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Review

Commercial & Dispute Resolution

Default, Default, Default: High Court Gives Judgment on Default Notices and Default Charges under Regulated Consumer Credit Agreements

INTRODUCTION

His Honour Judge Roderick Denyer QC, sitting as a judge of the High Court, handed down judgment recently in *American Express Services Europe PE Limited v Ian Karl Robert Brandon* [2010], Unreported, 25 May 2010, on two key issues which often arise in consumer credit litigation: firstly, whether the default notice served under Section 87 of the Consumer Credit Act 1974 (the "**CCA 1974**") was invalid; secondly, whether the default charges amounted to penalties. This extremely helpful judgment, and given its High Court status meaning it is binding on the County Court, will no doubt comfort lenders facing such allegations.

"This is an important judgment for lenders facing two issues often arising in consumer credit litigation: firstly, whether the default notice served under Section 87 was invalid; secondly, whether the default charges amounted to penalties"

BACKGROUND

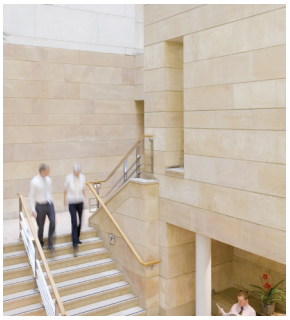
Mr Brandon entered into a running-account credit agreement (otherwise known as a credit card agreement) with American Express Services Europe PE Limited ("**AMEX**") on 28 March 1998. By June 2007, the outstanding balance was around £6,500. Mr Brandon failed to make his payments so on 19 June 2007 AMEX served a default notice under Section 87(1) of the CCA 1974. It required Mr Brandon to make a minimum payment of £275.80 "within 14 calendar days from the date of this default notice". Mr Brandon failed to make any further payment so AMEX wrote to him on 11 July 2007 ending the agreement and demanding the unpaid balance. If it was not paid within 28 days, AMEX said it would register the default with credit reference agencies. Mr Brandon's default also meant that late payment charges of £25 and over limit charges of £25 had been applied to his account.

THE ISSUES

The Court had two main issues to determine on appeal, namely:

1 Whether the default notice was invalid because it failed to state a date for compliance, as required by Section 88(2) of the CCA 1974, of "not less than 14 days after the date of service of the default notice"; and

2 Whether the late payment charges of £25 and over limit charges of £25 were penalties meaning they were irrecoverable unless they were a reasonable pre-estimate of AMEX's loss.



DEFAULT NOTICE

Default notices are often of incredible importance. If the debtor has breached his or her agreement then, by Section 87(1) of the CCA 1974, a creditor needs to serve a default notice before it becomes entitled to:

- terminate the agreement;
- demand earlier payment of any sum;
- recover possession of any land or goods;
- treat any right conferred on the debtor by the agreement as terminated, restricted or deferred; or
- enforce any security.

If a creditor just intends to pursue for the arrears, no default notice is needed. By Section 88(2), any notice after 1 October 2006 must give the debtor at least 14 days after service (7 days for notices served before 1 October 2006) to remedy his or her breach or before the creditor proposes to takes further action. Section 176 of the CCA 1974 inserts a presumption that, if sent by post, a default notice is deemed served on the date it would have been delivered in the normal course of post. This is the case even if the default notice does not come to the debtor's attention: *Lombard North Central plc v Power-Hines* [1995] CCLR 24.

In Mr Brandon's case, the default notice was served on 19 June 2007 and demanded he made payment "within 14 calendar days from the date of this default notice". As service was deemed after 19 June 2007, Mr Brandon argued that the time period for compliance was too short. It therefore followed, so Mr Brandon argued, that the default notice did not give the statutory period required by Section 88(2) and was therefore invalid. AMEX could not, therefore, rely upon it.

After hearing submissions, HHJ Roderick Denyer QC decided that because AMEX did not take any steps until 11 July 2007 (when it wrote terminating the agreement) and Mr Brandon was not prejudiced by a technical breach of Section 88(2), the default notice was valid and the agreement had been properly terminated.

DEFAULT CHARGES

Before the Deputy District Judge at AMEX's application for summary judgment, the Court decided that the late payment charges of £25 and over limit charges of £25 were payable under the terms and conditions. Mr Brandon argued that they were, in any event, penalties. He relied upon the House of Lords' decision in *Dunlop Pneumatic Tyre Company Limited v New Garage Motor Co Limited* [1915] AC 79, the Unfair Terms in Consumer Contracts Regulations 1999, the Office of Fair Trading's guidance on default charges and the fact that AMEX had recently reduced these charges.

The Deputy District Judge was not impressed: he said that he did "not accept that [AMEX] suffers no loss when a borrower fails to make payment on time or goes over the agreed limit" and that a default "puts pressure on cash flow. If borrowers do not pay it puts pressure on the reserves. If a sufficient number of borrowers fail to pay that can put the lender in beach of its regulatory requirements". He then went on to decide that these charges were a reasonable pre-estimate of loss and were therefore recoverable from Mr Brandon.

At the hearing of Mr Brandon's appeal in the High Court, HHJ Roderick Denyer QC decided that this was a view which the Deputy District Judge was perfectly entitled to reach. It could not, therefore, be overturned on appeal and HHJ Roderick Denyer QC did not suggest he would have come to any other conclusion.

COMMENT

HHJ Roderick Denyer QC's decision is an extremely welcome one for any lender. The judge's finding that a default notice, whilst technically non-compliant, will still be valid so long as the debtor suffers no prejudice is of crucial importance. Given its High Court status, it has far reaching implications and may mean that any technical non-compliance of a notice can be overlooked so long as there is no prejudice. Similarly, the judge's refusal to interfere with the Deputy District Judge's finding that the default charges were lawful is also very helpful. The customer plainly agreed to the default charges and the Court's finding that if a debtor fails to pay on time then a lender does suffer loss is plainly right.

Going forward, lenders should ensure they are familiar with this decision to maximise their prospect of recovery. It is understood, however, that this decision has been appealed to the Court of Appeal and a hearing to decide whether permission to appeal should to be granted is currently listed for 6 December 2010. Given the difficulties with a second appeal, it will be interesting to see whether the application for permission to appeal fails at the first hurdle.

FURTHER INFORMATION

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