In CFL Finance Ltd v Bass & Others [2019] EWHC 1839 (Ch) Chief ICC Judge Briggs held that a settlement agreement was not regulated by the Consumer Credit Act 1974 ("CCA").

Alex Cunliffe

Background

In November 2010, CFL Finance Ltd ("CFL") sued Moises Gertner ("MG") on a personal guarantee, compromising on terms that MG pay £2m by instalments. On a failure to make payments, the settlement provided that the claimed sum would be payable.

When CFL attempted to enforce, MG argued the agreement was CCA regulated and unenforceable as a result. The Judge disagreed.

Comment

s.9(1) CCA provides that "credit" includes any form of financial accommodation. MG's case was that the settlement's provisions for instalment payments was credit, following *Dimond v Lovell* [2000] 1 QB 216, where the court held "*if payment … is deferred after the time when, if nothing about the time for payment had been agreed, the payment would be due, the payer is giving credit*". *Dimond* was distinguished on the basis that the times for payment were agreed and no sums were therefore due until then. This is to misunderstand *Dimond*, and to redefine credit in a way excluding all current CCA agreements. Instead, the court should have looked to place a hypothetical usual time for repayment on this agreement. By contrast with a contract for the purchase of goods, under a settlement agreement, the time for payment is bound up in the reasons for settling and is unique.

In *Holyoake v Candy [2017] EWHC 3397 (Ch),* a loan was rescheduled on multiple occasions, each agreement to do so being therefore CCA regulated. The court distinguished *Holyoake* on the basis that the original contract there was a loan, not a personal guarantee. However, the nature of the underlying obligation which creates the indebtedness is irrelevant to whether time is then given for payment. Given the court found that MG had implicitly accepted his debt by the nature of the terms, it is difficult to see how this could be thought to be anything but a refinancing under s.11(1)(c) CCA.

Conclusion

This would be a welcome decision, since the *Holyoake* position creates numerous pitfalls when settling agreements. However, the basis of the decision is clearly shaky, and I would not be surprised if it were appealed.

Open justice: Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK) [2019] UKSC 38

Dominic Bright

How much of the written material placed before the court in a civil action should be accessible to people who are not parties to the proceedings?

"extent and operation of the principle of open justice"

The President of the Supreme Court rightly stated that this case is "about the extent and operation of the principle of open justice". There were three issues:

1. does a court rule – allowing the court to supply documents to a non-party from court records – prescribe the power to order access to all documents that have been filed, lodged, or held at court;
2. is access to court documents governed solely by the court rules, or is there an inherent power; and
3. if there is such a power, how should it be exercised?

Purposes of running a justice system v open justice

On the first issue, Lady Hale found that "records of the court" means "those documents and records which the court itself keeps for its own purposes." These "are completely different from the purposes for which non-parties may properly be given access to court documents." Accordingly, "current practice in relation to what is kept in the records of the court cannot determine the scope of the court's power to order access to case materials".

Inherent power to order access to all court documents

Lady Hale opined on the inherent power to order access to all court documents:

> "There can be no doubt at all that the court rules are not exhaustive of the circumstances in which non-parties may be given access to court documents. They are a minimum and of course it is for a person seeking to persuade the court to allow access outside the rules to show a good case for doing so."

The Supreme Court was in agreement that "there should be no doubt about the principles. The question in any particular case should be about how they are to be applied."

How the principles are to be applied

First, "to enable public scrutiny of the way in which courts decide cases – to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly." Second, "to enable the public to understand how the justice system works and why decisions are taken." To do so, the public must be able to understand the issues, evidence, and submissions.

As much of this is reduced into writing before the hearing takes place: "It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material." This does not mean that the public at large have a right of access because "although the court has the power to allow access, in general the applicant has no right to be granted it." It is for an applicant to explain why he seeks it, and why it is that allowing the application will advance the principle of open justice.

Good reasons for dismissing the application include: 1) "national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality"; 2) "practicalities and the proportionality"; and 3) that it is an application for "disclosure of a marked up bundle without the consent of the person holding it".

"consultative process in which all the interests are represented"

The bodies responsible for framing the court rules were enjoined "to give consideration to the questions of principle and practice raised by this case." This includes "the extent of any continuing obligation of the parties to co-operate with the court in furthering the open justice principle once the proceedings are over". The appropriate forum for resolving these issues is not the highest court in the land, it is "a consultative process in which all the interests are represented".

Commercial: Re-trial for inadequately reasoned findings at first instance: Simetra Global Assets v Ikon Finance Limited [2019] EWCA Civ 1413

David Sawtell

"There is nothing wrong with a shortcut, provided you don't get lost." Unfortunately, in this instance, the first instance judge erred in taking too many. This led the Court of Appeal in *Simetra Global Assets v Ikon Finance Limited* [2019] EWCA Civ 1413 ordering the re-trial of a matter that had already lasted 13 days in the Commercial Court. The reasoning given by Males LJ, giving the only substantive judgment in the Court of Appeal, throws a great deal of light on the test for the adequacy of reasons in judgments.

Robin Knowles J had handed down a 13 page, 75-paragraph judgment ([2018] EWHC 2624 (Comm)). In it, he resolved to cut through what he described evidentially as a "very confused and incomplete picture' at [1]; in so doing, he stated that he would "not address disputes of fact where in my judgment they lead nowhere in determining whether the Claimants are entitled to what they claim from those parties." The Court of Appeal held that he had gone far too far in cutting down the issues.

Males LJ, at [46], summarised a number of authorities on giving adequate reasons into four propositions:

1.) While succinctness is desirable in a judgment, short judgments must be careful judgments.
2.) It is not necessary to deal expressly with every point. A judge must, however, say enough to show that care has been taken and the evidence, as a whole, has been properly considered.

3.) The best way to demonstrates this is to utilise "the building blocks of the reasoned judicial process": identify the issues, marshall the evidence on those issues, and give reasons as to why the principally relevant evidence is either accepted or rejected.

4.) A judge must deal with apparently compelling evidence (where it exists) which is contrary to his or her conclusion and explain why it is not accepted. In *Simetra*, the judge strikingly did not analyse contemporary and apparently important documents ([49]).

This case is a useful yardstick to hold up to first instance judgments when considering whether or not to appeal them for failing to deal with the issues before the court.