Santander UK Plc v Harrison & Harrison [2013] EWHC 199 (QB)

By Jonathan Lewis

The capitalisation of mortgage payment arrears was not regulated by the Consumer Credit Act 1974 ("CCA") where it did not amount to "credit in the form of a cash loan" but was the mere restructuring of an existing agreement by allowing more time to pay without making new funds available.

FACTUAL BACKGROUND

1. In 2006, the bank granted a loan to Mr and Mrs Harrison under its standard mortgage conditions and secured by way of a first charge over the property. When they fell into arrears, the bank proposed capitalising the arrears by adding them to the capital balance and increasing the monthly instalments. The Harrisons accepted this proposal but soon fell into arrears again and the bank brought a claim for possession against them.

THE BORROWERS' ARGUMENT

2. The Harrisons sought (in effect) to convert their original mortgage agreement which was not regulated by the CCA into an agreement which was so regulated. Their argument involved the following steps:

   a. The original mortgage agreement and the later capitalisation were not regulated under the Financial Services and Markets Act 2000 because less than 40% of the property was used used as a dwelling. Further, the agreement was not regulated by the CCA because the amount loaned exceeed £25,000.

b. As the £25,000 has now been removed, the loan agreement is capable of being regulated by the CCA.

c. The capitalisation was a "*modifying agreement*" under s.82(2) CCA because, even though the removal of the £25,000 limit applied only to <u>new</u> agreements, and transitional provisions in the Consumer Credit Act 2006 (Commencement No. 4 and Transitional Provisions) Order 2008 stipulated that that the limit did not apply to <u>variations</u> of existing agreements, article 4(1) provided an exception. By article 4(1), where part of the variation was to provide "*credit in the form of a cash loan*", then the new agreement (here the capitalisation agreement) fell to be considered a modifying agreement within s.82

d. The capitalisation of the arrears amounted to credit in the form of the cash loan, consequently the agreement was regulated by the CCA.

CREDIT IN THE FORM OF A CASH LOAN

3. Males J noted that the bank could either capitalise the arrears pursuant to the express powers contained in its standard conditions without seeking the consent of the borrowers or it could do so consentually. In this case there was an agreement to the capitalisation of the arrears and a consequent increase in the monthly instalments (at [17]).

4. Section 82(2) provides as follows:

> (2) Where an agreement (a 'modifying agreement') varies or supplements an earlier agreement, the modifying agreement shall for the purposes of this Act be treated as –
> (a) revoking the earlier agreement, and
> (b) containing provisions reproducing the combined effect of the two agreements, and obligations outstanding in relation to the

> earlier agreement shall accordingly be treated as outstanding instead in relation to the modifying agreement.

5. Males J held that, although the capitalisation agreement varied or supplemented the earlier loan agreement, the removal of the £25,000 financial limit was not to affect the agreement as varied unless the variation was an agreement under which credit in the form of a cash loan was provided (at [23]). He accepted that the capitalisation did amount to giving the borrowers credit (at [24]). However, that was insufficient to bring it within the exception: the credit had to be provided in "the form of a cash loan" (a phrase which is not defined it the CCA or the Order) (at [25]).

6. Males J reasoned that, whilst the provision of credit includes the making of a cash loan, the CCA recognises a distinction between a cash loan and other forms of financial accommodation, although the word "other" suggests that a cash loan is itself one form of financial accommodation (at [26]). This is in accordance with the ordinary meaning of these terms. Hence, he concluded that one form of financial accommodation is the giving of further time for payment of an existing debt – that would not normally be regarded as the provision of a cash loan.

7. He thus concluded that the mere restructuring of an existing agreement by allowing more time to pay without making new funds available did not constitute a "cash loan" for the purpose of Article 4(1). Rather, it amounted to the giving of a form of financial accommodation (at [30]). He gave two reasons for this conclusion. First, it accords with the natural meaning of the words and gives effect to the distinction between the provision of credit which takes the form of a cash loan and the provision of credit which does not (at [31]). Second, it would be startling if a routine deferral of an instalment under an unregulated credit agreement, even if valid and enforceable when made, could cause the whole agreement to

become unenforceable. That would be a trap to any such lender and could not have been intended.

CONCLUSION

8. Whilst issues as to the securitisation of the loan and as to whether there was an unfair relationship between the parties arose, they did not call for much discussion. Banks can breathe a sigh of relief following this decision knowing that borrowers will not be able to retrospectively convert non-regulated agreements into regulated agreements when mortgage arrears are capitalised.

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