

## Henderson Chambers Finance and Consumer Credit Group Alerter

### UNFAIR RELATIONSHIPS: PATEL V PATEL [2009] EWHC 3264 (QB)

The unfair relationships provisions of the Consumer Credit Act 1974 (ss 140A to 140D), which came into force on 6 April 2007 but apply to agreements whenever made, have now been considered in detail in the recent High Court case of *Patel v Patel* [2009] EWHC 3264 (QB). The claimant advanced sums totalling »56,450 to the defendant between 1979 and 1983 on terms which (as the Judge found) were varied in 1992 to provide for interest to accrue on the balance outstanding at that time (»207,465) at 20% per annum with monthly rests. The amount claimed at the issue of proceedings was »4,556,181; by the start of the trial the amount claimed had grown to over »6 million.

#### Limitation

The first question considered by the Judge was whether the defendants claim for relief under s. 140B was time-barred as a result of s.8 of the Limitation Act 1980, which provides that an action upon a specialty shall not be brought more than 12 years after the date on which the cause of action arose. The claimant relied upon *Rahman v Sterling Credit* [2001] 1 WLR 496 and *Nolan v Wright* [2009] 3 All ER 823, both of which concerned attempts to re-open extortionate credit bargains under s. 139 (1).

The Judge concluded that the claim for relief was not time-barred. He identified the critical question as 'What is the relevant date at which the fairness or otherwise of the relationship has to be determined?'. The answer was that, if the relationship between the creditor and the debtor has ended, the determination should be made as at the date when the relationship ended; and if the relationship is still ongoing (as it was in the present case), the determination should be made as at the time of trial. The result is that the debtors cause of action is a continuing one which accrues from day to day until the relevant relationship ends, and it follows that an application under s. 140B can be made at any time during the currency of the relationship arising out of a credit agreement, based on an allegation that the relationship is unfair to the debtor at the time when the application is made, or at any later time (as s. 140A(4) expressly permits) until the expiration of the applicable period of limitation after the relationship has ended.

#### Unfairness

The Judge concluded that the terms agreed in 1992 were unfair to the defendant at the time of the agreement, and became progressively more unfair to him thereafter. The reasons for regarding the terms as unfair were as follows:-

- (1) Unlike the original agreement, the 1992 agreement was no longer in any sense a joint venture in which the claimants return was linked to the profitability of the business.
- (2) By 1992, the business was no longer a risky start-up; it was an established business, trading profitably, and the risk to a lender was correspondingly less.
- (3) The claimant adduced no evidence to show that an interest rate of 20%, compounded monthly, was a reasonable commercial rate to charge a borrower in the defendants position in 1992. At the time of the agreement, the relevant bank base rate was 7%. An interest rate almost three times greater than the base rate was completely out of line with the terms of the original loans, and in the circumstances was exorbitant.

(4) As interest rates have fallen, the rate of 20% charged by the claimant became more and more exorbitant. The subsequent conduct of the claimant, and the way in which he exercised his rights under the agreement, very substantially increased the initial unfairness. The following matters were of particular significance:-

- (1) The claimant did not make any written record of the terms of the 1992 agreement until 2003. A formal written contract would have served as a memorial for the defendant, and made it clear that the agreement was one which the claimant might choose to enforce by taking legal action even many years later. The absence of a written record of the agreement made it easier for the defendant to believe, as the years went by and no steps were taken by the claimant to request repayment, that the agreed terms might not be enforced.
- (2) Although in 2003 the claimant did record the terms of the agreement in a document which (as the Judge found) the defendant signed, he did not provide the defendant with a copy of that document. Fairness to the defendant would, at the very least, have involved giving him a copy of the document.
- (3) Not once in 15 years after the 1992 agreement did the claimant provide the defendant with any calculation of the amount which he considered to be outstanding. In circumstances where interest on the loan was being charged at a very high rate and was being compounded monthly, it was a matter of basic fairness that the claimant should provide the defendant periodically with calculations of the amount claimed to be owing.
- (4) It was of equal or greater significance that outstanding sums were to be repaid only as and when requested by the claimant, and that between January 1993 and 2007 he only once requested any money to be paid to him; a sum of »20,000 in November 2001. The effect of this approach was to encourage the defendant not to pay the interest accruing on the loan and also to foster a not unreasonable hope that the claimant was not going to insist on payment in accordance with the terms agreed in 1992.
- (5) The claimant owed it to the defendant as a matter of elementary fairness to keep a proper record of his own of payments received, and not to depend on the defendant to provide this information and try to reconstruct it from bank statements and other old documents many years later.
- (6) Even when the claimant met the defendant in October 2007 to discuss repayment of the debt, he did not provide the defendant with any calculation of the amount said to be due, either before or at the meeting. This was not a transparent approach.

The above points had to be considered in the context of the personal relationship between the claimant and the defendant, in particular the fact that the defendant looked up to the claimant because of his greater education and achievements, leading to an imbalance in their relationship which increased as the defendant grew older.

The Judge concluded that, in the circumstances, it would not be fair to the defendant to require him to pay anything more than the sum which was agreed to be owing in 1992, namely »207,465, rather than the »6m which would otherwise have been due.

Andrew Davies of Henderson Chambers appeared for the defendant in *Patel v Patel*

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