Richard Mawrey QC's consumer credit column: October 2012

Resource type: Article: other

Status: Maintained

Jurisdiction: United Kingdom

Richard Mawrey QC is a consumer credit expert practising at *Henderson Chambers*. He has been a specialist editor of *Goode: Consumer Credit Law and Practice* for 30 years and is co-author of *Blackstone's Guide to the Consumer Credit Act 2006* and *Butterworths Commercial and Consumer Law Handbook*.

In his sixteenth consumer credit column, Richard considers the law of assignment and its application to consumer credit agreements.

Richard Mawrey QC, Henderson Chambers

"Aunt Sally"

In the unlikely event that claims farmers ever required a patron saint, the most obvious candidate would be Aunt Sally. As readers will surely know, Aunt Sally is a fairly basic throwing game. What was originally a crude model of an old woman's head (sometimes with upper torso) and is now a stylised ball and stand, is set up and the object is to knock it over by a well-aimed shot. There are obvious affinities with a coconut shy. Its origins are obscure, possibly mediaeval, possibly early modern, and it was a staple of the Victorian fairground. Indeed it may be related to the grisly game where a live chicken was tied to a stand and the object was to throw sticks at it, with whoever killed the wretched bird taking it home for his supper. Nobody seems to know who the original "Aunt Sally" was but the game is still played very keenly in pubs in the Thames Valley, particularly in Oxfordshire.

Over the years Aunt Sally has come to signify an argument or proposition which is set up only to be knocked down. Although, of course, the intention of the claims farmers is a million miles away from creating Aunt Sallys (possibly Aunt Sallies?), this is precisely the game they have been playing for years, to the great profit of the legal profession and the great annoyance of the courts.

It all started with the catastrophic decision of the Blair Government, egged on by the anti-lawyer media to destroy legal aid in civil cases and adopt the "No win, no fee" expedient of the Conditional Fee Arrangement. Older and wiser heads in both branches of the legal profession and in the judiciary predicted that this was the green light for all manner of shysters to batten on gullible members of the public by fomenting litigation from which, in most cases, (even were the litigation to be successful) the shysters would be the only ones likely to benefit.

The Consumer Credit Act 1974 (CCA) had, by the Millennium, been chugging along relatively peacefully for a quarter of a century. Although the provisions of some of its dependent regulations could be very onerous, particularly the Consumer Credit (Agreements) Regulations 1983 (*SI 1983/1553*), by and large both sides of the industry had come to accept the system and it was working pretty well. Sadly, two things then coincided. First, the Government issued the White Paper *Fair, Clear and Competitive; the Consumer Credit in the 21 Century (www.practicallaw.com/8-380-3856)* and then embarked on a decade-long campaign of turning the existing law upside down, to the detriment of almost everyone (bar, of course, the lawyers). Secondly the enormous claims-farming industry of bringing personal injury claims ran out of steam – and indeed ran out of credibility and, more importantly, money. Thus the claims farmers needed to find fresh pastures just at the time that Government was opening up fertile new acres.

The result was, predictably, that the courts became clogged as the claims farmers took more and more

bad points under the CCA in their attempt to sell to a public over-burdened by consumer debts a series of magic remedies that would get all those debts cancelled. The provisions of the Agreements Regulations in both their original 1983 and their post-2005 versions were mined for any possible nugget of hope that a debtor might scoop the pool and have his debts rendered permanently unenforceable. It took years of patient efforts by creditors' lawyers and some noble members of the circuit bench to knock all these Aunt Sallys off their perch.

Then came the exploitation of the various provisions requiring creditors to provide copies of the original agreement on demand or requiring them to provide statements of account at regular intervals. One hopes that, to change the metaphor, all those very undeserving hares have now been run to earth.

But human ingenuity knows no bounds and 2012 has seen the shysters come up with yet another attempt to create a "Get out of Jail Free" card for the feckless debtor. As will be seen, this particular wheeze involved not merely scraping the bottom of the barrel but boring through to the floor beneath.

The stand on which this particular Aunt Sally was set up was the law of assignment. Indeed in its starkest form the argument reached the point of saying that a regulated consumer credit agreement could not be assigned at all. How did this come about?

To quote the great sage Nigel Molesworth, "any fule kno" that the Law of Property Act 1925 section 136 provided for the legal assignment of what were described as "choses in action", meaning essentially for our purposes the benefit of a contract or debt. The following three conditions have to be met:

- The assignment must be absolute and not by way of charge.
- The assignment must be made in writing.
- The assignment must be notified in writing to the debtor.

If all these formalities are complied with, then the assignee steps into the assignor's shoes and takes the benefit of the contract or debt and becomes the only person entitled to enforce it. Once he receives notice of the assignment, the debtor must pay the assignee. If he pays the assignor (that is, the original creditor) he simply does not discharge the debt and the assignee can sue him for it.

This is black-letter law which we all learned at our mother's knee. Indeed it is one of the very few pieces of law I learned in Oxford in the early sixties which time has not rendered obsolete. And it is important law in the context of credit because the assignment of credit agreements by creditors has been an important feature of the UK credit industry since before the War. When I started at the Bar, many finance companies (as they were then known) operated block discounting agreements whereby a portfolio of credit (usually hire-purchase) agreements would be assigned by the original creditor to a discounter. These agreements were often quite elaborate, with provision for recourse to the original creditor in case of default by the debtor or for compulsory re-assignment of the agreement in that event.

Thus, when the CCA was enacted in 1974 the assignment of credit agreements was a well-known feature of the credit industry. Consequently, when Mr Francis Bennion (still with us and writing pithy and probably correct letters to *The Times* querying the lawfulness of Mr Grayling being appointed Lord Chancellor) sat down to draft the Consumer Credit Bill he wrote into it several provisions dealing with the consequences of assignment. And for nearly forty years nobody considered that those provisions had in any way affected the basic law of assignment as it had existed since New Year's Day 1926.

So what was the peg on to hang the startling notion that the CCA had made assignment of regulated agreements impossible? Rather improbably it was section 189(1), the section containing all the definitions. The main body of the CCA places a multitude of obligations (and grudgingly confers a few rights) upon "the creditor" and "the owner". The "owner" is, of course, the technical name for the creditor when the contract

is one of hire-purchase (or consumer hire) but for these purposes we shall concentrate on the creditor.

By an uncharacteristic sloppiness in drafting (*et adnuit Homerus*) Mr Bennion's definition of creditor (slightly amended by the CCA 2006 but not in the crucial respect) now reads:

> "'creditor' means the person providing credit under a consumer credit agreement or the person to whom his rights and duties under the agreement have passed by assignment or operation of law, and, in relation to a prospective consumer credit agreement, includes the prospective creditor".

Clearly, therefore, the definition is intended to encompass the assignee of a credit agreement, whether that person is a contractual assignee or an assignee by operation of law, such as a trustee in bankruptcy or personal representative under a will or intestacy. Where the drafting was sloppy was in the phrase "to whom his rights and duties under the agreement have passed …"

Now it is equally black-letter law that, while one can assign the benefit of a contract, one cannot assign the burden. Otherwise every debtor in the land would assign the contract to a man of straw and let his creditor whistle for the money. Thus it would appear at first blush that the CCA was defining a creditor as someone to whom both rights and obligations have passed by assignment. This might seem to be contrary to the rule that the burden of a contract cannot be assigned.

Les grands fromages of the consumer credit world, Professors Goode and Guest pointed out this infelicity from the outset and, in the case of the former, his writings on the subject in *Goode Consumer Credit Law and Practice* have been continued by his unworthy successor (guess who?). What they pointed out, however, was that the duties of a creditor were not the same thing as "the burden of a contract": they were the conditions imposed on the creditor by the CCA in return for the creditor being permitted to enforce the contract. All the CCA was doing was enforcing a very old common law rule which said that assignee of the benefit of a contract took that benefit subject to all the conditions necessary to be fulfilled to enable him to obtain that benefit.

This not very startling proposition was made clear in Guest's *Encyclopaedia of Consumer Credit Law*, in *Goode*, in Denis Rosenthal's *Consumer Credit Law and Practice – A Guide* and all the other authoritative works.

This did not deter the claims farmers one little bit. I, and other consumer credit lawyers, were inundated by calls from worried creditors faced by arguments from the farmers that only the original creditor could enforce a credit agreement because the effect of section 189(1) was to deprive an assignee of the rights of a creditor. Most assignees stood firm, leaving the farmers to make their usual mistake, namely that of trying their luck in the courts. And it has to be said that, initially, they struck gold (or, more technically "fool's gold").

In *Jones v Link Financial Ltd [2012] EWHC 2402*, Mrs Jones was a habitual defaulter who had run the patience of her original creditor, GE Money Consumer Lending Ltd, to breaking point. In desperation, GE assigned the agreement to Link. This was an entirely kosher section 136 assignment of which written notice was given to Mrs J. Link sued her.

Amazingly, the county court judge in Blackpool actually accepted the argument that CCA section 189(1) deprived an assignee of the status of a creditor because the definition purported to breach the rule that the burden of a contract cannot be assigned. I must say that Blackpool folk seem to have gone weak in t'head since I did seven years hard at school on the Fylde Coast. The effect of the judgment would be that the assignee could not enforce because the definition of creditor excluded him owing to the rule about assigning the burden and the original creditor could not sue because he had divested himself of all title to the agreement by the assignment. The judge did however hold that CCA section 141 entitled an assignee to bring proceedings against a debtor even if this was nominally on behalf of the original creditor. He gave

judgment for the debt.

Mrs Jones appealed. Before Hamblen J she was represented by one of the bright young Turks of my own chambers (Richard Roberts), true to the tradition of the Bar that a client is entitled to have her argument advanced no matter how hopeless (tactlessly I told him it was hopeless beforehand which can't have helped). Hamblen J was made of sterner stuff than Judge Butler. With the smug glee of a bridge player laying his hand on the table to show that each card is a winner, the Judge laid out the citations from Guest, Goode and Rosenthal and said, in effect, "my rubber". He held that section 189(1) had not created an unassignable consumer credit agreement, still less a situation where neither the assignee nor the original creditor could enforce the agreement, a conclusion the judge rightly castigated as "absurd". Link was entitled to recover in its own right and the heresy that CCA section 189(1) has made regulated agreements unassignable and, if assigned, totally unenforceable, has, one hopes, been extirpated. Assignees will go on enforcing contracts, as they have since the days of Lord Birkenhead (the godfather of the 1925 property legislation).

So Hamblen J's deftly thrown ball knocks yet another Aunt Sally from her perch. Pints all round, barman, I fancy.

Resource information

Resource ID: 8-521-4247

Products: PLC UK Financial Services

This resource is maintained, meaning that we monitor developments on a regular basis and update it as soon as possible.

Related content

Topics

Consumer Credit (http://editorial.practicallaw.com/topic5-103-1116)

Practice notes

An overview of the Consumer Credit Act 1974 (http://editorial.practicallaw.com/topic2-518-4050)

Richard Mawrey QC's consumer credit columns (http://editorial.practicallaw.com/topic4-506-2095)

Legal update: archive

High Court considers the assignment of consumer credit agreements (http://editorial.practicallaw.com/topic2-521-1708)