

Claim No: 2XO87797

IN THE BRISTOL COUNTY COURT

Date: 30 October 2013

Before:

MR RECORDER MONTY QC

BETWEEN:

ARROW GLOBAL GUERNSEY LIMITED

Claimant

-and-

ALISON FROST

Defendant

Miss Kate Urell (instructed by Restons Solicitors) for the Claimant

Mr Paul Brant (instructed by Quality Solicitors Howlett Clarke) for the Defendant

Hearing dates: 7, 8 October 2013

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Recorder Monty QC

Mr Recorder Monty QC:

1. The Claimant, Arrow Global Guernsey Limited, is the assignee from MBNA of a debt incurred by the Defendant, Mrs Alison Frost, by her use of an MBNA credit card between 1998 and 2010. The amount of the debt is £15,379.38. Mrs Frost does not deny that she owes the money, nor does she deny the amount of the debt, but asserts that because of non-compliance with the relevant requirements of the Consumer Credit Act 1974 (“the Act”) it is not enforceable against her.
2. For the reasons set out in this judgment, I find for the Claimant and reject all of the Defendant’s arguments on unenforceability and unfair relationship.

The claim

3. The Claimant became the assignee of the debt by a formal assignment on 20 December 2011. A legal assignee of a debt under a regulated consumer credit agreement is a creditor within the meaning of the Act and is entitled to enforce the debt, subject to the performance of the requisite statutory duties under the Act: *Jones v Link Financial Ltd* [2013] 1 WLR 693. The Claimant’s status as legal assignee of the debt was conceded at the trial.
4. The Claimant’s case is that MBNA provided Mrs Frost with a credit card by an agreement dated 7 April 1998 pursuant to an application made by Mrs Frost in writing. Thereafter the card was used by Mrs Frost but she failed to make the minimum repayments required under the terms of the credit agreement. On 9 April 2010 MBNA served a Default Notice requiring the payment of the arrears of £1,691.09 by 26 April 2010, failing which the then outstanding balance of £15,391.38 would become due. There was no compliance with the Default Notice, the credit agreement was terminated, and the full outstanding balance fell due. In the alternative, the Claimant says that MBNA/the Claimant was contractually entitled to terminate the credit agreement and demand repayment of the outstanding balance without service of a Default Notice and that the credit agreement was in fact terminated. In the further alternative, the Claimant asserts that termination was not a condition precedent and the full amount became due following Mrs Frost’s failure to comply with the Default Notice. Finally, if the credit agreement is found to be unenforceable without an order of the court, the Claimant seeks an order under section 127 of the Act to enforce it.
5. Mrs Frost’s defence is based upon a number of alleged contraventions of the requirements under the Act.
6. In this judgment, references to sections are to the sections of the Act.

The evidence

7. Before dealing with the challenges to the claim, I should first mention the evidence which I have taken into account.
8. For the Claimant, I have read the two statements of Mr James Rimmer, who is the Claimant's litigation manager. Mr Rimmer also gave oral evidence and was cross-examined. As noted above, the Claimant is the assignee of the debt, and most of Mr Rimmer's evidence came from information obtained by him from Dianne Powell, who is employed by MBNA as a recoveries manager. In my view Mr Rimmer's evidence was reliably comprehensive and supported by the documents exhibited to his statements, and as indicated below, I accept his evidence in its entirety.
9. I have also read three statements from Mrs Frost, and three statements from Mr Frost, both of whom also gave oral evidence and were cross-examined. I was not impressed by Mrs Frost as a witness. It was a common theme of Mrs Frost's evidence that since the signed form could not be produced, she did not have to pay; and she accepted that she had run up the credit card bill, but stated in cross-examination that she and her husband were not the type of people who didn't pay their debts. Mrs Frost was unable to recall many of the letters which were received or sent, and asserted that she had left her husband to deal with the dispute, simply signing letters he had drafted without reading them. She asserted that she had not received any of the relevant documents, in particular the Default Notice, and the contractual termination letter. I did not find these assertions credible, in particular her assertion that she could recall that there was no space on the application form for her to sign and that she did not sign the form. If Mr Frost had been dealing with any of these matters, I would have expected him to have mentioned it in evidence, but there was nothing of any substance in Mr Frost's statement save in relation to the telephone calls made by or on behalf of MBNA. Furthermore, it became apparent to me when listening to Mrs Frost's evidence that whilst she asserted that she had not signed an application form, or received certain letters, in fact the truth is that she could not remember whether she had done so or not, but was relying on the fact that the Claimant could not produce a signed document or that her husband had been dealing with the letters. I was similarly unimpressed by Mr Frost as a witness. He accepted that he wrote letters for his wife to sign, that he had gone to a claims management company regarding the dispute, and he also referred in his statement to the allegations of telephone harassment. Apart from that, his evidence did not deal with any relevant issues. He was asked if he agreed with his wife's evidence, and in response he said that he couldn't say that he was listening to it (despite the fact that he had been in court) and was not prepared to say that he in fact agreed with her evidence, a response which I found surprising. As a consequence, in my view I should treat with some caution Mrs Frost's assertions as to fact unless these are supported by any contemporaneous documents.

Signing of agreement – section 61

10. Section 61 provides:

- (1) A regulated agreement is not properly executed unless—
 - (a) a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) is signed in the prescribed manner both by the debtor or hirer and by or on behalf of the creditor or owner, and
 - (b) the document embodies all the terms of the agreement, other than implied terms, and
 - (c) the document is, when presented or sent to the debtor or hirer for signature, in such a state that all its terms are readily legible.

11. The Claimant says that the credit agreement was entered into on 7 April 1998. In support the Claimant has provided a reconstituted copy of the credit agreement, which was appended to the Amended Particulars of Claim as AG1. However, Mrs Frost says that she entered into a credit agreement with MBNA in 1994, not 1998. Paragraph 3 of the Amended Defence states:

“It is denied that the Defendant entered into an agreement with MBNA Europe Bank Limited on or around 7 April 1998. The Defendant could not have entered into an agreement with MBNA Europe Bank Limited in 1998. It is further denied that the document at AG1 represents a true copy of the agreement between the parties. The Claimant is required to prove that the Defendant entered into an agreement of which AG1 is a true copy”.

12. I will deal with the obligations to provide a true copy of the agreement separately below.
13. There was some criticism made of paragraph 3 of the Amended Defence to the effect that it did not clearly raise the question of whether there was an agreement in 1994 or 1998, as opposed to simply whether the Claimant had correctly named the company which had provided the card. Mr Brant, for Mrs Frost, said that paragraph 3 took issue with whether the Claimant had correctly named that company. Miss Urell, for the Claimant, explained on instructions that the company which provided the card was MBNA International Bank Limited; on 1 March 2001 it changed its name to MBNA Europe Bank Limited (and it had that name at the time of the assignment of the debt to the Claimant); and on 22 November 2013 it changed its name again, to MBNA Limited. This point was not challenged or pursued by Mr Brant. Nonetheless, it seems to me right that it is for the Claimant to prove that Mrs Frost entered into the credit agreement in respect of which this action has been brought.
14. In my judgment, the Claimant has established beyond doubt that the credit agreement was entered into on 7 April 1998, and I reject Mrs Frost’s evidence that it was entered into in 1994.
 - 14.1. The Claimant’s evidence, from Mr Rimmer, which I accept, is that MBNA had a case management system known as Autoscore, the purpose of which is to record

events and information from the time MBNA received a signed application form from someone who wanted an MBNA credit card.

- 14.2. I also accept Mr Rimmer's evidence that the Autoscore system is permanent and unchangeable and that once details are entered onto the system, they remain there.
- 14.3. The Autoscore printout produced by Mr Rimmer shows that an application by Mrs Frost for a credit card was received on 7 April 1998.
- 14.4. The printout gives as Mrs Frost's address 14 Clover Road, Wick St Lawrence and states that she had lived there for 2 years, with her previous address being 30 Sophia Gardens, Weston Super Mare. It was put to Mrs Frost in cross-examination that she had indeed moved to 14 Clover Road in 1996 and she did not challenge that assertion. The addresses, and the time during which Mrs Frost had lived there, are consistent with the Autoscore information being entered up on 7 April 1998.
- 14.5. The printout shows, next to "Credit Limit", the entry "Not Given". Mr Rimmer said in cross-examination that he did not know why this was, as it would have been usual to open an account with a credit limit. In re-examination, Mr Rimmer said that it could be because the applicant had not requested a particular credit limit on the form. In my view, this entry does not assist in helping me determine the question of when the account was opened.
- 14.6. The printout states that Mrs Frost was a self-employed partner in the firm "The Frost Partnership" and had been for 5 years. Mrs Frost produced evidence to show that The Frost Partnership was established by her and her husband in 1994. If one includes 1994, then the 5 year period is correct and is consistent with the information being provided in 1998.
- 14.7. The printout gives a gross annual income for Mrs Frost of £28,000, a total household income of £65,000 and £37,000 of other (unspecified) income. Whilst Mrs Frost said that she did have an income in 1994, because her husband was making monthly housekeeping payments, it seems to me that the figures on the printout are only truly consistent with the position in 1998, when Mrs Frost was indeed receiving an income from the business.
- 14.8. The 23-page printout of account activity on the card, produced by the Claimant, commences on 18 June 1998 and is therefore consistent with the account having been opened in 1998.
- 14.9. Mrs Frost told me that she has only ever had one credit card, being the MBNA card, and that she used it in 1994 when The Frost Partnership was being set up, to buy a number of things for the new business, and so the Claimant must be

wrong, as she had the card in 1994. However, Mrs Frost was not able to produce any documents showing that there was any MBNA card being used by her prior to 1998. She produced no credit card statements for the period 1994-1998 and no receipts to show that she had used the card for purchases in 1994 (or during the 1994-1998 period). I accept that it is for the Claimant to prove that the agreement was in 1998, but it seems to me that I can take into account, when deciding which of the parties is more likely than not to be right about the date, the fact that Mrs Frost can produce no independent evidence to support her assertion that it was 1994.

- 14.10. I accept Mr Rimmer's evidence that there is no record of Mrs Frost holding any other credit card facility issued by MNBA.
- 14.11. However, the Autoscore printout appears to show two further matters. First there is a reference to a Midland VISA card. I take judicial notice of the fact that Midland Bank plc became part of the HSBC banking group in the early 1990s and the Midland name ceased to be used in 1999, when it became called HSBC Bank. Mrs Frost accepted that she had an HSBC account (and although she denied having had a Midland account, in my view she was mistaken about this) and it seems to me more likely than not that she had a Midland VISA card as at 1998, although I can draw no conclusions in the absence of any evidence as to how long precisely she had held that account and that card. Secondly there is a reference to Mr Frost being an existing MBNA card holder with a credit limit of £7,500. I reject Mrs Frost's evidence that she never used her husband's card. In my view, on balance it seems to me likely that Mrs Frost used either her Midland VISA card or her husband's MBNA card in 1994. I have concluded that Mrs Frost did not, in my view, have her own MBNA card until 1998 and therefore she was not right about having used it in 1994.
- 14.12. The Claimant produced four screen prints from its Credit Reference File. On each of these, the "Open Date" (the date on which the account was opened) was given as 7 April 1998.
- 14.13. Mr Brant pointed to the fact that the Claimant's solicitors had written to Mrs Frost on 18 June 2013 in terms which stated:

"It is the position of both MBNA and our Client that you entered this agreement in 1994."

However, an email of the same date stated:

"There is, as we are sure you have realised, an error in our initial correspondence. It is the position of our client that the account with MBNA was opened in 1998. We will correct that in a revised letter."

On the same day a letter in otherwise identical terms corrected “1994” to “1998”. I accept that the first letter’s reference to 1994 was an error. I do not accept Mrs Frost’s assertion that it correctly stated the position.

15. For all these reasons, I reject Mrs Frost’s assertion that the agreement was entered into in 1994. I find as a fact that it was entered into on 7 April 1998.
16. I also find as a fact that Mrs Frost signed an application form in 1998 and accordingly that the provisions of section 61(1)(a) were satisfied.

16.1. This point is clearly linked to the creditor’s duty under section 78 to give certain information about the agreement to the debtor. As I have indicated, I will deal with the section 78 duty below, but for present purposes it is sufficient to note that there is no requirement for the creditor to provide pursuant to section 78 a copy of the agreement which actually contains the debtor’s signature. It therefore seems to me that it is for me to decide whether, on balance of probabilities and as a question of fact, whether Mrs Frost did indeed sign an agreement in 1998 as alleged by the Claimant.

16.2. I have already found as a fact that the agreement was entered into on 7 April 1998.

16.3. Mr Brant observes that the court in *Carey v HSBC Bank plc* [2009] EWHC 3417 (QB) at paragraph 53(11) specifically considered the evidential importance of producing the original agreement where signature was disputed. That paragraph stated that if the debtor

“...asserts positively that although he has been using a credit card agreement for years, he never actually signed an agreement, or one that complied with s61, the creditor may well have to try and find the original in order to deal with that allegation.”

That is of course right, but it is in my view equally clear that where the creditor is unable to find the original, it can still make good its case that an application was indeed signed by the debtor by the use of other evidence. In other words, the absence of a signed form is not fatal to the creditor’s case if it can otherwise prove that an application form was indeed signed.

16.4. Mr Rimmer’s evidence was that the Autoscore system records information from the time a signed application form is received. It was never suggested to Mr Rimmer that it could record information in relation to a telephone application, and although Mrs Frost suggested that she might have applied on the telephone, the fact is that she could not remember whether it was a telephone or a written application. It seems to me on balance far more likely that it was in writing, because of what Mr Rimmer says, and therefore that there must have been a

signature on the application form. His evidence, which I accept, was that the Autoscore printout records receipt of an application form which had been signed by Mrs Frost. I think it inconceivable on the basis of Mr Rimmer's evidence that the application would have been processed without a signed application form.

- 16.5. Mr Brant pointed to the fact that MBNA had been able to refer to other application forms, from 1998, which did contain signatures of third party applicants, but had been unable to produce a form signed by Mrs Frost. I accept Mr Rimmer's evidence that a number of copy or original applications from 1998 had gone missing and could not be found despite a thorough search. As I have indicated, the absence of the signed form is not fatal to the Claimant's case that an application form was signed by Mrs Frost.
- 16.6. Mrs Frost said that she did not sign an application form. However, her evidence on this was extremely unsatisfactory. At first, she said that she had never signed a credit card agreement, that the application form had arrived in the post, she completed the form but it did not have a space for a signature, only for her name address and occupation. Mr Rimmer's evidence, which seems to me to be far more likely to be accurate on this point, was that the application form had to be signed for it to be entered onto the Autoscore system. I simply cannot accept that Mrs Frost can recall what was on the form in 1998 (or, on her case, in 1994). Then Mrs Frost said that the application may have been over the phone. She also said that she recalled that there were no terms and conditions with the card but that she remembered activating it.
17. For these reasons, I find as a fact that there was compliance with section 61 and that Mrs Frost did sign an application form and did enter into a credit card agreement with MBNA on 7 April 1998. In the light of my finding that the agreement was properly executed, and that section 61(1)(a) was complied with, there is no need to consider further the provisions of section 65 or section 127. Had I found that there was a breach of section 61(1)(a) then I could not have made an enforcement order as this would have been an incurable defect: section 127(3).

Request for information – section 78

18. Section 78 imposes a duty on the creditor to provide certain information, at the debtor's request, under the agreement:
 - (1) The creditor under a regulated agreement for running-account credit, within the prescribed period after receiving a request in writing to that effect from the debtor and payment of a fee of £1, shall give the debtor a copy of the executed agreement (if any) and of any other document referred to in it, together with a statement signed by or on behalf of the creditor showing, according to the information to which it is practicable for him to refer,—

- (a) the state of the account, and
 - (b) the amount, if any currently payable under the agreement by the debtor to the creditor, and
 - (c) the amounts and due dates of any payments which, if the debtor does not draw further on the account, will later become payable under the agreement by the debtor to the creditor.
19. It is important to note that the requirement to provide information under section 78 is not to establish whether or not there was a properly executed agreement in the first place. For the reasons set out above, in my view there was. Section 78 is concerned with the provision of information to the debtor in a relatively straightforward and cost-effective manner.
20. HHJ Waksman QC, sitting as a Judge of the High Court, in the case of *Carey v HSBC Bank plc* [2009] EWHC 3417 (QB), gave a comprehensive overview of the section 78 requirement. I adopt with approval the summary set out by Miss Urell in her skeleton argument, which follows below.
- 20.1. The copy of the agreement provided in response to a section 78 request need not be the original or a photocopy thereof. A reconstituted copy suffices.
 - 20.2. The copy provided need not be in the same format as the original.
 - 20.3. The copy does not serve a “proof purpose” but an “information purpose” in the sense that it is intended to provide information as to what was agreed to.
 - 20.4. The copy need only contain the information contained in the original agreement, subject to the permitted omissions contained in the relevant regulations.
 - 20.5. The copy need not contain signatures or dates of signatures.
 - 20.6. The most recent terms of the agreement must also be provided if the terms and conditions have been varied.
 - 20.7. If a debtor alleges defects in the original agreement, these must be pleaded and proved as a separate allegation.
 - 20.8. There is only one sanction for non-compliance, namely unenforceability (section 78(6)) which can be cured by late provision of the correct documentation.
21. An application was made by Mrs Frost under section 78 on 18 October 2008, at the same time as a Data Protection Act request was made.
22. Mr Brant asserted that there had still been no compliant response to the section 78 request.
- 22.1. The obligation is (i) to produce a true copy of the original terms and conditions (ii) to produce a true copy of the current terms and conditions (iii) to comply with the remaining obligations under section 78(1).

- 22.2. Mr Brant noted that the Claimant relied on the documents at AG1 attached to the Amended Particulars of Claim. However, these documents did not set out the information at section 78(1)(a) to (c) nor was that information provided in a statement signed by or on behalf of the creditor.
- 22.3. Miss Urell contended that the statement together with the requisite information was provided in Mr Rimmer’s witness statement and that together with the service of AG1 the Claimant had complied with section 78.
- 22.4. Mr Brant’s response was that section 78 requires all the information to be provided at the same time, because of the words “together with”. In support of that proposition, he cited an unreported decision of Deputy District Judge Bradley, sitting in the Worthing County Court on 6 January 2012, *HFO Capital Limited v Robertson*. In that case it was held that a section 78-compliant copy of the agreement could not be supplied piecemeal over time in different documents served for different purposes, leaving the debtor to work out when he has received a proper response. This was because “section 78 refers to ‘a’ statement in the singular, which is to be signed and served ‘together with’ the copy of the agreement.”
- 22.5. In my view, whilst I accept that “together” can mean “at the same time as”, it can also mean “as well as”, and it seems to me that if the creditor provides the requisite information in close proximity, so that the debtor can clearly understand the position and clearly has in his possession all the information required to be provided, that is good compliance with section 78. With respect to Deputy District Judge Bradley, whose decision is not binding on me, I do not therefore accept the premise that all the information must be provided at exactly the same time, nor do I think that the wording of section 78 compels such a conclusion. In my view, therefore, the Claimant has complied with section 78.
- 22.6. Even if I am wrong about this, a failure to comply with section 78 can be remedied at any time: see section 78(6). The Claimant served a further bundle of documents containing the section 78 information and signed statement on Mrs Frost on the second day of the trial, once Mr Brant had raised this point in his closing submissions. Mr Brant again objected to this as being good compliance. First, because it was served on Mrs Frost’s solicitors and not on her. This was remedied by re-serving it on Mrs Frost. Secondly, because it was new evidence, which should not be admitted at such a late stage, but I determined that it should be allowed in as an exercise of my discretion. Thirdly, Mr Brant said that the information provided was not section 78-compliant because the interest rates differed in the statement from the terms and conditions, but on close examination this was ill-founded; they were the same. I therefore find that even

if I am wrong about section 78 having been complied with by AG1 and Mr Rimmer's statement, it was complied with by service – albeit late – of the bundle of documents on the second day of the trial.

- 22.7. Further, even if I am wrong about all of the above, in my view Miss Urell is right in her assertion that the Amended Particulars of Claim, which were accompanied by the documents at AG1, contained a statement signed on behalf of the creditor showing the state of the account and the amount payable under the agreement by the debtor to the creditor, and that this was section 78-compliant.
23. I draw no conclusions in relation to section 78 from the reference to “the agreement which is currently being checked” in Mrs Frost's undated letter, received by MBNA on 20 July 2009. It is far from clear that this establishes that, by this time, MBNA had complied with the section 78 request, and the Claimant has not satisfied me on balance that section 78 was complied with prior to the provision of either (a) the documents served with the Amended Particulars of Claim and in Mr Rimmer's statement, or (b) the documents served on the second day of the trial.
24. For these reasons, I reject the submission that there has been no compliance with section 78.

Copy of executed agreement – section 63

25. Under this section, a copy of the executed agreement and all documents referred to therein must be provided to the debtor either at the time of making the agreement or within 7 days thereof.
26. The agreement would have been made once the application form, signed (as I have found it was) by Mrs Frost, was received accepted and signed on behalf of MBNA.
27. The breach of section 63 which is pleaded in the Amended Defence is an alleged failure to provide the terms and conditions along with the credit card.
28. The Claimant's evidence was that Mrs Frost would have a copy of the executed credit agreement, in accordance with MBNA's standard procedures, contained in what is commonly known as the “card carrier”. Mrs Frost says that she did not receive the terms and conditions. In my view the truth is that she cannot now recall whether she did or not. Thus the real issue here is whether the terms and conditions were sent with the card carrier.
29. Mr Brant referred me to the case of *Harrison v Link Financial Limited* [2011] EWHC B3 (Mercantile) in which MBNA's procedures came in for considerable criticism, and it was found as a fact that MBNA had failed to send the terms and conditions to the debtor. It is notable in that case that the debtor had retained the relevant documents sent to him by MBNA, and although the card carrier was there, the terms and conditions were not. The

court held that it would have been remarkable had these been discarded when all the others had been retained. In the present case, by contrast, there are no documents whatsoever which have been retained by Mrs Frost, and so it seems to me that I have to determine this issue as a question of fact, on the balance of probabilities.

30. Mr Rimmer's evidence does not mention the terms and conditions in the context of what documents would have accompanied the card carrier other than a copy of the executed agreement. However, since the evidence is that the agreement comprised the documents at AG1, I am prepared to accept on balance of probabilities, and therefore I find as a fact, that the card carrier was accompanied by the terms and conditions. I therefore find as a fact that the Claimant did comply with section 63.
31. If I am wrong about that, and if I had found that section 63 had not been complied with, I would have exercised my discretion under section 127, for the following reasons.
32. This agreement predated the repeal of section 127(3)-(5) following the coming into force on 6 April 2007 of the Consumer Credit Act 2006. Section 127(1)-(5) directs the court to dismiss an application for an enforcement notice if but only if it considers it just to do so having regard to prejudice caused to any person by the contravention in question, and the degree of culpability for it, and the powers conferred on the court by sub-section (2) (the power to reduce or discharge any sum payable by the debtor, so as to compensate him for prejudice suffered as a result of the contravention in question) and sections 135 and 136 (the power to impose conditions, suspend the operation of the order, and to vary agreements). This is also subject to sub-sections (3) and (4):
 - (3) The court shall not make an enforcement order under section 65(1) if section 61(1)(a) (signing of agreements) was not complied with unless a document (whether or not in the prescribed form and complying with regulations under section 60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor or hirer (whether or not in the prescribed manner).
 - (4) The court shall not make an enforcement order under section 65(1) in the case of a cancellable agreement if—
 - (a) a provision of section 62 or 63 was not complied with, and the creditor or owner did not give a copy of the executed agreement, and of any other document referred to in it, to the debtor or hirer before the commencement of the proceedings in which the order is sought, or
 - (b) section 64(1) was not complied with.
33. There is no problem with sub-section (3), since as I have found Mrs Frost did sign the agreement which contained all the terms and conditions. It was conceded by Mr Brant following the evidence which emerged in cross-examination that this agreement was not a cancellable agreement since this was a distance sale, either by post or on the telephone. Therefore, sub-section (4) does not apply.

34. This is in my view a case in which I would have exercised my discretion. The terms and conditions were supplied to Mrs Frost when she signed the agreement. I can see no possible prejudice to Mrs Frost by her not having received the terms and conditions again when she received the card. This was not a case where, as in *Harrison*, no terms and conditions were supplied to the debtor at any time. Had I exercised that discretion, I would not have thought it right to compensate Mrs Frost in all the circumstances.

Default notice – sections 87 and 88

35. Under section 87:

- (1) Service of a notice on the debtor or hirer in accordance with section 88 (a “default notice”) is necessary before the creditor or owner can become entitled, by reason of any breach by the debtor or hirer of a regulated agreement,
- (a) to terminate the agreement, or
 - (b) to demand earlier payment of any sum, or
 - (c) to recover possession of any goods or land, or
 - (d) to treat any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred, or
 - (e) to enforce any security.

36. Section 88(1) sets out what a default notice must contain (it must be in the prescribed form) and section 88(2) deals with the date by which default must be remedied. Section 88(2) states:

- (2) A date specified under subsection (1) must not be less than 14 days after the date of service of the default notice, and the creditor or owner shall not take action such as is mentioned in section 87(1) before the date so specified or (if no requirement is made under subsection (1)) before those 14 days have elapsed.

37. The point which is taken in relation to the default notice is that the specified date was less than 14 days after the date of service.

38. A letter purporting to be a default notice was sent to Mrs Frost dated 9 April 2010. The date by which action was required to be taken was stated as being 26 April 2010. Since section 88(2) requires that date to be not less than 14 days after the date of service of the default notice. Thus the default notice had to be served on or before 12 April 2010 or else there would be less than 14 days before the date stated in the notice and it would be invalid.

39. Section 176 deals with service of documents under the Act.

- 39.1. The learned editor of *Goode: Consumer Credit Law and Practice* (“Goode”) points out that section 176 does not specify when a default notice is deemed to be served (elsewhere in the Act, by contrast, section 69 expressly provides that a notice of cancellation if sent by post is deemed to be served at the time of

posting). Goode goes on to state at paragraph 53.44 that the date for service of a default notice is therefore governed by the Interpretation Act 1978 section 7, which provides that where an Act authorises or requires a document to be served by post, whether the expression “serve” or the expression “give” or “send”, or any other expression, is used, then unless the contrary intention appears the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document. The same section goes on to state that unless the contrary is proved, service is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.

39.2. With the greatest respect to the views set out in Goode, it seems to me that in fact section 176 in fact deals with service quite simply and without any need to refer to the Interpretation Act.

39.3. First, sub-section (1) states:

A document to be served under this Act by one person (“the server”) on another person (“the subject”) is to be treated as properly served on the subject if dealt with as mentioned in the following subsections.

This in my view is clear. It means that if the document is dealt with as set out in the following sub-sections, it is “to be treated as properly served”.

39.4. Secondly, sub-section (2) states:

The document may be delivered or sent by an appropriate method to the subject, or addressed to him by name and left at his proper address.

In the present case, the default notice was sent in the post (which is an appropriate method). It was therefore “dealt with” in accordance with sub-section (2) by posting it, and that means it fell “to be treated as properly served”.

39.5. I am reinforced in this view by the definition of “serve on” in section 189:

“serve on” means deliver or send by an appropriate method to.

39.6. It therefore seems to me, using the wording in the Interpretation Act, that a contrary intention does appear in the section; section 176 appears to me to be stating expressly that proper service is effected if the document is sent in the post. There is no need in my view to use any deeming provision.

40. I now turn to the evidence in relation to the sending of the letter.

41. Mr Rimmer’s evidence was that the default notice was sent by MBNA using UK Mail’s Business Class Service. Pursuant to an agreement between MBNA and UK Mail, the latter is contractually obliged to deliver any documents sent by business class within 2 days of despatch, including Saturday. Mr Rimmer says that an entry in the case management system known as Customer Information Score (“CIS”) shows that it was collected from

MBNA by UK Mail on 9 April 2010, which was a Friday. The agreement with UK Mail meant that the letter would be at the sorting office the day it was posted. The Claimant therefore says that it was deemed served on the following Monday, 12 April 2010.

42. The relevant CIS entry reads as follows:

“090410 1704 CAE11F NOD SENT 9.04, EXP 26.04 15391.38 1691.09”

43. Mr Rimmer was questioned by Mr Brant about what this entry actually shows. Mr Rimmer explained it as follows. “090410” is the date on which, and “1704” is the time at which, the entry was updated on the system. He was not able to say whether this was the time at which the letter was actually printed or not. It was possible that it was printed out before or after 17.04 and although he could not give the precise time, it would definitely have been on 9 April. However, he said that the fact that the entry read “NOD SENT” meant that it was actually collected by UK Mail that day. Mr Rimmer said that “NOD SENT 9.04, EXP 26.04” indicates that a notice of default was actually sent on 9 April with an expiry date of 26 April. “CAE11F” is an identification reference. The figures “15391.38” and “1691.09” indicate in pounds sterling the total amount due and the overdue amount respectively. In cross-examination, Mr Rimmer said that it was not possible that the letter could have been printed as late as 23.55 on 9 April, and although he was not sure when it was printed, he had been informed by MBNA that it was on 9 April. Ultimately, however, Mr Rimmer had to concede that he just didn’t know whether the letter was ready for collection on 9 April.
44. Mr Brant contended that this CIS entry, combined with Mr Rimmer’s evidence, showed it was likely that the default notice was sent either on Monday 12 April and received on Wednesday 14 April, or on Saturday 10 April and received on Tuesday 13 April. In either case, the requisite 14 day period would not have been given. He points to the fact that the CIS entry gives a time of 17.04 and says that even if this was the time at which the letter was printed, the Claimant has produced no evidence to show that it was actually posted on 9 April.
45. On balance, I accept the evidence given by Mr Rimmer on what the entry shows. The CIS entry is confirmation of the fact that the notice of default was sent on 9 April, in other words, on 9 April 2010 the notice of default was printed and collected by UK Mail the same day for delivery in the post. It seems to me that the word “SENT” in the CIS entry is clear evidence to support the Claimant’s case that it was indeed sent that day. Mr Rimmer was clear about that – “SENT” meant that it was sent that day. The arrangement between MBNA and UK Mail means that the default notice would have been delivered within 2 days of collection, including Saturday, so that it would have been delivered on Monday 12 April.

46. If I am right on my interpretation of section 176, then the notice of default was served on the day it was sent, namely 9 April 2010.
47. If I am wrong on my interpretation of section 176, then since I accept the Claimant's evidence on this point, I find as a fact that the default notice was served when it was actually delivered, on Monday 12 April 2010. I do not therefore need to invoke the provisions of the Interpretation Act, but even if I did, I would have held that the notice was posted on 9 April 2010 and would have been deemed to have been delivered 2 days later, on Monday 12 April 2010, which would therefore have been the deemed date of service. I therefore hold that the default notice did give the requisite 14 day period.
48. Even if I was wrong on all of this, and if I had in fact held that if the actual or the deemed date of service was 13 or 14 April 2010 (in other words, either 1 or 2 days short of the requisite 14 day period), in my view that could properly be ignored as being *de minimis*.
49. There is little authority on what can be ignored as *de minimis* for these purposes. However, it does seem to be accepted that where there is a *de minimis* misstatement in the notice, it will not invalidate it.
50. For example, Goode at paragraph 13.64 states as follows:

“Where the remedial action which the debtor or hirer is required to take is the payment of arrears, these must be specified accurately: see the notes to the CCA 1974, s 88. Anything more than a *de minimis* misstatement will make the default notice invalid. The same is presumably true of any other remedial action, though the question is less likely to arise. It also seems to follow that a substantial error in stating any of the other items listed will be fatal.”
51. In the same textbook, at paragraph 5.168:

Where the discrepancy between the amount referred to in the default notice and the true amount required to remedy the breach is a minor one, the court may overlook that discrepancy on the on the basis of a *de minimis* exception (see, for example, *Rankine v American Express Services Europe Ltd* [2009] EWCA Civ 1539, [2009] CCLR 3).
52. In *Brandon v American Express Services Europe Limited* [2011] EWCA Civ 1187 at paragraph 30, the Court of Appeal was prepared to assume, allowing an appeal from a summary judgment order, that where the minimum statutory period under section 88 was short, “then it is (at least) realistically arguable that the defect cannot be overlooked as *de minimis*.” It seems to me that the Court of Appeal was saying that it was leaving open the question of whether where a default notice which was served short there could be a *de minimis* argument which might either save the notice if accepted, or be fatal to the notice if rejected. I certainly do not read Brandon as authority for the proposition that where statute has prescribed a notice period there is no power to overlook short notice (a failure to comply with the statutory notice period) if that failure is *de minimis*.

53. Finally, I note that in the unreported case of *HFO Capital Limited v Robertson* (see paragraph 22.4 above) the Deputy District Judge held,

“In my judgment, subject to the principle that the errors which are trivial can be disregarded (*de minimis*), the Act (as relevant to this dispute) provides a code which must be followed before a debt can be enforced.”

He went on to refer with approval to the judgment of the Court of Appeal in *Brandon*.

54. I am therefore prepared to accept that any trivial errors which are *de minimis* can be disregarded.

55. In the present case, the amounts due were correctly stated in the default notice, and I would have held, had I found as a fact that service was not until 13 or 14 April and it been necessary to do so, that one or even two days short notice should be waived as being *de minimis* and that the default notice was thus valid.

Contractual termination – section 98A

56. This is the Claimant’s alternative case, as an alternative to serving a default notice.

57. The Amended Particulars of Claim relied on two letters dated 12 and 21 September 2012 and/or service of the Original and/or the Amended Particulars of Claim. By an application made at the outset of the trial, but which had been made by formal application notice on 11 September 2013, the Claimant applied to re-amend the Particulars of Claim to add in the words “and 18 June 2013”; in other words, to rely on a letter of termination dated 18 June 2013.

58. The application was opposed by Mr Brant, on the following grounds. First, that that it added a new cause of action which only arose after issue of the proceedings and which was not foreshadowed in the Claim Form. Although the particulars in the Claim Form refer to “Default Notice”, I do not agree that this means that the Claimant is precluded by the wording of the Claim Form generally from contending that there was a contractual termination. Indeed, the Amended Particulars of Claim already plead contractual termination, and the re-amendment seeks to introduce reliance on a different letter. Secondly, that this is an extremely late application, and as such is deprecated by the CPR and the overriding objective. Mr Brant argued that the Claimant should be obliged to issue fresh proceedings to introduce this new cause of action. I allowed the re-amendment, on the ground that – contrary to Mr Brant’s assertion – it furthered the over-riding objective to ensure that all points which could be in issue between the parties in relation to the subject matter of this claim should be dealt with in this trial without the need for fresh proceedings which would mean more costs and more court time. Mr Brant confirmed that he would not be seeking an adjournment and that he was prepared to deal with the point. In the premises, it seemed to me sensible and practical to allow the re-amendment, which as I have said I did.

59. The Claimant conceded that it could not rely on the letters of 12 and 21 September 2012, and the only live point here was whether the letter of 18 June 2013 was good contractual notice. The Claimant did not press the contention that there was contractual termination by the service of the Particulars or Amended Particulars of Claim.
60. I have already mentioned that there were in fact two letters of 18 June 2013 (see paragraph 14.13 above). It is the second of the two letters on which the Claimant relies.
61. The letter terminated the agreement, pursuant to clause 10(a) of the applicable terms and conditions, on 30 August 2013. That date was more than 2 months after the date of the letter.
62. Section 98A permits termination by the creditor provided it gives no less than 2 months' notice.
63. Mrs Frost says that she did not receive the letter. I find as a fact that she is wrong about this and that it was received by her. I simply cannot accept as reliable her evidence that she received none of the letters and documents which were plainly sent to her, including this one.
64. The letter was also copied to Mrs Frost's solicitors. I am prepared to accept for present purposes that they had no authority, either actual or ostensible, to accept service of a section 98A notice.
65. In my view, the letter of 18 June 2013 operated as an effective contractual termination which was served on Mrs Frost.

Unfair relationship – sections 140A and 140B

66. Mrs Frost contends that there was an unfair relationship between herself and MBNA/the Claimant because of excessive or unreasonable debt collection methods employed in this case. It is for Mrs Frost to prove her case under section 140A.
67. Section 140A provides:
 - (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following—
 - (a) any of the terms of the agreement or of any related agreement;
 - (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
 - (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).
 - (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

Sub-section (4) allows a determination to be made under this section even where the relationship between creditor and debtor has ended.

68. Section 140B sets out the powers of the court in relation to unfair relationships. These include powers to reduce or discharge any sum payable by the debtor by virtue of the agreement, to set aside (in whole or in part) any duty imposed on the debtor by virtue of the agreement, and to alter the terms of the agreement: sub-sections (1)(c), (e) and (f).
69. Mrs Frost said that she had been subjected to a bombardment of harassing telephone calls made by, or on behalf of, MBNA and that these had continued even after she had requested that they stop and that any contact from the creditor should be in writing. She said in her statement and in her oral evidence that she was getting between 2 and 4 telephone calls a day from MBNA and from debt collection agencies. She says that the callers were hostile in their approach, they would not accept anything she said, and simply demanded the overdue payments. She says that she found the calls very distressing, to the point where she was terrified to answer the telephone. She says that she was caused genuine fear and was caused to feel physically sick. On 12 May 2009, Mrs Frost wrote to MBNA saying that she had received 12 calls by that time, which she had recorded, and that she had repeatedly asked that the matter be dealt with in writing, but the calls had continued. On 8 July 2009 MBNA replied, saying that they were acting as a responsible lender in attempting to resolve the situation by contacting Mrs Frost.
70. Mr Rimmer produced a Call Log prepared by MBNA from information held by its Case Management System records. It sets out all telephone contact or attempted contact made in 2009 onwards by MBNA or its appointed external collection agents. The Call Log shows that MBNA only spoke to Mrs Frost on two occasions, namely 23 June 2009 and 16 March 2010. On 23 June 2009, Mrs Frost is recorded as having said she is disputing the agreement and requesting an amendment to her credit file, and that she wants a call back from the manager as she was not happy with the response. On 16 March 2010 the Call Log records Mrs Frost as having terminated the call. Apart from those two occasions, Mrs Frost accepted in oral evidence that she answered the telephone on a number of occasions saying, "Mrs Frost is not available", or words to that effect; she accepted that she was giving the impression to the caller that someone other than Mrs Frost was answering the telephone. On a number of occasions, Mr Frost answered the telephone and said that there was a dispute over the account (24 June 2009, 9 September 2009), that he was making a complaint and the calls should stop (16 September 2009), that he would not discuss the matter which was in the hands of solicitors (6 November 2009), and that they would ignore the calls and would be taking the bank to court (16 March 2010). The Call Log has many entries which show that answerphone messages were left, or that there was no answer, or that the caller was told that it was a wrong number or that Mrs Frost was unavailable.

71. In cross-examination, Mr Rimmer said that the Claimant would not have continued to call a debtor if the debtor requested that all future contact be in writing, and that would not regard continuing and frequent calls in such circumstances as acceptable.
72. In *Roberts v Bank of Scotland plc* [2013] EWCA Civ 882 the Court of Appeal considered harassment by telephone calls from a lender in the context of the Protection from Harassment Act 1997. In that case, the lender made 547 calls or attempted calls over a 13 month period. The debtor made it clear that she did not want to discuss matters on the telephone, and asked the bank to stop telephoning, but to no avail. The debtor was, during the period of these telephone calls, only £17 over her credit limit and the bank had wrongly frozen her account because there was money in her current account which, had the account not been frozen, could have been used to bring the account back in order. The Court of Appeal held that even if the debtor was overdrawn on each occasion when a call was made, that could not possibly have justified the number of calls, or their intimidatory content, to a single lady living alone who appeared to be in some financial difficulty. Mr Brant referred to *Roberts* as showing what conduct could amount to harassment, and by analogy to give rise to an unfair relationship.
73. It is important to bear in mind section 140A(2) and to have regard to all matters the court thinks relevant in determining whether there is an unfair relationship. I bear in mind the fact that the Call Log shows that Mrs Frost only spoke to MBNA or its representatives on 2 occasions. I also take into account as a relevant factor Mrs Frost's attitude to the debt generally. When she ran into financial difficulty, she contacted a claims management company called Credit Issues Limited. As a result of advice she seems to have received from them or from a firm of solicitors, BPS Law, who were instructed by Credit Issues Limited to give some advice, it appears that a decision was taken that since MBNA could not produce the signed credit agreement, Mrs Frost was not going to pay anything. I do not accept Mrs Frost's evidence that she told MBNA or its representatives anything at all about her financial situation. On the contrary, I accept Miss Urell's submission that it was Mrs Frost who adopted a combative position and threatened to sue MBNA "for several hundreds of thousands of pounds" (letter, 12 May 2009), and although not precisely in the same terms a threat to take MBNA to court was repeated by Mr Frost as I have mentioned above. It is also notable, and in my view relevant to take into account, that immediately before ceasing to make any further payments, in late 2008, Mrs Frost used the credit card cheque facility on the account to obtain sums of £4,000, £1,000 and £750 which had the effect of almost doubling the amount owed to MBNA in less than 2 weeks. Mrs Frost denied that this was a deliberate and strategic attempt to load as much onto the card as possible before the decision not to pay. I do not accept Mrs Frost's denial. In my view, it was deliberate and part of a strategy which evolved once Mrs Frost had been advised by Credit Issues Limited and/or their solicitors that the agreement was unenforceable.

74. It seems to me that the situation in this case is a long way from the sort of harassment which was the subject matter of criticism in *Roberts* or indeed in the context of section 140A in the case of *Harrison v Link Financial Limited* [2011] EWHC B3 (Mercantile). In that case, MBNA had “hounded” the claimant and used “non-traceable” telephone calls, which the judge characterised as “conduct of which it must be supposed the whole purpose was to make the claimant’s life so difficult that he would come to heel.” The judge held that “such conduct has no proper function in the recovery of consumer debt.” In my opinion and taking into account all the matters I have set out above as I am obliged to do under section 140A, I find as a fact that Mrs Frost has not established that there was an unfair relationship. I therefore will not make any order under section 140B.

Conclusion

75. It must follow, in my judgment, that the Claimant is entitled to judgment for £15,391.38, being the sum due under the agreement, for the following reasons:
- 75.1. The Claimant has complied with its statutory requirements under sections 61, 63, 78, 87 and 88.
 - 75.2. The Claimant has validly terminated the contractual relationship by its letter of 18 June 2013, in accordance with section 98A.
 - 75.3. There is no basis for finding that there was an unfair relationship and I do not make any determination under section 140A or any order under section 140B.
76. Finally, I would wish to record that I am grateful to both counsel for their thorough and careful submissions.

(End of Judgment)