HENDERSON CHAMBERS

8 May 2013

Financing and refinancing in s11 of the Consumer Credit Act 1974: *Consolidated Finance Ltd v Collins* [2013] EWCA Civ 475

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In a judgment handed down today, the Court of Appeal has adopted a broad interpretation of the meaning of "refinance" in s11 of the Consumer Credit Act 1974 ("the Act"). In the present four appeals, the interpretation of section 11 was critical to the issue of whether numerous standard form credit agreements were exempt and enforceable or regulated and unenforceable.

Julia Smith of Henderson Chambers represented the Office of Fair Trading, which intervened.

FACTS

1. The facts in each of the appeals were materially similar and Sir Stanley Burnton (with whom Sullivan and Arden LLJ agreed) focused on the lead Appellants Mr and Mrs Collins.

2. Mrs Collins had been adjudged bankrupt upon the petition of her local authority founded upon the relatively modest sum of £4,384 in unpaid council tax.

3. Having obtained her details from the bankruptcy register, Bankruptcy Protection Fund Ltd ("Protection") made an unsolicited telephone call to Mrs Collins offering to secure the annulment of her bankruptcy. This was

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to be achieved by means of a loan which would be secured against hers and Mr Collins' property ("the Property") and which would discharging her debts (which totalled £13,544 plus statutory interest just in excess of £1,000), costs, expenses and fees.

4. Protection sent various advertising documents warning of the fact that "*Your house will most likely be repossessed…*" and that "*[Protection] was set up to prevent people from losing their home as a result of bankruptcy.*" Protection also introduced Mr and Mrs Collins to Lupton Fawcett solicitors ("LF"), whom they habitually retained.

The Service Agreement and Facility

5. Pursuant to the terms of their agreement ("the Service Agreement") Mr and Mrs Collins were conditionally liable to pay Protection's and LF's considerable fees (£5,000 and £1,500 excluding VAT respectively) upon the successful annulment of the bankruptcy order. (As Sir Stanley Burnton noted, this condition was a virtual certainty.)

6. They were required to execute a facility letter ("the Facility") pursuant to which Protection's sister company Consolidated Finance Ltd ("Consolidated") would advance the relevant monies. Crucially, clause 2.1 of the Facility provided that the monies were to be used for the purposes of "*refinancing the Debt*". The "Debt" itself was defined in clause 1.1 as "*the aggregate principal sum of £32,000 [the amount required to satisfy the creditors and pay the relevant fees] plus interest accrued thereon.*"

7. Further, the Facility provided for interest on the loan at between 2.5% and 4% per month, an exit fee of at least £3,000 and a period for repayment of all sums of three months.

8. A legal charge was also granted by Mr and Mrs Collins.

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The Annulment

9. Protection sought the annulment of the bankruptcy order. LF made the necessary application and settled a witness statement explaining that Protection had provisionally agreed to advance sufficient funds to pay all debts, costs and expenses and that it was proposed that such monies would be advanced prior to the hearing of the application. Protection made the necessary payments. The application to annul was duly and successfully made, at which point Mrs and Mrs Collins became liable to pay Protection's contingent fees.

10. The total sum claimed by Consolidated in the claim against Mr and Mrs Collins was £77,384.89 and was estimated to exceed £100,000 by the date of judgment.

PRELIMINARY ISSUES

11. Before HHJ Marshall QC, sitting at the Central London County Court, the parties agreed that the Court should determine two preliminary issues. First, had Consolidated (as opposed to Protection) advanced the loan monies to the various defendants? Secondly, if so, was the Facility a regulated agreement or an exempt agreement?

12. At first instance, the learned Judge held that Consolidated had advanced the loan monies and that the Facility was exempt from regulation and thus free from arguments of unenforceability for lack of compliance with the Act.

13. The defendant debtors appealed.

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THE APPEAL

14. It was common ground that the Facility was a credit agreement and therefore, by virtue of s8(3) of the Act, regulated unless exempt.

15. Consolidated argued that the Facility fell within s11(1)(b) of the Act, in that the loan monies financed the provision of services by Protection under the Service Agreement. If so, it followed (without controversy), that the Facility was also a debtor-creditor-supplier agreement within the meaning of s12(b) of the Act and thus exempt from regulation by virtue of article 3(1)(a)(i) of the Consumer Credit (Exempt Agreements) Order 1989 ("the Order"). The Facility had been structured so as to fall within that exemption, which exempts agreements:

> *"for fixed-sum credit under which the total number of payments to be made by the debtor does not exceed four, and those payments are required to be made within a period not exceeding 12 months beginning with the date of the agreement; ..."*

16. Conversely, the appellant debtors argued that their respective Facilities had rerefinanced their indebtness to Protection, and thus fell outwith the exemption.

17. The key provision was therefore s11(1) of the Act:

> *11 Restricted-use credit and unrestricted-use credit*
>
> *(1) A restricted-use credit agreement is a regulated consumer credit agreement–*
>
> …
>
> *(b) to finance a transaction between the debtor and a person (the "supplier") other than the creditor, or*
>
> *(c) to refinance any existing indebtedness of the debtor's, whether to the creditor or another person,*
>
> *and "restricted-use credit" shall be construed accordingly.*

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Restricted use credit?

18. The first issue was whether the Facility provided restricted-use credit under s11(1)(b) (financing as argued by Mr and Mrs Collins) or under s11(1)(c) of the Act (refinancing as per Consolidated's case).

19. It was conceded by Consolidated that clauses 1.1 and 2.1 were (if literally construed) circular and meaningless.

20. Consolidated faced a further hurdle in that the same clause in a materially similar agreement had been reviewed by the Court of Appeal in *Consolidated Finance Ltd v McCluskey* [2012] EWCA Civ 1325. In that case, Arden LJ had held that clause 2.1 did not provide for restricted-use credit as no term as to restriction could be implied.

21. Sir Stanley Burnton agreed with Arden LJ *in McCluskey* but – for different reasons – nonetheless held (at para 44) that for the purposes of the appeal he was prepared to accept that the credit was advanced for a restricted use, namely to pay Protection for its services under the Service Agreement. In so doing, he held that the language of the Facility had gone wrong and was clearly nonsensical and that in such circumstances, following *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, the correct approach was to consider whether the parties intended the loan monies to be used for a restricted use. In order to construe the Facility, the Court considered all the relevant contemporaneous documentation, antecedent communications and the knowledge of the parties.

Financing or refinancing

22. The next and crucial issue was whether Consolidated had merely financed the Service Agreement or whether it was refinancing it.

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23. The Court held (at para 50) that, on its true construction, the Facility refinanced the Service Agreement. The reasoning was this: upon the annulment of the bankruptcy order, Mr and Mrs Collins became liable to pay Protection for their services. In that instant of success Protection was entitled to be paid. However, it was only after this point that Consolidated received the Facility and the legal charge. Thus, Consolidated did not advance the loan monies to Mr and Mrs Collins to fund the services under the Service Agreement as those services had already been rendered and the obligation to pay had accrued. Consolidated was therefore not financing but refinancing the Service Agreement.

24. The point was made at para 49:

> *"Section 11 draws a distinction between the financing of a transaction and the refinancing of an existing indebtedness. If a transaction under which money is to be earned by a creditor and paid by a consumer has been completed so as to create an indebtedness on the part of the consumer, at that point any third party financing to be used to satisfy that indebtedness is to refinance that indebtedness. On the other hand, if the transaction has not yet taken place, a restricted-use credit agreement will be one to finance the transaction."*

CONCLUSIONS

25. It followed that since the Facility was a refinancing agreement, it fell within s11(1)(c) of the Act and not, as Consolidated had argued, s11(1)(b). It therefore fell outwith the scope of article 3(1)(a)(i) of the Exempt Agreements Order and was regulated. Since there had been no service of a s87(1) notice, the Facility could not be enforced in these claims and the appeals were granted. Further, even if a s87(1) notice were to be served prior to fresh proceedings, since there had been no attempt to comply with the formality requirements of Part V of the Act, the Facility was improperly

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executed and unenforceable without the permission of the Court under s127 of the Act.

26. In final remarks, Sir Stanley Burnton expressed concerns about the involvement of LF. He noted that they acted both for Consolidated and Mr and Mrs Collins and that in their engagement letter they purported to exclude any duty to advise as to the appropriateness of the loan and legal charge. His Lordship was of the *obiter* view that LF must have known that the transactions were manifestly to the disadvantage of their clients Mr and Mrs Collins and ordinarily should have advised them of such. He queried whether the exclusion in the retainer was sufficient to oust the duty to advise. Further, given LF's on-going relationship with Protection and Consolidated, LF may well have had an irreconcilable conflict of interests.

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