



Neutral Citation Number: [2014] EWCA Civ 1413

Case No: B2/2013/0424

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM CHESTER COUNTY COURT**  
**JUDGE HALBERT**  
**9CH05795**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30/10/2014

**Before :**

**THE MASTER OF THE ROLLS**  
**LORD JUSTICE BEATSON**  
and  
**LORD JUSTICE BRIGGS**

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**Between :**

**GRACE & ANR**  
**- and -**  
**BLACK HORSE LIMITED**

**Appellants**

**Respondent**

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**THOMAS BRENNAN** (instructed by **QUALITY SOLICITORS HOWLETT CLARKE**)  
for the **APPELLANTS**  
**KATE URELL** (instructed by **G.J. COOPER** (from August 2014) and **SCM SOLICITORS**)  
for the **RESPONDENT**

Hearing dates : Monday 6<sup>th</sup> October 2014  
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**APPROVED JUDGMENT**

**Lord Justice Briggs :**

1. On 2<sup>nd</sup> September 1997 the first appellant Mr. William Grace bought his grandson a laptop computer. He did so by entering into a hire purchase agreement with Chartered Trust PLC (“CTP”), the predecessor in title of the respondent, Black Horse Limited. It was a regulated agreement within the meaning of the Consumer Credit Act 1974 (“the CCA”), with the consequence that CTP was obliged, pursuant to s. 63, to supply Mr. Grace with a copy of it. The purported copy differed in material respects from the agreement which Mr. Grace had signed (as to interest rate and APR). The result was that, pursuant to s. 63(5), the agreement was not properly executed.
2. In those days, the draconian consequence of CTP’s failure to comply with s. 63 was not merely that, pursuant to s. 65, the agreement was unenforceable against Mr. Grace otherwise than by an order of the court. By s. 127(4), the court was prohibited from enforcing a regulated agreement where its improper execution was the result of a breach of s. 63. Mr. Grace’s agreement was, as the judge put it, “irremediably unenforceable”. It could never have been enforced against Mr. Grace by CTP or (later) by Black Horse. Even though the rigour of s. 127 has since been ameliorated, in relation to regulated agreements made in or after April 2007, it remains in full force in relation to earlier agreements, so that Mr. Grace’s agreement was and remains permanently unenforceable, against him.
3. Mr. Grace fell into arrears under the agreement, initially because he closed the business account from which instalments were being made by direct debit. This led to the imposition of penalty charges by CTP which, since Mr. Grace regarded the direct debit breakdown as CTP’s fault, he protested by refusing to make any further payments at all.
4. Eventually CTP brought proceedings in respect of the mounting arrears (by then just under £700 plus penalties) and, on 10<sup>th</sup> April 2000, entered a default judgment which was registered against Mr. Grace with credit reference agencies (“CRAs”).
5. There followed a series of county court hearings in 2000 during which (probably on the court’s own initiative) the unenforceability of the agreement came to light. The result was that the default judgment was set aside, CTP’s claim dismissed, with costs, and CTP gave an undertaking to remove the default judgment registration, with which it belatedly complied, in January 2003.
6. CTP then added the costs amount to the amount of the hire purchase debt for which default judgment had previously been obtained, together with some other charges, giving rise in its records to an apparent debt owed by Mr. Grace of £928. CTP then wrote off that debt, but filed an entry with the CRAs alleging that Mr. Grace had defaulted, in May 2000, in repayments of a loan in the sum of £928. It is this registration (“the default registration”) which was the *casus belli* in the present litigation. It is common ground that, by then, the contractual arrears and penalties under the hire purchase agreement amounted to about £800 odd.
7. Mr. Grace found out about the default registration in September or October 2003. Having raised the matter with the CRA Experian, he pursued his complaint with CTP (by then known as Black Horse Finance Limited) in November and December 2003.

Black Horse vacated the default registration with the CRAs on 5<sup>th</sup> January 2004. Mr. Grace's claim in these proceedings is that, in the meantime, the existence of the default registration had caused him to be unable to obtain banking facilities other than a simple cash account, and that this disability persisted, even after the removal of the default registration, until October 2004.

8. Meanwhile, Mr. Grace's partner Mrs. Margaret George entered into a hire purchase agreement with Capital Bank for the purchase of a static caravan at Talacre Beach in North Wales. That agreement superseded an earlier agreement for a different caravan which she made in 2002. Whereas the 2002 agreement involved an APR of 10.5%, she incurred an APR of 17.9% under the 2003 agreement. In March 2006, as the result of correspondence with Capital Bank by Mr. Grace on her behalf, she discovered that the increased APR was attributable to the blot on his credit record constituted by the default registration, since she was cohabiting with him. The hire purchase agreement was later assigned by Capital Bank to Black Horse.
9. On 14<sup>th</sup> December 2009, Mr. Grace and Mrs. George issued a claim in the Chester County Court seeking (among other things) damages for breach of statutory duty by Black Horse under Section 13 of the Data Protection Act 1998 ("the DPA"), upon the basis that the default registration involved a contravention of the Data Protection Principles which had caused each of them damage, in his case due to his inability to obtain satisfactory banking facilities and, in her case, due to the increased APR which she incurred under the 2003 agreement.
10. Mrs. George had, on Mr. Grace's advice, in the meantime ceased making payments under the 2003 agreement, upon various grounds which I need not describe. The result was that Black Horse counterclaimed for arrears under the 2003 agreement, and sought delivery up of the caravan. In response, Mrs. George claimed rescission of the 2003 agreement for (among other things) misrepresentation which, she acknowledged, would require the return of the caravan to Black Horse.
11. The claim and counterclaim were tried by HHJ Halbert in the Chester County Court over three days starting on 28th August 2012. Mr. Grace and Mrs. George appeared as litigants in person. There had been some doubt about Mrs. George's fitness to participate. It was resolved by a medical certificate from her GP, to the effect that, while suffering short-term memory difficulties, she had full capacity to participate in the proceedings, in particular by appointing Mr. Grace to represent her. The judge was also given a letter signed by Mrs. George addressed to the court, conferring

"full authority to my partner Mr. William Brian Grace, to represent me in the proceedings before the court, in claim 9CH05795.

He has my full consent to disclose and discuss and present all aspects of my claim against Black Horse Limited, in which I am second claimant."

In the event, the substantial conduct of the trial was undertaken by Mr. Grace. Mrs. George attended for parts of it, in particular to give evidence. She was not in attendance on the final day of the trial.

12. At the end of closing submissions, and after the judge had indicated that he intended to reserve the judgment, counsel for Black Horse (Miss Urell) raised a concern about the caravan the subject of the 2003 agreement. It had become apparent during the giving of evidence that it had been unused by the appellants for a year prior to trial, that site rental payments were not being made, and that there was a threat from the site landlords to remove it. This led to the following exchange between the judge, Miss Urell and Mr. Grace:

“MISS URELL: Your Honour, there is just one other point before I - -

HHJ HALBERT: Subside?

MISS URELL: Exactly. You heard evidence from John Bloor about the state of the caravan and [inaudible] to be a reserved judgment I would have waited until the end, but the fact of the matter is the caravan is, it would appear about to be disposed of, uplifted, etc, by - -

HHJ HALBERT: By the landlords.

MISS URELL: - - and [inaudible] goods. So we can't repossess it.

HHJ HALBERT: Well I think the simplest thing to do is make an Order *de bene esse* in the meantime.

MISS URELL: I'm grateful.

HHJ HALBERT: And that you go and get it because Mrs George made it quite clear she doesn't want it any more.

MR GRACE: No, Your Honour.

HHJ HALBERT: So you might as well go and get it. So you have as of now permission to go and recover the caravan.

MISS URELL: I'm grateful.

HHJ HALBERT: What you're going to do with it I [inaudible] to think, but.

MR GRACE: Well it's im-, it was immaculate, Your Honour. It's absolutely immaculate.

HHJ HALBERT: Well when did you last see it?

MR GRACE: About twelve months ago, but there's no, there's nobody should have been in there except - -

HHJ HALBERT: Well we'll wait and see [inaudible].

MR GRACE: Well nobody at all really because it's been disconnected from the mains, the gas and the electric. We did have a buyer for £8,000 but we couldn't sell it because it was still under the hire purchase and that would have gone at time to offset any claim that we may have had, but we couldn't do it.

HHJ HALBERT: I understand. Right. Does that deal with it?

MISS URELL: I'm grateful.

HHJ HALBERT: Right Mr. Grace. Anything else you want to add?"

13. There followed closing submissions by Mr. Grace, during which he made no objection to the judge's oral order concerning the caravan.

14. In his careful and detailed reserved judgment delivered in draft to the parties on 25<sup>th</sup> September and handed down on 21<sup>st</sup> November 2012, the judge dismissed both Mr. Grace and Mrs. George's claims, and all her challenges to the enforceability of the 2003 agreement. By paragraph 2 of his Order made that day (and initialled by him a week later) he gave:

"judgment on the Counterclaim for the Defendant to the extent of the delivery up of the caravan (which has already been effected) with money claim adjourned generally with liberty to restore after the sale of the caravan."

15. The judge dismissed the appellants' claims on two grounds. The first was that, in relation to the whole of Mrs. George's claim and all of Mr. Grace's claim other than the loss due to inadequate banking facilities between December 2003 and October 2004, those claims were statute-barred. Secondly, he concluded that, although the default registration had indeed involved a breach of the Data Protection Principles, and had been the cause of their alleged loss, the loss was not attributable to the breach of the principles. This was because, in his view, Black Horse could without any breach of the DPA have registered Mr. Grace's default under his hire purchase agreement, even though unenforceable, in the lesser sum of £800-odd, which would have caused him exactly the same damage to his credit rating, and the same loss to Mrs. George by association as his co-habitee. In short, the appellants' claims failed largely because they were statute-barred but they failed entirely because they could not establish causation.

16. I need not explain the judge's reasons for finding that the 2003 agreement was enforceable against Mrs. George, since permission to appeal has not been obtained in relation to them. On their paper application, the appellants were refused any permission to appeal by Arden LJ, but were granted permission by Clarke LJ on their oral renewal upon two grounds, namely limitation and the propriety of the judge's November order for delivery up of the caravan. It may not have been apparent to Clarke LJ from the way in which the oral application was presented to him, that permission to appeal only in relation to limitation would not avail the appellants anything in relation to their claims. In the event, the appellants have vigorously pursued an appeal against the judge's decision on causation, now professionally represented by Mr. Thomas Brennan, and without oral objection by Miss Urell (although she mentioned the point in her skeleton argument). As will shortly appear, the causation issue has become the main, and most difficult, issue on this appeal. It raises an important question as to the legitimacy of registration as a default with credit reference agencies of a non-payment by a debtor (or hirer) of monies contracted to be paid under a regulated but irremediably unenforceable credit agreement, which has not previously been directly addressed in any reported decision. It is nonetheless convenient to deal firstly with the limitation appeal.

### **Limitation**

17. It was common ground between counsel that, save for the period of Mr Grace's losses after 14<sup>th</sup> December 2003, the Appellants' claims fell foul of the primary six year limitation period for claims for breach of statutory duty provided by S.9 of the Limitation Act 1980. There was no Respondent's Notice in relation to the judge's conclusion that Mr Grace's losses after December 2003 were not statute barred. Had that point been raised, it might have given rise to an interesting question about whether a failure to remove an offending default registration is itself a continuing breach.
18. The Appellants' case on appeal was squarely based upon s.32 of the Limitation Act 1980, which provides for a postponement of the running of time in cases of fraud, concealment or mistake. For present purposes the relevant provisions of s. 32 are as follows:
- (1) ...where in the case of any action for which a period of limitation is prescribed by this Act, ...
- ...
- (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant
- ...
- the period of limitation shall not begin to run until the plaintiff has discovered the...concealment...or could with reasonable diligence have discovered it.
- (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time

amounts to deliberate concealment of the facts involved in that breach of duty.

19. Mr Brennan submitted that CTP's default registration of a debt which had by then been declared irremediably unenforceable, and for a sum which included costs ordered to be paid by it to Mr Grace, was a deliberate breach of duty within s. 32(2) which was unlikely to be discovered for some time, and that the judge should so have held, thereby rescuing both claims from limitation.
20. There are in my view two fatal obstacles to that submission. The first is that it was neither pleaded nor proved at trial that the breach was committed deliberately. Although it may be said that a judge with claimants who are litigants in person and are alleged to be statute barred may fairly consider what provisions of the Act might offer an answer to their difficulties, there was nothing in the case before the judge to suggest that the breach had been committed deliberately. Deliberate commission of a breach of duty does not merely mean that the defendant is aware of what he is doing when committing the breach. It requires that he be shown to have been aware at the time that what he was doing was a breach of duty.
21. The second fatal obstacle, at least to Mr Grace, is that, on the materials before the court at trial, he plainly discovered the breach more than six years before the proceedings were commenced. Since he and Mrs George were cohabiting partners at the time, it is a fair inference that she discovered the breach at much the same time, albeit not that it had caused her loss. Mr Grace stated when he discovered the default registration in his witness statement, and Mrs George did nothing to deny or dispel that inference. The result is that if applicable at all, time started running in relation to his claim under s. 32 (1), and probably her claim as well, more than six years before they issued proceedings.
22. It follows that the appeal based upon s.32 must fail.

### **Causation**

23. The Judge's analysis of causation necessarily proceeded upon the basis, which he fully explained in his judgment, that it would have been lawful (rather than a breach of the DPA) for CTP to have registered as a default under Mr Grace's hire purchase agreement any arrears incurred by the time of the default registration, even though the agreement to pay them had always been, and had by then been declared by a competent court to be, irremediably unenforceable. He found that the default registration was a breach of the DPA only because it was inaccurate, by specifying £928 rather than £800 as the arrears, by describing the hire purchase agreement as a loan agreement and by describing Mr Grace as a borrower rather than a hirer. He found that CTP's failure to review and remove or alter the registration was also a breach of the DPA. He regarded it as unarguable that those breaches were causative of Mr Grace's loss, because a registration stating that he was in default as hirer under a hire purchase agreement in the sum of £800 would have done exactly the same damage to his credit rating.
24. The judge's view that registration of arrears under an unenforceable credit agreement was lawful, rather than a breach of the DPA, was based squarely upon the decision of

Flaux J in *McGuffick v Royal Bank of Scotland* [2009] EWHC 2386 (Comm). The judge said (at paragraph 7.3.9) that:

“The effect of this judgment is that where an agreement is unenforceable under the provisions of the CCA, the debt nonetheless subsists. If payments are made under it they cannot be recovered and if payments are not made there is a default in payment and the debtor (*sic*) is free to report the default to a credit reference agency if it has a legitimate reason to do so and the sharing, between credit providers, of information about the credit worthiness of potential borrowers is a legitimate reason.”

25. *McGuffick* was a test case in which the lender had failed to provide upon request information and documents relating to a regulated credit agreement contrary to s.77 of the CCA with the consequence that the agreement had become temporarily unenforceable, pending the provision of that material. Indeed, although it initially could not find the material, RBS later continued to decline to provide it so as to ensure that the court was properly seized of the issue whether reporting the arrears to a CRA in the meantime was unlawful. Various species of possible unlawfulness were considered, the foremost of which was that such a registration, or the threat of it, would amount to a method of enforcement of the debt, contrary to s.77(4)(a). Included among the species of possible unlawfulness was a breach of the first of the DPA Principles, which requires data to be processed fairly and lawfully, and in compliance with one of the conditions in Schedule 2. Condition 6 in Schedule 2 is complied with if the processing is necessary for the purposes of the legitimate interests of the processor or the third parties to whom the data is disclosed. The question whether the registration of non-payment under an unenforceable credit agreement as a default in payment was accurate, as required by the fourth principle, does not appear to have been specifically in issue: see paragraph 23(8).
26. It was apparent to Flaux J that the issues which he was being asked to determine might be affected by the fact that the agreement was, in the case before him, only temporarily rather than irremediably unenforceable. Although asked to make rulings about cases of irremediable unenforceability, he very properly declined to do so: see paragraphs 19 to 21. The present case is therefore outside the confines of Flaux J’s ruling. Nonetheless his judgment is the only considered analysis of the effect of unenforceability upon the creditor’s freedom to make a CRA registration of arrears under a regulated credit agreement, and therefore deserves close attention.
27. Flaux J was asked by counsel for the debtor to take the legal consequences of unenforceability mainly from two earlier cases: *Wilson v First County Trust Ltd (No.2)* [2004] 1AC 816 (HL) and *Conister Trust Limited v John Hardman & Co and McClure Naismith* [2008] EWCA Civ 841 (CA). Both were cases about irremediable unenforceability, but the issues in them were far removed from the question now before this court. The relevant question in the *Wilson* case was whether, but for the fact that the agreement had been made before the coming into force of the Human Rights Act 1998, the effect of unenforceability was to infringe the creditor’s rights under Art 6 of, and Art 1 of the First Protocol to, the Human Rights Convention. The relevant question in the *Conister Trust* case was whether the contractual obligation of the debtor under an unenforceable agreement was a ‘liability’ within the meaning of a litigation funding scheme. I have not found it necessary to describe the reasoning in either of those cases in further detail save to say that, in the *Wilson* case, their



Lordships were divided as to the correct analysis and their dicta were in any event *obiter* and that the *Conister* case raised essentially a question of construction of a private contract, rather than interpretation of the meaning of unenforceability under the CCA.

28. The conclusion reached by Flaux J about the legal effect of remediable unenforceability was that the underlying contract remained in force, the rights and obligations under it were neither extinguished nor suspended, but that the enforcement of those rights was itself suspended, for as long as the temporary unenforceability lasted. He was fortified in this view by three decisions about other types of statutory unenforceability, namely *Taylor v Great Eastern Railway* [1901] 1QB 774, *Eastern Distributors v Goldring* [1957] 2QB 600 and *Orakpo v Manson Investments Ltd* [1978] AC 95. The last of those concerned irremediable unenforceability under s.6(1) of the Moneylenders Act 1927 due to the absence of a sufficient signed memorandum. In that case, at p.106, Lord Diplock said that:

“Agreements or securities that are unenforceable are not devoid of all legal effect. Payments made voluntarily pursuant to their terms are not recoverable...”

29. The final authority relied upon by Flaux J was *R v Modupe* [1991] CCLR 29, in which the Court of Appeal (Criminal Division) held that a contractual liability under a credit agreement which was unenforceable otherwise than by a court order, under s.65 of the CCA, was nonetheless still a liability of the debtor within the meaning of the phrase ‘evading an existing liability by deception’ in s.2(1)(b) of the Theft Act 1878. This was not a case of irremediable unenforceability. In the court’s view s.65 merely deprived the creditor of a self-help remedy by recovery of the subject matter of the unenforceable hire purchase agreement.

30. It is clear that, in the analysis which I have thus far summarised, the reasoning underpinning Flaux J’s conclusion that unenforceability did not deprive the contract of all effect, but rather left in place the debtor’s liability under it, was not limited to cases of temporary or remediable unenforceability. He declined to follow dicta to the contrary in the *Wilson* case because they were inconsistent with earlier authority and *obiter*: see paragraphs 67-68. Some of those earlier cases were about irremediable unenforceability: e.g. the *Orakpo* case. But he then expressly distinguished the *Wilson* case on the basis that it was not concerned with irremediable unenforceability, and concluded, at paragraph 71:

“In those circumstances it seems to me that the argument that, during the period of time when the bank was not compliant with section 77(1) (in relation to which the bank accepts that for that period the agreement was unenforceable), the bank’s rights had been completely extinguished or the bank had been deprived of those rights is a somewhat artificial one. The analysis which recognises that the rights continue to exist whilst being unenforceable during the period of non-compliance seems to me much more consistent with the whole concept of redeemable unenforceability.”

31. In the present case, while in no doubt that Mr Grace’s agreement was irremediably unenforceable (see paragraph 3.6), the judge treated the analysis in the *McGuffick* case as applicable to all types of unenforceability under the CCA: see paragraph 7.3.9, quoted above. Mr Brennan’s first line of attack by way of appeal is that he was wrong to do so.

32. In one sense Mr Brennan is clearly right. Flaux J was clearly not laying down a single rule for all cases of unenforceability, and he clearly did not regard his decision as applicable to irremediable unenforceability, at least without further analysis, which Judge Halbert did not provide. But I consider that his assumption to that effect was nonetheless correct. My reasons follow.
33. The conclusion that even irremediable unenforceability leaves the underlying agreement, and its rights and obligations, in place seems to me to flow inexorably from the authorities about other forms of statutory unenforceability and, in particular, from the *Orakpo* case which, as I have noted, was about irremediable unenforceability. I agree with Flaux J that this conclusion is not displaced by the *obiter dicta* in the *Wilson* case. Further, the CCA makes an apparently careful distinction between unenforceability and voidness as the sanction for different kinds of non-compliance by creditors: see ss. 59(1) and 173(1) which provide for voidness, and ss. 65(1), 77(4)(a) and 90(1) which provide for various forms of unenforceability. S.91(b) provides in terms for a release of the debtor from liability under the agreement in the stated circumstances.
34. But this analysis does not answer the specific question with which we are concerned namely, whether the registration as a default of unpaid amounts remaining due under an unenforceable agreement amounts to a breach of the DPA. That question was put to us by Mr Brennan by reference not to the first Principle (with which Flaux J dealt) but with the fourth, which requires that personal data should be accurate. He submitted that it was not accurate to stigmatise a debtor who had declined to make payments under an irremediably unenforceable agreement as a defaulter, at least without stating in the registered entry that the agreement was unenforceable. He said that was *a fortiori* the case once (as here) the agreement had been declared to be irremediably unenforceable by a competent court.
35. In support of that submission Mr Brennan pointed to paragraph 44 of the 2007 version of the Data Protection Technical Guidance issued by the Information Commissioner, which with reasonable clarity treats the refusal of a court to give judgment for an alleged debt as a sufficient reason for not registering a default, or for withdrawing it. More to the point he relied on the following dictum of Lord Hoffmann in *Dimond v Lovell* [2002] 1AC 384, at 398 (where Mrs Dimond was the debtor under an unenforceable credit agreement):

“The real difficulty, as it seems to me, is that to treat Mrs Dimond as having been unjustly enriched would be inconsistent with the purpose of S.65(1). Parliament intended that if a consumer credit agreement was improperly executed, then subject to the enforcement powers of the court, the debtor should not have to pay. This meant that Parliament contemplated that he might be enriched and I do not see how it is open to the court to say that this consequence is unjust and should be reversed by a remedy at common law: compare *Orakpo v Manson Investments Ltd* [1978] AC 95.”

How, Mr Brennan asked rhetorically, could such a debtor be labelled a defaulter?

36. For Black Horse Miss Urell countered as follows. First, if it was the case (as I have concluded that it was) that the underlying agreement remained lawful and in force, then it necessarily followed that arrears under it could form the basis of an accurate default registration, just as had happened in the *McGuffick* case. Looked at from the viewpoint of the agreement, the arrears did involve a default, even if the creditor could do nothing to enforce payment. Secondly, and as was accepted by Flaux J in the *McGuffick* case (at paragraph 101), the CRAs' computerised registration systems do not accommodate endorsements about unenforceability. Thirdly, Mr Grace had defaulted under his hire purchase agreement long before it was declared unenforceable on technical grounds, and other lenders had a legitimate interest in being able to find that out, in furtherance of the public policy favouring responsible lending. While acknowledging that a default registration with a CRA was always a stigma, she said that it was not inappropriate where the debtor was only immune from enforcement on technical grounds. Finally she submitted that unenforceability under the CCA was a specific statutory sanction which did not in terms include a prohibition against default registration, and lenders should not be made to suffer that added penalty by a sidewind.
37. I will take those submissions in turn. As to the first, I recognise that my conclusion that the judge was right to equate the consequences of irremediable unenforceability with those described by Flaux J as flowing from remediable unenforceability is a large step towards a conclusion that there was therefore no breach of the DPA arising from the default registration. But that consequence is not inevitable. Flaux J was not asked to address an alleged breach of the fourth principle (i.e. because the registration of the debtor as a defaulter was inaccurate). It may have been common ground that, if the debt survived, then Mr McGuffick was a defaulter in relation to it, even though payment could not be enforced. Equally, his conclusion that the registration was fair and lawful (for the purposes of the first principle) may have involved an unspoken conclusion that it was accurate.
38. As for the second submission, I have not been persuaded that the shortcomings in the CRAs' registration systems can excuse a registration which is in substance inaccurate because of an omission (namely that the 'default' related to an unenforceable agreement). If an accurate registration cannot be accommodated, then the answer is for the industry to change its registration systems, and in the meantime for inaccurate registrations not to be made.
39. Thirdly, there is nothing in Miss Urell's point that Mr Grace defaulted before his agreement had been declared unenforceable (and that on the court's own motion). The default registration was not made until after the judgment declaring unenforceability, and asserted that he continued after that judgment to be a defaulter. Nor is there merit in the submission that Mr Grace had escaped enforcement on technical grounds. The requirements of the CCA for which unenforceability is the sanction are part of a structure laid down by Parliament for the protection of consumers and the regulation of the consumer credit market. Although they may be technical in their application, and the consequences for non-compliance sometimes draconian, they are not mere technicalities in the sense that Miss Urell described them. In the present case for example the discrepancies in the copy agreement sent to Mr Grace were about the interest rate and the APR under the hire purchase agreement.

There is nothing merely technical in the statutory requirement that these matters be clearly and accurately set out for the consumer.

40. Finally, although there is some force in the submission that the sanction of unenforceability should not be extended by a sidewind, it fails to address the real question, which arises under the DPA, not the CCA. The real question is whether it was accurate to describe Mr Grace as a defaulter, once his agreement has been declared unenforceable.
41. I have not found the choice between these submissions at all easy. But in the end I have concluded that Mr Brennan is right. It was not accurate to describe Mr Grace as a defaulter under his hire purchase agreement once a competent court had decided that it was irremediably unenforceable against him. My reasons follow.
42. It is common ground that a default registration with a CCA is a stigma, with potentially serious consequences for the consumer's credit rating. Yet where Parliament has decided that a class of consumer should not have to pay a debt of that kind, and a court has decided (or the parties have recognised) that a particular consumer is within that class, I consider it very counter-intuitive to think that he can accurately be stigmatised as a defaulter in a semi-public register without, at least, the unenforceable nature of the debt being recorded in the same entry. For it is invariably the creditor's default in complying with the CCA that has led to the consumer being regarded by Parliament as not having to pay the debt, and a statutory liberty not to pay is so central to any continued non-payment that the registration of his non-payment as a default is generally inaccurate unless accompanied with a reference to that liberty.
43. I recognise that this conclusion may require a re-examination of remediable unenforceability, because I am by no means sure that the same analysis may not equally apply. Why should the exempt debtor be labelled a defaulter during any limited period during which Parliament had decided that he should not have to pay? But that question is for another day.
44. The outcome of this analysis is that this part of the appeal succeeds. To the limited extent that Mr Grace is not statute barred, the breach of the DPA constituted by the default registration did cause the alleged loss, because no other registration of him as a defaulter under his hire purchase agreement could then have been made, there having then been no facility for the simultaneous registration of the non-enforceability of his debt.

### **The Caravan**

45. Here the attack from Mrs George is upon the lawfulness of the judge's written order on 21<sup>st</sup> November for the delivery up of the caravan. This is advanced as the springboard for an ambitious attempt by Mrs George to obtain the termination of her 2003 hire purchase agreement on terms of a full release of her liability under it, and a return of all payments made by her to Black Horse under it.
46. The ingenious argument goes like this. (i) The judge should not at the end of the trial have made the *de bene esse* oral order for delivery up, because Mrs George was not in court that day, was not asked, did not consent to it, and had no opportunity to argue against the making of it. Nor was the effect of the order explained at the time. (ii) In

any event the purely oral order was not an order of the court within the meaning of s.90(1) of the CCA. (iii) Black Horse took possession of the caravan, without a qualifying court order and therefore in breach of s.90, at some time before the hand-down on 21<sup>st</sup> November. (iv) Therefore, pursuant to the draconian sanction for such a breach in s.91, the 2003 agreement had by then terminated, and Mrs George had become entitled to a full refund of all payments made under it, so that the retrospective written order for delivery up should never have been made, and an order in terms of s.91 made instead. It is submitted for Mrs George that she was unaware of any of this in time to make any such submission on 21<sup>st</sup> November.

47. In my judgment every step in this imaginative argument is flawed. As to (i), Mrs George was represented for all purposes connected with the litigation on the last day of the trial by her partner Mr Grace, who participated in the discussion about the oral order for delivery up. His authority was confirmed by Mrs George's letter to the court, accompanied by a medical opinion that she had the requisite capacity to litigate by instructing him. The judge gave him a short but accurate explanation of the effect of the order as he made it, and he did not object to it in any way.
48. Furthermore, the parties' pleaded cases were *ad idem* on the question whether Black Horse should have possession of the caravan. Mrs George wanted rescission of the 2003 agreement for (among other things) misrepresentation, and Black Horse claimed delivery up for breach of the same agreement. It would have been competent for the judge at any stage during the trial to have ordered its return, without prejudice to the parties' very different cases about why that should happen. The pleadings disclosed no undistributed middle ground under which Mrs George could have retained it, and Miss Urell could not, upon this court's enquiry, recall any such ground as having emerged at trial.
49. There was good reason to order delivery up of the caravan prior to judgment, not least because there was a threat of its removal from the site landlords. s.131 of the CCA gives the court express power (in addition to the powers under the CPR) to make orders for the interim protection and custody of relevant property, and the order made at the end of the trial, pending judgment, was well within those powers. It involved no adjudication of the underlying dispute, for the reasons already given.
50. (ii) The judge's oral order was plainly an order of the court within S. 90 of the CCA, which is entirely unspecific as to form. Of course, in almost all cases the creditor will want a written order so as to be able to demonstrate the requisite authority to third parties, such as any relevant landowner. Mr Brennan faintly suggested that an oral order was unlikely to have been in the contemplation of the draftsman of an Act otherwise so concerned with accurate documents. In my view the draftsman may safely be assumed to have been content to allow the court to follow its own rules. Orders by the court to persons to do or desist from doing things (i.e. injunctions) are commonly made orally, and take effect from the moment when they are pronounced by the judge.
51. (iii) If therefore Black Horse did take possession of the caravan pursuant to the oral order before 21<sup>st</sup> November (as Miss Urell told the judge, on instructions, that it had) this was a perfectly legitimate execution of the then oral order. In fact Black Horse now say (with evidence in support) that it did no such thing, but we need not resolve that.

52. (iv) The alleged consequences therefore do not follow. It was appropriate for the judge to make reference in his written order of 21<sup>st</sup> November to the delivery up, in the way that he did, having been informed (whether or not correctly) that delivery up had already been achieved.
53. For those reasons this part of the appeal fails. If my Lords agree, I would allow the appeal on causation, dismiss it on limitation and in relation to the caravan, and remit the quantification of that part of Mr Grace's claim which has not been found to be statute barred to the Chester County Court, to be determined if possible at the same time as the adjourned quantification of Black Horse's claim under the 2003 agreement.
54. This is already a case in which the parties' effort and expense has been seriously disproportionate to the amounts at stake. The parties are therefore firmly encouraged to pursue mediation or some other form of ADR to resolve their remaining differences.

**Lord Justice Beatson**

55. I agree.

**The Master of the Rolls**

56. I also agree.