Default notices: the de minimus test

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"It was evident from the general tone of the whole party, that they had come to regard insolvency as the normal state of mankind, and the payment of debts as a disease that occasionally broke out."

— Charles Dickens,

Little Dorrit

Any attempted validation of the welfarist credentials of the Consumer Credit Acts 1974 and 2006[1] necessitates an evaluation of not simply the formational requirements of credit agreements, but also the mechanics of enforcement and whether such comply with the avowed aims of the legislation.[2] It is true that the judiciary have demonstrated an enthusiasm to emancipate and support the debtor in cases ranging from incorrectly stated charges for credit,[3] discrepancies in interest rates between original and substitute credit agreements[4] to connected

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The later having been introduced implement Directive 2008/48 on credit agreements for consumers and repealing Council Directive 87/102 [2008] OJ L133/66 and is effective for consumer credit agreements made on or after February 1, 2011.

[2] Described in the Long Title of the 1974 legislation as existing "for the protection of consumers" and, judicially, in *Southern Pacific Personal Loans Ltd v Walker [2009] EWCA Civ 1218* at [23], Mummery L.J. observed that "the 1974 Act was passed to protect consumers of credit, an aim which accounts for its substantive content and conditions its judicial interpretation". In the important case of *Carey v HSBC Bank Plc [2009] EWHC 3417 (QB)* at [38], H.H. Judge Waksman QC agreed, stating that "primacy was accorded to the protection element of the Act". More recently, In *Rankine v American Express Services Europe Ltd (2008) C.T.L.C. 195*, H.H. Judge Simon Brown QC commented (at [9]) on the need for the legislation to "protect the individual unsophisticated in financial affairs in contracts with unscrupulous and sophisticated financial institutions" (Although he also opined that the legislation was "highly technical" (at [8])). For consumer credit agreements generally, note the comments of Sellers L.J. in *Reynolds v General & Finance Facilities Ltd (1963) 107 S.J. 889*. However, the complexity of the Act has often undermined consistent application per Clarke L.J. in *McGinn v Grangeworth Securities Ltd [2002] EWCA Civ 522* at [1] and the *White Paper, "Fair, Clear and Competitive—The Consumer Credit Market in the 21st Century*". Such led to amendments under the Consumer Credit Act 2006, predominantly in the areas of licensing, the provision of a more extensive range of post-contractual information and the introduction of the "unfair relationship".

[3] *Wilson* v *First County Ltd* [2004] 1 AC 416. This case was decided under the now repealed s.127 (3). By virtue of s.127 (1), the court now has a *discretion* on whether to make an enforcement order.

[4] *Phoenix Recoveries (UK) Ltd v Kotecha [2011] EWCA Civ 105.*

[5] *Office of Fair Trading v Lloyds TSB Plc [2007] UKHL 48; [2008] 1 A.C. 316.*

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lender liability claims against overseas suppliers.[5] However, it is in the realm of default notices that the courts have been afforded the opportunity to adopt a more paradigmatic approach to interpretation at the expense of the nascent (and nebulous) *de-minimus* test, which empowers them to disregard trivial technical deficiencies where circumstances demand. It would appear that this test, like its tortious "just, fair and reasonableness" counterpart in the tort of negligence, has the potential to empower the courts to do justice in the circumstances of a particular case where there is a perceived "prejudice" to the debtor as a consequence of flawed informational provision. In many ways, this acts as a *de facto* counterbalance to the one-sided nature of many standard form regulated consumer credit agreements- often overlooking any flagrant disregard for contractual obligations on the part of the debtor who, to use an equitable analogy, can all too rarely be said to have gone to law with "clean hands". This notwithstanding, the debtors (or more likely, their lawyers), show clear conversance with the purpose of the default notice, which is to provide a protective mechanism to the otherwise unhindered enforcement of regulated consumer credit agreements by creditors. Its prescriptive nature ensures debtors should be familiar with the nature of their breach and the way to remedy such, thereby obviating any prospect of precipitate action by the creditor. [6]

Applicable Law

The key provision is Consumer Credit Act 1974 s.87 which states -

> **"Need for default notice.**
>
> (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

[5]

[6] Historically, the requirement for notice as a condition of repossession, existed in a range of statutes including the Conveyancing and Law of Property Act 1881 s.14 and the Law of Property Act 1925 s.146. However, the Bills of Sale Act 1878, a forebear of the Consumer Credit Act, empowered a holder or grantee, "either with or without notice, and immediately or at any future time, to seize or take possession". Later incarnations, e.g. the Hire Purchase Act 1965 s.25(3), required the service of a default notice. It is likely that this is still the position at common law: in *Reynolds v General & Finance Facilities Ltd (1963) 107 S.J. 889*, Sellers L.J. commented "that, the agreement being a one-sided one with stringent terms, the plaintiff was entitled to a reminder that his instalments were in arrears before it could be terminated." A similar view was expressed by Lord Denning M.R. in *Eshun v Moorgate Mercantile Co Ltd [1971] 1 W.L.R. 722* at 725.

(e) to enforce any security.”

Essentially, the obligation to serve this notice arises upon breach of a regulated credit agreement[7] by a debtor and, even where validly served, the creditor may only seek the remedies stipulated in the provision where these are identified in the credit agreement. However in respect of running account (or open-ended[8]) credit -

> “(5) Subsection (1) (d) does not apply in a case referred to in section 98 A (4) (termination or suspension of debtor's right to draw on credit under open-end agreement).”

This provisions states that -

> “Where a regulated open-end consumer credit agreement, other than an excluded agreement, provides for termination or suspension by the creditor of the debtor's right to draw on credit—
>
> (a) to terminate or suspend the right to draw on credit the creditor must serve a notice on the debtor before the termination or suspension or, if that is not practicable, immediately afterwards,
>
> (b) the notice must give reasons for the termination or suspension, and
>
> (c) the reasons must be objectively justified.

This is a significant caveat,[9] and effectively excuses the creditor from compliance with the stricter s.87 requirements in credit card and overdraft default cases where there is a pressing need to restrict exposure to further loss.[10] Similarly, a creditor is able to issue proceedings for current arrears in running or fixed amount credit agreements without the need for a default notice- such would fall short of termination or a demand for *earlier* payment. This is helpful, particularly as it avoids negotiating the byzantine requirements - substantive and procedural - of a valid default notice under s88 which requires –

> **“Contents and effect of default notice.**
>
> (1)The default notice must be in the prescribed form and specify—

[7] As defined by ss.8 and 15 Consumer Credit Act 1974.

[8] Term introduced by Consumer Credit Directive 2008/48 on credit agreements for consumers and repealing Council Directive 87/102 [2008] OJ L133/66 art.13.

[9] In the face of a "widening" application of default notices, see e.g.in *Consolidated Finance Ltd v Collins [2013] EWCA Civ 475*, the Court of Appeal decided that an agreement under which a short-term loan was advanced to a bankrupt still constituted a regulated agreement and therefore demanded the service of a default notice to enable subsequent enforcement.

[10] Indeed, according to s.98A(6), the objective justification envisaged by s.98A(4)(c) includes there being "the unauthorised or fraudulent use of credit" or "a significantly increased risk of the debtor being unable to fulfil his obligation to repay the credit".

(a) the nature of the alleged breach;

(b) if the breach is capable of remedy, what action is required to remedy it and the date before which that action is to be taken;

(c) if the breach is not capable of remedy, the sum (if any) required to be paid as compensation for the breach, and the date before which it is to be paid."

(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."

This is clearly a "statute-heavy" area of law and s87 must further be read in conjunction with the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983[11] (as amended). For purposes of this discussion, its key provisions are –

"2. (2) Any notice to be given by a creditor or owner in relation to a regulated agreement to a debtor or hirer under section 87(1) of the Act (which relates to the necessity to serve a default notice on the debtor or hirer in accordance with section 88 before taking certain action by reason of any breach of the agreement by the debtor or hirer) shall contain—

(a) a statement that the notice is a default notice served under section 87(1) of the Consumer Credit Act 1974;

(b) the information set out in...Schedule 2 to these Regulations..."

Schedule 2 states that the "creditor or owner" must provide the "debtor or hirer" with a default notice to include –

"3. A specification of:—

(a) *the provision of the agreement alleged to have been breached*;[12] and

(b) the nature of the alleged breach of the agreement, specifying clearly the matters complained of; and either

(c) if the breach is capable of remedy, what action is required to remedy it and the date, being a date not less than fourteen days after the date of service of the notice, before which that action is to be taken; or

[11] Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 (SI 1983/1561).
[12] The wording has been Italicised to highlight the slight amplification from s.88.

(d) if the breach is not capable of remedy, the sum (if any) required to be paid as compensation for the breach and the date, being a date not less than fourteen days after the date of service of the notice, before which it is to be paid."

(e) A further key provision is Regulation 6 which requires -

"an unambiguous statement by the creditor or owner indicating, if any action specified under paragraph 3(c) or (d) as required to be taken is not duly taken or if no such action is required to be taken, the action which he intends to take by reason of the breach by the debtor or hirer of the agreement—

(a) to terminate the agreement;

(b) to demand earlier payment of any sum;

(c) to recover possession of any goods or land;

(d) to treat any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred;

(e) to enforce any security;

(f) to enforce any provision of the agreement which becomes operative only on a breach of another provision of the agreement as specified in the notice,

at any time on or after the date specified under paragraph 3(c) or (d), or, if no action is specified under that paragraph as required to be taken, indicating the date, being a date not less than seven days after the date of service of the notice, on or after which he intends to take any action indicated in this paragraph."

These provisions replicate those contained in s.87, and are similarly circumscribed by a range of protective sanctions. For example, a significant restriction on the creditor's right to recover possession of goods is contained in reg. 7 and the Consumer Credit Act 1974 with respect to goods subject to hire purchase or conditional sale agreements, where the debtor has paid one-third or more of the total price of the goods. In such a case, the creditor or hirer must obtain a court order sanctioning repossession of these "Protected Goods".[13] If goods are recovered in breach, the debtor may secure the return of all of the money paid to the creditor, regardless of how long he has had the goods.[14] A court order is also required to enter onto "premises" to secure recovery of goods subject to hire purchase or conditional sale,[15] with the consequences of non-

[13] Consumer Credit Act 1974 s.90.
[14] Consumer Credit Act 1974 s.91; *Capital Finance v Bray [1964] 1 W.L.R. 323*.
[15] Consumer Credit Act 1974 s.92. This is subject to exceptions, e.g. recovery will be permissible where the debtor has disposed of the goods to a third party: *Helby v*

compliance being potentially punitive.[16] As a counterbalance to what appears to one-sided construct, a hirer may seek a Protection Order,[17] where there is a risk to property pending possession proceedings. In any event, as mentioned previously, s.88 remedies are available *only* where provided for in the respective credit agreement, and remain stubbornly contingent upon the outcome of a debtor's or hirer's application for a Time Order[18], which can, potentially, afford the applicant considerable latitude and economic respite through a judicial rescheduling of the *entire* outstanding indebtedness and not simply the amount due at the date of the order.[19]

Judicial Interpretation of Default Notices

The aforementioned provides a flavour of the ethos of the legislation: consumer welfarism. However, to what extent do the courts punish the creditor for *flaws* in the drafting of default notices? Whilst, *ceteris paribus*, they should be precise and statute-compliant, the legislation is, as written, prolix, complex, and often cyclic, and the nature of the breach rarely straightforward, meaning that the default notice constitutes a considerable hurdle to be overcome in securing any of the remedies outlined. Moreover, the courts are often reluctant to eschew a consumer orientated, strict interpretation of the law, thereby offering the creditor relief only where they demonstrate a "de-minimus" departure from statute when drafting these notices. It was perhaps portentous when, in *Eshun* v *Moorgate Mercantile Co. Ltd*.,[20] the Court of Appeal (Lord Denning M.R., Edmund Davies and Phillimore L.JJ.), stretched the language of the more austere and laconic s.25(3) Hire Purchase Act 1965 [21] to hold to account the creditor for wrongful re-taking of a vehicle on hire purchase. This provision required a default notice to state:

> "the amount which has become due, but remains unpaid, in respect of sums to which the relevant provision applies, and requiring the amount so stated to be within such period (not being less than seven days beginning with the date of service of notice) as may be specified in the notice."

The hirer had fallen two months into arrears, at which point the creditor served a "notice of default" requiring payment within 10 days, failing which they would enforce their contractual right of determination and repossession on the assumption that the hirer's inaction indicated his desire to terminate by

Matthews [1895] A.C. 471. Clearly, recalcitrance on the part of this third party could, conceivably, lead to a claim in conversion.

[16] A failure to comply with these requirements may render the creditor liable for trespass.

[17] Consumer Credit Act 1974 s.131.

[18] Consumer Credit Act 1974 s.129(1).

[19] Consumer Credit Act s.136. See, e.g. *First National Bank Plc v Syed [1991] 2 All E.R. 250* and *Southern and District Finance Plc v Barnes [1996] 1 F.C.R. 679; (1995) 27 H.L.R. 691; [1995] C.C.L.R. 62*. By s.130(2), in hire purchase or conditional sale agreements, the court can make an order to effectively re-write the entire agreement.

[20] *Eshun* v *Moorgate Mercantile Co. Ltd*. *[1971] 1 W.L.R. 722*.

[21] Now repealed.

repudiation. Following repossession for a failure to fully comply with the notice, the hirer sought damages for unlawful seizure. In finding the notice invalid, Lord Denning M.R. concluded that any notice must firstly stipulate "the provision upon which the owners rely in order to recover possession" as well as the "specified consequences" of default.[22] Edmund Davies L.J. fell short of dissenting on this interpretation, simply elucidating his "slight measure of reservation"[23], whilst Phillimore L.J. preferred the view that the notice should merely state the consequences of

non-payment.[24] This approach was redolent of a period of transition in attitudes to consumer credit and protection, and any metamorphosis of judicial attitude in the interpretation of default notices away from Lord Denning's more brutal consumerist interpretation of statute has been slight and based on the tentative *de minimus* principle.

In *Woodchester Lease Management Services Ltd* v *Swain & Co*,[25] for example, the Court of Appeal addressed in some considerable detail the position where a default notice fails to comply with the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983. In that case, a notice issued following a failure by the appellant hirer to make payments under a Consumer Hire Agreement contained a "critical flaw": it stated the arrears to be £879.90, when the true figure at that time amounted to £634.30. It was on this basis that the hirer claimed there had been a failure to comply with the requirement under Schedule 2, Regulation 3(c), where the notice must state "if the breach is capable of remedy, what action is required to remedy it..." Kennedy L.J (sitting with Sumner J) in holding for the appellant commented-

> "This statute was plainly enacted to protect consumers, most of whom are likely to be individuals. When contracting with a large financial organisation they are at a disadvantage. The contract is likely to be in standard form and relatively complex with a number of detailed provisions[26]...the scheme of the legislation...would be frustrated if the notice could claim that in order to put matters right the hirer must pay a

[22] *Eshun* v *Moorgate Mercantile Co. Ltd. [1971] 1 W.L.R. 722* at 726D.
[23] *Eshun* v *Moorgate Mercantile Co. Ltd*. *[1971] 1 W.L.R. 722* at 727A.
[24] *Eshun v Moorgate Mercantile Co Ltd [1971] 1 W.L.R. 722* at 727G. There was, however, concurrence on the attempt to circumvent the then recently decided *Financings Ltd v Baldock* [1963] 2 Q.B. 104, by seeking to impose upon the hirer a repudiatory breach: the court stated that his falling two months into arrears was not repudiatory. Of course, this approach is often circumvented by the credit agreement stating that punctual payment is "of the essence" and therefore a "condition", so the failure to pay a single instalment will constitute a repudiatory breach enablng the creditor to recover damages to the extent as if the agreement had run its course: *Yeoman Credit Ltd v Waragowski [1961] 1 W.L.R. 1124*.
[25] *Woodchester Lease Management Services Ltd v Swain & Co [2001] G.C.C.R. 2255.*
[26] It was *in Suisse Atlantique Societe d'Armement Maritime SA v Rotterdamsche Kolen Centrale [1967] 1 A.C. 361 HL* at 406, that Lord Reid suggested that such imbalance undermines freedom of contract.

> sum far in excess of the amount in fact owing and yet constitute a valid notice…"[27]

Whilst engaging, he went on to say that "the court might overlook an error which could be described as no more than de minimus."[28] Critically, such is, in effect, suggesting that s.87 affords the sort of judicial discretion conferred on the courts by s.127, where there has been a failure to comply with formalities. This is fine, save to say that unlike s.127, s.87 is silent on the point. A better view could be that Kennedy L.J. was simply referring to the need for a purposive or golden rule-based interpretation of the statute to avoid injustice (or absurdities) arising from too strict an approach. In any event, such provides an interesting and significant caveat to literal interpretation, and implicitly advocates a case by case approach to the legitimacy of default notices which does, conceivably, permit the court to take into account a range of considerations, including the conduct of the debtor.

In *Rankine* v *American Express Services Europe Ltd and Others*,[29] a case that truly does reward its reading, not least for H. H. Judge Simon Brown QC's often entertaining dismissal of the claimants' attempts to avoid liability under several consumer credit agreements, the court had to consider the legitimacy of a default notice which failed to state the exact provision of the agreement supposed to have been breached, simply claiming "that the terms and conditions have been breached". The Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 state that the default notice must specify "(a) the provision of the agreement alleged to have been breached." [30] A failure to provide such fundamental information would surely exceed the de minimus exception advocated in *Woodchester*? Surprisingly, H. H. Judge Simon Brown QC opined that-

> "There is no merit in the contention that the fact that the default notice failed to specify the precise term which D had breached was fatal to the effect of the default notice served. It was clearly stated when read as a whole what the breach was and what was required to be done to remedy it. Second, even if there was a breach, it was a *de minimus* breach of the provisions of the Enforcement Regulations and of significance."

Whilst sensible to classify as de minimus the slight overstatement of sums due, a failure to stipulate the relevant provision was arguably of fundamental significance going beyond what was anticipated by the Court of Appeal in *Woodchester*, where Kennedy L.J. stated that the debtor –

[27] *Woodchester Lease Management Services Ltd* v *Swain & Co [2001] G.C.C.R. 2255* at 2255.
[28] *Woodchester Lease Management Services Ltd* v *Swain & Co* [2001] *G.C.C.R. 2255* at 2261.
[29] *Rankine v American Express Services Europe Ltd [2008] C.T.L.C. 195*.
[30] Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 (SI 1983/1561) Sch.2(a) para.3.

> "needs to know precisely what he or she is said to have done wrong and what he or she needs to do to put matters right. That, as it seems to me, is the scheme of the legislation."[31]

In light of this, the approach of the High Court would appear to have been generous to the creditor (and arguably informed by the historical conduct of the debtor in seeking to avoid liability under credit agreements, whereas in *Woodchester*, the degree of culpability was considerably less grave),[32] although its approach is not universally accepted. For example, in the recent Scottish case of *Citifinancial Europe plc* v *Rice*, [33] the court identified inadequacies in the single default notice issued to cover *two* regulated credit agreements in breach,[34] a failure to identify the parties to the agreements and, most significantly, a lack of clear reference to the matters complained of. In dismissing the creditor's action for recovery of possession of the security (there were arrears totalling £17,023.51), Sheriff A F Deutsch commented that whilst -

> "from the standpoint of lawyers statement of a particular clause or paragraph number would ordinarily be regarded as sufficient…I do not think it can be said that on its own this amounts to clear specification of the matters complained of."[35]

Significantly, this was despite the Sheriff finding it "to be clear notice that the provision, which had been breached…is that requiring the payment of monthly instalments".[36] So, despite it being obvious which term has been broken, the notice must clearly identify such. Here, the court concluded that the defects evidenced in the case went beyond de minimus and were fundamental,[37] a view more in line with *Woodchester*. Notably we were further reminded of the increasing relevance of the extent of any "prejudice" towards the debtor in the de minimus equation, a point earlier raised by the Court of Appeal in *Brandon* v *American Express Services Europe Ltd*.[38] In this case, Mr Brandon had failed to make payments under a regulated credit card agreement prompting American Express ("Amex") to issue him with a default notice (19 June 2007) threatening termination of the agreement should he not remedy the breach (and make a minimum payment of £275.80). Mr Brandon failed to make this payment and was served with a Notice of Cancellation and in 2009 Amex issued proceedings in sum of £6,624.24 to include interest and costs. Unlike aforementioned authority,

[31] *Woodchester Lease Management Services Ltd* v *Swain & Co [2001] G.C.C.R. 2255* at 2261.
[32] The court made several other minor comments on default notices, most notably that a notice will not be invalidated by virtue of elements of monies claimed becoming irrecoverable under other legislation—essentially, the creditor need only "state the sums due on the face of the agreement" (at [50]).
[33] *Citifinancial Europe Plc v Rice (2013) Hous. L.R. 23*.
[34] Such a practice, although irregular, is doubtless permissible, see, e.g. *Goode, Consumer Credit Law and Practice at [5.1670]* and *Ropaigealach v Allied Irish Bank Plc [1996] C.L.Y. 416.*
[35] *Citifinancial Europe Plc v Rice (2013) Hous. L.R. 23* at [11]–[12].
[36] *Citifinancial Europe Plc v Rice (2013) Hous. L.R. 23* at [12].
[37] *Citifinancial Europe Plc v Rice (2013) Hous. L.R. 23* at [15].
[38] *Brandon v American Express Services Europe Ltd [2011] EWCA Civ 1187*.

this default notice had seemingly provided too little time for the appellant to remedy the breach: whereas s.88(2) states that the date specified in the notice "must not be less than 14 days after the service of the default notice, and the creditor shall not take action...before the date so specified", here, the notice required the breach to be remedied "*within fourteen calendar days from date of the default notice*" (emphasis added). There was clearly a discrepancy which could arguably eclipse the appellant having complied with all other requirements.[39] Amex were granted summary judgment at both first instance and on appeal to the High Court, where H.H. Judge Denyer QC commented that the defence claim that less than 14 days had been allowed by the default notice to remedy the breach could not be dismissed "as being unreal", but was persuaded by the contention that Mr Brandon had not suffered "any prejudice at all by virtue of that technical breach" as no enforcement action was taken with fourteen days of the notice- indeed a Notice of Cancellation was not sent to Mr Brandon until 11 July 2007. The Court of Appeal, however, allowed Mr Brandon's appeal thereby reversing the award of summary judgment with Gross L.J stating –

> "as a matter of construction of the Default Notice I cannot accept that Amex is plainly right in contending that the 14 day period ran from the service of the Notice as opposed to "the date of this Default Notice" as the Notice on the terms stated; to the contrary, Mr Brandon has much the better of the argument on this point of construction."[40]

Essentially, Mr Brandon was able to show "a real prospect of a successful defence"[41] as it was realistically arguable that the apparent technical flaw in the default notice would not -

> "be overlooked as de minimus...both to the failure to allow a minimum 14 day period and to the absence of prejudice flowing from the defect in the Default Notice."[42]

As a test of validity, this suggests a clear divergence: is de minimus to be determined by the extent of the departure from the statute *or* by whether this has caused some quantifiable prejudice to the debtor- economic or otherwise *or* both? Moreover, what would constitute prejudice?[43] In this case, it is extremely difficult to identify where the prejudice would lie: it was accepted that no enforcement action had been taken within the 14 days of service and, *a fortiori*, Gross L.J. concluded it to be "indisputable" that Mr Brandon had no intention of

[39] CPR Pt 6.26 suggests that the deemed date of service by post is 2 days after posting, although as the Court of Appeal noted, these do not directly apply to default notices and stand as guidance only.
[40] *Brandon v American Express Services Europe Ltd [2011] EWCA Civ 1187* at [29].
[41] CPR Pt 24.2 (a) (ii) having been considered.
[42] *Brandon v American Express Services Europe Ltd [2011] EWCA Civ 1187* at [30].
[43] In *HFO Capital Ltd v Burney [2011] E.W. Misc. 23 (CC),* Hill J. suggested (at [15]) such could arise by the creation of an adverse credit rating as a consequence of a notice being served.

making further payments.[44] As such, it would appear that the mere fact of non-compliance may, in certain cases, be conclusive, although the consequences for the creditor would be punitive and potentially reward the debtor's economic management. The fact that the Court of Appeal did not offer clear guidance on whether a technical deficiency in a default notice can be ignored where devoid of prejudice is lamentable.[45]

This ambiguity is enunciated by the possible consequences of issuing "bad" default notices. It appears likely that once a creditor terminates an agreement on the back of a technically defective default notice, it arguably constitutes unlawful repudiation of the credit agreement- such was the view of the Court of Appeal in *Eshun* v *Moorgate Mercantile Co Ltd*,[46] which ordered the respondent to pay compensation for wrongful retaking of a vehicle subject to hire purchase. It was unfortunate that the court in *Brandon* was concerned with summary judgment only- Amex had sought to enforce the agreement through the service of a Notice of Cancellation followed by proceedings for the outstanding debt, but the court was not required to comment further on the consequential impact of the flawed notice- in other words, did it render the agreement unenforceable? Judicial dictum indicating that a flawed notice need merely be re-drafted and served would almost certainly be limited to cases where there has *not* been an attempt at termination or recovery of possession.[47]

Conclusion

Dickens, a quintessential champion of social justice (as he perceived it), would doubtless be satisfied at the courts' interpretations of default notices and their ostensibly welfarist approach. It is true, that such appears to have been tempered where the debtor has demonstrated an erudite and serial capacity for manipulation of the Consumer Credit Act - a clear example being *Rankine* v *American Express Services Europe Ltd* (where H. H. Judge Simon Brown QC noted the claimants' contentions "that there are loopholes in the Act and the Regulations that nobody else had detected before…and that this enables consumers to run up debts and not pay for them"[48]) – but, generally speaking, a

[44] *Brandon v American Express Services Europe Ltd [2011] EWCA Civ 1187* at [5].
[45] The Court of Appeal reversed the High Court decision on a further claim by Amex that there had been, in any event, valid non-default contractual termination (now per s.98A) effected by the service of Notice of Cancellation on July 11 (pursuant to cl.10(2) of the regulated agreement). Gross L.J. stated such had "evolved into the decisive issue… without any pleadings whatsoever" (at [38]) and "this was simply too significant a change of case" but, obiter, commented that "this issue was realistically arguable on both sides…had the procedural groundwork been laid. But here that had not been done" (at [40]).
[46] *Eshun v Mooorgate Mercantile Co Ltd [1971] 1 W.L.R. 722.*
[47] e.g. *Harrison v Link Financial Ltd [2011] E.C.C.26* at [75] per H.H Judge Chambers QC, where the agreement was deemed unenforceable for a failure to comply with a range of informational requirements under the Consumer Credit Act 1974, but it was doubtless the case, that a defective default notice was a key consideration in the court's ultimate pronouncement on the matter.
[48] *Rankine v American Express Services Europe Ltd [2008] C.T.L.C. 195* at [8].

test based upon such a factor would inevitably lead to confusion and undermine certainty in consumer credit law and enforcement. Instead, the courts may do little more than expect the creditor to "get it right" subject to de minimus variations as informed by the vague and as yet undefined "prejudice" test- after all, they are often possessed of the resources and experience to do so and, as opined by Lord Brown in *Office of Fair Trading v Lloyds TSB Bank plc*,[49] the absorption of these by the creditor sits as part of "a fair balance between the creditor and the debtor" in such relationships.

[49] *Office of Fair Trading v Lloyds TSB Bank Plc [2007] UKHL 48* at [19].