Commercial: COMPROMISE: settlement agreement regulated by the Consumer Credit Act 1974

Winston Jacob

Can a settlement agreement be a regulated agreement under the Consumer Credit Act 1974? Yes, depending on the circumstances, said the Court of Appeal in *CFL Finance v Laser Trust* [2021] EWCA Civ 228.

A claim for sums due under a guarantee was settled by way of a Tomlin Order. The schedule to the Order required the guarantor ("G") to make a number of payments to the claimant ("CFL"), in default of which the total sum claimed would become payable. G defaulted in payment and CFL sought to enforce the agreement. G argued that the settlement agreement was a regulated agreement under the Consumer Credit Act 1974 ("CCA") and unenforceable.

The Court of Appeal held that there was no reason in principle why the CCA could not apply to an agreement set out in the schedule to a Tomlin Order. Such an agreement was a contract. Provided it involved the provision of "credit", the CCA could apply to it.

The term "credit" extended to refinancing transactions, whether or not the original indebtedness was CCA regulated. However, mere forbearance would not attract the CCA. The Court of Appeal identified the following circumstances where the CCA would or would not apply to a settlement agreement:

(i) It would not apply where the creditor allowed the debtor time to pay for no consideration (for these purposes, a debtor giving up a defence he believes lacks a fair chance of success provides no consideration).
(ii) It would not apply where the debtor disputed the original claim in its entirety on substantial grounds, provided there is no question of the settlement agreement defeating the application of the CCA to the original claim.
(iii) It would apply if the debtor admitted that he was indebted to the creditor and they entered into an agreement under which, for consideration, the creditor agreed to accept payment by instalments.
(iv) It might apply where, although the debtor denied any liability, the defence lacked substance, and the debtor provided consideration.

The present case fell within the fourth category. The Court of Appeal considered that there must come a point where the existence of the debt was sufficiently clear that an agreement providing for future payment would confer "credit" regardless of whether the debtor denied that anything was due. It declined to decide where the dividing line lies. However, on the facts, there was both a compelling case for saying that G's defence had no real prospect of success and a very real possibility that G did not himself believe it to have a fair chance of success. That being so, there was a genuine triable issue as to whether the settlement agreement provided him with "credit" within the meaning of the CCA and was an unenforceable credit agreement.

Personal Injury & Part 36: Seabrook v Adam [2021] EWCA Civ 382

Dominic Bright

Can causation be contested when liability is admitted?

Facts

In a personal injury claim for two heads of loss (neck and back injury), breach was admitted, and causation was denied. The claimant made two similar, but not identical, Part 36 offers. Both were to

accept 90 percent of the claim for damages, and interest to be assessed, on the basis that liability was admitted.

Judgment was entered and damages were awarded.

Issues

First, were the offers genuine attempts to settle? Secondly, did the claimant better them, despite the fact that nothing was awarded for one head of loss (back injury), albeit 100 percent was awarded for the other?

Procedural history

The District Judge held that they were not genuine offers to settle. The Circuit Judge dismissed the appeal, on the basis that the defendant bettered the offers, because liability was limited to damage for only one head of loss.

Discussion

If a Part 36 offer relates to the whole claim, on acceptance the claim will be stayed. If it relates to only part of the claim, on acceptance the claim will be stayed as to that part.

For negligence, a duty of care must be owed, breached, and cause damage of a kind which is recoverable. Then, the court will determine the remedy, if it is not agreed.

In a claim for negligence, denial of causation is a bar to judgment.

Part 36 offers must be interpreted in light of both the particular words used and the pleadings. In the instant case, "primary liability" was admitted. Causation was denied. For two reasons, the offers addressed *both* liability and causation, and related to *both* heads of loss.

First, if they were concerned only with liability in the sense of breach, which was already conceded, they could not have been genuine attempts to settle.

Secondly, neither offer referred to a separate head of loss, so "the claim for damages" meant "the claim in its entirety". A defendant is not merely "liable in tort". He must be "liable for something".

Conclusion

Had an offer been accepted, liability would have been admitted for *both* heads of loss. Then, it would be unarguable that causation in respect of one head of loss had not been proved. There was liability for only one head of loss, so the defendant bettered both offers.

As Asplin LJ concluded (with whom Males and Lewison LJJ agreed):

> "In order to avoid the kind of dispute which has arisen here, especially in a low value claim, it is important to make express reference in the Part 36 offer to whether the offer relates to the whole claim or part of it and/or the precise issue to which it relates … In particular, if the issue to be settled is 'liability', it would be sensible to make clear whether the defendant is being invited only to admit a breach of duty, or if the admission is intended to go further, what damage the defendant is being invited to accept was caused by the breach of duty."

Employment: Claimant's English nationalism found not to be a political belief worthy of protection under the Equality Act 2010

Oscar Davies

In *Thomas v Surrey and Borders Partnership NHS Foundation Trust and Ors* (ET 2304056/2018), a judgment handed down on 19 February 2021, it was held that a claimant, Mr Thomas, who held English nationalism as a political belief, could not rely on that belief as a protected characteristic under the Equality Act 2010 ("**EA 2010**") to protect him from discrimination at work.

Mr Thomas had worked at an NHS trust in 2018. His job was terminated on 24 July 2018, for what he believed to be based on a colleague finding out about his English nationalism. He did not mention his political beliefs at work once.

Mr Thomas then brought a number of claims, including discrimination, on the basis of his political belief. The matter was considered as a preliminary issue and that is what the judgment determined.

The tenor of the Claimant's argument was that, in accordance with the ECtHR case of *Redfearn v United Kingdom* [2013] IRLR 51 (ECtHR), one is entitled to rely upon their political beliefs even if they may "offend, shock or disturb" given that we live in a pluralistic society with varying interests. Mr Thomas did not want to incite violence onto others and thus no Convention rights would be infringed. In addition, the Claimant argued that given the European Convention rights operate from individuals against (emanations of) the State, those rights could not then be used against the Claimant, an individual, by the First Respondent, an NHS trust.

The Respondents' argument was based on *Grainger plc v Nicholson* [2010] ICR 360, following the 'Grainger criteria' of what may be a belief worthy of protected under the EA 2010. In particular, the Respondent argued that the Claimant's belief did not pass the fifth criterion, which states that the belief "*it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others.*"

The judge held that ultimately the fifth of the Grainger criterion was not fulfilled, and that Mr Thomas's anti-Islamic views were not compatible with a democratic society. The judge stated "I was exercised by the meaning of the requirement not to conflict with the fundamental rights of others in the third limb of the fifth criterion" [103]. The judge took into account the potential for discrimination by the claimant against other members at work because of his political belief. These possible infringements "took him outside of the right to complain that he had been discriminated against in relation to those beliefs in the circumstances covered by the Equality Act 2010".

Mr Thomas's case was therefore dismissed, depriving him of his right to bring a claim against his former employer on the basis of his political belief.

The case is currently on appeal.

Setting Aside Default Judgement: How Prompt do you need to be?

Adam Swirsky

It is now well established that, on an application to set aside a default judgment, in addition to the specific grounds set out in CPR 13, the court must also have regard to the three-stage test in **Denton v TH White Ltd [2014] EWCA Civ 906**. The specific requirements of CPR Part 13.3 are that the defendant must show that they have a real prospect of successfully defending the claim or that there is some other good reason why the judgment should be set aside or varied. Importantly, the court must also have regard to whether the person seeking to set aside the judgment made an application to do so promptly.

The question as to whether or not the application has been made promptly can be problematic. All cases are, of course, decided on their own facts but past decisions are often difficult to reconcile. In **Barons Bridging Finance Plc v Nnadiekwe [2012] EWHC 2817 (Comm)** the court set aside a judgment entered several years earlier because there were very serious conflicts of evidence between the parties and the defendant alleged that she was the victim of fraud. At the other end of the spectrum, in **Hart Investments Ltd v Fidler [2006] EWHC 2857 (TCC)** the judge concluded that a delay of 59 days was "very much at the outer edge of what could possibly be acceptable" whilst in **Regency Rolls Ltd. v. Murat Carnall [2000] EWCA (Civ) 379** Simon Brown LJ thought that 30 days was altogether too long a delay (although this was not a set aside case).

In the recent case of **Points of View v Erre DB Group SA [2021] 2 WLUK 70** the court formed the view that 26 days was too long. Whilst accepting that the defendant had established that its defence had a real prospect of success, the court decided that, because the defendant had not to engaged with the court process, there was no excuse for its failure to follow the procedural rules and, despite being made just 26 days after finding out about the judgment, the application to set aside had not been made promptly and was too late.

The moral? Don't ignore litigation and don't take the risk of having to make an application to set aside judgment.