Blackshaw v MFS Portfolio Ltd

No Substantial Judicial Treatment

Court
Chancery Division

Judgment Date
25 November 2016

Case No: CH/2015/0009

High Court of Justice Chancery Division

[2016] EWHC 3708 (Ch), 2016 WL 06903010

Before: Mr Justice Mann

Friday, 25 November 2016

Representation

Ms Blackshaw appeared in Person.
Mr Wheeler appeared on behalf of the Defendant.

Judgment

Mr Justice Mann:

1. This is an application for permission to appeal with the appeal to follow immediately afterwards, should permission be granted in relation to a decision of District Judge Hart given on 16 December 2014, in which she refused the application of Ms Blackshaw to annul the bankruptcy order effecting Ms Blackshaw which was made on 17 June 2014.

2. The history of this matter goes back a long way, to 1995 when Ms Blackshaw applied for a credit card with the Bank of Scotland Plc. There is a debt owing on that credit card. There have been at least two assignments of the debt or the right to claim in respect of the card. One from the Bank of Scotland Plc, which was the issuer, to MBNA Europe Bank Ltd, and then after proceedings had been issued in 2009, a further assignment to the petitioning creditor MFS Portfolio Limited.

3. There is a considerable history of proceedings in relation to this. MBNA, having had an assignment in about 2006, issued proceedings against Ms Blackshaw claiming approximately £7,000 in September 2009. A default judgment was entered on 28 September 2009 in the sum of £7,528.18. Thereafter, a charging order was obtained over Ms Blackshaw's property. The debt then having been assigned, MFS, notwithstanding the charging order, the benefit of which having presumably been assigned to MFS, served a statutory demand for £7,789.18 being the judgment sum together with interest. There was no application to set aside that statutory demand, nor at that stage was any attempt made to challenge the judgment in default.

4. The statutory demand not having been complied with, MFS presented its petition on 1 August 2013. A notice of opposition was filed and there were fairly lengthy proceedings during which evidence was exchanged. There was a substantive hearing at which the notice of opposition that Mr Blackshaw had filed was considered and dismissed, as it happens, by the same District Judge.

5. An opportunity was given to Ms Blackshaw to put forward proposals to settle the debt, but she made no proposals and in due course, at a hearing on 17 June 2014, the bankruptcy order was made. There was no appeal from that, but within a month, on 7 July 2014, Ms Blackshaw made her application to annul.

6. At around the same time, she also made an application to set aside the judgment in default, but that was withdrawn on the basis, as Ms Blackshaw apparently told the District Judge, that she had come to the conclusion she lacked locus as a bankrupt to pursue the application.

7. Eventually the application came on before the District Judge and she made an order refusing the annulment. It is from that order that Ms Blackshaw seeks to appeal.

8. Ms Blackshaw has made considerable and extensive complaints about the way in which information about the claim has, and often has not, been produced by the petitioning creditor and it would seem, at first sight, that in terms of less than prompt behaviour, some of those complaints have justification. However, at the end of the day, there is nothing arising out of those complaints which, in my view, goes to the questions which arise on this appeal.

9. The questions which arise on this appeal have been distilled with the help of Ms Blackshaw to two essential points. First, were the necessary formalities for the entry into the consumer credit agreement when the credit card was taken out been complied with? If they have not, then it is common ground that the debt is incapable of enforcement. Second, Ms Blackshaw seeks to raise a question over the validity and compliance with formalities of a notice of default which is a necessary precursor to any enforcement of the loan. If the notice of default is invalid or does not comply, then a further court order would have been necessary before enforcement and it is common ground that no such order was obtained. If Ms Blackshaw wins on either head, then it would follow that the loan on the credit card would be unenforceable, the judgment ought to fall away and so ought the petition. Mr Thomas Wheeler who appears for the respondent in this case does not contend otherwise.

10. Those two points were placed before and considered by the District Judge in her judgment. The first point is dealt with under the heading, "Compliance with the Consumer Credit Act, 1974 ". The essence of the point which arose was this. Ms Blackshaw was trying to get to the bottom of what terms, if any, she had signed up to and can be seen to have signed up to. Under section 61 of the Consumer Credit Act, a regulated agreement such as that which she has said to have entered into, is not properly executed unless:

> "(a) A document in the prescribed form self-containing all the prescribed terms and conforming to regulations under section 60(1) is signed in the prescribed manner both by the debtor or hirer and by or on behalf of the creditor or owner, and
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> (b) The document embodies all of the terms of the agreement, other than implied terms, and
>
> (c) The document is, when presented or sent to the debtor or hirer of the signature, in such a state that all its terms are readily legible."

11. The point which arises in this case is whether the detailed terms of the agreement which are said to have formed part of the agreement ever actually did so. After a number of requests and very late in the proceedings, MFS managed to produce, presumably via MBNA, a print of a microfiche of the application form pursuant to which it is said that the credit card was granted. They had previously produced an application form relating to a different credit card, but the proceedings in the

County Court apparently referred to the correct application by number and ostensibly referred to the application for the loan pursuant for the application form which was produced.

12. As the District Judge observed, that application form is largely illegible. It is in small print and the small print has not survived the microfishing or, at least, it has not survived the printout from the microfiche. What one can see, however, and what the District Judge was satisfied about was that both parties signed that application form.

13. That, however, is not necessarily enough. Under the section which I have read, the signature of Ms Blackshaw must have been sufficient in its placing and the terms of the document to amount to a subscription to the full terms of the agreement to which she was subscribing. It is common ground that behind the one page of the application form which has been produced, there must have been some other terms pursuant to which the bank considers the loan to have been granted.

14. Those terms have not been made available. There is a more recent edition of the terms which, it is claimed, were added by permitted amendment, but the original terms were not produced by MFS when challenged and Ms Blackshaw says that she does not have them, and I think her case is that she did not receive them. She does, however, accept that she received subsequent variations. There therefore arises a question of whether those terms were properly subscribed to by Ms Blackshaw. If they were not, then there is a contravention of section 51 and the effect of that under section 127 is that the loan is unenforceable.

15. The District Judge had before her the issue as to whether and, if so, what terms were part of the agreement, although it does not appear that there was a clear articulation in terms before her of the question of whether there was a signature which actively subscribed. She made her findings in paragraph 12 of her judgment. In paragraphs 10 and 11 she set out the relevant statutory provisions and their effect, and then turned to the facts. She said this:

> "(12) The original agreement is now produced to the extent that I have available a copy of a microfiche of the application form for the credit card. It is, as is often the way the way with reproduction from microfiche, barely legible. It was produced to Ms Blackshaw as a result of the 'subject access request' ('SAR') which she made on 15 May 2014. It is not suggested by her that this is not the correct application form. It appears to have been signed by her and it also appears to have been signed on behalf of the Bank of Scotland. The agreement that was produced by the petitioning creditor earlier in the proceedings is now admitted to be the wrong agreement. It relates to Ms Blackshaw but under a completely different account number. However, I am satisfied having seen a transcript of the hearing at which the bankruptcy order was made on 17 June 2014 that that was a matter which was drawn to my attention at that time and I decided that it was not a good reason not to make a bankruptcy order."

16. I should interpose by way of explanation that what was drawn to her attention at the time of making the original bankruptcy order was not first the wrong form and then the correct form, but merely the fact that the wrong form was in front of her. The District Judge then goes on in her judgment to say this:

> "(13) I am also satisfied as a result of the Court of Appeal's decision in HSBC v Brophy that a signed application form in the nature of the one now produced amounts to an application for credit, and it is an offer by the consumer to be bound by the terms and conditions, and the counter-signing by the bank amounts to an acceptance, and therefore the signed form is an executed agreement.
>
> (14) The only problem, therefore, for the creditor is that the microfiche does not have with it a copy of the terms and conditions supplied at that stage. Ms Blackshaw says that she does not have them either, that at the time that she entered into this agreement she was a very reliable, if not obsessive keeper of records and that she would have taken a copy.

The question is therefore, firstly, whether it matters that the terms are not part of the agreement or with the agreement and secondly, whether it is sufficient for me at this stage to conclude that this agreement is unenforceable. The well-known authority of Carey v HSBC which concerns a point under section 78 of the Consumer Credit Act makes it clear that it is acceptable for creditors to rely on reconstructions.

(15) The court has to consider these matters in the context of the age of the agreement and in the context of a number of assignments that have occurred. This is an agreement that was subject to not simply one assignment but two, and it is also an agreement that is some 20 years old. I am not, therefore, persuaded that the absence of the original terms and conditions at this stage is sufficient to form the basis for an annulment. The fact that Ms Blackshaw does not have them is not any real evidence that they were missing in 1995. In the context of a standardised credit card agreement, it is very unlikely that the terms and conditions were not supplied. It is also very unlikely that Ms Blackshaw would have entered into such an agreement without any terms and conditions.

(16) Further, there is evidence that she subsequently received various amendments to terms and conditions. In all of those circumstances, I do not consider that the point is sufficient to assist her today. If the matter had been raised either in response to the County Court proceedings in 2009 or by way of an application to set aside the statutory demand, then they might, conceivably, have constituted arguable points. However, there is a judgment in place against Ms Blackshaw and in order to go behind that judgment, I would have to conclude that there was some form, 'miscarriage of judgment, collusion or fraud'. Raising the absence of a copy of the terms and conditions more [than] 20 years after the event is simply insufficient to persuade me that I ought to go behind the judgment in default."

17. Thus the District Judge seems to have been satisfied that terms and conditions existed and were supplied to Ms Blackshaw. What she does not deal with is whether they were actually subscribed to by Ms Blackshaw by her signature.

18. Ms Blackshaw says that the failure to supply the terms demonstrates that the terms were not supplied. If they were not supplied, then there was non-compliance with section 61 and the loan is unenforceable as a result of section 127 . She says that the lender has still not supplied evidence of the terms behind it.

19. One cannot pretend that the position is wholly satisfactory, and one would expect a lender to be able, if called upon to do so, formally to prove the loan. To produce an illegible microfiche is, in some circumstances, not going to be sufficient. However, the District Judge considered the matter and considered that on the balance of probabilities the terms are likely to have been provided. She no doubt relied on the evidence and no doubt had consistent experience of how these things worked or were said to work in practice. It seems to me that so far as she made express findings, they were findings which were open to her and which, subject to the subscription by signature point, are going to be fatal to the prospects of any appeal launched by Ms Blackshaw. It is not enough for Ms Blackshaw simply to say "Well, they have not produced the terms, therefore, there cannot have been any". There are many possible reasons why the terms have not been produced. One can imagine, although there was no explanation, that each and every bit of microfiching does not contain the terms which go behind it. That would multiply every bit of record-keeping by however many pages the standard terms and conditions of the day existed in. It is understandable that microfiching would only be of the basic agreement, although it can certainly be said that a lender who expects to have to enforce an agreement should do rather better in keeping records than Bank of Scotland, MNBA and MFS seems to have managed between them in this case.

20. Nonetheless, so far she made findings about the likelihood of the existence of terms and conditions, the District Judge was entitled to come to the decision which she did and it is not a decision with which this court should interfere on an appeal.

21. The remaining question, however, is whether or not it should be found that Ms Blackshaw did actually subscribe with her signature to the terms and conditions. Mr Wheeler accepted that that was something which was important. It was not

sufficient simply that terms and conditions existed. They must be linked to the signature of Ms Blackshaw so that she can be said to have subscribed to them by her signature for the purposes of section 61 . The District Judge made no finding about that.

22. However, in my view, looking at the terms of her judgment, it is implicit that she considered it was likely that the application form contained words of subscription. It is common experience that such terms exist in standard form agreements and as Mr Wheeler submitted, it is unlikely that the Bank of Scotland got that wrong and there was no cross-reference to the terms and conditions. If they had got it wrong and there was no such reference, one would have expected cases of some notoriety to have arisen by now because it would have been well-known, and various debtors would no doubt have sought to take advantage of the point. So far as I know and as far as is reflected in the judgment, that had not happened.

23. In the circumstances, it seems to me that the implied finding of a subscription of signature arrived at by the District Judge was a justifiable one and, again, one with which this court should not interfere on an appeal.

24. It therefore follows that Ms Blackshaw fails in her first point in seeking to establish that there were no relevant terms and conditions and that there was no compliance with section 65 opening up a challenge available to her under section 127 .

25. The second point which she takes is in relation to a notice of default which is required by the Act before any enforcement of the agreement can take place, absent a court order permitting enforcement.

26. When a challenge about the notice of default was first raised, MFS produced a reconstituted notice of default. It seems they did that by taking a form of notice of default and possibly cross-referring to some internal record which suggested that at the date of the notice of default, which was 7 July 2009, about £1,210.83 and some form of arrears were outstanding. The reason that is said is that the reconstituted notice of default refers to a breach and requires receipt of a payment of that amount with a current account balance of £7,122.44 owing.

27. By the time of the hearing, however, Ms Blackshaw had managed to do better than the lender because she had found and produced the original notice of default served on her. That then took the place in the proceedings of the reconstituted notice of default. Ms Blackshaw makes the failure to produce a correct version of the notice of default one of her complaints about the failure to produce documents which seems to have taken place from time to time on the part of MFS. That is a justifiable complaint, but it is not one which avails her in the proceedings. We, like the District Judge, are able to consider her case on the notice of default by reference to the real thing rather than a reconstruction.

28. The notice of default in its relevant parts read as follows. It is, as I have said, dated 7 July 2009. It has a box encouraging careful reading of the document and describes itself as a default notice served under section 87 of the 1974 Act. It sets out the number of the credit card agreement and goes on to say this:

> "We refer to the above agreement which you have entered into with us. You have repeatedly broken your agreement with us by failing to make your minimum payments. Paragraph 8(f) of your credit agreement provides that subject to sending you any notice required, you must immediately pay your whole balance if you repeatedly break this agreement and fail to sort the matter out. A stop has been placed on your card and a default has now been registered against this account at the Credit Reference Agencies.
>
> This statutory notice is to tell you that in order to remedy this breach, you must pay the full amount of your outstanding balance which is £7,122.44 by 24/07/2009."

The notice goes on to contain other information which is required by statutory instrument.

29. Ms Blackshaw's complaint about this notice is that it seeks the entire outstanding balance on the account when, in fact, the arrears which she says are demonstrated by the internal document to which I have referred were only £1,210.00-odd. Her complaint is based on the requirements of the Consumer Credit (Enforcement, Default of Termination Notice) Regulations 1989 (SI 1983/1561).

30. Those Regulations state what a notice of default has to contain and in schedule 2 paragraph 3 , the following specification is required:

"(3) A specification of,

(a) the provision of the agreement alleged to have been breached; and

(b) the nature of the alleged breach of the agreement, specifying clearly the matters complained of; and either

(c) if the breach is capable of remedy, what action is required to remedy it on the date, being a date [not less than 14 days] after the date of service of the notice before which action is to be taken; or

(d) if the breach is not capable of remedy, the sum (if any) required to be paid as compensation for the breach and the date, being a date not less than 14 days after the date of service of the notice, before which it is to be paid."

31. Ms Blackshaw's point is that the sum required to remedy the breach at the time was not the £7,000-odd sum referred to in the actual notice, but the amount of arrears of £1,210-odd to which I have already referred. She says that the failure to specify the right sum for remedying the breach means that the notice of default is non-compliant.

32. The answer of MFS to that lies in the terms of the agreement. By the time this notice of agreement was served, the default provisions had been amended so that they read:

"Paying your balance.

(f) Subject to sending you any notice required, you, or your legal representatives, must immediately pay your whole balance (including all interest and charges and fees due). We may refuse to authorise further transactions if

- This agreement ends
- You fail to make a payment in full when it is due
- You break an important part of this agreement or repeatedly break this agreement and fail to sort the matter out.
- A bankruptcy order is made against you, or you make a voluntary arrangement with your creditor; or
- You die."

33. The case of MFS is that there had been repeated failures to pay the minimum sum due and that that entitled them to repayment on the whole, subject to the service of a notice, which requirement is fulfilled by the default notice itself. In those circumstances, MFS says that the amount required to remedy the breach was not £1,210.00-odd, assuming that that did amount to some form of arrears in a meaningful sense at the time, but the sum specified in the notice of £7,122.44. That, they say, is what is required to remedy the breach and therefore, the notice was compliant.

34. Ms Blackshaw, as I have indicated, disputes that, saying that that is not how the agreement worked, but she also relies on section 173 of the Act which prevents contracting out. It reads, so far as material,

> "173) Contracting out forbidden
>
> (1) A term contained in a regulated agreement or linked transaction, or in any other agreement relating to an actual or perspective regulated agreement or linked transaction, is void, if and to the extent that, it is inconsistent with a provision for the protection of the debtor or hirer or his relative or any surety contained in this Act or in any regulation made under this Act."

35. She submits that clause 8(f) in the form in which I have read it amounts to some sort of impermissible contracting out and that MFS is somehow not entitled to rely on it.

36. The District Judge dealt with these arguments in paragraphs 17 and 18 and dismissed them. She records the argument about the arrears and the amount necessary to pay the balance and says this in paragraph 17;

> "(17) However, the default notice refers specifically to clause 8 of the terms and conditions that then applied and Ms Blackshaw has produced those particular terms and conditions and that satisfies me that they do, indeed, provide a power for the creditor to ask for the repayment of the entirety of the balance owed in such circumstances.
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> (18) I have also considered schedule 2 of the Consumer Credit (Enforcement Default and Termination Notice) Regulations 1983 and sections 87 and 88 of the CCA, and I cannot see that the default notice does not fully comply. I am therefore not satisfied that there is anything to criticise in the default notice."

37. I find myself in full agreement with the District Judge. Ms Blackshaw, I am afraid, misunderstands the way in which the default provisions operate. If by the time the default notice is served circumstances have arisen which entitle the lender to recover not merely sums which might be regarded as arrears, by which I assume is meant accumulated minimum payments, but also the whole of the sum, then they are entitled to claim that sum, and the sum to require to remedy the breach for non-payment of that sum is the payment of the whole sum due. The bank is not confined, at that stage, to claiming merely the amount of arrears if it has an accrued contractual right to have the whole of the sum. Accordingly, that part of Ms Blackshaw's argument fails. It depends on the terms of the agreement.

38. So far as her answer to that is said to lie in section 173 , I am afraid that does not avail her either. I do not think there is any inconsistency between the terms of condition 8(f) and any provision of the Act, whether those to which she refers to or otherwise, which makes 8(f) an impermissible contracting out. The terms of the agreement are the terms of the agreement and there is nothing in any of the provisions to which Ms Blackshaw has taken me which prevent the bank entering into an

agreement on the terms of paragraph 8(4) or enforcing it in due course. Accordingly, I agree with the District Judge and what she says in paragraph 18 of her judgment.

39. It follows therefore that those two limbs of Ms Blackshaw's argument fail.

40. I mentioned briefly Ms Blackshaw's reference to the conduct of MFS and their solicitors. As I have indicated, it may well be that they were tardy, if not highly inefficient, in producing documents which ought to have been produced and in producing the wrong document in these circumstances, and in terms of producing the wrong form of signed application their conduct amounts to virtually the unforgivable. They really ought to be able to produce documents which are necessary to constitute their cause of action when called upon to do so, and certainly they ought not to be producing the wrong documents. They ought to have spotted that.

41. I have sympathy with the frustration which Ms Blackshaw must feel in relation to all those matters, but they do not, of themselves, give her a ground of appeal. If either of her main grounds had succeeded, she would not need those arguments, but those arguments failing, the inefficient conduct of the other side in litigation is not sufficient to give her a right to get the bankruptcy annulled.

42. The court can annul a bankruptcy order under section 282(1)(a) of the Insolvency Act, 1986 , if (amongst other circumstances):

"It at any time appears to the court-…

(a) that on any grounds existing at the time the order was made, the order not to have been made."

43. I am afraid that despite the best and courteous efforts of Ms Blackshaw to convince me otherwise, I completely unconvinced that the grounds on which she relies are any grounds for supposing that the bankruptcy order should not have been made or, more pertinently (because this is an appeal) that there is any ground for challenging the determination of the District Judge.

44. It follows, therefore, that Ms Blackshaw's appeal fails. The only question is whether it should fail the permission to appeal stage or whether I should grant permission and then dismiss the appeal.

45. It seems to me that having heard the arguments on this point and clarification as to the basis of the appeal having been obtained, the right course is to say this appeal never had a real prospect of success and therefore to dismiss her application for permission to appeal. Either way, Ms Blackshaw will, as she understands, fail on this hearing today.