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PRA Group (UK) Limited v. Mr Segal
Norwich County Court claim number C9CH73D4

Article by David Bowden

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Executive speed read summary

PRA Group is an assignee of MBNA's credit card debts. Mr Segal owed over £13,600 on his credit card. A default notice was sent by MBNA requiring the then arrears of £2107.33 to be paid by 22 December 2012. No payments were made and county court proceedings were brought to recover the debt. Mr Segal consulted Paul Tilley who instructed Tom Brennan who have acted in a number of similar court challenges to credit agreement enforceability. The case was heard in a 2 day trial in Norwich in June 2017. There were 6 pleaded defences and a 7th ambush defence was sprung on the lender's assignee at trial. The judge found that the default notice was defective because it referred to the wrong clauses in the credit card conditions. It was also reprinted on the wrong stationary. The judge also accepted the debtor's evidence that he did not receive it. The judge refused to give judgement even for the arrears. The judge dismissed the entire claim. The judge said taking this course was not in breach of CCA section 170 which provides for no further sanction for breach. This disposed of the case. The judge said had he been required to do so, he would have ruled that the £12 monthly default charge was an unfair contract term. The judge ruled that it was legitimate to ring, send text messages and write to the debtor to try and obtain payment. The judge ruled that these legitimate debt collection tools did not make the relationship between the debtor and creditor unfair. However the judge ruled that because no compliant default notice was sent, this made the relationship unfair. The judge found the debts to have been correctly assigned and ruled that the notices of assignment had been sent. The judge rejected allegations that the credit card agreement was '*improperly executed*' and ruled that the statutory copies had been sent by MBNA. He also rejected the allegation that CCA s78 had not been complied with.

PRA Group (UK) Limited v. Mr Segal
Claim number C9CH73D4 *19 December 2017*
Norwich County Court, Mr Recorder Howlett

What are the facts?
Mr Segal had a credit card issued by MBNA to him in February 2003. It was branded with West Ham United Football Club that Mr Segal supported. Mr Segal was given an application pack at a football match. He defaulted in payment and a demand was sent requiring payment of the full outstanding balance.

How did the debt end up with PRA Group limited?
Mr Segal's credit card debt was included in a portfolio of other debts that MBNA initially sold to Aktiv Kapital Portfolio AS Oslo Zug Branch. Aktiv then sold the debt on to PRA Group (UK) Limited ('PRA') in April 2013.

What were the arrears demanded in the default notice?
3 December 2012 a default notice was sent to Mr Segal by PRA requiring him to pay his credit card arrears of £2107.33 by 22 December 2012. The arrears were not paid.

What was the full balance due on the credit card?
PRA then wrote to Mr Segal by letter dated 7 February 2013 making demand for payment of the full outstanding balance on his card in the sum of £13606.20.

What enforcement action was taken?
Payment was not made. A county court claim was brought by PRA against Mr Segal to recover the debt.

Who acted for the lender's assignee?
PRA was represented by Howell Jones solicitors in Kingston upon Thames. They instructed Mr Philip Mantle of No 5 chambers in Birmingham.

Who acted for the borrower? What is their track record?
Mr Segal obtained legal advice from Paul Tilley of Quality Solicitors Howlett Clarke in Brighton. They in turn instructed barrister Thomas Brennan who drafted a complex defence for Mr Segal. The matter was tried over 2 days in Norwich County Court before a Recorder in June 2017. A detailed reserved judgement was handed down shortly before Christmas 2017.

Paul Tilley is qualified neither as a solicitor nor chartered legal executive and gives his job title as '*litigation executive*'. The Bar Standards Board does not have recorded a professional practicing address of any chambers for Mr Brennan. Mr Tilley used to work at Watsons, Solicitors in its office in Llandudno until

August 2013 when that office was closed down. Mr Tilley writes a regular blog which is posted on the Legal Beagles website - www.legalbeagles.info.

Between them Messrs Tilley and Brennan have acted on a number of consumer credit cases in the last 10 years. These include the Court of Appeal case of *Grace & George v. Black Horse Limited* **[2014] EWCA Civ 1413,** the Mercantile Court case of *Harrison v. Link Financial Limited* **[2011] EWHC B3 (Mercantile)** and the Birmingham County Court case of *HFO Capital v. Wegmuller* **[2012] EW Misc 19 (CC).** They also made it into the '*The Guardian'* newspaper on 27 September 2016 under the headline *'Court delivers landmark victory on Lloyds TSB's overdraft charges'* in a news item about Oliver Foster-Burnell.

What defences were run at trial?
Mr Brennan ran these 7 defences on Mr Segal's behalf at trial:

- PRA was put to strict proof of its entitlement to sue as MBNA's assignee,
- It was alleged the credit agreement was '*improperly executed'* under section 61 of the Consumer Credit Act 1974 ('CCA'). Mr Segal claimed the credit agreement he signed did not incorporate all of the prescribed terms,
- Mr Segal alleged that he was neither provided with a copy of the credit agreement when he signed it nor when the executed agreement was posted out to him,
- Mr Segal alleged that PRA breached section 78 of the CCA in claiming that he was not provided with a correct copy of the credit agreement when he made formal request to PRA,
- Mr Segal alleged that PRA had not sent him a default notice which complied with sections 87 and 88 of the CCA,
- The £12 monthly arrears fee was an unfair contract term and/or unlawful penalty, and
- Mr Segal claimed there was an '*unfair relationship'* between him and PRA under the CCA.

Did any of these defences succeed?
Of all of these 7 defences, only the one in relation to the default notice succeeded. However the judge ruled that, had he been required to do so, he would have found the £12 default charge to be an unfair contract term. Whilst the debt collecting measures used by PRA were not unfair, the judge ruled that because of his finding on the default notice, he would have ruled this caused an unfair relationship.

How did the assignee reconstitute the default notice?
PRA attempted to reconstitute a copy of the default notice sent by MBNA to Mr Segal in December 2012. Either PRA or MBNA did not do this properly. The default notice produced at court was on notepaper of '*MBNA*'. However the correct legal name of that entity in 2012 was '*MBNA Europe Bank'*. Further the stationary described MBNA as '*regulated by the Financial Conduct Authority'* but the FCA did not come into existence until 1 April 2013. These avoidable errors raised suspicions in the judge's mind that something was not right.

What was the reason the judge gave for allowing the default notice defence to succeed?
The default notice defence succeeded for these 5 reasons:

- The copy was not reconstituted on the correct legal notepaper of MBNA,
- It referred to the wrong condition number in the MBNA standard credit card terms and conditions. The condition number quoted in the default notice said nothing about the debtor's requirement to pay and pay on time.
- The sum for arrears in the default notice did not tally with the sum that MBNA had sent to Mr Segal on 16 January 2013 in its formal 'Notice of sum in arrears'.
- The judge accepted Mr Segal's version of events following his cross-examination under oath in the witness box that he '*had not received the default notice'*.
- There was no evidence from MBNA as to how it:
    - Created default notices on its computer systems, or
    - Posted default notices out including the method of posting and whether 1st or 2nd class mail was used.

What consequence flowed from the judge's finding about the default notice?
The judge dismissed the claim entirely. The judge did not even give judgement for the arrears due under the credit agreement. PRA submitted unsuccessfully that dismissing the claim would breach section 170 of the CCA which provides that there is to be '*no further sanctions for breach of the Act'*. The judge roundly rejected this submission ruling:

'*The question for me is whether as matters stand in the light of the finding which I have made, MBNA was, and PRA is, entitled to treat the agreement as terminated and to recover the entire outstanding balance. The answer to that question is, by virtue of section 87, "no". I shall therefore dismiss the action. I am not persuaded that by doing so I am imposing a civil penalty on PRA. Rather, PRA has by this action sought to exercise a right of enforcement which it does not have*.'

What reason did the judge give for dismissing the challenge to the assignability of the debt?
By the date of the trial in June 2017 copies of the assignments to both Aktiv and PRA had been unearthed and produced to the court. The judge ruled that he was '*satisfied that both assignments were valid legal assignments, made in writing under the hand of the respective assignors and made absolutely rather than by way of charge only*' under section 136 of the Law of Property Act 1925. The judge also ruled that he was 'satisfied also that Mr Segal was given written notice of the assignments' and that '*no formality is required beyond the fact that the notice is given in writing and that it brings to the attention of the debtor that the debt has been assigned so that the debtor must pay the assignee rather than the original creditor'*.

What reason did the judge give for dismissing the challenge to the improper execution of the credit agreement?
In cross-examination under oath Mr Segal admits that he had signed MBNA's credit agreement contained in the fold-out leaflet. Mr Segal was 'adamant that the document which he signed comprised the application form only and contained no terms and conditions whatsoever'. PRA said there could be only 3 possible explanations, namely that MBNA sent out:

- the complete gatefold document containing all of the terms and that an error has been made in recording a copy of it, or
- a document containing some (but not all of the terms) and not including the prescribed terms, or
- a document containing no terms at all and the copy has been altered or added to in some way.

PRA said the first explanation was '*much the most probable'* and the judge ruled that he '*accepted the submissions of PRA'* noting that '*Mr Segal had given evidence about matters which happened more than 14 years ago'* but cautioning that whilst he '*did not find him to be a dishonest witness'* the judge felt that he was '*sure that his recollection of signing a document which contained no terms whatsoever was flawed'*.

What reason did the judge give for dismissing the challenge to the sending of executed and unexecuted copies of the credit agreement?
The judge dealt with this quite crisply. He ruled that not only had '*Mr Segal signed a copy of the agreement containing all of its terms*' but that '*he was also provided with a second copy to keep'*. Again the judge noted that '*Mr Segal was recalling matters which were more than 14 years old'* noting that it was '*inherently improbable that MBNA would prepare documents which failed in such obvious and important respects to comply'* with the CCA. The judge observed that MBNA's terms and conditions stated in the '*top left hand corner that a second copy is provided for the applicant to keep'* and that it was '*unlikely that this information would appear if it was not correct'*. Concluding on this issue the judge ruled that '*a further copy was sent with the credit card in accordance with section 63'* whilst commenting that there was '*obviously, no doubt that the credit card was sent to and received by Mr Segal'* and that '*in the ordinary course of things it is to be expected that a copy of the terms would have been sent with it'*. The judge ruled that there was '*evidence that the credit card was created and posted'* and so he was '*prepared to, and do, draw the inference that the required copy of the agreement was sent'.*

What reason did the judge give for dismissing the challenge under CCA section 78?
This challenge was dealt with and dismissed quite quickly by the judge. The judge ruled that in response to his s78 request '*Mr Segal was provided with copies of the credit agreement, the original terms and conditions and those which applied at the date of supposed termination'* and that he had also '*been provided with account statements on a periodic basis*'. He ruled that there '*the requirement is that copies be true, rather than exact*' and the reconstituted copies were acceptable. The judge ruled the copy of the credit card terms and conditions in the trial bundle '*were indeed those which applied at the supposed date of termination'* and that it followed that '*PRA has complied with its obligations under section 78'*.

What CJEU case law does the debtor rely on?
Mr Segal relies on these 4 cases from the Court of Justice of the European Union:

- *Banco Espanol de Credito SA* v. *Camin* **C-618/10**,
- *Arpad Kasler v. OTP Jelzalogbank Zrt* **EU:C:2014:282; [2014] Bus LR 664,**
- *Bogdan Matei & Ioana Ofelia Matei v. SC Volksbank Romania SA* **[2012] EUECJ C-602/10**, and

- *Ernst Georg Radlinger & Helena Radlingerova v. Finway SA* **[2016] EUECJ C-377/14.**

How did the debtor put his challenge based on unfair contract terms?
Mr Segal claimed that a default charge of £12 a month which MBNA added to his account was an unfair contract term and breached the Unfair Terms in Consumer Contract Regulations 1999. He also claimed this default charge was an unlawful penalty at common law and did not represent a genuine pre-estimate of MBNA's loss.

Mr Segal says that the Supreme Court decision as to whether bank overdraft charges were fair or not (*Office of Fair Trading v. Abbey National* **[2010] 1 AC 696**) is irrelevant for these reasons:

- In bank charges there was evidence before the court as to how current accounts overall were priced and that the overdraft charges were rationally related to the service offering,
- There is no such evidence here as to how the £12 charge relates to the offering of a credit card,
- The £12 a month default fee is on top of the interest charged and is a penalty, and
- The later CJEU cases mean that either the Supreme Court ruling in bank charges either has to be read down or is inconsistent with and/or impliedly over-ruled by these late CJEU cases.

What ruling did the judge give on unfair contract terms?
The judge determined the case based on his ruling that no compliant default notice was sent. His 'by the way' remarks on unfair contract terms are unnecessary to decide the case and should be treated as such. He made these 4 remarks on unfair contract terms:

- *Abbey National* decision is not of direct application because '*it concerns unauthorised bank overdraft charges, not default charges in running account credit agreements'*. The judge said that '*I do not consider that* Abbey National *is authority for the view that default charges necessarily fall within the regulation 6(2) exemption'* and that he '*accepted*' PRA's '*responsible and proper recognition that the charges here almost certainly do not'*,
- The burden of showing that the term is fair is on PRA,
- PRA has called no evidence on that point and that he was '*unable to tell whether, for example, the charges might be fair in all the circumstances as forming a proportionate part of the revenue stream for providing the overall package of services under the account, or to secure proper performance of the contract'* and
- '*PRA has <u>not</u> discharged the burden of showing that the default charges are fair'*.

What reason did the judge give for rejecting the 'unfair relationship claim'?
The judge's remarks on this are quite helpful and pragmatic. Mr Segal specific allegations were that he was:

- telephoned by MBNA and then Aktiv Kapital every other day pressing him for payment,
- sent text messages,
- served with a statutory demand by PRA.

He claimed he '*suffered stress, migraine headaches, had time off work and lost business'* but that '*he had not kept any log or other record of the telephone calls'* and he '*had produced no medical evidence'*.
PRA submitted that '*for a creditor to contact a debtor is not in itself unfair and that where a substantial sum is owed it is not surprising that a creditor presses for payment or that the debtor does not welcome such pressure'*.

The judge ruled that whilst the telephone calls and text messages for Mr Segal '*caused him stress and may indeed have led to a resumption of his migraine headaches'* that he did '*not consider that his evidence shows that the conduct of MBNA or Aktiv Kapital or PRA in exercising its rights under the agreement was in itself unfair'*. He went on to observe that '*being in debt is stressful and even legitimate pressure to pay is likely to add to the stress*'.

The judge concluded his ruling on the '*unfair relationship'* point by ruling that he did *'not consider that any pressure or conduct generally by PRA and its predecessors has been shown to have further contributed to that unfairness'*, but that he did find the relationship between Mr Segal and MBNA to be '*unfair by reference to the default payment terms'*.

What have other courts ruled on default notices?
It is astonishing what a poor corporate memory MBNA appears to have. In *Harrison v. Link Financial Limited* **[2011] EWHC B3 (Mercantile)**, HHJ Chambers QC had witness evidence from Mrs Worden of

MBNA and she also attended court for cross-examination. That written evidence explained the processes within MBNA for the production and sending of default notices. However despite the clear attack here on the default notice, no attempt was made by PRA to produce similar evidence to the court as to how default notices were produced and sent. Nor is *Harrison* referred to in the judgement and it is not clear if PRA's counsel referred to it in his written or oral submissions or whether it was in the bundle of authorities which would have allowed Recorder Howlett to take judicial notice of it.

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David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.