Supreme Court hands down judgment in *Durkin v DSG Retail Limited and another*

By Hannah Curtain

On 26 March 2014 the Supreme Court handed down its decision in *Durkin v DSG Retail Limited and another*. The judgment in this long-running case addresses the issue of a consumer's right, in the context of a debtor-creditor-supplier agreement, to rescind the credit agreement on lawful rescission of the sale agreement.

BACKGROUND

1. Mr Durkin visited a PC World in Scotland (DSG, First Respondent in the proceedings) to buy a laptop with an inbuilt modem in 1998. A model was identified by an employee, but Mr Durkin was not allowed to check if it had an inbuilt modem. He agreed to purchase it on the understanding that if it did not have an inbuilt modem he could return it. He paid a £50 deposit, and signed a fixed-sum restricted-use DCS agreement with HFC Bank (Second Respondent in the proceedings) for the balance.

2. On discovering it did not have an inbuilt modem, Mr Durkin returned the laptop to PC World the next day seeking repayment of his deposit and cancellation of the credit agreement. PC World refused to accept Mr Durkin's rejection of the goods and did not cancel the credit agreement. Mr Durkin eventually recovered the £50 deposit in an out-of-court

settlement. However, he made no payments under the credit agreement and informed HFC that he had rescinded his contract with PC World.

3. HFC continued to demand payment by Mr Durkin under the credit agreement and ultimately went on to serve a default notice, as well as reporting Mr Durkin to certain credit reference agencies.

Mr Durkin's claim

4. In 2004, Mr Durkin sought declaratory relief in the sheriff court in Aberdeen that he had validly rescinded both the contract of supply and the credit agreement. He also claimed damages for (i) damage to his credit standing (ii) interest charges paid because he was unable to obtain credit on 0% balance transfer terms (hitherto, he had obtained credit to fund certain spending by serially transferring outstanding balances between credit cards) and (iii) loss caused by his inability to put down a 30% deposit on a property in Spain in 2003.

5. The claim was successful at first instance: the Sherriff found that Mr Durkin had the right to rescind both the supply and credit agreements, and had done so. This was pursuant to s.75(1) CCA, which provides:

> *"If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor."*

6. The Sherriff followed *UDT v. Taylor* 1980 SLT (Sh Ct) 28 in finding that Mr Durkin had the right to rescind the credit agreement as a *"like claim"* against the creditor, vis-à-vis his right to rescind the contract with the supplier. He was awarded £8,000 for injury to his credit standing, £6,990

for extra interest paid and £101,794 for the loss of a capital gain on the Spanish property. Further, HFC was in breach of its duty of care to Mr Durkin, such breach having caused the latter two claimed losses.

Appeal to the Court of Session

7. Mr Durkin appealed quantum and HFC cross-appealed against the declaratory relief. The Court of Session dismissed the appeal on quantum and allowed HFC's appeal, holding that section 75 did not allow Mr Durkin to rescind the credit agreement: this was not a *"like claim."* Further, absent evidence of the enquiries that ought reasonably to have been made, HFC did not breach a duty of care by reporting Mr Durkin's default to credit reference agencies.

8. Mr Durkin appealed to the Supreme Court.

THE JUDGMENT – SUMMARY

9. The Supreme Court has given judgment in favour of Mr Durkin (Lord Hodge giving the leading judgment, with which Lady Hale, Lord Wilson, Lord Sumption and Lord Reed agreed).

10. Interestingly, this was not on the basis of Mr Durkin's arguments as to the meaning and effect of s.75: the Supreme Court considered that the Court of Session had been correct to hold that s.75 did not confer a right on Mr Durkin to rescind the credit agreement, if he did not have any such right under the general law [19]. This was for five key reasons:

    a. Section 75 provides that a debtor who has a right of action against a supplier for misrepresentation or breach of the contract of supply, can sue the creditor for that misrepresentation or breach *of the supply contract* (emphasis added). There is concurrent liability for the supplier's breach [19].

b. Consistent with that concurrent primary liability is the principle that the supplier and creditor should be jointly and severally liable for the supplier's breach [19].

c. Also consistent with that concurrent primary liability, and the fact that the creditor may be sued for matters which he cannot control, is the creditor's entitlement to an indemnity from the supplier under section 75(2) [19].

d. This is further consistent with the views expressed by the Crowther Commitee in the Report of the Committee on Consumer Credit in 1971 (Cmnd 4596), which led to the 1974 Act [20].

e. Finally, section 75 also applies to a s.12(c) unrestricted-use credit agreement where the supplier introduces the debtor to a financial organisation in order to fund a supply transaction with him, but where the loan is paid to the debtor so that he is in fact free to use it for another purpose. In such cases, if the supply contract were rescinded and the purchase price repaid, the debtor would be free to use the borrowed money for other purposes: there is no need for a parallel right to rescind the finance agreement (provided this is not contrary to the terms of the credit agreement).

11. This was not however the end of the question. The Supreme Court went on to hold that Mr Durkin was entitled to rescind the credit agreement under a term implied by law [26].

12. In reaching this conclusion, Lord Hodge held that it is not consistent with the policy of the 1974 Act that the debtor in a case such as this should have to work out the consequences of the rescission of the supply contract by raising an action against the supplier for breach of contract, to include the loss he would incur in meeting his ongoing obligations under the credit agreement [22]. Rather, it is inherent in a debtor-creditor-supplier agreement that, if the supply transaction being financed is brought to an end by the debtor's acceptance of the supplier's repudiatory breach, the debtor

must repay the borrowed funds, which he recovers from the supplier. To reflect that reality, the law implies a term into such credit agreements that the credit agreement is conditional upon the survival of the supply agreement, thereby entitling the debtor on rejecting the goods and rescinding the supply contract, to rescind the credit agreement similarly on the basis of this implied condition [26].

13. The Supreme Court further found that HFC was in breach of a duty of care (in the Scottish delict claim) owed to Mr Durkin by reporting default to reference agencies without making sufficient enquiries about whether the credit agreement was rescinded [33].

14. The £8,000 claim for harm to Mr Durkin's credit standing was not challenged, and was therefore awarded, but Mr Durkin was prevented, by operation of s.32 Court of Session Act 1988 from pursuing his appeal against the findings of the Court of Session in relation to the other heads of his claim, in which he was therefore unsuccessful.

CONCLUSION

15. The Supreme Court's interpretation of section 75 is perhaps unsurprising: the imposition of joint and several liability upon creditors for suppliers' breaches of supply contracts cannot have been intended to create causes of action against the creditors that could not arise against the suppliers. No claim could be brought against the supplier for the rescission of the credit agreement. What is surprising is the implication of a term in reliance upon the fact that the credit had to be used to finance a particular transaction and the absence of any mention, when giving the Court's reasoning in relation to the implied term, of the existence of arrangements between supplier and creditor. It is hard to see why a creditor which lent for a specified purpose and imposed a contractual obligation on the borrower to use the loan for that purpose should lose the benefit of the

credit agreement if that purpose fell away but the borrower had had the money. Would, or should, the lender then be limited to recovering the principal plus such interest as the court, in its discretion, was prepared to award, as opposed to the contractual interest the borrower had agreed to pay? The Court was, however, only considering debtor-creditor-supplier agreements which do involve the arrangements between creditors and suppliers which justify the connected lender liability imposed by section 75.

16. The less radical route by which the Court afforded relief to Mr Durkin was through its finding that HFC was under a duty to investigate assertions made by a debtor that a supply contract had been rescinded, in order to be reasonably satisfied that money was owed under the credit agreement before reporting default to credit reference agencies.

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