aside. Most of the judgments were obtained in default, but in 35 instances the defendant had filed an admission. With regards to the default judgments, CPR 13.3(1)(b) allows for the set aside of judgments if there is some good reason why and in this case there was good reason because the judgments should never have been made. There is also a requirement for the application to have been made promptly and a considerable period of time had elapsed since the judgments had been made, in excess of two years. However, there were exceptional circumstances here, where the lender, the beneficiary of the judgments wished for them to be set aside due to them having been improperly obtained.

With regards to the judgments obtained following an admission, this was a final order and caused more difficulty for the court. It was, however, held that the court had the power under CPR 3.1(7) to set aside the judgments on the grounds that there were truly exceptional circumstances here. The judgments would all be set aside.

Possession order – right of re-entry – unfair relationship

Goldhill Finance Limited v Berry

Central London County Court, Judge Monthly QC, 26th October 2018.

Summary of decision: *Once a mortgage lender takes court proceedings for possession, and the court has made an order, which it subsequently stays, it is not open to the lender to take possession under its common law rights as mortgagee.*

The borrower had obtained a loan from the lender in May 2015 for £170,000 secured over her flat. It was a short term loan repayable in September 2015 and in default of it being repaid interest was to accrue at the rate of 5% a month.

She failed to repay the loan on time and the lender issued proceedings and obtained a 28 day possession order in February 2016.

A warrant for possession was requested but before it was due to be executed the borrower applied to the court to have the warrant for possession suspended under section 36 of the Administration of Justice Act 1970 (AJA), as the borrower had a buyer for the property. The court suspended the warrant on 22nd August 2016 until 19th September.

However, the next day, on 23rd August, the lender took possession of the property, which at that time was unoccupied. They did so under their common law right as mortgagees. The lender sold the property but the proceeds were insufficient to pay off the loan in full and there was a shortfall.

The lender then brought a money claim for the amount outstanding. The borrower counterclaimed arguing that the way in which the lender had enforced its security had given rise to an unfair relationship within the meaning of section 140A of the Consumer Credit Act 1974.

The lender attempted to justify its taking of possession without a court order by reference to concerns as to the likely market price of the proposed sale, suspicions as to whether the proposed sale was genuine and whether there was sufficient equity in the property to satisfy the debt.

The court held that taking possession in the face of an existing, suspended warrant for possession created an unfair relationship under the loan agreement. Once a mortgagee has started court proceedings, the court may regulate the existence of the right to possession under section 36 and whilst the common law right is not extinguished, it cannot be enforced. It is not open to the mortgagee to ignore the orders and exercise its common law right to possession, even if the property becomes unoccupied.

The appropriate order was to assume that a sale had been completed by the borrower when she had a buyer in September 2016 and to give judgment for the lender for a sum representing the shortfall then due with some adjustments in respect of a payment made and reducing the interest that had accrued.

FCA Supervisory Notice – exercising rights to collect debts – suspension of notice pending appeal

PF (International) Limited v Financial Conduct Authority

Upper Tribunal, Tax and Chancery Chamber, Judge H Herrington.

***Summary of decision**: Where the FCA issues a Supervisory Notice removing a firm's regulatory permissions, an application to suspend the effect of the Notice pending an appeal will not be granted if this will prejudice the interests of consumers.*

The firm (PFI) was in the business of selling premium vacuum cleaners door-to-door and would either provide credit itself or broker credit with another finance provider. In November it ceased further sales and its activities were confined to collecting outstanding payments under existing credit agreements and servicing the vacuum cleaners already sold. At that time it had 1,134 active agreements with a balance due of £400,000. About £20,000 was collected monthly.

PFI had previously been authorised by the FCA to conduct credit broking, entering into regulated credit agreements as lender and exercising the lender's rights and duties under a regulated agreement. At the time it was authorised the FCA imposed a requirement that the firm should not canvass regulated borrower-lender-supplier agreements or hire agreements off trade premises.

The FCA issued Supervisory Notices on the firm as it had concerns that the firm was unfit and so failed to meet the threshold conditions. The FCA had concerns that:

- The firm was canvassing off trade premises in breach of the requirements imposed on it. It had attended the home of individuals without an appointment to call with a view to persuading them to enter into credit agreements.
- The firm had failed to carry out adequate creditworthiness assessments.
- The firm had targeted consumers with credit agreements that were unsuitable due to the customer's age, poor credit history, indebtedness or disability.
- The firm had misled the FCA and failed to inform them of relevant matters in breach of Principle 11 requiring co-operation with the regulator.
- The firm had connections to another entity which was its controller and which had previously had its licence revoked by the OFT.

PFI took issue with most of these matters including the allegation concerning canvassing. The FCA considered that consumers would be harmed if the firm was able to continue to trade with its current permissions. The firm said that it needed to retain its permission of exercising rights under a credit agreement so that it could collect payments and use such funds to service equipment provided to existing customers, including thousands who have already paid off the loans and have a lifetime service agreement with the firm.

The firm made an application to the Upper Tribunal for a suspension of the Supervisory Notices pending a full appeal of the Supervisory Notice.

Judge Herrington held that pursuant to Rule 5(5) of the Tribunal Procedure (Upper Tribunal) Rules

2008, he was only concerned with whether a suspension of the effect of the Supervisory Notices would not prejudice the interest of any consumers intended to be protected by these notices. The burden was on the firm.

The judge was deeply concerned with the allegation concerning canvassing and felt that there was a serious case to answer in relation to most, if not all such agreements made. The effect of this would be that the firm entered into such agreements outside the scope of its permission. As such the agreements would be unenforceable under section 26A of FSMA 2000 although it would be possible for the firm to apply to the FCA for a validation order under section 28A.

Having taken this and all of the other allegations into account and the firm's response to these the judge concluded that he must take a balancing view. This came out in favour of dismissing the application for a suspension of the Supervisory Notice and so the firm would not be allowed to collect payments from existing customers. The matter would be allowed to proceed to a full appeal hearing expeditiously.

MORTGAGES

Self-cert mortgage – duty of care – MCOB

Mason v Godiva Mortgages Limited

High Court (QBD), Judge Martin Chamberlain QC.

Summary of decision: *A mortgage lender had not breached any common law, contractual or statutory duties when granting a mortgage to borrowers which they had been unable to repay. It had no duty to advise on the suitability of the mortgage.*

Godiva (a subsidiary of Coventry Building Society) provided a mortgage advance in 2008 to Mr and Mrs Mason £487,500 on an interest-only basis for a five-year term secured on their home. It was a 'regulated mortgage contract' (RMC) and so regulated by the FCA and subject to the Mortgage Conduct of Business Rules (MCOB). Whilst they met all the interest payments during the term of the mortgage, they were unable to repay the capital at the end of the mortgage term since a property development venture did not materialise.

The mortgage they had obtained had been self-certified. The intermediary who arranged the mortgage had stated that each of the borrowers earned £100,000 although Mr Mason had queried this with the broker. The borrowers argued that the lender should never have provided the mortgage as they should have realised that the income was implausible and so the mortgage was unaffordable.

They sought damages for breach of a common law or contractual duty of care. They also claimed damages for a breach of duty imposed under section 150(1) of the Financial Services and Markets Act 2000 which confers a right of action against an authorised firm for breach of FCA rules, in this case MCOB (concerning a lender's obligation to take account of the borrower's ability to repay the mortgage).

Godiva resisted this claim on the basis that no duty of care arose as it did not offer the Masons any advice. Instead, Godiva argued that it was the intermediary's role to advise the Masons on the RMC.

The court held that Godiva did not owe the Masons a duty to exercise care and skill. They offered no advice to the Masons and more importantly this was documented in its offer. To impose a duty of care on Godiva would create inconsistency with the express terms of the contract. The judge agreed that it was the intermediary who were responsible for advising the Masons on the suitability of the mortgage.

The judge also considered the duties owed by Godiva under MCOB. Under MCOB 11, the lender was required to show that account was taken of the Masons' ability to pay. In doing so, they were entitled to rely upon self-certification of income if it considered this appropriate where the firm has no reasonable grounds for doubting the information provided. (Note that the current MCOB rules have stronger requirements on the use of self-certification of income.)

The judge also set out further measures that Godiva had taken in successfully discharging its duty:

- their policy was to refuse to offer self-certification products to first-time buyers; in this instance the Masons had an existing mortgage on which they had not defaulted;
- they had employed fraud detection checks that would have flagged aspects of the application that were implausible and had not been triggered here;
- they had received assurances that the Masons intended to continue working well beyond the age of retirement;
- the intermediary had completed a checklist saying that the applicants had checked the application form and signed a declaration in respect of this.

This judge felt that these factors demonstrated that the lender considered the individual circumstances of the borrowers and so had acted with reasonable prudence.

Robert Rosenberg
Barrister