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Review

Commercial & Dispute Resolution

Multiple Agreements under the Consumer Credit Act 1974: More Good News for Lenders

INTRODUCTION

Consumer credit decisions are like the proverbial bus: following the recent and emphatic judgment in *McGuffick*[1] comes the Court of Appeal's equally emphatic decision in *Southern Pacific Mortgage Limited v Jayne Elizabeth Heath* [2009] EWCA Civ 1135 ('**Heath**') on multiple agreements under Section 18 of the Consumer Credit Act 1974 (the '**CCA 1974**'). For many lenders, particularly those facing claims by consumers alleging a multiple agreement exists (typically on re-financing where part is used to pay off an old loan with the balance being free to use as the borrower wishes) but has not been properly documented meaning the agreement is irredeemably unenforceable, this decision will come as extremely welcome news.

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THE FACTS

Put shortly, Ms Heath owned a property in Workshop subject to a charge in favour of the Halifax. The balance outstanding was around £19,000. She applied for and obtained a loan from a new lender for around £28,000. It was a condition of the loan that Ms Heath's existing loan with the Halifax would be repaid on completion. Ms Heath accepted the terms and entered into an agreement with the new lender. Upon completion, her mortgage with the Halifax was redeemed and Ms Heath received the balance of around £9,000 to spend as she wished.

The lender later assigned its agreement with Ms Heath to Southern Pacific Mortgage Limited ('**Southern Pacific**'). The total credit advanced exceeded £25,000 (the statutory limit at the time of the loan) meaning it was not regulated by the CCA 1974 or subject to the Consumer Credit (Agreements) Regulations 1983 (the '**CCAR 1983**').

THE PROCEEDINGS

After initially obtaining a possession order, suspended on terms both in 2004 and 2006, Southern Pacific applied for a warrant of possession. Ms Heath obtained legal advice and argued that the agreement between her and Southern Pacific was regulated by the CCA 1974 because it was a multiple agreement under Section 18 and should be treated as two separate agreements. She also argued that because the forms failed to comply with the requirements of the CCA 1974 and the CCAR 1983, the agreement was unenforceable and the Court could not give Southern Pacific permission to enforce it.

The arguments came before the High Court on 29 January 2009 and His Honour Judge Purle QC, sitting as a High Court Judge, (in a judgment described by Lord Justice Lloyd as a 'clear and admirable judgment') decided that the agreement was not a multiple agreement but an agreement not regulated by the CCA 1974. Southern Pacific could therefore enforce the debt and obtain possession of the property. Ms Heath appealed to the Court of Appeal.

1 If you want to know more about the Court's decision in McGuffick, please see our Review dated 8 October 2009 entitled "First Consumer Credit Test Case decided in Bank's Favour" available from our website: http://www.hammonds.com or by contacting Russell Kelsall by e-mail at russell.kelsall@hammonds.com.

THE ISSUE

The Court of Appeal was, as Lord Justice Lloyd says at the beginning of his judgment, asked to decide the correct interpretation of Section 18 of the CCA 1974. Tellingly, he noted that the decision may have (if Ms Heath was right) "serious consequences for transactions of a commonplace nature." The precise issue to be decided was whether the transaction (not the credit) fell under Section 18, meaning it had to be split into parts and require separate documentation.

SECTION 18

Notoriously difficult to understand and with differing academic views, Section 18 says:

(1) This section applies to an agreement (a "multiple agreement") if its terms are such as -

(a) to place a part of it within one category of agreement mentioned in this Act, and another part of it within a different category of agreement so mentioned, or within a category of agreement not so mentioned, or

(b) to place it, or a part of it, within two or more categories of agreement so mentioned.

(2) Where a part of an agreement falls within subsection (1), that part shall be treated for the purposes of this Act as a separate agreement.

(3) Where an agreement falls within subsection (1)(b), it shall be treated as an agreement in each of the categories in question, and this Act shall apply to it accordingly.

(4) Where under subsection (2) a part of a multiple agreement is to be treated as a separate agreement, the multiple agreement shall (with any necessary modifications) be construed accordingly; and any sum payable under the multiple agreement, if not apportioned by the parties, shall for the purposes of proceedings in any court relating to the multiple agreement be apportioned by the court as may be requisite.

THE DECISION

After considering the various arguments, the Court noted that if Ms Heath's argument was right (ie that the agreement was a multiple agreement because there were two loans: one for restricted-use credit to pay off the Halifax loan and another for unrestricted-use credit which Ms Heath was free to spend as she wished), it would pose substantial practical difficulties. For example, if part of the loan was to be used to pay off an existing debt then the amount may not be easy to work out: it would often alter on a daily basis. To state the precise figure on the agreement may therefore be difficult meaning (if the agreement were regulated) that it may be unenforceable. This, Lord Justice Lloyd said, must be a relevant consideration.

The Court of Appeal went on to dismiss Ms Heath's appeal and said, in particular, that:

- The starting point is the terms of the loan. From this, one must work out whether the agreement is one advance, under which there are two or more parts in different categories, or whether it (or part of it) falls into two or more categories.
- It was wrong to start from the proposition that if there seemed to be more than one disparate category (ie restricted use credit to pay off the Halifax advance and unrestricted use credit for the balance) then the agreement **must** fall into two or more parts.

- Instead, the question is whether the **agreement** falls into one or more categories, not the credit provided under it.
- Section 18 is, in part, aimed at attempts to avoid the application of the CCA 1974. This was a bigger issue before the removal of the £25,000 limit.
- The use of the word "category" in Section 18(1)(a) and (b) was the same and meant disparate categories (for example, restricted-use and unrestricted-use or running-account credit and fixed sum credit): it did not mean compatible categories (like unrestricted-use, debtor-creditor and running-account credit).
- Section 18(1)(b) recognised that the agreement as a whole could fall within more than one category without being an agreement in parts (which would require separate documentation).

Taking these considerations into account, Ms Heath's loan was not split between the amount to be paid towards the Halifax charge and the amount which Ms Heath was free to use. Instead, there was simply a term of the agreement requiring **part** of the loan to be used to pay off the outstanding mortgage. This was not a multiple agreement and it would be an artificial exercise for the Court to notionally apportion the monies between the two categories.

SUMMARY

During these tough economic times, lenders are facing an increased number of consumer credit challenges from borrowers, many of which are stimulated by claims management companies. The decision in *Heath* further erodes the prospects of such claims succeeding. Lenders can also take considerable comfort from the Court of Appeal's decision that it is the agreement that must be considered. Lenders will often advance monies to borrowers who wish to use part to pay off existing debts and part for unrestricted use. Lenders may even include a contractual provision requiring certain debts to be paid off as a condition of advancing the loan. This, the Court of Appeal said, did not automatically make the agreement a multiple agreement.

Instead, it is clear that the Court will look at the agreement and see whether it (and not the credit) falls within Section 18. This is likely to seriously reduce the number of claims under Section 18 and Courts are likely to treat with suspicion any such claim, particularly where the consequences may have serious implications for the credit industry. Lenders defending claims under Section 18 should seriously consider the impact of *Heath* on the facts of its dispute. It is likely that applications for summary judgment under CPR 24.2 or strike-out under CPR 3.4 will no doubt follow with obvious costs consequences for borrowers, claims management companies and after the event insurers.

FURTHER INFORMATION

For further information on this article, or for advice with any of the matters raised or any other issue arising out of consumer credit law, please contact:

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