BOOK REVIEW

Nora Beausang, Consumer and SME Credit Law (Dublin: Bloomsbury Professional 2021), ISBN 9781526515872

Author: Mr Justice Max Barrett

Beausang's *Consumer and SME Credit Law* is a great book. It will, I expect, quickly become an essential purchase for the many lawyers whose practices touch on the issue of consumer/SME credit law. For the busy judge dealing with summary debt applications, it will doubtless become a definitive guide on the applicable law, offering a trustworthy work on which to ground judgment. To those of us who have worked in-house in financial institutions and long relied on well-thumbed and heavily marked-up versions of Bird's now near-quarter century old *Consumer Credit Law in Ireland*,[1] Ms Beausang's book represents a welcome, worthy successor to that venerable volume.

Ms Beausang's book comes at a notable moment for consumer credit law: the expected enactment of the Consumer Rights Bill 2022 (and hence the transposition of the Omnibus Directive,[2] the EU Digital Content Directive,[3] and the EU Sale of Goods Directive[4] into Irish law) means that this already complex area of law seems set to become even more heavily regulated. As Ms Beausang (whose book treats with the Bill) sagely observes in her introductory remarks,

> [R]egulation in the area of consumer credit is only going one way. A failure of regulated firms…to accommodate the growing corpus of regulatory requirements [and, it might be added, a failure by lawyers to familiarise themselves with the changes being made] will not serve their own interests, quite apart from those of the consumers with which they deal.[5]

As I read Ms Beausang's book, I was struck by a number of ways in which consumer/SME credit law seems, in my respectful view, not always best to serve those it seeks to protect. First, it is notably complex. It may be that the Consumer Rights Bill will assist in this regard. It is certainly the case that Ms Beausang's book makes the complex more accessible. Even so, one cannot but recall the observation of Clarke L.J. for the English Court of Appeal in its turn-of-the-century decision in *McGinn* v. *Grangewood Securities Ltd*:[6]

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[1] Dublin: Round Hall Press, 1998.
[2] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (O.J. L328, 18.12.2019, 7).
[3] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (O.J. L136, 22.5.2019, 1).
[4] Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (O.J. L136, 22,5,2019, 28).
[5] Beausang, *vii.*
[6] [2002] EWCA Civ. 522, para.1.

> *Simplification of a part of the law which is intended to protect consumers is surely long overdue so as to make it comprehensible to layman and lawyer alike. At present it is certainly not comprehensible to the former and is scarcely comprehensible to the later.*

Two decades later, consumer/SME credit law has become even more complex, albeit Ms Beausang's text makes navigation of the ocean of relevant Irish and EU law and regulation a considerably easier task than heretofore. Moreover, given that the above-quoted observations emanate from an English court, it will be interesting to see whether 'Brexit' will be used by the United Kingdom (whose Consumer Credit Act 1974, as initially enacted, was to some extent the *fons et origo* of contemporary European consumer credit law) as an opportunity to introduce non-EU inspired innovations to its existing consumer/SME credit law regime.

Second, although consumer credit law protects the vulnerable, it oftentimes seems to inadequately distinguish between classes of vulnerable people. Often as a judge, one is confronted with a two-consumer couple (same-sex or otherwise) where one party to that couple has assumed responsibility for the couple's joint financial affairs and the other has taken responsibility for homemaking. I am not always convinced that the present law adequately protects (or enables a court to protect) the weaker party in such contexts; and although marriage and like personal relationships involve a joining of equals, it is not always the case that each party to any one such relationship is equally competent when it comes to financial matters.

Third, in many summary debt applications which come before the High Court, borrowers are in such poor financial straits they cannot afford legal advice. Often, such persons come self-represented to court – and doubtless will soon be coming to court even better-armed now that they can avail themselves of Ms Beausang's learned text. However, it might perhaps be contended to be unfair that the credit and courts systems are structured in such a way that the most vulnerable are often required in effect to come unaided to court. (Sometimes impecuniosity even leads the unfortunate into the clutches of unregulated persons who offer false hope with spurious legal advice). A question perhaps therefore arises whether, if such persons were able, post-default, to avail of one or two low-/no-cost meetings with a solicitor who could advise on the truth of how they stand positioned legally, the system would operate more fairly and efficiently. The cost of such meetings could be included in the cost of credit, perhaps eventually to be refunded if never availed of, and if spread over the course of a loan would hopefully not amount to a significant increase in the cost of credit in any one case. Any sensible person confronted with a solicitor saying 'You will not win', and an unregulated advisor saying 'You cannot lose' would hopefully know which advice to prefer – and defaulting borrowers are typically unfortunate, not unwise.

Fourth, on a related note, a question may arise whether, instead of having the summary stage of large debt cases decided in the High Court, with the matter going to full trial in the High Court in the event of the summary application failing, it would be preferable for the State to construct a bifurcated process in which the summary stage in consumer debt cases, of whatever value, took place before the District/Circuit Court, with the matter then going to full trial in the High Court if a District/Circuit Court Justice saw fit (and with the issue of costs reserved to the High Court judge). That way, if the borrower eventually lost at full trial, s/he would only be confronted with District/Circuit Court costs in the event that the High Court judge thought it appropriate, in all the circumstances presenting, to order the costs of the summary stage against the borrower.

Fifth, summary debt applications in consumer/SME cases often involve a court deciding whether a potentially ruinous debt should be visited on one or more borrowers. In such cases, it seems to me that a consumer/SME is entitled, even if only as a matter of courtesy, to have written reasons as to why the judge has decided a case as s/he has (especially if a decision favours a creditor). The sums involved may not always be the biggest in the world; however, they are always big to the consumer/SME involved and, especially when self-represented, a consumer-borrower (or the proprietor/s of a SME) may simply not understand, when listening to a judge in court, why a case has gone as it has. If and when written reasons are offered, they should of course be comprehensible. Indeed, the adequacy of the standard form of written judgment that issues from our courts, and whether the traditional form of written judgment remains the optimal form in a modern world now some decades into the Information Age are important issues confronting a court system that must always re-legitimate itself in the eyes of succeeding generations of users if it is to continue to be perceived as a boon to society. Dense, prolix judgments, unsupported by (uncondescending) user-friendly summaries seem especially unjustifiable in the consumer/SME credit arena.

Finally, on a separate note, as the author of the judgment in *Allied Irish Banks plc* v. *Counihan*,[7] I was interested, following my read of Ms Beausang's text, to find that there appears not yet to have been a reported or otherwise publicly available case in which an Irish court has found a financial institution to have included an unfair term in its terms and conditions. This may be testament to a robust but fair-minded approach on the part of the drafters of such terms and conditions (doubtless mindful of the ever-watchful eye of the Central Bank as regulator); whether a case will yet emerge in which terms and conditions as they operate in any one instance are unfair remains to be seen.

Ms Beausang's book is a remarkable work, over 2,300 pages long and well worth reading through or 'dipping into' (or both). As Justice Hogan rightly observes in his insightful foreword to the book, one can only pay tribute to the enormous scholarship and erudition on display in its pages. Lord Denning once observed how, in writing one of his books, 'I have tried to make my meaning clear. That is necessary if you are to influence others'.[8] Ms Beausang's book is thoroughly clear and I have no doubt that it will influence many judges in their decision-making (and many lawyers in the advice they tender) in the years ahead. I do not need to recommend it as a book (though I do recommend it); a brief glance at its contents will suffice for Ms Beausang's *Consumer and SME Credit Law* to recommend itself to its intended audience.

[7] [2016] IEHC 752.
[8] Denning, Alfred, *The Closing Chapter*, London: Butterworths, *vi*.