Enquiry of the month

Claimant agrees to set aside their judgment and charging order due to non-compliance with post – contractual information requirements under the Consumer Credit Act 1974

In this month's Enquiry of the Month, we will look at an enquiry and resulting success story from Chris Bone, Money Advice Caseworker from Citizens Advice Sunderland (CAS).

The client had a credit card which fell into arrears and default around 2011. The debt was sold to a large debt purchaser (the claimant) in 2014 who then issued a County Court claim. Judgment in default was entered in 2015 which was enforced via a charging order about 6 months later. The client was paying £30 pcm towards the CCJ although not under an installment order. The balance outstanding was £1,578.

The claimant sent a letter to the client dated December 2017 referring to the original creditor's non-compliance with the post-contractual information requirements under the Consumer Credit Act 1974 (CCA 1974). Specifically, their failure to supply the debtor with a compliant statutory notice of sums in arrears (SNOSIA) when required under s86C of the CCA 1974. For more information see the SDAS aresource 'Checking Post Contractual Information Compliance under the Consumer Credit Act 1974' and the accompanying webinar on the IMA website in the Resources Directory which sits under Network and Information Sharing section.

The claimant's letter acknowledged the sanction for non-compliance provided under s86D(4) CCA 1974 (i.e. that interest and default sums must not be charged during the period of non- compliance) by confirming a refund of the same**.** However, it was silent on the additional sanction under s86D(2) and (3), namely that where there is non-compliance with the duty under s86C to provide a compliant SNOSIA)' *the creditor or owner shall not be entitled to enforce the agreement during the period of non-compliance*. In this case the original creditor nor the claimant had served a compliant SNOSIA so the period of non-compliance was still running.

Chris enquired as to whether an application could be made to set aside the CCJ and charging order based on this unenforceability and whether the case *Madison CF v*

Various [2018] EWHC 2786 (Ch) (Madison) provided authority in support of such a challenge. This case is unfortunately not publicly available, but a summary is provided in the December 2018 SDAS ebulletin. If readers would like a copy of the full judgment, please submit an enquiry through the usual channels.

We advised that the client had a strong application to set aside the judgment on discretionary grounds under Civil Procedure Rule (CPR) 13.3 (1)(b) as it is arguable there is some other good reason why the judgment should be set aside. If the judgment were set aside, this would also have the effect of setting aside the charging order CPR 70.6 unless the court ordered otherwise.

In *Madison* a creditor had applied to set aside multiple default judgments it had obtained, the enforcement of which it acknowledged were invalid due to non-compliance with the post-contractual information provisions in the CCA 1974 in respect of the underlying agreements. This was held to be a good reason to set the judgments aside. This approach was also approved of by the Financial Conduct Authority (FCA) (see para 51 of the judgment).

It is notable that the court in *Madison* also granted some applications to set aside judgments which were entered upon admission as well those entered upon default. Applications for setting aside judgments made on admission are made under CPR 3.1 (7) which gives power '*to vary or revoke final orders*'. The bar for success is much higher than for default judgments. The authoritative legal commentary text on the CPR, *The White Book 2020* confirms at para 3.1.17 that CPR 3.1 (7) should only be exercisable in *'exceptional circumstances'* and cites the decision in *Madison* as of only 3 established instances in caselaw where this test was met.

In deciding whether to set aside a default judgment the court must have regard to the promptness of the application under CPR 13.3 (2). This could potentially be a significant hurdle for the client given judgment was entered 5 years ago. However, usefully, *Madison* also held that, despite the promptness consideration not being met due to a delay of two years, the 'exceptional circumstances' in that particular case which included the unlawful enforcement of agreements, justified setting aside the default judgments despite the delay (paras 26 –28).

We advised that the '*exceptional circumstances*' referred to in *Madison* as justification for setting aside judgments, even where the promptness test is not met, arguably apply by analogy in the client's case. The claimant should not be permitted to enforce where there are aware (effectively evidenced by implication in their letter of December 2017) that it is not lawful to do so.

We agreed that if it were necessary, we would assist CAS to draft the application to set aside the original judgment and charging order but that it would be appropriate to try negotiation first. We drafted a letter on behalf of CAS and the client with reference to the above arguments, requesting that the claimant makes an application to set aside the default judgment and the charging order enforcing it on the basis under s86D (3) CCA1974 the judgment had been unlawfully entered.

The letter stated that if the claimant refused to make the application our client would do so himself with assistance from SCA and SDAS. In this event he would request that the court makes an order as to costs on the same basis as that in the *Madison* case i.e. that the court orders the claimant to pay the costs of the application and £25 to the defendant considering the judgment in default (see paras 54 –57 of that judgment).

Success!

Following receipt of our letter the claimant responded in writing to confirm that they would apply to set aside their judgment and charging order and that this decision was supported by the *Madison* judgment. They confirmed that the client need make no further payments and that the account would be closed. They also apologised for their error (confirming they would be contacting the client to apologise personally) and offered him £250 in compensation.

What about the £30 per month payments?

Following this success Chris enquired as to whether the client could claim back the £30 per month payments which he had been making regularly despite the unenforceability of the agreement. Unfortunately, the client is very unlikely to any have a legal right to ask for these payments to be refunded for the following reasons.

In *McGuffick v RBS* [2009] EWHC 2386 (Comm) the High Court held that amongst other things, '*demanding payment from the borrower'*, does not amount to 'enforcement' for the purposes of s65 CCA 1974 which provides '*An improperly-executed regulated agreement is enforceable against the debtor or hirer on an order of the court only.'*
In addition, the legal text *Goode: Consumer Credit Law and Practice* (Issue 64, November 2020) when discussing the case *NRAM Plc v McAdam & Anor* [2014] EWHC 4174 (Comm) [2015] EWCA Civ 751 at paragraph [23.20] acknowledges that the sanction regarding interest and charges in S77A (6):*"is in terms purely defensive and makes no provision for recovery of payments made"*.

Goode goes on to state that it may be arguable that payments made following a creditor's non-compliance with s77A are recoverable via the "*restitutionary remedy of recovery of payments made under a mistake of fact and/or law although this might fall foul of the principle that payments made under an agreement rendered unenforceable under, say, CCA 1974, s 65 are irrecoverable because unenforceability does not equate to the agreement being void."*

We concluded that this position would also apply by analogy to s86D (4) which mirrors s77A.

However, whilst the client is unlikely to have a viable legal claim to recover the money, he could make a complaint on the basis that it was not fair or reasonable for the original creditor and claimant to continue to take payments where they knew (or should have known) that the agreement was unenforceable and that the subsequent enforcement action that they had taken was unlawful. If not upheld this complaint could be escalated to the Financial Ombudsman Service (FOS). However, it should be noted that FOS has refused to uphold at least two similar complaints despite acknowledging non-compliance with these CCA 1974 provisions; on the basis that the debtors had the benefit of the borrowing and were likely roughly aware of the state of their accounts.