

**LEGAL CASE STUDY**

**Unfair Relationship In Consumer Loan**

At the recent Legislative Council meeting, discussion took place about the potential implications of a case highlighted in The Lawyer magazine concerning a ruling that an “unfair relationship” arose between a creditor and debtor, where the timeshare purchase agreement to which the loan related provided that the whole timeshare/points (i.e. the capital asset in the words of the Judge) could be forfeited for non-payment of management charges.

The Lawyer, April 2014

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| *Unfair relationship*  *An unfair relationship arose between a creditor and debtor where the timeshare purchase agreement to which the loan related provided that the whole capital asset would be forfeited for non-payment of management charges.*  *So held the High Court in Link Financial Ltd v Teresa North Wilson. Wilson entered into a fixed sum loan agreement with Link Financial Ltd (Link) to fund the purchase of a holiday timeshare. The purchase price was just over £20,000. Wilson had falsely provided details of her income despite being unemployed at the time. The timeshare agreement provided that if Wilson failed to make any payment due under the agreement within 14 days' notice to do so, the vendor could rescind the agreement and forfeit all money paid by Wilson. Wilson failed to pay management charges and loan instalments. The agreement was rescinded and Link sought to recover the sums due under the loan. Wilson claimed there was an unfair relationship under s140 of the Consumer Credit Act 1974 (s140) because of the forfeiture provision in the related purchase agreement.* |
| *At first instance the court held there was no unfair relationship. This was because there had been no high-pressure selling, no contravention of the Timeshare Act*  *1992, Wilson was an educated woman who had understood the agreement and she had lied about her income. Judgment was given against Wilson for £41,000 (which included interest and costs).*  *Wilson appealed, arguing that the agreement was unfair because the effect of rescission and forfeiture meant she could not rely on the capital value of the timeshare to reduce the loan debt.*  *The High Court allowed the appeal. The relevant clause in the timeshare agreement was unfair and gave rise to an unfair relationship, despite the findings made by the judge as referred to above. Wilson should have been able to use the capital value of the timeshare to part repay the loan. As there was no expert evidence available as to the capital value, it was ordered that no further sums should be paid by Wilson.*  *Things to consider*  *The onus was on Link to prove that the agreement was fair, not on Wilson, and it had failed to do so. Although Wilson's dishonesty as to her income was relevant, that was not the basis upon which the agreement was rescinded and therefore, its causative weight and relevance was much lower than it might otherwise have been. It was only one of the factors taken into account.* |

As outlined above, the case was successfully argued by Link Financial in the County Court but the High Court appeal reversed this decision. It is, however, likely that the case would have had a different outcome had it been argued (with supporting evidence) (a) that as the initial contract that the consumer signs concluded at the end of the 14-day cooling off period, when payment of the full purchase price could be made, and the membership relationship came into existence at that time, the purchase agreement was irrelevant from then on and it was all down to what was in the club constitution/articles and (b) in addition, in practice the member in question had not lost her rights and could have resumed active membership.

The Legislative Council was of the view that there are clearly lessons to be learned from the case and it was agreed that Guidance should be issued to members:

**Member Guidance**

* Claims companies could pick up on this type of ruling and use it as a blue print for ideas for structuring a claim so developers should be vigilant
* Developers are advised to review the wording of their purchase agreements to make it clear that there is no default under the purchase agreement itself in respect of non- payment of management fees in future years.
* It should be borne in mind that irrespective of the court proceedings, the loan obligations continue
* Developers should request that their finance company (and they in turn with any debt collection company they may engage or to whom sell the loan) informs them of impending court cases so that assistance can be provided where necessary
* RDO members should consider adopting a “reinstatement” programme which could be, for example, a written policy that records a de facto process allowing for a “suspension” status of a customer’s membership for a set period of time, until such time that the customer may wish to return to their membership and at which return point they have their obligations and rights reinstated, subject naturally to such adjustments as are reasonably necessary in the circumstances of the product involved and the timing of their request to resume active membership. During the “suspension” period there would be no obligations to pay management fees. This programme should be made visible to owners, so that they understand that there is no absolute loss of rights and that there is a mechanism for them to come back to resume active membership whether it be for usage itself or for the purposes of reselling or transferring to a third party.

Legislative Council

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