Neutral Citation Number: [2021] EWCA Civ 228

Case No: A2/2020/1029

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)
Mr Justice Marcus Smith
[2020] EWHC 1241 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2021

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE NEWEY
and
LORD JUSTICE POPPLEWELL

- -

Between:

CFL FINANCE LIMITED	**Appellant (Cross-Respondent)**
- and –	
(1) LASER TRUST	**Respondent (Cross-Appellant)**
(2) MOISES GERTNER	**Respondent**

- -
- -

Mr Jonathan Kirk QC, Mr Frederick Philpott and Mr Lee Finch (instructed by **Teacher Stern LLP**) for **Mr Gertner**
The other parties were not represented

Hearing date: 15 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Tuesday 23 February 2021 at 10:30am

Lord Justice Newey:

1. This appeal concerns a "Tomlin" order made to dispose of proceedings which CFL Finance Limited ("CFL") had brought against Mr Moises Gertner. It raises an important and difficult issue as to when, if ever, the Consumer Credit Act 1974 ("the CCA") applies to agreements settling litigation.

Basic facts

2. In 2008, CFL advanced £3.5 million to Lanza Holdings Limited ("Lanza") pursuant to a facility agreement dated 13 June 2008. Under the terms of the facility agreement, interest was payable at 2.25% per calendar month and the loan was conditional on Mr Gertner, whose family owned and/or controlled Lanza, guaranteeing Lanza's obligations to CFL. To that end, Mr Gertner entered into a guarantee dated 13 June 2008, clause 2.6 of which was in these terms:

> "This guarantee is a continuing guarantee and will extend to the ultimate balance of all of the debt … PROVIDED ALWAYS THAT the maximum amount recoverable under this Deed from the Guarantor shall not exceed the sum of £3,500,000 … plus all interest and costs thereon properly payable by the Borrower in accordance with the terms of the Facility Agreement."

3. Lanza having defaulted, CFL issued proceedings against Mr Gertner in November 2010. The particulars of claim asserted that Mr Gertner was liable under the guarantee for £1.7 million plus interest. About £1.8 million was said to be owed in respect of interest as at the date of the particulars of claim, with interest on the outstanding balance continuing to accrue on a compound basis at 2.25% per month.

4. Mr Gertner disputed CFL's claim in its entirety in a defence dated 15 July 2011. In the first place, Mr Gertner alleged that CFL's then chief executive officer had entered into the loan to Lanza without due authority and that, as a result, "the Loan is irrecoverable and cannot be demanded either from Lanza or from the Defendant". The following further defences were also put forward:

   i) Mr Gertner's liability under the guarantee was limited to £3.5 million by clause 2.6 and, since he had funded the £1.8 million payment with which Lanza had been credited, "[t]he balance … payable by the Defendant, if anything may not exceed the maximum sum of £1,700,000";

   ii) CFL's former chief executive officer had agreed with Mr Gertner that "in the event of any further monies were due and/or payable by Lanza and/or [Mr Gertner] to [CFL], such repayment would only take place at a time financially convenient to Lanza and/or [Mr Gertner] and in the event that Lanza and/or [Mr Gertner] were in serious financial difficulties, further payment, if any, would be postponed until such time as Lanza and/or [Mr Gertner] were able financially to make payment of such sum, if any, as was due". The agreement to this effect was in point as Lanza "was insolvent and without any funds and is unable to repay the Loan";

iii) It was agreed between CFL's former chief executive officer and Mr Gertner that a formal document required under Jewish law called a "Heter Iska" would be entered into and this was a condition precedent to the facility agreement and loan to Lanza. No Heter Iska having in fact been entered into, "interest in respect of the Loan is … not recoverable at all or from [Mr Gertner]";

iv) The interest which CFL sought to charge amounted to a penalty and/or an unfair credit transaction, in consequence of which "the Loan and Facility Letter should be set aside in their entirety".

5. On 5 August 2011, CFL applied for summary judgment against Mr Gertner, but on 26 September the litigation was settled by way of a Tomlin order. In accordance with usual practice, the order provided for all further proceedings to be stayed upon the terms set out in a schedule, save for the purposes of carrying those terms into effect. The schedule comprised a settlement agreement between CFL and Mr Gertner ("the Settlement Agreement") which provided as follows:

> "RECITALS
>
> (1) CFL is the Claimant in proceedings in the High Court of Justice Chancery Division the title and claim number of which is CFL Finance Limited (Claimant) v Mr Moises Gertner (Defendant) claim number HC10C03795 ('the Proceedings').
>
> (2) CFL claims the following sums from Mr Gertner in the Proceedings:
>
> (a) The capital sum of £1,700,000;
>
> (b) Simple interest at the rate of 2.25 per cent per month on £3,500,000 from 13 June 2008 to 23 September 2008;
>
> (c) Simple interest at the rate of 2.25 per cent per month on £1,700,000 from 24 September 2008 to 13 October 2008;
>
> (d) Compound interest on the outstanding balance at 2.5 per cent per month from 14 October 2008 to the date of payment.
>
> (3) The Parties wish to settle the Proceedings upon the terms set out in this Agreement.
>
> Payments
>
> 2. £2,000,000 shall be paid to CFL on the dates and on the terms set out below:
>
> (a) £325,000 on or before 26 October 2011; and

(b) £1,675,000 by 8 quarterly instalments of £209,375 each and commencing three months after the signing of this Agreement with such payments being made to CFL as follows:

(i) £209,375 on or before 26 December 2011

(ii) £209,375 on or before 26 March 2012

(iii) £209,375 on or before 26 June 2012

(iv) £209,375 on or before 26 September 2012

(v) £209,375 on or before 26 December 2012

(vi) £209,375 on or before 26 March 2013

(vii) £209,375 on or before 26 June 2013; and

(viii) £209,375 on or before 26 September 2013.

3. £50,000 shall be paid to CFL as a contribution towards its costs on the dates and on the terms set out below:

(a) £25,000 shall be credited to the client account of Mishcon de Reya, solicitors for CFL, on the signing of this Agreement; and

(b) £25,000 on or before 26 September 2013 such payment therefore being added to the final quarterly instalment due to CFL by Mr Gertner on or before 16 September 2013 as set out in paragraph 2(b)(viii) above.

…

Effect of payment defaults

5. If, in breach of paragraphs 2 and 3 above, the sums payable under paragraphs 2(a), 2(b) and 3(b) shall not be paid in cleared funds … by close of business on the dates identified in paragraphs 2(a), 2(b) and 3(b) or within seven days of the dates identified in paragraphs 2(a), 2(b) and 3(b) or if the sums payable under paragraph 3(a) shall not be paid in cleared funds to the client account of Mishcon de Reya on the date identified in paragraph 3(a):

5.1 the following sums claimed by CFL from Mr Gertner in the Proceedings shall become immediately due and owing from Mr Gertner to CFL:

> (a) The capital sum of £1,700,000;
>
> (b) Simple interest at the rate of 2.25 per cent per month on £3,500,000 from 13 June 2008 to 23 September 2008;
>
> (c) Simple interest at the rate of 2.25 per cent per month on £1,700,000 from 24 September 2008 to 13 October 2008;
>
> (d) Compound interest on the outstanding balance at 2.5 per cent per month from 14 October 2008 to the date of payment.
>
> …
>
> Consent order
>
> 6. The Parties agree to sign forthwith or cause their respective solicitors to sign a Tomlin Order…to stay the Proceedings against Mr Gertner and to co-operate in arranging to have the Order filed at the Court and sealed…."

6. Mr Gertner paid sums totalling just over £1.5 million under the Settlement Agreement, but he none the less failed to comply by any means fully with paragraph 2 with the result that paragraph 5 was applicable according to its terms.

7. On 11 September 2015, CFL served a statutory demand on Mr Gertner in which he was said to owe more than £11 million pursuant to the Settlement Agreement. On 6 October 2015, CFL presented a bankruptcy petition which eventually came on for hearing before Chief Insolvency and Companies Court Judge Briggs in June 2019. On 15 July 2019, Judge Briggs gave judgment in CFL's favour and made a bankruptcy order against Mr Gertner.

8. Judge Briggs' decision was appealed by both Mr Gertner and Laser Trust, a creditor of Mr Gertner which opposed his bankruptcy. The appeals were heard by Marcus Smith J and succeeded on the basis that the proceedings should have been stayed so as to allow a proposal for a voluntary arrangement to be considered by Mr Gertner's creditors. Paragraphs 1 and 2 of Marcus Smith J's order accordingly stated that the appeals were allowed "on the basis of Grounds 1, 2 and 3 of Mr Gertner's Grounds of Appeal" and "on the basis of Ground 1 of Laser Trust's Grounds of Appeal". The bankruptcy order against Mr Gertner was set aside and proceedings on the petition stayed pending further order.

9. However, Marcus Smith J, in his judgment of 22 May 2020, rejected arguments to the effect that the Settlement Agreement was unenforceable under the CCA. Ground 5 of Mr Gertner's grounds of appeal was to the effect that Judge Briggs had "wrongly determined that the [Settlement Agreement] did not provide credit (financial accommodation), for the purposes of Section 9(1) of the [CCA]". Marcus Smith J disagreed. He could "see no reason why the fact that a contractual agreement is

scheduled to a Tomlin order would cause the Consumer Credit Act to cease to apply if it otherwise did apply" (paragraph 66 of the judgment), but he concluded that there was no "provision of credit" such as would bring the Settlement Agreement within the scope of the CCA. The Settlement Agreement was not, therefore, regulated by the CCA.

10. CFL appealed against Marcus Smith J's decision and Mr Gertner cross-appealed. On 22 October 2020, however, Master Bancroft-Rimmer ordered CFL to provide security for Laser Trust's costs of its appeal by 5 November, failing which the appeal was to be struck out without further order. No security was in the event supplied, and an order was subsequently made without objection from CFL dismissing the bankruptcy petition against Mr Gertner. The hearing before us was therefore concerned exclusively with Mr Gertner's cross-appeal.

11. Mr Gertner was the only party represented at the hearing. That being so, Mr Jonathan Kirk QC, who appeared for Mr Gertner with Mr Frederick Philpott and Mr Lee Finch, took care to draw our attention to arguments which might have been advanced on CFL's behalf and I am very grateful to him and his team for their assistance. However, we have not, of course, had the advantage of hearing argument from advocates representing CFL.

The statutory framework

12. The CCA makes extensive use of the terms "consumer credit agreement" and "regulated agreement". Section 8(1) explains that a "consumer credit agreement" is "an agreement between an individual ('the debtor') and any other person ('the creditor') by which the creditor provides the debtor with credit of any amount" and during the material period section 8(2) provided for a consumer credit agreement to be a "regulated agreement" unless it was an "exempt agreement" under section 16, 16A, 16B or 16C. The only exemption that it is relevant to note for present purposes is that then conferred by section 16B, which related to agreements "entered into by the debtor or hirer wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by him" and under which a creditor was to provide credit exceeding £25,000 or a hirer was to make payments exceeding £25,000.

13. The meaning of "credit", a key term, is the subject of section 9 of the CCA. Section 9(1) states that "credit" "includes a cash loan, and any other form of financial accommodation".

14. Section 11 of the CCA divides regulated agreements into "restricted-use credit agreements" and "unrestricted-use credit agreements". By section 11(1), a "restricted-use credit agreement" is:

> "a regulated consumer credit agreement—
>
> (a) to finance a transaction between the debtor and the creditor, whether forming part of that agreement or not, or
>
> (b) to finance a transaction between the debtor and a person (the 'supplier') other than the creditor, or

> (c) to refinance any existing indebtedness of the debtor's, whether to the creditor or another person,
>
> and *'restricted-use credit'* shall be construed accordingly".

"Finance" is defined in section 189 to mean "to finance wholly or partly", and an example of a restricted-use credit agreement is given as example 13 in schedule 2, which section 188 stipulates is to have effect for illustrating the use of terminology employed in the Act. Example 13 reads as follows:

> "*Facts*. Q, a debt-adjuster, agrees to pay off debts owed by R (an individual) to various moneylenders. For this purpose the agreement provides for the making of a loan by Q to R in return for R's agreeing to repay the loan by instalments with interest. The loan money is not paid over to R but retained by Q and used to pay off the moneylenders.
>
> *Analysis*. This is an agreement to refinance existing indebtedness of the debtor's, and if the loan by Q does not exceed £5,000 is a restricted-use credit agreement falling within section 11(1)(c)."

15. Different species of "restricted-use credit agreements" and "unrestricted-use credit agreements" are termed either "debtor-creditor-supplier agreements" or "debtor-creditor agreements" by sections 12 and 13 of the CCA. Section 13 provides:

> "A debtor-creditor agreement is a regulated consumer credit agreement being—
>
> (a) a restricted-use credit agreement which falls within section 11(1)(b) but is not made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier, or
>
> (b) a restricted-use credit agreement which falls within section 11(1)(c), or
>
> (c) an unrestricted-use credit agreement which is not made by the creditor under pre-existing arrangements between himself and a person (the 'supplier') other than the debtor in the knowledge that the credit is to be used to finance a transaction between the debtor and the supplier."

16. As the law stood in 2011, section 21 of the CCA stated that a licence was required in order to carry on, among other things, a "consumer credit business". By section 40, a regulated agreement was not enforceable against the debtor by a person acting in the course of a consumer credit business if the person was not licensed. Further, a regulated agreement made by a creditor in the course of a consumer credit business at a time when he did not have a licence was enforceable against the debtor only if the Office of Fair Trading made an order under section 40(2). "Consumer credit business" meant, by section 189, "any business being carried on by a person so far as it

comprises or relates to (a) the provision of credit by him, or (b) otherwise his being a creditor, under regulated consumer credit agreements".

17. Sections 60-66 of the CCA deal with the making of regulated agreements. Sections 61-64 lay down requirements which must be satisfied for a regulated agreement to be properly executed, and section 65 states that an improperly-executed regulated agreement is enforceable against a debtor on an order of the Court only.

18. Part VI of the CCA, comprising sections 75-86, is concerned with "matters arising during currency of credit or hire agreements". At the relevant times, section 77A obliged the creditor under a regulated agreement for fixed-sum credit to give the debtor periodic statements and barred the creditor from enforcing the agreement during a period of non-compliance. Where a creditor under a regulated agreement fails to give the debtor notice of arrears in accordance with section 86B, enforcement against the debtor is likewise precluded during the period of non-compliance.

19. Section 140A of the CCA, making provision in respect of "unfair relationships between creditors and debtors", is not limited to regulated agreements but extends to "credit agreements" generally. By section 140C, a "credit agreement" is "any agreement between an individual (the 'debtor') and any other person (the 'creditor') by which the creditor provides the debtor with credit of any amount".

20. Section 173 of the CCA forbids contracting-out.

The judgment

21. It was Mr Gertner's case before both Judge Briggs and Marcus Smith J that the Settlement Agreement was unenforceable because it was a regulated agreement under the CCA. As Marcus Smith J explained in paragraph 56 of his judgment, Judge Briggs concluded that the CCA did not apply for two reasons:

> "(1) First, [Judge Briggs] held that there was no 'provision of credit' so as to bring the Settlement Agreement within the scope of the Consumer Credit Act.
>
> (2) Secondly, he held that because the Settlement Agreement was a compromise of differences, as a matter of public policy, it should not be gone behind. Related to this was a question as to whether – because the Settlement Agreement formed a part of the Tomlin Order – it was not an agreement within the meaning of the Consumer Credit Act."

22. Marcus Smith J took a different view from Judge Briggs on the second of these points. In that connection, Marcus Smith J said this:

> "65. The Consumer Credit Act applies to agreements and it appears to have been accepted by Mr Gertner before me that the Act would not apply to an order of the Court. However, Mr Gertner did not accept that because a compromise was attached to a Tomlin order that fact alone would cause a settlement

> otherwise subject to the Consumer Credit Act to cease to be so. In this, I consider Mr Gertner to be right.
>
> 66. Whilst a Tomlin order causes the proceedings between the parties to remain live for the purposes of enforcement of the settlement, the fact that a contractual settlement is appended to an order staying proceedings save for the purpose of carrying the terms of the settlement into effect does nothing to change the contractual nature of the compromise between the parties. The scheduled terms to a Tomlin order form, notwithstanding the related order of the court, a contractual agreement. I can see no reason why the fact that a contractual agreement is scheduled to a Tomlin order would cause the Consumer Credit Act to cease to apply if it otherwise did apply."

23. In contrast, Marcus Smith J agreed with Judge Briggs that the Settlement Agreement did not "provide [Mr Gertner] with credit" and, hence, that the CCA was inapplicable. The core of Marcus Smith J's reasoning can be seen from paragraph 61(5) of his judgment, in which he said this:

> "In this case, the effect of the Settlement Agreement was to dispose of CFL's claims against Mr Gertner under the guarantee and to replace them with a new (primary) obligation to pay the various sums set out in paragraph 7(3) above. There is nothing in the Settlement Agreement that involves the provision of any kind of credit or financial accommodation. All that has happened is that the parties have agreed to end the dispute between them on Mr Gertner's promise to pay money to CFL. In no sense has the obligation to pay under the guarantee (to the extent it existed) been deferred. Rather, that obligation has been extinguished, and replaced by another."

Marcus Smith J added the following in a footnote to the last sentence of this passage:

> "The position is exactly the same irrespective of the strength or weakness of CFL's claim under the guarantee. The Judge sought to draw certain inferences as to the parties' states of mind from the fact of the compromise (e.g., at [28] '…I infer it was expedient for [Mr Gertner] to seek a compromise…'; at [30]: '…I infer that CFL was confident that it would succeed in its claim…I also infer that CFL had good reason to be confident…'). I do not consider the parties' states of mind to be relevant at all. What matters is the effect of the compromise between them. In this case, this was to dispose of CFL's claims under the guarantee and replace them with a fresh promise under the Settlement Agreement."

24. Marcus Smith J went on in paragraph 62 of his judgment:

> "For this reason, the Judge was quite right to conclude that 'no credit was extended beyond the due date for payment'. That is

> exactly the case: there was simply a promise by Mr Gertner to pay money to CFL."

The issues

25. The appeal raises two main issues:

    i) Does the CCA apply to the schedule to a Tomlin order?

    ii) Did the Settlement Agreement provide Mr Gertner with "credit"?

Does the CCA apply to the schedule to a Tomlin order?

26. The CCA bites on agreements. Thus, under section 8 of the CCA a "regulated agreement" or any other "consumer credit agreement" requires, as the terms suggest, "an agreement between an individual … and any other person". That being so, it was common ground before Marcus Smith J that the CCA would not apply to terms simply embodied in a Court order, and Mr Kirk also accepted this before us. However, a Tomlin order involves a contract. As McCombe LJ explained in *Watson v Sadiq* [2013] EWCA Civ 822 at paragraphs 49-50, "the terms of the schedule to an order in *Tomlin* form amount to a contract between the parties" and the schedule "is not an order of the Court at all". In the same vein, Hamblen LJ observed in *Vanden Recycling Ltd v Kras Recycling BV* [2017] EWCA Civ 354, [2017] CP Rep 33 at paragraph 45, "a consent order is an order of the court whilst the scheduled terms to a Tomlin order are a contractual agreement". Although the order itself will be approved by the judge making it, the terms contained in the schedule "are not something for approval by a judge" and "are not ordered by the court and are not enforceable without a court order" (see the White Book at 40.6.2). On the face of it, therefore, there is nothing to prevent the Settlement Agreement being a "regulated agreement" if it involved the provision of "credit" to Mr Gertner by CFL.

27. Judge Briggs took a different view on the strength of an "essential character" test. Applying that test, Judge Briggs said in paragraph 35 of his judgment, the Settlement Agreement "which compromised proceedings for less than the sums claimed in those proceedings, without admission of liability, cannot be characterised as one 'for making loans'".

28. Judge Briggs derived the "essential character" test from *McMillan Williams v Range* [2004] EWCA Civ 294, [2004] 1 WLR 1858. That case concerned a contract under which the claimant firm of solicitors employed the defendant solicitor on a commission-only basis for "one-third of all [her] paid bills", but on the basis that she would be paid a "monthly advance" in anticipation of the commission that she was expected to earn. When the claimants brought proceedings to recover the difference between sums they had paid to the defendant by way of "advance" and the commission to which she had become entitled, the defendant countered that the contract provided for her to be given credit and so was unenforceable under the CCA. Rejecting that contention, Ward LJ, with whom Mantell and Jonathan Parker LJJ agreed, said in paragraph 23:

> "In summary, I see the essential nature of this contract to be one where payment is made in advance of services to be

> rendered and that does not involve the notion of giving credit. In any event it is impossible to say at the time when the contract is made whether [the defendant] would be the debtor or the creditor at the time when the calculation came to be made and thus one simply does not know whether at the moment the parties' obligations were crystallised she would in fact have been provided with credit."

Earlier in his judgment, Ward LJ had made the following comments:

i) "At the time this agreement was made it was not known whether there would be a surplus or a shortfall when the calculation came to be made at the end of two years or on the earlier termination of the agreement. Thus, as it seems to me, one was unable to tell at the material time whether the supply of the benefit, assuming the monthly advances to be such a benefit, attracted a contractual duty of repayment in money which was being significantly deferred. Unless there was a debt, there was no credit" (paragraph 16); and

ii) "Bearing in mind the need to decide at the time the contract is entered into whether it makes provision for credit or not, the approach of the court must, in my judgment, be to search for the essence of the contract. So one asks: is its essential character an arrangement for making loans or for paying remuneration? It seems to me plain that this is a contract, however unusually it may be drafted, providing for the terms upon which this young assistant solicitor was to be remunerated" (paragraph 20).

29. Judge Briggs considered that support for his approach was also to be found in paragraph 24.81 of Goode, "Consumer Credit Law and Practice", which reads:

> "Even if there is deferment of debt, the agreement is not one for the provision of credit where the deferment is not by way of financial accommodation and merely arises incidentally from the parties' accounting arrangements. It is well established that a transaction is not a loan transaction where the credit given is but a normal incident of a wider transaction not involving the lending of money. In the words of Lord MacDermott:
>
> > 'For example, a rent agent may have to pay rates and a solicitor may have to pay stamp duties for clients whose accounts are not in credit at the time of payment. But in the ordinary course of events I do not think it would occur to anyone, or be a correct use of language, to say that such disbursements were loans or made by way of loan.'
>
> The same reasoning would seem applicable in determining whether an agreement is for the provision of credit."

Having quoted from this passage, Judge Briggs said in paragraph 37 of his judgment:

> "The proceedings gave rise to a settlement. The settlement included the payment of an acknowledged debt. The payment

> of that debt was to be made by a date certain. It was, in my view, incidental to the settlement that the payment of the debt was structured over time certain."

30. Marcus Smith J differed from Judge Briggs on this aspect of the case, saying in paragraph 66 of his judgment that he could "see no reason why the fact that a contractual agreement is scheduled to a Tomlin order would cause the Consumer Credit Act to cease to apply if it otherwise did apply". I agree. There is no analogy with the rent agent or solicitor whom Lord MacDermott had in mind in the passage quoted in paragraph 24.81 of Goode, and, if the Settlement Agreement operated to defer debt, the deferment did not "merely [arise] incidentally from the parties' accounting arrangements". Neither, in my view, does it help to seek the "essential character" of the Settlement Agreement. If the Settlement Agreement provided "credit" within the meaning of the CCA, I do not see why the fact that it served to settle the proceedings CFL had brought against Mr Gertner should preclude application of the CCA. The present case is very different from *McMillan Williams v Range*, where it could not be said when the contract at issue was made whether the defendant would ultimately owe anything and the claimants' payments were sensibly seen as remuneration for services.

31. The key question, accordingly, is whether the Settlement Agreement involved the provision of "credit" to Mr Gertner by CFL.

Did the Settlement Agreement provide Mr Gertner with "credit"?

32. As already mentioned, by section 9(1) of the CCA "credit" "includes a cash loan, and any other form of financial accommodation".

33. Mr Gertner does not suggest that the Settlement Agreement provided for him to receive a "cash loan". It is his case, however, that the Settlement Agreement involved the provision to him of a "form of financial accommodation".

34. The "essence of credit", as is pointed out in paragraph 24.7 of Goode, "Consumer Credit Law and Practice", is debt deferment. As to when debt is regarded as deferred, Goode advances at paragraph 24.25 the general principle that "*debt is deferred, and credit extended, whenever the contract provides for the debtor to pay, or gives him the option to pay*, *later than the time at which payment would otherwise have been earned under the express or implied terms of the contract*". In *Dimond v Lovell* [2002] 1 AC 384, Sir Richard Scott V-C said in paragraph 57 of his judgment in the Court of Appeal that the principle propounded in Goode "correctly expresses the test for identifying 'credit' for the purposes of the Act of 1974". When the case reached the House of Lords, Lord Hobhouse commented at 405 that the Goode test "will not always be a satisfactory one to apply", going on to observe:

> "Many commercial agreements contain provisions which could be said to postpone (or advance) the time at which payment has to be made. Frequently, there will be reasons for this other than the provision of credit. Payment may be postponed as security for the performance of some other obligation by the creditor. Payments may be made in advance of performance in order to tie the paying party into the commercial venture. Payment

> provisions may like any other aspect of the transaction be part of its commercial structure for the division of risk, for the provision of security or simply the distribution of the commercial interest in the outcome of the transaction."

However, Lord Hoffmann, with whom Lords Browne-Wilkinson, Nicholls and Saville agreed in this respect, quoted the Goode formulation at 394 without voicing any disapproval of it before holding that the agreement at issue provided "credit" and so was a regulated agreement within the meaning of the CCA. In *Dimond v Lovell*, a person whose car had been damaged as a result of another's negligence hired a car while her own was being repaired on the basis that the hire company would have the conduct of any litigation necessary to recover damages in respect of the accident and payment of the hire charges would be postponed until any such claim had been concluded. Lord Hoffmann said at 395:

> "In my opinion there was no misuse of language when the contract described clause 5(i) as a credit facility. The only obligation of 1st Automotive [i.e. the hire company] under the agreement was to provide the vehicle. In the absence of credit, it would have been entitled to payment during or at the end of the hire. All the provisions about the pursuit of the claim were express or implied conditions that deferred the right to recover the hire and therefore constituted a granting of credit."

35. There is no doubt that the term "credit" extends to refinancing transactions. That is clear in the light of section 11(1)(c) of the CCA and example 13 in schedule 2, which show that an agreement "to refinance any existing indebtedness of the debtor's, whether to the creditor or another person" can be a "regulated consumer credit agreement" and a "restricted-use credit agreement". It is to be noted, moreover, that section 11(1)(c) refers to the refinancing of "*any* existing indebtedness" (emphasis added). It is not restricted to the refinancing of indebtedness within the scope of the CCA.

36. On the other hand, mere forbearance will not of itself attract the CCA. As noted above, a "consumer credit agreement" is an *agreement* by which credit is provided and so, for the CCA to apply, debt deferment must take place pursuant to an agreement. More than that, it seems to me that Goode must be correct when it states in paragraph 24.24 that, "Even if the supplier agrees to a delay in payment, there is no credit agreement unless he receives consideration for consenting to the delay, as by stipulating for interest". Absent consideration, a creditor's agreement to delay could not effect a contractual variation and would be binding on the creditor, if at all, only by way of promissory estoppel. That being so, it would seem to avail a debtor nothing to deny the enforceability of the agreement to delay: the contractual liabilities would remain. The upshot, in my view, is as stated in paragraph 24.24 of Goode:

> "[I]f a person allows delay in settlement of a debt without binding himself to grant time to the debtor, there is no agreement for credit. This is so whether the delay in the demand for payment arises from inadvertence or inactivity – as where the supplier is simply dilatory in sending out his accounts – or is an intentional indulgence, as where the supplier

> agrees to allow further time to pay or to accept payment by instalments. Only where this deferment is not just an indulgence but contractual is there an agreement for credit; and, again, to establish a contract it is necessary to show that the supplier received some consideration for agreeing to the delay."

37. A promise to forgo either a claim or a defence can, of course, constitute consideration (see e.g. Chitty on Contracts, 33rd. ed., at 4-048). The principle extends to the renunciation of a claim which was in fact invalid "so long as it was a 'reasonable claim' (i.e. one made on reasonable grounds) which was in good faith believed by the party forbearing to have at any rate a fair chance of success" (Chitty on Contracts, at 4-053). Thus, in *Cook v Wright* (1861) 1 B & S 559 Cockburn CJ, Wightman J and Blackburn J said at 569 that "unless there was a reasonable claim on the one side, which it was bonâ fide intended to pursue, there would be no ground for a compromise" and in *Callisher v Bischoffsheim* (1870) LR 5 QB 449, Cockburn CJ said at 452:

> "Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bonâ fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration."

Likewise, a defendant's abandonment of a defence advanced on reasonable grounds which he believed to have a fair chance of success must amount to consideration. Moreover, it can be seen from *Simantob v Shavleyan* [2019] EWCA Civ 1105 that forbearance of a defence that is later held to have had no real prospect of success under the test in *Swain v Hillman* [2001] 1 All ER 91 is capable of amounting to good consideration. On the other hand, the giving up by a defendant of a defence which he himself recognises to lack even a fair chance of success cannot of itself constitute consideration.

38. A further point is that there is authority indicating that there is no provision of "credit" if, at the time the relevant agreement is made, it is not known whether the "debtor" will ultimately owe anything. In *McMillan Williams v Range*, the Court of Appeal endorsed the principle stated in the headnote of *Nejad v City Index Ltd* [2001] GCCR 2461:

> "Where it is completely uncertain whether the arrangements between parties will give rise to a debt at all, there is no 'credit' merely because those arrangements postpone any obligation to pay until such time as the future possible indebtedness has crystallised."

As I have already mentioned, moreover, Ward LJ went on to say in paragraph 16 of his judgment:

> "At the time this agreement was made it was not known whether there would be a surplus or a shortfall when the calculation came to be made at the end of two years or on the earlier termination of the agreement. Thus, as it seems to me,

> one was unable to tell at the material time whether the supply of the benefit, assuming the monthly advances to be such a benefit, attracted a contractual duty of repayment in money which was being significantly deferred. Unless there was a debt, there was no credit".

39. For completeness, I should also mention *Holyoake v Candy* [2017] EWHC 3397 (Ch). In that case, a company referred to as "CPC" had brought proceedings against Mr Holyoake to recover sums said to be due under a "credit agreement" or "related agreement" within the meaning of section 140C of the CCA. A "Settlement Deed" was concluded extending time for repayment of the debt. A recital to the Settlement Deed recorded that Mr Holyoake "had intimated that he might defend the claims in the Proceedings by reference, among other things, to the CCA".

40. It was argued before Nugee J that the CCA did not apply to the "Settlement Deed" because it was a bona fide compromise of claims made under the CCA and, if it could be unpicked, it would never be possible to settle such a claim (see paragraph 500 of the judgment). Nugee J did not accept the contention, commenting in paragraph 501:

> "There is an obvious danger in holding that any agreement settling CCA claims is effective to oust the Court's powers under ss. 140A-C of the CCA, as it would open the way to lenders routinely requiring borrowers to settle any possible CCA claims, which would run the risk … of driving the proverbial coach and horses through the protection afforded by the CCA."

41. Nugee J had been taken in this context to *Binder v Alachouzos* [1972] 2 QB 151, where a defendant had defended a claim to recover loans by alleging that the plaintiff was an unregistered moneylender. Shortly before trial, the parties entered into a compromise under which the defendant admitted that the Moneylenders Acts did not apply and agreed to pay the plaintiff various sums. When, however, the defendant defaulted and the plaintiff sued on the compromise agreement, the defendant denied that it was enforceable, once again invoking the Moneylenders Acts.

42. The Court of Appeal held the compromise to be binding. Lord Denning MR said at 157-158:

> "There are here two competing considerations. On the one hand the Moneylenders Acts are for the protection of borrowers. The judges will, therefore, not allow a moneylender to use a compromise as a means of getting round the Act. They will inquire into the circumstances giving rise to the compromise. They will not allow the moneylender to take unfair advantage of the borrower. Even if the borrower consents to judgment being entered against him, the courts will go behind that consent, if the justice of the case so requires. For instance, where the interest charged was so high that it was presumed to be harsh and unconscionable, the court refused to enforce a consent to judgment: see *Mills Conduit Investment Ltd. v. Leslie* [1932] 1 K.B. 233.

> On the other hand, it is important that the courts should enforce compromises which are agreed in good faith between lender and borrower. If the court is satisfied that the terms are fair and reasonable, then the compromise should be held binding. For instance, if there is a genuine difference as to whether the lender is a moneylender or not, then it is open to the parties to enter into a bona fide agreement of compromise. Otherwise, there could never be a compromise of such an action. Every case would have to go to the court for final determination and decision. That cannot be right….
>
> In my judgment, a bona fide agreement of compromise such as we have in the present case (where the dispute is as to whether the plaintiff is a moneylender or not) is binding. It cannot be reopened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was taken. Both sides were advised by competent lawyers on each side. There was a fair arguable case for each. The agreement they reached was fair and reasonable. It should not be reopened. I agree with the judge below that this agreement of compromise was binding and I would dismiss the appeal."

Agreeing, Phillimore LJ said at 159:

> "Speaking for myself, I think it is entirely plain that this was a bona fide compromise, and that there is nothing in the evidence here which could make this court say with any confidence that these were money lending transactions, illegal transactions; and accordingly, as it seems to me, here the court is faced with a bona fide compromise of what was a question of fact. The terms of the agreement are not to be described as colorable. The court ought to be very slow to look behind an agreement reached in such circumstances as these."

In a similar vein, Roskill LJ observed at 159 that "Whilst it has always been the policy of the courts not to allow the Moneylenders Acts to be evaded, it has also been the policy of the court to encourage compromises and to enforce compromises when they are made" and went on at 160:

> "In my judgment it is the law of this country, as Lord Denning M.R. has said, where there is a bona fide compromise of an existing dispute and that compromise includes a compromise of what … is basically an issue of fact, namely, whether or not there had in fact been unlawful moneylending, especially where the compromise has been reached under the advice of counsel and solicitors, that that compromise is enforceable against the party seeking subsequently to repudiate it. Any other course would cause very great difficulty in the administration of justice."

43. Distinguishing *Binder v Alachouzos* in *Holyoake v Candy*, Nugee J said in paragraph 502 of his judgment:

> "Moreover, in *Binder* the Court of Appeal appears to have laid emphasis on the fact that what was involved was a bona fide compromise of a genuine issue of fact as to whether the Moneylenders Acts applied at all. That principle has been applied to other statutory provisions: cf *Foskett on Compromise* (8th edn) at §7-32 (although parties cannot contract out of the protection of the Rent Acts, that does not prevent a bona fide compromise of a genuine dispute of fact as to whether a statutory provision applies); *A-G v Trustees of the British Museum* [2005] EWHC 1089 (Ch) at [28] per Morritt V-C (a bona fide compromise could be made of the question whether a statutory prohibition on disposal of objects vested in the trustees as part of the museum's collection applied); and *FPH Law v Brown* [2016] EWHC 1681 (QB) at [29] per Slade J (a bona fide compromise of an issue as to the enforceability of a CFA). But if that is the principle, it does not directly assist CPC. There was no issue, or none at any rate that has been identified, as to whether the agreements preceding the Settlement Deed were credit agreements such that the CCA applied. What was compromised was not any genuine issue of fact which went to the applicability of the CCA. What was compromised was any claim that Mr Holyoake had under the CCA."

44. Marcus Smith J observed in footnote 57 to his judgment that Nugee J's comments in *Holyoake v Candy* are "not precisely in point" because the present case, unlike *Holyoake v Candy*, "was not a case where a dispute to which the Consumer Credit Act applied was being settled". I agree. The Settlement Deed at issue in *Holyoake v Candy* related to a claim in respect of a "credit agreement" or "related agreement" and Mr Holyoake had said that he might use the CCA to defend the proceedings. In the circumstances, it is unsurprising that Nugee J was alive to the danger of an agreement settling CCA claims ousting the Court's powers under the Act. No similar point arises from Mr Gertner's contentions in this case. His case, as Marcus Smith J noted, is that the Settlement Agreement is *itself* within the scope of the CCA. As Marcus Smith J noted in paragraph 61(2) of his judgment, Mr Kirk abjured any contention that either Lanza's facility agreement or Mr Gertner's guarantee was a regulated agreement under the CCA.

45. Drawing some of the threads together, it seems to me that the following can be said:

i) The CCA does not apply to an agreement by which a creditor agrees for no consideration to allow a debtor more time to pay;

ii) A debtor will not have provided consideration merely by giving up a defence which he himself recognised to lack even a fair chance of success. In the absence, therefore, of other consideration, the CCA cannot be applicable;

iii) The CCA does not apply either to an agreement by which a "creditor" and "debtor" compromise a claim which the "debtor" genuinely disputed in its entirety on substantial grounds, provided at least that there is no question of the agreement defeating the application of the CCA to the original claim. In that situation, it cannot be said whether the "debtor" in fact owed the "creditor" anything before the compromise was agreed. That being so, the compromise cannot be considered to defer a debt even if it provides for the "debtor" to make payments in the future. The "debtor" must be regarded as undertaking the obligations for which the compromise provides not to defer a debt but in exchange for the "creditor" giving up a claim that might or might not have been well-founded;

iv) If, in contrast, a debtor does not dispute that he is indebted to the creditor and the two enter into an agreement pursuant to which, for consideration, the creditor agrees to accept payment by instalments, it appears clear that the debtor is provided with "credit" within the meaning of the CCA and, hence, that the agreement is a "consumer credit agreement" under section 8 of the CCA.

46. What then is the position where a "creditor" and "debtor" enter into an agreement settling a claim to recover a debt where the "debtor" has denied any liability, the grounds of defence lack substance but the "creditor" nevertheless receives consideration in some way? It is to be noted that, in the present case, Mr Gertner undoubtedly gave consideration under the Settlement Agreement since he undertook to pay £50,000 as a contribution to CFL's costs.

47. Marcus Smith J's analysis implies, I think, that the CCA could not apply to *any* contractually binding settlement agreement, regardless of whether the "debtor's" defence had substance. He thought it decisive that any obligation that Mr Gertner might have had to pay under his guarantee had been extinguished and replaced by a fresh promise under the Settlement Agreement and added that the "position is exactly the same irrespective of the strength or weakness of CFL's claim under the guarantee". That view might be said to chime with the desirability of upholding bona fide compromises to which there was reference in *Binder v Alachouzos*.

48. On the other hand, where a creditor agrees to accept instalments in place of a claim for immediate payment to which there was, in truth, no defence, there is a common sense case for considering a debt to have been deferred and so the debtor to have been provided with "credit". Further, the approach favoured by Marcus Smith J runs the risk of undermining the protection afforded to debtors by the CCA. His reasoning would seem to mean that a debtor could lose protection which he would otherwise have enjoyed under the CCA by asserting any defence, however hopeless, and, presumably, by doing so in pre-issue correspondence rather than a formal defence. There could even be cases such as were postulated in one of Mr Gertner's skeleton arguments, where "unscrupulous" creditors "avoid the CCA protections altogether by commencing proceedings as soon as a debt is not paid and then swiftly compromising proceedings by a settlement agreement" which "would be immune from legal challenge under the CCA no matter how extortionate its terms were".

49. It is worth, I think, mentioning a somewhat analogous situation. In the context of bankruptcy and winding-up proceedings, the Court looks to whether the alleged debt

is "disputed on grounds which appear to the court to be substantial" (see rule 10.5(5)(b) of the Insolvency (England and Wales) Rules 2016), the subject of a "genuine triable issue" (see e.g. *Markham v Karsten* [2007] EWHC 1509 (Ch), at paragraph 45) or "disputed in good faith on substantial grounds" (see e.g. *Revenue and Customs Commissioners v Changtel Solutions UK Ltd* [2015] EWCA Civ 29, [2015] 1 WLR 3911, at paragraph 36). Where the debt on which a winding-up petition is founded is so disputed, the petitioner is not viewed as a "creditor". Thus, in *Stonegate Securities Ltd v Gregory* [1980] Ch 576 Buckley LJ said at 580:

> "In my opinion a [winding-up] petition founded on a debt which is disputed in good faith and on substantial grounds is demurrable for the reason that the petitioner is not a creditor of the company within the meaning of section 224 (1) [of the Companies Act 1948] at all, and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding up proceedings."

50. My own conclusion, in the end, is that Marcus Smith J was mistaken in thinking that the CCA could not apply to the Settlement Agreement "irrespective of the strength or weakness of CFL's claim under the guarantee". It seems to me that there must come a point at which the existence of a debt is sufficiently clear that an agreement providing for future payment will confer "credit" within the meaning of the CCA regardless of whether the debtor has denied that anything is due. Suppose, for example, that a creditor chases for a payment, that the debtor tries to buy time by putting forward a defence that he knows to be obvious nonsense, and that the parties then enter into an agreement under which the debtor undertakes to pay at a future date. The agreement would, I think, fairly be viewed as deferring debt and so providing "credit", and that would be so whether the agreement is made in advance of any litigation or only after the creditor has issued proceedings. In such a case, the CCA should apply to the same extent as if the debtor had not gone through the motions of disputing liability. The debtor's relinquishment of his "defence(s)" would not of itself have constituted consideration and, in a similar way, the settlement agreement should be seen as operating to defer an existing debt.

51. There is room for argument as to quite where the dividing line is between a debt (in relation to which the CCA could apply) and a mere claim (to which it could not). One possibility is that a debt should be considered to exist when the only defence advanced is clearly invalid in law. Arguably, Parliament might be expected to have had in mind a purely objective test of that kind when enacting the CCA. On the other hand, there is also, to my mind, a case for saying that it is enough to prevent the CCA from applying to a settlement agreement that the debtor believed a defence he was advancing to have substance. Such an approach could be said to reflect the desirability of upholding bona fide compromises. On this footing, a contractually binding settlement agreement under which a creditor agrees to future payment should be regarded as providing for the debtor to be given "credit" within the meaning of the CCA where the debt was disputed only on grounds which (a) the debtor did not himself believe to have even a fair chance of success and (b) did not objectively have a real prospect of succeeding. Very often, of course, it might be hard for a debtor to deny that defences which he had himself put forward had had substance. That could obviously be the case where, for example, a defence had turned on facts within the

debtor's own knowledge and the debtor had confirmed his belief in the relevant facts by appending a statement of truth to a defence or by saying so in a witness statement. If, however, it could be seen that there was no serious defence to a debt claim, in the sense that no defence that the debtor was advancing had a real prospect of succeeding or was believed by the debtor to have a fair chance of success, debt would be regarded as deferred, and the debtor given credit, if a settlement agreement for which there was consideration provided for some or all of the claim to be paid only in the future.

52. Not having had the benefit of adversarial argument, I do not think we should express a concluded view on exactly where the dividing line lies unless that is necessary to resolve Mr Gertner's cross-appeal, and I do not think it is.

53. Mr Gertner's solicitors signed the statement of truth at the end of his defence of 15 July 2011 to confirm that Mr Gertner believed the facts stated in it to be true. However, while the defence is less than clear, I read the points referred to in sub-paragraphs (i) to (iv) of paragraph 4 above as relating only to interest and not as bearing on the claim for outstanding principal of £1.7 million. It is true that paragraph 18 of the defence asserted that "the Loan and Facility Letter should be set aside in their entirety" because the interest charged gave rise to a penalty or an unfair credit transaction, but Mr Gertner can never have thought that the interest level could afford a real defence to the £1.7 million and Mr Gertner had pleaded earlier in his defence that paragraph 11 of the particulars of claim (in which CFL alleged failure to repay the outstanding balance plus interest) was admitted "subject to the issue of interest". If that is right, the only defence which Mr Gertner advanced in respect of the £1.7 million was that mentioned in the second sentence of paragraph 4 above: that CFL's then chief executive officer had entered into the loan to Lanza without due authority and that, as a result, "the Loan is irrecoverable and cannot be demanded either from Lanza or from the Defendant". This defence would seem to lack any legal merit even if the facts alleged in the defence were true: it was not disputed, after all, that Lanza had received the £3.5 million from CFL and any doubt as to the chief executive officer's authority, to the extent that it might have mattered, must have been overtaken by the fact that CFL had accepted partial repayment and was now demanding the balance. Of course, the insubstantiality of the defence as a matter of law does not necessarily mean that Mr Gertner did not believe it to have a fair chance of success, but the possibility that he lacked any faith in the defence certainly cannot be discounted. Doubtless because of how the arguments were developed before him, Judge Briggs made no finding on the point.

54. In the circumstances, it seems to me that Judge Briggs was incorrect to conclude, as he did in paragraph 135 of his judgment, that the debt on which the bankruptcy petition was founded was "not disputed on genuine and substantial grounds". There is, I think, both (a) a compelling case for saying that the defence which Mr Gertner put forward to CFL's £1.7 million claim was clearly invalid in law and had no real prospect of succeeding and (b) a very real possibility that Mr Gertner did not himself believe the defence to have even a fair chance of success. That being so, there is a genuine triable issue as to whether the Settlement Agreement provided Mr Gertner with "credit" within the meaning of the CCA and, hence, is at present unenforceable for non-compliance with one or more of sections 40, 61-64, 77A and 86B of the CCA.

55. Had the bankruptcy petition against Mr Gertner still been pending, the right course would have been to dismiss it. Since, however, the bankruptcy petition has now been

dismissed, it appears to me that we should allow Mr Gertner's cross-appeal to the extent of amending paragraph 1 of Marcus Smith J's order so as to provide for his appeal from Judge Briggs to be allowed on the basis of ground 5 as well as grounds 1, 2 and 3.

Conclusion

56. I would allow Mr Gertner's cross-appeal to the extent of amending paragraph 1 of Marcus Smith J's order so as to provide for his appeal from Judge Briggs to be allowed on the basis of ground 5 as well as grounds 1, 2 and 3.

Lord Justice Popplewell:

57. I agree.

Lord Justice David Richards:

58. I agree that the cross-appeal must be allowed for the reasons so clearly expressed by Newey LJ. The issue which he discusses in his judgment at [51] is a point of real difficulty which, for the reasons he gives, it is not necessary to decide on this appeal. Both of the approaches which he identifies have substantial merits and I express no view as to which is to be preferred.