Neutral Citation Number: [2019] EWCA Civ 12

Case No: B2/2018/0006

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HHJ Madge
B22YP133

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2019

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE FLAUX
and
LORD JUSTICE PETER JACKSON

- -

Between :

Christopher DOYLE	**Appellant**
- and -	
PRA GROUP (UK) LIMITED	**Respondent**

- -
- -

Thomas Brennan-Banks (instructed by **Wannops Law**) for the **Appellant**
Richard Jones QC and **Philip Mantle** (instructed by **Howell-Jones LLP**) for the **Respondent**

Hearing date : 16 January 2019

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Approved Judgment

Sir Terence Etherton MR:

1. This is an appeal in relation to a preliminary issue as to whether the claim of the respondent, PRA Group (UK) Limited ("PRA"), against the appellant, Christopher Doyle, for all sums outstanding under a credit card agreement between MBNA Europe Bank Limited ("MBNA") and Mr Doyle ("the Agreement"), is barred by section 5 of the Limitation Act 1980 ("LA 1980").

2. The Agreement is subject to the Consumer Credit Act 1974 ("CCA"). The preliminary issue turns on whether the cause of action for the outstanding sums accrued when Mr Doyle first defaulted in his payments or only when Mr Doyle failed to comply with the default notice stipulated by CCA s.87(1) and required by clause 8f of the Agreement.

3. In his judgment delivered on 1 June 2017 Deputy District Judge Medlicott, sitting in the Uxbridge County Court, found in favour of Mr Doyle. By his order dated 12 December 2017 His Honour Judge Madge, sitting in the County Court at Central London, allowed PRA's appeal.

4. Mr Doyle has appealed to this court with the permission of Asplin LJ.

Factual background

5. The Agreement, which was made in 1997, was a running account credit card agreement. PRA claims that, by a series of assignments, the benefit of the Agreement became vested in PRA.

6. The Agreement has no fixed or minimum duration. It contains provisions for minimum monthly payments. Clause 8f provides for payment of the whole outstanding balance on the account in certain circumstances. It is as follows, so far as relevant:

> "8f Subject to us sending you any notice required or taking any steps required by law, you, or your legal representatives, must immediately pay your whole balance (including all interest and charges and fees due) and we may refuse to authorise further transactions if:
>
> - this agreement ends;
> - you fail to make a payment in full when it is due;
> - you break an important part of this agreement or repeatedly break this agreement and fail to sort the matter out;
> - a bankruptcy order is made against you, or you make a voluntary arrangement with your creditors; or
> - you die."

7. Clause 10 contains provisions enabling the Agreement to be brought to an end by either side, irrespective of any breach.

8. Mr Doyle fell into arrears on his MBNA account. MBNA served on Mr Doyle a default notice under CCA s.87(1). The default notice stated that Mr Doyle was in breach of the Agreement because he was seriously in arrears and that, in order to remedy the breach, a payment of £4,296.34 had to be paid by 21 December 2009. It also stated that the account balance was £26,570.20. The default notice further stated that, if Mr Doyle failed to make that payment before 21 December 2009, further action might be taken against him, namely that his account would be closed, the agreement would be terminated and court proceedings might be taken to recover the whole amount owed by him.

CCA

9. CCA s.87 provides for the service of a default notice in certain circumstances. It is as follows so far as relevant:

> "87.— Need for default notice.
>
> (1) Service of a notice on the debtor or hirer in accordance with section 88 (a "default notice") is necessary before the creditor or owner can become entitled, by reason of any breach by the debtor or hirer of a regulated agreement,—
>
> (a) to terminate the agreement, or
>
> (b) to demand earlier payment of any sum, or
>
> (c) to recover possession of any goods or land, or
>
> (d) to treat any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred, or
>
> (e) to enforce any security."

10. CCA s.88 stipulates the contents and effects of a default notice. Section 88(1) provides that the default notice must be in the prescribed form and specify (a) the nature of the alleged breach; (b) if the breach is capable of remedy, what action is required to remedy it and the date before which that action is to be taken; and (c) if the beach is not capable of remedy, the sum (if any) required to be paid as compensation for the breach, and the date before which it is to be paid. Section 88(2) provides, among other things, that the date specified must not be less than 14 days after the date of service of the default notice, and that the creditor shall not take any such action as is mentioned in section 87(1) before the date so specified.

11. CCA s.89 provides that, if before the date specified for that purpose in the default notice the debtor or hirer takes the action specified under section 88(1)(b) or (c) (viz. taking the action specified in the default notice to remedy the breach or, if not capable of remedy, paying the sums specified in the default notice as compensation for the breach), the breach shall be treated as not having occurred.

LA 1980

12. LA 1980 s.5 provides that an action founded on simple contract shall not be brought after the expiration of six years.

The proceedings

13. On 31 October 2015 PRA issued a Claim Form, with Particulars of Claim attached, for the total amount of £26,570.20 outstanding under the MBNA Agreement, together with interest.

14. Mr Doyle served a defence dated 25 February 2016, in which he denied that PRA is entitled to recover the amounts claimed. Among the various grounds on which he relies is a contention that the claim is barred by expiry of the limitation period since the last payment was in about April 2009 but the proceedings were not issued until October 2015.

15. The proceedings were issued within six years of the date specified in the default notice, namely 21 December 2009, but Mr Doyle denied in his Defence that the default notice had any relevance to the commencement and expiry of the limitation period

16. That particular defence was, as I said, taken as a preliminary issue.

The judgments below

17. Without any intended discourtesy, it is not necessary to set out the detailed reasoning in the judgments below. It is sufficient to say that District Judge Medlicott found in favour of Mr Doyle on the grounds that the cause of action against Mr Doyle arose at the time of breach of the terms of the Agreement and the service and expiry of the default notice were merely a procedural precondition to issuing proceedings.

18. His Honour Judge Madge, on the other hand, held that the effect of CCA s.87 was that the cause of action only arose after the time specified in the default notice for remedying the default.

Discussion

19. Despite the conscientious analysis of the Deputy District Judge and the sustained written and oral submissions of Mr. Thomas Brennan-Banks, counsel for Mr Doyle, I consider that the conclusion of Judge Madge was plainly correct. The point is a very short one of contractual and statutory interpretation.

20. The classic definition of "cause of action" is that given by Lord Esher MR in *Read v Brown* (1888) 22 QBD 128, as follows: "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the Court". That definition was approved and followed by the Court of Appeal in *Coburn v Colledge* [1897] QBD 702. Its substance was summarised in the following way by Lord Guest in *Central Electricity Board v Halifax Corporation* [1963] AC 785 at 806:

> "The date when a cause of action accrues may be said to be the date on which the plaintiff would be able to issue a statement of

> claim capable of stating every existing fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to judgment."

21. The effect of the introductory wording of clause 8f of the Agreement ("Subject to us sending you any notice required or taking any steps required by law") and, more particularly, CCA s.87(1) is that, absent service and expiry of a default notice compliant with CCA ss.87 and 88, there would have been both a complete defence to a claim for all outstanding sums under the Agreement and an unanswerable right to strike out the claim.

22. Critically, section 87(1) does not provide merely that a default notice is necessary before the commencement of proceedings to recover everything outstanding under the regulated agreement. It provides that there is no right to treat the agreement as at an end or to make a demand for accelerated payment of outstanding amounts. That is not a "procedural" precondition. It qualifies the substantive legal rights of the creditor. The contractual precondition in clause 8f of the Agreement ("Subject to us sending any notice required … by law) must have the same meaning and legal effect.

23. That interpretation of CCA s.87(1) is also supported by the wording of section 89, which was not the subject of comment in the judgments below but was mentioned in the oral exchanges before us. It provides that, if the debtor or hirer takes the action to remedy the breach or pay compensation for it as specified in the default notice in accordance with section 88(1), "the breach shall be treated as not having occurred". That consequence is not restricted to a procedural bar on the creditor but reverses the substantive legal rights and obligations of both parties. It is expressed in quite general terms and, on the face of it, applies for all purposes and without limitation of time. As part of a suite of provisions dealing with default notices, which should be interpreted consistently, it is consistent with section 87(1) also altering the substantive legal rights of the parties and not merely imposing a procedural restraint.

24. Mr Brennan-Banks laid particular weight on *Swansea City Council v Glass* [1992] QB 844. In that case the plaintiff local authority served notices, pursuant to the Housing Act 1957 s.9, requiring the defendant to effect repairs to his house. On his failure to do so, the local authority carried out the necessary works pursuant to the power conferred on them under section 10(1) of the 1957 Act. They then served on the defendant written demands for the costs incurred. The defendant did not pay. More than six years after completion of the works, but less than six years after the service of the demands, the local authority issued a summons in the County Court seeking payment. The Court of Appeal held, as a preliminary point, that the cause of action for the purposes of the applicable six year limitation period under LA 1980 s.9 (sum recoverable by virtue of any enactment) accrued on completion of the works required by the notices and that, accordingly, the action was statute barred.

25. The entitlement of the local authority to recover expenses for the work they had done derived, at the relevant time, from section 10(3) of the 1957 Act which provided, so far as relevant, as follows:

> "Any expenses incurred by the local authority under this section, together with interest from the date when the demand for the expenses if served until payment, may… be recovered

> by them, by action or summarily as a civil debt, from the person having control of the house …"

26. Taylor LJ, with whom the other two members of the court agreed, accepted the submission of counsel for the local authority that it was implicit in the statutory provisions that a demand for expenses must be served by the local authority before proceedings could be taken to recover them. He did not, however, accept the further proposition that service of the demand was not merely a procedural requirement but an essential ingredient in the cause of action.

27. Having referred to *Read v Brown*, *Coburn v Colledge*, *Central Electricity Board v Halifax Corporation* and *Sevcon Ltd v Lucas CAV Ltd* [1986] 1 WLR 462, Taylor LJ said (at p. 852) that the decisions showed that a cause of action may well accrue before, for procedural reasons, the plaintiff can bring proceedings. He said that, where the cause of action arises from statute, the question as to what is merely procedural and what is an inherent element in the cause of action is one of construction. He said that, for the purposes of section 10(3) of the 1957 Act, the local authority had to prove (1) that notice in accordance with section 10(1) was served on the person having control of the house to execute the works, (2) that he failed within the time specified to execute them, (3) that the local authority had themselves carried out the works specified in the notice and (4) that they had incurred expenses in so doing. He said that a statement of claim alleging those matters could not be struck out as disclosing no cause of action. Critically, he observed that the phrase "together with interest from the date when a demand for the expenses in served until payment" in section 10(3) showed that interest ran only from the date of the demand and, by implication, not from the date when the cause of action arose. He also observed that section 10(4) expressly provided that, where the local authority opted to take summary proceedings to recover their expenses, the limitation period ran from the date of service of the demand or, if there was an appeal, from the date when the demand became operative. He concluded that, again, by implication, since no such provision was applied to proceedings in the High Court or the County Court, time in those proceedings did not run from the date when the demand was served or became inoperative: it would run from the accrual of the cause of action which, *ex hypothesi*, was a different time.

28. In that case, therefore, there were two clear indications in the wording of the statute that the demand for payment under section 10(3), as distinct from a demand for payment under section 10(4), was merely a procedural requirement rather than an essential ingredient of the cause of action. By contrast, there is no such indication in CCA as regards the requirement for service of a default notice under section 87(1), and, indeed, the wording of section 87(1) clearly indicates the contrary for the reasons I have given.

29. Mr Brennan-Banks sought to distinguish *BMW Financial Service (GB) Limited v Hart* [2012] EWCA Civ 1959, upon which PRA has relied in the courts below and in its skeleton argument for this appeal. We did not feel it necessary to call on Mr Richard Jones QC, for PRA, and so did not hear any oral submissions from him on that case. On the face of it, I agree with Mr Brennan-Banks that the facts, and in particular the terms of the contract, in that case were materially different from those in the present case. It is not necessary to place any reliance on it. More generally, so far as concerns the point in issue on the preliminary issue before us, each case turns on its own particular facts, and in particular the wording and proper interpretation of the

agreement in question and any applicable statutory provisions. There is no other relevant case in which the agreement and the legislative wording are the same as those in the present case.

30. Mr Brennan-Banks emphasised that Mr Doyle's default did not bring an end to the Agreement. He referred in that connection to observations by Briggs LJ in *Grace v Black Horse Ltd* [2014] EWCA Civ 1413, [2015] Bus LR 1, at [28], and submitted that the fact that the underlying contract continued to subsist supported Mr Doyle's case. I do not understand that submission. The fact that the Agreement for a running credit card account does not come to an end automatically on default, however serious, does not bear on the question whether CCA s.87(1) and the pre-condition in clause 8f of the Agreement affect the substantive legal rights of the parties or just impose a procedural bar on the creditor which does not prevent accrual of the cause of action at the moment of default for accelerated payment of all outstanding sums.

31. Mr Brennan-Banks referred us to various annotations to CCA ss.87-89 in *Goode: Consumer Law and Practice*. They do not address the particular point in issue on this appeal. I do not consider they assist.

32. He also referred to clause 10 of the Agreement but I cannot see that clause has any material bearing on the preliminary issue.

33. In his skeleton argument Mr Brennan-Banks referred to observations made by Flaux J in *McGuffick v Royal Bank of Scotland plc* [2009] EWHC 2386 (Comm), [2010] Bus LR 1108. Mr Brennan-Banks did not elaborate on those observations in his oral submissions. I do not consider they are of any relevance to this appeal.

34. Mr Brennan-Banks advanced two policy arguments in support of Mr Doyle's appeal. First, he said that the decision of Judge Madge removes the certainty which the limitation period gives a debtor that he or she can "move on with their lives" because, on Judge Madge's approach, a default notice can be served at any time. Secondly, he said that delay benefits the creditor and is detrimental to the debtor because the information available to the debtor (obtainable from the creditor) to investigate and challenge the creditor's claim and the default notice is likely to have become lost or destroyed, particularly, as in the present case, where there have been successive assignments of the benefit of the credit agreement and the debt. I do not consider that either of those policy arguments carries any material weight.

35. Mr Brennan-Banks elaborated on the first of those policy arguments by pointing out that, on Judge Madge's approach, if, even after the lapse of a long period, the creditor serves a defective default notice, he or she could then serve another one, drawing out the period of delay even further: see *Harrison v Link Financial Limited* [2011] EWHC B3 at [75]. In the same vein, he said that the effect of CCA s.185 was that, in the case of a joint account, the failure of the creditor to serve both joint account holders could expose the one who was not served with a long-delayed exposure to a claim.

36. On the issue of prejudice from an ability to delay indefinitely service of a default notice, Deputy District Judge Medlicott said that certain observations of Lopes LJ in *Coburn v Colledge* weighed heavily on him. The issue in that case was whether, for the purposes of limitations, the cause of action of the plaintiff solicitor for payment

for work done for the defendant accrued on completion of the work or only after the plaintiff had delivered his signed bill of costs. The Court of Appeal held that the limitation period began to run as soon as the work was completed, and so the plaintiff's right of action was barred. Lopes LJ said (at p. 709):

> "Sect. 37 of the Solicitors Act, 1843, appears to me to assume that there is a cause of action, and merely to postpone the bringing of an action upon it until the period of one month from the delivery of the bill. There is nothing in the section, so far as I can see, inconsistent with the view that the cause of action arises when the work is completed. It was urged that, if this construction were adopted, a solicitor would have a shorter time during which he may abstain from bringing his action for work done than the rest of Her Majesty's subjects. That may be so; but on the other hand, if the plaintiff's contention is correct, the solicitor may abstain from delivering his bill for twenty years, and then at the end of that time he may deliver it and sue after the expiration of a month from its delivery. It seems to me that that would be a very anomalous and inconvenient result."

37. As the Deputy District Judge observed, that passage was referred to, and quoted, by Taylor LJ in *Swansea City Council v Glass* at 853, when he said: (at 853):

> "Thus, I conclude that the requirement to serve a demand is a procedural condition precedent to bringing proceedings. It is not part of the cause of action.
>
> I am fortified in this view by consideration of what could result if the local authority were right. Upon their argument, the local authority could delay service of a demand indefinitely. Then, having served their demand long after the works were complete, they would have a further six years in which to take proceedings in the High Court or the County Court. In *Coburn v. Colledge* [1897] 1 Q.B. 702, 709, Lopes L.J. said: …."

38. There is no doubt that CCA s.87(1) was intended to confer a benefit on the debtor under an agreement regulated by the CCA. It undoubtedly does so since it provides a debtor in default with the opportunity to remedy and expunge for all time that default.

39. It is true that, on Judge Madge's interpretation of section 87(1) and clause 8f of the Agreement, the debtor is potentially exposed to a long-delayed claim for sums outstanding under the credit agreement. That, however, is no different from the case of a loan repayable on demand. In such a case, the creditor's cause of action only arises if and when the creditor makes a demand. That is implicitly recognised in LA 1980 s.6 which provides that, where a contract of loan does not provide for repayment of the debt on or before a fixed or determinable date or make repayment conditional on a demand or some other matter, the cause of action to recover the debt accrues on the date on which a demand is made.

40. Mr Brennan-Banks submitted that section 6 supports Mr Doyle's case because Parliament has provided a special time limit for contracts within section 6 but an

agreement within CCA s.87(1) is not one of them. That submission misses the point that the Agreement, as affected by CCA s.87(1), is, for the purposes of the first policy argument, broadly analogous to a loan repayable on demand and loans within LA 1980 s.6 are treated in the same way, for limitation purposes, as a loan repayable on demand.

41. Moreover, set against the detriment to the debtor of potential exposure to a long-delayed claim for payment is the benefit to the debtor of not having to make payment sooner of what was lawfully due to the creditor. In effect, the debtor would have enjoyed extended credit beyond that to which he or she was entitled under the loan or credit agreement.

42. So far as concerns Mr Brennan-Banks' second policy argument – the loss of information over time to enable the debtor to challenge the creditor's claim – the creditor can only succeed if it can prove its case. It must adduce sufficient evidence, of sufficient cogency, in order to prove its case to the civil standard of proof necessary to discharge the burden of proof. The debtor is able to challenge and test that evidence in any court proceedings commenced by the creditor against the debtor.

43. Finally, Judge Madge said (at [26]), and PRA contends, that CCA ss.140A and 140B enable the court to remedy any abusive conduct by the creditor in artificially extending the limitation period by delaying service of the default notice. Accordingly, it is said, it is not necessary artificially to interpret section 87(1) and to analyse its impact on the rights of the parties under the Agreement to avoid the possibility of excessive delay and consequences for the debtor of such excessive delay. Mr Brennan-Banks submitted that reasoning is incorrect.

44. CCA ss.140A and 140B confer very wide powers on the court to remedy unfairness to a debtor where, for example, the creditor has exercised or enforced any of his rights under the regulated agreement or any related agreement or has done or failed to do any other thing. The scope and application of the court's powers under sections 140A and 140B in any particular case will depend upon the precise circumstances of the case. They are relied upon by Mr Doyle in his Defence. It is not necessary or appropriate, in order to decide the preliminary point, to speculate on their application to hypothetical sets of facts or to the facts of the present case. I consider that Judge Madge was correct, irrespective of CCA ss.140A and 140B.

Conclusion

45. For all those reasons, I would dismiss this appeal.

Lord Justice Peter Jackson:

46. I agree.

Lord Justice Flaux:

47. I also agree.