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# Court of Appeal refuses permission to appeal in '*by way of business*' FCA lending authorisation exemption case by family run business to a builder

*Newmafruit Farms Limited v. Alan Pither*
*A2/2016/3778*

## Article by David Bowden

BAR STANDARDS BOARD
REGULATING BARRISTERS

**Court of Appeal refuses permission to appeal in 'by way of business' FCA lending exemption case**

**Executive speed read summary**

**A successful fruit farm business made a series of loans over many years to a builder and companies he controlled. These loans totalled £1.75million. The majority of the loans were to finance building projects both in England and Florida that the fruit farm and builder were undertaking by way of a joint venture. The builder either spent the cash or diverted the funds elsewhere. The fruit farm brought an action to enforce the loans. On a summary judgment application, a deputy high court judge granted judgment for £1.5million. In relation to the other loans the judge below said there were triable issues. This included whether the fruit farm needed authorisation from the FCA to exercise its rights under regulated consumer credit agreements. The builder said the fruit farm did not have a licence from either the OFT or authorisation from the FCA to conduct consumer credit business. The fruit farm will have to show that the lending to the builder was not carried on '*by way of business*' to be exempt from FCA authorisation. The judge below also ruled that none of the credit agreements complied with the formalities under the Consumer Credit Act 1974. Finally the judge below ruled it was inappropriate to rule on an application for an enforcement order on a summary basis. The Court of Appeal has now refused Newma Fruit farms permission to appeal on the papers but a hearing has been fixed for 8 November 2017 at which a final attempt will be sought to obtain permission to appeal.**

*Newmafruit Farms Limited & others v. Alan Pither & others*
*A2/2016/3778* *16 March 2017*
*Court of Appeal, Civil Division*

**What are the facts?**

Mr Newman is a director and major shareholder in Newmafruit Farms Limited ('Newmafruit'). Mr Peter is an accountant and used to be Newmafruit's finance director. Mr Peter is a long standing friend of Mr Pither (a property developer) and acts as his personal accountant. From 2008 Newmafruit began to generate substantial profits and built up substantial cash reserves. Mr Peter suggested to Mr Newman that Newmafruit could earn a better return on its money by lending directly to businesses and entrepreneurs. It therefore made loans of varying amounts not only to Mr Pither but also to others including Mr & Mrs Gosling, Mr Peter and various corporate entities.

**What was the lending for?**

Newmafruit lent substantial sums to Mr Pither and his companies. These sums were advanced to complete property development projects in Kent, Essex, Norfolk and Florida. Mr Pither had scarcely undertaken any building work but rather had used the money to fund his other business ventures or to pay his personal expenses. On 20 June 2011 Newmafruit and Mr Pither entered into an agreement which provided for repayment of the lending by 20 June 2013. The lending was not repaid.

**What action did Newmafruit Farms bring?**

Newmafruit brought an action to recover the sums totaling nearly £1.75million it had lent to Mr Pither. The judge granted summary judgement for nearly £1.5million but said there were defences in relation to £250k of the lending that could go forward to trial.

Mr Justice Jay on 22 July 2016 granted a worldwide freezing injunction against Mr Pither's assets and ordered him to disclose all his assets to Newmafruit. Newmafruit made claims against Mr Pither and his companies alleging:

- Deceit,
- Breach of fiduciary duty,
- Dishonest assistance,
- Conspiracy,
- Breach of contract, and
- Unjust enrichment.

**On what basis did Mr Pither seek to defend these claims?**

Mr Pither sought to defend Newmafruit's action to enforce its loans. This defence fell into these categories:

- Some lending was made to limited companies (now insolvent) for which Mr Pither had no personal liability,
- Newmafruit needed regulatory authorisation to be able to make loans which it did not have,
- Newmafruit needed an enforcement order from a court to enforce unenforceable loans which it was not suitable to determine on a summary basis,

- Newmafruit's loans were unenforceable because it had neither complied with the requirements of the Consumer Credit Act 1974 ('CCA') on loan agreements nor had it provided account lifetime information mandated by the CCA to Mr Pither, and
- Newmafruit had waived its entitlement to recover these loans or was estopped from doing so.

**What were the issues before the High Court?**
The 8 issues the court had to decide were:

- Should Mr Pither be allowed to amend his defence and counterclaim to make the new CCA related allegations?
- To which entities were the loans made and was Mr Pither responsible for loans made to corporate entities?
- Had Mr Pither agreed to repay any of the lending in the past?
- Did Newmafruit need either a consumer credit licence or authorisation from the FCA to make these loans?
- Were the loans Newmafruit made '*by way of business'*?
- Was Newmafruit carrying on by way of business the activity of exercising rights under CCA regulated agreements?
- Could a court make an enforcement order to allow Newmafruit to enforce on a summary basis?
- Had Newmafruit complied with the documentation and information requirements that the CCA imposes on lenders and the corresponding rights that this gives to borrowers?

**What grounds did Newmafruit Farm advance as to why it should be able to enforce its loans?**
Newmafruit produced evidence from its bankers showing where all the payments had been made. On the whole these were sent to Mr Pither directly but some funds were sent to attorneys acting on Mr Pither's behalf. It said the lending had not been repaid. It also relied on the 2011 agreement in which Mr Pither agreed to repay the money in 2 years' time.

**What did the Consumer Credit Act 1974 say about the need for a consumer credit licence?**
Until 1 April 2014 section 21(1) of the CCA provided that a licence was required to '*carry on a consumer credit business'*. Section 40 of the CCA said that a regulated consumer credit agreement was '*not enforceable against the debtor*' where a creditor was not licensed. Section 189 of the CCA defined '*consumer credit business'* as being '*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'*. However s189(2) of the CCA provided a carve-out where a lender was not treated as carrying on a lending business '*merely because occasionally he enters into transactions belonging to a business of that type'*.

The position under the CCA was therefore clearer for those in the position of Newmafruit who had lent money to a builder who was building something for it in a joint venture. The commentary written by Professor Eva Lomnicka in '*Guest and Lloyd: Encyclopedia of Consumer Credit Law'* notes at least 4 appellate decisions on this including *Shahabinia, Marshall*, *Hare v. Schurek* and *Tamimi v. Khodari.*

**How did this change when the Financial Conduct Authority started to authorize consumer credit business?**
On 1 April 2014 the FCA started to regulate consumer credit business. A large amount of the CCA was repealed and put into a badly written rulebook (which has proved to be far more difficult to understand or navigate) called **CONC**. At the same time a statutory instrument ('RAO') came into force called the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment No 2) Order 2013 **SI 2013/1881.**

However this has to be seen in context of the '*general prohibition'* in section 19 of FiSMA 2000 which prohibits the carrying on a '*regulated activity'* without either permission from the FCA or by an exempt person. Section 26(1) of FiSMA provides that an '*agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party*'. Article 48(2) of the RAO provides that a '*relevant agreement is not enforceable against a debtor…by a person carrying on a regulated activity*'. Article 60B of the RAO then defines '*regulated credit agreements*' as a '*specified kind of activity for the lender …to exercise, or have the right to exercise, the lender's rights and duties under a regulated credit agreement*'.

Section 22 of FiSMA provides that an activity is a regulated activity where it is '*an activity of a specified kind which is carried on by way of business*'. Part II paragraph 23 of the RAO then defines this activity as

a regulated where 'rights under any contract under which one person provides another with credit' and it defines '*credit*' as '*any cash loan or other financial accommodation'*.

**What does the FCA's Perimeter Guidance say? Are there any exemptions?**
FiSMA states the extent of the very large area that the FCA regulates. However the FCA has issued guidance as to what is meant to happen at what it terms the 'perimeter' of this regulated area. This is set out in its Perimeter Guidance Manual (**PERG**). **PERG 2.3.3G** states:

> *'Whether or not an activity is carried on by way of business is ultimately a question of judgment that takes account of several factors (none of which is likely to be conclusive). These include the degree of continuity, the existence of a commercial element, the scale of the activity and the proportion which the activity bears to other activities carried on by the same person but which are not regulated. The nature of the particular regulated activity that is carried on will also be relevant to the factual analysis.'*

In **PERG 4.3.3G**, the FSA says that the difference between the '*carrying on the business'* test and the '*by way of business test' 'should have little practical effect'* but at **PERG 4.3.6G** the FCA identifies some distinctions.

**What had the Court of Appeal previously ruled in *Helden v Strathmore*?**
The meaning of the phrase '*carried on by way of business'* in FiSMA was considered. The Court of Appeal said **[2011] EWCA Civ 542** that there is a distinction between (a) an activity '*carried on by way of business',* and (b) carrying on *'the business of engaging in that activity'*. In relation to some activities such as arranging or advising on regulated mortgage contracts), the RAO provides that an activity is only to be treated as regulated if the person carries on the business of engaging in that activity. But where an activity is not so specified such as exercising a lender's rights and duties under a regulated credit agreement, a looser requirement applies. Here it is only necessary to show that the activity is '*carried on by way of business'*.

**What ruling did the High Court give on whether Newmafruit Farms need authorisation from a regulator to lend money?**
The deputy judge below (Martin Chamberlain QC) went through the provisions in the CCA, FiSMA and the RAO and ruled that in relation to a tranche of loans amounting to around £250k by value that the issue of whether Newmafruit needed permission from the FCA to lend money could go forward to trial and that the proposed amended defence and counterclaim on this from Mr Pither (although appearing late in the day) had a *realistic* prospect of success but required a determination factual issues.

**Did the High Court manage to exclude any lending from his ruling?**
Yes. This fell into 4 distinct categories:

- In relation to some loans, Newmafruit had lent money not to Mr Pither but rather to a corporate body than he controlled. These agreements are not regulated consumer credit agreements because they were not made to an '*individual*' and thus were out of scope because of sections 8(1) and 189(1) of the CCA
- The judge had to consider lending in relation to Quail West in Florida where the funds were sent by Newmafruit to Mr Pither's attorney in Florida. The judge ruled that this is a 'regulated agreement'.
- For some lending the judge correctly finds that the agreements between Newmafruit and Mr Pither were '*exempt*' agreements under s16B of the CCA because the amount of the credit was for more than £25,000 and the regulated limit under the CCA at that time was £25,000 or less.
- For the final tranche of loans, the judge said that on the material before him it was not possible to say whether the sums were borrowed by Mr Pither or not but he noted that it seemed '*likely that they were borrowed wholly or predominantly for the purposes of Mr Pither's business*'.

**What ruling did the High Court give on whether Newmafruit made these loans by way of business?**
Here the judge had to decide whether the lending by Newmafruit to Mr Pither was '*carried on by way of business*'. He also had to decide if Newmafruit was '*carrying on by way of business the activity of exercising rights under regulated agreements'*. The judge said if Newmafruit was, then any such credit agreements would be unenforceable against Mr Pither because of Article 48(2) of the RAO.

On this enquiry the judge said that the FiSMA 2000 (Carrying on Regulated Activities by Way of Business) Order 2001 **SI 2001/1177** did not assist him in determining whether Newmafruit was exercising a lender's rights under a regulate credit agreement or not. Instead the judge referred

extensively to both the first instance decision of Newey J **[2010] EWHC 2012 (Ch)** as well as the Court of Appeal decision in *Helden v. Strathmore*. Newey J had extensive regard to PERG in his judgment noting that whilst PERG was not binding on the courts it was still of interest. Pulling the strands of **PERG** and *Helden* together, the judge decided that:

> '*it is not necessary for Mr Pither to show that the exercising of lender's rights under regulated agreements represented for Newmafruit the carrying on a business in its own right. The test is the looser one of whether the activity of exercising lender's rights under regulated agreements was carried on by Newmafruit "*by way of business*". The latter test could be (though would not necessarily be) satisfied even if the activity were undertaken "*on an isolated occasion*" only*.'

The judge noted that '*Mr Newman's evidence does not address the extent to which Newmafruit is currently engaged in the activity of exercising its rights as lender under these agreements'*. He went on to conclude on this issue there was a triable issue saying that:

> '*In the light of this evidence, and applying the looser test explained by Newey J in* Helden v Strathmore*, it is impossible to say, in respect of the sums lent pursuant to regulated agreements, that Mr Pither has no real prospect of establishing that Newmafruit is acting "*by way of business*" in exercising its rights as lender under these agreements. Given the relevant factors identified, the judgment referred to in* ***PERG 2.3.3G*** *could only be made on much fuller information.'*

**What did the High Court say about whether Newmafruit had complied with the CCA documentation and information requirements?**

Here the judge had to consider 2 well-known parts of the CCA. The first being section 61 which mandates in conjunction with statutory instruments the form and content of a regulated consumer credit agreement. The second being the corresponding provisions in section 55 about pre-contract information. On this the judge was clear and concise ruling that:

> '*It is common ground that none of the agreements giving rise to the debts claimed by Newmafruit in this action was preceded by the required disclosure and none of them was executed in the prescribed form.'*

**What was the criticism of the High Court judgement?**

There are these 3 main criticisms of the judgement below:

- This was only occasional lending by Newma Fruit Farm. Under the rules under the Consumer Credit Act 1974 prevailing until April 2014, this would not have been regarded as being regulated. FiSMA contains the general prohibition (including criminal liability) but then leaves it to the Regulated Activities Order to decide whether an activity is regulated or not and moreover to the FCA's Perimeter Guidance (PERG) to try and decide which side of the line an activity falls on or not. However one of the problems with PERG is that it provides non-binding guidance and thus PERG has its limitations when it comes to technical issues like the extent of the perimeter. PERG does not bind the FCA and a court is entitled to take a different view
- One of the loans was made to an attorney in Florida to buy a property there. It is not clear that there is any connection with the loan and the United Kingdom. The territorial scope of the CCA 1974 is limited to the UK. The deputy judge does not pause to consider this nor are any of the prior overseas timeshare cases on this referred to in his judgement.
- The judge overstates the position on enforcement orders. It cannot be right that a judge with all the facts on a summary judgment application is never in a position to determine an enforcement application especially where the errors are trivial.

**When will the oral permission hearing be heard?**

Although permission to appeal was refused on the papers, this has been renewed to an oral hearing. This has been fixed for 8 November 2017 at which Newma Fruit Farm will have a final attempt to convince a single Lord Justice at a hearing that one or more grounds of its appeal either have a real prospect of success or that there is some other compelling reason for the Court of Appeal to hear this.

**24 March 2017**

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