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Chancery judge hearing insolvency appeal dismisses all technical challenges to agreement validity under the Consumer Credit Act 1974

Karen Blackshaw v. MFS Portfolio Limited, Paul Atkinson (Trustee in Bankruptcy) and the Official Receiver
Ch/2015/0009

Article by David Bowden

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Executive speed read summary

A credit card agreement from 1995 had been assigned twice. The debtor defaulted in 2009 and a default judgment and charging order were obtained. In 2013 the assignee served a statutory demand on the debtor to try and obtain payment proposals. A bankruptcy order was then made in June 2014. At that point the debtor sought to apply to annul the bankruptcy order. Half a dozen points were made including that the credit card agreement did not comply with the CCA or the agreements regulations and that the default notice was invalid or defective in some way. The assignee had difficulty in reconstituting copies and retrieving a copy of the default notice. The application to annul was refused. The debtor appealed and this came on for hearing before Mann J in the Chancery Division. He upheld the district judge's ruling that there were no defects in either the credit card terms and conditions or the default notice. Whilst the judge said there had been inefficiencies in producing documentation in this case, that was not sufficient to annul the bankruptcy order. He lifted the stay and the assignee can now proceed in its bankruptcy. The assignee has conceded it has to surrender the benefit of its security in its charging order for the benefit of all creditors.

Karen Blackshaw v. MFS Portfolio Limited, Paul Atkinson (as Trustee in Bankruptcy) and the Official Receiver
Ch/2015/0009 25 November 2016
High Court of Justice, Chancery Division (Mann J)

What are the facts?

In June 1995 Karen Blackshaw ('the debtor') takes out a credit card with Bank of Scotland plc. In 2009 the debtor falls into arrears and a Default Notice is served on her. In September 2009 a claim is issued in Norwich County Court seeking the full balance and default judgment for £7525.18 is entered on 28 September 2009. A charging order is made over the debtor's home to secure the judgment in December 2009 but no steps are taken to obtain an order for sale.

How did MFS Portfolio become involved?

These credit card accounts are then sold, firstly to MBNA Europe Bank in 2006. MBNA then assigns these receivables to MFS Portfolio ('the assignee') in June 2012 and a notice of assignment is served by post on the debtor in July 2012. Owing to an error, the court file records the creditor as 'ME III Limited' but District Judge Rogers later grants an application to substitute the assignee as the correct judgment creditor.

What happened during Ms Blackshaw's insolvency?

No payments were made by the debtor to the assignee and so it served a statutory demand on her in April 2013. No application was made to set that demand aside and a bankruptcy petition was then presented against her in August 2013. On 17 June 2014 District Judge Hart sitting in the Royal Courts of Justice, Bankruptcy Court in London makes a bankruptcy order.

What application did Ms Blackshaw make subsequent to her insolvency?

On 7 July 2014 the debtor applies to set aside the 2009 default judgement as well as to annul the bankruptcy order. The debtor advanced these 6 grounds:

- The credit card agreement was unenforceable under sections 61 and 65 of the Consumer Credit Act 1974,
- The default notice was defective because it required the debtor to pay the whole outstanding balance,
- Her credit card debt had not been validly assigned to the assignee,
- The assignee was in breach of CCA section 78,
- The lender had increased its interest rates prior to issuing court proceedings, and
- The default judgement was invalid because it was in the wrong creditor's name.

What ruling did the district judge in the county court make?

In an *ex tempore* judgment District Judge Hart dismissed the debtor's application to annul her bankruptcy on 16 December 2014. All 6 grounds of challenge were dismissed.

On what grounds did Ms Blackshaw seek to appeal?
On 6 January 2015, the debtor sought permission to appeal this order. In February 2015, Peter Smith J ordered a stay in the bankruptcy pending the outcome of the appeal. The 6 grounds advanced before Hart DJ were then whittled down to these 3 grounds of appeal:

- The credit card agreement was unenforceable under sections 61 and 65 of the Consumer Credit Act 1974,
- The default notice was defective because it required the debtor to pay the whole outstanding balance, and
- The behaviour of the assignee, lender and their solicitors amounted to '*a knowing misleading of the Court by production of false documentation*'.

What submissions did the assignee make to resist the appeal?
The assignee submitted that DJ Hart came to the right decision for the reasons she gave. It said the debtor had been provided with a copy of her 1995 application form for her credit card following the submission be her of a data subject access request to the original lender under the Data Protection Act 1998. Following *Brophy* **[2011] EWCA Civ 67**, a signed application form amounted to an application for credit by the debtor and the acceptance of that offer by the original lender amounted to a properly executed agreement. The assignee submitted it was highly unlikely the debtor would have entered into a credit agreement without the sight of the applicable terms and conditions. The debtor had conceded below that she had received later mailings in which notices of variation of the product conditions were sent to her.

As to the default notice, the assignee said there were no defects. It contained the correct arrears figure and stated the credit card balance figure which would become due if the arrears were not paid by the due date in the default notice.

What ruling did Mann J make on the appeal?
In a short *ex tempore* ruling handed down on 25 November 2016, Mr Justice Mann sitting in the Chancery Division of the High Court refused the debtor permission to appeal. He also ordered that the stay on the bankruptcy be lifted.

What did Mann J rule on whether the credit card agreement was improperly executed or not?
Mann J started by noting that section 61 of the CCA states that a '*regulated agreement is not properly executed unless the documentation is in the prescribed form and contains the terms and conditions'*. He noted that the debtor disputed that '*the terms and conditions were ever attached to the original contract because she has no record*'. Mann J said he had to establish '*were the terms and conditions attached?*'

Mann J noted that the assignee had '*initially provided an incorrect agreement at the original bankruptcy hearing*' but observed that '*the details relied upon within the original claim form were correct'*. Mann J was disappointed that the '*contract now provided is illegible'* but he noted that '*the signature of both applicant and original creditor can be seen'*. However Mann J said that '*signatures are not necessarily enough'* because '*the signature of the applicant must be sufficient in placing to amount to a subscription to the terms and conditions'* and this meant too that there '*must have been some terms attached'*

Mann J noted that DJ Hart below had made a finding on this in her judgment and that she '*had been satisfied that the terms and conditions existed and were supplied*' but Mann J felt that DJ Hart had '*not deal with whether they were subscribed to by the applicant's signature'*. Overall Mann J said he found '*the situation is less than satisfactory*' and that '*better record keeping ought to have been employed by all concerned*' but that '*it was not for this Court to interfere on appeal'* and that DJ Hart had '*on the balance of probabilities*' found that the terms '*were likely to have been provided'* and noted that she had '*consistent experience of these types of matters*'.

Finally Mann J ruled that '*it was implicit in her judgment that the application for the credit card would contain words of subscription'* and that '*it was unlikely that the Bank of Scotland would get it wrong'* and accordingly he declined to interfere with the judgment below.

What did Mann J rule on whether the Default Notice was defective or not?
Mann J noted that the assignee had provided a reconstituted default notice and that '*cross referring to internal records*' this '*suggested that at the date of default notice, 7 July 2009, the arrears on the account were £1200-ish*' and that the '*Default Notice required payment of this sum by the specified date within the*

notice'. However by the time of the application to annul the bankruptcy, the assignee had located a true copy of the Default Notice.

Mann J said that the assignee submitted that '*the terms and conditions at paragraph 8f'* were '*clear*'. Mann J said that where '*there were repeated failures to make payment'* by the debtor the assignee was '*entitled under the contract to repayment by notice'*. The debtor sought to rely on CCA section 173 (the provision against contracting out) and submitted that clause 8f was an '*inadmissible contracting out'*. However Mann J disagreed and noted that DJ Hart had dealt with this fully in her judgment. Mann J said that he was '*in full agreement with the District Judge*' and he went on to say that the debtor had *'misunderstood the default provisions'*.

Mann J ruled that if a lender '*is entitled to the full sum owed upon breach'* then it is '*not confined to merely claiming only the amount of arrears if there is a contractual right to the full amount'*. Accordingly Mann J ruled that s173 did '*not avail the Applicant'* and that there was '*no inconsistency'* between the default notice and the credit card terms & conditions.

What did Mann J rule on whether the lender or its assignee had knowingly mislead the court or not?
Mann J's patience with the debtor had run out by this point. Although he noted that the conduct of the assignee and its solicitors '*may well be tardy or inefficient in producing wrong documentation'* and that '*they ought to produce documents that form their cause of action'* which he said '*they should have spotted*'. Nevertheless Mann J ruled that '*inefficient conduct is not sufficient for annulment of a bankruptcy'* even where a '*court has sympathy with'* the debtor.

Will there be a second appeal?
The ruling made by Mann J was a judgment given by him on appeal. If there were to be an appeal, it could only be a 2nd appeal to the Court of Appeal. To be in time it would need to be lodged with the Registrar of Civil Appeals by 16 December 2016. In order to get permission it would need to meet the stringent 2nd appeal criteria that either it raised an important point of principle or practice, or there was some other compelling reason for the Court of Appeal to take it. Neither of these 2 criteria appears to be met.

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