Case No: 1QC52520

IN THE SHEFFIELD COUNTY COURT

The Law Courts
50 West Bar
Sheffield, S3 8PH

Date: Wednesday, 30th November, 2011

Before:

DISTRICT JUDGE HILL

- -

Between:

HFO CAPITAL LIMITED

Claimant

- and -

MICHAEL BURNEY

Defendant

- -
- -

NOT PRESENTLY KNOWN for the Claimant
THE DEFENDANT appeared in person

- -

Approved Judgment

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DISTRICT JUDGE HILL:

1. It is agreed in this case that in August 2004 Mr. Burney entered into a credit card agreement with Barclays Bank trading as Barclaycard, That agreement was a regulated Consumer Act agreement. It is common ground that he fell behind with payments in the course of 2005 and 2006, that is to say he was unable to make the minimum payments required under the agreement and it fell into arrears.

2. What is first of all a little surprising in this case is that it does not appear that Barclaycard took action. Some statements of account are exhibited in this case in the Claimant's bundle. They show a balance and the final statement (page 27 of the exhibit bundle) of £1,072.62. The date of that is 21st March 2007. Nothing more recent is produced in the way of statements. All goes quiet, surprisingly, until February of this year when Mr. Burney received a warrant through the post, two separate notices from this Claimant, purporting to be on one hand a notice of assignment of a debt to them, the debt being what he owed on that credit card, and a notice purporting to be a default notice under the Consumer Credit Act in relation to that account. Within a month proceedings were issued in relation to that debt. The figure contained on the last page (page 27 in the bundle of exhibits in the Claimant's witness statement) does not in fact coincide with the amount which the proceedings were apparently issued to recover, aside of course from interest and costs.

3. That is the background. Mr. Burney challenges the claim on a number of grounds. First of all, I have to examine the issue of whether there has been a valid assignment of rights under the original agreement from Barclaycard to the Claimant. It needs to be said that there is confusion potentially with regard to the name of the Claimant, which is HFO Capital Limited, because there is another company with exactly the same title. The other company was a company registered in the Cayman Islands, and I will refer to it simply as "Cayman". The Claimant company, having the same name, is registered in the Republic of Ireland. I will call that "Ireland" or "the Claimant".

4. There have been two purported assignments in this case on which the Claimant relies for its title to pursue this claim. Some information is given about these transactions in the witness statement of an employee of the solicitors acting on behalf of the Claimant. I have no direct witness evidence at all from the Claimant or its employees directly or from the associated company Cayman, or indeed from Barclaycard. The witness statement from the solicitors exhibits a copy of an agreement. It bears the date 20th November 2006. It is said to be the agreement under which Barclaycard sold this account to Cayman. Yet the witness statement itself says that the date of that assignment was in fact 6th November 2007. I cannot reconcile the two dates. Perhaps more significantly is then a gap in the evidence in relation to whether in fact Mr. Burney's account with Barclaycard was one of those perhaps many thousands of such accounts included in that sale to Cayman, because the agreement exhibited is just a general agreement providing a framework for such sale. It refers to the terms of an offer as if an offer is a separate document or perhaps series of documents, but nothing more is produced.

5. The Claimant filed in August of this year a skeleton argument for use at the first hearing which was aborted. In that skeleton the Claimant's solicitors acknowledge effectively this evidential gap. It is not the first time that reference is made to awaiting a letter from Barclaycard to provide verification that this account relation to

Mr. Burney was indeed part of the accounts sold on to Cayman. No such letter has been produced by the Claimant. That is now acknowledged in the skeleton argument. That skeleton goes on to seek to get round that, but I have to say that in my view there was no merit in the way that skeleton seeks to argue on behalf of the Claimant to escape this particular evidential problem.

6. There are other aspects to the paperwork in this case which cause me concern. It is a case in which I feel I must be satisfied on all counts that the case is made out. It is simply not satisfactory for the Claimant's skeleton argument to say on balance of probability there was an assignment. Either there was or there was not. Either it can be shown by documentation or direct evidence from the contracting parties, Barclaycard on the one hand, perhaps Cayman on the other. But, no, there is no such evidence. Irrespective of potential additional evidence to which Mr. Burney at a late stage in this hearing has referred, slightly to my surprise, emanating from Barclaycard, irrespective of that the onus in this case is on the Claimant to prove the case. Yes, of course the standard of proof in a civil case is balance of probability, but I do not have an essential ingredient in this case and in the general circumstances of the matter I cannot be satisfied that it is established that there was such an assignment to Cayman.

7. I am not going to stop there, although it might be convenient to do so. The next logical issue is the validity or otherwise of the notice of assignment which was served on Mr. Burney in February this year. It is common ground no notice of assignment was ever served by Cayman. I come to the second assignment, that is the one which was purportedly entered into between Cayman and the Claimant itself. There is a document, also exhibited by the Claimant's witness statement, called Intergroup Business Sale Agreement. It is dated 31st January 2008. It purports to be for the sale of an entire business. Most of the document is redacted. At face value that appears to deal with the issue of the second assignment, because there is no suggestion that only part of the business is being transferred. It appears to be the business lock, stock and barrel. So there would not be an exercise then in deciding which of the outstanding accounts might be transferred on and which not. So it is clearly an exercise that Barclaycard and Cayman had to carry out and on which there is no evidence.

8. I then go to the purported Notice of Assignment served in February on behalf of the Claimant itself. This is headed "Account Transfer to HFO Capital Ltd." It is an undated document. The lack of a date is perhaps slightly surprising but I think not by itself fatal. It gives information. It gives a correspondence address for the agent of the Claimant, the agent being HFO Services Ltd. It refers to Barclaycard as the original lender, which is correct. It says "first assignee, HFO Capital Ltd. (HFO Cayman). Current assignee, HFO Capital Ltd. (HFO Ireland)". It then gives the account number for the original agreement, original lender account number and a very long account number is then quoted. Unfortunately it appears not to correspond to the account number shown on those statements of account from Barclaycard up to page 27 in the exhibit bundle. The last digit is incorrect. Perhaps it is a typing error. Whatever the explanation, and it has not been spotted by the Claimant, it is a mistake. Dates of assignment are then quoted on this notice. "Date of assignment from original lender to Cayman, 6th November 2007". That corresponds to the date asserted in the witness statement from the solicitors that contradicts again the date on that document which is 20th November 2006, which is the only document that has

been produced as evidence of the assignment to Cayman. So that is at least inconsistent.

9. Mr. Burney has referred to some case law in relation to notices of assignment. It is at section P8 of his evidence bundle and he has quoted the case of *W. Harrison & Co. Ltd. v Burke and Anr.* [1956] 2 All E.R. 169, C.A. in front of, amongst others, Lord Denning. It is a very short headline title to the report. It is not a transcript, but it is talking about an assignment by a hire purchase company of a hire purchase agreement entered into by the particular defendant and of the notice given in writing under section 136 of the Law of Property Act 1925. It was held in that case by the Court of Appeal that the notice was bad because the date of the assignment was wrongly stated therein, and therefore the legal right to the debt under the hire purchase agreement had not been assigned effectually at law within section 136(1) of the 1925 Act. I consider that there are similar discrepancies in the purported notice of assignment purportedly served by HFO Capital Ltd. on Mr. Burney in February. I conclude again that they are prevented from pursuing at this time a claim because they have failed to serve an adequate notice of assignment.

10. Still not stopping, I am then asked to consider the issue of the default notice purportedly served at the same time in February by this Claimant on Mr. Burney. I have a copy of this document. It is dated 3rd February 2011. Mr. Burney says it does not comply with the requirements of the Consumer Credit Act. It is non-compliant for a number of reasons. Reference has to be made to the Consumer Credit Enforcement Default and Termination Notices Regulations 1983 as amended. The requirements of the legislation are contained principally in Schedule 2 to those Regulations. The notice is headed "Default Notice Served under Section 87(1) of the Consumer Credit Act 1974". So far so good. It identifies original creditor again as Barclaycard. It quotes original account number, but again there is a mistake in that number. It is exactly the same mistake as in the purported notice of assignment. It quotes a date of default on 22nd December 2006. Date of assignment, 6th November 2007 and again exactly the same point arises with regard to that date, which is not consistent with the date on the agreement adduced in evidence in the exhibit bundle of the Claimant's witness statement.

11. What of course is important with default notices is that they should clearly state the nature of the breach of the terms of agreement by the defendant and what is required of the defendant to remedy such breach if it can be remedied. Curiously, the skeleton argument from the Claimant in August argued that we do not have to consider a remedy because the agreement has already been terminated. But by their own concession there is no evidence of a default notice ever having been served on behalf of Barclaycard, no evidence at all that this credit agreement had ever been effectively terminated before. What was the purpose of trying to serve this Consumer Credit Act default notice in February of this year if in fact the exercise had already been completed previously? The notice goes on to quote an assigned balance figure of £1,106 which I mentioned already is not exactly the figure shown on the last statement of account at page 27 in the exhibit bundle. It also then goes on to take about "current balance, £1,722.72", quite a larger figure. It quotes a contractual interest rate of 17%. The notice goes on to talk about assignments in relation to HFO Capital Ltd. Cayman. One then has to read on for an explanation of the nature of the breach. It says then:

> "Terms of your agreement with Barclaycard required you to make minimum monthly payments and not to exceed your credit limit. You failed to do so and have therefore breached the agreement in both respects."

So that is a fairly terse statement of the nature of the breach. There is no detail offered as to the minimum monthly payment requirement or indeed as to the credit limit itself.

12. Then in bolder type it states this:

> "If you cannot afford to pay the balance in full you must send us a down payment equivalent to 40% of the balance outstanding within fourteen days of receipt of this letter and enter into a monthly arrangement to pay the remaining balance."

It is not I think immediately clear exactly what is required in this respect to remedy the breach. What is the balance which is to be paid with fourteen days or the extent of the balance within fourteen days? Is it the assigned balance or is it the current balance? It does not state that. It is argued that perhaps this is something which would be reasonably obvious to Mr. Burney or any other reasonable person in his situation. I have to say that there is ambiguity in this notice in that respect.

13. There is then a warning in upper case letters which reads:

> "IF YOU COMPLY WITH YOUR OBLIGATIONS BY 24 FEBRUARY 2011 NO FURTHER ENFORCEMENT ACTION WILL BE TAKEN IN RESPECT OF THE BREACH"

What is meant by "your obligations"? Turning to Schedule 2 of the Regulations it is made clear in paragraph 4 that a notice in upper case lettering is required in specific language, and it is set out in Schedule 2 quite precisely these are the words which are to be used. It says:

> "In the following form if the action required by this notice is taken before the date shown no further enforcement action will be taken in respect of the breach."

Those words are not in fact used. Instead we have a slightly ambiguous reference to "if you comply with your obligations". It seems to me there is a breach in relation to Schedule 2 in that particular respect.

14. It is argued that the breaches in relation to that default notice are just de minimis. I disagree about that. I think it is important that there is no ambiguity with regard to what is required to remedy a breach and no ambiguity at all about the nature of that breach. Two balance figures are provided. It is not clear exactly which one is the subject of the demand for payment of at least 40% within fourteen days or by some other date. I do not think that that is de minimis.

15. It is also argued that notwithstanding such technical breaches of the default notice, if the Defendant cannot show any prejudice then the notice nevertheless should be allowed to stand and the Claimant should be allowed to proceed with the action. First of all, it does seem to me inherently prejudicial if a notice is defective in more than just de minimis fashion. Mr. Burney points out that service of a default notice means an adverse credit report with a consequential adverse credit rating. It might be suggested perhaps he already had some adverse information on his credit rating because he had been in arrears with this agreement back in 2005 and 2006. Perhaps his argument on prejudice cannot be taken too far, but nevertheless I consider this to be more than de minimis and I am of the view that this default notice is not valid, which means the Claimant has to start again. That of course is if it can fill in the evidential gap and indeed demonstrate that there is a valid assignment from which it can itself derive title to this particular claim.

16. One or two other issues have been raised in the course of the paper work in this case which I do not propose to deal with in any detail at all. Mr. Burney made reference to a request for information under section 78. I think to all intents and purposes that was complied with in any event. It was a late request long after the proceedings themselves were issued, and I think the reconstituted copy agreement seems to at least just about comply with the requirements of that section. There were further issues raised with regard to the conduct of this case by the Claimant or Cayman at a time when there was lacking a Consumer Credit Act licence from the OFT. But is conceded that at the time these proceedings were started until now that the Claimant itself at any rate had such a licence even though the records apparently call in question how much longer that licence may continue because of a note to the effect that consideration is being given to it being revoked. But so long as the licence is maintained it seems to me that no point can be taken in relation to that. The fact is that the agreement in question was made with Barclaycard in 2004. It was not made at any stage with either Cayman or Ireland. The argument is simply whether they took an assignment.

17. For those reasons therefore I am not satisfied this claim should be allowed to proceed, and I am going to dismiss the claim.

MR. BURNEY: Excuse me, sir. I do not know the correct protocol now, but I have incurred a small number of costs in attending to defend this claim. I have actually included this in my skeleton argument at paragraph 16 for some consideration. As an unemployed man and a new father, sir, the money that I have had to spend defending this case, well I just do not have it effectively. I feel that some sort of compensation is in order.

JUDGE HILL: If you are asking for costs then I have to be satisfied that there has been unreasonable conduct. We have had this hearing. I do not feel that it quite gets over the necessary threshold for that. So what I am prepared to consider simply is your out of pocket expenses for attending court. Have you got any expenses today?

MR. BURNEY: My expenses today, sir, the cost of the petrol to get here, the parking, the inevitable parking ticket which I would have received by now.

JUDGE HILL: How many miles will you have travelled?

MR. BURNEY: I will have travelled today 15 miles – no, 30 in total.

JUDGE HILL: I will award you £12 for that. The parking, you have at least paid for some parking even if you have overrun for that now. How much have you actually paid?

MR. BURNEY: Parking, £5, sir.

JUDGE HILL: So that is £17. You have not paid any court fees because of course it was not your claim to bring and there is no counterclaim. So that is that. Have you lost any earnings today or are you unemployed?

MR. BURNEY: I am unemployed, sir.

JUDGE HILL: So I have got £17. I think by the sound of it that is it, is it not.

MR. BURNEY: Fine, sir, yes.

JUDGE HILL: I am going to make an order for payment of £17 witness expenses in fourteen days.

THE CLAIMANT: Sir, I would argue against those costs. Clearly information which could have been provided far earlier was not in fact done so. Sir, you have heard today in fact some of the issues raised were contained in the skeleton argument which was received this morning and clearly had such evidence been put forward in a timely manner then such costs could have been avoided.

JUDGE HILL: Yes, but it is for the Claimant to prove its case. It was for the Claimant to bridge the gap in the evidence, which it itself acknowledged. I am afraid the onus is on that Claimant. That order is going to stand.

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