

### Introduction

On 10 October 2012, the Court of Appeal handed down an extempore judgment in *BMW Financial Services (GB) Limited v Hart* (2012) on an issue which will be of considerable interest to consumer and asset finance providers: when does the limitation period for bringing a claim for the unpaid balance expire? In a pragmatic and sensible decision, the Court of Appeal decided that the cause of action to recover the unpaid balance did not start until the lender had served a termination letter or accepted the debtor's repudiation of the agreement.

### The Facts

BMW Financial Services (GB) Limited ("BMWFS") entered into a hire purchase agreement (the "Agreement") with Mr Hart. It does not appear that the Agreement was regulated by the Consumer Credit Act 1974 (the "CCA"). In July and August 1999, Mr Hart failed to pay two monthly instalments. By a letter dated 26 August 1999, BMWFS accepted Mr Hart's repudiation of the Agreement and terminated it. BMWFS demanded payment of the unpaid balance.

Mr Hart left the UK without paying. BMWFS issued a claim on 26 August 2005. Default judgment was obtained. On returning to the UK, Mr Hart became aware of the judgment. He successfully applied to have it set-aside by arguing that the claim had been issued outside of the limitation period. His Honour Judge Halbert, sitting in the Chester County Court, decided, following *Reeves v Butcher* [1891] 2 QB 509, that the limitation period started when Mr Hart did not pay the instalment in July 1999 and that the claim was time-barred.

### Court of Appeal

BMWFS appealed to the Court of Appeal arguing that HHJ Halbert had erred in his interpretation of *Reeves* and the terms of the Agreement. After hearing submissions, the Court of Appeal allowed the appeal and decided:

- In *Reeves*, the agreement stated that the monies would not be called in so long as the borrower regularly paid interest. If, however, the borrower missed a payment, the balance of the loan (including interest) would become due 21 days after default.
- Under the terms of the Agreement, BMWFS had no right to make a claim for the unpaid balance until it had given notice of termination or accepted Mr Hart's repudiation of the Agreement.

- It was only when BMWFS had given notice of termination or accepted Mr Hart's repudiation that the sums due under the Agreement became due. Until that point the only sums Mr Hart had to pay were the outstanding instalments.
- Mr Hart's failure to pay the instalment did not, on its own, accelerate the obligation to pay the whole amount due under the Agreement.
- The Court of Appeal therefore distinguished the earlier decisions of *Reeves* and *Hemp v Gardland* 114 E.R. 994 (which *Reeves* followed).

### Comment

The Court of Appeal's decision is both pragmatic and commercially sound. The Agreement, like many others, stated that the balance became due upon termination. If the Agreement had been regulated by the CCA, termination is subject to the lender serving (where appropriate) a notice under the CCA (most commonly a default notice or, for non-default cases, a combined enforcement and termination notice). Notice is specifically required before a lender can become entitled to (amongst other things) demand "earlier payment of any sum".

If the Court of Appeal had come to any other conclusion it would have been contrary to the wording of the CCA. This envisages that the balance does not become due (and cannot be demanded as being due) until after the expiry of the notice period. The Court of Appeal's decision can also be used in appropriate circumstances by lenders wanting to stop the limitation period running. It seems clear that, subject to an argument that the lender has affirmed the agreement by not taking steps to accept a debtor's repudiation, termination could be delayed until the end of the term of the agreement. This would allow lenders to delay (most obviously where the debtor is in a difficult financial position or cannot be located) issuing proceedings until the last moment, like BMWFS did, and avoid being time-barred.

### FURTHER INFORMATION

This article has been written by:

#### Russell Kelsall

Senior Associate

T +44 113 284 7265

F +44 870 458 2913

E russell.kelsall@squiresanders.com

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.